How They Do Things in France

by Francis Bennion

They do things differently in France, but do they do them better? Can they teach us how to do them better? A fascinating booklet produced by the Statute Law Society raises these questions.{Preparation and Accessibility of the Written Law in France The proceedings of the Fontevraud Conference of the Statute Law Society, September 1991 (ed. Sir W. Dale, 1993). Copies (price unspecified) from the Honorary Secretary, Mr Nigel Frudd, Fox & Gibbons, 2 Old Burlington Street, London W1X 2QA.} I shall leave readers to frame their own answers. My aim in this article is merely to sketch the scene, using the material in the booklet. Mostly this is contributed by officials of the Conseil d'Etat.

The constitutional structure

Under the Fifth Republic, Parliament consists of the National Assembly (directly elected by the people) and the Senate (indirectly elected by local councils). Much of its work is done in the full House rather than committees. It holds two sessions, one from October to December and the other from April to July. As M. Dominique le Vert puts it-

> 'The power of Parliament is limited. This is part of the present Constitution in which de Gaulle wanted to check and reverse the Parliamentary tradition in the Third and Fourth Republics, in which Parliament was all-powerful, he considered over-powerful, and, you will remember, we had governments which lasted 3 months, 4 months ... And one of the ways in which the founders of the Fifth Republic thought they could diminish the power of Parliament was to limit the time in which it would be in session.'{P. 31.}

The equivalent of our Cabinet is known as the Council of Ministers. To assist in the preparation of Bills there is the Council of State. Even in England, this is well known as the Conseil d'Etat, so I shall use that title. Then there is the Court of Fracturing. We are familiar with its French name, the Cour de Cassation, so I shall use that too. Finally there is the Constitutional Council, which in certain cases may authorise the government to legislate by decree.

Over nine-tenths of new laws originate with the government. The procedure is laid down by the constitution, supplemented by organic laws and House rules. As with us, most Bills originate in the ministries. They are drafted by civil servants trained for the purpose. When a legislative proposal is approved by ministers it is issued (internally) as a white paper. If the Prime Minister approves it is issued (again internally) as a blue paper, which is sent to the Conseil d'Etat. After processing by that body it becomes a green paper. This goes to the Council of Ministers, and then to Parliament.

As with us, most Bills are introduced in the lower House. One with less political impact, or of a technical nature, may be introduced in the Senate. The Bill gets a (substantial, not formal) first reading in the House into which it is introduced. This involves debate and amendment. Then, as amended, the Bill gets a second reading in the other House. Thereafter it passes between the Houses until there is agreement. If necessary a joint committee of the two Houses is set up. The National Assembly has the last word.

Before a House begins to consider a Bill on the floor it goes before one of the six standing committees. These deal respectively with (1) legal matters, (2) finance and economics, (3) foreign affairs, (4) defence, (5) social and cultural matters and (6) production and exchange. The committee appoints one of its

members as a rapporteur. The rapporteur studies the Bill, with the help of the Clerks of the House, and consults interested persons such as the minister, civil servants and lobbies. Then he or she prepares a report, which may include suggested amendments to the Bill. This is debated in private by the committee. The minister is present, and gives the government view, but does not join in the debate. Finally the rapporteur presents the committee's report to the full House, which debates the Bill with its aid. All through, there are constant behind the scenes discussions, in which the President or his representative may participate. The committee's report forms an important part of the travaux préparatoires, which are published and used to interpret the resulting law.

Apart from laws enacted by parliamentary Bills (lois), there are laws in the form of decrees of the President or Prime Minister (décrets). These correspond to our delegated legislation. The distinction, in the words of M. Bernard Ducamin, is 'between rules which have to be deliberated on and voted by the Parliament, in the name of the citizens who have elected their representatives, and rules which are more relevant to the function of an executive power'.{P. 16.} He goes on-

> 'The idea was, and still is, to avoid a state of affairs in which, in the Assemblée Nationale, long periods of discussion are devoted to the "pensions of the widows of sailors", while at the same time important rules affecting the modernisation of our country are neglected through lack of time.'{Ibid.}

This might not go down well with some of our own politicians, who tend to regard pensions of the widows of sailors as being just as important as great matters of state. One suspects this may apply in France too. M. Dominique le Vert confesses, in words that will find a ready sympathy with our drafters and officials, that despite constitutional theory there is 'a tendency on the part of Parliament to try to write into the Bill all sorts of hypothetical detail'.{P. 31.}

Training of drafters

Drafters are trained on the legislative drafting courses at the Ecole Nationale d'Administration (ENA). These teach concern for simple and precise language. But, as M. Jean Massot explains, technical knowledge is also required.

