Judicial Method of Interpretation of Codes

Carlos de la Vega Benayas
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INTRODUCTION: THE AFFINITY AMONG LEGAL SYSTEMS

I realize that the topic of this paper is quite general and broad and that it is addressed to an audience which includes persons living under a legal system where the concept of a particular system is not well defined. The state of Louisiana, nevertheless, does belong to a certain category of systems in which the application of the law approximates that of the Continental, European, or, according to Louisiana jurists, civil law, under which the concept of a systematic and ordered legal whole is predominant. Whether such a concept constitutes an established idea or a belief is debatable, particularly when one keeps in mind the fact that the notion of a system does not always signify one that is closed, or restricted, and inflexibly logical and reasonable. System and systematic, order and ordered—these are not the same. Even the most open, or expansive, juridical system possesses an internal coherence, a prevailing logic and a functional interdependency among its parts, from which can be drawn a rational methodology, a systematic meaning. In my opinion, an objective examination of all legal systems would reveal no more differences than the relative mixtures that are already known to exist. Regardless of some of the parallels and comparisons that have been drawn between legal systems, and especially between the common law and civil law, differences and contrasts do exist and the methods used for the realization and application of the law are clearly not the same, although the ultimate goal is: to achieve justice in each case. It is also clear that the Continental judge does not perform his task in the same way that the Anglo-Saxon judge does. The reasons for this are well known—they include, for example, factors of a social, political, psychological, and economic nature. What should be important is whether or not each society, each nation is satisfied with its system, techniques, and methods for the realization of the law.

The common origin of the legal orders or systems under discussion is the Roman law which, along with its architecture, has been noted as Rome's fundamental contribution to contemporary civilization and culture. Rome, it has also been said, is the mother of the law and the state.

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The Roman law, with the least possible amount of legislation—the formal positive law contained in the Twelve Tables (5th century B.C.)—developed into a veritable juridical mosaic founded on opinions (responsa prudentium), resolutions, and judgments derived from individual cases or conflicts. The realization of the law in Rome did not proceed from an application and interpretation of codes, which at that time did not exist, but from a case-by-case development of justice.

An aggrieved party went first to the praetor, who granted or denied his right to bring an action, and then to the iudex, who rendered a judgment granting or denying the party's right to obtain relief. The Roman law is judicial law, a doctrinal elaboration (by jurist consults) and a judicial resolution of conflicts that began with the literal application of rules and agreements during the formative period, that progressed to a search for a way to introduce fairness, good sense, and natural reason into the resolution of cases (ius honorarium, as for instance, the causa Curiana which was the first interpretative device used to balance the harshness of the strict interpretation of testaments), and ended with the Justinian period, marked by a desire to apply the law on the basis of a plain and literal interpretation of codes, which were integrated into the Corpus juris civilis. Justinian's dream, apparently, was to convert all law into an inflexible monument that would be the source of resolutions for all conflicts, and he thus prohibited any commentaries, gloss, or interpretation of his code.

The similarity in the development of the English law is obvious. In the Middle Ages the English magistrate, like the Roman praetor, granted and denied the right to bring suit, or institute process. Later on, to mitigate the effects of the literal interpretation of the common law, and the strict adherence to precedent (stare decisis), the courts of equity developed, and their role is today manifested in the tendency toward excessive legislating, a necessity of modern and technical society. This proliferation of statutes (law in the continental sense) will inevitably necessitate codification, a demand that history bears out and needs no elaboration.

The law of the continental European countries, also, has experienced a similar evolution. During the High Middle Ages the Roman law influence was quite great, and it was during this period that the Glossators undertook the task of explaining the most important legal texts, but with strict regard for their literal meaning. Later, the Commentators initiated the movement toward greater independence in the interpretation of legal texts, thus giving rise to a new form of doctrine. Finally, the laws of the various nations became diversified and formed a disjointed but related set of norms, some of which were taken from the Roman law, others from Germanic law, many from the decrees of the king, and most from the so-called uses and customs.
(customary law). Justice was first administered by the king and his officials and then by judges and courts under the protection of a law that was not fixed or codified, acquiring thereby great power, as under the French judicial parlements, whose conservatism in the exercise of that independence is listed among the causes of the French Revolution, inspired, also, by the teachings of Montesquieu who, copying badly from the English system, argued that in order to avoid judicial arbitrariness the judge should be no more than the voice which pronounces the words of the law, a lifeless being which cannot control its own force and vigor.

