**** Page 282 - Part IV*

Dynamic and Static Processing of Texts

**** Page 283 - Chapter Twenty*

The Nature of Dynamic Processing

Dynamic processing is the authoritative resolving of *doubt* as to the meaning and application of a legislative text. In the previous Part we surveyed the need for processing raised by the user's problems of text collation, text comprehension and doubt resolving. The first two are tackled by static processing, to which we turn later in this Part. First, because it is juristically more important, we look at the dynamic process of doubt resolving.

It was pointed out above that there are two aspects to this question. The law on a topic may need to be stated as a whole (and cannot be satisfactorily stated if areas of it are infected by doubt). Or the doubt may arise in connection with the application of an enactment to a particular set of facts. The doubt is unlikely to relate to that set of facts alone; it will probably exist whenever facts of that type occur. Dynamic processing operates on both aspects, which of course interact. But the processor tends to be working with the latter aspect, whether as the administrative official handling an application for the exercise of his discretion, or as the judge hearing a particular case, or otherwise. For convenience we refer to these two aspects of processing as wide and narrow processing respectively.

The doubt-factors

Before examining the nature of dynamic processing, we need to weigh up the doubt-factors explored in the last five chapters. This is necessary because we cannot understand the processor's function unless we understand the basis of the authority possessed by him, and this relates closely to the nature of the doubt-factors. Where the doubt-factors are *intentional* there can be no doubt that the processor has authority to resolve them. Difficulty arises where a doubt-factor is *unintended*. It is a difficulty that lies at the heart of our long-standing problems with statutory interpretation. The intentional doubt-factors were explained in chapters 15 to 17. By use of ellipsis or the broad term, or by politic uncertainty, the legislature openly delegates the function of resolving doubt to the processor. He must therefore proceed to carry out that function,

acting within the legal framework governing the exercise of his functions generally.

But what of the case where the legislator did not intend to delegate? As we have seen, this may arise where unforeseen developments have overtaken the text (chapter 18) or where the drafter has erred (chapter 19). Either way the text is defective as an expression of currently operative law. Can Parliament be taken to have given a general delegation covering such defective texts? There is no sign of it. Or does the processor's function, particularly where the processor is a court, necessarily involve tidying-up operations of this kind? Judges have given few indications that they think so, and many that they do not.

Two things stand as obstacles to processing as a cure for defective texts. One is the predictability principle. This states that the statute user is entitled to be able to rely on the letter of the legislative text. The other is the reluctance of modern judges to usurp the legislative function, which in a democracy belongs only to elected representatives assembled in Parliament. These considerations, while of fundamental importance and worthy of the highest respect, are not sufficient to dispose of the matter. Faced with a defective text, both statute user and processor are necessarily obliged to surmount the defects as best they can. The defects put the user on enquiry. Unless they have been already processed, he must seek guidance from what it may be expected future processors will do to resolve the doubts they arouse. Basically, he needs to know whether the processor's approach to the defective text will be literal or remedial.

Back to the duplex approach

In understanding the juristic nature of dynamic processing of defective tests, we need to return to the discussion in chapter 1 of the duplex approach to legislative meaning (pp 14-15). The dichotomy between text-creation and text-validation was there outlined, together with a suggested reconciliation of the conflict between the idea of the infallible legislature and the fact of the fallible drafter.

Into the gap between the clear commands of the ideal legislature and the defective texts of actual law the processor steps. His function is to perfect the texts with due regard to the predictability principle and to democratic propriety. This is a difficult task, requiring to be scientifically approached.

Who are the processors?

Statute law itself appoints the processors; they do not intervene from outside. Even a written constitution is an emanation of statute law; Britain of course does not possess one. The principal processors are the judges. In British constitutional theory judicial power, like

executive power, originates with the monarchy: 'All jurisdiction exercised in these kingdoms that are in obedience to our King is derived from the Crown' (Bacon's Abridgment, 'Prerogative' (D)(l)). The judges stand in the place of the sovereign in whose name they administer justice *{John Russell & Co Ltd* v *Cavzer, Irvine & Co Ltd* [1916] 2 AC 298, 302).

Nevertheless it is by statute that modern courts are set up and administered. Little is said directly in the Acts about the nature of the judicial function. The Supreme Court Act 1981, reproducing provisions originating in the Judicature Act of 1873, confers jurisdiction indirectly. The High Court is given the jurisdiction formerly vested in the Court of Queen's Bench, the Court of Common Pleas at Westminster, and so on (s 19(2)(6)). The Court of Appeal succeeds to the powers of the Court of Appeal in Chancery and the Court of Exchequer Chamber (s 15(2)(6)).

Other statutes conferring jurisdiction are slightly more illuminating. The House of Lords, when hearing an appeal, is required to 'determine what of right, and according to the law and custom of this realm, ought to be done in the subject-matter of such appeal' (Appellate Jurisdiction Act 1876, s 4). County court jurisdiction is conferred item by item. For example, s 16 of the County Courts Act 1984 gives jurisdiction to 'hear and determine' any action for the recovery of money due under any statute where the amount claimed does not exceed a specified sum.

An Act dealing with a particular matter often confers jurisdiction expressly in relation to that matter. For example, Pt IX of the Consumer Credit Act 1974, headed 'Judicial Control', confers detailed functions on county courts as to the settlement of disputes under the Act. Either because of a general provision conferring jurisdiction, or under some specific enactment, a court finds itself with the function of determining a dispute governed by a statutory text. If it considers the meaning doubtful, the court, even if it is only a court of first instance, is not permitted to say 'Non liquet' (it is not clear). Provided the doubt is relevant to the cause before it, so that the cause cannot be determined without resolving the doubt one way or the other, the court cannot dodge resolving it. By his judicial oath or affirmation, the judge has bound himself to 'do right to all manner of people *after the laws and usages of this realm'* (Promissory Oaths Act 1868, s 4). Where a relevant law is doubtful the judge must make up his mind what it is. His *ratio decidendi* has the effect of declaring the law.

Under the doctrine of *stare decisis,* accepted in our system, the law is not declared for that case alone. To stand by things decided is:

> to abide by former precedents, *stare decisis,* where the same points come again in litigation, as well to keep the scale of justice even and steady and not liable to waver with every judge's opinion, as also because, the law

in that case being solemnly declared and determined, what before was uncertain and perhaps indifferent is now a permanent rule which it is not in the breast of any subsequent judge to alter or vary from according to his private sentiments, he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land, not delegated to pronounce a new law, but to maintain and expound the old one, *jus dicere el non jus dare' (Broom's Legal Maxims,* (1st edn, 1845), p 61).

Administrative authorities

Judges are not the only processors of statute law, though they are the ultimate ones. Any public official charged with the function of administering an Act or statutory instrument must resolve relevant doubt as to its meaning. Where by a broad term it confers on him a discretion, the way he uses the discretion may have the effect of setting up detailed rules of law. The official differs from the judge in being 'on the inside'. He is part of the government system that originated the law in question. His function is not judicial and impartial, but administrative. It is his duty to help ensure that the Act achieves its governmental aim.

Professional and academic commentators

Vitally connected with dynamic processing of legislative texts are the experts who write textbooks, learned articles and other commentaries. The busy judge has little time for reflection: it is his main duty to decide the case before him. The official too is distracted by the need to ensure that the administrative machine works efficiently, and that he does not arouse political criticism of his actions.

The commentator, whether a practitioner writing from the depths of his experience or an academic accustomed to handle theoretical considerations, performs as an invaluable auxiliary to the processor. Few modern judges share the opinion of Lord Hanworth MR, who once said that problems of statutory interpretation 'cannot be solved by reliance upon the opinions of writers of text-books, however able, who are yet living' *(Re Ryder and Steadman's Contract* [1927] 2 Ch 62, 74). The current view was expressed by Lord Denning in an article written in 1947. He said that the notion that academic lawyers' works are not of authority, except after the author's death, has long been exploded. He added: 'Indeed, the more recent the work, the more persuasive it is' (63 LQR 516). We have discussed above (p 21) the status of commentaries by the drafter himself.

The contribution made by the commentator to the process of doubt-resolution has several aspects. First, he can present a rounded explanation of the object aimed at by the Act. For this he can draw on materials not permitted to be directly cited in court. Next, the

commentator can analyse the nature of the doubt and suggest ways of resolving it. The higher the academic or professional standing of the commentator the more weight will be attached to his observations.

Finally, the commentator can marshal the cases bearing on a disputed point and by doing so demonstrate how far processing has already got. He can convert narrow processing to wide. All this can be of great help to the profession. In the field of criminal law, for example, the *Criminal Law Review* has proved itself invaluable in this way. Indeed, if dynamic processing is defined as the authoritative resolving of doubt it is arguable that the commentator himself qualifies as a processor.

Nevertheless, reserving the term for those charged by law with this duty, we will now examine in more detail the role of the administrative and judicial processor respectively.

Dynamic Processing: The Administrative Processor

Modern statute law often leaves it to officials to resolve doubts as to its meaning. It does so despite the citizens' antipathy to this, noted by Sir Courtenay Ilbert: 'Englishmen prefer to be governed (if they must be governed) by fixed rules rather than by official discretion' (Ilbert 1901, p 209).
The most formal way of effecting this delegation is by conferring on the Minister in charge of the appropriate government department power to spell out detail by statutory instrument. We saw above (p 242) how vague is the key word 'supply' as a basis for value added tax. The Finance Act 1972, which imposes the tax, does not leave the matter there however. Section 5 lays down guidelines as to what is and is not to be treated as a supply of goods or services for the purposes of the Act. Even this is not enough. Subsection (7) adds:

Subject to the preceding provisions of this section, the Treasury may by order provide with respect to any description of transaction—
(a) that it is to be treated as a supply of goods and not as a supply of services; or
(b) that it is to be treated as a supply of services and not as a supply of goods; or
(c) that it is to be treated as neither a supply of goods nor a supply of services.

This is an example of what may be called *peripheral drafting*, which is a most useful technique. The reason for the name is that the drafting pays special attention to the periphery, where doubts are particularly likely to arise (see the section headed 'Core and penumbra' on p 239 above). Peripheral doubt may be dealt with by the drafter in either of two ways, one bad and one good. The bad way, which is unfortunately the most common, is to lay down complex provisions over the whole field. The good way is to use peripheral drafting, which confines the drafting complexity to the area where it is needed.
Take for example a concept like theft. Peripheral drafting would say 'It is an offence to steal' and then go on to deal in detail with peripheral cases where the meaning of this might be doubtful (for

example where the defendant has a claim of right). The other way, followed by the Theft Acts 1968 and 1978, is to make the definition of theft complex *in every case*. Nine out of ten cases are likely to be straightforward, but to find out the law the statute user has to plough through the complexity every time. Greater use of peripheral drafting would simplify the law. Its main principles could be stated briefly, and separately. One would need to consult the fine print in difficult cases only.

To give a minister power to resolve doubt by regulations is really to usurp the function of the courts, but it is increasingly done as a matter of convenience. It is justified on Chalmers' principle that legislation is cheaper than litigation. Under s 5(7) of the Finance Act 1972, set out above, the Treasury determined that a gratuitous loan of goods by a taxable person in the normal course of business should be treated as neither a supply of goods nor a supply of services (Value Added Tax (Treatment of Transactions) (No 1) Order 1972, SI 1972 No 1170). By this the Treasury set at rest doubts which had arisen among certain traders. Without such machinery, the doubts could have been resolved only by the courts in the course of litigation.

This form of doubt-resolving is mentioned here for completeness. As we have seen, it is not strictly a form of processing, but a type of legislation. Processing of doubts arises through the piecemeal exercise of judgment or discretion in particular cases. By this the doubtful provision is underpinned by sub-rules lending exactness.

The processors

Many different types of official are vested with processing authority. This may be conferred directly or indirectly. It is conferred directly when the official is named in the enactment. (The naming is by office rather than personal identification.) It is conferred indirectly when the official who actually exercises the judgment or discretion does so as an employee in the department of the named officer. As before, we take as an example the Consumer Credit Act 1974. This demonstrates the hierarchical nature of the arrangements commonly made.

Section 1 of the Act confers on the Director General of Fair Trading the duty:

(a) to administer the licensing system set up by the Act, and

(b) to exercise the adjudicating functions conferred on him by the Act in relation to the issue, renewal, variation, suspension and revocation of licenses, and

(c) generally to superintend the working and enforcement of the Act.

Section 2 empowers 'the Secretary of State' to regulate the carrying out by the Director General of his functions under the Act. (By virtue of Sched 1 to the Interpretation Act 1978 this means 'one

of Her Majesty's Principal Secretaries of State', the one in question being selected by the Prime Minister.) Section 3 places the adjudicating functions of the Director General under the supervision of the Council on Tribunals. By virtue of Sched 1 to the Fair Trading Act 1973, anything authorised or required by or under the Consumer Credit Act to be done by the Director General may be done by any member of his staff. The Director General and his staff are collectively known as the Office of Fair Trading.

The result of these provisions is that central administration of the Consumer Credit Act is divided between officials of the Department of Trade and officials of the Office of Fair Trading. Local enforcement of the Act is entrusted to officials of local authorities. This follows the usual pattern of central and local administration, repeated with numerous regulatory Acts. Other types of Act confer processing powers on central and local officials. The most important of these Acts are the ones relating to income tax, customs and excise duties, value added tax and other forms of taxation, those containing health, social security and welfare provisions, and those concerned with education, employment and registration. The police too possess processing powers, together with similar functionaries such as traffic wardens and immigration officers.

Whenever relatively junior officials exercise judgment or discretion they are likely to do so in accordance with guidelines laid down by their superiors. The superior may or may not be the office holder on whom the statutory authority is directly conferred. The Director General of Fair Trading is such an office holder, and duly issues guidelines to his staff. But a police constable may be given direct authority by being mentioned as such in the statute. Yet he is obliged to carry out his statutory duties in accordance with the instructions of his superior officers.

Such policy guidelines or instructions are not likely to be regarded by a court as prejudging individual cases or improperly fettering the official's discretion, provided they do not preclude fair consideration of all relevant issues (see *R* v *Port of London Authority, ex pane Kynoch Ltd* [1919] KB 176, 184; *Stringer* v *Minister of Housing and Local Government* [1970] 1 WLR 1281). Any such policy must be reasonable and not capricious *{Cummings* v *Birkenhead Corpn* [1972] Ch 12). Where a proper policy has been laid down, exercise of judgment or discretion in accordance with the policy cannot be regarded as a failure to exercise it, and thus tantamount to a refusal entitling a person aggrieved to appeal.

It is important to bear in mind that the scope for official processing is cut down where judicial processing of the point has already occured. Official processing mainly takes place in areas not considered by the court. Once the court has resolved the doubt in question, officials (like everyone else) must abide by the court's decision. The recent rise of judicial review has enhanced the court's power to supervise administrative processing.

Processing intentional doubt-factors

We now look at some examples of how officials process the various kinds of intentional doubt-factor discussed in chapters 15 to 17.

