LEGISLATIVE DRAFTING

VCRAC CRABBE

Cavendish
Publishing
Limited

LEGISLATIVE DRAFTING

by

V. C. R. A. C. CRABBE

First published in Great Britain 1993 by Cavendish Publishing Limited,
The Glass House, Wharton Street, London WC1X 9PX.
Telephone: 071-278 8000 Facsimile: 071-278 8080

First edition 1993
Reprinted 1994

British Library Cataloguing in Publication Data

Crabbe, Vincent
Legislative Drafting
I Title
328.373

ISBN 1-874241-15-5
Printed and bound in Great Britain

ACKNOWLEDGEMENTS

I must acknowledge the great debt I owe to a number of people. Sir George Mutlow Patterson, the last Attorney General of the Gold Coast and the first Attorney General of Ghana led me into the intricacies of legal and legislative drafting. He was ably aided by Mr. Alfred Lonsdale - alas, to leave us very early. Then came Mr. Fred Boyce from the Maori Affairs Department of New Zealand. The two of us, Fred and I, together had to shoulder the heavy legislation which the Independence of Ghana entailed.

When Sir Noel Hutton, then First Parliamentary Counsel at Westminster advised the Government of Ghana about the establishment of a Legislative Drafting Branch of the Attorney General's Chambers, he sent to Ghana Mr. Anthony (later Sir Anthony) Stainton, who was also to become First Parliamentary Counsel at Westminster. I worked under him as number two. He was followed by Mr. Francis Bennion. I was number two. After Mr. Bennion came Mr. Namasivayam from Sri Lanka. I later changed places with Mr. Namasivayam, he being number two when I became number one in charge of Legislative Drafting. I had the privilege of working with Mr. Vincent Grogan from the Drafting Office in Dublin. Mr. W. P. J O'Meara, a former President of the Conference on the Uniformity of Legislation in Canada, joined us. So did Mr. John Hearne who drafted the 1922 Irish Constitution.

My training was in very good hands. It was my good fortune to have worked under them and with all of them. I am ever in their debt. Again, I must thank Mr. Francis Bennion for permission to use material from his vast publications.

Throughout my career the works of Elmer Driedger and Reed Dickerson are constant companions. I owe so much to them.

Since November, 1974, I have been associated with the training of Parliamentary Counsel under a Scheme organised by the Commonwealth Secretariat. The Hon. Mr. Justice Kutlu Fuad, formerly Director of the Legal Division of the Commonwealth Secretariat, Mr. Jeremy Pope the present Director and Mr. Richard Nzerem, Assistant Director, have been responsible for that, as was Mr. Sagar. It has been a life rich in experience. The debt that I owe them is very great.

I must also acknowledge my indebtedness to my many students. They continue to bring knowledge and experience to my life.

I am very grateful to Mr. Geoff Kolts, former First Parliamentary Counsel to the Federal Australian Government, and to Mr. I. M. Turnbull, the present First Parliamentary Counsel. They made me an 'honorary member' of their Staff, and continue, to this day to send me the *Drafting Instructions*, issued for the benefit of the members of their staff.

I wish to thank the Attorney General of Canada for permission to use material published by Elmer Driedger and also by the Government of Canada. I also wish to thank the Manager, Commonwealth Information

Services of Australia for permission to use material published by the Government of Australia.

I am grateful to the Oxford University Press, publishers of the *Statute Law Review*, for permission to use materials published in the *Review*. The Chapters on *The Legislative Sentence*, *Punctuation* and *Subsidiary Legislation* are based on material already published in the *Review*. My thanks also go to the Editors of the *African Journal of International and Comparative Law* for permission to use material taken from *Drafting in Developing Countries: The Problems of Importing Expertise* published in the Journal.

I am grateful to my colleagues Professor P.K.Menon and Mr. Gilbert Kodilinye for permission to use material from *Has Parliament An Intention?* published in the *Commonwealth Caribbean Legal Studies*. Likewise, I thank the President of the American Bar Association, for permission to use material from *Professionalizing Legislative Drafting*, Reed Dickerson, Editor; Copyright 1971 American Bar Association.

I wish to thank Dr. Richard Allsopp, formerly of the English Department of the Faculty of Arts, University of the West Indies, Cave Hill, Barbados, for clarifying my own thoughts on clarity. Dr. E. Callaghan of the English Department has been a constant guide on the structure of the sentence. I wish to acknowledge the debt I owe her. I am very grateful to Dr. Albert Fiadjoe and Mr. Sampson Owusu, the computer wizard of the Faculty of Law, University of the West Indies, for all their assistance. And as well Mrs Doris Owusu the 'alternate director' to Mr. Sampson Owusu. I must thank my predecessor at Cave Hill, Professor J. Ryan, for making available to me some of his notes which have been of benefit to me.

Words cannot sufficiently thank Mrs. Iris Hinds, my secretary, for her very kind and generous assistance. The hours were early and late. The handwriting is bad. Always with a smile. Never a complaint. Without her able attendance at the computer this book could not have seen the light of day.

I must remember my good friend, J. Nartei Nartey, and our great and revered mentor 'Tsienu', for their help and guidance over the years. So must I remember my mother, Akolley, and my brothers Sassie and Nee Afua. I must also thank my brother Kwakutia. And to Lucy, Sarah, Betty, Iole, Jutta and Richenda, and the boys, I say a big, big Thank you.

I also owe a great debt of gratitude to the publishers, Cavendish Publishing Limited, London and to Mr Sonny Leong and Miss Jo Reddy of that company.

And to any person whom I have overlooked or could not get in touch with, my very sincere apologies and my very warm thanks.

DEDICATION

To all Parliamentary Counsel, wherever they may be …

PREFACE

Legislative drafting has been likened to a child's game of Snakes and Ladders. Snakes and Ladders is a game of chance. Legislative drafting is a game of skill. How is the skill acquired? There are many ways of killing a cat. We started legislative drafting from sheer necessity. The early pioneers in the field were compelled to learn by their own efforts. They did not have the hand of experience to guide them. We are fortunate today to have experience laid at our door, as in all other forms of human endeavour.

There are established today, a great number of legislative drafting departments. At any of these departments a young Parliamentary Counsel starts training with the drafting of minor statutory amendments, Regulations and Gazette Notices. Over a period of time, the young Counsel graduates to the more difficult and demanding tasks. This is the tried and tested system of apprenticeship.

The most advanced form of the system of apprenticeship is where Parliamentary Counsel work in pairs. A senior Counsel and a junior Counsel work together on a Bill. The primary responsibility for the Bill may be that of the senior Counsel or of the junior Counsel. Working together on a Bill is a sound technique which ensures continuity. It allows for guidance and advice. Whilst it is a step higher than self tuition, it has its drawbacks.

There is a widespread shortage of experienced Parliamentary Counsel. The pressure on the few is great. Thus they do not have the time they would want to devote to the required supervision, so an aspiring Parliamentary Counsel may lack a formal introduction to the demanding task of legislative drafting.

Some other form of assistance is called for. That is, the teaching of legislative drafting in a formal classroom setting. Such training is not intended to be a substitute for the time honoured system of apprenticeship; it is intended to supplement it. How else can we deal with the widespread shortage of Parliamentary Counsel? And the demands for better legislation are increasing, not only in form but in pith and substance.

Formal classroom training is also not meeting the needs of governments. The demand for trained Parliamentary Counsel remains high, yet governments are in a dilemma. There remains the standard shortage of personnel. So there is none to be released for training. For small jurisdictions several months of absence for training means that there is no one in place to draft legislation.

That means also that the apprenticeship system remains the dominant method for training. Distance learning can now be called in aid - again not as a substitute, but in an effort to supplement and enhance the time-honoured system of apprenticeship.

It is hoped that this book will provide some assistance, a little background knowledge to Parliamentary Counsel in the very important task of drafting legislation.

V.C.R.A.C. Crabbe

Faculty of Law,
Cave Hill.
August 1993

CONTENTS

TABLE OF CASES

TABLE OF STATUTES

Chapter 1

Introduction

The Nature of the Task

Legislation is the framework by which governments achieve their purposes. To politicians and administrators, legislation is a means to attain their economic, cultural, political and social policies. Whatever a person's aversion to law, a modern state has to legislate in order to accomplish certain political objectives and certain particular public policies.

In all Commonwealth countries, as in all other societies, legislation has become a necessity - particularly in those systems which share or have had a common pedigree. We need legislation to effect changes in the law; we need legislation to interfere with vested rights and interests. The purse strings which governments all over the world hold is dependent on legislation to impose taxes and other duties, excise and imposts.

Dictators and tyrants hate the restraints which the law imposes upon them, yet they enact legislation which strengthens their hold on society. Many experienced departmental officials are generally wary of operating in the presence of the law. They prefer to do their tasks in a more natural atmosphere in contrast to the impositions of the law. Yet fortified by the knowledge that there would be legislation were it necessary, these same departmental officials venture out into the arena of public administration.

The tools of their trade are the enabling enactments which, at times, these same departmental officials denounce as thwarting the administrative process. The facultative aspect of legislation is often not immediately appreciated by departmental officials until they hit against the wall. There is then the search for an applicable law, as a kind of magic wand or master key - to be discarded as soon as a hole is made through the wall.

A regime of regulatory norms (by their definitive character) tends to limit the area of activity and fetter the exercise of powers. The disparaging remarks often made against legal rules by departmental officials are, however, not justified in an orderly society with pretences to the governance of laws, not of men.

The limiting effect of legislation is also felt by many a government in office, with or without a programme to carry out. Many a government would wish to govern without any legal restraint save the restraints it imposes upon the governed. This attitude of unrestrained governmental competence is, in part, what led to the Watergate Scandal - all in the name of the privacy of national security. And still many a government in office has succeeded in suppressing, by implausible means, all opposition and legal control in its quest for comprehensive executive competence to govern.

Yet, ironically, though not surprisingly, even revolutionaries, soon after an illegal take-over of the State machine, are quick to proclaim a law in the hope of normalising their new position. Further, by means of legislation, political parties in office have permanently entrenched themselves. In some cases they have gone on to proclaim, in a republic, one person as President-for-life.[1]

The term *President* is reserved only for that person. In all this legislation is used as a means to a socio-political end, as a weapon against perceived enemies or evils. All this, in a vain search for that elusive ideal – permanent peace and stability. Legislation in these circumstances is often perceived, more out of convenience than genuine belief, as some kind of *deux ex machina* capable of realising any governmental goal, at any time.

The term *legislation* may be used in a narrow or in a wide sense. In the narrow or usual sense, the term includes Acts of Parliament, Orders, Regulations, Orders-in-Council, Statutory Instruments and Rules.[2] In some jurisdictions such as Swaziland there are Decrees which are laws, the status of which are thought to be above that of Parliament, passed by the King since 1973 when the independence Constitution of 1968 was revoked.

In the wider sense legislation covers various shades of nominative rules and practices as of professional, social or religious groups and societies; customary laws and ways of behaviour; departmental orders and circulars for implementing statutory regulations and rules.

All these must translate into the concept of the rule of law. Every public action must ultimately have authority in an existing law - statutory, common or prerogative. For purposes of government, legislation in the narrow sense is the main form of translating policies into enforceable laws. Many governments still rely on various forms of persuasion to gain the support or the tolerance of the people. If the persuasion is successful the results are not very different from legislation.

In the United Kingdom there seems to be another form of legislation or persuasion resorted to by Governments in office; this is 'legislation by contract'. Powerful bodies such as the trade unions, local authorities or the civil service with the latent power to defy the law with impunity, are manoeuvred into voluntary acquiescence and observance of laws and policies regulating salary increases, picketing or public spending.

This understanding is legally unimpeachable so long as it is within the statutory powers of the Government. This apparently extra legal arrangement indicates the limits of what legislation can achieve or be stretched to achieve, even in countries whose competence of legislative innovation may be presumed to be equal to the task of their governments.

---

1 In Malawi, for example. And a British Prime Minister claimed that she would go 'on and on and on!'

2 Incidentally *legislation* also means the process of law-making.

Although legislation is the task of the Legislature, it is noted that, due in part to the same reasons that have justified resort to increased subsidiary legislation, the Executive has become preponderously dominant even in the area of legislation. The corridors of state power have been blurred in practice, except, perhaps, as far as the Judiciary is concerned. But in many jurisdictions, even the Judiciary has felt the weight of the Executive. As a result Legislatures have been branded as mere rubber stamps for the policies of the government of the day[3].

These Legislatures merely assent to, and confer democratic legitimacy on, the Bills presented by the Government. This general ascendance of the Executive is true almost everywhere. It operates to an extent in the United Kingdom. A Lord Chancellor could describe his government as 'an elective dictatorship'.[4]

The Legislature may be used or side-stepped. With reference to the United Kingdom's attempt at legislation by contractual obligation, Carol Harlow[5] states that

> The powers of administrative authorities including Ministers are assumed to be derived from legislation or supporting regulations, by which their conduct must be regulated. If wider powers or changes in powers are required, then new legislation ought to be brought forward or amending regulations laid down before Parliament for approval. Increasingly, however, governments and local authorities are relying on indirect techniques of government. Persuasion, consultation, informal agreement are the style of the day. In the planning field, to use but one example, conditions which might be *ultra vires* if challenged in a court of law are imposed indirectly in the form of bargained "planning gain".

Harlow contends that Ministers, by relying on common law contractual powers or on the prerogative power may do indirectly what they cannot do directly 'thus by-passing Parliament entirely'. In the quasi-dictatorships and imitation or façade democracies of the left and the ultra right, which are the lot of the new independent sovereign states, the position is even worse.

Where laws are passed as a matter of formality with little or no debate, the chances are that the laws will be largely unknown to the ultimate audience. This, in general, has a negative impact on the efficacy of the laws themselves as well as on the efficiency of the government. The attainment of goals becomes difficult by reason of the absence of co-operation between the government and the governed.

---

3 See *Has Parliament an Intention?, Commonwealth Caribbean Legal Studies*, ed. Kodilinye and Menon p. 37; *The Interpretation of Statutes*, Cory (1936) 1 U.T.L.J. 286.

4 Lord Hailsham, *The Dilemma of Democracy*, 1978.

5 (1980) 43 M. L. R. p. 247.

Well-measured laws will be of little effect if resisted, directly or indirectly, by those for whom they are made. Passive obedience cannot lead to good legislative maximum effect. In such circumstances therefore legislation is not a *sine qua non* for government. It only serves as a catalyst or midwife. Laws are passed but with little or no effect.

Generally speaking, legislation is the normal means by which the government is able to govern. In fact, so institutional is legislation to government that, however well-devised, no government could last long without the power to make laws for the good order and governance of a particular jurisdiction in accordance with political exigencies. It may indeed be said that legislation and government are complementary aspects of the same social process. However little a part it plays, legislation is still an important, if not a critical, aspect of the process of modern government. The so-called primitive societies which did not have formal legislatures understood law and order through their taboos and customs.

By legislation policies are transformed into enforceable laws. The government enacts positive laws of a creative kind with the intention of bringing about a new condition, a new power, a new set of circumstances. The intention is to generate something that was not there before or could not be done or achieved by the law as it was. In this way, the government moves the country or stops it from moving in a particular direction perceived by the government as either desirable or undesirable. In the same way new social relations are created and the scope of activity of the individual is widened or narrowed. In many instances government enacts laws in reaction to social situations which seemingly develop independently or deliberately.

These developments are bound to occur in normal social life. But if they are perceived by the government as not conducive to the stability, peace and good order of the State, the government proscribes them. This process of legislation involves changing the existing law where the existing law – as perceived by government – no longer serves a useful purpose. Thus, as far as the science of government is concerned, the important part of legislation is not only the regulatory aspect but the law-making process itself. That is the creative and dynamic aspect of government.

There are, however, certain social ills and problems which a government cannot solve by legislation. Instead an informal approach is usually preferred - a process of socialisation and education. This is usually in the area of private law in which the problematic acts are not in themselves criminal. For instance, should China or India legislate or find other ways around the problem of growing population? Compulsory nationwide sterilisation failed in India.

By the stroke of a pen Barbados with its Family Law Act, 1987, has not found a solution to child illegitimacy. Does legitimising all children born out of wed-lock really solve the more sinister problem of a decline in morality or of a decline in the values of the family system which gives rise to the illegitimacy?

Is legislation on *de facto* marital relationships the answer? Does this not further weaken the family fibre? Could a country undertake a massive programme of moral regeneration through informal or non-governmental means?

Should the mistress system in Europe be legalised as a lesser evil, if evil it be?[6] A government could still do nothing and hope that time will eventually teach the correct lesson. Indeed sometimes an attempt to arrest an evil only lets loose a host of other more sinister evils, in the typical Biblical sense. In the result the child is thrown out with the bathwater. South Africa has passed numerous laws for its 'race problem.'

Seemingly the answer is not in sight by any standard of judgement - because the *problem* is an optical illusion. Children left on their own to play do not recognise colour. And they are not colour-blind! It is as well then to appreciate the limits of legislation in the science of government. It is not *the* universal problem solver.

The amount of legislation that a government may generate to aid itself depends upon the variety and novelty of the business it has to accomplish. It also depends upon its belief in the efficiency of laws; the latter position is usually ideological. In general, the non-communist countries use the law as a means to an end in the Dicean sense of the rule of law. The communist oriented states, on the other hand, have a different version of the rule of law. The socialists criticise Dicey's meaning of the rule of law as bourgeois, so they have advanced the concept of 'socialist legality' – now entrenched in the 1980 Guyanese Co-operative Republic Constitution.

The late Maurice Bishop of Grenada was in pursuit of this principle by his Peoples' Laws, a kind of legislation by popular acclaim or intimation. To some extent President of Tanzania Nyerere's *ujamaa* programme proceeded along the same thinking. Parliament did not pass a law to enforce *ujamaa* in Tanzania. The mere belief and acceptance by the Party of the programme was supposed to be sufficient to launch the villagisation scheme into success. Yet some observers have attributed the failures of the programme, at least in part, to the absence of formal laws to enforce it. Perhaps, there was some hidden resistance among the people themselves.

Thus in the socialist world the meaning of law and the process of legislation tend to be somewhat diffused since the Party is also seen as a legislative organ. In Kaunda's Zambia, the Party's Constitution appears to be above the Constitution of Zambia! Be that as it may, legislation *is* a legally enforceable measure for regulating human behaviour. It is necessary for many governmental purposes. This is still so even where the line between law and policy is not clear; thus the business of governments demands legislation.

Modern government and legislation are complex businesses. An Act of Parliament is enacted not, primarily, for those who enact it; it is enacted for the

6 *The Guardian Weekly*, Vol. 146 No. 4 Week ending January 26, 1992.

people in a given jurisdiction. It is a form of communication from those who govern to those who are governed. Those who govern may be military rulers or they may be elected dictators or benign despots. An Act of Parliament, or a Decree or Law by a military government tells people how to behave. That should be in a language which is clear, lucid and free from ambiguity.

Parliamentary Counsel who draft the Bills for a government should have due regard to, and respect for, the principles which govern the means of communication – that is language. Each language has its own conventions. Each language has its own nuances. An adherence to these conventions and nuances is the essence of an effective communication. It is a discipline in itself.

The basic unit of a language is the sentence. A sentence is an arrangement of words in such a manner that some thought or idea is conveyed to the person to whom the sentence is addressed. Where the arrangement of the words is lucid and in the appropriate order a particular meaning is conveyed. Where there is an inappropriate arrangement of words an ambiguity may be created. The meaning intended to be conveyed is not clear. That will not do for a command, a prohibition, which is what the law - statute law - seeks to do.

Parliamentary Counsel must be very, very conversant with the structure of the sentence. The arrangement of words should be such that there is no ambiguity. The sentence, 'A piano for sale by a lady with carved legs' may be generally understood. Does it not, however, convey the meaning that it is the lady who has the carved legs and not the piano? Her legs may have been amputated and replaced with well carved ones! That was not the intention of the person who made the statement. 'Then, they waved to their friends with one hand and chewed sandwiches with the other.'[7] We do not chew sandwiches with our hands! We use our teeth.

An understanding of the principles of grammar is absolutely necessary. The language of legislation may be peculiar but it need not be. *Legislative drafting does not have its own peculiar rules of grammar or of syntax.* An appreciation of the language of the law is essential to the work of Parliamentary Counsel. They must also have a sufficient knowledge of the principles of law generally and of the laws of their particular jurisdictions.

Experience lies deep in the make up of the accomplished Parliamentary Counsel. According to Dreidger it takes about ten years to train a competent Parliamentary Counsel.[8] One can learn all the rules of swimming but that does not make one a swimmer; one has to get into the water. That is where the test is. Most lawyers are not trained as Parliamentary Counsel. Neither do they, in general, understand the rôle of Parliamentary Counsel in the science of government. Legal writing is not legislative drafting.

---

7 From Denys Parson's *Fun-tastic*, *Pan Books*, 1971.

8 In conversation with the author at a Seminar on Legislative Drafting at the Commonwealth Secretariat, London, in June 1975.

Again, as Beaman[9] said,

> … the number of contingencies a lawyer has to guard against in the case of a will or contract, while sometimes they are very numerous, are mere fly-specks compared with the contingencies that must be considered in the case of a statute …

Nor have the judges made the task of Parliamentary Counsel any easier. 'The Courts do not invariably display a deep reverence for every product of the art of Parliamentary Counsel.'[10] In *Roe v Russell*[11], Scrutton L.J. regretted that he could not order the costs of the action to be paid by the draftsman of the Rent Restriction Acts.

Whatever the arguments there is complete agreement that, in a modern state, legislation is now the great source of law. Acts of Parliament confer discretionary powers on subordinate authorities to issue delegated legislation. Acts of Parliament still remain the pre-eminent source of the law. The doctrine of parliamentary sovereignty gives pride of place to an Act of Parliament.

The decisions of the courts form part of the corpus of the written law. Acts of Parliament do, in some cases, supplement the common law. It is not unknown for an Act of Parliament to set the record straight after the courts have given a decision. In the United States, Congress enacts legislation within the constitutional framework. The Supreme Court of the United States has often struck down an Act of Congress as being unconstitutional.

That occurs also in many Commonwealth jurisdictions which have written constitutions. An Act of the United Kingdom Parliament cannot be struck down as being unconstitutional. The United Kingdom courts do not sit as a court of appeal from Parliament.[12] It is not unknown for the courts, by a process of analogical reasoning, to adopt a statutory rule designed to deal with a particular subject matter and apply it to another subject matter.

The Policy of Legislation

In the modern state[13] the enactment of legislation is primarily a function of the government. Governments cannot conduct policies of the state in any meaningful sense without the capacity to govern. The Executive, in essence, constitutes the source of legislation.[14] A private member could introduce

9 *Hearings before the Joint Committee on the Organization of Congress* quoted by Reed Dickerson in 'How To Write A Law', *Notre Dame Lawyer*, Vol. XXX1 No. 1, p. 15.

10 Megarry, *Miscellany-at-Law*, p. 349.

11 [1928] 2 K. B. 117 at p. 130.

12 There is limited judicial review of subsidiary legislation.

13 This may even be true of a state as the United States of America.

14 In most Commonwealth countries. In the United States, for example, the members of the Administration are not members of Congress, except the Vice President who presides at sittings of the Senate.

legislation. The Executive, however, can and does easily stifle a Private Member's Bill[15]. A random look at the legislative calendar at Westminster will show that there are about 55 days available in the session for Government legislation.

The Government controls the use of all that time. Consequently, there is no point in anyone other than Parliamentary Counsel getting a Bill ready because it would not be introduced, and it would not be passed. Conversely, when the Government does introduce a Bill, the Bill is almost certain to get through. The Government controls not only the time but the vote on all important matters.[16] It could be argued then that legislation is more a function of the government rather than the function of Parliament.

The conception of an Act of Parliament will make this clear. Three basic processes are involved. Firstly, the formulation of the policy that leads to the enactment of an Act of Parliament. Secondly, the research undertaken by the sponsors of the Bill which becomes the Act. Thirdly, the technical aspect of the matter, that is to say, the drafting of the Bill which becomes an Act of Parliament.

An individual or a group of persons may be interested in a particular measure. That measure may call for the exercise of the legislative power of the state. That individual may or may not be a member of Parliament. Who ever that individual is, behind the interest there lurks a motive – either economic or personal or political or social in character. Legislation becomes a means to an end for the achievement of some, at least, of all of the purposes desired. A group of persons may be a political party which seeks to have its political philosophies translated into law. It is the party in power.

Departmental officials make recommendations to the Minister that legislation should be introduced to deal with specific issues. Commissions of Inquiry and Committees of Parliament make recommendations for legislation. Public organizations and private organizations make suggestions which result in legislation. In all these instances there is a conviction that a situation exists which calls for legislation.

This leads to the investigation of the social devices which would suggest the remedies for the problems that call for legislation. In this investigation, recourse may be had to legislative committees, to lobbyists and to interested persons. At each stage of the investigation there will be studies commissioned, conferences and consultations constituted and conflicts of competing concepts contained.

There may be public debate generated by a Government White Paper. When ideas have crystallised, a decision will be taken that there is need for

15 There are honourable exceptions such as A. P. Herbert's *Matrimonial Causes Act* 1937, 1 Ed 8 & Geo 6 c 57 and also the Bill for the *Adoption Act*, 1967 c 87.

16 Sir Noel Hutton, *Professionalizing Legislative Drafting*, Ed. Reed Dickerson, p. 113.

legislation. A summary of the various proposals will be submitted to, say, the Minister concerned. In some cases the public may not be aware of all these happenings until a hint is given in the 'Speech from the Throne' when what is involved is a major piece of legislation.

The proposals will be submitted to the Cabinet in the form of a Cabinet Memorandum.See Appendix A for a skeleton form.[17]

After Cabinet approval has been obtained, instructions are sent to Parliamentary Counsel to draft the required Bill. Parliamentary Counsel prepares the draft of the Bill which is sent to the sponsoring Ministry for comments. Others, in special circumstances, may be asked for their comments.

There may be a few revised drafts. Finally the Bill, as settled between Parliamentary Counsel and the sponsoring Ministry, is sent to the Cabinet Committee on Legislation, and then to the Cabinet as a whole for approval for introduction in Parliament. In Appendix B are copies of Instructions for the Preparation of Legislation.[18]

A Little History

Throughout all the stages of a Bill, Parliament gives its stamp of approval to the 'art of the Parliamentary Counsel'. How true is the assertion that, 'The legislature, when they intend to pass, to constitute, or to repeal a law, are not bound to use any precise form of words.'?[19]

That assertion is but a reminder that in the past Acts of Parliament were drafted by judges and Privy Councillors, many of whom were themselves members of Parliament. There is the celebrated case in which Hengham C. J. reproved counsel:

> Do not gloss the statute; we understand it better than you do, for we made it.[20]

By 1487, barristers in private practice as well as counsel in government departments were the draftsmen of Bills. It was William Pitt who attempted to organise the preparation of statutes by standing counsel.[21] It was not until 1869 that, as a result of a Treasury Minute dated the 8th February, the Office of Parliamentary Counsel was formed. A Select Committee was appointed in 1875 to consider the means that could be adopted to improve the manner and language of legislation.

---

17 Taken from the *Handbook on Legislation* published by the Government of Australia, and reproduced with the very kind permission of the Attorney General.

18 Reproduced with the very kind permission of the Attorney General of Canada. There are slight variations in the procedure in different Commonwealth countries.

19 Said the twelve judges in *Longmeads Case*, (1795) Leach C C 694, 696, quoted in *Craies on Statute Law* [7th Ed.] p. 21.

20 Quoted by Megarry, *Miscellany-at-Law*, p. 356.

21 Ilbert, *Legislative Methods and Forms*, p. 77.

In its report, the Committee stated that the object of the Treasury Minute of 8th February, 1869, was

> to establish an official department, at the head of which should be a Parliamentary Counsel of great experience, to whom all the Government Departments in England should have a right to go, *so that there should be some person directly responsible for all their Bills if anything went wrong.*[22]

This, however, did not lead to the immediate establishment of the Office of Parliamentary Counsel being solely responsible for the preparation of legislation. For many years thereafter, practising counsel drafted many Bills in their own chambers. They were paid fees according to the amount of work done, but the Treasury Minute did have effect.

Be that as it may, the drafting of legislation has, indeed, a respectable tradition which is deeply rooted in the past. We shall never know the hand that wrote the Ten Commandments. We do know that the *juris prudentes* of Rome drafted legislation with the help of the *scribae*. The 'jurists left the drafting of the statutes to the *scribae*, who neither desired to give up their involved style, nor were capable of doing so'.[23] Tribonian also appears to have had a great deal to do with the legislation of Justinian.[24]

But long before Rome and Greece we had the laws of Manu. The Code of Manu is described as, in the original,

> Written in verse and is divided into twelve chapters. In most Parts, the rules are so clearly and concisely stated that nothing can be gained by attempting to summarise or condense.[25]

We have had the Codes of Hammurabi - 1752 B. C. - , the 'completest and most perfect monument of Babylonian Law'.[26] It was carved into a basalt pillar consisting of 282 statutes - preserved intact till this day. Ashoka in India issued edicts carved in rock and metal. 'Those edicts, spread out all over India are still with us, and conveyed his messages not only to his people but to posterity … "[27]

Nor must we forget the great debt we owe to Egypt. Early legislation took the form of decisions or decrees by the Pharaohs. It was tailor-made to suit their wishes and the way they wanted their Kingdoms built. It was also their response to the problems of their Kingdoms. A major achievement of ancient Egypt was the development of writing which was known as hieroglyphs, a

---

22 *Ibid*., p. 77. Italics supplied.

23 Schutz, *Principles of Roman Law*, 1936 p. 80. Perhaps the modern involved style of legislative drafting owes its origin to the *scribae*.

24 Buckland, *A Text Book of Roman Law*, 2nd Ed. p. 39.

25 S. Allen, *The Evolution of Governments and Laws*, 1916, p. 1005.

26 *Enclopedia Britannica*, 1968. Vol. 11 p. 41.

27 Nehru, *The Discovery of India*, p. 79.

system of writing which extended to the whole of the Middle East as a result of the spread of Egyptian civilization.

Thus the first recorded laws are to be found in the records of the ancient civilizations of Egypt, Mesopotamia, and the Yellow River of China. The first of the Codes of Law that appeared in Mesopotamia were the laws of Eshuna in 60 clauses written in Arcadian.[28]

The Problems

Parliamentary Counsel perform an extremely difficult task. There is much that is beyond their control. The pressures on them are many. They have to think of the past, the present and the future. They consider the conduct of society in the past. They write in the present to deal with present particular problems. They speak to the future by laying down rules of conduct for the guidance of society.

They have to think of the problems involved from as many different angles as possible – the simple as well as the complex. It is not just a question of changing a few ideas around. They have to think of the legal practitioners who will try to read the law – even if in bad faith – to suit a particular case and who will take advantage of a loophole.

Legal practitioners continually try to misunderstand legislation. Then there are the judges who criticise Parliamentary Counsel for ambiguities or for the complexity of an Act of Parliament. MacKinnon L. J. said that,

> If the Judges now had anything to do with the language of Acts they are to administer, it is inconceivable that they would have to face the horrors of the Rent and Mortgage Interest Restrictions Act - horrors that are hastening many of them to a premature grave.[29]

We even think of the social reformer who may condemn our work. Parliamentary Counsel may appear radical to the conservative and as reactionary to the radicals. Often there is insufficient time to draft a piece of legislation.

The task requires hours of intellectual concentration, planning and strategy. Ministerial requests for legislation come with *urgent*, *immediate* flags. Far reaching constitutional amendments may be done over the counter. In times of emergency, orders, directives, notifications affecting life and liberty are drafted at top speed. Parliamentary Counsel may work round the clock and with an heavy heart for fear of a hasty, rash draft.

The consolation is that the work has been done, even if imperfectly done! The agony, the tension is over. And time the enemy becomes a friend.[30] The

---

28 A.S.Diamond, *Primitive Law*, (1971)

29 (1946) 62 L. Q. R. 34.

30 Sir Noel Hutton, *The Mechanics of Law Reform*, (1961) 24 M. L. R., 18.

time available is short. The work is urgent. It has to be done at any cost during the limited time available. But when a particular draft is cumbersome with hundreds of provisions requiring careful, patient and minute examination, time is the enemy.

Parliamentary Counsel usually prepare a number of drafts before the final draft. They study their preliminary drafts, conference after conference. They revise the drafts. They re-write them again. 'The inspiration of genius is seldom in final form in first form … The pride of authorship means sweating blood.'[31] There may be calls for further clarification from the sponsoring Ministries.

All this involves time and concentration. There is a constant battle between urgency and limited time. After days of hard labour when the draft is finalised, a sense of relief, if not of satisfaction, pervades the atmosphere. There is a sigh. But too soon. After a few days doubts may arise as to the accuracy of the draft, its perfection, its sufficiency.

There is then the passage of the Bill in the Legislature. Every Lycurgus and Solon sitting on the back benches will denounce the Bill 'as a crude and undigested measure, a monument of ignorance and stupidity'.[32] Amendments may come. Committee stage amendments may be a headache. They may or may not be ill-considered, ill-conceived. Parliamentary Counsel has to deal with all these situations. Unpredictable sometimes as they are. Then there is a final reading, and a second sigh of relief because the ordeal is over. Parliamentary Counsel work extremely hard.

Background Knowledge

Law does not operate in a vacuum. Statute law less. A statute is intended to guide, and regulate, the conduct and affairs of those to whom it is addressed. Its content thus takes cognisance of the cultural, economic, political and social conditions of the society within which it is intended to operate. A sound knowledge of these conditions is very necessary.

Any of these conditions or a combination of any of them would constitute the facts upon which Parliamentary Counsel may draft a particular piece of legislation. In drafting a piece of legislation on marriage one may well ask whether age is all that matters. Are there other incidents that go to make a valid marriage, such as the form of the celebration of the marriage, and the issue of dowry?

Where dowry goes to the essential validity of the marriage, then the mere fact that one has attained the age of majority does not mean that one can

31 *Pride of Authorship*, Editorial, 37 American Bar Association Journal, 209 (1951).

32 Lord Thring, *Practical Legislation*, p. 8.

contract a valid marriage ignoring the issue of dowry. Marriage is, indeed, an issue of social fact rather than of law. Legislation would thus seek to regulate a social fact.[33] In doing so, it must of necessity, look at society and at the institutions which society has established for its guidance. Legislation would not seek to uproot society. If it does the law is in peril of its life.

There are mistresses in monogamous societies. Legislation against that system 'would obliterate public life.'[34] It is very difficult to prosecute for bigamy in a predominantly polygamous society. Each piece of legislation has a background. Each piece of legislation has a policy. A sufficient knowledge of that background teaches Parliamentary Counsel to so construct the law that it is honoured in its practice.

Research

Legislative drafting involves the attempted solution of problems faced by governments, and by society as a whole. An understanding of the problems will help in finding the solutions. That depends upon adequate knowledge of the conditions that had given rise to the problems. Parliamentary Counsel must thus have some basic knowledge of indeed almost every subject matter. They supplement their basic knowledge with research. It is important that Counsel have a sound knowledge of law.

Added to that will be a sound knowledge and understanding of the issues that had created the problem, the solution to which they attempt to find through the process of legislation. Parliamentary Counsel must know what they are looking for. Their industry and discipline help them to ask the right questions and thus save themselves valuable time. In the end, Parliamentary Counsel become Jacks of all trades and masters in legislative drafting. At Appendix C are a few practical tips to help a young Parliamentary Counsel ask the right questions for the purposes of research.

Herein lies the significance of a library to Parliamentary Counsel, particularly a Law Library. Libraries are the repositories, not only of knowledge but of civilisation as a whole. A Law Library stands at the cross roads of civilisation. Our knowledge of the Common Law, of the doctrines of equity and of the development of the Law as a whole could not have reached us if libraries had not taken the trouble to collate and collect the Year Books, the Law Reports and all the learned journals and materials of the law. To a Lawyer, and to Parliamentary Counsel particularly, a Law Library is a *sine qua non* for the performance of their functions. Parliamentary Counsel's capacity for research is sadly limited if there is no library to which they can go for help.

---

33 *The Family Law Act*, 1987, of Barbados, for example.

34 *The Guardian Weekly*, Vol. 146 No. 4 Week ending Jan. 26, 1992.

Drafting Instructions

Parliamentary Counsel turn government policy into effective legislative language. The policy considerations come to them in the form of Drafting Instructions. These Instructions must state precisely what the problem is, at least to the administrator. What had given rise to the problem? What attempts had been made to solve the problem without the assistance of legislation? How and why had the attempt failed?

Unless ideas have crystallised, it is sheer waste of time to embark upon drafting a piece of legislation. But those who instruct Parliamentary Counsel should not attempt to be lawyers. *Least of all should they attempt to be Parliamentary Counsel and send draft Bills to Counsel*. They help Parliamentary Counsel by remaining as laymen leaving Parliamentary Counsel to appreciate the policy in the final analysis, the decisions based on the policy and the implications of the policy. Legislative drafting does not consist in copying precedents nor in polishing what others have drafted.

As Driedger has pointed out,[35] if Parliamentary Counsel

> receives a draft, he must construe and interpret what may be an imperfect statement, and he may misunderstand what is intended. A draftsman who is presented with a draft measure would not be discharging his duties if he assumed that a proper legislative plan had been conceived and that proper provisions had been chosen to carry it out; he cannot be expected to confine himself merely to a superficial examination of the outward form of the measure …
>
> Even assuming that a perfect bill is submitted to the draftsman, he must still subject it to the complete drafting process, for how else can he discover that it is a perfect bill and satisfy himself that it will give legislative effect to the intended policy? Draft measures prepared by inexperienced persons are usually defective, and then the draftsman must spend much time in undoing what has been done.

And from Westminster[36] comes the stern warning that,

> Nothing is more hampering to Parliamentary Counsel, when the drafting stage is reached, than to be obliged to build what is usually a complex structure round 'sacred phrases' or forms of words which have become sacrosanct by reason of their having been agreed upon in Cabinet or in one of its committees. A still more serious objection to agreed form of words of this kind is that they often turn out to represent agreement upon words only, concealing the fact that no real compromise or decision has been reached between conflicting views upon some important question.

35 *The Composition of Legislation,* p. xix - xx.

36 *The Preparation of Bills*, (1948) p. 8

In their duty to fill in the details of the broad policy statements, Parliamentary Counsel may raise legal questions which may lead to the reconsideration of policy. An architect does not tell a client that a five bedroom house is what the client needs. The architect would advise the client that with the financial resources available, and having regard to the area of the land for the building, the contours of the land, the orbit of the sun and the wind direction during the day and during the night, a north facing building would suit the purposes of the client. Bearing these matters in mind, the architect would *advise* the client how the bedrooms would be situated in relation to the study, the lounge, the dining room, the kitchen and the other facilities that go with these. Such is the responsibility of Parliamentary Counsel.

To sum up, Drafting Instructions should,

(a) state clearly that the appropriate authority, the Cabinet or its appropriate committee, has given approval in principle for the drafting of the legislation;

(b) state clearly the principal objectives the legislation is intended to achieve;

(c) state clearly the anticipated implications of the legislation;

(d) contain all relevant information touching upon the legislation;

(e) contain appropriate references to decided cases which have a bearing upon the legislation;

(f) state clearly any unresolved issues which have a bearing upon the matters that are to be included in the legislation, accompanied by any opinions, legal or otherwise, and the views of the sponsoring Ministry on those opinions;

(g) contain suggestions as to the penalties to be imposed for infringement of the provisions of the legislation;

(h) indicate whether an existing legislation might need amendment, or whether consideration should be given to that existing legislation;

(i) contain suggestions regarding commencement, and the reasons for suggesting different dates for different provisions;

(j) state clearly whether departments which may be affected by the legislation have been consulted, and the views of those departments;

(k) be accompanied by the Reports of Commissions of Inquiry or committees, the recommendations of which form the basis for the legislation or have a bearing on the legislation;

(l) contain suggestions for transitional or temporary provisions, or for saving provisions.

Legislative Scheme

After reading and digesting the Drafting Instructions, after Parliamentary Counsel has mastered the subject matter of the proposed legislation, the next important step in the drafting process is the preparation of the legislative scheme. Upon that scheme hangs the quality of the Bill. The legislative scheme represents Counsel's mental picture of how well the Act of Parliament would look in structure and quality, in substance and in form. Here Parliamentary Counsel deals with the logical sequence of the various matters that bear upon the Bill; here the symmetrical arrangement of sections is organised.

Form and substance take their proper places. The law and its administration are equally balanced. Without the legislative scheme the resultant Act will look like a patchy, sketchy work. It will give the appearance of an ill-conceived, ill-prepared piece of work. This is an area where the policy of the law is put in an outline for the achievement of the objectives of the proposed legislation. It is in the legislative scheme that Parliamentary Counsel perceives whether the Act will be a workable piece of legislation, whether the task of the courts will be made easier in the construction of the Act as a whole. The legislative scheme is in effect, the architectural plan of the building that is called an Act of Parliament. A specimen of a few legislative schemes are in Appendix D.

The Qualities

Legislative drafting is an extremely onerous, exacting and highly skilled task. It is not often appreciated that it is difficult. It is not easy to express in words exactly what is clear in the mind. And even if that can be easily expressed, it is not easy to do so in such a way that there can be no misunderstanding. It is not a task 'for children, amateurs and dabblers. It is a highly technical discipline, the most vigorous form of writing outside of mathematics. Few lawyers have the *special* combination of skills, aptitudes and temperament necessary for a competent draftsman.'[37]

A candidate for legislative drafting must have facility in the use of the language of legislative instruments. Experience in legal practice is desirable. So is an interest in drafting, a systematic mind and an orderliness in the formulation of thoughts, the ability to pay meticulous attention to detail and the ability to work with accuracy under pressure.

An enquiring, critical and imaginative mind is a *sine qua non*. There must be the ability to work with colleagues and those skilled in other disciplines, and one must be disposed to give and take constructive criticism and advice. Common sense, and social and economic awareness are essential. To these we must add a sense of humour.

---

37 Reed Dickerson, *Fundamentals of Legal Drafting*, p. 3.

Accuracy and precision of language may proceed from an innate habit of mind. Yet they can be acquired in many ways. Parliamentary Counsel must cultivate an attitude of rigid self-criticism. Counsel must remember at all times that what seems perfectly clear to them may not be equally clear to the person who reads a piece of legislation - be that person a judge, a lawyer or what is often described as a layman.

We cannot rule out the fallibility of human foresight and, indeed, of language itself. Yet Parliamentary Counsel must do the best they can to reduce doubt and ambiguity, and to bring difficulties to a workable minimum by an intelligent application of knowledge to bear on their drafts. The measure of their ability, is their success in giving little room for doubt and ambiguity.

As Driedger has said - and this is often quoted - the perfect Bill has never been drafted. It never will be. Parliamentary Counsel must combine in their natures the aloofness of the Bench, the professional skills of the practising lawyer, the characteristics of the legal scholar and all the attributes of the law teacher.

Criticism

'Animals are such agreeable friends - they ask no questions, they pass no criticism.'[38] Parliamentary Counsel should always bear that warning in mind. They should not shun or avoid criticism. It is to Counsel's advantage that there are people who would question how well a Bill has been drafted. Legislation is enacted for a variety of people and for a variety of reasons. It is a serious business. The happiness of a people depend on it. The progress of a people may be hindered by it. Those who are responsible for drafting legislation should bear this in mind.

Criticism, whether in good or in bad faith, is an asset to Parliamentary Counsel. As much as Counsel would complain of a shoddy piece of work in an article of merchandise, so too must Counsel allow for other people's denunciation, or appreciation, or perception of what is presented as a Bill which becomes an Act of Parliament. Counsel should accept criticism in good faith – whatever the source; it should be considered as an attempt to improve the quality of the Bill.

There are two aspects to be dealt with here: the quality of the drafting and the soundness of the proposed law. To this may be added a third aspect: how well will the resultant Act work in practice. Criticism will help Counsel to recognise where there is an ambiguity, where the wording has deviated from the substance, where clarity has been sacrificed to simplicity, where verbosity has detracted from the beauty of expression.

---

38 George Eliot, Mr. Gilfils Love-Story, *Scenes of Clerical Life*, Ch. 7.

Chapter 2

Policy and Parliamentary Counsel

Governments need legislation. The governed need well drafted readable, understandable legislation. The arm of the government extends to control every aspect of our lives. Legislation of one type or another binds us. In whatever sphere we lay a claim the tentacles of government are evident. There are Acts of Parliament to guard and to guide us. There is subordinate legislation to regulate, to rule us.

In our parliamentary system of government the Cabinet is drawn from Parliament. The Cabinet is in essence the Executive. The Executive controls the legislative programme of Parliament. An Act of Parliament, in a very large measure, is thus the work of the Executive. In other words government *policy* motivates legislation. The legislative policy expressed in an Act is first determined and settled by the Government. Parliament in the main gives a Bill its stamp of approval.

The idea that legislation can be used to achieve great changes in society is very attractive to politicians. They seem to believe that anything can be achieved by legislation. To them, 'A parliament can do anything but make a man a woman, and a woman a man.'[1] It is hard for them to realise that not all social ills can be cured by legislation.

Centuries of social behaviour can not be laid to rest at the stroke of a pen. Society did not start with a statute book in its hands. Legislation is but a mirror of society. It reflects the development of society as a whole; we need to guard against the consequences of misguided legislation.

Parliamentary Counsel thus have a vital rôle to play in the conception and birth of an Act of Parliament. They have the duty to express legislative policy in a language free from ambiguity. Transforming government policy into law is the prime function of Parliamentary Counsel.

In the performance of that function, the Government expects Parliamentary Counsel to ensure that the Government's policies are given legal effect. Equally, Governments expect Parliamentary Counsel to express legislative intention as accurately as possible, and capable of only one interpretation, that is to say, the intention that the Government intends that law to have.

The Government also expects that Parliamentary Counsel will ensure that the Bill as drafted is in harmony with all the existing legislation as well as with the Common Law or the Customary Law. *An Act of Parliament does not stand on its own. It is part of the law as a whole*. Hence the reference to it as a

---

1 2nd Earl of Pembroke, quoted by the 4th Earl of Pembroke on 11th April, 1648

chapter in the Statute Book. Bills as drafted must also comply with parliamentary procedure.

That brings in the question of the other audience, parliamentary and public. The expectations of Parliament in regard to a Bill require that the Bill is self explanatory and that it is arranged in a manner that allows for orderly debate. But Parliaments pass legislation for the public whose affairs, approaches and aspirations will be governed by the legislation. They, too, have their expectations. They, too, expect the Act to be intelligible, precise, and free from ambiguity.

The expectations of the public stem from the fact that there are interests other than those of the Government concerned with the quality and the vitality of legislation. The policy of a piece of legislation may have its genesis from the public through the manifestoes of political parties. The manifesto of a political party is an undertaking that, should it gain political power, it would introduce legislation to give effect to its policies and philosophies economic, social or otherwise. Its election to office is considered an endorsement of that expectation. The public expects to see legislation that reflects the policies and philosophies it has endorsed.

Departmental officials administer legislation passed by Parliament. They thus become another source of legislative policy. In the implementation of the law departmental officials discover defects and discrepancies in the law. A piece of legislation may have become obsolete. It may have become unworkable. There may be gaps in the existing law which need to be filled in. Departmental officials make recommendations as to how the defects and the discrepancies require alteration.

It may be a call for an amendment. The situation may call for a new Act. The Zambian Intestate Succession Act, 1989, purported to give jurisdiction to subordinate courts to hear matters in relation to succession.[2] On its coming into force it was discovered that the Act did not contain provisions relating to the procedure by which the courts would exercise their jurisdiction.

Legislative policy may also originate from interest or pressure groups, who, as previously stated,[3] would seek to use legislation as a means to an end for the achievement of their purposes. Commissions of Inquiry and other Committees have already been mentioned as sources of the origin of policy.[4]

The classic theory is that Parliamentary Counsel do not initiate policy. They are only technicians whose function it is to translate policy into law. They must not seek to initiate policy. Policy issues are the preserves of others. But how does one translate policy without understanding that policy? Herein lies the inevitability of Parliamentary Counsel getting involved in policy

2 No. 5 of 1989.

3 Page 8.

4 Page 8.

considerations. The training given to Parliamentary Counsel, their vast knowledge of the existing law, their experience of the probable consequences of a piece of legislation, all these matters place them on a pedestal from which they have to be consulted on policy issues and from which they need to advise and to warn.[5]

Parliamentary Counsel need not be glorified amanuenses.[6] Yet the ability to discern the thin dividing line between policy and implementation, between practice and procedure, between the motive and the motivation, between the problem and the solution of the problem make Parliamentary Counsel candidates for early participation in the policy issues that lead eventually to the drafting of legislation.

In this participation, it is important that Parliamentary Counsel do not usurp the role of a policy maker. Their interest in substantive policy is not denied. Their expertise must be conceded but they must appreciate their own limitations and they should not seek to dictate policy. Only thus can they, as seasoned legal advisers, help to shape policy.

In that exercise, tact tends talent and duty demands diplomacy. Purposes are measured by philosophical pragmatism. Causes and cures are considered on the anvil of effectiveness and common sense. These are the fields open to Parliamentary Counsel to contribute in improving substantive policy.

On the receipt of drafting instructions, Parliamentary Counsel must examine and analyse the legislative proposals. Are the proposals capable of implementation? How harmoniously will the proposed legislation fit into the scheme of existing legislation? What are the alternatives? Would an amendment be appropriate rather than a new piece of legislation? What are the legal difficulties inherent in the proposals?

Is there constitutional legitimacy? What are the implications in the proposals for personal rights and for vested interests? In Appendix C is a set of questions with which Parliamentary Counsel should concern themselves. Such pertinent questions raise pertinent issues. The resolution of the pertinent issues involves considerations which affect the policies behind the proposals. They lead to informed policy decisions.

Conferences with departmental officials and, with the permission of the Minister, other interested persons will make it possible to iron out areas of difficulty. Here is the area where Parliamentary Counsel deal with the precise details of the policy behind the proposals. Here is the area where Parliamentary Counsel ensure that matters overlooked are dealt with so that the Bill, as finally drafted, will not only reflect the wishes and aspirations of the sponsors but will also be a workable piece of legislation.

---

5 Like Walter Bagehot's sovereign.

6 James Peacock, *Notes on Legislative Drafting*, p. 17.

Matters likely to lead to litigation are dealt with here. In *Roe v Russell*[7] there was 'a failure to provide for such obvious incidents of tenancy as death with or without a will, bankruptcy, power to assign and power to sub-let in whole or in part of the demised premises'. That led Scrutton L. J., to regret that he could not order the costs of the action to be paid by the draftsmen of the Rent Restriction Acts, 1920 - 1939.[8]

Parliamentary Counsel thus have a duty to foresee all possible eventualities that are likely to occur. If the law is drafted to specifically exclude dogs, then cats, even tigers are not so excluded. In such circumstances, *animal* as appropriately defined would be what is required. And what about the blind man who has to rely on a dog? These are matters for Parliamentary Counsel to fill in. Once the salient questions are asked and the relevant answers are supplied, the gaps in the broad policy will be filled. Exceptions to the general rule may be required.

To adapt Hart and Sacks,[9] a Parliamentary Counsel is

> an architect of social structures, an expert in the design of frameworks of collaboration for all kinds of purposes, a specialist in the high art of speaking to the future, knowing when and how to try and bind it and when not to try at all. The difference between a legal mechanic and a legal craftsman turns largely on an awareness of this point.

In drawing up the legislative scheme[10] for a Bill, Parliamentary Counsel may include matters that had not been foreseen at the conference table, or in the Drafting Instructions. Ideas crop up which would add to the practicability of the legislation. But then they would demand, as well, interstitial policy decisions which would require the approval of the sponsors of the Bill. Here again is an area in which Parliamentary Counsel contribute to improving substantive policy. In translating the substantive policy into a Bill additional policy matters may arise. They may not have been readily apparent before the actual drafting had begun.

The ultimate responsibility for the larger policy decisions is that of the sponsors of the Bill. Yet, the success of the legislation depends upon the skill and competence with which Parliamentary Counsel draft a piece of legislation. Parliamentary Counsel need to provide for sanctions, and may look at alternative provisions. Does the approach of Parliamentary Counsel give the requisite direction in fulfilling the wishes of the sponsors? The manner in which a Bill is drafted contributes to an improvement to the substantive policy.

In other words, a failure to properly translate the substantive policy into the appropriate law adversely affects the policy. The wishes of the law giver in

---

7 [1928] 2 K. B. 117, [1928] All E. R. 262.

8 *Ibid* p. 130.

9 *The Legal Process: Basic Problems in the Making and Application of Law,* 1958 p. 200

10 A specimen is in Appendix D.

those circumstances may not have been achieved. 'The most determined will in the lawgiver, the most benevolent and sagacious policy, and the most happy choice and adaptation of means, may all, in the process of drawing up the law, be easily sacrificed to the incompetency of a draftsman.'[11]

A law which provides that, 'when two trains approach each other at a crossing, they shall both stop, and neither shall start up until the other has gone'[12] has as its substantive policy the avoidance of railway accidents at railway junctions. As drafted, the law has frustrated the intention of the sponsors.

Rights are generally pursued against the background of political reality. At times that raises issues of a purely political nature for Parliamentary Counsel. The resolution of such political problems requires purely political considerations rather than legal considerations. But policy makers may wish to have a legal solution to political matters. A simple issue of a reasonable time would involve an appraisal of conditions which are economic, political or social rather than legal.

It is then a matter purely for the sponsors of the legislation to determine whether, say, thirty days form a sufficient period within which to file nomination papers for the purposes of an election. But it is within the competence of Parliamentary Counsel to determine whether thirty days form a sufficient period within which to bring an election petition. Counsel's knowledge of procedure - both of the civil law and of the criminal law - will be called in aid in determining the issue.

The aspirations of a people may present acute problems which border on the ethical. A political issue of the introduction of a one-party state clearly involves issues of a fundamental right. Human rights activists would argue that the step would whittle down the individual rights of freedom of speech and freedom of association. It could be argued on the other hand that, in order to achieve social cohesion and to build a national consciousness rather than promote ethnicity, a one-party state is desirable. How does a Parliamentary Counsel, taught to fearlessly defend human rights, deal with such serious situations which are against the grain of Counsel's training?

Events have shown that whilst a theory may be beautiful in theory the reality may be ugly. In such circumstances, what is the response of Parliamentary Counsel? However weighty the arguments about the rights and wrongs of a policy contained in Drafting Instructions, there comes a time when Parliamentary Counsel may have to say, 'No.' It is admitted that Counsel is not primarily concerned with policy matters. It is submitted that Parliamentary Counsel is in a position to advise on policy. Because by virtue of Counsel's expertise and independence much can be achieved especially

11 Coode, quoted by Driedger, *The Composition of Legislation*, p. 321.

12 Taken from Gyles Brandeth, *The Law is an Ass*, Pan Books, 1984, p. 126.

when Counsel has to point out the implications and the dangers inherent in a particular policy proposal.

Perhaps it should be mentioned here that Parliamentary Counsel in young Commonwealth countries should guard against importing concepts in one system of law into their own systems of law. This question of concept should not be taken lightly. In West Africa there is the concept of allodial and communal ownership of land. A customary right of occupancy of land is perpetual in duration. Yet it confers no ownership. It confers no right of property. There is only a right of possession. There is no power of disposal.

It 'is no more than a tenancy creating certain rights and obligations between occupier as tenant and the grantor, and determinable upon certain conditions.'[13] To provide for fee simple absolute in possession or freehold land is thus to create problems and litigation. As was stated by the Privy Council in the Gold Coast case of *Enimil v Tuakyi*,[14]

> It seems clear from the authorities … That the term owner is loosely used in West Africa. Sometimes it denotes what is in effect absolute ownership; at other times it is used in a context which indicates that the reference is only to right of occupancy … this looseness of language is, their Lordships think, due very largely to the confused state of the law in (West Africa) as it now stands. As appears from the report made in 1898 by Rayner, C.J., on Land Tenure in West Africa … there has been introduced into the … customary law, to which the notion of individual ownership was quite foreign, conceptions and terminology derived from English law. In these circumstances it is not surprising that it is difficult to be sure what is meant in any particular case by the use of the expression owner.

Enimil v Tuakyi cited the Nigerian case of *Amodou Tijani v Secretary Southern Nigeria*[15] in which the Privy Council said,

> As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very useful form of native title is that of a usufructuary right which is a mere qualification of or burden on the radical or final title … Their Lordships have elsewhere explained principles of this kind in connection with the Indian title to reserve lands in Canada. But the Indian title in Canada affords by no means the only illustration of the necessity of getting rid of the assumption that the ownership of land naturally breaks itself up into estates conceived as creatures of inherent legal principle … The notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual … this is pure native custom along

13 B. O. *Nwabueze, Nigerian Land Law*, 1972 p. 27

14 (1952) 13 W.A.C.A. 10 (Gold Coast).

15 [1921] A. C. 399.

> the whole length of this coast, and whenever we find, as in Lagos, individual owners, this is again due to the introduction of English ideas.

But even here, the Privy Council got it wrong as regards the concept of individual ownership. The concept of individual ownership is not foreign to the Customary Law. As Bentsi-Enchill[16] makes it quite clear,

> The very notions of family, sub-family, and immediate family properly carry with them an acknowledgement of original individual acquisition by the founder of the family or branch of the family.

Even the terms, *family*, *sub-family*, and *immediate family* do not fully express such terms as *abusua* or *abusua panyin*, the latter of which is equivalent to the Roman *paterfamilias*. For this purpose, Parliamentary Counsel need not be deterred from using terms which are readily understood in their jurisdictions. A Ugandan will readily understand the word *magendo* and what it imports rather than the word 'black market.'

Whenever the British Crown took over the administration of a territory, the statutes of general application, the doctrines of equity and the rules of the common law as they stood in England became the basic law of that territory.[17] This led to the stifling of the development of the indigenous systems of jurisprudence. The indigenous laws were to be known as the Customary Law.[18]

The importation of English Law led to the dual administration of justice and its attendant problems. In Sri Lanka, for example, many different systems of law are now administered. They are Sinhalese Law,[19] Buddhist Law, Hindu Law, Tamil Law, Islamic Law, Roman-Dutch Law[20] and the English Law. A Tamil living in the Jaffna district of Sri Lanka would inherit property on his father's or mother's death according to Tamil Law. He might be called upon to be a trustee of a Hindu temple. He would thus be subject to principles which originated in the English Courts of Equity, and to Hindu religious law which may be relevant in determining his powers, his rights, his duties.

He would mortgage his property according to the principles of Roman-Dutch Law. He has a choice whether to contract a marriage according to statute law or the Customary Law. His capacity to marry would be determined by statute law. If he brought an action for divorce he would, to some extent, be

---

16 *Ghana Land Law* (1964) p. 81.

17 In Zimbabwe, then Southern Rhodesia, it was the Roman-Dutch Law enforced in the Colony of The Cape of Good Hope on 10th June, 1891. In Ceylon, the English Law became a gloss on the Roman-Dutch Law and the Customary Law.

18 Particularly in Africa.

19 This is more commonly referred to as Kandyan Law, a term introduced by the British to describe what was originally the law of the Sinhalese. By the time the British took over Ceylon the Maritime Provinces had already been under the Dutch and were thus subject to the Roman-Dutch Law. The operation of Sinhalese Law was limited to those who could trace their ancestry to the Kandyan Provinces.

20 The British recognised the Roman-Dutch Law as the 'common law' of Ceylon. In its application, however, the English judges introduced English ideas of law into the Roman-Dutch Law.

subject to the principles of English Law. His claims to the custody of his children would depend on Roman-Dutch Law. His wife's right to retain property she had brought into the marriage community and any property she may have acquired subsequently would be governed by Tamil Law.[21]

This type of situation leads to difficulties. It creates problems for Parliamentary Counsel. It highlights the dangers in importing a concept of jurisprudence in one system of law into another system of law. *Delict* under Roman-Dutch Law is not synonymous with wrong under the Customary Law. A mere translation may not be appropriate since the *concept* that a word connotes in one system of jurisprudence is not the same concept in another system of jurisprudence.

In the Zimbabwe case of *John Katekwe*,[22] a father under the Customary Law has a cause of action for damages for the seduction of his daughter. Legislation had conferred majority status on the daughter. A question to be resolved was whether the Age of Majority Act, 1982,[23] wiped away the father's cause of action. Did the Act intend to do away with the tenets of the Customary Law? The lower courts said, 'No.' The Supreme Court said, 'Yes.'

The Supreme Court failed to realise that the father's cause of action had nothing to do with the age of the daughter. The father's cause of action lay in the damage done to the honour of the family by the seduction as well as in the lessening of the amount of dowry that the father would get on the marriage of his daughter. That amount would be higher had the daughter not been interfered with.

With regard to the Age of Majority Act 1982, a provision is required which specifies the application of the Act in areas such as the right to vote and the right to sue and to be sued. Certain incidents of the Customary Law should be left intact. Not all Customary Law is bad. Not all imported law is good.

There is the great need for balance for the improvement of both Customary and statutory law, and in the improvement of the social conditions of a people. The vast majority of the people in many jurisdictions of the Commonwealth live by the tenets of the Customary Law. That is a fact to be reckoned with in the drafting of legislation.

---

21 The Thesawalamai Law applies to the Malabar inhabitants of the province of Jaffna, that is the Jaffna Tamils. Other Tamils are governed by the Roman-Dutch Law.

22 S. C. 87/84 Civil Appeal No. 99/84. See also (1990) Stat. L. R. Vol. 11 No. 2, p. 90.

23 No. 12 of 1982.

Chapter 3

Language and Legislation

Language expresses human thought and human endeavour; it reflects our very way of life. Every aspect of our lives is affected by language. We understand ourselves and our society by language. We communicate with each other and conduct our daily affairs by the means of language.

