The Many Faces of Equity. A Comparative Survey of the European Civil Law Tradition

Mauro Bussani
Francesca Fiorentini

Available at: https://works.bepress.com/mauro_bussani/36/
The Concept of Equity
An Interdisciplinary Assessment

Edited by
DANIELA CARPI

Universitätsverlag WINTER Heidelberg 2007
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Author(s)</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>DANIELA CARPI</td>
<td>Introduction</td>
<td>7</td>
</tr>
<tr>
<td>CLAIRE ESTRYN, ERIC FREEDMAN and RICHARD WEISBERG</td>
<td>The Administration of Equity in the French Holocaust-Era Claims Process</td>
<td>21</td>
</tr>
<tr>
<td>IAN WARD</td>
<td>Poetry, Politics and Prerogative</td>
<td>53</td>
</tr>
<tr>
<td>PIERGIUSEPPE MONATERI</td>
<td>The Prophetic Nature of Equity</td>
<td>69</td>
</tr>
<tr>
<td>GEORGE M. WILLIAMS JR.</td>
<td>Democracy and Understanding</td>
<td>83</td>
</tr>
<tr>
<td>MAURO BUSSANI and FRANCESCA FIORENTINI</td>
<td>The Many Faces of Equity: A Comparative Survey of the European Civil Law Tradition</td>
<td>101</td>
</tr>
<tr>
<td>EUGENE O'BRIEN</td>
<td>A Law Unto Himself: Derrida and the Force of Justice</td>
<td>135</td>
</tr>
<tr>
<td>HEINZ ANTOR</td>
<td>The Ethics of Story-Telling and of Reading: Literature, the Law, and the Principle of Equity</td>
<td>151</td>
</tr>
<tr>
<td>FEDERICO TESTA and MARTA UGOLINI</td>
<td>Public Services: Between Equity and Customer Satisfaction</td>
<td>169</td>
</tr>
<tr>
<td>ARTHUR JACOBSON</td>
<td>The Conscience of the King: Equity As Reconciliation in Shakespeare's Last Play</td>
<td>185</td>
</tr>
<tr>
<td>GYÖRGY E. SZÖNYI</td>
<td>Indecorum and the Subversion of Equity in Shakespeare's Troilus and Cressida</td>
<td>209</td>
</tr>
<tr>
<td>GIUSEPPINA RESTIVO</td>
<td>Shylock and Equity in Shakespeare's The Merchant of Venice</td>
<td>223</td>
</tr>
<tr>
<td>DANIELA CARPI</td>
<td>The Inequitable Trial in Webster's The White Devil</td>
<td>249</td>
</tr>
<tr>
<td>JOHN SCAGGS</td>
<td>'A Kind of Wild Justice'?: Equity and Revenge in Early-Modern Revenge Tragedy</td>
<td>259</td>
</tr>
<tr>
<td>YVONNE BEZRUCKA</td>
<td>Law vs. Equity: Jarndyce vs. Jarndyce in Charles Dickens's Bleak House</td>
<td>269</td>
</tr>
<tr>
<td>SUSANA ONEGA</td>
<td>Patriarchal Law and the Equity of Love in Fowles' A Maggot</td>
<td>279</td>
</tr>
<tr>
<td>CARLA SASSI</td>
<td>Myths of National (In)Justice: James Robertson's Joseph Knight as a Vehicle of Equitable Judgement</td>
<td>293</td>
</tr>
<tr>
<td>RÜDIGER AHRENS</td>
<td>Equity in Colonial and Postcolonial Discourse: the Case of Joseph Conrad and E. M. Forster</td>
<td>307</td>
</tr>
<tr>
<td>ISOLDE SCHIFFERMÜLLER</td>
<td>Life in the Power of the Law: Kafka's The Trial</td>
<td>319</td>
</tr>
<tr>
<td>WALTER BUSCH</td>
<td>'Rechtfertigung' (Sense of Justice) and the Crisis of the Law, Heinrich v. Kleist's Novella Michael Kohlhaas</td>
<td>331</td>
</tr>
<tr>
<td>CHIARA BATTISTI</td>
<td>&quot;Let Right Be Done&quot;: or Marnet's Quest for Equity in The Winslow Boy</td>
<td>343</td>
</tr>
</tbody>
</table>
MAURO BUSSANI and FRANCESCA FIORENTINI (University of Trieste)

The Many Faces of Equity. A Comparative Survey of the European Civil Law Tradition

Outline

This paper aims to provide a comparative analysis of the meaning and the role of equity in the Continental Europe private law tradition. In particular, it will show that within the realm of history, equity lends itself to use as a mirror of the role played by jurists in the law-manufacturing process. Following the evolution of equity in different legal systems will yield a reliable picture of the particular balance achieved between institutional settings and the various, concuring and cooperating elements of the law-making process.

For this purpose, after some preliminary remarks intended to set the scenario (section 1), we shall briefly outline the Western historical roots of the notion of equity, starting with the legal experiences of Ancient Greece (section 2) and Rome (section 3). Subsequently, we shall point out how, on the shoulders of those past traditions, equity became one of the core instruments of law-making activity in the age of the ius commune (sections 4-6). We shall then try to clarify the role assumed by equity when private law codifications brought about major change in the sources of law, so that the notion of ‘law’ eventually came to overlap with that of ‘positive law’ (section 7). Through brief discussion of the French, German and Italian experiences we shall highlight how the set of technical devices embedded in the equity tradition was (and still is) far from being eliminated – or from having its scope reduced – by the long wave of positivism (sections 8-15 and 16-17).

Although the present analysis is restricted to the civilian experience of the European tradition, cross-references and overlaps with the common law will come as no surprise to comparative law scholars. On the contrary, these interactions will appear to be nothing other than peripheral evidence for the broader common core upon which the Western legal tradition is based.¹

¹ Mauro Bussani is the author of sections 16-17. Francesca Fiorentini is the author of sections 0-15.

1. The legal roots of equity

In general terms, the various meanings of 'equity' in private law have always oscillated between two poles linked by the idea that equity should substantiate "justice under the circumstances". On the one hand, equity stands as a view of the very essence of law on the basis of the idea that if positive law is to be 'just', it should always be applied so that the same treatment is guaranteed in identical cases. On the other hand, equity has been regarded as the antithesis of positive law, because 'justice' entails that positive law must be interpreted and applied to each real case by considering all the particular circumstances, objective as well as subjective.

The above general notion of equity as 'justice under the circumstances' has not always been filled with the same contents. 'Justice under the circumstances' has sometimes represented the implementation of considerations regarding ethics or fairness. At other times, the process of reaching a legal solution by means of equity has been described by jurists as an interpretive activity strictly driven by legislative directives.

Moreover, equity—and, from a historical point of view, this has been its most prominent role—has been used by jurists to convey the whole of their interpretive culture in the law-making process: a device, to put it in other terms, with which jurists have been able to draw on a broader, meta-positive apparatus when adjudicating private law litigations.

These various shifts in the meaning of the term extend their roots into both the Greek notion of equity (epieikeia) and the Roman notion of aequitas.

2. Epieikeia in Ancient Greece

Early Greek speculation (c.750 - c.600 B.C.) did not differentiate between nature and reason. This primitive scheme of thinking, which was also reflected in the epic literature, did not distinguish between the concepts of justice (represented by the goddess Themis) and law (Dike) in abstract terms. Always implicit in these representations was the idea that human society and the phenomena of nature were governed by a cosmic order regulated by the gods and which not even the gods could change.

During the later archaic (c.600 - c.500 B.C.) and the classical periods (c.500 - c.332 B.C.), the advent of written legislation exerted a decisive influence upon the formation of new concepts of law and justice. The existence of positive law introduced a clear distinction between aspects of community life which could and those which could not be regulated by enacted law. This refined the concept of Themis from a direct expression of the divine will into an indication of what ought or ought not to be done in a certain human community according to the will of a specific human authority. For this reason, the term nomoi, which denoted positive enactments, began to flank themis; and the term Dike, although it retained the meaning of what is right and just, also came more concretely to denote the legal process, the claims of litigants, and the judgments of the courts.

Moreover, positive law differed in every single city-state, for it reflected usages specific to the particular community, and this contributed to shifting the focus of philosophic speculation from the belief in an immutable order.
governing human affairs to positive enactments regulating human society. The idea that laws changed according to the place and time led to the assumption that laws were mere conventions which might conflict with justice and in any event could not be predicated upon justice. The core itself of Greek ideas on justice—which were then transmitted to posterity—became a synthesis between the sense of ‘just’ and the belief in a rational social order, on the one hand, and the diversity—and variability—of laws, customs and enacted provisions on the other. This synthesis is evident in Aristotle, whose relevant passages on these issues are contained in the Nicomachean Ethics and in the Rhetoric.

