Framing Statutes in an Age of Judicial Supremacism

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There is nothing new about pleas for statutes and other proclamations of legal rules to be couched in terms that are unequivocal and convey the same objective meaning to every reader. In the eighteenth century Montesquieu in *De L'esprit Des Lois*[1] criticised the use of *considérable* (because "ce qui est considérable pour quelqu'un, ne l'est pas pour un autre") and *inquiéter* (because "l'inquiétude que l'on cause à un homme dépend entièrement du degré de sa sensibilité"). The need for certainty has been urged particularly strongly in relation to the definition of criminal offences and in the context of commercial law. If I am to be required to refrain from certain acts on pain of criminal sanctions if I do not then I am entitled to know in advance of acting precisely what it is I am not allowed to do.[2] What Francis Bennion calls the principle against doubtful penalisation is well settled.[3] Commercial lawyers, on the basis no doubt that an unambiguous rule solves most problems by making it clear which party should insure, are likely to go so far as to value certainty over fairness.

> But as in all commercial transactions the great object is certainty, it will be necessary for this Court to lay down some rule, and it is of more consequence that the rule should be certain than whether it is established one way or the other.[4]

The objective of precision in drafting is not simply utilitarian, the avoidance of unnecessary argument. Under our constitution statutes owe their legitimacy to their status as the formal edicts of a popular assembly. They are our nearest approach to *vox populi.*

These arrangements do not preclude an intentional and considered delegation by Parliament of its powers. But Parliament abdicates its power indefensibly when the delegation is not considered and explicit, but is the consequence of the use of fudged and ambiguous terms, or terms so insufficiently precise that a Court bent on extending its powers is able plausibly to assert a meaning that the legislature did not in fact intend. As Jeremy Bentham well understood, in the uncertainty of the law lies the power of the judges.[5]

In fact our statutes do contain many examples of discretions voluntarily conferred by the legislature on the Courts, either tacitly, by the use of terms calling for a value judgment such as *indecent,*[6] *just, reasonable, inequitable* or

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* Law Commissioner. The views expressed are those of the writer.

1 (1784) Livre xxix Chapitre xvi.

2 A consideration blithely disregarded by the Films, Videos and Publications Classification Act 1993 s 131(3).

3 FAR Bennion *Statutory Interpretation* (2nd ed) (Butterworths London 1992) 571.

4 *Lockyer & Ors v Offley* (1786) 1 TR 252, 259; 99 E.R. 1079, 1082 per Willes J.

5 For Bentham's views see for example the passages cited in G J Postema, *Bentham and the Common Law Tradition* (Clarendon Press Oxford 1986) 291, 292.

6 Discussed in *R v Nazif*[1987] 2 NZLR 122, 127.

oppressive or by the grant of an express power to arrive at a just solution. To the extent that such provisions reflect the fact that human affairs are so infinitely variable that no draftsman can be expected to foresee every possible circumstance such provisions are unexceptionable. Most criminal sentencing, for example, is (subject to maxima and occasionally minima fixed by statute) discretionary.

If there is to be a discretionary rather than a fixed rule it is desirable for the statute to lay down policy guidelines as precise as the context permits (the Credit Contracts Act 1981 s 11 is an example). Without firm guidelines Courts are capable of galloping madly off in the wrong direction. The Family Protection legislation is a striking example. It is clear that what the Testator's Family Maintenance Act 1900 contemplated was the relief of family dependants in economic need. In the last thirty years or so however without any change to the wording of the successors of that statute that would justify such a shift the courts have transformed the law. Judges now tinker with the testamentary dispositions of deceased persons not on the basis of economic need but so as to take into account moral and ethical considerations, quite undeterred by the absence of any general agreement (let alone legal rule) as to what the relevant moral and ethical considerations may be.[7]

By conferring on the courts the power to determine the outcome in unforeseen situations Parliament avoids the hard cases that can result from a rigid rule but risks its intention being defeated. The draftsman's dilemma is that such a power is one (to quote Bentham) "the concession of which is dangerous, the denial ruinous".[8]

Some voluntary ambiguity is attributable to (using another Bennion coinage) politic uncertainty,[9] a desire for an appearance of agreement despite the existence of nettles left carefully ungrasped. Policy issues however difficult should be sorted out by politicians who should not be permitted "to cloak their work in the neutral colours of judicial action".[10]

There seem to be two main reasons why Judges defy statutes. There are judges who find satisfaction in doing as between litigants the justice that accords with the judge's personal moral assumptions, in the teeth of statutory provisions if need be. This is amply exemplified by the whole history of the judicial approach to the provisions of the Statute of Frauds and its various local descendants.[11]

The other reason is the sheer pleasure in getting one's own way, in aggrandizement, in power. We are living in an age of what Professor Griffith

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7 It is instructive to compare such a case as *In Re Blakey* [1957] NZLR 875 with such later cases as *Re Leonard* [1985] 2 NZLR 88. See generally Law Commission, *Succession Law: A Succession (Adjustment) Act* (1997) NZLC R 39 paras 30–35.

