

Louisiana Law Review

Volume 43 | Number 1
September 1982

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Repository Citation

Roberto G. MacLean, *Judicial Discretion in the Civil Law*, 43 La. L. Rev. (1982)
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JUDICIAL DISCRETION IN THE CIVIL LAW*

Roberto G. MacLean**

In Cervantes' *Don Quixote*, when Sancho Panza was appointed governor of the Barataria Island, he was required by the villagers to try a number of cases as judge. One of those cases involved a law requiring every person who entered the village over a particular bridge to declare his purpose for entering the village. If the person told the truth, he was allowed to go free; but if he told a lie, as punishment, he was hanged at the gallows next to the bridge. One day a man, who when crossing the bridge into the village was asked why he was going there, said, "I am going to be hanged." Thus, if the man were let go, he would have told a lie and should have been hanged; but, if he were hanged, he would have told the truth and should have been let go. In either instance the solution was legally unsatisfactory.

Contemporary lawyers are as cunning as Cervantes' villagers, and changing social, economic, political, and cultural circumstances place the contemporary judge in situations where there is in the law no express disposition to guide him. In our times, certain factors such as inflation and existing family relations present the judge with everyday problems for which there is no express guidance in the law. The questions that must be resolved are how such changes in social, political, economic, and cultural circumstances should be faced and whether the Civil Law is adequately equipped to meet that challenge. One of the most effective ways by which a legal system can do this is through the discretionary powers given to its judges.

In evaluating such powers, one must first determine what the general image of the discretionary powers of the judiciary is in the Civil Law. One of the leading comparatists in this country, Professor John H. Merryman, has said:

[In the Civil Law a judge is] a kind of expert clerk. He is presented with a fact situation to which a ready legislative response will be readily found in all except the extraordinary case. His function is merely to find the right legislative provision, couple it with the fact situation, and bless the solution that is more or less

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* This was the eleventh of the John H. Tucker, Jr. Lectures in Civil Law and was delivered at the Paul M. Hebert Law Center on February 4, 1982.

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automatically produced from the union. The whole process of judicial decision is made to fit into the formal syllogism of scholastic logic. The major premise is in the statute, the facts of the case furnish the minor premise, and the conclusion inevitably follows. . . .

The net image is of the judge as an operator of a machine designed and built by legislators. . . .

Judicial service is a bureaucratic career; the judge is a functionary, a civil servant; the judicial function is narrow, mechanical, and uncreative.¹

A distinguished Louisiana scholar, Professor A.N. Yiannopoulos, states in his well-known *Louisiana Civil Law System*: "A rational judicial process involves always determination of issues in accordance with the requirements of formal logic. The judicial decision is a conclusion reached on the basis of syllogism: rules of law furnish the major premise, fact situations form the minor premise, and the conclusion follows with logical necessity."² To this, he adds: "Once the problem is cast in this form, the result follows with inescapable necessity. There is no room for discretion because formal logic is compelling."³ A French scholar, Professor Roger Perrot, once described the Civil Law judge as "a colossus with clay feet."⁴ In the common talk among lawyers, it has even been said that in the Civil Law system legislators are almost like gods, and judges not even men.

The foundations, if not the justifications, for this image of the Civil Law judge are of two kinds: historical and structural. Among the *historical reasons*, traced to Rome, one finds that in the Roman legal system the Civil Law judge's predecessor, the *iudex*, was not a prominent man of the law. For a long time he was a layman who enjoyed rather low social prestige, because the post was often gained through royal or political favors and, in some cases, was even bought by the candidate. This situation gave rise to the attitude that judges were not fair, honest, and hard working, and that instead they rendered their judgments in favor of the most powerful. The code instituted by Frederick the Great of Prussia attempted to be judge-proof; it contained over 16,000 articles and left no room for judicial interpretation. In fact, the judge was forbidden to interpret the law.

