BOOK REVIEWS

REVIEW ARTICLE*

STATUTORY INTERPRETATION: NEW COMPARATIVE DIMENSIONS

Die Auslegung von Gesetzen in England und auf dem Kontinent. Eine vergleichende Untersuchung der Rechtsprechung und ihrer historischen Grundlagen (Interpretation of Statutes in England and on the Continent. A comparative study of judicial jurisprudence and its historical foundations) By STEFAN VOGENAUER [Mohr Siebeck Tübingen 2001]. Published in the series Beiträge zum ausländischen und internationalen Privatrecht (Studies on Foreign Private and Private International Law) (Max-Planck-Institute for Foreign Private and Private International Law, Hamburg). Page references to the book will be: V- followed by the page numbers and, if required, the footnote numbers. See also the reviews by J Bell in (2002) 22 LS 473–80; RC van Caenegem in (2003) 71 Tijdschrift voor Rechtsgeschiedenis 473–475; O Lando in (2004) 41 CMLRev 1161–1163; and HW Baade in (2005) 69 Rabels Zeitschrift 156–8.]

I. INTRODUCTION: THE COMPARATIVE TRADITION

It has long been an article of faith among comparative lawyers that English and continental courts use fundamentally different approaches to the interpretation and application of statutes. Contrasting the 'schematic and teleological' European method with the traditional English method, Lord Denning MR has stated that civilian 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 which lies behind it'.[1] English writers have censured the supposedly free and easy ways of the civilians.[2] Continental jurists, on the other hand, have credited their systems with resort to 'extensive interpretation, analogy, *Umkehrschluss*,[3] [and] legislative purpose.'[4] German writers have criticized the common law for its assumed 'strange rigidity in dealing with statutes', its 'weakness of juristic method' and the 'almost nonsensical positivistic outlook of English jurisprudence' (references at V-15).

The 'thesis of the fundamental difference', as Vogenauer calls it, holds that English courts adhere to the literal meaning of statutes, while continental courts practise free exegesis (V-5, 1295–1308). This is the first and most important of four doctrines widely accepted by comparative lawyers. Vogenauer has subjected it and the other three doctrines[5] to extensive critical

* The aim of this section is to survey, on a selective basis, some of the more important decisions of international tribunals.

[1] *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1977] QB 208, 213 (V-9 n 53).

[2] 'On the continent . . . the words of legislation are considered approximate. They do not have to mean what they say, even if what they say is clear. They are mere a starting point for flights by the judges', FAR Bennion *Statute Law* (3rd edn Longman Harlow 1990) 83 (V-1308 n 46).

[3] The meaning of this German term equates approximately to the phrase *expressio unius est exclusio alterius*.

[4] W Fikentscher *Methoden des Rechts in vergleichender Darstellung*, vol 2, *Anglo-amerikanischer Rechtskreis* (Mohr Siebeck Tübingen 1975) 117 (V-6 n 27).

[5] These are: (1) divergent views on what amounts to law account for differences in statutory interpretation (V-11–12, 1308–17); (2) since Britain's accession to the European Communities, English courts have been adopting European methods under the impact of European community

[*ICLQ* vol 54, October 2005 pp 1023–1056] doi:10.1093/iclq/lei051

https://doi.org/10.1093/iclq/lei051 Published online by Cambridge University Press

scrutiny. His work consists of three main parts. Part I covers Continental countries (German law: V-28–231; French law: V-232–343; European law: V-344–429; history of continental statutory interpretation: V-430–663). Part II deals with statutory interpretation in English courts. Part III contains comparisons (V-1254–94) and an account of his findings, and his four comparative theses (V-1295–334). There is an index, a bibliography and a list of cases.

Vogenauer has divided the English development into three periods: equity of the statute—the Yearbook period to 1830 (V-669–779); strict literalism—1830 to 1950 (V-780–962); purposive interpretation—1950 to the present (V-963–1252). Each of the three segments on English law is a study in its own right.

