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SOME OBSERVATIONS ON THE ROLE OF THE JUDGE UNDER THE SWISS CIVIL CODE

Alfred E. von Overbeck*

I. INTRODUCTION¹

Although Switzerland certainly is not a "mixed civil law and common law jurisdiction,"² its legal system attributes to judges a measure of freedom which seems greater than they have in other civil law jurisdictions and might be of some interest, especially for American lawyers.

A few historical remarks may be useful. Switzerland grew from the union, in 1291, of three very small rural communities situated around the

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1. The most important books and articles on the subject are the following, which are cited by the name of the author, and where there are several publications listed by the abbreviation indicated.

2 H. DESCHENAUX, DER EINLEITUNGSTITEL, SCHWEIZERISCHES PRIVATRECHT 1-281 (Basel 1967) [hereinafter cited as DESCHENAUX]; also in French: LE TITRE PRÉLIMINAIRE DU CODE CIVIL 109 (Fribourg) [hereinafter cited after the German edition]; C. Du Pasquier, *Les lacunes de la loi et la jurisprudence du Tribunal fédéral suisse sur l'art. 1er Code Civil Suisse*, BASLER STUDIEN ZUR RECHTSWISSENSCHAFT, no. 31 (Bale 1951) [hereinafter cited as Du Pasquier]; O. A. GERMANN, PROBLEME UND METHODEN DER RECHTSFINDUNG (2d ed. 1967) [hereinafter cited as GERMANN]; A. MEIER-HAYOZ, DER RICHTER ALS GESETZGEBER (Zürich 1951) [hereinafter cited as MEIER-HAYOZ]; MEIER-HAYOZ, BERNER KOMMENTAR ZUM SCHWEIZERISCHEN PRIVATRECHT, Einleitung Arts. 1-10, on Art. 1 at 78 *et seq.* and Art. 4 at 421 *et seq.* (Berne reprint 1966) [hereinafter cited as KOMMENTAR]; MEIER-HAYOZ, LUCKEN INTRA LEGEM; RECHTSFINDUNG, BEITRÄGE ZUR JURISTISCHEN METHODENLEHRE, FESTSCHRIFT FÜR O. A. GERMANN ZUM 80 GEBURTSTAG 149 (Berne 1969) [hereinafter cited as FESTSCHRIFT GERMANN]; MEIER-HAYOZ, UEBER GESCHRIEBENES UND UNGESCHRIEBENES RECHT, RECUEIL DE TRAVAUX SUISSES PRÉSENTES AU VIII^e CONGRÈS INTERNATIONAL DE DROIT COMPARÉ 1 (Bale 1976); MEIER-HAYOZ, DER RICHTER ALS GESETZGEBER (ZUR RECHTSPOLITISCHEN KOMPONENTE RICHTERLICHER TÄTIGKEIT), FESTSCHRIFT ZUM 70 GEBURTSTAG VON DR. IUR. M. GULDENER 189 (Zürich 1973) [hereinafter cited as FESTSCHRIFT GULDENER]; B. Schnyder, *Entgegen dem Wortlaut. . . Erhaltung und Entfaltung des Rechts in der Rechtsprechung des Schweizerischen Bundesgerichts* in FESTGABE DER SCHWEIZERISCHEN RECHTSFAKULTÄTEN ZUR HUNDERTJAHRFEIER DES BUNDESGERICHTS 29 (FESTGABE SWISS FEDERAL COURT, Basel 1975) [hereinafter cited as B. Schnyder]; P. TUOR & SCHNYDER, SCHWEIZERISCHES ZIVILGESETZBUCH 29 *et seq.* (9th ed. Zürich 1975) [hereinafter cited as TUOR & SCHNYDER].

See also the bibliography in KOMMENTAR, *supra* note 1, at nos. 15 *et seq.* re Art. 1, and nos. 3 *et seq.* re Art. 4. Generally this volume gives an excellent introduction to the Swiss Civil Code.

2. See T. B. Smith, *Law Reform in a Mixed 'Civil Law' and 'Common Law' Jurisdiction*, 35 LA. L. REV. 927 (1975).

lake of Lucerne, into a loose and complicated system of alliances. The only central power was the “*Tagsatzung*” in which the unanimity rule prevailed. The invasion of the French revolutionary troops in 1798 created for a few years a centralized state, followed for ten years by an “*Acte de médiation*” imposed by Napoleon but well adapted to Swiss conditions in many respects. However, after the Congress of Vienna, Switzerland was restored to a confederation having not much more central power than before 1798. After much political turmoil, a Federal Constitution was accepted in 1848, followed by the more centralizing Constitution of 1874 which, though heavily amended, is still in force. There are many points (for instance, the bicameral system) in these Constitutions which were influenced by the American Constitution.

Under the Constitution of 1848, the Federal State legislated in matters of civil status and some aspects of marriage. This power was admitted on the rather weak base of the constitutional right of religious freedom. The Constitution of 1874 was more specific in this respect and in fact made further additions. An amendment accepted in 1898 gave the Federal State power to legislate in all fields of private law.³

At the same time, criminal law became a federal matter. However, public and administrative law, including civil and criminal procedure, remained as law of the Cantons (it is not feasible here to enter into details of the distinction between private and public law as it is drawn in Switzerland). A permanent Federal Court (*Bundesgericht, Tribunal fédéral*), was established in 1874 to ensure uniformity of federal law.

In the course of the nineteenth century, most Cantons replaced the traditional customary law and local statutes by codifications of their own. The French-and Italian-speaking Cantons adapted the French Civil Code to their needs, while other Cantons, including Berne, had Codes based on the General Civil Code of Austria. A few Cantons developed more original codifications. The most important was the Code of the Canton of Zurich, drafted by Bluntschli. It was based on German science but took into account traditional institutions such as cooperatives.