8 *Of Laws in General* (ed H L A Hart, University of London The Athlone Press 1970) 239.

9 F A R Bennion *Statute Law* (3rd ed Longman London 1990) Chap 17; there is a local discussion of politic uncertainty (*avant la lettre)* at [1972] NZLJ 556, 557.

10 *Mistretta v US* 488 US 361 (1989) 407.

11 It may be noted for example that the doctrine of part performance seems to have been accepted from the start (see A W B Simpson, *A History of the Common Law of Contract* (Clarendon Press Oxford 1987 pp 614–616)). Other judicial ploys include the authenticated signature fiction, the incorporation of documents by reference and the availability of rectification.

has described as "judicial adventurism".[12] Perhaps the more precise term is "judicial supremacism".[13]

It is possible without too much difficulty to chart the spread of this last-mentioned infection in New Zealand. It was in 1983 that the President of the New Zealand Court of Appeal, Sir Owen Woodhouse, observed in an extra-curial address that

> the effort to provide for everything and leave nothing or very little to be fleshed out by the courts in terms of underlying legislative policy has not resolved but compounded the various problems which were intended to be overcome while making many statutory provisions unusually difficult to interpret .... Against this background it is not surprising that suggestions have been made that there should be a return to a more open form of drafting with statutes drawn to state general rules rather than provide by detailed specification for every possibility that the draftsman might be able to conjure up.[14]

Elsewhere in the same address Woodhouse a propos of the Family Protection and Matrimonial Property legislation said

> In all this the judiciary has been engaged in a working partnership with the legislature of the kind that is intended and so obviously needed by our constitutional arrangements.[15]

The difficulty with this approach is that it is presumptuous. Under our constitutional arrangements Parliament and the courts are not partners. Parliament is supreme and the duty of the courts is to obey. The inch sought by Woodhouse would be likely to grow to an ell or longer.

Woodhouse's successor as President was Sir Robin Cooke. His views will be referred to at later stages of this article. Cooke's aspirations will be seen to have gone well beyond mere partnership. We can fast-forward to consider three cases illustrative of the contemporary, post-Cooke, position.

But first let us remind ourselves of the observation in the course of a judgment by the Lord Chancellor in the political defamation case of *Sparrow v Pipp* that

> The pity is that there is not more judge-made law. For most of His Majesty's judges are much better fitted for the making of laws than the queer and cowardly rabble who are elected to parliament for that purpose by the fantastic machinery of universal suffrage. ... My Lords, we are venerable, dignified, and wise, superior in almost every respect to the elected legislators of the House of Commons.[16]

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[12] John Griffith 'Who will referee the refs?' *Times Literary Supplement* 25 September 1998, 13.

[13] The term has been used in this context by Sir Stephen Sedley ([1993] PL 543, 544) and by Lord Irvine of Lairg ([1996] PL 59, 77).

[14] A O Woodhouse 'The Judge in Today's Society' *Auckland Law School Centenary Lectures* (Legal Research Foundation, Auckland, 1983) 87, 101.

[15] ibid 91.

[16] Reprinted in A P Herbert, *Uncommon Law* (Methuen London) 1982 153, 156, 158.

Life imitates art. Sentiments appropriate to tongue-in-cheek expression in *Punch* in the year 1928 are to be found seventy years later solemnly mirrored in the *New Zealand Law Reports*. In 1998 the New Zealand Court of Appeal in *Lange v Atkinson*[17] justified a new rule relating to privilege as a defence to political defamation being devised by the judges rather than by the legislature not despite, but rather on the basis that they were warranted by, a "parliamentary reluctance" to change the law, a reluctance the Court permitted itself to suggest could be attributed to "a perception of self-interest by parliamentarians",[18] words falling not so very much short of "queer and cowardly rabble".

