

# A Short Introduction to 'The Problem of Legal Gaps'

Claudia Irti\*

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## I. CODIFIED LAW AND THE LEGAL GAP

The 'problem of legal gaps' has long been debated,<sup>1</sup> but it was only after the great codifications that it became a central topic among the most popular European scholars,<sup>2</sup> 'the field where opposite considerations of law and legal science confront themselves'.<sup>3</sup>

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\* © 2014 Claudia Irti. Professor of Law, Unicusano University, Rome, Italy.

1. 'Legal gaps were not unknown in the Roman tradition. Emperor Justinian in the Tanta Constitution referred to legal gaps, ordering the promulgation of the Digest. Jurists specifically referred to the legal gaps in the early essays *de interpretatione in iure*, since the second half of XV century'. CHIASSONI, *Lacune nel diritto—progetto per un vademecum giuridico, in Interpretazione e diritto giudiziale*, I, ed. by M. Bessone, Giappichelli, 1999, p. 111 ff.

2. ZITELMANN, *Luckenimrecht*, DUNCKER & HUMBLOT, Leipzig, 1903; DONATI, *Il problema delle lacune nell'ordinamento giuridico*, Milano, 1910; BRUNETTI, *Il domma della completezza dell'ordinamento giuridico*, Firenze, 1924; SANTI ROMANO, *Osservazioni sulla completezza dell'ordinamento statale*, Modena, 1925; BOBBIO, *Lacune del diritto*, in *Novissimo digesto italiano*, vol. IX, Torino, Utet, 1973 pp. 419-424; CANARIS, *Die Feststellung von LückenimGesetz*, Berlin, 1964; CANARIS, *De la manière de constater et de combler les lacunes*

The European legal experience prior to the age of codification was founded on the Civil Law, the *jus commune*, a body of legal principles stemming from Roman law, rearranged in the Justinian Corpus Juris and constantly interpreted, applied and adapted by a range of jurists (judges and doctors) engaged in a continuous task of law interpretation.<sup>4</sup> In this system, the practically unlimited possibility to use different interpretative techniques—from analogy to *extensio regis*, from equity, Natural Law, common Reason to *lex alii loci*<sup>5</sup>—in order to integrate laws in the legal system, made any ideas about the problem of the legal gap pointless.<sup>6</sup>

Towards the end of the eighteenth century, the birth of national States with a centralized control and the need for a new arrangement of the social life consistent with the late political and social changes (which reached their highest point with the French Revolution) matched with the Natural Law idea<sup>7</sup> of a logic-formal law, which, explained methodically, would be able to guarantee certainty and order.<sup>8</sup>

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*de la loi en droit allemand*, in *Logique et Analyse*, 9, 1966; CONTE, *Completezza e chiusura*, in *Nove Studi sul linguaggio normativo*, Giappichelli, Torino, 1967-1968, pp. 15-37; ALCHOURRON & BELYGIN, *Normative Systems*, 1971; CORSALE, *Lacune dell'ordinamento giuridico*, in *Enc. Giur.*, XXIII, Torino, 1973, pp. 257-271; BELYGIN, *Legal Dogmatics and Sistemation of law*, 1983; CHIASSONI, *supra* note 1, at p. 111 ss. CHIASSONI, *Lacune nel diritto. Appunti per una tipologia realistica*, in *Prassi giuridica e controllo di razionalità*, a cura di L. Triolo, Torino, Giappichelli, 2001, pp. 37-89; GUASTINI, *Le fonti del diritto e l'interpretazione*, Giuffrè, 1993, *Il diritto come linguaggio*, Torino, Giappichelli, 2001; LIPARI, *Spunti in tema di lacune dell'ordinamento giuridico*, in *Studi in onore di Davide Messinetti*, ed. by Ruscello, 2008, Napoli, p. 533 ff.

3. CHIASSONI, *supra* note 1, at p. 111 ff.

4. 'Special Law' was side by side with *Ius Commune*; special laws would include laws, charters and constitutions issued by the local government or by the 'prince': the local legal system.

5. Particularly Gorla writes about the legal resort to '*communis opinio totius orbis*' or '*praxis totius Europae*' 'as a means to complete the local legal system in the *casus omissi o dubii* and as a criterion of evaluation or interpretation of its norms as complying or not with 'common reason'. Then there is 'analogous legal resort to *lex alii loci*, so that legal receptions of the Law of another country and thus, directly, standardizations occur'. *Relazione sul Diritto comparato al congresso di Taormina 1981*, in *Cinquanta anni di esperienza giuridica in Italia*, Giuffrè, 1982, p. 496.

6. CORSALE, *supra* note 2, at p. 268. The author refers to GILLESSEN (*Le problème des lacunes du droit dans l'évolution du droit médiéval et moderne*, in *Le problème des lacunes en droit*, ed. by Perelman, Bruxelles, 1968) who noticed 'the absence of the problem of legal gaps in the studies of Medieval Legal History', explaining the reason for this by the fact that 'the problem would present a real difficulty only from the XIX century, that is when the theory of the necessary completeness of the written law was established' (fn29).

7. GRENDENE, *Lezioni di Storia delle codificazioni europee*, in [http://helios.unive.it/~corec\\_sis/corsi/2003/grendene/download/Mod04OL.pdf](http://helios.unive.it/~corec_sis/corsi/2003/grendene/download/Mod04OL.pdf).

8. ZWEIGERT & KOTZ, *Introduzione al diritto comparato*, 1998, Giuffrè, v. I, p. 106 ff.; DAVID, *I grandi sistemi giuridici contemporanei*, 1994, Cedam, p. 51 ff.; L.J. COSTANTINESCU, *Introduzione al diritto comparato*, 1996, Giappichelli, p. 24 ff.; MONATERI, *Il modello di civil law*, 1997, Giappichelli, p. 78 ff.; CORSALE, *supra* note 2, at p. 268; GORLA, *Unificazione*

Soon the belief developed that a new arrangement of the social life could be done through a renewal of Law: hence the idea of 'a complete and definitive regulation of all Private Law',<sup>9</sup> the idea of a code.<sup>10</sup>

Codifying means firstly to simplify:<sup>11</sup> 'simplicity of the system and predictability of the solutions which must be given in judicial decisions'<sup>12</sup> are the pursued purposes of the nineteenth-century legislator.

The contextual re-affirmation of the principle of the separation of powers<sup>13</sup>—in which the judge is a simple executor of the legislator's will and lacking of any creative power—prevents, or even opposes, acknowledgement of the judge's interpretative autonomy, and it ends up with creating the idea of a definitive and presumptuously complete law model.

When a casuistic model of codification is not embraced,<sup>14</sup> simplification leads to a general and abstract formulation of the coded principles.

It is when such principles are applied that, without the interpreter's integration, the limits and the incompleteness of the coded systems emerge: on one hand, the value of codification and on the other hand the contextual re-affirmation of the principle of separation of powers end up

"legislativa" e unificazione "giurisprudenziale". *L'esperienza del diritto comune*, in *Foro It.*, 1977, V, c. 91.

9. ASCARELLI, *Studi di diritto comparato e in tema di interpretazione*, 1952, Giuffrè, p. 175.

10. This is what distinguishes a code from prior legal consolidations only aimed at rearranging the early law: consolidation consists in integrating all subsequent modifications in one act; all the prior texts remain in force since the consolidated act has not any legal value. Conversely, codification is necessary to abrogate the initial act and all its following changes, thus bestowing legal value to the new act which integrates all the changes. 'Modern' codes are different from consolidations (here included the Justinian's *Corpus Iuris Civilis*) in the following characteristics: (1) they contain new content (in fact, when this comes from the pre-existing traditions, it is re-elaborated and re-formulated and it is no longer in force, instead of being a simple chronological or systematic collection of pre-existing material; (2) they abrogate any concurrent source; (3) each of them addresses only a branch of the law and generally regulates it in a complete way. About this issue: VIORA, *Costituzioni Piemontesi*, Torino, 1928; TARELLO, *Le ideologie della codificazione nel secolo VIII*, Genova, 1968.

11. See also MARINELLI, *Il problema dell'ermeneutica giudiziaria*, ANALISI E DIRITTO, UNIVERSITÀ DEGLI STUDI DI GENOVA (1998), a report delivered at the University of Verona in December 1997, as introduction to a seminar about this topic, now available on the Web site: [http://www.giuri.unige.it/intro/dipist/digita/filo/testi/analisi\\_1998/Marinelli1.pdf](http://www.giuri.unige.it/intro/dipist/digita/filo/testi/analisi_1998/Marinelli1.pdf). From the same author, see also *Ermeneutica giudiziaria, Modelli e fondamenti*, Giuffrè, 1996.

