Statute law: judges as legislators

The UK is beginning to use an expansive method of interpretation, both for European legislation and for domestic statutes. Francis Bennion describes how Lord Denning championed this approach 20 years ago.

Introductory

I first crossed swords with Lord Denning nearly half a century ago. It was in the same year as I entered the Parliamentary Counsel Office in Whitehall, where most Government legislation is drafted. In an article in the *Modern Law Review* I attacked Denning's attempt to abolish the need for consideration in contract judicially rather than leaving it to be dealt with by legislation if Parliament thought fit ('Want of Consideration', 1953 *M.L.R.* 441).

I might have saved myself the trouble. Even then, Denning was far ahead of his time. On this as on many other matters, his time came round in the end as the profession caught up with him. He spotted the trends before anyone else did. Favouring certainty in law, I remain sceptical about those trends. That is beside the present point.

There have been many voices over the years attacking Denning's view that judges should correct what they see as defects in statute law without waiting for Parliament to do it by amending legislation. Half a century ago Denning said of an ill drawn Act that the judiciary should 'fill up the gaps and make sense of the enactment'. On appeal Viscount Simonds riposted, in words that became famous, that this 'appears to me to be a naked usurpation of the legislative function under a thin disguise of interpretation' (*Magor and St Mellons R.D.C. v. Newport Corpn.* [1952] AC 189 at 190). But over the past thirty years or so, whether one likes it or not, Denning's view of the creative function of the judiciary in relation to statutes has grown in influence.

It was once thought that a court called upon to construe an Act passed to give effect to a treaty ought not to refer to the wording of the treaty; indeed the House of Lords so ruled. Denning thought the better rule in this area, as in others, was that the court should arrive at an *informed* interpretation. In one case, ignoring the House of Lords ruling, he said that an Act passed to give effect to an international convention should be construed in conformity with the convention, and that he had confirmed that this was being done by looking at the convention in question. He sagely added: 'I think we are entitled to look at it, because it is an instrument which is binding in international law; and we ought to interpret our statutes so as to be in conformity with international law' (*Salomon v. Customs and Excise Comrs.* [1967] 2 QB 116 at 141). Few nowadays would disagree with that sentiment, yet its effect is that judges may strain the literal meaning of an enactment to make it conform to a treaty.

This is just one example of the use of legislative history in statutory interpretation, with which, under the Denning influence, the courts have lately become much more free. No legal limitation was ever placed on the court's liberty to read in private any materials it thought fit, whether for the purposes of a particular case before it or in order to acquire information about current affairs generally. Long before *Pepper v. Hart* Lord Hailsham L.C. said in Parliament: 'I always look at *Hansard*, I always look at the Blue Books, I always look at everything I can in order to see what is meant . . . The idea that [the Law Lords] do not read these things is

quite rubbish' (1981 H.L. Deb. (5th series) col. 1346). From the bench Lord Denning assented: 'Having sat there for five years, I would only say: "I entirely agree and have nothing to add"' (*Hadmor Productions Ltd. v. Hamilton* [1983] 1 AC 191 at 201).

Back in 1971 Denning had referred in court to Hansard in order, as he put it, to ascertain the mischief which the Betting, Gaming and Lotteries Act 1963 was intended to remedy. However he cited a speech by the Minister which went beyond the mischief and explained the intended remedy. In 1976 Denning looked at Hansard to find out why cinematograph film exhibitions were excluded by the proviso to s. 1(3)(b) from the application of the Obscene Publications Act 1959. He said: 'I propose to look at Hansard to find out. I know we are not supposed to do this'. He went on to cite passages from Ministers' speeches in the Lords and Commons which explained the reason for the exclusion. Boldly he found this reason 'no longer valid today' (*R. v. Greater London Council, ex parte Blackburn* [1976] 1 W.L.R. 550 at 556).

In 1979 Denning, after saying that 'the recent pronouncement by the House of Lords in *Davis v. Johnson* . . . [says] we ought to regard Hansard as a closed book to which we judges must not refer at all', proceeded to get round the prohibition by citing extracts from Hansard given in a textbook (*R. v. Local Comr. for Administration for the North and East Area of England, ex parte Bradford Metropolitan City Council* [1979] Q.B. 287 at 311-312).

In a 1982 case Denning got round the Hansard prohibition by citing an affidavit sworn by a government official which stated that Ministers had given certain assurances during the passage of the relevant Bill through Parliament (*R. v Secretary of State for the Environment, ex parte Norwich City Council* [1982] Q.B. 808 at 824). In the following year he reverted to direct reference to a Hansard report of a speech by Lord Wedderburn made in proceedings on the bill for the Employment Act 1980 (*Hadmor Productions Ltd. v. Hamilton* [1983] 1 A.C. 191 at 204). On appeal to the House of Lords his action was strongly criticised by Lord Diplock (*Hadmor Productions Ltd. v. Hamilton* [1983] 1 A.C. 191 at 232-233).

An Australian commentator on *Hadmor* remarked of Lord Denning: 'Such an eccentric view of the doctrine of precedent is, of course, completely unacceptable (especially to the House of Lords) and the practical effect in England of his determined push for change has been to see the door locked, barred and bolted in his face, and guarded by such weight of judicial authority as only Parliament would be able to overcome' (Donald Gifford, *Statutory Interpretation* (1990) p. 134). How mistaken this was! Under the Denning influence the House of Lords shortly afterwards reversed the exclusionary rule in the famous case of *Pepper (Inspector of Taxes) v. Hart* [1993] A.C. 593. Out of seven Law Lords in a specially-constituted court, only the Lord Chancellor, Lord Mackay of Clashfern, dissented.

Lord Denning had an early and profound influence on the way our courts construe European Community legislation. He had already played a considerable part in advancing what is now considered the primary interpretative technique both in Europe and at home, purposive construction.

The version of purposive construction applied by British courts does not require or permit a wholesale jettisoning of the grammatical meaning. Since the purpose is mainly to be gathered from the language used, it must by definition broadly conform to that language: an animal cannot be different from its skin. By contrast, the continental version of purposive construction enables the legislative animal to be skinned alive. It was thus described by Lord Denning, in words wherein we can detect that familiar Hampshire burr-

> "[European judges] 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 . . . 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 it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means 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."(*James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1977] 2 WLR 107 at 112.)

Lord Denning's reference to the continental way of following the spirit rather than the letter contrasts with T S Eliot's sardonic version of the English lawyer's motto: 'The spirit killeth, the letter giveth life.'(cited by Lord Hailsham LC in *The British Legal System Today* (1983 Hamlyn Lectures) p. 49). Lord Denning tried hard to persuade the House of Lords to adopt this Continental form of loose and expansive purposive construction, but failed. So far British lawyers have to reckon with it only where Community law is engrafted on our own, but there are signs that the dichotomy is weakening. On this, as on so many aspects of statute law, Lord Denning may in the end have his way.

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