Preliminary Year

Sri Lanka Law College

Legislative Drafting

&

Statutary Interpretation

iGuide

Empowers Independent Learning

Independent Law Student Movement

Reviews, responses and criticism
iGuide,
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The Article 4(a) of the 1978 Constitution provides that legislative power shall be exercised by Parliament and Article 4(b) provides that judicial power is to be exercised by Parliament through courts.

Justice Amarasinghe in *Stason Exporters Ltd v Brooke Bond Ceylon Ltd* observed that "The duty of a court is to construe Acts of Parliament according to the intent or will of the legislature and to give the words their meaning, even if that intention appears to the court just or unjust, right or wrong, injudicious, odd, absurd, or inconvenient or whatever may be the ulterior consequences of so interpreting them, and to leave the remedy, if one be resolved upon, to others. Dislike of the effect of a statute is of no consequence."

Anatomy of a Statute

It is the "words" of a statute that a court will be concerned with and if those "words are not by themselves unclear or ambiguous, resort will be had to the framework of the Act to "colour" which would otherwise be seen as their plain meaning".

(1) Long Title

- a short summary of the provisions of that Act and an articulation of the general purpose of the Act
- *R v Bates* – the long title is never allowed to affect or restrain the plain meaning of a statute but only to act as an aid in resolving difficulty. Where sections are clear the long title can not be used to narrow or restrict the meaning
- *Ramalingam's Case* - The owner of a shop, who has no employees, is an employer within the meaning of section 43 of the Shop and Office Employees Act and is bound to comply with "closing orders" made by the Minister under the provisions of the Act. The preamble of a statute cannot control the clear and unambiguous provisions of the statute.

(2) Preamble

- Function of a preamble is to explain the object of an Act or to explain the reason why it is being enacted or why its enactment is considered to be desirable. It can be used as an aid to statutory interpretation.

  Ex – The Geneva Conventions Act 2006 (Sri Lanka)

  The international covenant on Civil and Political Rights Act 2007 (Sri Lanka)

  The preamble has been useful in the interpretation of the statute.
- Ex - *AG vs Prince Earnest Augustus of Hanover* [1957]AC 436 *R vs Males* [1962] 2 QB 500
- Lasky – it is at least and authoritative guide in the hands of a competent draftsman and could hardly fail to be an instrument of clarification for

collecting the intent and showing the mischief which the makers of the Act intended to remedy.

- *Burrakur Coal v India* - where very general language is used in an enactment, which, it is clear, must be intended to have a limited application, the Preamble must be used to indicate to what particular instances the enactment is intended to apply
- Devenish – the modern theory is that a preamble contains an exposition of the purpose of the statute and should be an "unqualified" guide to ascertaining the intention of the legislature

(3) Short Title

Purpose is to enable the reader to know the reference to a statute and therefore the objective is more of identification rather than description. It contains the year of enactment and a number.

- Ex – Employment Act 1970 (Act No. 2 of 1970)
- Lord Diplock – in a certain case was of the view that in general the short title may ***not*** be used to assist in the construction or interpretation of the body of the statute
- It is important to remember that section referring to the short title forms part of the statute and a wrong or unwise choice of short title can have the effect of adding confusion to the statute book where for example, an amending Act is made to appear as a principal Act.

(4) Marginal Note

- Objective is to give an identification in relation to the content of a section
- *Rex v Mantila* – although marginal notes are not debated in Parliament they can not be ignored
- In Sri Lanka the marginal note forms part of the draft bill that is debated in Parliament
- Opinion is not uniform but in favour that marginal notes ***can not*** be used for interpreting a section e.g. *Chandler v D.P.P.*

(5) Proviso

- Exception, limitation, restriction or condition is place on the main section by words such as "provided however" or "provided that".
- Shah Bhejraj – " as a general rule, the proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily a proviso is not interpreted as standing in general rule"
- Justice G. P. Singh –
    i. Proviso should not be construed as adding something by implication where the main enactment is clear
    ii. A proviso should be construed in relation to the sections to which it applies. However in *Ismale Lebbe v Jayawardena*, Sarath Silva CJ was of the view that the correct approach is to treat provisos in the entire context in which it appears

iii. Proviso can be sued as a guide if the enactment is not clear and the proviso can give indication of its true meaning

(6) Headings

- Thornton – "A heading is a label or a sign post but no more"
- Interpretation Acts of various countries have varied approaches e.g. in Australia headings are deemed to be part of the Act, where in New Zealand, headings do not affect the interpretation of an Act
- *R v Surrey* – "while the court is entitled to look at headings to resolve any doubt as to ambiguous words in the law, it is clear that the headings can not be used to give a different effect to clear words in the section where there can not be doubt as to the ordinary meaning of the words"
- If the language of a section is clear and consistent with the heading, the heading must give way. If the language of the section is clear and although more general but is not inconsistent with the heading, the section must be read subject to the heading. If the language is doubtful or ambiguous, the meaning which is consistent with the heading must be accepted.
- The heading to one group of sections can not be used to interpret another group of sections.

