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The Quiet Revolution

Alain Levasseur



Honoré Daumier

On January 1st, 1973 Great Britain became a member of the European Economic Community, ending several decades of a hesitation waltz marked by the tempo of a dithering nationalism which still haunts many, and makes them wonder whether Great Britain will ever play by the rules of the game after having waited so long before entering it at the end of

the first half. Whatever the future holds in store, Great Britain is now one of the nine, brought to the shores of the European Continent. This momentous political event stole the limelight away from the legal problems which had to flow quite inevitably from an economic (and political) rapprochement.

These legal problems draw their data from the now well-known dis-

tinguishing and dividing features of the common law and the civil law, and raise the most challenging and exciting question of whether these two well-entrenched legal families, compelled by basic human needs to face each other eye to eye, can work out a *modus vivendi* which would spare national prides by preserving some elements of their respective historical heritage. Or will

the civil law system, carried along with the current of the economic strength and political power of the original six, invade the sacred and inflexible boundaries of the common law tradition and confront directly the common law lawyer in his habits and preferences of heart as well as his beliefs of mind and soul?

Lord Reid has confessed, "[w]hat we shall do if we are forced into the Common Market and have to deal with Continental Legislation and decisions I just do not know. We shall have to learn a lot about not only European Law but more important about the habits of mind of European lawyers, which I suspect are more theoretical and less practical than our own." This concern deeply felt and expressed under the form of a confession of a bewildering helplessness reflects the intensity of the quiet revolution which is presently taking place in Great Britain in the area of legal methodology. This revolution pitches against each other the civil law and the common law approaches to legislation as well as their conceptions of the role and function of the judge vis-à-vis statutory law.

I. The civil law and common law approaches to legislation.

The divergent approaches to legislation as manifested by these two legal traditions relate, first, to the place and scope of statutory law as a source of law and, second, to the technique to be followed in drafting statutes. In both of these areas of divergence, European Community law falls in the mold of the civil law.

A. Civil Law and Common Law Approaches to Legislation as a Source of Law.

The traditional approach of the common law to legislation has always been one of suspicion and reluctant acceptance, an approach deeply rooted in the historical past

of the common law as a "taught tradition of decision, a tradition of applying judicial experience to the decision of controversies, a tradition shaped in its beginnings as a quest for reconciling authority with reason, imposed rules with customs of human conduct, and so the universal with the concrete." (Pound). The British or common law judges "regarded it as dangerous and unnatural to prescribe the outcome of comparable cases in advance by making general regulations to cover the whole area of life. . . . The judges saw statutes as being an evil, a necessary evil, no doubt, which disturbed the lovely harmony of the common law." (Zweigert & Kotz by Weir). Even today there still exists "the dominant principle, never absent from the minds of judges, that the common law is wider and more fundamental than statute. . . . The principle is expressed in the familiar rule that statutes 'in derogation of the common law' are to be construed strictly." (Allen). "I am tempted to take as an analogy the difference between old-fashioned, hand made, expensive quality goods and the brash products of modern technology. If you think in months, want an instant solution for your problems and don't mind that it won't wear well, then go for legislation. If you think in decades, prefer orderly growth and believe in the old proverb more haste less speed, then stick to the common law. But do not seek a middle way by speeding up and streamlining the development of the common law." (Lord Reid).

The civil law approach to the role of legislation as a source of law stands at the antipodes of the above. In those countries which claim a common heritage from "debris of the Roman Law [built] into their walls" (Sir Henry Maine) it is believed that justice as the es-

sence of law is best achieved through enacted law as the "solemn expression of legislative will." (art. 1 LCC). The civil law tradition is thus one which vests the supreme lawmaking power in a representative body and ranks the legislative expression of the popular will at the apex of a pyramid of sources of law devised and arranged in a dogmatic and systematic pattern. "The attitudes that led France to adopt the metric system, decimal currency, legal codes, and a rigid theory of sources of law, all in the space of a few years, are still basically alien to the common law tradition." (Merryman).

