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JUDICIAL METHOD IN INTERPRETATION OF LAW IN LOUISIANA

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During the century and a half following the adoption of the Code of 1825 Louisiana became less and less isolated. In its position at the mouth of the Mississippi River and with the wealth of agricultural products which were in demand, the state was destined to absorb the language and customs of the other states of the Union. Louisiana was and is a relatively small state. Legal materials, scarce until modern times, were almost exclusively those developed in other parts of the United States. The English common law was the basis for the legal systems of all of the original Colonies. The United States Supreme Court, the superior legal authority in the United States, was concerned principally with problems from common law states, to be decided according to the common law.

For these reasons and many more, the civil law seemed to lose its force in Louisiana, and common law methods became more and more prevalent. There was, however, a sort of renaissance of the civilian method in Louisiana during the middle third of the 20th Century.¹ Louisiana is now referred to by some observers as a mixed jurisdiction influenced by both the common law and the civil law.² It is like Quebec, the Canadian province surrounded by English-speaking people and having a law descended directly from the English common law, but a province, nevertheless, whose legal system is based upon the laws of France and whose civil code, before revision, was largely based upon the Code Napoleon.³ Louisiana's reliance upon law schools located in older northern and eastern states of the United States, where the curriculum was based on the common law, its reliance upon common law legal materials and the immigration of

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1. See generally Herman & Hoskins, *Perspectives on Code Structure: Historical Experience, Modern Formats, and Policy Considerations*, 54 TUL. L. REV. 987, 1022-31 (1980).

2. See, e.g., T. SMITH, A SHORT COMMENTARY ON THE LAW OF SCOTLAND (1962); Tate, *The Role of the Judge in Mixed Jurisdictions: The Louisiana Experience*, in *THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS* 23 (J. Dainow ed. 1974); Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COM. L. 419 (1967); Tate, *Civilian Methodology in Louisiana*, 44 TUL. L. REV. 673 (1970).

3. See generally L. SAINTONGE-POITEVIN, *CIVIL CODE OF THE PROVINCE OF QUEBEC* (1967); Crépeau, *Foreword to I REPORT ON THE QUEBEC CIVIL CODE XXVII* (1977).

lawyers educated in the common law have at least given Louisiana a rich source from which to choose the intellectual instruments and attitudes by which the lives and property of its citizens will be governed.

THE LEGISLATIVE SOURCE OF LAW

The attitude toward statutory materials is, of course, one of the outstanding differences between the common law and civil law systems. Louisiana's early legal heritage and the success of its early codes of substantive and procedural law contributed to the absence of suspicion of statutory materials, a suspicion which was common during the early centuries of the development of the British common law. Our Civil Code defines law as the solemn expression of the legislative will.⁴ It has been fashionable in Louisiana for well over a quarter of a century to accuse innovative judges of indulging in a process of "judicial legislation."⁵ Judges cringe at such an accusation, because our citizens and voters understand such a term to be derogatory of a judge's worth. Legislative supremacy in Louisiana is more than theoretical; it is factual.

Louisiana, therefore, has a wealth of statutory materials from which to choose in solving its legal problems. The relationship between the various sources of statutes is not always, however, so clear and certain. We are governed not only by state law, but by federal law as well. The United States Constitution is the supreme law of the land, and judges in Louisiana, as do all elected officials, take an oath to uphold that Constitution. Our state laws must conform to the requirements of the United States Constitution. Federal statutes enacted by the United States Congress under the authority of the United States Constitution likewise govern our affairs. In deciding cases under the United States Constitution, Louisiana judges say that they are not obligated to follow the interpretations of that Constitution as expressed by any federal court except the United States Supreme Court.

Louisiana also has a written constitution; in fact, we have had eleven such constitutions since 1812.⁶ The Civil Code of 1870, basically the Civil Code of 1825, is still in effect, with some revisions.⁷ The

4. LA. CIV. CODE art. 1 (1870).

5. See generally R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES*, ch. 3 (1975) [hereinafter cited as DICKERSON].

6. The eleven written constitutions that have been adopted by Louisiana are the constitutions of 1812, 1845, 1852, 1861, 1864, 1868, 1879, 1898, 1913, 1921 and 1974.

7. For over one hundred years the Louisiana Civil Code of 1870 remained as the fundamental civil law in Louisiana. In spite of vast and sometimes rapid changes in social and economic conditions and in technology, there has been only partial revision of that Code. Property law has been revised (Book II), changes have been made in matrimonial regimes (Title 6 of Book III) and partnership law (Title 11 of Book

articles of the Civil Code are simple acts of the legislature and can be amended by any subsequent legislative act adopted by a simple majority.⁸ Nevertheless, the Civil Code is treated, both by the legislators and by the courts and lawyers, with much greater respect than are other statutory materials.

