STATUTORY INTERPRETATION IN FRENCH AND ENGLISH LAW

BY RUPERT GRANVILLE GLOVER, M.A.(HONS.) (*Cantuar*), LL.B.(HONS) (*Cantuar*), *Lecturer in Law, University of Canterbury*

There has been renewed interest in continental approaches to statutory interpretation since Lord Denning MR made his now famous remarks in *Buchanan* v *Babco*:

> "They 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 on 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 legislation—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".[1]

However, when the *Buchanan* v *Babco* case reached the House of Lords, there was scepticism about the approach advocated by the Master of the Rolls, Lord Wilberforce commenting drily that "there is no universal wisdom across the Channel upon which our insular minds can draw".[2] The purpose of this article is to look at the nature of French law and approaches to its interpretation in order to see whether or not it has something to teach lawyers working in the common law tradition, and in order to assess the validity of Lord Denning's and Lord Wilberforce's remarks.

The World of Codes

It is a commonplace that French law is based upon a system of codes and statutes and that it has no equivalent of our unenacted common law or equity.[3] The first of these codes, the *Code civil*, was passed into law in 1804 as the fulfilment of a promise dating back some two hundred and fifty years, to unify the law of France.[4] The draftsmen of the *Code civil* were not political theorists. They were lawyers and judges inspired by the notions of natural law that informed their epoque. They considered the Napoleonic codes to be "written reason", capable of universal application and durable in the face of social and economic change. Accordingly they framed their codes with a high degree of abstraction. It is revealing to compare the views of a great Anglo-American jurisprudent with those of

[1] [1977] 1 All ER 518, 522-3.

[2] [1978] AC 141, 154.

[3] This is not true of French administrative law, which is almost entirely judge-made (by the *Conseil d'Etat*), or of Private International Law in France. When the French speak of "droit commun" they mean the unified law of the codes.

[4] Voltaire remarked that, in France, the traveller changed law as often as he changed horses.

one of the leading French exponents of the codes. Roscoe Pound characterised the common lawyer as having

> "a frame of mind which habitually looks at things in the concrete, not in the abstract. . .which prefers to go forward continuously on the basis of experience from this case or that case to the next case, as justice in each case seems to require, instead of seeking to refer everything back to supposed universals. . .".[5]

By contrast, Portalis explained the views of the drafters of the *Code civil* as follows:

> "The office of the law is to fix, by taking a broad view, the general maxims of the law; to establish principles which are rich in their consequences, and not to descend into the detailed questions which can arise from case to case".[6]

As might be expected, then, rules of French law are often framed at a level of abstraction and intellectual conceptualisation which is quite alien to the experience of the common lawyer. One example should suffice. The French law of torts hangs on Article 1382 of the *Code civil*, which reads:

> "Every act whatsoever of man that causes damage to another obliges him by whose fault it happened to repair it".[7]

It is interesting to contrast this generalised statement of French law with the words of Viscount Simonds in a leading Privy Council torts case:[8]

> ". . .it does not seem consonant with current ideas of justice and morality that for an act of negligence, however slight or venial, which results in some trivial foreseeable damage the actor should be liable for all consequences however unforseeable and however grave, so long as they can be said to be direct".

In other words, where such a broad statement as Article 1382 is unacceptable to the English jurist, it is felt to be perfectly adequate by the Frenchman. He is concerned with the *ratio legis* rather than with the precise words used in the code or statute. What matters is the sense and if, in one piece of legislation, a word is used in two different senses, or if two different words are used to express the same idea, that will not be a matter for reproach so long as the meaning is clear. Thus the French have no need for interpretation acts or sections. They are concerned with the rationale of the law, and this extends not only to the legislative policy of the provisions to be interpreted but also to the logical theory upon which these may be presumed to rest.

Legislative History and Statutory Intepretation

The English approach to statutory interpretation holds that the court may only in very restricted circumstances refer to the legislative history of

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[5] Roscoe Pound, *Future of the Common Law* (1937), 18-19.