(7) Punctuation Marks

- *Marshal v Cottingham* – "punctuation is normally an aid and no more than an aid towards revealing the meaning of the phrase used and the sense that they are to convey when put in their setting"
- *Mohamed Shaheed v State of Maharasht* – statute provided that a person who "manufactures for sale, sells, stocks or exhibits for sale or distributes a drug without a licence" is liable for punishment. The question was whether stocking without a licence was an offence. The Supreme Court held that the absence of a comma after the work "stocks" led to the interpretation that only stocking for the purpose of sale without a licence was an offence and not stocking by itself.
- *Sama Alan Abdulla v State of Gugarat* – "any secret official code or password, or any sketch plan model". The court interpreted the inclusion of the comma after the word "password " to mean that the word "secret" only qualified the expressions "official code" and "password".
- Lord Reid – "it is to be hoped that courts will continue to be prepared to ignore or insert punctuation where to do so is necessary to give effect to the purpose of the statute".

(8) Interpretation Clause

- Interpretation Clause adds enormous value to statutory statutory interpretation. It provides for the interpretation of certain words and phrases appearing in the body of the act. Some of the words may have technical meaning.

  Ex – Under the Climate Change Response Act 2002 of New Zealand, the term "greenhouse gases" is defined to provide its technical meaning.

- Words are defined in statutes by restrictive definitions (where the word means "...") and exhaustive definitions (where the word includes "...")
- When an exhaustive definition is used, it should not prevent the word from being given its ordinary meaning when applicable
- If a defined expression or word is used in a context to which the definition will not fit, it may be interpreted according to its ordinary meaning.
- *Brown v Anderson* – definition of a word in a statute does not govern the same word in a regulation promulgated under that statute unless the regulation should defined the word in the same way.

(9) Schedule

- Purpose is to include matters that are subsidiary to the main provisions of the statute
- Weight to be attached to the statute as an interpretational aid depends on the nature of the subject matter included in the schedule
- The statute, being part of the legislation, has the same legal validity as the provisions of the statute.
- Devenish – where there is a conflict between the body and the schedule, the provision which is most in harmony with the intention of the legislature is to be accepted.

Rules of Interpretation

Bhandari CJ in the case *of Hazarimad Kuthilia v Income Tax Officer Ambala* repeated certain well known rules for construction of statutes –

1. Where the language is plain and unambiguous, there is no need to resort to the rules of statutory interpretation
2. Words should be given their ordinary and familiar meaning having regard to the context in which they are used
3. It must be assumed that the legislature knew in its mind and understood the meaning of the terms employed by it and thus the terms do not contain a hidden meaning which only the study of a powerful intellect can discover

In light of the foregoing, rules of interpretation may be adopted to find the probable meaning of the author of a document or statute where such meaning is unclear.

(1) Literal Rule

- Cross - The essential rule is that words should be given the meaning which the normal speaker of the English language would understand them to bear in the context in which they were used
- *R vs. Judge of the City London*, Esther J. – ***"If the words of an Act are clear, you must follow them even though they lead to a manifest absurdity. The Court***

has nothing to do with question whether the Legislature has committed an absurdity."

- *Felix vs. Thomas* depicts an instance where the Judicial Committee of the Privy Council of Trinidad and Tobago utilizing the Literal Rule.
- The words should be taken in themselves in the first instance, without referring to case law
- In Sri Lanka, many cases have adopted the Literal Rule.

  Graeitian J adopted the Literal Rule in *Musheen's Case* 55 NLR 64. Likewise, Amarasinghe J adopted the Literal Rule in *Stassen Exports Ltd. vs Brookebond Ceylon Ltd* (1990) 2 SLR 3; and in *Somawathie vs Weerasinghe* (1992) 2 SLR 121
- Amarasinghe J in *Somawathie v Weerasinghe* – no more can be necessary than to expound those words in their plain, natural, ordinary, grammatical and literal sense
- This rule promotes certainty, consistency, uphold Parliamentary sovereignty and the separation of powers and the neutrality of the courts
- However, this rule is based on a false premise that words have a plain ordinary meaning apart from their context and reliance on dictionary meanings is difficult given that the dictionary provides for several meanings in some instances.
- Also this limits interpretation to arriving merely at the meaning of a word and no more.
- Judges are also prevented from being creative and this could result in harsh, unreasonable and unjust applications.

(2) Golden Rule

- This is a modification or qualification of the literal rule
- In Sri Lanka the Golden Rule has been used in regard to procedural matters. *Billion Bay Apparels (Pvt) Ltd vs Chief Minister of Sabaragamuwa Provincial Council and others* (2015) – "omission to incorporate the place of attestation in Jurat was held not fatal to the legal proceedings and was no ground in rejecting the affidavit."

