PART I

Enacted and judge-made law

1

Introduction

To legislate on a matter is to take action which is intended to regulate that matter in some way. This is not to claim that regulation is the only intention behind a legislative initiative. The intention to regulate is, nevertheless, the intention that distinguishes an action as legislative. Other reasons for legislating could be to clarify, consolidate, pronounce authoritatively on or preclude the need for further debate – or possibly (in exceptional instances) even to provoke debate – about a matter. But one could seek to clarify, consolidate, pronounce authoritatively on or preclude or provoke further debate without legislating. Essential to the act of legislation is the intention that it has some kind of controlling or enabling effect – that, from the point at which the legislation takes effect, some aspect of the world should (which is not to say that it will) be treated as governed in a particular way.

In everyday speech, we do not assume legislating to be an exclusively juridical activity: the proposition that poets are the world's unacknowledged legislators,[1] for example, expresses the belief that poetry shapes human thought and conduct, while the claim that there is no legislating for a particular human prejudice or disposition is to assert that this prejudice or disposition is beyond influence. By and large, however, legislating is a juridical activity – law making – and it is on juridical legislation that this book concentrates.[2]

1 Statutes and cases

A law book about legislation might reasonably be assumed to be about statute law – as, indeed, this book is. But should it not be about case law

[1] See Samuel Johnson, *The History of Rasselas, Prince of Abissinia*, ed. J. P. Hardy (Oxford University Press, 1968 [1729]), 27; P. B. Shelley, *A Defence of Poetry*, ed. M. W. Shelley (Indianapolis: Bobbs-Merrill, 1904 [1821]), 90.

[2] On legislation as a moral as distinct from a juridical phenomenon, see Conrad D. Johnson, *Moral Legislation: A Legal-Political Model for Indirect Consequentialist Reasoning* (Cambridge University Press, 1991), 7–8, 168–87, 204–6.

as well? Judicial rulings, after all, are regulative determinations. If it is accepted that the juridical meaning of 'legislating' is 'law making', must we not also accept that legislating cannot be the exclusive province of legislatures?

One has to be careful with this proposition. If legislation is the act of making law, and if courts develop the common law by extending the realm of precedent, then judges are indeed legislators. Yet there are reasons to balk at this claim. '[T]he production of authority that this or that is the law,' Brian Simpson has remarked, 'is not the same as the identification of acts of legislation … [Judges'] acts create precedents, but creating a precedent is not the same thing as laying down the law … [T]o express an authoritative opinion is not the same thing as to legislate.'[3] Nigel Simmonds argues that judges' 'interstitial modification of rule-formulations' should not be 'treated … as alterations of the law itself', not least because the judicial modification of an earlier court's formulation of a rule applies 'to the very case that gave rise to the modification': if such modifications are 'construed exclusively in terms of a fundamentally legislative model', we are compelled 'to view a good deal of familiar adjudicative activity as a most serious departure from the rule of law in the form of retrospective rule making'.[4] The term 'legislator' can, John Finnis observes, include 'any judiciary that … enjoys a creative role', but one uses the term thus 'at the expense of some significant differentiations'[5] (such as the one remarked on by Simpson).[6] For courts do not introduce or adopt new rules but rather change settled ones – and, in the case of final courts of appeal, are sometimes not actually changing rules but rather are, as it were, putting the law back on track (by establishing that a rule, though it has 'been at all relevant times legally correct and … authentic', has been obscured because of the way it has been applied in the lower courts, so that the final court of appeal is moved to treat the understanding of the rule that has emerged from its application as 'an error awaiting correction').[7]

There is a fairly obvious and dogmatic way of responding to these assessments. Legislation is typically a process of laying down – which

[3] A. W. B. Simpson, 'The Common Law and Legal Theory', in *Oxford Essays in Jurisprudence (Second Series)*, ed. A. W. B. Simpson (Oxford: Clarendon Press, 1973), 77–99 at 85–6.
[4] N. E. Simmonds, *Law as a Moral Idea* (Oxford University Press, 2007), 162, 166.
[5] John Finnis, *Natural Law and Natural Rights*, 2nd edn (Oxford University Press, 2011), 286.
[6] Finnis endorses Simpson's statement regarding the difference between judicial creativity and legislating at ibid. 296 n; see also ibid. 472.
[7] John Finnis, 'Adjudication and Legal Change' (1999), in his *Collected Essays. Volume IV: Philosophy of Law* (Oxford University Press, 2011), 397–403 at 402.

