Legislative drafting: a judicial perspective

Hon. Mr Justice Bokhary PJ[1]

Abstract:

Drafting should neither create complication nor sacrifice certainty in the pursuit of simplicity. Statutes are meant to be workable. Courts strive to give legislation a workable construction. Drafting is especially difficult when the legislative "will" is an uncomfortable amalgam of conflicting wishes. Then the courts' best course may be to hold an even balance by following the language of the statute as closely as possible. In a plain case of drafting error the courts' interpretative role includes adding, omitting and substituting words to preserve the statute's obvious purpose. If the intention is to cast a wide net, care must be taken to employ sufficiently wide language. Some subjects call for considerable statutory detail. Others are well served by statements of intention. Everyone must guard against attempts to employ legislation by reference to subvert democracy by making it difficult for legislators to see what the promoters are doing and then for the public to see what has been done. Legislative counsel construct statutes to embody the legislature's purpose. Courts construe statutes purposively. They work towards the same objective.

Introduction

The earliest law-givers appear to have seen the law as unalterable and to have directed their efforts to making that law known rather than to creating new laws.[2] Eventually it came to be

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[1] Justice of the Court of Final Appeal, Hong Kong. This paper was presented at the CALC Conference in Hong Kong, 1-5 April 2009.

[2] FA Hayek, *Law, Legislation and Liberty,* Vol.1 (Revised 1982 ed.) at p. 81.

recognised that "the legislator is the law-maker who can overtly change the law [while] the interpreter is the law-maker … whose innovation is firmly restrained by the duty to explain his conclusions as consonant with existing legal authority".[3]

There was a time when judges regularly took part in the drafting of statutes, but that was centuries ago.[4] Today's judges are concerned with the product rather than the process of legislative drafting. Can we nevertheless offer something of use to legislative counsel in their work? Our best chance of doing so lies, I think, in providing them with a better understanding of how we do our own work. Any observations that we make on how they do their work should be made with a proper understanding of the difficulties that they face.

Constitutional cases

Where its constitutionality is challenged, legislation may be upheld, read down or struck down. More often, the judicial function is to apply legislation – after interpreting it where necessary. Constitutional rights and freedoms, the Court of Final Appeal has consistently declared, are to be interpreted generously so that people may enjoy them in full measure. Extra-judicially, I have added that constitutional cases should be decided "in a manner which is fully faithful both to the letter and to the spirit of the constitution, and which accords with the highest ideals of the people at their best".[5]

Ordinary Cases: Purposive Interpretation

Conformably with that constitutional approach, we interpret ordinary legislation purposively. In *Medical Council of Hong Kong v. Chow Siu Shek* we held that "it is necessary to read all of the relevant provisions together and in the context of the whole statute as a purposive unity in its appropriate legal and social setting [and] to identify the interpretative considerations involved and then, if they conflict, to weigh and balance them".[6]

Being the author of that expression "the whole statute as a purposive unity", I should disclose that I formulated it after and despite hearing the story of an eminent Queen's Counsel (later a Law Lord) opening a company appeal to the House of Lords by reading from the 1948 United Kingdom Act , starting at section 1. When he had read up to section 32 and was still going strong, he was asked from the chair whether he intended to read out the *entire* Act. "Yes" he said. "Why?" he was asked. Because, he explained, on the last occasion when he had appeared before their Lordships, he relied on a single subsection of the same Act, but his argument was rejected on the basis that the subsection had to be read in the context of the Act as a whole. He was promptly told that he did not have to read out any more of the Act.

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3 Peter Birks and Grant McLeod, *Justinian's Institutes* (1987) at p. 11.

4 Julius Stone, *Legal System and Lawyers' Reasonings* (1964) at pp 237n and 349.

5 *Making Law in the Courts* (2002) 10 APLR 155 at p. 160.

6 (2000) 3 HKCFAR 144 at p.154B-C.