Language has been the source of many a misunderstanding. It influences our judgment of other people; it determines our social status, our education. It is bound up with society. When language changes, society changes. When society changes, language changes. Today's people of Rome do not speak Latin.

Language, especially written language, has a magnet all its own. The pleasures of poetry, the spell of the orator, tell of the magical influence of language. Whether the language is emotive, informative or prescriptive, its influence is great. Paul's plea before Agrippa,[1] Shakespeare's Mark Antony[2] demonstrate the power of language. All our records, be they scientific, business or parliamentary, represent an aspect of the function of language. Our very thinking is facilitated by language which is the great instrument of communication. Parliamentary Counsel should be interested in language because Acts of Parliament are instruments of social control, what Dean Roscoe Pound calls the 'rules of social engineering.'

Legislative Drafting as a means of Communication.

An Act of Parliament expresses legal relationships. It is also a form of communication. It lays down our rights and our obligations, our powers, our privileges and our duties. In this it tells us what to do and what not to do. It is a command to others. There should, therefore, be *no misunderstanding* as to the message that it seeks to convey. It is part of the language of a people. It will be understood as language of that jurisdiction is understood. In that respect, an Act of Parliament should be drafted in accordance with principles that govern language as a means of communication in that particular jurisdiction.

The ability to communicate depends upon our ability to think. One is of the essence of the other. That is why 'what is commonly called the *technical* part of legislation, is incomparably more difficult than what may be styled the

---

1 Chapter 26, *Acts of the Apostles*.

2 *Julius Caesar*, Act III sc. 2.

ethical. In other words, it is far easier to conceive justly what would be useful law, than so to construct that same law that it may accomplish the design of the law giver.'[3]

Words

Words are the basic units of expression, and form the elements of a sentence to convey an idea. That idea may be a command to do a positive act or a prohibition to refrain from doing something. Jesus Christ gave us the injunction: 'But I say unto you, that every idle word that men shall speak, they shall give an account thereof in the day of judgement. For by thy words thou shall be justified, and by thy words thou shall be condemned.'[4] Many an accused person has been found guilty as a result of the accused's own evidence. The appointment of the Renton Committee was an indication of how Acts of Parliament and subsidiary legislation are seen by others.[5]

Aldous Huxley[6] stated that 'When Gotama insisted on Right Speech, when Jesus stressed the significance of every idle word, they are not lecturing on the theory of semiosis; they were inculcating the practice of the highest virtues.' The injunction of Jesus Christ must be written large in the hearts and minds of Parliamentary Counsel. It may not be a bad idea to have that injunction, on the desk, facing a Parliamentary Counsel each day Counsel sets out to draft a Bill. By their words, they may corrupt those in power. By their words they may bring distress or deprivation to their fellow men.

But a word 'is not a crystal, transparent and unchanged. It is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used.'[7] This emphasises the fact that few words have 'the precision of mathematical symbols.'[8] That echoes the warning of Justice Holmes that, 'ideas are not often hard but words are the devil.'[9]

The choice of words is thus an important matter in legislative drafting. Proper words in proper places, make the true definition of style.[10] Or as *Hamlet* would put it, 'Suit the action to the word, the word to the action; with this special observance, that you over step not the modesty of nature.'[11]

---

3 Austin, *Jurisprudence* quoted by Ilbert, *The Mechanics of Law*, p. 98.

4 *Matthew* 12: 36.

5 The issues discussed by the Renton Report, 1975, (Cmnd. 6053) are of equal relevance to other jurisdictions.

6 *Words and Their Meaning* pp. 35-336.

7 *Towne v. Eisner* U. S. 245, U. S. 418 at 425 [1918] *per* Justice Holmes.

8 *Boyce Motor Lines Inc. v United States* 342 U.S. 337 (1952) *per* Justice Clark.

9 Quoted by Megarry, *A Second Miscellany-at-Law* p. 152.

10 Swift, *Letter to a Young Clergyman*, 9th June, 1720.

11 Act III, Sc. 2.

Does the expression 'agricultural product', for example, include the expression 'dairy product'? The answer hinges on the meaning of *agriculture* and *dairy*. *Agriculture* is defined by the *Concise Oxford Dictionary* as the science or practice of cultivating the soil and rearing animals. A number of statutes have also defined *agriculture* along the same lines. The Small Holdings and Allotments Act 1908[12] is an example. It provides in subsection (1) of section 61 that

> 'agriculture' shall include horticulture, and the use of land for any purpose of husbandry, inclusive of *the keeping or breeding of livestock*, poultry or bees, and the growth of fruits, vegetables, and the like.[13]
>
> 'dairy' means farming concerned with dairy products.

In the definition of *dairy* the dictionary lists milk, cream, butter and cheese as dairy products. It is pertinent to observe that cream, butter and cheese *are made from* milk which itself is produced by animals such as a cow or a goat. Dairy farming is thus concerned with the rearing of animals for the purpose of producing milk which in turn may be processed into dairy products such as cream, butter or cheese.

Thus both *agriculture* and *dairy* are concerned with the breeding or keeping of animals. The distinction is that in agriculture the keeping or breeding of animals is not just for dairy purposes. Agriculture is thus broader in scope than dairy. Indeed agriculture encompasses *dairy*. Two statutory provisions proceed on that footing. The Corn Production Acts (Repeal) Act, 1921[14] and the Agriculture Wages (Regulation) Act, 1924[15] respectively provide that *agriculture* includes dairy farming.

It could be argued that in those statutory definitions, there is an extension of the ordinary and common meaning of *agriculture*. Such an argument would contend with the fact that

> Freedom to stipulate definitions at will is, however, largely theoretical … a definition must follow customary usage as closely as possible.[16]

There is a wealth of decided cases which show that the statutory definitions of *agriculture* do not bear a meaning that departs from the ordinary and common meaning of that word. In *Walter v Wright*[17] Lord Hewart, C.J., held that *agriculture* includes any use of land in connection with breeding or

12 8 Edw. 7 c 36.

13 Emphasis supplied.

14 11 and 12 Geo. 5. c. 48.

15 14 & 15 Geo. 5. c 37.

16 Thornton, *Legislative Drafting*, p. 56.

17 [1938] 4 All E. R. 116.

keeping an animal ordinarily found on a farm. *Lanarkshire Assessor v Smith*[18] considered whether poultry farming was agriculture. Lord Sands[19] stated that,

> it is well settled, I think, that the term agriculture in a statute is not to be construed in a manner which circumscribes its ambit etymologically. It includes the various uses of land which, popularly and historically, are associated with farming …

It may be contended that dairy farming has greatly improved to the extent that it must be seen or regarded as being distinct from agriculture. It is an industry in itself. Lord Sands[20] again:

> … under modern conditions it [poultry farming] has been found profitable. In many cases, greatly to extend this branch of the farming industry, and even to make it exclusive. But I do not think that this alters its character as a use of the land traditionally associated with the farm.

Legislation may deal specifically with dairy farming as distinct from the growing of, say, vegetables or vice versa. It thus becomes necessary to distinguish between the two, even though agriculture would include dairy farming.

In the provision,

> No person shall interfere with the production, transportation or marketing of a perishable agricultural or dairy product,

there is the need to keep the two industries distinct. There might be difficulties when the expression *dairy product* is not specifically mentioned. It could be argued that a perishable agricultural product is not the same thing as a perishable *dairy product*. The maxim *exclusio unius est exclusio alterius* might be called in aid. Hence the desirability of having to use both expressions. What about poultry farming?

The point is that all these are now regarded as distinct industries in their own right. They must be treated as such despite their common denominator of 'as a use of land traditionally associated with a farm'. Thus where the legislation is intended to deal with the *use* of land for agricultural purposes as distinct from building purposes *agriculture* could be defined as including *dairy farming*, *poultry farming and any such other industry*.

Is there also a distinction between *produce* and *product*? The *Oxford English Dictionary* defines *produce* as a thing, or things collectively produced, either as a result of action or effort, product, fruit and also as agricultural and natural products collectively as distinguished from manufactured goods. *Product* is defined as that which is produced by any action, operation or work; a production; the result; or as a thing produced by nature or natural process. In the collective sense it would mean produce or fruit.

---

18 [1933] S. C. 366.

19 *Ibid*., p. 371.

Thus, the primary meaning of *produce* or *product* would appear to be the same. But there is a distinction as indicated by their secondary meanings. The distinction is that an agricultural good is, for example, *produce* if it has not undergone a manufacturing process. It becomes an agricultural *product* once it has undergone a manufacturing process.

Section 2 of the Sale of Produce Ordinance[21] provides that *licensable produce* includes lime juice, lime oil, cocoa, coffee, cotton and such other articles of produce. Section 2 of the Agricultural Produce Ordinance[22] defines agricultural produce as bananas, coffee, carrots, cassava, lemons, melons, mangoes, oranges, sugar cane, tomatoes, tobacco.

Section 2 of the Coconut Products (Control) Ordinance[23] provides that *Coconut products* means deodorised coconut oil, lard substitute and any other product derived or manufactured wholly or in part from the kernel of the coconut. *Deodorised coconut oil* is defined as meaning any oil manufactured in Guyana from the kernel of coconut.

In *Cambrian Land v Allan*,[24] the court considered the provisions of the Vehicles (Excise) Act 1971.[25] It held that the words 'produce of agricultural land' did not cover carcasses after they had been processed by a slaughter-house.

It thus appears that usage also draws a distinction between *produce* and *product*.

Here is an example of a provision which highlights the need for the correct use of words:

> No *animal of the dog kind* shall be allowed to *go at large* without a collar or tag, as *now* prescribed by law, and no person owning, *keeping* or *having custody* of a dog in Draftaria shall permit *such dog* to be in a public place in Draftaria unless *such* dog is *firmly* secured by a *substantial* leash not exceeding four feet in length, held by a person capable of *managing such a dog, nor*, shall a dog be permitted to go on private property without the consent of the owner or occupant thereof.[26]

The words in *italics* raise problems:

(a) *animal of the dog kind* may refer to quite a range of animals: fox, hyena and wolf. In that instance the determining factor is based on the scientific family to which a dog belongs. *Kind* may raise the issue of man's best friend and thus bring pets into consideration. If animals of the dog kind are specifically excluded, then *other* animals *not* of the

---

21 Cap. 272 of the Laws of Grenada.

22 Cap. 7 of the Laws of Jamaica.

23 Cap. 69:05 of the Laws of Guyana.

24 [1981] R. T. R. 109.

25 C. 10, Sched. 4, Pt. 1, para. 9(1).

26 Adapted from Article 18, Police Regulations, District of Columbia, quoted by Reed Dickerson, *Materials on Legal Drafting*, p. 127.

dog kind could be allowed in. Other words in the excerpt clearly show that dog is what is intended. Thus *animal of the dog kind* is ambiguous;

(b) *go at large* needs qualification. A dog need not be in chains at all times even in the owner's premises, for example. It should be allowed to go at large on that property. That is part of the freedom of movement desirable to avoid charges of cruelty to the dog. So here the intention is that the dog should be under some form of control when it is *in a public place*.
But if the wearing of the collar or tag is taken into account it may well be that the intention is that the dog, even when it is on the owner's property, should wear the collar or tag prescribed by law. In which case there is no need to qualify *go at large* with *in a public place*;

(c) *now*: an enactment is for all time unless repealed. Thus *now* as used here could mean at the time of the enactment of the provision;

(d) *keeping* in what sense? It could be for a while. It could be permanently. In those circumstances *having custody of* appears to be a better expression. So *keeping* is redundant;

(e) *such dog* refers to *animal of the dog kind*. The use of *such* here is not desirable. It would be far better to simply say *the dog* or *that dog*;

(f) *firmly* is a relative term. It primarily means fixed, stable, steady, not shaking, established. Its use here is thus not appropriate; and for the purposes of the leash, how secure would it need to be in order to satisfy the requirements of firmness and thus the requirements of the law?

(g) *substantial* is also a relative term. The *Concise Oxford Dictionary* brings within the ambit of *substantial* expressions like, having substance, actually existing, of real importance or value, of considerable amount. A leash of four feet in length can hardly be referred to as of a *substantial* length. Perhaps the intended meaning here is solid material or structure. So the reference would be to the quality of the material used in the making of the leash, the strength, the thickness of the material used rather than the length of the leash. The ambiguity is obvious;

(h) *managing* could here mean managing as an agent, as where an owner of a dog, going on holiday, leaves his dog with a kennel established for the breeding or boarding of dogs. But then *custody* would do well. It could also mean *looking after* the dog. Another ambiguity;

(i) *such a dog* takes us back to *animal of the dog kind*. In the present context it could mean *an* animal of the dog kind. *Such dog*, that is, *the* dog is not the same thing as *such a dog*. Since both expressions have been used different meanings could be given to them. Thus *such a dog* here refers to type of dog and not necessarily to the dog already referred to;

(j) *nor* is used here to mean *and not*, that is, *and no dog shall be permitted to go on private property …*

There are other defects in the excerpt such as the absence of the appropriate legal subject and the unnecessary use of the passive voice. A possible redraft would be:

An owner of a dog

(a) shall not allow the dog to go at large without a collar or tag as required under [section 24 of the Dogs' Act 1007];

(b) shall not permit the dog to be in a public place [within the area of authority of the city of Draftaria] unless the dog is held

(i) on a leash not exceeding four feet in length, and

(ii) by a person capable of controlling the dog;

(c) shall not permit the dog to enter on to the property of any other person without the consent of the owner or occupier of that property.

Needless words should not be used in legislation. Where a word has the same meaning as a phrase it is better to use that word rather than the phrase. In composing the legislative sentence Parliamentary Counsel should attempt to be direct, simple, brief, vigorous and lucid. This means that Counsel should

(a) prefer the familiar word to the uncommon;

(b) prefer the concrete word to the abstract;

(c) prefer the single word to the circumlocution;

(d) prefer the short word to the long;

(e) prefer the Anglo-Saxon word to the Romance;

(f) prefer the mathematical formula to the description of the mathematical process, where necessary, as the mathematical formula is often clearer and more convenient to the reader of the Act than a verbal description of the process. In Appendix E are examples of the use of, and a statutory instrument that indicates the appropriate use of, the mathematical formulae.

The general principle is qualified by the subject matter and purpose of the sentence but Counsel should take care to avoid what is often referred to as legalese. This excludes terms of art of a profession or science that must be used for want of a clearer and shorter statement in ordinary English.

Needless words create trouble, they are an inconvenience to the reader and indicate a failure to write concisely and in a disciplined manner. In the end they complicate the construction and application of an Act by their presence. A word is better than a phrase if they mean the same thing, for one or more words in the phrase may be needless repetition of the thought. Why should Parliamentary Counsel use the expressions *null and void*, or *force and effect*?

Parliamentary Counsel should also

(a) use short, familiar words and phrases that best express the intended meaning in accordance with common and approved usage;

(b) use the same word to express one meaning and one meaning only and different words should not be used to express the same meaning;

(c) use pronouns only if their antecedents are quite clear from the context and structure of the sentence thus avoiding pronominal uncertainty;

(d) use restrictive or defining relative pronouns in accordance with recommendations in Fowler's *Modern English Usage*;

(e) use with care the possessive noun or pronoun.

Parliamentary Counsel should not use

(a) the words *said, same, aforesaid, before-mentioned, herein-before-mentioned, whatever, whatsoever, whomsoever*, and similar words of reference;

(b) unnecessary adjectives and adverbs;

(c) Latin expressions where an English phrase would do as well. But there would be no objection to, say, Parliamentary Counsel in Uganda using *magendo* for *black-market*. The average reader in Uganda would easily understand what *magendo* means and all its implications which *black-market* would not convey.

Meaning and Spelling of Words

The *Oxford English Dictionary* should be used as the conventional dictionary for legislation, and the preferred meaning or spelling from that dictionary then will generally be the acceptable one.

A word that has acquired in the community another spelling or meaning than the one preferred in the *Oxford English Dictionary* may replace the *Dictionary* word; but a word of purely *community* meaning should not be used without a definition unless it is so well established in the community that its meaning would likely be judicially noticed or easily proven.

And and Or

The use of the word *or* or of the word *and* has given rise to many difficult problems. The use of either of those words calls for a high degree of precision.[27] An appreciation of the legal effect of the use of *and* or *or* would help in minimising the difficulty in the choice of which word to use. The

27 Reed Dickerson, *The Difficulty of Choice Between And and Or*, [1960] A.B.A. Journal, p. 310.

difference in meaning lies in this: *or* is disjunctive, *and* is conjunctive. *And* connotes togetherness. *Or* tells you to take your pick.[28]

The basic rule therefore is that *and* should be used when the intention is to refer to one thing, such as a *husband and father*. Here the reference is to a person who is *both* a father *and* a husband. If the reference is to two different persons but *and* is used the expression would be a *father, and a husband*.

Even then the *and* is still conjunctive for *both* a father as one entity, and a husband as another entity, would be required to act as in the sentence, *A father and a husband shall file a statement*. The meaning becomes clearer when another word is used rather than *husband: A father and a teacher shall sign the declaration form of a student*.

If *or* is substituted for *and* the expression becomes *A father or a husband shall file a statement*, that is to say, a father as an individual is commanded to act; a husband as an individual is commanded to act. The reference here is to two categories of persons. One, those who are fathers; two, those who are husbands. Three situations are thus involved:

1. *A husband and father*, that is, one person who is both husband and a father. It is obvious that there are fathers who are not husbands. There are husbands who are not fathers.
2. *A father and a husband shall* …, that is, two persons are dealt with here both of whom are commanded, by the use of *shall*, to act or refrain from acting, obviously *in concert*:
   (a) a father who is not necessarily a husband, but could be a husband, *and* a husband who is not necessarily a father but could be a father;
   (b) a father who *is* a husband *and* a husband who *is* a father; and
   (c) a father who is not a husband *and* a husband who is not a father.
3. *A father or a husband*, that is, either one, independently of the other, would act or refrain from acting whether or not the father is also a husband, whether or not the husband is also a father.

Where there is an enumeration of subject matters coupled with the exercise of a discretionary power, it is immaterial whether *or* or *and* is used. For in that case the discretion implies that the authority which has the discretion can - and would - act as that authority thinks fit in exercising the discretionary powers. Thus where it is provided that,

The Minister may make Regulations providing for

(a).....

(b).....

(c).....

(d).....,

---

28 *Ibid*., p. 310.

the Minister could issue a set of Regulations providing for (a), (b), (c) *and* (d). He could also issue, as he wishes, Regulations providing for only (a) at one time and another set of regulation providing for (b) at another time, and so on. In this example the use of *may* governs what follows. So the use of *and* after each paragraph or the use of *or* after each paragraph would not make much of a difference.

A difficult situation arises when *and* and or are *both* used in the same legislative sentence.

A father and husband or wife shall …

The problem here is that there is an ambiguity. The expression could mean

1. a father and husband, *as one person*, or a wife;
2. a father who is not a husband or a wife;
3. a husband who is not a father or a wife;
4. a father who is not a husband or a husband who is not a father or a wife

In other words is the reference here to

1. *two persons*? that is
   (a) a person who is *both* a father and a husband, *or*
   (b) a person who is a wife not necessarily *the* wife of that husband;
2. *three persons*? that is
   (a) a person who is a father but is not a husband, *or*
   (b) a person, who is a wife, *and*
   (c) a husband who may or may not be *the* husband of that wife;
3. *two persons*? that is
   (a) a person who is a husband but is not a father, *or*
   (b) a person who is a wife;
4. *three persons*? that is
   (a) a person who is a father, *or*
   (b) a person who is a husband, *or*
   (c) a person who is a wife.

In the last example, 4, the *and* becomes an *or*. It is thus desirable to note the words of Lord Wilberforce in *Anisminic v Foreign Compensation Commission*:[29]

> There remains, of course, the drafting of article 4 (1) (b) (ii) 'that the person referred to and any person who became successor in title,' which does not appear to suggest that a situation may exist where a successor in title is relevant even if the claim is made by the original owner. But I think

29 [1969] 2 A.C. 147 at p. 214 (H.L.)

> this is not decisive: it is merely the result of unfortunate telescopic drafting. The draftsman ought to have dealt separately with the two cases saying (i) if a claim is made by the person referred to as aforesaid that he was a British national … (ii) if a claim is made by the successor in title of such person and such person succeeded before February 28, 1959, that both he and the person referred to as aforesaid were British nationals. We are well used to doing, by interpretation, this kind of work on the draftsman's behalf, and I think we can do so here.

And/or

The symbol *and/or* should never be used in a legislative sentence. It is not precise. It is likely to lead to confusion, if not ambiguity. In R*e Lewis, Goronwy v Richards*[30] Farrell J stated that,

> The question which I have to decide is what is the effect of the gift of the testator's residuary estate to 'Margaret Ann and/or John Richards.' It may mean an absolute gift to Margaret Ann and if she does not survive the testator and the tenant for life, then to John Richards; or it may be a gift to the two of them as joint-tenants, or as a third alternative it may be wholly void for uncertainty.

The ambiguity created by the use of *and/or* is obvious. According to Lord Reid,[31] 'The symbol *and/or* is not yet part of the English Language'. In *Bonitto v Fuerst Bros. Co. Ltd.*[32] Viscount Simon L. C. referred to the symbol as 'a bastard conjunction.'

A, An, The

An *a* is used in legislative drafting as the indefinite article. It stands for the *singular*. Often it is used as part of the statement of the universal description, *a person*. Before a vowel *an* is used.

1. A person shall not stand on a bench in a public park.
2. An employer shall ascertain from an employee whether the employee is a graduate.

The *the* is used as the definite article. It is placed before a noun or to denote a person or a thing. The use of *the* in legislative drafting means that *a* person or *a* thing has been already identified or referred to or mentioned:

1. There is hereby established a scheme to be known as the Compulsory Service Scheme.

---

30 [1942] 2 All E. R. 364 at 365.

31 *Stein v. O' Hanlon*(1965) A. C. 890 at 904.

32 (1944) A. C. 75 at 82.

2. The Scheme applies to a citizen of Draftaria who completes a course of study at a tertiary institution.
3. The Principal of an educational institute.

In the first sentence *a* is used. It is indefinite. In the second sentence *The* is used because it is a unique reference, since a particular scheme has been sufficiently identified. So is the *The* in the third sentence. If *A Principal* is used that would imply that there are more than one Principal at *an* educational institute.

Any

The word *any* really means *one* or *some*. It does not have the same meaning as *a* or *an*. 'Baa, baa, black sheep, have you *any* wool'? Its use in legislative drafting should take due cognisance of its ordinary meaning.

Thus the expression *any person* in a legislative sentence should be *a person*, which is a universal description. Driedger[33] has stated that *any* is 'a tiresome word in legislation. Many *anys* can be replaced by *a* or *an* with better effect.'

Each

The word *each* refers to numbers, two or more. In other words there is a previous identification.

1. A company shall have five directors.
2. Each director shall file the particulars specified in the Second Schedule.

Here the use of *a* rather than *each* would be inappropriate. The reason is that there would be an ambiguity if *one* of the directors files the particulars as to whether the requirements of the law have been met. The contents of the Second Schedule may not indicate that all the directors are required to file the particulars.

Each director shall file a statement of that director's income.

Here *of that director' s income* modifies *statement*. The use of *each* is thus not different from the use of *a*.

Every

The word *every* connotes an implied class. *Every teacher* indicates an identified class of teachers. The reference is thus to each single teacher of that identified class. So the reference is to numbers. Thus if the reference is to

33 *The Composition of Legislation*, p. 131.

teachers generally, not an identified class but *persons who are teachers* the appropriate expression would be *A teacher*.

Such

According to the *Concise Oxford Dictionary* there are thirteen meanings of *such*. They include meanings such as, the same kind or degree, or of the kind or degree already described or implied in the context, or the kind or degree sufficient to explain the preceding or following statement, and the legal jargon aforesaid, or of the aforesaid kind.

Here is a provision[34] which shows the unwise use of *such*:

> A person who is nominated for a public office at a primary election, with or without balloting, and whenever required accepts such nomination, may decline such nomination if such person is thereafter nominated for another office by such party; or any such person thereafter nominated to fill a vacancy caused by such nomination by such party may decline the nomination made at the primary election not later than September twenty-first, preceding the general election, but such a declaration shall not be effective if such nomination by such party is duly declined, or if the person nominated to fill such vacancy duly declines the nomination made at the primary election as aforesaid. The Certificate filling such vacancy shall be filled as provided by section one hundred and forty of this chapter not later than October seventh preceding the general election.

In the excerpt *such* appears twelve times. It is an example which should be avoided at all costs. Which *such* qualifies which word or expression? The result is that there are uncertainties of modification, and inconsistencies in conceptualization. The internal arrangement of the words causes ambiguity. It could be redrafted thus:

(1) Where a person

(a) is nominated for a public office by a party at a primary election with or without a ballot, and accepts that nomination, and

(b) is nominated for another public office after that person has accepted the nomination made by the party under paragraph (a),

that person may confirm the acceptance of the nomination made under paragraph *(a)*, or decline that nomination and accept the nomination made under paragraph *(b)*.

(2) A party may nominate any other person in respect of a nomination declined under subsection (1).

---

34 Taken from Reed Dickerson, *Materials on Legal Drafting*, p. 235.

(3) A person nominated under subsection (1) or subsection (2) shall, not later than the twenty-first day of September preceding a general election, declare in writing the acceptance of the nomination or the rejection of the nomination.

(4) A party shall, not later than the seventh day of October preceding a general election, inform the [Electoral Commission] of the names of the persons nominated by the party.

The provision could also be redrafted in other forms.

Same

The word *same*, used as a substitute for a preceding noun or phrase, is a legal jargon which should be avoided in legislative drafting. It leads to ambiguity more often than it helps precision and can result in lazy and stilted drafting.

Where

The word tends to be a technical term in legislative drafting, perhaps largely as a result of the influence of George Coode. It normally, and at best, conveys the equivalent of fairly general circumstances or a description of a factual situation:

Where dogs are running at large …

Where in a community …

Where aggravation is not a defence …

When

As an interrogative or an adverb *when* means at what time, or on what occasion? As a conjunction it means at the time that, any time that. But in legislative drafting the word has the aspects of a technical term. Its most appropriate use is to distinguish the circumstance that occurs:

When a child is born prematurely …

When a person is committed to prison …

When a woman dies …

It thus has a time reference. It is not intended to deal with circumstances.

If

If also tends to be a technical word. Its most frequent use is to attach a condition to the operation of the law expressed by the legislative sentence. It should be used to state a condition.

Where, *when* and *if* should not be used interchangeably though in many instances they are used to do the same work. In some instances this interchangeability occurs either from a desire for variation or because no particular attention is paid to the distinctive uses of the terms.

Which, That

Most writers have their own preference for *which* or *that* as the appropriate pronoun to use to introduce a restrictive or defining relative clause. In the legislative sentence most of the relative clauses are defining or restrictive so that the use of *which* does not cause as much ambiguity as it can in other written matter. But *which* can frequently send a reader off on what Fowler terms a 'false scent'; and, in other cases, when a non-restrictive or non-defining *which* is called for, it is difficult to avoid confusing *which* with its use in the defining relative clause.

That is the more useful pronoun to introduce a restrictive or defining relative clause in a legislative sentence. It is gaining more acceptance as argued for in Fowler's *Modern English Usage*. If accepted as a convention, the writing discipline required to make the distinction between *which* and *that* will ease many of the drafting problems associated with the defining of antecedent nouns within a legislative sentence. It will also help Parliamentary Counsel appreciate the syntax of a given legislative sentence.

Deem

The *Concise Oxford Dictionary* defines *deem* as believe, consider, judge or count. In legislation it is used to create a legal fiction. To provide for the retroactive operation of an Act the commencement provision will state that,

> This Act shall be deemed to have come into force on the first day of January, 1990,

when the date of enactment is December, 1992.

The word can also be used in its ordinary dictionary meaning of *consider*. Perhaps it is in respect of the unnecessary use of *deem* in its ordinary meaning that led Lord Mildew[35] to say that, 'there is too much of this damned deeming.'

To avoid confusion, Parliamentary Counsel should restrict *deem* to its use in legislation to establish a legal fiction. In *St. Aubyn v Attorney General*,[36] Lord Tucker stated that,

---

35 *Travers v Travers* (unrep.) from A. P. Herbert's *Codd' s Last Case*quoted by Megarry, *Miscellany-at-Law*, p. 361.

36 [1952] A. C. 15 at p. 59.

> I can see no ground for calling in aid a 'deeming' section when that which is to be deemed has in fact taken place without its assistance. If the notional transfer is to supersede the real transfer with consequences detrimental to the taxpayer, this should, I think, be made plain by unambiguous language.

In *Robert Batcheller & Sons Ltd. v Batcheller*,[37] Romer J. stated that,

> It is, of course, quite permissible to 'deem' a thing to have happened when it is not known whether it happened or not. It is an unusual but not an impossible conception to 'deem' that a thing happened when it is known positively that it did not happen. To deem, however, that a thing happened when not only is it known that it did not happen, but it is positively known that precisely the opposite of it happened, is a conception which to my mind, if applied to a subject matter such as art. 93, amounts to a complete absurdity.

These statements are but a warning to Parliamentary Counsel in the use of the word *deem*. Driedger[38] draws a distinction between

(a) shall not be deemed, and

(b) shall be deemed not.

'*Shall not be deemed* should be used only where a previous deeming is denied; *shall be deemed not* is used to establish a negative fiction that can stand on its own feet:'

> For the purposes of section 24 only, a conviction shall not be deemed to be a disqualification.
>
> A conviction for an offence under the Road Traffic Act, 1907, other than a conviction for murder or manslaughter, shall be deemed not to be a disqualification for standing as a candidate for election as a member of Parliament.

Capital Letters, Small letters

When does Parliamentary Counsel use capitalization? Capitals should be used sparingly. There are a few basic conditions to be observed in the use of capitals. They should be used in expressing

(a) the points of the compass

  (i) when specifying an area such as the *East*, *West*, *North* and *South*, *North-east Street*;

  (ii) when specifying a geographical name such as *West Africa*; the *Karamoja District of Ruritania*;

---

37 [1945] Ch. 169, 176.

38 *The Composition of Legislation*, p. 133.

(b) the names of organizations, parties and the like such as *the University of the West Indies*, the *Democratic Labour Party*; but *democracy* or *democratic* need not be capitalized;

(c) proper names such as *Acts*, *Regulations*, *Rules*, *Orders in Council*, and *Proclamations* when referring to an Act of Parliament or subsidiary legislation issued under an Act of Parliament; *Schedule*, *Form*, or words derived from proper names,

  (i) when the connection of a derived adjective or verb with a proper name is immediate such as *African descent*, the *English language*;

  (ii) when dealing with adjectives of nationality such as *Ethiopian script*;

  (iii) the title of books, the days of the week, the months of the year, holidays and historical days;

(d) proprietary names such as *International Business Machines*;

(e) when a title is intended to apply to a particular holder of an office such as the *Chief Justice*, or a government ministry such as the *Ministry of Foreign Affairs*, or the *Department of Education*.

Clarity

Clarity is important in legislative drafting. It helps to eliminate ambiguity and vagueness. There are a few considerations to help in this process. The first consideration to observe is that a word has no *meaning* by itself; its meaning is derived from the context in which it is used.

The *Concise Oxford Dictionary* has about fifteen meanings for the word 'law'. They range from a 'body of enacted or customary rules recognised by a community as binding' to 'obedient, obedience to law'. We have the *Law of Torts*, *Constitutional Law*, *Administrative Law*, the *Laws of Nature*, the *Doctrines of Equity*. In each context there is the underlining bond of a set of rules recognised for given purposes. The body of rules referred to as the Law of Torts are enforceable. The body of rules known as the Laws of Nature are not enforceable by the courts of law.

The second consideration is that of concepts. A concept is vague if in a given context it leaves open too wide a range of borderline cases to delimit precision in that context. The expression, *No person shall smoke*, leaves a lot of questions to be answered. Smoke *what*? Marajuana? A cigarette? If so can one smoke a pipe or salmon for that matter? Smoke *where*? In one's bedroom, in a public place?

The third consideration is that the subjective intent of the writer or speaker must coincide with the objective meaning of the word or phrase used in its context and be so supported by some external source such as a dictionary, reasonable interpretation or even antecedent experience. If that is not the case, then as the expression goes, 'we are not talking the same language'.

When Jesus Christ said, ' … and for this cause came I into the world, that I should bear witness unto the truth. Everyone that is of the truth heareth my voice,' Pilate asked Christ, 'What is truth?'[39] This type of situation arises whenever the courts fall on the intent of Parliament in trying to construe a provision of an Act of Parliament.

The fourth consideration is that if the subjective intent attempts to meet two objective meanings, that is to say, provide a reasonable compromise, equivocation can result. Mr. Lloyd George, asked by a lady what was the difference between a man and a woman replied, 'I can't conceive, I can't conceive.'

There are two meanings here:

1. I cannot perform certain of the biological functions which are the preserve of the female.
2. I cannot for the life of me understand why there should be a difference.

In the expression,

> An employer shall ascertain from a prospective employee whether he is a graduate,

the *he* is intended to refer to the prospective employee. In the sentence structure it refers to the employer who is the subject of the sentence. This is an example of what Reed Dickerson would refer to as a pronominal uncertainty.

The fifth consideration is that what may normally be omitted in some contexts may not be omitted in others in the interest of clarity.

> For terminating a mortgage under these conditions see Schedule C. Otherwise see Schedule B. Schedule A does not apply to termination.

See Schedule B for what? Otherwise see Schedule B implies that Schedule B does not apply for the termination of a mortgage. However it is specifically stated that Schedule A does not apply to termination of a mortgage. So what does Schedule B stand for?

The sixth consideration is that simplicity is not clarity nor is simplicity necessarily good sense. The example of the law relating to the trains stopping at a junction makes this clear. Subsection (3) of section 8 of the Crimes (Hijacking of Aircraft) Act 1972 of Australia provided that

> The punishment for an offence against this section is imprisonment for life.

This plain simple provision led to a plain simple question in *R v Sillery*.[40] Does the provision impose a mandatory penalty or does it confer a discretion on the court to impose a penalty less than life imprisonment? The trial court and the first appellate court held that the penalty was mandatory. The higher appellate court held that the penalty was discretionary.

---

39 *John* 18, 37-38. See also Bacon, Of Truth, *Essays*.

40 (1980) 30 A.L.R. 563, 656, quoted by I.M. Turnbull in *Problems of Legislative Drafting, Stat. L.R.*, 1986 p. 69.

The seventh consideration is that sequence will readily imply connection. *Ejusdem generis* and *noscitur a sociis* have something to do with this. The adage, 'show me your friend and I will tell you your character,' applies here. The principle is that 'where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified.'[41] Equally, 'where several words are followed by a general expression which is as much applicable to the first and other words as to the last, that expression is not limited to the last, but applies to all.'[42]

So the meaning of a word can be ascertained by reference to the meaning of words associated with that word. *Cats*, *dogs*, *sheep*, *goats and other animals* have two basic points of identification. Each animal is *four-footed.* Each animal is a *domestic animal*. So if the reference is to *domestic animals* then *other animals* would include *hens* and *turkeys*. But if we are dealing with four-footed animals the *other animals* would include other four-footed animals. What other four-footed animals would be included will, all the same, be related to the type of animals the context would admit.

And lastly, the maxim *expressio unius est exclusio alterius* - the express mention of one thing implies the exclusion of another. Or put another way *expressio facit cessare tacitum.* The expression, *No person shall bring a dog into a food store*, means in effect that a person can bring a cat, a monkey, perhaps, even a tiger in to the food store! The appropriate provision would be to use *animal* with an appropriate definition which would shut out the animals to be excluded.

Ambiguity

Ambiguity arises when there is a double meaning. The expression is capable of more than one meaning. Lloyd George's, 'I can't conceive, I can't conceive' means that he could not appreciate any difference between the two sexes. It also means that he is incapable of performing certain biological functions. Driedger[43] mentions three difficulties in the use of words which give rise to ambiguity. First, has the word a particular meaning? In what *sense* is the word used? Secondly, there is the question of *scope*. Does the word in a particular context 'have a meaning it is capable of bearing in the abstract'? Thirdly, how precise in meaning is the word used?

The sentence,

No person shall damage growing vegetation in a public park

could be read to mean

41 *R v Edmundson*, (1859) 28 L.J.M.C. 213 at p.215.

42 *Great Western Railway v Swindon etc. Railway* (1884) 9 App. Cas. 787 at p.808.

43 *Construction of Statutes*, p. 4.

(a) No person in a public park shall damage growing vegetation,

or

(b) No person shall damage vegetation growing in a public park.

In (a) a person who is in a public park contravenes the provision if that person damages vegetation, whether the vegetation is growing in the public park or outside the public park. In (b) a person whether in a public park or outside of a public park contravenes the provision if that person damages vegetation which is growing in the public park.

There is ambiguity also in the sentence,

> No person in a public park shall ride or drive or in any other manner use a bicycle, a motor cycle, a moped or any other mechanically propelled or operated vehicle or manually operated contrivance in a manner that is likely
>
> *(a)* to injure any other person in the public park, or
>
> *(b)* to disturb, in any manner, the enjoyment by any other person, of the facilities of the park.

Does a person contravene the provision if that person rides a bicycle, for example, in the public park but *not* in a manner likely to injure any other person in the public park? Is it not the intention that a person should *not* ride a bicycle in a public park? Not necessarily. Would riding a bicycle in order to park it in the appropriate designated place for the parking of bicycles offend against the provision? The distance covered in the park may have something to do with this view.

What is a mechanically propelled or operated vehicle? A pedal bicycle would not be considered as a mechanically propelled or operated vehicle. So what construction is to be placed on *any other* by reference to a bicycle, a motor cycle or a moped? Since *drive* and *use* have been specifically mentioned, *any other* should be replaced by *a*, to avoid arguments based on *ejusdem generis*.

Reed Dickerson[44] identifies three ambiguities: semantic ambiguity, syntactic ambiguity and contextual ambiguity. Semantic ambiguity arises where the word used is itself not capable of a precise meaning. In the sentence,

> No person in possession of a motor vehicle shall drive that vehicle if the serial number of that vehicle is altered or obliterated,

possession has two meanings. One, legal possession in the sense of being the legal owner. Two, physical possession in the sense of actually sitting in the vehicle and driving it. The ambiguity here is a semantic ambiguity.

---

44 *Materials on Legal Drafting* pp. 54-57.

Syntactic ambiguity arises where there is an ambiguity as to the appropriate noun, for example, which another word modifies. In the sentence,

The trustee shall require the tenant promptly to pay the rent,

promptly could modify *trustee*:

The trustee shall promptly require the tenant to pay the rent.

It could also modify *to pay*:

The trustee shall require the tenant to pay the rent promptly.

The sentence,

No person shall damage growing vegetation in a public park,

already discussed, is an example of a contextual ambiguity. In contextual ambiguity, even though the words and syntax of the sentence are not equivocal, there may still be an uncertainty as to which of two or more alternatives is intended. There may be internal or external inconsistencies. Where one provision contradicts another provision in the same Act there is an internal contextual ambiguity. It is not clear which provision prevails over the other. Where Acts *in pari materia* contradict each other there is an external contextual ambiguity.

Vagueness

Vagueness connotes an uncertainty of meaning. It is distinguished from ambiguity by the fact that there is no equivocation, yet all is not clear. It is the opposite of precise in the matter of degree rather than a matter of choice as in ambiguity. In vagueness two issues are at play. There may be vagueness as to a particular thing or matter, an indistinctness, an uncertainty as to *meaning*. There may be also an uncertainty or indistictness as to the *character* of that thing or matter.

The colours black and white produce the colour grey. So we have grey, charcoal grey, dark grey. When does one shade of grey emerge as a distinct colour in the progress of white to black? Or of black to white? The colours red and blue produce the colour violet. Yet in between we have lilac, mauve, purple, even crimson. Can the colour indigo be described as blue? We have indigo blue which is a colour between blue and violet. And indigo white is a crystaline powder formed by reduction of indigo. Yet no one would primarily consider indigo as having white in its make-up. Such are the problems of vagueness.

Each of the following three definitions illustrate what vagueness connotes and its problems:

(a) *extreme cruelty* means the wrongful infliction of grievous bodily injury or grievous mental suffering which destroys the ends and objects of matrimony;

(b) *extreme cruelty* includes any unjustifiable and long practised course of conduct which mentally destroys the legitimate ends and objects of matrimony;

(c) *extreme cruelty* means that degree of cruelty, either actually inflicted or reasonably inferred, which endangers the life or health of the aggrieved party, or renders his or her life one of such extreme discomfort and wretchedness as to incapacitate her or him, physically or mentally from discharging the marital duties.

Does the definition in (a) create any certainty? What does *wrongful* mean in that definition? What is *grievous* injury? Is *extreme* sufficiently definite? As regards the definition in (b), at what stage is the *course of conduct* sufficiently proximate to destroy the legitimate ends of marriage? Could a marriage be mentally destroyed but, physically, *not* destroyed? What are, for a given couple, the ends and objects of matrimony? In the definition in (c) what determines the degree of cruelty which endangers life and limb? What is *wretchedness*?

A little discussion on cruelty in matrimonial causes would facilitate an examination of the problems which these definitions raise and thus give a definition of vagueness.

Until 1870 the only cruelty recognized by the Courts was physical violence. In that year *Kelly v Kelly*[45] decided that there could be cruelty in the absence of physical violence. The next milestone was *Russell v Russell*.[46] It decided that injury to health, or a reasonable apprehension of injury to health, was an essential element in cruelty.

The popular idea as to what is cruelty does not necessarily coincide with such cruelty as would entitle a spouse to a remedy in law. The latter is sometimes referred to as 'legal cruelty'. Courts have never determined the line which decides those acts which they consider as 'legal cruelty'. That line must, necessarily, be a fluctuating one depending on the ideas prevalent in each generation.

The leading principle in determining cruelty is that there must be danger to life, limb or health, (bodily or mental) or a reasonable apprehension of it to constitute legal cruelty. The general rule in all questions of cruelty is that the whole of the relations between husband and wife and all the relevant circumstances must be considered. That rule is of special value when the cruelty consists not of violent acts, but of reproaches, complaints, accusations, taunts. The test whether the conduct complained of was wilful or unjustifiable is not exhaustive.[47]

45 [1870] 12 P & D 59.

46 [1897] A. C. 398.

47 *King v King* (1953) A.C. 1243.

An objective test which is very useful in practice was suggested by Sir John Nicholl in *Westmeath v Westmeath*.[48] He said that cruelty was impossible to define with precision; the test should be *the effects produced rather than the acts done*.

While judges have repeatedly referred to the impossibility of defining cruelty, at the same time there has been a constant search for a formula by which it can be recognized. On this positive side it is now accepted that

(a) the conduct must have caused injury to health or a reasonable apprehension thereof;

(b) the conduct must be of a grave and weighty nature;

(c) the conduct must be the cause of the injury to health and such like tendencies; and

(d) the test is not that of the reasonable man but the effect on the spouse of the conduct or misconduct complained of.

Several adjectives have been used to describe cruelty.[49] The phrase *grave and weighty* is now a time honoured one having been used in the courts of England for the last 150 years. In 1952 another definition was given to *cruelty* in *Jamieson v Jamieson*[50] where the husband tried to dominate his wife and break her spirit. It was described as *tyrannical*.

So what does *extreme cruelty* mean? The word *extreme* means *utmost or excessive* and denotes a measure of cruelty as severe, or as violent in the utmost degree or in an exceedingly great degree. In the light of the above observations, it does appear that the definitions of *extreme cruelty* require two tests:

(a) is the conduct complained of sufficiently grave and weighty to warrant the description of being cruel?

(b) has the conduct caused injury to health or reasonable apprehension of an injury?

Examining the three definitions of *extreme cruelty* it does appear that the emphasis in definition (a) is placed on bodily injury and mental suffering; in definition (b) the emphasis is on the course of conduct; and in definition (c) the emphasis is on the degree of cruelty. So these three definitions define *extreme cruelty* from three different angles all of which constitute the act of cruelty. None of the definitions is precise by itself.

As to whether the definition (a) creates any certainty *Hudson v Hudson*[51] may be called in aid. Cruelty which does not cause injury to health is rare, or

48 (1827) 2 Hag Ecc. Suppl. 61.

49 Such as *habitual, persistent*.

50 [1952] A.C. 525.

51 [1948] P. 292; [1948] 1 All E.R. 773.

apprehension of it must be rare. In practice it is not difficult to produce medical evidence that the complaining spouse has in fact suffered grievous physical injury, or that there is danger of it, or that he or she is suffering from nervous disorder. Perhaps an exact definition is to be distrusted where all is degree and circumstance. Certainly great precision in the rule serves only to beget laxity in its application.

The word *wrongful* as used in the definition begs the question. When an attempt is made to define *extreme cruelty*, the use of *wrongful* creates another problem requiring a solution. So *wrongful* will need to be defined. In any event does the use of *wrongful* convey the idea that bodily injury may be inflicted 'validly', 'lawfully' or 'of consent between the spouses'? In modern times we hear of spouses deriving sexual pleasure by inflicting bodily injury to one another. Viewed from that context does *wrongful* have a meaning and a purpose in the definition?

Law recognises many kinds of injury as *grievous*. These include emasculation, permanent disfiguration of the head or face, fracture or dislocation of hair or tooth and any injury which endangers life or which causes the sufferer to be in severe bodily pain during the space of twenty days, unable to follow the pursuits of ordinary day life. However besides these kinds of grievous injuries, judicial decisions have recognized a number of other kinds of injuries which may fall within the ambit of the definition of *extreme cruelty*. Therefore the word *grievous* is not exhaustive in this context. This is an issue of fact and it would be unwise to make any attempt at a precise laying down of the law.

The word *extreme* used in the phrase *extreme cruelty* is not definite. The general rule in all questions of cruelty is that the whole of the relation between husband and wife and all the relevant circumstances must be taken into consideration. Bodily injury and mental suffering are undoubtedly elements to be considered but there are other exceptional cases. Cruelty is of two kinds: the crude brutal kind, and conduct which affects the other spouse's health. Therefore *extreme* is not definite for the reason that there is no mention of *conduct* but only of *acts*.

The error in definition (a) is that it attempts to create categories of acts which amount to cruelty. *Extremeness* must be determined from a whole set of facts and of atmosphere as disclosed by evidence.

Definition (b) deals with a *course of conduct* that destroys a marriage. It does not contain a legal subject. Is it the course of conduct of one of the spouses? Or the conduct of some other person such as a mother-in-law? This definition mentions *a long practised course of conduct* instead of *persistence* as intended by section 1 (1) (a) (iii) of the 1965 English Act.[52]

52 1965 c. 72.

Further the *conduct* referred to in this definition does not show that it is sufficiently grave and weighty to warrant the description of being *extremely cruel*. The conduct referred to deals only with the mental aspect of cruelty. The question as to whether the conduct has caused injury to the health of a spouse or a reasonable apprehension of such injury, is also very necessary in the context.

So *extreme* is not definite in the context of the expression *course of conduct*. Further the word *includes* does not restrict the definition to only the *course of conduct*. In fact in (b) there is no definition of the expression *extreme cruelty*.

It is the spouse's *course of conduct* complained of that destroys a marriage. The ends and objects are destroyed in the marriage. It is unnecessary to say *legitimate ends and objects of matrimony*. A marriage contracted by *habit and repute and cohabitation* for a period of over ten years is considered a valid marriage.[53] The children born out of that marriage are not illegitimate. The ends and objects of a marriage may vary from country to country. In a country where the christian concept of *one man one woman* prevails the objects are security, companionship, and the rearing of children.

Thus the relationship between *ends and objects* and *extreme cruelty* would, in the context of the definition, mean such conduct as would make the marriage life of one spouse intolerable and would affect that spouse's health. This course of conduct need not be *long practised* or *persistent*. But a *long practised* cruelty as a ground for an order will not be as important in the future as in the past. If there is cruelty in one day why should it not amount to *long practised* or *persistent* cruelty? Is the wife to wait until she is half murdered? *Broad v Broad*.[54]

The words *extreme discomfort* and *wretchedness* are used in definition (c) to express the suffering caused to one spouse by *degree of cruelty*. A simpler and better expression in this context would be to define cruelty not by comfort or discomfort or wretchedness but by

> that degree of cruelty which makes the marriage life of the other spouse intolerable and affects that spouse's health.[55]

But according to the definition, the cruelty has to be inflicted so as to *endanger the life or health* of the aggrieved party. Therefore, *extreme discomfort* or *wretchedness* may not be the criteria for determining the degree of extreme cruelty. If force, (physical or moral) is systematically exerted to compel the submission of a spouse to such a degree and during such a length of time as to injure that spouse's health, although there is no actual physical violence, would that amount to cruelty?

---

53 As in Sri Lanka for example.

54 78 LT. 687.

55 *Ibid.*

It is thus difficult to determine precisely a degree of cruelty. The general rule in all questions of cruelty is that the whole of the relations between a husband and a wife and all the relevant circumstances must be taken into consideration in determining cruelty. However there must exist a danger to life, limb or health (bodily or mental) or a reasonable apprehension of it.

In the circumstances we can only lay down a test for determining the degree of cruelty; such a test should take into consideration,

(a) whether the conduct complained of is sufficiently grave to warrant the description of being cruel; and

(b) whether the conduct caused injury to health or a reasonable apprehension of that injury.

Therefore any attempt to determine a *degree* of cruelty would be futile and unnecessary. Each case would be considered within the circumstances of the conduct complained of. A spouse's unnatural sexual relations with another person could constitute cruelty: *Gardner v Gardner*[56]. Excessive drinking by a spouse may amount to cruelty: *Baher v Baher*[57]. Threats which keep a spouse in fear and subjection have been held to constitute cruelty, as have indifference and neglect of a spouse! So cruelty has to be inferred from a whole set of facts and atmosphere disclosed by evidence.

Mere austerity, temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, if they do not threaten bodily harm, do not amount to cruelty. There must be a state of personal danger so as to affect the discharge of marital duties and obligations by the spouse affected. Duties of self- preservation must take place before the duties of marriage. The test of cruelty in the context of marriage would be the effects produced rather than the acts done.

In this discussion we have dealt with semantic vagueness, that is, vagueness caused by the use of particular words or expressions that are not precise in their meaning. We have also dealt with contextual vagueness, that is, vagueness caused by the uncertainties in the context of the definition as a whole as distinct from the particular words which are uncertain.

Be that as it may, vagueness can be a friend of Parliamentary Counsel. It may be desirable in a given context to leave the resolution of an uncertainty to the courts. In *Soil Fertility v Breed*[58], *parcel* was considered in a case arising from a prosecution under the Fertilisers and Feeding Stuff Act, 1926. A pallet consisting of twenty bags of fertilizer of an aggregate weight of one ton was held to constitute a parcel. Said Lord Parker:

> it may be that the legislation is deliberately vague in the matter in order that common sense should prevail according to the customs of every case.

56 [1947] 1 All E.R. 630.

57 [1955] All E.R. 193.

58 [1968] 3 All E. R. 193.

Plain English

Megarry has a chapter in *Miscellany-at-Law*. The title of the chapter is, *Of Peculiar Language*[59]. The title is taken from *Lyons v Tucker*[60] where Grove J., stated that,

> the language of statutes is peculiar … and not always that which a rigid grammarian would use; we must do what we can to construe them …

This criticism has stuck. Many others have followed. The Law Reports are replete with the sayings of the judges who, 'carp at the language of the legislator and say the draftsman might have put it differently.' Lord Denning has also come to the aid of Parliamentary Counsel: 'the English language is not an instrument of mathematical precision … this is where the draftsmen of Acts of Parliament have been unfairly criticized.'

In *Legislation, Legal Rights and Plain English*[61] the Law Reform Commission of Victoria, Australia, made the point, *inter alia*, that plain English concentrates on those grammatical structures and words which are readily understood. That indeed is what any language, as a form of communication, is designed to do. That, indeed, is what Parliamentary Counsel *always seek to do*. They may not yet have achieved accuracy and precision. It is submitted that the problem lies at the root of the English language itself. *It is not an instrument of mathematical precision*.

In an answer to a parliamentary question the Financial Secretary to the Treasury, asked if he would take steps to simplify the language of legislation, said that the primary objective in legislation must always be certainty. 'The body of statutes which was deliberately designed in ordinary layman's language, namely, the Rent Acts, had probably as a result given rise to more litigation than any other series of statutes.'[62]

The Case For

The Law Reform Commission of Victoria, Australia, identified the principal points in the argument for plain English.[63] Plain English is concerned with communication. It enables documents to be clearly written and well designed so that all members of the community affected by them can read them easily and readily understand their rights and obligations. A plain English document does not change or distort the impact of the original. It ensures that the expression of the law is clear and free from obscurity, and from convoluted language.

---

59 Pages 349-365.

60 (1881) 6 Q.B.D. 660 at 664 reversed, 7 Q.B.D. 523.

61 Discussed in (1986) 12 C.L.B. 1018 *et seq*.

62 Reported in the *Law Journal*, 14th May, 1965.

63 (1986) C. L. B. p. 1018.

Plain English is a full version of the language, not a truncated form or a type of basic English. It concentrates on those grammatical structures and words which are widely and readily understood. It retains all necessary technical terms but offers explanations to general readers. Poorly written documents waste time, create confusion and misunderstanding, induce errors, and lead to inefficiencies in administration. The Commission stated that the demand for plain language legislation is not new.

The Problem

Reed Dickerson has stated that[64] 'Plain English' is in many legal contexts anything but plain. Besides, the concept suggests that there is an ideal way to say things that will fit all legal audiences. Parliamentary Counsel's audiences differ. The focus should also differ. The problem is that legislation, more often than not, is used to solve issues that are complex and difficult. The issues themselves are not susceptible to plain statement. As Driedger[65] has succinctly stated,

> Statutes cannot be so written that no dispute or difficulty in construction could ever arise.
>
> A reader who has no knowledge of the subject matter of a statute cannot be expected to understand it; nor can a draftsman be expected to write it so that he can … Some statutes are, indeed, frightfully complicated, but it is not the draftsman who made them so. Laws must sometimes be enacted to deal with very complex situations and obviously no one can understand the statute unless he understands those situations.

The Renton Committee 1975[66] reviewed the 'numerous criticisms which have been brought to [their] attention.' They appreciated the work and worth of Parliamentary Counsel, their 'skill and dedication,' the pressures under which they work and the 'constraints which make it very difficult for [Parliamentary Counsel], with the best will in the world, to produce simple and clear legislation.' They concluded:

> Even in the face of such difficulties many statutes are well drafted and give no grounds for criticism in respect of clarity and simplicity; indeed some of our witnesses have praised the drafting of a number of recent Acts. Not all of the criticism we have heard in relation to particular Acts has turned out, on close examination to be entirely valid. Nevertheless,

64 *Fundamentals of Legal Drafting*, 2nd Ed. Little Brown, p. 166.

65 *The Composition of Legislation*, p. xxiii. He repeated this assertion in his evidence before the Renton Committee. See Cmnd. 6053 paras. 61 - 62.

66 Cmnd. 6053.

> after making all due allowance, there remains cause for concern that difficulty is being encountered by the ultimate users of statutes, and this difficulty increases as the statute book continues to grow.

The Solution

Without such aids as format, indices, tables of contents, type colour, type style and page design, how do we deal with the difficulties encountered by the ultimate user of legislation? It is submitted that the clue lies in the structure of the legislative sentence and in the ability of Parliamentary Counsel to communicate. The use of the present tense is strongly advocated as an Act is always speaking. The indicative mood is preferable to the subjunctive mood. But the subjunctive mood has its uses too. The imperative *shall* should be used only where there is a true command. The use of short simple sentences cannot be over emphasised. Equally, Parliamentary Counsel should appreciate that consistency is a virtue in legislative drafting as that 'is a *sine qua non* to effective communication.'[67]

A basic rule as a guide to clarity is to express only one main thought in each sentence. Where there is a complicated piece of drafting, the device of paragraphing correctly used would make the meaning more precise. Compactness is essential. When the parts of a sentence are widely separated it is difficult to grasp the meaning. The structure of the sentence must not be diffuse. No unnecessary words should be employed. Superfluous words are likely to obscure the meaning. The use of ordinary common words is advocated, as well as the use of words with precise meaning.

Short words are not necessarily common words. Nor are all short words easily understood. Common words may be short and easily understood but are not necessarily short words. The use of the simple word *or*, and of the simple word *and*, has given rise to many problems.[68] The courts have at times interpreted *or* as *and* and *vice versa*. So Parliamentary Counsel must make the meaning clear by the arrangement of words in a logical order which is also grammatically correct. The subject of the sentence should be kept as close as possible to the verb, and the verb close to the object of the sentence. Modifying words should be kept close to the words they modify. It is better to use base verbs rather than their derivative nouns and adjectives.

Adjectives and adverbs, and their corresponding phrases and clauses, should only be used in order to make the meaning more precise; other than

---

67 Reed Dickerson, *How To Write A Law*, (1955) 31 *Notre Dame Lawyer*, p. 14.

68 See, for example, *Phillips v Price* (1953) 3 W.L.R. 616, quoted by Megarry in *Copulatives and Punctuation*, (1959) 75 L.Q.R. p.29.

that it would be better if they were not used at all. Parliamentary Counsel should not be afraid to revise the draft of a Bill many, many times. 'Pride of authorship requires patient consideration and comparison of constructive suggestions for improvement from every source'.[69] Above all Parliamentary Counsel must appreciate, in the words of Confucius, that,

> If language is not correct, then what is said is not what is meant; if what is said is not what is meant, then what ought to be done remains undone.[70]

69 Editorial, (1951) 37 *Journal of the American Bar Association*, 289, quoted in Reed Dickerson's *Materials on Legal Drafting*, *op. cit.*, p. 131.

70 Quoted in Sir Ernest Gowers, *The Complete Plain Words* (Pelican Books, 1983 reprint), p. 159.

Chapter 4

Constitutional Limitations

A constitution expresses the sovereign will of a people and embodies the soul of a people. It is both a legal document and a political testament. It is the fountain of all power and the source of all authority. Its provisions are not mere rules of conduct for the guidance of society, but also commands to be obeyed. It is not an equation in mathematics to be interpreted by reference to numbers; it is, in a sense, organic. It grows with the society for which it was conceived. The distance covered between *Plessy v Ferguson*[1] and *Brown v Board of Education*[2] is a period of over half a century.

It is true that not *all* the provisions of a constitution are mandatory and thus subject to jurisdiction. A constitution creates authorities and vests certain powers in those authorities. It gives certain rights to persons as well as to bodies of persons. It imposes obligations as much as it confers privileges and powers.

All of these duties, obligations, powers, privileges and rights must be exercised in accordance with the letter of the constitution. More than that, they should be exercised and enforced in accordance with the *spirit* of the constitution. Its supremacy and its permanence depend upon its maintenance as the fundamental law. 'To what purpose', asked Chief Justice John Marshall,[3] 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained.'

Most Commonwealth countries operate under a written constitution which is the supreme law. An enactment is void from the beginning if it is inconsistent with the constitution, or in contravention of the constitution. A constitution brings into sharp focus the theory of parliamentary sovereignty. In the United Kingdom, Parliament is supreme. The courts do not question the validity of an Act of Parliament; they cannot declare an Act of Parliament illegal on the ground that it is unconstitutional because there is no constitution by which to measure an Act of Parliament. The theory of parliamentary sovereignty goes much further. A present Parliament cannot fetter the hands of a subsequent Parliament.[3a] A Conservative government could denationalise or privatise an industry nationalised by a Labour government. The courts will enforce either legislation.

---

1 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896).

2 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954)

3 *Marbury v Madison*, 1 Cranch 137, L.Ed 60 (1803)

3a See, for example, *Ellen Street Estates Ltd. v Minister of Health* [1934] 1 K.B. 585, p. 590.

A written constitution lays down certain mechanics of enactment which a Parliament established under that constitution must obey. A written constitution establishes fundamental maxims – certain rules of conduct by which departments of government shall shape their policies and their conduct. Its importance lies in the fact that it seeks to control those who govern and those who are governed. It sets the standard by which is measured the duties, the obligations, the powers, the privileges and the rights it has conferred. This means that there are restrictions on the power of Parliament to make laws 'for the peace, security, order and good government.'

In some cases, there are restrictions on the subjects, especially in federal systems, such as Nigeria,[4] which had a Schedule containing an Exclusive Legislative List and a Concurrent Legislative List. A Federal law would apply to the whole of the Federation. A State law would apply only in that particular State. Where there is a conflict the Federal law will over-ride the State law.[5]

The Belize Constitution, 1981,[6] has provision in s.82 for enacting formulae. The Constitution of Jamaica, 1962,[7] has in s.61 provision for five different enacting formulae. Section 78 of the Belize Constitution provides that where a money Bill, having been passed by the House of Representatives, and is sent to the Senate at least one month before the end of the session, is not passed by the Senate without amendment within one month after it is sent to that House, the Bill shall, unless the House of Representatives otherwise resolves, be presented to the Governor-General for assent notwithstanding that the Senate has not consented to the Bill. The enacting formula for such a Bill presented to the Governor-General will, obviously be different from the enacting formula provided for in sub-section (1) of s.82.

Section 79 places restrictions on the powers of the Senate as to Bills other than money Bills. It provides that where a Bill other than a money Bill is passed by the House of Representatives in two successive sessions (whether or not the National Assembly is dissolved between those sessions) and, having been sent to the Senate in each of those sessions at least one month before the end of the session, is rejected by the Senate in each of those sessions, that Bill shall, on its rejection for the second time by the Senate, unless the House of Representatives otherwise resolves, be presented to the Governor-General for the assent notwithstanding that the Senate has not consented to the Bill. A Bill presented to the Governor-General for assent by virtue of this provision will have an enacting formula based on subsection (2) of s.82 of the Belize Constitution.