[6] My translation. Portalis's *Discours préliminaire* is reproduced in Fenet, 1 Recueil complet des travaux préparatoires du Code civil (1836) 463 ff. Present passage at 470.

[7] Translation by André Tunc.

[8] *The Wagon Mound (No. 1)* [1961] AC 388, 422.

an enactment in order to clarify the intentions of the legislature.[9] In France, however, it is quite acceptable for a court of construction to seek guidance from the *travaux préparatoires* to a piece of legislation in order to ascertain the intentions of the legislator, and this not only when the text is obscure or ambiguous, but also when the *ratio legis* is sought in order to see whether the legislation in question may be applied to something not expressly within its contemplation.[10]

The corollary of this is that law does not cease to be law when the immediate purpose for which it was enacted has ceased to exist. Sometimes the French courts are obliged to seek in the old codes solutions to problems which could never have been contemplated by their drafters. For example, Article 1384 of the *Code civil* declares that "a person is responsible. . .for the damage. . .which is caused by the action. . .of things in his care". The article has been variously applied to electricity, motor vehicles and aircraft, none of which existed in 1804. Thus, there will be occasions when recourse to the *travaux préparatoires* will not be useful, and this means that, over a period of time, French legislative history loses its authority and the courts are thrown back on the meaning of the text itself, a situation with which English law is comfortable and which the English courts have dealt with by means of a variety of rules and cannons of construction. It is necessary therefore to examine the means adopted by French Courts for dealing with questions of textual statutory interpretation.

The Exegetical Method of Interpretation

Immediately following the Napoleonic codification it was considered that the sole purpose of statutory interpretation was to discover the true intention of the legislator. Consequently the powers of the courts extended only to scrutinising the texts, aided sometimes by recourse to the *travaux préparatoires*. On the frequent occasions when these latter afforded no guidance, various procedures of reasoning were employed.

One of the principal approaches entails reasoning by analogy.[11] This is used where two similar cases occur, one of which is covered directly by legislation, the other not. The rule governing the first case is applied by analogy to the second. An example is Article 313 of the *Code civil* which allows a husband to disown a child of his wife's which has been concealed from him. This has been extended by analogy to disclaiming responsibility for a pregnancy which his wife has concealed from him.

A fortiori reasoning is familiar to the English lawyer, but reasoning *a contrario* is less so. This occurs when a legal rule is treated as exceptional,

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[9] See, for example: *Beswick* v *Beswick* [1968] AC 58 per Lord Reid at 73-4; *Black-Clawson International Ltd* v *Papierwerke Waldhof-Aschaffenburg AG* [1975] 1 All ER 810 per Lord Reid at 814, Viscount Dilhorne at 822, Lord Wilberforce at 828. Lord Diplock states a clear warning against drawing an analogy with continental *travaux préparatoires* in *Davis v Johnson* [1979] AC 264 at 329.

[10] See H. Capitant. *Les travaux préparatoires et l'interprétation des lois* in *Recueil d'études sur les sources du droit en l'honneur de François Gény* Vol. 2, pp.204ff.

[11] English courts are reluctant to use this approach, but the Scottish quasi-civil law has long been prepared to draw general principles from more restricted statements: see Landis, *Statutes and the Sources of Law* (1965) Harv. Jo. Leg. Vol. 27.

leading to the conclusion that other cases should be treated in an opposite way.[12] A related method is to construe rules giving rise to exceptions in a restrictive manner.

Two other rules used by the English and French Courts alike are *specialia generalibus derogant*, whereby a general rule in one statute will be displaced by a specific rule in another"[13] and what the French call *cessante ratione legis cessat lex*, by which obscure provisions are interpreted in the light of the overall aim of the legislation, a technique which corresponds to our "mischief" rule (the rule in *Heydon's* case), and in New Zealand to section 5(j) of the Acts Interpretation Act 1924.

