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THE FORMATION OF LAW: THE INTERRELATION OF DECISION AND STATUTE

CHARLES S. DESMOND*

INTRODUCTION

A GOOD many lawyers (not including this writer) believe that legislation usually changes the law for the worse. There is a respectable historical background for this vague feeling of American lawyers and judges that courts, not legislatures, should make the law. Most lawyers have been trained in the idea that the decisions of the appellate courts are the essence of the law in this country. This idea, in turn, is based on the fact that in the first half-century or more of our national existence the courts carried most of the task of formulating the law. The judges were technicians and specialists, better trained for their jobs than the new citizen legislators. The legislators were busy setting up a viable government. So the judges took the opportunity to build up by adaptation and invention a body of common law, partly new, partly old, partly modified. The major activity of the legislatures in this field came later, and it consisted mostly of the development of new fields of law, leaving largely untouched the prior work of the courts in the ancient areas. Still later there arrived on the scene the omnipresent administrative bodies. Today, it would seem, the amount of direct judicial law-making by decision is quantitatively small, in relation to our size and population. The five principal appellate courts of New York (the Court of Appeals and the four appellate divisions) decide together only about three thousand cases a year. Most of those are handed down without formal or lengthy opinions and so produce no definite statements of generally applicable law. Many are fact determinations. Many more deal with procedural matters, or with highly specialized, unique situations. The residuum of important common-law pronouncements or broadly applicable statutory analyses is small indeed. New York courts, unlike, for instance, the Supreme Court of Canada, are not empowered to give advisory opinions. So the courts, unlike the legislatures, must sit back and wait for business in the form of litigated cases. And, in conformity with strong tradition, the courts are seemingly slow to change long standing rules, particularly when property rights are at stake.¹ So the court-made changes in the law are relatively few and gradual.²

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1. See *Crowley v. Lewis*, 239 N.Y. 264, 146 N.E. 374 (1925); Cardozo, *A Ministry of Justice*, 35 Harv. L. Rev. 113, 114-15 (1921).

2. For an extreme example of reluctance, see *People v. Morton*, 308 N.Y. 96, 98, 123 N.E.2d 790, 791 (1954).

JUDICIAL LEGISLATION

With the increasing frequency of the exercise of legislative power, the courts have "made" less law on their own initiative. Instead, they have been busy construing, applying and interpreting statutes. In such a situation, it is inevitable that the charge of "judicial legislation" is levelled at the courts.

At rare times the accusation is proper. At other times the charge is an exercise of a losing lawyer's ancient privilege of "cussing out" the court.

A judge may fairly be accused of "judicially legislating" when he reads into a statute something that is not expressly or impliedly present, or when he deletes something that is. In so doing, the judge usurps legislative power, for the power directly to enact laws, that is, to declare prospectively what the law is hereafter to be, is a legislative function. The judge's power, on the other hand, is to adjudicate the rights of citizens in adversary proceedings, and, in so doing, to construe and apply the law.³ Putting it another way, the primary job of a court is to dispose of particular, actual disputes by applying the law to the immediate facts.

Thus, it would appear that true "judicial legislation" means one of two things: either a distortion by the courts of legislative language ("literary free wheeling," says Justice Frankfurter)⁴ or, arrogation by the courts of the exclusive power of the legislature to act in certain areas of law-making. The second version of the indictment is, significantly, expressed most often in intramural contests within the courts themselves,⁵ but the charge in such context is not really one of usurpation or encroachment on the legislative domain. Rather, it is merely a statement by dissenters that a certain subject matter should be left to legislative treatment.

In any other sense, it is almost meaningless to accuse judges of misfeasance when they tinker with the common law to bring it up to date. Since the common law is wholly "unwritten," non-legislative and non-codified, and since its great merit is its adaptability and elasticity, it would forfeit its prime argument for existence and continuation if the courts refused to review and revise it, when necessary. *Stare decisis* "embodies an important social policy" but it is "not a mechanical formula."⁶ When and if the courts are too hesitant about making the necessary changes, the legislature can and does step in.⁷ Judge Lehman dealt adequately with this idea in the *Sears, Roebuck* case:⁸

3. See *Dash v. Van Kleek*, 7 Johns. R. 477, 492 (N.Y. 1811).

4. *Shapiro v. United States*, 335 U.S. 1, 43 (1948).