Whether these two opposite approaches to legislation as a source of law are the cause or the effect of the two obviously different styles of drafting statutes is a question beyond my purpose here. On this occasion I wish to restrict myself to a merely objective portrayal of the two styles.

B. The Civil Law and the Common Styles of Drafting Statutes.

Without intending to show any disrespect for either of the two legal traditions, I believe that one could draw a parallel between cubism and the civil law style on the one hand and pointillism and the common law style on the other hand.

The civil law style reflects the belief that "the legislator does not exercise authority as much as he serves a sacred office. He must not forget that legislation is made for men, and that men are not made for legislation . . . that it is impossible to anticipate all the drawbacks that practice alone can reveal . . . that it would be absurd to surrender oneself to a belief in absolute perfection in matters susceptible of only relative goodness . . . that to anticipate everything is a goal impossible of attainment." (Portalis). It follows from this belief that the

civil law style of drafting is like "a monochromatic expression of natural forms in terms of simplified planes and lines and basic geometric shapes, sometimes organized to depict the subject simultaneously from several points of view." (Cubism, defined in Webster). The civil law style is "to set, by taking a broad approach, the general propositions of the law, to establish principles which will be fertile in application and not to get down to the details of questions which may arise in particular instances. It is for the judge and the jurist, imbued with the general spirit of the laws, to direct their application." (Portalis). By his style, his technique of drafting, the civilian legislator associates the judge in the administration of justice in a mutual and reciprocal attitude of trust and confidence.

The common law technique of drafting statutes resembles the extreme care and minuteness of a Seurat and the school of pointillism whose style has been defined as "applying dots or tiny strokes of color elements to a surface so that when seen from a distance the dots or strokes blend luminously together." (Pointillism—Webster). The common law technique is one molded and shaped "by a frame of mind which habitually looks at things in the concrete, not in the abstract; which puts faith in experience rather than in abstractions." (Pound). This concern for "realism" is translated into statutes "elaborate to the point of complexity; detailed to the point of unintelligibility; yet strangely uninformative on matters of principle." (Lord Justice Scarman). The art of legislation had been to "pile up as many words as possible, significant and insignificant, on the chance that in their multitude the intention of the enactment might find safety." (Pollock). "It must be said

with all respect that one can quite often find traces of this attitude even in modern legislation." (Zweigert & Kotz by Weir). "Legislation in detail is resorted to because Parliamentarians harbour the suspicion that Judges cannot be trusted to give proper effect to clear statements of Principle." (Lord Emslie and Lord Wheatly).

C. European Community Law and Legislation.

In the new legal order which came into being with the creation of the European Economic Community the normative sources of law rank at the top of the pyramid. These normative sources include the treaties considered as primary normative sources of law, and the community administrative acts such as regulations, directives, and decisions, gathered under the label of secondary normative sources. As far as the decisions of the European Court of Justice are concerned, it is a fact that the court has on many occasions referred to and followed its previous decisions, although the latter have never been considered as binding precedents.

With respect to the style of the community normative sources of law, although there is no uniform pattern on account of the different purposes to be achieved by the different lawmaking acts, still there is a noticeable common thread running through them as they emanate from institutions, themselves children of the founder states all sharing in one common civil law tradition. This common thread or common gene has been identified by Professor D. Lasok in these terms: "It can be said, generally, that the community legislation follows the continental pattern, i.e., translating policies into rules of general application and proceeding from the general to the particular. The Legislation is not as tightly drafted as

our own statutes, allowing those who apply the laws a certain margin of appreciation in the interpretation of the rules of law." (Renton Report).

These divergent approaches to legislation necessarily carry with them in their tracks two basically opposite conceptions of the role the judges ought to play when confronted with the duty to interpret statutory law. It is in this role that the British judges may feel like aliens called to duty at the service of a foreign legal system.

