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# Non Liquet: From Modern Law to Roman Law

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# NON LIQUET: FROM MODERN LAW TO ROMAN LAW*

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*To Federico Carpi in friendship*

## I. MAY THE JUDGE REFUSE TO PRONOUNCE JUDGMENT?

In modern legal systems, the judge cannot as a rule evade his basic duty, that of adjudicating. He has the option of either allowing or of rejecting the plaintiff's claims. Under the criminal procedure rules adopted by several countries, a judge may acquit for insufficient evidence.[1] But he cannot be released from exercising his function as a judge, claiming either that the facts of the case are not sufficiently clear to him (factual doubt), or that the norm to be applied in the specific case cannot be determined (judicial doubt), or even that there exists no fixed norm for

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* An explanatory note on the structure and limits of the present essay may be useful. In studies which also have a historical character, it is customary to present the subject matter in chronological order, first outlining the more ancient legal system, following then as far as possible its evolutionary steps, finally to end with the analysis of existing legal systems. In this article, however, in order to place the reader in medias res he is presented with modern legal systems with which he is already familiar: in such systems it is practically inconceivable that the judge should refuse to give judgment in case of doubt. After the arguments adduced in justification have been discussed, the author turns to the problem in the context of Roman law, reaching some conclusions de lege ferenda. Neither the criminal aspect of the problem i.e., that of the penalty incurred by a judge for omitting to perform his duty of pronouncing judgment, nor the problem of non-justiciability which as recently been the subject of intense controversy, is dealt with in this article.

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1. For the discussion of problems connected with dismissal for insufficient evidence, *see* A. Maliverni, *L'Assoluzione per insufficienzea di prove*, 3 STUDI IN ONORE DI GIUSEPPE GROSSO 557 (1970).

the determination of the case (*lacuna* in the law)[2]. Thus the *Code Civil des Français* (or *Code Napoléon*) lays down explicitly: "A judge who refuses to decide a case, on the pretext that the law is silent, obscure or insufficient, may be prosecuted as being guilty of denial of justice."[3]

This article is the outcome of a long evolutionary process. Prior to the French Revolution, before the separation of powers, the main question was not that of *lacunae* but rather that of the directions given to the judge in order to help him carry out his functions. In the Middle Ages, when the judge was confronted with a situation in which to his best knowledge no available norm could be applied, he used to turn directly to God (God's Judgment).[4] This was the custom, especially in France, during the 10th, 11th and 12th centuries; and in some rare instances God's Judgment tended to provide a solution not only to questions of fact, but even to questions of law.[5]

Later, during the 13th to 16th centuries, seeking a more rational solution to disputes and using the written text of the (traditional) oral law, the judge was expressly expected to be able, in dubious cases, to pass sentence according to his conscience or by the process of analogy. "Judges generally are, moreover, also legislators: they fill the *lacunae* in

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2. It is not our intention to examine here the important and interesting question of *lacunae* in general, but only insofar as they relate to the specific problem of *non liquet*; for the general question see N. Bobbio, *Lacune del Diritto*, 9 NOVISSIMO DIGESTO ITALIANO 419 (1963) and the anthological work LE PROBLÈME DES LACUNES EN DROIT (C. Perelman ed., 1968).

3. "Le juge qui refusera de juger sous pretexte du silence, de l'obscurite ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice" (art.4). *See* J. NORMAN, L'OFFICE DU JUGE ET LA CONTESTATION (1965). Boileux, commenting on this article, observes

> Let us remark here that the judge appointed to solve a litigation must perforce pronounce (*doit nécessairement prononcer*); he is even forbidden to suspend sentence in order to consult with the legislator on the meaning of the law: such a consultation (*référé*) would amount to a denial of justice, and denial of justice is punished by a fine . . . ." J.M. BOILEUX, 1 COMMENTAIRE SUR LE CODE NAPOLÉON 28 (6th ed. 1866).

*See also* E. BONNIER, TRAITÉ THÉORIQUE ET PRATIQUE DES PREUVES EN DROIT CIVIL ET EN DROIT CRIMINEL 49 (1873), including a discussion of the principle *actore non probante reus absolvitur* as an obstacle to *non liquet*.

4. On God's judgment, *see* M.A. Benedetto, 7 NOVISSIMO DIGESTO ITALIANO 899 (1961); J. Gaudemet, *Les Ordalies au Moyen Age: Doctrine, Législation et Pratique Canoniques*, 2 RECUEILS DE LA SOCIÉTÉ J. BODIN, XVII, LA PREUVE 99 (1965); H. LEVY-BRUHL, LA PREUVE JUDICIAIRE 559 (1964).

5. On this point *see* J. Gilissen, *Le Problème des Lacunes du Droit dans l'Evolution du Droit Médiéval et Moderne*, *in* LE PROBLÈME DES LACUNES EN DROIT 197, 205 (C. Perelman ed., 1968) which provides the main source of the present brief historical excursus. *See* also A. PERTILE, 6:2 STORIA DEL DIRITTO ITALIANO DALLA CADUTA DELL'IMPERO ROMANO ALLA CODIFICAZIONE 199 n.8 (1966).

the law with their own rulings."[6] In dubious cases it was admissible to invoke the authority of local experts.

Later again, as written law came to prevail over oral tradition, a hierarchy of sources was established: the magistrate was supposed to consult first the written law, then oral traditions and ultimately to refer to Roman law, or rather to the *ius commune scriptum,* which included not only the Justinian law, but also canon law and the commentaries of jurists, glossatores and post-glossares: *Quicquid non agnoscit glossa non agnoscit forum.*[7] This method, however, could not solve all the problems: gaps were sometimes discovered even in the written common law.

Then, on the basis of Romanist texts and under the influence of authors (mainly De Ghewiet in Belgium and Domat in France), it was decided to follow what appeared to be analogous and equitable; and these principles can even be found in modern codes. On the other hand, during the ancient regime the principle of monarchy as the sole source of law was steadily gaining ground (*rex fons est omnismodi iustitiae* and *qui veut le roi, si veut la loi*).[8]

In 1766 Louis XV declared that all legislative power belonged to him, without restriction and in its entirety. The King considered it to be his exclusive prerogative to fill any gaps in the law and in case of legal doubts the judge was obliged to turn to him and to his council. "Reference to the legislative power (*référé au législatif*) derives from the recourse to interpret the law. While the courts are empowered to interpret the law, they cannot contradict its terms and its clear construction: in case of serious doubt, they must ask the legislature, i.e. the King, who will then issue a 'declaration of his will'."[9]

This *référé au législatif* remained in use even after the French Revolution, due to a rigidly dogmatic view of the separation of powers, considered as a protection against royal absolutism. Thus, under a law dated August 1790, in case of serious doubts as to interpretation the judge was required to consult the Law and the legislative power, based in the people. This method, however, proved even more dangerous than the evil it sought to remedy. Not only did it disturb the balance between the

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6. Gilissen, *supra* note 5 at 202.

7. "He who knows not the commentaries knows not the court". On the many problems connected with that *ius commune* see F. Calasso, 1 MEDIO EVO DEL DIRITTO, LE FONTI 345 (1954) (for the dogmatic conception see in particular, p. 375); *see also* G. Ermini, *Diritto Comune*, 5 NOVISSIMO DIGESTO ITALIANO 826 (1960).

8. "The will of the King is the will of the Law."

9. Gilissen, *supra* note 5 at 229.

powers in favor of the legislature, it even led in effect to outright violation of the principle of non-retroactivity. For this reason the authors of the Civil Code of 1804 preferred to compel the magistrate to pass judgment even where the text of the law was silent. The outcome was, on the one hand a widening of the powers of the judge and on the other hand, the abolition of the former option given to the judge to turn for help to the legislative power.

A further stage in this development was reached a century later, in Switzerland. There is an evolution of a century between the Napoleonic Code and the Swiss Civil Code. Article 4 of the French and Belgian Civil Codes expresses a certain lack of confidence in the judge, justified under the *ancien regime*, but clearly not so nowadays; indeed Article 258 of the Belgian Penal Code has become anachronistic.

It may be said that the Swiss Civil Code, elaborated at the beginning of the twentieth century, reflects the spirit of the most advanced jurists of that time."[10] Article 1 of the Swiss Civil Code indeed provides that: "In the absence of suitable legal dispositions, the judge pronounces according to custom and, in the absence thereof, according to such norms as the judge himself would lie down, was he called to act as legislator."[11] The rule prohibiting non liquet therefore finds its implicit or explicit expression, in practically all-modern legal systems.

However, it should be noted that they consider the question mainly from the perspective of the judge when confronted with the juristic norm to be applied to a specific case. Thus, one of the introductory provisions to the Italian Civil Code (art. 12) states that "In applying statutes no other meaning can be attributed to them than that made clear by the actual significance of the words, according to the connection between them, and by the legislative intent."

If a controversy cannot be decided by a precise provision, consideration is given to provisions that regulate similar cases or analogous matters. If

10. E. Wolf, *Les Lacunes du Droit et leur Solution en Droit Suisse*, *in* LE PROBLÈME DES LACUNES 105 (C. Perelman ed., 1968).

