Appraisal of What Constitutes Legal Gaps and How They Are Filled in Different Jurisdictions

by
Ogwezzy Michael. C*

Abstract

Legal gaps are gaps in law that results from the legislator's mistake, short-sightedness, carelessness or tardiness. In Nigeria and other jurisdictions, the following types of legal gaps are distinguished: insufficiency, that is where the law fails to make rules when it should do so, inconsistency meaning that the law contains contradicting rules, indeterminacy: the rules of law are unclear, axiology legal gap: the rules of law contradict moral order. Legal gaps can be resolved by the following tools: analogy: resolving the case in question based on a similar case to which there is an applicable rule; broad interpretation: interpreting the rule applicable to the similar case in such a way as expanding it to the present case as well; exercising discretionary power when determining the facts of the case. In another perspective and even much broader definition implies that a legal gap exists when the norms in force issued by the bodies with legislative power do not contain any provision by which the judge could resolve the case in question and under this circumstance the weight of evidence adduced by the parties will be placed on the scale of justice to see where the weight will tilt to. Gaps in a legal system such as "logic legal gaps" can be filled when the judge can deduce the applicable norm by way of pure logics. In the case of "alternative legal gap" which implies where the law provides more than one applicable norms without specifying which one is to be used in resolving a particular legal dispute and "judgement legal gap", in these situations, the judge is to complete the law on the basis of moral judgement. From the above propositions, this paper will do an "appraisal what constitutes legal gaps and how they can be filled under different jurisdictions" This paper is therefore intended to further study the meaning of gaps in a legal system, how these gaps could be recognized and whether their existence is a precondition for equitable activity. Thereafter the author examine the processes involved in filling the gaps by considering established procedures and hierarchical sources to be referred to in the process of filling the gaps that exists in law.

* LL.B, (Ibadan) B.L, (Enugu) ML.D, (DELSU) MASIO/LL.M, (ZH/Switzerland) LL.M, Ph.D (Nigeria). Senior Lecturer, Adekunle Ajasin University, Akoku, Ondo State-Nigeria, Email address: ogwezzym@yahoo.com

I Introduction

Legal systems are not randomly distributed around the world. Most jurisdictions inherit their legal system from an invader, an occupier, or a colonial power.[1] Few countries have actually chosen their legal system as the outcome of a conscious debate over the existing possibilities, hence in all legal jurisdictions whether single or mixed legal system, they experience one form of gap or the other in their jurisprudence or legal context.[2] In a broad sense, a legal gap exists when it is impossible to establish beyond doubt which rule is applicable to the case in question. Under such circumstances, the law fails to make rules for a certain situation although it should have done (original legal gap) or should do so (derivative legal gap).[3]

In England, during the 17th, 18th and first half of the 19th centuries, there was an explosion of legislation, much of it complex and badly drafted. Public law statutes were drafted by Committees of the House of Commons that met in Middle Temple Hall. They at least had the benefit of the expertise of lawyers. Private bills were drafted by their promoters without the benefit of the same expertise. As Holdsworth has described in his *History of English Law*:[4] "Thus the style in which the statutes were drawn became more and more variegated. The result was increased difficulty in interpreting them, and sometimes in ascertaining their relations to one another. And since, during this period, the style of legal draftsmanship, which was used in the drawing of pleadings, conveyances, and other documents, was tending to become more verbose, the statutes which these lawyers drew exhibited the same quality: and so the difficulties of understanding and applying the growing body of statute law were increased."[5] By the 19th century, the prevailing state of affairs led Jeremy Bentham to observe characteristically: "The English lawyer, more

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1 As diverse as all classical mixed jurisdictions are, their founding tends to follow three similar historical tales. The first is intercolonial transfer between a civil law and a common law colonial power, as was demonstrated in Puerto Rico, the Philippines, Louisiana, and South Africa. Second is a merger of sovereignties, as was the case in Scotland. Finally, the jurisdiction is founded "in reverse," which includes Israel. Intercolonial transfer often led to mixed jurisdictions because the colonial power typically faced great cultural and logistical resistance when attempting to apply its own legal system while administering the country. Due to a fear of an uprising or resistance to attempts to change infrastructure and legal systems in the conquered territory, the colonial power chose to retain aspects of original law, which typically was civil law. (Stella Cziment, "Cameroon: A Mixed Jurisdiction? A Critical Examination of Cameroon's Legal System Through the Perspective of the Nine Interim Conclusions of *Worldwide Mixed Jurisdictions*, Civil Law Commentaries Vol. 2, Issue 2. Winter 2009, at p.2).

2 Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *Economic Development, Legality, and the Transplant Effect*, 47 *Eur. Econ. Rev*. 165, 168–69 (2003). See, Nuno Garoupa and Carlos Gómez Ligüerre, "The Efficiency of The Common Law: The Puzzle of Mixed Legal Families", *Wisconsin International Law Journal,* Vol. 29, No. 4, 2012, at p.673.

3 Lóránt Csink, and Péter Paczolay, "Problems of Legislative Ommission in Constitutional Jurisprudence", Hungarian National Report for the 14th Conference of Constitutional Courts, available online at *www.lrkt.lt/conference/Pranesimai/omissionHUN_en.doc. or http://www.confeuconstco.org/reports/rep-xiv/report_Hungary_en.pdf accessed 15 October, 2013*.

4 (1924, XI 370).

5 John Dyson, "The Shifting Sands of Statutory Interpretation", at 7-8, Available online at *www.statutelawsociety.org/__data/assets/pdf.../Sir_John_Dyson.pdf, accessed 28 October, 2013.*

especially in his character of Parliamentary composer, would, if he were not the most crafty (sic), be the most inept and unintelligent, as well as unintelligible of scribblers".[6]

II The Nature of Legal Gaps

First of all the gaps of law and gaps of legislation must be distinguished. There is a gap of law when a sphere which has to be decided upon has not at all been legislatively regulated (this amounts either to legal vacuum or to the legislator's conscious choice not to regulate a sphere of life). In the light of the issues to be considered under this subsection, one of the subtypes of legal gap as a general concept is namely the legal vacuum. The gap of legislation, on the other hand, means a lack of a rule that should be there proceeding from the intent behind the regulation of an Act or statute (there is a lack of a rule the existence of which can be presupposed on the basis of the teleology of a statute).[7]

"Legal gap" therefore is defined in general as the fact that "any necessary and obligatory regulation that has not been fulfilled by the lawmaker". The concept is analysed by making it subject to several variations within itself. These variations are named in this context as *intra legem* gap (legal gap); conscious gap, unconscious gap; explicit gap implicit gap. Reasons for those variations of legal gap and their consequences are certainly made subject in the scientific legal doctrine and, questions on how and in which circumstances the judge can fill in the legal gap by means of his power to "create law".[8] Having considered the nature of legal gaps, the next sub-issue to be considered is the concept of mixed jurisdiction.

III Concept of Mixed Jurisdiction

The classic definition of a mixed jurisdiction of nearly one hundred years ago was given by F.P. Walton:[9] he claimed that "Mixed jurisdictions are legal systems in which the Romano-Germanic tradition has become suffused to some degree by Anglo-American law".[10] This is not too different from the modern definition of mixed legal system given

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6 The Works of Jeremy Bentham, Bowring (ed) v 3 (1843), at 242. (*The Works of Jeremy Bentham,* published under the Superintendence of his Executor, John Bowring (Edinburgh: William Tait, 1838-1843)., 11 Vols. Vol. 3).

7 "Problems of Legislative Omission In Constitutional Jurisprudence", Replies to the Questionnaire for the XIVth Congress of the Conference of European Constitutional Courts drawn up by the Constitutional Court of the Republic of Lithuania, at pp.1-2, available online at *www.confeuconstco.org/reports/rep-xiv/report_Estonia_en.pdf., accessed 28 October, 2013.*

8 "Questionnarie on Problems of Legislative Omission In Constitutional Jurisprudence For the XIVth Congress of the Conference of European Constitutional Courts", XIVth Congress of the Conference on European Constitutional Courts, Turkish National Report, at p.2 Available online at, *www.lrkt.lt/conference/Pranesimai/QUESTIONNARIE-English.doc accessed 19 November, 2013.*

9 William Tetley, "Mixed Jurisdictions: Common Law vs. Civil Law (Codified and Uncodified)", (published in (1999-3) *Unif. L. Rev*. (N.S.) 591-619 (Part I) and (1999-4) *Unif. L. Rev*. (N.S.) 877-907 (Part II); and later reprinted with permission in (2000) 60 La. L. Rev. 677-738, and reprinted again in Chinese translation by Peking University Press (2003) 3 Private Law Review 99-175), at pp.1-2.

10 F.P. Walton, *The Scope and Interpretation of the Civil Code*, Wilson & Lafleur Ltée, Montreal, 1907, reprinted by Butterworths, Toronto, 1980, with an introduction by Maurice Tancelin, at p. 1.

by Robin Evans-Jones: he said "What I describe by the use of this term in relation to modern Scotland is a legal system which, to an extensive degree, exhibits characteristics of both the civilian and the English common law traditions".[11] Both Walton and Evans-Jones are referring to common law/civil law mixed legal systems which stem from two or more legal traditions. Mixed jurisdictions are really political units (countries or their political subdivisions) which have mixed legal systems. Common law and civil law mixed jurisdictions include for example,[12] Louisiana, Québec, St. Lucia, Puerto Rico, South Africa, Zimbabwe,[13] Botswana, Lesotho, Swaziland,[14] Namibia,[15] the Philippines, Sri Lanka (formerly Ceylon),[16] and Scotland. It goes without saying that some mixed jurisdictions are also derived partly from non-occidental legal traditions like North African countries, Iran, Egypt, Syria, Iraq and Indonesia, for instance.[17]

A mixed jurisdiction is a country or a political subdivision of a country in which a mixed legal system prevails. For example, Scotland may be said to be a mixed jurisdiction, because it has a mixed legal system, derived in part from the civil law tradition and in part from the common law tradition. This definition of "mixed jurisdiction" is very similar to those of Walton and Evans-Jones cited earlier, except that the term as used here describes only the territory in which a mixed legal system exists, rather than the mixed legal system itself.[18] While a mixed legal system is one in which the law in force is derived from more than one legal tradition or legal family. For example, in the Québec legal system, the basic private law is derived partly from the civil law tradition and partly from the common law tradition. Another example is the Egyptian legal system, in which the basic private law is derived partly from the civil law tradition and partly from Moslem or other religiously-based legal traditions. Again in Nigeria, the legal system is derived from common law, Islamic and customary law.

According to Stella Cziment, mixed jurisdiction exist all over the world, though they can be overlooked and mistakenly categorized as a common law state with civil law transplants or vice versa. This mistaken categorization occurs because the terminology

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[11] Robin Evans-Jones, "Receptions of Law, Mixed Legal Systems and the Myth of the Genius of Scots Private Law" (1998) 114 L.Q.R. 228 at p. 228.

[12] René David and J.E.C. Brierley, *Major Legal Systems in the World Today*, 3rd edn., London: Stevens & Sons, 1985, paras. 56-58 at pp. 75-79.

[13] Reinhard Zimmermann, "*Das römisches-holländisches Recht in Zimbabwe*" (1991) 55 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 505.

[14] J. H Pain, "The Reception of English and Roman-Dutch Law in Africa with Reference to Botswana, Lesotho and Swaziland" (1978) 11 *Comp. and Int'l. L. J.* of Southern Africa 137.

[15] Reinhard Zimmermann and Daniel Visser, "South African Law as a Mixed Legal System", being the Introduction to R. Zimmermann and D. Visser, eds., *Southern Cross. Civil Law and Common Law in South Africa*, Clarendon Press, Oxford, 1996 at p. 3. See also See also David Carey Miller, "South Africa: A Mixed System Subject to Transcending Forces" in Esin Örücü, Elspeth Attwooll & Sean Coyle, eds., *Studies in Legal Systems: Mixed and Mixing*, Kluwer Law International, The Hague, London, Boston, 1996 at pp. 165-191

[16] M.H.J. van den Horst, *The Roman-Dutch Law in Sri Lanka*, 1985; Anton Cooray, "Sri Lanka: Oriental and Occidental Laws in Harmony" at pp.71-88.

[17] William Tetley, *op. cit*.

[18] *Ibid*, at pp.6-7.