1. J. MERRYMAN, *THE CIVIL LAW TRADITION* 37-39 (1969).

2. A. YIANNPOULOS, *LOUISIANA CIVIL LAW SYSTEM* 89 (1977).

3. *Id.* at 90.

4. Perrot, *The Judge: The Extent and Limit of His Role in Civil Matters*, 50 *TUL. L. REV.* 495 (1976).

In France, the theory of separation of powers, which arose during and after the Revolution as a reaction to abuses committed by judges, in effect put judges "on probation" in society.

Besides these historical factors, there are certain *structural reasons* for not granting ample discretionary powers to the judge. Among these reasons is the idea that a code is a self-sufficient, self-contained body of law that needs no discretionary assistance. Related to this idea is the principle that reason must prevail over experience, for one must remember that at one time reason was the goddess of philosophy. The influence of Kant and the rationalist philosophy had reached its height, and there was a strong reaction against the use of mere experience and pragmatism. As a second structural reason, in some Civil Law countries there exists the crime of prevarication, which is a crime committed almost solely by judges. Prevarication consists of rendering a judgment that goes against the text of the law; this, of course, creates a serious drawback to granting discretionary powers to the judge. A third structural reason is that some judges are not as creative as others; their case loads and routine are enemies of judicial discretion. When a judge has a large case load and routinely approaches his daily work, he will find it easier to act mechanically and more difficult to exercise his potential discretion.

The propositions submitted herein are: The image of the Civil Law judge is somewhat exaggerated to the point of distortion. The Civil Law judge enjoys a wider discretion than is commonly believed. His accepted image has arisen as a result of a different cultural approach. And, when comparatists examine the Civil Law judge, they must consider how the judge functions within the general context of the system in which he operates.

Like the factors supporting the *accepted* image of the Civil Law judge, the arguments favoring the *contrary* propositions are both historical and structural. One of the historical arguments against the accepted image is that even if it is true that the *iudex* in Rome did not enjoy very high prestige, the Roman judicial system did offer other mechanisms for exercising wide judicial discretion, both by the *praetor* and through the *ius honorarium*. The *ius honorarium* itself provided ample flexibility and creativity within the Roman judicial system.

One now finds that the judiciary enjoys in some Civil Law countries an increasing prestige and importance. Common and familiar examples of this heightened stature are the importance of *jurisprudence constante* and the rising number of new cases in which court decisions have a binding force in Civil Law countries. Some examples of this phenomenon in Latin America are the Amparo law of Mexico,

the Suumula of the Supreme Court of Brazil, and the decisions of the Civil Law Courts sitting *en banque* in Argentina. These developments reveal that the role of the judge in the Civil Law, in spite of everything else, is not decreasing. On the contrary, the judge is obtaining more power.

Among the structural reasons opposing the accepted image of the Civil Law judge is the general nature in which many laws are drafted. In *Major Legal Systems in the World Today*, Rene David describes the Civil Law technique by saying: "To formulate the legal rule in the most general terms means that it is less precise; it means that the judge is given greater discretion in its application."⁵ On the other hand, the image of the judge, bound by the strictness and rigor of formal logic, is not compatible with many of the doctrines of modern times. Two legal philosophers working in Latin America, Professors Recasens-Siches and Garcia Maynes, have asserted that the formal syllogism traditionally associated with Civil Law is no longer applicable; the logic to be applied to the law is not the formal one, but what they call "logic of the reasonable." Likewise, one of the leading philosophers of our time, Professor Hans Kelsen, in his *Pure Theory of Law*, describes the legal rule, not as an imperative in the sense that Austin described it, but as a frame of possibilities that must be fulfilled by the judge according to the particular characteristics of each case.⁶ In view of the fact that these arguments are contrary to the foundation of the accepted image of the Civil Law judge, it is wise to delve more deeply into the Civil Law system in order to see how that system works in practice.