Ellipsis

When government inspectors seek to enter premises under statutory powers they need to be quite sure that they conform to the statutory requirements. Where these are or may be elliptical, a policy judgment by the department concerned must be taken. Thus until the courts decided that the common phrase 'has reasonable cause to believe' was elliptical, and meant 'has reasonable cause to believe ***and does believe'***, departments in charge of an inspectorate had to reach their own judgment on the meaning of the phrase and instruct their officials accordingly. To be on the safe side, the tendency in such cases is to adopt the meaning which ensures legality whichever way the doubt is resolved. This was done in ***R*** v ***Adams*** [1980] QB 575. Here the police mistakenly relied on an ellipsis by which (if it had existed) a search warrant could have been used more than once. The result was that their second entry of premises under the warrant turned out to be unlawful.

Safety-first tactics are often impracticable. If the dock officials had adopted them in ***London and India Docks*** v ***Thames Steam Tug and Lighterage Co Ltd*** [1909] AC 7 there would have been a loss of revenue from lighter owners which the House of Lords ultimately held to be payable. The police had considerable difficulty with the breathalyzer provisions before the necessary sub-rules were worked out by the courts (p 274 above). Safety-first interpretation by the police would have rendered the legislation inoperative from the start.

Broad terms

Section 62 of the Highways Act 1959 entitled a highway authority to recover expenses incurred through repairing damage caused by 'excessive' weight passing along a highway, or other 'extraordinary' traffic thereon. The only clue given by the Act as to what these broad terms were intended to mean was that the entitlement must appear to the authority 'by a certificate of their surveyor'. 'Surveyor' here is also a broad term, since it lacks exactness. The provision derived from an earlier Act, and much processing was required to establish the necessary sub-rules. Must the surveyor be on the staff of the authority? If so must he hold an established post? Can his certificate apply to more than one road? Must it particularise the roads included? Is its issue a condition precedent to recovery of the expenses? Must it contain an estimate and apportionment of the expenses? These questions and many more had ultimately to be determined by the courts. Meanwhile highway authorities and their surveying staff grappled with them as best they could, adopting

their own provisional sub-rules. The Highways Act 1959 has been repealed and replaced by the Highways Act 1980, s 59 of which reproduces s 62 of the 1959 Act. The phrase 'by a certificate of their surveyor' has now become 'by a certificate of their proper officer', another broad term.

The Tribunals and Inquiries Act 1971, s 12 requires tribunals to give 'the reasons' for their decisions if asked. Various courts have held that this implies that proper and adequate reasons must be given, that they must be in clear intelligible form, that they must deal with all substantial points raised, and so on. Subject to these rulings the clerks to the tribunals have had to work out for themselves just what the requirement involves in the way of practical administration.

Part II of the Housing Act 1957 gave wide powers to local authorities in relation to houses 'unfit for human habitation', a good example of a mobile broad term (see pp 242-246). Although there has been the usual amount of judicial processing of the phrase, in the main it has been for housing authorities to work out the effective sub-rules. In this, as often happens, they are aided by central advisory sources such as relevant government departments, associations of local authorities and professional housing management organisations.

Politic uncertainty

We saw in chapter 17 how officials responsible for instructing the drafter usually like to see their powers expressed in vague terms, so as to minimise effective challenge. In some policy areas however officials may dislike administering an Act so flexible that it leaves wide scope for criticism of their practice. An example of wide discretion is given by the town and country planning legislation. Although in theory this places decision-making in the hands of elected local government representatives, in practice planning officials determine policy. Moreover this is an area where processing by the courts has been of relatively little importance.

Unintentional doubt-factors

We turn now to examples of administrative processing of doubts which are caused by unforeseeable developments or drafting error.

Unforeseeable developments

We considered unforeseeable developments in chapters 11 (pp 181- 186) and 18. One example given there should not have arisen, since it was really due to drafting error. This was *The Longford* (1889) 22 QBD 239. When the Judicature Act of 1873 amended the courts system the drafter should have made consequential amendments in the earlier Act referred to in that case. It was one more instance of the 'missed consequential', a common occurrence. Parliamentary

changes do not properly belong in the category of unforeseeable developments because when they occur Parliament has the opportunity to make the necessary adjustments in existing legislation.
Another example *A-G v Edison Telephone Co* (1880) 6 QBD 244, was a triumph for the drafter. He managed to find words which were apt to include the telephone although it had not yet been invented! The Post Office officials who considered that on policy grounds their monopoly powers should cover telephone messages were vindicated in their practice.
Official practice may have to change to correspond with social change, as occured in relation to rent officers over developments in the meaning of 'family' (p 244).

Drafting errors

Officials are frequently put in difficulty by mistakes of the kind described in chapter 19. What is the rate collector to do if he cannot fix a notice of the rate on the church door because the district has no church? *(R* v *Dyott* (1882) 2 QBD 47). How can the official administering the hackney carriage licensing system proceed if he does not know whether a proprietor convicted of a second offence under the Licensing Act is or is not liable to have his licence revoked? *(Bowers* v *Gloucester Corporation* [1963] 1 QB 881). What does ACAS do when the Act tells it to consult a party who refuses to be consulted, or to ascertain the opinion of workers whose identity is not discoverable? *(Grunwick Processing Laboratories Ltd* v *Advisory, Conciliation and Arbitration Service* [1978] AC 655). What does the City of London treasurer do when the City is liable for costs directed to be paid out of the 'county fund' and he knows perfectly well that the City does not possess such a thing? Resort can be had to the courts, but that is time-consuming and expensive. Usually the official makes his own mind up.

The nature of offical processing

The answer to questions caused by doubtful drafting depends on whether the offical processing is ante-judicial or not. By ante-judicial processing I mean processing which anticipates judicial processing. Even though judicial processing of the point may never in fact occur, the official (often with the aid of legal advice) attempts to forecast what a court would decide. It follows that ante-judicial processing can happen only if, and to the extent that, a court would have jurisdiction to entertain a case in which the doubt could be settled. Sometimes the department may bring a test case for this purpose. Processing which is not ante-judicial occurs where the court does not have jurisdiction to resolve the doubt, or its jurisdiction is peripheral. The main category is where the doubt-factor is the use of a broad term. The Competition Act 1980 is based on the concept of what it calls 'an anti-competitive practice'. No definition of this

broad term is given, except the obvious (and almost equally broad) statement that it concerns the restricting, distorting or preventing of competition in connection with the production, supply or acquisition of goods or the supply or securing of services (s 2). The result is that it is for the Office of Fair Trading to process the phrase and supply a network of sub-rules underpinning it. Before this process began there were many questions. Would it include the giving of loyalty rebates or discriminatory discounts? Would it extend to full line forcing or the refusal to supply goods to price cutters? The trade did not know until the Office of Fair Trading chose to tell it. An Opposition attempt to add to the Bill a list of 26 practices to be treated as anti-competitive was defeated.

The body of sub-rules which emerges in such cases is given the description 'practice'. In introducing estate duty, the Finance Act 1894, s 8(1) perpetrated an appalling piece of asifism:

> The existing law and practice relating to any of the duties now leviable on or with reference to death shall, subject to the provisions of this Act and so far as the same are applicable, apply for the purposes of the collection, recovery, and repayment of Estate duty . . . as if such law and practice were in terms made applicable to this Part of this Act.

The result of this disgraceful evasion of the drafter's duty (for which the drafter himself may well not have been personally responsible) was that throughout the eighty years estate duty endured it was never possible to consolidate the enactments relating to it. This was so even though they were supplemented by almost every annual Finance Act from 1894 onwards.

Official practice changes from time to time, and it is often very difficult for the outsider to discover exactly what the practice of an earlier time was. Unlike judicial processing, much administrative processing takes place out of public view and its results are not embodied in accessible records. The way a doubt is officially resolved may remain unknown unless the officials concerned choose to reveal it. Equally, a *change* in the official interpretation of a doubtful statute may pass unnoticed if not revealed. Some government departments include such matters in their annual or other reports. Thus a 1979 report by the Civil Service Department revealed a reinterpretation of s 8(2)(a) of the Pensions (Increase) Act 1971. As a result of this, the report said, 300,000 files would need to be reviewed at a cost of some £250,000 *{Legal Entitlements and Administrative Practices* (1979), para 31 and App 2; cited Miers and Page 1982, p 241).

Policy handouts

Government departments frequently issue booklets, leaflets and other guides informing interested parties how doubt-resolving processing is carried out and what its results are. The former Supplementary

Benefits Commission published a *Handbook* explaining how its various discretionary powers were exercised and the way it resolved doubts on the wording of the parent Act. In *Supplementary Benefits Commission* v *Jull* [1980] 3 WLR 436, the court referred to para 16 of the *Handbook* in support of its view on how such a doubt should be determined. Another example is furnished by the planning circulars issued by the relevant government department, eg the circular entitled *The Use of Conditions in Planning Permissions* issued in 1968 by the Ministry of Housing and Local Government (the circular is referred to in *Newbury DC* v *Secretary of State for the Environment* [1981] AC 578, 600).

Where a non-governmental body has statutory functions it may issue similar guidance. An example is the Notes for Guidance issued by the Law Society in connection with the legal aid scheme administered by it *(Hanlon* v *The Law Society* [1981] AC 124). Some Acts *require* the administering department to issue guidance of this kind. Thus s 4 of the Consumer Credit Act 1974 requires the Director General of Fair Trading to arrange for the dissemination of information and advice about the operation of the Act. Section 12 of the Housing (Homeless Persons) Act 1977 required housing authorities to have regard, in exercising their discretion, to guidance issued by the Secretary of State. A Code of Guidance was accordingly issued by the Department of the Environment *(A-G* v *Wandsworth LBC* [1981] 1 WLR 854).

An important publication of this kind is the booklet issued by the Board of Inland Revenue which details the extra-statutory concessions made by the Board in relation to income tax, corporation tax, capital gains tax etc. These concessions are an important method of mitigating the literal effects of taxing Acts where these are contrary to current government policy. The concessions also serve to indicate, where doubts exists on the meaning of a particular taxing provision, that the authorities have adopted the practice of collecting tax in accordance with the less onerous reading.

Judicial control

The courts retain some degree of control even over processing that is not ante-judicial. The usual principles of judicial review apply to restrain abuse of power by orders of certiorari or prohibition, or compel the carrying out of statutory duties by orders of mandamus. These prerogative orders do not exhaust the courts' powers of control over administrative authorities. The doctrine of *ultra vires* can always be resorted to by those who claim that an authority has gone too far or has failed to exercise a judgment or discretion in accordance with the terms of the empowering statute.

In *Lally* v *Kensington and Chelsea RB* (1980) *The Times,* 27 March, Browne-Wilkinson J considered the practice of the borough council

in setting up a sub-rule with regard to the exercise of its discretion under the Housing (Homeless Person) Act 1977. The sub-rule was that in all cases an intentionally homeless persons would be granted temporary accomodation for a period of 14 days only. The judge, while accepting that he was not sitting as a court of appeal from the local authority, nevertheless made an order against the council. He pointed out that the court could intervene 'only if the local authority had misdirected themselves and had reached a conclusion that no reasonable council could have reached'. They had done this by applying a rigid 14 day rule instead of allowing in each case a period suited to the circumstances of the family in question.

The courts will not hesitate to cut down powers given by wide wording if they consider this necessary to give effect to the purpose of the Act. A well known example concerns the imposition of conditions on the grant of planning permission. Section 29(1) of the Town and Country Planning Act 1971, reproducing earlier legislation, authorises a local planning authority to grant planning permission 'either unconditionally or subject to such conditions as it thinks fit'. In broad terms this gives power to impose any condition at all, but the courts have curtailed this width. The following statement of law by Lord Denning in *Pyx Granite Co Ltd* v *Ministry of Housing and Local Government* [1958] 1 QB 554, 572 has been approved by the House of Lords in several subsequent cases (see *Newbury DC* v *Secretary of State for the Environment* [1981] AC 578, 599):

> Although the planning authorities are given very wide powers to impose 'such conditions as they think fit', nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest.

This is one more example of ellipsis. Unexpressed in the planning permission formula are words having the effect of this statement by Lord Denning.

Formerly, Acts of Parliament not infrequently contained provisions ousting the jurisdiction of the courts to carry out judicial review. The exclusionary clause was to the effect that an exercise of the administrative judgment or discretion should be 'final' or 'conclusive', or should not be questioned in any legal proceedings *{Ridge* v *Baldwin* [1964] AC 40). The courts resisted such provisions, and they are not used in current legislation. Their death-knell came in s 11(1) of the Tribunals and Inquiries Act 1958, which provided that existing provisions of this kind should not prevent judicial review (see s 14(1) of the Tribunals and Inquiries Act 1971).

Dynamic Processing: The Judicial Processor

For sound reasons, the courts have been reluctant to acknowledge their processing function in relation to legislation, since it is itself legislative, rather than strictly judicial, in nature. However, it would be of considerable help to the clarity of the law if judges could bring themselves openly to accept this undoubted function, and refine their technique accordingly.

How would a distinct judicial technique for processing operate? Let us begin with the case where judicial processing of the point in question has not occurred before. The judge has a clean sheet. As soon as he realised that determination of the *Us* required resolution of a doubt as to the meaning or operation of a legislative text, he would proceed accordingly. If his judgment was likely to be reported, he would, with the aid of counsel in the case, make sure that it contained a passage appropriately worded for adding a new sub- rule. If he thought fit, he might then *direct* that the judgment should be reported.

It would be helpful, though not essential, if judgments in such cases could assume a more structured and standardised form. If a sub-rule is to be laid down by a quasi-legislative process it would assist the statute user if it were in rule form. It would also assist future processors of the same text, including appellate courts deciding whether to overrule or approve the sub-rule. Here it may be convenient to remind the reader that these sub-rules are of varying degrees of complexity. As we have seen in relation to lotteries, highway repairs and other matters, a broad term may be so broad as to produce a complex network of sub-rules when it is processed. If codified, they would occupy considerable space in a statute setting them forth exactly. That such codification has not occurred in British- type statute law is mainly due to unsystematic formulation of sub- rules by judges.

Sometimes the courts seize on the processing opportunities conferred on them by Parliament and fashion an important principle, worthy of a more dignified description than 'sub-rule'. This is particularly likely to happen in an area in which judges have been prominent historically. One such area concerns the welfare of wives and children. We are not surprised to find that the courts have

used neutrally-expressed statutory powers to make maintenance orders in favour of divorced wives as a means to create the important principle of the 'clean break'. In *Minton* v *Minton* [1979] AC 593, 608, Lord Scarman described the effects of this important piece of judicial processing when he said:

> The law now encourages spouses to avoid bitterness after family breakdown and to settle their money and property problems. An object of the modern law is to encourage the parties to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down.

This type of processing is an important judicial contribution to statute law. It strengthens the case for a more orderly treatment in judgments. The statute user should not have to guess whether the judge intended to create a sub-rule. Nor should he have to guess what its content and effect are.

Interstitial articulation

The judges could go much further than is suggested above in framing sub-rules with precision. They could supplement the work of the drafter by including in their judgment on an Act an *interstitial articulation*. This may be defined as a judicial sub-rule framed in a way which codifies it, and fits it textually into the body of the Act.

The ideal requirement In explaining this technique, it is convenient to start with what it is that the parties ideally need when an enactment has to be applied to the facts of their own case. They ideally need a version of the enactment that fits like a glove, or in other words is *tailored to the shape of those facts*. The parties are not interested in how the enactment might apply to any other facts but their own. Blackstone gives an example when he frames this syllogism: 'against him who has rode over my corn, I may recover damages by law: but A has rode over my corn, therefore I shall recover damages against A' (Blackstone 1765, **III** 399). Obviously the relevant law would not be framed in terms merely of riding over corn, but more widely. The parties here are only interested in riding over corn however.