"mixed jurisdiction" is relatively new.[19] While Vernon Valentine Palmer believes that many states may in fact fall into the third legal family of mixed jurisdictions, there are fifteen states both independent and non-independent systems that are classical mixed jurisdictions.[20] Mixed jurisdictions share three main characteristics. First, the legal system of a mixed jurisdiction is built on a dual foundation of both common and civil law. Second, this dual foundation will be noticeable to outside observers and it will be present in the culture and identity of the society. Third, there is a common structure between the divisions of civil and common law and the private law tends to be continental civil law while the public law tends to be Anglo-American common law.

IV The Emergence and Operation of Common Law and Civil Law Systems

Common law is that legal tradition which evolved in England from the 12th century onwards. Its principles appear for the most part in reported judgments, usually of the higher courts, in relation to specific fact situations arising in disputes, upon which courts have adjudicated. The common law is usually much more detailed in its prescriptions than the civil law. Common law is the foundation of private law, not only for England, Wales and Ireland, but also in forty-nine U.S. states, nine Canadian provinces and in most countries which first received that law as colonies of the British Empire and which, in many cases, have preserved it as independent States of the British Commonwealth. While civil law is "concise", the common law is "precise" and detailed.[21]

Another source has it that the development of the common law is derived in part from the French local customs imported from Normandy into England by William the Conqueror in 1066.[22] Moreover, common law, being more vulnerable than civil law to foreign intrusions because of its less systematic structure and less coherent nature, was "civilised" at various points throughout history, particularly in recent years.[23] In 1832,

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[19] Stella Cziment, "Cameroon: A Mixed Jurisdiction? A Critical Examination of Cameroon's Legal System Through the Perspective of the Nine Interim Conclusions of *Worldwide Mixed Jurisdictions*, Civil Law Commentaries Vol.2, Issue 2. Winter 2009, at p.2.

[20] Vernon Valentine Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family* 5 Cambridge: Cambridge University Press, 2006, at p.4.

[21] William Tetley, "Nationalism in a Mixed Jurisdiction and the Importance of Language." (South Africa, Israel and Québec/Canada) see Louis-Philippe Pigeon, Rédaction et interprétation des lois, 3rd edn., Gouvernement du Québec, Québec 1986 at, pp.7-8. published in (2003) 78 *Tul. L. Rev*. pp.175-218**.**

[22] *Ibid*., Common law legal regimes those rooted in the English legal system are characterized by a host of institutional characteristics that distinguish them from the institutional constellations associated with "civil code" regimes rooted in the French, German and Scandinavian traditions. modern common-law regimes are heavily infused with codes (statutes). Indeed, common law *per se*. meaning areas of law in which judge-made precedent is the only source of law. governs an increasingly small proportion of litigation in the United States and other "common law" countries. (See., Gillian K. Had.eld, The Quality of Law in Civil Code and Common Law Regimes: Judicial Incentives, Legal Human Capital and the Evolution of Law, University of Southern California Law School March 2006 at p.7. Available online at http://www.law.yale.edu/documents/pdf/the_quality_of_law_in_civil_code.pdf, accessed 31 October, 2013).

[23] *Ibid*., at pp.7-8. H.P. Glenn, "*La Civilisation de la* Common Law", *Mélanges Germain Brière*, E. Caparros, (dir.) Collection Bleue, Wilson & Lafleur Ltée, Montreal, 1993 at pp. 596-616.

the Chancellor's permission to take suit was eliminated.[24] In 1852, forms of action were abolished.[25] In 1873, the Courts were unified.[26] In 1875, a Court of Appeal was established.[27] New substantive law of a civilian flavour was introduced and recently, case management rules have been added. Continental Europe received civil law from ancient Rome and then retained it by codification, imposed for the most part by victories of Napoleon and later on by the example and great influence of the French Civil Code of 1804.[28] Other jurisdictions, particularly the countries of Latin America, as well as Egypt, imitated the French Code (or other codes based upon it) in enacting their own codifications. Civil law jurisdictions often have a statute law that is heavily influenced by the common law.[29]

English common law emerged from the changing and centralizing powers of the king during the Middle Ages. After the Norman Conquest in 1066, medieval kings began to consolidate power and establish new institutions of royal authority and justice. New forms of legal action established by the crown functioned through a system of writs, or royal orders, each of which provided a specific remedy for a specific wrong. The system of writs became so highly formalized that the laws, the courts could apply based on this system often were too rigid to adequately achieve justice. In these cases, a further appeal to justice would have to be made directly to the king. This difficulty gave birth to a new kind of court, the court of *equity*, also known as the court of Chancery because it was the court of the king's chancellor. Courts of equity were authorized to apply principles of

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[24] See generally J.H. Baker, *An Introduction to English Legal History,* 3rd edn., London :Butterworths, 1990 at pp.79-81.

[25] Common Law Procedure Act, 1852, 15 & 16 Victoria., c. 76 (the form of action no longer needed to be stated in the new uniform writ and different causes of action could be joined in the same writ). The forms of action had been largely abolished by the Uniformity of Process Act, 1832, and by the *Real Property Limitation Act*, 1833, 3 & 4 Will. IV, c. 27, section 36.

[26] *The Judicature Act*, 1873, 36 & 37 Vict., c. 66

[27] The *Judicature Act,* 1873*,* Section 4 had established the Court of Appeal and the High Court, as divisions of the Supreme Court of Judicature established by sect. 3. This Act came into force at the same time as the *Judicature Act*, 1875, 38 & 39 Vict., c. 77, which made some other modifications as well.

[28] The French Civil Code of 1804 was enacted on March 21, 1804 as the "*Code civil des Français*". The title was changed to the "*Code Napoléon*" in 1807, because of the Emperor's personal interest in the drafting of the Code while he was first consul of the Republic. The original title was revived in 1816 after the fall of the Napoleonic Empire, but was reinstated in 1852 by decree of Louis Napoleon (Napoleon III), then President of the Republic. Since 4 September, 1870, however, the Code has been referred to as the "Code Civil".

[29] William Tetley, *op. cit*. 7-9. Civil law is the kind of law that evolved from Roman law, based on a written "civil code". This was adopted in France after the French Revolution in 1789. Called the Code Napoléon, it covered only matters of private law: The legal attributes of a person (e.g.: name, age of majority). The relationship between individuals (e.g.: marriage, adoption, parentage), Property (e.g.: possession, land boundaries), the legal institutions governing or administering these relationships (e.g.: wills, sales, leases, partnerships). Through plain language and the specific nature of each regulation, civil codes are intended to be easy to understand and apply. It does not rely on precedent to the same extent as common law. (Canadian Encyclopedia: "common law", "law", "civil procedure" and "constitutional law". Available online at link: http://www.thecanadianencyclopedia.com/index.cfm?TCE_Version=A, accessed 30 March, 2013. See also Beaudoin, Gérald-A.. Constitution., The Canadian Encyclopedia., Historical Foundation of Canada, 2000. (Available online at http://www.thecanadianencyclopedia.com/index.cfm?TCE_Version=A, accessed 30 October, 2013).

equity based on many sources (such as Roman law and natural law) rather than to apply only the common law, to achieve a just outcome. [30]

In the Middle Ages, common law in England coexisted, as civil law did in other countries, with other systems of law. Church courts applied canon law, urban and rural courts applied local customary law, Chancery and maritime courts applied Roman law. Only in the seventeenth century did common law triumph over the other laws, when Parliament established a permanent check on the power of the English king and claimed the right to define the common law and declare other laws subsidiary to it. This evolution of a national legal culture in England was contemporaneous with the development of national legal systems in civil law countries during the early modern period. But where legal humanists and Enlightenment scholars on the continent looked to shared civil law tradition as well as national legislation and custom, English jurists of this era took great pride in the uniqueness of English legal customs and institutions. That pride, perhaps mixed with envy inspired by the contemporary European movement toward codification, resulted in the first systematic, analytic treatise on English common law: William Blackstone's (1723-1780) *Commentaries on the Laws of England*. In American law, Blackstone's work now functions as the definitive source for common law precedents prior to the existence of the United States.

Common law is generally *uncodified*, by implication; there is no comprehensive compilation of legal rules and statutes. While common law does rely on some scattered statutes, which are legislative decisions, it is largely based on *precedent*, meaning the judicial decisions that have already been made in similar cases. These precedents are maintained over time through the records of the courts as well as historically documented in collections of case law known as yearbooks and reports. The precedents to be applied in the decision of each new case are determined by the presiding judge. As a result, judges have an enormous role in shaping the law. Common law functions as an adversarial system, a contest between two opposing parties before a judge who moderates. A jury of ordinary people without legal training decides on the facts of the case. The judge then determines the appropriate sentence based on the jury's verdict.[31]

According to Gillian Hadeld, Common law means areas of law in which judge-made precedent is the only source of law that governs an increasingly small proportion of litigation in the United States and other "common law" countries. Even in the traditional common law areas of contract, tort, and property, there are numerous general application statutes such as the Uniform Commercial Code and state civil codes, together with

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[30] Anthony Robbins, "The Common Law and Civil Law Traditions", The Robbins Collection 2010.Available online at http://www.law.berkeley.edu/library/robbins/pdf/CommonLawCivilLawTraditions.pdf, accessed 29 October, 2013.

[31] *Ibid*., See J.H. Baker, An Introduction to English Legal History (London, 2002). See also Manlio Bellomo, The Common Legal Past of Europe 1000-1800 (Washington DC, 1995). Alan Cromartie, The Constitutionalist Revolution: An Essay on the History of England, 1450-1642 (Cambridge, 2006). See, Joseph Dainow, "The Civil Law and the Common Law: Some Points of Comparison," American Journal of Comparative Law, volume 15, number 3 (1966-7), p.419-35. See also, S.F.C. Milsom, Historical Foundations of the Common Law (London, 1981). See also, Peter Stein, Roman Law in European History (Cambridge, 1999)., See also R.C. Van Caenegem, The Birth of the English Common Law (Cambridge, 1988).

regulatory statutes for specie areas such as bankruptcy, corporate governance, securities, insurance, product safety, landlord-tenant relations, and so on.[32]

Civil Law, on the contrary is *codified* legal order of a country.[33] Countries with civil law systems have comprehensive, continuously updated legal codes that specify all matters capable of being brought before a court, the applicable procedure, and the appropriate punishment for each offense. Such codes distinguish between different categories of law: substantive law establishes which acts are subject to criminal or civil prosecution, procedural law establishes how to determine whether a particular action constitutes a criminal act, and penal law establishes the appropriate penalty.[34] In a civil law system, the judge's role is to establish the facts of the case and to apply the provisions of the applicable code. Though the judge often brings the formal charges, investigates the matter, and decides on the case, he or she works within a framework established by a comprehensive, codified set of laws. The judge's decision is consequently less crucial in shaping civil law than the decisions of legislators and legal scholars who draft and interpret the codes.[35] The next subheading discuses what constitutes legal system and a legal order in any legal jurisdiction?

V What Constitutes Legal Systems and Order

There are various definitions of the term "legal system": "A legal system, is an operating set of legal institutions, procedures, and rules. In this sense there are one federal and 36 states legal system in Nigeria, and still other distinct legal systems in such organizations as the Economic Community of West African States (ECOWAS), the African Union (AU), European Economic Community and the United Nations."[36] While a "legal order is the body of rules and institutions regulating a given society. Some hold to the view that a legal order may be as forming or striving to form a coherent body of law, juridical system, legal system, and a system of law."[37] "Each law in fact constitutes a *system*: it has a vocabulary used to express concepts, its rules are arranged into categories, it has techniques for expressing rules and interpreting them, it is linked to a view of the social

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32 Gillian K. Hadeld, "The Quality of Law in Civil Code and Common Law Regimes: Judicial Incentives, Legal Human Capital and the Evolution of Law", University of Southern Carlifornia, Law School, March 2006 at 1. Available online at http://www.law.yale.edu/documents/pdf/The_Quality_of_Law_in_Civil_Code.pdf, accessed 02 May, 2014.

33 Civil law may be defined as that legal tradition which has its origin in Roman law, as codified in the Corpus Juris Civilis of Justinian (528-534 A.D.), and as subsequently developed in Continental Europe and around the world. Civil law eventually divided into two streams: the codified Roman law (as seen in the French Civil Code of 1804 and its progeny and imitators - Continental Europe, Québec and Louisiana being examples); and uncodified Roman law (as seen in Scotland and South Africa). Civil law is highly systematised and structured and relies on declarations of broad, general principles, often ignoring the details. Civil law has its own style, in fact its major distinction is its style, in particular its "conciseness".

