Bennion on Statute Law

Part IV - Dynamic and Static Processing of Texts

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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 *lis* 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 thequestion 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 divers meanings' 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).