One of the main problems which legislation must address is how to capture reality in the few precepts of a legal rule. Many times the information needed by the legislator to produce a new rule or a new piece of legislation is insufficient in terms of data or elements of fact to accurately reflect all the richness and variety of life. Many times the interests actually in conflict in society are different from the apparent conflicts solved by the law; hence, many times the observer of a legal system finds contradictions between laws as they are given and the actual behavior of people in society. Everyone who works in a legal system—legislators, practitioners, professors, and judges—are conscious of these contradictions. Legislators strive to do their best both in gathering maximum information about a problem and in synthesizing that information into a rule of law; but, once

5. R. DAVID & J. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 91 (2d ed. 1978).

6. H. KELSEN, *PURE THEORY OF LAW* 351 (1967).

the legislators have completed their task, their work obtains a life of its own. The legislators can believe justly that they did their job in the best way they could and then turn their attention to another problem. The attorneys for the parties involved in litigation are conscious of the shortcomings of a rule of law as against reality. But they, too, can only do their best to present the cases for their clients. The academicians are conscious of the contradictions between law and reality. They can meditate and conjure up devices for overcoming such contradictions, but they can also postpone solutions until a better occasion for dealing with a particular contradiction arises. The only person who cannot postpone or avoid a contradiction is the judge. He is the one who must solve, here and now, all contradictions that he finds existing between the law as it is given and the actual behavior of people. This is so when the judge tries to be just and is not content with simply applying the mechanics of the law—when he wishes to achieve justice in the judgment he gives.

Contradiction is inherent in the law. The moment that a statute is posited, it begins to age and become inadequate for unanticipated future circumstances. Life never stops. And perhaps some of the characteristics of the Civil Law system, such as the belief that reason can do too much, have helped to accentuate the contradiction between law and reality. What can a judge do? As Ehrlich has said, "There is no excuse, as it were, for squeezing decisions out of a statute with a hydraulic press."⁷ There is no easy way out. Even at the height of post-revolutionary France, article 4 of the French Civil Code provided that the judge who refused to render a decision under the pretext of the silence, obscurity, or insufficiency of the law was liable to prosecution for a refusal of justice. Professor Roger Perrot has observed that:

[T]he judge has the immense power to transform a ready made garment into a tailor-made suit at the price of alterations that may be considerable and sometimes rather unexpected. From this it has often been deduced that the judicial authority is thus able to perform a work of rejuvenation.⁸

No legal system can survive in any society without an acceptable degree of judicial discretion. In the Civil Law, one finds discretion at the following levels: discretion in the Civil Law as a system, discretion within the civil codes, and discretion within the particular rules of those codes.

7. EHRlich, *Judicial Freedom of Decision: Its Principles and Objects*, in *SCIENCE OF LEGAL METHOD: SELECTED ESSAYS* 76 (1969).

8. Perrot, *supra* note 4, at 496.

Discretion within the system itself is a technique which gives ample leeway to the judge in his characterization or interpretation of the facts. When a judge is faced with a particular set of facts, he has the choice of placing those facts under one legal category or another—he has a choice in characterizing the facts according to law. An example of this technique is the decision of the Supreme Court of the writer's own country, Peru, regarding irregular marriages. A large percentage of the people of Peru live under irregular marriages, which means the parties cohabit without having gone through the accepted procedure for contracting a legally valid marriage. The question of the legal effect of these irregular marriages has been the subject of much discussion. Until recently, the legislature in Peru refused to give legal effect to irregular marriages, and the Supreme Court, in principle, could do nothing to recognize such unions. But, it was still very difficult for the judges to ignore completely a phenomenon that was occurring among an enormously large percentage of the population. The Supreme Court of Peru then found a way out by characterizing the facts of such a situation in an imaginative and unexpected way. The case was an unusual one in which the "husband" died after living with his "wife" for thirty or thirty-five years and after raising a family together and being, for all practical purposes, like any other family except for the lack of legal sanction. All of his legal inheritance was to be inherited not by the woman with whom he lived, but by some of his blood relatives. The Court declared, on the basis of the couple's having lived together for so many years, that there existed between the man and the woman a "de facto" partnership that should produce all the effects of such an association. As a partnership ends by the death of one of the partners, so had this "de facto" partnership ended by the demise of the husband. Hence, the assets and liabilities of the husband were to be liquidated, with half of the proceeds going to the woman and the other half to the man's estate. Like Hamlet, the judge in such cases could say: "I could be bounded in a nutshell and count myself a King of infinite space."