Take a modern example. Suppose a person is charged with the offence of using his house as a retreat for the consumption of dangerous drugs by addicts. Both defence and prosecution wish to know whether, if the defendant is convicted, his house can be forfeited. The Misuse of Drugs Act 1971, s 27(1) says that:

> . . . the court by or before which a person is convicted of an offence under this Act may order *anything* shown to the satisfaction of the court to relate to the offence to be forfeited (emphasis added).

The parties might think that here they have their answer. No word could be wider than ***anything:*** it must include a house. That however is an argument. It is a very strong argument, but the position is not as clear as it would be if s 27(1) had said '. . . may order any ***house*** . . . to be forfeited'. That is the sort of wording the parties in that particular case really want. It avoids all argument, and is absolutely conclusive.

Now of course they cannot have that wording. If passed in that form the enactment would have been incomplete. The nearest they could have hoped for is something like '. . . may order anything (of whatever nature, whether corporeal or incorporeal) . . . to be forfeited'.

It may be argued that the drafter of s 27(1) should have worded his enactment in such a way. In the context of the present discussion, that argument is not available. We have accepted as a general proposition that the drafter cannot say everything. Suggestions about how he might have said a bit more when drafting a particular enactment are beside the point.

Any competent lawyer will know that the parties in our drugs case would be unwise to assume that, for the purposes of s 27(1) as actually drawn, a house really is 'anything'. Research will reveal to them that in *R* v *Beard (Graham)* [1974] 1 WLR 1549 Caulfield J said (without giving any reason) that the word 'anything' in s 27(1) is a very general description of *personal* property and would not include a house. (See also *R* v *Cuthbertson* [1981] AC 470 and *R v Khan [\9%2]* 1 WLR 1045.)

In this example, the gap in the express wording of the enactment was the absence of any statement of whether or not 'anything' included anything in the nature of a house. The court in *Beard* closed, or at least narrowed, this gap; and it did so in the usual way. Parties in future such cases (who might be concerned with a flat or a shop—or even a ship) will, in the usual way, need to try and work out for themselves the *ratio decidendi* of *Beard,* or decide whether Cauldfield J's dictum was merely *obiter*.

Assertion or articulation? There are two ways a court can deal with a gap in the express wording of an enactment, as it applies to the particular facts under consideration. The first is the usual way, namely simply to *assert* (as in *Beard)* that the enactment 'means' (or does not 'mean') so-and-so. (For a critical account of this judicial technique of *assertion* see Murphy and Rawlings 1981.) The other way would be for the judge to fill the gap by spelling out in his judgment a legislative formula that fits more closely to the facts of the instant case. In other words to *restate* the enactment in an expanded version which includes the expression (in relation to such facts) of precisely what it was that Parliament, or in practical terms the drafter, left unsaid. The precision of modern drafting nowadays makes such restatement practicable.

The starting point is formally to isolate those of the express words of the enactment that are relevant to the facts of the instant case. Few enactments are as brief and simple as s 27(1) of the Misuse of Drugs Act 1971. The technique of compression used by modern drafters leads to long sections, often divided up into complex and indigestible subsections. Here is a typical example. Section 5 of the Public Order Act 1936 (as substituted by s 7 of the Race Relations Act 1965) runs as follows:

Any person who in any public place or at any public meeting—
(a) uses threatening, abusive or insulting words or behaviour, or
(b) distributes or displays any writing, sign or visible representation which is threatening, abusive or insulting,
with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence.

This one section contains a very large number of different enactments. Each one constitutes an offence on its own, and can be stated separately without departing from the language Parliament has used. For example one of the many offences created by s 5 can be expressed in this way: 'Any person who in any public place uses insulting behaviour, whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence.'

Here a word of caution is required. Although this brief formula is extracted from the section without alteration, it cannot necessarily be treated as if it formed the entirety of the section. Other words located elsewhere in the section, or in other parts of the Act, may colour its meaning: an Act is to be construed as a whole. Subject to this caveat, the application of which is not likely to make much difference in the general run of cases, it is helpful to abbreviate a section in this way. It should always be possible to produce an abbreviation of this kind. Even if not actually produced to the court, notionally it forms the subject of the enquiry into meaning. What needs to be grasped is that an enactment is less a specific portion of an Act than a *proposition* which, though always to be gathered from the words of the Act (and not significantly departing from them), fluctuates in its composition according to the point at issue. The statute user has to develop a technique of skimming through a provision and mentally picking out the bits that matter in the case he has before him. If his mind can learn to blot out the irrelevant words, the remainder will read continuously and make sense.

The need to do this is accepted by judges. Lord Scarman cited an enactment in a form he described as 'trimmed of words inessential for present purposes' in *Riley* v *A-G of Jamaica* [1983] 1 AC 719, 739. In *Ludlow* v *MPC* [1971] AC 29, 38, Lord Pearson used the technique in relation to r 3 of Sched 1 to the Indictment Act 1915 (revoked and replaced by the Indictment Rules 1971). The rule allowed joinder of charges in an indictment 'if those charges are

founded on the same facts, or form or are a part of a series of offences of the same or a similar character'. Lord Pearson said of the two offences charged in *Ludlow:*

This question can be narrowed, because these two offences were not presented as being part of some larger series of offences and they were not of the same character. Thus the question comes to be whether these two offences formed a series of offences of a similar character.

The technique is the one we have called ***selective comminution*** in describing it above (p 235). Its usefulness has been recognised by other writers. For example, JR Spencer used it to telling effect when exposing weaknesses in s 22 of the Theft Act 1968 (Spencer 1981(2)). A refinement of the technique where ***defined terms*** are included in the relevant enactment was suggested by Donaldson MR in *Bland* v *Chief Supplementary Benefit Officer* [1983] 1 WLR 262, 265, where he called it reconstructing the relevant subsection 'to make it slightly more intelligible'. The refinement was to set out in the selective comminution, the full meanings of the defined terms included in the enactment.

Here is a more complex example. D is charged with making without lawful excuse a threat to kill V, contrary to s 16 of the Offences against the Person Act 1861. D admits making the threat, but argues that he had a lawful excuse in that the threat was uttered to prevent a crime. He relies on s 3 of the Criminal Law Act 1967, a selective comminution of which reads:

(1) A person may use such force as is reasonable in the circumstances
(2) in the prevention of crime
(3) Clauses (1) and (2) above replace the rules of the common law on the question when force used for the purpose of the prevention of crime is justified by that purpose.

In clause (3) of this there has been some necessary rewording. As well as dealing with force used in the prevention of crime, s 3(1) of the Criminal Law Act 1967 covers force used in making an arrest. Section 3(2) of the Act (the relevant effect of which is reproduced in our clause (3)) says that s 3(1) 'shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose'. Rewording of this limited nature (described by drafters as 'carpentry') is necessary to achieve the purpose of selective comminution, but it must never depart more than is requisite from the statutory wording. Nor of course must it in any way change the meaning.

The prosecution counter D's argument by saying that s 3 refers to the actual use of force, and does not mention threats. D retorts that statutes are to be construed with logic and common sense, and that in logic and common sense the greater includes the less. He puts forward the following as an elaborated version of clause (1):

(1) A person may use such force *or threat of force* as is reasonable in the circumstances.

The judge accepts D's argument and directs the jury accordingly. His direction omits any reference to actual force because on the evidence that is irrelevant. He prefaces his direction by saying 'I am not going to attempt a comprehensive definition because you will be considering purely this case'. He directs the jury that the law says: 'A person may use such threat of force as is reasonable in the circumstances in the prevention of crime.' The above is based on the decision of the Court of Appeal in *R* v *Cousins* [1982] 2 WLR 621. The quoted preface to the direction was used by the Crown Court judge in that case (see p 625). It illustrates how in practice courts are concerned only with opposing constructions of an enactment *as it applies to particular facts*. Where does the Crown Court judge get this statement of the law from? As we have seen, it is not what s 3 of the Criminal Law Act 1967 says. It can scarcely be what the common law says, because s 3(2) has abolished common law rules in this field. There are two possibilities in such cases. One is that the judge is making express a meaning that is implied in the words Parliament has used. The other is that the judge is treating Parliament as having delegated to him some degree of legislative power.

Articulating the implied meaning It is submitted that the true answer is an amalgamation of these possibilities. While one might accurately describe what the judge does as an exercise of delegated legislative power, in essence he is making express an implied meaning. Certainly that is the analysis the judiciary themselves prefer. Here it needs to be borne in mind that in the origins of our law judicial authority and legislative authority are, as Richardson and Sayles put it, 'but two facets of law-giving' (Richardson and Sayles 1934, p 555). To this day Parliament remains both the supreme legislature and the supreme judicial authority.

In a significant phrase, Lord Bridge referred to the mid-nineteenth century as 'an age when Parliament was less articulate than it is *now'(Wills* v *Bowley* [1983] 1 AC 57, 104). The precision of modern drafting means that Parliament nowadays clearly articulates many details that in former times were left to be spelt out by the courts. Nevertheless, as we have seen, this unavoidably falls far short of articulating all the detail necessary to decide every case.

When the court in effect supplies this missing detail, it does not usually say that that is what it is doing. (For an instance where it did do so, see the remark by Viscount Kilmuir LC in *Inland Revenue Commissioners* v *Hinchy* [1960] AC 748, 762 that the effect of a previous decision of the House of Lords was to 'rewrite' the relevant section.) As we saw above in relation to/? v*Beard (Graham)* [1974] 1 WLR 1549, the court usually contents itself with explaining

in informal language that the enactment 'means' whatever is necessary to decide the case. The court does not attempt to articulate what might be described as the invisible wording of the enactment. Its beam for a moment rescues this from darkness, but then passes on.

The same is true of counsel, when they advance to the court their opposing constructions. They argue that the enactment 'means' one thing or the other, but rarely attempt to draft (as if it were a part of the Act) the wording their argument requires to be taken as implied. It is true that they receive little judicial encouragement to do so.

It may be helpful if we now examine one of the occasional exceptions to the usual judicial way of proceeding. In *R* v *Schildkamp* [1971] AC 1 the prosecution went to the House of Lords over a point on the meaning of s 332(3) of the Companies Act 1948. A selective comminution of this reads:

(1) Where any business of a company is carried on
(2) with intent to defraud creditors of the company
(3) every person who was knowingly a party to the carrying on of the business in manner aforesaid
(4) [shall be guilty of an offence].

The question for the House of Lords was whether this enactment applied literally or was, by an implication arising from its context, confined to the case where the company was in liquidation. By three to two, the House held that it was so confined and that the appeal of the prosecution failed. Dissenting, Lord Guest said (p 15):

One of my difficulties in giving effect to the respondent's contentions is to understand what words of limitation are to be imported in subsection (3). As the subsection creates a criminal offence, this must be a matter of precision. Mr Hawser, for the respondent, suggested that subsection (3) should commence with the following words:

'If in the course of the winding up of a company it appears that the business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose . . . "

This would be a clumsy section to construe and the [prosecutor] would have considerable difficulty in drafting an indictment in line with such a provision.

Lord Hodson, for dismissing the appeal, said he was not impressed by the argument that on the majority view some rewriting of the enactment was necessary (p 11). Lord Upjohn, who delivered the main majority opinion, pointed the way to how the rewriting might best be achieved (while purporting to do the opposite).

The Court of Appeal had framed the point of law for decision by the House of Lords as being 'what, if any, words of limitation must be imported in s 332(3)?' Lord Upjohn rejected this formulation

as not disclosing the real point of law. He said: 'The real point is whether before a prosecution can be initiated . . . the company must be in liquidation' (p 28). He dismissed the difficulties raised by Lord Guest on the ground that s 332(3) itself required no alteration: 'it stands as it is, plain and unambiguous, but in the context in which it is found it requires a limitation in its application . . .' (p 26).

In a sense both sides were right. Lord Upjohn was right in saying that it was not necessary for the House of Lords to formulate a textual amendment of s 332(3) in order to rule that it did not mean what it said. Lord Guest was right in saying that the majority ruling involved the necessity of some notional amendment of the literal meaning even if it was not put into exact words. (The decision was reversed by s 96 of the Companies Act 1981).

There are many different ways of saying a thing. The professional drafter's motto is that 'anything is draftable', though it may have to be drafted as an overriding provision rather than one that neatly slots into the passage it modifies. Lord Diplock went too far when he said in *Jones* v *Wrotham Park Settled Estates* [1980] AC 74, 105, that a departure by the court from the literal meaning is not legitimate unless it is 'possible to state with certainty what were the additional words that would have been inserted by the draftsman'. No two drafters will draft a proposition in the same words, but draft it they will. Lord Upjohn's speech suggests that as good a way as any of articulating the effect of the decision in *Schildkamp* would be to treat it as adding the following proviso to s 332(3): 'Provided that no prosecution shall be instituted for an offence under this subsection unless the company is being, or has been, wound up.'

It is submitted that it would substantially improve the clarity of legal reasoning if judges openly accepted that when they construe a statute, what they are in substance doing is *declaring* or making explicit certain of its implied provisions. As Neil MacCormick puts it, the statute is *concretised* through the process of judicial interpretation (MacCormick 1978, pp 188, 218).

As a corollary of such acceptance, it would be helpful in many ways if judges would further accept a responsibility to *articulate* what seems to them an appropriate version of those implied provisions which their judicial function requires them to concretise. The judiciary would thus, to a limited extent, resume its ancient drafting function. Within the verbal interstices provided by the express wording of an Act or statutory instrument, there would then grow, decision by decision, the concrete details needed to spell out its meaning in particular cases. Holmes J said in *Southern Pacific Company* v *Jensen* (1916) 244 US 205, 221: 'I recognise without hesitation that judges do and must legislate, but they do so only interstitially . . .'

Whether or not judges who necessarily fill up gaps in statutes can properly be described as legislating, they do what they do

interstitially. As Miers and Page put it in their book *Legislation:* Judges make law interstitially, within the limits of existing rules, precedents and doctrine . . .' (Miers and Page 1982, p 205). Elsewhere they say:

To the extent that judges do make law, for example where there is no appropriate rule available, they do so only interstitially within the context of the discharge of their primary function (of settling disputes in accordance with pre-existing rules). *(Ibid* p i.)

The interstices identified in these passages vary in their nature. The term *interstitial articulation* alludes to what can almost literally be regarded as cracks, clefts or crevices between verbal propositions in statutes. The OED defines *interstice* as:

An intervening space (usually, empty); especially a relatively small or narrow space, between things or the parts of a body (frequently in plural, die minute spaces between the ultimate parts of matter); a narrow opening, chink or crevice.

As Cardozo said in an important section of his book *The Nature of the Judicial Process,* how far the judge may go 'without travelling beyond the walls of the interstices' is governed by complex factors (Cardozo 1921, p 141). It would be of advantage for the product of this activity to be clear and precise rather than, as so often under our system, tangled and diffuse.

