

against the appointment of an Ombudsman who is unlikely to be able to withstand the pressure from the executive that he should not rock the boat.

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THE INTERPRETATION OF STATUTES

The (English) Law Commission's report in June 1969 on the Interpretation of Statutes is the final version of cogitations extending over several years. Thirteen pages of introductory considerations (Chapters I, Introduction; II, the Scope and Nature of the Problem; and III, the Relevance of Comparative Material) are followed by 24 pages of text-book discussion (Chapters IV, the Functions of "Rules" and "Presumptions" in Interpretation; and V, the Context of a Statutory Provision). This latter chapter contains a discussion on so much of the "context" as is at present inadmissible in an English court, and leads on to another six pages (Chapter VI) of consideration of the possibility of providing "specially prepared material" other than the statute itself to help in the elucidation of its meaning. The remaining 7 pages are occupied with two special notes on treaties behind statutes and on delegated legislation, and with a Summary of Conclusions and Recommendations (Chapter IX), leading to a single-page draft statute on the subject.

Of the four sections of this draft statute, the first would allow attention to be paid to punctuation, side-notes and so on, and to any relevant document (including a treaty) within the formal notice of Parliament before the passage of the legislation. Subsection (2) deserves quotation:

"The weight to be given for the purposes of this section to any such matter as is mentioned in subsection (1) shall be no more than is appropriate in the circumstances."

Apart from being patronisingly otiose this subsection lends itself, by the ordinary grammatical principle of *expressio unius*, to the interpretation that less than appropriate weight may legitimately be given.

Section 2 prescribes preference for a construction in accordance with treaty obligations, and also for a construction "which would promote the general legislative purpose underlying the provision in question." "Underlying" presumably indicates that the purpose is not expressed, and will have to be discovered with the aid of the extraneous documents admitted by section 1.

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Section 3 applies sections 1 and 2 “with the necessary modifications” to subordinate legislation. Would one of the “necessary modifications” be that in construing a ministerial regulation attention should be paid to documents formally within the notice of the minister?

By section 4 “it shall be presumed” that a civil action is intended to lie for breach of a statutory duty “unless express provision to the contrary is made.” Unless these words are themselves to be construed in some peculiar way, they mean that no degree of mere unsuitability for a civil action will prevent it lying: the report nowhere indicates awareness, despite material in note 92 to §38, that some statutory duties are less appropriate to civil remedies than others.

This draft, if ever it becomes legislation, is likely to add considerably to the courts’ problems of construction; and, in view of the comparative rarity of the situations to which its assistance is applicable, it is not likely sensibly to diminish those already existing.

As for the report itself, to which the draft is merely an appendix, only one illustration is given in the text — a few more are sketched in the notes — of the existing rules being alleged to have led to judicial misinterpretation of the intention of the legislature. In *Bourne v. Norwich Crematorium*¹ a crematorium company failed to qualify for a tax advantage provided for buildings used “for the purpose of a trade which consists in the manufacture of goods or materials or the subjection of goods or materials to any process.” The decision is criticised as having relied on the “literal meaning” of the words rather than on the “purpose of capital allowances,” thus excluding crematoria “while at the same time recognising for such allowances other trades with far less obvious claims on society.” Can it in seriousness be maintained that the “purpose of capital allowances” is to give a pat on the back to deserving occupations? The purpose, wise or otherwise, is clearly to stimulate the availability of consumer goods; and if the door is to be opened to such random guesses at the legislature’s “underlying purpose,” we are better off by far with the literal rule.

One looks in vain for any concrete statement of the problem calling for the Law Commission’s intervention, or even of what is meant by interpretation. A problem is indeed stated in general terms as being that, in view of the various presumptions to be elicited from the decided cases, and uncertainty on which in a competition will prevail (only one illustration, and that not illuminating) the volume of litigation is increased; but no steps are proposed to remedy this problem except by adding two more presumptions with still no indication of priority. It should be said in mitigation that the one burning problem of interpretation (*mens rea*) is excluded because it is being dealt with in relation to a restatement of the

1. [1967] 1 W.L.R. 691, 695.

general principles of criminal law. The Commission seems to have felt that some explanation was necessary of this lack of result, and takes refuge in Lord Wilberforce's call "for educating the judges and practitioners and hoping that the work is better done." They say (§.79) that they have tried to do this "by providing a more extended exposition of the whole topic than we would normally think necessary when presenting proposals for reform in other spheres." Whether or not the Law Commission has a didactic vocation, this "exposition" is already available from more perceptive pens — though perceptiveness anywhere is not obtrusive, by reason of the habit of quoting generalizations from judgments with no indication of the nature of the ambiguity calling for resolution. Judicial even more than legislative pronouncements can be confidently understood only in their context.

Of the three changes proposed, apart from these added presumptions:

- (1) no estimate is given of the volume of unnecessary litigation provoked by uncertainty whether a civil action is created by breach of a statutory duty, and uncertainty would still exist on whether the indiscriminating presumption proposed would be construed literally by the courts;
- (2) the courts would appear to have solved (to the guarded satisfaction of the Commission) the question of reference to treaties; but
- (3) the question of references to other documents takes us to the heart of the matter.