11. "A défaut d'une disposition légale applicable, le juge prononce selon le droit coutumier et, à défaut d'une coutume, selon les règles qu'il établirait s'il avait à faire acte de législateur." On this important issue *see* A. MEIER HAYOZ, DER RICHTER ALS GESETZEBER: EINE BESINNUNG AUF DIE VON DEN GERICHTEN BEFOLGTEN VERFAHRENSGRUNDSATZE IM BEREICHE DER FREIEN RICHTERLICHEN RECHTSFINDUNG GEMASS ART. 1 ABS. 2 DES SCHWEIZERISSCHENN ZIVILGESETZBUCHES 221 (1951) with several (not always accurate) quotations from other codes. *See also* G. CHIOVENDA, PRINCIPI DI DIRITTO PROCESSUALE CIVILE NAPOLI 74 (4th ed., 1928) (with bibliography); and G. DU PASQUIER, LES LACUNES DE LA LOI ET LA JURISPRUDENCE DU TRIBUNAL FÉDÉRAL SUISSE SUR L'ART. 1 CCS (1951).

the case still remains in doubt, it is decided according to the general principles of the legal order of the State."[12] In such a case, rather than interpreting a norm, and before interpreting it, the question is to seek it or to reframe it.[13] But the specific problem of the judge confronted with a case of factual doubt is not even mentioned, and the case must be adjudicated according to the general principles of the burden of proof. Yet in some legal systems, there is a tendency to deny the effect of res iudicata to a decision given only on the ground of a party's failure to raise the burden of proof, i.e., when the judge cannot "find" the facts positively or with any degree of certainty.[14]

In English law the judge's duty to adjudicate is recognized by the Common Law and some of the most prominent judges, like Pollock, consider this to be the essential function of the judge, so that refraining from giving judgment is tantamount to a denial of justice.[15]

This situation is similar to modern Israeli law. The following precedent may serve as an illustration: "I am not ashamed to acknowledge", says the judge, "that I cannot tell whether the truth is with the plaintiff or with the defendant", adding that "both versions were equally plausible." Therefore, the judge absolved the defendant, since the plaintiff, upon whom the burden of proof rested, had been unable to adduce more persuasive evidence.[16]

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12. Codice di procedura civile [C.p.c.] (It.). "Nell'applicare le legge non si puo` ad essa attribuire altro senso che quello fatto palese dal significato proprio delle parole seconde la connessione di esse e della intenzione del legislatore. Se una controversia non puo essere decisa con una precisa disposizione, si ha riguardo alle disposizioni che regolano casi simili o materie analoghe; se il caso rimane ancora dubbio, si decide secondo i principi generali dell'ordinamento giuridico dello Stato": notwithstanding its location, its scope of application is not restricted to the Code.

13. For a wider study of this proposition *see* F. MESSINEO, MANUALE DI DIRITTO CIVILE E COMMERCIALE 65 (1947); C.P.C. art. 55 (Italian Code of Civil Procedure). For some interesting critical notes on the practicalities of judges' functions, *see* G. Lazaro, *La Funzione dei Guidici*, 26 RIVISTA DI DIRITTO PROCESSUALE 1 (1971). Allgemeines Bürgerliches Gesetzbuch [ABGB] art. 7 (Austrian Civil Code); Código Civil art. 6 (Spanish Civil Code); Código Civil arts. 5, 7 (Brazilian Civil Code); and the Albanian Civil Code art. 2. *See also* MEIER HAYOZ, *supra* note 11.

14. This tendency is found, for instance, in Austrian law; *see* H. Lorber, *Das Non Liquet*, 1970 ÖSTERREICHISCHE JURISTEN-ZEITUNG [ÖJZ] 537; H. HAUSMANINGER, THE AUSTRIAN LEGAL SYSTEM 28, n.19 (1998). For a general view, including the historical evolution and present norms of civil law, *see* G. Pugliese, *Giudicato Civile, Storia Diritto Vigente*, 18 ENCICLOPEDIA DEL DIRITTO 727 (1968); A.M. Rabello, *Working towards Codification of Israeli Private Law: Between Common and Civil Law, in* H. HAUSMANINGER ET AL. EDS., DEVELOPMENTS IN AUSTRIAN AND ISRAELI PRIVATE LAW (1999).

15. *See* G. WHITECROSS PATON, A TEXTBOOK OF JURISPRUDENCE 88, n.168 (3rd ed. 1964).

16. Vorbichik v. Schoengarten, 1964, (III) 18 P.D. 95; Attorney General v. A Bach, Magistrate, 1954, 9 P.D. 1056, 1064; this decision, criticized on appeal, was commented on with approval by E. Harnon, *How should a Judge act when he cannot choose between the credibility of either plaintiff or defendant?*, 21 HAPRAKLIT 415 (1965). The decision was ultimately upheld by the

Perhaps, from the Israeli experience, new light has been shed in the limitation of this theory regarding the event of *lacuna* since the passing of the Foundations of Law Act 1980 which provides that:

> *Where the court, faced with a legal question requiring decision finds no answer to it in statute law or case law, or by analogy, it shall decide it in the light of the principles of freedom, justice, equity and peace of Israel's heritage.*[17]

This is a norm directed at incorporating traditional Jewish law, at least in part, in the Israeli legal system.

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Supreme Court, *see* E. HARNON, LAW OF EVIDENCE 188 (1970) (in Hebrew). Such a decision has the validity of *res iudicata*. In some recent enactments however, such as the Civil Procedure Rules, 1963, K.T. 1477, 490, a distinction is made between the rejection of a plaintiff's claims on the merits, effective as *res iudicata*, and the mere striking out of the action which does not preclude the filing of a new action on the same cause; see on this subject S. Ginossar, *Renewal of Actions*, *in* 5 STUDIES IN LAW 48 (1958). *See also* E. Harnon, *Res Iudicata and Identity of Actions*, 1 ISR. L.R 545 (1966):

> In considering this problem, some emphasize the idea that a presumption of truth is attributed to the decisions of courts. *Res iudicata pro veritate accipitur.* Relying on this rationale, the Supreme Court in Israel came to the conclusion that a former judgment should not have the effect of res iudicata as collateral estoppel is the court did not make any positive findings on the controversial issue.

For frequent reliance on this idea by the Supreme Court in Israel *see* Felman v. Shachav, 1952, 6 P.D. 313, 321, 323; Knopf v. Popper, 1956, 10 P.D. 785, 793; Mugrabi v. Vardimon, 1957, 11 P.D. 1242, 1250. On the problem of *lacunae* in Israeli law, *see* G. Tedeschi, *Article 46 of the Palestine Order-In-Council and the Existence of Lacunae*, *in* LE PROBLÈME DES LACUNES STUDIES IN ISRAELI LAW 275 (1959); G. Tedeschi, *L'Insufficienza della Norma e la Fedelta dell'Interprete*, *in* RIVISTA DI DIRITTO CIVILE 7 (1962) containing some interesting considerations on Talmudic law. On the questions of non-justiciability see also the dissertation of Y. Zemach, Political Questions in Israel and the United States (1971) (unpublished Ph.D. dissertation, University of Virginia), and more generally, A. Witkon, *Justiciability*, 1 ISR. L.R. 60 (1966).

17. Foundations of Law, 5740-1980, 34 Laws of the State of Israel 181 (Ministry of Justice trans., 1980); on this law see primarily: A. Barak, *Gaps in the Law and the Israeli Experience*, 20 MISHPATIM 281 (1991); A. Barak, *The Foundations of Law Act and the Heritage of Israel*, 13 SHENATON HA-MISHPAT HA-HAIVRI (1987); H. BEN MENACHEM, THE FOUNDATIONS OF LAW ACT - HOW MUCH OF A DUTY? 257; H.H. COHN, RESIDUARY LAW 285; M. ELON, MORE ABOUT THE FOUNDATIONS OF LAW ACT 227; E. SHOCHETMAN, ON ANALOGY IN DECISION MAKING IN JEWISH LAW AND THE FOUNDATIONS OF LAW ACT 307; S. SHILO, COMMENTS AND SOME NEW LIGHT ON THE FOUNDATIONS OF LAW ACT 351; B. SCHERESCHEVSKY, THE FOUNDATIONS OF LAW ACT 379; A. Kirschenbaum, *The Legal Foundation Law, 1980 - Today and Tomorrow* 11 IYUNEI MISHPAT 117 (1985); G. Procaccia, *The Foundations of Law Act 1980*, 10 IYUNEI MISHPAT, 145 (1984); M. Cheshin, *Israel's Heritage and the Law of the State*, *in* CIVIL RIGHTS IN ISRAEL: ESSAYS IN HONOUR OF HAIM H. COHN 47 (R. Gavison ed., 1982); M. Keshet, *Foundations of Law Act 1980*, 33 HAPRAKLIT 611 (1980); G. Tedeschi, *The Law of Laws*, 14 ISRAEL L.R. 145 (1979); S.Z. Feller, *The Application of the Foundations of Law Act in Criminal Law*, *in* SEPHER SUSSMAN 345 (A. Barak et al., eds., 1984); Y.M. Edrei, *The Foundations of Law Act as a Statutory Source for Judicial Activism*, *in* JUDICIAL ACTIVISM 127 (A. Porat ed., 1993).

This law historically underwent decades of debate and controversy[18] until its final wording[19] a debate that has manifested itself in the judicial arena, though albeit in only a meager number of decisions.[20] With relevance to our discussion, the law directed to the judge, constitutes a *de jure* obligation upon the judge to pass judgment, even in the event of *lacuna.*[21]

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18. For the historical overview highlighting the fierce discussions in the Knesset acting as a constituent assembly over the nature and form of the law, to the 1959 precursor of the eventual bill until its ultimate promulgation, see ELON, *supra* note 17; SHILO, *supra* note 17, 351-353.

19. For an insight in the legislator's intent, see *Foundations of Law Bill* and the appendix in A. Barak, *Gaps in the Law and the Israeli Experience*, 20 MISHPATIM 280-283 (1991). In the 1959 discussion in Knesset, the term Jewish Law (Mishpat Ivri) was proposed connoting direct application of the legal material in this system, only to be ultimately replaced in its final draft by the more amorphous term, "Israel's heritage." For the purpose of clarity, jurists have interpreted "Israel's heritage" as merely a synonym for Jewish Law, *see* ELON, *supra* note 17, 253-256; SHOCHETMAN, *supra* note 17, 307-308; SCHERCHEVSKY, *supra* note 17. Those opinions dissenting include: A. Barak, *The Foundations of Law Act and the Heritage of Israel*, 13 SHENATON HA-MISHPAT HA-HAIVRI (1987); MENACHEM, *supra* note 17; CHESHIN, *supra* note 17; COHEN, *supra* note 17; SHILO, *supra* note 17.