12. ASCARELLI, *supra* note 9, at p. 174; see also CORSALE, *supra* note 2, at p. 268; MONATERI, *supra* note 8, at p. 79.

13. MONTESQUIEU, "*Lo spirito delle leggi*" [*The Spirit of the Laws*], UTET, 1974.

14. The casuistic model was adopted by the Prussian Code, l' *Allgemeines Landrecht für preussischen Staaten*, which with its more than 16000 subsections intended to provide a precise answer to any possible legal argument or controversy, thus, limiting the task of the interpreter to that of a simple executor of the law (see § 2).

showing the problem of legal gaps to its full extent;<sup>15</sup> in fact, according to some scholars,<sup>16</sup> ‘the point of departure for the revision of interpretational theory was really created by the so-called problem of the gaps in the legal system’.

The debate on this topic is transnational, and since the twentieth century it has revolved around some recurrent themes and particularly around the analysis of a range of problems categorized by the scholars of legal gaps:<sup>17</sup> the ‘typological problem’, which focused on the need to define the concept of gap;<sup>18</sup> the ‘ontological problem’, which triggered the debate about the completeness of legal systems<sup>19</sup> and aiming to confirm or deny the existence of the legal gaps; the ‘methodological problem’, which examines in depth the methods of legal reasoning used by the interpreter in order to integrate any gaps; and the ‘phenomenological problem’, raised by those<sup>20</sup> who wanted to deal with legal gaps as variables depending on the interpretation.<sup>21</sup>

Each of those topics would deserve a deep and lengthy treatise. This Article, however, is intended more modestly to examine the main stages of the origin of the problem of legal gaps in the codified systems and, by means of an historical and critical reading of the pre-ordered normative solution of the aforesaid problem in the Italian legal system (article 12 of the preliminary dispositions), to understand the methods by which legal actors (whether they are judges, theorists or even simple legal users) have to deal with what was authoritatively defined as a daily work of legal integration,<sup>22</sup> in a continuous dialectic tension between self-integration and hetero-integration.<sup>23</sup>

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15. CORSALE, *supra* note 2, at p. 268.

16. ASCARELLI, *supra* note 9, at p. 183.

17. ZITELMANN, *supra* note 2. This classification was adopted by CHIASSONI, *supra* note 1, at p. 111 ff.

18. After this, other scholars created a varied typology of legal gaps; for instance, see BOBBIO, *supra* note 2; CONTE, *supra* note 2; ALCHOURRON & BELYGIN, *supra* note 2; BELYGIN, *supra* note 2.

19. For a quick overview of legal theory and the several schools of thought in favour and against the principle of completeness, see GUASTINI, *supra* note 2, at p. 157 ff.

20. Introduced by CHIASSONI, *supra* note 1, referring to CANARIS, *De la manière de constater et de combler les lacunes de la loi en droit allemand*, *supra* note 2, and to GUASTINI, *supra* note 2.

21. MONATERI, *Interpretare la legge (I problemi del civilista e le analisi del diritto comparato)*, in *Riv. Dir. Civ.*, 1987, I; CHIASSONI, *Prassi giuridica e controllo di razionalità*, Giappichelli, 2001; MODUGNO, *Appunti dalle lezioni di teoria dell'interpretazione*, Cedam, 1998.

22. CORSALE, *supra* note 2, at p. 269.

23. BOBBIO, *Teoria generale del diritto*, Giappichelli, 1993, p. 262 ff; LIPARI, *supra* note 2, at pp. 533-34.

## II. THE PROBLEM OF LEGAL GAPS IN THE EARLY NATURAL LAW CODIFICATIONS

In 1794 the *Allgemeines Landrecht für Preussischen Staaten*, or as everybody refers to it, the ALR, was published by Frederick William II of Prussia. This great legal consolidation was started by Frederick William I in the early eighteenth century in order to simplify and homogenize law in Prussian territories.<sup>24</sup>

It is a code with more than 16,000 regulations<sup>25</sup> whose overt aim is to provide judges with a complete collection of rules and solutions for any possible dispute or legal matter, thus preventing judges from any interpretative activity and restricting their function to that of a simple legal executor. Together with the promulgation of that code, a special Legal Board, the *Gesetzkommission*, was established so that the judges could readdress the unclear cases, as it was expressively forbidden to them by the king to distance themselves from the 'clear and intelligible regulations of the Law . . . under the pretext of acting [upon] an interpretation of the legislator's will or purpose'.<sup>26</sup>

The basic idea—in compliance with the principle of the separation of powers—was fully to limit the interpretative functions of the judges, an aim which is fulfilled by detailed legal rules and by attributing the power to solve any doubtful case to the sole legal authority.

Historic studies noticed the inefficiency of the system Frederick II wanted, and showed that the '*Gesetzkommission*' was never employed for its intended functions, whereas the code, although it minutely provided for different possible circumstances, was never able to cover the variety of events which arose in disputes, so that the judges were obliged to interpret each individual disposition.<sup>27</sup>

In the body of the code, however, it was possible to identify a norm, paragraph 49, by which the judge who failed to find 'any law useful to the decision about the dispute', was attributed with the power to judge 'according to the general principles established by the local Law and

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24. MONATERI, *supra* note 8, at p. 81.

25. The great number of dispositions, apart from its casuistic nature of the compilation, is due to the fact that all the different branches of the Law were included: public, private, constitutional, criminal, ecclesiastic and feudal. *Id.* at p. 82.

26. This prohibition was contained in the decree of promulgation of the code. Its violation would have entailed severe sanctions for the infringers. ZWEIGERT & KOTZ, *supra* note 8, at p. 110. Another contribution by the Prussian code 'in the fight against the jurists undertaken by Frederick the Great was the disposition prohibiting the judges to quote the opinions of the scholars and the decisions of the other courts'. MONATERI, *supra* note 8, at p. 82.

27. MERRYMAN, *La tradizione di Civil Law nell'analisi di un giurista di common law*, Giuffrè, 1973, pp. 59-60.

according to the regulations established for similar cases, as he was righteously convinced'.<sup>28</sup> It is almost an implicit acknowledgement of the limits of any form of codification which, as detailed as it might be, cannot predict every possible legal controversy, and it is forced to delegate to the judges the duty to integrate the inevitable gaps.

The Prussian legislator was not the sole lawgiver who wished to implement a rigid separation of powers by reserving the power of interpretation to itself, including the handling of doubtful or omitted cases.

The same choice was adopted by the legal actors during the French Revolution prior to the proclamation of the *Code civil*.

The French revolutionaries, in compliance with Montesquieu's postulate,<sup>29</sup> believed that it was necessary to reduce the judges' function to simple executors of the law, imposing upon those facing a matter of *interprétation de la loi* to turn to the Legislature,<sup>30</sup> through the so-called '*référé législatif*'.<sup>31</sup>

In France, as well as in Prussia, a system requiring continuous intervention by the legislative authority soon proved to be unfeasible.<sup>32</sup>

Thus, with the enactment of the *Code civil* in 1804, any obligation imposed on the judges to refer to the legislature was abolished and through the regulation in article 4<sup>33</sup> (banning denials of justice), the power

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28. GIULIANI, *Le disposizioni sulla legge in generale gli artt. da 1 a 15*, in *Trattato di Diritto Privato*, ed. by P. Rescigno, vol. I, Utet, II ed., 1999, pp. 379-89 n.20, where there is the quote of the text entitled *Diritto generale locale prussiano*, in *Le Leggi Civili della Germania*, ed. by Mr Fioretti, Lawer, II, Napoli, 1889, p. 28 ff., containing the translation of the above-quoted code.

29. MONTESQUIEU, *supra* note 13.

30. The obligation to defer to the legislature, the so-called *référé législative* was established with a decree dated 16th August 1790 (art. 12). In the same period, the *Tribunal de Cassation* was established (by the decree of 27th November 1 December 1790), whose main function was to quash—that is, abolish—all the judgments containing *une contravention expresse au texte de la loi* without providing a binding interpretation of the rules to apply. Thus, the quashed case would be referred back to the judicial body to be discussed again; originally this Court, despite its name, was not considered a judicial body, but rather, as a special tool used by the legislator in order to guarantee supremacy over the judges. On this topic, GORLA, *I precedenti storici dell'art. 12 disposizioni preliminari al codice civile del 1942 (un problema di diritto costituzionale?)*, in *Foro It.*, 1969, V, c. 112, para. 6 and, quoted by the same author, CALAMANDREI, *La cassazione civile*, Bocca, 1920.