34 *Ibid*.

35 *Ibid*.

36 J.H. Merryman, *The Civil Law Tradition*: *An Introduction to the Legal Systems of Western Europe and Latin America*, 2 Ed., Stanford University Press, Stanford, California, 1985 at p.1.

37 Quebec Research Centre of Private and Comparative Law, *Private Law Dictionary and Bilingual Lexicons*, 2nd edn. Revised and Enlarged, Les Éditions Yvon Blais, Cowansville, Québec 1991 at p. 243 .

order itself which determines the way in which the law is applied and shapes the very function of the law in that society."[38] William Tetley is of the view that the term "legal system" refers to the nature and content of the law generally, and the structures and methods whereby it is legislated upon, adjudicated upon and administered, within a given jurisdiction.[39] Having underscored what is meant by legal system and order, it is pertinent to examine the theoretical framework of legal gaps in a legal system.

VI Theoretical Frameworks of Legal Gaps in Legal Systems

According to Pierluigi Chiassoni, after World War II, theoretical investigations on gaps improved greatly in the Civil Law countries, as a consequence of the use and refinement, by a few legal theorists, of some conceptual tools worked out by analytical philosophers.[40] The several analytical theories of gaps so far set forth share a few, basic, tenets. On the whole, these tenets make up the backbone of what is considered the standard civil law view on gaps. They are as follows: (a) the existence of gaps is neither a necessary, nor an impossible, feature of positive legal orders. It is, on the contrary, a mere possibility for every given legal order, or any section thereof which is the contingent existence thesis.[41] (b) There is no necessary, universal, way of filling-up gaps in the western legal tradition on the contrary, whenever a judge thinks there is a gap in the law, he or she may usually choose among a set of alternative gap-filling techniques, that are likely to lead to different outcomes and this represents that optional filling-up thesis. (c). The optional identification thesis regards the identification of a gap in the law, by a judge or a jurist, as not the outcome of a purely mechanical, or logical, job. On the contrary, it depends directly or at least indirectly on empirical and/or interpretive activities. These activities, in turn, are or may be in at least some cases value-laden and decision dependent. (d) From the perspective of a conceptual pluralism thesis or practice-sensible and practice-oriented theory, it is worthwhile distinguishing several different concepts of a gap, so as to casting light on, and put an order to, the fuzzy, everyday, intuitions legal practitioners entertain on the matter.

The major differences among the several analytical theories of gaps within the civil law tradition concern the optional identification thesis and the conceptual pluralism thesis,

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[38] William Tetley, "Mixed Jurisdictions: Common Law vs. Civil Law (Codified and Uncodified)", (published in (1999-3) *Uniform Law Review* (N.S.) 591-619 (Part I) and (1999-4) *Uniform Law Review* (N.S.) 877-907 (Part II); and later reprinted with permission in (2000) 60 *Los Angeles Law Review*. 677-738, and reprinted again in Chinese translation by Peking University Press (2003) 3 *Private Law Review* 99-175), at pp.3-4.

[39] *Ibid*.

[40] (like Ludwig Wittgenstein, Rudolf Carnap, Gilbert Ryle, John Langshaw Austin, and Georg Henrik von Wright, to mention the most prominent representatives). Norberto Bobbio's 1963 entry *Lacune del diritto*, on the one hand, and Carlos E. Alchourrón's and Eugenio Bulygin's 1971 book *Normative Systems*, on the other hand, represent two of the most thoughtful contributions within the (new) analytical perspective. (See Pierluigi Chiassoni, A Tale from Two Traditions: Civil Law, Common Law, and Legal Gaps, Paper presented at "American-Italian Seminar on Relations Between the ius commune Inglese and Law ", Faculty of Law, Geneva, 18-19 September 2006, Analysis and Law 2006, edited by P. Comanducci and R. Guastini at p.54, available online at http://www.giuri.unige.it/intro/dipist/digita/filo/testi/analisi_2007/03chiassoni.pdf accessed 13 November, 2013).

[41] See Pierluigi Chiassoni, above note 40.

respectively. As to the *optional identification thesis*, a basic distinction may be drawn between three kinds of theories. First of all, there are theories that simply *presuppose* the optional identification thesis, without giving it any due, express, consideration. Secondly, there are theories that regard the identification of gaps as being, *directly*, the outcome of a *logical process* consisting in the determination of the solutions provided by previously identified, limited, sets of norms for previously identified, limited, sets of cases. These theories consider interpretation as an empirical (not-logical) activity, which affects the identification of gaps only in an indirect way and, furthermore, involves decision-making in hard cases only (*e.g.*, Alchourrón's and Bulygin's theory).[42] Thirdly, and finally, there are theories that, on the contrary, emphasize the interpretive dependence of gaps' identification and, furthermore, regard interpretation as a necessarily value-laden, decision-involving, activity (*e.g.*, the theories developed by representatives of the Genoese Realistic School).

A What Constitutes Legal Gaps in a Juridical System?

A legal system is said to be legally complete if there is a complete answer to all the legal questions over which the courts have jurisdiction to determine. It contains a legal gap if some legal questions subject to jurisdiction have no complete answer hence this paper is

[42] Alchourrón and Bulygin start their discussion of whether the principle of prohibition excludes gaps with a distinction between *norms* and *normative propositions*. Norms are prescriptive sentences, which are used to give obligations, prohibitions or permissions. Normative propositions are descriptive sentences that convey information about norms or about the obligations, prohibitions or permissions issued by the norms. The *principle of prohibition* pertains, they argue, to norms, not to normative propositions. It is perfectly possible that both the normative proposition that p is prohibited and the normative proposition that p is permitted (in some system) are false: the system may be silent. Likewise, it is possible that both normative propositions are true: the system may be inconsistent: "There is nothing paradoxical about a consistent description of an inconsistent normative system". There is, however, some ambiguity in this approach. Normative propositions are taken to say something about norms (i.e. normative sentences) *or* about obligations, prohibitions and permissions. It is clear that normative sentences may be silent or inconsistent concerning some act p. But it does not necessarily follow that the normative system is silent or inconsistent. It is possible to attempt to explain the legal validity of some norm in terms of its being issued by a generally recognized legal source. According to such an explanation, the occurrence of inconsistent normative sentences in the legal sources of a system renders the system inconsistent if in some case q the act p is, according to the system, both prohibited and permitted. According to Dworkin such a definition would be too narrow (as it cannot account for legal principles), but it certainly is too broad. Legal systems quite often formulate exceptions to norms. These exceptions sometimes are to be found in very different parts of the system's statutes and precedents. Legal systems also usually make use of priority rules, e.g. *lex posterior derogat legi priori*. It is, therefore, unacceptable to hold that every norm which can be found in a legal source is necessarily valid. If we still follow the positivist approach, we should explain legal validity of norms in terms of being issued by the normative legal system. To know whether some norm is legally valid, we then have to interpret the legal system and to determine whether the norm exists in an acceptable interpretation of that system. It may be argued that some interpretation which allows for inconsistent norms within the same system does not present an acceptable interpretation. In that case, the normative propositions describing both contradictory norms cannot both be true. In the same way, if the normative sentences of some system are silent about some act, it does not follow that the system itself is silent. The *principle of prohibition* seems to say that according to the system such an act is permitted. In his *Rechtsphilosophie*, the German legal philosopher Gustav Radbruch argued that in a strict sense absence of law ("*ein rechtsleerer Raum*") is impossible: when a legal system is silent it regulates in a negative way, by denying legal consequences. (See also C.E. Alchourrón, and E. Bulygin, "Normative Systems", Wien, 1971, at pp.121-123 see also G. Radbruch, *Legal Philosophy*, 6th edn., Stuttgart, 1963, at. 298) Arend Soeteman Legal Gaps available online at http://ivr-enc.info/index.php?title=Legal_gaps accessed 12 November, 2013.

centred in most part on what constitutes legal gaps and how these gaps has been addressed by different theorists and legal philosophers are expressed in sub-titles (a) to (j) as follows:

(a) Genuine and Non-Genuine Legal Gaps

An important distinction is made between genuine and non-genuine (actual and alleged) legal gaps. There is a non-genuine gap when, from the formal point of view, the positive law can be applied without the need to supplement it, yet the legal cognition requires the supplementation (the norm cannot be implemented when "taking into account all the circumstances" the solution suggested by a statute cannot be regarded as the right one, because it is considered to be "wrong").[43] The genuine gaps embrace such instances where a statute completely lacks a rule concerning the sphere that the statute regulates (the statute is so to say silent). Thus, a genuine gap is a legislative gap or the legislative omission where legislating is required by the Constitution (it is expected that there be a legal rule concerning an existing norm).[44]

(b) Obvious and Covert Gaps in Law

Sometimes a differentiation is made between obvious and covert gaps. There is an obvious gap when the implementer of law notices it at the first glance, and there is a covert gap when the existence thereof becomes apparent only as a result of interpretative effort of a judge or magistrate. As a rule, the determination of legal regulation is not treated as a gap in some legal doctrine the ambiguity and abstract character of norms is overcome through interpreting, *inter alia* with the help of constitutional values. There is a gap only when a norm is so unclear that it is impossible to ascertain the applicable rule on the basis of none of the generally recognised interpretation methods. Also, there is no gap when a rule is not established in the text of statute *expressis verbis*, yet it can be deducted from the general teleology of the statute. Neither is there a gap when a necessary rule is not included in the statute regulating a given sphere, but it has become by a mistake an object of regulation of some other statute or when it can be deducted from several statutes in their conjunction. A relationship under examination need not be regulated explicitly; it is sufficient if the guidelines for the resolution of a case derive from the legal order implicitly.

(c) Jurisdictional Gaps

Joseph Raz regards gaps, as something which has to be accounted for carefully in a well-built theory of law.[45] Raz deals with two of the four basic issues concerning gaps: namely, the conceptual issues and the existence issues.[46] (i) As to the concept of a gap, Raz distinguishes, to begin with, between *jurisdictional gaps* and *legal gaps* proper.

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43 See e.g. M. Sillaots. *Kohtunikuõiguse võimalikkusest ja vajalikkusest kontinentaal-euroopalikus õiguskorras* (The Possibility and Necessity of Judge-Made Law in the Legal Order of Continental Europe). Tartu, 1997, at pp.39-40.

44 See A. Taska., Õigusteaduse metodoloogia (*The Methodology of Law*). Lund, 1978, at p.61.

45 Pierluigi Chiassoni, above note 40

46 *Ibid*, See also, J. Raz, "*Legal Reasons, Sources and Gaps"*, in The *Authority of Law. Essays on Law and Morality*, Oxford: Clarendon Press, 1979, at pp.33-77.

Under *Jurisdictional Gaps*, a legal system is jurisdictionally complete if its courts have jurisdiction over all legal questions. It has a jurisdictional gap if its courts lack jurisdiction over certain legal questions.[47] The notion of a jurisdictional gap is a useful conceptual device to determine, on the contingent basis of positive law criteria, the scope of what, in Schauer's fuzzier perspective, was the claim of a legal system to completeness.

(d) Simple Indeterminacy Gaps

The notion of a legal gap is more in tune with lawyers' common sense. It is meant to be a more precise and rigorous notion, though as Raz makes it clear, there are two kinds of situations where the law is gappy for not providing "a complete answer" to a question "subject to jurisdiction". On the one hand, there are *simple indeterminacy gaps*. They occur either *(a)* when a rule-formulation contains vague or ambiguous terms (*linguistic indeterminacy*), or *(b)* when legislative intent, being assumed as a relevant interpretive resource, proves indeterminate (*indeterminacy of intent*). On the other hand, there are *unresolved conflict gaps*. They occur whenever the law provides no criteria for settling a conflict between two norms or "reasons". In Raz's terms, a situation of unresolved conflict will arises when conflicting reasons fail to override each other, not because they are equally matched, but because they are not matched at all: for whatever reason, the conflicting reasons are incommensurate in strength.[48] (ii) As to the existence of gaps, Raz makes clear his position in the following terms: legal gaps ... arise ... where the law *speaks with an uncertain voice* (simple indeterminacy) or where it *speaks with many voices* (unresolved conflicts). Contrary to much popular imagining, there are no gaps where the law is silent. In such cases closure rules, which are *analytic truths* rather than positive legal rules, come into operation and prevent the occurrence of gaps.[49]

(e) Visible, Ontological and Deontological Gaps in Law

Legal gap exists when a certain relation is not regulated by any legal rule. There are categorized two types of gaps in legislation: visible and invisible. The visible gap is not deliberately filled in. Such a gap is often called "intentional imperfection of law". In this case, no analogy may be applied. Those who apply law are not entitled to act against the will of law-maker.[50] Another classification of legal gap is ontological gap and the deontological one. The ontological gap implies the unconformity of a legal rule with what exists. The deontological gap implies the inconsistency of a legal rule with what should be.[51]

(f) Original and Derivative Legal Gaps

Legal gaps arise from an imperfect unity of the legal system, a legal gap exists when it is impossible to establish beyond doubt which rule is applicable to the case in question.