The second technique for exercising discretion within a Civil Law system is through the interpretation of the law. There are some codes which attempt to be as precise and exact as possible concerning the methods of interpretation to be used, such as literal interpretation, logical interpretation, and exegetical interpretation. But, always it is the judge who must choose among the many methods available.

One of the great Louisiana jurists, Judge Albert Tate, said on one occasion that the legal problem is not always simple; the meaning of the law may not be clear, hence it must admit of judicial discre-

tion in interpretation in order to produce a just result.⁹ Thus, the choice of methods of interpretation to produce a just result is always an exercise of judicial discretion. Professor Julio Cueto-Rua, in *Judicial Methods of Interpretation of the Law*, has very aptly noted that: "In choosing the method to which he will turn when a grammatical-logical approach is unsuccessful, the judge will choose that method of interpretation which will yield the most fruitful result in the case. By most fruitful result is meant that result most consistent with justice."¹⁰

In *The Merchant of Venice*, Shylock insisted on specific performance of Antonio's bond, even though Antonio had offered him money in lieu of the pound of his flesh which he had committed himself to give in case of default. The judge, in exercising his discretion, had a choice of several methods of interpretation by which to reach a just result. He decided that Shylock should have his pound of flesh, but added that he was not entitled to a single drop of blood. The judge in this case used the literal method of interpretation to reach what he thought was the most just solution to the case.

Apart from these general techniques present within the codes themselves, the judge in the Civil Law tradition has sufficient discretion to achieve a justice beyond that granted by the mere words of the law. Professor Merryman, for instance, states:

[T]hat the dogma that a code can be complete and coherent fails to survive even a cursory glance at the jurisprudence. . . . The books are full of decisions in which the court has had to fill gaps in the legislative scheme and reconcile apparently conflicting statutes. Although the text of a statute remains unchanged, its meaning and applications often change in response to social pressures, and new problems arise that are not even touched on by any existing legislation.¹¹

However complete a code might seem, there will always be gaps and interstices which require the judge's exercise of discretion.

The gaps in statutes or codes are a reality that must be recognized. How can those gaps be filled? There are several solutions provided in the legislation itself. First, for example, the Civil Code of Switzerland, which dates from 1912, establishes in article 1 that all

9. Tate, *Techniques of Judicial Interpretation in Louisiana*, 22 LA. L. REV. 727, 754 (1962).

10. J. CUETO-RUA, *JUDICIAL METHODS OF INTERPRETATION OF THE LAW* 276 (1981).

11. J. MERRYMAN, *supra* note 1, at 44.

gaps left by the code are to be filled in by the judge, who acts as a legislator. Professor Alfred E. von Overbeck has noted in this regard that "the Swiss legislator was the first modern legislator to recognize that he needs the judge to achieve his own tasks. . . ."¹² Even though the Austrian code dates from 1811 and its text does not seem to permit expressly the use of the same technique allowed under the Swiss code, more than one commentator has interpreted article 7 of the Austrian Civil Code as allowing the judge to act as a legislator in such cases.

Another code technique used for filling gaps is legislation that requires the judge to resort to general principles of law. This is the solution opted for in the Argentine Civil Code of 1869;¹³ the Swiss code of 1912;¹⁴ the 1932 Civil Code of Mexico;¹⁵ the Peruvian Civil Code of 1936;¹⁶ the 1942 Civil Code of Brazil;¹⁷ and the Italian Civil Code of 1942.¹⁸ The use of such general principles of law allows the judge ample resources from which to draw in deciding cases involving gaps in the law, and some of those codes are even more precise.