Where an argument is rejected because it fails to approach a statute as a purposive unity, it should not be difficult to indicate precisely why it so fails. The Court of Final Appeal once did so in a single sentence when we said, in regard to the *Inland Revenue Ordinance*, Cap.112, that the taxpayer's argument "focuses on the operation of sections 15, 20B and 21A to the point of losing sight of section 60's proper role as preserved by the proviso to section70."[7]

Every statute must, as Lord du Parcq observed in *Bombay Province v. Bombay Municipal Corp*, "be supposed to be 'for the public good', at least in intention".[8] And there is nothing new in the idea of purposive interpretation aimed at promoting underlying legislative policy. In *Stradling v. Morgan* the Barons of the Exchequer said that "the sages of the law … have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion".[9] Context and object were stressed by Chief Justice Abbott in *R v. Hall*. Meaning is, he said, "to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion, on which they are used, and the object that is intended to be obtained."[10] That statement was cited with approval by Lord Romilly MR when giving the advice of the Privy Council in *The "Lion"*.[11]

In the famous note which he added to his report of the decision of the Court of Common Pleas in *Eyston v. Studd*, Edmund Plowden wrote that "it is not the words of the law, but the internal sense of it that makes the law, [which] consists of two parts, *viz* of body and soul, the letter of the law is the body of the law, and the sense and reason of the law is the soul of the law".[12] Citing that in *Ho Choi Wan v. Hong Kong Housing Authority*, I ventured to observe that "[t]he imagery is of another age, but accords with the modern view of the law as a rational problem-solver [and also] with the concept of giving a statute the construction that best furthers its policy".[13] None of this is to ignore the words of the statute. The intention of the legislature is, as Lord Nicholls of Birkenhead explained in *R v. Environment Secretary, ex p Spath Holme Ltd*, "the intention which the court reasonably imputes to [the legislature] in respect of the language used".[14] Lord Chancellor Jowitt's 1946 statement in *Joyce v. DPP* about a 1351 statute – namely that "[i]t is not an extension of a penal law to apply its principle to circumstances unforeseen at the time of its

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7 *Lam Soon Trademark Ltd v. Commissioner of Inland Revenue* (2006) 9 HKCFAR 391 at p. 399E-F.

8 [1947] AC 58 at p. 63.

9 (2 Eliz. I) 1 Plowden 199 at p. 205.

10 (1882) 1 B & C 123 at p. 136.

11 (1869) LR 2 PC 525 at p. 530.

12 (1574) 2 Plowden 459 at p. 465.

13 (2005) 8 HKCFAR 628 at p. 652B-C.

14 [2001] 2 AC 349 at p. 396G.

enactment, so long as the case is fairly brought within its language"[15] – shows that statutes are construed as always speaking, purposively and with due regard to their wording.

Something more readable

Lord Justice Mackinnon called the *Bills of Exchange Act, 1882* "the best drafted Act of Parliament ever passed".[16] Other contenders include the *Partnership Act, 1890*, the *Sale of Goods Act, 1893* and the *Marine Insurance Act, 1906*. Of these four statutes, the credit goes principally to Sir Frederick Pollock for the one on partnership and to Sir Mackenzie Chalmers for the other three. Each of those four statutes addresses a subject on which the persons most likely to be involved tend to be knowledgeable themselves and moreover to have ready access to legal advice.

On other subjects – such as one's job, to take a single example –people naturally like to be able to discover their legal position by reading the relevant statute for themselves. But in Hong Kong – and I suspect in a number of other places, too – the statute on employment is hard even for lawyers, let alone laymen, to follow. Some of these difficulties flow from the nature of the subject, but others are due to drafting style. In *Knill v. Towse*[17] the question was whether a person was entitled to vote in two electoral divisions at the same election. Giving the judgment of the Divisional Court of the Queen's Bench Division, Mr Justice Mathew stressed how important it was that "in practical matters of every day concern, such as the possession and exercise of the franchise … the law conferring it, and the rules which govern its exercise, should be easily comprehensible by the mass of the ordinary voters".[18]

None of that is to deny that the law has, to some extent, a vocabulary of its own. Some expressions are so deeply embedded in the cases that it may be preferable to adhere to them even though better expressions could be found if one were starting with a clean slate. Sitting in the High Court of Admiralty, Sir William Scott (later Lord Stowell) said that the expression "particular average" was "not a very accurate expression" for what it meant was "no average at all, but still the expression [was] sufficiently understood, and received into familiar use".[19] Legal terms of art have their place.

As simple as possible but no simpler

I think that it has been said – and it is certainly worth saying – that everything should be made as simple as possible but no simpler. Drafting is of course open to legitimate criticism if it creates complication. But it is always necessary to bear in mind the point made in the Renton Report that

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15 [1946] AC 347 at p. 366.

16 *Bank Polski v. K J Mulder & Co*. [1942] 1 KB 497 at p. 500.

17 (1889) 24 QBD 186.

18 Ibid. at p. 196.

19 *The "Copenhagen"* (1779) 1 Ch Rob 289 at p. 293.