The idea or goal, as in the time of Justinian, was to give the judge, and the applier of the law in general, a legal text, so to speak, perfect and complete, anticipating absolutely all cases that life could possibly offer. Not even Portalis, the renowned redactor, believed that this was possible; but, such faith in reason and security converted reasonable men into deluded ones.

The direct purpose of the civil code and other laws was to prohibit interpretation (since if everything was in the code, it did not need to be interpreted) and to establish an appellate court as a watchman to insure that judges adhered strictly to the written law. There is no need to explain how life itself silenced the dream of a self-sufficient law and how the very essence of the judicial function transformed a court that originally had only one political mission—the defense of the law (ius constitutionis)—into an entity that integrated the ultimate jurisdictional phase, or the maximum judicial authority, the court becoming in a sense a court of last instance or resort (ius litigatoris). The clearest example of a court which has undergone this sort of evolution, if such clarity is possible, is the Supreme Court of Spain.

With this brief overview, I draw only the conclusion that there is an essential affinity among all legal systems, and among the phases of their evolutions, with some systems being restricted, or closed, and others expansive, or open, toward other perspectives. What ultimately distinguishes some human groups from others are their customs, using this word in a very broad and general sense. By concentrating on our immediate focus—the juridical system—there is little question about its ultimate end: to realize a just legal order, where diversity will be so satisfactory that the uniformity could not prevent us from believing that perhaps in the not-too-distant future our juridical worlds will approximate one another. An example of this is the international tendency to draw closer together and formulate uniform laws in private, civil, and commercial law matters, such as those proposed for the European Community. In a general way, this is reminiscent of Toynbee's belief that no European nation has a history that is completely intelligible by itself.
It is understood that in every legal system there is a proper methodology which distinguishes the various fields from one another in their common pursuit of the realization of the law: (1) the method of the creation and formulation of the sources of the law, (2) the method of understanding, or knowing, the law, and (3) the method of applying the law. The first refers to the origin and development of the particular class of norms, or rules, that make up the legal system, its parts, and internal hierarchy: laws, customs, principles, equity, jurisprudence, and other extra-legal or extra-positive norms. The second refers to knowledge, or appreciation, of the law in a philosophical sense; whether it be doctrinal or scientific, for example: the philosophy of law, the science of law, the methodology of the science of law. The last refers to the practical realization of the law through the work of jurists, lawyers, legal officials, and arbiters and, fundamentally through the judicial function, which consummates and determines the law, stating what the law is or is not in each conflict \textit{in vivo}, and not in \textit{in vitro}. Of these areas, only the first and third will be discussed here.

\textbf{The Sources of Law in Spain}

It is necessary at this point to review a bit more extensively the comments made earlier concerning the origin and development of juridical norms in relation to the existing legal system, or legal order. The development of the sources of law, or more precisely, the historic origin of norms, of the Spanish system sprang from a mixture and juxtaposition of elements: some that were indigenous, some that were German, others that came from the French (i.e., their civil code), as well as some from the influence of the Roman law, upon which the French law is substantially based, and, finally, others that resulted from the development of the Spanish law, which was actually a reception of the first mentioned element. All of this, however, was not accomplished in a unified way, nor did judges become true legal organs, until the 19th century. Essentially, Spanish law was a mixture of indigenous and foreign elements. Not only did Roman, German, and canon law, with its compilations of written law, coexist, but they more or less absorbed local customs and uses as well. The existence of Roman law codes gave way to Spanish-Roman codes, culminating with the 13th-century \textit{Fuero Juzgo}, which remained in force until the promulgation of the \textit{Código civil} in 1889. These earlier codes, however, were not codes in the modern sense, and they comprised a variety of juridical orders or systems. Later came the compilations and summaries, such as: the \textit{Fuero Real} (1255), the \textit{Espeulo}, the \textit{Siete Partidas} (1250), this being the superior legal, and literary, monument and
an authentic summary of Spanish-Roman law, the Ordenamiento de Alcalá (1348), the Leyes de Toro (1505), the Nueva Recopilación (1567), and the Novísima Recopilación (1805). This brief overview alone reveals a reality different from that usually presented, one which is quite simplistic. This is so even without a review of the varied, unsystematic, and diffuse judicial organization of that period, which witnessed the appearance of “free-willed” judges, governed only by customs and their own discretion, and during which all judges and courts, through the application of those laws and summaries, employed a sophisticated procedural system, taken primarily from canonical, Italian, and national law and being for the most part written, whose intricacies were harshly criticized by the great classical writers, such as Quevedo and Cervantes. That is to say, the juridical-judicial reality was not exactly uniform and, of course, the law, understood as a general norm promulgated by the political-legislative authority, was not the predominant source of law.