31. 'The need of *interpretation* arose when there was not a *texte expresse ou précis de la loi* about the case (or, as it was said, when the law *ne decide pas le cas*) or when the text of a law was obscure. It was the concept of *casus omissus* or *casus dubius*. GORLA, *supra* note 30, at c. 123.

32. *Id.*; GORLA, *supra* note 30, at c. 125.

33. 'The judge who will refuse to decide pretending silence, obscurity or insufficient law could be prosecuted for the offence of denial of justice'.

of interpreting the law was implicitly 'returned'<sup>34</sup> to the judiciary authority.

The very writers of the *Code civil*, though convinced of the importance of codification, realized that it would be impossible for them to collect in a legislative text the answers to all potential judicial controversies. Portalis, the most influential member of the codifying team, in his *Discours préliminaire sur le projet de Code Civil* noted that '*l'office de la loi est de fixer, par de grandes vues, les maxims generals du droit; d'établir des principes féconds en conséquences, et non de descendre dans le détail des questions qui peuvent naître sur chaque matière*'.<sup>35</sup> Also, the task of 'conducting' the implementation of the principles identified in the rare and extraordinary cases should have been left to the judges and the jurists who, as 'permeated by the spirit of the laws', would have been able to fill any possible gap.

Nevertheless, the French legislator simply set forth the disposition of the mentioned article 4, without inserting in the *Code civil* any norm for the purpose of controlling the interpreter's activity or of suggesting to the latter criteria to adopt in case of a 'silent, obscure or insufficient' law.<sup>36</sup>

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34. LIPARI (in *Morte e trasfigurazione dell'analogia*, In *Lieberamicorum* per Dieter Henrich, Torino, 2012, pp. 36-37) reminds that Gèny (*Méthode d'interprétation et sources en droit privé positif*, Paris, 1989, n.81 bis.) 'courageously underlined that the norm of article 4 cannot demand to subjugate the judge "à ses propres défaillances, mais, au contraire, lui conférer à default de toute direction formelle, un pouvoir de décision propre"'.  
 35. PORTALIS, *Discours préliminaire sur le projet de Code Civil*, (1799); ZWEIGERT & KOTZ, *supra* note 8, at p. 111.

36. In spite of the civil code's lack of a rule which legitimizes the interpreter's creative task in case of legal gaps, juridical practice clearly highlighted to what extent the judges play an important role in the creation of a rule in case of gap, by using, for this aim, tools and interpretative canons similar to those used in all the other European systems (resort to analogy, to the general principles etc.). DAVID (*I grandi sistemi giuridici contemporanei*, Cedam, 1994, 11th ed., p. 98) reminds us that since 1904, on the occasion of the centenary of the *Code civil*, the first president of the French Court of Cassation gave a speech about the interpretation of code with this tone:

When the text, imperatively, is clear and precise and does not produce any misinterpretation, the judge is obliged to bow down and to obey . . . . But when the text contains some ambiguity, when doubts arise about its meaning and its extent, when, compared to another it can, to a certain extent, be contradicted or reduced, or, on the contrary, developed, I reckon that in that case the judge has the greatest powers of interpretation. He must not insist on searching stubbornly what was the authors' thought one hundred years ago when writing this or that article. He must ask himself what the same article would be if it was written nowadays. He must tell himself that in front of all the changes occurred in the last century in the fields of the ideas, of customs, of institutions, of the economical and social situation of France, justice and reason impose to adjust, freely and humanly, the law text to the reality and the needs of modern life.

Such a norm, instead, can be found in *Allgemeines Bürgerliches Gesetzbuch für die deutsche Erblander*—ABGB<sup>37</sup>—a codification decided upon by the empress Maria Theresa and promulgated in 1811 and taking effect in 1812, after more than fifty years of preparatory studies.<sup>38</sup>

Subsection 7 of ABGB<sup>39</sup> orders that, in case of a doubtful or omitted case, the judges will have the ‘duty’<sup>40</sup> to decide the case by resorting to both extensive and analogical interpretation of the laws regulating similar cases and if this would not suffice, ‘as the case remains doubtful’, by resorting to principles of Natural Law.<sup>41</sup>

Thus the ABGB reflected a firm belief in the autonomous existence natural law principles stemming directly from Nature and man’s reason and These are separate from positive law and immanent in social reality.

A similar norm is introduced by article 3, subsection 2 of the preliminary dispositions to the Civil code of 1865 for the Kingdom of Italy (‘If a dispute cannot be adjudged with a precise regulation, you

*Le Centenaire du Code Civil 1804-1904*, p. 27. For an interesting overview on the position of the French jurists about the topic of ‘the discretionary power of the judges’ and the linked topic of the legal gap in the past and in present, see ALPA, *L’arte di giudicare*, 1996, Laterza, p. 10 ff. and bibliography within.

37. In contrast to the Prussian code, the Austrian code only deals with private law.

38. On the long route to the promulgation of the Austrian Civil Code, see J.M. Rainer, *La teoria dell’interpretazione in Portalis e Zeiller*, report at the International Conference ARISTEC, ‘*Scienza giuridica, interpretazione e sviluppo del diritto europeo*’, Rome 9-11 June 2011, at University of Roma Tre.

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Lasst sich ein Rechtsfall weder aus den Worten, noch aus natuerlichen sinne eines gesetzte entscheiden, so muss auf anliche, in den Gesetzen bestimmt entscheidene Falle, und auf die Grunde anderei damit verwandengesetze Rucksicht genommen werden. BleibtderRechtsfallnochzweifelhaft; so mussolchermitHinsichtauf die sorgfaltig-gesammelten und reiflicherwoegenUmstandennachdenaturlichenRechtsgrundsatzententschiedenwerden. [When a case cannot be decided either through the words or the natural sense of the law, attention will be paid to similar cases decided precisely in compliance with laws and the reasons of other laws which show analogy with the above case. If the case is still doubtful, it will have to be decided according to the principle of the Natural Law, after paying attention to the circumstances scrupulously collected and maturely examined.]

See also DE ZAILLER, *Commentario sul codice civile universale austriaco*, Milano, 1815.

40. Even here the ‘duty’ to decide the case is imposed to the judge, even if *omissis* or *dubius* (see art. 4 *Code Civil*).

41. In *Commentario sul codice civile universale austriaco* (Milano, 1815), De Zailler on commenting upon the norm, adds:

[S]ince we cannot demand that a civil code, like a system of natural private law should contain all the legal principles and even all the rights deriving from them, similarly the legislator, in order to prevent difficulties and doubts of the judges to whom a similar case would not seem defined in the code, grants them the power to decide it with the principles of the Natural Law, that is according to the philosophy of law . . . .

See also MERRYMAN, *supra* note 27, at p. 67.



should take into account the dispositions concerning similar cases or matters. If the case is still doubtful, it should be adjudged in compliance with the general principles of Jurisprudence'.) which uses a formulation nearly similar to that contained in article 12, subsection 2 of the preliminary dispositions of the current civil code of 1942. It differs from the latter only in its reference, in the last sentence, to 'the general principles of Jurisprudence', rather than to 'the general principles of the State legal system'.<sup>42</sup>

In the norms quoted above, we can notice a gradual departure from the principles of Natural Law and a progressive trend toward the precepts of legal positivism: 'towards the end of XIX century the word «natural» disappeared from the legal texts.'<sup>43</sup>

On 1 January 1900 in Germany, the *BürgerlichesGesetzbuch*<sup>44</sup> (BGB) entered into force. This code, the product of the Pandectist school, was written in an 'abstract and conceptual language', 'complete and precise',<sup>45</sup> but it does not contain any norm regulating the interpreter's activity in case of a regulatory gap.

Such a choice was probably due to the fact that, after more than one hundred years since the first codifications, European legal doctrine<sup>46</sup> had already accepted the idea that the interpretation, and likewise the

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42. Article 15 of the 1838 Albertine Statute is considered, together with the Austrian code, the immediate historical precedent for both norms; in fact, it orders:

When a controversy cannot be decided by the word or by the natural sense of the law, attention will be paid to similar cases precisely decided by the laws and to the foundations of other similar laws. If the case is still doubtful, it must be decided in compliance with the general principles of the Law, after examining all the circumstances of the case.