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47 *Ibid.*
48 *Ibid*.
49 *Ibid*.
50 *Ibid*.
51 Problems of Legislative Omission in Constitutional Jurisprudence, For XIVth Congress of the Conference of European Constitutional Courts, Response of the Constitutional Court of Georgia, Available online at http://www.confcoconsteu.org/reports/rep-xiv/report_Georgia_en.pdf, accessed 18 November, 2013.

Under such circumstances, the law fails to make rules for a certain situation although it should have done (*original legal gap*) or should do so (*derivative legal gap*). Legal gaps result from the legislator's mistake, carelessness or tardiness.[52] According to another even broader definition, a legal gap exists when the norms (in force) issued by the bodies with legislative power do not contain any provision by which the judge could resolve the case in question.[53]

(g) Applicable and Correctional Legal Gaps

Bódog Somló in his book entitled *Jogbölcsészet (Philosophy of Law)*, is of the view that: "Gaps in the law mean that the law needs to be completed".[54] Completion may be necessary for various reasons. When it is required to make the law applicable, it is an *applicability legal gap* and when it is needed to make the law correct, it is a *correctness legal gap*.[55]

(h) Inconsistency, Insufficiency, Indeterminacy and Axiological Legal Gaps

Peczenik identified and distinguished between inconsistency, insufficiency, indeterminacy and axiological legal gaps.[56] According to him, inconsistency in law means when the law fails to make rules when it should ordinarily do so. Insufficiency refers to a situations where the law contains contradicting rules while, indeterminacy in the parlance of legal gap refers to where the rules of law are unclear, while axiology legal gap is referred to when the rules of law contradict moral order.[57]

(i) Logical, Alternative, Judgement and Absolute Legal Gaps

According to Somló, quoting the works of Lóránt Csink, and Péter Paczolay, applicability legal gaps can be of the following types: "When the judge can deduce the applicable norm by way of pure logics", it is a *logic legal gap*. An *alternative legal gap* is one where the law provides more than one applicable norms without specifying which one is to be used in resolving the particular case. The third type is termed as *judgement legal gap*, when the judge is to complete the law on the basis of moral judgement. It may happen that a legal gap does exist but there is no legislative body empowered to fill the gap in contrast with the previous cases where the judge may act, and therefore the gap remains in the legal rule. Such norms are typically the ones regulating the obligation of the supreme power. As the law excludes a legitimate resolution of the question, the legal gap may only be eliminated by a breach of law, i.e. in an illegitimate way. This is called an *absolute legal gap*.[58]

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[52] Miklós Szabó: *A jogdogmatika előkérdéseiről (On the Preliminary Questions of Legal Dogmatics)*. Prudentia Iuris, Miskolc, 1996, p. 204.
[53] Lóránt Csink, and Péter Paczolay, above, note 3 at p.1
[54] Bódog Somló: *Jogbölcsészet (Philosophy of Law)*. Prudentia Iuris 1, Miskolc, 1995, at pp.123–125.
[55] Lóránt Csink, and Péter Paczolay, above note 3 at p.2.
[56] Aleksander Peczenik: *On Law and Reason*. Kluwer, Dordrecht, 1989, at p.24.
[57] Lóránt Csink, and Péter Paczolay, above, note 3 at p.1.
[58] *Ibid*, at p.3.

(j) Theoretical and Practical Legal Gaps

Referring to Lóránt and Péter, both stated that Barna Horváth, in 1937, distinguished two types of legal gaps.[59] A *theoretical legal gap* is "the logical path between the legal norm and the legal case", existing in every case. As a result, both "creating a legal norm applicable to all cases" and "applying the legal norm to a specific legal case by purely logical means" are impossible. A *practical legal gap* is "when the bridge built by conventional judgement and experience over a theoretical legal gap collapses from time to time". The latter category is an occasional but serious disturbance in legal practice. The existence of legal gaps was proven by Horváth by the tool of syllogism. In his opinion, the legal norm contains a (first) premise (*propositio maior*), and the legal case contains a second premise (*propositio minor*). Logically, the second premise is missing from the legal norm, creating a legal gap.

According to Otilia Micloşină, the South-American conception of lacuna implies, the lack of any regulation for a concrete case".[60] It is also a fact that a hypothetical case, not legally regulated, represents a lacuna.... From the definition formally presented, one could understand that there is lacuna only when a case is not explicitly regulated by a norm. Does it result that the magistrate fills a lacuna, when he adopts a decision, whether that case has no explicitly legal regulation and this one on the basis of analogy, legally qualifies it? In the law of Roman Catholic origin, the magistrate is not allowed to create law. In the situation presented previously, the magistrate invokes the implicit norms to resolve a cause and uses analogy in this respect. In Pintore's definition where gaps exist, the lacuna does not appear only in case of the absence of explicit norm, but also the moment of the absence of legal norm, either explicit or implicit. Norberto Bobbio estimates that there is lacuna of law when in a given legal system there is a missing rule which the judge may invoke in case he has to solve a controversy deduced to his judgment."[61]

According to Otilia Micloşină[62] the phrase "lacuna of law", the term of law signifies legal system, and it is translated by the system of norms which the judge has to apply in order to decide a concrete case. Any social group has a patrimony of legal norms gathered over times. These norms may come from traditions, from the will of the dominant class, from jurisprudence and/or doctrine. The amplitude of this patrimony varies depending on the complexity of considered society. But, even in the most high-level society, there are concrete situations when the magistrate does not find in that system of law the legal norm which may be applied. It is about the cases which appear as a result of the new or original social situations and in front of which, the judge, in spite of the important number

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[59] *Ibid*, See also, BARNA HORVÁTH: *A jogelmélet vázlata (Draft of the Theory of Law).* Szeged, 1937.

[60] Mario Jori-Anna Pintore, "Manual of the General Theory of Law", G. Giappichelli (ed.), Torino, 1995, at p.222.

[61] Norberto Bobbio, "Contributions to a Legal Dictionary", G. Giappichelli (ed.), Torino, 1994, at p.89.

[62] Otilia Micloşină, "Defining Gap in Law", Available online at *www.upm.ro/proiecte/EEE/Conferences/papers/S1A12.pdf accessed 11 November, 2013.* Kelsen considers that there are only valid norms, and, therefore, there are no norms, unless valid; analogically, it was considered that the lacuna can be filled, and therefore, it does not exist. Still, to say that there are no lacunas because there is an integrative technique which appealing to an implicit norm of the system succeeds in filling them, it means that we turn back at the situation in which there are no diseases because there are medicines that cures them.

of existing legal norms, does not identify legal alternatives. Under these circumstances, it may be used the notion of "lacuna of law".

According to other conception it is considered that the notion of lacuna of law can have two different meanings:[63] (a). A field of law which is not stipulated under any legal provision. (b). The lack of specific legal provisions for a concrete case which appears as a result of the fact that the law-maker cannot anticipate any detail, but the judge can fulfil the application of a general provision of a concrete case.[64]

These definitions delimit the lacuna of law, starting from and applying the principles of natural law. Robert Kolb takes into consideration a gradation of the concept of lacuna which results from the general conception of the legal order. He made a distinction between lacuna of law which is like any form of indeterminacy of law and lacuna which means the absence of applicable legal norm from the system of sources of law.[65] Kolb concludes that one cannot approach lacuna from the isolated point of view, but that this represents a legal category which implies the entire theory of law.[66]

B Distinction between the Lacuna of Law and the Pure Silence of Legal Texts

In situations where legal gaps exist, there is need for a distinction between the lacuna of law and the pure silence of legal texts. Silence is not synonymous with lacuna. Legal silence can be deliberate. Under certain circumstances, it may be imposed from the legal point of view. Life is full of original and various situations, that it is impossible for them to be all integrated in legal sources. The author thinks that lacuna is not the silence of law, an objective fact, but it represents an incompleteness of law, therefore, a subjective fact. Lacuna appears only as a result of an interpretation which took in consideration the inherent values of legal policy. Behind any technical concept there is an axiological evaluation. Moreover, lacuna is not only the lack of an applicable rule of law, but any incompleteness of law. The law maker should have anticipated a legal norm which should be applicable, but it appeared a failure. Law is silent when it should ordinarily act.[67]

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[63] Michel Troper, *Statutory Interpretation in France*, in *Interpreting Statutes. A Comparative Study*, Neil MacCormick and Robert Summers, Darmouth Publishing Company, Hants, 1991, at p.175.

[64] In German law, the following definition for lacuna in law was proposed as follows: "there is lacuna when a normative system has a deficiency in the conditions in which the objective law as a whole, including the supra-legislative principles and legal ideas extracted from the nature of things, does not offer a norm of regulation*"*. See C. W. Canaris, *How to find and fill loopholes in German law in Leproblème the Gap in Right*, Chaïm Perelman, Bruylant, Bruxelles, 1968, at p.167.

[65] Robert Kolb, Interpretation and Creation of International L aw, Bruxelles: Bruylant, 2006, at p.780.

[66] *Ibid*.

[67] Csaba Varga, Doctrine and Technique in Law; A presentation at Internationales Rechtsinformatiks, Symposiom/ IRIS/2004, Kolloquium Philipps (Rechtstheorie), Salzburg 26-28 February, 2004 at 2-3. Available online at *www.univie.ac.at/ri/iris2004/arbeitspapierln/.../csaba_phil.doc, accessed 10 November, 2013.*
What is identifiable of law when no implementation or judicial actualisation is priory made is a *dynamei* at the most, that can exclusively become anything more through an instrumental operation by legal technique. Accordingly, law is made up of (1) a homogenised formal concentrate (2) operated by being referred to a practical action, the result of which will posteriorly be presented to the public as law converted into reality.

VII Methods of Filling the Gaps in Legislation

Legal gaps can be resolved through the following approaches discussed under sub-sections (a) to (d) hereunder:

(a) Analogy and Broad Interpretation

This involves resolving the case in question based on a similar case to which there is an applicable rule; while the concept of broad interpretation involves interpreting the rule applicable to the similar case in a way expanding it to the present case as well; exercising discretionary power when determining the facts of the case.[68]

(b) Filling the Gaps by Way of Subsumption

The gap in law can be filled by way of subsumption, i.e. by relating the legal case to the legal norm. This is to be done by the judge. According to Horváth, the law "can only be regarded as complete after filling the gap created by the theoretical legal gap, and the law thus completed becomes continuous as its gaps are all filled". By that, he has practically resolved the antagonism between the two categories.[69] The formalistic normative approach automatically denies the existence of legal gaps, saying that the legislator has done its work (i.e. the non-existence of a rule logically means that the conduct in question bears a legally neutral normative status).[70] This positivistic theory of law was followed by Gyula Moór. He held that "*not regulating a certain detail by the law does not mean a gap*". Accordingly, if the legislator failed to make rules for some situation in life when codifying an Act, this must have been done intentionally. However, when there is some change occurring after the promulgation of the statutory regulation which requires a different judgement as compared with the former cases, this can only be done in Moór's opinion by amending the relevant Act of Parliament rather than by judicial practice.[71]

(c) Filling the Gaps by Way of Legislation and Analogy of the Judge

According to Peter Mezei[72] in his study of Hungarian legal literatures dealing with the problem of legal gaps, he made following classifications: by their origin, legal gaps can be "original" or "posterior". In case of an original legal gap, "despite its existence, a certain fact is not included in the statutory regulation". When such a case is found by the judge, the tool of interpretation is to be used in order to verify whether the omission of legislative duty was intentional or incidental. If it is established that codification of the given case was omitted intentionally, then the judge is not empowered to fill the gap as this can only be done by way of legislation. Incidental omission may happen when

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68 *Ibid*, See also, Miklós Szabó: *Jogi alapfogalmak (Basic Concepts of Law). Prudentia Iuris*, Miskolc, at, pp. 49-52.