On summing up the passages on equity in the Ethics and Rhetoric, it appears that Aristotle conceived equity in two meanings. As regards the sources of law, he defined equity as the source of the rule for the particular case, as opposed to the (general) rule of positive law.

As regards how the law must be interpreted, Aristotle perceived equity as a criterion for the interpretation of positive law, suggesting that priority should be given to the ratio (‘reason’) of the law over its text.

Not surprisingly, in the Greek antiquity the general attitudes of the legal process and of philosophical speculation mirrored each other. That equity (epieikeia) was elaborated as a notion included in justice, and not opposed to justice, is corroborated by the legal literature. Studies on the oratory texts show that epieikeia—notwithstanding the lack of express reference to this term in the discussions before the courts—was a method of applying the law that was opposed to a literal reading of the statutes.

In conclusion, for the ancient Greeks, the flexible element of equity became a fundamental argument in the public discourse on justice and its technical outcomes. And this view, as we shall see, was a cornerstone for future developments.

3. The Roman aequitas

There are no doubts regarding the reception of Greek philosophy in Roman aristocratic circles through the schools of rhetoric, at least from the 2nd century B.C. onwards. For our purposes here, however, it is the nature and the extent of the influence of the Greek equity doctrine upon the Roman legal order which should be assessed.

...but by a mere ‘yes’ or ‘no’ ruling; and they were not registered: E. M. Harris, “Le rôle de l’epieikeia dans les tribunaux athéniens”, Revue Historique de droit français et étranger, 1 (2004), pp. 1-14.

Thus permitting judges to take extenuating circumstances into account: ibidem. For the presence of equity in the oratory as a cryptotype see C. Carey, “The Rhetoric of Law in Athenian Oratory”, Journal of Hellenic Studies, 116 (1996), p. 42: “to judge from surviving oratory, there appears to have been a fundamental inhibition against frontal assaults on the authority of law [...] the blunt opposition of epieikeia and law favoured by rhetoricians is avoided. Epieikeia figures in surviving oratory not as text, but as sub-text; explicit appeal to epieikeia is in fact not found in the orators”. On practical applications of equity by Greek courts see also C. K. Allen, Law in the Making, Clarendon Press, Oxford, 1964, p. 292.

It should be borne in mind that in ancient and pre-classical times the Romans conceived their ius civile as an immutable and eternal law symbolizing the origins of civitas. When commercial relations with other populations increased and the ius civile as the private law applicable to Roman citizens only was no longer suitable for regulating the new kinds of transaction, the evolution of the law was brought about, not by leges publicae (public statutes) nor by senatus consultum (acts of the Roman Senate), but by a magistrate called the praetor. By 242 B.C. the praetor peregrinus (a magistrate who administered litigation between foreigners) was introduced — as opposed to the praetor urbanus (the magistrate administering litigation between Roman citizens) — to regulate the new forms of commercial transaction with aliens. Because the praetor peregrinus was not bound to private law on affairs between citizens and to its procedures of forms of actions called legis actions, he was able to extend the decision of the iudex, i.e., of the subject ultimately charged with the decision of the case — as legally framed in the forms of action elaborated by the praetor. Thus created was a new body of law which fundamentally corrected and supplemented the older ius civile and employed such judicial standards as aequum et bonum (right and fair) and bona fides (good faith). As W.W. Buckland points out, "in speaking of equity in Rome" we are to "think of the Praetor as its chief source. In this capacity we have to think of him not as a judge, but as a lawmaker", a lawmaker who "was contemplated as having, and as being bound to have, a special leaning towards equity".

16. In the Republican age the idea of modifying the ius civilis was not conceivable, because ius civilis represented the very origins of the civitas and was therefore considered immutable: G. Broggini, "Aspetti storici e comparatistici", L'equità. Atti del Convegno del Centro nazionale di prevenzione e difesa sociale, Lecce 9-11 settembre 1973, Giuffrè, Milano, 1975, pp. 17 ff., p. 20.

17. Statutory provisions issued by the assemblies with voting power, which, in the age of the Republic, were: comitia curiata, comitia centuriata and comitia tributa. Such statutes were never a main source of private law: W.W. Buckland, A Manual of Roman Private Law, Cambridge University Press, Cambridge, 1953; Scienza, Aalen, 1981, pp. 2 ff., here p. 5.

18. These were quasi-legislative instructions to magistrates issued by the Senate: W.W. Buckland, A Manual of Roman Private Law, pp. 10 ff.

19. In the later centuries of the Republic and in the first century of the Empire, justice was administered by annually elected magistrates, the praetores: these had the ius dicendi, i.e., the power to issue proclamations of the legal principles they intended to follow. All ordinary litigation came before them in the first instance and the issue was framed under their supervision, though the actual trial was before a iudex, who was not a professional lawyer, but a mere private citizen of the wealthier class: W.W. Buckland, A.D. McNair, Roman Law and Common Law, Cambridge University Press, Cambridge, 1974, p. 3; see also M. Kaser, "Zum Ediktrecht", Zeitschrift für Reichsrecht, II, H. Böhlau Nachf., Weimar, 1951, pp. 21 ff.

20. W. W. Buckland, Equity in Roman Law, University of London Press, London, 1911, reprinted edition, Rothman, Littleton, Colorado, 1983, pp. 5 ff. The grant of actio ueiis, for which there was no corresponding rubric in the edict, has been traced back to an equitable law-making iudex, at p. 7. See also F. Fringsheim, Romum et aequum, pp. 173 ff.

21. W. W. Buckland, Equity in Roman Law, p. 3. Thus, Guisot could say in his Institutiones: "Saepe enim accidit, ut quis iure civili tesseatur, sed iure privato non sit locutio condendam" (4, 116A); A. Guarna, Esequile diritto romano, in Nuovissimo Digesto Italiano, VI, UTET, Torino, 1960, pp. 619 ff., here p. 622. In other terms, to quote Papinian, "ius praetorium est quod praetores introducunt adiuvandos vel supplendos vel corrigendos iuri civili jus Gratia proprie utile publicum" (D. 1.1.7.1). On the meaning of this quotation see also A. Watson, "Equity in the time of Cicero" in A.M. Babelo (ed.), Aequitas and Equity, pp. 22 ff.


24. During the 3rd century A.D., the sources of law were centralized; the interpretation of existing law was reserved to the emperor and the literary activity of the praetors-
the old procedure with a new one to be held before an official judge, who was now regarded as an organ of the state (no longer as a private index) and deriving the authority of his decisions directly from the emperor.25

Thus, the notion of aequeitas changed its scope. Previously the key instrument of judicial power, it now assumed a meaning which emphasized its opposition to ius. Equity became the means by which the princeps (i.e. the emperor) could modify the existing law.26 Hence a doctrine – resembling the Aristotelian theory of equity as superior to strict law – was gratefully adopted by the absolute monarchs, who regarded strict law and its judicial interpretation as undesirable restrictions on their authority.27

Formally, it was the Christian emperor Constantine who ordained (in 314 A.D.) that justice and equity should in all matters prevail over strict law, yet reserving to himself (two years later: 316 A.D.) the power to interpret. Thus it was with Constantine that equity began to be called aequeitas christiana. This opened the way for the identification of justice with Christian justice and for the idea of a universal authority resting with the emperor and conferred upon him in order to safeguard justice, virtue, and the Christian faith.28

4. Equity and interpretatio in the Medieval legal Renaissance

This brings us to consideration of legal experience in the Middle Ages, where a greater role was played by equity in interpretation (the so-called interpretatio) of legal texts following re-discovery of the Justinian Corpus Iuris Civilis.29

A state in the modern sense did not exist in medieval society; and at the same time none of the princes, monarchs, local lords and free cities had a monopoly of law-making. This fostered the idea that the law was relatively autonomous from political power.30 The latter was perceived as neither the sole nor primary source of order in society. The former was to be regarded as the source of a supreme order deriving (unlike in modern legal positivism) from the "natural order of reality" (natura rerum) or from God: that is, from an entity superior to the human condition and superior to any political, contingent power.31 The absence of identification of law with a unitary political power meant that the everyday law-making process required an actor able to respond to the needs of society. This role could only be, and indeed was, performed by the doctores. Legal science was the only – one might say the ‘lonely’32 – actor in the law-making process.