20. In the approximately forty cases which have been decided in the Israeli Supreme Court, two major conflicting views have emerged concerning the interpretation of the Foundations of Laws Act. Justices A. Barak and M. Elon hold these two approaches. The positions are dealt with at length in *Handels v. Bank Kupat Am Ltd.*, 35(2) P.D. 785 (1980); the first case to examine the act in the supreme court since its coming into force. Justice Barak interprets the statute as applying only in legal areas of lacunae; and if a gap in the system indeed exists, i.e., no answer has been found in statute law or case law, the judge must then follow a two-tier examination: the search begins first and foremost with the process of analogy and only in the rare instances that a suitable analogy is not found, is the judge obligated to decide upon the principles of Israel's heritage. Justice Elon dissents on two major points regarding the law's activation: firstly, he is of the opinion that the legislator did not enhance the role of analogy in the judicial process:

> I see no need in explicitly declaring the analogy as a source of law . . . for it is the "bread and butter" of the judge in his day to day judgments . . . and therefore, claiming that analogy is one of the sources of law delineated in the Foundations of Law Act appears to be redundant,

ELON, *supra* note 17, at 232-233. Therefore, Elon views the principles of Israel's heritage as the only supplementary source provided by the Foundations of Law Act. Secondly, he broadens the scope of the law's performance. The law is not limited to the area of lacuna, rather the issue at hand is open to various interpretations and the source from which the proper interpretation must be examined must first and foremost stem from Jewish law (acc. to Elon's interpretation of 'Israel's heritage') as Jewish law is the supplementary source of law of the Israeli legal system; see Elon, "Israeli Law and its Place in Israeli Jurisprudence," 1968, 25 *Hapraklit* 27. For further cases examining this law, see *Shefer v. State of Israel*, 1993, (not yet in print); *Szerszevsky v. Prime Minister,1991*, (VI) 45 P.D. 779; *Shakdiel v. Minister of Religious Affairs*, 1988, (II) 42 P.D. 221; *Adras v. Harlows* G.M.B.H., 1988, (I) 42 P.D. 221; *Insurance Corporation of England v. State of Israel*, 1985, (II) 41 P.D. 309.

21. G. Tedeschi, *On Dispositive Law (Ius Dispositivum)*, 15 IYUNEI MISHPAT 5, 13 (1990): "The Israeli legal system does not permit the existence of lacunae by granting the judge the prerogative of refusing to pronounce judgment claiming non liquet. The Foundations of Law Act, 1980 obligates the judge to find a solution to every legal problem." SCHERECHEVSKY, *supra* note 17 at 380, claims on the basis of the authoritative nature of Art reinforces this claim. 46 of the Palestine Order-in-Council "that this is obligatory law and not merely used for comparative purposes or only according to the judge's discretion," *supra* note 17, at 380. For a dissenting opinion, *see* MENACHEM, *supra* note 17, who interprets the law as requiring mere counsel and not obedience. *See also* BARAK, *supra* note 20, critique of Ben Menachem's opinion where he concurs with Justice Elon's position in Handels which states that "the supplementary law is not merely a suggestion directed towards the

Essentially, the judicial task of 'filling in the gaps' of the legal system existed prior to this act via Art. 46 of the Palestine Order-in-Council, 1922-1947.[22] Art. 46 was thereby repealed and replaced with the Foundations of Law Act. However, in addition to formalizing under Israeli law the act of filling lacunae and replacing English common law and the doctrines of equity with the principles of Israel's heritage as a supplementary source of Israeli law,[23] the inclusion of analogy (notably excluded in Art. 46)[24] as an additional and moreover, primary supplementary source is of great import.[25]

It is unnecessary to stress the powerful tool that analogy is in the face of lacunae. It is an all-encompassing corpus of comparative law which can reject virtually all claims of non liquet in the case of lacuna and compounded with the subsequent obligation of implementing the principles of Israel's heritage. In the rare event of unsatisfactory analogy, the Israeli judge is effectively barred from refusing to pronounce judgment.[26]

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judge. It is law that the judge is required to apply. Once a lacuna is revealed, the judge is obligated to refer to the supplementary law in order to fill the lacuna."

22. *See* generally G. Tedeschi, *Lacunae in the Law and Article 46 of the Palestine Order-in-Council, in* STUDIES IN ISRAELI LAW 132 (1959); A. LEVONTIN AND C.H. GOLDWATER, CONFLICT OF LAW IN ISRAEL AND ART. 46 OF THE PALESTINE COUNCIL-IN-ORDER (1974); I. ZAMIR, ADMINISTRATIVE PROCEDURE IN ISRAEL AND ART. 46 OF THE PALESTINE COUNCIL-IN-ORDER (1974).

23. The concept of supplementary sources appears in Foundations of Law Act, *supra* note 17, Art. 1, under the heading: "Supplementary Sources of Law." This pronouncement thereby potentially elevates the status of Israel's heritage. The actual weight of this supplementary source established is dependent upon the relationship one determines between analogy and the principles of Israel's heritage. H.H. Cohn prefers the interpretation of 'residuary sources' to supplementary sources, which connotes a more periphery implementation of the principles of Israel's heritage (which is what Cohn identifies as residuary law) as merely guiding principles in the judicial process. Legislation does not enhance these principles for they are "etched in the heart of every judge" and suitably find natural habitat "in the trends of the Jewish and democratic state of today." (COHN, *supra* note 17, 295. This position is in practice quite similar to that of Ben Menachem and, essentially, deviates only in semantics.

24. See Tedeschi, *supra* note, 22 at 149-152.

25. As aforesaid, this statement is in line with Barak's interpretation delineated above (*supra* note 20), as opposed to those of Ben Menachem, Cohn, Elon, Shochetman, and Schereschevsky. Barak terms the distinction between the first stage (analogy examination) and the second stage (Israel's heritage examination) in the two-tier process with the former as a homogeneous supplementary source, i.e., via a process which is domestic to the legal culture, and as that of the latter as a heterogeneous source; however, herein lays the difficulty. For although the principles of Israel's heritage are not included per se among the complex of the Israeli legal system, these principles are certainly not foreign to it. Barak distinguishes between the principles, which he decides as the philosophical orientation or outlook, and not the individual normative application of specific law. A. Barak, *Gaps in the Law and the Israeli Experience*, 20 MISHPATIM 281, 319-315 (1991).

26. This position is compatible with the existing trend in expanding judicial powers (*see generally* A. PORAT ED., JUDICIAL ACTIVISM (1993). Of the opinion that resolving disputes is the primary task of the judge, Barak claims it would be antithetical "for the judge to refrain from passing

## II. THE PROBLEM IN CANON LAW AND INT'L LAW

What is the position of the judge in canon law? Is he free to follow the dictates of his conscience and, accordingly, to refuse to adjudicate whenever he is unable to reach a clear opinion as to the right of the parties? That answer is no. In canon law, he may not refrain from pronouncing judgment, his functions are not optional and within thirty days from the day when the hearing is concluded, he has to decide either in favour or against the claim (Can. 1710).

If he is unable to reach the required moral certainty, due either to judicial or to factual doubt, he has to seek that certainty with the help of the supplementary means offered by the canon law. Should those means prove insufficient, he must dismiss the claim as insufficiently proved; so that in fact the defendant will emerge released from the liability alleged against him.[27]

In the case of legal lacuna, the judge must pronounce and cannot refuse to pass sentence pleading the silence or the obscurity or the insufficiency of the law.[28] Thus, Canon 1608 provides that no judge may refuse to adjudicate by reason or inability to find direct guidance in the text of the law: the canon code clearly defines the judge's position, and in such cases it gives him legislative powers.[29]

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judgment in a situation of uncertainness which stems from unclarity or multiple possibilities in the interpretation of the statute" A. Barak, "On the Outlook of Law and Judgment and Judicial Activism" (supra), 15. This is in line with Barak's personal belief that the judiciary must be handed the task of preventing social chaos: "Where there is no judge - there is no justice. The land is filled with justice (Psalms); similarly, the land is filled with courts of law. There lie no areas devoid of law, for in lawlessness, exists the 'law' of 'might makes right' (or kol d'alim gvar *Babylonian Talmud, Baba Batra*, 34, b.)." (supra), 31. With specific regards to the Foundations of Law Act, Y.M. Edrei disagrees with Barak's legal theory of legal development claiming that the theory does not properly heed to the legislator's intentions. Edrei posits that Barak's theory, failing to view the supplementary sources of law in terms of sources for judicial interpretation, will lead to the dangerous result of unrestrained judicial power. A legal theory lacking defined sources of law, claims Edrei, is likely to spurn judgments based on personal discretion, that are not anchored in statute as was witnessed in *Yardor v. Director of Election Committee*, 1965, (III) 19 P.D. 36 or *Electric Company Ltd. v. Ha'aretz, 1978*, (III) 32 P.D. 337. Edrei's position, expanding the Foundations of Law Act's usage beyond lacunae to include legal sources or interpretation seems to be parallel to Elon's aforementioned position.

27. See F. Della Rocca, "Sentenza (Diritto Canonico)", 1969, 16 *NNDI*, 1104. Canon 1869 4 provides that if a judge cannot reach (moral) certainty (through factual evidence), he must pronounce unproved the plaintiff's claim and release the defendant. See A. Jullien, *Juges et Avocats des Tribunaux de l'Eglise* (Rome), 1970, 471 ff.

28. See W. Onclin, "Les Lacunes de la Loi en Droit anonique" *Le Problème des Lacunes*, op. cit. at p. 181 ff. (esp. p. 186); see also A. van Hove, *De Legibus Ecclesiasticis* (Rome, Malines), 1930, 321.