69 *Ibid*.

70 *Ibid*, See also, Vanda Lamm-Vilmos Peschka (ed.): *Jogi lexikon (Encyclopaedia of Law)*. KJK-Kerszöv, Budapest, 1999, at p.301.

71 *Ibid*.

72 *Ibid*, See also, Péter Mezei: A joghézag kérdése régen és ma (The Question of Loopholes Historically and Today). *Jogelméleti Szemle* (on-line journal), Budapest, 2002/2, http://jesz.ajk.elte.hu/mezei10.html.

an existing case is, by chance, not taken into account during legislation. In that case, the judge may employ analogy to deduce from an existing similar norm the rule necessary for resolving the case[73].

(d) Filling the Gaps by Amending the Statutory Regulations or by Adopting New Norms

A posterior legal gap results from a situation where the phenomenon concerned did not exist at the time of legislation, but its subsequent occurrence has led to lawsuits requiring regulation of the phenomenon. Such changes may, on the one hand, result from the amendment of national law and international (or the European Union's) norms, treaties, and, on the other hand, they may be caused by everyday events. The gap should be filled first of all by amending the statutory regulations or by adopting new norms, but in exceptional cases judges may also act. This is only possible in case of partial legal gaps. [74] By their scope, legal gaps can be "complete" or "partial". In case of a complete legal gap, there is no provision at all pertaining to the case to be judged upon. A partial legal gap is one where an existing provision is incomplete. The judges and the legislators are empowered to fill the gaps. Legislation may be used to eliminate any kind of legal gaps. The role of the judge is much more debated. Those who deny the very existence of legal gaps contest the judges' role as well. However, lawyers who insist on the contrary consider the judiciary to be the primary body designated to eliminate legal gaps.[75]

A Examining the Theoretical Basis of Filling the Gaps in Law

According to Greenawalt, one of the main exponent or theorists of filling the gaps in legislation while relying on Benjamin Cardozo's third lecture on *The Nature of the Judicial Process,* entitled *The Judge as a Legislator*.[76] He stated that "comparing the task of the judge with that of the legislator, Cardozo found that each of them is: legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open space in the law.... His action is creative. The law which is the resulting product is not found, but made. The process, being legislative, demands the legislator's wisdom".[77] But perhaps the most significant and controversial theory in present-day analytical jurisprudence is the "rights thesis" of Professors Ronald Dworkin and Rolf Sartorius.[78] The theory holds that "that there is always one correct outcome for any legal dispute, that the litigants have a "right" to this outcome, and that the outcome may be determined by the discretion or creativity of a judge on the basis of existing legal materials including statutes, precedents, rules, principles, and perhaps

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73 *Ibid*, p.4-5.

74 *Ibid.*

75 *Ibid*.

76 Greenawalt, Discretion *and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 *Columbia Law Review,* 359 (1975)

77 B. Cardozo, "The Nature of the Judicial Process", Yale: Yale University Press, 1921 at 113-115

78 Dworkin, *Hard Cases,* 88 *Harvard Law Review* 1057 (1975), *reprinted in* R. Dworkin, *Taking Rights Seriously*, Cambridge, MA: Harvard University Press, 1977 at pp.81, 82-90.

but Professor Kent Greenawalt, argues that discretion is a vague term having differing meanings in different contexts and thus hardly points to a clear conceptual alternative to the rights thesis. Though, Cardozo's position seems to be the logical alternative to the rights thesis, inasmuch as Dworkin claims that a judge must find the existing law whereas Cardozo holds that in close cases a judge may create new law as does a legislator.[79] He believes that although a judge is obviously not a legislator in general, the judge does legislate new law in close cases to fill gaps between existing rules. Cardozo offered his theory as a departure from the traditional Blackstonian theory of "pre-existing rules of law which judges found, but did not make".[80]

Just as Professor Greenawalt's theory of filling the gap is devoted to criticizing the rights thesis of Dworkin and Sartorius, Greenawalt's own position in favour of judicial legislation is presented indirectly as a contrast to the rights thesis by Anthony D'Amato, as follows ... "The judge should determine whether existing rules and principles are "clear" in favouring one side or the other. (a) If clear, the judge is bound by them to give the decision to the side favoured by the rules and principles. (b) If unclear, the judge may engage in judicial legislation.[81] Anthony D'Amato concluded by stating "that If a judge is indeed a legislator, even if only in hard cases, our idea of "law" and what we study when we study "law" undergoes a significant change. We begin to look at the judge rather than at his decisions; we study his opinions rather than the results in the cases; we treat what he says off the bench in the way that medieval subjects paid attention to the remarks of lords and princes.[82]

It has been advocated that Judges should tolerate some moral deficiencies in the law that they should not have tolerated had they not undertaken, as part of the job, to uphold the law. But they should not by that same token tolerate just any moral deficiency in the law. Invariably, they should strive to improve the law, at the very least by filling in its gaps in a morally decent way. Sometimes they should also improve it by reversing or containing immoralities introduced by other officials, inasmuch as they retain the legal power to do so.[83]

In many legal systems the moral commitment to uphold the law that the judge undertakes on taking the job is formalized in an oath of office. The content of such oaths is worth noting. In most legal systems judges take an oath to do 'justice according to law', or something like that. This is not an oath to apply the law. On the contrary, it is an oath to do justice, to decide cases in a morally meritorious way. To do so is not to usurp the role of the legislature. For the oath does not authorize judicial legislation. It authorizes judicial changes in the law, to make the law more just, but only when these changes are

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[79] D'Amato, Anthony, "Judicial Legislation" (2010), *Faculty Working Papers.*, Paper 107., at 1. Available online at http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/107 accessed 18 November, 2013. See also Anthony D'Amato, "Judicial Legislation", 1 *Cardozo Law Review*, at pp.63-97 (1979).

[80] *Ibid*, at p.2.

[81] Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 *Columbia Law Review* 368, 378 (1975).

[82] D'Amato Anthony, above, note 79, at p.19.

[83] John Gardner, "Law and Morality", pp.8-9. Available online at http://users.ox.ac.uk/~lawf0081/pdfs/lawmoralityedited.pdf, accessed 19 November, 2013.

brought about by legal reasoning, i.e. by reasoning with (or according to) law. That is the 'according to law' part of the oath.[84]

Legal officials, such as judges, play an indispensable role in securing the rule of law as when they apply 'the necessary abstract rule of law to the concrete case, they create the legal rule for the individual case before them. The object of law to secure order must be defeated if a controversial rule of conduct may remain permanently a matter of dispute.[85]

B Filling Gaps or Lacuna in Law by Judges through Normative Reasoning

This approach has emerged in more recent times. Here the court is not just looking to see what the gap was in the old law, it is making a decision as to what they felt Parliament meant to achieve and is referred to as the purposive approach.[86] In *Magor and St Mellons Rural District Council v. Newport Corporation*,[87] Lord Denning attempted to justify why judges should fill existing gaps in legislation using a purposive approach[88]reaffirm that: "We do not sit here to pull the language of Parliament and of Ministers to pieces and make nonsense of it. That is an easy thing to do, and it is a thing to which lawyers are often prone. We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis". But this did not receive the approval of the House of Lords on appeal. Lord Simonds, a strict constructionist, scotched this new approach and castigated it "as a naked usurpation of the legislative function under the thin guise of interpretation".

It is a fiction to think that law is not made by judges. The creative role of the judges arises when there is a gap in legislation and this analogy has been accepted in almost all jurisdictions of the world. In *S. P. Gupta v. President of India and ors,*[89] the court observed: The interpretation of every statutory provision must keep pace with changing concept's and values and it must, to the extent to which its language permits or rather does not prohibit, suffer adjustments through judicial interpretation so as to

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84 *Ibid*.

85 Iain G.M. Scobbie , "The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function", 2 *European Journal of International Law* (1997) 264-298 at 270, Available online at http://ejil.org/pdfs/8/2/1429.pdf, accessed 19 December, 2013.

86 "Judges and the law", Available online at http://labspace.open.ac.uk/mod/resource/view.php?id=415855, 19 November, 2013.

87 (1951) 2 All E.R.839.

88 The purposive approach (sometimes referred to as "purposivism", purposive construction, purposive interpretation, or the "modern principle in construction" is an approach to statutory and constitutional interpretation under which common law courts interpret an enactment (that is, a statute, a part of a statute, or a clause of a constitution) in light of the purpose for which it was enacted. The historical source of purposive interpretation is the mischief rule established in *Heydon's Case*. (1584) EWHC Exch J36. Purposive interpretation was introduced as a form of replacement for the mischief rule, the plain meaning rule and the golden rule to determine cases. Purposive interpretation is exercised when the courts utilize extraneous materials from the pre-enactment phase of legislation, including early drafts, hansards, committee reports, white papers, etc. The purposive interpretation involves a rejection of the exclusionary rule. See, "Purposive Approach", Wordvia http://www.wordvia.com/dictionary/Purposive%20approachaccessed 02 May, 2014.

89 IR 1982 SC 149, 1981 Supp (1) SCC 87, 1982 2 SCR 365.

accord with the requirements of the fast changing society which is undergoing rapid social and economic transformation. The court also went on to say that: "....law does not operate in a vacuum. It is therefore intended to serve a social purpose and it cannot be interpreted without taking into account the social, economic and political setting in which it is intended to operate. It is here that the Judge is called upon to perform a creative function. He has to inject flesh and blood in the dry skeleton provided by the legislature and by a process of dynamic interpretation, invest, it with a meaning which will harmonise the law with the prevailing concepts and values and make it an effective instrument for delivery of justice." It is clear from the above statements that, not only constitutional interpretation, but also statutes have to be interpreted with the changing times and it is here that the creative role of the judge appears, thus the judge clearly contributes to the process of legal development. The courts do not always follow the precedent blindly and do not always consider themselves bound by the given principles. The court does evolve new principles. However, the courts do always have to follow within the limits of the constitution and they cannot exceed the constitutional limits. "When new societal conditions and factual situations demand the Judges to speak, they, without professing the tradition of judicial lock-jaw, must speak out." Also, in *M.C. Mehta v. Union of India (Shriram - Oleum Gas)*[90] the court held that with the development and fast changing society the law cannot remain static and that the law has to develop its own new principles. Sabyasachi Mukharji, C.J., in *C. Ravichandran Iyer v. Justice A.M. Bhattacharjee*,[91] the court held that the role of the judge is not merely to interpret the law but also to lay new norms of law and to mould the law to suit the changing social and economic scenario to make the ideals enshrined in the Constitution meaningful and a reality. The society demands active judicial roles which formerly were considered exceptional but now a routine. The above decision reflects that the courts do make laws, they frame new principles; interpret the statutes and the constitution with the changing times in a bid to fill gaps in law that were not foreseen by the legislators due to emerging socio-economic situations.[92]

C Filling the Legal Gaps in a Civil Law Jurisdiction

The Civil Law tradition from the ages of the great Roman jurists and emperor Justinian, up to the 19th Century codification processes was well aware of gaps. They represented, however, what, at present, would be regarded as a political and/or a methodological issue. Indeed, both the Roman jurists and their *ius commune* followers (Glossators, Commentators, etc.) took for granted that gaps were, so to speak, a fatal side effect of any piece of written law: something naturally going along with it, like a shadow. Accordingly, they were concerned with either, or both, of the two following problems: first, *who* should be regarded as entitled to fill them up (that is whether the sole emperor or, in any case, the

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90 1987 AIR 965, 1986 SCR (1) 312, 1986 SCC (2) 176 1986 SCALE (1)199.

91 1995 SCC (5) 457, JT 1995 (6) 339.