II. VOGENAUER'S METHOD

A. Historical treatment

1. Common origins

The historical approach is one of the great strengths of this work. The author has successfully demonstrated that civilian and common law modes of interpretation have common origins, going back to the fourth century BC. Vogenauer reports (V-538–40) Aristotle as having said that every law is necessarily formulated in general terms, and that this makes it impossible to delineate with precision and in advance the cases intended to be within, and those intended to be outside its intended reach.[6] Having made this same point again in *The Art of Rhetoric*, Aristotle mentioned by way of illustration the case of a man wearing a ring, who strikes another with his hand. Aristotle asked whether such a man would be guilty under a law which penalizes 'the wounding of another with an iron instrument'.[7] This kind of case calls for restrictive interpretation. Aristotle found the justification for this and for the application of statutes beyond the text (extensive interpretation) in the presumed intention of the legislator and in wider considerations: '. . . this is a case for equity'.[8] Much the same point, though with different illustrations,[9] is later to be found in the works of a number of famous civilian authors from Cicero to Grotius (V-539). The justification for this *epiky* doctrine of interpretation seems to have varied from author to author. Vogenauer mentions concepts such as *aequitas*, suitability, justice, fairness and even the law of nature and the law of God (V-539–540).

Vogenauer has shown that the English interpretative practice which has become known under the title 'equity of the statute' was derived from Continental sources (V-771). After these beginnings, the systems may have diverged, but to assume that civilian systems developed in the direction of liberalism and the common law in the direction of literalism would be very simplistic. Vogenauer has demonstrated that both civilian and common law systems have known periods of liberal interpretation, followed by periods of literalism which, in turn, were modified to allow for greater emphasis upon purpose and other factors as interpretative tools.

2. The ubi lex *tradition of the civil law*

Common lawyers might be surprised to learn that there is a strong strand in the civilian tradition

law (V-13–14, 1317–25); (3) the traditional English method of literal interpretation is inferior to the more sophisticated European way (V-14–15, V-1325–32).

[6] H Rackham (tr) *Aristotle The Nicomachean Ethics* (3rd edn Heinemann London 1962) 315 and 317. Much the same argument was later put forward by other civilian writers like St Thomas Aquinas and Christopher St Germain (V-771).

[7] JH Freese (tr) *Aristotle The 'Art' of Rhetoric* (Heinemann London 1959) 145 and 147.

[8] ibid 147.

[9] One of the stock examples was a law requiring the return of deposited objects. Contrary to its wording, there was said to be no obligation to return a sword to a madman or a revolutionary.

https://doi.org/10.1093/iclq/lei051 Published online by Cambridge University Press

which elevates literalism to paramount status. Roman lawyers and, following them, medieval commentators, applied the literalist approach, inter alia, to legislative terms of a very general kind, rejecting suggestions that their ambit might be reduced by restrictive conditions: 'Where the law makes no distinction, we must not make any distinction either.'[10] The same point is made in another statement with even more specific reference to legislative terms of a general nature: 'General words are to be understood generally.'[11] This *ubi lex* maxim, of which there were several versions,[12] was to prove persistent. Vogenauer states (V-530–531):

> In the following centuries the *ubi lex* maxim was cited again and again. To this day, it is to be found in French treatises dealing with legal method and is still being echoed in French court decisions and in the case law of the Court of Justice of the European Communities.

Restrictive interpretation as a judicial tool disappeared almost completely from the European scene in the late 18th and 19th centuries, the civilian period of strict literalism.

Vogenauer makes clear with the help of many examples (V-543–549) that civilian legal history also shows a contrary movement which was ultimately to prove more influential in shaping the modern law. Towards the end of the 19th century, the *ubi lex* tradition was abandoned by a clear majority of courts and writers in civilian countries (V-543). It is still occasionally referred to, but is no longer generally followed by civilian courts.

3. The common law: the equity of the statute

Aristotle's influence appears to have caused European law, including the developing common law, to move towards a very liberal practice of interpretation, which became known as the equity of the statute. The analogous application of statutes to cases not covered by the text was accepted practice. Sir Christopher Hatton explained the theoretical basis for analogous application:

> some Statutes are expounded by Equities, to reach to things of Vicine nature and condition; and sometimes, because the one cometh in lieu of the other, and the things lie under the same necessity of Reformation that the cases expressed are under . . .[13]

Many examples are given. A statute giving the executor the right to sue for goods taken from the testator during his lifetime is extended to administrators; a statute forcing a valuer who has put an excessive value on goods to buy them himself at the inflated value is extended to valuers of real estate.[14] Statutes creating very serious criminal offences were not applied by analogy, but less serious offences were dealt with more liberally. A statute imposing a penalty on the warden of the fleet for allowing prisoners to escape was extended by analogy to 'Sheriffs and Gaolers, or Keepers of Prisons'.[15] Although this is but legal history, English and Australian courts are no longer as far removed from such thinking as they once were.