The problem confronting legal science, however, was its power deficit, and as a consequence the law had to be related to an authority which legitimized its production and its implementation. This legitimization was readily found in Justinian’s re-discovered Corpus Iuris, which had been the law of a universal empire emanating from a Catholic emperor.33 Thus the core reference for the activity of legal science was the text of Justinian, not because the law contained therein was necessarily the best law for medieval society, but because legal science needed to relate every legal solution that it ‘found’ to the authority of a legitimizing text.

The building process of a legal order by the scientia iuris was carried out by means of a peculiar interpretation of the Justinian legal texts. So what did legal scholars do? First, they examined the Roman text and extracted its inner justification (ratio legis), which they opposed to the wording of the text (verba legis). Second, on the former ratio they performed the interpretatio, i.e. the interpretation of the legal facts. Third, they regarded this interpretive activity as an exercise in aequitas, that is, in equity. In this process, equity was the key means with which to associate formal law with the facts.34 But for medieval legal science – this being the fourth and final point – equity incorporated into legal order the inner nature of reality (natura rerum, rerum convenientia) as


26 The cognition extra ordinem differed most from the proceeding per formulas in its public character. The judge in the cognition extra ordinem was an organ of the state and not a private index as in the previous formulary procedure: W. W. Buckland, Equity in Roman Law, p. 6. In the imperial age, a hierarchy of the judiciary began to arise, its supreme authority being the emperor. By contrast, in the formulary procedure the authority of the judicial decision derived directly from the authority of the praecon, within the limits of his territorial competence: W. W. Buckland, A Manual of Roman Private Law, p. 389 ff.


28 H. E. Yntema, “Equity in the Civil and the Common Law”, p. 72 ff.

29 At this time, equity absorbed elements of beneficent and certitas in an endeavour to soften the rules in consideration of special circumstances, and explicitly took the form of a criterion for the settlement of conflicts of interests: A. Biscardi, “Sulla Clouda e Episkopía” in A.M. Rabello (ed.), Aequitas and Equity, pp. 1 ff., p. 7.


33 Ibidem, pp. 154 ff. speaks of the ‘loneliness’ of the medieval legal scholarship as a source of law.


35 If we consider the famous definition given to aequitas by one of the first Glossators, we obtain a telling effective idea of the role played by equity in the medieval mentality: "being equity source and origin of justice, it is a matter of identifying what equity is. Equity is the harmony of facts that requires an equitable legal treatment whenever equal causes arise. God himself can be qualified as equity. Equity, indeed, is nothing other than God". This is the famous "Fragmentum Fragense" in H. Fitting, Juristischen Schriften des frühen Mittelalters, H. F. Halbe, 1876, pp. 236 ff., p. 216.
5. Aequitas canonica

As mentioned, another foundational element in the Western legal tradition is the experience of canon law, which constituted a crucial cultural crossroads between the civil and common law sub-traditions.

The importance of the notion of equity as the very core of the entire edifice of the Church's legal order hardly needs to be emphasized. Suffice it to point out that, from the outset, the legal order of the Church was erected on a conceptual opposition between, on the one hand, a divine law, immutable and eternal, and on the other, human law, mutable and subject to modifications from time to time and from place to place. Since the formation of early canon law (eleventh century), the authoritative texts contain numerous terms, such as "temperance," "moderation" (temperantia, relaxatio), indicative of the characteristic interpretative approach to canon law, the distinctive feature of which was indeed its instrumentality to the meta-legal supreme aim.

The recourse to interpretive devices intended to ameliorate the strictness of legal rules, and the reference to the aequitas canonica, became well-established in the twelfth century. Thereafter, equity, from the vague ideal of justice that it represented in the (civil) law past, became the very essence of applied law. Aequitas canonica became the key instrument with which to connect facts-driven flexibility with the Church's strict law. If we bear in mind that the existence of the Church and of its legal order was oriented to (and determined by) a meta-legal result — the 'salvation of souls' (salus animarum) — equity as a bench mark for the (canon) law-giver can be further explained as the obligation (a) to fill the gaps in positive law and (b) to derogate from civil law whenever it was necessary to prevent sin (periculum animae).

It was the supreme aim of averting "sin" and "damnation" that justified equity and at the same time imposed it as a formative unwritten principle of the canon legal order. Equity became an openly recognized source of law in the hands of the law-giver.

40 See the Prologus in Decretum of Yves of Chartres, col. 52 A quoted by P. Grossi, L'ordine giuridico medievale, p. 122.
42 See Gratian's canon law collection Concordia discordantium canonum (about 1140). Reference to aequitas is constant in most legislative Papal acts (decretales, i.e. decretales) of post-Gratian times: Onorio II (1124-1130); Alessandro III; Innocenzo III (1198-1216); Onorio III (1216-1227); see P. Grossi, L'ordine giuridico medievale, p. 212.
44 The canon law-givers were the Pope, who enacted the law mainly by issuing decreals, the prelates, who had to guide believers in the Christian way of life by applying the canon law rules, and the judges of the ecclesiastical tribunals, such as the Sacra Romana Rota: P. Grossi, L'ordine giuridico medievale, p. 215; L. Musselli, Storia del diritto canonico, Gappichelli, Torino, 1992, pp. 44, 52; A. Cavanna, Storia del diritto canonico, Europa, p. 168.
45 Onorio III, Decretales, I, 36, 11: "In his vero, super quibus inas non inventus expressum, procudas aequitate servata, semper in humaniorum patrem...deolando securum quod personas et causas, loca et tempora videns postulat".
47 See supra, footnote 33. The influence of the civil law school of Bologna was clearly present in this evolution. As noted above, the factual and practical dimensions of equity in
observe the complex relationship among the different sources of law and identify the style of a given legal experience.

It is from this perspective that we shall now examine cooperation among legal formants (i.e. every formative element that contributes to the shaping of legal rules) in some of the leading civil law experiences: those represented by French, German, and Italian law.

7. Equity and legal positivism

As well known, in modern times the Continental legal tradition has been faced by a powerful factor, legal positivism, which has profoundly affected the role of jurists, as well as making, giving and studying of law.

It is hardly necessary to recall that the advent of positivism was not a peculiarity of the European continent but it was there that it found a historical connection with (and a specific connotation through) the phenomenon of private law codification. The latter gave positive law a centripetal force that it

51 According to the structuralist approach of Rodolfo Sacco, the law is formed by a plurality of 'legal formants', i.e. every formative element that contributes to the shaping of legal rules. Thus, one may distinguish among the rule of positive law, the rule as interpreted by the scholar, or the rule as applied by the judge; but one can also break down these rules into further sub-elements by identifying, in each of them, in principle, the declaration which differs from detailed rules. Elements which form the law may also be meta-legal ones such as policy considerations, economic factors, the social context and values, and the structure of the legal process (organization of courts, administrative structure and practice, etc.) when they are relevant to the solution of a given legal problem. Legal formants may not have the same content: it is their complex relationship that gives a specific content to a legal solution. R. Sacco, "Legal Formants: A Dynamic Approach to Comparative Law", American Journal of Comparative Law 39 (1991), p. 1; "Formante", Digesto IV delle Discipline Privatistiche, Sezione Civile, UTET, Torino, 1992, pp. 438 ff.


previously did not possess. Law legitimacy tended to overlap with a material, political power regarded as the source itself of codification. Consequently, "law" tended to be confused with "positive law", and the role of scholars and judges as law-manufacturers was bound to be disregarded or even despised. Legal positivism was driven by the dream of rendering the legal order into a complete, autonomous and self-sufficient system of positive rules. From this perspective, equity as a gap-filling conveyor of meta-positive elements, of ethics, morals, fairness, equity as the predominance of the jurist over the legal text, had to be greatly restricted. We shall now use the notion of equity as a device with which to measure the effective force of this historical shift in the long period. We begin with France.

8. Equity in modern French law: a struggle over power, prestige and the meaning of justice

In order to protect the new order, the Revolutionary power introduced a series of measures designed to ban any kind of judicial discretion, to confine judges within a strict separation-of-powers framework, and to prevent them from taking part either directly or indirectly in the exercise of legislative power.