THE NEED FOR STATUTORY INTERPRETATION

The source of law in Louisiana, since colonial times, has been the legislature. The work of that body is sometimes viewed with dismay, but hardly ever as an intrusion into the legal process. There is, of course, the need to interpret statutes; there are constitutional questions to be decided when statutes are claimed to conflict with constitutional provisions; there is also the doctrine of separation of powers, which has occasionally caused tension between the courts and the legislature.

Louisiana's constitution itself recognizes the doctrine of separation of powers, and creates three great departments of its government—the legislative, the executive and the judicial.⁹ In a time when the doctrine of separation of powers seems to have lost some of its theoretical validity and actual force almost everywhere in the Western world, our state purports to continue the division of government into three great branches and to prohibit the exercise by one of a function of another.¹⁰ There are areas arising from this doctrine which have caused the courts to challenge the superiority of the legislature. There are certain powers which are said to be inherently judicial; the courts have guarded these powers from inroads by the legislature. There has also been resistance by the courts to legislatively imposed functions which have been found not to be judicial in nature. Efforts by the legislature to infringe upon the control, education and discipline of lawyers and judges have been resisted by the courts,¹¹ as have attempts to place certain administrative duties upon the courts.¹²

III) and work continues on proposed revisions of titles dealing with family law, obligations and successions. See Litvinoff, *Consumer Protection and the Civil Code: Louisiana Perspective*, 10 *REVUE GENERALE DE DROIT*, 24, 25 (1979).

8. LA. CONST. art. 3, § 15(G) (1974).

9. *Id.* art. 2, § 1.

10. See *id.* art. 2, § 1.

11. See *id.* art. 5, § 5(b). See also *Saucier v. Hayes Dairy Products, Inc.*, 373 So. 2d 102 (La. 1979); *Singer Hutner Levine Seaman & Stuart v. Louisiana State Bar Association*, 378 So. 2d 423 (La. 1979) (the Louisiana Supreme Court will uphold legislative acts passed in aid of its inherent power but will strike down statutes which tend to impede or frustrate its authority); *Louisiana State Bar Association v. Connolly*, 201 La. 342, 9 So. 2d 582 (1942); *Ex parte Steckler*, 179 La. 410, 154 So. 41 (1934); *Meunier v. Bernich*, 170 So. 567 (La. Or. App. 1936); Hargrave, *The Judiciary Article of the Louisiana Constitution of 1974*, 37 *LA. L. REV.* 765 (1977).

12. See *McGee v. Lee*, 328 So. 2d 159 (La. 1976).

It is, therefore, significant to consider the relative dignity of statutory materials in Louisiana. The written constitutions, of course, are controlling. The provisions of those instruments usually have resulted from the work of delegates in a constitutional convention followed by submission of the finished document to the people for ratification.¹³ Constitutional provisions are controlling and furnish the rule against which statutes are measured when their constitutional validity is attacked. The Civil Code, on the other hand, is a statute and could have become law by the vote of a mere majority of the members of the legislature with the approval of the executive. It requires a two-thirds vote in the legislature to amend the constitution, but only a majority vote to enact a statute or to amend the Civil Code.¹⁴ Generally speaking, the provisions of the Civil Code are usually accorded more dignity and authority than the vast body of other statutory materials enacted by the legislature each year. Among lawyers there is more respectful attention given to provisions of the Civil Code than to most other statutes that might bear upon a problem to be decided, in spite of the fact that no statute or jurisprudence requires the court to employ different methods of interpreting provisions of the code as opposed to provisions of other statutes. Consequently, any discussion of statutory interpretation in Louisiana will include the problems of interpreting both the provisions of the Civil Code and provisions in other statutory materials. There are cases in which the Louisiana Supreme Court has stated that the interpretation of statutes is a judicial function, and not a legislative function.¹⁵

RULES FOR STATUTORY INTERPRETATION

But there are statutes, both general and special, that purport to regulate statutory interpretation. The Civil Code contains nine or ten articles on the subject. The first one prohibits retrospective operation of laws.¹⁶ The legislature has frequently enacted statutes which, by their very terms, are designed to have retrospective operation.¹⁷

13. LA. CONST. art. 13, § 2 (1974). See *Bates v. Edwards*, 294 So. 2d 532 (La.), appeal dismissed, 419 U.S. 811 (1974).

14. See LA. CONST. arts. 3, § 15, 13, § 1 (1974). See also *Fullilove v. U.S. Casualty Co. of New York*, 129 So. 2d 816 (La. App. 2d Cir. 1961).

15. *State v. Burgess*, 23 La. Ann. 225 (1871); *Perry v. Clinton R. Co.*, 11 Rob. 404 (La. 1845).

16. Article 8 of the Civil Code provides in pertinent part: "A law can prescribe only for the future; it can have no retrospective operation. . . ." Immediately problems can be visualized, as this article is part of an act of the legislature. See also LA. R.S. 1:2 (1950).