"the draftsman must never be forced to sacrifice certainty for simplicity, since the result may be to frustrate the legislative intention".[20]

Where the substance of a statutory scheme is highly complex, it is difficult to see how the scheme can be expressed fully and accurately in a simple form. Hong Kong's tax regime being relatively simple, the Inland Revenue Ordinance is for the most part expressed in terms of corresponding simplicity. Tax avoidance is dealt with by a general anti-avoidance rule rather than a host of targeted anti-avoidance rules. A more complicated tax regime would naturally call for more elaborate provisions. Since persons are to be taxed by the legislature and not the courts, it is of constitutional importance that the legislature makes it clear what taxes it is imposing. None of this is to forget Jacqueline Dyson's valuable observation that "[q]uite apart from any simplification of the language used by the legislators, general principles drafting could be used so that the courts could go further than they have in adopting a purposive method of construing Finance Acts".[21] Mind you, I would not blame legislative counsel if they are not wholly convinced that ministers would always stand up for general principles drafting when quizzed by legislators on the implications of the proposed statute. And what about the judges? I can say at least that, as has been explained by Sir Anthony Mason, we ought to appreciate that general principles drafting may call for greater breadth of vision on our part and certainly increases the importance of our having an informed understanding of the relevant legislative scheme and the ways in which it can operate.[22]

Deeming

Statutory deeming is common, and is resorted to for a variety of purposes, the primary purpose being, as Viscount Simonds said in *Barclays Bank Ltd v. Inland Revenue Commissioners*, "to bring in something which would otherwise be excluded".[23] Sir Robert Megarry[24] has drawn attention to this sentence which appeared, almost unchanged, in at least 16 National Insurance Acts in more than 25 years:

> "For the purposes of this Part of this Schedule a person over pensionable age, not being an insured person, shall be treated as an employed person if he would be an insured person were he under pensionable age and would be an employed person were he an insured person."

Wording of that type is almost traditionally cited for the purpose of raising a laugh against legislative counsel. But to be fair, the sentence's longevity suggests that it played its part in enabling those who administered the National Insurance scheme to carry out Parliament's intention. And I have a feeling that it would take very many more words to express the same idea

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20 Cmnd 6053, para. 11.5 (UK).

21 *Legislation and the Courts* (ed. M Freeman) (1997) at pp. 58-59

22 *The Mason Papers* (ed. Geoffrey Lindell) (2007) at p. 54.

23 [1961] AC 509 at p. 523.

24 *A New Miscellany-at-Law* (2005) at p. 192.

in a more readable form. That said, it is necessary to remember that "it is always difficult to foresee all the possible consequences of the artificial state of affairs that the deeming brings into being".[25] Since a thing may be deemed for all or only some purposes and as between all or only some persons, it would help the courts if legislative counsel always made the position express rather than leave it to implication.

Origin of Interpretation Clauses

Next, I venture to offer some observations on interpretation clauses. Such clauses do not appear to be of any antiquity. In 1852, Lord St Leonards LC said that they were of "modern origin".[26] By 1865, Chief Justice Cockburn had lost patience with interpretation clauses. He voiced the hope that "the time will come when we shall see no more of interpretation clauses, for they generally lead to confusion".[27] In 1885 Lord Blackburn referred to "the soundness of the objection of the old school of draftsman to the introduction of interpretation clauses".[28] Even in recent times, it has been said that when statutes provide definitions, that "often creates more problems than it solves"[29] and that the "definitions themselves are often not clear and may be subject to interpretation".[30] On the other hand, it is pointed out in a leading text (one of the editors of which had been First Parliamentary Counsel) that interpretation clauses "are responsible for a great deal of economy in drafting".[31] And—at least as importantly, I think—that provides a corresponding measure of economy in reading.

Noting that interpretation clauses now form an established and important feature of our statute law, the Court of Final Appeal has said that—

> "no useful purpose would be served by viewing interpretation clauses with hostility or suspicion. The proper approach is to read them purposefully and with the context very much in mind."[32]

Unless the context otherwise requires

Whether of the "means" or "includes" type, the definitions given in interpretation clauses are generally if not invariably qualified by the formula "unless the context otherwise requires" or some such formula. A point has been made about that by Sir William Dale in this imaginary conversation:

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25 *Murphy v. Ingram* [1973] Ch 434 at p. 446.

26 *Dean of Ely v. Bliss* (1852) 2 De GM & G 459 at p. 471.