When Parliament enacted the Limitation Act 1950 s 4 which provides in respect of various actions that time runs from "the date on which the cause of action accrued" it plainly intended that term of art to have the meaning ascribed to it as the law had then always stood, namely the date on which all the facts necessary to establish the claim are in existence. "The first point to be borne in mind is that the Act must be construed as if one were interpreting it the day after it was passed".[19] When in *J D Searle & Co v Gunn*[20] the Court of Appeal held that for the purposes of s 4(7) "a cause of action accrued when bodily injury of the kind complained of was discovered or was reasonably discoverable as having been caused by the acts or omissions of the defendant",[21] it effectively amended the statute though protesting all the while that "we see no need for statutory intervention to achieve a result which is consistent with justice and which gives effect to the overall legislative intention".[22]

The law is clear that an unambiguous statute must be enforced even though it contravenes some treaty or tenet of international law. No other rule would be consistent with the sovereignty of Parliament. The only relevance of international law is as an aid to interpretation in the event of an ambiguity.[23] In *Sellers v Maritime Safety Inspector*[24] the Court of Appeal quashed a conviction for breach of the Maritime Transport Act 1994 s 21(1) on the basis that an unequivocal provision in s 21(1)(b) requiring that the Director of Maritime Safety must be "satisfied that the pleasure craft and its safety equipment are adequate for the voyage" should be so modified as to apply only to the extent that the requirement of the Director accorded with the relevant rules of international law. A statutory power was to be read down as limited to an exercise consistent with New Zealand's international obligations. Just such an argument had been expressly rejected by the Court of Appeal in *Ashby v Minister of Immigration* [1981] 1 NZLR 222 on the basis that so to fetter the exercise of a statutory discretion as to require the taking into account of international law obligations would be not to interpret but to legislate.

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17 [1998] 3 NZLR 424.

18 462.

19 *The Longford* (1889) 14 PD 34, 36 per Lord Esher M.R.

20 [1996] 2 NZLR 129.

21 133.

22 132.

23 The authorities are conveniently collected by the Law Commission in *The Treaty Making Process: Reform and the Role of Parliament*(1997) NZLC R45 paragraphs 37–42.

24 [1999]2 NZLR 44.

So is the supremacy of Parliament nibbled away.

Of the various possible techniques available to those indulging in judicial supremacism, the most heroic is the entitlement claimed (but never overtly exercised) by Sir Robin Cooke to refuse to enforce a statute because "Some common law rights presumably lie so deep that even Parliament could not override them".[25] This assertion has been treated appropriately dismissively.[26] To be fair to Cooke there are precedents for his approach. There was the Jacobite belief that succession to the throne was a divinely ordained right with which mere mortals might not tamper and the insistence by the Dukhobors that the direct individual revelation that required them to parade in public nude overrode all external authority either secular or Biblical. That such views have their origin in supernatural rather than rational belief is plain enough. Cooke's observations are really no more than a secular version appropriate to the late twentieth century of such observations as those of Keble J presiding during the Commonwealth over the trial for high treason of Love, a Presbyterian divine, that

> Whatsoever is not consonant to the law of God in Scripture, or to right reason, which is maintained by Scripture; whatsoever is in England, be it acts of parliament, customs, or any judicial acts of the Court, it is not the law of England, but the error of the party which did pronounce it, and you or any man else at bar may so plead it.[27]

As a more commonplace method of avoiding an unwelcome outcome a Court permits itself a strained or perverse interpretation of the words of a statute (sometimes employing such shameless euphemisms as "reading down" and "reading in"),

> And finds, with keen discriminating sight,
> BLACK'S not *so* black; nor WHITE *so very* white.[28]

"Inherent in our system of checks and balances is the practical truth that every Act of Parliament, even one touching the jurisdiction of the courts themselves is ultimately subject to interpretation by the superior courts of general jurisdiction"

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[25] *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398. See also *L v M* [1979] 2 NZLR 519, 527; *Brader v Ministry of Transport* [1981] 1 NZLR 73, 78; *New Zealand Drivers Association v New Zealand Road Carriers* [1982] 1 NZLR 374, 390; *Fraser v State Services Commission* [1984] 1 NZLR 116, 121; [1988] NZLJ 158.

[26] Notably by Kirby P in *Building Construction Employees and Builders' Labour Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372 and see P A Joseph *Constitutional & Administrative Law in New Zealand* (The Law Book Company Limited Sydney 1994) 454–456. Observations by English judicial supremacists favouring this notion are robustly answered by Lord Irvine of Lairg in 'Judges and Decision-Makers: The Theory and Practice of Wednesbury Review' [1996] PL 59, 75–78.

[27] *R v Love* (1653) 5 State Trials 43, 172.

[28] This couplet was contributed by George Canning to the poem 'New Morality' first published in the final issue of the *Anti-Jacobin* (1799)

says Cooke.[29] It would be a mistake (as readers of *Ansimic*[30] should know) for the draftsman to underrate the potency of this scarcely veiled threat.