The Spanish Codification

As a result of all this, the interpretation and application of the law could not be accomplished according to a uniform criterion nor did judges and courts follow one particular deductive method suitable to codified legislation. The situation was typified by contradictory interpretations, uncontrolled discretions, an anarchical system of judicial recourse due to the lack of an orderly procedural system, the mediocre organization of the court, and the overlapping of jurisdictions, etc. The reaction to this state of affairs gave impetus to the codification movement in Spain, although such a movement had begun throughout continental Europe as a whole toward the end of the 18th century.

It is well known that the theory and practice of the civil law in Europe, i.e., the private civil law as opposed to public law, a law predominantly casuistical and jurisprudential in origin, sought a perfectionism of the system that would serve not only the ends of juridical certitude, but also the ends of a better understanding, or comprehension, of the law, including its pedagogical goals. It was believed that the dispersion of norms, or rules, lent itself to confusion. These beliefs, as has been pointed out, manifested themselves during the High Middle Ages and during modern times as well. Analogous, though not exactly, is the notion underlying the North American Restatement, a sort of summary of doctrine and the principles derived in judicial cases and decisions. But, as one knows, a summary is not a code, for the latter is linked to certain fundamental ideas and purposes, such as rationalism, systematization, thematic unity, and regulation of norms, while the former is merely a juxtaposition, a summary of rules and norms of varied juridical content. The first codes deserving of that
designation are the Code Napoleon (1804) and the Austrian Civil Code of 1811. The Code Napoleon, of course, had the greatest influence, affecting the Dutch, Spanish, Italian, and Egyptian codes, we well as various Central and South American codes and, in particular, the civil codes of Louisiana and Quebec. (The Swiss, and especially the German, codes are considered excessively technical and will be cited only sparingly in the comparisons made in this work). In Spain, the codification movement of the 19th century began in 1812 under the Court of Cadiz and culminated, in matters of private law, with the promulgation of the Civil Code of 1889. This does not mean, of course, that the entire civil law of Spain is contained in that code, for there are numerous ancillary laws and statutes that regulate important private law matters.

The idea of integrating all normative legal material into a unitary body, or work, does not only respond to a rationalist conception or mental predisposition as was pointed earlier, but it responds also to a practical, pragmatic purpose—to avoid juridical insecurity. It should be remembered that security and justice, as juridical values or general principles, are dialetically complimentary and are not, in a Manichean fashion, opposed to each other. The insecurity sought to be avoided is that arising from the diversity of scattered norms, from the dubious value and effectiveness of such diversity, and from the contradictory judicial application of those norms.

To say that codification leads to a cumulative and complete hermetism would be fallacious—a simplification sometimes encountered with political drafters, as opposed to juristic ones. Today in continental Europe, it is recognized and understood that codes do not contain all the law. Codification has not closed, or restricted, the system. Juridical reality, today, is characterized by the existence of a varied and diverse normative whole constituting the so-called “block of legality,” whose highest norms (the constitution, the preliminary title of the civil code, the laws establishing public bodies, and administrative laws) create an order or hierarchy which, in the application of those laws, is intimately linked to the principle of legality and is immersed in the juridical-political structure of the state. The fundamental idea underlying the concept of the state conforming to the law is the limitation of power, and the cause and origin of this limitation is the security of the individual’s liberty and dignity, of his autonomy within certain just limits, which are likewise established by the law. This concept of the state was developed during the last third of the 19th century and, in a technical juridical sense, is a contribution made by the Germans, that is, in respect to the notion of the state’s submission to the law. The social and political elements, however, are in the English political tradition (the limitation of power) and are, also, the result
of the concept's peculiar reception by French doctrinal writers and revolutionaries, as reflected in the North American revolution (declaration of rights, separation of powers, and, later on, judicial control of the law and administration). Evolved from the French revolutionary experience is the notion that the state and its organs should act within the limits of legislation and the law, properly speaking, as a guaranty of the right of the individual, who ceases to be a passive subject and becomes a citizen and participant in the power. This submission of the state to the law rests on the principles of legality: the submission of all state organs to a regulated and standard order emanating from the collective legitimating will. The principle of legality, called the principle of principles and being one of the bases of the concept of the state conforming to the law, signifies that all acts and all norms are subjected to a just juridical and social order, but not simply to any order, as pointed out in Articles 1 and 9 of the Spanish Constitution of 1978. The latter article provides: "The citizens and the public authorities are subject to the Constitution and all other laws." This subjection to the law logically extends first to the judges and the courts; but, this subjection of judges to the principles of legality does not have to be understood as a blind, bureaucratic obedience to the words of the law and only the law. In the first place, the law should be one that reflects the superior principles of the Constitution, that is to say, a law which is not contrary to or deviates from the Constitution. If the law is unconstitutional, the court, through the judge, will respond to the situation. If the law is one that is actually not in force, it will not be applied. If the law is not appropriate, a different source of norms, or rules, will be examined.