27 *Wakefield Local Board of Health v. West Riding & Grimsby Railway Co*. (1865) 6 B & S 794 at p. 801.

28 *Mayor of Portsmouth v. Smith* (1885) 10 App Cas 364 at p. 374.

29 Lord Reid in *Brutus v. Cozens* [1973] AC 854 at p. 861H.

30 *Sutherland Statutory Construction,* 5th ed. (1992), vol.2A, at p. 152, para. 47.07.

31 Cross on *Statutory Interpretation*, 3rd ed. (1995) at p. 120.

32 *Lisbeth Enterprises Ltd v. Mandy Luk* (2006) 9 HKCFAR 131 at p. 139G-H.

> "*Solicitor*: I am not an expert in copyright law, you know. But let us see what the Act says. You've explained your objection to 'In this Act "copyright" … means …' Now read on.
>
> *Author*: 'means the exclusive right …'
>
> *Solicitor*: You've left something out, 'except where the context otherwise requires'.
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> *Author*: That is to say, copyright means what the Act says it does, except where it means something different?
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> *Solicitor*: More or less – it's a favourite formula. One has to wait and see whether in any passage the general drift indicates something different.
>
> *Author*: I do not call that helpful. The seed of uncertainty is sown at the outset." [33]

Such a reaction, while understandable, is hardly the last word on the subject. Speaking from experience, a legislative counsel has pointed out that "having stipulated a meaning for a word it is extraordinarily, almost uncannily, difficult to use it only in that sense".[34] And it is in any event a canon of statutory construction that definitions are to be read subject to anything that is, as Lord Selborne once put it, "repugnant in the context, or in the sense".[35]

Purposive interpretation in context involves guarding against the tendency which Lord Radcliffe identified when he observed that—

> "[i]n our history of judgment-making too many decisions have begun by insisting that particular words have one particular meaning and then deducing that, if they have, certain consequences must necessarily follow."[36]

There are two statements which I would cite to illustrate how context controls meaning. One involves a statute. It is Lord Justice Salmon's statement in *Harrington v. Croydon Corp* that the words "reasonable expense" in section 27(2)(a) of the *Housing Act 1964* "must mean reasonable to those called upon to bear it."[37] The other statement involves a grant of land. It is Lord FitzGerald's statement in *Lord Advocate v. Young* that "[b]y possession is meant possession of that character of which the thing is capable".[38]

No matter how obscure

Common law courts have no tablets on which they may inscribe *non liquet* (it is not clear). No matter how obscure the words of a statute are, a common law court is, at least in general, duty-bound to arrive at a determination as to their legal meaning. As is only too well-known, Viscount Simonds complained in *St Aubyn v. Attorney General* that the provisions concerned were

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[33] *Legislative Drafting: A New Approach (1977)* at p. 7.

[34] G C Thornton, *Legislative Drafting*, 4th ed. (1996) at p. 154.

[35] *Meux v. Jacobs* (1875) LR 7 HL 481 at p. 493.

[36] "Not in Feather Beds", *Law and Order* (1968) at pp. 214-215.

[37] [1968] 1 QB 857 at p.869F.

[38] (1887) 12 App Cas 544 at p. 556.

"couched in language so tortuous and obscure that [he was] tempted to reject them as meaningless".[39] Of course he resisted the temptation. Even the difficulties are far less than those in that case, they can still be quite considerable – perhaps of the type described by Janet O' Sullivan in her case commentary on the decision of the House of Lords in the limitation case of *Haward v. Fawcett*[40]. She noted, without exaggeration, that "the words of the statute may require some bending when dealing with cases of professional advice".[41]

Statutes are, as Lord Dunedin once observed, "designed to be workable".[42] If, as can sometimes happen in an imperfect world, the drafting leaves something to be desired, the slack must be taken up by interpretation. According to Lord Eldon—

> "There was an Act for rebuilding Chelmsford Gaol: by one Enactment the New Gaol was to be built by the Materials of the Old Gaol: by another the Prisoners were to be kept in the Old Gaol till the New Gaol was finished."[43]

Those involved in the rebuilding project would have had to make workable sense of the Act. I do not know the circumstances, but perhaps the Act might be taken to mean this. So much of the Old Gaol as could be spared without rendering it unfit to house prisoners should be used, together with new materials, to build the New Gaol up to the stage when it becomes fit to house prisoners. The Old Gaol should then be completely demolished. And its remaining materials should be used on so much of the New Gaol as remains to be built.