Judges were forbidden to express their interpretation of the laws, and the prohibition was enforced through a wide array of techniques, of which the most effective was referral to the legislature of any problem on interpretation of enacted law. In this way all equitable questions were routed outside the control of courts into the hands of the legislature. All that was left to judges was the task of qualifying the facts. Judicial power ultimately became nothing but the power to apply the law as strictly (i.e. as closely in keeping with the legislature's orientations) as possible. In this context the notion of the judicial decision as a legal syllogism consisting of major premise (statutory law), minor premise (the facts) and conclusion (judicial decision) was at the core of the legal process, since it fully responded to the dominant culture of positivism.

This was the operative and practical allocation of powers in a context that – in the history of ideas – is often considered the apogee of the strict separation of powers theory.

56 G. Gorla, "Giurisprudenza", Enciclopedia del diritto, XIX, Giuffrè, Milano, 1970, pp. 488 ff.; 501 reports Ruberspierre's speech to the constituents assembly of 18 November 1790: "Ce mot de jurisprudence des tribunaux, dans l'acceptation qu'il avait dans l'ancien régime, ne signifie plus rien dans le nouveau, il doit être effacé de notre langue. Dans un État qui a une constitution, une législation, la jurisprudence n'est autrue chose que la loi." On the creative activity of non-legislative institutions in the pre-revolutionary France, see also J. P. Dawson, Equity and the Royal Prerogative, p. 2.
57 The constitution of August 17, 1789, art. 9 declared that “no judge will be permitted, in whatever manner, to interpret the law and in the cases where it is doubtful, the judge will refer to the legislative body in order to obtain, if necessary, a more precise law” (This article became the substance of art. 12, law of 16-24 Aug. 1790). Through this referral (référence) legal questions passed directly from lower courts to the legislature. Another kind of legislative referral was possible if required by the litigants, and in this case the legislature decided the case with ad hoc decrees: F. Gény, Méthodes d'interprétation et sources en droit privé positif. Essai critique, Librairie générale de droit et de jurisprudence, Paris, 1954, I, pp. 85 ff; R. Carré de Dalbega, Contribution à la théorie générale de l'État, Sirey, Paris, 1920, I, L, pp. 727 ff; V. V. Palmer, "May God protect Us", p. 1303. However, the experiment of legislative referrals overburdened the legislature and was abandoned in 1828.
58 See R. Carré de Dalbega, Contribution à la théorie, pp. 720 ff (in the wake of Montesquieu's Esprit des Lois). This revolutionary programme has been called by Merryman "the French deviation", meaning by this expression the independent direction taken by France during and after the Revolution of 1789, when it parted from European juris communis and opted for a national legal order. This national legal system was characterized by a peculiar interpretation of the doctrine of separation of powers, which greatly demeant judges and their role: J. H. Merryman, "The French Deviation", Scritti in memoria di Gino Giusti, I, Giuffrè, Milano, 1994, pp. 617 ff., 629 f. The author also stresses that this attempt to make the law judge-proof failed and the French system, as we shall shortly see, resumed the judicial function.
The Exegetical School

The above extreme positivistic approach survived long after the end of the revolutionary period, because it was sustained by a dominant ideology which—
to some extent—still today is considered and respected in France. This ideology was grounded on the above view of the separation of powers, and it was favoured by the centralization of government functions, as well as by the political weakness of the judiciary. This explains the success of the Exegetical School, which shaped the opinion of contemporaries and dominated the intellectual world until the 1830s. The overall approach of the jurists of this School is well represented by the motto (Demolombe’s) “the texts above all”, which obviously placed the emphasis on giving legal solutions through a process of pure deduction from the written law, and thus eliminated any interpretive role of the judge (and of the scholar).

The Exegetical School’s official declarations about the predominance of the text over the jurist was, however, nothing but a formal expedient which served to hide much wider and more powerful interpretive activity by judges and doctors. The extent to which Demolombe’s motto was a mere declaration—and in no wise represented the methodology actually applied—is very well illustrated by a body of distinguished legal literature. Amidst an endless list of examples, it will suffice to recall a passage from Demolombe himself—written on the topic of the formation of contrat—to furnish clear-cut evidence of this fiction.

The definition of the notion of convention is given by the Civil Code at art. 1108, where the code, in indicating the elements forming the convention, expressly refers to le consentement de la partie qui s’oblige. Here, the literal meaning of the provision is simple and clear: in the literal meaning of the code, every contract is regarded as a promise which is binding for the offeror. Then any unilateral promise is required and sufficient for the existence of a contract. Acceptance is not required, except when also the offeree must oblige himself. The jurists of the Exegetical School—far from following the codal provision—turned the rule upside-down by means of interpretation of the declaration of will by the promisor to be called consentement, then the consentement must be bilateral.

Contrary to what has sometimes been argued, the law-making role of the jurist was reinstated in France (not starting from the seminal work of François Gény at the end of the nineteenth century) within the same school that constantly took pains to present itself as the defender of the supremacy of the written text over any other interpretive formant. In other words, even though the supremacy of the text seemed to survive in the declarations of the Exegetes, equity as the power of the jurist (through his/her legal culture reservoir) to cooperate in the law-making process continued surreptitiously to operate as a propulsive element of the legal system.

The place of equity in French private law: the official discourse

To be sure, the distrust of judicial equity and the supremacy of positivism brought to the fore by the Revolution deeply affected French legal thought. But an inquiry into the inner structures of French legal process reveals quite a different balance between positive law and interpretive formants behind the hide-and-seek game played by the Exégètes. Indeed, the equity issue in French private law must today be regarded from two main perspectives: the official

60 Thus according to V. V. Palmer, From Embrace to Banishment, p. 297.
63 See e.g. R. Sacco, “Introduzione al diritto comparato”.
64 Other elements are required, such as a valid causa, but this is not relevant to our point here.
65 C. Demolombe, Cours de Code Napoléon, XXIV, Fedeone, Paris, 1868, n. 45, 47 f.: “L’article 1108 semblait n’exiger que le consentement de la partie qui s’oblige. Mais il est manifeste que la convention ne peut se former que par le consentement de toutes les parties qui y figurent, non seulement de celle qui s’oblige, mais encore de celle envers laquelle l’obligation est contractée; c’est ce que reconnaît virtuellement l’article 1108 lui-même, par l’emploi qu’il fait du mot consentement, qui implique la réunion de deux volontés, dont l’une se noue avec l’autre. C’est-à-dire que deux éléments sont essentiels pour la formation d’un consentement; l’offre ou la proposition d’une part, et l’acceptation d’autre part, tels en sont les deux termes inéprouvables!”. Even more significant are the words of C. S. Zachariae, Cours de Droit français, Méline, Bruxelles, 1850, f. n. 543, f. 1: “L’article 1108, qui n’exige formellement que le consentement de la personne qui s’oblige, est, sous ce rapport, rédigé d’une manière vicieuse”.
66 V. V. Palmer, From Embrace to Banishment, pp. 299 ff.
67 F. Gény, Méthode d’interprétation. Ever since that date it has often been recognized that, without the help of case law, the civil code could not have survived the evolution of the nineteenth century. E.g. L. Joossens, Évolutions et actualités, Sires, Paris, 1936, p. 67; R. Savatier, “Destin du Code Civil Français”, Revue internationale de droit comparé, 16 (1945), pp. 637-664, p. 643.
68 To put it in Shakespearean terms, we could say “The law hath not been dead, though it hath slept” (W. Shakespeare, Measure for Measure, Act IV, Scene 1).
side of the coin, and the unofficial or covert one. As to the last side to be stressed is the place afforded to equity by (i) positive law and (ii) the in-principle declarations of French courts.

(i) The code's general frame is arts. 1 and 5, which express the obligation imposed upon the courts to connect all the solutions adopted with the enacted law. These well-known provisions state that "a judge who refuses to decide a case, under the pretext of silence, obscurity or insufficiency of the positive law may be prosecuted as being guilty of a denial of justice" (art. 4); and that "judges are forbidden to decide cases submitted to them by general and regulatory provisions" (art. 5).70 As a consequence of the attempt to ban equity — as the conveyor of the judicial law-making function — only a few articles of the code expressly refer to even that form of equity (équité) meant to give the judge partial and restrained leeway in departing from the wording of the written text. Besides, these are provisions on very particular situations, the only possible exception being art. 12 of the new code of civil procedure, which enables the judge to ground his/her ruling on equity when statutory law expressly allows it or the parties ask the judge to decide as an arbitrator who can depart from the rules of written law (cpr. art. 1474 c.p.c.).71

70 It should be borne in mind that the preliminary versions of the French civil code (art. 11 of the draft of the year VIII; 1800) contained a different rule which stated that "in civil matters, the judge, in the absence of a specific statute, is a minister of equity. Equity is the return to natural law or to customs received in the statutory law". This rule did not prevent the supremacy of positivism in the final version of the Code civil. The chief objection to its adoption has been that its terms sanctioned the power of the judges to complement and to supplement the written law, conscripting judge-made law as a direct, albeit subsidiary, source of law. The theory of judges as masters of equity was then definitively dismissed by the court of cassation: Cass. Soc. Jan 23, 1948, J.C.P. 1948.II.4229; J. Dufaux, "Equity and French Private Law" in R.A. Newman (ed.), Equity in the World's Legal Systems, pp. 245 ff, 248.