Indicated in a precise manner in Article 1 of the Civil Code: "The sources of the Spanish legal order are written law, custom and the general principles of law." Thus, the sources are presented according to the following hierarchy: written law is first; in its absence, custom is applied; and, in its absence, the general principles are applied, but with the solemn warning, contained in the same article, that judges have a duty to resolve, or decide, every case—a prohibition of non liquet.

One might therefore wonder what goal has been achieved by the aspiration of manifesting unity in codes. In other words, what end has been accomplished if one moves from the separation and dispersion of norms (as opposed to the dispersion of legislation) the codification, unification, and simplification, and then, as though by round trip, back to the coexistence of multiple and diffuse norms? The goal is this: a very humane aspiration in which logic and security are allied. The purpose is to furnish the citizen and those who apply the law with a clearer legal order and to provide the judge with a mechanism
by which he can achieve a justice that is more equal (the principle of equality) and a more secure (the principle of security) in relation to all human conduct.

This aspiration presupposes, therefore, that if, in a country where the civil law is codified, there also exists codes containing other classes of norms, then the effect becomes twofold. On the one hand, the civil code does not contain all the law in force. On the other hand, the art and technique of rendering judicial decisions (officium judicis) is not as simple an operation as some have claimed, nor can its limits be defined only in reference to the Continental or civil law system as others have maintained.

**THE DEPTH AND LIMITS OF JUDICIAL INTERPRETATION**

At this point, one may safely conclude that the judicial method of interpretation of codes, that is, the application of the law in Continental systems, cannot be described by simply indicating the classic methods for the interpretation of norms or rule of law. Article 3 of Spanish Civil Code exemplifies this: "The rules of law shall be interpreted according to the exact sense of their words, in relation to the context, the historic and legislative antecedents and the social reality of the time at which they are to be applied, with fundamental attention being given to their spirit and purpose." To this, which is itself a rule concerning the interpretation of rules (thus different from a rule that interprets another rule), there must be added the notion of equity in the task of interpretation, or which cooperates in interpretation, in accordance with the meanings pointed out in paragraph 2 of Article 3 of the Civil Code: "equity shall be pondered in the application of rules." The paradox is clear that a rule given for the interpretation of rules is, because of its own obscurity, subject to interpretation. But, this is the destiny of all laws, in spite of the infantile prohibitions to the contrary. In this sense, a profound historic change has taken place. There has been a shift from the sharp prohibition against interpretation by judges to the clear mandate that they participate in the realization of the law. It is interesting to note, however, the inverse dialectic relation between authoritarianism and autocracy, on the one hand, and judicial independence, on the other—the more authoritarian the power, the less freedom there is for the interpreter.

Since the Spanish Civil Code itself adds in Article 4 the possibility of resorting to analogy, and since the articles referred to are contained in the portion of the Code concerning "application of the law" (in Chapter II), the conclusion is clear that the legislature intended to establish a narrow and concise system for the application of the law, comprising not only the subject of interpretation, but the integration of norms, that is, the delicate task of filling "gaps." It is therefore
correct to speak of the method of applying rules, and not of interpreting codes. This is so because, in truth, interpretation is no more than one part of the overall application of the law. This is so, also, because the judge in a country of codified law, as a result of the existence of a variety of norms, does not limit himself only to an interpretation of the code, but to an application of norms, or rules, according, of course, to the guidelines established by the general rules of the code, but also with the possibility or obligation of having to apply, as subsidiary norms or rules, other norms not found in the code—custom, general principles of law, or jurisprudence affirmed by the Supreme Court. This latter, in turn, not only includes the uniform or repeated interpretation of legislative norms (i.e., codes and statutes), but also integrates extra-legal, or extra-positive, principles and norms (e.g., from natural law and equity). It is through this process, or in this way, that an actual, living law is born of judicial disputes and formally penetrates the legal system of a country.

Here lies the difference between the common law and civil law—that the foundation of the judicial function rests in the laws, whether codified or not, since “codification” in this context represents only a formal statement of the law, in light of the fact that there are ancillary laws not incorporated into the code. The supremacy of the written law is consecrated in the Constitution and in the Código civil itself, through the articles mentioned earlier. The Anglo-Saxon system of precedent, stare decisis, is not in force in our country.