[10] *Ubi lex non distinguit, nec nos distinguere debemus* (V-530 n 740, V-527).

[11] *Verba generalia generaliter sunt intelligenda* (V-531 n 745); Bennion treats this maxim, to be found in Coke's Institutes, as part of the common law, though in the limited context of the delegation of legislative power—FAR Bennion *Statutory Interpretation. A Code* (4th edn Butterworths London 2002) 1001 and n 3.

[12] 'A general statement must be understood in a general sense' (generale dictum generaliter est intelligendum); 'A statute speaking in general terms is to be understood in a general sense' (Lex generaliter loquens, generaliter intelligenda). The sources for these statements are to be found in V-530–1 nn 738–53.

[13] *A Treatise Concerning Statutes, or Acts of Parliament: And the Exposition Thereof* (printed for Richard Tonson London 1677) 41–2.

[14] ibid 43.

[15] ibid 66–7.

https://doi.org/10.1093/iclq/lei051 Published online by Cambridge University Press

B. Interpretative criteria and their function

According to Vogenauer, the courts in all the jurisdictions covered by his study use five interpretative criteria: (1) the statutory language, in particular the grammatical[16] implications; (2) the genesis of a provision; (3) its context within the particular statute and within the legal system as a whole; (4) its purpose; (5) extra-legal values. Vogenauer insists that this selection accords with common sense (V-1302). The search for such criteria is not new. Vogenauer quotes Blackstone (V-670), who first provided such a list.[17] Though expressed differently, all five of Vogenauer's criteria have identical or at least related counterparts in Blackstone.[18] Blackstone lists 'the subject matter', which, though not included by Vogenauer, has played a significant role, at least in the common law. Having dealt fairly briefly with the interaction of his five criteria, Vogenauer then analyses two major aspects of that interaction: (1) the weight the courts give to each criterion and (2) their reasons for doing so. There is always a final and relatively brief segment concerned with the legal and political cultures which surround the interpretative approaches of the courts. This pattern is followed in all segments of the work, including the historical ones and the final comparative analysis.

The legislative text must be of paramount importance in all jurisdictions. Vogenauer lists the legislative language as the first, and presumably the most important, interpretative criterion (V-30, 235, 347, 670). When a lawyer finds that a provision has two possible grammatical meanings, one of which includes the case being considered and the other excludes it, an ambiguity exists and needs resolution. Grammar alone will not solve such a problem and even the most determined literalist has no choice but to resort to other interpretative criteria. A crucial and surprising aspect of Vogenauer's study is that grammatical ambiguities are not his major focus. Instead, he has concentrated on the legal treatment of provisions which, according to their grammatical meaning, are either unambiguously applicable or unambiguously inapplicable to the cases under consideration. It is in this context that his criteria (2) to (5) do their most important work. By reducing or expanding the grammatical scope of a provision, they lead the courts to depart from the result indicated by the grammatical criterion alone. In Bennion's great work, the grammatically unambiguous meaning ('the linguistic meaning taken in isolation from legal considerations', as Bennion calls it) also plays a role.[19] However, Bennion has given it prominence mainly in the context of ambiguity. Vogenauer has chosen it as the foundation of most of his study. This has given the book its special character and its great symmetry and clarity.

Vogenauer's approach is based on the fundamental assumption that, in all the jurisdictions covered, a departure from literal meaning may be necessitated by one or more of the other interpretative criteria. This stands in stark contrast to strict literalism as expressed in the ancient Roman maxim, 'When the words are unambiguous, it is not permissible to ask what has been

[16] 'Grammatical' is being used here in the sense of 'literal, irrespective of considerations other than the rules of grammar'—one of the meanings given in the *OED*.

[17] 'The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law', W Blackstone *Commentaries of the Laws of England* vol 1 (A Facsimile of the First Edition of 1765 University of Chicago Chicago 1979) 59.

[18] The juxtaposition is as follows: (1) the legislative language, in particular its grammatical implications (Vogenauer)—the words (Blackstone); (2) the genesis of the statute (V)—the legislator's intention at the time when the law was made (B); (3) the context within the particular statute and within the legal system as a whole (V)—the context (B); (4) the purpose of the statute (V)—the spirit and reason of the law (B); (5) any extra-legal values which might have a bearing on it (V)—the effects and consequence (B). The concepts listed under (2), though related, are obviously not identical.