The doctrine of abuse of right is a doctrine of long-standing in many Civil Law countries. The doctrine of abuse of right condemns not only the exercise of a right but the abusive use of it in such a way as to damage another person. In Louisiana, this doctrine appears only tangentially in article 623 of the Civil Code, which establishes the rule that a "usufruct may be terminated by the naked owner if the usufructuary commits waste, alienates things without authority, neglects to make ordinary repairs, or abuses his enjoyment in any other manner." A good example of the application of the doctrine of abuse of right is found in literature, specifically in Shylock's efforts to exercise his right against Antonio. As pointed out earlier, when Antonio fell into default and could not pay Shylock, the latter demanded the pound of flesh to which he was entitled as a result of his agreement with Antonio. The exercise of that stipulation was, however, an abuse of right because Shylock could have received money for the payment of both the principal and interest due, since Antonio, although late, did offer a repayment in money. Besides this literary comparison, the doctrine of abuse of right has very interesting modern

12. von Overbeck, *Some Observations on the Role of the Judge Under the Swiss Civil Code*, 37 LA. L. REV. 681, 685 (1977).

13. *Codigo Civil de la Republica Argentina* art. 16 (1869).

14. *Code Civil Suisse* art. 4 (1912).

15. *Codigo Civil Para El Distrito y Territorios Federales* art. 19 (1932).

16. *Codigo Civil Peruano* art. 23 (1936).

17. *Codigo Civil Brasileiro* art. 4 (1942).

18. *Codice Civile del Regno D'Italia* art. 12 (1942).

uses in such fields as antitrust legislation, especially in the European Economic Community, where monopolies are not condemned *per se*, but only insofar as they constitute an abuse of a dominant position in the market.

Another general principle of law to which judges may turn in filling gaps is the principle that condemns undue or unjust enrichment. Unjust enrichment is based upon the tenet that no one ought to enrich himself at the expense of another. An example of unjust enrichment is provided by a case heard by the Supreme Court of Peru in which the facts centered around the credit sale of a second-hand truck. The dealer asked for a 20 percent down payment, and for the remainder of the purchase price, he asked the buyer to sign a number of promissory notes. In the sales agreement, it was stipulated that if the buyer defaulted in the payment of two installments, the dealer would repossess the truck. As could be anticipated, the truck broke down soon after the sale, and the purchaser, unable to work as a result, could not pay the remainder of the price. Consequently, the dealer repossessed the truck and not only kept the down payment but also sued for the balance due under the promissory notes. Even though the seller had the formal right to sue on the notes, the court rendered judgment in favor of the defendant on the grounds that the seller would otherwise be unduly enriched.

A third, widely recognized general principle of law relied upon by judges in filling gaps in the law is that of equity. As it is understood within the meaning of articles 21, 1903, 1964, and 1965 of the Louisiana Civil Code, equity is based on natural law, on reason, and on the idea that one should not do unto others that which he would not wish others to do unto him. If there are any doubts about how broad the powers of a judge are under article 21, one need only quote Judge Tate, who says:

[A]s a practicing state appellate judge for twenty-five years prior to my federal service, I must confess that instances arise with increasing frequency in the present day in which, with all the judicial good faith in the world, no real legislative intent or text can be found to have intended to govern a particular new conflict of interest. In the past I have spoken of this dilemma, arising in part from rapid changes (which in a new social context deprive the literal legislative text of any functionally-intended application to a "new"—unforeseen or unanticipated—conflict of interest), and also from the legislative preoccupation with social and governmental problems of greater magnitude than the tinkering with private law to keep it current. On those occasions I have suggested that

article 21 of the Louisiana Civil Code permits the Louisiana judge, in the unprovided-for case, to formulate the new law-rule or law-application on the basis of its fairness and social utility, as would a legislator.¹⁹