29. See R. Naz, "Juge", 1957, 6 *Dictionnaire de Droit Canonique* col. 205 ff.; see also A. Jullien, op. cit. at p. 471 ff. "When the judge cannot reach moral certainty - a rare possibility - he must judge, but in accordance to Canon 1869, 4. The judge... is evertheless obliged to pronounce,

Where a court composed of several judges is confronted with a matter of factual doubt, the matter is decided by a majority vote. In the exceptional case of a vote divided among an even number of judges, the decision falls according to the principle actor non probante, reus absolvitur. Unless the Ordinary dismisses the judges and appoints a substitute collegiate chamber.[30]

The question of non liquet also arises in international law. Although the principle of non liquet in itself is generally rejected, opinions are not unanimous. Municipal law, as we have seen sometimes offers the judges some method, either internal or external, to fill a possible lacuna. But what about a system like that of international law, with its limited number of norms, where the recourse to analogy and to general implicit principles is not admitted, and whose judges are not allowed to adjudicate in equity without the explicit agreement of the parties? To this question, which has repeatedly been raised,[31] some have pondered whether the international judge should not be empowered to declare sibi non liquet in the absence of a suitable norm.[32]

On the other hand, it has been suggested that the principle rejecting non liquet, not unknown in certain norms of international legal dispositions[33] is so deeply rooted in modern legal conscience that it should be considered to apply even in international law.[34]

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because his is a public function from which he cannot exempt himself". See also: M. Falco, *Introduzione allo Studio del Codex Juris Canonici* (Torino), 1925, 103-4 and F.J. Connel, "Reflex Principles", 1966, 12 *New Catholic Encyclopaedia* 169.

30. F. della Rocca, "Sentenza" op. cit.; R. Naz, "Juge" op. cit. col. 203 ff. (I have been unable to obtain the recent volume by L. Musselli, *Il Concetto di Giudicato nelle Fonti Storiche del Diritto Canonico* (dalle origini al secolo XVII) (Padova), 1972.

31. J. Stone, *Legal Controls of International Conflict* (London), 1954, 153 ff.; J. Stone, "Non Liquet and the function of Law in the International Community", 1959, *British Yearbook of International Law* 124 et seq.; J. Stone, "Non Liquet and the International Judicial Function" in *Le Problème des Lacunes* op. cit. p. 3304 ff.; I. Tammelo, "On the logical Openness of Legal Orders, 1959, 8 *Am. L. Comp. L.* 187 ff.

32. It must be stressed that the two questions of legal lacunae and of non liquet, while they are strictly interconnected, are nevertheless two separate issues: a case of non liquet is perfectly possible without any lacuna in law, as has been clearly shown especially by P. Reuter, *Droit International Public* (Paris), 1958, 303.

33. See, for instance, Art. 42 2 of the Convention for the regulation of controversies relating to investment between States, providing that Le Tribunal ne peut refuser de juger sous pretexte du silence ou de l'obscurite du droit (The courts cannot refuse to pass sentence owing to the silence or the obscurity of the law"): on this point see especially J.J.A. Salmon, Quelques Observations sur Lacunes en Droit International Public" in *Le Problème des Lacunes*, op. cit. pp. 313-330.

34. See in this particular aspect H. Lauterpacht, "Some Observations on the Prohibition of Non Liquet and the Completeness of the Law" *Symbolae Verzijl* (The Hague), 1958, 197 ff.; Idem, *International Law* (Cambridge), 1970, 96 (this thesis was particularly attacked by J. Stone, in his essays cited supra, n. 21.

In this respect the question also arises of the completeness of the international law. Obviously this question makes no sense for a supporter of the principle of non liquet; but, as held by Kelsen, the general rule that whatever is not expressly prohibited is implicitly permitted probably extends to international law. "He who assumes that in such a case the existing law cannot be applied ignores the fundamental principle that what is not legally forbidden to the subject of the law is legally permitted to them."[35] Consequently, if any one of the above arguments is accepted as valid, the question of non liquet in international law will not differ substantially from that under municipal law.[36] Indeed the main supporter of allowing non liquet in international law before discussing "the Meta-Legal aspects of the Problem," stated in advance, "...though the debate has proceeded as if the question was whether a non liquet was admissible as a matter of law, de lege lata, the more correct level may rather be in terms of whether a non liquet should be admissible de lege ferenda."[37]

## III. GROUNDS FOR REJECTING NON LIQUET IN MODERN SYSTEMS

What are the reasons for rejecting non liquet? What is the basis of the judge's duty to pass judgment in all cases, to adjudicate, even if this may be at the expense of truth?[38]

This is justified by the argument that in every case, regardless of its complexity, the law must find a definite solution and determine accurately the rights of the parties. Del Vecchio in his General Principles of Law has adequately expressed this.[39] There is no source of friction among men and no possible controversy; however complicated or unforeseen, that is not only susceptible of a definite judicial solution, but

35. H. Kelsen, *Principles of International Law* (New York), 1952, 3306; see also B. Akzin, "Kelsen - in Memoriam", 1973, 8 *Is. L.R.* 325. On the completeness of International Law see also A. Pieriserenil, *Diritto Internazionale* (Milano), 1956, vol. I, p. 98 ff.

36. See N. Bobbio, *Les Lacunes* op. cit. at p. 423 et seq.

37. J. Stone, *Legal Controls...* op. cit. supra n. 20 at p. 153 ff.; see also n. 1, p. 153, stressing the difference between non liquet in Roman Law and in International law: The modern meaning of the term is thus different from that in Roman law, where the term 'non liquet' originated. It there referred either to the mere deferment of a decision pending further information, or the personal non-participation of a particular member of the tribunal in the decision. Though these situations could arise internationally, the situation debated on the modern 'non liquet' involves a full non possumus of the tribunal, the refusal to decide being both absolute and institutional." On the problem as it arose in Roman law see infra. Text at n. 344 ff. For the position in Jewish law, see text at n. 76 ff.

38. For some observations on the functions of the judge, the affinities and differences between the functions of the judge and those of the historian, together with some remarks on "judicial truth", see S. Ginossar, "Preuve Judiciaire" *Encyclopaedia Universalis*; see also H. Levy-Bruhl, La Preuve Judiciaire op. cit. supra n. 4 at p. 14 ff.

39. Translated by F. FORTE (Boston), 1956; the original edition was published as "Sui Principi Generali del Diritto" 1921, *Archivio Giuridico*, F. Serafini 85.

in fact demands it. No statement demonstrates so adequately the eminently practical nature of law or its full and perfect relation to life. Great doubt and uncertainty may well persist in the theoretical aspects of law, for every branch of knowledge (including Jurisprudence as a theoretical science) has always presented questions which have remained unsolved to the present day, although they have been discussed for centuries.

But to the question Quid iuris? (What are the limits to my rights and those of others?) In every concrete case there must be an answer, which may be certainly open to criticism, but is at least definitive in practice. Our present juristic system conforms to this exigency of practical justice by withholding from the magistrate the power to deny final judgment "on any pretext, even silence, obscurity, contradiction or insufficiency of the law." He must dispose of all cases of transgression with such appropriate civil or penal remedies as each may require.[40]

Another question then arises, relating to the nature of the judge's duty. It should be noted that this duty may extend beyond the terms of the plaintiff's claim, as when the latter is not legitimately entitled to sue and the judge is nevertheless bound to "decide not to decide", and to declare himself incompetent. This would indicate that the judge's duty is not necessarily that of determining the rights of the parties.

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40. Ibid, p. 1 ff.; we also quote n. 1, p. 6; "This does not arise from 'juridical megalomania' (juristischer Grossenwahn), as was the opinion of H.U. Kantorowitz (Gnaeus Flavius, Der Kampf um die Rechtswissenschaft (Heidelberg), 1906, 17, but from the practical necessity that each one must, in a certain way, coordinate his own behavior with that of others. This is the essential basis or concept of law. A system of law which, though able to solve some problems in life, should prove itself incapable of solving all others would nullify itself ipso facto, since it fails in its primary function - that of creating order among human beings (hominis ad hominem proportio - the relation of man to man). Only in this practical sense is a jurist obliged to reach a conclusion regarding each question presented him; a line of demarcation between the lawful and the unlawful, between the exigible in the facts, ebus ipsis dictantibus et humanis necessitatibus (the facts themselves and human necessities being decisive); and the jurist must in the end recognize it. If the biologist, the philologist and the historian confess their inability to solve all the problems pertaining to their respective sciences, this is not because they are more modest than the jurist (as H.U. Kantorowitz, loc. cit., hints), but rather because limits and doubts in theoretical knowledge do not suspend the progress of life. When instead, as in legal science, one seeks to regulate human actions effectively, science merges to some extent with the necessarily continuous course of these actions, and, therefore, cannot fail to accompany them with its judgments, which are, however, only of immediate practical value. While it is indeed true that in its theoretical range jurisprudence also has doubtful points, its age-old problems, and can ad infinitum doctrinally debate even res iudicatae; nevertheless each new controversy, as it arises, although it may involve points scientifically unclarified, bears with it the concomitant necessity of the issuance of a judgment that will be definite and certain and which will have practical finality".

Carnelutti's doctrine,[41] which distinguishes between the judge's duty to the litigants and his duty to the State, seems most acceptable: "The State, having appointed the judge, lays upon him the obligation to judge the controversy at the request of the parties, who are in fact exactly in the situation of the third party, favoured in a contract made without their direct participation."[42]

To conclude, in modern legal systems the Judge cannot consider -- as is often done at will by the scientist -- that his opinion is not sufficiently clear, refusing, on this ground, to pass judgment. In civil affairs, he is imperatively ordered, under pain of severe sanctions, to find within the law the solution of the controversy submitted to his judgment. In criminal matters, he must either convict or acquit. At most he may, should he claim to be insufficiently enlightened, demand some additional information. But this is only a short reprieve. He must adjudicate.[43]

## IV. THE QUESTIONS OF NON LIQUET IN ROMAN LAW

If we stop to consider the position of the judge who is but a human being, riddled with doubts and uncertainties, we must first recognize that sometimes, on rare occasions, he may find himself, not as an institution but a person, confronted with grave problems of conscience. For example, when he would rather refrain from applying the general principle onus probandi incumbit ei qui dicit (see Digesta 22.3.21) directing him to reject the claim of the plaintiff for no other reason than the latter's inability to adduce sufficient evidence. Although he may appear to be a perfectly upright and honest person.