71 In the field of contract law, art. 1135 reads "agreements are binding only not as to what is therein expressed, but also as to all the consequences which equity, usage or statutes give to the obligation according to its nature". In the law of property, art. 565 (even if it is hardly ever applied: P. Malaunie, P. Morvan, Droit Civil, Introduction générale, Paris, Defrenouos, 2003, p. 32) subordinates the right of accession to the principles of "natural equity". Art. 1579 provides that equity shall have precedence over appraisals in marriage. Other cases of express reference to equity can be found in matters related to set-off in undivided property, increase in remuneration of undivided owner for ameliorations of the undivided property (art. 815-13); see also J. Carbonnier, Droit civil, Presses Universitaires de France, Paris, 1999, p. 33.

72 The overall approach of French scholars, too, displays official distrust in equity as a source of law, thereby once again highlighting the distance between what jurists say and what they actually do: see text and notes below. As general references on this point see the "Rapport français" by P. Malaunie, Les réactions de la doctrine à la création du droit par les juges, Travaux de l'Association Henri Capitant, XXCI, Dalloz, Paris, 1982, pp. 81 ff. One of the most frequently cited sentences in the French literature is that l'équité n'est pas une source du droit ni, elle-même, règle de droit: P. Malaunie, P. Morvan, Droit Civil, p. 33; J. Ghestin, G. Goubeaux, "Introduction générale", Traité de droit civil sous la direction de J. Ghestin, Libraire générale de droit et de jurisprudence, Paris, 1990, p. 196. This is usually explained with the classical argument that a legal rule must be abstract, general and stable in order to protect the foreseeability, and the principle, of equal treatment before the law. Equity is by its nature concrete, particular and ephemeral: all these features increase the risk of unexpected and arbitrary judicial decisions. P. Malaunie, P. Morvan, Les réactions de la doctrine: if it is not a source of law, equity is only a source of inspiration of the positive law, like natural law, C. Albiges, De l'équité en droit privé, Libraire générale de droit et de jurisprudence, Paris, 2000, p. 4. Even distrust of judge-made law as a threat to the principle of separation of power can be found in some legal writers, for all M. P. Fabreguettes, Le logique judiciaire et l’art du juger, L.G.D.J., Paris, 1926, p. 402: "n'est en matière d'administration de la justice, pire chose que l'équité, car l'équité n'est qu'un sentiment: variable comme tous les sentiments, elle diffère donc du tout au tout suivant les individus"; O. Dupeuxy, O. Dupeuxy, "La jurisprudence, source abusive du droit", Mém. offerts a Jacques Maury, II. Dalloz et Sirey, Paris, 1960, p. 349 ff. Also R. David has noted that the term équité has a bad reputation among jurists ("La doctrine, la raison, l'équité", Revue de recherche juridique, 1986, pp. 109-157, p. 136).

73 In the field of contract law: Soc., 9 Oct. 1985, D., 1986, Jur., 420, in the field of successions: Civ. Ire, 22 July 1985, Bull. Civ. I, n. 235, 209; Civ. I, 18 July 1995, J.C.P. 1996, N, II, 935, on matters related to prêmes de démembrement: Soc. 18 Jan. 1989, Bull. civ. N, 45, 56. For more references see C. Albiges, De l'équité en droit privé, pp. 97 ff.; L. Cadier, "L'équité dans l'office du judicieux civil, Justice et équité", Justices, 9 (1988), pp. 87-93, p. 88. It is also of interest that during World War I French courts refused to recognize the théorie de l'imprévision as a technique with which to remedy unjust contractual results deriving from inflation (Civ. 6 Jan. 1921, D.P.1921.1.73; see also R. David, "L'imprévision dans les droits européens", Études Jafreuf, l'actualité de droit et de science politique d'Aix-Marseille, Aix-en-Provence, 1974, pp. 211 ff.). Meaningfully showing a trend favourable to have special equitable interventions to the legislator (and not to the courts), the problem was dealt with by special legislation based on policy reasons (e.g. see the début de l'exposé des motifs de la loi d'allocation, of 21 Jan. 1918, in D.1918.2.261, spéc. c. 7).
11. The covert discourse

Indeed, even today, and even when positive applicable law does not expressly refer to l’équité, the extent to which judges of first instance as well as conseillers de Cassation resort to the set of equity devices – i.e., to their interpretive power stemming from their legal culture – is readily apparent. And this applies not only when the application of the legislative rule would result in solutions (perceived by the judge as) ‘unjust’ but whenever the wording of the statute is defective because the factual circumstances are deemed not to fit the provision, or because societal needs, as interpreted by the law-giver, require the latter to go beyond or aside from the legal text. From this perspective, one may conclude that the dominant view that recourse to equity is only allowed when positive law expressly admits such recourse is no more than an expedient to ‘keep up appearances’.34

Yet appearances are important. The expectations of French (and Continental) public opinion are not (always) met by equitable arguments. In other words – as has been said35 – judicial decisions should give the public what the public wants, i.e. formal observation of legal rules that are referable to legislation and consequently have democratic legitimacy. To be sure, this explains the longstanding judicial practice of grounding rulings on statutory provisions only; but


36 M. Lasser, “Judicial (Self-)Portraits”, p. 1354

the adjudication process needs to operate in practice (and does so) by means of a wider array of tools in which positive law is only one of the legal formants leading to a decision, and where the interpretive role of the judge is unavoidable as well as crucial.

Various examples may be cited of the judicial power to keep any positivistic dogma at bay in modern French private law.1 One of the most striking is the extraordinary development of tort law on the basis of just five articles in the code (1382-1386)37. A system of strict liability has been constructed from a codified system of tortious liability clearly based upon fault; but – and this should be stressed – judges never ostensibly break away from the form and style of the legislator. They always keep up appearances.38


12. The French style

In conclusion, the French experience shows that institutional hindrances cannot exert a long-term effect on judicial equity, because judges are trained to work around those obstacles. The flourishing of positivist bans on equity was originally meant to curb judicial power; nevertheless, formal obedience to the text rapidly became—and still is—the disguise beneath which fresh life is breathed into scholarly and judicial law manufacturing. Legal fictions, together with deceitful self-portraits by scholars and judges, are the bases on which the French jurist is trained to deal with its own "equitable" power, the devices through which the official portrait of judges is tied up in a compromise with the unofficial one.

13. Equity in German law

In Germany the codification of the BGB brought about a major change in the sources of law by substituting enacted enacted law for scholarship as the long-standing principal formant. Nevertheless, German law has undergone a profound process of cross-fertilization between positive law and equity, as innovative judicial power, since the very beginning of its codified private law era.

First, if we take 'justice under the circumstances' as an outcome pursued by legislative directive, we note that the German civil code contains provisions which explicitly refer to billig Ermessen (Billigkeit) as a principle entailing due judicial consideration of the specific circumstances of the individual case: examples are the power of the judge to determine unspecified terms for contractual performance, to set aside excessive contractual damages, to determine the amount of the Schmerzensgeld, etc. Secondly, when we take equity as the conveyor of the interpreters' legal culture, we realize how wide is the portal through which this kind of equity finds its way into German private law. This portal is kept open by the Treu und Glaube principle of § 242 BGB, as well as by the other Generalklauseln requiring judgments to be based upon good morals (gute Sitten) or necessary care (erforderliche Sorgfalt), all of which oblige the judge to seek the legal grounds for the decision elsewhere than in positive law. Despite the requirement widespread in German legal culture as well for rulings to be formally grounded on statutory provisions, it is openly recognized that § 242 and the other Generalklauseln legitimize the equitable work of the interpreter, enabling the latter to exploit his/her reservoir of legal culture outside the boundaries of positive law.

63 Other general clauses are contained in, for instance, BGB, §§ 138, 817, 819, 826 (regarding good morals); §§ 241a II, 259 II, 276 II, 831 I, 833 s., 836, 2038 II (regarding necessary care).