The use of equity, however, is not a matter of pure legal technique. It also has great ethical significance. Consider the situation in the New Testament when Jesus Christ was asked, by someone who wanted to put him in a difficult situation, whether it was legal for a man whose lamb had fallen into a pit to work on Sunday in order to get the lamb out. Jesus replied: "It is lawful to do good on the Sabbath."²⁰

Finally, the judge exercises discretion with regard to particular rules of law. A general survey of the Louisiana Civil Code, for instance, provides numerous examples of such rules allowing the exercise of judicial discretion. In the first place, the judge in some cases must determine whether an agreement or obligation is or is not against the public order or the public good. For example, article 11 provides:

Individuals can not by their conventions derogate from the force of laws made for the preservation of *public order* or *good morals*. But in all cases in which it is not expressly or impliedly prohibited they can renounce what the law has established in their favor, when the renunciation does not affect the rights of others, and is not contrary to the *public good*.

Likewise, under articles 217, 1892, and 2031, in cases closely connected with the notion of public good, the judge must decide what constitutes good morals or *bonos mores*.²¹ In other cases, the judge must decide when someone has acted in good faith or with good intention.²² Con-

19. Tate, *The "New" Judicial Solution: Occasions for and Limits to Judicial Creativity*, 54 TUL. L. REV. 877, 885 (1980).

20. See *Matthew* 12:11-12.

21. "As long as the child remains under the authority of his father and mother, he is bound to obey them in everything which is not *contrary to good morals* and the laws." LA. CIV. CODE art. 217 (emphasis added).

"That is considered as morally impossible, which is forbidden by law, or *contrary to morals*. All contracts having such an object are void." LA. CIV. CODE art. 1892 (emphasis added).

"Every condition of a thing impossible, or *contra bonos mores* (repugnant to moral conduct) or prohibited by law, is null, and renders void the agreement which depends on it." LA. CIV. CODE art. 2031.

22. See, e.g., LA. CIV. CODE arts. 1901, 3006 & 3033.

Article 1901 provides: "Agreements legally entered into have the effect of laws on those who have formed them.

They can not be revoked, unless by mutual consent of the parties, or for causes acknowledged by law.

They must be performed with *good faith*." (emphasis added).

versely, the judge has discretion in determining when a spouse has acted in bad faith in the management of the community under article 2354.²³ In examining the intention of the parties, the judge at times must not only determine good and bad faith but must also examine the parties' motives in terms of interest or passion.²⁴

A determination of whether an act has or has not been performed in a reasonable manner is also within the discretion of the judge.²⁵ In other instances, the judge is called upon to evaluate certain circumstances,²⁶ to examine the nature of a particular relationship,²⁷ to determine the intention of the parties,²⁸ and to determine whether

Article 3006 provides: "In case of an indefinite power, the attorney can not be sued for what he has done with *good intention*."

The judge must have regard to the nature of the affair, and the difficulty of communication between the principal and the attorney." (emphasis added).

Article 3033 provides: "In the cases above enumerated, the engagements of the agent are carried into effect in favor of third persons acting in *good faith*." (emphasis added).

23. "A spouse is liable for any loss or damage caused by *fraud or bad faith* in the management of the community property." LA. CIV. CODE art. 2354 (emphasis added).

24. See LA. CIV. CODE art. 419: "He who petitions for the interdiction of any person, and fails in obtaining such interdiction, may be prosecuted for and sentenced to pay damages, if he shall have acted from motives of *interest or passion*." (emphasis added).

25. See, e.g., LA. CIV. CODE arts. 218 & 2937.

Article 218 provides: "An unemancipated minor can not quit the parental house without the permission of his father and mother, who have the right to correct him, provided it be done in a *reasonable manner*." (emphasis added).

Article 2937 provides: "The depository is bound to use the same *diligence in preserving the deposit that he uses in preserving his own property*." (emphasis added).

26. See, e.g., LA. CIV. CODE arts. 160 & 231.

Article 160 provides in part: "In determining whether the claimant spouse is entitled to alimony, the court shall consider his or her earning capability, in light of *all other circumstances*." (emphasis added).