Is there a legal system that takes the plight of the judge into consideration?

To answer this question we shall briefly examine the same position in Roman law, Jewish law and in Moslem law. The well known procedure followed under Roman law in civil actions involving the trial of a claim brought by one party against an opponent was divided into two separate stages: the first one (in iure) took place before the magistrate, generally the praetor, in his court of law, the second (apud iudicem) before a judge

41. Diritto e Processo (Napoli, undated) 118 ff. in the series Trattato del Processo Civile: "Obbligo del Giudice" and "Obbligo del Giudice e Diritto della Parte".

42. See also G. Chiovenda, *Principi del Diritto Processuale Civile* (Napoli), 1928, 43 ff., according to whom the action is an authoritative right. On the differences between the functions of the arbitrator and those of the judge, see ibid. at p. 108; on submission to arbitration by agreement, see F. Carnelutti, *Istituzioni del Processo Civile Italiano* vol. I, p. 68.

43. H. Levy-Bruhl, *Aspects sociologiques du Droit* (Paris), 1955, 114 ff.

or judges, being generally a private person or persons selected by the parties or taken from a list of registered judges.[44]

This division of the procedure into two stages (in iure-apud iudicem) was characteristic of the civil procedure in Roman law throughout the period of ordo iudiciorum privatorum, i.e., in the ancient procedure per formulas[45]. It disappeared only in the cognitio extra ordinem, in which the procedure is carried out entirely before the magistrate. During the first stage, it was customary to state the issues; in the second, the judge, having heard the evidence, judged and pronounced sentence.[46]

While the Institutions of Gaius contain many details concerning the first stage of the procedure, giving us a clear picture of the legis actiones, the formulae and the prerogatives of the praetor, only little, if anything, is said about the second stage. Thus little is known about the duties of the judge (officium iudicis).[47]

An essay, De officio iudicis by Q. Elio Tubero, a lawyer of the last century of the Republic dedicated to the lay judge (iudex)[48] which might have thrown light on this subject has regrettably not been preserved. What now is the attitude of Roman law towards a magistrate when in doubt? In the Digest we find the distinction between judicial and factual doubt:

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44. On this point, see in particular V. Arangio-Ruiz, *Istituzioni di Diritto Romano* (Naples, 14th ed.), 1960, 112. F. La Rosa has recently confirmed that the selection of judges was not a matter of free private choice, but was limited by the lists of persons in the album iudicum, without claiming, however, to have found any explicit evidence of this custom: "La formula dell'Actio Iudicati (Contributo allo studio dei poteri del Iudex)" St. Grosso vol. 4, 1971, 240 ff.; contra see G. Pugliese, *Il Processo Civile Romano* vol. 2 - *Il Processo Formulare* Part I. (Milano), 1963, 228 et seq., and also 235 ff., and A. Biscardi, *Lezioni sul Processo Romano Antico e Classico* (Torino), 1968, 118 ff. and 410-11; A. Berger, *Encyclopedic Dictionary of Roman Law* (Philadelphia), 1953, 359, s.v. "album iudicum"; and finally, P. Collinet, "Le Role des Juges dans la Formation du Droit Romain Classique", 1936, *Capitolium* 5 ff. (reprint).

45. On this point, see H.F. Jolowicz, "Procedure in Iure and Apud Iudicem. A Suggestion." *Atti Congresso* Bologna, 1935, vol. II. p. 57 ff. (non vidi); H.R. Hoetink, "The Origin of the Dual Mode in Roman Procedure," 1947, 55 *Seminar* 16 et seq.; H. Felix Jolowicz, "The Iudex and the arbitral Principle", 1949, 2 *RIDA* 477 ff. (=Mel. De Visscher).

46. For some comparative remarks between Roman and English procedure, see A. Engelmann and Others, *A History of Continental Civil Procedure* (Boston), 1927, 269 ff.; W.W. Buckland and A. McNair, *Roman Law and Common Law* (Cambridge), 1936, 315 ff.; see also M. Cappelletti and J. Perillo, *Civil Procedure in Italy* (The Hague), 1965, 26 ff.

47. See justification in G.I. Luzzatto, *Il Problema d'origine del processo extra ordinem* (Bologna), 1965, 105.

48. F. Schulz, *History of Roman Legal Science* (Oxford, 2nd ed.), 1953, 94. With regard to the term officium see G. Cervenca, "Sull'uso del termine officium nella legislazione post classica-giustinianea" *St. Grosso*, 1970, vol. 3, p. 206 ff. with bibliography.

> when the Judges claim the existence of judicial doubts, the praesides answer them. In the case of factual doubt praesides must abstain from advising, but should instruct them to pronounce according to their conscience; for in such cases the advice might be detrimental to justice and conducive to favoritism or self-seeking.[49]

Ulpianus explains that the praesides should serve as the magistrates' referees in case of judicial doubt, in which case they will instruct the judge to pronounce sentence according to the imperatives of religio (iudex ex conscientia iudicare debet) is expressly stated by Gotofred); while (the text continues) any attempt to influence the judge in the examination of factual evidence is an abominable distortion of justice and may result in unjust sentences or even in dishonesty. Although this passage carries, we might say, a certain Justinianaean flavour (especially the appeal to the judge's conscience, religio), its substance, with its clear distinction between factual and judicial doubt, bears the mark of the classical jurist.[50]

The passage refers to the provincial magistrate, who may have been expected to have had greater difficulties in finding the law, we may nevertheless assume that the function of the Roman judge was also not free from problems: indeed Arangio-Ruiz brilliantly writes that "the function of the private judge should not be considered limited to the solution of factual questions, as if judicial questions were already implicitly solved in the formula."[51] Therefore, the magistrate may find

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49. D. 5.11.79.1: "Iuddicibus de iure dubitandibus praesides respondere solent: de facto consulentibus non debent praesides consilium impartire, verum iubere eos prout religio suggerit sententiam proferre: haec enim res nonnumquam infamat et materiam gratiae vel ambitionis tribuit."

50. It would appear that we concur neither with the excessive criticism of G. Beseler, who considers the whole phase from the word solvent to the end, as an interpolation ("Romanisstische Studien", 1930, 50 *ZSS* 33), nor with A. Dell'Oro, who discards the point altogether: *I Libri de Officio nella Giurispridenza Romana* (Milano), 1960, 142; see also the accurate remarks by Dell'Oro, ibid, n. 157. On this passage see also: TH. Mommsen, "Aegyptischer Erbschaftsprozess vom J. 135", 1893, 14 *ZSS* 6; E. Weiss, Recitatio und Responsum im romischer Provinzialprozess, ein Beitrag zum Gerichtsgebrauch", 1912, 33 *ZSS* 238; F. Vassalli, "Miscellanea Critica di Diritto Romano II, Ius e Factum Contrapposti come Oggetto di Conoscenza", 1914, *annaali Perugia* (=Scrritti Giuridici Vol. III, 1, p. 388) who also argues successfully that the last part of the sentence (from haec enim res to the end) has been interpolated; B. Biondi, "Appunti intorno alla Sentenza nel Processo Civile Romano", in *St. Bonfante*, Vol. 4 ,1930, 45 and 68; A. Steinwenter, "Rhetoric und romischer Zivilprozess", ,1947, 65 *ZSS* 88; M. Kaser, "Beweislast und Vermutung in romischer Formularprozess" ,1954, 71 *ZSS*, 232, quoting G. Donatuti'S essays - which we have been unable to obtain; idem. "Infamia und Ignominia in den romischer Rechtsquellen", 1956, 73 *ZSS* 231.

51. From "Istituzioni" op. cit. at pp. 138-9; see also G. Broggini, "La Prova nel Processo Romano Arcaico", 1960, 11 *Ius* (=Coniectanea, 1966, 167 n. 90).

himself confronted with doubts and, if the evidence produced appears to be insufficient he may be unable to form a clear opinion.[52]

Lemosse writes, "... as for himself, the judge pronounces according to his personal conviction . . . . The outcome of the trial, therefore, depends neither upon the credibility of the witnesses, nor upon the arguments presented", although he recognizes that "serious reasons were required in order to discard any evidence."

Aulus Gellius intimates that in the final analysis, conscience is not the only norm. In one word: the Romans waver between the necessity to respect evidence, whose value must prevail upon arbitrary choice, on the one hand, and, on the other, the desire to protect the freedom of the judge, which is often the only defense against the roguery of certain litigants. This is why the iudex is given free scope of action to a point bordering upon denial of justice."[53]

But how should the judge behave if he has been unable to form such an unequivocal opinion? May he not then honestly claim that the case is not clear to him (sibi non liquere)?[54] Aulus Gellius, a writer who died circa 130 AD, tells us about an interesting case that occurred during his term of service as a civil court judge. "A sum of money was claimed before

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52. On evidence see especially: J.P. Levy, "La Formation de la Théorie Romaine des Preuves" *St. Solazzi*, 1948, 418 ff.; E. Levy, "Beweislast im Klassischen Recht", 1952, 3 *Iura* 155 ff.; M. Kaser, "Beweilast und Vermutung" op. cit. at p. 221 et seq.; G. Pugliese, "L'Onere della Prova nel Processo per formulas", 1956, 3 *RIDA* 349 ff.; J.A. Arias Bonet, "Prueba Testificial y Obvagulatio en el Antiguo Derecho Romano", *St De Francisci*, 1956, vol. 1, p. 283 ff.; G. Longo, "L'Onere della Prova nel Processo Civile Romano" ,1960, 11 *Iura* 149 ff.; G. Broggini, "La Prova nel Processo Romano Arcaico" op. cit. at p. 133 ff.; G.I. Luzzatto, Il Problema d'Origine del Processo "extra ordinem" vol. I, op. cit. at pp. 106-07. We do not wish to take a stand in the controversy between J.P. Levy, E. Levy, M. Kaser on the one hand, and G. Pugliese and G. Broggini, on the other, concerning the existence of rules of evidence. G.I. Luzzatto, after full examination, sustains the traditional opinion, according to which, while no strict norms of evidence can be assumed, there existed common sense rules generally and customarily acknowledged in practice; see on this point E. Cuq, Manuel 882; "the theory of evidence is the fruit of the rectors' work rather than of case-law", affirms LemOSSSE, "Cognitio - *Etude sur le Rôle du Juge dans l'Instruction du Procès Civil Antique*" (Paris), 1944, 158 ff.