Let us provide some examples of implementation of the good faith paragraph (242) in order to give a brief idea of the entire edifice built by German courts through the use of general clauses. The systematization of case law by German judges and scholars has produced three main ways in which § 242 BGB profoundly affects the law of obligations:

(1) The provision has been used to create several duties additional to those expressly stated by contract clauses or by positive law.

(2) Paragraph 242 BGB has been used as a device to produce a restrictive effect against abusive exercise of rights — i.e., against any exercise of rights that is deemed to be outside the limits of good faith.


The wording of § 242 BGB (The debtor is bound to perform his/her obligation according to the requirements of good faith, ordinary usage being duly taken into consideration) only directly regulates how, in an already existing obligation, the debtor must perform his/her duties. Yet, even since enactment of the code, the rule has been broadly interpreted as concerning the obligation in its full extent as well as the duties not only of the debtor but also of the creditor. The provision is now widely applied also outside the boundaries of private law, for instance in the realm of administrative law and the law of procedure: G. H. Roth, "§ 242", Rdnr. 89 ff., 92 ff., 117 ff.

This approach to § 242 shows that the doctrine of Faltpgruppen is not a mere collection of cases, but rather a theoretical elaboration: J. Schmidt, "§ 242", Rdnr. 87 ff., 258 ff. For the influence upon German scholarship of K. Lorenz's "Typenlehre": see W. Weber, Staudinger Kommentar zum BGB, Sellier-de Gruyter, Berlin, 1939, Rdnr. 74. For a survey in English of the wide range of application of § 242 in German contract law see W. F. Ebke, B. M. Steinhauser, "The Doctrine of Good Faith in German Contract Law" in J. Bentzon, D. Friedman (eds.), Good Faith and Fault in Contract Law, Clarendon Press, Oxford, 1995, pp. 171 ff.

These duties (of care and protection: the so-called Fürsorge-, Schutz- and Obhutspflichten) serve to ensure proper execution of the contract. They require that, in fulfillment of the contract, creditor and debtor must behave in such a way that the person, property or other legal assets of the other party are not injured: G. H. Roth, "§ 242", Rdnr. 144 ff., 151 ff. Moreover, the duty of good faith obliges the parties to a contract to give relevant information to the other party, not only after the formation of the contract but from the very beginning of the negotiations and also after termination of the contract: J. Schmidt, "§ 242", Rdnr. 365, 350. Judicial law has developed remedies against the violation of these additional duties by identifying liability for culpa in contrahendo (for violations of pre-contractual duties) or for positive Vertragsverletzungen (for violations of existing — even though implicit — contractual duties): U. Diederichs, K.-H. Gursky, Principles of Equity in German Civil Law, p. 280.

The abuse of rights arises when the right is used by the person entitled to it in a manner inconsistent with the purpose of the provision (or of the contract clause) from which this right is derived; as well as when exercise of the right fails to fulfill the other party's reasonable expectations which the defendant himself had generated: J. Schmidt, "§ 242", Rdnr. 626, 451 f. e.g. see BGG NJW 1993, 3264 f.; BGG NJW 1980, 1043 f.; BGG WM 1971, 383. The abuse of rights also concerns the venire contra factum proprium cases, where at stake is a self-contradictory conduct of the defendant that has impaired some legitimate interest/right of the plaintiff: R. Singler, Das Verbot wider sprüchlichen

Verhaltens, CH Beck, Munich, 1993; G. H. Roth, "§ 242", Rdnr. 238, 176. The most important case of prohibition of contradictory conduct is comprised in the notion of Verwirkung. Here, the violation of good faith consists in an unfair delay in claiming the right. For details see G. H. Roth, "§ 242", Rdnr. 296 ff., 190. In German private law, Verwirkung has gained particular importance because of the excessive length of the statutory periods of limitation (the ordinary duration was thirty years until 31 December 2001). Since the entry into force of the German law modernizing the law of obligations, the time for limitations has been reduced in accordance with the model laid down by the Principles of European Contract Law and with the shorter statutory time of three years established in most European legal systems as the ordinary period of limitations: See, in general, R. Zimmermann, B. Peters, "Verjährungsfristen" in Bundesminister der Justiz (ed.), Gutachten und Vorschläge zur Überarbeitung des Schuldrechts, I, Bundesanzeiger, Köln, 1981, pp. 77 ff.; L. Haas, D. Medicus, W. Rolland, C. Schäfer, H. Windtland, Das neue Schuldrecht, CH Beck, Munich, 2002, pp. 22 ff.; S. Lorenz, T. Riehm, Lehrbuch zum neuen Schuldrecht, CH Beck, Munich, 2002, pp. 19 ff.; P. Huber, F. Faust, Schuldrechtsumwälzungen, Einführung in das neue Recht, CH Beck, Munich, 2002, pp. 267 ff.; H. P. Westermann, Das Schuldrecht 2002, Boorberg, Munich, 2002, pp. 219 ff.

This is the doctrine of Wegfall der Geschäftsgrundlage. 'Contractual basis' is an assumption of any party that becomes obvious to the other party during the formation of the contract and has received his acquaintance. This assumption must refer to the existence — or the coming into existence — of circumstances forming the very basis of the contractual intention. The legal consequence of the absence — or of a successive lapse — of such circumstances is that the content of the contract has to be fixed; alternatively, if that modification is not possible, it must be terminated: G. H. Roth, "§ 313" in Münchener Kommentar zum BGB, Rdnr. 20, 1795. Courts have considered the absence/lapse of contractual basis relevant only if "the consequences of strict enforcement of the contract would, considering the changed circumstances, cause entirely unreasonable demands on the debtor": BGG MDR 1933, 282; BGG NJW 1959, 2203 f., thus reiterating the consideration of the specific circumstances of the case which is the striking feature of any equity judgment. It should also be emphasized that the recent law modernizing the German law of obligations (in force since Jan. 1 2002) has codified the doctrine of lapse of contractual basis, thereby offering new evidence for the circular movement produced by equity regarded as the bottom-up creation of law (first the Rechtsbrauch forms new legal devices — or supports the existing ones by adapting them to the specifics of factual cases — then doctrinal elaboration systematizes the case law material into an ordered system ready to be codified).
This conception was already one in the Italian civil code of 1865. Then, under the 1942 Italian civil code, it is evident that the provisions clearly referring to equity are more numerous than in the old code. This theoretical approach has not substantially changed. Indeed, the dominant view only considers equity

The Italian civil code of 1865 made reference to equity for marginal cases, largely corresponding to the provisions enacted in the French code: performance and effects of the contract (art. 1224), natural equity in matters of right of accession (art. 463). It is evident that the art. 463 of Italian c.c. 1865 was based on art. 356 code Nap., and that art. 1124 Italian c.c. followed art. 1135 code Nap. The other provisions of the Italian c.c. of 1865 concerning equity were art. 1652, on a special type of lease relationship (mezzadria) and art. 1718, regarding a case of determination of profits and losses division between company partners. No provision was established on the determination of compensation for damages. Hence express references to equity were in fact very few, and they related to cases with very marginal application. As to the legal doctrine, by the end of the nineteenth century, the point of reference, reflecting current ideas on the notion and role of equity in the law, was well represented in an essay by a leading scholar of the time, Vittorio Scialoja: "On positive law and equity" (Del diritto positivo e dell'equità: dicerbo inaugurale letto nella grande aula della Biblioteca Valenziiana il giorno 23 novembre 1879 nel solenne ristampero degli studi nell'Università di Camerino, Savini, Camerino, 1880). Scialoja argued (pp. 13 ff. that equity consists in the aspirations of people to a certain standard of law. As long as this is a pure aspiration, equity cannot be linked to a rule of law in judicial decisions. To acquire such authority it must become law, and this only happens when such a thought or sentiment has become a true, firm belief of the people, when it has reached a degree of stability such that it can undergo the process required by state constitutions in order to become a statute. Only when equity obtains binding force may courts make use of it in their decisions. The ideas of this period can be summarized in the motto "aequitas legislatorum, ipsa magna legislatori convenit". In the era of positivism this motto replaces the old one according to which "aequitas iuris, ipsa magna legislatori convenit". V. Scialoja, ibidem, p. 15. See also R. De Ruggiero, Istituzioni di diritto privato, Principato, Messina, 1937, pp. 18 ff. when positive law does not expressly refer to equity, then the judge must apply the strict law. This may give rise to unjust outcomes (summers us summum ius), but will nevertheless constitute the lesser evil, being the alternative to abuse of the judge's discretionary power (at 21). See also C. Perras, "Equita" in Nuovo Dizionar ltaliano, V, UTET, Torino, 1938, pp. 446 ff.