92 *Ibid*. See the decision of Sabyasachi Mukharji, C.J., in the case of *C. Ravichandran Iyer v. Justice A.M. Bhattacharjee.*

sole legislative authority, on the one hand, or even the judge and the jurist, according to their respective roles, on the other); secondly, *how* to fill them up (*i.e.*, by which techniques proceeding to the so-called *extensio legis*).[93] By the mid-nineteenth century, however, as an outcome of the working of several factors (codification; Enlightenment ideologies about legislators' omnipotence, separation of powers, rule of law, and judges' passivity; the holistic conception of positive law advocated by the Historical School and Legal Dogmatics; etc.) the Civil Law world was apparently stung by the "positivistic" dogma asserting that legal systems are, by their very nature, *gapless* sets of norms, providing for any possible case whatsoever.[94]

According to Roberto MacLean, contradiction is inherent in the law. The moment that a statute is enacted, it begins to age and become inadequate for unanticipated future circumstances.[95] Life never stops. And perhaps some of the characteristics of the Civil Law system, such as the belief that reason can do too much, have helped to accentuate the contradiction between law and reality. What can a judge do? As Ehrlich has said, "There is no excuse, as it were, for squeezing decisions out of a statute with a hydraulic press."[96] There is no easy way out. Even at the height of post-revolutionary France, Article 4 of the French Civil Code provided that the judge who refused to render a decision under the pretext of the silence, obscurity, or insufficiency of the law was liable to prosecution for a refusal of justice. Professor Roger Perrot has observed that: The judge has the immense power to transform a readymade garment into a tailor-made suit at the price of alterations that may be considerable and sometimes rather unexpected. From this it has often been deduced that the judicial authority is thus able to perform a work of rejuvenation.[97] No legal system can survive in any society without an acceptable degree of judicial discretion. In the Civil Law, one finds discretion at the following levels: discretion in the Civil Law as a system, discretion within the civil codes, and discretion within the particular rules of those codes. Discretion within the system itself is a technique which gives ample leeway to the judge in his characterization or interpretation of the facts. When a judge is faced with a particular set of facts, he has the choice of placing those facts under one legal category or another he has a choice in characterizing the facts according to law.[98]

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

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93 P. Chiassoni The Interpretation of Normative Documents: Justinian and Glossatori, in L. Gianformaggio, M. Jori (eds.), Written by Uberto Scarpelli, Milan, Giuffrè, 1998, at. 208-209, 221-222, Utopia of Analytical Reason. Origins, Objects and Methods of Philosophy of Positive Law, Turin, Giappichelli, 2005, ch. IV.

94 Pierluigi Chiassoni, above note 40.

95 Roberto G. MacLean., "Judicial Discretion in the Civil Law", 43 *Los Angeles Law Review* (1982) at p.49.

96 *Ibid.*, See also Ehrlich, *Judicial Freedom of Decision: Its Principles and Objects,* in Science of Legal Method: Selected Essays 76 (1969).

97 *Ibid*, See also Perrot, "The Judge: The Extent and Limit of His Role in Civil Matters", 50 *Tulane Law Review* 496 (1976).

98 *Ibid*, at p.50.

Albert Tate, in certain occasion the legal problem is not always simple; the meaning of the law may not be clear, hence it must admit of judicial discretion in interpretation in order to produce a just result. Thus, the choice of methods of interpretation to produce a just result is always an exercise of judicial discretion.[99]

Thus, the choice of methods of interpretation to produce a just result is always an exercise of judicial discretion. Professor Julio Cueto-Rua, has very aptly stated that: "In choosing the method to which he will turn when a grammatical-logical approach is unsuccessful, the judge will choose that method of interpretation which will yield the most fruitful result in the case. By most fruitful result is meant that result most consistent with justice.[100]

Apart from these general techniques present within the codes themselves, Roberto MacLean, posits that the judge in the Civil Law tradition has sufficient discretion.[101] to achieve justice beyond that granted by the mere words of the law. Professor Merryman, for instance, states: that the dogma that a code can be complete and coherent fails to survive even a cursory glance at the jurisprudence.... The books are full of decisions in which the court has had to fill gaps in the legislative scheme and reconcile apparently conflicting statutes. Although the text of a statute remains unchanged, its meaning and applications often change in response to social pressures, and new problems arise that are not even touched on by any existing legislation. However complete a code might seem, there will always be gaps and interstices which require the judge's exercise of discretion. The gaps in statutes or codes are a reality that must be recognized. How can those gaps be filled? There are several solutions provided in the legislation itself. First, for example, the Civil Code of Switzerland, which dates from 1912, establishes in Article 1 that all gaps left by the code are to be filled in by the judge, who acts as a legislator.[102] Professor Alfred E. von Overbeck has noted in this regard that "the Swiss legislator was the first modern legislator to recognize that it needs the judge to achieve his own tasks..." . Even though the Austrian code dates from 1811 and its text does not seem to permit expressly the use of the same technique allowed under the Swiss code, more than one commentator

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[99] *Ibid*, See also A. Tate, *Techniques of Judicial Interpretation in Louisiana,* 22 *Los Angeles Law Review* 727, 754 (1962).

[100] *Ibid*. at 51. See also, J**.** Cueto-Rua, "Judicial Methods of Interpretation of the Law", 276 (1981).

[101] "The law may have run out in hard case situations, but only partly so for the rules still maintain their settled core of meaning even if they cannot resolve a particular case. Thus the judge who is faithful to his role furthers the determinacy of a general law, 'filling in the gaps by exercising a limited law-creating discretion'. He neither sets aside his law books entirely, nor tries blindly to follow the law. Instead, he: 'both makes new law and applies the established law which both confers and constrains his law-making powers'."(See, Peter Parten, "How Should Judicial Decisions be justified? An Investigation into the Role of the Judiciary from a Political Perspective". Unpublished MA Thesis in Political Philosophy Submitted to the Department of Politics, University of York, September 2008 at 17. See also Ralph Miliband, *The State in Capitalist Society* London: Weidenfeld and Nicolson, 1969 at p.272).

[102] Article 1 provides: the law applies according to its wording or interpretation to all legal questions for which it contains a provision. In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator. In doing so, the court shall follow established doctrine and case law. Swiss Civil Code adopted on 10 December, 1907 (and is thus formally known as the "Swiss Civil Code of 10 December 1907"), and in force since 1912. (Status as of 1 January 2013) available online at http://www.admin.ch/ch/e/rs/2/210.en.pdf accessed 12 November, 2013.

has interpreted Article 7 of the Austrian Civil Code[103] as allowing the judge to act as a legislator in such cases.

Other code technique used for filling gaps is legislation that requires the judge to resort to general principles of law are the solutions opted for in the Argentine Civil Code of 1869;'[104] the 1932 Civil Code of Mexico;[105] the Peruvian Civil Code of 1936;"[106] the 1942 Civil Code of Brazil;[107] the French Civil Code[108] and the Italian Civil Code of 1942."[109] The use of such general principles of law allows the judge ample resources from which to draw in deciding cases involving gaps in the law, and some of those codes are even more precise. The doctrine of abuse of right is a doctrine of long standing in many Civil Law countries. The doctrine of abuse of right condemns not only the exercise of a right but the abusive use of it in such a way as to damage another person. In Louisiana State, this doctrine appears only tangentially in article 623 of the Civil Code, which establishes the rule that a "usufruct may be terminated by the naked owner if the usufructuary commits waste, alienates things without authority, neglects to make ordinary repairs, or abuses his enjoyment in any other manner."....[110]

Under the New Zealand Bill of Rights Act 1990, for example, Parliament has also mandated that judges interpret statutes in a manner that is consistent with the Bill of Rights Act if possible. This means that gap-filling is required by reference to a statute that is already expressed in general terms and requires gap-filling in its own right.[111] However,

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[103] Austrian Civil Code of June 1, 1811, No. 946. See Article 7. It provides that in cases which cannot be decided by the usual means of interpretation (grammatical, natural construction of law or analogy), the case must be decided with regards to the carefully collected and well considered circumstances, according to the precepts of natural law. Similarly Article 1 of the Swiss Code, empower the Judge, in the case of a gap in the law, to apply customary law, and in its absence to decide the case according to rules which he would establish, if he were the legislator. (See Leo Gross., *Essays on International Law and Organization*, Vol. 1, New York: Transnational Publishers 1984, at p.230).

[104] Civil Code of the Republic Argentina Article 16 (1869).

[105] Civil Code for the Federal District and Territories Article 19 (1932).

[106] Peruvian Civil Code, Article 23 (1936).

[107] Brazilian Civil Code, 1942, Article 4

[108] France, have a provision that makes it an offence not to decide a case. Article 4 of the French Code Civil (1804) provides that: *Le juge qui refusera de juger, sous pretext du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice* . (This means that: the judge who refuses to judge, under pretext of the silence, obscurity or insufficiency of the law may be prosecuted as guilty of denial of justice).

[109] Civil Code of the Kingdom of Italy or *Codice Civile del Regno D'Italia* Article 12 (1942).

[110] Roberto G. MacLean, above note 71 at p.93.

[111] New Zealand has no written constitution and so the boundaries of judicial review cannot be defined by any words in a constitution. Moreover, the appropriate scope of judicial review is not defined by any other statute. While there is legislation related to judicial review, the better view, is that this legislation is procedural only. Even if that is not the case, the statute in question does not set out the grounds of review and it is quite clear that the common law and inherent jurisdiction of our High Court survives. Accordingly, the setting of limits or boundaries to the grounds of judicial review is a task that falls squarely on the courts. (See Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2007) at 121-145 and 815-884., See also Matthew Groves and H P Lee " Australian Administrative Law: The Constitutional and Legal Matrix" in *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007) at pp.1-33. New Zealand Judicature Amendment Act 1972) See generally Justice Susan Glazebrook, "Immigration and Judicial Review" Oral presentation to Australian Supreme and Federal Court Judges at a Conference held in Hobart from 24-28 January 2009. Available online at http://www.courtsofnz.govt.nz/speechpapers/Supreme%20%20Federal%20 Judges%20Paper.pdf, accessed 12 November, 2013.

that many of the common law values used to interpret legislation (for example rights of access to the courts) were designed to protect individual rights.[112]

A third widely recognized general principle of law relied upon by judges in filling gaps in the law are that of equity.[113] As it is understood within the meaning of Articles 21, 1903, 1964, and 1965 of the Louisiana Civil Code, equity is based on natural law, on reason, and on the idea that one should not do unto others that which he would not wish others to do unto him.[114]

Finally, the judge exercises discretion with regard to particular rules of law. In the first place, the judge in some cases must determine whether an agreement or obligation is or is not against the public order or the public good. For example, Article 11 of Louisiana Civil Code of 1965, provides: Individuals can not by their conventions derogate from the force of laws made for the preservation of *public order* or *good morals.* But in all cases in which it is not expressly or impliedly prohibited they can renounce what the law has established in their favor, when the renunciation does not affect the rights of others, and is not contrary to the *public good.* [115] Likewise, under articles 217, 1892, and 2031, in cases closely connected with the notion of public good, the judge must decide what constitutes good morals or *bonos mores* (bonus dwell)". In other cases, the judge must decide when someone has acted in good faith or with good intention.[116]

D Filling the Legal Gaps in Common Law Jurisdictions

Michael Sinclair wrote that the Constitution is authoritative, constitutive wisdom from the past; so too are statutes properly made pursuant to it. These are the texts provided to us by the ancients, but they do not come with ready-made interpretations. Nor do they cover all domains of human behaviour, or all sources of conflict. Judicial decisions fill the gaps. They have to, as conflicts cannot be left unresolved if society is to survive as such. It follows that judicial decisions should be normatively adaptive to "the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men" as Holmes famously put it. But times change, and those decisions join the authority of the past,

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[112] Justice Susan Glazebrook, "Filling the Gaps" Available online at http://www.courtsofnz.govt.nz/speechpapers/Speech05-05-2003.pdf, accessed 12 November, 2013.

[113] *Ibid*. Note that the use of equity, however, is not a matter of pure legal technique. It also has great ethical significance. Consider the situation in the New Testament when Jesus Christ was asked, by someone who wanted to put him in a difficult situation, whether it was legal for a man whose lamb had fallen into a pit to work on Sunday in order to get the lamb out. Jesus replied: It is lawful to do good on the Sabbath. (See the Holy Bible: New International Version, Grand Rapids-Michigan: Zondervan, 1990, *Matthew* 12:11-12.).

[114] *Ibid*.

[115] "That is considered as morally impossible, which is forbidden by law, or *contrary to morals.* All contracts having such an object are void." LA. Civ. CODE art. 1892.

