Judge Made Law

General Theory of Judge Made Law

The rulings of the French Cour de Cassation are well known for their conciseness. Often justified by the annulment function, this drafting could be less relevant where the law-making power of the judge is concerned. Because this power rests on the task of uniform interpretation of the Cour de Cassation, this yardstick here envisions the drafting of the ruling. Interpreting the general rule in order to adapt it to the case is unavoidable and the law-making power of the judge widely rests on it. The exercise of this power ought to appear in the ruling through the demarcation of the need to interpret due to the circumstances of the case and of the interpretation method used to answer it. In addition, in order to reach uniformity, the ruling must favour a cautious support to the chosen interpretation. The play of this *de facto* authority implies that the meaning and full range of the legal proposition are entirely understood. The knowledge of various elements usually lacking in the rulings (precedents, dissenting opinions, authorities, social and economic data) might shed light on this meaning and range and one may ask, for each of these elements, if it is more convenient to include them in the text of the order, to reveal them in their context, or to keep them to the secrecy of the deliberation. These various propositions vary according to the ruling: the canons of drafting can never be identical for doctrine bearing rulings and other rulings, for interpretations intended to apply the rule to the case and for interpretations intended to control the compliance of one rule to another.

In France, the modulation in time of the effects of overruling in case law generates bitter arguments on the ground of principle. One must be pragmatic: legal insecurity is a necessary evil of which one must try to restrain the harmful effects. For this purpose, our law offers legal techniques well adapted (appearance, period of limitation, equity).

Time nurtures the judge-made law, when it is not time that create case law. Past, present and future, instruments of the implementation of the rule of law, may paradoxically be timeless, the passing of time, disorders, commitments and its disavowal, allowing the law to build itself, to rebuild itself, are forgotten.

Judge-Made Law and the Various Branches of Law

Law of succession in a privileged viewpoint on the part played by case law in making law and maybe also on a fundamental evolution in the understanding the French Cour de cassation has of its function. In law of succession, judges have very early played a forefront creation role, but, generally speaking, scrupulously respecting their constitutional subordination to law. Therefore, the court work on this subject has become a model of the classical type. However, recent decisions, with significant implications, reveal in this respect a drastic change in attitude that could be explained by a deliberate attempt of judicial emancipation.

restrained by the administration, which uses the technique of legislative validations to thwart the decisions it dislikes. The tax office restrains the judge with its own rules, derived from the administrative doctrine by which it tells its agents to follow, or not, case law.

Judge-Made Law and the World

The author notes that the European Court of Human Rights has established itself into a true European constitutional court but risks being overwhelmed by disputes, despite its use of pilot cases. He also deplores its extensive use of Article 6 as well as its laxism where change in attitudes are concerned, in particular in a recent case that seems to make the consent of the victim an exemption cause for the sadistic treatments she suffered.

Seldom studied, the cases before the Court of Justice of the European Communities concerning private law are however worth considering. Boasting their own characteristics coming in part from the teleological interpretation method adopted but also from the dialog established with the national judicial judge, this consistent case-law, showing a definite activism, will probably play a decisive part in renewing the substance of the private law of the member States as well as the order of its sources. One can already witness several signs. This study intends to outline them on current issues

Private international case law went through two successive periods. In a first stage starting at the beginning of the 19th century till the middle of the 20th, it really has a creative function: it invents special rules to resolve conflicts of law and courts and above all the general solving methods. In the second stage starting in the middle of the 20th century, it mainly adapts rules it did not create. However in this function, case law is not deprived of all creativity.

This article argues that the theory of the judge as a law-making authority, formerly a product of the American school of legal realism, today no longer exists, as a matter of fact, in the case-law of the Supreme Court of the United States, and that, therefore, this theory now has become a myth.