It is obvious that in a country covering an area of about one third of Louisiana, divided into 22 Cantons (three of which are subdivided in two semi-Cantons), the development of modern transportation along with economic conditions and mobility of population would make unification of private law more and more necessary. A statute of 1850 dealt with marriages

3. On the history of codification, see P. Liver, *Allgemeine Einleitung in KOMMENTAR*, *supra* note 1, at 7 [hereinafter cited as Liver].

between persons of different religions, and a statute of 1862 with their divorces. Under the new Constitution, a more comprehensive statute on marriage and divorce was passed by Parliament in 1874 and accepted by the voters with a very slim majority.⁴

In 1881 the law of obligations and commercial law were unified in a Code of Obligations. Revised in 1907, this was to become the fifth book of the Swiss Civil Code. In 1889, there followed a statute on bankruptcy and attachment for debt. In 1891, a statute on conflict of laws and jurisdictions came into force; it was designed primarily to deal with conflicts between Cantons, but was extended to international conflicts, to which it still applies.

The Swiss Civil Code was drafted and adopted in a comparatively short time. This is to a large extent due to the merit of one man, Eugen Huber. He first wrote a comparative work on the laws of the Cantons,⁵ and was the author of successive drafts and commentaries.⁶ He took a leading role in the Committee of Experts which discussed the draft and was a Member of Parliament when the Code was adopted.

An extended appraisal of the content of the Swiss Civil Code would be out of place in this context. Suffice it to say that at the beginning of the century, it could be considered as progressive concerning the protection of persons and personal freedom, and also concerning the expression of social ideas such as the welfare of the child.

The Code still retains its original structure, though important changes have been made. In the Code of Obligations, company law was revised in 1938, and the law of the contracts of employment in 1972. The whole of family law in the Swiss Civil Code is under revision. A new law of adoption was enacted in 1973. A new Child Law, which would completely abolish any discrimination against illegitimate children, has been adopted on June 25, 1976, and shall probably enter into force in 1977. A draft on matrimonial property has been completed, and work has started on a new divorce law.

Our purpose here is mainly to give some explanation of gaps in the

4. *Bundesgesetz die gemischten Ehen betreffend* (3 Dec. 1850) AS AF Bd 2 at 130; *Nachtragsgesetz betreffend die gemischten Ehen* (3 Feb. 1962) AS AF Bd 7 at 126; *Bundesgesetz betreffend Feststellung und Beurkundung des Zivilstandes und der Ehe* (24 Dec. 1974) AS NF Bd 1 at 515. Arts. 25 *et seq.*

5. E. HUBER, *SYSTEM UND GESCHICHTE DES SCHWEIZERISCHEN PRIVATRECHTS*, 4 vols. (Berne 1888-1893).

6. E. HUBER, *ERLÄUTERUNGEN ZUM VORENTWURF DES SCHWEIZERISCHE ZIVILGESETZBUCH* 3 vols. (2d ed. Berne 1914).

Code and the process through which they are filled by judicial discretion and by "the judge as legislator," according to the introductory articles of the Code, especially Articles 1(2) and 4. The German and French originals of Articles 1-4, and an English translation, are set out in an Appendix.⁷

First we shall draw attention to the differences between the German and Swiss Codes. We shall also discuss "doctrine and judicial tradition" according to Article 1(3), and make some remarks on the binding force of precedents.

II. DIFFERENCES BETWEEN THE SWISS CIVIL CODE AND THE GERMAN CIVIL CODE

The Swiss Civil Code came into force only in 1912, twelve years after the German "*Bürgerliches Gesetzbuch*," but it has a character of its own and cannot be assigned without qualifications to the group of the codifications of German-speaking countries. Since German is spoken by the majority of the Swiss population, however, (at present about 65% as against 18% French and 12% Italian, many of the latter being of Italian nationality) the influence of German legal thinking and writing was of course very important.

From a technical point of view, it is interesting to compare the Swiss Civil Code and the German Civil Code.⁸ The German Code is a purely scientific work, made by lawyers for lawyers. It has been described as embodying "the most precise and consistent legal terminology of all times." Its 2385 articles are drafted in long, complicated phrases and contain many cross-references. The Swiss Civil Code, on the other hand, tried to combine a scientific approach with popularity. In many instances its language is imprecise or even, taken literally, actually incorrect.⁹ It is a much disputed question whether the Swiss Code can really be understood and applied by laymen and lay judges without the help of the jurists. A precise answer to this question could only be given on the basis of extensive sociological research which has not yet been undertaken. For various reasons the layman would probably not get very far in applying the Code correctly; he would tend to take isolated rules out of their context, forgetting, for instance, that the general rules of the Code of Obligations also apply. Additionally, a considerable body of case law, especially the

7. *Infra*.

8. See, R. GMÜR, DAS SCHWEIZERISCHE ZIVILGESETZBUCH VERGlichen MIT DEM DEUTSCHEN BÜRGERLICHEN GESETZBUCH (Berne 1965) reviewed by Szladits, 15 AM. J. COMP. L. 384 (1966-67).

9. Liver, *supra* note 3, at nos. 119 *et seq.*

case law of the Swiss Federal Court, has been built up and the Code cannot be correctly applied without knowing it. It is probably beyond the reach of a layman to research this case law. He could hardly follow the principle that all three texts (German, French, Italian) have the same value and that one should resort to the version which contains the real meaning of the law.

Thus there is no proof that the Swiss Code is more intelligible to laymen than the German Civil Code. The Swiss Civil Code may be more easily accessible to the many non-lawyer judges in Swiss courts. However, experience with courts composed entirely of non-lawyers has not been encouraging and there are few such courts left. At least the President of the court or the Registrar (who in Switzerland is present during the deliberation and drafts the judgments) would nearly always be a lawyer.

A much more important difference between the two Codes lies in the fact that while the German Civil Code aimed at giving a very precise regulation and at leaving as few gaps as possible, the Swiss Civil Code deliberately was restricted to guidelines and principles in many instances and left open a very wide field to judicial discretion and development of the law. As opposed to the German strictness and perfectionism of the German Civil Code, this may permit creative improvisation. But it may also be a reminder of the inscription on the Federal Building in Berne: "*Dei providentia et hominum confusione Helvetia regitur*" (The providence of God and the confusion of man rules Helvetia).

Apart from the general tendency to reject the idea that a Code is self-sufficient—according to GénY,¹⁰ the Swiss legislator was the first modern legislator to recognize that he needs the judge to achieve his own tasks—there were several reasons which made necessary this kind of legislation. The Swiss Civil Code had to be accepted by twenty-five jurisdictions with very different conceptions. General rules may have been easier to accept than specific ones. Also there existed a greater confidence in the judge than is the case in some other countries. It is necessary to remember that one of the main purposes of the earliest Swiss pacts was that a person be tried by his own judge. Further, there is in Swiss practice a certain reluctance to take an overly scientific approach to law, which is well illustrated by an incident reported by Liver.¹¹ A German "*Herr Doktor*" quoting Baldus and Bartolus was told by a Swiss judge that he did not care about those masters and that he would judge according to local custom and law.