When presented with a conflict, the judge—in accordance with the parties’ allegation of facts and citations of applicable rules—searches, in a sense, the normative horizon of positive and written rules (whether or not they are contained in a formal code) for the rule that is properly applicable to the facts of the case. If the proposed and “proved facts” of the case fit comfortably into the rule selected as being applicable, or adequate, the double task of subsumption and application is easy. Obviously there is no need to resort to additional sources or to make further inquiries. It is possible, and this is normally done in the Spanish courts, to add to the mere examination of the rule other arguments ex abundantia, whether they are doctrinal or scientific in nature (absent, of course, any identification of the writers) or whether they are jurisprudential in nature, by citing a Supreme Court decision or statement on a similar subject, which always gives more authority to the holding and provides it with a more solid base, but which does not constitute, as in the common law, a ratio decidenti for the holding unless the decision is sustained only in the jurisprudence. (It is interesting to recall that, during the 18th century under the reign of Charles III, judges were prohibited from giving reasons for their decisions, in order to avoid confusing the parties and citing varied and contradictory theories).
Let us suppose, for this is usually the case, that the proper settlement of the opposing interests is found in a rule from the Civil Code or some ancillary statute. What, really, is the function of the judge and the methodology he is to use? The answer would be simple if one could still believe, as did those of an earlier time who perceived the judge's task as a simple subsumption, a mere syllogism: law being the major premise, the facts and claims being the minor premise, and the holding being the conclusion. Reality now, as then, is different, and there is no need to expose the reader to a discussion of the history of doctrinal evolution other than briefly to recall that the school of jurisprudence of interests, the free law, the sociology of American realism, etc. attempted to develop what judges in reality follow—a true syncretic technique without making it the slave of a particular doctrine or dogma, but these movements failed to take juridical conceptualism into account. In other words, the proponents of this technique forgot that the technique must operate by concepts, which according to Ihering and Windscheid are obtained by the interpreter of the law, for the perfection of the system and that those concepts are elaborated by the construction of juridical logic according to the positive law, and thus lacks any gaps.

Up to the time of the holding, the process is complex, and not at all simple. A brief discussion will show this. First, I included in one of my books the following inscription. "Man, plus norm, plus fact: That is what I understand by law." Man in this instance is the judge, the agent or organ, with all his human qualities, both positive and negative, that arise from his educational, social, and cultural surroundings. The judge realizes that he must "jump" (for the philosophers, somersault) from the facts to the rule, or norm—from what is to what ought to be—and produce as a result the law. For this, it is necessary to admit that the law is not one of the three, but all of them in a logical union. The facts are not the law, as the Scandinavian Realist School and some Anglo-Saxon writers would have it. The rule is not the law, as the normative positivists or the conceptualists maintain. The law is not the judge, as many renowned North American judges would have it, the words of Holmes being illustrative: "Law is what judges do."

The rules are given, or exist, for the facts; however, facts without normative regulation would have no social efficacy, but would be a mere phenomenon. Both rules and facts need a human bridge, a speaker, someone to pronounce and declare the law (iuris dictio)—that bridge is the judge, the jurisdiction of the court.

The judge finds himself before the facts; he does not search for or "find" them, but is offered them by the parties, or litigants. However, the facts that the judge contemplates in order to deter-
mine the application of the rule are not simple facts, originally pure at the time they were produced, but facts that have undergone a long process of qualitative and quantitative elaboration of human significations, that is to say, that flesh has been added to their bare bones (just as with the historian's task), and this process is brought about by the parties, their attorneys, and, in the end, by the judge who, after evaluating the "proved facts," determines them and gives them meaning. In other words, in spite of what is commonly believed, the facts are also interpreted, hence the decisive importance of the proof of the facts and, even more so, their appreciation by the judge. The judge will respect the facts, certainly, by virtue of his duty of impartiality and objectivity. But in the judge's task, which is his responsibility, there is also that of determining the facts, once appraised and evaluated. In this sense, the appellate judges realize the extraordinary importance of that determination of fact executed by the trial judge. Only in very exceptional instances can that determination, the judge's weighing of the evidence, be challenged before the Supreme Court on the basis of an error of fact or law.

Viewed in this way, it is obvious that there can be no automation in the decision, because, before entering upon the interpretation and determination of the rule, the judge has decided upon the facts and, thus, the facts so decided upon can be integrated, subsumed, into the facts contemplated in the applicable rule, what the Germans refer to as "tatbestand," the Italians, "fatti specie," and the English, "operative facts."