[116] See also, Roberto G. MacLean, above note 93 at 54. *See, e.g.,* L A. Civil Code, Articles 1901, 3006 & 3033. Article 1901 provides: "Agreements legally entered into have the effect of laws on those who have formed them. They cannot be revoked, unless by mutual consent of the parties, or for causes acknowledged by law. They must be performed with good faith".

texts in tension with new, adaptive rationality. *Stare decisis*, the doctrine of precedent, mediates that tension, giving the edge to prior decisions, be they purely common law, or interpretations of statutes or constitutions.[117]

Common law and its principle of *stare decisis* could not have survived through so many social upheavals and radical technological and economic changes without being flexible and adaptive. Lord Mansfield saw the common law's adaptability to change in the requirements of justice as its principal advantage over statutes: "A statute very seldom can take in all cases, therefore the common law that works itself pure by rules drawn from the fountain of justice, is for this reason superior to an act of parliament.[118] The reference is to Judge Cardozo's 1920 Storrs Lectures, "Judicial Process," which gave the benchmark quotable: "The labour of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of courses laid by others who had gone before him." There are two reasons here. Were all cases to be decided afresh at all levels (a) there would be a burden of numerosity constrained only by the litigants' willingness and budget, and (b) it would create an insecure base of decisions previously made. From a societal point of view *stare decisis* can be seen as promoting efficiency in dispute resolution resource allocation.[119]

As a corollary to the above ideas of Michael Sinclair, on constitution and the role of judges in the use of precedents in gap-filling and shaping of the law, Pierluigi Chiassoni, asserts that in different jurisdictions, gaps feature among the sources of concern, for legal practitioners (judges, jurists, barristers, attorneys at law, etc.) and legal theorists alike. On the one hand, gaps challenge the practitioner's skills in coping with cases that as lawyers like to say are somehow "unprovided for" by the law. On the other hand, gaps are a powerful test for legal theorists' ability to provide careful, practice-sensible, and practice-oriented accounts of a tangled phenomenon. For indeed, as soon as one leaves the apparently sound lands of practitioners' common sense, as soon as one departs from lawyers' apparently smooth "intuitions" (*i.e.*, fuzzy and unreflective everyday notions), a host of overwhelming questions suddenly pops up: and it's conceptual quick-sands everywhere. *What* a gap in the law *really is*? *Really* are there *gaps* in the law? What is it, for a judge, to *find* a gap in the law, if any? Assuming there is a gap in the law how is it to be filled up properly by the law-applying agencies? And so forth. This question has been answered earlier under the sub-head "methods of filling the gaps in legislation".[120]

A most common way of resolving disputes under the rule of law is by reference to, and application of, the language of applicable multilateral or bilateral treaties or statutes, or some other writing which provides evidence of the relationship and past positions of the

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[117] Michael Sinclair, "Precedent, Super-Precedent", *GEO. MASON L. REV. VOL*. 14:2, 2007, at p.366.

[118] *Ibid*., at 371. See the case of *Omychund v. Barker*, (1744) 26 Eng. Rep. 15, 22-23 (Ch.).

[119] Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 *Cornell Law Review*, 423 (1988). See also Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 *Vanderbilt Law Review* 654 (1999).

[120] Pierluigi Chiassoni, above note 40, at pp.51-52.

parties to a dispute.[121] Another method is by reference to custom, the practice of nations in a particular area (customary international law) and principles of law derived from such. But what happens when there is no such guiding authority for the benefit of those involved in resolving the dispute? Such gaps are inevitable in any legal system, including the international one, because treaties (contracts), statutes, and rules derived from custom cannot be designed to cover all situations which give rise to disputes. International law provides an answer to that question for the resolution of international disputes: general principles of law may used to fill the void or "gap." These may be referred to, as one authority did, as "nonconsensual" sources of international law.[122]

In the municipal law systems of countries with a common law tradition, judges very often look to the decisions from outside sources to fill in the "gaps" of the law to be applied in the resolution of a particular case. As an example, state courts in the United States very often cite the decisions of other state courts in the course of an opinion in a case, where a needed legal rule of the deciding state is absent or unclear. As a corollary, some justices of the Supreme Court of the United States have adopted the practice of using the decisions of courts of other countries and international courts for their persuasive value in clarifying unclear rules to be applied in a case. In civil law countries, as Professor Mark Janis of the University of Connecticut Law School noted that, "lawyers and judges in the civil law tradition are familiar with the problem of lacunae, gaps in the law, a concept based on the premise that only formal legislative institutions are empowered to make legal rules".[123]

Thus, judges in civil law countries need statutory authority to "fill in the gaps" of the legislatively created legal rules. Must the civil law judge merely look at the statutes or decisions of courts in foreign jurisdictions for a "fill in the gaps" principle, or must the judge find explicit statutory authority for such practice, i.e. to find "explicit authorization permitting courts to fill the legislative vacuum?" The existence of a body of legal principles and rules that are common to all, or almost all legal systems, is supported by some observations made by a British barrister, C. Wilfred Jenks, in his book titled "the Common Law of Mankind".[124]

> Jenks observes that virtually all of the legal systems of the world, including those in Latin America, Islamic countries, African countries, countries within the former Soviet bloc, India, China, and Japan have been profoundly influenced in the course of their development by either the civil law or the common law. The result is that many principles of law are common to these legal systems. One only has to examine, for example, the law of contracts or torts or the criminal law relating to murder in these legal systems to understand the truth of this assertion. Thus the common law and the civil law, which by themselves share common principles of law, provide

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[121] James G. Apple, Veronica Onorevole and Andrew Solomon (eds), "The American Society of International Law and International Judicial Academy", Volume 2, Issue 2, Jul/Aug 2007 , available online at http://www.judicialmonitor.org/archive_0707/generalprinciples.html or http://www.jura.uni-augsburg.de/en/curriculum/summer_program/materials/Materials2012/Augsburg_Comp_Law_Readings_Week_3_-_Brown_2012.pdf, accessed 20 November, 2013.

[122] *Ibid*.

[123] *Ibid*.

[124] C. Wilfred Jenks, *The Common Law of Mankind*, New York: Frederick A. Praeger, Inc., 1958, at pp. xxvi, 456.

the basic framework that many general principles of law can be derived and used to "fill the gap" when there is no general principle of international law available for application in the resolution of a particular case.

The traditional civilian approach to the role of statutes, which is reflected in a citation by French jurist Jean Etienne Marie Portalis:[125] "The function of the law is to fix, in broad outline, the general maxims of justice, to establish principles rich in suggestiveness (consequences), and not to descend into details."[126] French jurists distinguish between those situations in which the facts do not fall within the scope of a statutory provision or code and those in which they only partly fall within the scope of that code or statutory provision ("*insufficiency of the law").* In the former cases, French judges attempt to find a link by means of deductive reasoning or analogy. In the latter cases, they try to overcome the insufficiency of the law by a "creative interpretation" of the code provisions concerned, which may include resorting to factors such as the "intent of the legislature" or the "interest of the parties".[127] Civil law jurists in fact distinguish between two methods of analogy: statutory analogy and analogy of law. If the judge follows the method of statutory analogy, he or she fills a gap in the code by deriving a rule from a provision contained in the code and applies it to the case at hand, because he or she finds that the two cases are similar. In the case of analogy of law, the starting point is not one single provision but several provisions. Again, a rule is derived from the codified law and applied to the case before the court. In light of these observations, American scholar Grant Gilmore described a civilian code as ... a legislative enactment which entirely pre-empts the field ... thus, when a court comes to a gap or an unforeseen situation, its duty is to find, by extrapolation and analogy, a solution consistent with the policy of the codifying law."[128] Common Law judges, on the other hand, traditionally did not need to fill gaps at all.,[129] therefore for a Common Law judge,[130] case law has represented the classic source of law and statutes were an exceptional intrusion into the body of Common Law.[131] Thus, whenever a statute did not specifically address the facts, the Common Law was the default rule and courts in Common Law countries have usually refused to fill gaps in statutes by

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[125] Katja Funken, "The Best of Both Worlds: - The Trend Towards Convergence of the Civil Law and the Common Law System", LA732 Comparative Legal Essay, S 804151001, at 7-9. Available online at http://www.jurawelt.com/sunrise/media/mediafiles/13598/convergence.pdf, accessed 22 November, 2013.

[126] JEM. Portalis, *et al*. , 'Discours Preliminaire Prononce Lors de la Presentation du Project (de Code Civil) de la Commission du Governement, in: Fenet PA, *Recueil Complet des Travaux Preparatoires du Code Civil* T.I. 470, 1827.

[127] G. Mousourakis, "LA 431/LA 631 Lecture in Comparative Law", The University of Queensland, TC Beirne School of Law, 20 April 2000. The French example illustrates how Civil Law judges usually attempt to find a solution coherent with the "spirit" and "system" of the code. Furthermore, Section 7 of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch* or *ABGB*) states that *"... where a case cannot be decided either according to the literal text or the plain meaning of a statute, regard shall be had to the statutory provisions concerning similar cases and to the principles which underlie other laws regarding similar matters."*

[128] G. Gilmore, "Legal Realism: Its Cause and Cure" (1961) 70 *Yale Law Journal* 1037 at p.1043.

[129] E.A Farnsworth, "A Common Lawyer's View of His Civilian Colleagues" (1996) 57 *Los Angeles Law Review* 227 at pp.231.

[130] Katja Funken., above note 125.

[131] J.M. Landis, "A Note on "Statutory Interpretation", (1930) 43 *Harvard Law Review* 886.

statutory analogy.[132] This approach, however, evolved from an age where statutes were of marginal importance. Today it is, to a large extent, no longer tenable. This is due to the abovementioned increase in codification in countries such as Australia, the United Kingdom and the United States. This development of statutes as a source of law in Common Law jurisdictions justifies and in some areas even requires the use of statutory analogies in order to fill gaps. For instance in the United States, entire areas of business law are regulated by federal statutes, but at the same time, as Justice Brandeis noted in the famous US Supreme Court case of *Erie Railroad Co. v.Tompkins*,[133] *"there is no federal general Common Law"* in America. The increase in statutes in Common Law jurisdictions is likely to require Common Law judges to fill gaps in those codes by statutory analogies, just as Civil Law judges do. Thus, the filling of gaps is likely to be an area of future convergence.

Common Law relied on few, if any, statutes while Civil Law starts from a large body of statutes rooted in Roman law dating back to the sixth century.[134] In both Common and Civil Law the body of statutes has expanded dramatically through time,[135] which makes the parallel problematic, and pure" forms of either system hard to identify.[136] This is because the gaps left open by the Statute Book are filled by the Courts according to different criteria in the two systems. In a Common Law regime the gaps are filled utilizing the body of applicable precedents, which is what we model below. In a Civil Law system the gaps are filled by interpretation of the code. At least in the world we model here, the use of precedents stands out as a more (economically) efficient way to fill the gaps. Common Law adapts via the use of precedents, while Civil Law changes little unless the Statute Book itself is changed. If one were designing Civil Law and Common Law from scratch, then it would be efficient to strive for more detailed legislation in the Civil Law than in the Common Law world. If this were the case, in this re-designed world, the distinction we make between Statute and Case Law would broadly correspond to the distinction between Civil and Common Law.

VIII Filling the Gaps in Legislation through the Purposive Approach in Nigeria

Filling the gaps that exists in legislation in Nigeria requires the adoption of purposive approach.[137] The approach takes account of the words of the legislation according to their

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[132] R.S. Atiyah, "Common Law and Statute Law", (1985) 48 *Modern Law Review* 1 at p.12.

[133] 304 US 64, 78 (1938).

[134] Luca Anderlini, Leonardo Felli and Alessandro Riboni, "Statute Law or Case Law?" (1 July, 2008), at pp.2-3. Available online at www.hss.caltech.edu*/~miaryc/PEW/Leonardo_Felli_PEWCaltech.pdf,* accessed 20 November, 2013.

[135] G.A. Calabresi, *A Common Law for the Age of Statutes*, Cambridge: Harvard University Press, 1982 at p.8

[136] A.T. Von Mehren, *The Civil Law System*. Englewood Cliffs: Prentice Hall, 1957, Ch. 16.