10. 2 F. GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF 328 (2d ed. Paris 1932) [hereinafter cited as GÉNY].

11. Liver, *supra* note 3, at no.21.

III. THE GAPS IN THE CODE

In order to assert the role of the judge in applying the Swiss Civil Code, it is essential to remember that this Code deliberately rejects the idea that it could be complete and give an answer to every conceivable question. This eighteenth century theory was proclaimed by the French revolution, but the Code Napoleon had already rejected it: Article 4 obliged the judge to decide even if the Code did not give a clear answer.¹²

The "*Ecole d'exégèse*" and the "*Begriffsjurisprudenz*" of the nineteenth century again wanted to deduce everything from the wording of the law. The Swiss Code on the contrary is in line with Gény's idea of "*libre recherche scientifique*."¹³

It is thus recognized that the Code has some gaps, and there are several theoretical distinctions amongst these gaps. We shall not go into the details of these, in part controversial, distinctions but shall only consider them insofar as they are useful for the comprehension of Articles 1 and 4 of the Code.¹⁴

The main distinction is between gaps *intra legem* and gaps *praeter legem*.

A gap *intra legem* is a point which the legislator has deliberately left open to be filled by means outside the law. The most important instance is the reference to equity in Article 4, which has numerous applications throughout the Code. Many authors also speak about gaps *intra legem* in connection with the interpretation of general expressions such as "justified interest."¹⁵ However, it is not possible to draw a precise line between questions which can be solved through interpretation and gaps.

The gaps *praeter legem* are those where there is a lack of any applicable provision of law (open gap), for instance, if an action is instituted but no forum provided (Art. 157 Swiss Civil Code). It may also exist where, contrary to the system of the Code, there has been omitted a necessary exception to a general rule (hidden gap).

Article 1(2) and Article 4 specifically relate to the filling of gaps.

12. Cf. PORTALIS, PRINCIPES FÉCONDS EN CONSÉQUENCES, quoted in 1 GÉNY, *supra* note 10, at 99.

13. It is known that Huber knew and had a high regard for Gény's work. However, one is not certain to what extent particularly Article 1(2) was influenced by Gény, nor for that matter by Aristotle. Cf. KOMMENTAR, *supra* note 1, at nos. 11-13 re Art. 1.

14. See DESCHENAUX, *supra* note 1, at 95, par. 12; GERMANN, *supra* note 1, at 111 *et seq.*

15. See FESTSCHRIFT GERMANN, *supra* note 1; *contra*, DESCHENAUX, *supra* note 1, at 98.

Theoretically, Article 1(2) calls on the judge to set a new rule which shall be applicable also to later cases, while Article 4 asks for a decision most appropriate for a specific case. In practice, the difference of approach tends to disappear¹⁶ - a decision under Article 1(2) can be very specific, and the application of Article 4 tends also to follow some general criteria; *mutatis mutandis* Article 1(3) is applicable.¹⁷ In fixing the amount of "tort moral," for instance, the judge will take into account the sums allowed in former cases.

Finally, one speaks about "gaps improperly so-called" where a provision of the law is or has become contrary to what is thought to be desirable or just. Normally, it is a task for the legislator, not for the judge, to correct such "mistakes." However, to a certain extent such provisions can be set aside according to Article 2(2) and the gap so created filled according to Article 1.¹⁸

IV. JUDICIAL DISCRETION UNDER ARTICLE 4

What is meant by "principles of justice and equity" in Article 4? The German expression "*Recht und Billigkeit*" does not seem quite equivalent to the French "*règles du droit et de l'équité*." The doctrinal writers agree that the words "*Recht und Billigkeit*" designate one single concept which could also be stated as "*billiges Recht*"¹⁹ or (in my opinion) by "*Billigkeit*" (equity). What is meant is that the judge should give the most appropriate and just decision in the particular case. He has to find the law by a casuistic method - as opposed to the legislative method. He is not to be inspired by feelings such as pity, sympathy, and so forth. His decision has to be objectively supported by reasons and has to take into account the particular elements of the situation. Meier-Hayoz criticizes the French word "*règles*", because in Article 4, as opposed to Article 1(2), the judge does not state a rule but only a decision in a single case.²⁰ On the contrary, Deschenaux is of the opinion that the word "*règles*" is appropriate,

16. KOMMENTAR, *supra* note 1, at nos.19-21 re Art. 4; FESTSCHRIFT GERMANN, *supra* note 1, at 154; GERMANN, *supra* note 1, at 356, 364.

17. KOMMENTAR, *supra* note 1, at n.53 re Art. 4.

18. *Id.* at nos.295 *et seq.* re Art. 1; on the cases where the judge decides against the wording of the Code, *see* Schnyder in FESTGABE SWISS FEDERAL COURT, *supra* note 1. On Art. 2, *see* Bolgár, *Abuse of Rights in France, Germany and Switzerland: A Survey of a Recent Chapter in Legal Doctrine*, 35 LA. L. REV. 1015, 1030 (1975).

19. KOMMENTAR, *supra* note 1, at no.11 re Art. 4; DESCHENAUX, LE TRAITEMENT DE L'ÉQUITÉ EN DROIT SUISSE, RECRUEIL DE TRAVAUX SUISSES PRÉSENTÉS AU VIII^e CONGRÈS INTERNATIONAL DE DROIT COMPARÉ 27 (Bâle 1970). For a possible different meaning, *see* FESTSCHRIFT GERMANN, *supra* note 1, at 156.