The fundamental point, which is nowhere noticed by the Commission, but which leaps to the eye on a consideration of the cases cited, is that this is predominantly, if not quite entirely, a public law problem — whether revenue, directly criminal, or regulatory in pursuance of some social policy. The Commission does not state the inadequacy alleged by those dissatisfied with the existing state of the law which is that the policy-making organs of the constitution find that the courts do not apply their coercive process to the situations or persons to whom the policy-making organs would like it applied — not in these days or under British constitutional arrangements by direct refusal, but at worst from hostility seeking a pretext, and at best by genuine if misguided misunderstanding. It will not escape notice that in this situation policy is not normally initiated by the legislature, but by the executive: what the legislature clothes with the force of legal obligation is the desire of the executive, and the language of the legislature is nearly always that suggested to it by the executive. This then is the essence of the problem of statutory interpretation; that the executive does not get its way. There are some who would not find this a matter for tears; but in these days when the executive is supposed to voice the will of the people it is generally regarded as regrettable.

Closely linked with this point is the meaning of interpretation: what are the courts seeking to ascertain when they refer to the intention of the legislature? To the departments who have initiated the legislation the answer is clear: since the policy is theirs, it is their intention that counts,

except in so far as the legislature has altered it. Hence the suggestion, undeniably reasonable on this basis, that any collateral document that assists in detecting a detail of intention which the words of the legislation itself have failed to make clear should be referred to by the courts for this purpose, at least if the legislature can be said to have had it in mind at the same time as the legislation. And yet the courts have denied this suggestion. The explanation is not that they are unreasonable, but that they are looking for something else. When they refer "not to what the legislature meant to say, but what it said it meant" they are not playing with words. The Commission itself refers several times to statutes being addressed not solely to the courts, but "to audiences of varying extent," so that it is not fair to construe them by reference to information to which the "audience" has not reasonable access. But this does not go far enough: statutes are not messages to the courts at all (perish the thought), but wholly to these other "audiences." The statutes whose interpretation causes the trouble are commands, and the "audiences" are those who have to obey them. A command is not a command until it is communicated to those who have to obey; and although the subject is expected to come and look for legislative commands rather than wait for them to be brought to his personal notice, he is not, so the courts have held, bound to look for anything else than the law itself or instruments authorized by the law. Legislation, principal and subordinate, is the appointed vehicle for communication from ruler to ruled, and the search of the courts is for what can reasonably be said to have been communicated by that vehicle — that is to say what the ruled or his legal advisers could be expected to understand, even if by negligence or incompetence they did not; but not what the ruler intended, but failed, to communicate.

The problem is therefore not a matter of "interpretation" in the ordinary sense at all, but a constitutional question: how much trouble is it the citizen's duty to take to discover what the Government wants of him? Once it is clear that the search is not for the intention of the legislature except in so far as it is revealed, there is an end to the superficial attractiveness of allowing the court to delve into intention not revealed by legislation but discoverable from other sources. The other sources are inadmissible not artificially, but because they are irrelevant to the question of what the "audience" would reasonably take the command to mean. The attitude of the courts — though they have regrettably not so expressed themselves — has been that it is not for the citizen to guess at his peril the intention of the authorities, but for the authorities at their peril to make their intention clear to the citizen. Even when the point is put in these perhaps biased terms it is possible to take either view; but it is suggested that realization of the true constitutional nature of the issue would bring more observers round to the view that the courts — in Britain and the Commonwealth — are on the side of the angels.

The view that it is for the authorities to make themselves plain leads straight to the comment which many expressed to the Commission (§ .5 of the report) that there would be no difficulty with rules of interpretation if statutes were intelligibly drafted. The Commission has three answers to this: first "there are practical limits to the improvements which can be effected in drafting. Account must be taken of the inherent frailty of language." The Commission's own draft in Appendix A is no doubt an illustration of this; but people exist — if rarely — who can analyze ideas and then express them clearly: the authorities ought to obtain their services. Those in charge of governmental drafting seem to be wholly unaware of how unnecessarily execrable the quality of their drafting is. Nor is it anything but an excuse that English as a language does not lend itself to precise expression. A second answer is that the final form of legislation is often the result of a delicate compromise — but if the legislature's common intention is subjectively very complicated, that is hardly the fault of the citizen to whom the command is directed: it is not for the authorities to complain if their ambivalence is misunderstood. And thirdly there is the old complaint that inelegant drafting is a reaction to the obstinate misinterpretation by the bench of clear drafting. It would be a fascinating subject for historical research to trace each string of infuriating verbiage to its source in some crabbed finding that the draftsman's former words did not cover the situation which the authorities had not then thought of but wish now to catch. But research apart it is time this bluff was called. The fact is that clear drafting has never been misinterpreted: this argument is the bad draftsman's pretence that his drafting was not bad.

There are many other matters of detail in this Report and also in Appendix A which call for criticism; but it would be unfair to pass over the one point, for it is considerable, deserving praise, namely the refusal to codify the existing "rules" and "presumptions."

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