Not coincidentally the common feature across European private law codifications is that the younger the codification, the more it makes express references to equity. Sufiice it to compare the German BGB of 1900 with the French code Napoléon of 1804; or the latter with the Swiss civil code of 1907; or the old Dutch civil code with the new one of 1997; see G. Broggini, "Aspetti storici e comparativistici", pp. 17 ff.

Other models besides the French one influenced the shaping of this civil code. R. Sacco, "Modèles français et modèles allemands dans ledroit civil italien", Revue internationale de droit comparé, 1976, pp. 225 ff. Moreover, since the advent of the Italian 1948 constitution, the problem of the limits of equity in the legal order has also become strictly connected to the right to a judicial process which follows the statutory law (legge) stated by art. 101 (2) of the constitution ("Justice is administered in the name of the people. Judges are subject only to statutory law") and regarded – in general – as incompatible with an equity judgment which cannot follow general and predictable rules. R. Guastini, Il giudice e la legge. Giappichelli, Torino, 1915, pp. 35 ff. U.S.M., Società italiana e tutela giurisdizione dei cavalieri. Primo lavoro di riforma dell'ordinamento giurisdizionale, Roma, 1916.
as a legislative directive and maintains that references to it only oblige courts to complete the rule of the case according to positive law. It is in this same vein that the prevailing view approaches the provisions whereby positive law leaves to the judge the power to depart from a statutory rule and to substitute it with an autonomous decision grounded on equity (intended as ‘justice under the circumstances’).  

1971, pp. 159 ff. (with references to the preliminary works on that provision). The constitutional approach to the equity issue has reinforced the theory that recourse to equity is possible only if legislation expressly admits it, because equity is not conceivable as a source of general rules, as it was in Roman law or in English law: see C.S.M., Società italiana, pp. 161 f.; V. Varano, “Equità. I) Teoria generale”, p. 7; V. Fosini, “L’equità”, pp. 3 ff., 4. Indeed, the official catalogue of the sources of law comprised in Art. 1 of the provisions preliminary to the civil code only includes statutes, governmental regulations and usage. On the official exclusion of judges and doctors from the catalogue of sources of law in Italy, see A. Gambaro, “Rapporti italiani” in P. Malaurie, P. Morvan, Les réactions de la doctrine, pp. 117 ff. A distinguished Italian legal historian, F. Calasso, has denounced the ‘scandal of equity’ in the Italian scientific debate, or, in other words, its constant refusal to consider equity as a legitimate source of law in addition to the positive law and the principle of legality: F. Calasso, “Equità. Premessa storica”, Enciclopedia del diritto, XV, Giuffrè, Milano, 1966, pp. 65 ff.  


In the field of contract law, under art. 1371 c.c. equity is a criterion for interpretation of contracts when their text is unclear, once application of the rules of interpretation laid down by the code (arts. 1362 ff.) has proved fruitless. On this view, the judge should interpret the contract according to an equitable consideration of the interests of the parties, but the rule is seldom applied by courts, and when it is applied it is often considered as mere rhetorical support for a decision rendered independently of equitable considerations (see e.g. Cass., 16 Feb. 2001 n. 2332, Nuova dir., 2001, p. 667). Similar provisions exist for rescindable contracts (1450, 1468), and the equitable assessment of penalty clauses (1384), of unforeseen circumstances (art. 1467 and, for contracts with unilateral commitments, art. 1468). Other legislative references to equity in the field of contract law concern construction contracts: art. 1660, 1664, landlord-tenant relationships: art. 1651; factor’s contracts: art. 1733, 1736; agency contracts: art. 1749, 1751; brokerage contracts: art. 1755; employment contracts: art. 2110, 2118, 2120). As to damages liquidation, recourse to equity is allowed when the proof of the amount of damages is insufficient, both in contract and of tort law (arts. 1226, 2047, 2056). In such cases, damages may be liquidated by the court in accordance with an equitable assessment.  


In all these cases, the judge is under a duty to explain why he regards equity as a more suitable rule than positive law, and equity judgment must be made in accordance with the (positive law-driven) syllogism. In other words, it is apparent that the prevailing opinion tends to bring equity judgment as close as possible to judgment grounded on strict law.  

15. Lifting the Italian veil  

Once again, however, when one departs from both the wording of the legislative provisions and the ‘official’ views, the scenario changes a great deal. In the operative dimension of the Italian system – just as in the French one – one finds out that the loudly declaimed theoretical distrust of equity as an instrument with which judges can introduce meta-positive considerations into the law-giving process does not trim the interpretive power of the courts in a...  


1990 V. Varano, “Equità. II) Giudizio di equità”, Enciclopedia giuridica, XII, Treccani, Roma, 1989, p. 5. F. D’Agostino, “E’ censurabile la motivazione delle sentenze d’equità?”, Le dimensioni dell’equità, Giappichelli, Torino, 1977, pp. 47 ff. This solution seems to be corroborated by the prevailing notion of equity judgment by the giudice di pace and the interpretation made of the new text of art. 113 c.p.c. by Italian courts. The new art. 113 c.p.c. no longer requires the honorary judge to adopt equitable solutions according to the principles of positive law regulating the subject matter, as used to be the case under the previous art. 113 c.p.c. (regulating equity-grounded decisions of the previous giudice conciliatore). The new text of art. 113 c.p.c. has given rise to debate among courts as to the impact of that provision on the notion of equity judgment. While the Corte di Cassazione initially regarded the new text as imposing a ‘subjective’ notion of equity-grounded judgment, meaning a decision where the judge has only to qualify the facts but is then free to identify their legal consequences (Cass. S.U., 15 Oct. 1999 n. 716, Giustizia Civile, 1999 f, 3243), since a recent decision by the constitutional court (Corte Cost, 5 July 2004 n. 206, Raccolta ufficiale delle sentenze e ordinanze della Corte Costituzionale, CXL, t. III, 2004, p. 93) the court of cassation now adheres to the position that the giudice di pace, too, must follow the principles regulating the subject matter (Cass., 11 Jan. 2005 n. 382, Massimario di Giustizia Civile, 1 (2005), p. 197; Cass. 15 Jan. 2005 n. 5037, Massimario di Giustizia Civile, 3 (2005), p. 539). Thus evident is Italian official distrust in any (explicit) recognition of judicial culture’s contribution to the reaching of a decision.  

1990 Scholars point out that the equity issue seems to be connected, in Italian law as well, with the overall treatment reserved to general clauses. For overlaps – but also technical differences – between good faith and equity in Italian law, see L. Biglazzi Geri, “Buona fede nel diritto civile”, Digesto IV delle Discipline Privatistiche, Sezione Civile, II, Torino UTET, 1988, pp. 154 ff., 184 ff.; A. Guarnieri, “Clausole generali”, Digesto IV, pp. 403 ff.; on comparative lines see also L’ordine pubblico e il sistema delle fonti del diritto, CEDAM, Padova, 1974, passim. General clauses were inserted in the 1942 code on the grounds that they might provide a flexible device with which to introduce into the law political considerations in compliance with the fascist regime’s ideology. F. Bert, “Sim...
number of circumstances. In Italy – as in France – the equitable power of judges (meaning their recourse: the variety of devices forming their legal will: e.g.) has been particularly prolific in areas that are not over-regulated by statues, or where the rules of positive law have been deemed as no longer responsive to the changing needs of society.103

Suffice it here to mention the judicial development of Italian tort law, where judicial activity has been crucial in framing the scope and limits of tortious liability on the basis of a reduced set of codal provisions.104 In this way, a good deal of new harms unknown to positive law have been recognized as recoverable by judicial interpretation: for example, so-called biological damage, some cases of pure economic loss,105 the so-called danno esistenziale (existential damage),106 or privacy and personal identity violations.107

103 Principi generali del nuovo ordine giuridico», Rivista di diritto commerciale, 1940, 1, p. 222; Relazione ministeriale al Libro del Codice civile «Della Proprieta»; 1941, n. 11 and 12. After the demise of Fascism the theoretical reaction was a refusal to consider general clauses as criteria for autonomous judicial considerations. Their role was reduced to interpretive directions summarizing what had already been stated in other enacted provisions. Besides the memory of Fascism, the basis of this approach was positivist dogma as well as the formalist method still dominant in the scholarly panorama of the time: R. Sacco, «Introduzione al diritto comparato», pp. 261 f. The enactment of a new civil code, in fact, had the effect of strengthening positivism and formalist conceptualism, thereby perpetuating the penetration into Italian Legal debate of the methodological debate that abroad had already begun to diminish the impact of positivism (realism, sociological jurisprudence, Interessenjurisprudenz): A. Guarnieri, «Le clausole generali», p. 143. At the beginning of the 1960s general clauses began to attract renewed attention in relation to enlargement of the theory of the sources of law to include meta-legal formats, and to reappraisal of the role of the interpreter, in particular the judge (p. 145). The view that general clauses might increase the discretionary power of judges was counteracted by the argument that also positivism could conceal arbitrary decisions: A. Guarnieri, «Le clausole generali» in G. Alpa et alii, eds., Le fonti del diritto italiano, 2. Le fonti non scritte, Tratt. Dir. Civ. diretto R. Sacco, UTET, Torino, 1999, pp. 131 ff., 146. This led to open recognition of the judicial origin of a series of crucial rules and institutes of private law.


