JUDICIAL FAIRNESS IN THE REALM OF STRICT LAW: Comparative Insights around a Classic Encroachment Case

Anne-Françoise Debruche

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Introduction

In a single drop of ditchwater, some people can see whole crowded cities and, thus, observe large segments of life. Such is the argument of a short tale written by Hans Christian Andersen. It shows that everything is in the eye of the beholder: the object studied, even if thought as relatively unimportant by itself, can prompt a surprising variety of far-reaching observations. The same argument applies to certain legal micro-problems: closer study may reveal fundamental propositions about law itself. Such is the case with encroachments on neighbouring land. Trespass on another’s ground, when studied through a comparative lens, leads to a number of wide-ranging considerations about judicial fairness and the interdependence of legal domains, as well as about the difficulties in importing institutions from one legal system into another. Thus, encroachment disputes can be a source of almost endless wonder for the comparatist, all the more so if he or she walks the path of the ius commune.

To start from a practical case, let us describe a typical encroachment situation. Two neighbours have been living in peace and concord in a quiet corner of the world until some day one of them decides to build an extension to his house. He discusses his plans with his friend and neighbour in general terms and enquires vaguely about the boundaries of the other’s land. Satisfied with an equally vague reassurance (‘Oh, sure, the boundary must be there, by the cherry tree; go ahead’), he proceeds to build the extension. At some point in time, a quarrel breaks out between the two households. In search of a legal stick to hit his neighbour with, the other suddenly finds out that the extension slightly encroaches on his land. Thereupon he institutes an action in demolition of the illegal encroachment.

1 Lecture held at the 9th Ius Commune Conference, Leuven, 25 November 2004.

2 Professor at the University of Ottawa (beginning next academic year); currently assistant and maître de conférence at the University of Liège, Belgium. I would like to thank my colleagues at the Quebec Research Centre of Private and Comparative Law, McGill University, Montreal, for their precious help with and comments on the preparation of this conference, and especially Mathieu Devinat, Mario Naccarato and Professor Jean-Guy Belley for their insights and suggestions.
The stage is set: this is the case that we are going to submit to a comparative analysis in order to observe, like Andersen in his drop of water, a legal building of some proportions. The foundations of this building are to be found in the following reasoning. In the four legal entities selected here for study (France, England, Belgium, Quebec), the plaintiff is *prima facie* entitled to demolition. He invokes a real right (property right, freehold estate, or any other) endowed with strict protection. But in the case described above, the encroachment is slight. Therefore, demolition may seem out of proportion to this small infringement of the neighbour’s strict rights. Can judges refuse demolition if they feel it is not the ‘right’ or ‘fair’ outcome of the case? And if so, on what basis? The answer will enable us, in the first part of this contribution, to determine how much space judges in each system have to express their feelings of fairness within the rules of positive law, also called ‘strict’ law. Next, in the second part, we will consider the types of problems the coexistence of judicial fairness and strict law may cause. In the third and last section, we will attempt to show how those findings may be pertinent to the *ius commune* reflection, in order to enrich and deepen it.

I Pathfinding: Expressions of judicial fairness in the realm of strict law

I.A A French cartography

Let us start the first part with the strictest law of all four systems, the law of France. French law, as interpreted and zealously guarded against unorthodoxy by the Court of Cassation, purports that all illicit encroachments must be removed. It does not matter whether the trespass is infinitesimal, was made in good faith or that the victim did not object to it. In our test case, a French plaintiff would thus encounter no difficulties at all in obtaining a judgement ordering the demolition of the trespassing portion. His real action, based on the inviolability of his sacrosanct property right, would be a complete success with the blessing of the Court of Cassation. Needless to say, many trial judges and courts of appeal feel ill at ease with the strict orthodox point of view upheld by their supreme civil court. Their sense of fairness is hurt when the balance of equities favours the defendant. In the case described, they would point out that he proceeded in good faith and that the plaintiff encouraged him by giving him false reassurances concerning the boundaries of his land. They would also emphasize the relative unimportance of the encroachment, as well as the harshness demolition would represent. But how would they justify their refusal to order demolition in a system where judges are reputedly considered, ever since the French Revolution, as the ‘mouth of the law’ and the respectful servants of the Civil Code? Relentlessly, over the years, they have tried to avoid unfair demolitions by using the only means of action their hierarchy