The ratio decidendi The first obvious advantage of interstitial articulation by judges is that where applied it would put an end to the well-known difficulties about working out the *ratio decidendi* of a relevant case. This working out is not a task to be shirked, as Lord Reid sternly reminded us in *Nash* v *Tatnplin & Sons Brewery (Brighton) Ltd* [1952] AC 231, 250:

It matters not how difficult it is to find the *ratio decidendi* of a previous case, that *ratio* must be found. It matters not how difficult it is to reconcile that *ratio* when found with statutory provisions or general principles, that *ratio* must be applied to any later case which is not reasonably distinguishable.

Whatever difficulties may remain in finding the *ratio* of a decision at common law, there could be no doubt of the *ratio* of a case turning on statutory interpretation where the judge had articulated the provision in question.

Sir Rupert Cross defined the *ratio* as 'any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion. . .' (Cross 1977, p 76). Holdsworth said that 'the authority of a decision is attached, not to the words used, nor to all the reasons given, but to the principle or principles necessary for the decision of the case' (Holdsworth 1928, p 46). Where an enactment governed the decision, and any relevant implied terms of the enactment were articulated by the judge, there could be no

doubt that the resulting form of the words was the rule of law upon which the decision was based. The authority of the decision then would be, *pace* Holdsworth, attached to the words used.
It should perhaps be stressed that it would be necessary for the articulation to confine itself to *ratio* and not stray into the realm of *dicta.* What under the present system is expressed in the form of an *obiter dictum* should, under the proposed system, continue to be so expressed.
The gain in certainty about what is the *ratio* of a case would in itself be a considerable advantage. Cross remarked on the confusion caused by difficulty in arriving at this:

> . . . every English law student is familiar with the difficulty of differentiating those parts of the leading judgments that are *ratio* from those that are mere *dicta,* and disagreements over the distinction lie at the root of a number of legal controversies. These difficulties and disagreements are largely, if not entirely, due to the elaborate and varied forms in which English judgments are delivered. (Cross 1977, p 49; Hart 1961, p 95).

Elsewhere Cross quotes with approval the remark by Paton and Sawer that the function of a court is not only to give judgment, but also to lay down a principle consistent with that judgment *{ibid,* p 99.) He ends his chapter on the *ratio decidendi* saying: 'there is no doubt that unnecessary uncertainty may be occasioned by the discursive nature of the judgments in appellate courts, and those sitting in such courts should take every possible step to avoid it' (p 102).
Adoption of the practice of interstitial articulation is certainly a 'possible' step. It would of course require the advocates presenting argument to the court to set the ball rolling by offering their own respective articulations of the contested enactment. As Lord Radcliffe said, 'a court decision is formed out of the work of those who prepare a case, those who argue it before the court and those who ultimately explain and record their view' (cited Zander 1989, p 275). Such articulation would appropriately form part of the 'skeleton arguments' now required to be submitted in advance to the court.

A worked example It may be helpful at this point to give an example of the working of this technique of interstitial articulation coupled with selective comminution. Almost any case involving statutory interpretation would serve for this purpose. The following is based on *Wills* v *Bowley* [1983] 1 AC 57, which we have already used as an example in explaining comminution (see p 235 above). The example indicates some of the things imaginary judges and counsel might do if using the technique, but does not purport to say what any actual judge or counsel involved in that case really did.
Mr P is briefed to prosecute D (a female) at a magistrates' court. She is charged with two offences. One is an offence under s 28 of the Town Police Clauses Act 1847 ('the s 28 offence'). The other

is the offence of assaulting three police officers in the execution of their duty of arresting her without a warrant ('the assault offence'). The facts are that the constables saw and heard D using obscene language in a street. When they tried to arrest her she became violent. Mr P looks up s 28. It is a long section, running to some three pages. He makes a selective comminution which reduces this to a mere 48 words. It runs as follows:

Parti
(1) Every person who in any street,
(2) to the annoyance of the residents or passengers,
(3) uses any obscene language
(4) shall be [guilty of an offence].

Part II
(5) Any constable shall take into custody, without warrant,
(6) and forthwi± convey before a justice,
(7) any person who within his view commits any such offence.

(This selective comminution is presented in two parts because the relevant portions of s 28 constitute two independent propositions and it is convenient to be able to refer to them separately.)
Mr P perceives that in order to succeed on the assault charge he needs to show that the power of arrest conferred by Part II had really arisen. If the arrest was not lawful D was justified in resisting it. Mr P finds there is some doubt about whether the evidence will establish what is required by clause (2). He realises that if the case goes to appeal he may have to uphold a conviction for the assault offence without his argument being supported by D's conviction for the s 28 offence. Indeed D may by that time have been acquitted of the s 28 offence.
Mr P then sees that, to obtain (and retain) a conviction for the assault offence, it may be necessary to convince the court that clause (7) is wide enough to include a case where the constable reasonably believes the accused to be committing a s 28 offence even though this is not actually the case. Mr P therefore prepares the following articulated version of clause (7):

(7) any person who within his view—
(a) commits any such offence, or
(b) does any act which he reasonably believes constitutes such an offence.

Miss Q is briefed for the defence. She prepares a similar selective comminution to that prepared by Mr P. She appreciates the point that has troubled him, and prepares an articulation of clause (7) that strengthens the wording in her client's favour. It runs as follows:

(7) any person who within his view does an act which actually constitutes any such offence.

The bench acquit D of the s 28 offence. In relation to the assault

offence, Mr P and Miss Q argue for their respective versions of clause (7). The bench prefer Mr P's version. They convict D of the assault offence on the ground that her behaviour fell within Mr P's clause *(7)(b)* and rendered her arrest lawful. D appeals by case stated to the Divisional Court, who dismiss her appeal. She then appeals to the House of Lords, who by three to two also dismiss the appeal. The majority agree that a slightly different version of Mr P's clause (7) is appropriate. It runs as follows:

(7) any person
(a) who within his view commits any such offence, or
(b) whom he honestly believes, on reasonable grounds derived wholly from his own observation, to have committed an offence within his view.

Through the effort of thinking out their respective articulations, counsel on each side formed a more exact appreciation of what the enactment provides. This helped them to prepare a full and clear formulation of what, in the contention of each, the relevant law really was. The process of preparing his or her articulation, and the resulting ability to refer to these formulations in argument before the court, clarified counsels' minds and assisted the cogency and certainty of their arguments. This was a distinct gain. The difficulty of *correct* formulation of any legal argument based on statute law is formidable, and often underrated. Gordon Woodman has remarked that its intellectual difficulty is a characteristic of such argument not often explicitly discussed (Woodman 1982, p 135).

The court too is enabled by this means to concentrate on the exact point at issue. The final version of clause (7) given above is based on Lord Bridge's answer to the certified question in *Wills* v *Bowley* [1983] 1 AC 57, 104. It is respectfully submitted however that Mr P's version is preferable to that of Lord Bridge. The former slots properly into the structure of s 28, and correctly identifies the nature of the offence. Lord Bridge's version refers to 'an offence' in general terms. In stating that the grounds of belief must derive wholly from the constable's observation, Lord Bridge is more restrictive than the wording of s 28 appears to justify.

These defects (if such they be) are probably due to the fact that under the present system argument is not directed to the precise wording of the key passage in the judgment. Indeed counsel before the House of Lords in *Wills* v *Bowley* are unlikely to have had an opportunity to comment on Lord Bridge's formulation of the answer to the certified question. In most cases before the courts there is not even the concentration of argument provided by a stated case. By including the articulation in its judgment, the court would give *precise* guidance as to what the law on the point is. This would help the parties in considering whether to bring or resist an appeal. If an appeal is brought, the articulation would help the appellate

court to decide whether or not the court below had erred.

From the point of view of the law generally, the articulation by the court of the relevant provision would make the enactment clearer for the future. This would assist potential litigants, and indeed all who are concerned to, administer, expound or alter the enacted law in question.

Prevention of error Perhaps the most powerful argument in favour of interstitial articulation is that it can hardly fail to reduce the number of cases that are wrongly decided. This is because it requires the argument to be thought through with a stringency and thoroughness not necessitated by conventional methods.

As a further example of this advantage we may take the hire- purchase case of *Porter* v *General Guarantee Corporation* (1982) CCLR 1; *The Times,* 15 January. Here the High Court came to a plainly wrong decision on s 75(2) of the Consumer Credit Act 1974. These were the facts.

A car dealer represented to the plaintiff that a certain car was in excellent condition. In fact it was in poor condition. Acting on this misrepresentation, the plaintiff agreed to buy the car on hire-purchase. To enable him to do so, the dealer introduced the plaintiff to a finance company, to whom the dealer sold the car. The finance company in turn sold it on hire-purchase to the plaintiff.

On contract law principles, the plaintiff later rescinded the agreement. He claimed that by virtue of s 56(2) of the Consumer Credit Act 1974 the dealer's misrepresentation was to be treated as made by the seller (the finance company). In respect of the loss suffered by it because of this rescission, the finance company claimed to be indemnified by the dealer under s 75(2) of the 1974 Act.

In claiming this indemnity the finance company was clearly in error. There is no indemnity under s 75(2) in a case like this. The statutory indemnity only arises where the creditor and the supplier are different persons. Here the finance company was both creditor and supplier, a situation which (under the definition of 'supplier' in the 1974 Act) is always the case with a hire-purchase agreement.

It might be said that there was no necessity to go to the length of working out an articulation in order to discover this error. Obviously that is true. But if the judge had been presented with an appropriate articulation he could hardly have failed to reach the correct result. Indeed the point can be pushed further back. If counsel for the finance company had first sat down to prepare such a formula he would so clearly have seen the true legal position that he could never have brought himself to advance to the court the argument he did. The fact is that modern statutes are so complex that techniques of this sort are essential. The process of working them out enables counsel to make sure he is on the right track. Having the formula before him in court ensures that his argument does not stray from that track.

Codification Over a long period, the judicial articulations of implied provisions of an Act would collectively form a codification. Their existence in reported judgments would greatly ease the problems, described above (pp 74-77), of carrying out a codification of processed enactments on conventional lines.

Conclusion The need for interstitial articulation (coupled usually with selective comminution) arises from the immense complexity of modern statute law. The opposing constructions put forward in actual cases usually represent but a tiny fraction of the possible meanings inherent in an enactment. Other possible factual situations (of which the range is infinite) will, if and when they arise, call forth other pairs of opposing constructions of their own. The potential in the case of a particular enactment may be without limit. So it is not at all surprising that statutes are difficult to construe, and that great care and thought are required to arrive at their correct meaning in any one case.

The best way to deal with this, both for arriving at the correct decision in the instant case and for optimum use of that case as a precedent, is to treat the words of the enactment as supplemented by a number (in some cases infinitely great) of notional or implied words. By the technique now suggested, such of these words as are needed to decide a particular case are picked out and declared by the court, acting on the advice of the advocates appearing before it. The words are not confined to the facts of the case, but are generalised so as to apply to facts of that kind (the factual outline). Thereafter the words are on record as a piece of dynamic processing of the enactment in question. Just as we now have precision drafting, so by this means we could enjoy precision judging. (For further examples of interstitial articulation see Bennion 1982(3), 1983(1) and 1983(3)).

Awareness **of drafting technique**

It has been said that a judge engaged in dynamic processing needs to be aware of relevant techniques of text-creation and text validation. To supplement what is said about these in chapters 1 and 2, we now describe how legislative drafting has become more precise in modern times.

Precision drafting Legislative drafting in Britain has now reached a high degree of precision. This warrrants the deployment of corresponding precision by judges and practitioners when legislation is dealt with in court. As we have seen, drafters occasionally fall short of this demanding standard. Such inevitable human failure should not prevent statute users from understanding how fully-developed the current drafting technique is, and what benefits can be gained from it.

This high level of precision in modern drafting is recognised by the judiciary. Thus Lord Reid said in *Luke v Inland Revenue Commissioners* [1963] AC 557, 577, that 'our standard of drafting is such that [the need to do violence to the words] rarely emerges'. In *Wills* v *Bowley* [1983] 1 AC 57, 104, Lord Bridge referred to 'a modern statute, using language with the precision one expects'. In *Jennings* v *United States Government* [1982] 3 All ER 104, 116, Lord Roskill remarked that until comparatively recently 'statutes were not drafted with the same skill as today'.

In this respect we have gone full circle. The earliest medieval statutes were mostly drafted by the judges. The king's justices were of the Council and of the Parliament. Hazeltine regarded this judicial membership as by far the most important element of Parliament from the point of view both of adjudication and legislation (see Plucknett 1922, p xviii). Holdsworth said of these early statutes:

> The statutes were concisely and clearly drawn, and do not seem to have given rise to many difficulties of construction. This is due not only to the fact that they were drafted by the best lawyers of the day, but also to the fact that the prevailing style of legal draftsmanship was good. (Holdsworth 1924, XI 366).

The telling factor however was the complete control the early medieval executive had over the wording of statutes. In this respect we have also turned full circle.

The executive lost this control early in the fifteenth century, when a crucial change came. The Commons, growing more powerful, rejected the system under which, when the king had granted their petition, a judge put the result into 'legal language'. The Commons complained that the ensuing statute often did not correspond to what they had asked for. The remedy was obvious. The Commons themselves should draw the proposal in 'legal language', and present the result to the king for ratification when they (and the Lords) were satisfied with its wording. Thus the Parliamentary Bill was born. (See Holdsworth 1924, pp 439-40.)

The judges, usually as members of the king's Council, continued to play a large part in the drafting of statutes. As the House of Lords grew to be a separate body, it claimed the right to use the services of the judges. Ilbert notes that after the Restoration the judges habitually assisted the House of Lords in their legislative business and drafted Bills or clauses. He adds:

> Sometimes the heads of a Bill were agreed to by the House, and a direction was given either to the judges generally or to particular judges to prepare a Bill. In other cases a judge would attend a grand committee of the House as a kind of assessor, and do such drafting work as was required (Ilbert 1901, p 78).

In 1758 the House of Lords had before it a Bill to amend the Habeas Corpus Act 1679. The House consulted the judges as to the existing

law and the effect on it of the proposed Bill. The judges responded adversely, whereupon the House threw out the Bill and ordered the judges to draft a new one (Holdsworth 1924, XI 375). Lord Hardwicke made a significant point in his contribution to the debate. The judges, he said, were asked 'not whether it is fit upon political reasons to pass such a Bill—that is a legislative consideration—but to inform your lordships in law' *(Ibid)*. Down to the present century the judges have on occasion drafted legislation (for example Lord Halsbury LC drew part if not the whole of the Companies Act 1900: *Hilder* v *Dexter* [1902] AC 474, 477-8). Nevertheless, from the sixteenth century onwards, more and more statutes were drawn by private practitioners.

Disorganised composition The unified control essential to clarity had, as stated above, been lost at an early stage in the emergence of the Houses of Parliament. It was not to be fully regained until the present century. This was a gap of some 500 years, during which the distinguishing feature of the statute book was *disorganised composition.*

Thus early on in this interval we find Coke complaining that the Acts of his time are 'overladen with provisoes and additions, and many times on a sudden penn'd and corrected by men of none or very little judgment in the law' (Co. Rep: Preface to Part ii). This state of affairs, said Coke, meant that learned men were often required to 'perplex their heads to make attonement and peace by construction of law between insensible and disagreeing words'. Ruffhead, in his eighteenth century edition of the statutes, described the enactments of the fifteenth and sixteenth centuries as 'hastily drawn up without Order and without Precision'. (Preface to Ruffhead's Edition of the *Statutes at Large* (1763) I v.)