20. KOMMENTAR, *supra* note 1, at no. 15 re Art. 4.

because even when applying Article 4, the judge must elaborate criteria which can be used in other cases and which, even if they are very specialized, do constitute rules.²¹ It is obvious however that a decision rendered according to Article 4 cannot be exhaustively reasoned; there remains a field of discretionary power of the judge in weighing the circumstances. Also the Swiss Federal Court exercises a certain restraint in revising decisions of lower courts in this field. It can revise such a decision, because it involves a question of law, not of fact (questions of fact cannot be reviewed by the Swiss Federal Court).²²

Article 4 enumerates three cases in which the judge must decide according to equity (discretion - circumstances - material ground). However, this enumeration is not exhaustive because there are also other cases where judicial discretion is open, for instance, when the Code states that the judge "can" decide according to equity, or whenever it uses the word "équitable." The same discretion is also indicated when Article 163(3) Code of Obligations says that the judge must reduce conventional penalties which he considers exaggerated.

Of the many provisions to which Article 4 applies, we shall quote but one example for each of the three cases mentioned. According to Article 706(2) Swiss Civil Code, if a source of water has been cut without fault, the judge decides if damages are due, and to what extent (point left to the *discretion* of the judge). Damages are fixed according to *circumstances* and the gravity of the fault according to Article 43(1) Code of Obligations. A person may change his name if the grounds alleged are *material* (Art. 30 Swiss Civil Code).²³

V. THE JUDGE ACTING AS A LEGISLATOR UNDER ARTICLE 1(2)

The best known provision of the preliminary title of the Swiss Civil Code is of course Article 1. The first paragraph expresses the idea that the Code applies not only to questions expressly mentioned, but also to those implied from its spirit. This contrasts with the restrictive interpretation of statutes usually employed by common law judges. Paragraph 2 relates to "doctrine and judicial tradition" which will be discussed later.

However, it is Article 1(2) which has attracted the greatest attention.

21. DESCHENAUX, *supra* note 1, at 132.

22. See L. ENGLER, DIE UEBERPRÜFUNG VON ERNESSENSENTESCHEIDEN GEMÄSS ART. 4 SCHWEIZERISCHES ZIVILGESETZBUCH IN DER NEUEREN BUNDESGERICHTLICHEN RECHTSPRECHUNG (dissertation Fribourg, Zürich 1974).

23. See DESCHENAUX, *supra* note 1, at 136 *et seq.*; KOMMENTAR, *supra* note 1, at nos.56-73 re Art. 1.

As already mentioned, it is not known how much Huber was influenced by Gény who discussed the provision with great satisfaction in the second edition of his book and even considered the formula as the best summary of his own developments.²⁴

When does the law not furnish an applicable provision? First, there could be some fields which are not covered by the Code or by another statute, but this situation is not very likely to occur. The most important instance seems to be Private International Law insofar as it is not embodied in the 1891 statute. Such is the case for the whole law of conflicts relating to contracts, torts, and obligations in general. The Swiss Federal Court has built up an impressive body of judge-made law in that field²⁵ without even going through the form of referring to Article 1(2) when it states a new rule of modifies an existing one.²⁶

In fields which are codified, the judge can apply Article 1(2) only when there really is a gap. Several decisions state that this should not be admitted too easily.²⁷ The most typical case is the filling of gaps *praeter legem*. However, Meier-Hayoz²⁸ and Germann²⁹ apply the same principle to gaps *intra legem* insofar as they do not fall under Article 4. Deschenaux³⁰ and Tuor/Schnyder³¹ express some doubts about this.

Article 1(2) first refers to customary law. Its place is rather small and nothing more will be said of this element because the filling of gaps by the judge acting as a legislator is much more important.³² By stating that the

24. GÉNY, *supra* note 10, at 308, 326 in no.204.

25. F. Vischer, *Der Richter als Gesetzgeber im Internationalprivatrecht*, in 12 SCHWEIZERISCHES JAHRBUCH FÜR INTERNATIONALES RECHT 75 (1955); Schnitzer, *Les contrats internationaux en droit international privé suisse*, 123 RECEUIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL 541 (1968).

26. *E.g.*, Swiss Federal Court Reports 100 II, 11, 20, 39, 451. Changes are rather frequent nowadays, while in 1951 Du Pasquier (at 71) found no reversal by the Swiss Federal Court of a rule stated under Article 1(2).

27. *E.g.* 90 I 141; 100 Ib 157. There is only a gap if neither the wording nor the content of the statute found through interpretation gives a rule, and if no solution can be found by means of analogy. *See also* 94 II 305: refusal to fill an alleged gap in a tax statute by customary law. *See* 101 Ib 379 for a recent case where administrative law was involved.

28. FESTSCHRIFT GERMANN, *supra* note 1, at 155; more doubtful, KOMMENTAR, *supra* note 1, at 263 re Art. 1.

29. GERMANN, *supra* note 1, at 121. However, the filling of gaps only begins when the written provision has been thoroughly interpreted according to its own text and to other parts of the statute.

30. DESCHENAUX, *supra* note 1, at 107.

31. TUOR & SCHNYDER, *supra* note 1, at 38, 42.

32. KOMMENTAR, *supra* note 1, at nos.233-50 re Art. 1. For example of customary law, *see* Du Pasquier, *supra* note 1, at 29.

judge should act as if he were a legislator, it is meant that he has to find a rule of law which is not only appropriate to the case at hand, but which will be applicable to future cases and which will fit into the system of existing law. For that purpose he has to examine whether there is not in the existing law a rule relating to a situation comparable to the one at hand, and which could be applied by analogy. More generally, he should stay within the system and the spirit of the Code. The judge should examine all the interests involved and weigh their respective values as a legislator would do. He also has to consider the postulate of legal security.

Article 1(3) gives an indication of the tools available to the judge, but "approved legal doctrine and judicial tradition" are not the only ones. Thus, Meier-Hayoz stresses especially that the judge, when filling gaps, should resort to comparative law as does the legislator when preparing a new statute.³³ This idea is expressly embodied in Article 7 of the Swiss Law on Maritime Navigation³⁴ which directs the judge to decide according to generally accepted principles of maritime law, if he finds no rules in the statute or in treaties. In the absence of such principles, he is directed to act as a legislator, taking into account law and custom, doctrine and case-law of seafaring countries.