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3 For example, see Cass. civ. 3ème, 20 March 2002, *Bull. civ.* III, n° 71, p. 61; Cass. civ. 3ème, 3 June 1941, *Gaz. Pal.* 1941, 2, 65; Cass. civ. 15 July 1901, S. 1902, 1, 217. The present lecture rests on the findings exposed in a PhD thesis defended at the University of Liège in May 2004 and entitled *Équité du juge et territoires de droit privé. Le paradoxe de l’emprise immobilière dans les systèmes romanistes et de common law* (Judicial fairness and forms of action: The paradox of land encroachments in civil and common law systems), to be published by Bruylant (Belgium) and Yvon Blais (Quebec) in 2006. In this brief presentation I will thus refer systematically to the thesis as it stands unpublished for additional discussion and references, which I will keep short here.
of legal sources allows them – namely, through extensive interpretation of the Civil Code. I will only mention three of their boldest attempts, all severely curtailed by the Court of Cassation.

I.A.1 Article 1143 of the Civil Code: The obligations path

The first attempt to circumvent unjust demolitions was rooted in Article 1143 of the Civil Code – thus, in the realm of contract law. The legal domain commonly referred to as ‘the law of obligations’ contains a provision, Article 1143, stating that the creditor has the right to ask for the demolition of any work constructed in violation of a prior obligation. Nevertheless, French judges have traditionally enjoyed the discretion to refuse such demolition when they felt that damages were a better way of ensuring the execution of the obligation. When Article 1143 was used as a ground for a claim in demolition of an encroachment, for instance buildings erected in violation of servitudes (easements) called de lotissement, French courts felt free to refuse any demolition they felt unfair and to grant damages instead. Of course, that solution would not help the defendant in our test case because he did not infringe on a servitude, but on the property right of his neighbour. But it saved many buildings built in contradiction to the cahier des charges de lotissements, until the Court of Cassation put a stop to this open expression of judicial fairness by excluding all discretion in the application of Article 1143.

I.A.2 The abuse of rights theory: The quasi-delictual path

The second instrument used to avoid unfair demolition was, as can be expected, the doctrine of abuse of rights. Obviously, including in our test case, judges could and did come to the conclusion that the real action in demolition of the encroachment was an abuse of the right of property on behalf of the plaintiff. However, the Court of Cassation rejected this fair shortcut outright in 1992: no defence of a real right could possibly be deemed ‘abusive’, only the use of such a right could.

I.A.3 The référe: The procedural path

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The third way used by French judges to express their sense of fairness was limited to the judges seized of an action called en référé. Such actions are immensely popular because of their quick proceedings, despite the fact that judgments au provisoire can be ultimately upturned by a judgment on the merits. Asked en référé to grant the demolition of an encroachment characterized as a trouble manifestement illicite (obviously illicit offence), the judge could use his discretionary power to choose the appropriate measure and refuse the demolition on account of its oppressive nature. In our test case, he could have done so. But the Court of Cassation closed this last door to judicial fairness when it decided that when the offence was ‘obviously illicit’, it had to be suppressed without any regard to justice or equitable considerations.

So, in France, the judge would have to order the demolition of the encroachment in any case, including in our test case. The judicial sense of fairness can find no voice in the orthodox cathedral of French strict law: the Court of Cassation saw to that.

I.B An English cartography

The situation of English judges could be no farther remote from their French counterparts. The root of this contrast lies in history and in the theory of legal sources that spontaneously blossomed in English law. Where the French judge is seen as a servant of the written law, the English judge voices a law of its own: the common law, also aptly called ‘judge-made law’. True, this common law can be amended by statute law: as a legal source, it is technically inferior to statute law. But in turn, statute law grows on the body of the existing common law like ivy on a tree; it hardly exists independently. Moreover, statute law is interpreted and applied by the judges who are the source of the ‘rival’ legal body of norms – the common law. Therefore, English judges extend their power sphere by interpreting strictly or restrictively the statutes, and correlative by voicing the common law as broadly as they can.