53. From "*Cognitio - Etude sur le Role....*" op. cit. at p. 162 ff. see also B. BIONDI, "Appunti intorno alla Sentenza nel Processo Civile Romano" *St. Bonfante* vol. 4, p. 34 ff. (=Studi Biondi vol. 2, pp. 435 et seq.); G.I. Luzzatto, *Il Problema d'Origine*, op. cit. at p. 109, n. 1.

54. On non liquet especially: M.A. von Bethmann-Holwegg, *Der Romische Civilprozess, 1864*, vol. 1, p. 182 ff.; Keller-Wach, *Der Romische Civilprozess und die Actionen*, 1883, 338; C. Bertolini, *Appunti Didattici di Diritto Romano* (Torino), 1914, vol. I., p. 314, and vol. 2, p. 152; E. Costa, *Profiilo Storico del Processo Civile Romano* (Roma), 1918, 76; L. Wenger, *Institutionen des Romischen Zivilprozessrechts* (Munchen), 1925; F. Leonhard – E. Weisse "Non Liquet", 1926, 13 *PW-RE* col. 726-7; A. Scialoia, *Procedura Civile Romana* (Roma), 1936, 183 ff.; M. Lemosse, "Cognitio - *Etude...*" op. cit. at p.164; R. Monier, *Manuel Elémentaire de Droit Romain* (Paris), 1947, vol. I, p. 166; P. Duff, "Non Liquet", 1956, 3 *S.A.L.R.* 39 ff.; G. Pugliese, *Il processo civile* - op. cit., at p. 252 ff. A.H. Jones Greenidge, *The Legal Procedure of Cicero's Time*, 1901, (New Reprint, New Jersey), 1971, 497 ff.

me, which was said to have been paid and counted out; but the claimant did not show this by documents or witnesses, but relied upon very slender argument."[55] The case was made even more delicate because the plaintiff was a person of undoubted rectitude. It was clear, however, that he was "a thoroughly good man of well known and tested integrity and of blameless life,"[56] while the defendant was a person of dubious character. "The man upon whom the claim was made was shown to be of no substance, of base and evil life, often convicted of lying, and full of treachery and fraud."[57] In view of the plaintiff's incapacity to bring evidence in support of his claim, the defendant not only insisted on his own release, but also demanded that the plaintiff be condemned de calumnia.[58] He claimed that evidence regarding the private life of the parties was irrelevant to the case, for this was a case of claiming money before a private judge, not a question of morals inquired into by the censor."[59]

Gelllius' friends were persons well acquainted with the letter of the law, "whom I had consulted on the point" (quos regoveram in consilium), advised him to release the defendant, applying thus the common sense norm later adopted as a rule, by which actore non probante reus absolvitur, and this should doubtlessly have been the normal behaviour.[60]

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55. Petebatur apud me pecunia, quae dicebatur data numerataque, sed qui petebat neque tabulis neque testibus id factum docebat et argumentis admodum exilibus nitebatur (Noctes Atticae, XIV, 2, 4).

56. Virum esse firme bonom notaque et. expectae fidei et vitae inculpatissimae... (Ibid).

57. ... non bonae rei vitaeque turpi et surdida convictumque vulgo in mendaciis plerumque esse perfidum et fraudum ostendebatur (Ibid).

58. "If a defendant was sued maliciously, the plaintiff having full knowledge that his claim for a tenth of the amount claimed in the former trial, but he had to prove that the latter acted calumnniae causa". Sic A. Berger, *Encyclopaedic Dictionary* op. cit., at p. 520. It may be noted here that recently it has become more and more vital to introduce norms of loyalty and integrity of the parties and their legal representatives in court, "and especially the introduction of a pledge of loyalty (obbligo di verita) by the party (and his representative) not to adduce facts it knows to be false, and not to contest facts (adduced by the adversary) it knows to be true. A pledge of this sort was known to the classical Roman tribunal, together with institutions aimed at preventing acts of reciprocal deception and cheating (M. Cappelletti, *Processo e Ideologie* (Bologna), 1969, 216 ff.; nevertheless, there remain other serious dangers, as noted by E. Redenti, "L'Umanita nel Nuovo Processo Civile", 1941, 18 Rivista *di Diritto Processuale Civile* 30 ff.; and P. Calamandrei, *Opere Giuridiche* (Napoli), 1966, 3306 ff. and 556 ff.; see also P. Henry Winfield, *The History of Conspiracy and Abuse of Legal Procedure*,1921; S. Ginossar, "Nuisance Between Litigants" ,1970, 2 *Mishpatim* 221 ff. and 553 ff.

59. "...res enim de petunda pecunia apud iudicem privatum agi, non apud censorem de moribus", Gellius, N.A. XIV, 2, 8). See A. Berger, *Encyclopaedic Dictionary* op. cit., at p. 352 and E. Volterra, 1963, 9 *NNDI* 344.

60. Therefore we disagree with J.P. Levy, "A Formation de la Théorie Romaine des Preuves" op. cit. at p. 420 n. 10, when he affirms that Gellius was unable to find (in the law) a solution to the problem of burden of proof, and was forced to seek it in a purely pragmatical work (one of Cato's addresses). In fact Gellius was conscious that what his advisors suggested was the general principle, which however did not satisfy his conscience in that specific case; on this see mainly G. Pug;oese, "L'Onere della Prova" op. cit. at p. 356 and n. 6.

The proposed solution seemed indisputable, yet Gellius could not bring himself to adopt it and to disregard the enormous reliability gap between the parties; and this doubt caused him to turn for additional advice to the philosopher Favorinus.

The latter, after a lengthy lecture on the duties of a judge, refers to the precedent of Cicero (first half of the 2nd century BC) that in case of conflicting evidence, the personalities of the parties must be taken in due consideration: if they are equally honest - or equally dishonest - then the judge must pronounce in favour of the defendant: but if only one of the parties is reliable, then the judge must give sentence in his favour. Favorinus therefore advised in the present case to admit the plaintiff's claim and to condemn the defendant, basing himself on the principle *qui petit melior est.*[61]

Gellius, who was then in his youth, was convinced by the moral justice of Favorinus' speech,[62] but nevertheless was still unable to judge on the basis of the behavior of the parties, without the support of evidence (de probationibus rei gestae) and unwilling as he was to release the defendant, he decided to declare himself unable to reach a clear opinion, thereby relieving himself of the obligation to pronounce judgment (et propterea iuravi mihi non liquere, atque ita iudicatu illo solutus sum).[63]

From this episode we learn that the magistrate did his utmost to reach a decision that would satisfy both justice and his own conscience; having weighed the evidence and considered the personality of the parties he turned to the advice of his consilium and that of a philosopher; his final decision iurare sibi non liquere was clearly not reached lightly, but with full cognizance of his responsibility as a judge. Therefore, although he

61. On this passage, and especially on this point, see H. Levy-Bruhl, *Recherches sur les Actions de la Loi*, (Paris), 1960, 216-218; by the same author see also his review of A. Cecchini, in, 1928, 7 *RH* 116-7 and "Dissentiones Prudentium" in Synt. *V. Agrangio-Ruiz, 1964*, vol. 1, pp. 537-8.

62. From the episode it appears that Gellius, and not Favorinus, had been appointed iudex, and that the decision sibi non-liquere was that of Gellius not of Favorinus, contrary to what E. Volterra writes (*Istituzioni di Diritto Romano* (Roma), 1961, 235) "cio risulta da un episodio narrato da Gellio, Noc. Att.14.2.25, intorno ad un processo in cui era stato noninato iudex il filosofo Favorino" this appears from an episode told by Gelluis - Att. Nights, 14.2.25 - about a trial in which the philosopher Favorinus had been appointed iudex).

63. "And therefore I swore 'mihi non liquere', and was thus delivered from the duty to pronounce". In addition to the authors mentioned in n. 43, see also C. Bertolini, *Il Giuranmento nel Diritto Romano* (Torino), 1886, 177. M. Lemosse op. cit., sees in Gellius' words a justification of his attitude: "this passage shows the reason for the attitude adopted by the iudex. A powerful man whose integrity was beyond suspicion could well judge regardless of the strict norms of the law, because no one would have dared to suspect him of having acted by self-interest or bias".

was unable to pronounce sentence, he cannot be censured for failing to pass judgment of the case.[64]

On the basis of Gellius' chronicle it is common opinion today[65] that during the period of ordo iudiciorum privatorum[66] the iudex was allowed to declare sibi non liquere,[67] in which case the case had to be rearrayed.[68] Did this custom outlive the ordo iudiciorum privatorum? Lemosse does not suppose so. "But this oath non sibi liquere disappears from later sources: subsequently to further changes in the procedure, Justinianean compilations mention it only indirectly... It is therefore natural that the oath sibi non liquere should have disappeared with the ordo iudiciorum, as it had not made its appearance before the creation of this ordo.[69]

Regretfully, there is little source material, which could give us the answer. Looking, first of all, at Justinian's Digest, we must keep in mind its particular character. In spite of the many interpolations and manipulations of its compilers, the Digest remains in substance a collection of fragments borrowed from classical jurists. This explains first how, unlike the Codex and the Novelle, two explicitly normative works, the Digest has at the same time a normative and a scholastic and doctrinarian function, with the latter clearly prevailing over the former;[70]

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64. See G. Pugliese: *Il Processo Civile Romano...* op. cit., vol. 2, p. 253: the obligation to judge did not necessarily entail the obligation to actually solve the controversy.