5. See *Funk v. United States*, 290 U.S. 371 (1933); *Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691 (1951).

6. *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

7. See *Mertz v. Mertz*, 271 N.Y. 466, 3 N.E.2d 597 (1936), which spurred the amendment in 1937 of the N.Y. Dom. Rel. Law § 57.

8. *Sears, Roebuck & Co. v. 9 Avenue—31 Street Corp.*, 274 N.Y. 388, 9 N.E.2d 20 (1937).

"True, inconsistent decisions rendered in disregard of the principle of stare decisis tend to make the law uncertain and unstable. A final appellate court may hesitate to disregard a precedent. It is free to do so when convinced that its earlier determination is unsound. Though, in such case, we speak of overruling a previous decision, that is a figure of speech which is not entirely accurate. We cannot destroy or diminish the legal effect of the earlier decision. It remains as between the parties a conclusive determination of the questions both of law and fact there litigated. We can refuse to follow it as a precedent when in litigation between other parties similar questions of law are presented. Thus a decision of this court overruling a previous decision is not, at least in theory, a retrospective change of the law; it is merely a reformulation of the general rules of law which we deem applicable in a particular situation."⁹

Simplifying our proposition even more, we may say that the legislature makes the law and the courts apply it. The policy of the state, "the public will," is expressed in statutes, and it is the duty of the court to apply those statutes, case by case, as they arise. In theory, the judge need only examine a statute, ascertain the legislature's intent and purpose as expressed in the statute's language, and then apply it to the facts disclosed in the pending lawsuit. However, all of the foregoing truisms conceded, our progress in the analysis of this problem is not advanced, for it is one thing to mouth a rule of law and another to have it survive in application.

THE INTERPLAY OF DECISION AND STATUTE

Professor Brogan, in his brilliant and entertaining *Politics in America*,¹⁰ says that "the judicial organization of the United States is the institution which a stranger has the greatest difficulty in understanding."¹¹ Primarily, Professor Brogan's difficulty is with the unique power of American courts to strike down legislation as unconstitutional. But, beyond that, even as perceptive a student of our governmental institutions as he found it hard to discern the lines between executive, legislative and judicial power. In the power of the courts over legislation DeTocqueville discovered "immense political influence."¹² But actually, as we shall show, the legislative and judicial powers rarely come into violent collision. At least in New York State, their mutual relations are distinguished by forbearance and accommodation. As far as I can recall, charges of usurpation are unknown in this state, and such encroachment as does occur is unintentional. The New York legislature and the New York courts are, busily and concurrently, "making law" and frequently overruling each other in the process. But, for all the seeming lack of

9. Id. at 400-01, 9 N.E.2d at 26.

10. Brogan, *Politics in America* (1954).

11. Id. at 388.

12. 1 DeTocqueville, *Democracy in America* 98, 100 (rev. ed. 1900).

symmetry, efficiency, or logic, for all the waste and repetitive motion, the dual system of law-making actually works.

This complexity is an inevitable consequence of the American and British bifurcation of law, statutory and common. Statutes are the solemn (if not always definite) written declarations of the public will, formally adopted by legislatures. The common, or "unwritten" law is, on the other hand, traditional, rather than the product of precise enactment. It is a system (rather than a code) of more or less flexible and adaptable rules derived from natural law and the innate sense of public justice, exhibiting the traditional sense of the community as to the appropriate rules of conduct for an organized society. Vague and formless though it seems, the common law is, nevertheless, as much a part of the local body of law as is any statute. The legislature can, in most instances, modify and revise it,¹³ and so can the courts.¹⁴ Moreover, the courts may act when the legislature has failed or refused to do so.¹⁵ Into some of the largest and most controversial fields of law, such as torts, the legislature has hardly moved at all. In other equally basic departments, such as the law of real property and of crimes, the common or court-made law peacefully co-exists with numerous statutes and with them effects a beneficial union. As to legislatively invented remedies, such as workmen's compensation, the statutes are comprehensive, detailed codes, but even in these areas the innumerable separate fact situations call frequently for court interposition by way of construction and application of minutely detailed statutes to fragmented or borderline combinations of facts. After thousands of years, the Ten Commandments—simple, terse mandates that they are—still keep theologians and moralists busy construing and applying.