17. The Louisiana Supreme Court has recognized that merely procedural or remedial laws "will be given retroactive effect in the absence of language showing a contrary intention." *Lott v. Haley*, 371 So. 2d 521, 523 (La. 1979). See also *Ardoin v. Hartford Accident & Indemnity Co.*, 360 So. 2d 1331 (La. 1978); *General Motors Acceptance Corp. v. Anzelmo*, 222 La. 1019, 64 So. 2d 417 (1953).

Within constitutional limits, such statutes may be valid. Is then the admonition that laws can prescribe only for the future and can have no retrospective operation a useless maxim? Obviously, this is not what the legislature thinks. In Title I of the 1950 Revised Statutes, section 2 is a refinement of the idea. It states that "no section of the Revised Statutes is retroactive unless it is expressly so stated."¹⁸ Prospective operation of statutes is a general rule and, as a general rule, it is respected by the courts.

When a law is clear and free from all ambiguity, the letter of the law is not to be disregarded under the pretext of pursuing its spirit.¹⁹ Sometimes, however, the law seems to be clear and free from all ambiguity, yet the courts have found it necessary to avoid a literal application of the statute. The Highway Regulatory Act,²⁰ which purported to regulate the manner in which automobiles should be driven on highways in the State of Louisiana, stated clearly and unambiguously that overtaking vehicles must pass on the left side of vehicles proceeding in the same direction. The Highway Regulatory Act also stated, clearly and without ambiguity, that a passing motorist must sound his horn as he was overtaking the vehicle ahead of him. Both of these provisions were held not to apply to four-lane, divided highways.²¹ A resort to the history of the regulations resulted in the conclusion that, when the statute was enacted, there were no multi-lane highways in the state; so, at a time when four-lane and six-lane superhighways had been constructed, courts felt free to hold that the legislature could have had no intention that these particular regulations should apply to traffic on multilane highways. Technology had outstripped the legislative imagination.

Words are to be interpreted in context and according to their received meaning among those learned in the art, trade or profession in which the words are used.²² Where the meaning of words is "dubious" resort must be had to the context in order to ascertain their "true meaning."²³ Statutes must be construed with reference to each other when they are regulating the same subject matter;²⁴ when the "expressions" of the law are "dubious," "the universal and most ef-

18. LA. R.S. 1:2 (1950).

19. LA. CIV. CODE art. 13 (1870); LA. R.S. 1:4 (1950) (repeating the rule).

20. LA. R.S. 32:1-380 (1950), prior to amendment by 1962 La. Acts, No. 310; LA. R.S. 32:1-399 (Supp. 1962).

21. *Sanders v. Hisaw*, 94 So. 2d 486 (La. App. 1st Cir. 1957); *Mooney v. American Automobile Insurance Co.*, 81 So. 2d 625 (La. App. 1st Cir. 1955).

22. Article 14 of the Civil Code requires that words are generally to be understood in their most usual signification, with great attention to be given to the general and popular use of the words of our language. Article 15 accommodates technical terms and phrases and terms of art, as does section 3 of Title 1 of the Revised Statutes.

23. LA. CIV. CODE art. 16 (1870).

24. *Id.* art. 17.

factual way of discovering the true meaning of the law . . . is by considering the reason and spirit of it, or the cause which induced the legislature to enact it."²⁵ Laws should not be divided into "odious laws and laws entitled to favor" with a view toward narrowing or extending their construction.²⁶

What is surely the most important of the statutory rules for interpretation is not truly designed as an aid for interpreting statutory law. Article 21 of the Civil Code instructs the judge:²⁷ "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent."²⁸ "Equity" is thought to be, not the chancery system developed in Great Britain, but that which may be right and just.

THE ROLE AND BASIS OF STATUTORY INTERPRETATION

Now we have before us the basic statutory provisions in Louisiana concerning statutory interpretation. Statutory interpretation is not taught as a formal subject in the law schools of Louisiana. Lawyers, nonetheless, do not ignore the subject. In all cases, lawyers employ every means which they think might be acceptable to the judge in interpreting the statute most favorably to the client's case. One method might work today, and another may be much more attractive in the next case. Methods of statutory interpretation, as a subject of study and as aids to good decisions, have not been popular among Louisiana judges. Judges of the district courts are principally fact finders. Judges of the intermediate courts of appeal usually rely upon precedent and interpretations by other courts of statutes identical to or similar to those under consideration.

25. *Id.* art. 18.

26. *Id.* art. 20.

27. Franklin, *Equity in Louisiana: The Role of Article 21*, 9 TUL. L. REV. 485, 495 (1935).

28. LA. CIV. CODE art. 21 (1870). Note that these rules have contained no reference to the use of analogy—one of the most valuable tools available to a judge for interpreting a statute, or for filling a gap in the statutory law. Equity is not defined in article 21. In the title on conventional obligations, the Civil Code refers to equity and explains it. Article 1964 says: "Equity, usage and law supply such incidents only as the parties may reasonably be supposed to have been silent upon from a knowledge that they would be supplied from one of these sources." And then article 1965 explains:

The equity intended by this rule is founded in the christian principle not to do unto others that which we would not wish others should do unto us; and on the moral maxim of the law that no one ought to enrich himself at the expense of another. When the law of the land, and that which the parties have made for themselves by their contract, are silent, courts must apply these principles to determine what ought to be incidents to a contract, which are required by equity.