Holdsworth says of the position towards the end of the seventeenth century:

> Thus the style in which the statutes were drawn became more and more variegated. The result was increased difficulty in interpreting them, and sometimes in ascertaining their relations to one another. And since, during this period, the style of legal draftsmanship, which was used in the drawing of pleadings, conveyances, and other documents, was tending to become more verbose, the statutes which these lawyers drew exhibited the same quality; and so the difficulties of understanding and applying the growing body of statute law were increased. (Holdsworth 1924, XI 370.)

The position worsened in the eighteenth century. Not only was the statute book inevitably growing bulkier, but the scope of legislation widened. It was an age of technicalities. Conveyancers drafting statutes were paid by the folio, and had no inducement to be brief. 'The result' says Holdsworth 'was that the statute book became not only so heterogeneous and so uncorrelated, but was

also so bulky, that, by the middle of the eighteenth century, it was becoming unmanageable' (Holdsworth XI 374).

The transformation came with the establishment of the Parliamentary Counsel Office under Thring in 1869 (see chapter 2 above). Holdsworth said that there could be no doubt as to the 'enormous improvements' effected by this change in the drafting of statutes (Holdsworth 1924, XI 387). A single government department came to be responsible for the drafting of all government Bills not solely relating to Scotland or Ireland. A uniform technique was adopted, which to the present day has steadily improved in precision.

It is important to grasp the essence of this transformation. The difference, as has been said, is between organised and disorganised composition. With disorganised composition there is in reality no coherent meaning. One statement contradicts another. Within a single statement there are glaring defects. As Grove J politely put it in ***Ruther*** v ***Harris*** (1876) 1 Ex D 97, 100, the language 'is not strictly accurate and grammatical'.

The enactment with which ***Ruther*** v ***Harris*** was concerned, s 21 of the Salmon Fishery Act 1861, furnishes a typical example of disorganised composition. It says that between certain hours no person 'shall fish for, catch, or kill, by any means other than a rod and line any salmon'. (Note that syntactical ambiguity is avoided only by the comma after 'kill', a breach of the rule that punctuation should not affect meaning. The headnote to the report makes the mistake of failing to include this vital comma, thereby demonstrating the validity of the rule.)

The mention in s 21 of both fishing for and catching salmon clearly indicates that the unsuccessful as well as the successful fisherman contravenes the section. Yet it continues with these words: 'and any person acting in contravention of this section shall forfeit all fish taken by him, and any net or moveable instrument used by him ***in taking the same'*** (emphasis added). The court robustly held that the net of a person who had caught no fish was forfeited.

That particular error is likely to have been the fault of the original drafter. An error probably caused by an ill-considered amendment in Parliament also fell to be dealt with by Grove J in the year 1876. Section 78 of the Highway Act 1835 was a very long section concerned with improper driving of horsedrawn vehicles. It was equipped with no less than three sidenotes, all of which referred only to ***drivers.*** In the middle of the section however there is inserted a prohibition of furious ***riding*** of any 'horse or beast'. The machinery provisions of the section, imposing penalties and dealing with the refusal of an offender to disclose his name, are solely in terms of 'drivers'. Again the court was robust. Grove J refused to hold that the legislature had made the 'absurd mistake' of creating riding offences without affixing any punishment for them. ***{Williams*** v ***Evans*** (1876) 1 Ex D 277, 282.)

Yet in fact the legislature had indeed made that absurd mistake. What the court did was come to the rescue of the legislature by correcting its error. That regularly had to be done with the sort of disorganised composition the courts were constantly required to grapple with before the advent of modern precision drafting. (As to the contribution formerly made by ill-considered parliamentary amendments to disorganised composition see the remarks by Lord James in *Garbutt* v *Durham Joint Committee* [1906] AC 291, 297. While such errors can still happen today, they are very rare.)

Changing the drafting technique While complex precision drafting of the common law type has its critics, their objections can mostly be got round by subsequent textual processing of the kind described in chapter 23 below. We had better make the most of the virtues of our drafting techniques, for they are firmly established and resistant to change. Certainly the Law Commission have failed to make any impression on them. Their first programme, following the establishment of the Commission in 1965, contained this pregnant passage:

> It is evident that a programme of law reform, which must necessarily use the instrument of legislation, depends for its successful realisation on the interpretation given by the courts to the enactments in which the programme is embodied. The rules of statutory interpretation . . . are often difficult to apply, particularly where they appear to conflict with one another and when their hierarchy of importance is not clearly established.

The Commission accordingly recommended 'that an examination be made of the rules for the interpretation of statutes', to which the Lord Chancellor agreed. A working paper followed, on which there was exhaustive consultation. The resulting recommendations were published in 1969 (Law Com No 21). They proved abortive. One reason was the steadfast oppostion of Parliamentary Counsel (who are well aware of the close link between rules of interpretation and drafting technique). As we have seen, a like fate befell the Renton Report (p 48) and the Law Commission report on drafting in relation to criminal responsibility (p 271).

Apart from perhaps abandoning the technique of indirect amendment (p 229), the Parliamentary Counsel Office has maintained its techniques unaltered in the face of continuous recent criticism. Yet they are far from being the only techniques that could be applied for the purpose. We have discussed at some length the claims of civil law drafting (pp 23-26). Now for further compar- ison let us glance at a third system, that prevailing in the United States. For those not familiar with it, there are some surprises in store.

 Legislative drafting in America

Every principle of drafting now observed in Britain is overturned in the United States. The executive does not have its legislation drafted by its own expert officials in a central office. It has no expert officials, and no central office. Drafting is not regarded as a refined art, to be mastered only after many years' full-time practice. Much federal and state legislation is drafted by law students at Harvard or Yale. There is no pressure for a scientific statute book, arranged under titles. Few people have shown concern at the flaws revealed by this passage from Reed Dickerson's classic book *Legislative Drafting:*

> In the rush to meet the exigencies of particular problems, laws are proposed and frequently enacted that do not show how far they amend or supersede pre-existing laws. Others are proposed that do not dovetail adequately with related or companion legislation. Many show litde regard for the need to develop a reliable means of communication between the legislator and die persons the legislation is addressed to. Common usage is too readily perverted by short cuts that save the draftsman's time but sooner or later lose untold hours for the individuals, agencies and courts that have to determine what the law means (Dickerson 1954, p 5).

The last sentence at least has a convincing ring in Britain!

While there are official federal and state legislative counsel in the United States, no one is obliged to use them or take their advice. Bills that become law are drafted by the personal staff of Congressmen and Senators, by specialists attached to Congress committees, by freelance drafting agencies, by lobbyists and by agencies of the executive. As we have seen, some are even drafted by law students.

The Harvard Legislative Research Bureau was founded in 1952 to provide governmental and public service groups with technical services in the preparation and drafting of legislation. In 1964 it began publishing the Harvard Journal on Legislation, which still flourishes. Reed Dickerson contributed to the first issue, an article on 'diseases of legislative language'. The journal was seen as a vehicle for disseminating the drafting work of the Bureau, including model bills on key issues of current public interest. Two recent models were a bill to protect the confidentiality of a newsman's sources (a 'shield' bill) and a bill to require periodic evaluation of governmental agencies (a 'sunset' bill).

Requests for the services of these Harvard units come mainly from three areas:

(1) Congressional and state legislative committees, agencies and legislative counsel.
(2) Lobbying organisation that attempt to represent the public interest.
(3) Legislators wishing to obtain a first draft, or initial picture,

of what a legislative response to their particular concern would look like.

Harvard makes no charge for these services, since it believes that supplying them (under expert supervision) enhances the students' educational development. I queried with Russell Isaia, a third-year student who was the current president of the Bureau, whether Harvard students could provide draft Bills of comparable standard to those produced by Parliamentary Counsel in Britain (who are not regarded as fully qualified until they have had at least ten years' fulltime drafting experience). He replied: 'We do not pretend to achieve the mastery that ten years' full time experience would provide, but it is usually sufficient to meet the standards of American legislatures.'

This digression on American legislation has been included to emphasise that the British way is not the only way (even if it is the best way currently on offer). It may also remind our judges that there are different drafting methods, and that it is therefore important to know which one is operating in the judge's jurisdiction— and what its detailed characteristics are.

The way forward

Was Lord Wilberforce right to say that law reform cannot grapple with statutory interpretation, and that it is merely a matter of 'educating the judges and practitioners and hoping that the work is better done' (HL Deb 6 November 1966, col 1254)? It depends what you mean by law reform. The question is how judges should treat the five doubt-factors which prevent legislation operating as direct communication with the statute user. Can the judges themselves rectify the system? Might they pass a resolution effectively updating the resolution passed by the judges of the Court of Exchequer Chamber four centuries ago *{Heydon's Case* (1584) 3 Co Rep 7a)? Or must Parliament step in to confirm a delegation which after all is no more than implied, and therefore disputable? We return to this question below.

Differentia] readings

Even where no doubt-factor is present, and static processing (dealt with in chapter 23 below) has rendered all the assistance it can, there may still be disagreement about meaning. This is because of the limits to semantic precision where general rules are formulated. When judges differ it may be because they take different views on how to resolve a doubt-factor. On the other hand it may be because, while no doubt-factor is present, they disagree about how a general formula applies to particular facts. Different minds, confronted with a formula using inexact language (as most language

is), will sometimes arrive at different results. The mental process of applying the rule to the facts can only end in a 'feeling' that one interpretation or another is correct. Such feelings are justified in presentation by advancing supporting arguments and denigrating counter-arguments. The weight to be attached to each supporting argument, and the offsetting weight of each counter argument, are in the last resort a question of 'feel'. This is abundantly illustrated in the reports. It is well described in the following passage from the speech of Lord Simonds in *Kirkness* v *John Hudson & Co Ltd* [1955] AC 696, 712. He begins by describing the task of the five Law Lords in the case:

> Each one of us has the task of deciding what the relevant words mean. In coming to that decision he will necessarily give great weight to the opinion of others, but if at the end of the day he forms his own clear judgment and does not think that the words are 'fairly and equally open to diversmeanings' he is not entitled to say that there is an ambiguity. For him at least there is no ambiguity and on that basis he must decide the case.

This is an important concept, which needs to be clearly grasped by interpreters. If, on an informed approach, no real doubt is felt about the meaning, there is no room for the application of any interpretative criteria (see *Director of Public Prosecutions* v *Ottewell* [1970] AC 642, 649). But then it has to be remembered that, as explained above, (pp 105-107), these criteria must be kept in mind in deciding whether or not doubt exists.

Examples of differential readings

A remarkable example arose in *Newbury DC* v *Secretary of State for the Environment* [1981] AC 578. The case concerned aircraft hangars on a former aerodrome. They had been used by the Home Office for the storage of fire-pumps. Subsequently they were used by a company for storing synthetic rubber. The question was whether these uses made the hangars 'repositories' within the meaning of a Town and Country Planning (Use Classes) Order. The differential readings at various stages of the case are well summarised by Lord Dilhome (at pp 596-597):

> All the members of the Divisional Court (Lord Widgery LJ, Michael Davies and Robert Goff JJ) and all the members of the Court of Appeal (Lord Denning MR, Lawton and Browne LJJ) agreed that the use of the hangars by the Home Office was not use as a repository. Despite the unanimity of judicial opinion and despite the strong view expressed by Lord Denning MR that 'no one conversant with the English language would dream of calling these hangars a 'repository' when filled with fire-pumps or synthetic rubber' and that of Lawton LJ that—
> 'As a matter of the ordinary modern usage of the English language . . . no literate person would say that the use to which the Home Office

had put the hangars in the 1950s was, or that the company are now,
using them as a repository'

I feel compelled to say that to describe the use of the hangars when so filled as use for a repository is, in my opinion, a perfectly accurate and correct use of the English language. They were when used by the Home Office used as repositories for fire-pumps and so to describe them is just as correct as it is to describe a burial place as a repository for the dead.

The other four Law Lords agreed with Lord Dilhorne. It was six judges against five, but the five had the last word.

Nothing could have been clearer in some eyes than the capital gains tax enactment applicable in *O'Brien* v *Benson's Hosiery Ltd* [1980] AC 562. A company entered into a seven-year contract of service with a Mr Behar. It thereby acquired what many people would call an 'asset' (the term used in the enactment). So valuable was the asset that after 18 months Mr Behar paid the company £50,000 for his release. Was not this a gain accruing to the company on the 'disposal' of its asset?

The Court of Appeal (consisting of Buckley LJ, Bridge LJ and Sir David Cairns) did not think so. The drafter of the Art had not relied only on common sense to do his work. He went to great trouble to spell out that 'asset' included all forms of property, including options, debts and incorporeal property generally. He added that there was a 'disposal' of an asset where a capital sum was received in return for forfeiture or surrender of a right. None of this satisfied the Court of Appeal. They allowed counsel for the company to lead them along byways of argument designed to show that the plain words should be given an artificially restricted meaning because of a House of Lords decision 25 years earlier on entirely different legislation. Five unanimous present-day Lords of Appeal corrected their error.

In *Bourne* v *Norwich Crematorium Ltd* [1967] 1 WLR 691 the court had to consider tax provisions later consolidated in the Capital Allowances Act 1968. Allowances were granted for expenditure on construction of an industrial building or structure, the relevant definition referring to a building or structure 'in use for the purposes of a trade which consists in . . . the subjection of goods or materials to any process'. Did this include the furnace chamber and chimney tower of a crematorium? No, said the court. It would be a distortion of the English language to describe dead bodies as 'goods or materials'. The decision was perverse, since the policy of the Income Tax Acts clearly indicates that the allowance should have been given. The Law Commission, when pronouncing on the decision, blamed what it called an unsatisfactory body of interpretative principles, or in other words 'literalism' (Law Com No 21 (1969) para 8).

The same thing happened in *Buckingham* v *Securitas Properties Ltd* (1979) 124 SJ 17. Slade J denied capital allowances to a security

company on the ground that making up wage packets was not the subjection of goods to a process. The term 'goods' did not extend to coins and notes treated as currency or a medium of exchange. But why should not coins and notes be treated as 'materials' and so qualify? The report is silent on this point.

In both these cases the taxpayer was deserving of sympathy. Should the drafter be blamed? No, because in referring to the subjection of goods and materials to any process he was using a phrase going as wide as the language permits. Anything movable and concrete is within these words on any reasonable construction. Was the Law Commission right in blaming a rule of interpretation requiring 'literalism'? No, because on a literal construction both corpses and currency notes are materials. So one can only blame the courts for failing to apply a straightforward enactment in a straightforward way. But is this fair either? Neither judge felt any doubt.

The drafter's dilemma

The phenomenon of differential readings places the drafter in a difficulty. He knows that what seems plain to him may not be found plain by others—even where their intellect is not clouded by extraneous factors such as sympathy for the plaintiff. The drafter's feelings are on record in one case, namely s 1 of the Wills Act 1968. In the Heap Report this is criticised for saying that attestation of a will by a beneficiary is to be disregarded 'if the will is duly executed without his attestation' (Statute Law Society 1970, para 84). The report states that a witness to the Heap Committee complained:

> The use of the word 'without' suggests that the attestation is not there whereas the whole point of it is that it *is* there. Modern usage would call for 'apart from', and if those words had been substituted for 'without', it would not be necessary to read the section several times in order to find out what it is trying to say.