GORLA, *supra* note 30, at c. 112 ff.

43. MERRYMAN, *supra* note 27, at p. 67; *see also* MONATERI: 'The shadow of legal positivism influenced so much the writing of article 12 of the preliminary dispositions that mentioning the general principles of the State legal system turned the original propositions into a formula dominated by an opposite spirit' in *Le Fonti del diritto, I principi generali, in Novissimo Digesto Italiano*, IV ed.

44. For a history of the German law and an overview of the circumstances leading to the publication of the German Code: ZWEIGERT & KOTZ, *supra* note 8, at p. 164 ss.; MONATERI, *supra* note 8, at p. 110 ff.

45. ZWEIGERT & KOTZ, *supra* note 8, at p. 179.

46. The problem of legal gaps was accurately investigated by scholars of the German legal doctrine; among the most remarkable: ZITELMANN, *supra* note 2; CANARIS, *Die feststellung von Lucken in Gesetz*, Berlin, 1967, French Translation, *De la manière de constater et de combler les lacunes de la loi en droit allemand*, in *Le problème des lacunes un droit*, ed. by Perelman, Bruxelles, 1968; LARENZ, Italian translation, *Storia del metodo e della scienza giuridica*, Giuffrè, 1965; ENGHISCH, Italian translation, *Introduzione al pensiero giuridico*, Giuffrè, 1970, and many more. An overview on the activity of legal completion through the work of the judge in the German system is in ORRU, *I criteri extralegali di integrazione del diritto positivo nella dottrina tedesca contemporanea*, Jus, 1977, p. 298 ff.

integration and completion of the law, should be part of the usual task of jurisprudence, without needing to legitimate it by an express delegation.<sup>47</sup>

Moreover, the flexibility of the German system is secured by the presence within the code of a great number of ‘general clauses’ which, over the years, ‘like a safety valve . . . prevented the BGB from exploding under the pressure of the social changes’.<sup>48</sup>

Just twelve years after the BGB, the *Zivilgesetzbuch* or Swiss Civil Code was promulgated. Article 1 of this code contains one of the best—known and controversial norms about the method of filling legal gaps. The Swiss legislator,<sup>49</sup> unlike the French and German legislator, admitted the incompleteness of the law, and explicitly put into the hands of the judge the task of filling gaps and indicated the criteria which he or she must follow.<sup>50</sup>

From the beginning this norm was hailed as ‘the answer to the criticism raised about positivism, the rigid dogmatism of *Begriffjurisprudenz*, the rigidity of the legal system established after the French Revolution’.<sup>51</sup>

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47. MERRYMAN, *supra* note 27, at p. 62; *see also* MONATERI, *supra* note 43: ‘BGB permeated by the pandects system and even a historical result of that system, does not need to refer explicitly to the conceptual creations of the jurists, since this reference is by tacit agreement already shared by its interpreters’.

48. ZWEIGERT & KOTZ, *supra* note 8, at p. 189. On the issue of the relation between general clauses and legal gaps, *see also* PATTI-Lacune “*sopravvenute*”, *presunzioni e finzioni: la difficile ricerca di una norma per l’inseminazione artificiale eterologa*, in *Nuova giur. civ. comm.*, f. 4, 2000, pp. 347-49—where the author notices:

[T]here is no real need of regulation when the case to be disciplined falls into the field of a general clause: the system can even renounce specific prescriptions and opt for a different regulatory technique. The extent of a legal gap must be evaluated also according to the extent of the general clauses in the system.

49. The preparation of a code for all the Swiss cantons was confided to Professor Eugen Huber, who is effectively considered the father of the Swiss civil codification.

50.

The Law is applied to all the juridical matters to which the letter or the sense of its dispositions can be referred. In the case not provided by the law, the judge decides according to the usage and, when failing, according to the rule he would adopt as legislator. He conforms to the most authoritative jurisprudence and doctrine.

Text of the article 1 ZGB translated from the official Italian version, available on the Web site: <http://www.admin.ch/ch/i/rs/210/indexpre.html>.

51. DE BIASO E FOGLIA, *Introduzione ai codici di diritto privato svizzero*, Giappichelli, 1999, p. 22. Truly, as already remarked, the disposition does not seem so innovative since ‘after the decline of legal and conceptual Positivism, it was recognized that a Positive legal order, once all the possibilities of interpretation of the legal text and the analogy are depleted, might still show some gaps which must be filled by the creation of the Law by the judge’. ZWEIGERT & KOTZ, *supra* note 8, at pp. 215-16.

III. THE PROBLEM OF LEGAL GAPS IN THE ITALIAN LEGAL ORDER:  
FROM ARTICLE 3, SUBSECTION 2 OF THE PRELIMINARY  
DISPOSITIONS OF THE 1865 CIVIL CODE TO ARTICLE 12,  
SUBSECTION 2 OF THE PRELIMINARY DISPOSITIONS OF THE 1942  
CIVIL CODE

Article 3, subsection 2 of the preliminary dispositions<sup>52</sup> to the 1865 Civil Code introduced into the code a regulation containing 'the sources' which the interpreter should use when a dispute could not be resolved by a precise regulation: first, the analogy and 'when the case is still doubtful', the 'general principles of Jurisprudence'.

Where the Austrian Civil Code of 1811 (subsection 7 of ABGB) recalled 'the principles of the Natural Law', the Italian code 1865, on the model of Charles Albert Civil Code of 1838,<sup>53</sup> encourages the interpreter to refer to the 'general principles of law'.

Despite the absence of the adjective 'natural', this disposition was at first interpreted by the doctrine<sup>54</sup> as an explicit reference to those 'principles of justice' immanent in the 'natural' reality, stemming from nature and the man's reason and communal to any order.<sup>55</sup>

Soon, though, commentators<sup>56</sup> influenced by a new 'exclusively historical and positive vision of the legal phenomenon' unanimously agreed that 'general principles of Law' were not to be regarded as

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52. The complete caption is '*Disposizioni sulla pubblicazione, interpretazione ed applicazione delle leggi in genere*' [Dispositions on publication, interpretation and application of the laws—author's translation].

53. See MERRYMAN, *supra* note 27. DEL VECCHIO (*Sui principi generali del diritto*, in *Arch. Giur.*, I, 1921, pp. 33-37) remarked that the first draft of Charles Albert Code had adopted the same words as the Austrian legislator, 'claiming that the doubtful cases should be decided according to the principles of Natural Law' and that 'although this formula in the draft elaboration raised several objections, we must notice that those objections were not caused by a substantial aversion to that concept, but they tended only to solve the possible danger of its very uncertain interpretation'.

54. DEL VECCHIO, *supra* note 53.

55. Some scholars tried to identify in 'the general principles of the law' a reference to the Roman Law or Jus Commune (*id.* at p. 35 n.2); GORLA, *supra* note 30, at p. 128 n.33, quoting BRUGI, *Per la storia della giurisprudenza e delle università italiane*, *Nuovi saggi*, 1921, p. 211, observed that on the basis of the dictate of article 3 of the preliminary dispositions of the Civil Code 1865 'the Italian Courts behaved with some freedom and instead of resorting to analogy, they resorted to other elements of persuasion, such as Jus Commune and its authorities (often quoted in our sentences dating back XIX century and even early XX century)'. See also GIULIANI, *supra* note 28, at p. 417 n.2.

56. In a critical sense, see DEL VECCHIO, *supra* note 53, at p. 33 ff., and its bibliography in it, in particular p. 35 n.2.

‘principles of Natural Law’, but as principles of positive law, traceable through a process of abstraction from each single legal disposition.<sup>57</sup>

Some commentators<sup>58</sup> even asserted that the general principles of law should be taken to mean ‘general principles of Italian Law’.