Likewise, article 231 provides: "Alimony shall be granted in proportion to the wants of the person requiring it, and *the circumstances* of those who are to pay it." (emphasis added).

27. See, e.g., LA. CIV. CODE art. 3006: "The judge must have regard to the *nature of the affair*, and the difficulty of communication between the principal and the attorney." (emphasis added).

28. "Transactions regulate only the differences which appear clearly to be comprehended in them by the *intention of the parties*, whether it be explained in a general or particular manner, unless it be the necessary consequence of what is expressed; and they do not extend to differences which the parties never intended to include in them." LA. CIV. CODE art. 3073 (emphasis added).

"Legal agreements having the effects of law upon the parties, none but the parties can abrogate or modify them. Upon this principal are established the following rules: . . .

That courts are bound to give legal effect to all such contracts according to the *true intent of all the parties*." LA. CIV. CODE art. 1945 (emphasis added).

"When there is anything doubtful in agreements, we must endeavor to ascertain what was the *common intention of the parties*, rather than to adhere to the literal

something has been done with prudence.²⁹ The Code grants a judge ample discretion to determine whether or not an agreement or act constitutes simple lesion.³⁰ In other instances, the judge is given even broader discretion as, for example, when he is called upon to determine whether or not an act or agreement is immoral or plainly unjust³¹ or when he is given latitude in assessing damages.³² There are also instances in which the discretion of the judge is expressly established.³³ Finally, to come full circle, paragraph 10 of article 3556 defines discretion: "When it is said that something is left to the discretion of the judge, it signifies that he ought to decide according to the rules of equity and the nature of the circumstances."³⁴

In completing the circle, one can return to the situation in which Sancho Panza found himself when confronted with the man who, upon being questioned about his entry into the village, replied that he was going to be hanged. In terms reminiscent of Portia's speech on the quality of mercy, or of the text of article 21 of the Louisiana Civil Code, Sancho Panza allowed the man to go free, stating that in cases when justice is in doubt, the judge should be merciful.

sense of the terms in a sense which would render it nugatory." LA. CIV. CODE art. 1950 (emphasis added).

29. "In managing the business, he [the negotiorum gestor] is obligated to use all the care of a *prudent administrator*." LA. CIV. CODE art. 2298 (emphasis added).

30. "Minors, not emancipated, are relievable against simple lesion in every species of contract. That is called *simple lesion*, in which the amount to be suffered by it, is not designated by law, as it is in the cases above mentioned of partition and sale between persons of full age." LA. CIV. CODE art. 1864.

"A simple lesion gives occasion to rescission, in favor of a minor not emancipated, against all sorts of engagements; and in favor of a minor emancipated, against all engagements exceeding the bounds of his capacity, as is laid down under the title: *Of Minors, of their Tutorship and Emancipation*." LA. CIV. CODE art. 2222.

31. See, e.g., LA. CIV. CODE arts. 1757(2) & 1758(1).

Article 1757(2) provides: "A natural obligation is one which can not be enforced by action, but which is binding on the party who makes it, in conscience and *according to natural justice*." (emphasis added).

Article 1758(1) provides: "Natural obligations are of four kinds:

1. Such obligations as the law has rendered invalid for the want of certain forms or for some reason of general policy, but which are not in themselves *immoral or unjust*." (emphasis added).

32. For instance, Civil Code article 2127 states that "[t]he penalty may be modified by the judge, when the principal obligation has been partly executed, except in case of a contrary agreement."

33. "Presumptions, not established by law, are left to the judgment and *discretion* of the judge, who ought to admit none but weighty, precise and consistent presumptions, and only in cases where the law admits testimonial proof, unless the act be attacked on account of fraud or deceit." LA. CIV. CODE art. 2288 (emphasis added).

34. (Emphasis added). Although the examples given in the text have been limited to those contained in the Louisiana Civil Code, comparable examples could have just as readily been provided from codes of most Civil Law countries.