> 'One must learn how to recognise what are simply explanations or recommendations; to accompany a rule with its sanction; to present an institution and its functions in proper order. There is also the matter of combining one text with another, by means of references, insertions and repeals ... Juridical correctness is one of the first objectives ... the administration. like business and even individuals, are more and more conscious of the necessity, for all activities, of a correct legal framework ... To find one's way accurately in the hierarchy of norms, to associate an administrative authority with a type of decision, to find the legal framework for required action, are the preoccupations where law and government mingle.'{P. 12.}

In other words the French recognise that legislative drafting is a skilled, technical ability that requires expert training. As M. Massot notably says, to prepare a text is not simply to write it. First there must be internal discussions with the department concerned, then inter-ministerial negotiation (sometimes with arbitration being required). The intervention of the Conseil d'Etat is to be expected. Knowledge of the surrounding constitutional and political scene must be acquired. The courses are lengthy and detailed.

Nevertheless, despite all the training drafters undergo, the system leads to defects in the finished product. M. Massot confesses-

> 'The rules issued are of a complexity that is often baffling. The coherence of the whole is often difficult to perceive, while legal consistency is in many cases missing.'{P. 11.}

M. Dominique le Vert adds to this catalogue of deficiencies-

> '... parliamentary proceedings produce defects in the law. It does happen - if merely due to confusion in the debate, it may go too quickly, or the Minister accepts, he is not well advised, it is going too fast, and there is a mistake. It may also be due to lack of professionalism among the ministerial advisers. They are not always very good - all of them. It sometimes happens that an MP is very stubborn, and the Minister, on a minor matter, says it doesn't matter, let him have his way; and then it is in the legislation and the judge may have problems. It is also due to concessions made by a Minister. He has a problem and says, "OK, I accept this clause, but please accept this one too - stop talking about this other amendment - let's forget it - because it is more important to me to have this other thing. It is a technical point." Yes, a technical point, he doesn't care; but afterwards the judges have to deal with the point.'{P. 30.}

This openly recognises what all legislators know: while we have to pretend that the product is perfect, human frailty will always creep in. The system of statutory interpretation must recognise and accommodate that truth.

Conseil d'Etat

The Conseil d'Etat, whose members are all recruited from the ENA, has a function both in relation to lois and décrets. At least 40 per cent of these are considered by the Conseil d'Etat before their adoption. This function, which goes back to a time before the Revolution, requires the Conseil d'Etat to fill in the detail of a Bill or decree and ensure that it complies with constitutional propriety and the intentions of Parliament. For this purpose the Conseil d'Etat is divided into four sections, each of which is autonomous. The procedure is described by M. Bernard Ducamin-

> '... the President [of the relevant section] chooses a "rapporteur" among the members of the Conseil d'Etat belonging to his section. As soon as possible the rapporteur has a meeting with the civil servants concerned in the draft; we call them traditionally "commissaires du gouvernement" since they speak in the Conseil d'Etat in the name of the minister to whose Department they belong. The rapporteur is the key to the system; he personally bears the burden of the proceedings, and studies freely - but in rather a short time - the draft ... after the meeting (sometimes during it) he rewrites, if necessary, the draft according to the principles followed by the Conseil d'Etat.'{Pp. 17-18.}

The redraft is then considered by the Conseil d'Etat, with the help of the rapporteur. Further discussions may take place with the commissaires du gouvernement. The final version is sent back to the department, with explanations of alterations made.
What is the aim of this process? M. Ducamin says: 'We try to have good drafting, which means a draft as short and simple as possible, and in good classical French...'{P. 19.} Precedent is followed, and uniformity and consistency are sought. The concern is to ensure respect for the hierarchy of norms, based on the constitution, constitutional convention, and international obligations. Other considerations are whether the draft is enforceable, and whether it is 'accessible' to those who will have to use it. Boileau's golden rule is borne in mind: ce qui se conçoit bien, s'enonce clairement (what is clear in the mind is clearly expressed). M. Ducamin goes on-

> '... since [written law] has to set forth dispositions having a positive content, subject to interpretation by civil servants, judges, lawyers and laymen, it cannot be of very easy reading. But it has to be read by any suitably educated person able to read good classical French; not the French spoken on TV or in the streets, which is rough and ready and rapidly changes, but the French, based on permanent rules, which is accepted by "les bons usages" ... Conciseness is probably one of our more permanent trends: everything which is not necessary in a text is dangerous ... Precision comes just after, because we fight continuously against ambiguity ... we never try to imagine all the questions which can conceivably be raised under the new text, and we never attempt to give an answer to all possible issues ... when there is a danger of being too long ... we

> say: "Il faut laisser place au travail des juges", i.e. "Let the courts do their job".{Pp. 21-22. Emphasis added.}

I have italicised the reference to laymen because I am not sure M. Ducamin seriously means to include them. On 'accessibility' he later says-

> 'By the way, accessible to whom? A perfectly written Bill, with a serious attempt at clarity and simplicity, is a piece in an existing puzzle; it never can be isolated from the context which, very often, is given not only by other texts but also by the interpretation given by the courts and non-written principles which dominate the problem.'{P. 22.}

In other words, the lay person cannot truly be numbered among the legislative audience because special skills, knowledge and experience are required for full comprehension of any legislative text.

