 Website: www.francisbennion.com
Doc. No. 2000.049 85 CLEA Newsletter, October, pages 30-33.
Any footnotes are shown at the bottom of each page
For full version of abbreviations click 'Abbreviations' on FB's website.

The Global Method: Statutory Interpretation in the Common Law World

by Francis Bennion

Former UK Parliamentary Counsel

Why do so many in the Common Law world who should know better go on teaching the wrong method of statutory interpretation? In the first edition of my textbook *Statutory Interpretation*, published in 1984, I unveiled a new method. As usual with these matters, the Common Law world took little notice. I now think this may have been partly because I failed to equip the new method with a sexy name. In this article I aim to remedy that omission. For reasons which will appear, I propose to call my new creation the Global method. Of course it is not new really, but just a novel, more helpful, way of presenting the old rules.

Common Law countries in the Commonwealth, the western hemisphere and elsewhere all have broadly similar methods of legislation. It therefore follows that they have broadly similar methods of statutory interpretation. The one flows from the other, and is based on the intention of the legislature. What really are the interpretative criteria in this system where legislative intention is all important? There is talk of a golden rule. Does it really exist? What of the so-called literal rule, and the mischief rule? I gave the short answer in the textbook mentioned above, repeated in subsequent editions. There is no simple rule of thumb, only a thousand and one interpretative criteria.

Many law teachers and commentators still write as if these three supposed 'rules' of statutory interpretation really do exist. Some even think they sum up the whole story. In fact they are illusory, and it is high time this was realised. The doubts expressed by Cross, which I am about to discuss, date from 1976. Word should have got around by now.

I started to think seriously about the three supposed rules when in the 1970s I first read a little book, also entitled S*tatutory Interpretation* (there is not much scope for variation in these matters), written by an old friend the late Sir Rupert Cross, who had been Vinerian Professor of English Law in the University of Oxford and a close friend of my Balliol tutor Sir Theodore Tylor. His brief monograph first appeared in 1976. It was the preface to it that stimulated me to write my own much larger book with the same title. Cross wrote-

> 'When teaching law at Oxford in the 1950s and 1960s I treated my pupils as I had been treated and told them to write essays criticising the English rules governing the subject. Each and every pupil told me that there were three rules - the literal rule, the golden rule and the mischief rule, and that the Courts invoke whichever is believed to do justice in the particular case. I had, and still have, my doubts, but what was most disconcerting was the fact that whatever question I put to pupils or examinees elicited the same reply. Even if the question was What is meant by "the intention of Parliament"? or What are the principal extrinsic aids to interpretation? back came the answers as of yore: "There are three rules of interpretation - the literal rule, the golden rule and the mischief rule." I was as much in the dark as I had been in my student days about the way in which the English rules should be formulated.'

Obviously Cross did not think these three so-called rules provided the answer. Having thought about the matter closely over the intervening years, I am convinced he was right. So where does the truth lie? It starts with what I have worked out to be the basic rule, as follows. Under the Common Law system it is taken to be the legislator's intention that an enactment shall be construed according to the numerous general guides laid down for that purpose by

law; and that where these conflict (as they often do) the problem is to be resolved by weighing and balancing the interpretative factors concerned.

That is the basic rule, and it is simple enough. It was laid down from the bench as early as 1873, when Lord Justice Cotton said judges 'are bound to have regard to any rules of construction which have been established by the Courts' (*Ralph v. Carrick* (1874) 11 Ch. D 873 at 878). There are many such rules. Also must added the numerous rules of construction laid down by the legislature, such as those in the (British) Interpretation Act 1978. Contrary to what is often said, the court does not 'select' one of these many guides and then apply it to the exclusion of the rest. What the court does (or should do) is take an overall view, weigh all the relevant interpretative factors, and then arrive at a balanced conclusion.

The guides to legislative intention, otherwise known as interpretative criteria, can be broken down into four distinct types, which may be respectively identified as rules, principles, presumptions and canons. Expanding this slightly, we may say these are: (1) common law and statutory *rules*; (2) *principles* derived from legal policy; (3) *presumptions* based on the nature of legislation; and (4) general linguistic *canons* applicable to any piece of prose.

Expanding further, we can broadly distinguish the interpretative criteria as follows. A *rule* of construction is of binding force, but in cases of real doubt rarely yields a conclusive answer. A *principle* of construction reflects the policy of the law, and is mainly persuasive. A *presumption* of construction arises from the essential nature of legislation and affords a prima facie indication of the legislator's inferred or imputed intention as to the working of the Act. A linguistic *canon* of construction arises from the nature and use of language and reasoning, and is not especially referable to legislation.