The Constitution of Jamaica, 1962, has similar provisions. Subsection (3) of s 37 provides for a special Act, that is, an Act of Parliament, the Bill for which

4 Second Schedule, The 1979 Constitution.

5 *Ibid*., Subsection (5) of Section 4.

6 No. 14 of 1981.

7 1962 No. 1550.

has been passed by both Houses and at the final vote thereon in each House has been supported by the votes of a majority of all the members of that House. A Bill for such an Act will have an enacting formula different from the normal enacting formula used as provided for in subsection (1) of s.61.

Section 49 deals with the alterations to the Constitution, and lays down certain procedures to be followed in respect of amendments to the Constitution. A Bill presented to the Governor-General, consequent upon s.49 would have the enacting formula specified in subsection (3) of s.61 of the Constitution. Section 50 also provides for a Bill which has been passed by both Houses and at the final vote thereon in each House, has been supported by the votes of not less than two thirds of all the members of that House.

Subsection (4) of s.61 provides for the appropriate enacting formula. Section 56 deals with the powers of the Senate as to money Bills, similar to s 78 of the Belize Constitution and s.57 provides for restrictions on the powers of the Senate as to Bills other than money Bills and certain other Bills. It is similar to s 79 of the Belize Constitution. Subsection (5) of s 61 accordingly provides for the appropriate enacting formula for a Bill presented to the Governor-General for assent under ss.56 or 57 of the Constitution of Jamaica.

Subsection (6) of s 61 of the Constitution of Jamaica specifically provides that,

> Any alteration of the words of enactment of a Bill made in consequence of the provisions of subsection (3) or subsection (5) of this section shall be deemed not to be an amendment of the Bill.

Payne v The Attorney General,[8] arose out of the political and other differences in the Associated States of St. Christopher, Nevis and Anguilla in 1967. After negotiations with Her Majesty's Government in the United Kingdom, the Anguilla Act 1980,[9] was passed by the United Kingdom Parliament to separate Anguilla from Saint Christopher and Nevis.

In pursuance of the West Indies Act 1967,[10] the United Kingdom established the Associated States of Saint Christopher, Nevis and Anguilla on the 27th February 1967. The United Kingdom imposed certain limitations on its responsibility for the Associated States. Section 3 of the West Indies Act 1967, provided that,

> No Act of the Parliament of the United Kingdom passed on or after the appointed day[11] shall extend or be deemed to extend, to an Associated State as part of its law unless it is expressly declared in that Act that that State has requested and consented to its being enacted.

---

8 Suit No. 7 of 1981.

9 1980 c. 67.

10 1967 c. 4.

11 27th February, 1967.

In 1980, the United Kingdom passed the Anguilla Act 1980[12] which provided that as from the appointed day[13],

> Anguilla shall cease to form part of the territory of the Associated States of St. Christopher, Nevis and Anguilla.

Section 3 of the Statutes Act 1967[14] passed by the Legislature of St. Christopher, Nevis and Anguilla provided that in every Bill presented to the Governor for assent the words of enactment shall be stated as

> BE IT ENACTED by the Queen's Most Excellent Majesty by and with the advice and consent of the House of Assembly of Saint Christopher, Nevis and Anguilla, and by the authority of the same …

On the 10th February 1981 the applicant, an elected member of Parliament, attended a sitting of the House. The House passed eight Bills in each of which the enacting formula had the expression, 'St. Christopher and Nevis' instead of 'St. Christopher, Nevis and Anguilla.' The applicant contended that the enacting formula was wrong and unconstitutional. He was overruled by the Speaker. He took the matter to the Courts.

The legal problems that arose, *inter alia*, for determination apart from the issue of *locus standi*, were

(a) the extent to which the United Kingdom Parliament retains its classical doctrine of parliamentary sovereignty over Caribbean States or whether the 'New View'[15] of parliamentary sovereignty is to apply;

(b) whether the United Kingdom Parliament could properly pass an Act extending its law to an Associated State despite the failure of that Parliament to honour the very letter, to say nothing of the spirit, of the 1967 Act;

(c) whether the Anguilla Act, 1980, repealed by implication the Statutes Act, 1967;

(d) should anticipatory review be granted regarding a breach of manner and form;

(e) whether the writing of a rule constituting a convention changes that convention into law;

---

12 1980 c. 67.

13 19th December, 1980.

14 No. 11 of 1967.

15 This view is based upon the argument that in the Caribbean there is no sovereignty of Parliament as classically understood. There is constitutional sovereignty. No one can disobey the Constitution with impunity, not even Parliament: *Ministry of Home Affairs v Fisher* [1980] A. C. 319. See also Alexis, *Changing Caribbean Constitutions*, p. 57, and Alexis, (1977) Vol. 1 No. 1 Guy. L. J., 41.

(f) whether the Anguilla (Consequential Provisions) Order 1981[16] was effective to change the name of the State to St. Kitts and Nevis.

*Payne' s*case raised some very interesting problems relating to legislative drafting. The first problem is of constitutional limitations: how to legally limit the powers of the Parliament of the United Kingdom without derogating from the principle of parliamentary sovereignty in a fundamental way. This might be solved by the United Kingdom Parliament extinguishing itself in relation to the country concerned after surrendering its powers to a new written constitution.

Secondly, should the West Indies Act have contained a provision for a case where an Associated State does not consent to separation? Rather than drafting the Anguilla (Consequential) Order, should the United Kingdom Parliament have acted under the West Indies Act? To do this, the provision for request and consent would have to have been modified.

Thirdly, all West Indian constitutions are derived from Orders-in-Council. Unless the Parliament of the United Kingdom surrenders its powers, not one constitution is safe.[17] However, if the Constitution or the West Indies Act had outlined a procedure for the secession of an Associated State, many a problem could have been averted. Since the British Government had not abdicated power, was the solution an amendment of s.5 of the West Indies Act? An amendment would allow Her Majesty, to amend the Order-in-Council through the Privy Council. The conflict between the Statutes Act and the Constitution would then have been avoided. The Constitution would prevail.

The failure to observe the form of the enacting formula arose also in a few cases in the United States: *Joiner v State*[18] and *State ex rel Gouge v Burrow, City Recorder*.[19] In the *Joiner* Case an amendment by the State Legislature did not contain an enacting formula. A question then arose whether the omission invalidated the purported amendment. The Supreme Court held that the amendment 'is a nullity and of no force and effect as law.' The Court stated that,

> The purpose of an enacting clause is to establish the Act; to give it permanence, uniformity and certainty; to afford evidence of its legislative statutory nature, and to secure uniformity of identification and thus prevent inadvertence, possible mistake, and fraud.

In the *Burrow' s*Case, the enacting formula omitted the words 'the State of.' The Constitution of the State provided that,

> ... the style of the Laws of this State shall be, 'Be it enacted by the General Assembly of the State of Tennessee …

16 S.I. 1981 No. 603.

17 This is, in fact, done. See, for example, the Ghana Independence Act, 1957, of the United Kingdom Parliament.

18 Supreme Court of Georgia, 1967. 223 Ga. 367, 155 S. E. 208.

19 Supreme Court of Tennessee, 1907. 119 Tenn. 376, 104 S. W. 526.

The Supreme Court of the State was emphatic:

> The provision we are here called upon to construe is in plain and unambiguous words. The meaning of it is clear and indisputable, and no ground for construction can be found. The language is: 'The style of the law of the State shall be, … ' The word 'shall' as here used, is equivalent to 'must'. We know of no case in which a provision of the constitution thus expressed has been held to be directory. We think this one clearly mandatory, and must be complied with by the Legislature in all legislation important and unimportant, enacted by it; otherwise it will be invalid.

Indeed, Holdsworth[20] states that,

> The enacting clause is that part of a Statute which gives it jurisdictional identity and constitutional authenticity ...

Article 75 of the Constitution of the Democratic Socialist Republic of Sri Lanka confers on Parliament

> … the power to make laws, having retrospective effect and repealing or amending any provision of the Constitution or adding any provision to the Constitution.

But in the exercise of this legislative power Parliament is bound by the Constitution. The courts can declare statutes as invalid on the ground that they are unconstitutional. An interesting illustration is the case of *Liyanage v R.*[21] The appellants were charged with participation in an abortive *coup d' etat* By the Criminal Law (Special Provisions) Act 1962[22] the Legislature sought to retroactively validate the appellants' prolonged imprisonment without trial; to create *ex post facto* a new criminal offence so as to cover the situation of the abortive *coup d' état* to alter the law of evidence so as to render admissible much that otherwise would be inadmissible, and to prescribe a minimum penalty.

All those provisions were limited in their effect to the appellants and to the circumstances of the *coup d' état* By another Act, a special tribunal nominated by the Chief Justice was constituted to try the case. The Privy Council declared the legislation to be invalid because it infringed the doctrine of separation of powers which was a part of the Constitution of Sri Lanka.

A written constitution is the supreme law. Parliamentary Counsel in jurisdictions with a written constitution, must have an intimate knowledge of the constitution. Great care is needed that nothing is drafted that would be inconsistent with, or in contravention of a provision of the constitution. They must bear in mind the limitations imposed upon them by their respective constitutions; failure to do so would raise serious constitutional problems.

---

20 *A History of English Law* (1909) vol. 11, p. 366.

21 [1967] 1 A. C. 259 P. C. See also *Ibralebe v R* [1964] A.C. 900.

22 No. 1 of 1962.

Some provisions of these constitutions are subject to jurisdiction; some are not. Of the latter some are a re-writing of some of the constitutional conventions of the United Kingdom. In this regard it is as well to ponder seriously on the words of Viscount Radcliffe in *Adegbenro v Akintola*:[23]

> British constitutional history does not offer any but a general negative guide as to the circumstances in which a Sovereign can dismiss a Prime Minister … it is in vain to look to British precedent for guidance on the circumstances in which or the evidential material on which a Prime Minister can be dismissed, where dismissal is an actual possibility: and the right of removal which is explicitly recognised in the Nigerian constitutions must be interpreted according to the wording of its own limitations and not to limitations which that wording does not import … while it may well be useful on occasions to draw on British practice or doctrine in interpreting a doubtful phrase whose origin can be traced or to study decisions on the constitutions of Australia or the United States where Federal issues are involved, it is in the end the wording of the constitution itself that is to be interpreted and applied, and this wording can never be overridden by the extraneous principles of other constitutions which are not explicitly incorporated in the formulae that have been chosen as the frame of this constitution …

Yet it is advisable for Parliamentary Counsel in young Commonwealth countries to study the constitutional conventions of the United Kingdom in order to appreciate *how* the written constitutions of their respective jurisdictions are intended to operate. Constitutional conventions are *rules of political practices which are regarded as binding by those to whom they apply, but which are not laws as they are not enforced by the courts …*[24] Conventions are not static rules of law. They are practices which bring 'about constitutional development without formal changes in the law.'[25]

These constitutional developments have evolved over a long period of time. The political acceptance of a political practice leads to the recognition of the practice as a convention. *In time the written constitution of a particular jurisdiction will evolve its own conventions*. For its nature requires 'that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.'[26]

This is also important to Parliamentary Counsel. The framers of a written constitution cannot be so clairvoyant as to foresee all the eventualities that are likely to arise in the future. The result is that there are bound to be grey areas.

---

23 [1963] A. C. 614, [1963] 3 All E. R. 544 at pp. 550-551.

24 Hood Phillips, *Constitutional and Administrative Law* 7th Ed. p. 113.

25 *Ibid*., p. 119.

26 *McCulloch v Maryland* 4 Wheat. (17 U.S.) 316, 4 L.Ed 579 (1819) *per* John Marshall, Chief Justice.

There are bound to be certain issues which would not be contemplated by the framers of the constitution. Indeed a Parliamentary Counsel drafting a constitution would do well to allow for that 'growth and transformation' which are so essential for the orderly development of society and the proper and efficient functioning of government. A written constitution need not be all that rigid. There is the need for flexibility in its rigidity.

Fundamental Human Rights

Human rights are as old as mankind. Rights and obligations were known to primitive societies which went to war over their rights just as we, today, go to war over our rights. Animals in the wild demarcate their respective territories and fight over an invasion of territory. Rights and obligations shape society. Individuals and societies assert themselves and rights are born. In the words of Mr. Justice Robert Jackson of the United States Supreme Court,

> Fundamental Rights may not be submitted to vote. They depend on the outcome of no elections.

Human beings have ideas and ideals as individuals. Societies lay claim to certain standards and societies create institutions that take cognisance of these standards of right and wrong. The enforcement and the protection of these rights and the sanctions developed to prevent wrong-doing are all intended to guide the conduct of individuals in society.

As a result governments are created. They, in turn, set up and maintain institutions that ensure the orderliness that societies require for the realisation of the aspirations of the people as whole.

The belief in the right of individual liberty is the basis of all liberalism. ' … proclaim liberty throughout the land unto all the inhabitants thereof … '[27] The rights of the individual, to be sure, are considered as the individual's birthright as a human being. But liberty is not licence, hence the need to prevent liberty from degenerating into licence. Thus it is desirable that the relations between individuals do not become 'solitary, poor, nasty, brutish and short.'

A government has legitimate needs for power for the purposes of good government. That is not denied. It also requires the creation of an atmosphere within which the energies of the individual can be released and made to thrive. So also is democratic liberty against the state. There is also the need to reconcile the rights of the individual with the authority of the State. The rule of law does not thrive on lip service. It should be strong enough to protect the fundamental human rights of the individual against arbitrary rulers.

The 1960 Constitution of Ghana provided under article 13 that the President declare solemnly his adherence to certain fundamental human principles:

---

27 *Leviticus* 25:10.

> That the powers of Government spring from the will of the people and should be exercised in accordance therewith.
>
> That freedom and justice should be honoured and maintained.
>
> .....
>
> .....
>
> That no person should suffer discrimination on grounds of sex, race, tribe, religion or political belief.
>
> .....
>
> That every citizen of Ghana should receive his fair share of the produce yielded by the development of the country.
>
> That subject to such restrictions as may be necessary for preserving public order, morality or health, no person should be deprived of freedom of religion or speech, of the right to move and assemble without hindrance or of the right of access to courts of law.
>
> That no person should be deprived of his property save where the public interest so requires and the law so provides.

That entrenched article was believed by some to be unique. It proved to be worth less than the paper on which it was printed.

The test came in *Baffuor Osei Akoto and Others v The Minister of the Interior and Another*.[28] The applicant sought a declaration that the Preventive Detention Act 1958 was unconstitutional. It was argued that the principles enunciated in article 13 of the Constitution placed a limitation on the legislative powers of Parliament and that any Act which contravened the fundamental principles enunciated as a solemn declaration was accordingly void.

The Supreme Court rejected this argument. It did not agree that the Preventive Detention Act was repugnant to the Constitution. In its view the article required the President upon assumption of office to *declare his adherence* to certain fundamental principles.

The Supreme Court said that,

> The contention … is based on a misconception of the intent, purpose and effect of article 13 (1), the provisions of which are, in our view, similar to the Coronation Oath taken by the Queen of England during the coronation service. In the one case the President is required to make a solemn declaration, in the other the Queen is required to take a solemn oath. Neither the oath nor the declaration can be said to have the statutory effect of an enactment of Parliament. The suggestion that the declaration made by the President on assumption of office constitutes a 'Bill of Rights' in the sense in which the expression is understood under the constitution of

28 Civil Appeal No. 42/61.

> the United States of America is therefore untenable … The contention that the legislative power of Parliament is limited by article 13 (1) of the Constitution is … in direct conflict with express provisions of article 20 … It will be observed that article 13 (1) is in the form of a personal declaration by the President and is in no way part of the general law of Ghana. In the other parts of the Constitution where a duty is imposed the word 'shall' is used, throughout the declaration the word used is 'should'. In our view the declaration merely represents the goal to which every President must pledge himself to attempt to achieve. It does not represent a legal requirement which can be enforced by the courts. The declarations however impose on every President a moral obligation, and provide a political yardstick by which the conduct of the Head of State can be measured by the electorate. The people's remedy for any departure from the principles of the declaration, is through the use of the ballot box, and not through the courts.

After that experience all other British colonies which had attained independence had written into their respective constitutions elaborate provisions regarding fundamental human rights. The lessons to Parliamentary Counsel and the moral of it all are quite clear. They have a responsibility to advise that the concept of democracy should permeate the machinery of government. For the individual preceded the state. Without individuals there would be no states.

The fundamental human rights provisions of modern constitutions set firstly, a standard against which the legality of legislation and of governmental action may be judged. Secondly, they also provide a yardstick by which the activities of private individuals may be judged. Thirdly, they serve to establish a set of norms to be followed by public authorities in the performance of their functions. Fourthly, they contribute to the moulding of public opinion. Parliamentary Counsel have a responsibility to ensure that not only the letter, but the spirit of the constitution is observed in the drafting of legislation.

Modern written constitutions vary greatly, however, in the range of rights covered. Some contain provisions of economic, social and cultural rights in addition to the very traditional, personal, civil and political rights. Parts IV and IVA of the Constitution of India contain provisions relating to the Directive Principles of State Policy and the Fundamental Duties of Every Citizen of India.

On the other hand, some constitutions limit themselves to providing for only a few rights. Article 28 of the Constitution of the Republic of Korea provides that the liberties and rights of the people not otherwise specified in the Constitution should not be ignored. The 1957 Constitution of the Argentine contained similar provisions to the effect that rights, duties, declarations and guarantees specifically mentioned in the Constitution should not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.

Constitutions containing provisions on fundamental human rights usually also specify the limitations which may legitimately be placed on those rights. These limitations are of two kinds: the first are general in character and are of continuous application. The second kind are limitations which can be imposed during periods of emergency. These limitations are restrictions placed upon the powers of government to prevent arbitrariness and tyranny. They are intended to enhance not hinder the authority to govern and are a confirmation of the oft quoted expression 'liberty under the law.'

Parliamentary Counsel would be well aware of all these provisions. Indeed, the governments of many of these jurisdictions encourage the study of these rights. But, in addition to Counsel's awareness of the existence of these rights, it is essential that Counsel understand and appreciate the philosophy as well as the history of these rights. Knowledge of the existence of a right is one thing: an understanding of the concept of it is another. It is the latter which equips Parliamentary Counsel to better understand the significance of how governments in their legislation should be obedient to fundamental human rights and to the rule of law.

It is thus appropriate to take into account certain differences, traditional customs, the values of a society as well as the moral principles which govern that society's ideas and ideals. The significance of this is that fundamental human rights are a shared and cherished human value. The ideas and ideals inherent in all these rights spring from humanity itself. It was that recognition that led in 1948 to the Universal Declaration of Human Rights adopted by the United Nations.

Its thirty articles encompass the basic rights and freedoms to which mankind is heir as 'a common standard of achievement for all persons and for all nations.' They are not ends in themselves. They are essential to the attainment of good public administration, free and fair elections and equality and development.

Principles of Good Public Administration

Departmental officials perform administrative functions. Their decisions involve legal as well as ethical considerations. These decisions affect the public one way or another. Barbados provides an example, by its Administration of Justice Act 1985[29] of a jurisdiction where legislation provides a basis for challenging administrative decisions in the courts. But it is more desirable to promote and protect human rights as an aspect of public administration than to rely on remedies or on an Ombudsman for bad administration. The important issues for Parliamentary Counsel in these areas

29 Cap. 109B, Vol. 1V, Laws of Barbados, 1971-1988.

are the principles of natural justice which, for our purposes, embrace the right to be heard, access to information, assistance and representation, statement of reasons and indications of remedies.

The right to be heard. Powers given by legislation to a Minister are in effect powers given to departmental officials. Whatever remedies lie otherwise at law, legislation should require the appropriate authority to give indefinite opportunity for an individual whose rights, liberties or interests are involved to state the facts and to present the relevant arguments. These should be taken into account by the relevant authority before the final decision is taken.

Access to information. It defeats the right to be heard if a departmental official is in a position to tell an individual or a group of individuals, 'I cannot tell you what you have a right to know.' The right to be heard implies that all relevant information of the facts which departmental officials will take into account in reaching the final decision is disclosed beforehand.

Assistance and Representation. Departmental officials must be required as a matter of law, to give adequate assistance to a person whose rights, interests or liberties are involved. They must also ensure that there is appropriate representation where possible.

Statement of Reasons. Legislation should require departmental officials to state the basis of the reasons for their administrative actions.

Indications of Remedies. Legislation should require that departmental officials state the remedies available to individuals generally or in particular who are affected by the final decision of the relevant authority.

In all these issues, legislation must also require departmental officials to strike the appropriate balance between the promotion and protection of fundamental human rights and the requirements of good and efficient government.

Free and Fair Elections

Free and fair elections are the foundation upon which a people can exercise their democratic right to choose its leaders. Therefore the system of elections should be accurate, impartial and reliable. Where the electoral system is subverted the entire representative system is itself subverted. Where the electoral system is perverted, elections become farcical.

The link between the electoral system and the fundamental human rights of freedom of expression, of association, of thought and conscience is an important one. Choice is of the essence of democratic representation and is dependent on the free exercise of the democratic representation of all the political issues of the day. The method of choosing representatives should be framed in such a way that individuals genuinely express their preferences. It is not enough to have the right to vote; it is essential that freedom and effectiveness are made possible by legislation.

Equality

Equality is perhaps the primary human right. Fundamental human rights are meaningless unless there is a complete absence of discrimination. There can be no equality where there is discrimination based upon political or jurisdictional considerations. In this regard *Koowarta v Bjelke-Peterson*[30] is very instructive. The High Court of Australia affirmed the validity of the Racial Discrimination Act 1975.[31] It was enacted to implement the obligation of Australia under the International Convention on the Elimination of All Forms of Racial Discrimination.

It was also held in another case[32] that

> … equality before the law is an engine of oppression destructive of human dignity if the law entrenches inequalities 'in the political, economic, social, cultural or any other fields of public life.'

Development

Development aims at the satisfaction of the material and spiritual needs of the people of a particular jurisdiction. Where there is repression there is a denial of fundamental human rights. Where there is a denial of fundamental human rights the individual cannot meaningfully contribute to the realization of the economic and social objectives of society.

True development involves the participation of *all* individuals in a society in the process of development. It calls for increase in economic output and a fair distribution of social and other benefits. But that can only be achieved in an atmosphere which respects, which honours all fundamental human rights – cultural, economic, political and social.

Good public administration, free and fair elections, equality and the right to development are the pillars which make meaningful the fundamental human rights provisions of all written constitutions. Legislation cannot change the hearts of individuals. It can, and does, become a pointer to progress, stir the conscience of individuals and demonstrate a society's attempt for achieving peace, order, security and good government.

30 (1982) 39 A. L. R. 417 at pp. 455-6.

31 An Act of Commonwealth of Australia, ss.9 and 72.

32 *Gerhendy v Brown* (1985) 57 A.L.R. 472 at p. 516, *per* Brennan J.

Chapter 5

The Legislative Sentence

A sentence is the expression of a thought. A sentence contains a subject and a predicate.[1] It is the basic unit of a language as much as a word is the basic unit of a sentence. It is thus essential that Parliamentary Counsel have an understanding of the principles of grammar. The language of legislation may be peculiar.[2] It need not be peculiar. *Legislative drafting does not have its own peculiar rules of grammar or of syntax*.

A section of an Act of Parliament is basically a sentence. It is an arrangement of words to express a command or to state a prohibition, to confer a power or to impose an obligation. To express any of these thoughts with commensurate clarity, Parliamentary Counsel need to ask a few questions. The answer to the question

(a) *how*, would suggest the manner in which the law drafted by Counsel is to operate, and to work;

(b) *what*, would tell us the nature of the legal action. What is it that is required to be done or what is it that is prohibited, or what is the conduct demanded by the law? It deals with an element of the legislative sentence which is always present, the basic predicate of the sentence. Thring[3] refers to this as the legal predicate which is a very important step in the legislative drafting process. If Parliamentary Counsel cannot capture a clear conception of what to draft as the law there is a problem. Counsel is then likely to produce a bad draft of the law. Indeed

> 'one of the most important talents that a draftsman must develop is an ability to visualize people when they are doing the things that are spoken of in a statute or regulation …'[4]

(c) *when*, would lay down the conditions under which the law is to operate, or the occasion upon which the operation of the law would depend;

(d) *where*, would describe the circumstances in which the law would operate;

---

1 Coode refers to these as *legal subject* and *legal action*. See Driedger, *The Composition of Legislation*. p. 322.

2 *Lyons v Tucker* (1881) 6 Q. B. D. 660 at p.664.

3 *Practical Legislation* (1902), London, John Murray, p. 61.

4 Maurice B. Kirk, *Making the Document Workable: Think about People Doing Things* quoted in Reed Dickerson, *Materials on Legal Drafting*, *op. cit*., p. 14.

(e) *who*, would give us the legal subject, the person on whom is placed the responsibility to act or on whom is placed an obligation or a prohibition not to act;

(f) *why*, would treat us to the *raison d' être* of the law, the policy considerations that lead to the formulation of proposals which eventually result in legislation as a whole. It is in this area that Parliamentary Counsel acquires the appropriate understanding of the Drafting Instructions that would help Counsel to find, by legislative means, the solution to the problem that had necessitated the drafting of the law. *Parliamentary Counsel must understand policy*.

The answers to these questions would, no doubt, raise other questions which would demand answers. A satisfactory knowledge of the issues raised by these questions and the answers to them would, in turn, go a long way to ensure that what is drafted would deal adequately, in language and in enforcement, with the problems that the law is intended to solve.

The Sentence

There are three processes involved in the preparation of legislation. They are

(a) the determination of, or the formulation of, the legislative policy;

(b) the creation of the legislative scheme, that is, the conception of the ideas that are to be expressed; and

(c) the drafting of the sentence that expresses the policy or the purposes of the policy proposals.

The determination or formulation of the legislative policy is the peculiar preserve of the policy-maker.[5] The creation of the legislative scheme is the peculiar province of Parliamentary Counsel. This has been dealt with in Chapter One.[6] We now begin to deal with the drafting of the sentence that expresses the legislative policy.

The basic rule is to write short simple sentences. The structure of the sentence is important. Big gates swing on little hinges. Upon that structure hinges all the problems that are likely to plague the law. The rules of grammar and of syntax are also very important. It is equally important to realise that legislation is not all a question of writing beautiful sentences. Lucidity is essential. Clarity is equally important.

The first principle to observe is that a law consists of

(a) the person on whom an obligation is imposed, or on whom is conferred a power or a privilege;

---

5 This has been dealt with in Chapters 1 and 2. Especially pages 19 *et seq*.

6 See page 16, *supra*.

(b) setting out clearly of what is required to be done, or not to be done;

(c) the circumstances, where appropriate, under which it is intended that the law should operate; and

(d) the conditions, where appropriate, subject to which an act may or may not be done, or shall or shall not be done.[7]

The second principle to observe is that the structure of the sentence that constitutes the law is so clear as to leave no doubt as to the intention of the law-giver. In this respect a legislative sentence is no different from a grammatical sentence. *It is important to note that legislative drafting does not have a system of grammar or of syntax all its own*. Thus the legislative sentence consists of a subject and a predicate.

The Subject

The subject of a sentence is invariably a noun or the equivalent of a noun. In legislative drafting it is the person on whom an obligation is imposed or on whom a power, a privilege or a right is conferred.[8] It is essential, however, to distinguish the subject of a grammatical sentence properly so called from that of the subject of a legislative sentence, often referred to as the *legal subject*; in the latter case it need not be a person.

Examples are:

> This Act may be cited as the Legal Practitioners' Act 1924.
>
> In this Act, unless the context otherwise requires, ...
>
> There is hereby established a fund to be known as the Consolidated Fund.

Where an obligation is imposed, the legal subject must necessarily be a person:

> The editor of a newspaper shall, within thirty days of the establishment of the newspaper and before an issue of the newspaper is published, file with the Registrar-General the declaration specified in the Schedule.

In the above example, the legal subject is not universal. The application of the law is limited to a particular class of people, that is, to persons described as editors. The legal subject here is identified by a class description. The law does not apply to *all* persons, only to the class of persons known as editors.

Where the law is intended to apply to *all* persons generally the legal subject will be expressed thus:

> A person shall not enter a swimming pool unless that person wears a bathing suit.

---

7 See Driedger, *The Composition of Legislation*, pp. 1 - 5; 322 *et seq*.

8 Coode, *Legislative Expression*, See Driedger, *The Composition of Legislation*, p. 323.

The legal subject here, though expressed in the singular, applies to *all* persons. It is a universal description. The legal subject can be expressed in a negative form:

> No person shall enter a swimming pool unless that person wears a bathing suit.

Thus it would not be appropriate to provide that,

> A dog shall not enter a public park unless it wears a dog's licence.

A dog cannot read. The appropriate law would be:

> A person shall not bring a dog into a public park unless the dog wears a dog's licence.

Two or more persons all of a class of persons may form the legal subject:

> (a) The managing director or the secretary of a company registered under this Act shall file with the Registrar of Companies the particulars specified in section 24.
>
> (b) A doctor and a nurse shall be present at the birth of a child under section 16.

In (a) either of the two persons could file the particulars. Either the managing director or the secretary could file the required particulars. It is not necessary that both should file the particulars. In (b) both the doctor and the nurse would have to be present.

The Predicate

The predicate of a grammatical sentence is what is said about the person or the thing forming the subject of the sentence. It is the same with the legislative sentence; it contains the enacting verb of the legislative sentence and determines what is required of the subject of the sentence. The predicate in a legislative sentence is often referred to as the *legal action*, even though no action may be required.

> An editor of a newspaper shall, before an issue of the newspaper is published, file with the Registrar-General the particulars specified in section 10.
>
> A police officer may, without a warrant, arrest a person whom the police officer suspects of having committed an offence.
>
> A contract entered into in contravention of this Act is void.

Two or more verbs may be used in the predicate:

> A person shall not bring an action against a police officer under section 12 unless that person

(a) makes a demand in writing on the police officer for a copy of the warrant,

(b) files within five days of making the demand, a copy of the demand with the Registrar of the court, and

(c) pays the fees for filling the copy of the demand.

An appellant

(a) may, within ten days of the delivery of the judgment of the court, file a notice of appeal, and

(b) shall serve a copy of the notice of appeal on the respondent.

Two separate actions are required here. One is discretionary the other is compulsory. The filing of the notice of appeal is at the discretion of the appellant but the service of the copy on the respondent is mandatory.

In the sentence,

> A police officer shall not arrest or detain a person unless the police officer informs that person of the reasons for the arrest or detention,

arrest and *detain* are two separate acts. But in the sentence,

> A police officer shall arrest and detain a person who has escaped from police custody,

there is a command for *both* actions to be taken. In other words, having arrested the person who has escaped, the police officer is bound to detain that person.

Circumstances and Conditions

The circumstances under which the law operates, referred to as *the Case* by Coode,[9] when properly expressed adds to the clarity and precision of the law. In the sentence,

> Where a person is convicted of an offence under section 10, the Court may, in addition to the fine imposed upon that person, order that person to pay a penalty not exceeding one hundred thousand dollars,

Where a person is convicted of an offence under section 10 states the circumstances the prevailance of which leads to the imposition of the penalty stated. In other words, in the absence of those circumstances, no penalty will be imposed. Another example is:

> Where there is water in a swimming pool, an owner upon whom a notice is served shall immediately
>
> (a) evacuate all water from the swimming pool, and

9 Driedger, *The Composition of Legislation*, p. 322.

(b) bar the swimming pool from access to all infants.

To state a condition, *if* is normally used:

If the appellant complies with section 24, the Court shall order the respondent to pay into court an amount of money equivalent to the sum of money claimed by the appellant.

If the appellant does what the law requires of him, the court is bound to make the order for the payment into court. *If* the appellant does not comply with section 24, then the court cannot order the payment into court. The exercise of the power of the court to order the payment into court is dependent upon the compliance, by the appellant, with the requirements of section 24.

Shall and May

The basic principle in the use of the words 'shall' and 'may' in a legislative sentence is that *shall* imposes a duty or an obligation, *may* confers a discretionary power. Thus *shall* is mandatory while *may* is discretionary. This basic principle has been codified in some Commonwealth jurisdictions such as Ghana.[10]

But there have been situations where the words have been misused by Parliamentary Counsel. There are cases where the courts have construed *shall* to mean *may* and *may* to mean *shall*. Sometimes the court's departure from the usual meaning or usage of the words has been convincingly explained. At other times the departure has been extremely difficult to understand.

Driedger[11] stresses that a command should never be used for a mere declaratory sentence, that is to say, a sentence that merely lays down an abstract proposition of law. *A true imperative involves two elements, namely, an indication of the person who is being commanded and a statement of the thing that person is required to do or refrain from doing*. If either of these elements is missing there is no true imperative.

A common example of the false imperative is a definition that says, 'officer' *shall* mean a member of the Barbados Police Force. In that definition, no person is commanded to do an act. It is merely declared that *officer* has the meaning specified.

The varying positions adopted by the courts in relation to the use of *shall* and *may* cloud rather than clarify the basic principle. In *Attorney General and Another v Antigua Times Limited*[12] section 3(2) of the Newspaper Surety Ordinance (Amendment) Act, 1971 made it unlawful to print or publish a

10 Interpretation Act, 1960 sec. 27. See also the Australia Interpretation Act, 1901 sec. 19, and the Barbados Interpretation Act, sec. 37, Cap. 1.

11 Driedger, *Legislative Drafting*, 27 Can. Bar Rev. 291 (1949).

12 [1976] A. C. 16.

newspaper unless, in addition to a bond, $10,000 had been deposited with the Accountant-General to satisfy any judgment of the Supreme Court for libel. There is a proviso that the Minister, being satisfied with the newspaper's security in the form of a policy of insurance or a bank's guarantee, *may* waive the requirement for the deposit.

The Privy Council took the view that *may* in the proviso to section 3(2) was mandatory and the Minister, if satisfied with the sufficiency of the security offered, had to waive the requirement that the newspaper must deposit $10,000 with the Accountant-General. It is submitted that it is possible to argue that the proviso gave the Minister a discretion as to whether or not the requirement of a deposit shall be waived but that if the newspaper shows that it does have sufficient security then the Minister's failure or refusal to waive the requirement of a deposit would be an improper exercise of discretion and therefore *ultra vires* the Act.

The courts, in following their well-defined policy of looking to the intent rather than the language, have variously held that *shall* is imperative, *may* is discretionary. It means that *may*, expresses a mandate, is either permissive or peremptory, applies to the past, to the future, and to the present.[13] There can be no doubt, however, that the use of *shall* to signify a command is established though the courts continue to find that circumstances, or the context of an Act, overcome the usual meaning. The mandate conferred is thus held to be merely permissive rather than imperative. The effect is to make *shall* have no stronger meaning than *may*.

The cases in which *shall* has been construed to mean *may* are a warning to Parliamentary Counsel that clarity is essential to avoid a different meaning being placed on *shall* or *may*. Such cases represent merely a misuse of *shall* which is corrected by judicial construction.[14] It has been persuasively argued that *shall*

> … may be construed to mean 'may' when no right or benefit depends on its imperative use; when no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or the individual by giving it that construction, or when it is absolutely necessary to prevent irreparable mischief, or to construe a direction so that it shall not interfere with vested rights, or conflict with the proper exercise of power ...[15]

Of special interest is the American case of *Reed v Wellman.*[16] Statute provided that in case of disputed surveys of boundaries, the owners of land '*shall* refer same to the state surveyor and draughtsman for settlement.' The State surveyor was given the power to summon witnesses and to compel the

13 Read, MacDonald & Fordham, *Legislation : Cases and Materials*, p. 324.

14 *Ibid*., p. 325.

15 35 Cyc. 1451.

16 110 Neb. 166, 193 N. W. 261.

attendance of witnesses, and to appoint an arbitrator. The arbitrator's decision was to be *prima facie* evidence of the correctness of the settlement. It was held that the statute, which was alleged to be invalid as taking away the constitutional right of appeal to the courts, was valid. The court construed *shall* to mean *may*. The court said that, 'where to construe the statute as mandatory would make it unconstitutional, such construction will be rejected if any other is possible.'

When *shall* is construed as directory, the idea of permission is not involved. A course of action is directed to be taken. The person or body undertaking to proceed under the Act is vested with no discretion to vary or omit parts or all of the designated procedure. The question is simply one of whether or not the variance or omission, if it occurs, will invalidate what has been done. Where the court considers it necessary to follow exactly the outlined procedure, the Act is mandatory. If not it is directory.[17]

There appears to be substantial unanimity as to the test to be employed in holding an enactment as being directory or mandatory. Lord Mansfield in *Rex v Locksdale*[18] made it depend on whether that which was to be done was or was not of the essence of the thing required, that is, whether the question in hand related to matters of substance other than form.

It has been said that *shall* and *may* 'are related in that the rejection of one will often mean the use of the other. They make clear whether an obligation or a power is cast on the legal subject.'[19] The use of *shall* indicates that the legal subject is under an obligation to act in accordance with the terms of a provision.

The provision,

A person shall not steal … ,

uses the universal, *A person*. That indicates that there is cast on each person an obligation not to steal. The provision does not indicate a future action or conduct. To express a provision in the form that a person *shall* or *shall not* do an act or refrain from doing an act is to cast on that person an obligation to do or refrain from doing that which is commanded or prohibited. Failure to comply with a mandatory provision would give rise to a cause of action leading to the imposition of the requisite sanction.

The use of *may* gives the legal subject a discretion to do a specified act. The legal subject *may*, or *may not*, do what is directed. It would follow that failure to act in pursuance of the terms of such a provision is not intended to give rise to a cause of action.

Julius v Bishop of Oxford[20] turned on the meaning of the words 'it shall be lawful' in the Church Discipline Act 1842. The court laid down the rule that

17 Read, MacDonald & Fordham, *Legislation: Cases and Materials*, p. 327.

18 1 Burr. 447.

19 Robinson, *Drafting*, pp. 39-40.

the words 'it shall be lawful' are not equivocal. They are plain and unambiguous. They confer a faculty or power. They do not of themselves do more than convey a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so.

It was further held that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specified, and with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, the power ought to be exercised and the court will require it to be exercised.

Thus to express an enabling power the language should be permissive, and *may* is the appropriate word. Parliamentary Counsel should avoid the use of the expression *it shall be lawful*, or that *such and such a thing may be done*. Prima facie, the expression imports a discretion. It will be construed as discretionary unless there be anything in the subject matter to which it is applied, or in any other part of the Act, to show that it is meant to be imperative.[21] The imperative *shall* means that there is a clear duty to be discharged. The permissive *may* means that there is an option.

It was held in *R. v Bishop of Oxford*[22] that as long ago as 1683, it was decided in the case of *R. v Barlow*[23] that when a statute authorises the doing of a thing for the sake of justice or the public good, *may* means *shall*. That rule has been acted upon to the present time. The same rule will apply to *it shall be lawful*. This dictum better explains the position taken by the courts in cases such as *Julius v Bishop of Oxford*[24] and *Attorney General and Another v Antigua Times Limited*.[25] But Parliamentary Counsel have a duty to be clear and unequivocal in their use of *shall* and *may* and should not rely on the context in which the word occurs and the probable involvement of the courts.

The County Courts Act 1850,[26] provided that, with regard to certain actions, the court in which the action is brought '*may* direct that the plaintiff shall recover his costs.' In *McDougal v Paterson*,[27] it was held that the provision was obligatory, not permissive:

21 *Re Newport Bridge* (1859) 2 E & E 377, 380. See also *York and North Midland Railway Co. v R.* (1835) 1 E & B 853.

22 (1879) 4 Q.B.D. 245.

23 (1693), 2 Salk. 609; 91 E. R. 516.

24 [1874] All E. R. 43.

25 [1976] A. C. 16.

26 13 & 14 Vict. C. 61.

27 (1851) 6 Ex. 337.

> when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorised to exercise the authority, when the case arises and its exercise is duly applied for by a party interested, and having the right to make the application. For these reasons we are of the opinion that the word 'may' is not used to give a discretion, but to confer a power upon the court and judges, and that the exercise of such power depends, not upon the discretion of the court or judges, but upon the proof of the particular case out of which such power arises.

In certain circumstances language which is ordinarily permissive may not only make it imperative upon the court to do the thing which the enactment states that it may do, but it may also prohibit that particular thing from being done by the court in any other way. In *Taylor v Taylor*[28] this matter was considered in relation to section 16 of the Settled Estates Act 1856 under which 'any person entitled to the possession of the rents and profits of any settled estates for a term of years … may apply to the court by petition in a summary manner to exercise the powers conferred by the Act.'

Jessel, M. R. said that,

> when a statutory power is conferred for the first time upon a court, and the mode of exercising it is pointed out, it means that no other mode is to be adopted. This section says that the proceeding is to be by petition. It is *enabling*, I know, in form that the application may be by petition, but *no other* process can be adopted … in the same way when a statute says who is the person to petition, that person *and no others*, shall be entitled.

It may be argued that section 16 provided that certain persons *may* apply by petition. If there are already other methods of making applications to the courts, for instance, by originating summons or notice of motion within the existing rules of civil procedure, then a logical conclusion is that the method provided for in section 16 is *in addition* to the existing methods of application. Indeed it seems that no useful purpose would be served by following *Taylor v Taylor*.[29] When, for instance, there are cheaper and faster modes of applying to the court such as by oral application it seems unjust to deny an applicant the opportunity to choose that mode simply because the court holds that *may* means *shall* in the context of the Settled Estates Act 1856.

The Modifiers

Ambiguity in legislative drafting often springs from the wrong arrangement of words in the structure of the sentence. One such cause of ambiguity is the wrong placement of the modifiers. A modifier is a word or collection of words that identify the subject of the sentence or the predicate of the sentence. In the sentence,

---

28 (1876) 1 Ch. D. 425 affirmed in (1876) 3 Ch. D. 145 (C. A.)

29 *Supra*

A person shall not kill an animal on the highway,

there is an ambiguity. The expression *on the highway* may modify

(a) *person*, that is, a person who is on the highway;

(b) *kill*, that is, a person shall not kill on the highway;

(c) *animal*, that is, an animal which is on the highway.

It is thus desirable to be clear at what the prohibition is aimed. Is it aimed at the person, or the killing or the animal? Thus, three fact situations are being dealt with here.

(a) Where the prohibition is aimed at the person, the provision would read,

A person who is on the highway shall not kill an animal.

Therefore a person who is *not* on the highway does not fall within the ambit of the law. Equally, the animal need not be on the highway. And the killing would not necessarily be on the highway.

(b) Where the prohibition is aimed at the killing, the section would read,

A person shall not kill on the highway an animal.

Thus the killing must not take place on the highway. The person need not be on the highway. But in this case the animal would be on the highway.

(c) Where the prohibition is aimed at the animal, the sentence would read,

A person shall not kill an animal which is on the highway.

In the sentence,

A person who drives a motor vehicle the serial number of which is obliterated commits an offence,

there is difficulty. The expression *who drives a motor vehicle* could be interpreted as describing *A person*. The expression *the serial number of which is obliterated* modifies *motor vehicle*. In other words the law is aimed at the class of persons which drives motor vehicles of a particular kind: motor vehicles the serial numbers of which are obliterated. Read that way, when the modifiers are removed the sentence stands as

A person commits an offence.

And that is meaningless. Obviously, the provision would be intended to prohibit persons from driving a particular type of motor vehicle, that is to say, motor vehicles the serial numbers of which are obliterated. Thus, the appropriate legislative sentence should be a statement of the prohibition required:

(1) A person shall not drive a motor vehicle the serial number of which is obliterated.

or

No person shall drive a motor vehicle the serial number of which is obliterated.

The provision for an offence will thus read,

> (2) A person who contravenes subsection (1) commits an offence.

A provision which states that,

> When the Minister is satisfied that a person whose aims, tendencies or objectives include the overthrow of the democratic and parliamentary system of government, he may by order restrict the right of that person to board a vessel or aircraft in Draftaria for the purpose of travelling abroad if he is satisfied that it is reasonably required in the interest of defence, public safety or public order so to do,

brings to light Coode's warning that,

> The most determined will in the lawgiver, the most benevolent and sagacious policy, and the most happy choice and adaptation of means, may all, in the process of drawing up the law, be easily sacrificed to the incompetency of a draftsman.[30]

All the provision seeks to do is to give power to the Minister to detain certain persons. The words, *whose aims*, *tendencies or objectives include the overthrow of the democratic and parliamentary system of government*, are intended to modify *person*. If the object of the Minister's satisfaction is stated as John, the provision would read,

> When the Minister is satisfied that J*ohn*, he may by order restrict the right of *John* to board a vessel or aircraft in Draftaria

The provision makes sense if there is a verb to determine the character of the object of the Minister's satisfaction. That is to say, the Minister must be satisfied that John *is* a person who *has* aims, tendencies or objectives which include the overthrow of the democratic and parliamentary system of government.

Secondly, the words, *to board a vessel or aircraft in Draftaria* modify the word *right*. The right to board a vessel or an aircraft. So, the difficulty arises as to whether the words, *for the purpose of travelling abroad* qualify the word, *restrict*, or the words, *to board a vessel or aircraft* or the word, *person*. The Minister does not restrict a person so that that person *travels abroad*. That would be no restriction. Nor should the expression modify, *to board a vessel or aircraft*. The Minister would restrict a person *from* travelling abroad.

There are other problems raised by the provision which are outside the purview of the use of the modifier in legislative drafting. There is no need to deal with them here.[31]

An appropriate redraft of the provision would read,

---

30 Coode, *On Legislative Expression* reproduced by Driedger, *The Composition of Legislation*, p. 321.

31 See *The Legislative Sentence*, Stat. L. R., Vol. 10, p. 80.

> The Minister may, in the public interest,[32] make an order for the restriction of the movements in Draftaria of a person whom the Minister is satisfied is a person
>
> *(a)* who has or professes aims, tendencies or objectives which include the use of force for the overthrow of the government of Draftaria as by law established, or
>
> *(b)* who advocates the overthrow by violent means of the government of Draftaria as by law established.

Preventing a person from boarding a vessel or aircraft in Draftaria is a restriction of that person's freedom of movement in Draftaria.

The Proviso

The use of the proviso is very much abused. Coode had said in 1842 that,

> IT IS MOST DESIRABLE that the use of provisos should be kept within some reasonable bounds. *It is indeed a question whether there is ever a real necessity for a proviso*. At present the abuse of the formula is universal. Formerly they were used in an intelligible manner; - where a general enactment had preceded, but a special case occurred for which a distinct and special enactment was to be made, different from the general enactment, this latter enactment was made by way of proviso … The proviso might still be legitimately used on the same plan, of taking special cases out of the general enactments, and providing specially for them.[33]
>
> And Driedger[34] asked,
>
> What is the grammatical function of the word *provided*?

Provided that really means *it is provided*. The *it* obviously refers to Parliament. But then every other provision in an Act *is provided by Parliament*. The Latin root is *provisum est*. That was used *throughout* the Statute of Marlborough. And so to this day. There is a need to warn Parliamentary Counsel of the dangers inherent in the use of the proviso. Indeed, many a Bill *can* be drafted without using the expression *Provided that* and its various forms. In the examples that follow there is no need for the *provided that* found in those provisions.

---

32 *Public interest* would include *the interests of defence, public safety or public order*. It may be argued that these facets of society do not have an interest.The use of an expression such as *a threat to defence*, *etc.* would be more appropriate. However, the use of the expression, *in the public interest* has acquired a legal standing.

33 Coode, See Driedger, *The Composition of Legislation*, p. 360, *et seq*. (Italics supplied).

34 *The Composition of Legislation*, p. 93.

1. Where an Act is not to come into operation immediately on the passing thereof and confers power to make an appointment, to make a grant or issue an instrument (including any regulations or by-laws), to give notices, to prescribe forms, or to do any other thing for the purposes of the Act, that power may, unless the contrary intention appears, be exercised at any time after the passing of the Act for the purpose of bringing the Act into operation at the commencement thereof.

   Providing that any instrument made under the power shall not, unless the contrary intention appears in the Act or the contrary is necessary for bringing the Act into operation, come into operation until the Act comes into operation.

2. Where an Act confers upon a person or an authority a power to make appointments to an office or a place, the power shall, unless the contrary intention appears, be construed as including a power to remove or suspend a person appointed, and to appoint another person temporarily in the place of the person so suspended or in the place of a sick or an absent holder of that office or place. Provided that where the power of such person or authority to make any such appointment is only exercisable upon the recommendation or subject to the approval or consent of some other person or authority, such power of removal shall, unless the contrary intention appears, only be exercisable upon the recommendation or subject to the approval or consent of such other person or authority.

By simply removing the words *Providing that*, and *Provided that* from each of the provisions and numbering the amended provision as subsection (2), nothing changes in the substance or the drafting of each of the provisions. The beginning provisions would be numbered subsection (1) in each case. The supposed provisos can thus be redrafted:

1. (2) An instrument made under the power shall not, unless the contrary intention appears in the Act or the contrary is necessary for bringing the Act into operation, come into operation until the Act comes into operation.

2. (2) Where the power of that person or authority to make that appointment is only exercisable upon the recommendation or subject to the approval or consent of some other person or authority, the power of removal shall, unless the contrary intention appears, only be exercisable upon the recommendation or subject to the approval or consent of that other person or authority.

Chapter 6

Punctuation

In *Duke of Devonshire v O' Connor*, Lord Esher M. R., stated that,

> In an Act of Parliament there are no such things as brackets any more than there are such things as stops.[1]

It has been contended by Lord Reid[2] that before 1850 at least there were no punctuation marks in the manuscript copy of an Act of Parliament. This has been challenged.[3] To Thornton, punctuation

> … is a device of syntax - a means, supplementary to word order, of suggesting the grouping of words in a sentence and thus revealing its structural pattern. The purpose … is to assist the reader to comprehend more quickly the intended meaning by providing sign posts to sentence structure.[4]

Dreidger contended that,

> Punctuation should not be used to convey meaning … Punctuation, judiciously used, will guide the reader through the sentence, help him sort out its elements and subconsciously prevent him from going astray.[5]

In disagreeing with Lord Reid,[6] Bennion states that,

> Modern draftsmen of public general acts take great care with punctuation, and it undoubtedly forms part of the Act as inscribed in the royal assent copy and thereafter published by authority.[7]

Maxwell on Interpretation of Statutes[8] appears to support the contention of *Craies on Statute Law*[9] that 'punctuation forms no part of any Act.' *Maxwell* argues that 'there was generally no punctuation in old statutes as engrossed on the Parliament Roll, and not all modern vellum prints of statutes are punctuated.' But Bennion adds that Mellinkoff[10] has shown that 'English statutes have been punctuated from the earliest days.'[11]

---

1 (1890) 24 Q. B. D. 468 at p. 478.

2 *I.R.C. v Hinchy* [1960] A.C. 748 at p. 765.

3 Bennion, *Statute Law* (2nd ed.), p. 57.

4 Thornton, *Legislative Drafting* (2nd ed.), p. 33.

5 Dreidger, *The Composition of Legislation* (2nd ed.), p. 83.

6 *Supra*, n. 3.

7 *Supra*, n. 3.

8 (12th ed.), p. 13.

9 (7th ed.), p. 198. But *Craies* had earlier stated that 'The copies printed on vellum since 1850 were certainly in some cases punctuated and punctuation when it occurs in the vellum copies is, it is submitted, to be regarded, to some extent at least, as *contemporanea expositio*'.

10 Melinkoff, *The Language of Law* (1963).

11 *Supra*, n. 3.

Maxwell, however, further argues that 'a provision in a statute may be read as though the punctuation which appears on the face of the Act were omitted' and that 'where it is necessary to give a provision a particular construction which is at variance with the way in which the section is punctuated, it may be read as though there were in fact punctuation where none appears on the face of the Act.'[12]

Section 113(4) of the Housing Act, 1957 is used to support the first contention. Section 10 of the Fugitive Offenders Act 1881 is used to support the second contention. Subsection (4) of s.113 of the Housing Act 1957 provides that,

> The local authority shall from time to time review rents and make such changes, either of rents generally or of particular rents, and rebates (if any) as circumstances may require.

Harman L. J. stated that,

> The obligation is not to make rebates, as grammatically it should be if the comma were there, but to make changes of rebates (if any).[13]

In other words the provision was read as though there were no comma after the third *rents*. Could the subsection be read to mean that the local authority is compelled to review the *rents*? The expression *shall … review* is mandatory. And having reviewed the rents to make 'such changes, either of rents generally or of particular rents' and to make rebates necessitated by the review and the changes?

Do not the words *if any* in brackets suggest that the changes in rents after a review may not necessarily lead to a rebate, but should that eventuality arise, then the local authority would be obliged to make a rebate? The rebate would depend upon the changes which arise out of the review of the rents. If there are no changes in the rents there would be no rebates. The expression *either of … or* would appear to suggest this view. Changes of what? Changes 'of rents generally or of particular rents.'

Indeed the preceding subsection (3) grants a discretionary power to the local authority to make rebates from rent:

> The local authority may grant to any tenants such rebates from rent, subject to such terms and conditions, as they think fit.

Subsection (3) deals then with rebates. Subsection (4) deals with review of rents and what would follow a review, that is, changes in rent which could, but not necessarily, lead to a rebate.[14]

---

12 *Interpretation of Statutes* (12th ed.), p. 14.

13 *Luby v Newcastle-Under-Lyme Corporation* [1965] 1 Q. B. 214 at p. 229.

14 But see Bennion, *Statutory Interpretation*, pp. 594-600.

The next example by *Maxwell* to support the contention that a provision could be read as though there were in fact punctuation where none appears is s.10 of the Fugitive Offenders Act 1881. It states that,

> Where it is made to appear to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, such court may discharge the fugitive, either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the court seems just.

The court held that its discretion was not limited to cases of a trivial nature nor to cases in which the application was not made in good faith. Its discretion could be exercised in any case in which the court thought that it would be unjust, or oppressive, or too severe. The section was thus given a wide construction as if a comma were inserted before 'or otherwise.'

Section 10 could be redrafted thus:

> Where it is made to appear to a superior court that
>
> *(a)* by reason of the trivial nature of the case, or[15]
>
> *(b)* by reason of the application for the return of a fugitive not being made in good faith in the interests of justice, or
>
> *(c)* otherwise[16]
>
> it would, having regard to the distance, to the facilities for communication, and to all the circumstances, be unjust or oppressive or too severe a punishment to return the fugitive …

In this form the court would primarily have three conditions to deal with. The third condition 'otherwise' being circumstances which do not fall within the ambit of paragraph *(a)* or *(b)* but which in the discretion of the court, having regard to all the circumstances of distance and facilities, it would be unjust to return the fugitive.

Was it necessary, then, for Parliamentary Counsel to have inserted a comma after the expression 'interests of justice'? It is submitted that it was not necessary since Counsel was dealing with an enumeration, but were Counsel using paragraphs no doubt a comma would have been used. In this instance

---

15 It may be argued that the 'or' here is not needed as well as the penultimate comma after 'justice' in paragraph *(b)*.

16 As redrafted paragraph *(c)* does not fit in with the introductory clause. It highlights a defect in paragraphing.

the comma has been left to be supplied in the mind of the audience. Even in the absence of paragraphs it may be wise to use a penultimate comma. However, it may not be necessary in view of the widespread practice of *not* using penultimate commas in some jurisdictions.

Driedger, as stated earlier, has said that punctuation should not be used to convey meaning. When punctuation is judiciously used it guides the reader through the sentence, helping him sort out its elements and subconsciously prevents him from going astray.[17] That may well be. But the fact that punctuation marks are relatively weak signs does mean that they do not convey meaning. However, in his *The Construction of Statutes* he added that punctuation marks form part of the text of the statute

> and cannot escape notice in reading the text. Correct punctuation can lead the mind of a reader to the grammatical construction intended by the draftsman, just as incorrect, too much or too little, can lead him astray. Punctuation may therefore have subconscious as well as a conscious influence on the mind of the reader.[18]

He deals with a few Canadian cases where,

> A misplaced comma cannot be allowed to destroy the reasonable inference to be deduced from the language of the whole clause,[19]

and where the court read a provision strictly in accordance with the punctuation

> because if it were not so then a comma would not be required after the 'committed in Canada.'[20]

In this case, the court 'corrected' the punctuation by omitting a period, reading the words 'judicial district in this Province. The statement of claim may issue' ' as being 'in this Province the statement of claim may issue …'[21] Macdonald J.'s comment cited above is equally true of words. In the example,

> one (1), two (2), two (3), four (4),

the second 'two' obviously means 'three' and has to be read as such. If the context is strong enough it can override anything. But that fact does not mean that what is overridden does not otherwise legitimately convey meaning.

It was, I believe, John Locke who said that,

> God having designed man for a reasonable creature, made him not only with an inclination and under a necessity to have fellowship with those of his own kind but furnished him also with language which has to be the great instrument and common tie of society.

---

17 Driedger, *The Composition of Legislation*, p. 83.

18 Driedger, *The Construction of Statutes*, p. 134.

19 Macdonald J. in *Re College of Dental Surgeons and Moody* [1923] 3 W.W.R. 171 at p. 174.

20 Nitikman J. in *Re Associated Commercial Protectors Ltd and Mason* (1970) 13 D. L.R. (3d) 643.

21 *First National Bank v Curry* (1910) 20 Man. R. 247

Words in a statute form part of the language of a people. A statute is a form of communication from Parliament to an audience, that is to say, those to whom the statute is intended to apply to do or refrain from doing certain things. It may be a command that orders a course of conduct, a prohibition that forbids a course of conduct, even a warning that certain consequences will follow if the statute is not obeyed. It may be a rule of conduct intended to guide those to whom the statute is to apply. It may prescribe a rule of law in a positive or a negative form for its audience.

That audience is expected to understand the statute as language is understood. Can it be otherwise? For only then can the statute evoke in its audience a response which is in consonance with the dictates of the statute. That response will depend upon the creation of a state of mind which makes possible an understanding of the statute. But whatever it is, the audience responds to the statute as part of language, an understanding of which depends in turn upon the accepted rules of grammar and of syntax. Punctuation is part of the grammatical arrangement of words in order to give meaning to what is written.

An example will suffice. The expression 'walk in love' will be understood as a mere statement. Perhaps a mere collection of a few words. A *comma* placed after 'walk' - 'walk, in love' - obviously gives some meaning to those words. It is no longer a mere statement. It is perhaps a peroration by a Minister of religion to his flock to 'love thy neighbour as thy self.' A change in meaning is indicated again when the *comma* is placed after 'in' - 'walk in, love.' Here it may be the spider inviting the fly to walk in to its parlour! It may be a husband, addressing the dear wife to come in to the study as that would not be a disturbance.

The ambiguity in the sentence,

The teacher said the inspector is a fool,

becomes clear when the *comma* is used thus:

The teacher, said the inspector, is a fool

or

The teacher said, the inspector is a fool

Again, the sentence,

Woman without her man is useless

can be rewritten as,

Woman, without her, man is useless

or

Woman, without her man, is useless

The difference in meaning is made quite clear by the use of the *comma*.

Another example. 'Can he talk!'. 'Can he talk?'. The same words. The use of the *exclamation mark* in the first set of words gives the meaning of an observation that the person being 'spoken' of is very talkative or talks very well. The use of the *question mark* in the second set of words conveys the meaning that a question is being asked. There is an uncertainty here. The enquirer seeks to know or to be given an assurance that the person 'spoken' of can talk.

Punctuation marks in a language are symbols that give meaning to what is written. Carey has pointed out that the purpose of punctuation

> is that the meaning of what is written should be conveyed to the reader's mind, through his eye, with the least possible delay and without any ambiguity. I would say, therefore, that the main function of punctuation is *to make perfectly clear the construction* of the written words. If this function is properly fulfilled, then automatically all risk of ambiguity will be avoided and the appropriate pauses will be indicated to the reader, when they are so optional as to be left to him to supply.[22]

The problem with punctuation in legislation then would appear to be that Parliamentary Counsel may be at sea in the use of punctuation marks. They may be omitted when they should be inserted. In cases where Counsel omits punctuation marks when they should not be omitted then the judges, working from context, will do their best to construe the legislation in question and to read that piece as if there were punctuation marks. In cases where Counsel misuses punctuation marks the judges again, in construing the legislation, will ignore the punctuation marks if by so doing the meaning will be made clear. Hence Dickerson advises that

> punctuation is a tool that the draftsman can ill afford to neglect. He should master it and use it as a finishing device together with other typographical aids in carrying meaning. But he should not rely solely on it to do what an arrangement of words can do. It is here that punctuation marks are the most abused.[23]

Drugs are abused. So is the use of other things abused. Nobody has yet suggested that drugs are of no use - or should be ignored - in medicine. In 1960 Lord Reid did not think much about punctuation in legislation.[24] Eleven years later in *Director of Public Prosecutions v Schildkamp* he said that,

> … it may be more realistic to accept the Act as printed as being the product of the whole legislative process, and to give due weight to everything found in the printed Act … it is not very meaningful to say that the words of the Act represent the intention of Parliament but that punctuation, cross headings and side notes do not.[25]

---

22 Carey, *Mind the Stop*, (Penguin ed., 1983), p. 15.

23 Reed Dickerson, *The Fundamentals of Legal Drafting* (1965), p. 117.

24 In *I. R. C. v Hinchy* [1960] A.C. 748.

25 [1971] A. C. 1.

Punctuation forms part of legislation. The language of the law is a part of language as a whole and language comprises also the writings whose value lies in beauty of form or emotional effect. Legislation is part of that literature. The law is part of the literature of a people. Punctuation plays its part - a useful role - in legislation as it does in language as a whole.