How has Article 1(2) worked in practice? The judges certainly have not abused their power to act as legislators. The contrary may be true. In his most recent article, Meier-Hayoz sounds a somewhat pessimistic note,³⁵ he finds that judges are very reluctant to assume the responsibility of acting *modo legislatoris*. Such a function is a burden, not a joy for them. They prefer to use arguments which make the decision appear as if it was a mere interpretation of the existing law. They also prefer to hide the policy considerations, which are the real grounds of decision, behind constructive arguments.³⁶

Meier-Hayoz expresses also some criticism of Article 1 itself, which makes too clear-cut a distinction between two functions of the judge: interpretation according to paragraph 1 and gap-filling under paragraph 2. In fact, there are few cases which are decided entirely by statute or entirely by the judge. In the great bulk of cases the decision is a result of a combination of interaction of statute law and judge-made law. The part of each may vary, but the legal process is always the same. Meier-Hayoz

33. KOMMENTAR, *supra* note 1, at nos.355 *et seq.* re Art. 1.

34. AS (1956) p. 1356.

35. FESTSCHRIFT GULDENER, *supra* note 1, at 197 *et seq.* See also KOMMENTAR, *supra* note 1, at no.337 re Art. 1.

36. See his criticism on the *Cardo* case in the text at notes 50-53, *infra*.

would prefer to abandon the idea of an "application" of pre-existing law by the judge and move towards a concept of "law in making" which combines the rule and the application of the rule, the decision finding and the formulation of rules. Swiss judges may be reluctant to act *modo legislatoris* because the training of lawyers places excessive emphasis on the application of existing law and neglects the question of creation of law.

Most of these criticisms are certainly well founded. For example, there are no specific courses on "jurisprudence" in Swiss universities. However there is no doubt that professors give increasing attention to these kinds of problems.

Even if Article 1(2) has not had as far-reaching effects as one could have expected, many discussions on the international level have shown that Swiss lawyers feel less bound by the letter of the law than their colleagues in other continental countries. Extensive research would be necessary to ascertain the extent of this difference in approach.

VI. CASES WHERE THE JUDGE ACTED AS A LEGISLATOR

(a) A very clear example of a gap is found where the Code creates an action, but does not provide a forum. It is surprising that only recently such gaps have been discovered in matters relating to matrimonial proceedings. The Swiss Civil Code does not provide a forum for the "*Eheschutzmassnahmen*" of Articles 169 *et seq.* These are measures a judge can take before there are divorce or separation proceedings. The Swiss Federal Court judged that the forum rule in matters of divorce of Article 144 (domicile of actor) should inspire the filling of the gap.³⁷ A few years later, the Court had to decide which judge could terminate such measures if they were no longer necessary. The courts of the Cantons had found three different solutions. The Swiss Federal Court preferred the forum of the defendant because normally the measures would have been taken in his favor and one should not ask him to defend at the actor's domicile.³⁸ The general principle *actor sequitur forum rei* was here preferred to the *forum actoris*.

Two years later the Swiss Federal Court had to deal with a modification of a pension determined in a separation judgment. The Court, basing the decision on Article 1, fixed the forum for such an action at the defendant's domicile.³⁹

(b) Some gaps may appear because of new technical developments.

37. Swiss Federal Court Reports 86 II 305, *see also* 93 II 3.

38. Swiss Federal Court Reports 93 II 4.

39. Swiss Federal Court Reports 95 II 73.

Article 684 forbids a landowner to pursue activities which create excessive nuisances for the neighbors. The Swiss Civil Code states only two possibilities: either the nuisances are excessive and they have to stop, or they are not excessive, and can continue. However, in 1964, the Swiss Federal Court had to decide a case, where nearby building activities caused damage to a tea-room and bakery; during two years this place could only be reached with some difficulty.⁴⁰ Part of the street had to be used for building machinery. The nuisances were clearly excessive, but they were necessary; otherwise the whole building project would have to be abandoned. The Swiss Federal Court found a gap which could hardly have been discovered when the Swiss Civil Code came into force, but which had become more apparent since the development of modern mechanical building methods and the increased use of public ground for that purpose.⁴¹ It decided that this gap had to be filled *modo legislatoris* and that the builder's activity had to be tolerated but he must pay damages.

(c) The declaration of illegitimacy of a child furnished a good illustration of discovering and filling a gap. Article 253 Swiss Civil Code very clearly states that only the husband has an action against the child and his mother. If he can prove that he could not possibly be the father, the child will be declared illegitimate. So it is only up to the husband to decide whether he wishes to draw the consequences from the fact that a child presumed legitimate is not his own.

However, it appeared that sometimes it would be in the interest of the child to reverse an erroneous presumption of legitimacy.⁴² This was especially the case where the mother divorced the "*Registervater*" (father according to the presumption of legitimacy) and married the real father of the child. The child could only be legitimated by the real parents after a declaration of illegitimacy which could be requested only by the former husband.

The Swiss Federal Court held for a long time that the Code had deliberately not provided for an action by the child.⁴³ But such actions succeeded in several courts of the Cantons and finally the Swiss Federal Court changed its point of view.⁴⁴ The Court examined whether the problem

40. Swiss Federal Court Reports 91 II 100, 196.

41. FESTSCHRIFT GULDENER, *supra* note 1, at 196, considers this an example of a "gap improperly said" because the System of the Code was complete. This does not seem to be the court's opinion, which does not specify the nature of the gap.

42. In England, the same thing appeared; *cf.* D. HOLDEN, CHILD LEGISLATION 20 (1969).

43. Swiss Federal Court Reports 73 II 204.

44. Swiss Federal Court Reports 88 II 477.

had been overlooked by the legislator. This was not clear, but seemed rather unlikely, especially in view of the fact that the German Civil Code deliberately excluded such an action a few years before the Swiss Civil Code was drafted. However, the Court said that, even if the omission had been deliberate, this could not prevent the Court from examining whether the *ratio legis* and the balancing of respective interests could justify a change.⁴⁵

Then the Court concluded that the rule of Article 253 as it stands is not just unsatisfactory—in this case it could not be changed except by legislation—but incomplete, in the context of the whole system of the law.

Thus, differing from former cases, the Court found a gap which could be filled. The Swiss Federal Court considered that Article 253 Swiss Civil Code purported to secure the stability of marriage and legitimacy but that, according to the Code, this public interest had to yield to the husband's interest if he wanted to sue. The Court was of the opinion that the interest of the child to be incorporated in the "real" family was as worthy of protection as the husband's interest. A further argument was drawn from Article 256 which, when the husband is dead or has disappeared, gives an action to coheirs or people excluded from the succession in certain cases. This purely financial interest is certainly less important than the child's interest.