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Felix Frankfurter noted that the oldest writing on statutory interpretation is a document found in England before 1567 and that in the four centuries since then "it would not be unfair to say . . . [that] not much new wisdom has been garnered."²⁹ One of the first books I investigated in preparing this paper noted that one scholar had called statutory interpretation a "non-subject."³⁰ Here we have, then, a non-treatise by a non-scholar on a non-subject.

When Professor Mitchell Franklin was writing about legal method, including the process of interpretation, he remarked that there "is no one legal method within a given legal system, but a succession of legal methods, each arising from concrete and determined historical situations."³¹ I think what Professor Franklin meant was that statutory interpretation is not necessarily a study which gives itself exclusively to abstract intellectual activity. I am not at all sure that we can profit from an abstract dissertation on the proper methods to employ in interpreting statutes—that is, the proper methods in all except the easy cases; even a person uneducated in the law who can read and write and understand can interpret the statutes that are clear. It is the application of those statutes to the problems of everyday living that requires a superior education and superior skills.

What I mean to say is, statutory interpretation is not without interest to scholars and not without an appropriate place in their studies. Nor is it without the scope of the judge's work. But the judge does not necessarily think of his work as interpreting statutes. The judge decides cases. The legislator should be aware of the methods of statutory interpretation. The legislator phrases his work in abstract terms. The legislator provides in the future for a particular problem. The judge learns about a problem from the past. He is asked to decide a conflict among the living, using the abstract phrases of the legislator. Litigants frequently do come before the court and ask, "Judge, tell us what to do in the future." Judges do regard the future, but in a different light from the litigant. The judge looks at the future not as a rule maker, not as a lawmaker, but as a problem solver, regarding the future with respect to the predictability of the law and the acceptability of the solution of the case which he has before him.

Statutory interpretation is, of course, a matter of language. Statutes communicate ideas, ordering and permitting, rewarding and punishing. Law employs language in the ultimate manner; it is written by the law giver to be understood to mean the same thing by

29. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947).

30. DICKERSON, *supra* n. 5, at xvii.

31. Franklin, *A Study of Interpretation in the Civil Law*, 3 VAND. L. REV. 557, 561 (1950).

Bork's "Original Understanding"

all the people. Judges, insofar as possible, must understand the written law, if not as the legislators understood it, at least as it is commonly understood.

From the time we were children, we were taught the proper way to use language. We were taught the meanings of words, grammatical usage and the way to put words together in sentences to convey the meanings that will be understood, or misunderstood, as we have intended. We were taught to understand the meanings of all kinds of writings—textbooks, history books, poetry, drama, newspapers, religious writings and philosophy. However, little of the material in such writings is the work of more than one man. It is inconceivable to think of poetry written by a committee, or a history enacted by the legislature. Statutory material today is seldom authored by one person. We cannot begin to understand the need to interpret statutes until we understand something about the way statutes are made.

Statutes might start as the work of one man, but from the time the author puts the first notion on paper, every word becomes the subject of disagreement, argument, misunderstanding and compromise. The author of the statute usually has some purpose in mind, and to accomplish that purpose, or a part of it, he must submit to amendment after amendment, revision after revision, compromise after compromise. Some of the many changes that are made will be made by legislators who hope to see the statute die, or by others who wish to weaken the influence of the statute, or by still others who wish to broaden the purpose of the statute beyond that intended by the author. It can be argued that the legislative process itself is designed to dispense with clarity, and to create confusion. When we consider that the author might not have had a very clear idea of what he wanted to accomplish by the new statute, except in some particular instance which he may keep well hidden, the essential need for interpretation is reinforced.

Statutes do not have a term of life fixed in years. As long as they remain on the books, they are subject to use, and sometimes in ways which would wholly surprise the author.

THE OBJECTIVE OF STATUTORY INTERPRETATION

It may be a hopeless effort to try to organize a system of statutory interpretation that could be used by judges to accomplish a proper result in a given case, a result which could have been foreseen by citizens and lawyers alike before the case arose. But what is a "proper" result? What is the object of statutory interpretation by judges? Is it the result which the lawmaker might have intended? Certainly not in all cases; the lawmaker might have lived two hundred years

ago. First, the statute must be interpreted sensibly. It cannot be given an absurd interpretation. It must be interpreted in a way that will be understood by most people and that will be accepted by most people. Logic alone is not sufficient to enable the judge to interpret the statute properly. But the interpretation should certainly not be illogical, or it will be neither understood nor accepted.