The starting point in common law is the same as the position under orthodox French law. Illicit encroachments have to be suppressed, either in the realm of torts (quasi-delicts), as a trespass or a nuisance, or in the realm of land law, through an action in recovery of land. But English judges, immemorial oracles of the common law, were able to devise some wide alleys in which judicial fairness could flow and amend the harshness of the demolition principle.

I.B.1 The path of proprietary estoppel

The first path open to judicial fairness in England regarding encroachments lays in the estoppel doctrine. At the outset, estoppel is a basic procedural principle: a party cannot deny

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8 That discretion results from the very wording of Arts. 808 and 809, al. 1 of the New Code of Civil Procedure (use of the word peut, i.e. ‘can’, to describe the power of the judge to award the requested measure); Jacques Normand, R.T.D. civ. 1985, p. 439.

what has been previously affirmed to another party when the latter relied on that representation to his or her detriment. From this basic principle stemmed many types of estoppel, which play diverse roles in various areas of English private and public law – estoppel is thus, to quote Lord Denning, ‘a house with many rooms in it’. In our encroachment test case, the estoppel involved would have been an estoppel by acquiescence, also called ‘proprietary estoppel’. The plaintiff made a representation to the defendant regarding the location of the dividing line between their lands. The defendant relied on it by building his extension up to that line. To grant demolition now would be detrimental to him, as well as globally unconscionable on account of the circumstances of the case. The general criterion of ‘unconscionability’, which underlies the action of proprietary estoppel, echoes the judicial preoccupation with fairness. When successful, proprietary estoppel enables the English judge to refuse the demolition and either grant damages or compel the acquisition of a right of lease or easement.

1.B.2 The path of injunction

The second path allowing for the expression of judicial fairness in encroachment litigation revolves around an equitable remedy, the injunction. Most actions directed against encroachments nowadays are actions in torts, namely torts of nuisance and trespass. The quasi-delictual nature of those actions explains why they can only lead to the grant of damages. To ensure the suppression of the encroachment, the victim must join a request for an injunction to the action in tort. An injunction is simply a judicial order to do or not to do something. It is severely sanctioned, through contempt of court, by damages and/or imprisonment. The remedy of injunction was devised by the Chancery jurisdiction and is thus particularly receptive to the ‘conscience’ of the judge asked to grant it. In other words, injunctions are discretionary. In our test case, if the plaintiff had filed an action in trespass and asked for an injunction in demolition, the injunction would more than likely have been refused in the name of equitable considerations. The judge would have outlined the good faith of the defendant, the acquiescence of the plaintiff, the minimal damage resulting from the encroachment and the hardship demolition would imply. The injunction would have been refused as being ‘oppressive’.


Through the doctrine of proprietary estoppel and the discretionary character of injunctions, English ‘strict’ judge-made law openly invites its judges to express their fairness.

I.C A Belgian cartography

Let us cross the Channel and now consider Belgian law. Belgian judges wished to be as fair as English courts, but they had to undertake it under the cover of interpreting the Civil Code. This they did with great effectiveness, using the theory of abuse of rights far in advance of French judges. Unlike the French Court of Cassation, its Belgian counterpart in 1971 warmly approved the application of the doctrine of abuse of rights to encroachment cases. Since then, its fortune has never been tarnished – quite the opposite. In our test case, as every Belgian jurist present in this room surely knows, the demolition requested would be rejected as ‘abusive’ as a result of the disproportion existing between the damage it would cause and the relatively small prejudice resulting from the trespassing portion. Therefore, Belgian judges dealing with an encroachment case are able to express their fairness when they see fit, thanks to a judicial Proteus at work in many areas of private law: the abuse of rights theory.