On the strength of this reasoning, the Swiss Federal Court gave an action to the child, but only on the condition that the first marriage be dissolved and the child legitimated by his father. The decision has generally been approved. In 1972 the Superior Court of Zurich took a further step and gave an action even to a child who would not afterwards be legitimated by his real father.⁴⁶

Article 256 as amended by the new Child Law removes some of the restrictions maintained by the Court. The child will have an action if the spouses have lived separately at any time when he was a minor. However, the mother will have no action of her own.

Thus, in a code system, the judge-made law finally found its way into the written law. The same thing happened concerning the nullity of marriages of which the sole purpose was to acquire Swiss nationality (Art. 120(4), Swiss Civil Code).⁴⁷

45. This shows a method of interpretation which does not stick to the historical meaning but takes into account the needs of changing circumstances. On this question, see KOMMENTAR, *supra* note 1, at no.132 re Art. 1; DESCHENAUX, *supra* note 1, at 98; K. Oftinger, *Ueerblick über die Problematik und einige Hauptpunkte der Interpretation*, 63 SCHWEIZERISCHE JURISTEN-ZEITUNG 358 (1967).

46. 69 SCHWEIZERISCHE JURISTEN-ZEITUNG 122 (1973).

47. There are numerous other examples, *e.g.*, Swiss Federal Court Reports 92 II 182, now embodied in the revised Arts. 336(1) and 361 CODE OF OBLIGATIONS.

(d) The matter of permitting a child to sue for a declaration of illegitimacy found its counterpart in the field of private international law. In many cases, an action by the child would have been especially desirable where the legal father was a foreign worker, who had disappeared in the meantime. But even when the Swiss Federal Court admitted the child's action in internal law, another difficulty arose in the field of conflicts. According to Article 8 of the Swiss law of 1891 on Private International Law, as it was generally understood, the forum for such an action was in the country of the nationality of the legal father, and his national law was applicable. This brought not only practical complications, but also the possibility that there might be no action under the father's law. The situation was particularly shocking because after a successful action the child would have acquired the mother's Swiss nationality.

In a remarkable decision of September 4, 1969,⁴⁸ the Superior Court of Zurich gave the child an action in Switzerland. The Court based its reasoning on two arguments. First, it considered that Article 8 of the law of 1891, drafted in view of relations between Cantons, was applicable to international cases only by way of analogy (Art. 32) and that the similarity of situations which is presupposed by analogy did not exist. While citizens of all Cantons had to be treated the same way, this is not so in a case where there are Swiss and foreign parties involved. Thus the Court found a gap in the sense of Article 1(2) of the Swiss Civil Code.

The other argument is based on a parallel between the former exclusive right of the husband to sue and the exclusive jurisdiction of his national state. The suppression of the first makes the second meaningless, and consequently there is a gap as well. In this context, the Court considers the gap as "*rechtspolitischer Natur*" and consequently corrects it through the operation of Article 2(2) Swiss Civil Code.⁴⁹

48. 65 SCHWEIZERISCHE JURISTEN-ZEITUNG 374 (1969). On this decision, see A. Bucher, *Grundfragen der Anknüpfungsgerechtigkeit im internationalen Privatrecht*, JUR. FAKULTÄT DER UNIVERSITÄT BASEL, SCHRIFTENREIHE DES INSTITUTS FÜR INTERNATIONALES RECHT UND INTERNATIONALE BEZIEHUNGEN, Heft 22, 159 and at 151 *et seq.* on former decisions (Basel & Stuttgart 1975). The Swiss Federal Court has not yet decided on the question, but in an unofficially published case (*Colla*, in 28 SCHWEIZERISCHES JAHRBUCH FÜR INTERNATIONALES RECHT 399 (1972), it expressed some doubts on the justification of the forum based on nationality. See also F. Knoepfler, *L'interêt de l'enfant et le droit international privé*, in FESTGABE SWISS FEDERAL COURT, *supra* note 1, at 476. We may add that since April 1, 1973, the desired result can also be obtained through an adoption of the child by the real father; see E. Götz, 44 ZEITSCHRIFT FÜR ZIVILSTANDSWESSEN 106 (1976).

49. The Court quotes KOMMENTAR, *supra* note 1, at no.295 *et seq.* re Art. 1. More precisely, one should say that Article 2(2) permits the disregard of a statutory rule, but that the resulting gap should be filled under Article 1(2); cf. MEIER-HAYOZ, FESTSCHRIFT GULDENER *supra* note 1, at 196.

The Court took jurisdiction on the basis of the nationality which the child would acquire if the suit was successful. This is of course something of a *circulus vitiosus*. Personally, we preferred that the court finally base its jurisdiction on the domicile or habitual residence of the mother and the child. It could have considered that the Law of 1891 did not take into account situations where spouses had different nationalities which was very exceptional at the time of that enactment.

(e) This idea applies even more to cases of divorce between spouses of different nationalities. Article 7h(1) of the Law of 1891 states that the foreign actor must prove that the ground of divorce and the Swiss jurisdiction are recognized in his country of nationality. In the case of spouses of different nationalities the Swiss Federal Court for a long time obliged the actor to prove these two points in his own national law as well as in the spouse's national law. The reason was that Swiss courts should not render divorce judgments between foreigners which would not be recognized in a party's national state. However, in 1968, the Court reversed this point of view and declared that the actor had only to prove that his national law, or even one of his several national laws, did admit the ground of divorce and the Swiss jurisdiction.⁵⁰ In fact, in that case, the husband was Italian; the plaintiff's wife was both French and Italian. Proof according to French law was deemed sufficient.

Meier-Hayoz criticizes the decision because the Court, instead of admitting that it had changed its policy in order to facilitate divorces, pretended to go back to a stricter construction of Article 7h(1).⁵¹ Personally, we would have preferred the same result on another basis. Both spouses were domiciled in Switzerland. The Court, following the opinion of many Swiss writers, could very well have considered that the divorce of spouses of different nationalities did not fall under Article 7h(1). It could then have admitted a gap and filled it with a reference to the law and the jurisdiction of the domicile, thus following the example set by the French *Cour de Cassation* in the famous Rivère case.⁵² The solution given by the Swiss Federal Court differentiates the possibilities available to the spouses: the Italian husband could not have sued his wife - or only under the narrower

50. *Cardo v. Cardo*, Swiss Federal Court Reports 94 II 69.