Sir Ernest Gowers dealing with punctuation quotes Aldus Manutius as saying that,

> That learned men are well known to disagree on this subject of punctuation is in itself a proof, that the knowledge of it, in theory and practice is of some importance. I myself have learned by experience, that, if ideas that are difficult to understand are properly separated, they become clearer; and that, on the other hand, through defective punctuation, many passages are confused and distorted to such a degree, that sometimes they can with difficulty be understood, or even cannot be understood at all.[26]

In legislation, the correct use of punctuation cannot be over-emphasised. Parliamentary Counsel who uses a punctuation mark must, necessarily, select the correct one; not only that, Counsel must use it in its right place. The punctuation marks normally found in legislation are *the brackets*, *the colon*, *the comma*, *the dash*, *the full stop*, *the inverted commas*, *the semi-colon*, and the creature ':-'. It has no name as a punctuation mark. Those who use it in legislation refer to that creature, that symbol, as *the colon-dash*.

The Colon-Dash and the Dash

It does appear that the colon-dash is not a punctuation mark. Parliamentary Counsel should avoid its use. Consider the sentence:

> This Act shall be construed as being additional to and not as derogating from any other law which restricts the right of persons to attend proceedings of any court or adjudicating authority or regulates restricts or prohibits the publication of the proceedings of courts or adjudicating authorities or any matter relating to such proceedings or relates to state privilege.

Would it be appropriate to rewrite this sentence thus, using punctuation marks:

> This Act shall be construed as being additional to, and not as derogating from, any other law which:- restricts the right of persons to attend proceedings of any court or adjudicating authority, or regulates, restricts or prohibits the publication of the proceedings of courts or adjudicating authorities or any matter relating to such proceedings, or relates to State privilege.?

---

26 *The Complete Plain Words*, (Pelican ed.), p. 238.

Would the *colon* do on its own? Would the *dash* do on its own? Clearly yes. Why both? Why *two* punctuation marks? The use of both the *colon* and the *dash* is redundant. Yet this is what Parliamentary Counsel does when in paragraphing the sentence Counsel writes that,

> This Act shall be construed as being additional to, and not as derogating from, any other law which:-
>
> *(a)* restricts the right of persons to attend the proceedings of any court or adjudicating authority, or …

And when the *dash* is used instead of the *colon-dash*, the sentence reads,

> This Act shall be construed as being additional to, and not as derogating from, any other law which - restricts the right of persons to attend the proceedings of any court or adjudicating authority, or …

Paragraphing would reduce the sentence thus:

> This Act shall be construed as being additional to, and not as derogating from, any other law which -
>
> *(a)* restricts the right of persons to attend the proceedings of any court or adjudicating authority, or …
>
> The sentence, without the use of the *colon-dash* or the *dash*, would read:
>
> This Act shall be construed as being additional to, and not as derogating from, any other law which[27] *(a)* restricts the right of persons to attend the proceedings of any court or adjudicating authority, or *(b)* regulates, restricts or prohibits the publication of the proceedings of courts or adjudicating authorities or any matter relating to such proceedings, or *(c)* relates to State proceedings.

Does the sentence lose its 'elegance' if the *colon-dash* is not used, if the *dash* is not used, and if paragraphs are used thus:

> This Act shall be construed as being additional to, and not as derogating from, any other law which
>
> *(a)* restricts the right of persons to attend the proceedings of any court or adjudicating authority, or
>
> *(b)* regulates, restricts or prohibits the publication of the proceedings of courts or adjudicating authorities or any matter relating to such proceedings, or
>
> (c) relates to State proceedings.

---

27 Fowler's conventions would prefer the word 'that' to the word 'which'.

It is submitted that the sentence does not lose any 'elegance' without the use of the *colon-dash* or the *dash*. The *dash* is perhaps used to introduce a particularisation or used in pairs to enclose a parenthetical matter,[28] or simply to indicate a sharp break. But it is submitted that the use of paragraphs takes care of that and there is no need to use the *dash* in legislation.

The use of the *dash* or *colon-dash* does not explain or amplify or paraphrase what immediately precedes it. The absence of the *dash* does not detract from the meaning. Its continued use is considered as being established - often seen but not explained. It is simply an abomination! Indeed it would be hard to find the use of the *colon-dash* or the *dash* in modern Canadian legislative drafting.

The Full Stop

The *full stop* does not present any problem to Parliamentary Counsel. When you come to the end of the sentence you do not go any further. You stop. Period.

The Inverted Commas

In legislation the *inverted commas* are used to define a word or a set of words, and in textual amendments. A few examples will be sufficient:

Definitions

"notice" means a notice issued in terms of subsection (2) of section 4;

"record of proceedings" includes the judgment or decision of a court or adjudicating authority and any evidence or other matter or thing that forms part of, or relates to, the record of proceedings before a court or adjudicating authority.

Textual amendments

1. In section 4, substitute the word "four" for the word "seven".
2. In section 14, delete the words "where a person is charged with obtaining access to any records."

---

28 In the United States of America the colon would be used for the dash and the brackets to enclose parenthetical matter.

3. The Principal Act is hereby amended in section 34 by deleting the words,

(a) "when he is charged with an offence under section 10;";

(b) "unless otherwise provided,";

(c) "as provided by the Minister.".

Brackets[29]

In legislation the *brackets* are used in order to insert a paraphrase, an information or an explanation into a sentence. Their use is only appropriate where the sentence is complete without the insertion. That is to say, they indicate material that is not part of the text.

In the sentence,

Section 24 of the Forestry Act, 1887, (which provides for applications to be made to the Minister) shall apply to an application made under section 6 of this Act,

the words in the brackets when removed from the sentence will not affect the logical and grammatical structure of the sentence. But in the sentence,

The Minister may (by legislative instrument) make Regulations,

the use of the brackets is wrong. The words in the brackets are not incidental to the main thought. The words 'by legislative instrument' are material, that is, essential to the sentence. They indicate the *type* of instrument that the Minister should use in making the Regulations. The Minister is not required to use an executive instrument nor a *Gazette* notice. The provision should thus read,

The Minister may, by legislative instrument, make Regulations …

The Colon

The *colon* is used to make a formal introduction. It is used to indicate a series or a particularisation or a list. An example.

The member States of the Organisation are:

(a) the Azores and their dependencies,

(b) the Caribbean States, and

(c) the Dominican Republics.

---

29 These would be called parenthesis in the United States of America. What we call square brackets they term brackets.

Would the absence of the colon do any damage to the meaning or otherwise of the sentence? It is submitted not. And like the *colon-dash* and the *dash*, the *colon* can be dispensed with. Except, that is, at the end of the enacting formula, when it is appropriate to use the colon.

The Comma

The comma is used mainly in ordinary writing to cause a break. In legislation form and clarity should dictate its use.

Where words or phrases are interpolated in a sentence

1. No member of the board, with the exception of the chairman, shall be paid …
2. The Board, with the approval of the Minister, may determine …
3. Each member, other than the chairman, shall be paid …

For the purpose of facilitating the construction of a sentence, and the comprehension of the sentence.

1. Where a fine is imposed under this section, a term of imprisonment may be imposed in default of payment of the fine, but no such term shall exceed

   (a) two years, where the term of imprisonment that may be imposed for the offence is less than five years, or …

2. The Board may dispose of an appeal by

   (a) dismissing it, or

   (b) vacating the assessment.

3. (1) There is hereby established a council to be known as the Football Council.

   (2) The Council consists of

   (a) a chairman, to be appointed by the Minister,

   (b) the president of the Football League, and

   (c) one representative for each of the football clubs affiliated to the Football Association.

Where the information conveyed is necessary to the main thought

1. The Minister may, by legislative instrument, make Regulations …[30]

[30] This is not much different from an interpolation. And see the examples of the use of brackets at p.94 above. Also in some jurisdictions Regulations would not be capitalised. But since it is the name of a piece of legislation it should be capitalised as *Act* is capitalised.

2. A person who,

(a) being required to attend in the manner in this Part provided, fails, without valid excuse, to attend accordingly,

(b) being commanded to produce a document, book or paper in his possession or under his control, fails to produce the same,

commits an offence and is liable, on summary conviction, before a magistrate or a judge of a superior court, having jurisdiction in the district in which that person resides, to a penalty not exceeding four shillings.

3. A person is not eligible to be a director unless that person holds shares in the company as the absolute and sole owner of the shares and not as trustee or in the right of any other person, on which not less than

(a) three thousand shillings, or such greater amount as the by-laws require, have been paid up, when the paid-up capital shares of the company amount to not more than one million shillings;

(b) four thousand shillings, or such greater amount as the by-laws require, have been paid up, when the paid-up capital shares of the company amount to more than one million shillings but do not exceed three million shillings; or

(c) five thousand shillings, or such greater amount as the by-laws require, have been paid up, when the paid-up capital shares of the company exceed three million shillings;

except that in the case of not more than one-quarter of the number of directors the minimum requirements of subscriptions to shares in paragraphs *(a)*, *(b)* and *(c)* shall be reduced to fifteen hundred shillings, two thousand shillings and twenty-five hundred shillings respectively.

Where the information conveyed is parenthetical

1. The Minister may, for the purposes of this Act, authorise the payment out of the Fund of a subsidy of …

2. There shall be paid out of funds provided by Parliament the expenses incurred by the Commission, including allowances paid to witnesses appearing before the Commission, which the Minister considers appropriate.

3. Part IV of the Forestry Act, 1984, containing supplementary provisions, shall have effect for the purposes of this Part.

In the sentence,

The owner upon whom a notice is served shall immediately,

(a) where there is water in the swimming pool, evacuate all water from the swimming pool; and

(b) bar the swimming pool from access to infants,

no *comma* is needed in relation to paragraph *(b)*. The sentence would thus read,

> The owner upon whom a notice is served shall immediately bar the swimming pool from access to infants.

But a *comma* is needed in relation to paragraph *(a)* because of the interpolation of the words

> where there is water in the swimming pool.

The sentence would read,

> The owner upon whom a notice is served shall immediately, where there is water in the swimming pool, evacuate all water from the swimming pool.

The difficulty in the use of the *comma* after 'immediately' is solved when the sentence is redrafted as,

> The owner upon whom a notice is served shall immediately
>
> *(a)* evacuate all water from the swimming pool, where there is water in the swimming pool, and
>
> *(b)* bar the swimming pool from access to infants.

Written without paragraphs the sentence would read,

> (a) The owner upon whom a notice is served shall immediately evacuate all water from the swimming pool, where there is water in the swimming pool, and bar the swimming pool from access to infants.

or

> (b) The owner upon whom a notice is served shall immediately, where there is water in the swimming pool, evacuate all water from the swimming pool, and bar the swimming pool from access to infants.

Following Coode's advice that the *Case*, that is to say, the circumstances in which the law would operate should be stated before the substantive law, the provision would read,

> Where there is water in the swimming pool, an owner upon whom a notice is served shall immediately
>
> *(a)* evacuate all water from the swimming pool, and
>
> *(b)* bar the swimming pool from access to infants.

It is submitted that there is no need to use the word 'immediately' since there is a *command* to the owner *to evacuate* the pool and *bar* access to infants. It is also submitted that the appropriate punctuation after *pool* in paragraph (a) should be a *comma* rather than a *semi-colon*.

The Semi-colon

This is used in legislation as a link between ideas, especially in the enumeration of paragraphs or subparagraphs of a tabular nature.

> The President may, by legislative instrument, make Regulations
>
> *(a)* prescribing standards of grade, class …;
>
> *(b)* providing for the inspection, grading …; and
>
> *(c)* generally for carrying into effect the provisions of this Act.

A problem, however, does arise as to when to use the *comma* instead of the *semi-colon* or the *semi-colon* instead of the *comma*.

> Words authorising the appointment of a public officer to hold office during pleasure include the power of terminating his appointment or removing or suspending him re-appointing or re-instating him and appointing another in his stead or to act in his stead in the discretion of the authority in whom the power of appointment is vested.

In re-writing the above sentence using paragraphs, should the *semi-colon* or the *comma* be used to mark off the paragraphs? Where the *semi-colon* is used the sentence would read,

> Words authorising the appointment of a public officer to hold office during pleasure include the power of
>
> *(a)* terminating his appointment or removing or suspending him;
>
> *(b)* re-appointing or re-instating him; and
>
> *(c)* appointing another in his stead or to act in his stead;
>
> in the discretion of the authority in whom the power of appointment is vested.

Where the *comma* is used the sentence would read,

> Words authorising the appointment of a public officer to hold office during pleasure include the power of
>
> *(a)* terminating his appointment or removing or suspending him,
>
> *(b)* re-appointing or re-instating him, and
>
> *(c)* appointing another in his stead or to act in his stead,
>
> in the discretion of the authority in whom the power of appointment is vested.

Which is the better of the two? It is submitted that the use of the *comma* in the second example is more appropriate. The sentence does not call for that break for which a *semi-colon* is more appropriate. The division of the sentence

is made to facilitate the construction and the reading of the sentence. The paragraphs are not of a tabular character.

The same sentence could have been drafted as follows:

> Words authorising the appointment of a public officer to hold office during pleasure include the power, exercisable in the discretion of the authority in whom the power of appointment is vested, of
>
> *(a)* terminating his appointment or removing or suspending him;
>
> *(b)* re-appointing or re-instating him; and
>
> *(c)* appointing another in his stead or to act in his stead.

Perhaps the brackets could be used after *power* and after *vested* instead of the *comma*. As already indicated the words interpolated, that is to say, 'exercisable in the discretion … is vested' are essential to the sentence and the *comma* is the more appropriate punctuation mark. So is the use of the *semi-colon* appropriate. Because the sentence has now been paragraphed, it is now tabulated.

In the example,

> The President may, by legislative instrument, make Regulations
>
> *(a)* regulating the purchase of, and the sale of, oranges and the keeping of records relating to purchases and sales;
>
> *(b)* governing the keeping of books of account, the preparation and filing of financial statements and the audit requirements with respect to the keeping of books of account;
>
> *(c)* prescribing the documents, reports, statements, agreements and other information that are required to be given or delivered in accordance with this Act;
>
> *(d)* prohibiting or otherwise regulating the distribution of written material by a person in respect of the sale of oranges whether in the course of selling or otherwise; and
>
> *(e)* exempting or providing future exemption of any person or class of persons from the operation of the Act.

it is submitted that the paragraphs, being tabular in character, the appropriate punctuation mark is the *semi-colon*. Each of the paragraphs, with the introductory words, could be written as a separate subsection.

Driedger advises that where the division into paragraphs is made for the purposes of facilitating the reading and construction, a *comma* not a *semi-colon* is better used at the end of each paragraph or subparagraph.[31]

---

31 Driedger, *The Composition of Legislation*, p. 186.

1. Where the interest in a share of the capital stock is transmitted by, or in consequence of,

   (a) the death, lunacy, bankruptcy, or insolvency of a shareholder,

   (b) the marriage of a female shareholder, or

   (c) any lawful means, other than a transfer according to this Act,

the transmission shall be authenticated by a declaration in writing as provided in this section or in such other manner as the directors of the bank may require.

2. No person shall sell an article of food that

   (a) has in it or upon it a poisonous or harmful substance;

   (b) is unfit for human consumption;

   (c) consists in whole or in part of a filthy, disgusting, rotten, decomposed or diseased animal or vegetable substance;

   (d) is adulterated; or

   (e) was manufactured, prepared, preserved, packaged or stored under insanitary conditions.

3. The President may, by legislative instrument, make Regulations for giving effect to this Act and, without prejudice to the generality of that power, he may make Regulations

   (a) for the conservation and protection of flora and fauna;

   (b) prohibiting, limiting or otherwise regulating

      (i) the exploitation by any person of any flora or fauna;

      (ii) the loading, processing, transporting or possession of any flora or fauna in any part of Ruritania; and

      (iii) the landing, importation, sale or other disposal of any flora or fauna;

   (c) providing for the issue of licences for the purposes of this Act, and prescribing their terms, conditions and forms and determining the fee for the issue of licences.

4. Where an enactment establishes a board

   (a) the quorum at a meeting of the board shall be a number of members equal to

      (i) at least one-half of the number of members provided for by the enactment, where that number is a fixed number, and

      (ii) where the number of members provided for by the enactment is not a fixed number but is within a range having a minimum or a

maximum, at least one half of the number of members in office if that number is within the range;

(b) an act or thing done by a majority of the members present and voting at a meeting shall be deemed to have been done by the board, but only if the number of members so present is not less than the quorum for that meeting; and

(c) a vacancy in the membership of the board shall not invalidate the constitution of the board or impair the right of the members in office to act where the number of the members in office is not less than a quorum.

A close look at example 3 under *Textual amendments* at pages 93-94 above will reveal that almost all the punctuation marks used in legislation appear in that one sentence. The *comma*, the *full stop*, the *inverted commas*, the *semi-colon* all appear. After the expression 'section 10' in paragraph (a) there is a *semi-colon* followed by the closing *inverted commas* before the *semi-colon* is used. In paragraph (c) there is a full stop after the word 'Minister,' then the closing *inverted commas* and then another *full stop*.

The reason is simple. In paragraph (a) the *first semi-colon* is part of the expression to be deleted. The *second semi-colon* is the normal *semi-colon* at the end of a paragraph in a series of paragraphs. In paragraph (b) the *comma* after the word 'provided' is part of the expression to be deleted and the *semi-colon* affords the normal break between paragraphs (b) and (c). In paragraph (c) the *first full stop* is part of the expression to be deleted. The *second full stop* is the normal use of the *full stop* at the end of the sentence.

There was a practice in Federal Australian legislation[32] of using a *comma* at the end of the last paragraph or sub-paragraph in a series of paragraphs or sub-paragraphs and before the concluding words. An example.

Where a certificate is issued under section 74 of the Act, and

(a) …;

(b) …;

(c) …;

(d) …,

the Minister may …

32 I am much indebted to Mr. Geoff Kolts and to Mr. Ian Turnbull – the first, a former First Parliamentary Counsel and the second, the present holder of that office, for the information on this aspect of legislation in Australia.

An issue was raised that the use of the *comma* at the end of the last paragraph created a problem. The problem lies in this, that the words 'the Minister may' where they appear after paragraph (d) may be mistakenly typed or printed as part of paragraph (d) and thus distort the meaning of the whole provision. This error is not peculiar to Australia. In almost every jurisdiction this type of typographical error does occur.

But in Australia the *semi-colon* is never used except at the end of a paragraph. The use of the *semi-colon* rather than the *comma* would be a signal that the words 'the Minister may' do not form part of paragraph (d). Another solution may well be to draft the conferment of the discretionary power on the Minister as a subsection and the case - or condition - in Coode's sense, as a subsection.[33]

It may be argued that Parliamentary Counsel's final arbiter is the final court of competent jurisdiction. The courts are the masters. This places an obligation on Counsel to draft in conformity with the prevailing rules of interpretation which determine the rights of the individual. By those rules the judges seek to divine the intention of the Legislature. Yet not every case that arises in the interpretation of a piece of legislation forms the basis of an action in court.

Parliamentary Counsel's audience does not consist solely of the courts of law. There are the policy makers, the departmental officials and those to whom the statute is generally addressed. They all have to understand the statute. Indeed the judges are the audience of last resort. The reasonable man may be an ordinary taxpayer. He may be a company director. He may be a policeman. He may be a gentleman's gentleman. How are his rights affected? What are his obligations and liabilities? Driedger has stated that statutes

> are serious documents. They are not, like the morning newspaper, to be read today and forgotten tomorrow. Like all other works of literature, they must be read and studied with care and concentration. Every word in a statute is intended to have a definite purpose, and no unnecessary words are intentionally used. All provisions in it are intended to constitute a unified whole.[34]

It is submitted that punctuation forms part of that unified whole. Parliamentary Counsel has the responsibility, in the use of punctuation marks, to enhance clarity and reduce ambiguity to a bare minimum. Human ingenuity is not limited. The ability to understand the written word differs from person to person. So it is with the ability to understand legislation.

---

33 The semi-colon can be used whenever a series of provisions appear in enumerated or lettered vertical list form, all of which it is convenient to classify as 'tabulation' and for all of which the paragraphing and indentation are identical. Is Driedger's distinction necessary?

34 Driedger, *The Composition of Legislation*, p. xxiii.

Advocates always argue as to where a *comma* or a *semi-colon* should be placed; they do so because a particular interpretation favours a particular presentation of a particular line of argument. It cannot be otherwise. Out of the anvil of argument justice, as far as humanly possible, is done. And Parliamentary Counsel, nonetheless, will have to use punctuation marks in drafting the law. The less room that is left for argument the better.

We cannot ignore the observation of Stephen J. that although Acts of Parliament 'may be easy to understand, people continually try to misunderstand.' Parliamentary Counsel must, therefore, not only

> 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. It is all the better if he cannot pretend to misunderstand it.[35]

35 *Re Castioni* [1891] Q. B. 149 at p. 167.

Chapter 7

Definitions

Kinds of Definitions

Definition is an attempt to state in precise terms the meaning of a word or of an expression. In legislation it should be used only as an aid to clarity and to reduce vagueness as much as possible. It should be used only when necessary and should be as complete as possible. Robinson[1] considers that the purpose of all nominal definition is to report or establish the meaning of a word or symbol. *Word-word* definition does this in the form of saying that one word means the same as another word. *Word-thing* definition does it in the form of saying that a word means a certain thing.

> If, for example, someone tells you that the German word 'rot' means the same as the French word 'rouge', while you remain ignorant what either of these words refers to, that is a *word-word* definition. If, on the other hand, he points to the cover of a book on his shelves and says that the German word 'rot' means that colour, he gives you a *word-thing* definition. *Word-word* definition correlates a word to another word, as having the same meaning. *Word-thing* definition correlates a word to a thing, as meaning that thing.[2]

In other words, a *word-thing* definition correlates a word to a thing, however you do it, and whether or not you introduce the thing by means of other words. The *method* by which you proceed does not alter the *purpose*, which is to correlate a word to a thing.[3] A lexical *word-thing* definition is an assertion that there was among certain people a rule or custom or habit by which a certain form was used as a sign of a certain thing.

A legislative *word-thing* definition is a proposal or request that there shall be such a rule.[4] A lexical definition is that sort of *word-thing* definition in which we explain the actual way in which some actual word has been used by some actual persons.[5] Thus a

> Lexical definition is a form of history. It refers to the past. It tells what certain persons meant by a certain word at a certain less or more specified time and place. In a 'modern' dictionary the time meant is the most recent period down to the instant of writing, and there is strong expectation that

---

1 *Definition*, 1954. Taken from Dickerson, *Materials on Legal Writing*, pp. 213-215.
2 *Ibid*., p. 16.
3 *Ibid*., p. 17.
4 *Ibid*., p. 31.
5 *Ibid*., p. 35.

> the same persons will continue to use this word in the same way for a considerable future time after the publication of the dictionary. This expectation will very probably be verified for most of the words and falsified for a few. The dictionary is much less reliable as a prediction than as history. The future of language never perfectly resembles their past.[6]

Humpty Dumpty's[7] assertion of being the master of words has nothing to do with lexical definition. Mr. Dumpty *stipulated* what *Mr. Dumpty* means. That was all. Parliamentary Counsel should never imitate Mr. Dumpty.

Methods of Defining

Robinson states that,

> The methods of lexical definition and of stipulative definition are fundamentally the same. For the problem, how to indicate a given thing as being the meaning of a given word, is fundamentally the same whether this relation between the word and the thing already exists or is merely proposed for the future.[8]

He then gives us seven other methods of defining a word. These are:

1. *The Method of Synonyms*. There is, firstly, the *synonymous* method of word-thing definition, which consists in giving the learner a synonym with which he is already familiar, that is to say, in telling him that the word being defined means the same as some other word whose meaning he already knows. For examples, 'chien' means dog, 'buss' means kiss.[9]

2. *The Method of Analysis*. It often happens that a man who does not know the name for the thing nevertheless understands a phrase that gives the analysis of the thing. This makes possible a second method of defining words, namely, to refer the learner to the thing meant by giving an analysis of it. Thus we may say: 'The word 'octagon' means a polygon having eight sides.' The *Oxford English Dictionary's* definition of a 'list' as 'a catalogue or roll consisting of a row or series of names' proceeds by giving two synonyms for the word followed by an analysis of the thing.

   Aristotle's method of defining by genus and differentia, when applied to the definition of words as opposed to things becomes a case of the analytical method of word-thing definition …[10]

6 *Ibid*., p. 35.
7 *Through the Looking Glass*.
8 *Definition*, p. 93.
9 *Ibid*., p. 94.
10 *Ibid*., p. 96.

3. *The Method of Synthesis*. Words may be defined, thirdly, by the *synthetic* method of indicating the relation of the thing they mean to other things

   '*Feuillemorte*' is the colour of withered leaves in autumn.

   By 'red' people mean those colours which a normal person sees when his eye is struck by light of wave-length 7,000-6,500 A.

   A particular colour is here indicated by mentioning where it can be found or what causes it. No synonym is given, nor is the colour analyzed. The thing meant is assigned to its place in a system of relations, synthesized into a whole with other things. Whereas the analytic method indicates the thing meant by showing it as a whole made up of parts, the synthetic does so by showing it as part of a whole.[11]

4. *The Implicative Method*. Fourthly, consider the sentence, 'A square has two diagonals, and each of them divides the square into two right angled isosceles triangles'. It does not profess to be about words at all. It is not explicitly a nominal definition; for it does not say that 'the word means so and so'. Yet a person who comes to it knowing the meaning of all the words in it except 'diagonal' can learn from it what the word 'diagonal' means. And therefore a person who wants to define the word 'diagonal', in the sense of teaching some other person what it means, can do so by uttering this sentence.[12]

5. *The Denotative Method*. There is undoubtedly a method of word-thing definition, quite distinct from any we have yet described, which consists in mentioning examples of what the word applied to. These examples may be either particular things to which the word applies, or sorts of things to which it applies … by the 'denotation' of a given word I usually mean roughly either all the particular things to which it is applied or all the classes which include all and only the particular things to which it is applied. And by the 'connotation' of a word I usually mean roughly the common characteristic or sort or class in virtue of which the word is applied to these and only these things …[13]

6. *The Ostensive Method*. The five methods so far described -the synonymous, the analytic, the synthetic, the implicative, and the denotative - all define a word by using other words. They all assume that the learner already knows the meaning of some words – all quite useless to a baby who knows no words at all.

11 *Ibid*., p. 98.

12 *Ibid*., p. 106.

13 *Ibid*., pp. 108-9.

There must therefore be at least one more method of defining a word, and it must be a method that can dispense with words altogether (except the word being defined) … Pointing is itself a symbol whose meaning has to be taught … The truth is that, for language to be connected to history and sensible experience, the meaning of some words must be given by confrontation, but there is no particular word whose meaning must be given in this way …[14]

7. *The Rule-giving Method.* Some words are not names. For example, the demonstrative words like 'him', 'there', 'me', 'soon', 'yesterday'. 'Yesterday' is not the name of any particular day. Nor is it the name of any special class of days.It is not a name at all. It is not a word appointed to mean always some one and the same thing. Yet it is not ambiguous. The same is true of all the demonstrative words … The rule for the word 'I' is that it is to be used by each speaker to indicate himself … The method of definition proper for these words is simply to state the rule of their employment, and I call it the *rule-giving* method.[15]

Definitions in Legislation

For the purposes of legislation the six kinds of definitions dealt with by Driedger[16] would suffice. These are:

to delimit, that is, to set the limits of meaning, without altering the normal meaning:

'wages' means remuneration paid by an employer to an employee for work performed by the employee for the employer;

to narrow, that is, to narrow the ordinary meaning of the word or expression by excluding things which otherwise would be part of that meaning:

'fruit' means oranges, tangarines, lemons, lime and bananas;

to particularise, that is, to restrict the word to a particular thing without changing its ordinary meaning:

'African' means a citizen of Zambia, Zanzibar or Zimbabwe;

to enlarge, that is, by retaining the ordinary meaning of a word and adding a meaning the word does not ordinarily have:

'African' includes a person either of whose parents is of European descent;

14 *Ibid*., pp. 117, 119, 126.

15 *Ibid*., pp. 126, 130.

16 *The Composition of Legislation*, pp. 45-48.

to settle doubts, that is, in order to remove a doubt as to whether a word means a particular thing:

'African' includes a person one of whose parents is a citizen of Zambia, Zanzibar or Zimbabwe and the other parent a person of European descent;

to abbreviate or to shorten and thus simplify composition, that is, to use one word to stand for a long name:

'Movement' means the Movement for the Restoration of Democracy.

To this end, Parliamentary Counsel should be very familiar with the Interpretation Act of Counsel's jurisdiction. That Act should be a constant companion. A word or an expression defined in the Interpretation Act should not be defined in any other enactment. An Interpretation Act applies unless there is a contrary intention. For that reason where it is intended to give a meaning to a word or an expression different from that which is contained in the Interpretation Act, express words would be needed to oust the definition in the Interpretation Act. It should also be borne in mind that once a word or an expression is defined in the interpretation section, the meaning assigned should be retained throughout the Act.

In defining words or expressions in legislation, *mean*s and *includes* should be used with great care. *Means* restricts. It is explanatory. The word or expression defined means what the definition prescribes. *Includes*, on the other hand, expands. It is extensive. It is exhaustive. It indicates that the word or expression defined bears its ordinary meaning *and* also a meaning which the word or expression does not ordinarily mean. *Includes* rather than *means* is used to catch anything that did not happen to catch Parliamentary Counsel's mind.[17] Words and expressions should not, therefore, be defined in an interpretation section unless they are ambiguous or equivocal. They should not be defined in a manner that disturbs their ordinary meaning, to include a meaning they would not ordinarily have.

It is wrong to provide that

'table' includes a chair

but appropriate to provide that

'furniture' means tables or chairs.

It will be noticed that *or* is used in the definition of *furniture* and not *and*. The reason here is that *tables* are intended to be treated separately from *chairs*. It prevents doubts. The use of *and* might create the impression that in a given case the two things would go together. But if *includes* is used then the definition would be,

'furniture' includes tables, chairs, desks and wardrobes.

17 Driedger, *The Composition of Legislation*, p. 46.

As already noted,[18] words are symbols that a particular community accepts to denote a particular meaning. The meaning of a word as understood by that community is not fixed because every age is different from the other ages that come before it. The needs of each community for communication may be different from those of other communities. In an isolated community the change in the meaning of words occurs gradually to the point of being almost imperceptible. However, where two or more communities with different languages interact or where a community experiences a radical change, the need for new words or a change in the meaning of words is more profound and noticeable. Under those circumstances one might learn with advantage from T. S. Eliot:

> Words strain
> Crack and sometimes break under the burden,
> Under the tension, slip, slide, perish,
> Decay with imprecision, will not stay in place,
> Will not stay still.[19]

The change in the meaning of words and the coining of new words are the two ways language possesses to keep abreast with the progress of civilization. When defining a word or an expression in the interpretation section of an Act, Parliamentary Counsel should keep in mind the fact that language is not static. New words come into use. Old words change their meaning or fall into disuse.[20] A Parliamentary Counsel who neglects this fact may fail to communicate effectively. On the other hand, the nature of the audience may determine the words to be used in the interpretation section.[21]

Thornton[22] states that most words can be described as vague and unstable because they have blurred edges. A central core of meaning may be more easily ascertainable than the fringes of meaning which are indeterminate. A Parliamentary Counsel should exercise care when defining or using an unstable word in the interpretation section. An unstable word should be defined in a way that would enable the reader to readily understand the sense in which that word is used. An unstable word defined in any other manner creates equivocation in the law.

In *Bourne v Norwich Crematorium*,[23] the court refused to accept that the expression *goods* included a corpse. The company owned a crematorium which comprised, *inter alia*, a chimney tower and furnace chamber in which

---

18 As for example, in a lexical definition.

19 Quoted by Frank Maher in *Words, Words, Words*, Melbourne University Law Review, vol. 14, 1983-4.

20 Thornton, *Legislative Drafting*, p. 15.

21 See p. 34, for example, the use of *magendo* in Uganda.

22 *Legislative Drafting*, p. 7.

23 [1967] All E. R. 576.

human corpses were reduced to ashes. The company claimed a tax allowance on the expenditure incurred in the construction of the tower and the chamber. The court held that the consumption by fire of the dead body of a human being was not the 'subjection of goods or materials to any process'. The tower and chamber were not within the definition of an industrial building or structure. Stamp J said that he protests

> against subjecting the English language, and more particularly a simple English phrase, to this kind of philology and semiology. English words derive colour from those which surround them. Sentences are not mere collection of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back into the sentence with the meaning which you have assigned to them as separate words, so as to give the sentence or phrase a meaning which as a sentence or phrase it cannot bear without distortion of the English language. That one must construe a word or phrase in a section of an Act of Parliament with all assistance one can from decided cases and, if one will, from the dictionary, is not in doubt; but having obtained all that assistance, one must not at the end of the day distort that which has to be construed and give it a meaning which in its context, one does not think it can possibly bear.

The freedom of Parliamentary Counsel to define a word in the interpretation clause of a Bill could be curtailed by judicial interpretation and the context in which that word is used. In the *Bourne* case Stamp J. found that it was not only objectionable, but a distortion of the English language, to call a human corpse 'goods'. The expression 'goods' has blurred edges. In practice there are limits to things that can fall under the expression 'goods'. In that sense the freedom of the Parliamentary Counsel to define a word in the interpretation clause is curtailed.

Driedger[24] states that words by themselves can hardly be said to have meanings. He argues that though a dictionary can give a definition of a word, the word cannot have a meaning until it is connected with other words in order to express an idea. In *James v Australia*,[25] Lord Wright demonstrated that the word free is in itself vague and indeterminate. The word *free* acquires a meaning from the context in which the word is used.

A good example of a word with more than one meaning is *shark*. The word may mean an animal of the whale family or a person who engages in unlawful financial activities. If a person says, 'I see a shark' that person could be referring to an animal shark or a loan shark. The answer depends on the circumstances. That person might be looking at the sea or at a known criminal. When defining a word with more than one meaning Parliamentary Counsel should ensure that the intended meaning is conveyed by the provision.

---

24 *The Construction of Statutes*, p. 3.

25 [1936] A. C. 578 at pp. 616-618.

Paradoxically, the context in which a word is used may actually distort that word from its normal use. For example, in the *Attorney General v Antigua Times Limited*.[26] the Appeal Court construed *may* as *shall*. Therefore, the context does not always give the natural meaning of a word.

The values of a community are always changing. So are the needs of the community. Time and circumstances influence the meaning given to a word. In *Towne v Eisner*[27] Holmes J said that,

> … a word is not a crystal, transparent and unchanged, it is the skin of living thought and may vary greatly in colour and context according to circumstances and the time at which it is used.

Three cases in which the expression *family* was considered illustrate this point. In *Gammans v Ekins*,[28] Mr. Ekins lived in a house in an unmarried association with a Mrs. Smith. He adopted her name and posed as her husband. They lived together for twenty years. In 1949 Mrs. Smith died. When proceedings were brought to evict Mr. Ekins from the house registered in Mrs. Smith's name, he claimed that he was a member of her family. The county court judge agreed. On appeal Asquith L.J. said that,

> To say of two people masquerading, as these two were, as husband and wife (there being no children to complicate the picture) that they were members of the same family, seems to be an abuse of the English language.[29]

In *Hawes v Evenden*,[30] the facts were similar to those outlined in *Ekins*.[31] In addition there were two children born to the association. Somervell L. J. said that,

> Where the evidence justifies a finding that they all lived together as a family, then, I think the mother is a member of the family …

According to Lord Somervell, a person could only become a member of the family to an unmarried association where children were born out of that association.

In *Dawnson Holdings v Fox*,[32] the facts were similar to those in *Ekins*.[33] No children were born out of the association. For twelve years after the death of the partner, the defendant continued to live in the house for which she paid rent as if she were his widow. The plaintiff brought proceedings to evict her

---

26 [1976] A. C. 16.
27 245 U. S. 418 (1918).
28 [1950] 2 K. B. 328.
29 *Ibid*., p. 331.
30 [1953] 1 W. L. R. 1169.
31 *Supra*.
32 [1976] Q. B. 503.
33 *Supra*.

when they learned that she was not a widow. The trial judge took umbrage under the *Ekins* case.[34] On appeal, Lord Denning M.R. said that *Gammans v Ekins* was binding as to the meaning to be given to *family* in 1949. He went on to say that,

> At any rate it (the court) is not bound when, owing to the lapse of time and change in social conditions, the previous decision is not in accord with modern thinking.

Bridges L. J. said that,

> Now, it is, I think, not putting it too high to say that between 1950 and 1975 there has been a complete revolution in society's attitude to unmarried partnerships of the kind under consideration. The social stigma that once attached to them has almost, if not entirely, disappeared.

James L. J. said that,

> The popular name given to the word 'family' is not fixed once and for all time. I have no doubt that with the passage of time it has changed.

The court held that the defendant should be considered as a member of that family.

Two United States cases are also informative. The Fourteenth Amendment (1868) to the United States Constitution accorded equal protection of the law to all United States citizens. The crucial issue was the meaning of the expression *equal*. In the first cases after the enactment of the Fourteenth Amendment, the courts construed *equal* as proscribing all state imposed discrimination against citizens of African descent.

In *Plessey v Ferguson*,[35] over a hundred years later, the Supreme Court held that equality of treatment is accorded when the races are provided substantially with equal facilities, even though the facilities are separate. A half a century later, in *Brown v Board of Education of Topeka*,[36] the Supreme Court rejected the separate but equal doctrine. Earl Warren, C. J. said that,

> We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by the reason of the segregation complained of, deprived of the equal protection of the law guaranteed by the Fourteenth Amendment.

The decisions of the British and American courts regarding the *family* and *equal* show that the meaning of words may change over a period of time. The freedom of Parliamentary Counsel to define a word in the interpretation clause is curtailed where that word has received judicial interpretation. In those

34 *Supra*.
35 163 U. S. 537 (1896).
36 347 U. S. 483 (1954).

circumstances it behoves Parliamentary Counsel to give a definition that is in harmony with the interpretation given by the courts. The need to give a definition that complies with a judicial interpretation is more compelling where the courts have interpreted a constitutional word or phrase.

The Supreme Court in the *Brown* case[37] held that segregated schools were not *equal* and could not be made *equal*. In the absence of an amendment to the Fourteenth Amendment, it would be wrong to define *equal* in an interpretation clause of a Bill to mean the provision of separate facilities. The freedom of Parliamentary Counsel to define words is either expanded or restricted with the passage of time.

Where the meaning of a word is not clear from the context in which it is used, Parliamentary Counsel may deliberately define that word in a manner that is vague. The courts would then interpret and give the word a more definite meaning when a matter involving the interpretation of that word comes before the courts. In *Carter v Bradbeer*[38] Lord Diplock said that,

> … so the words mean whatever they are said to mean by a majority of the members of the Appellate Committee dealing with the case, even though a minority may think otherwise … 'Bar' in section 76(5) (of the Licensing Act, 1964) now means what the majority of your Lordships have said what it means.

Although a Parliamentary Counsel has the freedom to define words in the interpretation clause of a Bill, the courts have the last say on the matter. There are two other attendant issues to the interpretation of words by the courts. Firstly, there is the old doctrine that the judiciary do not and should not participate in the process of law making. A Parliamentary Counsel who defines a word in a way that asks for judicial interpretation in order to give that word a more definite meaning makes a mockery of the doctrine of separation of powers. The doctrine has been discredited. Some scholars accept the view that judges make law.

The other issue is that most people frown on using litigation as an instrument of making the law certain. Russell L. J. in *Gallie v Lee*[39] said that, 'Litigation is an activity that does not markedly contribute to the happiness of mankind'. Parliamentary Counsel should aim to attain clarity when defining words or expressions rather than depend on the courts to bail them out of the deep waters of vagueness and the quagmire of ambiguity.

When defining words in the interpretation clause of a Bill a Parliamentary Counsel has very wide freedom. Should Counsel make a word grow its own individuality? Should Counsel change the character and meaning of the words

37 *Supra*.

38 [1975] 1 All E. R. 1204.

39 [1969] 2 Ch. 17 at 41.

or expressions being defined? Should Counsel even be likened to Humpty Dumpty who said that when he used a word it meant just what he chose it to mean - neither more nor less? No. Liberty is not licence. The freedom of Parliamentary Counsel is not absolute.

Definitions must conform with the usages of language in the jurisdiction for which Counsel drafts a Bill. It would be doing violence to language if *bachelor* or *spinster* were defined to include a married man or an unmarried mother. Cooper said that,

> Seldom has this gone farther than the English statute which it is said, provided: 'whenever the word 'cows' occurs in this Act it shall be construed to include horses, mules, sheep and goats'[40]

Under the circumstances it is more acceptable to define *animal* to include cows, horses, mules, sheep and goats thereby avoiding a definition that tends to twist the accepted meaning of a word. The overriding factor is that Parliamentary Counsel should draft laws in a manner so that a person to whom the laws are directed should be able to understand them.

Closely allied to the Humpty Dumpty[41] definitions is the need for Parliamentary Counsel to use new words in order to keep abreast with social changes arising from the progress of mankind. Thornton[42] cites with approval three examples in which new words have been used: *know how* in the Income and Corporate Tax Act, 1970,[43] *video* in the Video Recordings Act 1984,[44] *hijack* in the Aviation Security Act 1982.[45]

Parliamentary Counsel can also use new, scientific or commercial words that have attained an acceptable degree of stability. Counsel may also stipulate the meaning for a word and that meaning may be accepted. The problems associated with stipulative definitions were highlighted in a quotation cited by Dickerson[46] on the meaning of planets. A curious person talking to an astronomer is alleged to have said,

> I feel *such* an admiration for you astronomers because of your many wonderful discoveries about the universe. But the most wonderful of all it seems to me is your discovery of the names of the planets. How for instance did you ever manage to find that the red planet named Mars really is Mars?

---

40 *Writing in Law Practice* 7 (1963) quoted by Dickerson in *The Fundamentals of Legal Drafting*, p. 102 n.18.

41 Lewis Caroll, *Through the Looking Glass*.

42 *Legislative Drafting*, 3rd Ed., p. 15.

43 1970 c. 10

44 1984 c. 39

45 1982 c. 36

46 *The Fundamentals of Legal Drafting*, 2nd Ed. 140-141.

It escaped that person's imagination that the astronomers have freedom to give names to their discoveries. Parliamentary Counsel may enjoy a comparable freedom when drafting legislation in a new field.

Thornton[47] warns that a Parliamentary Counsel's desire to swim with the current by writing in the ordinary language must not lead Counsel to use a word so new that it has not attained a respectable degree of stability. Counsel should avoid using a new and unstable word because that word may be obsolete when the law comes to be interpreted. That unstable word may have acquired a new meaning or, worse still, it might not mean anything at all at the time the word comes up for interpretation. It is logical that one avoids using a word that appears to be in a fluid state. The freedom of Parliamentary Counsel to define words is, to that extent, restricted.

The discussion on the change in the meaning of words over a period of time is not complete without reference to the retrogression of words. There was a time when the expression *gay* used to be associated with happiness and merriment. Of late *gay* is associated with homosexuality. Parliamentary Counsel should be careful when using such a word because it has acquired a meaning that is different from its original meaning. Similarly, James II was said to have praised St. Paul's Cathedral as 'awful, amusing and artificial'. The three words were highly complimentary in his day. Three hundred years later there has been a definite shift in the meaning of the words.

Words, then, are not static. Most words are in a state of constant change; the rate of change depends on events that occur within a given jurisdiction. A particular jurisdiction may experience a very slow change. Another jurisdiction that interacts with different jurisdictions experiences more radical change. The meaning of a word may also change due to changes in the values of a society - for the better or the worse.

Most words have blurred edges. Both Parliamentary Counsel and the courts play a part in shaping the meaning of words. Parliamentary Counsel have a very wide but limited freedom to define words in the interpretation clause of a Bill. They should, at all times, take cognizance of any changes in the meaning of words within their respective jurisdictions. In the last resort, the courts have the final say as to the meaning of a word used in an Act. They are the masters after all.

To summarise,

(a) definitions should be used only

  (i) in cases where there is a deviation from the ordinary meaning of the word or expression defined;

  (ii) to avoid unnecessary repetition;

47 *Legislative Drafting*, 3rd Ed., p. 15.

(iii) to indicate the use of an unusual or novel word or expression;

(b) a definition should not contain a substantive law, nor should statements of the application of the law be made in a definition rather than in a substantive provision in the law;

(c) a definition should not give an artificial or an unnatural meaning of the word or expression defined;

(d) where a word or an expression is defined, it should never be used in a different sense in the same Act;

(e) the same word or expression should not be used with different meanings in the same Act;

(f) different words or expressions should not be used to express the same thing in the same Act;

(g) the expression *means and includes* is contradictory and should not be used.

Chapter 8

The Conventions

Practice, born out of experience, has led to the adoption, in many jurisdictions, of certain conventions in legislative drafting. We proceed to deal with these now.

The Memorandum to the Bill

A Bill is published with an explanatory Memorandum which is a prefix to the Bill. It is of considerable importance. It should contain the salient features of the Bill and state as clearly as possible the objects and reasons for the introduction of the Bill, the conditions of the law as it stands, the object of the Bill and the reasons for the introduction of the Bill to Parliament.

The Memorandum is a useful guide as to what is intended to be achieved by the proposed legislation as well as telling the ordinary reader what the Bill seeks to do.[1] It should include 'a forecast of any changes in public section manpower requirements expected to result from the passing of the Bill; it must be framed in non-technical language and contain nothing of an argumentative character.'[2] In some jurisdictions, the Memorandum is placed at the end of the Bill as Objects and Reasons.

Where a Bill contains provisions involving expenditure, the Memorandum to the Bill should include material setting out briefly the financial effect of the Bill. It should also contain, in appropriate cases, an estimate of the amount of money that would be required. The nature and extent of the information in such memoranda would depend upon the subject matter of the legislation concerned.[3]

Arrangement of Sections

After the Memorandum to the Bill comes the Arrangement of Sections. In a Bill it is referred to as Arrangement of Clauses:

---

1 But see Lord Denning's remarks in *Escoigne Properties Ltd. v L.R. C.* [1958] A. C. 549 and compare them with what Frazer J. observed in *Abrahams v Mac Fisheries Ltd.* [1925] 2 K. B. 18, 34-35.

2 Renton Report Cmnd. 6035 p. 14.

3 Renton, Cmnd. 6053, para. 15.6 p. 95.

Public Holidays Bill

ARRANGEMENT OF CLAUSES

Clause

1. Declaration of public holidays
2. Substituted public holidays
3. Additional public holidays

An arrangement of sections is in fact a collection of the marginal notes. It takes the place of the contents of a book. It gives a reader the full scope of the subjects dealt with in the Act. Unlike the Memorandum to the Bill the Arrangement of Sections is published with the Act.

The Long Title

An Act always has a long title. It indicates the nature of the legislative measure. It is a device to tell the members of Parliament what the Bill is about and helps to determine the *scope* of the Bill when it is being dealt with by Parliament. It should comprise the main theme, that is, the pith and substance of the Bill. A typical Bill will start as

DRAFT OF A BILL

for

AN ACT to establish public holidays and for
other purposes connected therewith.

or

AN ACT to amend and consolidate
the law relating to bankruptcy

or

AN ACT to amend the Education Act, 1782.[4]

A long title should not be vague and imprecise. It has to a large extent taken the place of the Preamble and should therefore cover the main themes of the legislation. The long title becomes *long* where it is desirable that particular attention should be drawn to some special features of the Act.

---

4 In some jurisdictions the short title is italicised.

The expression is used to distinguish it from the other title of an Act, the short title. The Housing Act, 1974[5] has this long title:

> An Act to extend the functions of the Housing Corporation and provide for the registration of, and the giving of financial assistance to, certain housing associations; to make further provision in relation to clearance areas and other areas in which living conditions are unsatisfactory or otherwise in need of improvement; to provide for the making of grants towards the improvement, repair and provision of housing accommodation and for the compulsory improvement of such accommodation; to amend the law relating to assistance for house purchase and improvement and expenditure in connection with the provision and improvement of housing accommodation and of hostels; to raise the rateable value limits under the Leasehold Reform Act, 1967; to amend the Housing Finance Act, 1972; to amend the law relating to the rights and obligations of landlords and tenants and the enforceability of certain covenants relating to the development of land; and for purposes connected therewith.

The Enacting Formula

An Act has an enacting formula. It gives the Act its 'jurisdictional identity and constitutional authenticity.'[6] The importance of the enacting formula has been discussed in Chapter Four.

Short Title

An Act usually has a short title with the calendar year of enactment as a section on its own:

> This Act may be cited as the Public Holidays Act, 1980.

It is a convenient means of citing the Act. It is the short name of the Act. In the words of Lord Moulton, the short title is a statutory nickname to obviate the necessity of always referring to the Act under its full and descriptive title.[7]

Where the Act is an amending Act, the short title would in some jurisdictions have the expression '(Amendment)' added:

> Public Holidays (Amendment) Act, 1980.

There may be situations where more than one amending Act is passed in the year. In such cases the short title would be,

---

5 1974 c. 44.

6 Holdsworth, *A History of English Law* (1909) Vol. 11, p. 366.

7 *Vacher and Sons Ltd. v London Society of Compositors* [1913] A.C. 107 at p. 128.

Public Holidays (Amendment) (No. 2) Act, 1980

Each amending Act, other than the first one, will carry the number of the amendment: (No. 3), (No. 4) and so on. Since Parliamentary Counsel do not know whether there would be other amendments to the same Act during the year the first amending Act does not have the expression '(No. 1)'. It should be noted that an amending Act normally exhausts itself upon compliance with its directions.

As the name explains, a short title should be short. It should be designed with great care and concern for those who have to use the Act. It should be chosen with an eye on its place in the index of contents of the statute book as a whole for the year when bound in a volume. In some jurisdictions it is the last section of the Act. In others[8] it comes before the long title. In still others it is the first section of the Act.

In *Lonhro Ltd. v Shell Petroleum Co. Ltd. (No. 2)*[9] Lord Diplock stated that the short title may be used to assist in the interpretation of the body of an enactment.

Sections and Subsections

An Act of Parliament is divided into *sections*. A section should contain *one* idea and therefore *one* enactment. It should be self-explanatory. It should be self contained. It should be lucid, short and simple. There should be no ambiguity as to its meaning nor should it be difficult to read.

Where the composition of the section turns out to be a long one, the section should be broken into *subsections*. All the subsections read together must form a coherent and a consistent whole. They should deal with the *same* idea, the same subject matter.

The sections of an Act are numbered consecutively throughout the Act. Arabic figures are used. Subsections are numbered consecutively within the section. Arabic figures in parenthesis are used for subsections.

Here is a provision which emphasises the need to use sub-sections and paragraphs in order to avoid ambiguity and to achieve clarity:

> It shall be unlawful for any person to obstruct, retard, prevent, delay or otherwise interfere with the production, transportation, shipment, delivery, purchase, sale, barter or marketing of any perishable agricultural or dairy product, or to cause the transportation, shipment, delivery, purchase, sale, barter or marketing of any agricultural or dairy product to be obstructed, retarded, prevented, delayed, or otherwise interfered with, by coercing,

8 In Uganda, for example.

9 [1981] 2 All E. R. 456 at p. 462.

> threatening, intimidating, or attempting to coerce, threaten, intimidate any person who owns, grows, produces, buys, sells, barters or markets any such product, or who is engaged in the transportation, delivery, shipment or marketing of any such product, for the purpose of inducing, extorting or compelling such person to join any organisation, or to contribute money, services or any other thing of value to such organisation or to any person or persons whomsoever, or to contribute money or other things of value to any person or persons on the condition, express or implied, that the production, transportation, shipment, delivery, marketing, purchase, sale or barter of such product will not be obstructed, retarded, prevented, delayed or otherwise interfered with.[10]

The above excerpt can be simply rewritten, removing the surplus words and other drafting errors, and improving upon the arrangement of the provision. It could be redrafted using sub-sections thus:

> (1) No person shall interfere with the production, transportation or marketing of a perishable agricultural or dairy product.
>
> (2) No person shall cause the production, transportation or marketing of a perishable agricultural or dairy product to be interfered with by compelling a producer, transporter or marketer of any of those products by the use of force, intimidation or threats to join an organisation or to contribute money or any thing of value to an organisation.
>
> (3) No person shall contribute money or a thing of value to a person on the condition express or implied for the purpose of preventing interference with the production, marketing or transportation of a perishable agricultural or dairy product.

Another redrafting might take this form thus:

> (1) No person shall interfere with the production, transportation or marketing of a perishable agricultural product or dairy product.
>
> (2) No person shall form or belong to an organisation which has as one of its objects the interference with the production, transportation or marketing of a perishable agricultural product or dairy product.
>
> (3) No person shall in any manner support an organisation or body of persons which interferes, or is likely to interfere, with the production, transportation or marketing of a perishable agricultural product or dairy product.
>
> (4) No person shall enter into an agreement with a person or body of persons so that the production, transportation or marketing of a perishable agricultural product or dairy product is interfered with.

---

10 Taken from Reed Dickerson's *Materials on Legal Drafting*, p. 78.

Paragraphs

Where a section or a subsection is unduly long, it is better broken up into paragraphs. The device of paragraphing helps the readability of the sentence and when appropriately used avoids ambiguity. Paragraphs ensure precision and therefore help in understanding the legislative sentence. A paragraph, like its parent section or subsection, should not be excessively long. It should be a unit of thought when read with the introductory words and with the concluding words.

A section should not be tabulated by paragraphing unless it would not read sensibly without it. The paragraphs of a section or subsection taken together should read as a coherent whole, and as an intelligible grammatical sentence.

A paragraph may be divided into sub-paragraphs. A sub-paragraph may be further divided. For proper understanding it is advisable to limit a section to paragraphs and sub-paragraphs only. Going on to the third or fourth level of paragraphing is an abuse of the technique of tabulation.

A paragraph is numbered with lower case letters of the alphabet in parenthesis:(a), (b), (c) in italics. A sub-paragraph is numbered with the small Roman numerals: (i), (ii), (iii) in italics.

The sentence,

> The Commissioner shall keep a record, in the form that he determines, in which he shall record the name and address of a person to whom he grants a license and any dealings with or affecting a license he has granted,

could be redrafted thus with paragraphs:

> The Commissioner shall keep a register
>
> *(a)* in which shall be recorded the name and address of a person to whom a license is granted; and
>
> *(b)* in which shall be recorded any dealing with or affecting a license granted by the Commissioner.

There is no need to retain the words, ‘in the form that … ’ as that is a purely administrative matter.

The following provision is obviously too long. It is a sentence. It is a monstrosity.

> A development plan shall contain particulars of the applicants proposals for the development and production of the reservoir including the method for the disposal of associated gas, the way in which the development and production of the reservoir is to be financed, the applicants proposals relating to the spacing, drilling and completion of wells, the production and storage installations and transport and delivery facilities required for the production, storage and transport of petroleum which proposals shall include the estimated number, size and production capacity of production

platforms, the estimated number of production wells, the particulars of production equipment and storage facilities, the particulars of feasible alternatives for transportation of the petroleum including pipelines, the particulars of on-shore installations required including the type and specifications or size thereof, and the particulars of other technical equipment required for the operations; the estimated production profiles for crude oil and natural gas from the petroleum reservoirs, the cost estimates of capital and recurrent expenditures, the economic feasibility studies carried out by or for the licensee in respect of the discovery, taking into account the location, the water depth, the meteorological conditions, the cost estimates of capital and recurrent expenditures and any other relevant data and evaluation thereof; the proposals relating to the establishment of processing facilities and processing of petroleum in Ruritania, the safety measures to be adopted in the course of the development and production operations including measures to deal with emergencies, the necessary measures to be taken for the protection of the environment, the applicants proposals for the employment and training of citizens of Ruritania the applicants proposals with respect to the procurement of goods and services obtainable in Ruritania and the estimate of the time required to complete each phase of the development plan.

It could be redrafted in paragraphs thus:

A development plan shall contain particulars of

(a) the applicant's proposals for the development and production of the reservoir including the method for the disposal of associated gas;

(b) the way in which the development and production of the reservoir is to be financed;

(c) the applicant's proposals relating to the spacing, drilling and completion of wells, the production and storage installations and transport and delivery facilities required for the production, storage and transport of petroleum which proposals shall include

(i) the estimated number, size and production capacity of production platforms,

(ii) the estimated number of production wells,

(iii) the particulars of production equipment and storage facilities,

(iv) the particulars of feasible alternatives for transportation of the petroleum including pipelines,

(v) the particulars of on shore installations required including the type and specifications or size thereof, and

(vi) the particulars of other technical equipment required for the operations;

(d) the estimated production profiles for crude oil and natural gas from the petroleum reservoirs;

(e) the cost estimates of capital and recurrent expenditures;

(f) the economic feasibility studies carried out by or for the licensee in respect of the discovery, taking into account,

(i) the location,

(ii) the water depth,

(iii) the meteorological conditions,

(iv) the cost estimates of capital and recurrent expenditures, and

(v) any other relevant data and evaluation of that data;

(g) the proposals relating to the establishment of processing facilities and processing of petroleum in Ruritania;

(h) the safety measures to be adopted in the course of the development and production operations including measures to deal with emergencies;

(i) the necessary measures to be taken for the protection of the environment;

(j) the applicant's proposals for the employment and training of citizens of Ruritania;

(k) the applicant's proposals with respect to the procurement of goods and services obtainable in Ruritania; and

(l) the estimate of the time required to complete each phase of the development plan.

In 1916 in the United States, a caveat was issued about statutory or legislative sentences. This was repeated in the 1919 report of the Commissioners on Uniformity of Legislation in Canada. It is worth repeating.

> Sentences ought to be made as short and simple as desired. Indeed, any long-winded sentence can be broken up and recast into many short sentences, which would very much enhance the clearness of statutory expression. Frequently a long series of subjects is followed by many predicates and many dependent clauses of co-ordinate value. If the subject were repeated with each predicate, the length of the statute would be appreciably increased, but in all such cases it is possible to use the detached form of statement, that is, paragraph each predicate, every dependent clause, and the parts of the sentence upon which these clauses depend.

With the development of the technique of paragraphing a mischief made itself evident. The technique enables a Parliamentary Counsel to create even longer sentences than before under the often false impression that Counsel is being more detailed, more precise and more intelligible.

The early proponents of the technique did not foresee the variety of paragraphing and subparagraphing that would be used. It is one thing to say that when it is desirable to cover by one section a number of contingencies, alternatives or conditions it will add to the clearness of thought and expression and to the facility of discussion if the section is broken into distinct paragraphs. It is another thing to pile paragraph on paragraph. Instead, one should recast the sentence to remove the need for such an intricate structure.

An arrangement of sentences in paragraphs and the use of other similar devices for more graphic presentation of enactments can materially increase clearness. They can enable the reader to distinguish more readily between the main and the dependent clauses - and to perceive the relationship between the elements of the provision.

Paragraphing appears simple to those who first begin to use it in the legislative sentence but it must be used with care. Merely separating the elements of the sentence by paragraphing can be the source of much bad composition. Paragraphing should be used to make a matter more readable, not more voluminous in content. An enumeration of matters falls within a different category of paragraphing than does the separating of the elements of a legislative sentence for easier recognition. Listing the contents of the law is distinct from describing the circumstances in which a law applies.

There is danger in the use of the technique of paragraphing. It may become merely a tool to extend a simple legislative sentence into a very long and complicated one. It may enable an ingenious Counsel to combine a number of distinct sentences under the impression that paragraphing will make the meaning clear to the reader. The technique can be abused. The need for care in using the technique cannot be over emphasised.

It is also a faulty style of drafting to interject a proviso, exception or qualification in a paragraph or sub-paragraph. The reader can be greatly inconvenienced by this faulty style of paragraphing. It is poor drafting when so many provisions are put in a subparagraph than it can contain and still be read as one grammatical sentence.

Headings and Parts

Headings and Parts add to the elegance of an Act. They should be used only 'as a guide to the subject matter of an Act.'[11] A heading does not form part of an Act. 'They are not voted on'[12] in Parliament. It should not be referred to in

11 Driedger, *Composition of Legislation*, p. 79.

12 *R v Hare* [1934] 1 K.B. 354 at p. 355 *per* Avory J. See also *Esso Petroleum Co. Ltd. v Ministry of Defence* [1990] All E.R.1 63. Bennion, *Statutory Interpretation,*, p. 590, considers headings as 'unamendable descriptive components' but adds that a heading is part of the Act in the sense that a heading is like anything else that Parliament puts out as its Act.

the text of the Act. It is intended to clarify the provisions of the Act. 'It may be considered in construing any provision of the Act, provided due account is taken of the fact that its function is merely to serve as a brief, and therefore necessarily inaccurate, guide to the material to which it is attached.'[13] As a rule headings are printed in italics. Parts are not printed in italics. Where Headings and sub-headings are used, the Headings would be in small capital letters and the sub-headings in italics.

An Act of a considerable size should be divided into Parts. It is no use dividing an Act of, say, ten sections into Parts. Headings would do. An Act is divided into Parts as a book is broken up into chapters to improve the readability of the Act. As a guide, each Part of an Act is self contained and could itself be substantially written as an Act.

Sir Courtenay Ilbert recommended that a complex statute might be divided into parts 'each Part being treated as a simple Act and containing its principle or leading motive in concise form at the outset of the Act.'[14] The division of an Act into Parts is generally frowned upon unless the subjects are such that they could appropriately be embodied in separate Acts.