Despite the criticism of those who affirmed that ‘such ethnic limitation falls entirely outside . . . the spirit and even the Law’ and could not refer to a system of national law, but manifestly referred to the higher truths of the general Law virtually communal to all the peoples,<sup>59</sup> this interpretation was finally accepted by the 1942 legislator who in article 12, subsection 2, referred to ‘the general principles of the State legal order’.<sup>60</sup>

#### IV. ARTICLE 12, SUBSECTION 2 OF THE PRELIMINARY DISPOSITIONS TO THE CIVIL CODE: THE RECIPIENT OF THE NORM

Thus, the Italian legal system provides the judge with the criteria to be used in filling a legal gaps. This disposition does not deal with the way to interpret law or of deciding<sup>61</sup> the legal controversies by the judge.<sup>62</sup>

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57. In a critical sense, see BETTI, *Interpretazione della legge e degli atti giuridici*, Giuffrè, 1949, p. 205 ff., and GORLA, *supra* note 30, at p. 114.

58. FADDA e BENZA, *Note al Diritto delle pandette del Windscheid*, Vol. I, Torino, 1902, p. 128, quoted by DEL VECCHIO, *supra* note 53, at pp. 38-39.

59. DEL VECCHIO, *supra* note 53, at p. 39 *passim*.

60. The legislative Commission appointed to write the code in 1942 had previously opted for a wider formula than the definite one, inserting a reference to the ‘general principles of the law in force’. The choice of modifying the norm by accepting in the final formula the direct reference to the ‘general principles of the State legal order’ is thus explained in the report of the keeper of seals (n.3):

[T]he specification in the final plan about the general principles of the Law, meaning that those principles must be sought inside the legal order in force, was fully accepted by the Parliament Commission. Nevertheless I wanted to insert in the text of article 3 a change (not only formal) to express more clearly and completely this concept. Instead of the formula ‘general principles of the Law in force’, which might have looked too restrictive of the work of the interpreter, I preferred the other, ‘general principles of the State legal order’, in which the word ‘order’ is inclusive, in its wider meaning, of the norms and institutions, but also of the state political legislative tendency and of its national scientific tradition (Roman Law, Jus Commune, etc.) complying with it. This order, adopted or enacted by the State, that is both our private and public positive order, will give the interpreter the necessary elements to search the regulating norm.

Excerpt from ALPA, *I principi generali*, in *Trattato di diritto privato*, ed. by Iudica and Zatti, Giuffrè, 1994, I, p. 163.

61. Remember that the beginning of the section in question says, ‘If a controversy cannot be decided with a precise disposition . . .’ See also *id.* at p. 136 ff.

62. According to SCHLESINGER:

[W]hile the doctrine . . . is really intended to interpret laws, the judge is summoned to—or at least it is commonly said—to *apply them* . . . . The activity of the judge . . . has not directly the purpose to determine the meaning of the normative texts, but the

If it is true that each interpreting activity includes a certain margin of 'creativity',<sup>63</sup> still it is different to delegate the power to 'create new legal rules'.<sup>64</sup> In fact, interpretation can be used in order to prevent or avoid a gap, 'meaning that the available normative texts can be interpreted in such a way that the legal gap could never arise' or, vice versa, it can produce a gap, 'meaning that the available normative texts could be interpreted in such a way that a legal gap could arise'. Interpretation, though, 'cannot fill legal gaps: if the gap arises, it arises only after the interpretation. In order to fill that gap, we need to integrate the law, that is, we need to create a new law'.<sup>65</sup>

Article 12 of the preliminary dispositions to the Civil Code seems totally consistent with this pattern: subsection 1 establishes a series of hermeneutical criteria<sup>66</sup> thanks to which the interpreter can apply the same norm to numerous legal situations; subsection 2, by introducing the criterion of analogy (similarity), permits the judge to produce a new norm starting from a formulated norm (or, in the case of general

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formulation of decisions about single cases. . . . The activity of interpretation of the theorists, thus, peters out in abstract and hypothetical considerations and it does not create any new rule, while, on the contrary, the activity of the judge . . . results in the formulation of a "new norm", that is, . . . in the formulation of a *dictum* endowed with authority.

*Interpretazione della legge civile e prassi delle corti*, in *Riv. Dir. Civ.*, n.4, 2002, p. 531 ff., in part. pp. 532-33. According to Marinelli, we must distinguish between 'authority-prestige' and 'authority-power': '[T]he authority of the doctrine nowadays peters out in terms of authority-prestige. The judge's deliberations can have, in turn, a greater or smaller authority-prestige, but they are mainly characterized by their authority-power.' MARINELLI, *supra* note 11, at p. 154.

63. See CORSALE, *supra* note 2, at p. 269 ('[W]e can affirm that the concrete activity of the juridical operators (and not only that of jurists, but also that of the common users of the Law) is a daily work of integration of the order, which takes place both for the cases foreseen by the legal dispositions and for those not foreseen.').

64. BARAK, *La discrezionalità del giudice*, Giuffrè, 1995, p. 89, affirms:

It is necessary to distinguish between the hypothesis when there is a legislative rule whose field of application is unknown and definable only by means of practice of discretion and the hypothesis when discretion is necessary to establish the rule itself. . . . Is discretion in interpreting a norm identical to that practiced in creating a legislative rule which confers the judge such nomofilachian [sic] power?.

65. GUASTINI, *Il diritto come linguaggio*, Giappichelli, 2001, pp. 164-65.

66. ALPA, *L' analogia*, in *Trattato di diritto civile*, directed by SACCO, *Le fonti del diritto italiano*, Vol. II, *Le Fonti non scritte e l'interpretazione*, Utet, 1999, p. 297 ff., notices:

[T]he interpretative criteria pointed to in article 12 are considered as exhaustive and contained into a *hortus conclusus* [enclosed garden], meaning that the interpreter cannot apply different [onwa] other than those foreseen in the disposition. This precept is soon contradicted when it is the case of the so-called historic interpretation (not contemplated in the list of criteria in article 12- preliminary article). . . . Thus it is clear that next to the main criteria foreseen by the preliminary articles there are also "subsidiary criteria", such as (for instance) material deducted from the preliminary works. . . .

principles, from numerous norms), once it is clear that the use of the criteria in subsection 1 could not solve the case.<sup>67</sup>

#### V. ANALOGY AND GENERAL PRINCIPLES AS TOOLS OF SELF-INTEGRATION OF THE CODAL SYSTEM

Norms like that contained in the article 12 of the preliminary dispositions to the Italian Civil Code were described by some authors<sup>68</sup> as closing norms of the system, thanks to which legal gaps could no longer be contemplated.

This theory is based on the fact that the legislative delegation to the judge creates a ‘decentralization in the creation of the Law’ and helps exclude gaps. The law, although it does not directly regulate the omitted case through a form of subordinate lawmaking.

On closer inspection, the problem is framed only in its ‘formal’ aspects, leaving unresolved the substantial issues. The debate on the legal gaps does not really seem to touch the issue whether the systems can be defined as ‘formally completed’ as opposed to ‘substantially

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67. CARCATERRA, entry: *Analogia(teoria generale)*, in *Enciclopedia del diritto Treccani*, vol. II, Roma 1988, p. 1 ff. The author remarks:

[A] deeper analysis might reveal that in reality such a clear cut distinction (on one side, hermeneutical criteria, on the other, analogy) fades: if this happens, if the same criterion is both a hermeneutical criterion and an analogical criterion, then clear and serious difficulties arise when distinguishing interpretation and analogy and their results.

This observation clearly refers to the distinction, sometimes denied, between an extensive interpretation and analogy: in both, ‘the strictly literary meaning of a normative statement is extended and thus defined both as interpretative extension and analogical extension’. Analogy, as already said, however, is a tool apt to fill the legal gaps by means of the criterion of similarity; conversely, extensive interpretation is a tool which can be used in order to ‘prevent’ legal gaps (see Guastini, *supra* note 65), by means of normal hermeneutical criteria used to determine what the norm establishes, and not to fill the gaps: ‘in the case of extensive interpretation, since it must determine the content of the norm in question, the extension falls within it, while in the case of analogy, since it must determine an unforeseen result not implicit in the norm, the extension overcomes this norm by producing another’. The same idea is found in Bianca, *La norma giuridica e i soggetti*, in *Trattato di diritto civile*, I, Giuffrè, 1990, p. 103, where the author remarks the importance of the distinction between analogy and extensive interpretation since penal and exceptional norms are not susceptible to analogy (art. 14 preliminary dispositions) while they are susceptible to extensive interpretation. On this topic, see also ALPA, *I precedenti. La formazione giurisprudenziale del diritto civile*, in *Giurisprudenza sistematica di diritto civile e commerciale*, Utet, 2000, p. 35 ff. It has also been noticed (GIULIANI, *supra* note 28, at p. 421 ff.) that the ‘preconceived reasoning’ of an ‘interpretative procedure which operates by degrees where each step is preclusive of the following’ has problems ‘in the reality of Law applications . . . since the initial step, where the very same “principles of the clear text”—literal interpretation—is degraded to mere juridical argumentation, which needs verifying compared to other principles.’