51. FESTSCHRIFT GULDENER, *supra* note 1, at 204; *see also* Bucher, *supra* note 48, at 140 *et seq.*

52. REVUE CRITIQUE 412 (1953); *see* G.A.L. Droz, *Une construction prétorienne exemplaire: la loi applicable au divorce d'époux de nationalités différentes en droit international privé français*, 9 NEDERLANDS TIJDSCHRIFT VOR INTERNATIONAAL RECHT, DE CONFLICTU LEGUM 125 (Mélanges Kolléwijn-Offerhaus, Leyden 1962).

conditions provided by Italian law.⁵³

The case certainly illustrates the reluctance of even the Supreme Court to act as a legislator.

VII. APPROVED DOCTRINE AND JUDICIAL TRADITION
ACCORDING TO ARTICLE 1(3)

Looking now to Article 1(3), the first question is whether this provision applies only to paragraph 2 or to both paragraphs 1 and 2. The latter answer is accepted now by all writers.⁵⁴ The wording of the three texts is not quite similar. The German "*Ueberlieferung*" is translated into French and Italian by "*jurisprudence*" (case law). This definition is a bit narrow, as non-judicial practice is also important in some cases. The translation of "*bewährt*," which implies an element of appreciation, is not quite accurately rendered by "*consacrés*" which could also mean a solution actually accepted by the courts but subject to criticism. It seems of little importance whether the judge follows ("*folgt*") or is inspired ("*s'inspire*") by doctrine and judicial tradition. Deschenaux' is of the opinion that the French formula is better, the doctrine not being a source of law which the judge is bound to follow.⁵⁵

Legal doctrine has to be approved - "*bewährt*." This is a critical rather than an historical appreciation. Neither unanimity of writers, nor antiquity, makes a doctrine "approved." It should be noted that there are no "books of authority" in Swiss law. The opinion of an author, who is well-known in his field, carries great weight, but is also subject to criticism. The judge must state in his decision why he prefers one opinion to another.

Doctrine in the sense of Article 1(3) is by no means restricted to Swiss writers. Foreign writers are frequently cited by the Federal Court. Thus, in a decision formally recognizing party autonomy in the field of choice of law for contracts, the Federal Court made an extensive review of foreign opinions and cases, and also international conventions.⁵⁶

Another important instance is the *Dal Bosco* case, decided in 1971.⁵⁷ The Swiss Federal Court, reversing its former point of view, recognized the marriage in Denmark of an Italian who had been divorced in Switzerland

53. D. Dutoit, *L'avenir possible du rattachement à la loi nationale en droit international privé suisse*, 26 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 49 (1969-70).

54. DESCHENAUX, *supra* note 1, at 119; KOMMENTAR, *supra* note 1, at nos. 423 et seq.

55. *Id.* at 121.

56. Swiss Federal Court Reports 91 II 44.

57. Swiss Federal Court Reports 97 I 389.

(according to Swiss law) from his wife who was a Swiss-Italian double national. The Court discussed at length the arguments of Swiss writers on this point and also the cases and opinions in other countries. While rejecting several arguments based on different theories of private international law, the Court admitted that “*Der Kritik am Entscheide Caliaro muss daher vom menschlichen and sozialen Gesichtspunkt aus Recht gegeben werden.*” [Criticism of the Caliaro decision must be made from the social and humane viewpoint.] It recognized the marriage on grounds of internal harmony of the Swiss legal system and public policy (*ordre public*).

We have already said that judicial tradition does not consist only of judgments. “*Ueberlieferung*,” as the German text states, comprises also the practice of administrative authorities (which is quite important in fields such as marriage, adoption, guardianship) and usages generally followed, for instance, by merchants.

The bulk of judicial tradition lies, of course, in case law. The most authoritative cases are the published decisions of the Swiss Federal Court. Most decisions in private law are rendered by the Federal Court on appeal from the highest court of the Canton (“*Berufung*”, “*recours en ré-forme*”), but decisions rendered by the administrative and public law chambers can also relate to private law. The Swiss Federal Court decides which cases are to be published, but it frequently cites also its own unpublished cases. This is not quite satisfactory and gives some advantage to parties—or attorneys—who had the opportunity to know about those cases.⁵⁸

Decisions of courts of the Cantons are much less frequently cited by the Swiss Federal Court or by courts of other Cantons. One reason is that only in the largest Cantons are the decisions published regularly and without delay. There are probably few important cases where a legal point is disputed which do not go to the Swiss Federal Court (which proceeds with more speed and less expense than many lower courts). Nevertheless, there have been several instances where courts of the Cantons have taken the lead in bringing about a desirable change against the standing opinion of the Swiss Federal Court, and were finally followed by the latter.⁵⁹

VIII. THE QUESTION OF THE BINDING FORCE OF PRECEDENT

This brings us to the question of the binding force of precedent.⁶⁰ In

58. Which can be obtained if one knows about their existence; cf. DESCHENAUX, *supra* note 1, at 124.

59. Cf. DESCHENAUX at 127, note 38.

60. On the question in general, see GERMANN, *supra* note 1, at 227-77, and his former contributions in 68 NF ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 297 *et seq.*,

Switzerland, there is of course no doctrine of stare decisis in the common law sense. Moreover, at the time when the Code was drafted, doctrinal opinion on the continent was opposed to any binding force of precedent.⁶¹ This may explain why Article 1(3) places doctrine and tradition, including case law, on the same level. Nevertheless, a doctrine of limited binding force of precedent has become firmly established in Switzerland.

The Swiss Federal Court often mentions "*la loi et la jurisprudence*" as if they had the same force. The published decisions are preceded by an abstract in three languages stating the principle on which the case was decided.

As a rule, the Swiss Federal Court follows its own precedents. When it departs from a former decision, it does so only after exhaustive discussion, and the abstract will then mention: "*changement de jurisprudence.*"

Similarly, the courts of the Cantons tend to follow their own precedents, and the precedents set by the Swiss Federal Court. But, as the Swiss Federal Court has stated several times, the lower courts are not bound. They may reject the opinion of the Federal Court on good grounds. On appeal, the Swiss Federal Court will examine whether it can agree with the change made by the lower court, or whether it will adhere to its own precedent.