Rarely in modern times are we privileged to know the views of the drafter on criticism of this sort. Here we have that privilege. The drafter was no less a person than the head of the United Kingdom drafting office, Sir Noel Hutton. In a session of the Renton Committee (of which he was a member) Sir Noel said to representatives of the Statute Law Society (which appointed the Heap Committee): 'this seems to be so plainly mistaken as a criticism that I wondered again if you yourselves had actually read the Act before publicising this as a criticism of it' (Statute Law Society 1979, p 11).

Differentials across the border

Where judges produce differential readings of the same words as applied to the same, or similar, facts, the normal result is that the

reading preferred by the highest court trumps the rest. An exception may arise where the Act applies in two different jurisdictions.

Section 1 of the Road Traffic Act 1972 created the offence of causing death by reckless driving. It applied both in England and Scotland. In ***R*** v ***Murphy*** [1980] Crim LR 309 the Court of Appeal (Criminal Division) held that in this connection the test of the existence of the recklessness was ***subjective***. The required mental element of indifference to the need to drive with due care had to be proved by the prosecution.

On the other hand in ***Allan*** v ***Patterson*** (1980) 124 SJ 149, the High Court of Justiciary in Scotland applied what it called 'a totally objective test' in construing the same provision. They held that it is the quality of the driving that matters. In this context' "recklessly" . . . plainly means a piece of driving which, judged objectively, is eloquent of a high degree of negligence'. Since there is no appeal to the House of Lords from decisions on criminal matters in Scotland, the two countries would have continued to operate a different law of reckless driving if in ***R*** v ***Lawrence*** [1982] AC 510 the House of Lords had not brought English law into line with the Scottish decision. While unfortunate, this would have been an inevitable consequence of having two jurisdictions, coupled with the inexorable phenomenon of differential readings.

Conclusion

We see that the 'feel' by which judges arrive at differential readings is subjective. It may be possible to ascribe an erroneous reading to a conspicuous factor, such as an over-persuasive advocate or a party who arouses sympathy. Alternatively, there may be no obvious reason. In some respects legal doctrine is decided on purely subjective grounds. The line may not be easy to draw. Some might treat 'repository' and 'materials' as broad terms, and argue that the cases we have cited concerning them merely illustrate resolution of a doubt- factor, as described in chapter 16. That does not appear to have been the view of the judges concerned.

The position is obscured by the fact that judges are not accustomed to approach problems of interpretation in this way, and so do not frame their judgments in appropriate terms. There is a clear conceptual difference between delegation by use of a broad term objectively capable of alternative meanings in a given connection, and subjective disagreement on meaning where no doubt is felt.

A processing Act?

Parliament has shown itself unwilling to deal with the correction of errors in statutes by any formal procedure short of ordinary legislation. The House of Commons Select Committee on Procedure received coolly the Renton Committee's suggestion of a streamlined

procedure for correcting errors in Bills discovered between the passing of the Bill and royal assent (Renton 1975, para 18.36; First Report from the Select Committee on Procedure Session 1977-78, para 2.44). A similar reception was accorded to the Government's Acts of Parliament (Correction of Mistakes) Bill 1977. The Select Committee on Procedure commented on this that 'we believe the public are entitled to have such corrections drawn to their attention by means of an amending Act' *{Ibid,* para 2.45: see Miers and Page 1982, p 106).

In these circumstances it would be helpful for an Act to be passed codifying what it is submitted are the existing judicial powers.

Terminology

It is convenient to begin with some defined terms to be used in the proposed Act. We propose that the Act should apply to the interpretation both of Acts of Parliament and statutory instruments. We may use the term 'legislative text' to cover both these, producing the following definition: 'legislative text' means a provision of an Act or statutory instrument, and references to the enactment of a text shall be construed accordingly.

It will be necessary to refer to 'the legislator', and the following is suggested: 'the legislator' in relation to an Act means Parliament, and in relation to a statutory instrument means the person or body by whom it was made. Difficulties arise in relation to the concept of the legislator's *intention.* The duplex approach calls for recognition of the drafter's role as well as Parliament's. It does not seem proper to refer in the Act to 'the drafter' bearing in mind that there may not be a single drafter, that the drafter may change in the course of the Bill's progress, that text creation is also the business of administrative officials and others, and that amendments may be added of which the drafter does not approve (for an example see Bennion 1976 (3)). Nevertheless some reference, even though oblique, needs to be made to the duplex approach.

There is also the vexed question of allowing citation of travaux preparatoires and other external materials, including reports of Parliamentary debates. While full allowance ought to be made for the objections to this, it is submitted that judges should be permitted a discretion here. They should always have in mind the predictability principle, and the need to avoid prolonging proceedings unduly, so the Act should contain reminders to this effect. Subject to this, it would be desirable to avoid the artificiality of requiring a ruse such as the reading out in court of a passage from a textbook which cites forbidden material. Judges can surely be trusted not to let the facility of citing external sources get out of hand or be misused.

Less difficult is the problem of the connection between the intention of the Minister in making a statutory instrument and the intention of Parliament in conferring the power to do so. It seems

desirable to deal with all these questions by a special provision, as follows:

Intention of the legislator.
(1) In construing any reference in this Act to the intention of the legislator, the court shall have regard to the principles set out in this section.
(2) The intention is primarily to be derived from the legislative text itself (including any source referred to in the text).
(3) The court may refer to any other source in addition if it thinks fit to do so having regard to the requirements of justice, including -
(a) the desirability of persons being able to rely on the meaning conveyed by the text itself,
and
(b) the need to avoid prolonging legal proceedings without compensating advantage.
(4) The court shall have regard, so far as may be relevant, to the procedures by which, in accordance with constitutional practice, the text may be taken to have been created and validated as law.
(5) In the case of a statutory instrument the court shall, so far as may be relevant, have regard to the intention of Parliament in delegating power to make the instrument as well as to the intention of the person or body by whom it was made.

Although it is convenient to refer to a 'court', the Act should apply to any functionary charged with applying a legislative text. The following is suggested for this: ' "court" includes a tribunal, arbitrator or other person or body with the function of interpreting a legislative text.'
Having completed the interpretative provisions, we now turn to the substance.

Substantive provisions

How far is it necessary or desirable to give statutory recognition to judicial processing? We need to distinguish here between intentional and unintentional doubt-factors. Deliberate delegation to the courts by ellipsis, the use of broad terms or politic uncertainty scarcely needs mention in our new Act. The trouble is that these techniques are not openly recognised now. It would help if the Act could refer to them in some way. The drafter's method in such cases is to operate indirectly by including a passing reference to the matter in question. The phrase 'without prejudice . . .' is useful here. Another point concerns just how far the new Act should

go. Should it refer to processing as such, and confer or imply power to make sub-rules? Or should it merely confer or imply power to deliver judgments in particular cases? Then, by the doctrine of ***stare decisis***, the judgments would form precedents from which sub-rules could be postulated in the way familiar in the development of common law doctrines. Since these are innovatory concepts they are more likely to gain acceptance if we move cautiously. So we adopt the latter course.

These considerations lead us to suggest an introductory clause, as follows:

Powers of court. Without prejudice to a court's implementation of a legislative text under which (whether expressly or by an implication a°ising from a deliberate omission or use of a term of wide meaning or otherwise) any power is conferred on or delegated to the court, it is hereby declared, for the avoidance of doubt, that a court has the powers referred to in sections to in relation to a legislative text relevant to the case before it.

It will be noticed that this operates, not by conferring any new power, but as a declaration of existing law. It is my contention that all these powers already exist, and that the new Act is not strictly necessary to enable the courts to proceed in the ways suggested in this book. The Act is simply a desirable measure to overcome the reluctance of the judiciary to exercise the powers they are in fact given by the wording of individual texts.

The first of the main clauses will deal with obsolescent Acts of the kind discussed in chapter 16 (in relation to terms mobile in time) and in chapter 18. Difficult problems await us here. It is suggested that we could usefully establish the 'always speaking' principle, subject to any indication to the contrary in the text. If the original mischief has disappeared altogether, the Act may have become spent. This possibility needs to be recognised, but subject to it the court should apply the Act in relation to what remains, updating the text as necessary. Here is the suggested provision:

Obsolescent text. (1) This section applies where it appears to the court that, through the passage of time since the enactment, or original enactment, of the text, its effect is doubtful.

(2) If the mischief or object at which the text was directed has changed its nature, the court shall apply the text, subject to such modifications as may be requisite, to the changed mischief or object.

(3) Subsection (2) does not apply where the change is such that the interests of justice require diat the text be treated as spent.

This enables the obsolescent language to be updated so far as

necessary, provided the original mischief or object has not virtually disappeared (in which case it would be right to treat the enactment as spent). The words 'or original enactment' in subs (1) allow for the possibility that the original text has been consolidated.

Next we turn to cases of drafting error. Here it would be very valuable to have parliamentary recognition of the possibility of error, with express power to the courts to deal with it. At the same time it does not seem necessary or desirable to go into much detail about the possible types of error. The predictability principle requires the power to rectify not to be given unless the error is obvious. It should also be reasonably obvious what the correct version is (though the exact wording may not matter). It seems worth distinguishing the defective text from the text which fails to carry out the legislator's intention. The following two clauses are suggested:

Defective text.	(1) This section applies where it appears to the court that, through grammatical error, syntactical ambiguity, omission, transposition or intrusion, logical error, punctuation mistake or other formal defect, the effect of the text is doubtful.

(2) Where it is clear what form the legislator intended the text to take, the court shall apply it in that form.

(3) In any other case the court shall apply it in the form best suited to serve the object of the text as intended by the legislator.

Unintended effect.	(1) This section applies where it appears to the court that, because the text goes narrower or wider than the object, or is based on an error of law or fact, or is otherwise misconceived, it does not carry out the legislator's intention, or goes wider than the intention.

(2) Where it is clear what the effect of the text should have been in order to carry out the legislator's intention and no more, the court shall give the text that effect.

(3) In any other case the court shall apply the text as it stands apart from this section.

These provisions, arranged in the form of a Bill, are set out in Appendix A (p 343).

Static Processing of Texts

Aiding text collation

The statute user's problem of text collation was described briefly in chapter 13 (pp 210-211). In order to discover what statute law provides for a factual situation, it is necessary, as we have seen, for the user to find out which are the relevant texts, and then make sure he has them in up-to-date form. In Britain the tools officially provided for this purpose are of high quality. This is one respect in which we are in advance of some other Commonwealth countries. The basic need is for an *index* arranged under topics (from which to compile a list of relevant texts) and a *table* in which texts so compiled are listed chronologically, with annotations showing amendments, commencement dates etc. Both these are provided by the British authorities.

The nearest we have to a keeper of the statute book in Britain is the Statute Law Committee. This was set up in 1868 by Lord Cairns. Its chairman is the Lord Chancellor of the day, who appoints the remaining members. Its current terms of reference are as follows:

> 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. (Renton 1975, paras 5.1 and 5.2.)

In 1870, shortly after the setting up of the Statute Law Committee, the first official index was published under its direction. This was in response to a suggestion made by Lord Cairns to the then Lord Chancellor, Lord Chelmsford. The title of the work was *Index to the Statutes in Force.* In 1876 Lord Thring prepared a paper of instructions, laying down improved principles. The scheme of the index, nowadays called the *Index to the Statutes,* continues to be to group, under appropriate headings, entries relating to the whole of the general statute law in force. Lord Cairns' suggestion also extended to the production of a chronological table, and this too began publication in 1870. It still continues, under the title *Chronological Table of the Statutes.*

In 1887 Alexander Pulling sent a memorandum to the Statute Law Committee. In it he made suggestions for remedying the inconvenience arising from the lack of an official system of indexing or collating what Pulling called 'statutory rules and orders' (a name which stuck). In the result Pulling was asked by the Committee to prepare the first of an annual series of volumes of S R & O's. They also desired him to compile a comprehensive index. The initial annual volume appeared in 1889. It has been repeated in each year since. The first index produced by Pulling was published in 1891. He also compiled the first collected edition of S R & Os. It contained instruments of a public and general character issued before 1890, and ran to eight volumes.

In 1893 the Rules Publication Act was passed. This required rule- making authorities, as the Act called them, to send the rules and orders they made to the Queen's Printer to be registered, numbered and printed. In the following year the Treasury made regulations governing the details of this process. In 1895 Pulling was placed in charge of indexing both statutes and what are now known as statutory instruments. The Statutory Publications Office was born, but has never itself been a publisher. That function continues to be in the hands of Her Majesty's Stationery Office (HMSO).

The *Index to the Statutes* is published 'annually', though publication difficulties in recent years have meant that this aim is not always realised. The *Index* covers in two volumes all public general statutes in force, including ante-Union Scottish Acts. A corresponding work relating to Northern Ireland is published less frequently. There is also an index to local Acts. These give local authorities special powers in relation to such matters as highways and streets, public utilities etc. This publication is called *Index to Local and Personal Acts*.

The Chronological Table of the Statutes also aims (though not always successfully) at annual publication, also in two volumes. It lists all public general Acts passed since 1235, whether or not they are still in force. If an Act remains operative, the *Table* lists the amendments which have been made to it. Again, there is a corresponding publication for Northern Ireland. At the end of the second volume of the *Chronological Table of the Statutes* there is a chronological table of local and personal Acts. This was instituted by a direction of the Statute Law Committee in 1974, and shows all amendments to local and personal Acts after 1973.

In relation to statutory instruments, there are two useful official publications. The *Index to Government Orders* is a biennial publication showing under appropriate subject headings the powers to make statutory instruments, together with titles of instruments made under those powers and still in force. The *Table of Government Orders* is a cumulative annual publication. It lists general statutory instruments in chronological order, showing whether each instrument is still in force and, if it is, giving details of any amendments which

affect it. The *Table* also includes instruments made under the Royal prerogative. The information given by these two publications is updated by *Annual, Monthly* and *Daily Lists of Statutory Instruments* issued by HMSO. Another useful feature is the supplementary material given in the annual volume of public general Acts passed during the year. This includes tables of short titles and effects of legislation, subject index, tables of derivations and destinations of consolidation Acts and a table of textual amendments made to Acts by statutory instruments.

In an account of the work of the Statutory Publications Office by a former Editor, AB Lyons, it is stressed that 'our function is to make the laws available to all, not to make them intelligible' (Lyons 1969, p 2). Intelligibility belongs to the realm of text- comprehension, also discussed in chapter 13 (pp 211-212). As we saw in chapter 14, there are specific factors that cause impaired intelligibility in the drafting of legislation. It remains to consider a further aspect related to the subject of this chapter. Can the drafting of Acts be improved to render text-collation easier?

Since an Act changes the law, it often has to include what are called transitional provisions. It cannot be brought fully into force with immediate effect, but must spell out precisely how its substantive parts are modified for pending cases and other transactions already in train. The Act also has to specify relevant dates. Usually these transitional provisions are quickly spent. Thereafter, their dead words cumber the Act, obscuring its substance.