includes measures such as repealing and amending – a law. But this does not exhaust the meaning of 'legislation'. Given that any law-making action is legislative action, legislation must include not only the enactment of rules but also the development of the common law by the courts. Judges' modifications of common-law rule formulations do indeed apply to the cases that occasion the modifications, and so to treat those modifications as legislative is to acknowledge a form of legislation, judicial legislation, which will sometimes retrospectively alter the legal status of acts performed before the legislation came to be. But resistance to this conclusion seems to amount to squeamishness: when a court departs from a precedent (as opposed to when it reaffirms a precedent in the light of its misapplication), it may well attach to an action, at the point when it was taken, a liability which at that point cannot be said to have existed – eschewing the notion of judicial legislation has no bearing on this fact. Certainly it would be a mistake not to regard judicial creativity and the enactment of laws by legislatures as radically different forms of law making. But – here we get to the heart of the response – this is not tantamount to claiming that legislative enactment is legislation whereas judicial creativity is not. The correct conclusion would seem to be, rather, that the enactment of primary legislation by a legislature is a core, perhaps *the* core, instance of legislation, whereas judge-made law is legislation in a relatively qualified or peripheral sense. Finnis, though he resists characterizing judge-made law as legislative, supplies the reasoning for those who would do just that: enacted law might be said to be legislation *simpliciter*, whereas judge-made law is legislation *secundum quid*.[8]

Will this response do? It takes little effort to find judicial and juristic pronouncements to the effect that there is really no other line of response that could do – that judicial legislation is a 'simple and certain fact'.[9] While those who claim as much more often than not refer to judge-made law as a 'special' rather than the standard form of legislation,[10] there are certainly some who appear to draw no significant distinction between the two. Those intent on differentiating the legislative functions of legislatures and courts on anything other than institutional and procedural grounds, Jerome Frank memorably argued, betray a childlike inability

[8] See Finnis, *Natural Law and Natural Rights*, 9–11, 365–6, 368, 430–1.
[9] Lord Edmund-Davies, 'Judicial Activism' (1975) 26 *CLP* 1, 2.
[10] See Robert Rantoul, Jr, *An Oration Delivered before the Democrats and Antimasons of the County of Plymouth; at Scituate, on the fourth of July, 1836* (Boston: Beals & Greene, 1836), 38.

to confront legal reality.[11] Lord Diplock spoke of the courts having not only the capacity to develop the common law (a capacity which he both acknowledged and lauded),[12] but also the ability to make new law by interpreting statutes. Through statutory interpretation, the court legislates as much as if it were enacting a fresh legal rule: 'whoever has final authority to explain what Parliament meant by the words it used makes law as much as if the explanation it has given were contained in a new Act of Parliament'.[13] Although the cliché that we are all legal realists now yields more than one meaning, perhaps its most obvious meaning is that we have come to accept judicial legislation as a given.

Yet it is noticeable, certainly if one looks to English case law, that most judges would either qualify or reject the proposition that this particular interpretation of realism has become a commonplace. Judges who consider judicial legislation a reality are quite often coy about the fact, as if they would prefer that the observation were not shouted from the rooftops.[14] Just as often the observation comes with the proviso that while judges legislate, they must not assume parliament's role of forging law out of policy;[15] perhaps this explains why, notwithstanding the occasional judicial proclamation as to the reality of judicial legislation, there appears to be no evidence that English judges have ever treated the proposition that they are *legislators* with anything apart from disdain.[16] The reality is that most English judges frown upon the concept of judicial legislation,

[11] See Jerome Frank, *Law and the Modern Mind* (New York: Brentano's, 1930). Frank argued that trial courts in particular have considerable law-making – or rather, law-defeating – power because fact-finding at trial stage will sometimes be carried out in such a way as to make a statute inapplicable to the case to be decided: see Jerome Frank, 'Words and Music: Some Remarks on Statutory Interpretation' (1947) 47 *Columbia L. Rev.* 1259, 1278.

[12] *Home Office* v. *Dorset Yacht Co. Ltd* [1970] AC 1004, 1058 (HL).

[13] Kenneth Diplock, *The Courts as Legislators* (Birmingham: Holdsworth Club, 1965), 6. The essay is the text of Diplock's Holdsworth Club address of March 1965.

[14] See, e.g., Edmund-Davies, 'Judicial Activism', 3 (though a judge is inevitably a legislator 'he risks trouble if he goes about it too blatantly'); Lord Radcliffe, *Not in Feather Beds: Some Collected Papers* (London: Hamish Hamilton, 1968), 273 ('Personally, I think that judges will serve the public interest better if they keep quiet about their legislative function').

