

Judge Made Law

Jean Foyer, *Opening Statement* 3

Guy Canivet, *Judicial Activism and Interpretative Caution* 7

In its ambiguity as a source of law, the concept of case law is precisely intended to reduce the tension that exists, in any system of law, between the function of law making and that of judging. Various and debatable ad infinitum, the arguments of interpretative prudence opposed to judicial activism do not make it possible to put definitively an end to the debate on the capacity of the judge to create law. The judge's powers in this regard vary through the ages, according to the subject matters, the time the statutes were passed, the roles of the Court, the techniques of interpretation, the circumstances and the legal systems. The work of the judge is very inspired by realism. Far from being opposed in a sterile and dogmatic conflict, the legislator and the judge have actually a complementary role in the permanence and the continuity of law that naturally – and democratically – leaves the last word to the former.

General Theory of Judge Made Law

Pierre Avril, *Is the Institutional Case law of the French Conseil Constitutionnel Making Law?* 33

Examining the institutional case law of the French Conseil constitutionnel reveals that some council decisions do not limit themselves to implementing the rules set by the Constitution with a view to its actual application, but that they sometimes challenge these rules, either explicitly by imposing additional requirements, or implicitly through the consequences stemming from them. Exceptional, these court orders are in fact true redraftings, but their range has been limited.

Bertrand Mathieu, *When Determining the General Interest, Which Part belongs to the Judge and which to the Lawmaker?* 41

Whereas the democratic principle entrusts the determination of the general interest to the Parliament, as representative of the People, this function is nowadays widely held, not to say usurped, by judges. If the control of constitutionality plays but a limited part in this situation, the development of the conventionality control, in particular in the system of the European Convention on Human Rights, plays an essential part here. A good illustration can be found, for example, in the mechanism of legislative validations and the controls carried out in this frame. This phenomenon expresses a significant evolution in the respective social functions of the judge and the lawmaker.

Pascale Deumier, *Law Creation and Drafting of Opinions by the French Cour de Cassation* 49

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.

Xavier Lagarde, *Some Short Reflections on Overrulings for the Future* 77

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).

Catherine Puigelier, *Time and Judge-Made Law* 89

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

Claude Brenner, *About the Creative Role of Case Law in Inheritance Law* 149

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.

- Bernard Teyssié, *Case Law and Labour Law* 163
 Law has a wealth of words it refrains to define. It leaves it to the judge to clarify the meaning of the formulated rule. This is granting him a rather wide power, likely to become a tool for making blossom or confining the device submitted to his assessment. But he may also happen to draft a new norm beyond the words of the law, or even against the words of the law he does not hesitate to neutralise or tilt... forgetting, in passing, that law making does not come within his empire.
- Jeanne Tillhet-Pretnar, *Case Law and Social Security Law* 179
 Social security law, drawn up originally to benefit only the wage earners, has quickly grown to cover the whole of the population. But the work of the legislator and of case law did not restrain itself to the widening of the social security cover of persons. Actually, presumptions and interpretation lead to the quasi-total generalisation of the social protection.
- Christophe Willmann, *A Judicial Contribution to the Debate on Memory* 189
 The so-called Memory laws, declarative and symbolic, have a republican and pedagogic aim: remind contemporaries the horrors committed yesterday (slavery, genocide, deportation, forced work) to make sure they do not happen again. For a decade, the legislator paid attention to this duty of memory, usually answering it effectively, but sometimes also with clumsiness. The judge has also been called upon in the memory angle, mostly in criminal matters (Bousquet, Barbie, Touvier, Papon cases...). Other realms have been spotted (World War II, colonization), using other legal techniques (administrative law, social law...) which synthesis suggests a "memorial justice", at the crossroad of private, public or even constitutional law.
- Sophie Schiller, *The Growing Role of Case Law in Business Law* 213
 In business law, judges exercise in a significant way their three missions: to clarify and complete the law, to eliminate contradictions and to adapt the law to the facts. Faced with technical and specialized business law, case law has the advantage of being able to adapt solutions to the specificities of each situation and to be created by judges often chosen for their technical skills. Case law is also adapted to these subjects that are constantly evolving by small successive steps. Besides the characteristics of these subjects, the success of case law in business law is also explained by the refusal of the written rules. This refusal is the consequence of two movements which dominate the evolution of business law today: contractualisation and Europeanization.
- Christophe de la Martinière, *The Creative Power of the Tax Judge* 229
 Today, the dispute between autonomy and realism of tax law seems to be over: if the tax judge exerts a great creating power it is only to compensate for the shortcomings of the law. The role of the government Commissioners is an illustration of the position held by case law, despite the lack of "great cases". The judge thus alleviates the law when it is too harsh on the taxpayer, as with the presumptions exempting the administration from establishing a breach of law. The wide range of his creativity appears in the fiscal management of companies, through the notions of unfair management and abuse of process. But this creative power is

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

Prosper Weil, *Introduction* 237

Jean Foyer, *The Case Law of the European Court for Human Rights* 239

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 deplors 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.

Cyril Nourissat, *The Case Law of the Court of Justice of the European Communities. A Civil Look On Current Issues* 245

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

Jacques Foyer, *Private International Case Law Between Creation and Adaptation of the Legal Rule* 261

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.

Élisabeth Zoller, *The United States Supreme Court Between Making and Unmaking Law* 277

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.

Geneviève Bastid Burdeau, *Testing the International Law-Making Power of International Courts Against Their Dispersion* 289

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?

François Terré, *A Judge-Made Law? No thank you!* 305

MICHEL VILLEY

Francis Jacques, *Michel Villey and Icons* 315

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.

Paul Moreau, *Thinking Family Law with Michel Villey* 331

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?

Simone Goyard-Fabre, *Critical... Did you say "Critical"? Anti-criticism and Post-critical Intuition*343

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.

René Sève, *Michel Villey and Contemporary Developments in Law*..... 357

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 cosmopolitanism 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

Wagdi Sabète, *About the Complexity of Determining Founding Values of Law to the Difficulty of Factual Judgement*371

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?

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