I.D A Quebec cartography

Last but not least, the situation of the Quebec judge is interesting because he evolves in a mixed jurisdiction. The Quebec Civil Code remains mostly of French inspiration, but the civil procedure is largely indebted to the common law. Moreover, common law institutions are regularly imported from the neighbouring provinces to flourish in Quebec law. The basic position of the Quebec Civil Code regarding encroachments is the same as in France or Belgium: any illicit trespassing portion violating another’s real right must be suppressed. But Article 992 provides that in some restrictively defined circumstances the victim can be made to choose between damages and granting a servitude. Does it mean that judges can do nothing?

Quebec judges manage, among other means that I will not mention here, to express their fairness in the same way as many English judges do. They use the discretionary power associated to the granting or refusal of the injunction in demolition of the encroachment. The story of how and especially why common law injunctions were imported into Quebec private law is a long and interesting one, but I will not attempt to tell it here today. Suffice it to say that Quebec practitioners saw injunction as the proper remedy to a double gap in Quebec law.


16 The chief one among those is the acclimatization of a disguised form of estoppel in property law, shaped as the implicit concession of a real right making the encroachment licit. The favoured real right in that respect is the Quebec right of superficie: see, for instance, Belleville v. Beaulieu, [2002] R.D.I. 288 [C.S.] and on that subject, Équité du juge, supra note 3, pp. 353-381.
private law. The first gap concerned the absence of an interlocutory, quick-paced procedure while awaiting a permanent judgment. The second gap pertained to the inefficiency of the procedure designed to ensure the compulsory execution of non-monetary obligations. The use of injunctions in encroachment cases and, more generally, its acclimatization in the area of property law pertains to the second gap. Injunctions thus supplement or replace classic real actions in order to ensure the actual removal of the illicit structure on the plaintiff’s land.\(^\text{17}\) Thanks to the popularity of the injunction remedy in property law, Quebec judges are therefore able to express their feeling of fairness in encroachment cases, just as English judges do when they take into account equitable considerations to reject ‘oppressive’ injunctions.\(^\text{18}\) In that way, they manage to go beyond the text of Article 992 of the Quebec Civil Code that tends to deprive them of such power.

II Judicial fairness v. strict law: An ill-chartered neighbour story

What are the metes and bounds of the neighbour relationship between judicial fairness and strict law? In other words, what are the problems resulting from the manifestations of judicial fairness in the fabric of strict law, as is evidenced by the encroachment issue in the four systems selected? In the second part of this lecture, I will attempt to classify those problems into three broad categories in order to improve the charter of this composite neighbourhood. The first category of problems concerns the relative unpredictability of the applicable rule of law when originating from the judge rather than from a legislative body. For clarity’s sake, let us call it the ‘source problem’. The second category deals with the effects of the inevitable interdependence of legal areas or domains – such as the law of obligations, tort law, property law, etc. Again, to make it short, let us name it the ‘interdependence problem’. The third and last category of problems associated with the emergence of judicial fairness in the realm of strict law concerns the drawbacks linked to the import of ‘foreign’ institutions into a given system – thus, the ‘import problem’.

II.A The source problem

Judge-made institutions may be open to the expression of each judge’s sense of fairness and thus be deemed laudable. But they may also be criticized in the name of the unpredictability this permeability to fairness implies. The scarlet letter of unpredictability can be observed in the decisions granting or not injunctions in England and Quebec. The same is true of the application of the doctrine of abuse of rights in Belgium and the doctrine of proprietary estoppel in English common law. Admittedly, when all equitable factors favour a single party, unpredictability is kept at bay. Such was the situation in our test case: the encroachment was


slight, there was acquiescence on the part of the plaintiff and the defendant had showed good faith all along. But what happens when some criteria are in favour of one party while some other criteria point the other way? This is often the case in real life. Judicial decisions show us defendants that were slightly or grossly negligent, plaintiffs that knew of the encroachment but said nothing, or knew nothing at all, and intrusions that range from minimal to substantial. In such cases, which are numerous, the equity of the judge will express itself with an unpredictability that even the rule of precedent cannot alleviate totally. Because they embody this judicial sense of fairness, mechanisms such as the injunction and doctrines such as proprietary estoppel or the abuse of rights are themselves shrouded in unpredictability.