II. The judges' role in interpreting statutory law and the challenge confronting the British judges.

A. The judges' role of interpreting statutes at civil law and at common law.

Roscoe Pound has admirably synthesized the civil law method of interpretation in these words: "The civilian is at his best in interpreting, developing and applying written texts. His method has been one of logical development and logical exposition of supposedly universal enacted propositions. His whole tradition is one of the logical handling of written texts." At the turn of the 19th century one of the foremost among the theoreticians of the civil law described the judge's science as consisting in putting into effect the principles formulated by the legislator: "to diversify them and to extend them, by means of wise and reasoned application, to private causes; to examine closely the spirit of the law when the letter kills; and not to expose himself to the risk of being alternatively slave and rebel and of disobeying because of a servile mentality." (Portalis). Thus, the civilian judge, entrusted by the legislator with the deposit of the principles most favorable to the common good, can go about his task to consider men as individuals where the legislator considered them en masse.

“The common law lawyer” on the other hand “is at his worst when confronted with a legislative text. His technique is one of developing and applying judicial experience. It is a technique of finding the grounds of decision in the reported cases. It is a technique of shaping and reshaping principles drawn from recorded judicial decisions.” (Pound). “The force of the formulation is spent when the imperative in such text is spent. The text of the law is its own barrier to growth. It is a thing-in-itself and is not both thing-in-itself and thing-for-other. [In] Anglo-American law the jurist turns his back on the formulated law when it reaches the limit of its command or its instruction. The received doctrine is that judicial determination and not legislative formulations are the basis for analogical development of law.” (Franklin).

Such were the basic alternatives presented to the British courts when at last Great Britain bridged the gap with the Continent. Having to deal with Continental legislation and decisions, what would the British judges do? Would the judiciary heed the words of Holmes: “if our imagination is strong enough to accept the vision of ourselves as parts inseparable from the rest, and to extend our final interest beyond the boundary of our skins, it justifies the sacrifice even of our lives for ends outside of ourselves”?

B. The British courts and European Community Law.

The adoption by the British Parliament of the European Communities Act of October 1972, insured the supremacy of Community Law over the national law of England at the same time it made Community Law an integral part of the British national legal order. Normative legal provisions clothed in a civil law apparel were to be applied by the local judiciary. This challenge

was accepted, not to say welcomed, by some of the most prominent members of the British bench. How much more civilian than the Master of the Rolls can one be:

“When we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back.

We must speak and think of Community law, of Community rights and obligations, and we must give effect to them. This means a great effort for the lawyers. We have to learn a new system.

What a task is thus set before us! The Treaty is quite unlike any of the enactments to which we have become accustomed. The draftsmen of our statutes have striven to express themselves with the utmost exactness. They have tried to foresee all possible circumstances that may arise and to provide for them. They have sacrificed style and simplicity. They have foregone brevity. They have become long and involved.

How different is this Treaty! It lays down general principles. It expresses its aims and purposes. All in sentences of moderate length and commendable style. But it lacks precision. It uses words and phrases without defining what they mean. An English lawyer would look for an interpretation clause, but he would look in vain. There is none. All the way through the Treaty there are gaps and lacunae. These have to be filled in by the judges, or by regulations or directives. It is the European way. What are the English courts to do when they are faced with a problem of interpretation? They must follow the European pattern. No longer must they examine the words in

meticulous detail. No longer must they argue about the precise grammatical sense. They must look to the purpose or intent. If they find a gap, they must fill it as best they can. They must do what the framers of the instrument would have done if they had thought about it. So we must do the same. Those are the principles, as I understand it, on which the European Court acts.”