The Cour de Cassation

The Cour de Cassation (literally, Court of Fracturing) gets its name from the Latin verb cassare, to break or smash. This is because its prime function is to review the decisions of lower courts on points of law and quash or 'fracture' them if they are found to be erroneous. The parallel with our order of certiorari is obvious. M. Jean Yves McKee, assistant to the Chief Justice (Premier Président) of the court, says-

> 'The members of the first Constitutional Assembly who created the Cour de Cassation in 1790 pinned their faith to what they called a new "religion of the state", based on written law. They believed that Parliamentary statutes, especially when codified, were intended to become the sole source of law of the country, eliminating all case law rules or local traditional practices or established customs. The statutory expression of the general interests of the nation as laid down by the Parliamentary Assembly was the supreme tenet of the new social order. In their eyes, and quite logically, the new judiciary was to be, I quote, "a voice stating the words of the law": once a fact was established, and the corresponding statute found, the ruling was to follow automatically [that is without 'interpretation'].'{P. 37. Emphasis added. For the pejorative meaning of 'interpretation' in other countries, including our own see Bennion, Statutory Interpretation (2nd edn, 1992) p. 95. In their penal code of 1794 the Prussians followed the French and forbade 'interpretation'.}

This arose from the circumstance that before the Revolution the regional courts (parlements) had been a byword for obstructiveness. They were seeking to resist the exercise of the royal prerogative, but the Revolutionaries feared the same methods would be brought to bear on their reforms. As M. McKee puts it: 'A very harsh implementation of Montesquieu's theories on the separation between the judicial, the legislative and the executive powers brought in a long-lasting subjection of the judiciary, narrowly confined to the application of statutory rules'.{P. 37.} The rules in question were largely formulated as codes.

Soon the Cour de Cassation acquired for itself broader functions. Through explaining the reasons for its decisions, it began to expound the sense of the codes and statutes and the way they should be applied. 'The dumb servant of statutes was rapidly switched into a sort of a skilful master giving tuition to courts as to the way of reading the law.'{M. McKee at p. 38.} The court evolved its own rules to give sense to obscure provisions, blend and give coherence to the law makers' varied regulations and fill in gaps. At the same time politicians' fears of a 'gouvernement de juges' gradually subsided. Nowadays the Cour de Cassation, with the other courts, is in what M. McKee calls 'the front line of social and economic shifts'. They are best able to feel 'the discrepancies and inefficiencies of statutes and of delegated law'.

Now, by a decree issued in 1967, the Cour de Cassation has the recognised duty of issuing an annual report setting out its views on the shortcomings of the laws, as perceived through the cases it decides, and stating the improvements it sees as necessary. These reports now run to around 500 pages. Since 1967 the court has put forward around 150 proposals, of which about 100 have led to legislative alterations. A law of

1991 has empowered lower courts to ask the court to give its opinion (avis) on the meaning of a statutory provision.

Codification

> 'If my knowledge is good, you have no Code in the United Kingdom, while in France we have had Codes for two centuries now, and we try to improve our codes and to possess more Codes.'

Thus M. Bernard Stirn.{P. 32.} His knowledge is good.

M. Stirn gives three reasons for the continental love of codes. They give more coherent presentation of the law on a subject. They give easier access to the law. They give greater stability to the laws.

In France there are now about 50 Codes. They are produced by a Codification Commission, which includes members of Parliament. It was set up in 1989, replacing one established just after World War II. It has executive functions and autonomy.{In this it is unlike our corresponding Law Commission, which is also charged by statute with the function of codification but in nearly 40 years has failed to enact a single code.} To show its importance, it is presided over by the Prime Minister (M. Stirn tells us that he 'doesn't come to every meeting'). It has three main functions: (1) to decide in what respects existing codes have to be amended and set the agenda by fixing programmes of work; (2) to lay down the rules for drawing up the Codes;{This is a function that has been neglected by our own Law Commission, as I have frequently pointed out: see, e.g., Bennion, 'The Law Commission's Criminal Law Bill: No Way to Draft a Code' [1994] 15 Stat. LR 108 at p. 109.} (3) to co-ordinate the work of preparation of a Code.

A salutary rule of the French is that no changes may be made in the law during codification. Another salutary rule is that a Code must embody all relevant laws and decrees, thus being comprehensive. Sometimes it will also include important decisions of ministers or administrative authorities. It does not incorporate decisions of the courts. It has also been found impossible to embody EC law in the Codes. Instead, a Code now has an EC part annexed to it. This merely sets out the relevant texts, making no attempt to absorb them.

Codification may be by decree. This saves parliamentary time, but can present a problem as M. Phillippe Martin explains.

> 'If the codification by decree is not totally faithful to the original Act of Parliament, a judge ruling in a case might declare that the codification by decree is invalid and go back to the original Act of Parliament as the true law of the land. So there is a kind of uncertainty about some Codes when contained in decrees, especially the Tax Code, which has been codified only by decree.{P. 35.}

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