Our own code refers to "the pretext of pursuing its spirit" and tells us not to disregard the letter of the law when it is clear and free from ambiguity. Recognizing, however, that expressions of law are "dubious" at times, the reason and spirit of the law should be considered, as well as the "cause which induced the legislature to enact it."³² The legislative intent, or the spirit of the law, or the end which the legislature sought to accomplish, are, of course, good tools available to the judge when he tries to discern the real meaning of a statute which he must apply. John Gray wrote: "When a legislature has had a real intention . . . on a point, it is not once in a hundred times that any doubt arises as to what its intention was."³³

There are some bodies of law in which it is said that a certain method of interpretation is required because of the very nature of the law. Workmen's compensation laws are to be interpreted liberally in favor of the injured workman, because the act is "remedial" in nature—designed to remedy a social evil and to spread the cost of repairing human damage in an industrial society among its members at large.³⁴ Criminal laws must be interpreted strictly against the state; when there is doubt, criminal laws must be interpreted to favor the accused.³⁵ Such interpretation is said to satisfy the need for specific provisions the violation of which will result in the loss of liberty and property and honor. With respect to the Civil Code, there is a wealth of material which might help explain the intent of the legislators. The long history of the Roman law in Europe, its development through the centuries and a large body of authoritative writing by scholars and teachers are available to help understand what the legislators meant two hundred years ago or more. Statutory materials in general, however, have no such great history that can be of much assistance in determining the legislative intent. Beyond the context of the statute and its fairly plain terms, if the legislative intent has not appeared, most statutes must be interpreted without significant assistance from the legislature responsible for the dubious language.

It may be that, in the Civil Code, Portalis and his companions

32. LA. CIV. CODE art. 18 (1870).

33. J. GRAY, *THE NATURE AND SOURCES OF THE LAW*, 172 (1921).

34. *Danielson v. Security Van Lines*, 245 La. 450, 158 So. 2d 609 (1963).

35. *State v. Searle*, 339 So. 2d 1194 (La. 1976).

have left a message for the judges.³⁶ He might have said, "Judges, this is the best we can do. We think we have covered everything. We've been as brief as possible. First, everyone ought to know the basic rules of society; second, we thought it essential, in addition to stating some general rules, to issue some specific requirements for the validity of many juridical acts. We know we have not covered every conceivable problem which can be raised by mankind in an active society. When those problems arise, we leave it to you to do justice in each case."

To do justice, Portalis? Can you hear the protest? "Oh, no! What will happen to predictability and certainty of law? There will be as many judgments as there are judges!"³⁷

JURIDICAL VALUES

The legal profession in Louisiana has been enhanced in recent years by the presence of an Argentine jurist, Dr. Julio Cueto-Rua, who has written about a theory of the judicial process of interpretation of laws that he claims the good judge can use to do justice, and to do justice in an objective manner.³⁸ When justice is done, says Cueto-Rua, the judge has balanced all the juridical values at work in the case. The result he calls justice. The process is described as axiological.³⁹

The first task of the judge, of course, is to find out what happened. He must know the facts. He must know the meaning or significance of the facts that he has found to exist. When he is aware of the facts, he begins a search for the applicable law. His excursion into the statutes might reveal the need to go back to the record, to reconsider the facts, to discard some as more or less irrelevant and to decide that others might have more meaning for reaching the solution of the problem. Back and forth from the facts to the law goes the judge, until he comes to the essential issues of the case. Now the problem becomes either to select the applicable law or to interpret the statutes

36. The most important hint for the proper consideration of statutory materials which may be "dubious" is Article 21: "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity." Article 1965 of the Civil Code explains equity in terms of the "Golden Rule" and unjust enrichment ("equity" meaning not doing unto others what he would wish that others not do to him, and that no one ought to enrich himself at the expense of another) and, perhaps, by Article 2315: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

37. Herman, *Perspectives on Code Structure*, 54 TUL. L. REV. 987, 1048 (1980).

38. J. CUETO-RUA, *JUDICIAL METHODS OF INTERPRETATION OF THE LAW* (1981) [hereinafter cited as CUETO-RUA].

39. *Id.* at 19-24.

which are found to govern the factual situation in order to reach the right result.

Cueto-Rua says there is only one right decision in a case. That is the decision which does justice.

Each rule of law is related to and expresses some juridical value. Juridical values are what scholars and philosophers have said make three thousand years of historical development understandable.⁴⁰ These values are what have inspired the development of modern civilization in the Western World and the evolution of its institutions. Some of the values are words that are not commonly used in the United States. The positive juridical values are order, security, cooperation, solidarity, power, peace and justice.⁴¹ Each positive value has a correlative negative value that arises in the absence of the positive value and three of those positive values also have negative values that arise because of an excess of the positive value.⁴² The negative value by deficiency of order is disorder, of course; an excess of order results in ritualism. The negative value of security is insecurity. The negative value by deficiency of cooperation is uncooperativeness; an excess of cooperation leads to massification or excessive conformity. The absence of solidarity is isolation. The absence of power is anarchy; an excess of power leads to oppression. The absence of peace is discord, and the absence of justice is injustice. Each of these values can gain various degrees of realization, but full realization of any of the positive values is hardly within the reach of human beings.