Parts are more frequently used now as an aid to the better arrangement of lengthy Acts or to permit segments of an Act to be referred to more easily. An Act may also be divided further into Divisions or other subdivisions of a Part. No such arrangement of an Act should be undertaken unless the context of the Parts or other subdivisions relate to a single or related subject:

> The framework of a Bill may be made more intelligible by dividing it into parts and by grouping clauses under italic headings.[15]

Excessive subdivision should be avoided. As a rule a Bill should not be divided into Parts unless the subjects of the Parts are such that they could appropriately be embodied in separate Acts. The division of an Act into Parts may affect its construction by indicating the scheme of arrangement.[16]

A practice has developed in some jurisdictions of having a Part entitled 'Preliminary' wherein are set out provisions regarding title, definition, commencement, etc. This is not advisable: such a 'Part' actually goes to the whole Act and all its 'Parts'. It cannot be considered to be different from the other Parts as it is intended to be embodied in all of them. In this case 'Preliminary' if needed at all, should be by way of a heading and little more.

---

13 *Ibid.*

14 *Mechanics of Law Making*, p. 17.

15 Sir Courtenay Ilbert, *Legislative Methods and Forms*, p. 245.

16 Ilbert, *Legislative Methods and Forms*, pp. 245, 246.

The Interpretation Section

It is now well established that an Act should have an Interpretation Section. In some jurisdictions the Interpretation Section as a general section is at the beginning, normally after the Short Title. In others it is placed as the penultimate section, that is, before the Short Title at the end of the Act.

Definitions, as stated in Chapter Seven, are used in legislation as an aid to clarity, to achieve consistency and as a method of reducing vagueness; they should be used only when necessary. It is wrong to define a word in one sense and then use it in the text with a very different meaning. The usual formula is,

> In this Act, unless the context otherwise requires,

then follow the definitions of the relevant words, or expressions, each in inverted commas, in alphabetical order.

There is merit in having the Interpretation Section early in the Act. At the outset, a reader finds a list of terms with their meanings before coming across them later in the Act. The reader's mind is prepared that there are certain words which have specific meaning for the purposes of the Act. Lord Thring regards it as logical to have the Interpretation Section at the beginning of an Act,

> as the reader cannot understand the Act till he is master of the definitions or explanations of the terms used in the Act.[17]

On the other hand, one does not refer to a dictionary before reading a book. And since definitions in legislation do not deviate much from the ordinary meaning of the word defined there is no harm in letting the reader of an Act follow the trend of the Act to understand the Act as a whole. Hence the expression, 'unless the context otherwise requires.' The importance of this little phrase lies in the recognition that words in legislation

> … must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense.[18]

The Interpretation Section should contain the definition of words that are not restricted in their application to a particular Part or section or other sub-division of an Act. Words so restricted should be defined in that Part or section or subdivision either at the beginning or at the end of the Part or section or those subdivisions. Where there are a very large number of words to be defined for use throughout an Act consideration should be given to placing the definition where that would better serve the convenience of the reader of the Act.

---

17 *Practical Legislation*, pp. 96-97.

18 *Victoria (City) v Bishop of Vancouver Island* [1921] 2 A. C. 384 at p. 387, *per* Lord Atkinson. See also *Great Western Railway Co. v Carpalla United China Clay Co. Ltd.* [1909] 1 Ch. 218 at p. 236.

There are often far too many definitions set out in an Act. That is largely due to imitation - copy drafting - rather than to strict necessity. That type of definition effectively intrudes between the reader and the message intended to be conveyed. The appropriate thing to do is to insert the definition in the body of the text, as in the Bills of Exchange Act, 1882.[19] and the Marine Insurance Act 1906.[20]

Parliamentary Counsel should be sensitive to the high degree of irritation caused by pages of definitions which precede substantive provisions of an Act. It is also useful to appreciate that

(a) words not used in an Act should not be defined in that Act for later use in subsidiary legislation such as Regulations;

(b) a word or an expression already defined in the Interpretation Act of one's jurisdiction should not be included as a defined word or expression in a particular Act, unless it is intended that the word or expression so defined be construed in a sense different from the meaning conveyed by the Interpretation Act;

(c) it is a nuisance to define a word intended for general use in an Act in some out-of-the-way place in the Act;

(d) it is wise to avoid a definition within a section and for a section which gets in the way of the legislative message, because of the length or complexity of the definition. The legislative message should come out clear on its own. The definition should be placed at the end of the section;

(e) a definition might be technical and thus intended for the technical user. The ordinary reader need only get the feel of the provision.

Construction

Provisions providing for the manner of construing the Act, or a portion of it, or respecting the interpretation of the Act should generally be part of the Interpretation Section. However, regard for the convenience of the reader of the Act might dictate that those provisions be better placed elsewhere in the Act.

If the reader of an Act is to be told how to interpret or construe portions or the whole of the Act, it is better dealt with at an early stage. There may be occasions when the nature of the subject matter or the extent of the provisions relating to interpretation and construction would dictate that these provisions

19 45 & 46 Vict c. 61.

20 6 Edw. 7 c. 41.

be placed at a later part of the Act; that is, provisions intended for a more technical user of the Act than the general reader. This would be a matter of the greatest convenience to the greatest number. Parliamentary Counsel's instincts and experience will be a better guide in these matters than any special rule or direction. But if the ordinary reader is kept in mind, the decision where to put these provisions will usually resolve itself.

Parliamentary Counsel in any jurisdiction should make themselves thoroughly familiar with the Interpretation Act of that jurisdiction, and with other statutes, especially those dealing with crime or criminal proceedings, which create meanings for special words such as 'indictment', 'summary conviction', 'witness', and the like.

Parliamentary Counsel should be familiar with the general rules of interpretation of statutes based on judicial interpretation.[21] The standard works are written primarily for the use of legal practitioners and of judges. They are far too detailed for the general purposes of Parliamentary Counsel. However Counsel should make enough use of these works in order to form a good working knowledge of the rules used by the courts in interpreting and construing statutes.[21a]

Sir Courtenay Ilbert's warning[22] is worth noting here:

> The English draftsman has to consider not only the statutory rules of interpretation which are to be found in the Act of 1889,[23] but also the general rules which are based on judicial decisions and which are to be found in a good many useful textbooks on the interpretation of statutes. Among the most important of these rules are,
>
> 1. The rule that a statute must be read as a whole. Therefore the language of one section may affect the construction of another.
> 2. The rule that a statute may be interpreted by reference to other statutes dealing with the same or a similar subject matter. Hence the language of those statutes must be studied. The meaning attached to a particular expression in one statute, either by definition or by judicial decision, may be attached to it in another. Variation of language may be construed as indicating change of intention.
> 3. The general rule that special provisions will control general provisions.
> 4. The similar rule that where particular words are followed by general words (horse, cow, or other animal), the generality of the latter will be limited by reference to the former (*ejusdem generis rule*).

21 See Chapter Sixteen.

21a See Crabbe, *Understanding Statutes*.

22 *Mechanics of Law Making*, p. 119.

23 Now 1978.

5. The general rule, subject to important exceptions, that a guilty mind is an essential element in a breach of a criminal or penal law. It should therefore, be considered whether the words *wilfully* or *knowingly* should be inserted, and whether if not inserted, they would be implied, unless expressly denied.
6. The presumption that the legislature does not intend any alteration in the rules or principles of the common law beyond what it expressly declares.
7. The presumption against any intention to contravene a rule of international law.
8. The presumption against the retrospective operation of a statute subject to an exception as to enactments which affect only the practice and procedure of the courts.
9. The rule that a power conferred on a public authority may be construed as a duty imposed on that authority [that is, *may,* may be construed as *shall*.]

Application Provisions

Provisions relating to the application of an Act should follow the Interpretation Section. Where there is no Interpretation Section, they should follow the Short Title. Where there is a statement of purpose and no preceding Interpretation Section or Construction Section, the Application Section should follow the section which states the principles or the objectives of the Act.

In jurisdictions where the Interpretation Section and the Citation Section are at the end of the Act, the Application Section should nonetheless be placed earlier in the Act and not before the Short Title.

Inserting restrictions on the application of an Act very late in an Act without prior indication can be quite inconvenient to readers. 'An application section outlines the ambit of the Act and is intended to influence the context of all subsequent provisions, so the application section should be set out early in the Act'.

But there are exceptions dictated by the convenience of the reader of the Act. Where the Application Section is of such a nature, by reason of length, for example, that it might cause the reader difficulty in following the legislative plan of the Act, consideration might be given to putting the Application Section elsewhere. The reader, in such cases should be told early that application of the Act is restricted, stating where to find the restrictions.

Parliament legislates for a country as a whole or for a part of it. In Federal States there are areas reserved for the Federal Legislature. The residue accrue to the State Legislatures. In other federal jurisdictions the powers of the Federal Legislature are stated in an Exclusive Legislative List and the

Concurrent Legislative List. This means that the Federal Legislature can legislate on matters specified in the Concurrent Legislative List but a State Legislature cannot legislate on any matter specified in the Exclusive Legislative List. It may thus be convenient, even necessary, to specify in a particular case the extent of the application of an Act of Parliament.

Though not a federal State, a United Kingdom Act may provide that,

This Act extends to Northern Ireland.

Northern Ireland has a Parliament of its own. But the Parliament at Westminster can, and does, constitutionally legislate for Northern Ireland. There may also be a provision which states that,

This Act does not extend to Scotland or Northern Ireland.

Scotland has its own system of law and jurisprudence different from those of England and Wales, though it does not have a Parliament all her own like Northern Ireland. Or the Act may state that,

This Act extends to England and Wales only.

An Indian Act may provide that,

> Notwithstanding anything contained in this Act, if the Central Government is satisfied that there is in force in any State or part thereof a law making adequate provision for the financing of activities to promote the welfare of persons employed in the iron ore mines or manganese ore mines, it may, by notification published in the Official Gazette, direct that all or any of the provisions of this Act shall not apply or shall apply with such modifications as may be specified in the notification.[24]

Another example from India could be thus drafted:

> (1) Where the Central Government
>
> *(a)* is satisfied that circumstances have arisen making it necessary that certain of the restrictions imposed by this Act should cease to be imposed, or
>
> *(b)* considers it necessary or expedient so to do in the public interest,
>
> it may, by notification in the Official Gazette, suspend or relax to a specified extent, either indefinitely or for such period as may be specified in the notification, the operation of all or any of the provisions of this Act.
>
> (2) Where the operation of a provision of this Act is, under subsection (1) suspended or relaxed indefinitely, the suspension or relaxation may, while this Act remains in force, be removed by the Central Government by notification in the Official Gazette.

---

24 Section 9, *The Iron Ore Mines and Manganese Ore Mines Labour Welfare Fund Act*, 1976, No. 61 of 1976.

An application section could provide that,

This Act applies to a contract executed after the first day of January, 1909.

or

Unless otherwise specifically provided, this Act applies to educational institutions registered under the Education Act 1924.

or

This Act applies

(a) to a person whose emoluments are paid out of funds provided by Parliament whether that person is in, or is outside of, Draftaria; and

(b) in respect of the discipline of a member of the Armed Forces of Draftaria, whether that member is in, or is outside of, Draftaria.

Duration

An Act of Parliament continues in force until it is repealed. There are occasions, however, when it becomes necessary to provide for the duration of an Act of Parliament:

This Act remains in force until the thirty-first day of March 1892.

(1) This Act remains in force for a period of four years commencing on the date of publication of the Act in the *Gazette*; but the President may, by legislative instrument, order that the Act shall remain in force for a further period not exceeding three years in the aggregate.

(2) An instrument made by the President under subsection (1)

(a) shall be laid before Parliament; and

(b) shall not come into force unless it is approved by a resolution of Parliament supported by the votes of not less than two-thirds of all the members of Parliament.

The Governor-General may, by Order published in the *Gazette*, declare that, with effect from the date specified in the Order, this Act shall cease to have effect; and accordingly this Act shall be deemed to have been repealed as from the date of publication of the Order in the *Gazette*.

Statements of Principle

The principles or the objectives of an Act should be stated in clear and concise form and the earlier that is done the better. The statements of the principles or the objectives of an Act should be placed as near as possible to the Short Title, the Interpretation Section, and the Application Section.

The principles or the objectives of the Act - the 'bare bones' as it were of the Act - should be set out in the form of a statement-of-principle section, and enunciated in concise form. In a taxing statute, for example, it makes sense to begin with the levying of the tax. This requires that the tax be clearly set out early in the Bill.

The Renton Committee[25] recommended that more use be made of statements of principle better to indicate the legislative intent. Where an Act is declaring new ground, or changing basic practices, customs or law, it is desirable that the objectives or the principles of the Act are most conveniently set out, for the reader as well as the legislator, in a statement of principle rather than in the long title, a preamble or buried within the context of the Act read as a whole.

General and Special Provisions

General provisions should follow the statement of principle or the objectives of the Act. A special case or an exception to a general principle or statement should follow the general principle or statement.

Provisions having general application throughout the Act, Part or section should be set out early in the Act, Part, or section. Any qualification, exceptions, limitations, restrictions or other provisions, which modify the general provision should follow rather than precede it.

It is often a convenience to the reader to signal that a general provision is to be later modified. This is often done by the use of expressions such as *Subject* to ... or *Notwithstanding* …

An exception, a restriction or a qualification may be combined with the provision by inserting it after the expression *except that*, or the words *but*, or *if*. In other cases a separate sentence can be used to better effect. Parliamentary Counsel should guard against the use of the expression *Provided that* to introduce a qualification.[26]

Transitional or Temporary Provisions

Transitional or temporary provisions should normally follow the subject matter to which they relate. Where transitional or temporary provisions relate generally to the Act, they should be placed towards the end of the Act or in a Schedule to the Act where they will least affect the numbering of the sections in a later revised version of the Act.

---

25 Cmnd. 6053 para. 10.13, p. 60.

26 See Chapter 5, pp. 83-84.

A provision intended to facilitate a transition from one statute to another or a provision that is intended to apply for only a limited time would ordinarily be more convenient if set out in proximity to the subject governed by that provision. Where a provision performing that type of function or matter is in one section only, it is more convenient to the reader to have it placed as the last subsection of the section concerned. To do so is consistent with principle.

The practical advantage of having these provisions at the end of an Act, when they are general (that is, before revision of the statute) is that the transitional or temporary provisions can be omitted without their omission endangering the correctness of cross references elsewhere in the Act.

Repealing and Amending Provisions

Provisions repealing or amending other Acts should be placed toward the end of the Act but before the commencement provision.

Repeals and amendments of other Acts can be considered 'exhausted' upon enactment in a 'textual amendment' jurisdiction. They fall within a class similar to the transitional and temporary provisions. They are better placed so that they can be omitted on revision without affecting other provisions or cross references within the Act. It is more convenient to the reader since a reader will in time anticipate the location of certain provisions within the Act.

Repeals

It is a constitutional principle that a Parliament cannot fetter the hands of a subsequent Parliament. An Act passed in one session can be repealed by an Act passed in a subsequent session. A repealing section will normally take the form,

> The Holidays Act, 1924, is hereby repealed.
>
> Section 24 of the Forestry Act, 1987, is hereby repealed.
>
> The enactments specified in the first column of the Schedule are repealed to the extent specified in the second column of the Schedule.

Most Interpretation Acts provide that

> Where an enactment is repealed in whole or in part, the repeal does not
>
> *(a)* revive any enactment or anything not in force or existing at the time when the repeal takes effect;
>
> *(b)* affect the previous operation of the enactment so repealed or anything duly done or suffered thereunder;
>
> *(c)* affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed;

(d) affect any offence committed against or a violation of the provisions of the enactment so repealed, or any penalty, forfeiture or punishment incurred under the enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;

and an investigation, legal proceeding or remedy as described in paragraph *(e)* may be instituted, continued or enforced, and the penalty, forfeiture or punishment may be imposed as if the enactment had not been so repealed.

Amendments

There are two kinds of amendments: textual and non-textual amendments. A non-textual amendment has a separate identity. It does not become part of the Act it purports to amend yet it alters that Act. A textual amendment, examples of which are given in Chapter Six, amends an existing Act by specifically stating

(a) the section where the amendments are to be made, and how the amendments should be made; or

(b) substituting a completely new section or subsection for the existing section or subsection as it will read after the necessary amendments have been made.

Renton[27] gives an example of a non-textual and textual amendment. The Report states that,

> A fairly simple example of an identical amendment drafted both non-textually and textually may be found in the Town and Country Planning Act, 1968. Section 149 of the principal Act, the Town and Country Planning Act, 1962, is amended non-textually by section 37(3) of the 1968 Act which reads as follows:
>
> For a person to be treated under section 149(1) or (3) of the principal Act (definitions for purposes of blight notice provisions) as owner-occupier or resident owner-occupier of a hereditament, his occupation thereof at a relevant time or during a relevant period, if not occupation of the whole of the hereditament, must be, or, as the case may be, have been occupation of a substantial part of it.
>
> A corresponding textual amendment of section 149 of the principal Act is effected by section 38 of the 1968 Act (with Schedule 4):

27 Cmnd 6053 para. 13.3 p. 76.

Section 149

In subsections (1)*(a)*, (1)*(b),* (3)*(a)* and (3)*(b)*, for the words "the whole or part" (wherever occurring) there shall be substituted the words "the whole or a substantial part".

Commencement

The section dealing with the commencement of the Act should normally be the last section of the Act.

The placing of the coming into force or commencement provision of an Act follows the same reasoning that applies to the temporary and transitional provisions. This is not the practice in all jurisdictions. Some Commonwealth countries put the commencement section very early in the Act as part of another section that can be dropped on revision.

Three things should be noted:

(a) sometimes an Act comes into force on the happening of an event as, for example, publication, without the need of a commencement provision;

(b) when an Act is to come into force on a fixed date, the coming into force provision is most frequently set out as a command:

1. This Act shall be deemed to have come into force on the first day of January 1909.

2. This Act shall come into force on the first day of January 1902.rather than as a statement:

1. This Act comes into force on the first day of January 1902.

2. This Act, unless otherwise specified in this Act, comes into force on the first day of January 1902.

(c) there are occasions when it becomes necessary to make some provisions relate particularly to the coming into force of an Act. These matters would not be as immediately intelligible if they preceded the coming into force section. For example, cases where certain retroactive or retrospective measures are necessary, or when distinguishing between the commencement of different provisions or extending the time within which an Act may be proclaimed.

(1) The provisions of this Act, other than sections 25 to 47, shall come into force on the first day of September 1212.

(2) Sections 25 to 47 shall come into force on the first day of November 1214.

> Sections 25 to 47 of this Act shall come into force on the first day of November 1214, and the remaining provisions shall come into force on the first day of November 1215.
>
> This Act shall come into force on such date as the President may, by legislative instrument, appoint and different dates may be appointed for different sections of this Act.

Internal References

A reference to another Part, division, section, subsection, paragraph or subparagraph within an Act should be identified by its number or letter and *not* by such terms as *preceding*, *following* or *herein provided*.

The expression *of this Act* should not be used unless necessary to avoid confusion where reference is also made to another Act.

The expression *of this section*, *of this subsection* or *of this paragraph* and similar internal references should not be used in subsections of a section, paragraphs of a subsection, or subparagraphs of a paragraph, unless necessary to avoid confusion with a reference to a provision outside the section, subsection, paragraph or subparagraph.

It is better drafting to identify a provision in an Act by reference to it as a section, subsection, paragraph or subparagraph as given in the Act and not by vague words which through the passing of time can become misleading. Expressions like *preceding section, hereinafter provided* should be avoided. Identification should be unmistakable and indicated by reference to the number of the section, subsection, paragraph or subparagraph.

It is unnecessary to overdo such a reference by extra words such as *of this Act, of this section*, where there is a general statutory presumption that these extra words are read into the reference.[28]

There are other statutory presumptions arising from the Interpretation Act of each jurisdiction that permit more brevity in legislative expression.

Referential Legislation

The incorporation of the provisions of one Act into another is known as referential legislation which can be useful or even necessary. The Interpretation Act of a jurisdiction is, by its very nature, part of every other Act of that jurisdiction. Its provisions relating to, for example, implied powers would other-

---

28 For instance, see section 13(6) of the Interpretation Act of Barbados.

wise be repeated in every other Act. The Statutory Corporations Act[29] of a jurisdiction also, in relation to the nature and powers of the corporation avoids the repetition in each Act establishing a statutory corporation of the relevant provisions. Most of these provisions are of universal application hence their inclusion in such an umbrella Act.

Thus unless absolutely necessary Parliamentary Counsel should desist from using referential legislation. To provide that,

> Section 24 shall apply subject to the provisions of any other enactment,

is to invite unnecessary criticism. A reader is being asked by a provision of that nature to read the whole of the statute book in order to divine the enactment subject to which section 24 applies. Equally, to provide that,

> 'globe' has the meaning assigned to it by section 12 of the Factories Act 1667,

may lead to confusion since *globe* may have been the subject of judicial interpretation unknown to Parliamentary Counsel. Worse still, is a provision which states that,

> Capacity to enter into an agreement for a lease is regulated by the general law concerning capacity to contract or to dispose of or to acquire property.

Here an intending tenant is required to study the general law relating to the capacity of a person

(a) to enter into a contract,

(b) to dispose of property, and

(c) to acquire property

before that person can *dare* to enter into an agreement for a lease.

There are two kinds of referential legislation. The first kind deals with the application of a previous section or groups of sections to a subsequent section or groups or sections in the same Act. The second kind deals with provisions of a previous Act being referentially incorporated in a subsequent Act.

As regards the first kind,

(a) the provisions intended to be made to apply need careful examination;

(b) it should be quite clear that the previous sections are clearly applicable without any variation for which no express provision has been made;

(c) if there is a doubt, it is better to repeat the relevant provisions;

(d) it is always better to be precise than to be obscure.

---

29 See, for example, the Ghana Statutory Corporations Act.

As regards the second kind,

(a) referential legislation should always be avoided;

(b) it should be borne in mind that the context and fact situation of one Act may be different from that of the other. Consideration should thus be given to the impossibility of applying the provisions of an Act dealing with one subject matter to another Act dealing with yet another subject matter;

(c) the difficulty of having to keep in view or in mind, if one can, one set of legislation while dealing with another Act in order to gather the meaning of the present legislation is not desirable;

(d) it is important to set out the sections to be incorporated, at length if need be, rather than to leave the matter to obscurity;

(e) consideration should be given to suitability. An earlier Act can only be incorporated as far as there can be no inconsistencies.

Consider section 75 of the Local Government Act 1888:

… the following portions of the Municipal Corporations Act, 1882, namely, Part II, Part III, Part IV (as amended by the Municipal Elections (Corrupt Practices) Act, 1884, section 124 in Part V, Part XIII, the Second Schedule, Part II and Part III of the Third Schedule and Part I of the Eighth Schedule shall, so far as the same are unrepealed and are consistent with the provisions of this Act, apply as if they were herein re-enacted with the enactment amending the same in such terms and with such modifications as are necessary to make them applicable to the said Councils and their chairmen, members, committees, officers, and to the other provisions of this Act.

Provided as follows …

Then follow *twenty-one* provisos!

The Treason Act 1945,[30] affords another example of referential legislation. It provides that,

1. The Treason Act, 1800, (which assimilates the procedure in certain cases of treason and misprison of treason to the procedure in cases of murder) shall apply in all cases of treason and misprison of treason whether alleged to have been committed before or after the passing of this Act.

2. (1) The enactments set out in the Schedule to this Act are hereby repealed in so far as they extend to matters of procedure in cases of treason or misprison of treason, that is to say, to the extent specified in the third column of that Schedule.

30 1945 c. 44.

> (2) For the removal of doubt it is hereby declared that nothing in the Treason Act, 1800, shall be deemed to have repealed any of the provisions of the Treason Act, 1695, or of the Treason Act, 1708, except the provisions of those Acts specified in the third column of the Schedule to this Act.

Section 1 of the 1945 Act necessitates a reference to the 1800 Act. Without that reference the reader of the 1945 Act would not know what the 1945 Act is all about. Having done that, the reader has to contend with the amendments specified by reference to the Schedule to the 1945 Act. This will take the reader to the Act of 1695 and the Act of 1708.

In *Livingstone v Mayor of Westminster*[31] Buckley J. gave an example of the lengths to which referential legislation can be carried:

> Section 30(2) brings in section 81(7) of the Local Government Act, 1894 which in turn brings in section 120 of the Local Government Act of 1888. The concluding words of section 120(1) of the Act of 1888 bring in section 7 of the Superannuation Act 1859, which in turn sends the matter back to section 2 of the Act of 1859.

Marginal Notes

A marginal note should be short. It should describe but not summarise the section to which it relates. Marginal notes should be confined to sections. They should not be used to describe subsections or paragraphs.

Marginal notes should be prepared by Parliamentary Counsel. They demand an intimate knowledge of the subject matter and should receive more attention than is usually given to them. A marginal note should express in a concise form the main object of the section to which it relates, or should at least indicate distinctly its subject matter. All the marginal notes, when read together in the Arrangement of Sections, should have such a consecutive meaning as will give a tolerably accurate idea of the contents of the Act.[32]

Ilbert advises that,

> Attention should be paid to the framing of marginal notes. A marginal note should be short and distinctive. It should be general and usually in a substantive form, and should describe, but not attempt to summarise, the contents of the clause to which it relates. For instance, a marginal note should run: 'Power of (local authority) to, Etc.,' and not 'Local authority may, Etc.' The marginal note often supplies a useful test of the question whether a subject should be dealt with in one or more clauses. If the marginal note cannot be made short without being vague, or distinctive without being long, the presumption is that more clauses than one are required.[33]

---

31 [1904] 2 K. B. 109 at p. 117.

32 Thring, p. 50.

33 Ilbert, *Legislative Methods and Forms*, p. 246.

Where the marginal notes are carefully prepared they indicate whether the section contains too much material. The ability to analyse an enactment through the means of its arrangement of sections based on marginal notes imposes a useful and necessary discipline on Parliamentary Counsel. It assists Counsel in organising both the content of the provisions and the arrangement of the Act in a more logical and convenient fashion.

Voice

In general it is a canon of good legislative drafting to use the active voice for the enacting verb in preference to the passive voice. The indiscriminate use of the passive voice has led to many problems of construction. But if the mischief is anticipated there are many occasions when the use of the passive voice not only makes the meaning clearer but is aesthetically more satisfying. In other cases the passive voice is well established:

This Act may be cited as the Forestry Act 1887.

The mischief that arises from the use of the passive form of the enacting verb is the concealment of the person to whom the provision is directed. This defect occurs when persons are commanded or enabled to do something, or commanded to refrain from doing something.

The use of the passive voice can delude Parliamentary Counsel into thinking that the legal subject of the provision has been identified when that is not the case. Worse still, Counsel may be unaware when using the passive voice that the legal subject has changed without being conscious of this happening.

But if care is used, the passive voice may help make a provision read more easily. Experienced Counsel learn to think in the active voice and express themselves in the passive when to do so serves some useful purpose.

Tense and Mood

The present tense of the indicative mood should be used wherever possible.

Tense

In some jurisdictions the Interpretation Act states that an enactment is construed as always speaking, and that anything expressed in the present tense is to be applied to the circumstances as they occur so that effect may be given to the enactment according to its true spirit, intent and meaning. It is unnecessary to view the law as laying down directions for future situations.

Mood

There is little need to use the subjunctive mood. Its use is ponderous, archaic and artificial. *He is*, for example, is far better than *he be*. Where, however, Counsel is stating a fiction, the subjunctive mood makes the point more effectively than the indicative: *as though he were a citizen* instead of *as if he is a citizen*.

The imperative or mandatory form of expression should only be used if some person is commanded to do or to refrain from doing something. Where a person is not commanded, that form should not be used. *This Act applies to ...* is much better than *This Act shall apply to …* In that case no person is being commanded to apply the Act, but rather the Act applies as a matter of statute law, of which that phrase is the pronouncement.

The indicative mood is much more convenient in legislation, and very often expresses the legislative intent better than any other form.

The present tense, indicative, often enunciates the law more simply and more clearly than the automatic, habitual use of the auxiliary *shall* before every enacting verb in a legislative sentence whether the sentence imposes a duty or obligation, states a binding proposition or commands a course of conduct.

Circumstances and Conditions

A circumstance or condition that limits the operation of a provision is customarily set out at the beginning of the provision. The convenience of the user of the Act should, however, govern in every case. Where the operation of a provision is limited to a particular circumstance or by a particular provision, the circumstance ought to be set out before the condition generally; and both ought to be set out at the beginning of the sentence unless otherwise required for the convenience of the reader.

Circumstances and conditions, however described, are essential to the consideration of how, when, and on whom a law is to operate and are normally better set out early on. This permits Parliamentary Counsel to delineate the cases in which a law is to operate and to specify any conditions affecting its operation.[34] Coode, though helpful on this, should not be followed too mechanically or the result will be ugly, contrived and incomprehensible sentences.

Parliamentary Counsel ought always to keep the reader in mind and design the sentence, not mechanically, but in a way most likely to communicate its message with the least difficulty, mystery, irritation or waste of the reader's

34 See *Coode on Legislative Expression*, reproduced in Driedger, *The Composition of Legislation*, p. 322 et seq.

time. Often this can be done best by flouting Coode while still appreciating its value in other instances.

Schedule

A Schedule is a convenient device for dealing with matters of detail which will otherwise unnecessarily encumber the main body of an Act. Matters of administrative detail not desirable to be the subject matter of Regulations may be provided for in a Schedule. The Schedule also frees the main body of an Act from a possible charge of untidiness. A Schedule can conveniently be used to deal with

(a) the repeal of several Acts or parts of several Acts, as in a Statute Law Revision exercise;

(b) a number of amendments, such as in a Law Reform (Miscellaneous Provisions) Act;

(c) definitions, such as in the Reservoir Bill of 1974, 'where all the definitions are outlying ones, and tabulated indexing in a schedule was adopted as the most convenient arrangement for the reader;'[35]

(d) a Treaty which is, or parts of which are, intended to have the force of law as part of the municipal law;

(e) an Agreement, where it is intended to confer statutory validity on the Agreement; and

(f) forms.

Care is needed in the drafting of Schedules. There should be no inconsistency as between an Act and its Schedule. For,

> If the enacting part of the statute cannot be made to correspond with the schedule, the latter must yield to the former.[36]

An enacting provision would state, for example, that

> The days specified in the Schedule are hereby declared to be public holidays.

or

> The Minister may, in the public interest, by legislative instrument, amend the Schedule to this Act.

or

35 Renton, Cmnd. 6053 para. 11.17.

36 *Re Baines* (1840) 12 A & E 227. See also *Dean v Green* (1882) 8 P. D. 79.

An application under subsection (1) shall be in the form set out in the Schedule to this Act.

or

The provisions of this Act relating to

(a) an application for the registration of a television set, and

(b) appeals to the Minister,

shall apply with such modifications as are set out in the Schedule.

The enacting provision should always make it clear, in the case of the use of forms, that the forms are mere models so that a deviation from a form does not invalidate the form used. Forms 'in schedules are inserted merely as examples, and are only to be followed implicitly so far as the circumstances of each case may admit.'[37] This aspect of the matter is now covered by the Interpretation Acts of most jurisdictions.

The format of a Schedule may take this form:

SCHEDULES

FIRST SCHEDULE *Section 4*

.....

SECOND SCHEDULE *Section 24*

.....

A Schedule, it has been stated,

is a mere question of drafting, a mere question of words. The schedule is as much a part, and is as much an enactment, as any other part.[38]

An Act of Parliament may often contain a provision giving power to a Minister to amend the Schedule to the Act:

The Minister may, by legislative instrument, amend the Schedule to this Act.

Except in very minor matters this power should not be conferred.[39]

37 *Bartlett v Gibbs* (1843) J. M. 16, 81, 96.

38 *Attorney-General v Lamplough* (1878) 3 Ex. D. 562, per Brett L. J.

39 See Chapter Thirteen, Subsidiary Legislation.

Keeling Schedule

The Keeling Schedule[40] is a device which 'sets out the wording of the enactment, indicating by bold type the changes proposed.'[41] It is not capable of universal or even wide application. 'It is only used where the changes made by the Bill in the previous enactments are exclusively textual amendments or repeals … The Keeling technique not only shows, in the Schedule how the law will look once it is amended, but also makes clear, in the text of the Bill itself, how the law is being amended.'[42]

Bennion has shown, however, that there are other difficulties in the use of the Keeling Schedule.[43]

Jamaica Schedule

This is best dealt with by quoting, *in extenso*, Bennion the originator of the idea.[44] He says that he devised a special type of schedule when drafting tax legislation for the Jamaica Government in the early 1970s.

> … the device works as follows. Principal Act, 1960 would have contained a schedule on the following lines (which later came to be known as a Jamaica Schedule). Paragraph 1 of the schedule states the commencement date for every provision of the Act not specified in any subsequent paragraph of the schedule (`the master commencement date'). Subsequent paragraphs deal seriatim with substantive provisions of the Act for which the master commencement date does not apply, or for which transitional provisions are required (setting them out). Subsequently, each Amending Act (as well as amending the substantive provisions of Principal Act 1960) also textually amends the Jamaica Schedule to Principal Act 1960 as necessary to incorporate transitional provisions for the new amendments.
>
> The result is that once Principal Act 1960 is reprinted as amended textually, the whole story is to be found in one document instead of five. It should be added that amendments to the Jamaica Schedule would also include repealing provisions, with operative dates. The Jamaica Schedule thus operates as a complete historical file on the substantive provisions of the principal Act.

40 It is named after Mr. E. H. Keeling, (later Sir Edward Keeling) who, with Mr. R. P. Croom-Johnson (later Mr. Justice Croom-Johnson) made the original proposal.

41 Bennion, *Statute Law*, p. 56.

42 Renton, Cmnd. 6035, para. 13.22.

43 *Statute Law*, p. 56-57.

44 *Statute Law*, pp. 278-279.

Montesquieu's Principles

C. K. Allen[45] counsels us that the ideal to be aimed at in drafting legislation should be the minimum of words consistent with clearness, explaining themselves, as far as possible, one step at a time without involutions and cross references. It is difficult to lay down any invariable scientific principles for legislative diction. However, he epitomizes certain sensible principles laid down by Montesquieu.[46] These are,

1. The style should be both concise and simple: grandiose or rhetorical phrases are merely distracting surplusage.
2. The terms chosen should, as far as possible, be absolute and not relative, so as to leave the minimum of opportunity for individual differences of opinion.
3. Laws should confine themselves to the real and the actual, avoiding the metaphorical or hypothetical.
4. They should not be subtle, `for they are made for people of mediocre understanding; they are not an exercise in logic, but in the simple reasoning of the average man'.
5. They should not confuse the main issue by any exceptions, limitations, or modifications, save such as are absolutely necessary.
6. They should not be argumentative; it is dangerous to give detailed reasons for laws, for this merely opens the door to controversy.
7. Above all, they should be maturely considered and of practical utility, and they should not shock elementary reason and justice and *la nature des choses*; for weak, unnecessary, and unjust laws bring the whole system of legislation into disrepute and undermine the authority of the State.

Thring's Rules

Lord Thring formulated a few Rules for the guidance of young Parliamentary Counsel. These are,

Rule 1.

Provisions declaring the law should be separated from, and take precedence of, provisions relating to the administration of the law

45 *Law in the Making*, 7th ed., p. 482-483.

46 *L' Esprit des Lois*, xxix, ch. 16.

Convenience demands a clear statement of the law as distinct from its administration. One must know the law before questions of administration can arise hence the precedence of the statement of the law over its administration. Thus the advice is,

(a) state the law, and then

(b) state the authority to administer the law, and then

(c) state the manner in which the law is to be administered.

That is the general proposition. Specific cases may require a different treatment. An example is the setting up of a statutory corporation, or the office of Coroners. It is advisable to establish the office of Coroner before stating the law of inquest. In such cases the law, as it were, emanates from the authority rather than the other way round.

The basic consideration is to determine what is subordinate in importance. Where administration is the paramount consideration the administration provisions would precede the statement of the law.

Rule 2.

The simpler proposition should precede the more complex and, in an ascending scale of propositions the less should come before the greater.

For example, *assault* should be provided for before *aggravated assault*. But it is a rule of guidance only. It aids Parliamentary Counsel in forming a clear conception of the relative bearing of the sections that are to be drafted - and problems of political pressure do arise. These should best be dealt with on the basis of political realities.

Rule 3.

Principal provisions should be separated from subordinate provisions.

The subordinate provisions should be placed towards the end of the Act, while the principal provisions should occupy their proper position in the narrative of the occurrence to which they refer. Principal provisions declare the material objects of the Act. Subordinate provisions are required to give effect to the principal provisions. They may deal with details, and thus complete the operation of the principal provisions.

Rule 4.

Exceptional provisions, temporary provisions and provisions relating to the repeal of Acts should be separated from the other enactments, and placed by themselves under separate headings.

This leads to the avoidance of confusion.

Rule 5

Procedure and matters of detail should be set apart by themselves, and should not, except under very special circumstances, find any place in the body of the Act.

This will explain the use of Schedules and sometimes of Regulations. In company legislation model Regulations could be set out in a Schedule.

Procedural and administrative matters can also be delegated to subordinate legislation. Thus Parliament deals with the substantive law, and the procedural law is settled by departmental officials.

Ilbert's Questions and Advice

Parliamentary Counsel must often consider the administrative machinery which is or will be in place for the implementation of a piece of drafted legislation. For this purpose, it may well be advisable to consider a few questions posed by Ilbert.[47] These are,

1. What powers and duties already exist for the purpose contemplated?
2. By whom are the powers exercised and the duties discharged?
3. What is the appropriate central authority?
4. What is the appropriate local authority?
5. What should be the relations between the central authority and the local authority?
6. What kind or degree of interference with public or private rights, either by the courts or by the central authority, will be tolerated by public opinion?
7. How is the change to be introduced so as to cause the least interference with existing rights and interests?
8. How is the requisite money to be found?
9. What provisions of the existing legislation bearing on the subjects are to be applied, superseded or borne in mind?

47 *The Mechanics of Law Making*, pp. 17-18.

These questions are for the most part questions which should be considered by those who propose a piece of legislation. None the less,

> they are questions on which the draftsman is often expected to advise, and on which the knowledge he has acquired often enables him to give useful advice. With the provisions of the statute law bearing on the subject, he is always expected to be familiar, and one of his most difficult tasks in the preliminary work which has to be gone through before a bill is drawn, is that of threading his way through what is often a jungle of legislative enactments. It is his duty to master and understand the complicated provisions of the existing law relating to the matter in hand, to know how they have been construed in practice, and what construction has been placed upon them by courts of law, to point out what obscurities, ambiguities, inconsistencies, or other defects they present, and to indicate in what cases and in what manner these defects may most suitably be removed by fresh legislation. But he must not expect that his advice on these points will always be followed. There are often good reasons, political or tactical, sometimes more easily appreciated by the politician than by the lawyer, but in many cases very sound and cogent, against the adoption of counsels of perfection urged, and properly urged, by the draftsman from the legal point of view.[48]

48 *Ibid.*

Chapter 9

The Presumptions

Over the years the courts have evolved certain canons of interpretation to determine the meaning of difficult provisions of an enactment. These canons are not inflexible rules of law; they are presumptions that are called in aid in cases of ambiguity. A few of these presumptions, of particular interest to Parliamentary Counsel, are discussed in this Chapter.[1]

Consistency

It is a guide to good drafting that the same words should be consistently used to mean the same thing in drafting legislation, and that different words will be given different meanings. This is what Lord Simon[2] referred to as the presumption against a change of terminological usage. Inconsistency in the use of words or expressions would create ambiguity, if not obscurity. The courts will look for consistency. The same words or expressions should therefore be used to mean the same thing.

Ouster Clauses

Provisions which take away the jurisdiction of the courts would meet with curt treatment from the courts. To provide that,

> The decision of the Minister shall be final and shall not be called in question in any legal precedings,

will not find favour with the Judges. That kind of provision would *not* prevent the courts from intervening to assert their jurisdiction, especially in the cases that raise issues of natural justice. *Anisminic Ltd. v Foreign Compensation Commission*[3] appears to have set 'a high-water mark of judicial control'. The courts would act to disarm Parliament from disarming the courts.[4]

---

1 See also Chapter Sixteen.

2 *Black-Clawson International Ltd. v Papierwerke Waldof-Aschaffenburg* A.-G. [1975] Ch. 88.

3 [1969] 2 A. C. 147.

4 But see s 22 of the Interpretation Act of Sri Lanka, which provides that, Artcle 140 of the Constitution deals with the 'grant and issue, according to law, of orders in the nature of writs of *certiorari, prohibition, procedendo, mandamus and quo warranto*....

Judicial Control

A provision of an Act of Parliament which seeks to restrict or eliminate judicial review will not find favour with the courts. In *R v Medical Appeal Tribunal ex p. Gilmore*,[5] Lord Denning stated that it is

> very well settled that the remedy by *certiorari* is never to be taken away by any statute except by the most clear and explicit words.

Lord Denning here is affirming in favour of the courts the presumption against restricting the supervisory powers of the courts.

The courts will also not allow the rule of law to be tampered with, especially by administrative authorities and tribunals. Thus to provide in an Act of Parliament that a decision or order *shall be final* or *shall be final and conclusive to all intents and purposes* will be considered as limiting judicial control. The courts will not have that. As Lord Denning said,[6]

> Parliament only gives the impress of finality to the decisions of the tribunal on the condition that they are reached in accordance with the law .... If tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end.

The Crown, The Republic

It is a well settled principle of construction that an Act does not affect the prerogatives, rights and interests of the Crown unless there are clear words in the Act that dictate interference.[7] This is founded on the presumption that an Act of Parliament does not bind the Crown in the absence of an express provision or necessary implication.[8] It is a long standing rule of interpretation. And the Crown Proceedings Act, 1947, expressly refrains from altering this long standing rule.[9] Thus to bind the Crown or the Republic an express provision is required:

> This Act binds the Crown [the Republic].
>
> But it may be necessary to provide, for example, that,
>
> Nothing contained in this Act shall apply to a transaction between the Government of Draftaria and the Government of a foreign state.

or

---

5 [1957] 1 Q. B. 574 at p. 583.

6 *Ibid.* at pp. 585-6.

7 *Attorney General v Hancock* [1940] 1 K. B. 427.

8 *Attorney General for Ceylon v A. D. Silva* [1953] A. C. 461; *China Ocean Shipping Co. v South Australia* (1979) 27 A. L. R. 1.

9 S. 40(2)(f).

The Minister may, by legislative instrument, direct that this Act shall apply to an undertaking established out of funds provided by Parliament.

Mens Rea

It is a maxim of the criminal law that a guilty mind is an essential element in the commission of a crime.[10] At common law *mens rea* is always established for a successful prosecution of a criminal offense. An accused person is presumed to have foreseen the consequences of the acts called in question, whether or not there was in fact the requisite mens rea. In murder cases, as a result of the doctrine of constructive malice, it is enough to establish that death ensued in the course of the commission of a violent crime.[11]

In the case of a statutory offence the drafting of the subject matter may be such that a criminal offence may be created whether or not there had been an intention to contravene the law or to do something wrong. Whether the contravention of a provision of an Act should be construed as not requiring *mens rea* or whether the Act is construed as subject to an implied qualification that *mens rea* be established would depend, primarily

(a) on the drafting of the provision;

(b) on the subject matter of the provision;

(c) on the circumstances that make one construction reasonable as against another construction; and

(d) on the nature of the punishment specified for the contravention.

In the sentence,

No person shall knowingly file a false return under section 12,

the use of *knowingly* makes it clear that the prosecution will have to establish that an accused person *knowingly* filed the return in addition to any other element of the offence. On the other hand if it is provided that,

No person shall have in his possession a substance prohibited under section 10,

the mere possession of the prohibited substance is an offence; that is an example of strict liability. Thus the operation of the presumption that *mens rea* is essential to a successful prosecution of an offence could be ousted. The words of the provision will determine that. There are three classes of offences in which the presumption can be ousted. These are,

10 *R. v Tolson* (1889) 23 Q. B. D. 164.

11 *D.P.P. v Beard* [1920] A. C. 479.

(a) acts which are not *criminal*, that is, acts which do not fall normally under the criminal law, but which are prohibited in the public interest;

(b) acts which constitute public nuisance; and

(c) acts which constitute the enforcement of a civil right, even though the proceedings are criminal in form.[12]

The words of the provision creating the offence are therefore very important. Thus in *Evans v Dell*,[13] Goddard J. said that,

> With the complexity of modern legislation one knows that there are times when the court is constrained to find that, by reason of the clear terms of an Act of Parliament, *mens rea* or the absence of *mens rea* becomes immaterial and that if a certain act is done, an offence is committed whether the person charged knew or did not know of the Act.

In *Harding v Price*,[14] Lord Goddard, L.C.J., said that,

> If a statute contains an absolute prohibition against the doing of some act, as a general rule *mens rea* is not a constituent of the offence, but there is all the difference between prohibiting an act and imposing a duty to do something on the happening of a certain event. Unless a man knows that the event has happened, how is he to carry out the duty imposed?

Vested Rights

In *West v Gwynne*,[15] Buckley L. J. stated that,

> There is no presumption that an Act of Parliament is not intended to interfere with existing rights. Most Acts of Parliament in fact do interfere with existing rights.

Thus the presumption against interference with rights can only be invoked where an Act is 'reasonably susceptible of two meanings.' Thus in *Attorney General for Canada v Hallet Ltd.*,[16] Lord Radcliffe stated that,

> It is fair to say that there is a well-known general principle that statutes which encroach upon the rights of the subject, whether as regards person or property, are subject to a 'strict' construction. Most statutes can be shown to achieve such an encroachment in some form or another, and the general principle means no more than that, where the import of the enactment is inconclusive or ambiguous, the court may then properly lean in favour of an interpretation that leaves private rights undisturbed.

---

12 *Sherras v De Rutzen* [1895] 1 Q. B. 922.

13 (1937) 53 T. L. R.

14 [1948] 1 K. B. 695.

15 [1911] 2 Ch. 1, 12.

16 [1952] A. C. 427 at p. 450. See also *R v Halliday* [1917] A.C. 260 at p. 274.

The warning to Parliamentary Counsel is quite clear.

Consolidation Acts

Director of Public Prosecutions v Schildkamp[17] appears to have put beyond a doubt that there is a strong presumption that a consolidation Act does not alter the existing law. That is so because Parliament is given the assurance that a consolidating Bill does not make any substantial changes in the law. At the Committee Stage, therefore, there is practically no amendment to the Bill. The Long Title to the Bill usually states that it is an Act to consolidate the law relating to a given subject. In a case where the Long Title states that the Bill is for an Act to consolidate and amend the law amendments are very much restricted.

Retroactive, Retrospective Operation of Act

A statute may be said to be retroactive in operation or retrospective in operation. The two words are often used interchangeably[18] but there is a distinction – however subtle.

Driedger[19] establishes that there is a difference between *retroactive* and *retrospective* even if in the dictionaries the definition of the one word includes that of the other. The law reports are replete with discussions in which the two words are often equated and used interchangeably. In order to avoid confusion a clear distinction is required.

A statute could be retroactive but not retrospective. A statute could be retrospective but not retroactive. A statute could be both retroactive and retrospective. And statutes that are both retroactive and retrospective could be, and usually are, prospective in character.

It is a fundamental rule of English Law that no statute is construed to have a retrospective operation unless that construction appears very clearly in the terms of the Act, or arises by necessary and distinct operation.[20] The presumption against retrospective operation applies in the interpretation of legislation of a penal nature. The presumption is based on the general principle that penal enactments are construed strictly and not extended beyond their clear meaning.[21]

17 [1971] A. C. 1.

18 See, for example, C. K. Comans, 27 *Australian Law Journal*. 'The power of the Commonwealth Parliament to make retrospective or retroactive laws is well established.'

19 *Construction of Statutes*, p. 186.

20 *Phillips v Eyre* (1870) L. R. 6 Q. B. 23.

21 See, for example *Attorney-General for Canada v Hallet and Carey* [1952] A. C. 427.

The presumption applies to both retrospective and retroactive operation of the law. The test of retroactivity is different from that of retrospectivity. For retroactivity the question is whether there is in the Act, read as a whole, anything which indicates that the Act *must be deemed to be the law from a date antecedent to its enactment*? For retrospectivity the question is whether there is anything in the Act which indicates that *the consequences of an earlier event are changed, not for the time before the enactment, but prospectively from the time of enactment, or from the time of the commencement of the Act.*

The application of the presumption against the retrospective operation of statutes is a difficult problem in the process of statutory interpretation. There is a confusion between presumptions: the presumption against interference with vested rights and the presumption against the retrospective operation of the law.

A statute that interferes with or destroys a previously acquired right could not be said to be retrospective. Thus in *West v Gwynne*,[22] the question was whether s.8 of the Conveyancing Act 1892, was of general application; or whether its operation was confined to leases made after the commencement of the Act. It provided that in a lease containing a covenant against assigning or under letting without licence or consent, the covenant should be deemed to be subject to a proviso to the effect that no fine was payable for the licence or consent.

It was argued that a statute is presumed not to have a retrospective operation unless the contrary appears by express language or by necessary implication. Cozens Hardy M. R. assented to that general proposition but he said that he failed to appreciate its application to the present case. To Buckley L. J. *retrospectiv*e was inappropriate; the question was not whether the section is retrospective. 'Retrospective operation is one matter. Interference with existing rights is another.'

West v Gwynne also supports the proposition that there are two distinct kinds of requisites for the application of a statute 'drawn from time antecedent to its passing.' The first is a characteristic and an event. A statute cannot be said to be retrospective merely because it is brought into operation by a characteristic or status that arose before it was enacted.

That, in my view, would be *retroactive*. The second is a factual situation which occurred, or a status acquired, before the commencement of the statute. It is retrospective if it is brought into operation by a prior event described in the statute. In *West v Gwynne*, there was a factual situation which could be described as a characteristic only and not an event.

Language is not always exact. Hence the difficulty in saying precisely whether the words in an Act setting forth a factual situation are intended to describe an event or a characteristic. A provision of an Act that the Act applies

22 [1911] 2 Ch. 1.

to a person who was employed on January 1, 1970 has two elements. One, that the person referred to *took employment* on that day - an event. Two, that the person referred to was an *employee* on that date - a characteristic, a status.

In the *Queen v Vine*[23] it was provided that 'every person convicted of a felony' should be disqualified from selling spirits by retail. The court, by a majority, interpreted that provision to mean a convicted person. The statute therefore applied to persons convicted before the statute came into being. Lush J., dissenting, said the phrase meant 'every person who shall hereafter be convicted.' To the majority there was a disability, attached to a characteristic. A person who was caught within the ambit of that provision had *acquired* a *status*, that of a convicted person - whatever the date of the conviction. That, clearly, is a retrospective operation of the statute.

A retroactive statute is one that states,

> This Act shall be deemed to have come into force on the first day of July, 1980,

when its date of enactment is, say, June 1985.

A retrospective statute operates for the future. It is prospective in character but imposes new results in respect of a past event or transaction. A retroactive statute does not operate *backwards*. It operates *forwards* from a date prior to its enactment. A retrospective statute operates prospectively but attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was. A retrospective statute changes the law from what it otherwise would be with respect to a prior event or transaction.

In *West v Gwynne* the true reason for holding that the statute there was not retrospective was that there was no reference in the statute to a time past or transaction. The only reference was to leases of a certain kind. Yet Buckley L.J. rejected the presumption because the statute was not operative as of a past time. His definition of retrospectivity was in reality a definition of retroactivity. He said:

> If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective.

He meant *retroactive*.

Phillips v Eyre[24] dealt with an Act of Indemnity. The Act was 'expressed to be operative with respect to past transactions as of a past time' and thus was in essence retroactive. Where an Act attaches an obligation or disability or imposes a duty as a new consequence, prejudicial in most cases, of a prior event then it can be said to be retrospective. In *Re A Solicitor' s Clerk*[25] the statute provided that,

---

23 (1875) L. R. 10 Q. B. 195.

24 (1870) L. R. 6 Q.B.1.

25 [1957] 1 W. L. R. 1219.

> where a person who is or was a clerk to a solicitor … has been convicted of larceny … or any other criminal offence in respect of any money or property belonging to or held by the solicitor … an application may be made … that an order be made directing that … no solicitor shall … take or retain the said person into or in his employment.

It was held that the making of an order in respect of a clerk who had been convicted prior to the enactment of the statute was not a retrospective operation. Lord Goddard L.C.J. said:

> But in my opinion this Act is not in truth retrospective. It enables an order to be made disqualifying a person from acting as a solicitor's clerk in the future and what has happened in the past is the cause or reason for the making of the Order, but the order has no retrospective effect … This Act simply enables a disqualification to be imposed for the future which in no way affects anything done by the appellant in the past.

Indeed, the dictum of Lord Goddard L.C.J. is in fact a classic statement of what a *retrospective* statute is. The factual situation here was the characteristic of the clerk as a convicted person. Similarly in the *Queen v Vine*,[26] the statute imposed a disability on 'every person convicted of a felony'. That person had acquired a status, that is, the status of a convicted person. The statute attached a disability to a characteristic and not to the felonious act or the conviction as a conviction.

According to Driedger, there are three kinds of statutes that can properly be said to be retrospective but only one that attracts the presumption:

(a) statutes that attach benevolent consequences to a prior event. They do not attract the presumption;

(b) statutes that attach prejudicial consequences to a prior event. They attract the presumption;

(c) statutes that impose a penalty on a person who is described by reference to a prior event, but the penalty is not a consequence of the event. These do not attract the presumption against the retrospective operation of laws.

It is not difficult to identify a retroactive statute. There is a specific statement that it shall be deemed to have come into force on a date prior to its enactment. Or it is expressed to be operative with respect to past transactions as of a past time.[27] What is difficult is first to identify a retrospective statute and then to distinguish between those retrospective statutes that attract the presumption and those that do not. The latter may be illustrated by two examples:[28]

---

26 [1875] L. R. 10 Q. B. 195.

27 Driedger, *Construction of Statutes*, p. 186.

28 Taken from Driedger, *Construction of Statutes*, p. 198.

> A person convicted of impaired driving is disqualified from holding a license.

This provision imposes a new disability and the courts would in all likelihood hold that the statute would be given retrospective effect if it were applied in respect of prior convictions.

> A person convicted of impaired driving shall pay an additional insurance premium of $100.00 to the Government Insurance Commission.

Here, there is a further penalty imposed in respect of a conviction. But would a court following *R v Vine* and *Re A Solicitor' s Clerk* hold that its application in respect of prior convictions is not a retrospective operation?

The two examples given are not the same; the consequences are different and the extreme cases are easy to understand. Where an Act provides that,

> A person who has attained the age of eighteen years is qualified to vote at an election,

no one would say that the Act applies only to persons who attained the age of eighteen years *after* its enactment. This is a beneficial provision. But if an Act provides that,

> The lands of a person who has been convicted of the offence of treason are forfeited to the State,

no one would want to apply that Act to convictions *before* its enactment. This is a prejudicial provision. The situations in between these two extremes are the difficult ones.

The principle is that the presumption applies if the statute would attach a new duty, penalty or disability, that is to say, a prejudicial consequence, to a prior event.

To discover when a prejudicial provision is a consequence of an event and when it is not, it is instructive to examine cases like *R v Vine*. In that case the statute considered provided that,

> Every person convicted of a felony shall forever be disqualified from selling spirits by retail, and no license to sell spirits by retail shall be granted to any person who shall have been so convicted …

The question, as stated by Cockburn C. J., was whether a person who had been convicted of felony before the Act was passed became disqualified on the passing of the Act. There was no provision in the Act that could be construed as a rebuttal of the retrospective presumption. Cockburn, C. J. said:

> Here the object of the enactment is not to punish offenders, but to protect the public against public houses in which spirits are retailed being kept by persons of doubtful character.

He obviously construed the words, 'Every person convicted of a felony' as referring to a status or characteristic only, and not to a past transaction. The majority regarded the new disability as protection to the public, and not a new punishment. Archibald J. said:

> It is an enactment with regard to public and social order, and the infliction of the penalty is merely collateral.

In his view the statute was retrospective since he considered that a new disability was attached to past events. On Cockburn's view the statute was prospective only since the factual situation described in the statute was a characteristic that arose in the past and not a past event.

In *Re Pulborough*,[29] the Court of Appeal considered a provision of the Bankruptcy Act, 1883. It provided that where a debtor is adjudged bankrupt, he should be subject to certain disqualifications including election to the office of member of a school board. The question was whether the Act applied to a person who had been adjudged bankrupt before its enactment. The majority held that it did not. Lopes J. said:

> It has been contended that the words 'is adjudged bankrupt' are to be read, 'has been adjudged bankrupt either before or after the passing of this Act'. I cannot so read those words.

He continued,

> Under section 32 of the Bankruptcy Act, 1883, the respondent on being adjudged a bankrupt is disqualified from being elected a member of the school board until the adjudication of bankruptcy against him is annulled, or he obtains from the court his discharge, with a certificate to the effect that his bankruptcy was caused by misfortune, without any misconduct on his part … A new disability, therefore is imposed upon him, and disabilities are imposed on other persons which had no existence before the Bankruptcy Act of 1883. Having regard to the scope of the Act, and the rule of construction applicable to statutes, I am confirmed in my view that the true meaning of the words in section 32 'is adjudged bankrupt'

Davey C.J. stated:

> It has been suggested that the words be read as meaning 'where a man is an adjudicated bankrupt'. The answer seems to me to be that those are not the words before us, and that the words we have to construe are grammatically different. I think the words 'is adjudged' are the verb, whereas in the

29 [1894] 1 Q. B. 725.

> paraphrase suggested the word 'adjudicated' would be an adjective. The one form of sentence points to an event to happen, whereas the form suggested predicates a certain quality of the subject which may just as well attach to him by a previous adjudication as by a subsequent one.

Lord Esher dissented. In his opinion,

> … section 32 is not penal within the meaning of the proposition, which states that a penal statute must be construed strictly, and in my opinion it is not in the true sense of the term, retrospective. To my mind, to say that the legislature intended to punish a debtor of whom that can be said would be to charge the legislature with injustice. The disqualifications are intended solely for the protection of the public, and not by way of punishment. The case of *Reg. v Vine* is a strong authority to show that under such circumstances that which is enacted is not penal.

Driedger[30] considers that if the intent is to punish or penalise a person for having done what he did, the presumption applies because a new consequence is attached to a prior event. If the new punishment or penalty is intended to protect the public the presumption does not apply. In *R v Vine* the majority held that the object of the statute was not to punish offenders but to protect the public. Lush J. considered the Act a highly penal enactment, and on that view the presumption would apply.

In *Re Pulborough*, the majority held the disabilities to be added to those set out in the Bankruptcy Act. Lord Esher did not think that the new disqualifications were intended as punishment but that they were intended solely for the protection of the public.

In summary it may be stated that[31]

(a) an Act is retroactive where it changes the law from a date prior to the date of its enactment;

(b) an Act is retrospective where it attaches new consequences to an event that occurred prior to its enactment;

(c) an Act is not retrospective by reason only that it adversely affects an antecedently acquired right;

(d) an Act is not retrospective unless the description of the prior event is the factual situation that brings about the operation of the Act;

(e) the presumption against the retrospective operation of an Act does not apply

  (i) where the consequences attaching to the prior event are prejudicial ones, namely, a new penalty, disability or duty;

30 *Construction of Statutes*, p. 202.

31 Driedger, *Construction of Statutes*, pp. 202-3.

(ii) if the new prejudicial consequences are intended as protection for the public rather than as punishment for a prior event;

(f) Regulations cannot be given retrospective or retroactive effect unless the enabling Act so authorizes expressly or by necessary implication;

(g) there is one exception to the presumption against retrospective operation of an Act, that is, where an enactment is repealed and replaced, the new enactment is retrospective so far as it is a repetition of the former enactment.

The Presumption that Parliamentary Counsel Knows the Law

There is a presumption that Parliamentary Counsel know the state of the existing law. The presumption is based on the premise that each piece of legislation enacted by Parliament is an addition to the Statute Book. The addition does in certain circumstances amend the existing law, or could be so regarded. Hence the need for Parliamentary Counsel to be very conversant with the existing law. Parliamentary Counsel must take pains to know what they are amending. All the relevant existing law, common law and case law must be studied in their entirety.

If, as Cote[32] says,

> The legislator is deemed to be aware of existing legal rules and principles, and therefore presumed to have no intention of inciting unnecessary exceptions,

then, it is submitted that, Parliamentary Counsel who draft the Bills for Parliament should know and understand the existing law.

In interpreting an Act of Parliament the courts may choose a construction which encourages continuity rather than change in the existing law. In *Wellesly Hospital v Lawson*,[33] a non-psychiatric patient was attacked by a psychiatric patient. The hospital in defence relied on s.59 of the Mental Health Act. It provided that,

> No action lies against any pyschiatric facility or any officer, employee or servant thereof for the tort of any patient.

The Court of Appeal held that the Hospital could not rely on the Act. The section had not altered the common law relating to the duty of care. A hospital, the Court said, is under a common law duty to provide adequate control and supervision and to prevent injury to other persons such as visitors, staff or patients despite s.59. The breach of the independent duty to keep under rea-

32 *The Interpretation of Legislation in Canada*, p. 403.

33 [1978] 1 S. C. R. 893.

sonable control a patient who the hospital knows (or ought to know) has propensities to violence was not removed by the Act. In other words, if the Hospital had discharged its duty of care at common law, but the patient nevertheless committed the tort, then the Hospital could rely on the section.

This case was explained further in *Nadeau et Benard v Gareau*.[34] A legislature is not deemed to have intended to modify the law beyond what the Act purports to achieve whether stated in express terms or by necessary implication, in other words, beyond the immediate object of the Act.

The presumption has been applied in many cases involving fundamental rights and property rights at common law. The warning to Parliamentary Counsel is clear. Where a change is intended then this must be expressed in clear words. Cote[35] has argued, however, that with trends in modern legislation one cannot say that the legislature does not intend to change the law.