[137] P.E., Oshio, "Towards A Purposive Approach to the Interpretation of the 1999 Constitution" at pp.20-21. Available online at *www.nigerianlawguru.com/.../TOWARDS%20A%20PURPOSIVE%20A...*accessed 25 November, 2013. This approach has many advantages for justice. First, it allows recourse by the courts to extrinsic materials like parliamentary history, official reports or records of proceedings in parliament etc. in order to properly access legislative intention.

ordinary meaning and also the context in which they are used, the subject matter, the scope, the background, the purpose of the legislation in order to give effect to the true intent of the legislation and not just the intention of parliament only. According to Professor P.E Oshio, the purposive approach is the modern approach to the mischief rule, but it is wider in scope than the mischief rule as the approach extends to applying an imputed intention of parliament.[138] It is the approach adopted in the interpretation of European Community legislation which merely states broad principles in the continental style and leaves the details (gaps) to be filled in by the courts. It enables the court to consider not only the letter but also the spirit of the legislation for "everything which is within the intent of the makers of the Act, although it be not within the letter, is as strongly within the Act as that which is within the letter and the intent also."[139]

In Nigeria, the Supreme Court stated the position as follows:

> My Lords, in my opinion, it is the duty of this court to bear constantly in mind the fact that the present Constitution has been proclaimed the Supreme Law of the Land, that it is a written organic instrument meant to serve not only the present generation, but also several generations yet unborn … that the function of the Constitution is to establish a framework and principles of government, broad and general in terms, intended to apply to the varying conditions which the development of our several communities must involve, ours being a plural, dynamic society, and therefore, mere technical rules of interpretation of statutes are to some extent inadmissible in a way so as to defeat the principles of government enshrined in the Constitution. And where the question is whether the Constitution has used an expression in the wider or in the narrow sense, in my view, this court should whenever possible, and in response to the demands of justice, lean to the broader interpretation, unless there is something in the text or in the rest of the Constitution to indicate that the narrower interpretation will best carry out the objects and purposes of the Constitution. My Lords, it is my view that the approach of this court to the construction of the Constitution should be, and so it has been, one of liberalism, probably a variation on the theme of the general maxim *utres magis valeat quam pereat*. I do not conceive it to be the duty of this court so to construe any of the provisions of the Constitution as to defeat the obvious ends the Constitution was designed to serve where another construction equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends.[140]

Oshio further asserted that despite the advantages of the purposive approach some writers express the fear that such liberal approach would encourage judicial activism or creativity and this may lead to a floodgate of judicial legislation which will offend the doctrine of separation of powers. Sometimes, judicial legislation is no more than a court extending or adapting an old rule to a new situation in order to do substantial justice. Since society is not static but dynamic our legal process should not be static but must change from time

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[138] *Ibid.*, at pp.23-24.

[139] *Stowell v. Lord Zouch* (1569) 1 PLOWD 369.

[140] See the comment of Udo Udoma JSC in *Nafiu Rabiu v. The State* (1981) 2 N.C.L.R. 293, 326.

to time in response to societal values and aspiration. This can only be achieved through judicial creativity in the interpretation of statutes and the Constitution.[141]

Hence Lord Denning one of the greatest protagonist of judicial law making in appropriate situations, exposed the predicament of the judge in the judicial process in the case of *Packer v. Packer*,[142] where he said that: "what is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still while the rest of the world goes on and that will be bad for both"[143] He also stated that, "My root belief is that the proper role of a Judge is to do justice between the parties before him. If there is any rule of law which impairs the doing of justice, then it is the province of the judge to do all he legitimately can to avoid that rule-or even to change it-so as to do justice in the instance case before him".[144] Furthermore the great strength of the common law is that the judges are free to develop it on a case by case basis as new factual situations arise. Hence, in *Ellerman Lines Ltd. v. Read*,[145] Scrutton, L.J held that: "if there is no authority for this it is time that we made (sic) one".[146]

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[141] See P.E., Oshio, above note 137.

[142] (1953) 2 All E.R. 127, at 129 (C.A). See also P. Robinson and P. Watchman (eds), *Justice, Lord Denning and the Constitution*, England: Glover Publishing Co. Ltd, 1981, at, 253. See also, Allan C. Hutchinson, *Supreme Courts Law Review*, Vol, 3:565, (1982) at 566-567, Available online at https://apps.osgoode.yorku.ca/osgmedia.nsf/0/759FE8203C594C0F852571C4006391A7/$FILE/Review%20-%20Robson&Watchman.pdf, accessed 25 November, 2013). In *Packer* v. *Packer* is one of those unsatisfactory cases in which an appeal court of even numbers is equally divided, and the judgment of the court below therefore stands as the decision, in this instance, of the Court of Appeal, not only in the case under litigation but as a precedent binding upon the Full Court of Appeal in the future. Judgement: The question at issue was one of statutory interpretation. Are illegitimate children included in the wording of the Matrimonial Causes Act, 1950, Section 26, which gives the court power, in any proceedings for divorce, nullity or judicial separation, to provide for the custody, maintenance and education of the children, the marriage of whose parents is the subject of the proceedings"? Denning L.J. thought that they were, Morris L.J. the only other member of the court, that they were not, so the ruling at first instance that an illegitimate child was not included prevailed. The Canon Law rule that a bastard child is legitimated by the subsequent marriage of his parents has been part of the law of most of Christendom since the 12th century, except in England, where it was rejected at the Council of Merton in 1285, when " *omnes cmites et Barms una voce responxkrunt, q w d nolunt leges Angliae mutari, que usitate sunt, et approbate."* From January 1, 1927, however, legitimation *per subseqwns matrimonium* has become part of the law of England by reason of the Legitimacy Act, 1926, with the unique exception that no child, either of whose parents was married to a third party at the time of his birth, can be legitimated should they subsequently marry. (See also O.M, Stone, "Case Note on Children Without the Law",: *The Modern Law* Review, Volume 16, Issue 4, at 515-517, Article first published online: 18 January, 2011. Available online at http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.1953.tb02139.x/pdf accessed 27 November, 2013).

[143] *Ibid*., (1953) 2 All E.R. 127, at 129 (C.A). See also, *Ostime v. Australian Mutual Provident Society* [*1960*] *AC 459* (HL). 56.

[144] See, Allan C. Hutchinson, above note 142.

[145] (1928) 2 K.B, 144.

[146] See Niki Tobi, *Sources of Nigerian Law*, Lagos: MIJ Professional Publishers Limited, 1996, at 79-80. In *Ellerman Lines Ltd v. Read* (1928) 2 KB 144, 152, the question that arose was that: on what basis do the judges decide to make authority where there was none before? Or to modify or adapt such authority as there is? There is no easy answer to this. Whatever we do must be consistent with the underlying principles and policy of the law. It must not overstep that indefinable line between the development and elaboration of existing principles and the making of brand new law which is unquestionably the province of Parliament. It must work with, rather than against, the grain of legal policy. It must go forward when the law is going forward and draw back when the law is drawing back. (See also http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070502/obg-8.htm accessed 29 November, 2013).

Thus in the case of *Attorney General of the Federation v. Abubakar*,[147] the Supreme Court observed per Aderemi, J.S.C. that:

> It has been said in one of the briefs before us that the case at hand is, by every standard, a novel one. I entirely agree; given the facts of this case and the little research I have carried out I have not come across any judicial decision relating to the peculiar facts of this case. But, no legal problem or issue must defy legal solution. Were this not to be so, the society, as usual, will continue to move ahead, law, God forbid, will then remain stagnant and consequently become useless to mankind. With this unfortunate consequence at the back of his mind, a Judge, whenever faced with a new situation which has not been considered before, by his ingenuity regulated by law, must say what the law is on that new situation; after all, law has a very wide tentacle and must find solution to all man-made problems. In so doing, let no Judge regard himself as making law or even changing law. He (the judex) only declares it (law) he considers the new situation, on principle and then pronounces upon it. To me, that is, the practical form of the saying that the law lies in the breast of the Judges." In some cases where the words used in the statute are ambiguous, the courts have discretion to choose the meaning which they consider most appropriate having regard to the context and other surrounding circumstances. If this amounts to law-making in the general sense, then judges make law....In the present state of things therefore, judicial creativity or activism[148] in statutory/constitutional interpretation becomes inevitable to keep pace with the fast growing and changing needs of the society. Accordingly, it is a natural response to the challenge posed by the dynamic nature of the society.

The Supreme Court explained the same principle in *Amaechi v. INEC*,[149] as follows:

> …the primary duty of the court is to do justice to all manner of men who are in all matters before it. It then seems to me clear, that when the court sets out to do justice so as to cover new conditions or situations placed before it, there is always that temptation, a compelling one, to have recourse to equitable principles. A court, in the exercise of its equitable jurisdiction must be seen as a court of conscience. And Judges who dispense justice in this court of law and equity must always be ready to address new problems and even create new doctrines where the justice of the matter so requires.

Indeed in Nigeria, judicial creativity through the use of discretion in constitutional interpretation is motivated by the desire to do justice, and fill the gaps in law when judges

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[147] (2007) 10 N.W.L.R. (Pt. 1041) p.1 at 171-172 (per Aderemi, J.S.C.).

[148] Judicial philosophy which motivates judges to depart from strict adherence to judicial precedents in favour of progressive and new social policies, which are not always consistent with the restraint expected of appellate judges. It is commonly marked by decisions calling for social engineering and occasionally these decisions represent intrusion into legislative and executive matters. (See M. Kirby, *Judicial Activism*, London: Thompson, Sweet & Maxwell, 2004, Chapter 1.) See also Bryan A. Garner (ed), *Black's Law Dictionary*, 7th edn, St Paul Minn: West Publishing, 1999.

[149] (2008) 5 N.W.L.R. (pt. 1080) 227 at p.451 (per Aderemi, J.S.C.).

are called to decide on a case were no legal precedent or legal rule exist.[150] Also in another perspective and even where much broader definition implies that a legal gap exists when the norms in force issued by the legislative bodies do not contain any provision by which the judge could resolve the case in question, under such circumstance the weight of evidence adduced by the parties will be placed on the scale of justice by the judge to see where the weight will tilt to and he will decide in favour of the party with overwhelming evidence in support of the case under consideration.

Finally Niki Tobi posits that: "certain instances when there exist neither statutes nor case law on a matter before the judge in such instances, the judge is initially helpless, but the case before him must be decided on way or the other. He cannot adjourn the case and ask the legislator to pass a statute on the point before him. He cannot fold his arms and tell the litigants that he is helpless on the ground that there is no a relevant statute or case law governing the issue before him. He must do something and quickly too for that matter. He therefore, propounds a principle suitable to the case before him. The principle is novel. The principle is an innovation, and so the judge is said to have made the law", and to have also filled an existing gap in legislation where no statutory rule of law or judicial precedent exit.[151]

IX Conclusion

This paper examined "what constitutes legal gaps and how there are filled in different jurisdiction". The context showed that different types of gaps do exist in legislation that is enacted in different jurisdictions of the world. Legal gaps result from the legislator's mistake, short-sightedness, carelessness or tardiness and are meant to be filled by judges because no legal problem or issue must defy legal solution. In a Common Law regime the gaps are filled utilizing the body of applicable precedents while a Civil Law system the gaps are filled by interpretation of the code. In circumstances where such cases has not been adjudicated upon in the past and therefore no precedent exist to be followed by the judge, the gap can only be filled through judicial creativity in the interpretation of statutes. The role of the judges in any judicial system is not just to interpret the law by to lay new norms where non exist to meet a particular legal situation. This research further reveals that gaps are inevitable in any legal system, including the international one, because treaties (contracts), statutes, and rules derived from custom cannot be designed to cover all situations which give rise to disputes.

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[150] Oputa JSC once counselled judges on this thus: "The judge should appreciate that in the final analysis the end of law is justice. He should therefore endeavour to see that the law and the justice of the individual case he is trying go hand in hand… To this end he should be advised that the spirit of justice does not reside in formalities, not in words, nor is the triumph of the administration of justice to be found in successfully picking a way between pitfalls of technicalities. He should know that all said and done, the law is, or ought to be, but a handmaid of justice, and inflexibility which is the most becoming robe of law often serves to render justice grotesque. In any 'fight' between law and justice, the judge should ensure that justice prevails that was the very reason for the emergence of equity in the administration of justice. The judge should always ask himself if his decision, though legally impeccable in the end achieved a fair result. 'That may be law but definitely not justice' is a sad commentary on any decision." (See Azinge, E. "Living Oracles of the Law and the Fallacy of Human Divination" 6th Justice Idigbe Memorial Lecture, Faculty of Law, University of Benin, p.8).

[151] See Niki Tobi, above note 146.