68. MOOR, *Sulla questione delle lacune nel diritto*, cit., p. 312 ff.

completed'. It is not clear whether the judge, expressly legitimated or not by the legislator, is authorized to 'search the solution' of the unresolved case by recurring to the 'simple' principles and values within the legal system in which he is operating, or whether he is permitted to 'hetero-integrate' the law, by using rules and principles unrelated to the positive Law.

Article 12, subsection 2, requires the judge, who could not decide a dispute on the basis of a precise disposition, to 'pay attention to the dispositions regulating similar cases or analogous matters', and, when the case remains still in doubt, to decide 'according to the general principles of the State legal system'.

These two distinct procedures for filling gaps are not different but consecutive (so only the impossibility to decide the case by using the first procedure legitimates the interpreter to refer to the second), and they are presented as analogical procedures: *legis analogy* in the first case, *juris analogy* in the second.

The first, *legis analogy*, arises when, in the absence of a specific normative prevision, the case may be resolved by applying a norm regulating similar or analogous issues.

The second, the *juris analogy*, contemplates, on the other hand, resorting to the 'general principles of the legal system'.

In the first case, in order to detect the norm to apply, the judge conducts a complex procedure, which presupposes a judgment of similarity<sup>69</sup> between the expressly regulated circumstances and those to be regulated, and, contextually, it involves a practice of abstraction (or simplification) of the expressed legal rule which might synthesize a wider and more general rule, called *ratio* of the norm,<sup>70</sup> to be then applied to the similar case.

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69.

'Similarity'—both when it is the case of applying analogically a single type and when it is used as an entire discipline of an 'analogous matter', here meaning as 'an autonomous branch of the economical activity and of the social life'—refers to the fact that, despite different circumstances, there is correspondence of those substantial elements which are relevant to the juridical norm. The analogy is based on the assumption that a circumstance with the same relevant elements coherently needs the same rule'.

BIANCA, *supra* note 67, at pp. 102-03.

70. GUASTINI, *Teoria e dogmatica delle fonti*, in *Trattato di diritto civile e commerciale*, directed by A. Cicu, F. Messineu, L. Mengoni, Giuffrè, 1998, p. 269: 'the analogical extension of a norm assumes the previous identification of its so-called *ratio*, that is the reason, the purpose for which the norm was disposed. This means to go back, from a norm to the 'principle' which founds it, as its justification'.

In the second case, the negative outcome of the judgment of similarity<sup>71</sup> requires further recourse to the general principles of the legal system: the identification of the principle to be applied is implemented, according to most scholars,<sup>72</sup> through a procedure of abstraction, starting from the analysis of a range of legal rules in order to find a far-reaching principle or a series of principles (hence called ‘general principles of the legal system’) which can be applied to numerous cases. ‘*Moreover, broadly speaking, the principles themselves are not apt to offer the solution to specific disputes: they mostly require, as commonly said, “objectification”*’.<sup>73</sup> Hence it is assumed that the procedure needs a first phase of ‘abstraction’ of the principle from a range of expressed norms and a second phase of ‘objectification’ of the principle whereby it becomes the solution to the dispute to which it is referred.

The difference between the *legis* analogy and the *juris* analogy would be reduced, according to a simplified view of both procedures, to a different grade<sup>74</sup> of abstraction of the inferred principle, directly proportioned to the extent of the starting point of the same process: ‘[W]hereas *legis* analogy extracts a general (unexpressed) principle from a single norm, *juris* analogy extracts inductively a general (unexpressed) principle from numerous norms.’<sup>75</sup> By this reasoning, *juris* analogy would also be a tool of self-integration<sup>76</sup> of the system, since the general principles may be traced to preexisting norms of positive law subjected to a not clearly identified ‘procedure of abstraction’.<sup>77</sup>

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71. Indeed, if this judgement had a positive result, the omitted case would be resolved by analogy *legis*.

72. CARNELUTTI, *Teoria generale del diritto*, Società editrice del Foro Italiano, 1951, p. 85 ff.; BOBBIO, *Analogia*, in *Novissimo Digesto Italiano*, IX, Utet, 1957, p. 601 ff., mentions a relation of ‘subsumption’ between an unregulated case and its regulating principle.

73. GUASTINI, *supra* note 70, at p. 299.

74. CARNELUTTI, *supra* note 72, at p. 87 ff.; GUASTINI, *supra* note 70, at p. 299 n.76. According to GIANFORMAGGIO, *Analogia*, in *Novissimo Digesto Italiano*, IV ed., Utet, p. 320 ff., also the extensive interpretation is supported by a similar procedure, so that we can have ‘an ordered sequence of three justificative procedures, from the simplest to the most complex, each of them blends into the other: extensive interpretation, analogical interpretation, resort to the general principles of Law’, *id.* at p. 327.

75. CARCATERRA, *supra* note 67, at pp. 8-9.

76. The (Italian) terminology is taken by CARNELUTTI, *supra* note 72, at p. 87, who was the first to distinguish between self-integration and hetero-integration of the juridical systems: self-integration occurs when the interpreter is obliged not to cross the ‘limits’ of the referential juridical order when filling the normative gaps; in contrast, when the interpreter is authorized to search for the ‘solution’ of an unresolved case by resorting to principles and values traceable beyond the juridical order in which he operates, it will be called a method of hetero-integration of the system. According to the author, analogy is always a ‘static and conservative’ tool of self-integration of system.

77. GUASTINI, *supra* note 70, at p. 294, speaks also of ‘induction’, ‘generalization’ and ‘universalization’; conversely, SACCO, *L’interpretazione*, in *Trattato di diritto civile*, directed by



Article 12, subsection 2, refers to 'the general principles of the State legal system', a formula which, 'as commonly known by the doctrine (and according to the results of the preliminary works), is intended to preclude the judge [from] any form of hetero-integration of the incomplete law.'<sup>78</sup> The judge is authorized to fill the legal gaps by using the simple principles of positive law expressed or inferred by dispositions in to the legal system of the Italian State.

A. *Self-Integration and Hetero-Integration: Some Critical Observations*

The previous interpretation of the dispositions in the article 12, though formally correct, is based on a series of presuppositions which a more concrete analysis would seem inevitably to put into question.

Firstly, it was widely noticed<sup>79</sup> that analogy as a logical procedure<sup>80</sup> is really an 'argumentative' tool,<sup>81</sup> adopted by the judges to justify the decision once it was made on the basis of a different decisional procedure.

The idea that judicial decisions are the result of a mere rational analysis, performed in a logical-deductive or logical-inductive way,<sup>82</sup> has

Sacco, *Le fonti del diritto italiano*, Vol. II, *Le Fonti non scritte e l'interpretazione*, Utet, 1999, p. 287 ff.

78. GUASTINI, *supra* note 70, at p. 286. He adds:

The judge, when applying a 'general principle', in compliance with the article 12, subsection 2, preliminary dispositions of the civil code, must demonstrate persuasively that the principle in question is traceable to a positive disposition which must be valid as much as its meaning and its (implicit) foundation. Without this, however, there will be resort to Cassation for 'violation or false application of norms of Law' (article 360 Code of Civil Procedure).

*Id.*

79. LUBERTO, *La crisi della concezione giuspositivistica delle fonti del diritto e le nuove metanorme sulla produzione*, in ARTOSI, BONGIOVANNI, VIDA, *Problemi della produzione e dell'attuazione normativa*, vol. II, 2001, Bologna, pp. 135-86, available at [http://www.cirfid.unibo.it/murst40-97/40-97/SezioneII/PartelIII/3.2/Luberto\\_new.doc](http://www.cirfid.unibo.it/murst40-97/40-97/SezioneII/PartelIII/3.2/Luberto_new.doc); ALPA, *supra* note 66, at p. 24 ff., where there are wide bibliographical references to other scholars of this issue.

80. See Cass. November 1965, n. 2404 in *Rep. Foro It.*, Voce *Leggi, regolamenti, decreti*. 81.

Our hypothesis, supported by authoritative writers (ZAGREBELSKY, *Il diritto mite*, Torino, 1996) is that logical tools like analogy are just argumentative resources for the interpreter, who independently arrives at the rule of the case from the method, but referring later to them in order to anchor his decision and demonstrate that the norm taken from the order is possible, that is justifiable in a given order.