A related technique is that of extracting a common rule from several enactments to produce consequences which the legislator did not expressly indicate but which flow naturally from them. This is a two-stage process, involving an inductive step to produce a general princple and a deductive step to find other particular cases which obey it.[14]

But like his English counterpart, the French judge finds his powers of interpretation curtailed when the enactment is clear. Even if the result seems inappropriate the law in such cases must be applied and only the legislature can modify it: *ubi lex non distinguit nec nos distinguere debemus.*

The modern French lawyer sees the exegetical techniques of statutory interpretation as rather limiting. This is explained by the fact that, when the codes were first enacted, France had long suffered the inconvenience and insecurity of diversified laws interpreted by powerful tribunals, and it was natural for reforming jurists to desire a unified system which would be subject to as little judicial interference as possible. But by the middle of the nineteenth century, this attitude began to change, along with the social, economic and political conditions of France. It was obvious that new questions could not be resolved in terms of the intentions of the legislator of 1804. In the same way, doubts began to arise about the adequacy of the techniques of statutory interpretation available to the courts. They had frequently been used inconsistently from one court to another. For example, if a woman were to be kidnapped at the same time as she conceived a child, the kidnapper could be declared the father of the child.[15] Some jurists, seeing an analogy with rape, argued that this latter amounted to a temporary kidnapping, so that the law should apply equally to the rapist. Others, however, applied the notion that *inclusio unius est exclusio alterius* so that the law was confined to kidnapping proper. This conflict between analogical and *a contrario* interpretation was widespread, and had the effect of discrediting statutory interpretation by exegesis.

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[12] Cf *inclusio unius est exclusio alterius.*

[13] In English law the maxim is usually expressed "Generalia specialibus non derogant". See, for example, *R* v *Speyer* [1916] LTR 89, 93-4 per Swinfen-Eady LJ; *Miller* v *Minister of Mines* [1961] NZLR 820.

[14] This is paralleled to a certain extent in a new approach by the House of Lords that, where there is an observable trend in a series of statutes, the common law will be decided analogously: see *R* v *Lemon* [1979] 1 All ER898, 927 per Lord Scarman; and *Warnink* v *Townend* [1979] 2 All ER 927, 933 per Lord Diplock.

[15] *Code civil* Article 340 (subsequently modified in 1912).

New Methods of Interpretation

At the end of the nineteenth century the Dean of the Law Faculty at Nancy, François Gény, put forward a new, sociological theory of statutory interpretation.[16] Gény based his approach on what he called "free scientific research". In applying the law the judge must be guided by the contemporary needs and ideas of society, and must act as the legislator himself would act were he faced with the same problem.

Gény's theory was too extreme for some, who saw it as enabling the judge to put himself in the place of the legislator. What has emerged is, in fact, a compromise between Gény's method and the traditional methods of exegesis. The tribunal must always rely first and foremost on the law, but in giving effect to it, must reach solutions which accord with the social climate. This was described by a great French jurist as "beyond the code but by means of the code".[17] It is thus essentially a teleological approach.

The overall result of this is that today's techniques of statutory interpretation are not too far removed from traditional ones. *Travaux préparatoires* are used where they are up to date and appropriate, and the various reasoning techniques outlined above are still regularly used, in particular the extrapolation of general principles from a group of legislative texts. This is not, strictly speaking, exegesis, in that it relates the texts to things of which their authors certainly never thought. The example, given above, of the extended meaning given to Article 1384 of the *Code civil* is in point. Originally responsibility for things in one's care was supposed to be read in combination with Articles 1385 and 1386, which specified the kinds of things to which Article 1384 related. It was not until the end of the nineteenth century that this part of Article 1384 was seen as having an independent rule-making value.

This new approach meant that civil law was free to develop. It was still based on the codes, but was no longer a closed circle. This development was encouraged by the Chief Justice of the Court of Cassation, Ballot-Beaupré, at the centenary of the *Code civil* in 1904, when he announced his adherence to the new doctrine. Judges were now free to adopt an ambulatory approach to statutory interpretation.