Very few statutes intended for wide use and control can specify each fact or group of facts on which they may impinge. For example, when the New York legislature expressed its will that every "factory" should be subject to inspection and to safety rules,¹⁶ it had to choose whether to name every sort of establishment or operation it wanted to include in "factory" or to use the common, generic term with a minimum of definition, and let the administrators, subject to court review, deal with the single instances. If the legislature had taken the alternative course of classifying as "factory" or "not factory" every kind of establishment it

13. *Markey v. County of Queens*, 154 N.Y. 675, 682, 49 N.E. 71, 73 (1898); *Bertles v. Nunan*, 92 N.Y. 152 (1883).

14. *Funk v. United States*, 290 U.S. 371, 379 (1933); *Woods v. Lancet*, 303 N.Y. 349, 354, 102 N.E.2d 691, 694 (1951); *Rumsey v. New York & N.E.R.R.*, 133 N.Y. 79, 85, 30 N.E. 654, 655 (1892).

15. *Funk v. United States*, 290 U.S. 371, 381-82 (1933).

16. N.Y. Labor Law § 2(9).

could think of, some of them would inevitably have been omitted from either category. The administrators thought that an apple-sorting, apple-cleaning business was a factory, and so did the courts.¹⁷ The courts' choice in calling the plant a "factory" was, we will suppose, "judicial legislation," but while the courts had a choice of answers they had no right to refuse to answer. The state legislature, when the court's decision came to its attention, decided that it had not intended to include among "factories" places like the cannery, or, more exactly the legislature concluded that if it had thought about apple-cleaning, it would not have listed it as a "factory" operation. So the legislature "reversed" the courts by means of an appropriate statutory amendment.¹⁸ This was not usurpation by either branch of government but step-by-step development of a complicated and extensive rule.

THE LEGISLATIVE INTENT

In official Albany it is established practice to relieve the tedium of long days with anecdotes about the elusiveness and illusoriness of "legislative intent" and many a mot has been coined in such exchanges. One of the best is the tale oft-told by an experienced legislator. The story is of a citizen, more zealous than practical, who haunted the offices of the leaders in an effort to persuade them to pass her very special, private bill. Finally, legislative patience wore so thin that arrangements were made to get rid of the bill (and the citizen) by enacting it. But the real and well-known, although nowhere written, "intent" was to send the bill to the governor's office in the confident expectation that it would be promptly vetoed by the chief executive. It was. No amount of library research could have discovered that particular "legislative intent."

Of course, it is the first meaning of "judicial legislation" which is used most often, most seriously, and with most apparent basis. The courts in their daily work simply must construe and apply statutes, otherwise they would have to ignore them in every instance where the literal statutory language does not automatically apply itself to the facts of a case. So the courts self-restrainedly formulate rules for construction, lest they fall into the worse fault of hit-and-miss *ad hoc* interpretations. Those rules are indeed numerous.¹⁹ Legislative intent, they say, is the principal and primary consideration. Legislation must be construed with reference to the times and situations of its enactment and the mischief it deals with. Words must be taken in their natural and obvious sense and all parts of one statute or statutory scheme must be looked at as a whole. Spirit,

17. *Red Hook Cold Storage Co. v. Department of Labor*, 295 N.Y. 1, 64 N.E.2d 265 (1945).

18. N.Y. Sess. Laws 1946, c. 970.

19. See McK. Statutes §§ 71-343. See also, McCaffrey, *Statutory Interpretation* (1953).

purpose and effect are to be examined. Constructions are to be avoided which produce objectionable, harsh, unreasonable, absurd, or unconstitutional consequences.