LUBERTO, *supra* note 79. On the importance of argumentation in the juridical interpretation, see also SACCO, *L'interpretazione*, *supra* note 70, at p. 273 ff.

82. GIULIANI, *supra* note 28, at p. 430, notices that 'the techniques of the analogical reasoning used in jurisprudence make problematic every pretention of a doctrinal explanation, in a time characterized by the passage from the traditional configuration in deductive terms to the

been questioned long ago.<sup>83</sup> The research of the solution is characterized first by a fact-finding and then a decisional procedure which has little to share with the mechanisms of a judicial syllogism. It is only in the later phase of justification that the need to justify the adopted solution leads the interpreter to reconstruct his own decisional course in a logical-deductive or logical-inductive way.<sup>84</sup>

On the other hand, it is only due to an *ex post* reconstruction that the rapidity, ductility and inevitably evaluative nature of the reasoning can be reduced to a series of strictly predetermined logical steps, even if it is that sort of reasoning which should lead to a judgment and, then, needs a certain logical-formal rigour.

Thus, if the analogical procedure has not a decisional but rather a justifying function, it is necessary to ascertain which canons, criteria or procedures are used by the judge in order to identify the solution to a case and above all to verify how the choice of such canons, criteria and procedures can be adjusted to the normative command.

Most scholars agree that the logical-rational phase of the decision is guaranteed by the phase of justification and motivation of the decision, when the judge uses argumentative tools such as analogy 'in order to make the decision accord with the system and legally sustainable'.<sup>85</sup>

The mental procedures which lead to the proper decision seems to be dominated by the 'intuitive' element.<sup>86</sup> The perception of the most

opposite one, in inductive terms.' On the co-existence of the deductive reasoning and the inductive reasoning, see also BOBBIO, *Sul ragionamento dei giuristi*, in *L'analisi del ragionamento giuridico*, a cura di Comanducci e Guastini, Giappichelli, Torino, 1989, p. 161 ff.

83. CALOGERO, *La logica del giudice e il suo controllo in Cassazione*, Padova, II ed., 1964, p. 33 ff.

84. ALPA, *supra* note 66, notices that the idea of distinguishing in every rational procedure between the 'context of discovery' and the 'context of justification' is supported by the dominant epistemology and that one 'who accepts the distinction believes that there are always two phases of the same cognitive procedure: one directed to the discovery, the other to its justification'. He adds that 'a second widespread tendency also in the judge's reasoning would make this distinction in the sense that the arguments, the reasons on the basis of which the judge makes a decision are different from those used to justify it, or rather, to account for it'. See also Vedi anche TARUFFO, *La giustificazione delle decisioni fondate su standards*, in *L'analisi del ragionamento giuridico*, *supra* note 82, at p. 311 ff., also in the comment of Comanducci, p. 345 ff., and in *Il controllo di razionalità della decisione fra logica, retorica, e dialettica*, available on the website <http://www.studiocecelano.it/lenouvevocieldiritto/>. Also for TARELLO (in *L'interpretazione della legge*, 1980, Giuffrè), the resort to analogy to fill the gaps in the order is not strictly a logic operation, but it depends on some particular characteristics (coherence and completeness) of the Law which are not intrinsic but the result from specific political choices.

85. ALPA, *supra* note 66, at pp. 27-28 ('[E]ach motivation is a justification and it is not an account of what happened in the judge's mind, in order to show it outside in a rationally controlled way.');

see also SCHLESINGER, *supra* note 62, at p. 531 ff., in part, pp. 540-41.

86. LIPARI, *supra* note 34, at p. 39, speaks of 'intuition analogy' referring to CAIANNI (*Analogia*, in *Enciclopedia del diritto*, II, Milano, 1958, p. 349 ff.).

correct solution, most of the times chosen among many possible alternatives,<sup>87</sup> is the result of a fusion between a value judgment,<sup>88</sup> regulated along juridical and/or extra-juridical parameters (e.g., the importance and the prevalence of the interests at stake in the light of the code and/or the changeable needs of society) and an evaluation on the juridical-social consequences of the adopted decision (pragmatic or consequential reasoning<sup>89</sup>).

The adopted solution, thus, will be the result of the practice of subjectivity by the judge,<sup>90</sup> but it will never be said to be the result of mere free will.<sup>91</sup> After the phase of identification of the rule to be applied to the undecided case is over, the phase of justification of the choice will follow, so that the adopted decision will be said to be in accordance with the principles and the values expressed by the legal system of reference.<sup>92</sup>

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87. TARUFFO, *La motivazione della sentenza civile*, Padova, 1975, p. 213 ff.

88. According to TARUFFO, *supra* note 84, at p. 326 ff., the judge, when giving a value judgement, can (1) refer to values and standards of evaluation existing in the society or in the field of predetermined social groups (reference to ENGHISC, *Introduzione al pensiero giuridico*, trad. ed. by Baratta, Giuffrè), (2) implement individual values of both parts or of one of the two, (3) personally establish a standard of evaluation, and in this case, it will be necessary to identify the extreme limit of the practice of this creative power consisting, for instance, in the compatibility of his practice with the principles of the positive law.

89. According to ALPA, *supra* note 66, at p. 31, the consequentialist technique is really widespread also in the civil law countries, but in the common law countries, it is quite old. The same economic analysis of the law is an example, since it is a decision-making technique based on the analysis of costs and profits resulting from any possible solution. On this topic, see MENGONI, *L'argomentazione orientata alle conseguenze*, in *Interpretazione e diritto giudiziale*, a cura di Bessone, I, Giappichelli, 1999, p. 179 ff.

90. TARUFFO, *supra* note 84, at p. 342, speaks of creativity which is translated into value judgments and in the choice of the relative standards of evaluation; see also PICARDI, *La funzione del giudice nell'interpretazione e nell'applicazione del diritto*, in <http://www.giustiziacarita.it/archmag/profpicar.htm>.

91. According to SCHLESINGER, *supra* note 62, at pp. 531-40:

[T]e discretionary power is not a symptom of fantasy or tantrum . . . : but just because the way in which the power of the judge could be practiced is feared, society demands from the Courts the proof of sagacity, wisdom and profound attention to the impact of their decisions on the people involved and on the future cases.

According to CAPPELLETTI, *Giudici Legislatori*, Giuffrè, 1984, p. 13:

[D]iscretion does not necessarily mean arbitrariness; and the judge, although he is inevitably the creator of the Law, is not necessarily a totally free creator. In fact, every civilized juridical system has tried to designate and apply some limits to the judicial freedom: trial and substantial limits. . . The real topic is not on the alternative creativity-not creativity, but on the extent of creativity and on the methods, limits and legitimate of the judicial creativity.

92.

In other words, any juridical system is not closed to the needs of the changing reality, but, at the same time, every juridical system can accept new solutions, only by inserting them in the system. . . The value judgment at the foundation of the decision is juridically relevant only if it can be made universal, that is, if it can be accepted for all

Only when the decision can go beyond this second phase will the value judgment in it be defined as ‘judicially relevant’ and then suitable to produce the juridical rule for filling the legal gap.<sup>93</sup>

Moreover, if this does not occur, that is, if the decision shows its ‘unique’ and scarcely persuasive characteristic in its choice and motivations, it may be discarded in the following steps of judgment, or overturned in Cassation due to ‘violation or false application of law.’<sup>94</sup>

Adherence to the legal provision is nevertheless guaranteed in the phase of justification or motivation of the judgment. In it, the judge will tend to justify his choice by invoking an analogical argument, through the identification of a similar case whose regulation implies the adherence to the same value judgment accepted by the judge. Or, if this is not possible, the judge will justify his decision by means of general principles in the legal system which may be extended to include (and justify) the new solution.<sup>95</sup>

In this way, the judge conducts the indispensable task of adjusting the law to a new social need by actualizing the content of the principles, expressed or unexpressed, which constitute the body of the legal system.