But judge-made institutions attuned to fairness are not only unpredictable in their own applications. They also communicate this unpredictability to other rules in the realm of property law, thus making their applications uncertain. The difficult coexistence between proprietary estoppel and the new system of land titles registration in England is a good example of this communicative unpredictability. The indefeasibility of title promoted by statute under the new system gives way, in certain circumstances, to the doctrine of proprietary estoppel. Thanks to this allowance, unpredictability creeps in again in a land registration system that had vowed to eliminate it. The living remains of those ‘equities born of fraud and fear’ may irk English jurists anxious to systematize their native law, but for the moment they are there to stay and must be taken into account by practitioners.

II.B The interdependence problem

Let us now turn to the second category of problems linked to the expression of judicial equity in the fabric of strict law, the ‘interdependence problem’. In Belgium and France, we observed that encroachment cases, while indigenous to the area of property law, were sometimes solved through the use of institutions borrowed from other legal domains. In France, Article 1143 of the Civil Code, natural citizen of the law of obligations, was thus applied to avoid the demolition of buildings erected in violation of a servitude of lotissement. Conversely, in Belgium the theory of abuse of rights has been used with great effect in encroachment cases, while usually considered as founded on Article 1382 of the Civil Code and thus implying a quasi-delict. In both Belgium and France, the encroachment of one legal domain on another served the cause of judicial fairness, but it also did some damage to strict law through friendly fire. In the case of Article 1143, the intrusion of the law of obligations into the domain of property law simply backfired. To protect real rights from the expression of judicial fairness, the French Court of Cassation modified its interpretation of Article 1143. Judges no longer enjoy any discretion in its application, not even in the realm of obligations. Because that Article had been stretched too far, its interpretation was restricted once and for all. The damage caused by the doctrine of abuse of rights to Belgian strict law is even more wide-spread. The abuse of rights theory has certainly blossomed in property law and encroachment cases. But its journey did not stop there. Adding many passports to its original quasi-delictual one, the doctrine of abuse of rights is rapidly spreading to all areas of Belgian private law. Its fortune in contract law is well known, as it is in labour law, company law, etc. Wherever it roams, this Proteus of a doctrine brings in more judicial fairness and power, at the expense of the existing strict law. It could almost be said that its true form is that of a
Trojan horse, sprouting more and more enemies of strict rules each passing court day in the legal domains invaded.

II.C The import problem

The third and last problem relating to the expression of judicial equity within strict law territory has been labelled the ‘import problem’. It is best observed in relation to the use of the injunction in Quebec property law. I pointed out earlier that the import of injunction into Quebec private law was prompted by practical concerns. In the matter of encroachments, for instance, injunctions provided an efficient way to ensure that the demolition ordered would actually be carried out. In that case, the desirable feature of the injunction was its sanction through contempt of court. But injunction, in English as well as in Canadian common law, is also an equitable remedy that relies heavily on judicial discretion. Such discretion fits in perfectly with the philosophy of tort law where the encroachment is analysed as a trespass or a nuisance. As a tort, encroachment thus calls for reparation, be it in damages or through an injunction. But the discretionary dimension of the injunction clashes directly with the restitutive philosophy underlying Quebec real actions. Real actions protect real rights with maximum efficiency, thus in nature through restitution of the land taken or demolition of encroachments. Having imported what they thought was a mere procedural remedy, Quebec jurists are finding out with some dismay it had a substantive dimension as well – a substantive life of its own, fed by equitable tradition and judge-made law. The actors of Quebec legal life have not quite decided yet what to do about this imported pet tiger’s sudden deafening roars. But many judges are encouraging it to assert itself to make the voice of fairness heard.

III Judicial fairness in the realm of the ius commune: A room with a view

How can these comparative findings enrich the ius commune reflection? It seems the answer can be presented in three parts, mirroring the three types of problems caused by the expression of judicial fairness in strict law. Accordingly, we will thus have a ‘source reflection’, an ‘interdependence reflection’ and an ‘import reflection’. I will discuss them in that order to conclude, thus applying the wise counsel of the King in Alice in Wonderland: ‘Begin at the beginning, and go on till you come to the end; then stop’.