This not only signifies that there is not automation in the decision, but also that the rule itself will not become operative nor binding, since the rule is not an absolute source, but a tentative one. This is so because the judge, in effect, always has in mind, or presupposes, the result of the rule—the consequence, or result, that points to the facts or tatbestand that is believed to be applicable—and because not only must this conclusion be elaborated, but so must the premises (the facts by virtue of their determination after the proof; the facts contemplated by the applicable rule as a result of interpretation). The outcome is that the judge actually recreates, or reconstructs the law, since he sets with his conduct (his technique and art) the other data and elements that the legislator did not see, because he could not, not because he did not want to, of course. Is there much difference, therefore, between the civil law judge and the Anglo-Saxon judge who must make the facts of the case substantially analogous to the precedent case as the ratio decidendi? It seems not. It may be reasonable to suppose that the subjectio of the English judge to precedent could be harder, more automatic than the Continental judge's subjectio to the legal rule (found in the code or in statutes). Without being con-
vinced of this, I will leave the matter for someone else to investigate, but I do note that the courts of equity were created to lessen that harshness.

The judicial recreation of the law which occurs when the judge applies a positive norm (written law, custom, jurisprudentially recognized principles, or general principles existing within the legal system of the country) is converted into a creation when the judge is confronted with a gap and when he must, by command of the law which requires that a decision be rendered in every case (Civ. Code arts. 1 & 7), look to another norm, or rule, not included within the formal sources of law just mentioned. This situation will be discussed later, however.

The facts being determined by means of the proof and their judicial appreciation (in the Spanish system there is no predetermined weight given to any evidence, an approach previously valued by the law, and free judicial weighing of the evidence exists except in a very few instances), the judge must begin the task of interpreting the rule.

The interpretation of the rule, however, presupposes that an applicable positive rule of law exists, because the judge has already tentatively chosen the rule that he considers to be applicable and, if the rule invoked by the parties is the correct one, the judge, in general, should not alter the proposed legal foundation. This also carries over in the judge's other mental processes: (1) establishing that the rule is in force and has not been repealed, (2) verifying that it accords with the Constitution, which is the law of laws, (3) verifying that it does not contradict a rule of higher rank or a principle of justice (in an extreme case doctrine admits that an unjust law, one that is contradictory to, for example, human dignity, will not be applicable), (4) assuring the operation of the principle of the hierarch of norms, which is pointed out in the Constitution and the Civil Code according to the following order: the Constitution, laws establishing public bodies, ordinary laws, legislative decrees, law-decrees, ministerial decrees and orders, and this must be done without prejudice to the system of the principal sources of law—written law, custom, and general principles, and (5) resolving any possible antinomy with another rule of equal rank.

After the rule has been judicially selected and determined, there follows the task of finding its meaning and signification and of determining if those correspond to the facts already tried and determined by the judge. This is interpretation in the strict sense. It must be pointed out that this is not an isolated task, but that it is carried out in the judge's mind in conjunction with the other tasks and is accomplished not only as an intellectual process, but also as one influenced by emotions, the latter referring to what Judge Hutcheson
calls a "hunch." It is possible, and it does in fact happen, although nothing is said about it (because of the legal hypocrisy of which Hegel speaks), that the judge denies a claim because of a moral conviction and then injects legal reasons into the decision. Because of this, it has been claimed that the "legal reasons" in an opinion are lies, pretexts.

The interpretation of the law is not predetermined by any one of the usual methods. Savigny delineated the most classic and familiar ones: literal, historical, logical, and systematic. Later, others were added by doctrine and jurisprudence: teleological, sociological, systematic, analogical, etc. This last one should be distinguished from analogy as a method of integration through a search for another rule by reason of a substantial identity between the facts of the new situation and the meaning of the rule that the judge intends to apply, obtaining thereby a sub-rule.

All of these methods of interpretation are contained in Article 3 of the Spanish Civil Code, transcribed above, and have been recognized by the Supreme Court. That rule does allow the possibility of the judge's resorting to that method which he deems appropriate. There is no written mandate, only admonition and advice. What happens (and the rule does not lack force or consequences because of it) is that, if the judge poorly or incorrectly uses one of those methods, his decision can be reversed on appeal by the Supreme Court. Those methods are the literal, the historical, the sociological, and the teleological.