65. Nevertheless, see F. Schuiz: *Classical Roman Law* (Oxford), 1951, 14: "In civi, unlike criminal procedure it is not permissible to pronounce non liquet". Schulz refers to the Romische Strafrecht by Th Mommsen, in which, however, the author does not deal with the question of non-liquet in the framework of civil procedure. Against Schulz's opinion, and in favor of W.W. Buckland's and H.F. Jolowicz's, see P. Duff; "Non Liquet" op. cit. supra n. 4.

66. With explicit reference to legis actiones, see G. Franciosi, *Il Processo di Liberta in Diritto Romano* (Napoli), 1961, 68 ff.; contra, see M. Marrone in his review of Franciosi's essay in, 1962, 13 Iura 262; pro, see G. Pugliese: "Processo Civile Romano" vol. I, p. 422, ff. (non vidi) and M. Kaser, *Romischen Zivilprocezessrecht* op.cit. at p. 88 n. 3; see also M. Mole, "Sentenza (Diritto Romano)" *NNDI* p. 1085 and n.7, where however, there is no distinction between sources relating to civil and to criminal procedure.

67. It may be useful to remark that Pothier introduced Gellius' passage in his Pandette, affirming explicitly: nevertheless, if the given Judges did not grasp the question of the case, they swore that it was not clear to them (sibi non liquere)" (sub. D. 5.1.79.1).

68. On this point, see E. Costa, *Profile Storico* op cit. at p. 76.

69. "Cognitio - *Etude*" op. cit. at pp. 164-5.

70. On this important subject see especially: F. Pringsheim, "die Archaistische Tendenz Justinians" in Gesammelte *Albandlungen* (Heidelberg), 1961, 9 ff. and also "The Character of Justinian's Legislation", ibid. p. 73 ff.; F. DE Visscher, "Le Digeste, Couronnemment de la Politique des Empereurs vis-a -vis des Prudents", *Conferenze per il xiv Centenario delle Pandette* (Milano), 1931, 55 ff.; G.G. Archi, "Il Classicismo di Giustiniano" in *Giustiniano Legislatore* (Bologna), 1970, 169 ff.; ibid., p. 181 ff. especially 186 ff.; "La Valutazione Critica del Corpus Iuris", *ibid.*, p. 206 ff.; M. Kaser, *RPR*, ,1969, vol. 2, p.. 20 ff.; Th. ayer-Maly, "Bemerkungen zum Aufbau der Digesetentitel" in *Synt. V. Arangio-Ruiz* op.cit. at p. 884; see also G.I. Luzzatto's view of U. Ziletti's work, in, 1966, 32 *SDHI* 363 ff.; and R. Bonini, "Il Manuale Novellarum del Van Der Wal (con alcune Considerazioni sui Rapporti fra Novelle e Digesto)" in *Archivio Giuridico, 1966*, vol. 171, p. 26 est. See also K. Heinz Schindler, *Justinianus Haltung zur Klassik* (Koln-Graz), 1966, and reviews

and second, how various terms assume a thoroughly different meaning in classical law and in post-classical Justinian law.[71]

An outstanding example is the iudex. As already shown, in classical law the iudex is generally a private citizen who applies the letter of the law upon specific orders from the praetor as prescribed in the formula; while in the late cognitio extra ordinem and in Justinianean trials, the iudex is a magistrate, an organ of public administration, having a general potestas iudicandi within the limits of his competence.

In the 17th book Ad edictum, the jurist Paul, reporting an opinion of Pomponius (38th book Ad edictum), writes: If in a collegial judgment one of the judges appointed to a civil cause declares "sibi non liquere", while the remaining judges reach an agreement; should he declare formally "sibi non liquere," the sentence pronounced by the rest of the college remains valid; for should the abstaining judge have openly dissented, yet the sentence would have been valid by majority vote.[72]

We shall not question at this point the use of the term iudex - the classical jurist might have written recuperatoribus or centumviri instead of pluribus iudices[73]. What appears unequivocally from this passage is that even in the case of a collegial judgment, a single judge had the option to abstain from giving a judgment if the question was not sufficiently clear to him, and that his abstention did not impair a sentence passed by a majority of the judges. This is justified by the fact that, had the abstaining judge voted against the adopted sentence, the other judges would have nonetheless been able to pronounce their sentence. There is yet another logical justification. In the Digest itself we find a passage by Celsus (D.42.11.39), asserting that in a college composed of three judges, two of the members cannot judge in the absence of the third, for they are all bound to adjudicate (quippe omnes iudicare iussi sunt); however, a sentence passed by a majority against the vote of the third

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by G.G. Archi, 1969, 15 *Labeo* 84 ff.; G. Grosso, in, 1970, 1 Index, *International Survey of Roman Law*, 206 et seq.; and Th. Mayer-Maly, 1968, 85 *ZSS* 556 ff.

71. See especially B. Biondi, "Intorno alla Romanita del Processo Civile Romano", in *Scritti Giuridici*, op.cit. Vol. II, p. 368 ff., and especially 388; "Diritto e Processo nella Legislazione Giustinianea", ibid. at 519 ff.; "Il Processo Civile Giustinianeo, ibid. at p. 567 ff.

72. Si uni ex pluribus iudicibus de liberali causa cognoscenti, de re non liqueat; caeteri autem consentienti, si is iuraverit sibi non liquere, EO quiescente caeteros qui consentiant sententiam proferre: quia etsi dissentiret, plurium sententiam obtineret (D. 42.1.36).

73. See Index Interpolationum, col. 228; see also the corresponding passage in Basilica 9, 3, 36.

judge is absolutely valid, since the basic condition "that all three judges must take part in the judgment" has indeed been fulfilled.[74]

Roman law is clearly based upon the assumption, explicitly mentioned by Marcellus (D.44.1.37), that only if all judges were present, can they be deemed to have taken part in the judgment; and there is a distinction between the judge's duty to take part in the judgment and the act of pronouncing sentence.

Another passage, not directly relevant to our problem is that taken from Ulpianus and referring to the arbiter ex compromisso: "Also, should the Praetor urge him to pronounce, and should he declare that the case is not yet sufficiently clear him, justice requires that he be granted a delay, after which he will be required to pronounce."[75] Not only does the passage refer neither to the iudex, nor to the common non liquet, but also it deals with a case, which is not yet clear. Far from refusing to pronounce sentence, the judge merely requests a postponement so that he may reach the degree of certainty required to form an unequivocal opinion. Apart from the Digest, other sources, more specifically post-classical, dealing with our problem, are as follows:

In the cognitio extra ordinem a judge unable to solve the controversy, because of either factual[76] or judicial doubt, may remit the decision to the imperial courts of law (relatio). The judge had the option of submitting to the Emperor a simple question of law (consultatio), upon which the case would be turned back to him for adjudicating, subject to a right of appeal, or of deferring the whole case to the Emperor.[77]

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74. This principle is also found in Jewish law, where, however, contrary to the Roman system, it is provided that should one of the judges wish to abstain, a substitute must act in his place, in order to avoid a reduction of the judging college: see *Mishna Sanhedrin*, III, 6 and V, 5 and Rashi's commentary to the *Sanhedrin treatise*, 29 a.

75. "Proinde si forte urgeatur a praetore ad sententiam, aequissimum erit, si iuret sibi de causa nondum liquere, spatium ei ad pronuntiandum dari."

76. In this sense see E. Costa, *Profilo Storico*, op. cit. at p. 153; G. Bassanelli, "La Legislazione Processuale di Giustino I (9 luglio 518-agosto 527)", 1971, 37 *SDHI* 119 ff.; "Such norms may be meaningful only if used to protect the parties against an imperial sentence, definitive for the whole matter; they would cease to be necessary if the imperial sentence were intended to solve exclusively a question of law" (p. 164, in Italian).

77. On this argument see M.A. von Bethmann-Hollweg, *Der Romische Zivilprozess* op. cit. at p. 91; E. Costa, *Profilo Storico....* op. cit. at p. 153 et seq. E. Andt, *La Procédure* par E. Rescrit (Paris), 1920, 8; P. de Francisci, "Osservazioni sulle Condizioni della Legislazione nei Secoli IV e V", *Scr. Salandra* (Milano), 1928, 141 ff.; P. Collinet, *La Procédure par Libellé* (Etudes Historiques sur le Droit de Justinien) (Paris), 1932, vol. 4, p. 365; J. Gaudemet, "L'Empereur, Interprète du Droit" *Fest. Rabel*, 1954, vol. 2, p. 169 ff.; U. Zilletti, *Studi sul Processo Civile Giustinianeo* (Milano), 1965; M. Kaser, *Das Romische Zivilprozessrecht* op. cit. at p. 501; and also G. Bassanelli, "La Legislazione Processuale", op.cit. at 119 ff.

In the Codex Theodosianus (XI, 29) and in the Codex Iustinianus (VII, 61), an entire title is reserved to the matter de relationibus. The first constitution of the Codex Theodosianus, attributed to Emperor Constantine and addressed to the corrector Lucaniae et Brittiorum,[78] reads: "...In view of the fact that there remains to litigants the legitimate choice of an appeal from decisions, you must consult Our Majesty only concerning a few matters which cannot be decided by judicial sentence, in order that you may not interrupt Our imperial occupations."[79]

Gaudemet offers an excellent justification of this practice: "All jurisdiction, whether by single judge or by jury, was therefore allowed to follow this procedure (per relationem). This was normal, since the Emperor is not conceived here as a hierarchically superior instance - which might have served to justify an interdiction to inferior judges to try the case directly. The emperor intervenes in his capacity as sole course of law and justice."[80] This is not the place to examine in detail the norms determining the various steps of a per relationem procedure and the connected interventions of the Emperors.[81]

We would only remark that at first the Emperors, wishing to maintain direct contact with civil officials throughout the provinces and anxious to promote and expand the use of Roman law rather than of local customary norms, favored the procedure.[82] But quite soon, at the time of Constantine (God. Theod. 11.29.2), the Emperors came to recognize the need for restricting this procedure, in order to avoid overloading the imperial courts.