There is no need for the judiciary to fear legislative encroachment on the common law. 'In a period of intense legislative activity, justified in part by the inadequacies of the general law, such a presumption, to borrow the words of Lord Simon, has neither a constitutional, legal nor a pragmatic justification.'[36]

Coherence in Legislation

Different enactments of the same legislature are supposed to be consistent. The courts favour an interpretation which leads to harmony amongst statutes more so, in dealing with statutes *in pari materia*. The basic principle as laid down by Lord Mansfield in *R v Loxdale*[37] is that,

> Where there are different statutes *in pari materi*a though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and as explanatory to each other.

There is a further presumption that there must be uniformity in the law and that the meaning of a word in statutes dealing with the same subject matter should be the same. 'It is permissible,' said Evershed J., in *Powell v Cleland*,[38] 'to call in aid for the construction of words or phrases used in one Act, meanings given to them in an earlier Act *in pari materia*. A corollary to this is that if two statutes considered *in pari materia* are drafted differently then a different meaning is intended. Statutes *in pari materia* are not treated as if they are parts of one Act'.[39]

---

34 [1967] S. C. R. 209.

35 *Ibid*., 408.

36 *Ibid*., 409.

37 (1758) 1 Burr. 445 - 447.

38 [1948] 1 K. B. 262, 273

39 *R v Johnson* (1845) 8 Q. B. 102, 106.

There are many examples of cases in which the courts have held statutes *in pari materia* to be inconsistent. A statute allowing a limitation period to be extended either before or after its expiry and another allowing extensions only before expiry were held to be inconsistent.[40] The same difficulties exist when there is concurrent legislative jurisdiction such as between a State and a local authority or a town board. This becomes more difficult as the repeal of earlier provisions can only be by implication.

The courts have tried to reconcile conflicting provisions caused by a Parliamentary Counsel's failure to examine the existing law before drafting a piece of legislation. In *Gladysz v Gross*[41] the District Pound Act, 1936, provided that the owner of an animal is liable for damages caused by the animal while wandering in a pound district. The Trespass Act, 1936, held the owner of damaged property liable unless he had built a fence according to the Act's requirements. Each statute stood on its own. For if there are two inconsistent enactments it must be seen whether one cannot be read as a qualification of the other.[42]

The courts have also attempted to harmonise conflicts by applying the order of primary holding that a latter statute, by implication, repeals an earlier statute in the face of the presumption against implied repeal.[43]

Conflicts also arise with Regulations made under an Act. The courts have held that, in case of inconsistencies, reference be had to the enabling Act to establish priority between the two. At times it has also been said that if the Regulations are made by the same authority, the presumption of inconsistency applies. Whatever the courts attempt to do, difficulties continue to exist.

For Parliamentary Counsel the criteria used to determine which Regulations have priority over others are not the solution nor a complete cure to defective drafting.

International law

Parliamentary Counsel should be aware of the general rules of private and of public international law, as well as those which apply specifically to Counsel's jurisdiction by treaty or other international agreement operating in the sphere of international law. It would be quite disastrous if a law were to apply to the exclusion of a treaty to which the State is a party. There is a presumption however that Parliament does not intend to legislate against international law or its international obligations. The law is not void *per se* if Parliament does so.[44]

40 *Massicote v Bentru* [1969] S.C.R. 818.

41 [1945] 3 D.L.R. 208.

42 *Gladysz v Gross* [1945] 2 W.W.R. 266.

43 *Seaward v Vera Cruz*, (1884) 10 A.C. 59 at p. 68.

44 *Arrow River & Tributaries Slide & Boom Co. v Pigeon River Co* [1931] 2 D. L. R. 216.

But this presumption now receives a great deal of attention especially in the area of human rights in Commonwealth countries. The Secretary-General of the Commonwealth, Sir Shridath Ramphal said, whilst opening the 1988 Judicial Colloquium in Bangalore, India, that,

> Recently, however, a new process has begun. Judges in jurisdictions as diverse as Britain, Zimbabwe and Australia, have begun to have recourse to, and interpret fundamental rights and obligations against the background of international human rights norms. This process will be stimulated and be better informed if legal practitioners are encouraged to highlight relevant international human rights jurisprudence in domestic courts.

The Zimbabwean case of *Ncube Tshuma and Ndlovu v The State*[45] is pertinent here. It is concerned with a contravention of s.15 of the Constitution. It was argued that the punishment of whipping was unconstitutional as it was torture or inhumane and degrading punishment. The court had recourse to extensive jurisprudence on international practice and decisions. The court said that,

> … perhaps the most important decision is that of the European Court of Human Rights in *Tyler v U. K.* delivered on 25th April, 1978, for it was concerned directly with Article 3 of the European Convention On Human Rights, a provision worded initially identical to section 15(1) of the Constitution of Zimbabwe.

The court concluded that the punishment contravened the Constitution. However, the Zimbabwean legislature amended the Constitution so as to make it lawful to inflict the punishment. Be that as it may, the lesson for Parliamentary Counsel is clear. We cannot disregard international law, especially treaties and conventions to which one's Government is a party. To disregard treaties and conventions when drafting legislation is to seek to embarrass the Government.

Judicial Interpretation

This is a very important issue which Parliamentary Counsel should not ignore. Parliament is presumed to have been aware of judicial decisions made prior to the enactment of an Act. The decisions form part of the context within which Parliament passes a piece of legislation; the context is relevant to the interpretation of the Act, and this principle is easy to justify. Where the courts have given a particular meaning to a word in a judicial decision and Parliamentary Counsel uses that word in an Act, then it will be assumed that Counsel intended the word to have the meaning as interpreted by the courts.

---

45 SC 156/87.

The same principle applies where legislation is inspired by decisions of a court of a different jurisdiction. The meaning given to the Act by the courts of the other jurisdiction will be given to it by the domestic court. This principle is buttressed by the doctrine of precedent.

The principle, however, is open to criticism. Duff J. in *Lanston v. Northern Publishing Co*.,[46] relying on Sir George Jessel in *Hack v London Provident Building Society* [47] observed that it is always dangerous to construe the words of one statute by reference to the interpretation which has been placed upon words bearing a general similarity to them in another statute dealing with a different subject matter. That said, Parliamentary Counsel's acquaintance with the decisions of the courts in relation to statutes *in pari materia* and the relevant foreign legislation or the common law cannot be ruled out. Counsel needs to be aware of these decisions which may be binding or highly persuasive.

The Interpretation Act

An Interpretation Act is a dictionary for all other Acts of Parliament of a particular jurisdiction. It is, in essence, part of every other Act of Parliament but it applies only if there is no contrary intention. If it is intended to depart from the meaning given to a word or an expression in the Interpretation Act, express words are required to achieve that. There is an abundance of case law on the significance of the Interpretation Act.

The purposes of an Interpretation Act are

(a) to avoid repetition of a range of words and expressions;

(b) to secure uniformity in the drafting of legislation in a particular jurisdiction;

(c) to help in the construction of an Act of Parliament.

As the common law resided in the breasts of the judges,[48] so must the Interpretation Act reside in the chests of Parliamentary Counsel. Counsel must bow before it for its provisions are but the lessons of experience. It makes for stability and certainty in the statute law; it eliminates trial and error, and is a steadying force, a guarantee against the vagaries of the shifting sands inherent in the progress of language itself. The Interpretation Act, 1889[49] outlived man's three score and ten years. Its offspring are still of great yeoman service in Commonwealth jurisdictions. It may have died with the Interpretation Act, 1978,[50] but it still rules us from the grave.

46 (1922) 63 S. C. R. 482

47 (1883) 23 Ch. D. 103.

48 *Gray v Gee* (1923) 39 T. L. R. 429 at p. 430.

49 52 & 53 Vict. c. 63.

50 1978 c. 30.

The presumptions dealt with in this Chapter do not tell the full story. Only an outline of certain areas has been covered. The presumptions are enough to put Parliamentary Counsel on the alert. There are presumptions of legislative intent relating to individual rights and freedoms, and many more. They are apparent in penal, taxation, property and procedural statutes. They are intended to ensure that justice is done and that the influence of the principles of natural law and justice are not entirely forgotten.

These are not binding as *stare decisis* may be binding. Yet they should be borne in mind in the drafting of legislation. We must not sacrifice clarity, uniformity, certainty in the law. Clarity, uniformity, certainty can be achieved in the drafting of legislation through the competency of Parliamentary Counsel. Failure to do so only places an unnecessary - perhaps an intolerable - burden on the audience for whom an Act of Parliament is drafted.

Chapter 10

Offences and Penalties

Laws are commands in the main. A command demands obedience. Obedience to the law is secured by sanctions. Sanctions are the penalties attached to disobedience to the law's commands. An enactment would thus contain a penal provision to ensure its observance or compliance. Penal provisions must be clearly expressed; they are strictly construed by the courts, in favour of the individual.[1]

The Elements

There are three elements in a penal provision. The element of prohibition, the contravention of the prohibition, and the sanction, that is, the penalty for the contravention. A provision which states that,

> A person who files a false return commits an offence and is liable on summary conviction to a fine of ten dollars,

has all the three elements lumped together. The provision implies

(a) a prohibition: *A person shall not file a false return;* or *No person shall file a false return*;

(b) a contravention of the prohibition: the filing of the false return, when the command is not to file a false return; and

(c) the sanction: *is liable on summary conviction to a fine of ten dollars.*

It is better to keep the three elements as separate as possible. Parliamentary Counsel should always seek to provide specifically for the prohibition, that is,

> A person shall not file a false return

or

> No person shall file a false return.

Where this is not done, the prohibition is lumped with the contravention. A person *should* be told in no uncertain terms what that person must not do. A person should be forewarned. Then it is sensible, as it were, to punish that person for the disobedience.

The system of jurisprudence in most Commonwealth countries when a

---

1 *Attorney General for Canada v Hallet and Carey Ltd.* [1952] A. C. 427 at p. 450. See also Lord Atkinson in *R v Halliday* [1917] A. C. 260 at p. 274.

person is accused of an offense is accusatorial, not inquisitorial. Besides, in most Commonwealth countries the constitution specifically provides, *as a fundamental human right*, that a person is presumed innocent until he is proved guilty or has pleaded guilty. It is therefore not appropriate to provide, for example, that,

> A person who contravenes subsection (1) is guilty of an offence.

The question of *guilt* is not determined by legislation. It is the function of a court of competent jurisdiction to find guilt. Legislation states the prohibition, its contravention as an offence and the penalty for the offence as a sanction.

Driedger[2] admits that when the expression *shall be guilty* is used 'a person is not actually *guilty* until he has been convicted.' So why state then that the person is *guilty*? On the understanding that the person is *not* guilty? Indeed, subsection 5(1) of the Criminal Code of Canada[3] states that,

> Where an enactment creates an offence and authorizes a punishment to be imposed in respect thereof,
>
> *(a)* a person shall be deemed not to be guilty of that offence until he is convicted thereof, …

So why provide that a person *shall be guilty* of the offence and at the same time that person *is deemed not to be guilty*?

The use of *shall* is also not appropriate. Used in that sense, it is a false imperative; no one is *commanded* to do anything. Here a statement of the consequences of the person's act is provided for. It is better, then, to use the expression *commits an offence*. The same consideration applies to *shall be liable*. It is not *a command* therefore *is liable* is the better expression:

> A person who contravenes subsection (1) commits an offence and is liable, on summary conviction, [on indictment] to a fine not exceeding … or to imprisonment for a term not exceeding …

Perhaps *shall be guilty* has its origin in *shall have been found guilty*:

> Where a person shall have been found guilty of an offence under section 10, he shall be liable …

There is no need for the use of the subjunctive mood and the contraction became *shall be guilty*. But then there is no command.

> A person found guilty of an offence under section 10 is liable, on summary conviction, to …

will serve equally well.

Statutory offences are of two kinds: summary offences and indictable

---

2 *Composition of Legislation*, p. 227.

3 Quoted by Driedger, *Ibid*.

offences. A summary offence carries a lesser penalty. An indictable offence carries a severe penalty. To provide that a person is liable *on summary conviction*, is to provide for a summary offence. Similarly, to provide that a person is liable *on indictment* is to provide for an indictable offence.

A summary offence will normally be dealt with by a court of limited jurisdiction, say, a Magistrates' Court. An indictable offence will be dealt with by a superior court of record, say, the High Court. But much will depend upon the legislation that sets up the hierarchy of courts, the jurisdiction of each court, and the policy behind the law in relation to punishment.

It is better to provide for the maximum penalty leaving the courts to determine whether they will impose up to that limit:

> … is liable to imprisonment for a term not exceeding ten years or to a fine not exceeding ten thousand dollars or to both that fine and imprisonment.

Here three penalties have been provided for:

(a) a fine of not more than ten thousand dollars;

(b) a term of imprisonment not more than ten years; and

(c) a combined penalty of a fine *and* a term of imprisonment not more in each case than the penalty specified in paragraphs (a) and (b).

It may be desirable, in a given case, for a minimum penalty to be specified:

(a) … is liable to imprisonment for a term not less than five years.

(b) … is liable to a fine of not less than five thousand dollars.

Both a minimum and a maximum may be specified:

(a) … is liable to imprisonment for a term not less than five years nor more than fifteen years.

(b) … is liable to a fine of not less than five hundred dollars and not more than five thousand dollars.

Where money is no object, 'an insufficient penalty by way of a fine merely invites a repetition of the offence.' Where, for example, in a drug case only a fine of, say, one hundred thousand dollars is specified, the drug lords will readily pay the fine. Millions of dollars are involved in drug deals. In such cases it would be better to provide for a sufficiently long term of imprisonment without the option of a fine.

A penalty prescribed for a statutory offense may be held to exclude a civil liability or remedy. Where that is the case, express provision should be made that the penalty prescribed is in addition to the civil liability or remedy:

(a) Subsection (1) is without prejudice to a civil liability arising under any law statutory or otherwise.

(b) Subsection (1) is in addition to a civil remedy available under any other law.

Where an Act creates a number of offences it is a matter of style *and* convenience whether

(a) to have the penalty prescribed within the section in which the offence is created; or

(b) to have an omnibus section to deal with all the offences.

Having stated the prohibition, a subsection will be provided stating that,

A person who contravenes a provision of subsection (1) or (2) commits an offence, and is liable, on summary conviction, to a fine not exceeding five thousand dollars.

This type of penalty may commend itself where *different* penalties are required for the various and varying offences. Each section will carry its own sanction. Where the same penalty is prescribed for the various contraventions the provision will simply state, under an offences and penalty section, that,

A person who contravenes a provision of this Act commits an offence, and is liable, on indictment, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding ten years.

Where there are many prohibitions in the Act and the penalty is not stated in each relevant section, the omnibus provision may take on this form:

A person who contravenes a provision of

(a) section 10 commits an offence, and is liable, on summary conviction, to …;

(b) section 12 or 14 commits an offence, and is liable, on indictment, to …;

(c) sections 16 to 36 commits an offence, and is liable, on indictment, to ….

This could be redrafted thus:

A person commits an offence who contravenes

(a) section 10 and is liable, on summary conviction, to …;

(b) section 12 or 14 and is liable, on indictment, to …;

(c) sections 16 to 36 and is liable, on indictment, to …;

It is not unusual to find a provision which states that,

A person shall not land goods at a port without the permission of the Comptroller of Customs. Penalty: One hundred dollars.

Or to provide that,

The penalty for an offence under subsection (1) is one hundred dollars.

Great care is needed in order to avoid ambiguity, in using that type of provision. In *R v Sillery*[4] subsection (3) of s.8 of the Crimes (Hijacking of Aircraft) Act, 1972, provides that,

The penalty for an offence against this section is imprisonment for life.

This plain, simple provision led to a plain, simple question: does the provision impose a mandatory penalty or does it confer a discretion on the Court to impose a penalty less than life imprisonment? The trial judge and the first appellate court held that the penalty was mandatory. The higher appellate courts held that the penalty was discretionary.

Here are a few examples of offences and penalties.

A Number of Offences

(1) A person commits an offence where that person

(a) fails, upon demand, to produce a copy of the document required under section 12;

(b) refuses to comply with a direction issued by the Minister;

(c) fails to comply with a provision of section 23.

(2) A person who commits an offence under subsection (1) is liable, on indictment,

(a) for a first offence, to a fine not exceeding ten thousand dollars; and

(b) for a second or subsequent offence, to imprisonment for a term not exceeding ten years.

Continuing Offence

(1) An editor of a newspaper shall, within thirty days of the coming into force of this Act, file with the Registrar-General the declaration specified in the Schedule; and no issue of the newspaper shall be published after the thirty days unless the declaration is filed.

(2) An editor who fails to comply with subsection (1) commits an offence and is liable, on indictment, to a fine of not less than five thousand dollars, and to a further fine of one thousand dollars for each issue of the newspaper that is published in contravention of the subsection.

4 (1980) 30 A. L. R. 563.

Imprisonment for a Fine

Where a fine is imposed under this section, a term of imprisonment may be imposed in default of payment of the fine, but no such term shall exceed

(a) two years, where the term of imprisonment that may be imposed for the offence is less than five years, or …

Smith v Mens Rea

The question of *mens rea*, in relation to a statutory offense, has generally been dealt with in Chapter Nine. However, the decision of the House of Lords in *D. P. P. v Smith* [5] raises important controversial issues as to the nature of the intent required in criminal offenses. Although *Smith* deals with murder, the lessons thereof are of significance to Parliamentary Counsel. A few preliminary questions need to be dealt with:

> Should the jury, where murder is alleged, be bound to infer the intent to kill or the intent to inflict grevious bodily harm?
>
> Should the objective or the subjective approach to intent, apart from its application to intent to murder, or, where relevant, to foresight, be adopted in the criminal law?
>
> Should the requirement of intent in murder, whether as ascertained subjectively or objectively, be satisfied by either an intent to kill or an intent to inflict grievous bodily harm?

The nature of the intent required to establish a criminal offence raises important and controversial issues.[6] The decisions of the courts reveal that the meaning of imputed intent with regard to the key words *intention*, *intend* and *intent* have been controversial as to their proper meaning.

There are two schools of thought concerning offences which require proof of intent. The first school, led by Lord Salmond, believes that the result of an act is intended only where it is desired. This is thought to be the ordinary meaning of the word. It is termed *specific intent* or *direct intent*.

The second school gives *intent* a wider meaning. It believes that a result is intended where it is desired and also where it could be forseen by a person as the consequence of that person's act. This view states that no one knows that a result is certain to follow from a person's act. A person may know that a desired purpose cannot be achieved without causing another result. This is termed *imputed intent*.

---

5 (1961) A. C. 290.

6 Item XIII First Programme, Law Commission Report, Professional Books, 1980.

The case of *D. P. P. v Smith*[7] has had a great effect on the law relating to imputed criminal intent. In that case, Smith the accused, was driving a car which contained some stacks of stolen scaffolding clips. He was told by a police constable, who suspected the goods to be stolen, to draw into the kerb of the road. Smith did not stop. Smith accelerated. The police constable clung to the side of the car. He was shaken off into the path of another vehicle. The injuries were fatal.

At no time during the trial did the prosecution submit that an actual or specific intent to kill police constable Meehan had been made against Smith.[8] Thus, the issue for the jury was,

> Whether the prosecution had established that the appellant intended to cause the officer grievous bodily harm.[9]

In his summing up the trial judge stated that,

> The intention with which a man did something can usually be determined by a jury only by inference from the surrounding circumstances, including the presumption of law that a man intends the natural and probable consequences of his acts.[10]

The jury found Smith guilty of murder. This was reduced to manslaughter in the Court of Appeal. The Court of Appeal held that the presumption was not an irrebuttable presumption of law. Byrne J. felt that the presumption merely meant

> that as a man is usually able to forsee what are the natural consequences of his acts, so it is, as a rule, reasonable to infer that he did forsee them and did intend them.[11]

Byrne J. noted that this is an inference which may be drawn, but if on the facts of the case it is not a correct inference, it should not be drawn.[12]

Byrne J. distinguished two types of cases. One, where the act must obviously cause bodily harm and the second, where a reasonable man would realize that his act might cause grievous bodily harm.[13] Byrne J's two categories represent the two schools mentioned. He noted that intent and desire are two different things. For him, once it is proved that an accused man knows that a result is certain, the question of desire is irrelevant.[14]

---

7 *Ibid.*
8 *Ibid.*, 299.
9 *Ibid.*, 325-6.
10 *Ibid.*
11 *Ibid.*, p. 300.
12 *Ibid.*, p. 300.
13 *Ibid.*, p. 301.
14 *Ibid.*, p. 302.

The verdict was reduced to manslaughter on the basis that the summing up may have influenced the jury into thinking that they were 'entitled to infer guilty intent merely on what a reasonable man would think to be likely, instead of treating the latter only as a pointer to the actual state of mind of the accused.'[15]

In the House of Lords, Viscount Kilmuir delivered the majority judgment. The main issues raised were:

1. Whether a jury is bound to infer the intent to kill or inflict grievous bodily harm?
2. Should the natural and probable consequence be the only basis for intent or should proof of actual intent be ascertained?
3. Should the approach to intent in the criminal law be subjective or objective?
4. Should the requirement of intent in murder whether ascertained subjectively or objectively, be satisfied by either an intent to kill or an intent to inflict grievous bodily harm?

Viscount Kilmuir noted that any definition of intent in murder should require that the act be aimed at someone so as to exclude negligence or carelessness.[16] He quoted Holmes J., *The Common Law*, as the true principle:

> The test of foresight is not what this very criminal foresaw, but what a man of reasonable prudence would have foreseen … the question of knowledge is a question of the actual condition of the defendant's consciousness, the question of what he might have foreseen is determined by the standard of the prudent man, that is by general experience.[17]

Like Donovan J. at first instance, Viscount Kilmuir applied the test of the reasonable man. But here the reasonable man is the ordinary reasonable man, 'the ordinary prudent man,' 'the reasonable prudent man'. The attribute,

> in judging of intent, denotes an ordinary man capable of reasoning, who is responsible and accountable for his actions.[18]

Viscount Kilmuir felt that the true question was whether there was a real probability of grievous bodily harm which meant,

> sufficiently serious harm to interfere with the victim's health or comfort.[19]

Though Viscount Kilmuir inferred that intent included foresight he made no satisfactory distinction between how intent is proved and the circumstances

15 Law Commission Report, Vol. 1, p. 224.
16 *D.P.P. v Smith, op. cit*, p. 301.
17 *The Common Law*, p. 53-54, quoted in *Smith*, p. 327.
18 *Ibid*., p. 331.
19 *Ibid*.

of the case. He suggests that in murder there is an irrebuttable presumption that a person intends the natural consequences of that person's act. There should not even be a rebuttable presumption since this would shift the onus to the defendant to prove that the results were not intended.

One foundation of the criminal law is that a person is innocent until that person has been proved guilty in a court of law; and that the onus is on the prosecution to establish guilt.

In *R. v Steane*,[20] the leading case against the view that intent includes foresight, the notion that a person intends the natural consequences of his act had been rejected. During the war, Steane (the accused) was ordered to make broadcasts for the enemy at the risk of his family being hurt. He was charged with doing acts likely to assist the enemy. He denied the intention. The court held that the prosecution must prove a guilty intent, since the act was done in subjection of the enemy. Steane was acquitted.

It is submitted that the court seemed to have equated intent with purpose. Rather than holding intent to be equivalent of purpose, the court should have acquitted him on the defence of duress. Steane *intended* to assist the enemy in order to save his family from certain consequences. Lord Denning[21] noted that

> the concept of intent cannot distinguish between the man who assists the enemy in order to save his family and the man who assists the enemy in order to earn a packet of cigarettes. Only the law of duress can make the distinction.

Steane was decided before *Smith*. The cases subsequent to *Smith* have either distinguished or disapproved that case. The courts have put the issue of intent in a subjective rather than in an objective manner.[22]

In *R v Moloney*,[23] the accused and his stepfather were drinking in a friendly way in a house. After a while they started to play a drunken game of whom was quicker at the trigger. Moloney killed his stepfather. Brown J. directed that the prosecution had to prove that Moloney intended to kill his stepfather or to cause him serious injury.

On appeal Bridge L.J. did not define intent but provided guidelines on how to identify it. He noted that judges should avoid any elaboration of what is meant by intent and leave it to the good sense of the jury to decide whether the accused acted with the necessary good sense.[24]

---

20 [1947] 1 All E.R. 813.

21 *Responsibility Before the Law*, quoted in Smith, *Criminal Law Cases and Materials*, 6th Ed. p. 65.

22 *See Hardy v Motor Insurance Bureau* [1964] 3 W. L. R. 433 and *Leung Kam Kwok v R* (1985) 81 Cr. A. R 83; *R. v Geff* [1985] 1 All E. R. 1025; 'The Mental Element in the Crime of Murder' [1980] 104 L.Q.R. 3.

23 [1985] 1 All E.R. 1025.

24 *Ibid*., 1036.

Lord Bridge advocates the subjective test:

> The first fundamental question to be answered is whether there is any rule of substantive law that foresight by the accused of one of those eventualities as a probable consequence of his voluntary act where the probability can be defined as exceeding a certain degree, is equivalent or alternative to the necessary intention.[25]

For Lord Bridge foresight of consequence belongs in evidence. He notes that the presumption in *Smith* was wrongfully treated as creating an irrebuttable presumption of substantive law.

Lord Scarman in *R. v Shankland and Hancock*,[26] questioned whether *Moloney* was sound. Striking miners in an attempt to prevent a fellow worker from breaking a picket line, had pushed a concrete block from the rail of a bridge (on which they placed he block) causing it to fall onto the taxi. The block struck the taxi in which the worker was travelling, killing the taxi driver.

Lord Lane felt that the judge had unwittingly misdirected the jury based on the way in which the guidelines in *Moloney* were expressed.[27] He felt that the real problem was to decide to what extent the high degree of likelihood (viewed objectively of death or serious injury resulting) can be taken into account by the jury.[28] The law was back to where the Court of Appeal left it in *Smith*.

The House of Lords referred to *D. P. P. v Smith* as 'an unhappy decision,' and attempted to clarify the law by laying down three guidelines:

1. The mental element of murder is a specific intent to kill or inflict grievous bodily harm. Foresight does not necessarily imply intent. This should be left to the jury.
2. Foresight is only evidence of intent.
3. The probability of the result of the act can be critical in determining whether the result was intended.

It is submitted that the probability of a consequence taken to have been foreseen should be overwhelming before it should suffice to establish intent. General Colin Powell foresaw that troops would be killed in Iraq during operation *Desert Storm*. He never intended that they *should* be killed. He knew of the likelihood that some of them would be killed.

The test should be subjective. Should the accused man have been aware? In *Moloney*, Lord Bridge gave an example of a man who boards a plane at London airport, which plane he knows to be going to Manchester. Lord Bridge notes that Manchester might be the last place that man wanted to go since his motive is to escape. Did that man form the intention to go to Manchester when he boarded the plane?

---

25 *Ibid*., 1038.
26 [1986] 1 All E. R. 641.
27 *Ibid*., 643.
28 *Ibid* 644.

It could be argued that he was so intent on escaping that he did not address his mind to it. Bad weather might cause a delay at Heathrow. The plane might even arrive two days after it should have landed at Manchester. Should the court examine all the circumstances of the case or should the mere fact of boarding prove the intent?[29]

It is recommended that a court or jury in determining intent in criminal offences should weigh the evidence in a particular case. Relevant factors should include whether the result was intended or whether the accused foresaw that the result might occur and whether the accused was reckless as to the results of the action taken. These would be decided subjectively.

A person should be regarded as intending a particular result if that person actually intends it or has no doubt that the conduct will have that result. Persons who are unaware of the probability of a consequence should not be held to have *intent* for the purposes of the criminal law. Where *intent* or *foresight* is required it should be subjectively proven.[30]

It has been argued that the intent to inflict grievous bodily harm should be an alternative to the intent to kill. First, the intentional infliction of grievous bodily harm although not actually intending to kill should be punished as severely as murder. Secondly, it is argued that eliminating the intent to inflict grievous bodily harm would encourage ruthless criminals to inflict grievous bodily harm in the furtherance of some purpose other than killing.[31]

It is submitted that,

1. A subjective rather than an objective test should be applied when determining intent in murder cases.
2. Murder should correspond to its popular meaning of the intentional killing of a human being.
3. In murder grievous bodily harm should be distinguished from grievous bodily harm in other criminal offences.
4. In determining whether a person knows that a particular circumstance exists the court should take into consideration that a reasonable man under the particular circumstances would have known that the circumstance existed but should not use this fact as the basis of decision.
5. An intent to inflict grievous bodily harm should not be regarded as an alternative to the intent to kill.

29 *Ibid*., 1037.

30 Law Commission Report, Vol. 1, p. 229.

31 *Ibid*., p. 230. See also *Buzzard, Intent* [1978] C. L. R. 5, and Smith *Intent, a Reply*, [1978] C. L. R. 14.

It can be stated that the general rule that a person intends the natural consequences of that person's act should be changed. It is seldom helpful and always dangerous.[32] The failure to distinguish between intentional and unintentional killing

> is just one among many indefensible barbarities which still disfigure English law.[33]

The cases reveal that *Smith* was wrongly decided. In the words of an Australian Judge,

> Hitherto I have thought that we ought to follow the decisions of the House of Lords at the expense of our own opinions and cases … having carefully studied *Smith' s*case I think that we cannot adhere to that view or policy. There are propositions laid down in the judgment which I believe to be misconceived and wrong.[34]

What then is intent?

Since external actions indicate interior motives, a person's *intent* can only be a matter of *inference from* what that person *actually does* or *expressly intends to do*. 'It is common knowledge that the thought of man shall not be tried, for the Devil himself knoweth not the thought of man.[35] Hence

> it is a rule of common law, as well as common sense, to look at what is done not what is said.[36]

That actions speak louder than words is a common adage. A standard test for *intention* could be drafted thus:

> In determining whether a person intended a particular result, the standard test is whether the person whose conduct is called in question
>
> *(a)* did intend to produce the consequences that actually resulted, or
>
> *(b)* had no substantial doubt or could not have had any doubt that the facts relied upon would produce the consequences that did result.

The test for *knowledge* could then be drafted thus:

> The standard test for knowledge of the circumstances surrounding a case is whether the person whose conduct is called in question
>
> *(a)* knew of the relevant circumstances of that case, or

---

32 *R v Stapleton* (1952) 86 C. L. R. 358 at p. 365.

33 Professor Hart, quoted in Smith and Hogan, *Cases and Materials* p. 65.

34 1963 A. L. R. 524 at p. 537.

35 Cited in *Brogden v Metropolitan Rly. Co.* (1877) 2 App. Cases 666 at p. 692. See also *Keighley Maxsted & Co. v Durant* [1901] A. C. 240 at p. 247.

36 *Caine v Coulton* (1863) 1 H & C 764 at p. 768

(b) had no substantial doubt or could not have had any doubt that the facts relied upon would produce a particular result.

In sum then, the relevant questions that *intent* raises are,

Did the person design what happened?

Did the person resolve or propose to do what that person did?

And we are back to the state of mind, inferred from what did happen, in which a person seeks or sought to accomplish a given act through a given course of action.

It is now pertinent to note what Wills J., said in *R v Tolson*:[37]

> Although, prima facie and as a general rule, there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject matter and may be so framed as to make an act criminal whether there has been any intention to breach the law or otherwise to do wrong or not … in such a case *the substance of the enactment is that a man shall take care that the statutory direction is obeyed, and that if he fails to do so, he does so at his peril.*(Italics supplied).

There is a rule that statutes imposing criminal or other penalties are narrowly construed. This construction is in favour of the person against whom the action is brought. In former times this rule was vigorously applied, but not now. For one reason, judges do not now have a hand in the drafting of legislation. This is left to Parliamentary Counsel. For the other, one would love to say that legislation is better drafted than in times past.

The modern position would appear to be that in construing a penal Act, if 'there appears any reasonable doubt or ambiguity, that doubt or ambiguity is to be resolved in favour of the person who would be liable to pay the penalty.' As Lord Esher said,

> If there is a reasonable interpretation which will avoid the penalty in any particular case, we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections.[38]

Plowman J. has also said that,

> In every case the question is simply what is the meaning of the words which the statute has used to describe the prohibited act or transaction? If these words have a natural meaning, that is their meaning, and such meaning is not to be extended by any reasoning based on the substance of the

37 (1889) 23 Q. B. D. 168 at p. 173:

38 *Tuck and Sons v Priester* (1887) 19 A. B. D. 629 at p. 638. See also *London and Country Commercial Properties Investments v Attorney General* [1953] 1 W. L. R. 312.

> transaction. If the language of the statute is equivocal and there are two reasonable meanings of that language, the interpretation which will avoid the penalty is to be adopted.[39]

However, the court must assure itself that the person to be penalised is fairly and squarely within the plain words of the enactment. It would not do if it is a question of 'substantially within' the mischief. And it has been said that,

> The sooner this misunderstanding is dispelled and the supposed doctrine given its quietus the better it will be for all concerned, for the doctrine seems to involve substituting 'the uncertain and crooked cord of discretion' for the golden met-wand of the law.

Parliamentary Counsel is required to use express language for the creation of a criminal offence. No Act will be deemed criminal unless the Act is necessarily made a criminal offence by the words of the statute concerned. In other words Parliamentary Counsel should set out the elements of an act or of an omission which would constitute an offence. For unless those elements are present a person cannot be convicted of that offence.

It may be the intention to bring a person within the ambit of the law; that intention may be completely different from what is set out in the Act which is what would be dealt with by the courts. Where there are doubts, the doubts will be resolved in favour of an accused person. The courts will not readily supply omissions.

39 *Re H. P. C. Productions Ltd.* [1962] Ch. 466 at p. 485.

Chapter 11

Consolidation

The provisions relating to the law on a given subject matter are often found in a series of Acts.[1] As a consequence, investigation of the law on a given subject requires simultaneous reference to a number of separate Acts. This problem can be solved by a re-enactment of the scattered provisions into one Act.[2] Consolidation is thus the process whereby several Acts of Parliament are brought together in a single, comprehensive Act.

Consolidation is a process of combining the legislative provisions on a single topic into one coherent enactment.[3] The earlier Acts of Parliament are repealed. In their place is substituted a single Act which embraces the subject matter of the earlier Acts. The aim of consolidation is to allow for easy access to a particular subject matter on which there would have been numerous amendments to the law at different times.

The Objects

Laws are constantly being changed. The need for consolidation is perpetual:

> The very object of consolidation is to collect the statutory law bearing upon a particular subject, and to bring it down to date, in order that it may form a useful code applicable to the circumstances existing when the consolidating Act was passed.[4]

There are three forms of public consolidation Bills. The first form is a pure consolidation.[5] The second form is a consolidation with corrections and minor improvements; this is normally done under the authority of a statute.[6] The third form includes all those forms in addition to provisions which give effect to the recommendations of law reform agencies and other bodies.

Under pure consolidation, a joint committee of Parliament normally makes any amendment which is necessary to bring the Bill into conformity with the existing law. Under the Westminster system of government, where the Speaker of the House and the presiding officer of the Upper House agree with the pro-

---

1 Report of Renton Committee, 1975, Cmnd. 6053, p. 95.

2 *Ibid*.

3 Miers and Page, *Legislation*, 1990, p. 143.

4 *Administrator General of Bengal v Prem Lal Mulllick* [1895] L. R. 22 Ind. App. 107 (P.C.).

5 Renton Committee, op. cit., p. 17.

6 Halsbury's Laws of England (4th ed.), vol. 44, para. 809.

posals, the Bill is reported as consolidating the existing law, and is virtually immune from amendment during its passage through Parliament.[7]

The Principles

The first principle to observe, therefore, is what type of consolidation Bill is required. A major quest is to consolidate legislation without a considerable expenditure of parliamentary time. Parliament is usually given assurance by the parliamentary committee that the Bill makes no substantial changes in the law. This assurance precludes or restricts amendments to the Bill during its parliamentary stages and thus facilitates its passage.[8] The long title to the Bill should, therefore, indicate that it is a Bill to consolidate an Act with its amendments. Where new law is to be included the long title should reflect this.

The principles which govern the interpretation of a consolidation Act should be noted. Unless the contrary intention appears, an Act which states in its long title that it is a consolidation Act is presumed not to change the law.[9] In *Atkinson v U. S A. Government*[10] it was held that, it was settled law that before the enactment of the Magistrate's Courts Act, 1952, examining magistrates had no power to state a case, and since that Act was a consolidation Act, there was evidence that it did not alter the existing law. This presumption, however, must yield to the plain words to the contrary.[11]

In *R v Governor of Brixton Prisons, ex parte De Demko*[12] the court held that a right of appeal against a conviction for fraud was expressly excluded by s 47 of the Supreme Court Judicature Act 1873, and that if exclusion was to be modified by the Act of 1881, clear words would be needed:

> One has to begin by the consideration that the Judicature Act, 1925, is expressed to be a consolidation Act; and one does not look for substantial changes in the law, or the jurisdiction in a consolidation Act - and one would not be astute to find them in language so extremely obscure, as that which I have read if it is to be applied for that purpose.[13]

When the same words are found in the consolidation Act, as in the original Act, they are to be construed exactly as they remained in the earlier Act.[14] In *Barenz v Whiting*,[15] Lord Diplock noted that whereas s.214 of the Income Tax

---

7 *Ibid.*

8 Driedger, E. *Construction of Statutes*, p. 214.

9 Scrutton L. J. in *Gilbert v Gilbert and Boucher* [1928] P. p. 1.

10 [1971] A. C. 157.

11 *Gilbert, op. cit.*

12 [1959] 1 K. B. 268 at 280-1.

13 *Ibid.*

14 *Stewart v River Thames Conservators* [1908] 1 K.B. 893.

15 1965 1 W.L.R. 433.

Act, 1972, was elliptical and contained an ambiguity, the court should look at s.22 of the Finance Act, 1952 to decide the ambiguities:

> As the Act of 1952 is a consolidation Act, the presence of such ambiguities entitles the court, and indeed requires us to look back at the legislation which this Act replaced in order to see whether any light can be thrown on that ambiguity.[16]

In *I.R.C. v Hinchy*[17] Lord Reid stated that in interpreting a consolidation Act, it is proper to look at earlier provisions which it consolidated. A re-enactment in the form of a straight consolidation makes no difference to the legal meaning. In that case the drafting would proceed on the principle that the statutory wording should be adequately reproduced. But *Atkinson v U. S A. Government* held that where a consolidation Act reproduces the previous words in altered form the court must construe them as they stand. The rationale for this is that Parliament might have intended to change the meaning; this situation is to be distinguished from *Barenz* where an ambiguity existed.

A consolidation Act repeals all the Acts that it consolidates. There is no break in the law. Parliamentary Counsel should be careful that an error is not made when drafting the commencement section for the fact that a consolidation Act can change the law may trap the unwary. Where there are substantial changes in the law, a consolidation Bill should be treated in the same way as other Bills.

The Methods

In a pure consolidation the scissors and paste method is used. Where the second and third forms are used, proposals may be received from interest groups or working parties. These are taken into account in drafting the consolidatinon Bill. In some cases the law needs to be amended before consolidation can proceed, as under the second and third forms of consolidation. The Joint Committee on Consolidation Bills in the United Kingdom designs special procedures to ensure that no change in the law is being made or that only 'changes of a minor nature, required to produce a satisfactory and coherent result are used.'[18]

The Renton Committee notes a technique,[19] yet untried which confers power for the making of Orders-in-Council amendments of Acts of Parliament required to facilitate consolidation.[20] These Orders would be subject to negative resolution. But Renton believes that the Orders should be subject to affir-

16 *Ibid*., at 443.

17 [1960] A. C. 748 at p. 768.

18 Renton, para. 14: 13.

19 This may not be suitable for other jurisdictions.

20 *Ibid*, para. 14: 25.

mative resolution instead, after the relevant Order has been reported by the Joint Committee on statutory instruments.[21]

Obsolete laws should be repealed. The consolidation of statutes should be done with reference to the government programme for legislation in the same field so that valuable time used to consolidate the law will not be wasted when the consolidated Act is repealed.[22]

Consolidation, therefore, solves problems of uncertainty in the law. An important point to observe in the consolidation of legislation is that the Acts to be consolidated must be in respect of the same subject matter. It would be inappropriate to consolidate fiscal legislation with family law legislation. Furthermore, where legislation is strewn about into bits and pieces of different Acts of Parliament, the Acts to be consolidated should be identified to ensure that all the Acts on the same subject matter have been brought together. This will reduce the likelihood of omitting an important piece of legislation in the consolidation exercise.

In drafting a consolidation Bill Parliamentary Counsel will do well to work out the effects of cumulative statutes, particularly when Counsel is faced with referential amendment of an Act to be consolidated. Counsel will not only be concerned with textual amendments for consolidation should not be undertaken on the basis of a defined topic or one subject matter. Renton,[23] considering the plea for consolidation on a one Act one subject basis stated that,

> The proposal is, in our view, based on the erroneous assumption that every statute can be completely intelligible as an isolated enactment without reference to the provisions of any other statute.

But Bennion,[24] however, considers Renton mistaken because 'no one with any knowledge of the subject would suppose that Titles could stand entirely on their own. But they would produce the inestimable advantage of organising each body of law as a coherent whole, with a unified system for internal numbering and cross-references. Practitioners would know just where to look for what they wanted, as users of that invaluable work *Halsbury' s Statutes*quickly learn which Title to consult.'

The method of consolidation can be seen as a form of processing. Consolidation takes the texts of various Acts of Parliament and, without altering the essential wording, combines the various Acts into a coherent whole.[25] Consolidation is also a legislative text and is therefore a law.

The consolidation exercise also assists in the process of text collation. A

21 *Ibid.*
22 *Ibid.*
23 Cmnd. 6053 para. 14:7.
24 *Statute Law*, p. 79.
25 Bennion, *Statute Law*, p. 76.

typical consolidation Act may embody the texts of numerous previous Acts. Under the practice of indirect amendment, these texts would have all been scattered and would not have been designed or drafted to fit in textually with another enactment. Consolidation in these circumstances serves to put the law in its appropriate perspective.[26]

In the consolidation process, the question may be asked whether the consolidation of earlier Acts should also include the defects in those earlier Acts. Formerly it was necessary to 'consolidate the error and omissions' but if Counsel sought to resolve the error or omission, there might be the accusation of indulging in 'draftsman legislation'. Nonetheless Counsel should correct patent errors and omissions.

The Consolidation of Enactments (Procedure) Act, 1949,[27] enables corrections and minor improvements to be made to the existing law; the expression 'corrections and minor improvements' is defined in that Act to mean 'amendments of which the effect is confined to resolving ambiguities, removing doubts, bringing obsolete provisions into conformity with modern practice, or removing unnecessary provisions or anomalies which are not of substantial importance, and amendments designed to facilitate improvement in the form and manner in which the law is stated …'

As a further refinement to allow consolidation Bills to embody improvements beyond the scope of what is permitted under the Consolidation of Enactments (Procedure) Act, 1949, a law reform agency might be empowered to make amendments in the process of the consolidation exercise. In this regard, the law reform agency could submit a report recommending amendments to the existing law. In the alternative, where the amendments required are too substantial for the law reform agency to undertake, an *ad hoc* expert committee could be established to consider the amendments.

26 *Ibid.*

27 12, 13 & 14 Geo. 6, c. 33.

Chapter 12

Codification

The purpose of a codifying Act is to declare the law on a particular subject matter in the form of a code. In codification the various areas of the law, such as equity, the common law, orders of the executive and judicial decisions are examined and then condensed in the form of a code. In other words, the entire law on a particular subject matter is extracted from case law and any other relevant enactments, and placed into one single Act. This compilation is then used as the *prima facie* evidence of the existing law.

Acts of Parliament are drafted by different persons at different times. The result might be duplication, contradictions, ambiguities, obscurities and provisions that are obsolete.[1] Sometimes two different types of legal systems exist in the same country. For example, in countries such as the Gambia where the customary law co-exists with the common law or in Sri Lanka where four or five different systems of law may co-exist in different parts of the country. In those cases a code is the only means by which these difficulties can be eliminated. Scattered judgments and enactments are brought into one Act, and the unification of the different legal systems operating in the same country can be achieved.

The point to note is that codification does not alter the law. It is equivalent to what may be called a declaratory Act. The authorities, however, are not in agreement on what constitutes codification. For instance, Ilbert defined a code as 'an orderly and authoritative statement of the leading rules of law on a given subject.' Chalmers, the leading English codifier, did not apply this restrictive qualification and described codification as an effort 'to reproduce as exactly as possible the existing law.'

The American David Dudley Field favoured Chalmer's comprehensive code rather than Ilbert's restriction to 'leading rules.' Field stated:

> Because we cannot provide for all cases should not be thought a poor reason for an Act providing for as many as possible. To render the existing law as accessible, and as intelligible, as we can is a rational object, though we cannot foresee what ought to be the law in cases yet unknown … To cast aside known rules which are obsolete, to correct those which are burdensome, or unsuitable to present circumstances, to reject anomalous or ill-considered cases, to bring different branches into a more perfect order and agreement …

---

1 Reed Dickerson, *Professionalizing Legislative Drafting*, p. 62.

The principle to be observed is that codification should, like consolidation, be done in respect of the same subject or topic. Codification is a process of reducing the whole of the law on a particular subject to one statute. The result of codification is that it preserves the common law together with many topics of doubt and difficulty.

The technique to be used in codification is to expressly provide in the codifying Act that no prior enactment and no decision of any court made before the effective date of the codifying Act must be relied on in any court or for any other purpose. The codification exercise may effectively modify the law as noted by Bennion:[2]

> A code, as respects a particular area of law, is a comprehensive statute which reproduces systematically, with or without modification, the current principles, rules and other provisions of that area of law, whether they derive from common law, statute or any other source.

As far back as 1885 Erwin Grueber thought that codification would solve the problem as he put it that,

> English people want to attain a comprehensive view of their own law, but they find it scattered about in thousands of Acts of Parliament and in endless volumes of law reports, and thus a knowledge of law is necessarily limited to those who make it their special study and profession.[3]

Advantages of Codification

A code is said to protect the legal system from alien doctrines.[4] It can rejuvenate a legal system by reducing mass to order and precision. A code is not just a nut and bolt exercise, it is also a matter of symbolism and deeper constitutional significance. Codification is a style. It does not mean the enumeration of all laws. It can strengthen judicial decisions and discretion, and can respond to social change.

Codification is not necessarily a vote of no confidence in the courts and should not be seen as a brake on the natural development of the common law. It is possible in a codifying Act to allow scope for judicial discretion, while avoiding generalisations which would cause inconvenience or uncertainty in the law.

---

2 Bennion, *Statute Law*, 2nd. Ed. at p. 83.

3 Erwin Grueber, *Holtzendorf Encyclopadie* [1885] 1 L.Q.R. 62.

4 L.C.B. Gower, *Here Lies the Common Law: Rest in Peace* [1967] M. L.R. 241.

Disadvantages of Codification

It is an illusion that a code can be complete in itself. It is argued that a code creates gaps in the law and ossifies it.[5] This makes it difficult to develop the law. It is felt that the common law is more malleable since the courts can distinguish between cases and set right faulty judgments. However, it is submitted that the latter point will not hold true where the code is drafted upon principles and a certain amount of discretion is left to the judges. A codifying Act cannot bring law to the layman. Lawyers and academics have to relearn the law in some cases.[6]

Objects of Codification

The objects of codification are, firstly, to make the law more accessible to the public, and to the legal profession. Secondly, to improve the law in general.

Types of Codification

There are basically two types of codification techniques. First, there is the technique based on the French Civil Code. This type uses broad principles and leaves it to the courts to fill in the gaps. Secondly, there is the type which is based on the German Civil Code. This type is more detailed and definitive. The second type provides greater certainty but the discretion of the court is limited.

The first type leaves the law uncertain until there is a build up of cases but the courts have more discretion in deciding cases.[7] Gower believes that the best principle to be accepted is to steer between the vague generalities and detailed technical rules.[8] There is difficulty in finding the right level of abstraction. A lot depends on the quality of the code and the spirit in which it is administered.

Guiding Principles in Codification

In codification Parliamentary Counsel should master the subject matter. Counsel should ascertain in detail what primary and secondary effect is required and express the result in plain unambiguous language. Codification calls for a restatement of the existing law including all the law on a particular subject matter.[9] The existing law is rearranged and restated. Existing rights,

5 [1986] C.L.R. 295.
6 Gower, *op. cit*., 246.
7 *Ibid*., p. 256.
8 (1968) 31 M. L. R. 361.
9 24 M.L.R. 18.

privileges, duties and functions are preserved. There is an improvement in the language of the law.

The code will thus include not only the existing legislation but will reflect the common law, equity, opinions of parliament, regulations and executive orders.[10] Once a title is codified the style should be continued to ensure clarity. Amendments should not deviate in terminology or style. A substantial change in language might be construed as a substantial change in substance.

There are two opposing views as to how a code should be construed. One school of thought believes that a codifying Act should be construed in the same way as other Acts, since it is presumed that a codifying Act is not intended to change the law. The language would be examined to ascertain the nature of meaning and resort would only be had to the previous law on special grounds, for example, where there is doubt as to what the words mean. Another school of thought believes that a codifying Act is not an ordinary statute and, therefore, should not be interpreted as such, but deserves to have its own canons of interpretation.[11]

Rules governing the interpretation of a codifying Act should be clearly formulated if the Act is to be interpreted differently from the ordinary meaning. Problems of statutory interpretation can defeat the objects of the Act.

Where a section of the law on a given subject matter is codified care should be taken so that it is not superimposed on the general law which is not codified.[12]

The Law Commission in Britain has not succeeded, since 1965, in placing a single codified Act on the Statute Book. In one of its Reports[13] the Law Commission noted that the codification of the law on landlord and tenant is too immense. It will not be completed for a long time. Codification is more practicable on a small scale. The limitation on quality personnel affects codification as does the available time in which to draft a codifying Act. Where personnel is limited, methods should be devised which ensure that the ordinary drafting of legislation does not conflict with the codification exercise.

A codifying Act can be a tool for law reform but is not synonymous with law reform. In drafting a codifying Bill the type of codification to be used should be determined. A codifying Act more detailed than the French Code should be chosen. A well prepared codifying Act will combine adherence to detail where this is required for the purposes of legal certainty, and some generality in stating basic principles which reserve power to the courts to adjust their decisions to the needs of equity and justice.[14] Rules of interpretation

10 \Dickerson, *op. cit*., pp. 62-64.

11 Jean Louis Baudouin *Codification as tool of Law Reform.* Paper No. 1, Meeting of Commonwealth Law Reform Agencies, 10 September, 1986, Jamaica.

12 Gower, *op. cit*., p. 259.

13 No. 92, 2. 34.

14 *Ibid.*

should be created. The Interpretation Act should not be aimlessly applied. Definitions should only be used to clarify the law.

Since codification should exclude the defects and ambiguities in the law, Parliamentary Counsel should be empowered to effect such modifications in the codifying exercise. What is contained in the codifying Act represents the law and what existed before the codifying Act is no longer the law. The classic statement on how a codified provision should be interpreted is in the dictum of Lord Herschell in *Bank of England v Vagliano*:[15]

> I think the proper course is to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with enquiring how the law previously stood, and then, assuming that it was intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If … treated in this fashion it appears … that its utility would be almost entirely destroyed and the very object with which it was enacted will be frustrated.[16]

He did feel however, that resort may be had to the previous state of the law for the purpose of aiding in construction where a provision is of doubtful import or where words have acquired a technical meaning.

Lord Halsbury stated that,

> construing the statutes by adding to it words which are neither found therein nor for which authority could be found in the language of the statute itself is to sin against one of the most familiar rules of construction, and I am wholly unable to adopt the view that, where a statute is expressly said to codify the law, you are at liberty to go outside the code so created.[17]

The plain meaning rule as expounded in *Vagliano* should not be followed. Appropriate comments, references to legal commentaries and legislative notes should be brought in aid in the interpretation of a codifying Act.

Drafting Principles

The principles of legislative drafting should be observed in codification. The complexity of statutes should give way to the use of plain English. The language used should not be obscure nor archaic. Short sentences should be used. There should be as few subordinate phrases as possible before the subject of the legislative sentence or between the subject and its verb. Lord Denning before the Renton Committee stated that,

15 [1891] A. C. 107.

16 *Ibid*., p. 144.

17 *Ibid*., p. 120.

> If you were seeking to see what different principles should be applied, the first would be to recommend simpler language and shorter sentences. The sentence which goes into 10 lines is unnecessary. It could be split up into shorter ones anyway and couched in simpler language. Simplicity and clarity of language are essential.[18]

18 *Ibid.*, para. 6:3.

Chapter 13

Statute Law Revision

Statute Law Revision is a very important matter. There is always the need for a systematic statute law revision. It should be undertaken at every convenient opportunity. It involves

(a) the definite repeal of obsolete or obsolescent enactments; and

(b) the changing of the language of enactments so as to bring them into line with current usage, *without making any change in the substance of the enactments*.

There have always been critics of legislation. Justinian's codification of the Roman Law was a project of law reform and of restating the law. It comprised the Institutes, the Digest and the Code. Together with the Novels or the constitutions enacted after 534 AD they make up the *Corpus Juris* as the whole of Justinian's legislation has been called since the 16th century.

By the 16th and 17th centuries there were in England many expressions of dissatisfaction with, and projects for reforming, the drafting of statutes and the shape of the Statute Book. The early critics included Edward VI, Lord Keeper Sir Nicholas Bacon,[1] James I[2] and Sir Francis Bacon, when Attorney General.[3] In recent years complaints have centred on the clumsiness and the need for simplicity and clarity.

According to Renton,[4] in the compilation of the Statutes of the Realm (1810-1828) no attempt was made to discard what was obsolete. From 1834 onwards, however, a number of commissions sat in a move towards revision. The First Report of the Statute Law Commissioners[5] contained some severe comment on 'the imperfections in the statute law'. The first Statute Law Reform Act, was passed in 1856.[6] Over the years Statute Law Revision has got rid of a large quantity of obsolete matter. An Act of 1867 alone repealed 1,300 statutes.

The Statute Law Committee was established in 1868 to prepare an edition of Statutes Revised. Its terms of reference were 'to make the necessary

---

1 '… a short plan for reducting, ordering, and printing the Statutes of the Realm.' *Craies on Statute Law,* p. 356.

2 'divers cross and cuffing statutes ... [should] be once maturely reviewed and reconciled; and ... all contrarieties should be scraped out of our books.' *Ibid*.

3 'the reducing of concurrent statutes, heaped one upon another, to one clear and uniform law.' *Ibid.*

4 Cmnd. 6053, para. 2.11.

5 1835.

6 Bennion, *Statute Law*, p. 80.

arrangements and to superintend the work of preparing an edition of Statutes Revised.' In 1945 the terms of reference were revised to read,

> To consider the steps necessary to bring the Statute Book up to date by consolidation, revision and otherwise, and to superintend the publication and indexing of Statutes, Revised Statutes and Statutory Instruments.

Before that in 1875 a Select Committee of the House of Commons was set up to consider, 'Whether any and what means can be adopted to improve the manner and language of current legislation'. There had been a criticism of the confused and unsatisfactory state of the statute book, the verbose and obscure language in which statutes were drafted, uncertainties about the effects of new legislation on existing law, and confusion resulting from ill-considered amendments made in Parliament.[7]

In the 1977-78 annual report of the Law Commission,[8] the Commission stated that,

> There are two distinct aspects of this work. One is to facilitate the production of revised edition of the statutes of general application by simplifying the form of those statutes. The other is to further the objectives of statute law reform generally by putting forward specific proposals aimed at reducing the bulk, uncertainty and complexity of the existing body of statute law. The guiding principle of both aspects of the work is, in one word, simplification. Apart from its direct and visible effects, the work is an important ingredient in other law reform work, such as consolidation, where research into detail statutory provisions is necessary in order to establish their relevance or practical utility. Until this research has been done, the process of modernising the existing body of Statute Law cannot in practice be carried out on the substantial scale that is needed.

There is a doctrine that no English Act grows obsolete. Mere disuse cannot be taken as evidence of repeal. Thus, in the absence of an authoritative expurgation of the Statute Book, there was always the danger of being brought under an old forgotten statute.[9]

Statute Law Revision should deal with

(a) enactments which have *ceased to be in forc*e, that is

  (i) *expired enactments* which, having been originally limited to endure for a limited or specified period are not perpetuated or kept in force by continuance. Their purpose is spent by exclusion of time;

  (ii) *spent enactments* which are exhausted in operation by the accomplishment of their purposes;

---

7 Cmnd. 6035, para. 2.11.

8 Law. Com. No. 92, para. 2. 44.

9 Bernard Shaw's advice to Sir Roger Casement: *Trial of Roger Casement, Famous British Trials Series*. See also *Bernard Shaw*, M. Holroyd, vol. 2, p. 587.

(iii) *enactments repealed in general terms*, that is, repealed by the operation of an enactment expressed only in general terms;

(iv) *enactments virtually repealed*, where an earlier Act is inconsistent with, or is rendered invalid by, a later Act;

(v) *superseded enactments*, where a later Act effects the same purpose as an earlier enactment by repetition of the terms of the earlier enactment;

(vi) *obsolete enactments*, where the state of the things contemplated by the enactment has ceased to exist. It is no longer capable of being put into force because circumstances have changed;

(b) *Unnecessary enactments*: here no statutory authority is needed because of the nature of the enactment.

Statute Law Revision is in essence a literary exercise. It deals with the excision of dead wood, the pruning off of superfluities and the rejection of clearly inconsistent enactments. It saves a great deal of time and assists in the accuracy and confidence of legal work. In some jurisdictions the Revised Edition of the Law becomes the final and authoritative edition.

The object of a Revised Edition of the Laws is to make available in a set of volumes all the statute law devoid of all difficulties arising from what James I described as

> … divers cross and cuffing statutes, and some so penned that they may be taken in divers, yea, contrary senses.

Lord Bacon,[10] proposed that in 'reforming and recompiling the statute law'

1. The government [should] discharge the books of those statutes whereas the case by alteration of time is vanished … These may nevertheless remain in the libraries for antiquities, but no reprinting of them. The like of statutes long since expired and clearly repealed; for if the repeal be doubtful, it must be so propounded to Parliament.
2. The next is to repeal all statutes which are sleeping and not in use but yet snaring and in force. In some of these it will perhaps be requisite to substitute some reasonable law instead of them, agreeable to the time; in others a simple repeal may suffice.
3. The third, that the grievousness of the penalty of many statutes may be mitigated, though the ordinance stand.
4. The last is the reducing of convenient statutes heaped one upon another to one clear and uniform law.

In Appendix F are a set of Draft Bills to deal with the preparation of a Revised Edition of the Law.[11]

---

10 *Letters and Life* (Spedding) vi p. 57.

11 Adapted from Sir Allison Russell's *Legislative Drafting and Forms*, 4th Ed.

Chapter 14

Law Reform

Law has always been a mirror of society. Times change and we with them; human conditions are not static. And so the law must change to reflect the needs of the changing times and conditions. The harshness of the common law of England gave rise to the doctrines of equity. So today the need for a systematic development of the law has led to the establishment of law reform agencies in almost all Commonwealth countries and in other countries.

It can be argued that through our process of 'judge made' law, there is a system of law reform. Indeed, Lord Denning in *Due Process of Law*[1] hailed the decision in the *Mareva Case*[2] as 'the greatest piece of judicial law reform in [his] time.' This depends largely on the philosophical approach of each judge. The pattern is not coherent. Though 'judge made' law allows for flexibility, for gradual development, by itself it can achieve but little.

The doctrine of binding precedent inhibits change yet society is not static. Social conditions demand change. Economic conditions in young Commonwealth countries require a fresh look at the laws which govern trade and commerce. In advanced societies there is the need to keep the law up to date. Perhaps the previous lack of a systematic development of our laws is due to the fact that the pace of development had been left to the judges. But then the cases which come before the judges do not by themselves present a coherent pattern for a systematic development of the law.

The need for such development had been recognised since about the beginning of 1930. Bodies such as the Statute Law Committee established in 1868 and the Criminal Law Revision Committee established in 1959 still exist. They have done a great deal of spade work. Their work, though of immense value, has not been on a systematic basis.

The breakthrough came with Lord Gardiner's famous practice Note.[3] The Judicial Committee of the House of Lords decided

> to modify their present practice, and while treating former decisions of [the] House as normally binding, to depart from a previous decision when it appears right to do so.

Behind the scenes Lord Gardiner's reforming zeal led to the Bill which eventually became the Law Commission Act, 1965. There were echoes around the Commonwealth.

---

1 P. 134 and at p. 225 of *The Closing Chapter*.

2 *Mareva Compania Nairera S. A. v International Bulk Carrers S. A.*, [1975] 2 Lloyds Rep. 509.

3 [1966] 1 W. L. R. 1234.

Most Commonwealth countries inherited at one stage or another the statutes of general application of the United Kingdom Parliament, the common law of England and the rules of law generally known as the doctrines of equity. If the date of assumption of power in a territory was, say, the 24th day of August, 1874, then the basic law for the territory became the common law of England, the rules of law generally known as the doctrines of equity and the statutes of general application as they existed in England on that date - 24th August 1874.

Thus was English law introduced into Britain's colonial territories. A statute repealed as part of the law of England in August 1890, would still in, say, 1900, be part of the law of that territory.[4]

The indigenous laws became the Customary Law, applicable to the indigenous population. This created a system of dual administration of justice. It created - and still creates - problems in the administration of justice.

The Law Commission Act, 1965 set a pattern for many Commonwealth countries. The Commission is required[5]

> to take and keep under review all the law … with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law.