Some approach such as that is, I think, not only called for by the principle that statutes are meant to be workable. It is also, I think, supported by what Baron Pollock described in *Mavro v. Ocean Marine Insurance Co*. as "the well-known canon that requires a meaning to be given to every part of an instrument, if possible".[44] That applies with at least as much force to a statute as to a contract.

A legislative counsel's lot …

All legislative counsel enjoy the satisfaction of doing important work. Some win undying fame: as Lord Thring did when, between 10 am and 6 pm on a Friday, he produced the Bill which was printed by Saturday morning and went on to become the *Representation of the People Act, 1867*.

But a legislative counsel's lot is sometimes not a happy one. His task would of course be far simpler if people who consult statutes always do so with a view to understanding them. Unfortunately, it is necessary to draft statutes with it in mind that people sometimes find it convenient to put forward what they know to be a misunderstanding of them. This regrettable

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39 [1952] AC 15 at p. 30.

40 [2006] 1 WLR 682.

41 PRFN 2006, 22(2) 127 at p. 130.

42 *Whitney v. Inland Revenue Commissioners* [1926] AC 37 at p. 52.

43 *Lord Eldon's Anecdote Book* (Eds: ALJ Lincoln and RL McEwen) (1960) at pp. 76-77.

44 (1875) LR 10 CP 414 at p. 419.

fact of life has been pointed out by a judge with legislative drafting experience. Thus in the extradition case of In *Re Castioni*, Mr Justice Stephen said that he had often drafted Acts which

> "although they may be easy to understand, people continually try to misunderstand, and in which therefore it is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand."[45]

Sir James Stephen has been quoted as saying that—

> "every now and then Parliament arrives at a conclusion which is designedly left in obscurity, and if you send that to your draftsman, and the draftsman says, does this mean A. or does this mean B., it is rather uncomfortable for Parliament to say some of us wanted A. and some of us wanted B.; and we should like it to be capable of interpretation in either way. That is the truth with regard to a great many Acts of Parliament, but it is one of those kind of truths which you cannot tell bluntly and in plain language."[46]

I leave it to others to say what Ludwig Wittgenstein (1889-1951) meant by his statement in the *Tractatus Logico-Philosophicus* that "[w]herof we cannot speak, thereof we must be silent".[47] At any rate, Sir James has spoken plainly enough. How might the courts deal with such a situation? In the voting qualification case of *Cull v. Austin*, Mr Justice Brett (later Lord Esher) said that the statute

> "must have been discussed and settled in almost every clause by persons having different views of the most earnest kind; and that the best way for the Court to hold a strictly even balance is, to follow as nearly as possible the words used in each clause of every section of the Act."[48]

The politics behind legislation sometimes involves considerable compromise. For example, Attorney General (later Lord Chief Justice) Hewart once said at the second reading of a liquor licensing Bill that the Bill represented a sincere and honest effort to express what was ascertained to be the highest common measure of agreement.[49] Presumably the drafter knew that. In his autobiography, Lord Wheatley speaks of daily discussions with parliamentary counsel on current and prospective Bills when Lord Advocate.[50]

Obvious blunders

What can a court do in a plain case of drafting error? The House of Lords held that in such a case the interpretative role of the court includes the power of adding words to, omitting words from or

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45 [1891] 1 QB 149 at p. 167.

46 Sir Alison Russell, *Legislative Drafting and Forms*, 4th ed. (1938) p.23n.

47 Seventh section.

48 (1872) LR 7CP 227 at p.235.

49 R Jackson, *The Chief* (1959) p. 115.

50 One Man's Judgment (1987) p. 126.

substituting words in a statute so as to preserve the obvious purpose of the statute.[51] When the question came before us, we followed that. I said that—

> "[o]ne course is to permit an obvious drafting mistake to undo the intention obviously to be attributed to the Legislature. The other one is to grasp the nettle of recognising the draftsman's obvious blunder for what it is and treating the product of such blunder as otiose thus preserving such intention. In my judgment, our proper course in this day and age of purposive interpretation is undoubtedly the latter one."[52]

The court steps in to the legislative counsel's aid to correct human error.