These rules or approaches are somewhat subjective as regards the courts since they represent methods invented by one group (judicial) for analyzing the intent of the other (legislative). In more recent years, these canons of construction have, perhaps, lost popularity as against the more objective tests based on legislative reports and debates and messages from presidents and governors. Closely akin is the Brandeis technique of examining the material, actually or presumptively used by the legislature.²⁰ Judicial construction of statutes, however, is not and by its nature cannot be scientific in method or result. Always we find ourselves returning to the foremost of the numerous rules, that is, that legislative intent and purpose is, when at all possible, to be found within the four corners of the statute itself. This rule of construction (or rule against construction) has served the New York courts well for at least a century. In *McChuskey v. Cromwell*,²¹ in the very early years of the Court of Appeals, New York's highest bench said this:

"It is, beyond question, the duty of courts, in construing statutes, to give effect to the intent of the law-making power, and seek for that intent in every legitimate way. But in the construction, both of statutes and contracts, the intent of the framers and parties is to be sought, first of all, in the words and language employed, and if the words are free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation, and when the words have a definite and precise meaning, to go elsewhere in search of conjecture, in order to restrict or extend the meaning. Statutes and contracts should be read and understood according to the natural and most obvious import of the language, without resorting to subtle and forced construction, for the purpose of either limiting or extending their operation. Courts cannot correct supposed errors, omissions or defects in legislation, or vary by construction, the contracts of parties. The office of interpretation is to bring sense out of the words used, and not bring a sense into them."²²

In *Meltzer v. Koenigsberg*,²³ almost one hundred years later, the Court of Appeals went, verbatim, all the way back to the *McChuskey* case to restate its salutary warning.²⁴ As Judge Cardozo wrote, statutes (absent unconstitutionality, of course) do not, "to the extent that their commands

20. The usefulness in New York of this technique has been lessened in recent years by the declining number of legislative and gubernatorial hearings on bills. As to its misuse by some courts, see Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says*, 34 A.B.A.J. 535 (1948).

21. 11 N.Y. 593 (1854).

22. *Id.* at 600-01.

23. 302 N.Y. 523, 525, 99 N.E.2d 679, 680 (1951).

24. See also, *In the Matter of Rathscheck*, 300 N.Y. 346, 90 N.E.2d 887 (1950).

are unmistakable,"²⁵ come within the jurisprudential ken at all. This is true, as to the construction and interpretation of contracts and wills as well. In the end there is no escape from this: judicial construction of doubtful statutes, like every other kind of "law-making," involves and includes some amount of policy making. The judiciary must be relied on to remember that it represents the justice of the state, that other branches represent its power.²⁶

CONCLUSION

The courts, as we have seen, are by judicial self-restraint kept on the right side of the road, and "self-discipline and the voters"²⁷ provide similar restraints for the legislators, all without acrimony. There is a lack of continuous liaison but an official nexus is supplied. Since 1934, New York has had in the Law Revision Commission a "Ministry of Justice," a body charged by law with surveying the private substantive law and recommending to the Legislature changes therein. The Commission considers itself to be "a mediator between courts and legislature, no more, no less."²⁸ The Commission during those twenty years has done much work in numerous fields,²⁹ but it has its limitations,³⁰ and of necessity leaves untouched more questions than it answers.

The functions and powers of the legislative and judicial branches of government do, to a certain extent, overlap. But rather than produce complete uncertainty or chaos, this "struggle" of the courts against the legislature has produced a jurisprudence beneficial to our society.

25. Cardozo, *Paradoxes of Legal Science* 9 (1928).

26. See remarks of William Evarts, delegate, in 3 *Proceedings, N.Y. State Constitutional Convention of 1867*, at 2367.

27. *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951).

28. See MacDonald, *Foreword to the Symposium*, 40 *Cornell L.Q.* 641, 642 (1955).

29. See *Symposium*, 40 *Cornell L.Q.* 641-763 (1955).

30. See MacDonald, *supra* note 28, at 642-44.