Such activity of integration can be described as a form of ‘hetero-integration’ of the law, in which it is emphasized that the criteria used cannot always be taken from norms ‘formally in force within the system.’<sup>96</sup> It may also be described, however, as a form of ‘self-integration’ of the law, since those criteria must necessarily find their position and ‘justification’ within the system.<sup>97</sup>

On the other hand, as noted by Francesco Carnelutti:<sup>98</sup>

Placed on the logical field, self-integration and hetero-integration are at two extremes of an antithesis: . . . In concrete [terms], even this distance reduces a lot. As the research of the principle becomes laborious, thus passing from legis analogy to juris analogy, the certainty disappears and justice releases from its bonds. The more general is the legal principle, the

the similar cases, which, in a system of Positive Law, can only happen by changing the practical or value judgment into a normative special case.

ALPA, *supra* note 66, at pp. 28-29.

93. On this topic, see also ROSELLI, *Dovere di conoscere la giurisprudenza*, in *Interpretazione e diritto giudiziale*, a cura di Bessone, I, Giappichelli, pp. 265-77.

94. Article 360, n.3, Code of Civil Procedure.

95. See BETTI, *supra* note 57, at p. 54 ff., who speaks of ‘a force of expansion, not simply logical, but axiological, able to overcome the legislative solutions determined by their evaluations and, for this reason, able to surpass the simple positive law’.

96. CORSALE, *supra* note 2, at p. 270.

97. *Id.*, *op. ult. cit.*, p. 270, believes that such criteria can be derived from the order when this is intended ‘as expression of the culture of a social group’.

98. CARNELUTTI, *supra* note 72, at p. 91.

closer it moves to those generic formulas, in which the ethic[al] order is expressed; thus, I have long noticed that analogy and free research can be found *in apicibus* . . . .<sup>99</sup>

*B. Article 12, Subsection 2, as an Anachronistic Norm*

As already highlighted, the words used by the 1942 legislator to indicate the criteria to fill possible gaps do not seem to be prone to any misunderstanding: where *legis* analogy is not useful, the judge will be able to resort to the 'general principles of the legal system of the Italian State', thus excluding any other method of hetero-integration of the law such as an appeal to the principles accepted in any foreign system. The limits of this norm, highlighted by some even before it came into force,<sup>100</sup> were clearly shown during the last decades after Italy joined the European Union and after its adhesion to conventions and international treaties aiming to achieve legal harmonization among the adhering States.

In the light of the events which occurred after the promulgation of the civil code, and the radically changed feeling of 'national State' which had led the past legislator to speak with great inflexibility,<sup>101</sup> Gino Gorla<sup>102</sup> at first wanted to suggest an 'evolutionary interpretation' of such article by recognizing:

[A]t least in the fields which are object of those communities or international conventions, the general principles to be applied, when *the case cannot be decided by a precise disposition* (for us, by the Italian Law) are, or rather should respectfully be, those coming from the fact that Italy

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99. *Id.*

The first is a rigid solution, the second is a fluid solution; the first helps conservation, the latter the evolution of Jurisprudence; the first puts the parties in front of the legislator, the latter puts them in front of the judge; the first subjugates justice to certainty, the second helps justice prevailing certainty; the first occurs by means of creation of abstract precepts, the latter by means of creation of concrete precepts.

100. See DEL VECCHIO, *supra* note 53, at p. 39, para. 2.3, n.48.

101.

That considered in the preliminary dispositions . . . was a positivistic concept of the general principles of Law, a concept belonging to 'closed' juridical orders of the State unlike the 'open' ones. A 'closure given by the pretext of completeness of the XIX century codes; a pretext endured until half the XX century and based on the concept of the State as the sole source of Law, a concept aggravated by the idea or the ideology of a national or . . . nationalistic State'.

GORLA, *I principi generali comuni alle nazioni civili e l'art. 12 delle disposizioni preliminari al codice civile italiano del 1942*, in *Foro It.*, 1992, V, pp. 90-92.

102. Among his works on this topic, in particular: GORLA, *supra* note 8, at p. 91 ff.; GORLA, *supra* note 5, at p. 503 ff.; GORLA, *supra* note 101, at p. 90 ff.

belongs to those communities, from their regulations or from those international conventions.<sup>103</sup>

Many authors, above all those in the field of comparative law, suggest the use of this discipline—that is, to use comparative law as a supplementary criterion in the interpretation of norms of the national law<sup>104</sup> and as a tool to fill possible gaps in the internal law, in harmony with what is contemplated in similar systems.<sup>105</sup> Thus there would be reference to the juridical experiences of other European countries<sup>106</sup> in which, more than in Italy,<sup>107</sup> it is possible to find judicial decisions expressly referring to principles and institutions of foreign Law, and where the discipline of comparative law has an unique role.<sup>108</sup>

Surely, in an atmosphere of unrestricted communication and debate in the international scientific community, it seems totally anachronistic to limit the *corpus* of principles that the judge must use as benchmark for his decision, or, in other words, to ‘justify’ it, to remain within the limited borders of the national law which in its historical tradition and evolution, can only be considered as the result of a great western juridical tradition nourished by communal values.<sup>109</sup>

The obstacle presented by the literal element of art. 12 can only be appreciated and interpreted in the historical context in which it was written, so that limits are placed upon preclusive power.<sup>110</sup>

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103. GORLA, *supra* note 101, at p. 92. Where the author uses as basis for such evolutive interpretation also article 11 of the Constitution.

104. SOMMA, *L'uso giurisprudenziale della comparazione nel diritto interno e comunitario*, Milano, 2001; AA.VV., *L'uso giurisprudenziale della comparazione*, in *Quaderni della Rivista trimestrale di Diritto e Procedura civile*, Milano, 2004; AA.VV., *Il giudice e l'uso della sentenze straniere*, edited by Alpa, Milano, 2005; SMORTO, *Il giudice e il diritto Straniero*, in *Scienza giuridica e prassi, Convegno Aristec*, Palermo 26-28 novembre 2009, edited by VACCA.

105. ZWEIGERT & KOTZ, *supra* note 8, at I, p. 20 ff.; MARKESINIS, *Il ruolo della giurisprudenza nella comparazione giuridica*, in *Contratto e Impresa*, 1992, p. 1359 ff.; MONATERI & SOMMA, *Alien in Rome. L'uso del diritto comprato come interpretazione analogica ex art. 12 preleggi*, in *Foro It.*, 1999, V, p. 47 ff.

106. As for examples taken from German Jurisprudence, see JAYNE, *Precedente e "rechtsfortbildung" nel sistema tedesco dell'illecito civile*, in *Foro It.*, 1988, V, p. 366 ff., and ZWEIGERT & KOTZ, *supra* note 8, at I, p. 22 ff., also with examples from Swiss courts; as for examples from British Jurisprudence, see those in GORLA, *supra* note 8, at pp. 117-18.

107. ALPA, *L'uso del diritto straniero da parte del giudice italiano*, in *Soc. Dir.*, 2000, p. 78 ff.; KOOPMANS, *Comparative Law and the Courts*, 45 ICLQ p. 545.

108. See also the observations of MONATERI & SOMMA, *supra* note 105, at p. 48 ff.

109. RESCIGNO, *Relazione conclusiva*, in *I principi generali del diritto*, Atti dei convegni Lincei, Roma, 1992, p. 331; GIULIANI, *supra* note 28, at p. 432.

110. More recently, some authors—MONATERI & SOMMA, *supra* note 105, at p. 48 ff—suggested a ‘new interpretation’ of article 12, subsection 2 of the preliminary dispositions thanks to which comparative Law could be used as a form of analogical interpretation, that is, to consider it as one of the possible ‘interpretative options’ recalled by the article itself: ‘that

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particular type of analogy' which, according to this theory, is the comparison should be used as a tool to resort to *lex alii loci* (foreign Law) with priority over the reference of article 12 of preliminary dispositions to 'the general principles of the juridical order of the State'. Since 'the reference to the State which can be found with regards to the principles cannot be found in the literal formulation of the principle of analogy', 'that is the literal interpretation of art. 12 of preliminary dispositions does not link analogy to the sole national dispositions', it would entail that, in case of a 'national gap', where the void cannot be filled 'with regard to the internal norms regulating analogous circumstances', the interpreter can and is obliged to resort to 'analogous dispositions and matters of an another system'. The resort to the general principles of the State would be legitimate only after resorting to *lex alii loci*, and implemented by means of comparison. It is a rather unique interpretation and not free of criticism, also pragmatically—in particular those in SMORTO, *supra* note 104, at p. 300—which seems given more by the desire of the authors to 'provoke' their readers rather than persuade them of the good value of the offered interpretative proposal.