Two years after the *Bollinger* case, Lord Denning pursued his adventurous path into the civil law:

“[The members of the European Court] adopt a method which they call in English by strange words—at any rate they were strange to me—the ‘schematic and teleological’ method of interpretation. It is not really so alarming as it sounds. All it means is that the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose which lies behind it. When they come upon a situation which is to their minds within the spirit—but not the letter—of the legislation, they solve the problem by looking at the design and purpose of the legislature—at the effect which it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means that they fill in gaps, quite unashamedly, without hesitation. They ask simply: what is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation? They lay down the law accordingly. To our eyes—shortsighted by tradition—it is legislation, pure and simple. But, to their eyes, it is fulfilling the true role of the courts. They are giving effect to what the legisla-

ture intended, or may be presumed to have intended. I see nothing wrong in this.

In interpreting the Treaty of Rome (which is part of our law) we must certainly adopt the new approach. Just as in Rome, you should do as Rome does. So in the European Community, you should do as the European Court does. Even in interpreting our own legislation, we should do well to throw aside our traditional approach and adopt a more liberal attitude. We should adopt such a construction as will 'promote the general legislative purpose' underlying the provision."

These far-reaching exhortations of Lord Denning and his followers are not shared by all, and more particularly not by several of the Lord Justices of the House of Lords who appear more reticent to go the European way:

"There is no universal wisdom available across the Channel upon which our insular minds can draw. We must use our own methods following Lord MacMillan's prescription, taking such help as existing decisions give us." (Lord Wilberforce).

Or again,

"I know of no authority for the proposition that one consequence of this country joining the European Economic Community is that the courts of this country should now abandon principles of construction long established in our law. The courts have rightly refused to encroach on the province of Parliament and have refused to engage in legislation. To fill the gaps which in his opinion existed, Lord Denning rightly

said, would, in our eyes be 'legislation pure and simple.'" (Viscount Dilhorne).

Is the House of Lords fighting a rear guard action to surrender eventually with honor and dignity? "Since it is plainly unsatisfactory to combine within one legal system two methods of interpretation, one of them will have to give way and my bet is that the European principle and practice will prevail." These words from Lord Justice Scarman, a member of the House of Lords, are today very close of becoming a reality. The wheels of reform have been set in motion in the domain of legislative drafting in answer to evidence "that a drafting style resulting in readier intelligibility is a widespread wish in the United Kingdom itself and elsewhere in the Commonwealth." (Sir William Dale). Should the British Parliament follow the recommendations made by the Renton Report and by Sir William Dale in his study on "Legislative Drafting: A New Approach," there will take place a formal rapprochement between the common law and the civil law systems. This rapprochement will undermine and sap at the roots of the traditional common law style of drafting statutes with the ultimate consequence that the "over-rigid adherence to traditional—some might call them chauvinist-English methods" (Lord Justice Roskill) of interpretation will have to bow to the European Civil Law way.

I believe that, we, here in Louisiana, might read a message in the quiet revolution which is taking place in the English common law and derive from it a legitimate feeling of pride and comfort. This message was actually written two cen-

turies ago by no less than Adam Smith, who stood then in the same position my dear friend Ferd has occupied so many times over the years, the position of concerned adviser and enlightening guide to his students (four of whom are here before you today). Ferd could have signed the following letter that Adam Smith wrote in 1759 in answer to a request for advice submitted by Lord Shelburne as to the proper course of studies his son ought to follow:

"... I would advise him to attend the Lectures of the Professor of Civil Law; for tho the civil law has no authority in the English courts, the study of it is an admirable preparation for the study of ye English law. The civil law is digested into a more regular system than the English law has yet been, and tho the principles of the former are in many respects different from those of the latter, yet there are many principles common to both, and one who has studied the civil law at least knows what a system of law is, what parts it consists of, and how these ought to be arranged. So that when he afterwards comes to study the law of any other country which is not so well digested, he carries at least the idea of a system in his head and knows to what part of it he ought to refer every thing that he reads. . . ."

Trained in the heartland of Common Law, turned a disciple of the Civil Law, transformed into an oracle of comparative law, Ferd is passing on to us a great heritage. The rich and unique legal history of our state will never forgive us if we accept it only under benefit of inventory.