III.A The source reflection

Through the encroachment theme, we have seen how judge-made institutions can both incorporate a certain amount of fairness into strict law and make the practice of rule finding more difficult. It is the classic case of equity versus predictability, well known in the context of the rise of the Chancery jurisdiction through the wry joke about the length of the Chancellor’s foot. If the path of the ius commune is seen as leading towards the implementation of a common civil law, those treading it must remain aware of the creative power of the national judges regarding the legislation they apply. At its lower strength, judicial power allows the extensive interpretation of statutes or codes – such is the case, we
have seen, for the doctrine of abuse of rights in Belgium. At its peak, judicial power means that the judge is the creator of a specific body of law that coexists with legislative law. This, of course, is the case in England, where common law and statute law are intertwined, and where judge-made law incorporates remarkable institutions such as proprietary estoppel and injunction. Whatever its intensity, judicial power generally implies a search for more equity in borderline cases and, consequently, more unpredictability. This unpredictability affects both the judge-made constructions and the statutes they may interfere with.

If the way to a European civil law is paved with statutory reforms, the judicial action on those statutes and around them should not be underestimated. In England, there will be a threat of increasing unpredictability by reason of the existing common law as well as by reason of the restrictive interpretation English judges are tempted to make of statutes. In Belgium and France, the unpredictability would stem from an extensive – some would say ‘overcreative’ – interpretation of the same statutes. Besides, it is clear from those examples that there would be increasing discrepancies between the countries themselves, since the judicial approaches to statute law differ greatly. To lessen the impact of the diversity among the judicial relationships to the legal rule, the orthodoxy of the French Court of Cassation regarding encroachment cases may be worth remembering. A centralized court empowered to strike out excessive interpretations by national judges and to impose a unified interpretation of the common civil law would definitely normalize the legal landscape.

III.B The interdependence reflection

The encroachment theme showed clearly how practical problems, however minor at first sight, have the potential to relate simultaneously to several legal domains. We have also seen that judges were quick to discover those diverse ties in their search for fairness. This interdependence of legal areas composing the map of private law poses a problem when dispositions pertaining to one domain are exported to another. Sometimes they modify rules in the importing domain. At other times, they return to their home domain with a new interpretation. Under the ius commune lens, the lesson of interdependence is the following: no domain should be thought of separately. Contract law, for instance, should not be considered by itself, in vacuo, cut from property law or the law of quasi-delicts. The same applies to those two domains. Together, they form the matrix of private law and must be thought as a whole, keeping in mind that key rules may shift from their native domain and emigrate to others, thus altering those domains or the key rules themselves in the transfer.

III.C The import reflection

Finally, the ‘import reflection’ teaches us to ponder every aspect of institutions that are to be transferred in a legal order to which they are not indigenous. To avoid finding themselves in the delicate position of Quebec jurists facing the injunction tiger, the proposed builders of a European private law must carefully study how a selected national institution relates to its original legal background, both in terms of procedure and of substantive law. Then, they should repeat this operation in relation to the legal landscape of every importing country. Only then will they minimize the risks of the imported institutions growing unexpected roots,
or lacking the nutriments they need to flourish.

So, the single drop of water revealed, under closer study, some interesting and quite unexpected sights. A legal micro-problem – a case of encroachment – suggested what a macro-problem the construction a common core of private law would prove. The task may seem Herculean at first, but those who undertake the work of the *ius commune* must keep their hopes up and tackle each challenge one at a time. At all cost they must refrain from oversimplification that would keep legal monsters prowling undefeated in the dark. Only by understanding the nature of each single work assigned to him, by showing resourcefulness and by accepting the help from others (his nephew Iolaos) did Heracles complete his prodigious undertaking and gain eternal fame. This is the type of success I wish to the *ius commune* heroes in the making. I felt privileged in sharing some comparative reflections with them and their supporters today.