Later on, the Act is likely to be amended by a further Act. Let us hope this is done by direct textual amendment, and not indirectly. The original Act can then be reprinted as amended, and endures as one coherent text. Even if the amendments are textual however, there is still a transitional problem. It is the same problem as arose with the original Act—of dealing with pending cases (and other transactions already in train) and specifying relevant dates. It means that further transitional provisions are needed to deal with the amendments made by the new Act.

Each time the original Act is amended, the same thing happens. Let us take as a model Principal Act 1960 and Amending Acts 1965, 1970, 1975 and 1980. Suppose that each Amending Act amends Principal Act 1960 textually and contains its own transitional provisions (which, following the usual practice, are not textually incorporated into Principal Act 1960). Suppose further that Principal Act 1960 is reprinted as textually amended. To get the whole story the user still needs to consult *five* documents, as follows:

(1) Substantive provisions of Principal Act 1960 (as textually amended by Amending Acts 1965, 1970, 1975 and 1980) plus transitional provisions 1960.
(2) Transitional provisions 1965.
(3) Transitional provisions 1970.
(4) Transitional provisions 1975.

(5) Transitional provisions 1980.

To deal with this problem I devised a special type of Schedule when drafting tax legislation for the Jamaican Government in the early 1970s. Using the above model, 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 dates 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. (For additional details see Statute Law Society 1972, pp 12 and 32). At least one academic commentator has welcomed the aid given by the Jamaica Schedule (Samuels 1974, p 534).

A further refinement ought to be mentioned. Where, as frequently happens, commencement dates are not specified in the Act itself but are left to be prescribed by order, the power to make commencement orders would include a requirement that each order should amend the Jamaica Schedule textually so as to write in the commencement date. As we have seen (p 49), a comparable procedure was adopted for the Consumer Credit Act 1974.

The great utility for computer use of equipping Acts with a Jamaica Schedule or historical file was fully spelt out in an article I wrote for the New Law Journal in 1981 and supplemented in a subsequent letter (see Bennion 1981(3) and (4)). The need for this reform is demonstrated by the flow of cases concerned with doubt as to the commencement of enactments (for examples see f 19831 Crim LR 255-6).

Text manipulation

Our final task is to examine ways of easing the statute user's problems of text comprehension, which were outlined in chapter 13 **(pp 211-** 212). We saw in chapter 14 the factors that cause legislative texts to be drafted in ways inimical to understanding. If we accept that these factors are ineluctable, and are content to take drafting methods as they are, what remedies can we devise? The clue is given in

Access to the Law, a study conducted for the Law Reform Commission of Canada in 1975. As the author, Dean Friedland of the University of Toronto, says: 'The challenge is to simplify the manner of presentation, not necessarily to simplify the law itself (Friedland

How can this challenge be met? First let us see exactly what is involved. We rule out summaries and paraphrases, whether official or unofficial. They have their uses, but they are not ways of presenting the text. An unfortunate consequence of the complication of legislative texts is that people despair of understanding them and resort to substitutes. Yet as we saw from the remark of Sir William Dale quoted in chapter 2 (p 26) 'when once one understands a United Kingdom Act, one can usually ascertain the answer to one's question.'

It is of course the *authoritative* answer to the question, direct from the horse's mouth. It is not the opinion of someone else (however expert he may be), but the pronouncement of the legislator. That is why it is worth going to a good deal of trouble to find it out. Modern drafters take care to spell out the detail of their provisions in a logical and consistent way. Usually, if not always, they succeed. If the matter goes to court, the court usually arrives at the result the drafter intended. The fact that we have spent time in this book analysing the deficiencies of this system ought not to obscure that.

So we must work with the official text, and the whole of it. But the official text is arranged in the way required by parliamentary procedure, its shape perhaps distorted by factors extraneous to its meaning. The language is compressed by the need for brevity, and the text is deficient in headings and other signposts. It may be only of several texts that the user needs to fit together or conflate.

The first question in meeting the challenge posed by Dean Friedland is this. Can we, so as to 'simplify the manner of presentation', as it were play about with the official text? Can we juggle the order of sections, or mix up provisions from an Act with provisions from a statutory instrument? This is not as straightforward as might appear.

The doctrine of the free-standing Act

It has been customary in Britain to regard each Act as a self-contained entity. It was drafted as a whole, and is to be read as a whole. It is a rounded piece of work, standing alone. Its author has not designed it to slot into some larger structure, created by other hands. This principle partly explains the inveterate opposition of parliamentary counsel to the textual amendment method. The doctrine was also responsible for the hostility by some drafters to publications such as *Statutes Revised,* which print the text in amended form and not as originally enacted. For convenience we will call it the doctrine of the free-standing Act.

If the doctrine has any substance in law it may form an impediment to the idea of shuffling the textual units around in an effort to 'simplify the method of presentation'. Has it any substance?

We saw in chapter 3 (p 48) how the draftsman of the Criminal Law Act 1977 may have felt inhibited by one manifestation of the doctrine. This is the rule in *A-G* v *Lamplough* (1878) 3 Ex D 214. We can illustrate the point now by a simplified example.

An Act prohibits certain conduct 'where condition A, B or C is satisfied'. It goes on to say that 'in any other case' the conduct is permissible if specified requirements are observed. A later Act repeals the reference to condition B. Do the words 'in any other case' now include B, although they clearly did not do so before?

It is arguable *that A-G* v *Lamplough* lays down a rule to the contrary. An Act amended by the repeal of certain words is not to be read in future by closing up the gaps and pretending the words were never there. In our model the phrase 'in any other case' did not include condition B when enacted. The repeal does not alter this (unless of course there are other words in the amending Act to indicate that the alteration is intended). So the repeal removes conduct satisfying condition B from control altogether.

It will be seen how inconvenient this rule is. The literal meaning of the amended text cannot be followed. Indeed to show the true meaning it is necessary to print the text with the repealed words included. The reader must be alert to remember that they have been repealed but he needs to know what they are because they affect the meaning of the words that remain. This is the triumph of the old-fashioned view. You must read each Act as originally enacted. No one must come to your aid by processing the text. So the statute book, instead of presenting a jigsaw picture with the pieces interlocking, resembles a pack of cards. Each Act trumps the one before. Fortunately the rule in *A-G* v *Lamplough* is not firmly established. It is little known, and if it ever comes up for review one hopes the courts will overrule it. We can do without unnecessary traps and obstacles to simplification.

The opposite of the doctrine of the free-standing Act may be called the doctrine of the continuous text. The drafter, whether of an Act or a statutory instrument, regards his text (so far as text- validation procedures allow) as something to be slotted into the existing legislation rather than as an independent entity. But he does not make the mistake involved in the now discredited practice of providing that an Act is to be 'construed as one' with various other Acts. (For the confusions caused by this see Craies 1971, pp 138-9, 223 and 360-1).

The drafter using the continuous-text method makes clear the relationship of his text to other texts with which it is 'continuous'. He does not set any traps or puzzles in relation to other texts, but he does enable helpful rearrangements to be made by processors. It is believed that most modern drafters now follow this method,

and that it is firmly enough established to enable us to devise processing methods which rely on it. We aim therefore to 'simplify the manner of presentation' while retaining the entirety of the official language, juggling it around as may seem convenient. What methods shall we use?

A text that lays down a series of alternatives operating according to the particular factual situation can be presented sequentially. This converts a generalised statement into a method by which the user can trace out the answer to his own problem without stumbling over provisions that for him are irrelevant. Moreover he is saved from having to work out which provisions *are* irrelevant. All he need do is answer a series of factual questions.

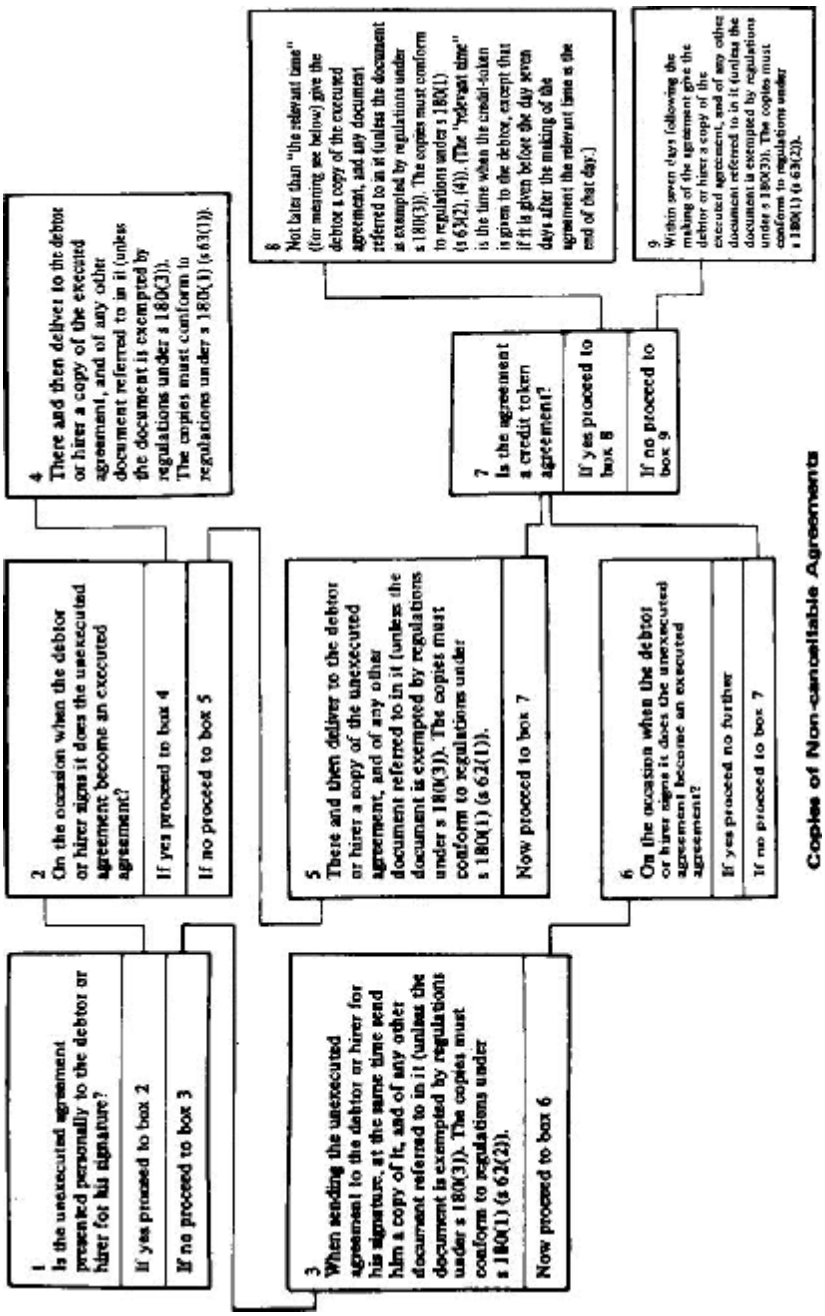
This presentation of a legislative text is called an algorithm. The following diagram is an algorithm I devised for my book *Consumer Credit Control*. It uses nothing else but unabbreviated provisions of the Consumer Credit Act 1974. The idea is to inform a trader of his statutory duties in relation to certain agreements governed by the Act. It will be seen that the algorithm gives only partial relief. Before using it the trader must decide that the agreement in question is not a 'cancellable agreement'. This involves applying a definition in the Act. (A different algorithm is provided for cancellable agreements.)

While this algorithm retains the complete statutory language, thus satisfying the condition under which we are operating in searching for ways of simplifying the manner of presentation, it is far from telling the *whole* story. Many terms used in it are defined terms, and for completeness the user needs to look in the Act for the definitions. There are references to certain regulations, and again the user needs the text of these. This illustrates the limitations of algorithms. They are useful, but only where some detailed set of alternatives is involved. The more alternatives there are, and the more clear-cut the factual situation involved in each one, the more effective and useful will the algorithm be.

Where texts in machine-readable form are stored in a computer data base, they can be accessed by various techniques for search and retrieval. Examples are key words in context (KWIC) and lists giving words used and numbers of occurrences. Hard copy (printouts) can be obtained, and texts can be scanned visually using VDUs.

So far the legal texts stored in computer data bases throughout the English-speaking world have consisted of archival material designed originally for conventional print media. Law reports, textbooks, even statutes are in a form designed for another age. There is little sign as yet that the significance of this has been grasped. The service rendered by the computer is only as good as the materials put into it. In time they will be designed for the purpose.

The boldest idea in this regard is to begin with the law itself, and frame it from the start in a logical symbolism. Instead of storing


1
Is the unexecuted agreement presented personally to the debtor or hirer for his signature?
If yes proceed to box 2
If no proceed to box 3
2
On the occasion when the debtor or hirer signs it does the unexecuted agreement become an executed agreement?
If yes proceed to box 4
If no proceed to box 5
3
When sending the unexecuted agreement to the debtor or hirer for his signature, at the same time send him a copy of it, and of any other document referred to in it (unless the document is exempted by regulations under s 180(3)). The copies must conform to regulations under s 180(1) (s 62(2)).
Now proceed to box 6
4
There and then deliver to the debtor or hirer a copy of the executed agreement, and of any other document referred to in it (unless the document is exempted by regulations under s 180(3)). The copies must conform to regulations under s 180(1) (s 63(1)).
5
There and then deliver to the debtor or hirer a copy of the unexecuted agreement, and of any other document referred to in it (unless the document is exempted by regulations under s 180(3)). The copies must conform to regulations under s 180(1) (s 62(1)).
Now proceed to box 7
6
On the occasion when the debtor or hirer signs it does the unexecuted agreement become an executed agreement?
If yes proceed no further
If no proceed to box 7
7
Is the agreement a credit token agreement?
If yes proceed to box 8
If no proceed to box 9
8
Not later than "the relevant time" (for meaning see below) give the debtor a copy of the executed agreement, and any document referred to in it (unless the document is exempted by regulations under s 180(3)). The copies must conform to regulations under s 180(1) (s 63(2), (4)). (The "relevant time" is the time when the credit-token is given to the debtor, except that if it is given before the day seven days after the making of the agreement the relevant time is the end of that day.)
9
Within seven days following the making of the agreement give the debtor or hirer a copy of the executed agreement, and of any other document referred to in it (unless the document is exempted by regulations under s 180(3)). The copies must conform to regulations under s 180(1) (s 63(2)).
Copies of Non-cancellable Agreements

within a data base formulations in ordinary language, which can then be accessed as a book is taken down from a library shelf, the computer is given the means of working out problems for itself, and delivering the answers. LEGOL, a linguistic system developed at the London School of Economics, points the way (see Bennion 1981(10)).[F]

From the point of view of the citizen, if not perhaps of the legal profession, the prospect opened up by LEGOL is exciting. The citizen is required to obey the law. Ignorance of it, however excusable, is not excused. Moreover ignorance of what has become all-pervasive statute law can be a considerable handicap in a person's business and private activities. To be able to interrogate a desk-top electronic counsellor about one's income tax, or one's duty in respect of a traffic accident, or one's right of recourse against a recalcitrant travel agency, will be of distinct advantage. There is a long way to go before the entire body of law can be made available in this way, but a start has been made.