These juridical values can briefly be described as follows. First, order signifies regularity in the sequence of events—a place for everything and a time for everything. Foreseeability and predictability are possible because of order. Order makes rational life possible. One author has said that to achieve a minimum of order is to achieve a certain degree of justice.⁴³ Disorder is the correlative negative value of order. When there is disorder no prediction is possible. An excess of order, however, leads to ritualism. Too much order and too much planning result in formality, the exaltation of form and an obstruction to achievement.

Security involves protection against risks. Security is achieved when risks are avoided or neutralized. Security protects against

40. See generally *id.* at 213. See also ARISTOTLE'S *THE NICHOMACHEAN ETHICS*, bk. V; HOBBS' *LEVIATHAN*, pt. 2 (A.R. Qaller ed. 1935); E. KANT, *THE PHILOSOPHY OF LAW*, pt. 2 (W. Hastie trans. 1974); S. PASSERFIELD & B. WEBB, *INDUSTRIAL DEMOCRACY* (1897); PLATO'S *REPUBLIC*, bks. I-IV.

41. CUETO-RUA, *supra* n. 38, at 216.

42. *Id.*

43. Cossio, *La Justicia*, 126 REVISTA JURIDICA ARGENTINA LA LEY 1043, 1644 (1967).

threats from the natural and social environments and provides the basic ground for human action. Order and security are closely linked together. When human beings are secure, they are able to display the full potential of their energies and talent. Anguish and anxiety are reduced to manageable dimensions, making it possible to live under the assurance of subsistence during a particular period of time. Organized social life has always provided a minimum of security for the members of the community. If the judge realizes that his decision may jeopardize security, he becomes particularly concerned, since insecurity, the correlative negative value of security, will result. It is the duty of the judge to protect the members of the community by enforcing the institutions which the community has organized or devised in order to prevent or neutralize dangers and perils.

In every social group there are people with power. They have the authority needed to choose goals and the means for achieving those goals. A man recognized for his knowledge, experience, courage and wisdom has power. He not only commands, he persuades. He is a leader. The social group operates as a whole under the inspiration of its leaders, gaining strength and consistency. The judge is in a privileged position in the social structure. His judicial function is essentially linked to the proper functioning of the social structures of power. As an organ of the community the judge recognizes that he must protect the existence of the community, preserve its organization and maintain the efficient operation by which the community sets and achieves its goals.

W L K (The correlative negative value of power is anarchy. There is no place for the judge in the midst of anarchy; the judicial function becomes impossible. His decisions are ignored, and the community ceases to exist. On the other hand, an excess of power leads to oppression—the destruction of individual autonomy. Judges are aware of the dangers of oppression, knowing that their function can only be effective and enduring if it is part of a system that is finally accepted by the members of the community. Judges know that they are effective only to the extent that their decisions are understood by members of the community and are accepted as something that ought to be.”

W L K (44. Our court was once called on to decide the validity—the constitutionality—of a proposed new constitution for the State of Louisiana. We were called upon to stop an election by which the constitution would have been ratified or rejected by a vote of the people.

That new constitution had been in the making for years. It was a principal part of the program of a recently elected, popular and competent governor. The old constitution then in effect was in almost unanimous disfavor, particularly among people whose only information about the old constitution was what they read in the newspapers.

Peace implies unity among human beings who see themselves as members of the same group. The judge realizes that he has the ability from time to time to reduce tensions and differences by wisely exercising his judicial power. He develops a rational approach for the settlement of disputes and provides the members with advance notice of which way future similar conflicts will be handled and settled. Judges are therefore reluctant to take any action which might be divisive or which might serve as the source of additional disputes among members of the community. The correlative negative value of peace is discord, an intense negative force in the life of the social group.

Cooperation places within the individual's reach goals which he could not otherwise attain; action by two or more persons, or action by the community, can result in achieving objectives not reachable by one person acting alone. Life is enriched; judges know that cooperation can result in a lessening of social tensions, a reduction of disputes and an improvement in opportunities for members of the community.

Uncooperativeness, the correlative negative value of cooperation, is damaging and disturbing. The judge recognizes the need to protect cooperation and to discourage uncooperativeness, which multiplies the difficulties of achieving common objectives.

Cueto-Rua refers to the excess of cooperation as leading to massification, a term derived from one used by a Spanish philosopher.⁴⁵ Massification might be related to what has been called a homogenized society in the United States. Do what others do, because they do it; do what one is told—standard actions, standard rules, little experimentation; no expansion of life; no flexibility. Judges know individualization is essential and that each individual has a right to his own hopes and dreams.