Insufficiently wide language

Sometimes the problem is the use of insufficiently wide language. It occurred in section 154(1) of the *Public Health Act, 1936*, by which rag and bone men were prohibited from delivering "any article whatsoever" to any person under the age of 14. In *Daly v. Cannon*[53] a boy under that age took some rags to a rag and bone man and received in return a goldfish. Charged under section 154(1), the rag and bone man was acquitted by the justices, who held that a goldfish is not an "article" within the meaning of the subsection. Agreeing with that, the Divisional Court dismissed the prosecutor's appeal. Lord Goddard CJ observed (i) that rag and bone men, realising that a bowl would be an "article", insisted that boys bring their own containers and (ii) that if the Act had said "article or thing", a goldfish would be covered by the word "thing". My comment is that given how astute people can be in getting round the wording of a statute, care must be taken to employ sufficiently wide language if the intention is to cast a wide net.

As he always did inimitably well, Sir James Comyn made a serious point with humour when he offered his *Bad Goods Act 1994* which – having criminalised the "sale, giving or otherwise parting to another of bad goods" – defined "goods" to mean "anything" and "bad" to mean "not good".[54]

The point of using sufficiently wide language is also illustrated by a recent decision of ours.[55] By section 41(3) of the *Buildings Ordinance*, building works "not involving the structure of any building" are exempted from the requirement of the Building Authority's approval for the carrying out of building works. The Court of Appeal had held that "involving the structure" of a building is to be equated with holding the building up. That view was rejected on appeal to us. As to purpose, we construed the exception narrowly in a manner consistent with the public safety

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51 *Inco Europe Ltd v. First Choice Distribution [*2000] 1 WLR 586.

52 *Chan Pun Chung v. HKSAR* (2000) 3 HKCFAR 392 at p. 398A-B.

53 [1954] 1 WLR 261.

54 *Leave to Appeal* (1994) at p. 59.

55 *Mariner International Hotels Ltd v. Atlas Ltd* (2007) 10 HKCFAR 1.

statutory scheme of which it forms a part. And as to language, we said that the word "involving" is one of the broadest words of association known to the English language. [56]

A new legislative drafting style?

Should statutes, or at least certain types of statute, be drafted in a new style: expressing aims and purposes and leaving it to the judges to fill in any gaps in the details? Lord Denning favoured such a move;[57] Lord Evershed proposed "a recession from … extreme elaboration";[58] and Lord Radcliffe went so far as to say that "[s]tatutes should be ideas of law, not law itself".[59] Even under the present drafting style, some statutes include a statement of general principle – sometimes called a "purpose clause" – meant to provide the context in which the detailed provisions of the statute are to be read. Indeed the inclusion of statements of intention has been traced to the use of preambles.[60] But such inclusion is by no means free from controversy. It is said in a leading text edited by a parliamentary counsel (Daniel Greenberg whose presence graces the distinguished gathering which the conference organisers have has assembled and to which this paper is respectfully presented) that opinions are sharply divided as to whether such clauses do, or may do, more harm than good.[61]

In Hong Kong, it has been clearly understood since 1972 (when the Court of Appeal's predecessor the Full Court decided *Elson-Vernon Knitters Ltd v. Sino-Indo-American Spinners Ltd*[62]) that the Objects and Reasons (nowadays called the Explanatory Memorandum) annexed to a Bill may be looked at for the purpose of ascertaining the mischief which the proposed legislation was intended to remedy. Such memoranda can play a useful role, and the *Elson-Vernon* case has twice been applied by the Court of Final Appeal twice (in *Director of Lands v. Yin Shuen Enterprises Ltd*[63] and *Secretary for Transport v. Delight World Ltd*[64]). But if the mischief to be remedied is worth stating, I consider it preferable that it be stated in the Bill itself, so as to become part of any resultant statute.

There is, as Serjeant AM Sullivan observed, a modicum of truth in the old saying "Show me the judge and I'll tell you the law" [65]. And Mr Justice William Brennan has pointed out that even in constitutional guarantees, judges like sufficient detail to avoid adjudication by personal

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56 Ibid. at p. 26F.

57 *The Discipline of Law* (1979), Ch.2.

58 *Essays on Jurisprudence from the Columbia Law Review* (Second printing 1964) at p. 97.

59 *Not in Feather Beds: The Lawyer and his Times* (1968) at p. 272

60 DC Pearce and R Geddes, *Statutory Interpretation in Australia*, 6th ed. (2006) at p. 154.

61 *Craies on Legislation*, 9th ed. (2008) at p. 352.

62 [1972] HKLR 468 at pp. 474-476.

63 (2003) 6 HKCFAR 1 at p.15B.

64 (2006) 9 HKCFAR 720 at pp. 730J-731B.