The law-making power of international case law, traditionally limited by the low number of cases and curbed by the sovereignty of States, has however imposed itself as a way to fill in the silence of custom and treaties on several legal points. For a decade, it is facing a totally new situation, characterised by an explosion in international litigations involving States, in particular the role of the WTO, international criminal courts and the commonplace use of the arbitration of the ICSID International Centre for Settlement of Investment Disputes. To what extent do the recent transformations of the functioning of the scattered and heterogeneous international courts contribute to the law-making power of case law?

MICHEL VILLEY

Permanent feature of M. Villey's thought: the alternation between an anti-idolatrous deconstruction and an iconic reconstruction. A theory of the idol and its subordination to the icon is to be built. In the *Carnets*, the system of categories works as a configuration of united icons. We fix some features of the concept of icon, its relation to the idol, the solidarity between icons. The icon is subject to salutary *worship*. The icon is the only valuable thing, what serves as a *benchmark* to think the idol. Fundamental reference and positive counterpart, antidote for a forgery, but also for a travesty, a decoy, an imbalance, a confusion or a mockery. We insist upon three linked icons: research, dialog, considering the thing itself, which all three facilitate advances in the thinking of law. One then goes from *the icon to the idol* by passing through the "knowledge of faith", which is activated by love, the icon of icons.

With its intempestive appearance, Michel Villey's thought is today very precious to warn against a conception of family law that would consist merely in shaping the law of individuals. Thanks to it, one can better understand how this conception, branded by legal subjectivism, takes root in a philosophy that, heiress to nominalism, denies any ontological dimension to communities such as the family, as well as to family relationships in their specificity (fatherhood, filiation, brotherhood, difference between genders) and claims, from the only principles of equality and freedom to think the relation on the basis of a mere contract. Family is no more a natural community of interest; organised hierarchically and harmoniously; it is the place to express and demanding every-one's rights and therefore the place of their quasi-necessary antagonism. About family we consider three aspects of contemporary law: the judicialisation of family life; the rise in individualism inside the family and the predominant role of will in the framing of intra-family relations; the confusion between these orders that are law and right. Finally, the author questions the limits of Michel Villey's thought concerning the future of the family: maybe the right connection between law, civil law and moral should, in particular, be more precisely

defined. In addition, beyond the naturalistic conception of Michel Villey, should not family be viewed as food for thought, especially as institution of the republic?

The sometimes passionate criticism that Michel Villey directs at "Moderns" is multifaceted and without compromise. The trial he puts to their rationalist obsession for anti-nature and lack of realism reaches at its climax in a fierce anti-criticism which makes Kant an "impossibility".
But rather than recommending a "return to Ancients", Michel Villey let understand the potential of an unnamed post-critical intuition. His themes, barely thematised, constitute the informal prelude to the philosophical mutation our world is calling for. In this intuition rich of the fundamental metaphysical care for realism echoes the ardent appeal of the spiritual energy which illuminates an outlook full of hope.

First this paper considers how Michel Villey conceived his philosophical positioning which could lead him, according to eras and opponents, to take varying stands, without for all that straying from the general principles of his doctrine of legal line of argument as a way to determine what is just. On this basis, the author recreates the attitude Michel Villey may have had on the contemporary development of human rights, and Dworkin thought, on economic law and Coase's or Posner's analysis, and finally on the internationalisation of law and the cosmopolitism of a U. Beck. The author concludes that Michel Villey's thought might help us to assess these evolutions while retaining a critical stand back towards them.

STUDY

These are the two forms of the Incomprehensible: basically, the concern is not traditional dualism, judgement of facts and judgement of values, or to be and have to be. In fact, there is another dualism which has traversed philosophical thinking since ancient times: the history of human understanding is an enigmatic history based on a scientific understanding and knowledge, which has permitted our knowledge of a great number of things even if the essentials are missing; it is the history of mysterious understanding carried by the metaphysical which gives meaning without demonstration. The complexity flows from the eternal question; faced with the mystery of the Incomprehensible, can one be content to say that it is absurd without any other explanation?