These interpretative criteria are peculiar in that, while most general legal rules directly govern the actions of the subject, these directly govern the actions of the court. There is however an indirect effect on the subject. Since the court is obliged to apply an enactment in accordance with the interpretative criteria, persons governed by the enactment must read it in that light. The law in its practical application is not what an Act says but what a court says (or would say) the Act means. I will now go on to discuss these four categories in turn.

A criterion is not deserving of the name *rule* unless it is compelling. The basic rule of statutory interpretation set out above is compelling, but does not take one very far. This tends to be the case with rules of statutory interpretation: where a real doubt as to meaning exists, the matter becomes one of judgment rather than predetermined response. Rules of statutory construction can be divided into those laid down at common law and those imposed by statute. Criteria laid down at common law which are worthy of the name *rule* are relatively few. They include the following.

Juridical nature of an enactment In construing an enactment of any kind, the interpreter must treat it with due regard to its juridical nature as an enactment of that kind. There are various types of enactment. Some are comprised in primary legislation, whereas others are derivative or secondary. Some legal qualities are common to all types, while others relate only to a particular type or types (for example constitutional or human rights aspects). The interpreter needs to be aware of the juridical nature of what is being interpreted, and construe it accordingly.

Plain meaning rule It is a rule of law, sometimes called the plain meaning rule, that where, in relation to the facts of the instant case, the enactment under inquiry is grammatically capable of one meaning only, and on an informed interpretation of that enactment the interpretative criteria raise no real doubt as to whether that meaning is the one intended by the legislator, the legal meaning of the enactment corresponds to that meaning. For this purpose (and here the plain meaning rule differs from the so-called literal rule) a meaning is 'plain' only where no relevant interpretative criterion (whether relating to material within or outside the text) points away from it. This rule determines the operation of nearly every enactment, simply because nearly every enactment has a straightforward and clear meaning with no counter-indications.

As Cross put it, if it were not a known fact that, in the ordinary case in which the normal user of the English language would have no doubt about the meaning of the statutory words, the courts will give those words their ordinary meaning, it would be impossible for lawyers and others to act and advise on the statute in question with confidence.

It is salutary to bear this in mind. The science or art of statutory interpretation deals in the main with the pathology of law, when something has gone wrong. Usually nothing does go wrong. Lawyers, like medical practitioners, need to be on guard against losing sight of the general prevalence of healthy conditions. Sir MacKenzie Chalmers, celebrated draftsman of such enduring codes as the Sale of Goods Act 1893 and the Marine Insurance Act 1907, remarked that 'lawyers see only the pathology of commerce, and not its healthy physiological action, and their views are therefore apt to be warped and one-sided'. The same can apply in relation to the pathology of law.

Commonsense construction rule It is a rule of the common law (sometimes known as the commonsense construction rule) that when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, the court should presume that the legislator intended common sense to be used in construing the enactment. As Lord Goddard CJ said, 'A certain amount of common sense must be applied in construing statutes' (*Barnes v Jarvis* [1953] 1 WLR 649 at 652). So when a particular matter is not expressly dealt with in the enactment this may simply be because the drafter thought that as a matter of common sense it went without saying.

I have not space to go into detail about the other criteria, but I will now describe the nature of the second type, namely principles derived from legal policy. These principles embody the policy of the law, which is in turn based on public policy. So far as concerns statutory interpretation by the courts, the content of public policy (and therefore of legal policy) is what judges think and say it is. No Act can convey expressly the fullness of its intended legal effect. Indeed only a small proportion of this can be conveyed by the express words of the Act. For the rest, Parliament assumes that interpreters will draw necessary inferences. An Act does not operate in a vacuum, but as a part of the whole *corpus juris* or body of legal rules and principles. General principles of law and public policy underlie and support the rules laid down by the whole body of legislation. If it were not so the rules would be merely arbitrary. Even where a rule does appear arbitrary (for example that one must drive on the left), there is a non-arbitrary policy principle underlying it (road safety is socially desirable).

I hope to have convinced any doubters that the Common Law system of statutory interpretation is not a question of just going by the words alone (literal interpretation) or applying rules of thumb (the literal rule, mischief rule or golden rule), but something much more difficult and pluralistic. It is identifying relevant factors from a large number of possible criteria, and then where necessary performing a balancing act. (The expansive Developmental method, based in Europe, has a much wider approach which I have not space to go into here.)

I call the Common Law system of statutory interpretation the Global approach for two reasons. The first is that it requires a wide range of considerations to be brought into account. The second is that it is worldwide.

For details of Francis Bennion's writings on statute law and other subjects see his website at www.francisbennion.com

85 Commonwealth Legal Education Association *Newsletter*, October, pages 30-33.