It is clear that literal interpretation follows the words of the text when they give rise to no doubts: *ino claris non fit interpretatio*. Actually, this constitutes only a rhetorical statement, since to declare that a text is clear presupposes that it has already been interpreted, that its meaning has been examined. The circumstances by which a text can be seized with obscurity are many, but, because of space limitations, they will not be discussed here.

The logical method or approach is derived from the coherence and internal systematization of the code or statute. Its object is to relate one rule with another by reason of its belonging to a group, a set, or an order, considering it, not as a part, but as a whole, such as is stated in the Digest (1.3.24): "nisi tota lege perspecta." Here is found the problem of antinomies or internal contradictions in the system, which are not infrequent in spite of the legislator's claims to the contrary. One of the conflicting rules will be selected, the *non liquet* rejected. The judge will be the one to decide.

The historical method is used when a rule is interpreted with respect to its history, its antecedents, and the circumstances which
gave rise to it. This method is linked to the ancient theory of the legislator’s will, or intent, at the moment the rule was established, which can clash with reality. Obviously, as the Spanish Civil Code advises, the choice should be made in favor of “the social reality of the time when they [the rules] are to be applied,” taking into account the sociological criteria which the Code consecrates (art. 3(1)). Rules exist, age, and erode with the changes in society. The legislator cannot be continually adapting them. This is the judge’s task, and he must act in accordance with objective criteria in performing his double function of interpreting not only the rules, but also those ideological, moral, and economic factors existing in the community at the moment in history when the rule is applied.

The last method is the teleological, which concerns the legislator’s main obligation (fundamentally to attend to the spirit and purpose of the rules), and thus refers to the search and investigation of the spirit (sense, inherent content) and the purpose (the intent, effect, result of its application). This is not the classic search for the intent of the legislator or of the law, but for a total focus that takes into account all the factors and methods already mentioned and that is directed to the harmonious attainment of a result compatible with social reality and the ultimate purpose of the rule. This purpose should be thought of imaginatively with a forward-looking view of the result which must operate within the interpretative process, for, as one author has said, the articles of a code cannot be damaged in a state of indifference because of the results.

Alongside these methods of interpretation must be placed the “equitable solution of the case,” assuming that equity does not operate as an autonomous source of law (being authorized only by the Civil Code in expressly permitted cases (art. 3(2)), but as the “humanization” or balanced adjustment of the rule of the case and, also, as the general principles of the law, being understood as carriers of the meanings of the rules of the entire legal system, in each case, according to one of the meanings given by the Code.

As stated earlier, all of the above presupposes the existence of a positive rule of law, whether codified or not, and that the interpretative task is confined to that rule. But it can happen, and it does because life is much richer than even the most omniscient legislator can foresee, that there exist what are called lacunae (“gaps”) or voids. “Lacunae” is truly a metaphorical expression, because all one does is to enter the realist field of normative integration. There are no lacunae because there is law. There are no lacunae because there are judges, it has been said. The Spanish Civil Code does not admit of them either, for it binds the judge to render a decision in all cases. When faced with facts that have no legal rule, the judge must resort
to custom (this having a different meaning under common law), that is to say, the judge turns to another, unwritten rule that is in force and whose result has been proved (art. 1(3)) and, in the absence of such a rule, the judge resorts to general principles. These principles are either those which inspired the legal system or those which constitute superior rules of justice that are active in the whole culture of the country. Such a principle must have its own substance, and the judge applies it as an autonomous source; but, in that event, because of the curious paradox of our procedural system in regard to the effects of an appeal, and in order to strike down the infringement of a principle by a trial judge in a decision, that principle must have been recognized or approved by the Supreme Court. The purpose of this rule of judge-made law is a practical one: to avoid any rule or aphorism being invoked as an infringed principle that does not have such character, but that does not deny the autonomous virtuality of either the principle or its application by the judge.

In the absence of written law, custom, or general principles, the judge will turn to other sources, which under Spanish law are all the following. In Spain, it is maintained that equity, as an autonomous source (apart from its moderating function in interpretation), can only be applied in limited instances (for example: the law governing usury, the law governing predial leases, amicable arbitration, etc.). Protected by the broad limits and scope of general principles, we can apply the rules of good sense, the nature of things, analogy, natural law, legal "standards," or jurisprudence etc.

The subject of jurisprudence in Spain (and in countries having codified laws in general) is a controversial one. The revision of our Civil Code in 1974 introduced a somewhat ambiguous formula, and to some, an unnecessary one. The Code states, in effect, that "jurisprudence shall complement the legal system with the doctrine which, by way of repetition, is established by the Supreme Court in interpreting and applying written law, custom, and the general principles of the law."