[19] Bennion *A Code* (n 11) 382–404.

https://doi.org/10.1093/iclq/lei051 Published online by Cambridge University Press

intended'.[20] Perhaps surprisingly, this maxim seems still to find some support in civilian jurisprudence, particularly in civilian courts.[21] However, such pronouncements can hardly prevail against the cardinal civilian principle that undue adherence to literal meaning at the expense of legislative spirit and policy must be avoided.[22] The real challenge for the reviewer is to determine whether Vogenauer's assumption is also justified in English law.

III. VOGENAUER'S FINDINGS

Vogenauer has found the traditional view of the fundamental difference (above I para 2) to be mistaken. His counter-thesis is that there is now 'a fundamental unity in judicial approaches to statutory interpretation' in the four jurisdictions which he has examined (V-1295–308). English law, like civilian systems, emphasises the great weight to be accorded to statutory language but permits, for valid reasons, restrictive or extensive interpretation. This is the essence of Vogenauer's view concerning these aspects of interpretation. Supporting judicial dicta on each side of the Channel are not difficult to find. In 1889 Lord Esher MR stated:

> an Act of Parliament is to be construed according to the ordinary meaning of the words in the English language, as applied to the subject matter, unless there is some very strong ground, derived from the context or reason, why it should not be so construed.[23]

This dictum is matched by a 1992 dictum of the German Constitutional Court:

> This determination . . . results from the clear legislative text, which is the documented evidence of the objective legislative will, clearly evident to everybody. No peculiarities are evident which might justify a departure from the text—perhaps in view of the genesis of the law—by way of corrective interpretation.[24]

Vogenauer's unity thesis is his most important conclusion. He does not deny that the influence of community law might have hastened the development, but insists that the evolution of the new style of interpretation has been an independent development within English common law.

IV. RESTRICTIVE INTERPRETATION

There is no better hypothetical example of the need for restrictive interpretation than the ancient

[20] *Cum in verbis nulla ambiguitas est, non debet admitti voluntatis quaestio*. Dig 32, 25, 1 (V-466 n 279). As Vogenauer says (V-818): 'According to the literal rule, the grammatical element is bound to take precedence over all other interpretative criteria.'

[21] German courts have endorsed what they call the '*Eindeutigkeitsregel*' (single meaning rule). In 1963 the German Constitutional Court stated (V-52): 'There is scope for interpretation only when there is doubt about the meaning of the words; that is not the case here. Rather, the legislator has made an unambiguous determination by which the Court is bound.' When a French judge encounters an '*acte clair*', French jurisprudence commits that judge to apply it without speculating about intention. As Raymond Odent, a former President of the *Conseil d'État*, has explained (V-249): 'When a text is clear, ie when its meaning according to all grammatical, semantic and syntactic rules cannot be subject to any doubt . . . the administrative judge must not surrender to any interpretative fantasies. He strictly applies the words.'

[22] 'When interpreting a declaration of intention, one must ascertain the true will rather than cling to the literal meaning of the terms' (BGB § 133); see also Code Civil Art 1156.

[23] *Hornsey Local Board v Monarch Investment Building Society* (1889) 24 QBD 1, 5 (V-875 n 632).

[24] To similar effect is the following 1958 statement by the German Federal Social Welfare Court (V-152): 'The fewer the doubts which arise on a literal reading of the wording of a provision, the more weighty must be the reasons which result from other relevant considerations, if they are to justify an interpretation which runs counter to usual linguistic usage.'

https://doi.org/10.1093/iclq/lei051 Published online by Cambridge University Press

one found in St Thomas Aquinas and later adopted by Christopher St Germain (V-771 n 669): assume that a statute makes it a criminal offence 'to open the city gates before sunrise'. If a citizen had opened a city gate at night to allow townspeople, fleeing from the enemy, to enter, would that citizen be guilty? Obedience to the literal meaning of the words would defeat the purpose of the statute (to protect the townspeople from the enemy), whilst disobedience would promote it. A literalist could only convict. The liberal approach could allow the fourth criterion (the purpose of the statute) to overwhelm the grammatical implications of the legislative language and acquit. In Vogenauer's terms, the liberal approach results in a 'purposive reduction' of the statutory text.