It must however be emphasised that the teleological approach in France is still subject to important restraints. The judge must base his decision upon the law, so that his creative powers are always subject to the limitation of his starting point in the legislation. In addition, any interpretation remains subject to the ultimate control of the Court of Cassation, thereby assuring uniformity of decision-making in like cases.

It should also be noted that the possibility of employing the teleological method does not exclude the historical method. Which method will be chosen in any case depends on a variety of factors, but certain trends can be identified: a treaty will always be interpreted historically; the more recent a statute or regulation, the less likely is a teleological interpretation;

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[16] In *Méthodes d'interprétation et Sources de droit* (1899). This work has been extremely influential in French legal circles.

[17] "Au-delà du Code, mais par le Code", Saleilles, in his preface to Gény's work, cited in 16 above.

the lower the court in the hierarchy, the more likely it is to favour historical interpretation, the teleological approach being most frequently used by the Court of Cassation and the *Conseil d'Etat.*

Conclusion

Before attempting to assess the validity of Lord Denning's and Lord Wilberforce's remarks, there is one final point which must be made. The French legal system has nothing like the concern with authority that is one of the principal features of English law. The French lawyer does not seek the *rationes decidendi* of previous judgments, nor does he feel ill at ease if he cannot find dicta to support his arguments. He seeks to draw conclusions from principles, and the only authority upon which he relies, in the final analysis, is the correctness of his reasoning.

Naturally, the pronouncements of judges carry weight, and so do the writings of academic jurists, known in French as *la doctrine.* But the French have no formal system of binding precedent and because it is not the practice of the courts of appeal or the Court of Cassation to cite individual precedents in their judgments[18] a French judge never finds himself in the position of having to follow unwillingly an authority with which he disagrees. As well, the French have nothing corresponding to our common law or equity, so it is proper to speak of the evolution of statute law through the cases in France, at least to the extent indicated above. The teleological approach should not be given undue weight in the overall scheme of things.

This said, then, it is possible to see that there is more than a grain of truth in Lord Denning's statement, at least so far as French law is concerned. But it can also be said that the Master of the Rolls has perhaps not placed his remarks in the more global context of French civil law. The teleological approach is sometimes used, but in a context which differs from that of English law. The major differences lie in the French emphasis on *ratio legis,* as opposed to the English concern wtih authority; in the fact that French statute law, and particularly the codes, is drafted in a far more generalised and abstract manner than its English counterpart; and that, while precedent may be very persuasive to the French jurist, it is not binding in the English sense, and it is complemented by the writings of academic lawyers, so that there is no real sense of *opinio necessitatis* as there is in English law.

Given these differences, it is suggested that, in practice, there is not such a great divergence between English and French statutory interpretation as Lord Denning implies. Because French enactments are freer in form than our detailed English legislation, there exist, as might be expected, flexible methods for interpreting them. But these methods are not without their counterparts in our system. The rule in *Heydon's* case and, in New Zealand, section 5(j) of the Acts Interpretation Act 1924, arguably

[18] Article 5 of the *Code civil* says that "judges are forbidden to pronounce by way of a general and rule-making disposition on the cases submitted to them". And the Court of Cassation will automatically quash the decision of a lower court if the only reason given for it is an earlier judgment, even a judgment of the Court of Cassation itself.

give our courts as much effective freedom of interpretation as French courts have. Interpretation in both systems is always ultimately based on the words of the enactment and, in French law as in English, there are areas where the courts will interpret these words strictly.[19]

It is therefore the present writer's conclusion that Lord Denning was not wholly wrong, and that Lord Wilberforce was not wholly right, in their respective comments in *Buchanan* v *Babco.* Rather, the wisdom on the Continent, or at least in French law, is, in the final analysis, not so very different from our own;[20] and this is a conclusion which should not be surprising considering the historical connexions between England and the Continent and the similar nature of many of the problems which tax the minds of jurists in both systems.

[19] In criminal and taxation law, for example, where interpretation by analogy is not permissible if it widens the liability of the citizen.

[20] See also Zweigert and Puttfarken, 44 Tulane LR 704.