65 *The Last Serjeant* (1952) p.112.

predilection.[66] This is not to suggest that judges would often differ if left to say what is ultimately just. And the cases most likely to dismay the public are those in which the letter of the law appears to have been pursued to the point of injustice.

Both in the selection of a legislative drafting style and in the interpretation of legislation however drafted, due regard must be had both to wording and to ascertainable purpose. As Judge Learned Hand said, "the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing [but it must be remembered] that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning"[67].

A Canadian jurist has given it as his perception that precision is all-important in the English legislative style while concision is all-important in the French legislative style.[68] If it comes to choosing between different drafting styles or techniques, is the choice to be made across the board or more selectively?

Some subjects call for considerable statutory detail and do not readily lend themselves to statements of legislative intention. Others call for less detail and would be very well served by such statements. A prime example of a statute that avoids detail and depends on a statement of intention is the *Protection of the Harbour Ordinance*, Cap.531. Resulting from a private member's Bill, this Ordinance consists of only four sections. Its intention and effect is contained in a single section, namely section 3, which reads:

> "(1) The harbour is to be protected and preserved as a special public asset and a natural heritage of Hong Kong people, and for that purpose there shall be a presumption against reclamation in the harbour.
>
> (2) All public officers and public bodies shall have regard to the principle stated in subsection (1) for guidance in the exercise of any powers vested in them."

At the opposite extreme are the criminal statutes of traditional China. Professors D Bodde and C Morris say that those statutes always endeavoured to foresee all the possible variations of any given offence and lay down a specific penalty for each such variation, so that the court was – at least in theory – left with no discretion in sentencing.[69] But the reality, as we shall see, was not quite so inflexible.

Whether at one extreme or the other, a statute may require interpretation before application. Even the *Protection of the Harbour Ordinance* did. We interpreted it before applying it in *Town Planning Board v. Society for the Protection of the Harbour Ltd*. By a judgment of the Chief Justice for the Court, we ascribed to it a "strong and vigorous statutory principle of protection and

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66 *Human Rights and Constitutional Law* (ed. James O'Reilly) (1992) at p. 118.

67 *Cabell v. Markham* 148 F 2d 737 (1945) at p. 739.

68 Louis-Philippe Pigeon, *Drafting and Interpreting Legislation* (1988) at pp. 7-8.

69 *Law in Imperial China* (1967) at p. 496.

preservation" to be implemented by interpreting the presumption against reclamation in such a way that "it can only be rebutted by establishing an overriding need for reclamation".[70] The concept of such overriding need comes from statutory interpretation. And it is key to application. The fact that no agency was created to police and pursue harbour protection leaves the Ordinance less effective than it would otherwise have been. But that is a question of policy and what it was possible for the promoters to achieve. The omission is certainly not a drafting matter.

As to the traditional Chinese criminal statutes, what Professors Bodde and Morris[71] tell us about their interpretation comes to this. If a literal interpretation of a statute carrying a drastic penalty would include some less serious wrongs, that statute would be interpreted to exclude those less serious wrongs, and a more lenient way of punishing them would be found. Equally, if a literal interpretation of a statute calling for mild punishment would include some more serious wrongs, that statute would be interpreted to exclude those more serious wrongs, and a more severe way of punishing them would be found.

Democracy and legislation by reference

Legislation by reference always has its drawbacks. Lord Justice Farwell described it as a "pernicious practice"[72]. But the technique is, I think, sometimes acceptable. What must be constantly guarded against with the utmost vigilance is the misuse of this drafting style to subvert democracy. Lord Justice Mackinnon has told of[73] an explanation which he once received as to why legislation by reference had been resorted to and a recommendation for a comprehensive new Act had been rejected. He was told that a Bill so drafted would be intelligible to any Member of Parliament of the meanest parts, who could debate every section of it, and move endless amendment.

Unfortunately, that instance does not appear to be an isolated one. Sir Mackenzie Chalmers identified two reasons why ministers and departments liked legislation by reference.[74] First, the public could not understand such legislation, so that the department had a pretty free hand. Secondly, the Bill would be very difficult to amend in committee, because legislators would not be able to follow its inferential details. In my view, legislative counsel should never lend their talents to the attainment of such anti-democratic objectives. They have "in reality a great deal of power over what the statute says and achieves",[75] and they must not abuse that power. Reassuringly a parliamentary counsel has declared that "no drafter here would entertain a request to draft a provision in a way that obscured its effect".[76] Certainly the judiciary should never

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70 (2004) 7 HKCFAR 1 at p.17C-D.