It is recognized in the common law, and was recognized even during the age of literalism, that consideration of the subject matter of a legislative provision may serve to narrow its scope. Willes J mentioned the 'rule alike of good sense and grammar and law, that general words are to be restrained to the subject matter with which the speaker or writer is dealing.'[25] This subject has recently been examined by JJ Spigelman, Chief Justice of NSW,[26] and it may suffice to give just one example of this form of non-literal interpretation, the *ejusdem generis* rule. In *AG v Brown*[27] a regulation authorized the Government to ban the importation of 'arms, ammunition, gunpowder, or any other goods'. Taken literally, 'any other goods' seems all-embracing; but after consideration of all the circumstances, Sankey J concluded that the intended subject matter of the regulation was goods 'which could be used as utensils of war', so that 'any other goods' had to be read as confined to items falling under that description (at 796). The Government's attempt to control 'chemicals of all descriptions, unless under licence' was therefore ineffective. The *ejusdem generis* rule is merely a particularly clear example of the use of 'subject matter' as an interpretative indicator. There are others.[28]

V. EXTENSIVE INTERPRETATION; ANALOGY

Lord Reid has stated:

> It is a cardinal principle applicable to all kinds of statutes that you may not for any reason attach to a statutory provision a meaning which the words of that provision cannot reasonably bear. If they are capable of more than one meaning, then you can choose between those meanings, but beyond that you cannot go.[29]

This dictum cannot be discounted as a dying echo of the age of literalism, for literalism continues to reverberate even in the House of Lords.[30] Lord Reid seems to have intended to rule out the analogical application of statutes. In the civil law, analogy has a long pedigree,[31] seems not to have been considered universally impermissible even during the age of continental literalism,[32]

[25] *Chorlton v Lings* (1868) LR 4 CP 374, 387.

[26] 'Statutory Interpretation: Identifying the Linguistic Register': (1999) 4 Newcastle L Rev 1; see also *Repatriation Commission v Vietnam Veterans' Association of Australia NSW Branch Inc* (2000) 48 NSW LRep 548, 577–8 (Spigelman CJ).

[27] [1920] 1 KB 773 (V-812).

[28] One example is *Viscountess Rhondda's Claim* [1922] 2 AC 33, a decision of the Committee for Privileges of the House of Lords.

[29] *Jones v DPP* [1962] AC 635, 662 (V-1004 n 308). Vogenauer mentions the very similar observation by G Hufeland, a civil lawyer, who stated in 1815 that interpretation can 'never go beyond the possible meaning of the legislative words; otherwise it can no longer be called interpretation' (V-502 n 543).

[30] 'The legitimate questions for a judge in his role as interpreter of the enacted law are: 'How has Parliament by the words it has used in the statute to express its intentions, defined the category of acts that [are meant to be within the scope of the statute]?' 'Do the acts done in this particular case fall within that description?'—*Duport Steels Ltd v Sirs* [1980] 1 WLR 142, 158 (Lord Diplock). Lord Scarman suggested that the courts' duty to obey the words of a statute possesses constitutional status—ibid 168 (V-1144).

[31] Vogenauer refers to passages in the *Corpus Juris* which made the analogical application of imperial legislation obligatory (V-491 n 452).

[32] V-501–2.

https://doi.org/10.1093/iclq/lei051 Published online by Cambridge University Press

and is considered a well-established part of the legal landscape today.[33] Do these contrasts pose a challenge to Vogenauer's fundamental unity thesis?

With respect, Lord Reid's dictum was in need of some clarification even when it was pronounced. The interpretation of a statutory provision must be distinguished from its analogical application.[34] Vogenauer has shown that legislative provisions may be extended beyond their literal meaning simply by the application of interpretative indicators. The words of a statutory provision are always the starting point for the ascertainment of its meaning, but they do not always carry more weight than do the other interpretative indicators, each of which sometimes overwhelms literal meaning. As every common lawyer knows, the context of a provision, either in the particular statute or even in the legal system as a whole, may override its literal meaning.[35] Adapting Vogenauer's terminology, one might call this a 'contextual extension'.