The greatest opportunity afforded to New Zealand Courts to flex their muscles in wrestling with statutory interpretation resulted from the helter-skelter passage of legislation overturning the established economic order that followed the coming to power of the Lange administration in 1984. So in *Northern Milk Vendors Association Inc v Northern Milk Ltd*[31] the Court of Appeal asserted an entitlement to fill a gap in legislation by devising a solution "appearing to accord best with the general intention of Parliament as embodied in the Act – that is to say, the spirit of the Act".[32] In that case[33] as in the later case of *Auckland City Council v Minister of Transport*[34] Cooke P disavowed any usurpation of "the policy-making function, which rightly belongs to Parliament". These cases are best understood as a revival of the doctrine, provoked by the laconic brevity of medieval statutes, that it was open to courts to divine and apply to cases not specifically dealt with what came to be called "the equity of a statute". It was a doctrine that had by at least the early nineteenth century been thoroughly discredited.[35] "If the meaning of the language used by the legislature be plain and clear, we have nothing to do but to obey it; and I think to take a different course is to abandon the office of Judge, and to assume the province of legislation".[36]

It is instructive for a number of reasons to consider in more detail one such case, the Court of Appeal decision in *New Zealand Maori Council v Attorney-General*[37]. One reason is to see whether the disavowal referred to is supportable. Another is that we have the benefit of an account of the matter by the Minister responsible for the insertion in the statute in question of the section on which the Crown case foundered, G W R Palmer. A third is that that Minister was a qualified lawyer with experience as a law teacher who should have been better able to understand the significance of his actions than colleagues without that background.

The Minister to allay genuine Maori concerns procured the insertion into the State-Owned Enterprises Act 1986 in the course of its passage through Parliament of s 9 which reads as follows

> **Treaty of Waitangi** - Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

Palmer has written

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29 'The Struggle for Simplicity in Administrative Law' in Michael Taggart ed *Judicial Review of Administrative Action in the 1980's* (Oxford University Press, Auckland 1986) 1, 10.

30 *Ansimic v Foreign Compensation Commission* [1969] 2 AC 147.

31 [1988] 1 NZLR 530.

32 537 per Cooke P for the Court.

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34 [1990] 1 NZLR 265, 289.

35 *Brandling v Borrington*(1827) 6 B&C 467.

36 *Miller v Salomans* (1852) 21 LJ (Ex) 161, 197 per Pollock C B, see also 194 per Parke B.

37 [1987] 1 NZLR 641.

> My intention was for this to announce that the government did not by passage of the State-Owned Enterprises Act 1986 seek to frustrate or jeopardise Maori rights. I did not envisage, however, that the provision would have an effect as dramatic as the one it did have in a case before the Court of Appeal. . . . The Court of Appeal ruled that section 9 meant that the Crown was obliged to establish a system so it could consider, in relation to particular assets or particular categories of assets, whether such transfer would be inconsistent with the principles of the Treaty of Waitangi and would be unlawful. The Crown had to find a way to safeguard lands and waters in such a way as to avoid prejudice to Maori claims.[38]

The effect of the decision when coupled with Palmer's refusal to correct the decision by legislation ("it would have been violently unconstitutional") or appeal it[39] is immeasurable. There can be no doubt that the Court (though it could not have been entirely sure in advance that Palmer would take the decision lying down) intended an alteration of the political landscape. It was not left to commentators to assess the importance of the decision. "This case" the President's judgment commences "is perhaps as important for the future of our country as any that has come before a New Zealand court".[40] It is too soon (and in any event beyond the scope of this article) to determine whether the effect of *Maori Council* and the string of cases following it on New Zealand racial harmony has been harmful or benign. What is clear is that decisions of state aimed at the creation and preservation of such harmony call for the exercise of such statesmen's skills as forward vision, diplomacy, finesse and sensitivity to public opinion and are the preserve not of courts but of those elected to govern. It is moreover a perversion of their proper role for judges to approach the task of interpreting statutes in the spirit of counter-majoritarian crusaders.

> We must construe these acts of parliament without allowing ourselves to be influenced by any of the political feelings of the present day as to the proper policy to be pursued with respect to Her Majesty's subjects professing the Jewish faith.[41]

The significance to the student of New Zealand legal history of *Maori Council* is threefold. It affords a measure of Palmer's own percipience.[42] More relevantly to the concerns addressed in the present article, it helps us to judge the worth of judicial disavowal of any usurpation of Parliament's policy-making function. It is impossible to read the judgments in *Maori Council* in the political context in which they were delivered and believe that any of the Judges really believed that what the Court determined to be the effect of the statute was what members of Parliament had wanted.[43].