The binding force of precedent depends to a certain extent on whether the judge has to apply a statutory rule, or a judicial rule found under Article 1(2). In the first case, departing from precedent is justified if the new interpretation conforms more to the real meaning of the law. In the case of a rule set by a judge acting as a legislator, the change has to be based on the considerations which a legislator would take into account, including the necessity for a certain stability of the law.⁶²

We may add here that one can draw from Article 1(2) an argument for a certain binding force of precedents. It would make no sense to oblige the judge to act as a legislator in a given situation if his decision had no binding force whatsoever for similar subsequent cases.⁶³

IX. CONCLUSION

We have tried to show that under a code system, which does not

423 *et seq.* (1949) and in II ACTA INSTITUTI UPPSALENSIS IURISPRUDENTIAE COMPARATIVAE (1959).

61. KOMMENTAR, *supra* note 1, at no. 499 re Art. 1; *see also* G. Gorla, *Dans quelle mesure la jurisprudence et la doctrine sont-elles des sources du droit?*, RAPPORTS NATIONAUX ITALIENS AU IX^e CONGRÈS INTERNATIONAL DE DROIT COMPARÉ, TÉHÉRAN 1974, 55 (Milan 1974), and other contributions to that Congress.

62. *Id.* at nos. 510-18 re Art. 1.

63. *Id.* at no. 501 re Art. 1.

purport to be exhaustive, there is a large field where the judge is sufficiently free to adapt the law to the needs of the everchanging situations of life. Common lawyers may discover some similarities with the reasoning of their own judges. It would be a much more demanding task to attempt to determine precisely how much—or how little—the reasoning of a Swiss judge who avails himself of the opportunities opened by Article 1(2) differs from that of a common law judge.

At this point we would like to conclude by quoting Benjamin N. Cardozo. After rejecting judicial impressionism and stating that “Our jurisprudence has held fast to Kant’s categorical imperative, ‘Act on a maxim which thou canst will to be law universal’”, he continues “I think the tone and temper in which the modern judge should set about his task are well expressed in the first article of the Swiss Civil Code of 1907.”⁶⁴

64. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 140 (Paperbound 22nd printing 1964) (1st ed. Yale Univ. Press 1921).

Appendix

SWISS CIVIL CODE ARTICLES 1-4

| EINLEITUNG | TITRE PRÉLIMINAIRE | PRELIMINARY CHAPTER |
|--|---|--|
| Art. 1 | Art. 1 | Art. 1 |
| A. <i>Anwendung des Rechts</i> | A. Application de la loi | A. <i>Application of Law</i> |
| Das Gesetz findet auf alle Rechtsfragen Anwendung, für die es nach Wortlaut oder Auslegung eine Bestimmung enthält. | La loi régit toutes les matières auxquelles se rapportent la lettre ou l'esprit de l'une de ses dispositions. | The Code governs all questions of law which come within the letter or the spirit of any of its provisions. |
| Kann dem Gesetze keine Vorschrift entnommen werden, so soll der Richter nach Gewohnheitsrecht und, wo auch ein solches fehlt, nach der Regel entscheiden, die er als Gesetzgeber aufstellen würde. | A défaut d'une disposition légale applicable, le juge prononce selon le droit coutumier et, à défaut d'une coutume, selon les règles qu'il établirait s'il avait à faire acte de législateur. | If the Code does not furnish an applicable provision, the judge shall decide in accordance with customary law, and failing that, according to the rule which he would establish as legislator. |
| Er folgt dabei bewährter Lehre und Ueberlieferung. | Il s'inspire des solutions consacrées par la doctrine et la jurisprudence. | In this he shall be guided by approved legal doctrine and judicial tradition. |

Art. 2

B. *Inhalt der Rechtsverhältnisse*I. *Handeln nach Treu und Glauben*

Jedermann hat in der Ausübung seiner Rechte und in der Erfüllung seiner Pflichten nach Treu und Glauben zu handeln.

Der offenbare Missbrauch eines Rechtes findet keinen Rechtsschutz.

Art. 3

II. *Guter Glaube*

Wo das Gesetz eine Rechtswirkung an den guten Glauben einer Person geknüpft hat, ist dessen Dasein zu vermuten. Wer bei der Aufmerksamkeit, wie sie nach den Umständen von ihm verlangt werden darf, nicht gutgläubig sein konnte, ist nicht berechtigt, sich auf den guten Glauben zu berufen.

Art. 4

III. *Richterliches Ermessen*

Wo das Gesetz den Richter auf sein Ermessen oder auf die Würdigung der Umstände oder auf wichtige Gründe verweist, hat er seine Entscheidung nach Recht und Billigkeit zu treffen.

Art. 2

B. *Etendue des droits civils*I. *Devoirs généraux*

Chacun est tenu d'exercer ses droits et d'exécuter ses obligations selon les règles de la bonne foi.

L'abus manifeste d'un droit n'est pas protégé par la loi.

Art. 3

II. *Bonne foi*

La bonne foi est présumée, lorsque la loi en fait dépendre la naissance ou les effets d'un droit. Nul ne peut invoquer sa bonne foi, si elle est incompatible avec l'attention que les circonstances permettraient d'exiger de lui.

Art. 4

III. *Pouvoir d'appréciation du juge*

Le juge applique les règles du droit et de l'équité, lorsque la loi réserve son pouvoir d'appréciation ou qu'elle le charge de prononcer en tenant compte soit des circonstances, soit de justes motifs.

Art. 2

B. *Limits of civil rights*I. *Misuse of a right*

Every person is bound to exercise his rights and fulfill his obligations according to the principles of good faith.

The law does not sanction the evident abuse of a right.

Art. 3

II. *Good Faith*

Good faith is presumed whenever the existence or the effects of a right has been expressly made to depend on the observance of good faith. No person can plead his good faith *fides* in any case where he has failed to exercise the degree of care required by the circumstances.

Art. 4

III. *Discretion of judge*

Where the law expressly leaves a point to the discretion of the judge, or directs him to take circumstances into consideration, or to appreciate whether a ground alleged is material, he must base his decision on principles of justice and equity.