German theory also recognizes 'teleological extensions', situations in which the purpose of a provision overrides its literal meaning.[36] A familiar common law example is *Adler v George*.[37] A statute prohibited the creation of an obstruction 'in the vicinity of a prohibited place' (an Air Force station). The accused had created an obstruction, not 'in the vicinity of', but inside the station. Although the words of the provision did not fit, the accused was nevertheless convicted. Lord Parker CJ stated (at 10) that confining criminal liability to acts outside the station would be absurd, so that the case is rightly seen as an application of the golden rule (the rule against literal meaning being allowed to occasion absurd results).[38] This controversial[39] and unusual rule must not be regarded as an interpretative indicator in its own right. In contrast with other rules of law or canons of construction, its main component is not a set of facts, but a subjective and emotively coloured reaction of the judicial mind ('following literal meaning in this case would be absurd'). The factual basis of such a judicial reaction will always be that literal meaning conflicts with another interpretative indicator. Lord Parker CJ made this clear when he suggested (at 10) that immunity for acts inside the station would be inconsistent with the purpose of the statute which was 'to prevent interference with members of her Majesty's forces . . . in relation to a prohibited place such as this station.' What 'absurdity' adds, if anything, is the rider that the scales must tilt heavily against the letter if it is to be defeated.

Adler v George is not an isolated case. Vogenauer mentions others in which purpose was expressly invoked for a similar purpose, and observes that they are too numerous for an exhaustive account.[40] The issue for the common law is not whether this kind of extension is possible, but how far it should be carried. Extensions based solely on interpretative indicators require no special justification, for all these indicators, including legislative language, are cues to legislative intention, the ultimate justification.

[33] M Troper, C Grzegorczyk, and JL Gardies 'Statutory Interpretation in France' in DN MacCormick and RS Summers (eds) *Interpreting Statutes. A Comparative Study* (Dartmouth Aldershot Hants 1991) 171; R Alexy and R Dreier 'Statutory Interpretation in the Federal Republic of Germany', ibid 73.

[34] According to Vogenauer, the first German scholar to have drawn a sharp distinction between extensive interpretation and analogical application was Friedrich Carl von Savigny (V-501–2).

[35] As Lord Wensleydale said in *Grey v Pearson* (1857) 6 HLC 61, 106: 'the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some . . . repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that . . . inconsistency, but no farther.'

[36] This could not have been endorsed more effectively than by May LJ's dictum: 'on modern principles of construction it is clearly legitimate to adopt a purposive approach and to hold that a statutory provision does apply to a given situation when it was clearly intended to do so, even though it may not so apply on its strict literal interpretation . . .', *R v Broadcasting Complaints Commission, ex parte Owen* [1985] QB 1153, 1174 (V-59).

[37] [1964] 2 QB 7.

[38] DC Pearce and RS Geddes *Statutory Interpretation in Australia* (5th edn Butterworths Chatswood NSW 2001) [2.4].

[39] Bennion *A Code* (n 11) 3–4.

[40] V-1047 nn 539 and 540.

https://doi.org/10.1093/iclq/lei051 Published online by Cambridge University Press

Extensions beyond the letter, justified by legitimate interpretative indicators other than the letter, cannot be taken to fall under Lord Reid's cardinal principle. Such extensions result purely from interpretation rather than from the analogical extension of individual provisions (*Gesetzesanalogie*).[41] The enhanced importance of extension by interpretation is implicit in the shift from the literal to the purposive approach, exclusively a common law development in England, while in Australia it has been encouraged by legislation.[42] As Pearce and Geddes have suggested, this reorientation has been more than the simple adoption of a broadened mischief approach as it existed previously in the common law.[43]

Gesetzesanalogie should be defined as the extension of a provision to cases which (1) according to the relevant interpretative indicators are not already included, and (2) cannot be considered positively excluded because, for some reason, the maxim, *inclusio unius est exclusio alterius* (*Umkehrschluss*), is inapplicable.[44] This definition accords substantially with that derived by Vogenauer from German theory.[45] What of fundamental unity, if Lord Reid's cardinal principle still rules out this form of analogy? Before Vogenauer's thesis is rejected, the following points should be considered:

(1) In practical terms, *Gesetzesanalogie* does not signify a very significant difference between civilian and common law systems. Analogy in this narrow sense was once part of the armoury of the common law, and there are a few English judgments which have arguably employed it fairly recently.[46] Moreover, the rarity of such judgments in England is matched by similar rarity on the continent. According to Vogenauer's comprehensive review of court practice, French and German courts do not often extend statutory provisions by avowed analogies.[47] German courts prefer to speak of 'wide, 'expansive' or 'supplementary' interpretation (*'weite', 'ausdehnende' oder 'ergänzende' Auslegung*) (V-60). Similarly, common law courts not infrequently extend statutory provisions by 'purposive-and-strained-construction', to use Bennion's apt phrase.[48] Examples are the acceptance, by the House of Lords, of the argument that homosexual lovers, linked by self-sacrificing bonds of love, are a 'family' within the meaning of Schedule 1 to the Rent Act of 1977,[49] or the insistence by the Australian Family Court that a post-operative female-to-male transsexual is a 'man' within the meaning of the