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38 *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin 1992) 88, 89.

39 Discussed by Palmer ibid p 89, 90.

40 651.

41 *Miller v Salomans* (1852) 21 LJ (Ex) 1612, 191 per Parke B.

42 "The transformation of Sir Geoffrey Palmer to wise old constitutional expert must remain forever a mystery" - D J Round, *Truth or Treaty* (Canterbury University Press, Christchurch, 1998) 131.

43 See for example page 659 "My strong impression is that Members who took part in the final debate thought that the Act would have the effect now contended for by the Crown" (Cooke P).

The third point (and of the heinous nature of his offence Palmer in his *apologia* betrays absolutely no sign of being aware) relates to the use at all in a statute of such an imprecise term as "the principles of the Treaty of Waitangi". As Richardson J noted[44] "it cannot yet be said that there is broad general agreement on what those principles are". So the Court of Appeal was left free to invent its own principles, including the proposition that the Treaty "signified a partnership between races".[45] Since then the judge-made concept "Treaty partnership" with all its ambiguities and uncertainties has passed into common usage and continues to excite expectations unlikely ever to be fulfilled. The President spoke nothing less than the truth when (rubbing salt into the wound) he observed "If the judiciary has been able to play a role to some extent creative, that is because the legislature has given the opportunity".[46]

So how should legislation be framed to make it as judge-proof as possible? The answers are the obvious ones. The draftsman should not be beguiled by Woodhouse's praise of open-ended drafting, for the legislature can have no confidence that the detail supplied by the courts will be the detail contemplated by Parliament. The draftsman must dot every 'i' and cross every 't', and if this makes the product less readable the answer is that elegance must give way to armour-plate.

The draftsman should, it is suggested, hesitate before including in a Bill a statement of purpose and principle. Bennion has written

> Drafters dislike the purpose clause. They take the view that often the aims of legislation cannot usefully be or safely be summarised or condensed by such means. A political purpose clause is no more than a manifesto, which may obscure what is otherwise precise and exact ... The drafter's view is that the Act should be allowed to speak for itself.[47]

In a recent discussion of statements of purpose Alec Samuels mentioned their virtues, it is true, but dwelt upon their vices too.

> A general statement can be uncertain and can prove unhelpful in construing the detail in the statute, because general words can throw doubt upon particular words and indeed general words may be inconsistent with the particular words. General words could induce the drafter to draft with less than customary caution and attention to detail; and general words could induce the judge to pay too much attention to purpose and principle and too little attention to the detail.[48]

In other words, the effect of a purpose clause can be to slacken the tight rein that this article argues is called for. The case of *Sellers* already referred to[49] is an

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44 673.
45 664.
46 664.
47 Francis Bennion *Statutory Interpretation* cited supra footnote 3, page 501.
48 "Statements of Purpose and Principle in British Statutes" (1998) 19 Statute Law Review 63, 64.
49 Supra, footnote 24.

example of judicial misuse of a purpose provision in the statute's long title to override clear and unambiguous words.

Anyone who might believe, like Woodhouse, that there exists a partnership between courts and Parliament should re-read *Maori Council* or the cases in which substantive effect was given by the Cooke Court to the New Zealand Bill of Rights Act 1990, a measure intended by Parliament to be no more than hortatory. The use of general terms like *considérable* or *inquiéter* or "principles of the Treaty of Waitangi", which really amount to a delegation of legislative power by Parliament to the courts, should be resorted to only if greater precision is entirely impossible. If the draftsman should be reduced to conferring a discretion the principles on which the discretion is to be exercised should be laid down.

The draftsman must be aware of the judicial claim that (as Lord Steyn has recently put it)

> Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and tradition of the common law. And the courts may approach legislation on this initial assumption. But this assumption has only prima facie force. It can be displaced by a clear and specific provision to the contrary.[50]

He must anticipate that judicial stance and provide where it is required the "clear and specific provision to the contrary" that will leave no room for argument.

This all amounts no doubt to a counsel of perfection. But adherence to these rules is essential if unelected judges are not to succeed in making off with a law-making power that our constitution confers on elected members of Parliament. That Parliament is supreme is not a rule of law but a matter of political fact.[51] Attempts by courts to sap that supremacy should be identified as the political acts that they are. It is the duty of the draftsman (the maintenance of the rule of law demands as much) to do nothing to make such undermining easier.

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[50] *Reg v Home Secretary ex parte Pierson* [1998] AC 539, 587.

[51] The arguments of H W R Wade to this effect in 'The Basis of Legal Sovereignty' [1955] CLJ 177 seem unshaken by contemporary heresies.