The Law Commission is charged to receive and consider proposals for law reform made or referred to it. It submits to the Lord Chancellor programmes for the examination of different branches of the law and undertakes the examination of particular topics. It formulates proposals for law reform by draft Bills and is also charged with the duty of preparing comprehensive programmes of consolidation and statute law reform. The Law Commission provides advice and information to Government departments and other bodies concerned with proposals for the reform of any branch of the law.

In 1977 the Chairman of the Australian Law Reform Commission stated[6] that,

> If we cling lovingly to old rules, no longer apt for our time, our institutions and our laws will fail us … if we fail to adapt our society and its laws to the challenges of fast moving technology, our institutions will fail us.

The Chairman was criticising some of the decisions of the High Court of Australia. The decisions showed a court generally disinclined to develop and

---

4 Zimbabwe (then Southern Rhodesia) and Sri Lanka (then Ceylon) inherited Roman-Dutch Law. South African influence in the case of Zimbabwe and Dutch Colonial influence in the case of Sri Lanka. Lesotho and Swaziland are other countries which have the Roman-Dutch Law as their basic law.

5 Section 3.

6 (1980) 6. C. L. B. 1496.

stretch the laws it had inherited to meet new moral, social and technological circumstances. Such forces posed dangers for Australia. That is the stuff of which Law Reform is made.

Australia provides another example of how to tackle the problems of law reform. In 1980 a National Conference on Rape Reform was held at Hobart in Tasmania which urged the State and Federal Governments to increase efforts for a complete overhaul of Australia's rape laws. Rape was one of the most regularly occurring crimes in Australia yet it went unpunished. The continuing high incidence of rape and the few convictions in the courts underlined the lack of deterrent effect of the then law.

The Conference was intended to initiate debate on specific proposals for legislative reform which were overdue and technically complicated. It also studied the American experience which had shown that increased public awareness was important if changes in rape laws were to be effective. The Australian Institute of Criminology, with financial support from the Law Foundations of Victoria and New South Wales, and the Tasmanian and New South Wales State Governments was among the sponsors of the Conference.

It began an epoch of law reform in Australia. Judges, lawyers, and politicians met in a national forum to discuss guidelines for a reform of the law of rape. The Conference called on the State and the Federal Governments actively to continue to search for reforms in rape and sexual laws. In a 17 point motion it said the Australian Institute of Criminology should act as a clearing house for statistics and research data and that Federal and State Attorneys General should meet to consider and evaluate progress.

A social worker claimed that most rape victims appeared to believe there was more to lose than to gain from having their cases go to court. A study had showed that 44 per cent of women did not report rape for family reasons, 33 per cent because of a reluctance to deal with the police, 28 per cent because of a fear of going to court and 10 per cent because they had known their assailants. The essence of a successful law reform must be to overcome the cause for those fears, and to remove the general reluctance of rape victims to report the serious crime to rape.

In a keynote address to the Conference, Dr. Virginia Nordby of the University of Michigan, said that law reform should aim at assuring an increase in the conviction rate. The State of Michigan had adopted a comprehensive new sexual assault law in 1975 which was directed at overcoming those problems. Punishment was the most significant deterrent. Reform should close the loopholes of evidence rules and judicial interpretations that had made it harder to obtain convictions. Punishment should also be matched to contemporary attitudes to the actual crime involved.

A third goal of law reform should be to protect the victim from further victimisation by the legal process itself and by society as a whole. The removal of references to specific gender from the laws and the substitution for both rape

and sodomy of a single sex-neutral crime of sexual assault or criminal sexual conduct would help. Degrees of sexual assault should be determined not only by the fact of sexual penetration, but by the extent of actual injury or threat to the victim. The issue of force should be a matter of more flexible subjective judgement. Most importantly the reforms should prohibit the defence from making allegations and questioning the victim's previous sexual activity. That threat was a principal inhibiting factor in the enforcement of rape law.

Since the reforms were introduced, the reporting of rape cases to the police has risen significantly. The increase in convictions had reached more than 90 per cent. A study of those working within the system revealed that the prohibition on past sexual history, the shifting of the burden of proof from victim to defendant and the degree structure of the crimes were reasons for the improvement.

The strength of the law reform movement in the Commonwealth was amply demonstrated in 1977. At the Fifth Commonwealth Law Conference, held in Edinburgh in July that year, law reform was the first of the four main topics for discussion. That Conference was followed, in August, by a meeting in London of Commonwealth law reform agencies, at which the representatives of no less that twenty seven legal systems in the Commonwealth examined their institutions, methods and procedures for the promotion of law reform. Though the institutions differ widely, the problems of method and procedure which they had encountered showed many striking similarities. It was partly because of those similarities that there was so much to learn from one another.

Thus, in England and Wales, it was profitable to consider the practice of other Commonwealth law reform agencies with regard, for example, to research and consultation. Moreover, in formulating substantive proposals for the reform of the law, much enlightenment was derived from studying the problems of other countries including, in particular, countries within the Commonwealth, and the solutions which had been adopted or proposed to those problems. In return there had been help to other Commonwealth countries by imparting to them the results of the Law Commission's own work and experience.

In setting up a law reform agency, a number of issues are first determined.

1. *The Machinery for Law Reform*

   (a) What should be the composition and membership of the agency?

   (b) Are the members to be full time or part time?

   (c) What is the reasonable level of independence of the agency in order to achieve the maximum collaboration with the government?

   (d) What alternatives to law reform are there? *Ad hoc* committees, a single commission or a body of experts?

2. *Programme and Priorities*

(a) What are the subjects suitable for law reform and what priorities should be accorded the substantive law and the procedural law? What about Statute Law Revision?

(b) Who should initiate proposals for law reform? Is approval needed from the government? Who should determine the priorities for law reform and what are the respective roles of the law reform agency, government departments and interested bodies.

3. *Research and Consultations*

(a) Should research programmes include behavioural, sociological or other fields?

(b) Should the conduct of the relevant research involve 'in house' staff, academics and practitioners?

(c) What are the best methods for consultation involving the legal profession, specialists in particular fields and interested bodies?

4. *Form and Implementation of Reports*

(a) How detailed should the proposals for reform be? Should they be accompanied by draft legislation prepared by Parliamentary Counsel?

(b) Should the law reform agency participate in the promotion of the implementation of the proposals?

5. *Collaboration and Mutual Assistance in the Field of Law Reform*

(a) The feasibility of regional co-operation; the sharing of research and other work in order to avoid duplication;

(b) the improvement in existing machinery for the dissemination of information;

(c) collaboration between various agencies within a Federal State and between Commonwealth countries.

The Machinery for Law Reform

The Composition and membership of a law reform agency are important considerations in the setting up of the agency. It is desirable to have full time rather than part-time members. The members need not all be lawyers indeed laymen should be included to bring in a balance. This is especially recommended as in many areas the law is for the *benefit* of the layman rather than for the lawyer. In areas where lawyers' law is to be replaced, the need for non-professional participation should not be excluded.

The constitutional and historical antecedents of a jurisdiction also determine the nature of its law reform agency. The nature and structure of society

as well as social, economic and political considerations also influence the composition of an agency. Indeed we should consider also the availability of expertise in law and in the allied social sciences.

The ideal law reform agency would be one which is a permanent institution, having full time members and adequate staff established under an Act of Parliament.[7] It should be charged with keeping the whole body of law under constant review and with its systematic law reform. The majority of its members should be lawyers, judges and academics.

A small body of about four to seven persons is ideal. Rapid changes are taking place in the economic, political, and social conditions of society; the adoption of laws must respond to the changes. Continuous law reform is essential taking into account the demands of public opinion for social change. But public opinion may not necessarily be a sufficient guide.

The volume of work is determined by the limitations of finance. Standing committees are set up to deal with specific areas depending upon the availability of specialised personnel. Part-time committees suffer from the weakness that their most active members are very busy people who have less time for dedicated and sustained research. As Professor Wade noted,[8]

> This would have to be the task of a much smaller body, preferably by varying composition (in part) so as to ensure expert knowledge in each field of study.

It is useful to appoint Parliamentary Counsel to work with a law reform agency and it is a good thing to have Parliamentary Counsel in at an early stage in the determination of policy matters. It is usual to give an agency powers to co-opt members to certain of its deliberations but Members of Parliament should be excluded for that would militate against the independence of the agency.

Experts need not be appointed permanently; they can be commissioned to write working papers and can also help in preparing papers with other experts in the social sciences.

In the words of Professor Wade,[9]

> To ensure flexibility and a strong dilution of the academic element there should be power to co-opt members for particular studies.

And Farrar[10] refers to the value of appointing judges as chairmen of law reform agencies:

> A judge could be appointed Law Commissioner and retain his office as

---

7 Such as the Law Commission of England and Wales.

8 *Machinery of Law Reform*, (1961) 24 MLR 8.

9 *Ibid*., p. 10.

10 *Law Reform and the Law Commission* p. 28.

> judge in the meantime … just as experience as a judge would be of value to a Commissioner, so would service on the Commission prove useful to the judge on his return to the bench.

The experience of the Law Reform Committee had proved the value of what Farrar called 'cross-fertilisation' in this field. To that we should add the value of teachers of law who can be of great assistance in areas of research.

The terms of office of members should not be indefinite. They should be appointed long enough for the completion of a project, and then replaced to provide opportunity for fresh ideas to be injected. In a Federal State[11] there is usually a law reform agency for each state. In some cases there are co-ordinating committees for the pooling of resources thus helping a poor state to achieve its objectives.

Both professional and non professional members make up the staff of a law reform agency. Parliamentary Counsel working with law reform agencies draft Bills which are attached to the reports.

In all Commonwealth countries law reform agencies have maximum *independence* compatible with the political system. This is achieved by

(a) the establishment of the agency by an Act of Parliament such as in the United Kingdom and in Zambia;

(b) consultation with the appropriate organisations in the making of appointments to the agency.

To ensure this the agencies are not under any ministerial control. They control their own budgets which in some cases are a charge on the Consolidated Fund. Adequate remuneration is paid to the members whose salaries, like those of judges, are not decreased during their tenure of office.

Ad Hoc Reform Committees

The existence of permanent law reform agencies does not rule out the appointment of *ad hoc reform committees* to reform certain areas of the law where there are high political or controversial issues. Royal Commissions and other public commissions of inquiry are sometimes appointed to report with recommendations on certain specific matters of public interest which lead to the reform of the law. The Matrimonial Causes Act, 1973,[12] was the result of the Report[13] of the Royal Commission on Divorce.

---

11 The United Kingdom, though not a Federation, has two Law Commissions, one for England and Wales and another for Scotland. There are fundamental differences between Scots Law and English Law. In Australia the component states have their own law reform agencies.

12 1973 c. 18.

13 Cmnd. 9678.

Programmes and Priorities

Under this heading, consideration is given to the rôle of the law reform agency. Since the agency has the requisite amount of independence, fundamental matters of policy and fundamental changes in the law are within its remit. It deals adequately with consolidation, if it can find the time. Matters of law revision are for law revision commissioners.

There is a difference between law reform and statute law revision. Statute law revision deals with the repeal of obsolete or obsolescent enactments and the changing of the language of enactments so as to bring them into line with current usage. Law Reform, as has been demonstrated, deals with the need to keep up to date the whole law on a given subject.

All this embraces two main matters: the subjects suitable for law reform and the limitation of projects for law reform. These fall squarely within the competence of the law reform agencies but it is important to realise that law reform is not the exclusive preserve of law reform agencies in the Commonwealth. Common sense dictates that law reform agencies should not deal only with the law; they need not ignore matters of political or broad studies of the law as well as smaller reforms. As already indicated, in many Commonwealth jurisdictions, English law is the basis of the law of the land.

The need thus arises for reform in cases where the indigenous law, the common law of England and statute law have to be fused into one coherent body of law. This, on occasions, embraces a fundamental change in the law. It should be emphasised that in such reforms there is no real distinction between lawyer's law and social legislation.

Law reform agencies are not deflected from their tasks of continuous review and rationalisation of the law. They thrive on an impartial approach to the problems of law reform, to the topics selected for reform, and thus present the possible alternatives and leave it to the Legislature to decide. In practice since the agencies present their report together with a draft Bill the task of the Legislature is much simplified.

In selecting topics for law reform it is desirable to undertake both broad studies and smaller reforms where there is much flexibility. It is necessary to deal with economic, empirical and sociological studies of fundamental areas of law yet law reform agencies keep their feet firmly on the ground. Law does not operate in a vacuum.

The road to a systematic codification was chartered long ago in the form of Stephen's Criminal Code which now forms the basis of the criminal law in many Commonwealth countries. Other examples are the original Sale of Goods Act 1893, and the Bills of Exchange Act 1882. Progressive codification is desirable. Social development usually over take the law. And then in areas where the law has been codified, law reform cannot be excluded.

What about fundamental social changes? Here public opinion becomes the yardstick by which to measure the reform of the law. And since law reform agencies usually have the desired independence or some other responsible authority to initiate their own programmes and to determine their own priorities, there is nothing wrong in an Attorney General, for example, referring a particular matter for the agency's consideration.

Research and Consultation

Research and consultation are necessary to the process of decision making in law reform. The approach largely depends on two perceptions,

(a) immediate reform as the aim of law reform;

(b) the aim of the reform to create a favourable climate of opinion for change.

In practice, small committees or teams are set up to deal with specific topics. Continuity is essential as a first step. These committees prepare a *Study Paper* on the topic selected for reform. The *Study Paper* will consist of

(a) a detailed account of the law as it exists, pointing out areas of doubt;

(b) criticism by various persons and bodies such as lawyers, academics, Parliamentary Committees, the judges; and

(c) the state of law reform in other jurisdictions.

This involves extensive research. Which is very time consuming. The practice is to commission academics or practitioners to prepare papers. This does not rule out the possibility of original research by the staff of the law reform agency. The *Study Paper* does not deal with proposals. It points out the background against which decisions can be taken. In the process the *Study Paper* then becomes the pointer to the direction which a reform should take.

Consideration of the *Study Paper* is the next step in the process. Each member of the agency puts in his written comments and proposals having regard to the errors in the *Study Paper*. The law reform agency then meets in teams to discuss the original *Study Paper* and the comments and observations made by the members.

Here the problem areas are identified and the teams formulate the proposals for reform. The next step is the preparation of the *First Working Paper*. It is a purely consultative document containing an outline of the present law, an identification of any defects considered to exist and the provisional proposals for reform. It forms the basis for consultations. The *First Working Paper* is studied by a *Working Party* of experts who are not members of the reform agency.

This *Working Party* considers papers prepared for its consideration and, at the end of its deliberations, it in turn prepares a *Second Working Paper*. The

Second Working Paper is then considered in detail by the law reform agency – the final version being the *Official Working Paper* of the reform agency. It is then published and copies are sent to those whose comments have been sought, and to the press, in order to enable the public at large to study the proposals for comment.

The *Official Working Paper* is the cornerstone of the consultative process. Those who agree with the proposals say so. Those who disagree marshall their arguments. Rational discussion takes place. Written observations are sent to the agency. These are circulated. The areas of possible reform action are identified and dissent is noted. The agency then organises week-end seminars for a public consideration of the *Official Working Paper*. The participants are drawn from a wide range of opinions. Attention is paid to comments in various journals.

After the seminar, the agency then prepares its *Final Report* which includes its *Proposals* for law reform and which it submits to the appropriate authority.

Form and Implementation of Reports

Two main issues arise when considering the form and implementation of the *Final Report* of a law reform agency:

(a) the need to argue the merits of the Proposals rather than just asserting them;

(b) *Draft legislation* as part of the *Final Report*.

As regards the need for public discussion of Reports, a former Attorney General of Australia in dealing with the Freedom of Information Bill said that,

> What we are seeing in this country today is that law reform is being taken into the living rooms of the nation, by television and other means. We are all being involved in it.

The purpose of attaching a draft Bill as part of the *Proposals* is to promote speedy attention to law reform in Parliament but then Governments take their own time. And Parliaments may be otherwise engaged. Years after the recommendations of the Renton Committee Lord Renton laments.

Michael Zander[14] states that,

> Lord Renton has related how, after the report of his Committee had been debated in both Houses of Parliament in 1975, the Labour Lord Chancellor, Lord Elwyn-Jones, called a private meeting of the Statute Law

14 *A Matter of Justice*, p. 251.

Committee. The Committee … made proposals for implementation of the Renton Committee's proposal that it should 'keep the structure and language of the Statutes under continuous review' and should issue reports every two or three years. It seemed as if the proposal would go through with the support of the Lord Chancellor. But a skillful campaign … led to the Cabinet rejecting the idea. Although he had personally appeared to be in favour of the idea, the Lord Chancellor subsequently stated in a written Parliamentary answer …

'After very careful consideration of these recommendations the Government was not satisfied that the Statute Law Committee was an appropriate body to discharge the functions proposed for it by the Renton Committee, or that the proposal to keep the Statute Book under continuous review was likely to lead to any worthwhile improvement in the drafting of legislation.'

Chapter 15

Subsidiary Legislation

The doctrine of the separation of powers notwithstanding, it is now legitimate for the Legislature to delegate legislative powers to make laws to a subordinate authority.[1] The Legislature exercises its discretionary power by conferring discretionary law making power on a subordinate authority. It is a method by which the Legislature leaves the detail provisions required under an Act of Parliament to a Minister, in effect to departmental officials.[2]

The recognition that Parliament finds it necessary, and perhaps convenient, to give subsidiary and ancillary powers to Ministers, in effect to departmental officials, came as long ago as the Statute II Edward 3,[3] that is, over 650 years ago. Then came the Statute of the Staple of 1388[4] followed by the Statute of Sewers, 1531[5] and again by the Statute of Proclamations in 1539.[6] The technique fell into disuse for the next two centuries. In 1717 the Mutiny Act[7] gave the Crown power to legislate in respect of the Army without recourse to Parliament. The nineteenth century certainly seized upon this and the practice became increasingly common. Today, in a single year, in all countries where Parliaments exist, and even where men in uniform persist, there is up to twenty times more delegated legislation than Acts of Parliament.

The power to delegate is now recognised as a constitutional element of the legislative power of Parliament. Governments face immense problems which are socio-economic in character. But, should Parliament delegate its essential functions, that is to say, the power to legislate, to subordinate authorities? The answer is a qualified 'yes'.

Parliament cannot entirely abandon its legislative powers in favour of subordinate authorities. It can lay down the legislative policy and the principles embedded in the policy and can give guidance for carrying the law into effect. It can, and should, control the exercise of the delegated legislative powers.

---

1 Three terms are used to describe the exercise of delegated legislative power: *delegated legislation* because it is the exercise of a delegated power to make law; *subsidiary legislation* because it is subsidiary to an Act of Parliament; *subordinate legislation* because it is made by an authority subordinate to Parliament.

2 There are other authorities such as a Rules Committee which makes Rules of Procedure for the Courts, local authorities which make By-laws and other statutory bodies with power to make Regulations.

3 C. 1 of 1337.

4 12 Ric. 2 c. 16.

5 23 Hen. 8 c. 5.

6 31 Hen. 8 c. 8.

7 4 Geo. 1 c. 4.

There are two types of delegated legislation. One, the exercise of delegated legislative authority by means of the 'Henry VIII clause.' Two, the exercise of other delegated legislative authority. The first type deals with the power to amend Acts of Parliament which arose out of Henry VIII's persuasion of Parliament 'to enlarge his power to make law by means of proclamation.'[8]

The object of an Henry VIII clause is to make it easy for minor amendments to be made to the Act - and perhaps to other Acts of Parliament. Today the device of the Henry VIII clause is confined in most cases to the amendment of the Schedule to an Act. Perhaps the time has come to get rid of this type of delegated authority.

The other type of subsidiary legislation is the more common. It is the power conferred by Parliament on subordinate authorities to put flesh and blood on the skeleton of an Act of Parliament. It has given rise to a lot of criticism. This led to the appointment of the Committee on Ministers' Powers in 1929.

Its Report[9] confirmed, in effect, the statement in *R. v Burch*[10] that 'Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion entrusted by the legislature to persons in whom it places confidence is no uncommon thing and in many circumstances it may be highly convenient.'

The Committee on Ministers' Powers[11] listed six reasons why delegated legislation has become a normal feature of parliamentary delegation.[12] They can be reduced to four:

(a) pressure on parliamentary time;

(b) the inability of Parliament to deal with technical matters;

(c) the need for flexibility; and

(d) emergency situations.

These are the arguments put forth in favour of Parliament dealing with the essential principles of legislation leaving the administrative details to the departmental officials.

The Committee on Ministers' Powers[13] also listed the main criticisms against delegated legislation as,

(a) its extension to matters of principle including the imposition of taxation;

---

8 *Craies on Statute Law* (7th ed.), p. 293.

9 (1932) Cmnd. 4060.

10 (1878) 3 App. Cas. 889, 906.

11 (1932) Cmnd. 4060.

12 *Op. cit*., pp. 51-52.

13 *Op cit*., p. 31.

(b) the amendment of Acts of Parliament;

(c) wide discretionary powers given to Ministers without, in some cases, a specific limit on the exercise of those powers; and

(d) the ousting of the jurisdiction of the courts.

There is a case[14] where a certain set of Regulations were amended without the knowledge of the Minister. Departmental officials and Counsel in league with their friends outside the Ministry had done this! Despite Crichel Down and its aftermath. It sounds very much like the Waterworks Bill, the Town Clerk and his matrimonial predicaments recorded by Megarry.[15] Statutory powers are intended to be exercised in good faith. The principle and practice of the doctrine of *alter ego* should not extend to legislation. The Interpretation Act of Guyana[16] has a provision which forbids

> the President, any Minister or any specified public officer to delegate any person to make subsidiary legislation …

Craies[17] deals with two kinds of safeguards to check the abuse of the exercise of delegated legislative power. These are

(a) *before the exercise of the power*,

(i) the delegation must be to a trustworthy authority, such as a Minister;

(ii) the limits of the delegated powers should be clearly defined:

> (1) The Minister may, by legislative instrument, make Regulations prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for the better carrying out of, or giving effect to, the provisions of this Act.
>
> (2) Without prejudice to the generality of subsection (1), Regulations under subsection (1) may provide for
>
> *(a)* the procedure to be followed in applications for recognition of refugee status and the form in which the applications shall be made;
>
> *(b)* the manner and form in which appeals may be made to the Minister;
>
> *(c)* the issue of identification documents to persons who have applied for recognition of their refugee status, and to members of their families;

14 Known personally to the author. It occurred between 1981 and 1982.

15 *Miscellany-at-Law*, p. 345

16 Cap 2.01 s 27(3).

17 *Craies on Statute Law* 7th Ed., p. 293-295.

(d) the form and issue of identification and travel documents to recognised refugees and protected persons;

(e) the form of any order or notice required to be served on a person in terms of section 15, and the manner in which the order or notice may be served;

(f) the affording, to persons who are detained after appealing unsuccessfully in terms of section 8 or 15, of facilities for them to seek admission to a country of their choice;

(g) co-operation and consultation with the United Nations High Commissioner for Refugees concerning applicants for refugee status, the making of representations by the High Commissioner in relation to any persons for the purposes of this Act, and the services and assistance that may be rendered by the High Commissioner for or on behalf of any persons for the purposes of this Act; and

(h) the form and manner in which effect shall be given to Article 35 of the Convention and Article 11 of the Protocol, concerning co-operation of the national authorities with the United Nations.[18]

(iii) there must be full consultation with affected interests; and

(iv) the instrument must be laid before Parliament:

(1) The Minister may, by Order approved by Parliament, amend the Schedule to this Act.

(2) The draft of the Order shall be laid before Parliament and the Order shall not be made by the Minister unless the draft of the Order is approved by a Resolution of Parliament supported by the votes of a majority of the members present and voting.

(3) The Order as approved by Parliament shall be published in the Gazette.

(b) *after the exercise of the power*:

(i) publication of the instrument;

(ii) laying before Parliament, for the exercise of affirmative resolution or negative resolution:

(1) The Minister may, by legislative instrument, make Regulations to give effect to the provisions of this Act.

(2) Regulations made under subsection (1)

(a) shall be laid before Parliament; and

18 Adapted from clause 17 of the Bill for the Refugees Act 1991, of Belize.

(b) shall come into force on the date they are so laid; but the Regulations shall cease to have effect on annulment by a Resolution of Parliament, supported by the votes of not less than two-thirds of all the members of Parliament. (*Negative Resolution*)

(1) The Minister may, by legislative instrument, make Regulations to give effect to the provisions of this Act.

(2) Regulations made under subsection (1)

(a) shall be laid before Parliament; and

(b) shall not come into force unless approved by a Resolution of Parliament supported by the votes of not less than two-thirds of all the members of Parliament. (*Affirmative Resolution*)

(iii) examination by a select committee, for example, the Statutory Rules Committee;

(iv) general parliamentary control; and

(v) a statement of the objects and reasons and explanatory notes for the making of the instrument. Usually, the Explanatory Note sets out the policy considerations which led to the making of the instrument, and in simple language, explains what the instrument is all about.

EXPLANATORY NOTE

This Note does not form part of the Regulations, but is intended to explain their general import.

The Regulations set out the rights and responsibilities of persons who use a public park. They state the facilities that are available in a public park and what a person may or may not do in a public park.

A typical format for a legislative instrument would have the enacting formula thus:

IN EXERCISE of the powers conferred upon the Minister by section 24 of the Housing Act, 1924, these Regulations are hereby made this 19th day of October, 1978.

.....

.....

Minister

In some jurisdictions the form is:

THE ROAD TRAFFIC ACT, 1927

(Section 237)

THE ROAD TRAFFIC REGULATIONS, 1938.

1.....

2.....

Minister.

Here is another format:

IN EXERCISE of the powers conferred upon the Draftaria Urban District Council by section 84 of the Local Government Act, 1907, these By-Laws are, with the approval of the Minister, hereby made this 23rd day of May, 1928.

.....

.....

Resolved by the Draftaria Urban District Council the 10th day April, 1928.

Approved by the Minister this 24th day of May, 1928.

Minister.

In the United States, Congress has legislative committees which conduct investigations into the necessity and scope of subsidiary legislation before it comes into force. Such an inquiry, if adopted in Commonwealth countries, would be 'an essential and appropriate ancillary to the Legislative function' of Parliament; the predominant issue would be the furtherance of the legislative purposes.

The powers would be stated with sufficient particularity. There would be an appropriate balance between the public need and the rights of the individual. The committee would require co-operation from all concerned in its efforts to obtain the facts needed for intelligent legislative action.There would be no vagueness about the work of the committee. The legislative action would need a sharp degree of explicitness and clarity.

The procedures of affirmative and negative resolutions are admitted. So also are those related to the work of the Select Committee on delegated legislation. What is envisaged here is something more than those. There would be power vested in such a committee to impose punishment for contempt of its authority for failure to supply relevant information; to imprison, if need be. There would be power to obtain all relevant information needed for the committee to properly perform the functions of investigation. There would be no invasion of the private rights of individuals. Questions asked must be relevant to the inquiry.

In 1893 Sir Henry Jenkyns, then first Parliamentary Counsel at Westminster, wrote:

> Statutory rules are themselves of great public advantage because the details … can thus be regulated after a Bill passes into an Act with greater care and minuteness and with better adaptation to local or other special circumstances than they can possibly be in the passage of a Bill through Parliament. Besides, they mitigate the inelasticity which would otherwise make an Act unworkable and are susceptible of modifications … as circumstances arise.

In the end I agree with Ilbert[19] that, 'The increasing complexity of modern administration and the increasing difficulty of passing complicated measures through the ordeal of parliamentary discussion, have led to an increase in the practice of delegating legislative power to executive authorities.'

In delegating legislative power to a subordinate authority it is desirable, as a constitutional duty, that Parliament sets the standards required for the exercise of the legislative power so conferred. Thus, the nature of the power delegated becomes important. Parliament may delegate to a subordinate authority

(a) a general power to legislate;

(b) a power to legislate

  (i) for a particular purpose,

  (ii) for a particular subject matter; or

(c) particular powers to legislate.

General Powers

There is often found in legislation power conferred on an authority to make *Regulations for the better carrying into effect the purposes and principles of an Act*.

What are the *purposes* of the Act? What are the *principles* of the Act? It could be argued that the power conferred here is one the exercise of which could be used to interfere with or alter substantive rights. For that may well fall within the *purposes* of the Act though the Act may be *expressly silent* on the matter. It could also authorise the making of purely administrative regulations.

A very wide power is conferred where a subjective test of necessity is prescribed, if the Minister is required to make Regulations *he*, the Minister, thinks appropriate for carrying out the *purposes* or *principles* of the Act. The purpos-

19 *Legislative Methods and Forms*, 1901, p. 37.

es or principles of an Act of Parliament represent the ultimate aims and goals intended to be achieved by the Act.

The power here conferred would make it possible for the Minister *as the sole judge of necessity* to do what *he* likes - aided, of course, by departmental officials. The power thus conferred could be perceived through the Machiavellian principle that 'the end justifies the means'. The end result may be considered to be all important - the means of getting there is left largely to the discretion of the Minister.

There is thus a distinction, however subtle it may be, between

(a) the power to make Regulations *as may be necessary to carry into effect the provisions of an Act*, and

(b) the power to make such Regulations as the Minister thinks fit to make for the purpose of carrying into *effect the purposes of the Act*.

In (a), Regulations which cannot be related to a provision of the parent Act would clearly be *ultra vires*. In (b), the Minister may well have a free for all!

Particular Purposes

For a particular purpose power may be conferred on a Minister to make Regulations *for the purposes of prohibiting the export or import of agricultural products*. Here Parliament has authorised the making of Regulations for a particular purpose. This means that a free hand has been given to the Minister to provide for the main principles of the Regulations as well as the details.

The whole fabric of the law, as it were, has been delegated to a subordinate authority to determine the details. That authority can determine the main principles regarding the importation or exportation of agricultural products. And there can be no successful challenge in so far as the Regulations fall squarely within the ambit of the stated particular purpose.

And when expressions such as 'the Minister *thinks necessary* for the stated purpose' are used, even greater power is conferred.

Subject matter

The situation is no better when we are dealing with the subject matter. Power conferred on a subordinate authority to make Regulations *in respect of the use or operation of transport facilities* would embrace a regulation for a purpose falling within the ambit of the defined subject matter.

Particular Powers

Here neither a legislative purpose nor a subject matter is defined. The power given is for the making of a specific set of Regulations. This has two aspects.

Power conferred to make Regulations *for the purposes of restricting or prohibiting the export of tobacco* has set out in full the objective to be attained. A set of Regulations which has as its purpose the restriction or prohibition of tobacco exports would be *intra vires*.

Ancillary matters could thus be dealt with. But when the power conferred is *for prohibiting the export of tobacco* then we have the definition of the specific power. The Regulations can only prohibit. They cannot request those concerned to supply returns, for example, of the available stock of tobacco.

Driedger put it clearly in *The Composition of Legislation*:[20]

> The distinction between purposes or subjects, on the one hand, and power on the other, is also relevant in relation to sub-delegation. For example, if a Minister had power to make regulations *respecting tarriffs and tolls* he could authorise some other person to fix a tarriff or toll; such a regulation would clearly be one respecting tarriffs and tolls. But if the Minister's authority is to make regulations prescribing *tarriffs and tolls* then the Minister must himself prescribe, and cannot delegate that authority to another.

So much, then, depends upon Parliamentary Counsel. The acute awareness of Counsel of their responsibilities as lawyers first and as Parliamentary Counsel second, who must keep watch and ward over the human values of the respect for the rights and interests of the individual, would enable them to draft discretionary power in such a way that departmental officials would not get away with it. Parliamentary Counsel need to be experts in the adjustment of human relations. They must not forget their status as specialists - and all that this implies.

Thus, in the conferment of a specific power, Parliamentary Counsel must distinguish between the power to make Regulations,

(a) for the purpose of restricting or prohibiting the export of agricultural products, and

(b) prohibiting or restricting the export of agricultural products.

There are two main types of powers involved here. Firstly, a direct power is conferred to do a particular thing and no other. In this case the authority concerned would do precisely what the enabling power says should be done. A set of Regulations diverting from the power would be *ultra vires*. This is the power given under (b). Here the Minister can make Regulations prohibiting or restricting the export of agricultural products. The Minister cannot add anything else.

---

20 2nd Ed. p. 193.

Secondly, under (a) a wider power is given. The Minister or other authority is given liberty to determine the method of achieving what the authority is empowered to do. In this type of power the authority may do anything to achieve the desired goal. In such powers it would be very rare cases where the Minister or other authority can be challenged under *ultra vires*. Under (a) the Minister may determine the method of achieving the objective of restricting or prohibiting the export of agricultural products.

The power to make Regulations *for the purpose of restricting or prohibiting the export of agricultural products* is an absolute power to make Regulations the end result of which will restrict or prohibit the export of agricultural products. Regulations could be made dealing with the production, storage or buying of the agricultural products. Regulations made under the power place the emphasis on the achievement of the objective of the Regulations, that is, restricting or prohibiting the export of agricultural products. Once the Regulations are made to achieve that objective any thing done thereunder to achieve that end is *intra vires*.

On the other hand the power to make Regulations *prohibiting or restricting the export of agricultural products* is a restrictive power. The Regulations made must directly prohibit or restrict the export of agricultural products. Anything beyond that prohibition or restriction would be *ultra vires*. This is a direct power for a particular action to be taken and no related Regulations can be made because such other Regulations will not directly prohibit or restrict the export of agricultural products. The Regulations must do exactly what the power says.

Thus the power given under paragraph (b) is *a definition of a specific power.* The power given under paragraph (a) is *a statement of the objective to be achieved* by the Regulations. Two different approaches are shown to achieve the same end: restricting or prohibiting the export of agricultural products.

The distinction between the purposes or subjects of a set of Regulations and specific powers to make Regulations is mainly in the difference of the powers conferred upon the authority making the Regulations. In the first category the authority has a wider power within which to do what it is authorised to do. In the other category the authority has a limited power to do just what it is asked to do.

Dealing with the different techniques by which power to legislate is conferred, Thornton[21] states that, 'Power to legislate for specified purposes or in respect of specified subject matters will more readily be constructed as implying ancillary and incidental powers than will the stipulation of a particular power.'

21 *Legislative Drafting*, 3rd Ed. p. 276.

Where powers are given to legislate for a particular purpose or a particular subject matter the enabling power authorises the making of Regulations for a particular purpose or subject matter. The power given to the authority will embrace decisions on policy matters. That is to say, any set of Regulations which would achieve the purpose of, or relate to, the subject matter. Where, to continue with the example already stated, power is given for

> the purposes of prohibiting or restricting the export of agricultural products,

almost the whole making of the law is given to the authority. The authority will determine not only the details but also the policy. It will determine the main principles regarding the exportation of agricultural products.

The authority could

(a) make Regulations that no person should produce more than a prescribed quota of agricultural products;

(b) put exorbitant duties on materials needed to prepare the agricultural products for export;

(c) authorise personnel at ports to confiscate the products from persons trying to export those products;

(d) give incentives to persons who produce the agricultural products for the domestic market;

(e) create offences to provide penalties relating to the export of the agricultural products.

No court can review the decisions of the authority so long as they fall under the purpose to be achieved. Perhaps fraud or improper motives would be the grounds upon which the *vires* of the authority could be challenged.

On the other hand, where specific powers to make Regulations are given, the enabling power does not give a purpose or a subject matter. The power given is for the making of a specific set of Regulations. The power given to make Regulations *prohibiting or restricting the export of agricultural products* is the definition of a specific power. It is a restrictive power.

The Regulations can *only* restrict or prohibit. The authority cannot, for example, regulate the price to be paid to producers. It cannot put any restrictions on agricultural produce, impose export taxes nor can it put under price control the materials needed for preparing the products. The authority can only operate within the tight framework of the delegated discretion. The sword of *ultra vires* hangs over the head of the authority.

The Broadcasting Act, 1982, of Barbados, establishes a Broadcasting Authority and states that,

> The Authority may, with the approval of the Minister, make Regulations respecting

(a) station and programme identification in the course of broadcasting and televising of programmes;

(b) the identification of sponsors and speakers;

(c) the records to be kept by licensees, and the time, place, and manner of their production to the Authority;

(d) the control of the character and standards of programmes for broadcasting by licensees;

(e) the proportioning of time allocated for advertising during programmes broadcast by licensees and the control to be exercised in respect of the nature of such advertising;

(f) the allocation of time by licensees to the broadcasting of matters of religious, political or industrial controversy and the ensuring of the presentation of due impartiality in programmes relative to such matters; and

(g) the prescribing of anything that is, by the Act, authorised or required to be prescribed.

This is, indeed, a good example of regulating for a purpose. The only stipulation is that the exercise of its discretion must be approved by the Minister. Even the 'all-embracing' last paragraph seeks to underscore the wide powers of this Authority in respect of any broadcast medium.

On the other hand, however, if the power to make the Regulations is stated to be *regulating broadcasting*, then this would constitute a specific power and the Authority would have to confine itself to regulating broadcasting without reference to any incidental or ancillary matters. As it stands, the Broadcasting Authority, for example, may exercise its discretion in a number of ways however remote it may seem to broadcasting, subject only to the approval of the Minister and the rules of *ultra vires*.

Similarly, if the power states that the Attorney General

> may make Regulations for the purposes of restricting or prohibiting the use of, and trafficking in, illegal drugs,

the Attorney General, according to his discretion, may make Regulations for any activity which would have as its end result the restriction or prohibition of the use of, and trafficking in, illegal drugs. This includes, for example,

(a) stiffer penalties for offences;

(b) creation of new offences;

(c) incentives to members of the public to give information relevant to the subject matter;

(d) regulations for testing for drugs; or

(e) delegation of investigative powers to other authorities.

Again this would be different if the Attorney General were given power to

> make Regulations to restrict and prohibit the trafficking in illegal drugs.

In this case, the Attorney General can *only* make Regulations in relation to the trafficking in illegal drugs and can have no authority to touch any of the incidental offences.

Where the enabling Act provides that,

> The President may, for the purposes of developing and utilizing the water resources of Draftaria, in the public interest, by order published in the *Gazette*, make Regulations,
>
> *(a)* respecting the construction, operation and maintenance of international river improvements;..

the power conferred is a combination of a prescribed purpose and a prescribed subject or subject matter. The opening words give the President power for a particular purpose: *for the purposes of developing and utilizing the water resources of Draftaria*. The objective to be attained is specified.

The President can therefore deal with ancillary matters. The President can provide for the main principles dealing with the matter and therefore policy matters on the subject. The President has very wide powers to deal with the subject matter and how he goes about it is under his discretion.

The condition attached to the subject is not defined. It is for the President to determine as it were, the *public interest*. So in whatever manner he decides to achieve the development is not open to challenge. Nor can there be a challenge that there was no public interest. What criterion would a person use to determine whether or not there was public interest?

Paragraph *(a)* is a specific power. However, it in no way restricts the power of the President. The power given under paragraph *(a)* amounts to a prescribed subject. It is therefore as wide as the opening clause. Under the circumstances the President can make Regulations prescribing dumping places. No one can challenge those Regulations. It can be argued that the prescribing of dumping places would help in the maintenance of international river improvements.

The regulation of dumping will help to keep the rivers free from contamination. If the rivers are free from contamination the lakes into which they flow will be free from contamination. The fish industry will flourish and contribute to the development of the country. All in all, the provision gives the President very wide powers to achieve the country's development.

In other words,

(a) the use of *may* gives a discretion which the President may or may not exercise, according to his judgement, as long as he follows the principles of the policy behind the grant of the power;

(b) the expression *for the purposes of developing and utilizing the water resources* is not only a statement of an objective but also makes the power valid in relation to any water resource in Draftaria. This includes all subterranean as well as surface sources;

(c) the President is limited in this matter only to subjection to the public interest, and to the fact that the power comes into effect on publication in the Gazette;

(d) the expression *respecting the construction, operation and maintenance of international river improvements* is also interesting since, according to Driedger, by the use of the term respecting the President can also sub-delegate to any other authority.

To recapitulate,

(a) a power conferred to *make Regulations for the purpose of …* is a power conferred for a particular purpose and therefore is a wide power which may cover anything so long as the purpose is achieved;

(b) a power conferred *to make Regulations respecting …* is a prescribed subject matter whose power is as wide as a prescribed purpose. So long as the Regulations achieve the subject matter they will be held valid;

(c) a power *to make Regulations*

  (a) *in relation to …*

  (b) *respecting …*

  (c) *for the purpose of …*

  (d) *prescribing …*

  (e) *determining …*

has three different types of powers. Paragraphs (a) and (b) are prescribed subject matters and therefore give the authority power to do anything so long as the thing done is *in relation to* or *respecting* the subject matter to be achieved. Paragraph (c) is a prescribed purpose. This power is also as wide as the power given under (a) and (b). The authority can make any Regulations to achieve the purpose desired. Paragraphs (d) and (e) on the other hand are prescribed powers. The authority cannot make Regulations on any ancillary matter. It has to do strictly what the paragraphs say and nothing else.

Classification

How then does the classification of a statutory power assist in the determination of the validity of a set of Regulations?

Two types of subsidiary legislation are involved here. Those which carry with them sanctions for infringement and those which do not. Regulations prescribing fees, forms or the steps to be followed in complying with the provisions of the Regulations do not carry or require sanctions to ensure their

enforcement. Such Regulations normally depend upon the Civil Service or the particular Department concerned for their enforcement. Such Regulations are comparable to internal management bye-laws and do not directly affect the public.

Regulations requiring members of the public to do or to refrain from doing certain things or Regulations which affect rights and property of private individuals are of little value if no sanctions are provided to ensure their enforcement.

Parliamentary Counsel should therefore first consider the *nature* of Regulations intended to be made. If they are purely administrative, no sanctions need be imposed. If the Regulations require sanctions to make them effective a penalty provision must be added or the authority should be given powers to impose penalties.

The extent to which powers should be delegated always requires careful consideration. The powers normally should not extend to matters of principle on which a decision ought to be taken by Parliament or the Legislature. The main problem is how to determine what should be stated in the Act and what should be left to Regulations. The extent to which legislative powers should properly be given in a particular case is not a matter which should be considered in isolation but in relation to,

(a) the identity of the authority and the extent to which it is desired to authorise that authority to sub-delegate;

(b) the consultation obligations to be imposed on the authority; and

(c) the nature and extent of parliamentary supervision intended.

The Privy Council held in *Utah Construction and Engineering Ltd. v Pataky* [22] following *Shanahan v Scott* [23] that,

> The result is to show that such a power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary meaning of carrying into effect what is enacted in the Statute itself and will cover what is incidental to the execution of its specific provision. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary its ends.

In *A.G. for Canada v Hallet and Carey*[24] the Governor-in-Council was given powers to do and authorise such acts and things, and make from time to time, such orders and Regulations, as he may, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, deem necessary for the purposes of,

---

22 [1965] 3 All E. R. 650 at p. 653.

23 [1957] 96 C. L. R. 245 at p. 250.

24 [1952] A. C. 427.

(a) .....

(b) .....

(c) maintaining, controlling and regulating supplies and services, prices, transportation, use and occupation of property, rentals, employment, salaries and wages to ensure economic stability and an orderly transition to conditions of peace …

This provision is a combination of powers to legislate for a particular subject matter and a particular purpose. The provision is so wide that there is no way any Regulations made by the Governor-in-Council could be nullified.

The respondent tried to contest the wide range of the powers in the section. It was argued that on a proper interpretation Parliament could not have intended such wide powers. The Privy Council held that,

> … where the import of some enactment is inconclusive and ambiguous the court may properly lean in favour of an interpretation that leaves private rights undisturbed. But in a case such as the present the weight of that principle is too light to counter balance the considerations that have already been noticed. For here the words that invest the Governor with the power are neither vague nor ambiguous …

It was further held that once the Governor-in-Council determined that something should be done for an authorised purpose, then he might, under the Act make whatever orders he might consider necessary or advisable to serve that purpose.

In *R v Halliday*[25] the Secretary of State for Home Affairs was given power to impose restrictions on the freedom of movement of persons whom he suspected of being disposed to help the enemy for the purposes of controlling peace. The provision was contested on the ground that the powers were too wide and therefore should be narrowed down in their interpretation. Rejecting to apply strict interpretation to the provision the court held that,

> the question is whether there is ground for suspicion that a particular person may be disposed to help the enemy. The duty of deciding this question is by the order, thrown upon the Secretary of State …

In the New Zealand case of *Reade v Smith*[26] the Supreme Court condemned a regulation made by the Governor-in-Council which authorised the compulsory transfer of pupils between schools and which was held to be in direct conflict with the principle of parental choice on which the parent Act was founded.

---

25 [1917] A. C. 260.

26 [1959] N.Z.L.R. 996.

This case also demonstrated that no matter how subjective the language used, the courts tend to refer to the intent of the parent Act to interpret the width of the authority given to the functionary who will exercise it.

In *Reade v Smith* the Act empowered Regulations which 'in the opinion of the Governor-General' were required 'for which he thinks necessary in order to secure the due administration of this Act.' The court, whenever possible, is prepared to set a definite framework within which a power should be exercised and so held that, in spite of the wide subjective power apparently delegated, it could always inquire whether the Governor-General could reasonably have formed the necessary opinion and whether he acted on a view based firmly on a question of law.

There is, however, one caveat in dealing with the delegation of wide and specific powers.

According to Wade[27] it would seem that, despite their strict standards, the courts will lean in favour of upholding a wide powered Regulation which forms part of a statutory scheme and which has long been relied upon in property transactions,[28] or in favour of emergency Regulations in such situations as in war time.[29]

We have seen in our discussions that the power to legislate for a specific purpose gives a Minister powers to make any Regulations for as long as they achieve the purpose. We have also seen that it would be very difficult to challenge such powers in a court of law unless fraud is proved.[30] We have also seen that the power to legislate for a specific subject matter is also as wide as the specific purpose.

The conclusion is, therefore, that it is very difficult for the court to hold Regulations made under these two powers to be *ultra vires*. The Regulations made are entirely under the Minister's discretion probably with the help of the officers in the particular Department concerned.

Regulations made under particular powers, on the other hand, are Regulations which are directly to the point. The Minister, as we have seen in the discussions, has power to make Regulations as stated in the provision and anything departing from that will be held *ultra vires*.

---

27 *Administrative Law*, p. 749.

28 See *Ministry of Housing and Local Government v Sharp* [1970] 2 Q.B. 223.

29 Note, however, that *Liversidge v Anderson* [1942] A. C. 206 is important in setting the line that not even the courts are prepared to allow unfettered powers dealing with delegated legislation. Note also Lord Diplock's favourable opinion of Lord Atkin's dissenting judgement in the *Liversidge v Anderson* case in *Rossminster* case [1980] A. C. 952. It would therefore be safe relying on Thornton p. 278, to say that for Parliamentary Counsel, the object, when drafting provisions which delegate power, must be to achieve a desirable flexibility [where required] without risk of derogating from basic principles of Legislative Drafting or of Administrative Law.

30 The *Carey* and *Halliday* cases.

In the interpretation of Regulations made under a general power the test used may be objective or subjective depending on the width of the provision giving the powers. For the Regulations made under specific purpose powers or specific subject matters, the test will be subjective and for the specific powers the test will be objective. For Parliamentary Counsel the problem then turns to the limits of administrative discretionary power. We do not deny that Government must govern or that Parliament is the legislative arm of government or that legislation looms large as an important province in the science of government.

The limits that can be imposed would depend upon a high degree of an appreciation of the scale of human values. Fundamental human rights are to the fore in many political issues of the day. They are concerned with the protection of life and liberty. Legislation is, in all respects, an encroachment on our rights and the basic values of liberty and property within a given socio-economic context. Can we stem the tide of the administrative legislative processes as an intolerable encroachment on the power of Parliament itself?

In fields such as national security, deportation, immigration and the like, what are the limitations that we can impose? If we favour wide administrative discretion in the area of legislation, especially in economic and social reform, can we condemn what latitude should accompany that discretion in the area of human rights? Liberty is a value. And so what do we say about subsidiary legislation like Regulation 18B and *Liversidge v Anderson*.[31] Such decisions are open to serious objection and have been severely criticised.

The rule of law demands that governmental authority affecting the interests of the individual must have a legitimate foundation. The Executive does not have any inherent rule making authority or regulatory powers except as regards purely internal administrative matters. Subsidiary legislation ensure that legitimacy. What values then should departmental officials consider worth protecting in our contemporary democracy? They must be values enshrined in the legal system.

If that is done perhaps we can trust departmental officials to fill in the details of the basic principles of the law enacted by Parliament. So we can allow the correct balance between the freedom of governmental authority - and the protection of the basic rights of the individual.

There is a purpose in power. For '… all power is a trust … we are accountable for its exercise … from the people, and for the people, all springs and all must exist.'[32]

31 [1942] A. C. 206.

32 Benjamin Disraeli, *Vivian Grey*, Bk. VI , Chap. 7.

Chapter 16

The Masters and the Servants

The courts are the masters;[1] they determine what an Act of Parliament says. Departmental officials may, in the implementation of an Act, give whatever meaning they consider appropriate to a particular piece of legislation. The layman will act according to that layman's understanding of the law. Lawyers will give their opinions as to what the law is. Advocates may try to misunderstand the law. Others either in good faith or bad faith will criticise the art of Parliamentary Counsel. Nobody is the wiser. But if there is a challenge, all must bow before the masters in the interpretation of the law. In this task the courts have evolved their own rules to guide them.

Parliamentary Counsel are civil servants. They are servants to all who read an Act of Parliament. It is essential, therefore, that Counsel know how the scrutiny to which they are subject is ultimately dealt with hence they should be familiar with the basic rules of interpretation.

It is important to distinguish between interpretation and construction even though the terms are used interchangeably.

Interpretation

Interpretation is a journey to discover the meaning of the words used in an Act of Parliament or any other written document. Interpretation is *authentic* where the meaning is expressly provided for as in this example,

> "child" means a person under the age of twenty-one years and who was born after the first day of January, 1962.

Two elements are involved here, that is to say, the age limit of under twenty-one years *and* the fact of birth *after* the first day of January, 1962. Therefore, a person under the age of twenty-one years who was born *before* the first day of January, 1962, is *not* a child for the purposes of the law.

Interpretation is *usual* or *customary* when it is based upon acceptance of the usage of the word or expression. A baker's dozen is not twelve. It is thirteen. That is the accepted meaning in the trade of bakers. And when a person talks incessantly we say that person talks nineteen to the dozen. Not twelve to the dozen.

---

1 Taking a cue from Humpty Dumpty, Lewis Caroll, *Through the Looking Glass*.

An interpretation is considered *doctrinal* where the meaning of the words or expression used turns on the *grammatical* arrangement of the words of the sentence. Where the interpretation is based upon what is termed the intention of Parliament the interpretation can be described as *logical*. Logical interpretation may be *extensive*, that is liberal interpretation, or *restrictive*, that is strict interpretation.

Construction

Construction is wider in scope than interpretation. It is directed at the legal effect or consequences of the provision called into question. Thus interpretation comes before construction. Having ascertained the meaning of the words, how do they fit into the scheme of the Act as a whole. We are in the realm of construction when the courts are dealing with such matters as *casus omissus*, and time and circumstances of an Act of Parliament.

Lord Simonds' strictures[2] on Lord Denning in *Magor and St. Mellons Rural District Council v Newport Corporation*[3] are pertinent here:

> My Lords, the criticism which I venture to make of the judgment of the learned Lord Justice is not directed at the conclusion that he reached. It is after all a trite saying that on questions of construction different minds may come to different conclusions, and I am content to say that I agree with my noble and learned friend. But it is on the approach of the Lord Justice to what is a question of construction and nothing else that I think it desirable to make some comment; for at a time when so large a proportion of the cases that are brought before the courts depend on the construction of modern statutes it would not be right for this House to pass unnoticed the propositions which the learned Lord Justice lays down for the guidance of himself and, presumably, of others. 'We sit here,' he says, 'to find out the intention of Parliament and Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis.' The first part of this passage appears to be an echo of what was said in *Heydon' s Case*300 years ago, and, so regarded, is not objectionable. But the way in which the learned Lord Justice summarises the broad rules laid down by Sir Edward Coke in that case may well induce grave misconception of the function of the court. The part which is played in the judicial interpretation of a statute by reference to the circumstances of its passing is too well known to need restatement; it is sufficient to say that the general proposition that it is the duty of the court to find out the intention of Parliament - and not only of Parliament but of Ministers also - cannot by any means be supported. The duty of the court is to interpret the

2 [1952] A.C. 189 at p. 190.

3 [1950] 2 All E.R. 1226 at p. 1236.

words that the legislature has used; those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited: see, for instance, *Assam Railways & Trading Co. Ltd. v Inland Revenue Commissioners*[4] and particularly the observations of Lord Wright.

The second part of the passage that I have cited from the judgment of the learned Lord Justice is no doubt the logical sequel of the first. The court, having discovered the intention of Parliament and of Ministers too, must proceed to fill in the gaps. What the legislature has not written, the court must write. This proposition, which restates in a new form the view expressed by the Lord Justice in the earlier case of *Seaford Court Estates Ltd. v Asher*[5] (to which the Lord Justice himself refers) cannot be supported. It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation. And it is the less justifiable when it is guess work with what material the legislature would, if it had discovered the gap, have filled it in. If a gap is disclosed, the remedy lies in an amending Act.

It should be added, though, that the Law Commissioners in their Report[6] favour Lord Denning's view.

Constitutions

A constitution is a document different from an Act of Parliament. It is the framework of the body politic. From it springs all authority and the strength and power of the people. It has a method all its own for its amendment. It is a living organism capable of growth and development. In the words of Chief Justice Marshall, it is 'designed to approach immortality as nearly as human institutions can approach it.' Its construction demands a broad and liberal spirit, not a narrow and pedantic approach.

Being organic in nature, its construction must be beneficial. It is not a private contract. That does not imply that the courts would pervert language in the interests of a particular legal or constitutional theory; it is essential to remember that a constitution is 'a mechanism under which laws are made and not a mere Act which declares what the law is to be.'

The Approach

For the interpretation of an Act of Parliament the general approach of the courts is that in all cases effect must be given to the language of the Act. Said Lopes, L.J:

4 [1935] A. C. 445.

5 [1949] 2 K. B. 481 at pp. 498-499.

6 Law Com. No. 21 of 1969 at p. 32.

> I have always understood that, if the words of an Act are unambiguous and clear, you must obey those words, however absurd the result may appear; … If any other rule were followed, the result would be that the court would be legislating instead of the … legislature …[7]

The courts in general do not exercise any control over Parliament. However, in jurisdictions with written constitutions the first approach of the courts is to discover whether the Act in question is within the constitutional competence of the legislature concerned. For the constitution is the supreme law, and a law inconsistent with, or in contravention of, the constitution is void to the extent of the inconsistency or the contravention. The courts have the power to declare an Act of Parliament as being *ultra vire*s the constitution or unconstitutional and therefore illegal.

But the courts will never question the *wisdom* of Parliament in enacting a piece of legislation. Where the Act is *within* the constitutional competence of the Legislature, it is no part of the function of the courts to question the policy of the law.

The corollary is that the courts will favour a construction which is in harmonious relationship with the constitution. It means that the courts will not admit the competence of colourable legislation, that is, the courts will not permit the Legislature to disobey the constitution by doing indirectly what the Legislature cannot do directly.

Resolving Ambiguity

The courts in dealing with difficulties in the construction of an Act of Parliament, do not proceed as mere grammarians. A statute is never supposed to use words without a meaning.[8] If there is ambiguity, the courts will

> adopt that construction which will give some effect to the words rather than that which will give none.[9]

In *Hill v William Hill (Park Lane) Ltd.*[10] Viscount Simon said that,

> It is to be observed that though a parliamentary enactment … is capable of saying the same thing twice over without adding anything to what has already been said once, this repetition in an Act of Parliament is not to be assumed. When the legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately before. The rule that a meaning should, if possible, be given to

---

7 *Victoria (City) v Bishop of Vancouver Island* [1921] 2 A.C. 384 at p. 388. See also *Warburton v Loveland* (1832) 5 E.R. 499 at p. 506.

8 *Auchterarder Presbytery v Lord Kinnoull* (1871) 6 Ch. & F. 646 at p. 686.

9 *Cargo ex Argos* (1873) L. R. 5 P. C., 134 at p. 153.

10 [1949] A. C. 530 at p. 546.

> every word in the statute implies that, unless there is good reason to the contrary, the words add something which has not been said immediately before.

The courts will not therefore reject words as insensible.[11] The courts proceed on the basis that the words of an Act should be so construed that no clause, no sentence, no word is superfluous. The courts would find a construction that would make the Act useful and pertinent.[12]

Suppression of Mischief

Heydon' s Case[13] has not lost any of its significance since the Barons of the Exchequer laid down the rule

> That for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered: (1) What was the common law before the making of the Act (2) What was the mischief and defect for which the common law did not provide (3) What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth (4) The true reason of the remedy. And then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief and *pro privato commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico*.

In the construction of an Act it is thus necessary to consider

(a) the Act in its ordinary sense, and to alter or modify the words as far as it is necessary to avoid manifest absurdity or incongruity;

(b) the state of the law which the Act proposes or purports to deal with;

(c) the mischief which the Act is intended to remedy;

(d) the nature of the remedy proposed; and

(e) the statutes *in pari materia* as a means of explaining the Act.[14]

In *Gartside v I.R.C.*[15] Lord Reid said that,

---

11 *R. v St. John, Westgate, Burial Board* (1862) 2 B & S 703 at p. 706.

12 *R. v Berchet* (1690) 1 Show. 106, E.R. 408, quoted in *R. v Bishop of Oxford* (1879) 4 Q.B.D. 245 at p. 261.

13 (1584) 3 Co. Rep. 7a.

14 *Salkeld v Johnson* (1848) 2 Ex 256.

15 [1968] A.C. 553 at p. 612.

> It is always proper to construe an ambiguous word or phrase in the light of the mischief which the provision is obviously designed to prevent and in light of the reasonableness of the consequences which follow from giving it a particular construction.

Construction of an Act as a Whole

An Act of Parliament is a serious document which confers rights and privileges and imposes obligations. It regulates the conduct of our affairs and demands a concentrated study. Driedger has remarked that,

> Every word in a statute is intended to have a definite purpose … All the provisions in it are intended to constitute a unified whole.[16]

It can only be understood if it is read as a whole. Its drafting proceeded on that basis. It was not passed in a vacuum. It is part of the circumstances that gave it its birth. It is only by recognising these facts that the object intended to be achieved by the Act can be appreciated. That can only come about if the Act is read as a whole.[17]

Natural and Ordinary Meaning

In the interpretation or construction of an Act the courts proceed on the basis that,

> every word ought, prima facie, to be construed in its primary and natural sense, unless a secondary or more limited sense is required by the subject or the context.[18]

Lord Atkinson in *Victoria (City) v Bishop of Vancouver Island*[19] said that,

> In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense.

In *Unwin v Hanson*[20] it was stated that,

> If the Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language. If the Act is one passed with reference to a par-

16 *The Composition of Legislation*, p. xxiii.
17 *Warburton v Loveland* (1832) 5 E. R. 499 at p. 506.
18 *Attorney General for Ontario v Mercer*, (1883) 8 A. C. 767 at p. 778.
19 [1921] 2 A. C. 384 at p. 387.
20 [1891] 2 Q.B. 115.

ticular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary words.

But as Lord Hobhouse said in *Salmond v Dunscombe*,[21]

It is, however, a very serious matter to hold that when the main object of a statute is clear, it shall be reduced to a nullity by the draftman's unskilfulness or ignorance of law. It may be necessary for a Court of Justice to come to such a conclusion, but their Lordships hold that nothing can justify it except necessity or the absolute intractability of the language used.

The Golden Rule

George Bernard Shaw[22] has warned that, 'the golden rule is that there are no golden rules.' All that the golden rule[23] of construction seeks to say is that where the application of the literal or plain meaning rule leads to manifest absurdity, inconsistency or repugnancy with the Act as a whole, 'the grammatical sense must then be modified, extended, or abridged, so far as to avoid such an inconvenience, but no further.'[24] It appears as if Bernard Shaw was supported by Lord Blackburn in *Caledonian Ry v North British Ry* :[25]

There is not much doubt about the general principle of construction. Lord Wensleydale used to enunciate … that which he called the golden rule for construing all written agreements. I find that he stated it very clearly and accurately in *Grey v Pearson*[26] in the following terms: 'I have been long and deeply impressed with the wisdom of the rule, … that in construing wills, and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or 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 the absurdity and inconsistency, but no further.' I agree in that completely, but in the cases in which there is a real difficulty this does not help much, because the cases in which there is a real difficulty are those in which there is controversy as to what the grammatical and ordinary sense of the words used with reference to the subject matter is.

---

21 (1886) 11 A. C. 627 at p. 634.

22 *Man and Superman*, III.

23 The appellation was given by Jervis C.J. in *Mattison v Hart* (1854) 14 C.B. 357.

24 *Bradlaugh v Clarke* (1883) 8 App. Cas. 354 at p. 384 *per* Lord Fitzgerald.

25 (1881) 6 App. Cas. 114 at p. 131.

26 (1857) 6 H.L.C. 61 at p. 106.

Chapter 17

Parliamentary Procedure

It is worthwhile for Parliamentary Counsel to have some knowledge of parliamentary procedure. For one thing, they need to be present in Parliament when Bills they have drafted are being dealt with. For the other, they may be called upon to advise the Speaker. In the older Commonwealth countries, there usually is Counsel to the Speaker. Even then, it is not unusual for Parliamentary Counsel to be called upon to advise on purely parliamentary matters.