[41] L Enneccerus and HC Nipperdey *Allgemeiner Teil des Bürgerlichen Rechts* (15th edn Mohr Siebeck Tübingen 1959) 340 distinguish between two kinds of analogy: *Gesetzesanalogie* (the analogous application of individual statutory provisions beyond the text) and *Rechtsanalogie* (the discovery of principles which, though not made explicit in a statute, nevertheless underlie some of its provisions). In the absence of corresponding English terms, one may be forgiven for using these German terms in an English text. The useful and indeed necessary distinction between analogy and extension is implicit in WMC Gummow *Change and Continuity. Statute, Equity and Federalism* (OUP Oxford 1999) 11–22.

[42] Acts Interpretation Act 1901 (C'th) 15AA and 15AB and similar provisions in state legislation—for detail, see Pearce and Geddes *Statutory Interpretation in Australia* (5th edn Butterworths Chatswood NSW 2001) [2.7]–[2.9].

[43] ibid.

[44] This second requirement is most clearly satisfied when legislation is applied to a situation which the legislator could not have anticipated; for a useful example, see *Chappell and Co Ltd v Associated Radio Co of Australia Ltd* [1925] Victorian L Rep 350.

[45] 'Methodological theory defines analogy as a process of transferring a statutory provision . . . applicable to one set of facts to another set of facts which is [unambiguously] not covered by the provision, but is legally similar', V-58.

[46] *R v Newcastle-upon-Tyne Justices, ex parte Skinner* [1987] 1 WLR 312 (V-1018–21). A further example might be the decision of the House of Lords in the *Royal College of Nursing* Case [1981] AC 800.

[47] To similar effect is the following observation: 'French judges tend to disguise the filling of gaps as interpretation', Troper, Grzegorczyk and Gardies (n 33) 177.

[48] Bennion *A Code* (n 11) 810, 819–22.

[49] *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27.

https://doi.org/10.1093/iclq/lei051 Published online by Cambridge University Press

Commonwealth Marriage Act 1961.[50] Although such decisions involve some distortion of the ordinary linguistic meaning of words, that is considered justified by the enhanced ranking of purpose as an interpretative indicator.

(2) A theory of interpretation which treats all extensions by analogy as based upon interpretation would define *Gesetzesanalogie* out of existence.[51] A necessary ingredient of such a theory would be the assumption that a reasonable legislator wants the operation of statutes to match the regulatory intent which has prompted their enactment. This would be but one of a number of tacit assumptions which already control our dealings with statutes.[52] Advantages of such a theory would be that the distortion of the linguistic meaning of words could be avoided and that the true bases of decisions would become more clearly apparent. This should be favoured at least by those judges who admonish the courts to articulate values and thus lay bare the true choices being made.[53] However, one can hardly hope for these improvements, for distortion of language appears to be the preferred ground of justification in all the jurisdictions which Vogenauer has examined.

Not long ago, prominent English judges made it clear that they accepted no responsibility for the adaptation of statute law to new developments and to changed attitudes and mores in society.[54] If statute law itself is not open to further development by the courts, might it not be possible for the common law to perform this task? This question has been the subject of considerable debate, conducted under the 'analogy' label, in the literature of the common law. Responding to Pound's seminal article on this subject,[55] writers have suggested[56] that 'from statute there may be derived some principle to be applied by way of analogy in fashioning the common law'.[57] Thus, the common law is expected to carry policies inherent in statutes beyond statutory words, a process deemed impossible within the statutory sphere itself. In Australia, writers have advocated ideas similar to Pound's, albeit with some modifications to adjust them to Australia's federal system. The Australian High Court has shown itself unsympathetic,[58] but there is support in the Australian literature for the view that the jury on this subject is still out.[59] Cross and Harris gave examples to show that the common law courts, for many decades, have been taking the course suggested by Pound.[60]

[50] *Kevin, Re* (2001) Family L Rep 158.

[51] W Sax *Das strafrechtliche 'Analogieverbot'. Eine methodologische Untersuchung über die Grenzen der Auslegung im geltenden deutschen Strafrecht* (Göttingen Vendenhoeck & Ruprecht Göttingen 1953).

[52] German law may already have reached this point (V-59 n 287 and literature there listed).