[15] See, e.g., *R* v. *Clegg* [1995] 1 AC 482 (HL), 500 (*per* Lord Lloyd); *DPP* v. *Lynch* [1975] AC 653 (HL), 695–6 (*per* Lord Simon).

[16] See, e.g., *Majrowski* v. *Guy's and St Thomas' NHS Trust* [2006] UKHL 34 at [74] (Baroness Hale); *Kamara* v. *DPP* [1973] QB 660 (CA), 667 (*per* Lawton LJ); *Mapp* v. *Oram* [1968] 2 WLR 267 (Ch. D), 272–3 (*per* Ungoed-Thomas J); *IRC* v. *Longford* [1928] AC 252 (HL), 259 (*per* Viscount Sumner).

even judicial quasi-legislation, for they equate it not with the development of the common law but with judges giving effect to their own legal preferences by making statutes mean what they want them to mean.[17] In recent times – particularly since courts became obliged to read down statutes so as to try to ensure their compatibility with human rights norms – the senior judiciary seems to have been more adamant than ever before that there is a line between warranted creativity with a statute and judicial legislation, and that this line should not be crossed.[18]

Where does this leave us? Given that to legislate is to make law, it is a mistake, strictly speaking, to reject the claim that judges legislate. But it is still sensible to eschew the term, 'judicial legislation' – to prefer instead something like 'judge-made law' or 'case law' – because legislating is, typically, a formal process of legal enactment. Legislatures enact laws. Courts, whatever their law-making capacities might be, do not. Recall the

[17] See, e.g., *R* v. *PD* [2011] EWCA Crim 2082 at [39] (Thomas LJ); *R (on the application of WL (Congo))* v. *Secretary of State for the Home Department* [2011] UKSC 12 at [87] (Lord Dyson); *Wilkinson* v. *Secretary of State for Work and Pensions* [2009] EWCA Civ 1111 at [19] (Patten LJ); *Inco Europe Ltd* v. *First Choice Distribution* [2000] 1 WLR 586 (HL), 592–3 (*per* Lord Nicholls); *Ropaigealach* v. *Barclays Bank* [2000] QB 263 (CA), 282 (*per* Chadwick LJ); *Murphy* v. *Brentwood DC* [1991] 1 AC 398 (HL), 471 (*per* Lord Keith) and 473 (*per* Lord Bridge); *Western Bank Ltd* v. *Schindler* [1977] Ch. 1 (CA), 18 (*per* Scarman LJ); and *Myers* v. *DPP* [1965] AC 1001 (HL), 1032–4 (*per* Lord Godson). For an endorsement of judicial 'quasi-legislation' when the relevant statutory rules only go to legal procedure and do not affect substantive rights (a distinction which, given that determinations as to procedure can impact on decisions about parties' rights, is far more easily asserted than drawn), see *R* v. *Governor of Brockhill Prison* [2001] 2 AC 19 (HL), 48 (*per* Lord Hobhouse).

[18] See, e.g., *Re S* [2002] UKHL 10 at [39]–[40] (Lord Nicholls) ('Interpretation of statutes is a matter for the courts; the enactment of statutes, and the amendment of statutes, are matters for Parliament … The area of real difficulty lies in identifying the limits of interpretation in a particular case. This is not a novel problem. If anything, the problem is more acute today than in past times. Nowadays courts are more "liberal" in the interpretation of all manner of documents. The greater the latitude with which courts construe documents, the less readily defined is the boundary. What one person regards as sensible, if robust, interpretation, another regards as impermissibly creative. For present purposes it is sufficient to say that a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment.'); *R (Anderson)* v. *Secretary of State for the Home Department* [2002] UKHL 46 at [30] (Lord Bingham) ('To read section 29 [of the Crime (Sentences) Act 1997] as precluding participation by the Home Secretary, if it were possible to do so, would not be judicial interpretation but judicial vandalism: it would give the section an effect quite different from that which Parliament intended and would go well beyond any interpretative process sanctioned by section 3 of the 1998 [Human Rights] Act …'); *M* v. *Secretary of State for Work and Pensions* [2004] EWCA Civ 1343 at [90] (Sedley LJ) ('the forbidden frontier'); also *Ghaidan* v. *Godin-Mendoza* [2004] UKHL 30 at [121] (Lord Rodger), about which more in Chapter 6.