105 According to art. 2043 Italian c.e. "any fraudulent, malicious, or negligent act that causes an unjustified injury (danno ingiusto) to another obliges the person who has committed the act to pay damages". The interpretative contribution of courts has been crucial precisely in defining the meaning of "unjustified" damage. See R. Sacco, «L'ingiustizia di cui all'art. 2043 c.e.», Foro Poldano, 1960, 1, pp. 1420-1440.

106 On the extent of the recoverability of pure economic damages as developed by case law see the comparative study by M. Bassani, V.V. Palmer (eds.), Pure Economic Loss in Europe, Cambridge University Press, Cambridge, 2003, pp. 133 ff., passim.

107 The so-called existential damage is to be meant as a non-economic loss suffered by a person as a consequence of the infringement of an interest, which is protected because it is deemed to be relevant to the victim's well-being. See P. Cendon, P. Zivitz (eds.), Il risarcimento del danno esistenziale, Giuffre, Milano, 2003; P. Cendon (ed.), Il diritto delle relazioni affettive. Nuove responsabilità e nuovi danni, CEDAM, Padova, 2005, with further references.

16. Concluding remarks. Civilian equity as a multifaceted instrument

The following points sum up the 'many facets' that equity has exhibited in the historical development of the civil law tradition.

(a) We have met different meanings of Equity: (i) Equity as an implicit duty of the law-giver to interpret and apply positive law by considering all the specifics of every concrete case; (ii) Equity as an explicit duty of the law-giver to follow legislative directions; (iii) Equity as a technical expedient with which to convey the legal culture of the law-giver into the decision-making process.

(b) In the same vein – but looking forward over the course of time – one can learn from history how jurists may deploy equitiable devices as powerful tools to serve different purposes. To be sure, these devices may be overt or covert weapons in the long-standing battle over the distribution of power in the given legal society; but they may also channel into legal discourse policy considerations that prove useful in the legal management of multi-cultural societies. The same devices may be directed towards preserving market values; but they may also – with a view to keeping pace with the dynamics of social needs – produce efficiency in the legal process by relieving the legislator of the task of endlessly amending any single private law provision.108

(c) Another point should be recalled. This overview has sketched: (i) the many ways in which legal rules are produced and applied; (ii) the many ways in which legal outcomes are officially explained; (iii) the frequency with which equity has acted as a source of law 'alien' to positive law, effectively showing the complexity of the law as a result of a variety of formative elements.


111 The co-operation of legislators and judges in the concretization of general clauses can be considered in this light see sections 13-17 above. For a common law analysis stressing the role of equity as efficiency see U. Bitte, "Efficiency as Equity: Further Steps in Comparative Law and Economics", A. M. Rabellio (ed.), Aquitas et Equity, pp. 347 ff.

112
Nevertheless, the positivist dogma of the democratic legitimization of the law produced consequences that still affect the way in which continental European jurists describe themselves and their role. Because they feel compelled to comply with the principle of legality of a democratic society, they are bound to (ultimately) refer their work to positive state law because any open acknowledgement of case law (or legal doctrine) as a source of law, or any frank acknowledgement of a meta-positive dimension of the adjudication process, would again raise the old, unresolved question of the legitimation of jurists' activity. This explains some of the occurrences that we have emphasised, viz.: (i) In France and Italy, contemporary acknowledgement of the irreplaceable role of judges as law-makers cannot be taken to the extreme of officially qualifying them as sources of law. In the process of adjudication, the French and Italian judge is and feels him/herself bound to declare that s/he is applying positive law alone — even when his/her ruling is based on different concurring criteria (sociological, moral, economic, etc.). (ii) although German scholars recognize judicial creativity more readily than their French and Italian colleagues, they debate on the criteria necessary to render the 'bottom-up' adjudication process as verifiable as possible. To this end, the Fallgruppen technique, which gives systematic order to the mass of cases, seems to be the fiction on which the Rechtspraxis relies to justify and describe itself as driven by the idea of rationality and predictability of the law.\(^{113}\)

17. Equity as interpretive fate of the law

A final point requires making. Equity has shown itself to be a prolific ground for analysis of the comparative law scholar. It has shown, at its best, that the law never stands still, the law is never “given”. What is given is the existence and survival of specific interpretive practices developed by jurists and the other legal players with the contribution of the law-users.

In other words, the real issue affecting the legal discourse, as well as the implementation of any code, is what Hegel called Stitlichkeit, and a whole tradition before him sensus communis: that is, for our purposes, the real life of a

\(^{113}\) An outstanding comparative inquiry of the adjudication techniques in both continental Europe and in the U.S. has been conducted by D. Kennedy, A Critique of Adjudication. The author distinguishes the U.S. judicial discourse from that of continental Europe. He portrays the former as a mixture of deductive reasoning and policy argumentation and the latter as merely grounded on deduction. On this seminal contribution see, however, the critical analysis by M. Lasser, “Symposium Ideology and Adjudications III: Law, Culture, and Text: Do Judges Deploy Policy?”, Cardozo Law Review, 22 (2001), pp. 863-899, showing how different the continental European situation is in reality. The result of our overview largely matches Lasser’s conclusions by showing the extent to which, notwithstanding differences in judicial attitudes and the lack of an overt ‘choice for candor’, policy considerations understood as meta-positive arguments do indeed penetrate judicial discourses on the European continent.

legal culture, the “web” of beliefs rooted in a historically located legal community. Granted, underlying every methodological choice there is necessarily the question of the values and the ends among which the jurist must choose. But whenever we deal with “law”, we are dealing with something which cannot be grasped by referring to stated principles and provisions unless we recall that law relies on the background of a community’s order translated, time and again, into actual law by the interpretive community.\(^{114}\) Once again, all this demonstrates what constitutes the real and general problem faced by the law, regardless of the purposes of the debate. In spite of the positivist approach that some may take, the problem consists in setting technically and socially acceptable boundaries on adjudication cultures and techniques.

The judge, of course, brings his or her own legal culture to bear on all this. S/he has admired or criticized the judicial precedents, and s/he has learnt the opinions of the given authorities at law school, thereby contributing to the strength of scholars in their role of decision-inspirers. S/he has both an attitude of self-restraint and a reservoir of legal notions, 'reactions' and answers stemming from the legal tradition of the country in which s/he lives.\(^{115}\) This repertoire may also comprise the role that the judiciary plays in the given legal framework: a role entailing a variable degree of respect for scholarly opinions, for superior court rulings, for the legislature’s prospective or actual choices. Hence, it is no surprise to find that decisions end up by being grounded on the balance among the various circumstances of the given case, i.e. as qualified in legal terms through the overall interpretative culture of the decision-maker.

All of this is possibly true of many fields of law. But within private law in particular, it does seem to be the appropriate way to appraise what the making of law entails – thus enabling us to bridge a multi-millennial tradition to the actual answers to present needs. Some might prefer to recast the concept by saying that there are policy factors at the core of the law which frame the technical outcomes according to changes in social demands. For our purposes, however, the choice of how to phrase the concept is neutral insofar as the legal notions of change and tradition are essential to the issue addressed here as well. The point


is that the law constantly reveals its interpretative fate, its interpretative mode of existence. In other words, we should be aware of what Shakespeare called (Twelfth Night, III, iv, 183) "the windy side of the law". As we have seen, equity is the air of this wind.