Delegates had been selected, some appointed and some elected. They had assembled and worked for a year to perfect the document. There was no basic defect in the document to be presented to the people. Changes here and there, however, had aroused the opposition of what could be called special interest groups.

The attack on the constitution was basic. There was no provision under the existing constitution for its termination or for the institution of a constitutional convention to create a new constitution, although the existing constitution did provide a means for amendment of that constitution. The procedure selected for the adoption of a new constitution did not comply with the requirements set out for amending the old constitution.

But the problem was not unfamiliar. Louisiana had adopted new constitutions before. The strongest juridical values were at work in the case. It soon became apparent to the judges who considered the case that only the strongest reasons, easy to state, easy to explain, and easy to understand would be generally acceptable to support a judgment declaring the proposed new constitution to be illegal and unconstitutional.

45. *E.g.*, A. HERNÁNDEZ-GIL, *METODOLOGÍA DE LA CIENCIA DE DERECHO* (2d ed. 1973).

Solidarity signifies the sharing of losses and gains, but there can be cooperation without solidarity. Cooperation occurs when the group works together. Solidarity occurs when the members of the group share the benefits of the labor. Human life is said to reach one of the highest levels of generous devotion to the well-being of the community by virtue of solidarity. The correlative negative value of solidarity is isolation—the refusal or rejection of membership in the group. Alienation; the breaking of ties; looking after oneself; disregarding the fate of the group as a whole. Judges, therefore, are suspicious of human action that tends to assert the priority of the self and of individual interests.

Brief examples of the kinds of problems which call into play the juridical values just described may help to visualize how the juridical values operate in the decision of a hard case. Issues of order predominate in cases involving acquisitive or liberative prescription. It is extremely important for people to know when the problems and tensions of the past will finally be put to rest. Order is introduced in human affairs and in planning when titles to things can be definitely perfected by the mere lapse of a certain time. A consistent interpretation of such rules of prescription helps stabilize society. Security is one of the values involved in cases concerning the right of purchasers in good faith. If a purchaser cannot be sure that what he buys is what he will be able to keep and to own, he will not purchase. A judicial decision which enhances the security of transactions will promote compatibility of mutual behavior on the part of those who offer goods for sale and those who offer to buy goods in the marketplace.

A person's refusal to obey a judicial order or some governmental instruction is a case in which the juridical value, power, is involved. Contempt of court cases and mandamus cases involve the refusal to obey or perform, which weakens the authority of the state agency and therefore the community in general. Many examples can be given of cases involving peace.⁴⁶ The obligations of vicinage or neighborhood, personal servitudes or restrictions imposed on property and the violations of such restrictions are often the source of conflicts and irritation and sometimes of open hostility among community members. Labor law cases regarding mutual obligations of employers and employees involve issues of cooperation.⁴⁷ Solidarity is involved in cases concerning the rights and duties of family members—those between spouses and those between children and their parents. Judges under-

46. See, e.g., *Garrett v. Pioneer Production Corp.*, 390 So. 2d 851 (La. 1980); *Dean v. Hercules*, 328 So. 2d 69 (La. 1976); *Hero Lands v. Texaco*, 310 So. 2d 93 (La. 1975); *Salter v. B.W.S. Corp.*, 290 So. 2d 821 (La. 1974); *Bates v. Edwards*, 294 So. 2d 532 (La.), *appeal dismissed*, 419 U.S. 811 (1974); *Poole v. Guste*, 261 La. 1110, 262 So. 2d 339 (1972).

stand the basic importance of the family as a social unit and its impact on the lives of children and the importance of preserving that social unit.⁴⁸

Justice is said to signify harmony, proportion and balance; rationality is implied. The harmony and equilibrium of justice is the harmony and equilibrium of all juridical values. Justice requires a certain degree of realization of each of the juridical values—order, peace, solidarity, cooperation, power and security. The judge's decision when he interprets a positive rule of law ought to satisfy each of the juridical values in the case. The best solution of a case is the solution that best accommodates the understanding of the kind of conflict which was submitted for judicial decision. The best solution, says Cueto-Rua, is the solution which preserves order, provides security, maintains power, brings peace, fosters cooperation and promotes solidarity.⁴⁹ When a solution accomplishes these purposes, justice is achieved. For every case, regardless of its peculiarities, antecedents or expectations, there is one solution available that is the best—an objective solution:

[A] solution which corresponds to the intrinsic characteristic of the case. This solution may be hidden, elusive, or fleeting, but it is there. The good judge will apply all of his energies, experience, knowledge and will in order to find the best solution. It is the good judge, then, who will be successful in finding that solution.⁵⁰

The harmonious characteristic of justice requires that the judge take into account the values that are directly at stake in the case so that those values can be realized without any impairment of the remaining juridical values.⁵¹

A decision which recognizes some of the values to the detriment of others is not a just decision. For instance, the exclusionary rule in criminal cases, which prohibits the introduction of evidence unconstitutionally obtained, may protect the security of individuals, but also may jeopardize power and peace. Cueto-Rua points out that there is a dynamic interplay among all the juridical values. Juridical values undergo constant and reciprocal changes in strength and emphasis. None of them can ever be fully realized. Nevertheless, human behavior can be judged on scales which link the positive and the negative pole

47. See, e.g., *Standard Company of New Orleans, Inc. v. Elliot Construction Co., Inc.*, 363 So. 2d 671 (La. 1978); *Eakin v. Ascension Parish Police Jury*, 294 So. 2d 527 (La. 1974).