No doubt there will always be areas where a judicial or administrative discretion must be exercised before the definitive answer can be known. Here all the computer can do is provide the citizen with information on how, in the light of relevant factors, the functionary entrusted with the discretion is likely to decide. Information so made available might indeed influence the decision itself. After all, the functionary will have a desk-top terminal too!

As well as assisting the individual citizen in this way, linguistic techniques like LEGOL may be expected to enhance the general quality of law. Logical consistency and certainty of operation are not conspicuous features of our present legal system, yet they are highly desirable. Use, for example, of 'entities' tested and refined in expression by the LEGOL technique need not be confined to the Act for which they were devised. An entity of general application (as many are) becomes available to be used over and over again as required in subsequent legislation. In time, the availability of what might be called prefabricated legislative units will shorten and simplify the drafting process, as well as furthering consistency of treatment in the law generally.

After that flight into the future, we return to the present day. Even within the limitations of our existing legal system, what is good for the computer is good apart from the computer. The computer will give more effective service if archival material can be rationalised *before* it is entered in the data base. No software yet written can achieve rationalisation by itself.

So what we need, both for the computer and apart from it, is manipulation of legislative texts to overcome the vices described in chapter 14. While retaining the official language, we need to present it in the most helpful way possible. That is the purpose of composite restatement.

Composite restatement

For the statute user, it is a matter of indifference whether the law on the point he is concerned with is contained in an Act of Parliament or a statutory instrument. He just wants to know what the law is; and he would like to find it in one place. He needs a simple system to direct him to the place. Once there, he wants the point dealt with as simply and comprehensively as the subject matter allows. He also needs the provision to be in up-to-date form.

These needs are self-evident, and scarcely need confirmation. One example of such confirmation is furnished by a note in what is perhaps the legal practitioner's most used publication, the Supreme Court Practice or White Book. This regrets that as a result of the enactment of s 31 of the Supreme Court Act 1981 (dealing with judicial review) the advantage has been lost of enabling a relevant rule of procedure 'to be found in one instrument instead of partly in a statute and partly in rules' (1982 edn, para 53/1-14/2). Composite restatement is designed to meet all these needs, while retaining the official wording in its entirety. As will be seen, it provides an answer to all the vices of statute law examined in chapter 14. A restatement is far easier to understand than the source material it processes; it is far more reliable than any summary, precis, digest or abridgement.

The Composite Restatement method outlined

Choice of topic A topic is selected which is largely regulated by statute law. (The method does not cover codification of common law rules.) Restatement is more useful the more Acts and statutory instruments are involved in the topic. Topics largely dealt with by ancient Acts, or by a short Act standing alone, are unsuitable. So are topics dealt with by formal Acts, Acts only of concern to officials, Acts relating to overseas territories, Statute Law Revision Acts and other special categories. Otherwise all legislation is suitable.

The restater The person constructing the restatement (whom we may call the restater) should have some experience of legislative drafting. He needs to have a thorough understanding of text creation, text validation and general principles of legislation. This includes use of the Interpretation Act, styles of drafting and techniques of commencement, amendment, repeal etc.

Text-collation The restater assembles the original official texts of all Acts and statutory instruments to be included in the restatement, including of course amending Acts and instruments.

Structure of the restatement There are a number of ways a restatement might be arranged but this account follows the system

I myself have devised and used. The basic textual unit is the *paragraph.* Groups of paragraphs dealing with an aspect of the topic are arranged in *divisions,* the first division consisting of *definitions.* A paragraph may stand alone or may consist of two or more *sub- paragraphs.* A paragraph or sub-paragraph usually consists of a single sentence, but unless very short the sentence is broken up spatially into *clauses.*

Numbering Divisions are numbered from 1 onwards. In numbering paragraphs allowance is made for future additions, so they are numbered in fives. The sign § is used as a prefix, so the first paragraph in Division 1 is referred to as 1 § 5. If § 5 is broken up into sub- paragraphs they are referred to as § 5A, § 5B, etc. Clauses are given marginal numbers (1), (2) etc, so clause (2) of § 5B is referred to as § 5B(2).

Headings Each division is given a heading, and if convenient there are cross-headings within the division. Each paragraph and sub- paragraph is also given a heading. Again if convenient, cross-headings are supplied within a paragraph or sub-paragraph.

Example Division 6 of my book *Consumer Credit Control* (Bennion 1976 (4)) begins as follows:

CURRENCY OF AGREEMENTS

6§5 Variation of regulated agreement under power contained in agreement

6§5A Notice requirements (general rule)

INTRODUCTORY

(1) Where under a power contained in a 'regulated agreement' other than a 'non-commercial agreement'
(2) the 'creditor' or 'owner' varies the agreement
(3) the variation does not take effect before clauses (4) to (6) below are satisfied (or by virtue of *6§5B* or *6§5C* are treated as satisfied).

STATEMENT OF RULE

(4) A notice in 'writing' setting out particulars of the variation
(5) must be 'given' to the 'debtor' or 'hirer' (or to each of them if more than one)
(6) not less than *seven days* before the variation takes effect.

Source notes Following each sub-paragraph its source is stated. The source note to the example given above cites five different provisions of the Consumer Credit Act 1974 and three different sets of regulations.

Typography As the example shows, different typefaces and other typographical devices are used to aid clarity. Understanding is assisted by splitting up the clauses so that the reader does not have to work out for himself where the breaks in sense occur. Single quotation marks are used to indicate defined terms, the definitions being set out alphabetically in Division 1. Another typographical device is to italicise key words or phrases to draw them to attention (see clause (6) of the example).

Restater 's task The structure in which the restated texts are arranged is designed to present the relevant statutory provisions to the reader in the most logical and helpful manner possible. The restater must at the start work out the best way to do this. Then he takes the official texts and fits them together accordingly. He is not inhibited about mixing provisions of an Act with those of a statutory instrument. For this purpose the two are of equal rank, and the restater's function is to carry out once and for all the task of conflation that otherwise needs to be attempted by each user who comes to the topic. In doing so he must be careful not to change the official language more than is strictly necessary for purposes of 'carpentry'.

A modern Act removes detail from the body of the Act, and avoids repetition, by alloting a label to detailed provisions and using that instead. The restater can sometimes improve on the Act or instrument in this respect. He can further simplify the substantive provisions of the restatement by devising additional definitions. This does not involve any change in meaning, but aids the reader who seeks only the main outline.

Another simplification is to omit provisions of no immediate interest to the user, such as regulation-making powers or provisions not yet operative. Ideally the restatement should be published in looseleaf form so that it can be updated as legislative changes occur. It should consist of all currently operative law on the topic, but not law which is not yet in force or has ceased to operate. A further aid is the spelling-out in detail of applied provisions, thus curing the difficulty referred to on pp 220-221.

Textual notes Sometimes the preparation of the restatement brings to light ambiguities, obscurities or omissions. Unless the true intention is so plain that the restater feels no doubt that a court would give effect to it, the errors must be reproduced. Either way, the restater's treatment of the point is explained in a *textual note.*

The Analysis Preparation of the restatement as a logical structure produces a valuable by-product. If the headings of divisions, paragraphs and sub-paragraphs are printed by themselves in numerical order, they form a useful *outline* of the legislative provisions applying to the topic.

Since the restatement presents the current statutory provisions in logical order, suitably conflated, it serves as a sound basis for explanation and commentary. We are accustomed to annotated Acts and statutory instruments, but the notes are themselves rendered inadequate by the inadequacies in presentation of the official texts. Now the expert commentator can do a more effective job.

The annotator There is no reason why the restater and the annotator should be the same person. The skills required are different. A restater needs no special knowledge of the topic with which his restatement deals. The annotator on the other hand should be knowledgeable in the topic. He need not wait for completion of the restatement to begin work. The essence of the composite restatement method is that the official language is retained, and this of course is available to the annotator from the outset.

Method To achieve maximum utility, a composite restatement needs copious annotation. As we have seen, the statutory text by itself is but the dry bones. It needs to be fleshed out by explanations and examples. While notes on sources, and any textual notes, need to be drafted by the restater, the other notes, as we have said, can be compiled by a different person. Apart from general introductory explanations, it is best if these notes follow each paragraph or sub- paragraph.
Appendix B gives extended examples of the Composite Restatement method. Part I sets out the portion of the Analysis section of *Consumer Credit Control* relating to Division Nine. Part II sets out the beginning of Division Nine omitting all annotations except those giving the sources and interpretation references.

An official restatement?

All statute users would gain if the main body of statute law were made available in the Composite Restatement form. There are three ways this might be done:
(1) By Parliament itself (the restatement might be enacted in the form of an Act of Parliament).
(2) By one or more private bodies, such as commercial publishers or university law departments.
(3) By a body, such as a Statute Law Commission, which has an official status (perhaps conferred by Act of Parliament) but has no power to override legislation.
In some ways an enacted restatement would be better than any other. It would itself constitute the law, and would repeal the Acts and subordinate legislation restated by it. The possibility of conflict between the enacted law and the restatement would be avoided, as would the need for anyone to consult both texts. Yet there are serious problems about an enacted restatement. First, the restatement

must include not only Acts of Parliament but also statutory instruments the making of which Parliament has delegated to ministers. It has done this because statutory instruments concern matters of detail which Parliament has not time to consider itself or because they relate to topics on which speedy action may be needed, or for similar reasons. Having delegated this responsibility Parliament ought not to be asked to take it back by passing statutory instruments in the form of an Act of Parliament.

Second, Parliament is unlikely to agree to enact the restatement without either being satisfied that it exactly reproduces the existing law (apart from formal or trifling departures) or allowing itself an opportunity to debate and amend it. Either of these would be destructive of the object of the restatement. The history of the process of consolidation (always well behind requirements) shows the danger of insisting on slavish reproduction of the existing law, with all its obscurities and ambiguities. Even the freedom given first by the Consolidation of Enactments (Procedure) Act 1949 and later (to a wider extent) by the system of 'consolidation with Law Commission amendments' has not enabled the output of consolidation in Britain to keep pace with requirements, partly because even the abbreviated parliamentary procedures are time and effort-consuming for the drafter. To allow parliamentary debate and amendment on the other hand would be unworkable. Parliament has insufficient time for substantive legislation, and we should in any case be back with the problem of distortion of the legislative structure by amendments made in Parliament.

The third objection to an enacted restatement is that it would have to take the form of a parliamentary Bill, so that the improvements in structure and signposting effected by the restatement would be lost. This might be obviated by making the restatement a schedule to an Act, rather as some constitutions were treated in the days when Westminster provided constitutions for other countries. This is a clumsy device however. Of course if parliamentary procedure were changed so that the forms of Acts could be improved, that might get round the difficulty.

Fourthly, it would interfere with the exercise by ministers of their delegated power of legislation if their regulations and orders were crystallised into legislation. Statutory instruments should remain under the control of those with power to make them (subject of course to overriding powers of annulment or affirmation retained by Parliament). Government departments would not relish seeing their regulations picked up and remodelled without their control, and such control, if given, would be another delaying factor. Furthermore, the amendment of statutory instruments would be difficult if they had become embedded in an enacted restatement. The text of the restatement would not distinguish between the origins of its provisions, and problems of *vires* might become acute.

It is true that the objections listed above did not prevent the

enactment by Congress of the United States Code in 1926, described as 'the official restatement in convenient form of the general and permanent laws of the United States'. Clearly the possibility of an enacted Restatement is worthy of investigation.

There is of course nothing to prevent a university law department, commercial publisher or other private body from producing and publishing a restatement in some field of enacted law. It will have the value indicated by the skill and effort which has gone into it, but that will be difficult for outsiders to assess. It is true that many private compilations have won high renown — ***Hahbury's Statutes*** being a notable example. Ideally the restatement should be fully comprehensive, and the effort required might be beyond the reach of any one British publisher — though a consortium of commercial publishers and others might accomplish the task.

My own view is that it would be best for the restatement to be produced and promulgated by an official body such as the Law Commission, or a body set up for the purpose. The law restated would remain fully in force in its original form, and would be amended by Act of Parliament or statutory instrument in the ordinary way. It would be for the body responsible for the restatement to follow suit and issue its own amending material in accordance with such changes in the statute law. Similarly, the courts would retain their full authority to pronounce upon the meaning and effect of any enactment in the form in which it was passed by Parliament or made by a minister. The courts would no doubt treat the restatement as being of persuasive authority, but in any conflict the actual law would prevail — the restatement would not in itself be law. It may be asked what is the use of the restatement if it is subordinate to statute law. Will it not be necessary for the practitioner to look at the statute law as well, so that his burden, far from being lightened, is actually doubled? I regard this question as the crux of the whole problem of whether a restatement is worth while.

The restatement is intended as a tool for practitioners who need to find out what the statute law on a particular subject is. I believe it is also capable of being used by lay persons — at least in the form of the Analysis and as an outline exposition (ie without investigating defined terms). Tools of this kind are in common use by practitioners and lay persons. For practitioners they take the form of annotated texts (such as ***Halsbury's Statutes*** or the ***Supreme Court Practice)*** or textbooks (such as Stone's ***Justice Manual*** or Archbold's ***Criminal Pleading, Practice and Procedure).*** Very often the busy practitioner relies on statements of law which are not in the official form, and courts nowadays are ready to follow suit. The restatement, if issued by an official body, would merely give a better and more authoritative substitute source. In practice, reference to the official text would rarely be necessary. The position would become like that of the American Law Institute and its restatements, which

in time attained far greater authority than at the outset was thought possible (Lewis 1945). (As to the possibility of setting up on similar lines a British Statute Law Institute, which could perform the function of producing composite restatements, see pp 68-69 above.)

To yield its full value, the text of the restatement would need to be annotated. Statutory texts, however well drafted, require copious explanations and illustrations to become fully accessible to the reader. Should the official body responsible for the restatement also be responsible for the annotations? My answer is no. To produce the full range of annotations would greatly enlarge the task of the official body — already heavy if it is to be discharged adequately. It would be best if the official body gathered the best talent available to produce the actual restatement but left it to commercial publishers and others to produce annotated editions. Indeed for the restatement to succeed it would be necessary for the efforts now devoted by commercial publishers to producing annotated texts of statutes to be switched to the restatement.

We can now attempt to answer the questions posed above. If the restatement were produced by an official body, as I have suggested, it would have strong persuasive authority but the enacted law would remain paramount. In practice it should be possible to proceed by consulting the restatement *instead* of the enacted law, especially if published commentaries cited the restatement rather than the enacted law. Only if difficulty arose over some obscurity or ambiguity would it be necessary to compare the texts. In such cases the existence of the restatement would be a valuable adjunct.

Commercial versions of the restatement with annotations might well become the most commonly used source books for statute law. I believe they would serve a useful public purpose in bringing statute law fully before those to whom it is directed in a form they could consult easily and understand.

It would of course be an immense task for a single organisation, even when financed by the state, to produce a restatement of the entire body of statute law. I would propose that a programme of restatement should take the place of the programme of consolidation of enactments, so that the former could use the services of drafters who would be otherwise engaged on consolidation. Composite restatement is far more useful than consolidation. Even so, it is obvious that the restatement would have to be carried out by instalments. Fortunately its value does not depend on completeness. As I hope to have shown with my own restatement of consumer credit law, the method is useful even when confined to a single topic. For further information see the video cassette *Composite Restatement* (Longman 1982).