proposition postulated earlier in response to Simmonds's contention that it is a mistake to conceive of judicial modifications to rule formulations – 'express formulations of rules in caselaw', that is, as distinct from 'the law itself'[19] – 'exclusively in terms of a fundamentally legislative model': that to resist this conception amounts to squeamishness. That proposition is obviously overblown, certainly if one understands 'fundamentally legislative model' to mean 'fundamentally enacted-law model'.[20]

It might be argued, of course, that the proposition is only overblown if one accepts what is being asserted: that enacted law is fundamentally legislative, but judge-made law is not. We know already that there are those who would reject this assertion. Lord Diplock, it was observed a moment ago, purported to see no significant distinction between parliament's enactment of a text and the judicial interpretation of that text: both, he thought, amount to law making. On this point he had an unlikely ally in the figure of Hans Kelsen, who believed that the very application of a statute to a specific set of facts amounted to an addition to the content of the law beyond what had been added by the statute itself: '[t]he individualization of a general norm by a judicial decision is always a determination of elements which are not yet determined by the general norm … The judge is, therefore, always a legislator … in the sense that the contents of his decision can never be completely determined by the preëxisting norm of substantive law.'[21] When judges settle on an interpretation of a statute, so Diplock and Kelsen would have it, they supplement – make law out of – the statute's meaning.[22]

There is certainly something alluring about this account. Lord Goff's observation that it is one thing to be 'aware of the existence of the boundary' separating warranted and unwarranted judicial creativity and another to be 'sure where to find it'[23] applies no less to the distinction between judges interpreting and amending statutes than it does to the distinction between appropriate judicial development of common-law principles and courts introducing into the law changes which ought to have been decided

[19] Simmonds, *Law as a Moral Idea*, 161.
[20] As Simmonds clearly does: see ibid. 160.
[21] Hans Kelsen, *General Theory of Law and State*, trans. A. Wedberg (Cambridge, Mass.: Harvard University Press, 1946), 146.
[22] Hence Diplock's claim that '[w]henever the Court decides [whether a particular kind of gain is taxable] it legislates about taxation … Do not let us deceive ourselves … that the Court is only ascertaining and giving effect to what Parliament meant.' *The Courts as Legislators*, 6.
[23] *Woolwich Equitable Building Society* v. *IRC* [1993] AC 70 (HL), 173.

on by parliament. To contend, furthermore, that judges aim not to amend and try only to interpret statutes is to risk being accused of approaching statute law with the old-fashioned presumptions of the declaratory theorist who thinks of judges as simply mouthpieces of the common law.[24] But this is a risk worth taking. While it is not impossible for judges to make law out of statutes, to claim that this is what judges normally do when they interpret statutes is wrong. Judges have a responsibility for the development of the common law, but generally seek to avoid departing from the plain meaning of statutory language.[25] Indeed, they negotiate statutes in accordance with a collection of interpretive principles and presumptions which serve to minimize the likelihood of courts making new law from what has been enacted. These principles and presumptions, that is, have been created – mainly by judges themselves – to ensure that interpretations of statutes, even when they modify or shift focus from the text, can be understood as expositions of what the law already is: the court which interprets a statute in light of, say, the remedial intentions of the enacting parliament or overarching treaty obligations is trying to set out contested and unclear yet already existent law rather than to legislate from a statute. To say that those who determine the meaning of statutes are making law as much as if their interpretations were contained in enacted legislation is to fail to see that the point of interpretation is not to establish a new rule which amends or supplants already enacted law but rather to reach a ruling which can, in one way or another, be shown to be in accordance with already enacted law. Part III of this book is intended, in a fairly circuitous way, to bring home this very point.

To detect declaratory sentiments in an explanation of statutory interpretation is to misunderstand the declaratory theory itself. The declaratory theory is a theory of the common law – one which, nowadays, is generally considered to have been discredited.[26] That it became discredited is easily enough explained: the proposition that judges make law – by developing the common law rather than by legislating from statutes – came

[24] Charles Louis Montesquieu, *The Spirit of the Laws*, trans. and ed. A. M. Cohler, B. C. Miller and H. S. Stone (Cambridge University Press, 1989 [1748]), 163 ('[T]he judges of the nation are … only the mouth that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigor').

[25] 'Judges … have a responsibility for the common law, but in my opinion they have none for statute law; their duty is simply to interpret and apply it and not to obstruct.' Lord Devlin, 'Judges and Lawmakers' (1976) 39 *MLR* 1, 13–14.