48. See, e.g., *Succession of Thompson*, 367 So. 2d 796 (La. 1979); *Wilkinson v. Wilkinson*, 323 So. 2d 120 (La. 1975).

49. CUETO-RUA, *supra* n. 38, at 242.

50. *Id.*

51. *Id.* at 255, 256.

of each juridical value. Some actions may show an important degree of realization of one juridical value, such as order, and may lack any degree of realization of another, such as solidarity. Every human action is said to be related to all the juridical values, both positive and negative. All the juridical values are closely and inevitably related; they are all a part of justice; ignoring or rejecting any one of them defeats justice.⁵²

PERSPECTIVES

A judge is not a historian, although he studies the record in a case to determine what really happened. He studies the law in order to decide what ought to be done. He must apply the rule of law which properly relates to the case. He faces, says Cueto-Rua, the following difficulties. First, rules of law are inspired by a variety of predominant values. Procedural rules are inspired by order; traffic regulations are based on security; military rules of discipline are founded on power; rules for the settlement of cases by compromise are inspired by peace; and so forth. The values involved in a case may compete with each other. Second, the meaning of the case, the "axiological" meaning of the case, may be complex because of various combinations of positive and negative values. Third, the axiological meaning of the case is not fixed in the past. The case will affect the future, and the meaning of the case is part of the present social reality. Fourth, the dialectical judicial process involves the judge's moving from facts to rules and from rules to facts, connecting numerous rules of law, which have been inspired by varying degrees of different juridical values, with the different relevant facts of the case. Fifth, the judge is required to decide the case in a rational manner in order to achieve equality and proportionality. Sixth, because the judge is called upon to be just, he is obligated to render a decision that realizes all the positive juridical values in a properly balanced way. He balances those values so as to achieve the best possible solution under the circumstances of the case. These are difficulties indeed!⁵³

I have never consciously decided a case by following the method described by Cueto-Rua. The beginning and the end of the method he described were familiar to me. Of course I tried to select the relevant facts and to consider their significance or meaning; I tried to analyze the rules of law which might have been applicable and tried to choose, in almost every way I have heard described, the proper interpretation, the proper meaning and significance, of each statute involved. I considered the rules of grammar and construction, the

52. *Id.* at 256, 257.

53. *Id.* at 271-72.

possible meanings of words, the history of the statutes, (insofar as it was available), the probable purpose of the statutes when their meanings were dubious, and the context of the words and of the law itself. I recognized the need for stability and predictability in the law and, of course, insofar as I could understand justice, I tried to render a just decision.

But I never knew that the juridical values in this world could be isolated and explained. How this judge made the leap from the selection of the relevant facts and the appropriate law to the just result could, I am afraid, be best described as bumbling, struggling, stumbling, muddling, trying one solution and then another until one seemed right.

In some cases, I suppose, my judgments might have been "result oriented." Not that I was aware of bias or prejudice, but that I thought I could see the right result when I began to understand the problem, although I could not explain the right result or describe the method by which it was reached. Some of the most difficult cases have been those in which one of my brothers would remind me: "The law is hard, but it is the law." It seems to me that this is a good sign of injustice. Is the law meant to be harsh? Does the lawmaker ever intend to be unjust? Does a civilized society demand this pound of flesh? If we judges could understand better ways to solve cases, we might not hear so often, "Lex dur, sed lex."

You have observed that there has been no discussion in this paper of any of the methods of statutory interpretation which have achieved enough popularity to be recognized and classified by some name or term, such as the "historical" method or the "conceptual" method or the "teleological" method.⁵⁴ It seems to me that each of the methods of statutory interpretation to which I have been introduced in the preparation of this paper has been included (or "subsumed" as Professor Cueto-Rua would say) in the method described by Cueto-Rua. Nothing is overlooked. The selection and application or interpretation of the statutes in relation to the relevant facts seem to require the widest knowledge and the deepest insight on the part of the judge. The interests of society, which the judge is obligated to consider in every decision, are so all-inclusive that his actions seem to move out of the realm of the subjective. It is almost a contradiction in terms to speak of the thought and action of a human being as "objective." A man's thoughtful decisions are a product of his whole life and his whole environment. The judge is a man, but a man obligated to make the best decision possible in every case. One man's best may not be

54. See generally Herman, *Quot Judices Tot Sententiae: A Study of the English Reaction to Continental Interpretive Techniques*, 1 *LEGAL STUDIES* 165 (1981).