It seems to be a question of semantics between that which is complemented and that which complements, this being sufficient to reveal its ingenuity—pure Byzantinism. In my opinion, the legal text has done no more than to recognize the normative value of jurisprudence within its own limits but without consecrating it as a formal source of law. To the legal mind unaffected by our problem it is evident that the conclusion cannot be but this: if it is not a formal source it will of another type. I classify it as an actual and institutional source.

The decisions of the Supreme Court produce law—not rules, or norms—when the justices apply legal rules or when they discover or formulate extra-legal ones. If two or more consistent and uniform deci-
sions are rendered by the Supreme Court they will be binding on
the Supreme Court itself and on the other judges and courts. The
latter are not formally obligated to follow the jurisprudential doctrine,
but their decisions can be set aside on appeal if such doctrine is not
followed. On the other hand, the Supreme Court can vary its juris-
prudence for, among other reasons, social change, that is to say, the
Supreme Court can derogate from, or overrule, its prior decisions.

In another sense, in order for the jurisprudence to have force,
to exist mutatis mutandis, the same requisites as under common law
are required. Fundamentally, the ratio decidendi, that is, the facts
and reasons, are the same in the new case and in the jurisprudential
precedent. Obiter dictum, complementary arguments, and statements
ex abundantia, or “a mayor abundamiento” as the Spanish say, are
not binding. Because of this the jurisprudence requires that an ap-
peal before the Supreme Court be directed at the judgment (the dis-
positive portion of the decision) and at its basis or grounds (the
reasons), not against the accessory arguments that do not constitute
the ratio decidendi.

In summary, it can be concluded that the methodology used by
a judge in a system of codified law is mixed; so, he must first follow
the legal rule and, in its absence, he must apply the extra-legal ones,
recreating them, and serving in this way as the viva vox iuris, as
a deliverer of the law. This is a work of creation, or if you do not
wish to give it that pompous and compromising name, of recreation.
The Continental judge, then, also makes law. Subsidiarily, in the
absence of a legal rule, but he does make it. Because of that, one
speaks of an unfolding, a judicial development of the law, which is
not in conflict with the theory of the separation of powers nor with
the essence of the judicial function. From this it follows that the in-
terpretation of codified law is something more than a mere legal
development.

It is clear that by virtue of the normative pluralism the inter-
pretative process has to be mixed. Fairly understood we can only
speak of interpretation in a strict sense when it is applied to written
law and custom, and even in a more particular way, because the latter
does not concern examining the meaning of a text (custom does not
appear in writing except in a very few collections, such as the Italian
Raccolte ufficiali di usi), but it involves a repeated and constant
behavior that is followed with a binding legal will. And, what are
referred to as the general principles of the law, likewise, cannot be
the object of the usual interpretation, because they are not, in essence
and in a technical sense, rules, but are instead general and indeter-
minate concepts whose appreciation is the judge’s personal task and
his formal recognition of which is achieved through doctrine and the
jurisprudence. In regard to analogy, its application constitutes a choice, a voluntary act by the judge (as is the case with judicial presumptions) because neither the statutes nor the Code indicates any obligation in this regard, which is reasonable if one considers the mental process of comparison, both deduction and induction combined, that analogy entails and because only the judge's prudence can determine what is applicable, according to naturally objective criteria, which are rational and suitable to the existing legal order.

CONCLUSIONS

In spite of its belonging to the Continental or system of codified law, the Spanish legal system constitutes an open system, where the Roman distinction between ius and lex persists. It is a pluralistic system comprised of rules that have distinct marks and character, rules in form and those in substance, positive rules of law and those that are extra-positive. It is a system where the principle of normative hierarchy prevails, with priority being given to the written law, the general rules dictated by the parliament or legislative power, with custom and general principles being subsidiary formal sources of law, and with the rest, including jurisprudence, being indirect extra-positive sources. The judge under the Spanish system is not a functionary or bureaucrat, a mere applier of the law. The judge participates in the creation of the law. He enjoys the freedom to apply the subsidiary and indirect sources. The judge does not owe rigid obedience to the rules concerning the interpretation of rules of law. The rule of interpretation is determined by each case. In the Spanish system the general principles of law constitute the safety valve of the legal order, not only as carriers of its meaning, but also as transporters of other possible rules which, through the work of the judge, fill the normative voids. The judicial method of interpretation of rules is integrated more and more in the moderate recognition of the normative effectiveness of judge-made law, represented principally by the jurisprudence of the Supreme Court, though without implying a strict obedience to the system of precedent.

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