The final link of this evolutionary chain is probably the promulgation by Justinianus of the Novella 125, De Iudicibus dated 543 AD, by which the Emperor endeavored to resist the impact of practice by prohibiting judges trying a case from asking the Emperor's advice on mere points of fact or on inferences to be drawn from them. The Emperor order the

78. On the corrector Lucaniae et Brittiorum see A.M. Rabello, "I Privilegi dei Chierici sotto Costantino", 1970, 16 *Labeo* 391 n. 13, with bibliography.

79. Super paucis, quae iuridica sententia decidi non possunt, nostram debes consulere maiestatem, ne occupationes nostras interrompas, cum litigatoribus legitimum remaneat artibrium a sententia provocandi.

80. From "L'Empereur, Interprète du Droit" op.cit.

81. For such an examination, see the essay by G. Bassanelli: "La Legislazione Processuale", op. cit. with rich bibliography.

82. "If any judge should suppose that a case ought to be referred to Us, he must pronounce no decision, but rather he shall consult Our Wisdom on the point on which he supposes that there is some doubt; but if he should render a decision, he must not thereafter deter litigants from appealing therefrom by promising to refer the matter to US. Given on the fourth day before the ides of February at Sirmium in the year of the fifth consulship of Constantine Augustus and the consulship of Licinius Casear. February 10, 319; February 7, 318."

judge to "perfecte examinare causam et quod sibi iustum atque legitimum visum sit iudicare,"[83] remarking that should one of the parties feel injured by the decision, he still has the right to appeal.[84] A certain assumption may thus be made that the Novella 125 of Justinian actually lays down the same rule as later adopted by modern legal systems, by imposing upon the judges the duty to pronounce judgment in all cases.[85]

## V. THE PROBLEM IN JEWISH AND MOSLEM LAW: SOME REMARKS, WITH SUGGESTIONS DE LEGE CONDENDA

It may be interesting to note that both the Jewish and the Islamic legal systems allow the judge to abstain from pronouncing sentence in certain cases. In Jewish law, it may be said that the judge must as a rule take care to reach the proper decision, in accordance with his responsibility towards God but without undue fear as to the consequences of his decision. Some rules deal with possible doubts and how to dispose of them. The solutions vary according to the subject matter, a distinction being made between mere proprietary rights (dinei mammonoth) and cases involving problems of "sanctity", such as marriage.[86]

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83. "...to examine the case with the utmost care and to pronounce in accordance with what appears to them fair and legitimate". It will be recalled that around that time a theory of evidence was being formulated, providing the judge with additional criteria of judgment. On this point see G.G. Archi, "La Prova nel Diritto del Basso Impero," 1961, 12 *Iura* 1 et seq.; Idem. "Les Preuves dans le Droit du Bas Empire" *Rec. Bodin* op. cit. Vol. 1, p. 389 ff.; U. Zilletti, "Studi sulle Prove nel Drittio Giustinianeo", 1964, 68 *BIDR* 167 ff.; also M. Kaser, "Rom Zivilprozesrecht" op. cit. at p. 485 ff.; and now D. Simon, *Untersuchungen zum Justinianischen Zivilprozess* (Munchen), 1969, 135 ff. and G. Provera's review in, 1970, 21 *Iura* 211 ff.

84. On Novella 125 and on the former Novella 113, see especially: N. van der Wal, *Manuale Novellarum Iustiniani* (Amsterdam), 1964, 48 and n. 4 and 147 no.2: ("henceforth the judges are forbidden to consult with the emperor" (in French); U. Zilletti, *Studi sul Processo* - op. cit., at p. 46 and n. 103, p. 261, et seq.; G. Bassanelli, "La Legislazione Processuale" op. cit. at p. 162 ff. and 214: "...But the codification of Justinian had even deeper repercussions in the history of trial, for it brought about radical changes in the relationship between the judge and the law to be administered by him. This is especially evident in the history of trial per relationem: regulated by Justinian in 529 (Cod. 1, 14, 12), it was entirely abolished after the codification by Novella 25".

85. In the present article we have discussed the question mainly as it arises in civil law. For a study of its aspect in criminal law, see TH. Mommsen, *Romische Strafrecht*, 1899, 4233 ff.; Hartmann, "Ampliatio" W, *RE*, 1894, vol. 1, col. 1979 ff.; F. Lanfranchi, *Il Diritto nei Retori Romani* (Milano), 1938, 553 ff.; U. Brassiello, "Processo Penale Romano", 1966, 13 *NNDI* 1159: ("At the completion of the evidence, the jury has the right to abstain from judgment, declaring sibi non liquere and ordering additional research. This leads to the ampliatio"). Ampliatio was in "Roman criminal procedure the reiteration of all the evidence when the jury declared that the case has not been sufficiently elucidated and required further (amplius) investigation", A. Berger *Encyclopedic Dictionary* op.cit. at p. 361. On Lex Acilila see S. Riccobono, *FIRA* vol.1, p. 84 et seq. and p. 94.

86. For a thorough analysis on this point see P. Shifman, "On the Concept of Doubt ('Safek') in Halacha and Law" 1, 1974, *Shenaton Ha-Mishpat Haivri* 328. In addition, see H. Ben-Menahem, "Is There Always One Uniquely Correct Answer to a Legal Question in the Talmud", 1987, 6 *The Jewish Law Annual* 164. For further background, the historical aspect is dealt with in Lamm & Kirschenbaum, "Freedom and Constraint in the Jewish Judicial Process", 1979, 1 *Cardozo Law*

Nevertheless, the Misha recognizes the judge's right to remain in doubt and to declare explicitly "I do not know" (Sanhedrin, 3, 6): "...if two (judges) find him innocent, two deem him guilty and the fifth says "I do not know" - additional judges must be appointed to the case."[87]

This rule is based upon the great respect due to the judge's conscience and the responsibility of his function. It is interesting to note that when a judge is suspicious of the plaintiff's intentions he should refrain from judgment, regardless of any evidence presented by the plaintiff himself; but this will not prevent another judge from hearing the case de novo.[88]

As for Moslem law, "in cases where the qadi feels unable to come to a correct decision on the basis of the evidence offered, he is allowed to abstain from judgment... Equally, where the relevant rule of law is itself a matter of doubt the qadi is not forced to give judgment...if no positive indication appears to him, (he must) abandon the case and refrain from judgment, there being doubt in his heart."[89]

This brief historical and comparative survey shows that in modern legal systems the judge may not refrain from giving judgment, either in favor or against the plaintiff's claim.[90] By delivering his decision the judge

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*Review* 99. Dissertation by P. Shifman, Uncertainty in the Validity of Marriage in Israeli Law (thesis, Jerusalem, 1972, in Hebrew, not yet published).

87. See also the *Mishna Sanhedrin*, 5, 5.

88. On this point see P. Shifman, op. cit., p. 14 et seq.; where the author remarks that in the Middle Ages, due primarily to the influence of Rabbenu Asher (Rosh), there was a change in directives. If the judge has good reason to suspect fraud on the part of the plaintiff, he has to decide the case in favor of the defendant; and conversely, if his suspicions fall upon the defendant, he must pronounce in favor of the plaintiff (note the similarity with Gellius' problem, reported supra). Finally, a new principle makes its appearance, namely that if the judge deems the case to be objectively doubtful, and such that presumably another judge would reach the same conclusion, he must attempt to bring the parties to a compromise. Not directly relevant to our problem is the duty of the court to abstain from judgment when there is reason to think that later events may disprove the justice of the sentence: In such exceptional cases the legal position is to be kept in abeyance subject to subsequent evidence; on this point too, see P. Shifman, op. cit. at p. 15.

89. From N.J. Coulson, "Doctrine and Practice in Islamic Law", 1956, 18 *Bulletin of the School of Oriental and African Studies*, University of London, pt. 2, p. 211 et seq. and 224 in particular.

90. On the concept of sentence see especially B. Windscheid, *Diritto delle Pandette* 123 ff. and the notes to those paragraphs by Fadda and Bensa; G. Chiovenda, Principi di Diritto Processuale - op.cit. at p. 134 ff. and 891 ff.; G. Pugliese, "Note sull'Ingiustizia della Sentenza nel Diritto Romano", *St. Betti*, (Milano), 1962, Vol. 3, p. 725 ff.; M. Marrone, *L'Effetto Normativo della Sentenza (Corso di Diritto Romano)* (Palermo), 1960. For the discussion of delicate problems as to the distinction between efficacy and authority of judgments and as to unjust judgment, see, with abundant bibliography, G. Pugliese, "Giudicato Civile, Dirito Vigente", *Enciolopedia del Diritto*, 1968, vol. XVIII n. 8 ff. and n. 12 et seq.; E. BETTI, "Res iudicata (Diritto Romano)", 1968, 15 *NNDI* 216 ff.; A. Guarneri, "Res iudicata" (Diritto Processuale Civile)" 1968, 15 *NNDI* 218 ff.; F. Lancellotti, "Sentenza Civile", 1969, 16 *NNDI* 1106 ff., with bibliography.

discharges his obligations as they stem from the law and from the judicial process. He is functus officio.

By consenting to act as judge, he has in effect waived the right to remain in doubt, whatever the nature of the case. He cannot claim not to know how to behave in the context of the controversy with which he is confronted in his court of justice, either under judge-made law or within the scope of legislative enactments.

Generally speaking the function of the judge is highly respected, but we should make some allowance for the fact that he is only a human being judging his fellow man; and proportio hominis ad hominem should be preserved. The possibility of appeal does not remove, or does not entirely remove, the doubts of adjudication, all the more since every judgment raises a certain presumption of truth, which may form the basis for the full-fledged doctrine of res iudicata. Therefore a simple revival of non liquet, however desirable it might appear in theory, would hardly be practicable. A proper mitigation might perhaps be found in the attitude adopted by some legal systems, which, without relaxing the judge's duty to adjudicate, withhold the full effects of res iudicata whenever the decision has been reached only through lack of proof and not upon facts clearly found by the judge. This concession may usefully serve to reconcile the conflicting requirements of truth and justice, on the one hand, and certainty, on the other.