[26] See Jim Harris, 'Retrospective Overruling and the Declaratory Theory in the United Kingdom – Three Recent Decisions' (2002) 26 *Revue de droit de l'Université libre de Bruxelles* 153.

to be regarded as uncontroversial. This study concerns enacted legislation rather than judge-made law, and so there is no need to dwell on the declaratory theory, though there is perhaps no harm in reflecting briefly on whether its status as one of the classic mistakes in common-law thinking is dependent on a somewhat harsh assessment. The stock observation that judges develop the common law should, for two reasons, be treated with caution. First, judicial decision making is not an intrinsically law-changing activity. Many decisions, certainly if we include in our estimation the decisions of lower courts, leave the common law exactly as it stood before the decisions were made. Secondly, the declaratory theorist's conclusion will sometimes be the right one: even when judges do seem to be modifying the common law, they might not be. What appears to be an alteration to precedent will sometimes be a correction of a legal derailment and a reaffirmation of established law – an effort to vindicate the law from past misinterpretation, as Blackstone put it, rather than to make something new.[27] The standard Austinian argument against the declaratory theory of the common law – that it is fantasy to think that judges never develop but only ever recapture the common law[28] – stands in need of no correction: the theory leaves unexplained how the common law came to be, and how it evolves.[29] But to emphasize the Austinian argument is to risk missing the point – which has been subject to various elaborations by those who recoil from the notion of judicial legislation[30] – that what appears to be a judicial alteration of the common law so that a new rule applies with retrospective effect will sometimes in fact be an exposition of law which, though perhaps misread or overlooked, already exists.

It would be foolish, nevertheless, to mount an out-and-out defence of the declaratory theory. There may be good reason to avoid the concept of judicial legislation, but there is no sense at all in arguing that judges do not

[27] 1 Bl. Comm. (William Blackstone, *Commentaries on the Laws of England*, 4 vols. (University of Chicago Press, 1979 [1765–9])) 70.

[28] 'There was a time when it was thought almost indecent to suggest that judges make law – they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge had muddled the pass word and the wrong door opens. But we do not believe in fairy tales any more.' Lord Reid, 'The Judge as Law Maker' (1972) n.s. 12 *JSPTL* 22, 22.

[29] See John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law*, 2 vols., 5th edn, rev. and ed. R. Campbell (London: Murray, 1885), II, 634.

[30] For two examples, see Finnis, 'Adjudication and Legal Change', 400–3; Simmonds, *Law as a Moral Idea*, 164–8.

change the common law by overruling and distinguishing judicial precedents. When a court of final appeal overrules one of its own precedents, its reason for doing so is as likely to be that the precedent is simply bad law as that it is law which has been obscured or overlooked and awaiting vindication: sometimes, that is, the overruling of precedent is the judicial version of what legislatures do when they expressly repeal statutes. Distinguishing, on the other hand, is the common-law equivalent of an amending statute. The court which distinguishes sees, between the precedent and the case at hand, a difference (or differences) which it considers sufficiently significant to justify not following the precedent. But the *ratio decidendi* of the precedent case is not overruled or repealed. Instead, the distinguishing court narrows the *ratio* established in the precedent so that the new case is beyond its scope: the *ratio* of the new case, that is, contains conditions (though not necessarily all the conditions) that the *ratio* of the precedent contains, but the *ratio* of the precedent is determined not to extend to the new case because a condition, or set of conditions, present in the new case is absent from the precedent. So it is that judicial decisions do not always, but quite often will, alter or add to the existing common law. Anyone who insists on describing judge-made law as a form of legislation is not fundamentally mistaken. But the description is misleading, and so the development of law through judicial negotiation of precedent does not feature in this study.[31]

2 Differences

Legislatures and courts each have law-making capacities, but there are significant differences in how they make law and the types of law that they make. Some of these differences are easily exaggerated: while it is true that enacted law is normally not retroactive and that courts try to avoid future-directed rulings, for example, it would be simplistic to assume that these principles are unassailable.[32] There are, nevertheless, some broad

[31] Though there is a companion study: *The Nature and Authority of Precedent* (Cambridge University Press, 2008).

[32] Although statutes which retroactively alter the legal status of actions or states of affairs that took place or existed before the statute was enacted are generally considered antithetical to rule-of-law values, it would be a mistake to think that such legislation is always inherently objectionable. Genuinely retroactive legislation can be used to remedy unfortunate consequences attributable to the operation of a law – for example, to confirm the validity of marriages which were technically void because it was impossible for the officials responsible for conducting the ceremonies to comply with a statute setting out the conditions to be met before a marriage certificate could be granted: see Stephen R. Munzer,