[53] 'it would be . . . helpful . . . if judges frankly acknowledged their debt to their own social values, and the way in which these have in fact moulded or influenced their judgments rather than the application of strict legal principle', *Cattanach v Melchior* (2003) 215 CLR 1, 104 [291] (Callinan J); K Mason *Constancy and Change. Moral and Religious Values in the Australian Legal System* (1990) 3.

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

[55] R Pound 'Common Law and Legislation' (1908) 21 Harvard L Rev 383.

[56] Other writers to have discussed the problem in this form are R Cross and JW Harris *Precedent in English Law* (4th edn OUP Oxford 1991) 173–5; P Atiyah 'Common Law and Statute Law' (1985) 48 MLR 1; DStL Kelly 'The Osmond Case: Common Law and Statute Law' (1986) 60 Australian LJ 513; Gummow (n 41) 11–18; VM Brand 'Common Law Expansion of Statutes' (thesis 1987, on file at the University of Adelaide Law School). G Calabresi *A Common Law for the Age of Statutes* (Harvard University Press Cambridge Mass 1982) has put forward a more radical suggestion.

[57] Gummow (n 41) 11–12.

[58] *Lamb v Cotogno* (1987) 164 Commonwealth L Rep 1, 10–12.

[59] Gummow (n 41) 16–20.

[60] Cross and Harris (n 56) 173–5.

https://doi.org/10.1093/iclq/lei051 Published online by Cambridge University Press

Vogenauer's outlook, based on his study of the case law, is differentiated. He considers that, even in areas of the law which are exclusively of statutory origin, the courts will adapt and mould the law within certain limits.[61] This conclusion accords with Bennion's 'ongoing Acts' analysis as manifested in a number of English and Australian cases.[62] As concerns legislation which interacts with the common law, Vogenauer's conclusion is that the burden of further development is indeed already being carried mostly by the common law. If this is so, the common law can do without *Gesetzesanalogie* without losing any of its flexibility. The result is that the courts are developing statute law further in all the jurisdictions and that, notwithstanding differences in the jurisprudential understanding of the nature of case law, the similarities preponderate over the differences. It is submitted that Vogenauer has an excellent chance of being vindicated by further research and the future development of the common law.

VI. CONCLUSION

This work has opened a window on the history and on the inherent conceptual structure of the subject. Common lawyers will appreciate particularly that Vogenauer's account of the English case law is of great authenticity, achieved by the thorough and comprehensive search for relevant material and by the use of sophisticated analytical tools derived from the comparative method. A translation of this work into English, particularly of the parts which deal with English law, is urgently needed.

Most importantly, however, Vogenauer's book is a milestone in comparative legal literature. It has demolished many ideas widely entertained by comparativists and has brought to an end an era in comparative law when the differences between the civilian and the common law approaches to statutory interpretation could have been described as fundamental and well-nigh unbridgeable. The book marks a major advance towards a fuller understanding of statutory interpretation and the creation of a more or less unified approach within the European Union.

HORST KLAUS LÜCKE†

FRANKENSTEIN'S MONSTER: A REVIEW OF RECENT LITERATURE ON THE DEATH PENALTY IN THE UNITED STATES

The Contradictions of American Capital Punishment By FRANKLIN ZIMRING [Oxford OUP 2003]; *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* By JAMES WHITMAN [Oxford: OUP 2003]; *The Cultural Defense* By ALISON DUNDES RENTELN [Oxford: OUP 2004].

Oxford University Press has recently published these three texts which significantly contribute to the death penalty debate within the United States.

These texts offer poignant insights into the associated vicissitudes of the ultimate penal sanction, and because of the re-election of the Republican President, George W Bush, there is a *reasonable* expectation that the President's next wave of judicial appointments will be of those

[61] V-1139–47.

[62] Bennion (n 11) 762 distinguishes 'fixed-time Acts' (intended to have an unchanging meaning and effect) from 'ongoing Acts' ('always speaking', ie intended to develop in meaning and effect with developing circumstances). For examples of the latter, see *Chappell* (n 44), *Fitzpatrick*, (n 49) and *Kevin* (n 50).

† Professor Emeritus, University of Adelaide. The author is grateful to his colleague, Dr Steven Churches, for many useful suggestions. The translations were prepared by the author of this review except where otherwise indicated.

doi:10.1093/iclq/lei052

https://doi.org/10.1093/iclq/lei051 Published online by Cambridge University Press