71 Above n. 69 at p. 497.

72 *Chislett v. Macbeth & Co.* [1909] 2 KB 811 at p.815.

73 *The Statute Book* (1942) at p. 14.

74 Lord Brightman, *Drafting Quagmires* (2002) 23 Statute Law Review 1 at p. 2.

75 Francis Bennion, *Statutory Interpretation*, 5th ed. (2008) at p. 477.

76 J.R. Spencer, *The Drafting of Criminal Legislation* [2008] CLJ 585 at p. 597.

interpret statutes so as to give the executive any statutory powers that have not been obtained from the legislature by straightforward methods.

Conclusion

A due measure of certainty is a component of the rule of law. And this brings us to the proposition which I have never seen more clearly put than by Lord Nicholls of Birkenhead who wrote that "[l]anguage is an imperfect means of communication. So the law must find some way to ascribe to language when used as the source of legal right or obligation a certainty of meaning it inherently lacks."[77] To serve the law in that endeavour is the duty of those who draft and those who interpret.

In times past when statutes were enacted by the Crown on petitions by Parliament, drafting them was the work of the King's Council, and naturally, as Sir William Holdsworth wrote, the judges and others learned in the law had a principal share in such work.[78] In 1305 Chief Justice Hengham said to counsel, "do not gloss the statute; we know it better than you do, because we made it".[79] Those days are gone, but there remain characteristics which the common law process and legislative drafting share.

The ideas, policies and words of the past echo in the successive judgments by which the common law is developed. Statute law, too, often discloses incremental advancement. Thus in a case on the *Poor Law (Scotland) Act, 1934*, Lord Thankerton noted that the right to poor relief in Scotland was purely statutory, and was first conferred by a 16th century statute.[80] Lord Atkin detected an unmistakable "trend" in the legislation.[81] Drafted to facilitate updated "always speaking" interpretations, legislation, like the common law, is kept up to date by judicial decisions. Adjudication is on past events while legislation is generally directed only to the future. Even so, legislation is informed by the past. And adjudication not only attaches consequences to past events but also provides precedents for the future. Just as the clear formulation of principle is the hallmark of enduring cases, so it is that the statutes which have stood the test of time are those containing well-drafted statements of principle.[82] But ultimately it is in the nature of progress that propositions of law are but a phase in a continuous growth.[83] As the Federal Court of India said and the Privy Council agreed, the re-adjustment of rights and duties is an inevitable process, and one of the legislature's functions, where circumstances make such a step necessary,

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77 *My Kingdom for a Horse: The Meaning of Words* (2005) 121 LQR 577 at p. 577.

78 Holdsworth's *History of English Law* (1938), Vol. XI at p. 366.

79 YB 33-35 Ed I (RS) 83.

80 *Duncan v. Aberdeen County Council* [1936] 2 All ER 911 at p. 916.

81 Ibid. at p. 914.

82 *Legislation and the Courts* (ed. Michael Freeman) (1997) at pp. 8-9.

83 O W Holmes Jr, *The Common Law* (1881) (Dover edition 1991) at p. 37.

is to effect the re-adjustment with justice to all concerned.[84] Much the same thing can be said about what the courts do when they develop the common law.

Both endeavours aim for predictable justice according to law. Sometimes predictability alone may be the most that either can provide. Take the case where the interests of two innocent victims clash. Sir Frederick Pollock and Professor F W Maitland say that "no law can be made which will not seem unjust to the loser".[85] Would splitting the loss remove, halve, leave unaffected or double the sense of injustice? All that I would say is that any statutory or judge-made law governing such a split had better be clear or else even predictability would be lost.

Legislative drafting is as difficult as it is important. As Lord St Leonards famously observed, "nothing is so easy as to pull [statutes] to pieces, nothing is so difficult as to construct them properly".[86] Legislative counsel construct statutes for the purpose of embodying the legislature's intention. Judges construe statutes purposefully. Legislative drafting and statutory interpretation have the same objective. Both are vital to the rule of law. I would be very happy if I have managed to make some contribution to a better understanding between the exponents of each, and I am most grateful for this opportunity to make the attempt.

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84 *Thakur Jaganath Baksh Singh v. The United Provinces* [1946] AC 327 at p. 337.

85 Pollock and Maitland's *History of English Law*, 2nd ed. (1898), Vol.1at p. xxvii.

86 *O'Flaherty v. M'Dowell* (1857) HL Cases 142 at p. 179.