The legislative programme of Parliament depends upon the legislative programme arranged by the government. The Cabinet Committee on Legislation or the Cabinet Legislation Committee is a Committee of the Cabinet. It is the organ of the Cabinet which is responsible for co-ordinating the legislative programme. It also examines draft Bills to ensure that they conform to government policy and that they comply with the decisions of the Cabinet. Its aim is the prompt and efficient despatch of the business in Parliament of the government of the day. This it does by

(a) ensuring that legislation considered by the Government as being essential to the implementation of its policies is dealt with in Parliament at the most appropriate and effective time;

(b) organising the introduction of legislation in Parliament to allow sufficient time for debate.[1]

In a number of Commonwealth jurisdictions Parliamentary Counsel attend the meetings of the Cabinet Committee on Legislation and at times, meetings of the Cabinet. They deal with issues that arise when a Bill is dealt with clause by clause at that Committee or at Cabinet. They may redraft certain provisions of the Bill there and then or submit a revised draft to the Committee for further scrutiny before the Bill is considered by Cabinet and before publication of the Bill in the *Gazette*.

When a Bill is introduced in Parliament[2] it is read a first time. First Reading means that the Clerk announces the title of the Bill. The Minister responsible for the Bill rises from the front Bench and bows. That is First Reading. It is a reminder of the days when Bills were actually read in Parliament as most members then could not read nor write; there is no debate on the Bill at this stage.

---

1 The Australian Government publishes a *Handbook on Legislation* which is very useful in these matters.

2 Where there are two Chambers the procedure is repeated. When the Upper and the Lower Chambers do not agree on amendments, usually a committee of both Chambers is constituted to resolve the differences.

The next stage is Second Reading when the principles of the Bill are fully debated. No amendments are permitted. However, in the course of a member's speech an indication may be given of the intention to move an amendment at the appropriate stage. In recent years, the Second Reading of a Bill may be referred to a special second reading committee. The committee reports to the whole House which then formally resolves that the Bill be read for a second time.

It is absolutely essential that Parliamentary Counsel attend the Second Reading Stage of a Bill drafted by Counsel. It will sufficiently warn Counsel of what to expect in the way of amendments, and to advise the Minister accordingly.

The Committee Stage follows the Second Reading. The Committee Stage is the most important part of the procedure. At this stage the Bill is debated clause by clause. The principles of the Bill cannot be debated. A motion is moved in respect of each clause to 'stand part of the Bill.' There is usually an informal atmosphere. A member may reply more than once to the same question.

Long set speeches are out of place. Remarks should be brief. Details of a Bill are being dealt with. They do not justify a lot of laboured arguments. Amendments put down usually come from the Minister sponsoring the Bill, departmental officials, even Parliamentary Counsel. Where amendments are accepted, Parliamentary Counsel drafts the required amendments.

In the words of Sir Noel Hutton, when a Bill is introduced in Parliament,

> the draftsman's work is by no means over. He settles the notice of introduction and any parliamentary resolutions, including any Guillotine Resolutions.[3] He attends all stages at which the Bill can be amended. He is there in order to advise the Minister in charge, and the Speaker, or the Chairman when the Bill is in a Standing Committee, about amendments. The draftsman examines all proposed amendments to the Bill and on these advises the department and the officers of the House as necessary. He drafts all Government amendments, which because of changes in policy are often very extensive.[4]

At the Report Stage the Bill, as amended in Committee is reported to the House. If the House is not satisfied the Bill may be sent back to the Committee. Occasionally, but not usually, amendments may be made at the Report Stage.

Finally, the Bill is read a Third time. At Third Reading debate is brief. General comments on the Bill as a whole may be dealt with. The Bill is then passed by Parliament and is submitted for the assent. When the assent is given, the Bill becomes an Act of Parliament.

---

3 A similar Resolution is the Kangaroo.

4 *Professionalizing Legislative Drafting*, Ed. Reed Dickerson, p. 118.

Due to its importance a little more needs to be said about the Committee Stage. Normally, Bills are dealt with at this stage by a Committee of the Whole House. Increasingly, Standing Committees are chosen by the Committee of Selection. A Standing Committee reflects the strength of the political party structure in the House itself; it is a miniature Parliament. Amendments are put down for the Committee's consideration. These amendments are drafted by the Parliamentary Counsel who drafted the Bill before the Committee. The language used is that of Parliamentary Counsel and each amendment is fully debated. At the end of each debate there is a motion that the clause as originally presented or as amended should stand part of the Bill.

Amendments moved by the Opposition or the Government's own backbenchers are sometimes accepted. Most probably the amendments are withdrawn when the Minister in charge of a Bill gives an undertaking that he will reconsider the substance of the provision to meet a point raised on the particular clause. Many are the situations when the Government will not agree to an amendment, however controversial the Bill is.[5]

Gerald Kaufman[6] gives us a very graphic idea of how the committee system works in the House of Commons. He states that once a Member goes into the committee room he is encapsuled in a private world, life is governed by the hours the committee sits and the party to which the member belongs. If the member is a government backbencher, the sole expectation is that the member sits silently, except when votes take place and the member is required to call out *Aye or No*, as instructed by the harrassed but unrelenting whip; … Apart from monosyllabic voting utterances, nothing whatever is expected from supporters of the administration, who sit at their desks, studying their constituency correspondence, from time to time looking up in case something interesting might be happening. He further states that,

> Ministers in charge of piloting the Bill are amply, indeed almost excessively, briefed. They are issued with one set of folders marked Notes on Clauses, which explain to them what each clause of their Bill is supposed to, and in some cases actually does, mean. As opposition MPs rise to move amendments, the Minister due to reply, consults another folder, entitled Notes on Amendments.
>
> Some of these notes are headed Resist, which means that at the end of the debate the backbenchers will have to be on hand to call out 'No.' Others - a much rarer genus - have the heading Accept. The third heading, Consider, imposes on the Minister the testing responsibility of actually listening to the debate and making up his own mind on the merits of the arguments.

5 An example is the European Communities Bill – de Smith *Constitutional and Administrative Law*, 5th Ed., 291.

6 *The Listener*, 29th March, 1984.

> When opposition members irritatingly ask awkward questions, answers to which are contained neither in Notes on Clauses nor in Notes on Amendments, solicitous civil servants (two of whom sit on the Chairman's dais, with others huddled in a corner) will pass the Minister little notes ....

Sir Noel Hutton has also stated that,

> In general the only amendments that are actually made in the Government Bill are those amendments which are proposed by the Government and those which are agreed to by the Minister in charge of the Bill. The former are always drafted by the Parliamentary Counsel in charge of the Bill; and as to those proposed by other members, his advice is nearly always taken and acted on. If a proposed amendment is acceptable to the Minister as a matter of policy but is defective in form, then either the amendment will be made and sorted out at a later stage by further government amendments, or it will be withdrawn on a promise by the Minister to promote a Government amendment at a later stage. The latter practice in turn leads to the accusation that the Government draftsmen, sheltering behind the Minister, exercise far too much control over the language and structure of legislation, thus making a mockery of the true democratic process.[7]

And Michael Zander[8] gives another telling example:

> The Official Secrets Act, 1911, which is still law today and has given rise to endless controversy passed all its stages in a single day in August of that year. Twenty years later the junior minister who piloted the Bill through the House of Commons described the event:
>
> I got up and proposed that the Bill be read a second time, explaining, in two sentences only, that it was considered desirable in the public interest that the measure should be passed. Hardly a word was said and the Bill was read a second time; the Speaker left the Chair. I then moved the Bill in Committee. This was the first critical moment; two men got up to speak, but both were forcibly pulled down by their neighbours after they had uttered a few sentences, and the committee stage was passed. The Speaker walked back to his chair and said: 'The question is, that I report this Bill without amendment to the House.' Again two or three people stood up; again they were pulled down by their neighbours, and the report stage was through. The Speaker turned to me and said: 'The Third reading, what day?' 'Now, sir,' I replied. My heart beat fast as the Speaker said: 'the question is that this Bill be read a third time.' It was open to anyone of all

---

7 *Professionalizing Legislative Drafting*, Ed. Reed Dickerson, p. 118.

8 *A Matter of Justice*, 261. And see Hugo Young, *Parliament' s Conspiracy of Deception*, *The Weekly Guardian*, Vol 141, No. 21, Week ending 26th November, 1989 '… Parliament exerts little control over Ministers, in any field. Their accountability is a thin and painless phenomenon. Ministers and backbenchers have an identical interest in denying that this is so. But they enter a conspiracy of deception. Parliament may sometimes be a nuisance, but to the government with a strong majority it is never a threat … Nor is there any refined or reliable thread running between Parliament and the people's wishes. Mandate and Manifesto are important words in the vocabulary of illusion …'

> members in the House of Commons to get up and say that no Bill had ever yet passed through all its stages in one day without a word of explanation from the Minister in charge … But to the eternal honour of those members, to whom I now offer, on behalf of that and all succeeding governments, my most grateful thanks, not one man seriously opposed, and in a little more time than it has taken to write these words that formidable piece of legislation was passed.

In the United States of America, a legislative committee of Congress commands the presence, under pain of punishment, of any person it feels would be of assistance in the deliberations on a Bill in committee. It calls for documents that would assist and conducts investigations into the necessity and scope of legislation before the committee. It holds sittings in private as well as in public to receive oral evidence from all manner of persons who evince an interest in the Bill before the committee. This procedure in the Congress of the United States seems to be gaining ground in some Commonwealth jurisdictions.

Appendices

APPENDIX A

1

FORMAT OF CABINET SUBMISSIONS[1]

CONFIDENTIAL

(OR OTHER SECURITY CLASSIFICATION)

Submission No...

Copy No...

For Cabinet

PREPARATION AND LAY-OUT OF CABINET SUBMISSIONS

Purpose of Submission

.....

Background

.....

Issues for Consideration

.....

Interdepartmental-Ministerial Consultations

.....

Financial Considerations

.....

Employment Considerations

.....

Legislation

.....

---

1 Reproduced from *Handbook on Legislation*, with the very kind permission of the Attorney General of Commonwealth Australia.

Recommendations

.....

*Minister fo*r … ..

Date

CONFIDENTIAL

APPENDIX A

2

GUIDELINES FOR THE SUBMISSION OF CABINET SUBMISSIONS

Introduction

Information relating to matters requiring Cabinet consideration, co-ordination of policy proposals; handling of Cabinet papers and the announcement of Cabinet decisions and subsequent action will be discussed.

Drafting of Submissions

Submissions, whether to Cabinet or a Cabinet Committee, should be prepared in the following manner:

1. *Length* - Submissions should be drafted to bring out essential issues or items. They should be kept short and in general not exceed 3 - 4 pages. Any necessary attachment to the Submission should be kept to a minimum
2. *Title* - A brief and descriptive title indicating the subject matter for consideration should head the Submission. The heading should be as specific as practicable and show, as appropriate, the title of any Act proposed to be amended, or the title of any proposed Bill where new legislation is involved.
3. *Body of the Submission* - This should be divided into parts as suggested below, in order to produce a clear and logical exposition of the subject. Paragraphs in the body of the Submission should be numbered consecutively. [Paragraph headings to set off the various parts aid reference and clarity.]
    (a) *Purpose of Submission* - the opening paragraph should reveal the purpose of the Submission.
    (b) *Background* - a brief summary of the events leading up to the proposal, including references to any previous considerations of the subject by the Cabinet or Committee.
    (c) *Issues for Consideration* - treated separately in sub-paragraphs as necessary.

(d) *Interdepartmental Consultation* - reference to inter-departmental consultation should be made in the Submission and where there are differences, those should be mentioned.

(e) *Financial Considerations* - costs of the proposal or savings, should be stated. If proposals affect revenue or the tax pattern, they should be developed in consultation with the Treasury and, as necessary, with the Treasurer, or the Permanent Secretary to the Ministry of Finance.

(f) *Employment Considerations* - where significant employment effects are likely to result from adoption of the proposals, these should be stated.

(g) *Legislation* - where approval of a recommendation would involve legislation, reference to this should be made in the Submission and an adequate statement of the nature of the proposed legislation should be presented. The Submission should indicate

(i) whether a completely new Act is required;

(ii) in the case of proposals involving amending legislation, the title or titles of the Act or Acts affected;

(iii) whether there is any particular degree of urgency associated with the legislation, e.g. whether it has to be in force by a particular date;

(iv) whether there is any other legislation (to be named) which needs to be drafted or otherwise dealt with in association with the proposed legislation.In connection with (iii) and (iv) above reference should be made to any legislation Committee decision concerning inclusion of the proposed legislation in the legislation programme for a period of Parliamentary Sittings.

(h) *Recommendations* - the Submission should conclude with a summary of recommendations for which Cabinet approval is sought. The recommendations should contain no argument or evidence, but should be confined to the action recommended to the Cabinet. The recommendations should stand on their own, although reference can be made as appropriate to the supporting paragraph in the Submission. In effect, the language of the recommendations should be as close as possible to the language of the necessary Cabinet Decision. Care should be taken to ensure that the recommendations are comprehensive, i.e., they should cover all proposals advanced in the Submission.

4. *Attachments - Cross References*. Where in the body of a Submission a reference is made to an attachment, that reference should be underlined and it should be made clear which paragraph of the attachment is referred to.

5. *Cabinet Decisions of earlier Administrations - Quotation of, and explicit references by number and date to, Cabinet Decisions of earlier administrations should be avoided*. According to the conventions which apply in this area, it is desirable that new Governments do not in the normal course have access to Cabinet and other personal or confidential papers of earlier administrations. Where a particular decision needs to be known, the preferable course is for a new Government to be advised of such of its terms as are necessary, but without providing access to the decision itself and all the associated papers. However, the conventions permit access to Cabinet files by incoming administrations in particular circumstances for the purpose of discovering what operative decisions have actually been made and ascertaining the content of communications in fact made between the Government and outside persons or authorities.

6. *Date of Submission*

The date the Submission is forwarded to the Cabinet Secretariat should be shown on the bottom left hand corner of the last page of the Submission.

Number of Copies

The Cabinet Secretariat requires 69 copies of each Submission and any attachments.

Time Factor

Unless circumstances are exceptional, a strict '*strict day rule*' will apply, i.e. to be taken in Cabinet, a Submission must have been circulated to Ministers at least three clear working days beforehand. Ministers have expressed the wish that, as far as possible, Submissions should not be listed for the Cabinet or a Cabinet Committee for consideration less than ten days following circulation.

Timing

If there is any urgency for Cabinet consideration this should be mentioned, e.g.,

(a) where Cabinet has requested a report by a certain date;

(b) where some agreement or Treaty is due for renewal;

(c) where legislation has to be in force by a particular date;

(d) where inter-governmental or other discussions are scheduled for a particular date.

Security

Cabinet documents are to be protected - in accordance with standing instructions on the security of official documents - and their confidentiality maintained.

Physical Preparation of Cabinet Submissions Paper -

(a) Size A4

(b) Use special paper with the appropriate security classification printed in red at the top and bottom of each page.

Type face

Not smaller than pica except in columnar attachments.

Page Numbers

These should be shown at the top (centre) of each page.

Attachments

(a) Each Submission and its attachments should be page numbered comprehensively, i.e., beginning at the first page of the Submission and running through to the last page of the last attachment.

(b) Where an attachment is so bulky that it is preferable that it be separate or is a bulky report already printed, it may have separate page-numbering. A cover should be attached showing appropriate security classification

ATTACHMENT …… TO SUBMISSION NO.

…… COPY NO ……

Appendices

APPENDIX B

1

THE PREPARATION OF LEGISLATION[2]

1. INTRODUCTION

This directive describes the procedures for the planning of the Government's legislative program and for the preparation and approval of the various Bills that comprise it. The directive also deals with aspects of the process whereby Bills are enacted by Parliament and with certain additional matters pertaining to legislation, notably Regulations.

It is to be noted that the planning of the legislative program commences up to one year prior to the opening of the Session of Parliament in which the various legislative items are to be introduced. Experience has shown the necessity of spreading the planning and preparation process over the whole year, as opposed to confining it to the short period immediately preceding the Session in question. This stems in part from the established procedure for the approval of individual Bills. As described in more detail in the directive, this procedure involves three separate steps: Cabinet approval of the policy; drafting of the Bill, which in many cases proves to be a lengthy and difficult process in itself; and Cabinet approval of the Bill.

The Cabinet Committee on Legislation and House Planning is charged with preparing the Government's legislative program for each Session, keeping this program under constant review and examining in detail all draft Bills. Accordingly, departments and agencies whose Ministers are bringing forward legislative proposals are urged to keep in close contact with the Secretariat to that Committee and in particular, to inform the Secretariat of any significant changes in the Ministers' plans.

2. PREPARATION OF LEGISLATIVE PROGRAM

(1) Request for Legislative Proposals

Immediately after the Speech from the Throne at the opening of each Session of Parliament, the Assistant Secretary to the Cabinet (Legislation and House Planning) will write to all Deputy Ministers and some Agency

---

2 Reproduced with the very kind permission of the Attorney General of Canada.

heads asking them to submit a list of the legislation their Ministers plan to propose to Cabinet, for introduction in the next Session after the one just commenced.

This list should include necessary technical or administrative amendments to Statutes falling under their Minister's authority.

The response to the request for legislative proposals should be submitted to the Assistant Secretary to the Cabinet within two months of receipt of the request. Each proposal should contain the following information where possible:

(a) a summary of its principal features;

(b) whether there is policy approval for the legislation from Cabinet and expenditure approval, where appropriate;

(c) whether it will constitute

  (i) new legislation,

  (ii) a repeal of existing legislation,

  (iii) a major revision of existing legislation,

  (iv) an amendment to existing legislation that is simple in drafting terms but would be controversial or would effect a major change, or

  (v) technical and administrative amendments ('housekeeping');

(d) its relationship, if any, to the Government's priorities, as enunciated in various policy statements;

(e) federal-provincial relations implications;

(f) new Governor-in-Council positions to be created and their terms and conditions of appointment;

(g) target date for passage, together with a tentative assessment of its priority, based on the following categories:

  (i) URGENT (measures for which there is a statutory time constraint or for which a deadline has been announced by the Government),

  (ii) ESSENTIAL

  (iii) OTHER

(2) Review by Cabinet

The responses are brought to Cabinet's attention by the Privy Council Office and a tentative outline of the legislative program for the next session is established, together with the assignment of priorities to the various proposals. From time to time, the outline and priorities are updated by Cabinet.

3. PREPARATION OF BILLS

(1) Cabinet Approval of Policy

After Cabinet has made its initial determination of the legislative program, and as soon thereafter as is feasible, departments and agencies should arrange for the submission for each proposed Bill of the necessary Memorandum to the Cabinet seeking policy approval, together with a Discussion Paper, if appropriate, in accordance with the Guidance Manual for the Preparation and Handling of Cabinet Papers prepared by the Privy Council Office. The Memorandum and Discussion Paper will be submitted in the usual way to the appropriate Cabinet Committee and then to Cabinet or the Cabinet Committee on Priorities and Planning as the case may be. It is to be noted that the Memorandum shall NOT be in the form of, or be accompanied by, a draft Bill. It should also be noted that the granting of policy approval may in fact be delegated by Cabinet to the Cabinet Committee on Priorities and Planning.

The Memorandum should terminate with the sponsoring Minister's recommendation that 'the Legislation Section of the Department of Justice be authorised by Cabinet to draft the required legislation in consultation with the sponsoring department or agency (and any other pertinent departments), in accordance with priorities established by the Cabinet Committee on Legislation and House Planning'

A Memorandum to the Cabinet seeking policy approval is not necessary in those cases where the Government has previously introduced the Bill in Parliament, or where the Bill has been approved by Cabinet for introduction, except in those cases where the policy context has changed to an extent that a confirmation of Cabinet's previous decision is called for.

(2) Qualification as to the Timing of Policy Approval

There may be cases where it is appropriate to seek policy approval for a Bill before Cabinet has completed the legislative program review described above. Indeed, where departments are able to formulate their policy proposals this far in advance of the contemplated introduction in Parliament, consideration by Cabinet at such an early stage may serve to reduce the possibility of a bottleneck in the process of drafting and approving the other Bills in the legislative program.

There may also be cases where policy approval by Cabinet may properly be sought respecting a proposed Bill that is not intended to be introduced until a Session subsequent to the Session following the current one.

Finally, there may be cases where items for a legislative program will be identified only after the program has been tentatively settled. In such cases, the necessary Memoranda to the Cabinet seeking policy approval should be submitted as quickly as possible, so that the items can form part of the program. No priority, however, can be assigned except as part of a subsequent review by Cabinet of the entire legislative program, as described in subsection 2(2) above.

(3) Drafting

(a) General

Either during the course of preparation of the policy Memorandum in relation to a legislative proposal or following completion thereof, officials should establish contact with the office of the Chief Legislative Counsel in the Department of Justice so that arrangements can be made for the assignment of one or more drafting officers to the project and so that meetings can be held with that officer or those officers to establish what their requirements will be in terms of drafting instructions. In the case of complex or lengthy projects, detailed written drafting instructions may be required to supplement the policy Memorandum and supporting Discussion Paper. Except in very rare instances, drafting instructions in the form of proposed draft legislation are not helpful.

Substantial time may be required to assemble the relevant material required as part of drafting instructions. The preparation of drafting instructions may result in some modification or extension of the Memorandum to Cabinet or the Discussion Paper. Discussion at this stage will make possible the development of reasonable estimates of the time likely to be required for drafting of the legislation in the light of the priority established by Cabinet for a particular project and its relationship to other projects on which drafting has been approved.

(b) Official Languages

It is of primary importance to note that the legislation will be prepared in both official languages and that both versions will be equally authentic. It is not acceptable for one version to be a mere translation of the other. For this reason, sponsoring departments and agencies should ensure that they have the capability to instruct in both official languages, to respond to technical questioning from drafting officers in either official language and to critically evaluate drafts in both official languages. It is not sufficient for a drafting officer and his instructing officer to reach full agreement on the

technical adequacy of one language version of a draft Bill. Both versions must meet the same standard of technical adequacy in the eyes of those qualified to critically evaluate them. This requirement can be particularly onerous where a legislative proposal is based on a precedent from another jurisdiction where legislation and related information, often of a very technical nature, are available in one language only. In such circumstances, it may be necessary to build into the planning and drafting process a significant time factor to allow for the development, testing and finalisation of appropriate terminology for the second language version of the legislation.

It should be noted in this regard that it is the responsibility of the individual department to provide the drafters with as much documentation as possible in the other official language. Such documentation should to the extent possible be original, i.e. not a translation. If original documentation does not exist, the department should have the accuracy of the translation verified by the Translation Bureau.

(c) Expenditure Implications

It is essential that officials of the sponsoring department or agency consult with the appropriate Ministry of State or the Treasury Board Secretariat, as appropriate, in the event that provisions are to be drafted which have different expenditure implications from those of the policy approved by Cabinet.

(d) Confidentiality

By tradition, Bills are treated with strict confidence before they are introduced in Parliament. Accordingly, the approval of Cabinet must be obtained before a draft Bill is shown or given to persons other than Government employees who are involved in the drafting.

(e) Need to Inform Privy Council Office

The Cabinet Committee on Legislation and House Planning is responsible for keeping the legislative program under constant review. For this reason, it is essential that the Secretariat to that Committee be informed by the sponsoring department or agency as to any significant departures from the approach to the Bill agreed to by Cabinet that may be considered necessary during the drafting process. Examples are that the Bill is no longer to be proceeded with or that the priority assigned to it is to be changed in some way, or that it is recommended that the policy agreed to by Cabinet is to be altered to a significant extent.

(4) Cabinet Approval of Bill

Once a Bill has been drafted and approved by the responsible Minister, the Legislation Section of the Department of Justice will arrange for its printing and for copies to be sent to the Legislation and House Planning Secretariat for distribution to Ministers, prior to the meeting of the Legislation and House Planning Committee of Cabinet.

It is the responsibility of the sponsoring department or agency to prepare a brief summary, preferably on one page, in each official language, stating the intent of the draft Bill and highlighting its main provisions. The summary should also mention any provisions in the draft Bill that constitute significant divergences from the policy approved by Cabinet. This summary will be distributed to Ministers together with the draft Bill. Accordingly, the typed original of the summary should be sent to the Legislation and House Planning Secretariat by the sponsoring department or agency to arrive not later than the final printed version of the draft Bill. No particular format for the summary is prescribed; what is essential is that it be clear and brief.

Prior to the consideration of the Bill by the Legislation and House Planning Committee, the sponsoring department or agency is required to submit to the Communications Committee of Cabinet a revised or updated communications plan if the original attached to the Memorandum to Cabinet that sought policy approval for the Bill is no longer timely. The strategy should deal with information requirements upon First Reading and during consideration by Parliament. It should include a summary of the Bill, which may appropriately be based on the summary for Ministers described above, amended as necessary for the purpose of public distribution.

When these requirements have been met, the Cabinet Committee on Legislation and House Planning, assisted by the sponsoring Minister, will scrutinise the Bill as to its drafting and as to its consistency with the earlier policy decision taken by Cabinet. The Committee will also consider the Minister's recommendation as to whether the Bill should be introduced in the House of Commons or in the Senate. The Cabinet Committee on Legislation and House Planning reports to Cabinet on the outcome of its consideration of a given draft Bill.

Following Cabinet's approval, the Legislation and House Planning Secretariat submits the Bill in its final form to the Prime Minister for his signature, or, in his absence, to the Acting Prime Minister or the President of the Privy Council, together with the royal recommendation in the case of Bills that require expenditure. The preparation of royal recommendations is taken care of by the Legislation and House Planning Secretariat.

(5) Briefing Material

Departments and agencies should prepare at an early date, and no later than the date of Cabinet approval of the Bill, briefing material for use in explaining the Bill to Parliamentarians and members of the public and a draft statement to be used by the Minister at Second Reading. This will assist the orderly conduct of Parliamentary business by affording the Minister and the president of the Privy Council flexibility in calling Bills for Second Reading and reference to Committee.

Preparatory work in anticipation of the Parliamentary Committee consideration of the Bill can often profitably be done prior to the Second Reading debate. Experience has shown that a background paper describing the Bill and providing a table of contents can be of considerable assistance to a Parliamentary Committee, particularly in the case of lengthy Bills.

Departments or agencies whose Ministers are sponsoring legislation containing regulation-making powers that may be of significant interest to Members of Parliament should prepare an outline of the proposed Regulations. Such an outline may prove to be of assistance to the Parliamentary Committee that considers the Bill. The approach to material described in this section should also be adopted with respect to consideration of Bills by the Senate.

4. INTRODUCTION OF BILLS

The timing and place of introduction is decided either by the Cabinet on the recommendation of the Committee on Legislation and House Planning or by the President of the Privy Council usually in consultation with the sponsoring Minister. Notice to the Clerk of the House of Commons is given by the Assistant Secretary to the Cabinet (Legislation and House Planning) only when instructed to do so by the President of the Privy Council usually in consultation with the sponsoring Minister. The Assistant Secretary notifies the sponsoring Minister that notice is being given. Where introduction is in the Senate, the timing of introduction is decided by the President of the Privy Council in consultation with the Leader of the Government in the Senate. The Assistant Secretary informs the sponsoring Minister in such cases of the timing of introduction.

It is to be noted that, barring unanimous consent of the House, 48 hours' notice is required before the sponsoring Minister may obtain First Reading in the House of Commons and 24 hours must elapse from First Reading before Second Reading may be moved. Timing of the Second Reading debate, Report Stage and Third Reading is also the responsibility of the President of the Privy Council in consultation with the responsible Minister.

The procedure at First Reading of a Government Bill in the House of Commons is as follows. After the 48 hours' notice requirement has been met, the Speaker will call the title of the Minister when the time for 'Introduction of Bills' is reached at the end of the daily Question Period. The Minister then stands, bows to the Speaker and sits down. The Speaker reads the necessary motions, which are not debatable. The Minister does not therefore say anything at this time. If a Minister does not wish to proceed immediately with a Bill that is ready for First Reading when his title is called, he calls out the word 'Stand' and the Bill's introduction is postponed until the next sitting. If a Minister is absent, the President of the Privy Council or another Minister may introduce or stand a Bill, if requested by the sponsoring Minister.

When a Bill is to be introduced in the Senate in the first instance, the necessary steps are taken usually by the Leader of the Government in the Senate. Unlike the introduction of Bills in the House of Commons, there is no requirement for notice.

5. AMENDMENTS AFTER INTRODUCTION

Where the sponsoring Minister wishes to move an amendment after the Bill has been introduced, the following procedure should be adhered to prior to the moving of the amendment. Amendments that are merely technical may be agreed to by the sponsoring Minister without Cabinet consultation. On the other hand, except in urgent cases, amendments that have an impact on the policy approved by Cabinet or that raise policy considerations not previously considered by Cabinet will be subject to the same procedure as the initial proposal, namely, the submission of a policy memorandum to the Cabinet for consideration by the original subject matter Cabinet Committee and approval by the Cabinet, followed by the approval of the draft amendments by the Legislation and House Planning Committee and Cabinet.

Urgent major amendments need not follow the full procedure referred to above, but may be approved by the Prime Minister and the President of the Privy Council together with other interested Ministers.

It is to be noted that all amendments moved by the Government should be drafted by the Legislation Section of the Department of Justice.

6. PROCEDURE IN STANDING COMMITTEE

During a Standing Committee's consideration of a Bill, the sponsoring Minister or his Parliamentary Secretary attends the committee's meetings, so as to assist the deliberations by ensuring that the Government's position may be expressed. This is of particular importance in situations where

amendments to the Bill may be proposed. In such cases the Minister or Parliamentary Secretary should ascertain that any amendments to be accepted are approved in form by the appropriate draftsman of the Legislation Section of the Department of Justice.

7. ROYAL ASSENT

The timing of Royal Assent ceremonies is arranged by the President of the Privy Council. Normally, Royal Assent ceremonies are held before an adjournment or prorogation or when a Bill of particular urgency requires Assent. It is to be noted that except where an Act is stated to come into force upon proclamation, Royal Assent has the effect of bringing it into force.

8. PROCLAMATION

Where an Act or any provision thereof is expressed to come into force on a day to be fixed by proclamation, a proclamation is issued at the request of the Minister responsible for the administration of the Act, in accordance with the following procedure. Upon deciding when the Act or any provision thereof should come into force, the Minister submits a recommendation to this effect to the Governor-in-Council, requesting that a proclamation be issued and setting out the date the Act or any provision thereof is to come into force.

In preparing the documentation for the submission, officials should follow the Privy Council Office manual entitled 'Directives on Governor-in-Council Submissions and Statutory Instruments'.

The date on which the Act or any of its provisions is to come into force is determined in the light of a number of factors. The date chosen may be as early as that of the Order-in-Council authorising the issuance of the proclamation, or it may be any subsequent date that is specified. Proclamations are required to be published in the Canada Gazette in order to provide formal public notice. It can take up to one month from the making of the Order-in-Council for the proclamation to be published, because of the numerous steps involved. The Department of Justice drafts the proclamation after the Order-in-Council is made, the draft proclamation is forwarded to the Deputy Registrar General who prepares it in final form and arranges for its signing and sealing, and the proclamation is then sent to the Privy Council office for publication in the Canada Gazette.

Accordingly, wherever feasible, departments or agencies should endeavour to arrange for the necessary submission to the Governor-in-Council to be made well in advance of the proposed date for the coming into force of the Act or any of its provisions.

9. REGULATIONS

In the preparation of proposals for legislation, departments and agencies should observe the following principles respecting regulation-making powers:

(1) When bestowing the power to make Regulations upon a person or a rule-making authority, care must be taken to ensure that the statute is not couched in unnecessarily wide terms.

(2) Specifically, certain powers are not to be granted unless the Memorandum to the Cabinet requesting the authority for preparation of the legislation by which such a power would be conferred specifically requests authority for the power and contains reasons justifying the power that is sought. These powers include the following:

   (a) power to make Regulations that might substantially affect personal rights and liberties;

   (b) power to make Regulations involving important matters of policy or principle;

   (c) power to amend or add to the enabling Act or other Acts by way of Regulations;

   (d) power to make Regulations excluding the ordinary jurisdiction of the Courts;

   (e) power to make specific Regulations having a retrospective effect;

   (f) power to subdelegate regulation making authority;

   (g) power by Regulations to impose a charge on the public revenue or on the public other than fees for services;

   (h) power to fix by Regulations, rather than by the statute itself, the penalties for breach of a regulation.

The drafting, making and scrutiny of Regulations are governed by the Statutory Instruments Act and the Regulations made thereunder. The Privy Council Office has prepared a manual which deals with these requirements, entitled 'Directives on Submissions to the Governor-in-Council and Statutory Instruments'.

10. LEGISLATIVE ITEMS IN ESTIMATES

In the past, the Speaker of the House of Commons has asserted the principle that the Estimates procedure is not to be used to seek new legislative authority. Pursuant to this principle, the Speaker has on occasion struck out items from the Estimates on the ground that they purported to amend legislation other than Appropriation Acts. Accordingly, normal legislation, prepared in accordance with this directive and subject to the regular Parliamentary procedure for passage, should be employed in preference to an item in the Estimates where an amendment to legislation other than an Appropriation Act is sought.

In cases of doubt as to the propriety of including an item with legislative implications in the Estimates, departments should consult at an early stage with the Program Branch of the Treasury Board.

APPENDIX B

2

ADMINISTRATIVE INSTRUCTIONS ON THE
PREPARATION OF LEGISLATION
FOR A SMALL JURISDICTION

PART I - BILLS

1. Proposals for Legislation.
2. Approval in Principle.
3. Drafting Instructions
4. Legislative Programme
5. Settlement of Draft Bill
6. Memorandum to the Bill
7. Cabinet approval of Draft Bill
8. Publication of Draft Bill
9. Certificate of Urgency
10. Passage of Bill
11. Assent
12. Publication of Act.

PART II - STATUTORY INSTRUMENTS

13. Cabinet Approval
14. Drafting
15. Making of Instruments
16. Publication

PREPARATION OF LEGISLATION

By direction of the Prime Minister, the following administrative instructions relating to the preparation of legislation are issued by the Secretary to the Cabinet.

PART I

BILLS

Proposals for Legislation

1(1) Where proposals for legislation are initiated within a Ministry they are the responsibility of the Minister holding the portfolio. Where they are initiated within a special Department they are the responsibility of the Minister to whom responsibility for that Department is assigned by the Prime Minister, who must be approached by the Head of Department with a view to obtaining his decision as to whether the legislation is necessary.

(2) Where a Minister considers that new or amending legislation by Act of Parliament is necessary, interested persons and bodies should be consulted wherever possible, and a Cabinet Memorandum asking for approval in principle must be submitted by the Minister to the Cabinet.

(3) The Cabinet Memorandum must set out the principles of the policy intended to be carried into effect by the proposed Bill, and the reasons why it is considered necessary, but should not enter on the detailed changes in existing law which will be needed. It must also state the classification of the proposed Bill. The classifications are

URGENT – To be introduced at the current meeting of Parliament.

PRIORITY A – To be introduced at the next meeting.

PRIORITY B – To be introduced at the next meeting but one.

PRIORITY C – To be introduced at some later time.

(4) Wherever possible a draft of the Cabinet Memorandum should be sent in advance to the Law Officers so that they may advise on whether an Act of Parliament is in fact necessary in order to achieve the objects desired, and on other legal aspects of the proposal.

Approval in Principle

2(1) The Secretary to the Cabinet will as soon as possible, notify the Department concerned and the Law Officers of the Cabinet's decision on an application for approval in principle.

(2) Where approval in principle is given, the head of the Ministry concerned will send Drafting Instructions to the Law Officers for the drafting of the Bill.

(3) Except in cases of extreme urgency, or for other exceptional reasons, instructions for the drafting of a Bill must not be given unless Cabinet's approval in principle has been obtained.

Drafting Instuctions

3(1) Drafting instructions must contain

(a) full details of the policy intended to be carried into effect by the Bill;

(b) references to the enactments proposed to be repealed or amended;

(c) an indication of the priority of the Bill as determined by the Cabinet.

(2) Drafting Instructions should be accompanied by any relevant memoranda, reports of committees, and other material which may be useful to Parliamentary Counsel. *Draft Bills should not be sent as drafting instructions*.

Legislative Programme

4(1) About two months before each meeting of Parliament, the Prime Minister's Office circulates a request for a list of the Bills proposed to be introduced during the meeting, and at subsequent meetings by each Minister. The returns from Ministries are consolidated and submitted to the Cabinet Legislation Committee, which prepares, for Cabinet approval, a programme for the forthcoming meeting and subsequent meetings. The order of priority for each Bill is decided by the Cabinet.

(2) Legislation which is not included in the programme may be introduced during the meeting, with the approval of the Cabinet, if the need should arise, but this should as far as possible be avoided, since in such cases there is seldom time for full consideration of the drafting of the Bill. *Hasty and ill-considered legislation is likely to contain errors which may interfere with its intended working and bring the law into disrepute*.

Settlement of Draft Bills

5(1) When, after such discussions and clarification of the Drafting Instructions as Parliamentary Counsel may consider necessary, the first draft of the Bill has been produced, it will normally be printed by the Government Printer on the instructions of Parliamentary Counsel. The print will be in the form of a large proof, with wide margins to enable corrections to be noted. Printing will be dispensed with only when time is too short and the size of the Bill is insufficient to justify printing at this stage.

(2) Parliamentary Counsel will send the first draft to the Ministry concerned and any other Departments which are interested in the subject matter of the Bill.

(3) All persons to whom a draft Bill is sent should scrutinise the Bill with care to make sure that it gives effect to the policy desired. It should not be assumed that, because a Bill has been drafted by Parliamentary Counsel, it does not require scrutiny in this way. It may happen that there has been some misunderstanding over the legislative intent, or there may be other reasons calling for corrections in the draft. Alterations to the text of the draft Bill must in no circumstances be made otherwise than by Parliamentary Counsel.

Memorandum to the Bill

6. Standing Order [55] of Parliament requires every Bill to be accompanied by a Memorandum to the Bill signed by the Minister introducing the Bill, explaining the main features of the Bill. The Ministry concerned should settle the wording of the Memorandum to the Bill, but Parliamentary Counsel should be consulted to ensure that the Memorandum to the Bill correctly describes the contents of the Bill.

Cabinet Approval of Draft Bill

7(1) When the form of the Bill has been agreed between the Ministry concerned and Parliamentary Counsel, the Minister responsible will submit it to the Cabinet for final approval and for permission to introduce the Bill in Parliament. The Ministry concerned shall forward to the Secretary to the Cabinet a memorandum by the Minister seeking this approval and permission, together with [35] copies of the draft Bill. Where urgency has prevented the printing of these copies, they may be typed or cyclostyled.

(2) The Secretary to the Cabinet will normally forward a copy of the Minister's memorandum and the Cabinet's decision thereon to the Law Officers so that a record may be kept of the Bills which have been approved for introduction.

Publication of Draft Bill

8(1) Except where the Certificate of Urgency procedure is to be used, the Ministry concerned should arrange for the publication of the Bill as soon as possible after Cabinet permission has been given. Standing Order [58(1)] of Parliament requires a certain interval to elapse between the publication and introduction of the draft Bill unless the Certificate of Urgency procedure is followed. Seven clear days must elapse between the day on which the sitting

commences and the day on which the Bill is to be introduced. If a Bill is published before or during a meeting and is not introduced at a subsequent meeting within one month of the original publication, that Bill must be again published.

(2) The Bill must be published as a supplement to the Friday issue of the *Gazette*, and must reach the Government Printer in sufficient time to enable a proof to be submitted by him to Parliamentary Counsel before publication. The time required will vary according to the length of the Bill, but will normally be at least 48 hours.

(3) Only one *Gazette* publication is now necessary, but since it is essential that all Members of Parliament should have had as much opportunity as possible to study the text of a Bill before it is debated in Parliament, the notice prescribed by Standing Order [58(1)] is regarded as the minimum. Normally, considerably more notice should be given.

(4) It is sometimes the case that a Bill prepared at the instance of one Ministry and designed for a particular purpose affects other Ministries, or is one to which an amendment could be moved to deal with minor points with which other Ministries are concerned. It is important therefore, that all Ministries should study Bills published in the *Gazette*, as well as paying careful attention to the legislative programme generally.

(5) Standing Order [58(1)] permits alterations to be made in the Bill as published if those are of a trivial or drafting character. The alterations are made when the blue copies of the Bill as introduced are printed. Since this procedure avoids the need for formal amendments in Parliament it should be used wherever necessary.

9(1) Standing Order [58(2)] provides that a Bill mentioned in a Certificate of Urgency, signed by the Prime Minister may be introduced without publication or distribution to Members of Parliament, and may be taken through all its stages in one day.

(2) Where a Bill has to be introduced on a Certificate of Urgency, the Ministry concerned should make the necessary arrangements with the Secretary to the Cabinet, and should inform Parliamentary Counsel without delay. The Ministry should also inform the Prime Minister's Office of the date on which the Certificate has been sent to the Speaker.

(3) It is emphasised that this procedure for the introduction of a Bill is for use in emergency only and is to be avoided as much as possible. *In order to achieve its purpose of giving effect to government policies, legislation needs to be prepared with care and due consideration. Apart from its other drawbacks Legislation put through in haste and without adequate publicity is likely to prove defective*.

Passage of Bill

10(1) The progress of a Bill in Parliament is governed by Standing Orders [58-59], which provide for four main stages. The *First Reading*, which is purely formal, takes place when the Minister responsible for the Bill rises in his place and bows to the Chair, and the clerk reads aloud the Long Title. The *Second Reading*, involves consideration of the principles and general merits of the Bill. The Bill then passes through the *Consideration Stage* (known as the *Committee Stat*e), at which the details of the Bill may be considered and amendments made. Normally two sitting days must elapse between Second Reading and Consideration Stage.

(2) The Bill is deemed to be passed when it receives the Third Reading, which normally cannot take place earlier than the next but one sitting day after the *Committee Stage*. The periods between stages prescribed by Standing Orders should be regarded as the minimum. Normally in a Bill of any length or one which is controversial there should be an interval of approximately a week between the *Second Reading Stage and the Committee Stage*, and all Government amendments should be put as early as possible.

(3) The sponsoring Ministry should take careful note of the progress of the Bill through Parliament, and a representative of the Ministry should be present at the *Second Reading Stage and the Committee Stage*. Parliamentary Counsel should also attend. The Weekly Business Statement, which is normally given in Parliament on Fridays, will usually indicate when any particular stage of a Bill is to be taken. Reference may also be made to the agenda and provisional agenda of Parliament.

Assent

11(1) When a Bill has been passed by Parliament the Clerk of Parliament will follow the relevant procedures laid down and submit Presentation Copies to the Head of State for assent.

(2) Where assent has been given it is the responsibility of the Clerk of Parliament to number the Presentation Copies. One copy is retained by the Prime Minister's Office and the Prime Minister's Office should forward the remaining copies one each to the Chief Justice, the Speaker and the Archivist.

Publication

12. As soon as possible after the assent, the Act should be published in the *Gazette*. The avoidance of delay may be of particular importance where a Bill has been introduced upon a Certificate of Urgency. Unless the Act otherwise provides, it comes into force at the commencement of the day following the

day on which the assent is signified, or as provided by the Constitution, or on the date of publication. The date of assent appears at the beginning of each Act. Where an Act provides that it should come into force on a date to be determined, the initiative for obtaining Cabinet approval for its date of commencement rests with the sponsoring Ministry.

PART II

STATUTORY INSTRUMENTS

Cabinet Approval

13. Where it is proposed to make a Statutory Instrument, the Minister concerned should, subject to any directions given by the Prime Minister, decide whether Cabinet approval for the making of the instrument is necessary. Where Cabinet approval is considered necessary a Cabinet Memorandum asking for this must be submitted by the Minister to the Cabinet.

Drafting

14(1) Subject to any directions given by the Cabinet or the Minister responsible, the Head of a Ministry should decide whether a legislative instrument is to be drafted within the Ministry or by Parliamentary Counsel. Except in special cases executive instruments will always be drafted within the Ministry concerned.

(2) Where an instrument is to be drafted by Parliamentary Counsel, Drafting Instructions must be sent to the Law Officers. These must contain full details of the policy intended to be carried into effect by the instrument and should be accompanied by any relevant memoranda, and other material which may be useful to Parliamentary Counsel. Subject to the necessary modifications, paragraph 5 relating to the settlement of draft Bills shall apply in relation to instruments drafted by Parliamentary Counsel.

(3) Where a legislative instrument has not been drafted by Parliamentary Counsel it must be submitted in draft to the Law Officers so that its validity and form may be checked before it is made.

(4) All statutory instruments intended for publication must be in the form required by the relevant legislation.

Making of Instruments

15. A statutory instrument is made when it is signed by the Head of State or the Minister responsible. The procedure laid down by the relevant legislation should be followed.

Publication

16(1) All legislative instruments must be published in the *Gazette*. The Ministry concerned should send a copy of the instrument to the Government Printer for publication.

(2) Where a legislative instrument or executive instrument is sent to the Government Printer for publication, the officer concerned must ensure that it is in the proper form and must indicate whether the instrument is a legislative instrument or an executive instrument.

(3) Unless the instrument otherwise provides, a legislative instrument comes into operation on the date of *Gazette* notification. This date is now printed at the end of the instrument. An executive instrument comes into operation on the day on which it is made.

Appendices

APPENDIX C

TIN TACKS FOR PARLIAMENTARY COUNSEL[3]

A. PRELIMINARY QUESTIONS

1. The Problem - consider questions of *if*, *is*, and *ought*.

Query

(a) *Purpose*. What is the objective to be achieved; what purpose is to be served by the proposals for legislation?

(b) *Dimensions*. What facts constitute the problem?

(c) *Solution*. What are the proposals for the solution of the problem as seen by the sponsors of the proposals for the legislation?

(d) *Machinery*. What are the estimates of the sponsors for the implementation of the proposed legislation?

Check

(a) *Credibility* – the source of the information relied on.

(b) *Reliability* – Reports of commissions of inquiry, other reports, studies, sufficient data.

(c) *Values* – Social and economic issues - political considerations.

Time at the disposal of Parliamentary Counsel, classification of the proposals, questions of urgency, priority.

Reference Necessity to refer the matter for other expertise.

2. The problems of considering relevant issues.

(a) *The facts* - who has the relevant information?

(i) is it reliable?

(ii) is it available?

---

3 Adapted from Reed Dickerson, *Materials on Legal Drafting*, p. 115.

Is there a crisis?

(b) *The Law*

(i) What is the existing law?

(ii) What is the law in other Commonwealth countries?

(iii) What are the defects in the existing law?

(iv) What are the proposed remedies?

(c) *The Problems*

(i) Are there any constitutional issues that raise problems for Parliamentary Counsel?

(ii) Would the proposed legislation be constitutional?

(iii) Do the proposals raise issues of separation of powers and of territorial jurisdiction?

(iv) What questions relating to the jurisdiction of the courts do the proposals raise?

(v) Do the proposals raise problems relating to ouster clauses?

(vi) Federalism - Exclusive Legislative List and Concurrent Legislative List.

(vii) Are fundamental human rights involved ?

(d) *Conclusions by Parliamentary Counsel on*

(i) the facts

(ii) the law

(iii) the approach and attitude of the sponsors

(iv) the constitutionality of the proposed legislation

(v) the appropriate form of legislation.

B. RESEARCH

1. *The facts*

(a) *Whose acts or omissions constitute the problem calling for legislation?*

(i) Who has the relevant information - is it reliable?

(ii) availability of sources for consultation, and for conference?

(iii) ethical, and legal obstacles to the collection of information.

(iv) protection of confidences.

(b) *What interests are threatened by the acts or omissions*?

(i) Awareness of threat.

(ii) Kinds of interests involved - health, safety - affection, loyalty - economic, development, projects - knowledge, skills, information, - power, political, influence - respect, status - ethics, morals.

(c) *Responsibility for threat*

(i) Individuals.

(ii) Group.

(iii) Methods involved in threat.

(iv) Organisation of the threat.

(v) Effects, increase or decrease of

(vi) Relevance of resources, financial and material.

(vii) Ideas about the threat.

2. *The Law*

(a) What are the constitutional issues - jurisdiction, legal procedures, due processes.

(b) Application of the existing law - defects, problems raised in application.

(c) The approach of other jurisdictions.

(d) Recommendations - case law, legal journals - other commentaries.

C. THE ANSWERS TO

1. What is the state of

(i) the existing law

(ii) case law

which has a bearing on the problem for which legislation is sought.

2. What is the machinery which the sponsors of the legislation have devised for implementation?

3. What has been the experience of the sponsors of the legislation in similar situations
   (a) administratively
   (b) judicially
   (c) criticisms
   (d) suggestions
4. What are the sanctions proposed to achieve the desired result ?

Appendices

APPENDIX D

The Legislative Plan or Scheme

Legislative policy is not the same thing as the legislative plan. Legislative policy is the object to be achieved by legislation. The Legislative plan is the outline of the method by which Parliamentary Counsel achieve the legislative policy.

1

Plan for the establishment of a Statutory Corporation

1. Establishment
   - (a) name
   - (b) sole or aggregate
   - (c) capacity to sue and be sued
   - (d) common seal
   - (e) custody of seal and use
2. Functions
   - (a) to buy and sell
   - (b) to manufacture
   - (c) as determined by Parliament
3. Board of directors
   - (a) Chairman and members
   - (b) Appointment and qualifications
   - (c) Remuneration
4. Finance
   - (a) Sources of funds
   - (b) Books and accounts
   - (c) Audit
   - (d) Investment of funds
5. Administration
   - (a) Executive Secretary

(b) Powers of Minister - Regulations

(c) Interpretation

(d) Citation and Commencement

(e) Repeals and Savings

(f) Schedules

2A

Plan for dealing with stray Bulls

1. No bull is permitted to run at large

2. A person who finds may capture and confine the Bull

3(1) Captor shall notify owner if known

(2) Owner entitled to take away on payment of capture fee and custody costs

(3) An owner who fails to take away in reasonable time after notice commits an offence and liable to a fine, and to fees and costs to be paid to the captor

(4) In default, magistrate may issue warrant to levy by distress

4(1) Where owner not known, captor to advertise

(2) Owner entitled to take away on payment of capture fee and cost of custody and of advertising

2 B

Another Plan for stray Bulls

1. No bull permitted to run at large

2. Finder may capture and

(a) if owner known, give notice

(b) if not known, advertise

3. Owner may take away any time on payment of capture fees and costs of advertising

3 A

Plan for the Registration of Newspapers

1. Newspaper definition

2(1) Proprietor *etc*. of newspapers established at date of Act to file statement (each for himself) showing

(a) Date of birth and nationality

(b) Name of Newspaper

(c) Place of publication

(2) *Per diem* penalty for default

3(1) Proprietor *etc.* of newspapers hereafter established to file statement showing as in

(a) 2(1)(a)

(b) 2(1)(b)

(c) 2(1)(c)

(2) *Per* issue penalty for default

4(1) New statements on change in proprietorship *etc*.

(2) *Per diem* penalty for default

3 B

Another Plan for the Registration of Newspapers

1. Newspaper definition
2. Proprietor, *etc.* to file statement at times prescribed in 3
3. (1) Time for newspapers established at date of Act

(2) Time for newspapers publication of which begin after

4. Change in proprietorship *etc.*
5. Penalties

(1) Breach of 2 by newspapers established at date of Act (*per diem*)

(2) Breach of 2 by new newspapers (*per* issue)

(3) Breach of 4 by newspaper (*per diem*)[4]

Appendices

APPENDIX E[5]

1

Where a corporation is or has been a personal corporation, notwithstanding paragraph (b) of subsection (1), its tax paid undistributed income at a specified time is

A = (B-C)

Where

A = the amount it would be accorded under paragraph (1)(b);

B = the aggregate of the incomes deemed under section 67 to have been distributed to its shareholders while it was a personal corporation prior to that time;

C = the aggregate of dividends received from the corporation prior to that time and not included, by virtue of section 67, in computing the incomes of the shareholders by whom they were received.

APPENDIX E

2

The Supplementary retirement benefit payable to a recipient for a month in any year is

$$(M \times \frac{BY}{BR}) - M$$

Where

M = the amount of the pension payable to the recipient for that month;

BY = the Benefit Index for that year; and

R = the Benefit Index for the retirement year of the person to or in respect of whom or in respect of whose service the pension is payable.

5 Taken from Driedger's *Manual of Instructions for Legislative and Legal Writing*.

NOTE

Another example of the use of the mathematical formula is illustrated by Statutory Instrument No. 37 of 1965, of Zambia. It is a very complicated one.

APPENDIX F

1.

DRAFT OF A BILL

FOR

AN ACT to facilitate the preparation of a Revised Edition of the Laws.

BE IT ENACTED by the Parliament of the Most Respected Kingdom of Jacaranda as follows:

Short title

1. This Act may be cited as the Revised Edition of the Laws (Statute Law Revision) Act, 1992.

Amendments of certain Acts

2. For the purpose of facilitating the revised edition of the laws, the amendments specified in the fourth column of the Schedule, (being amendments designed to shorten or simplify phraseology or being amendments of a minor nature), shall be made in the enactments specified in the first, second, and third columns of the Schedule.

SCHEDULE

Number and Year (or date of) Act	Short Title or subject matter	Section	Amendment
No.4 of 1924	The Oaks Act, 1924	11	For the words '.....' substitute the words '.....'
No.6 of 1900	The Trees Act, 1900	14	At the end of section add the words '.....'

APPENDIX F

2

DRAFT OF A BILL

FOR

AN ACT to facilitate the preparation of a Revised Edition of the Laws by the repeal of certain enactments.

BE IT ENACTED by the Senate and the House of Representatives in this present Parliament assembled and by the authority of the same as follows:

Acts repealed

1. The enactments specified in the First Schedule are repealed to the extent specified in the third column of the Schedule.

Subsidiary legislation

2. The subsidiary legislation specified in the Second Schedule are revoked to the extent specified in the third column of the Schedule.

Short title

3. This Act may be cited as the Revised Edition of the Laws (Repeal of Obsolete Enactments) Act, 1992.

SCHEDULES

FIRST SCHEDULE

Number and year	Short title	Extent of repeal
No.10 of 1985	The Glasses Act	The whole Act
No.75 of 1930	The Jamaica Act	The whole Act
No. 4 of 1990	The Ears Act	Section 14

SECOND SCHEDULE

Date	Short title	Extent of repeal
26th Oct., 1921	Customs (Transit) Regulations, 1921	The whole
15th June, 1972	Companies Rules, 1972	Rules 17-24, 40, 65 and Forms 11 and 13
2nd Jan. 1980	Shooting Range Regulations, 1980	Regulation 34

APPENDIX F

3

REVISED EDITION OF THE LAWS BILL
(*There would then follow the Memorandum to the Bill*)
REVISED EDITION OF THE LAWS BILL
ARRANGEMENT OF CLAUSES

Clause

DRAFT OF A BILL
FOR

AN ACT to provide for the preparation and publication of a Revised Edition of the Laws.

ENACTED by the Parliament of Draftaria.

Short title

1. This Act may be cited as the Revised Edition of the Laws Act, 1992.

Interpretation

2. In this Act, unless the context otherwise requires,

'Commissioner' means the person appointed as Commissioner under section 3;

Revised Edition of the Acts' means the revised edition, prepared under the authority of this Act of the Acts of Draftaria which were in force on the first day of January, 1992;

'revised edition of subsidiary legislation' means the revised edition, prepared under the authority of this Act, of the Proclamations, Regulations, Rules, By-laws, and all the other forms of subsidiary legislation which were in force in Draftaria on the 1st day of January, 1992.

Appointment of Commissioner

3(1) Archibold Walter Steven Mugisha, Knight Commander of the Most Excellent Order of the Mango Tree is hereby appointed Commissioner to prepare a revised edition of

(a) all Acts of Draftaria in force on the 1st day of January, 1992;

(b) all Proclamations, Regulations, Rules, By-laws and of all other forms of subsidiary legislation which were in force in Draftaria on the 1st day of January, 1992.

(2) Where for a sufficient cause the Commissioner is not able to perform his functions under this Act, the President may appoint some other person qualified so to do, to be Commissioner, for the purposes of this Act, and during the period of that inability.

Functions of Commisioner

4(1) In the preparation of the Revised Edition of the Acts, the Commissioner

(a) shall omit

(i) all Acts or parts of Acts which have been expressly or specifically repealed, or which have expired, or have become spent, or have ceased to have effect;

(ii) all repealing enactments contained in Acts and all tables and lists of repealed enactments, whether contained in Schedules or otherwise;

(iii) all preambles to Acts where the Commissioner considers that the omission can conveniently be made;

(iv) all enactments prescribing the date on which an Act or part of an Act is to come into force where the Commissioner considers that the omission can conveniently be made;

(v) all amending Acts or parts of the amending Acts where the Commissioner has incorporated the amendments in the Acts to which the amendments relate;

(vi) all enacting (formulae) clauses;

(vii) from the Revised Edition of the Acts, the Acts specified in the First Schedule to this Act in so far as those Acts have been repealed or have expired or become spent or have ceased to have effect;

(b) my consolidate into one Act any two or more Acts in *pari materia* making the alterations thereby made necessary and affixing such date thereto as the Commissioner considers appropriate;

(c) may alter

(i) the order of sections in any Act and renumber the sections;

(ii) the form or arrangement of a sections by transferring words, by combining any sections or other sections or by dividing a section into two or more subsections;

(d) may transfer an enactment contained in an Act from that Act to any other Act to which that enactment more properly belongs;

(e) may divide Acts into parts or other suitable divisions;

(f) may alter the short title of an Act or add a short title to an Act which may require a short title;

(g) may supply or add marginal notes;

(h) shall correct all grammatical, typographical and similar errors in the Acts and for that purpose the Commissioner may effect the alterations that are necessary whilst not affecting the meaning of an Act;

(i) may alter names, localities, offices, forms and methods in order to bring an Act into conformity with the circumstances of Draftaria;

(j) may do all other things that are necessary for perfecting the Revised Edition.

(2) The functions of the Commissioner contained in subsection (1) does not include a power to make alteration or amendment in the matter or substance of an Act.

(3) Where the Commissioner considers

(a) that an alteration or amendment in the matter or substance of an Act is desirable, or

(b) that an Act requires considerable alteration or amendment involving the entire recasting of the Act,

the Commissioner shall prepare a Bill setting forth the alteration or amendment or the recasting of the Act for introduction into Parliament.

Amendment of First Schedule

5. The President may, by legislative instrument, amend the First Schedule.

Omission of maps, charts *etc.*

6(1) Where a chart, map, or plan annexed to an Act is omitted in the Revised Edition of the Acts under paragraph (j) of subsection (1) of section 4, the Commissioner shall deposit a duly authenticated copy of the chart, map or plan with the appropriate authority, for inspection, without the payment of a fee, by a person who desires to inspect the chart, map or plan.

(2) A person who so desires may obtain a copy of a chart, map or plan deposited pursuant to subsection (1) upon the payment of the fee normally demanded by the appropriate authority for such a copy.

Commencement of Revised Edition

7(1) The President may, by legislative instrument, determine the date on which the Revised Edition of the Acts shall come into force.

(2) The President shall not issue an instrument under subsection (1) unless Parliament has, by a resolution passed in that behalf and supported by the votes of a majority of the members present and voting, approved the Revised Edition of the Acts.

(3) From the date determined under subsection (1), the Revised Edition of the Acts shall, for all purposes, have the force of law as the sole and only Statute Book for Draftaria in respect of all the Acts which were in force on the first day of January, 1992.

Saving of subsidiary legislation

8(1) By-laws, Proclamations, Regulations, Rules or other subsidiary legislation, made under a law included in the Revised Edition of the Acts and in force on the day the Revised Edition of the Acts comes into force, shall continue in force until otherwise provided.

(2) A reference in a by-law, proclamation, regulation, rule or any other subsidiary legislation mentioned in subsection (1), to the law under which it is made or to a part thereof, or to an enactment shall, where necessary, be construed as a reference to the corresponding provision in the Revised Edition of the Acts.

Subsidiary legislation

9(1) In the preparation by the Commissioner of the revised edition of subsidiary legislation, the provisions of section 4 shall apply to subsidiary legislation as they apply to Acts.

(2) The Commissioner shall omit from the revised edition of subsidiary legislation all subsidiary legislation enacted under the Acts mentioned in the First Schedule to this Act and the subsidiary legislation mentioned in the Second Schedule in so far as any such subsidiary legislation has been expressly cancelled, revoked, or shall have expired or become spent or ceased to have effect.

(3) The President may, by legislative instrument, amend the Second Schedule to this Act.

Commencement of Subsidiary Legislation

10(1) The President may, by legislative instrument, determine the date on which the revised edition of subsidiary legislation shall come into force.

(2) From the date determined under subsection (1), the revised edition of subsidiary legislation shall, for all purposes, have the force of law as the sole and only set of subsidiary legislation which was in force on the first day of January, 1992, under the Statute Book of Draftaria.

Complimentary matters

11. The revised edition may contain a reprint of historical and constitutional documents, including in particular Imperial statutes, Orders-in-Council, Letters Patent, Royal Instructions and other instruments as the Commissioner may determine.

Construction of references

12. Where in an enactment or in a document a reference is made to an enactment affected by or under the operation of this Act, that reference shall, where necessary, be construed as a reference to the corresponding enactment in the Revised Edition of the Acts or the revised subsidiary legislation.

Signed Copies

13. One copy of each volume of the Revised Edition of the Acts and of the revised edition of subsidiary legislation as signed by the President, the Commissioner and the Speaker shall be deposited with the Government Archivist and shall form part of the national archives.

Sale of Revised Edition

14. Copies of the Revised Edition of the Acts and of subsidiary legislation may be sold as a government publication.

Expenses of edition

15. The expenses of, and incidental to, the preparation and publication of the edition shall be a charge on the Consolidated Fund.

Print-ing this Act

16. This Act shall be printed at the commencement of the Revised Edition.

SCHEDULES

Index