  Wickramarathne vs Mendis – "The failure to provide the name of the registered Attorney – at - Law in the in the Notice of Appeal and the Petition of Appeal will not lead to a dismissal of this Appeal. "
- *Becke v Smith* – "where the ordinary meaning of words used is different to the intention of the legislation or it leads to a manifest absurdity or repugnance, the language may be varied or modified so as to avoid such further inconvenience"
- *Gray v Pearson* – "the grammatical and ordinary sense of the word should be adhered to unless that would lead to some absurdity or some inconsistency with the rest of the instrument"
- In *Adler vs. George*, the United Kingdom courts amended the words, 'in the vicinity' as 'in or in the vicinity' to prosecute alleged offenders under the Official Secrets Act (UK).

- Lord Denning in *CoroCraft Ltd v Pan American Airways* – "the literal meaning of the words are never allowed to prevail where it would produce manifest absurdity or consequences which were never intended by the legislature"
- This has been recognised in South African law by Devnish
- Distinguishing between an "absurdity on the face of a statute" and "an Act producing what the judges may consider as an absurd result" is problematic and is matter of opinion which can vary from judge to judge.
- What seems "absurd" to one may not be "absurd" to another.
- The courts use the golden rule to modify statutes –
    i. To correct obvious errors e.g. printing errors
    ii. To enable the text o operate in a manner that the court considers (subjective view) Parliament must have intended – in the absence of a clear necessity to do so, application of this rule would be wrong

(3) Mischief Rule

- It is always presumed that Parliament has a reason for enacting a law and this is generally presumed to be a cure of an existing defect in the prevailing law and this defect is considered for the purpose of this rule to be the "mischief".
- The court is expected to resort to interpretation which will assist the court in remedying the mischief, thereby giving effect to the intention of Parliament. • In Sri Lanka, the Mischief Rule has been used in *Dorothy Silva vs Inspector of Police* (Pettah) 78 NLR 553. – The aim of the Brothels Ordinance is to suppress prostitution and if any premises are used to promote such activities and possess all the attributes of a brothel, it will come within the ambit of this Ordinance.
- *Heydon's Case* – four things to be considered for the sure an true interpretation of statues are –
    i. What was the common law prevailing before the statute was enacted
    ii. What was the mischief or defect for which the common law did not provide?
    iii. What was the remedy the Parliament appointed to cure this defect?
    iv. What was the true reason behind this remedy?
- Piers is of the view that the mischief rule is problematic because it erroneously presupposes that all Acts are directed towards changing the law whereas many Acts introduce a new field of law
- *Smith v Hughes* - The defendants were prostitutes who had been charged under the Street Offences Act 1959 which made it an offence to solicit in a public place. The prostitutes were soliciting from private premises in windows or on balconies so could be seen by the public. The court applied the mischief rule holding that the activities of the defendants were within the mischief the Act was aimed at even though under a literal interpretation they would be in a private place.

- *Elliot v Grey* - The defendant's car was parked on the road. It was jacked up and had its battery removed. He was charged with an offence under the Road Traffic Act 1930 of using an uninsured vehicle on the road. The defendant argued he was not 'using' the car on the road as clearly it was not driveable. The court applied the mischief rule and held that the car was being used on the road as it represented a hazard and therefore insurance would be required in the event of an incident. The statute was aimed at ensuring people were compensated when injured due to the hazards created by others.
- *Corkery v Carpenter* - The defendant was riding his bicycle whilst under the influence of alcohol. S.12 of the Licensing Act 1872 made it an offence to be drunk in charge of a 'carriage' on the highway. The court applied the mischief rule holding that a riding a bicycle was within the mischief of the Act as the defendant represented a danger to himself and other road users.
- *D.P.P. v Bull* - A man was charged with an offence under s.1(1) of the Street Offences Act 1959 which makes it an offence for a 'common prostitute to loiter or solicit in a public street or public place for the purposes of prostitution'. The magistrates found him not guilty on the grounds that 'common prostitute' only related to females and not males. The prosecution appealed by way of case stated. The court held that the Act did only apply to females. The word prostitute was ambiguous and they applied the mischief rule. The Street Offences Act was introduced as a result of the work of the Wolfenden Report into homosexuality and prostitution.
  The Report only referred to female prostitution and did not mention male prostitutes. The QBD therefore held the mischief the Act was aimed at was controlling the behaviour of only female prostitutes.

According to Devnish the modern theories of interpretation which are still under development are –

(1) Purposive Theory

- Presumption that Parliament is trying to achieve a certain purpose and judges may look beyond the four corners of the statute to find a reason for giving a particular interpretation to ambiguous words so that the provisions of the statute may be interpreted in keeping with the Parliament‟ s purpose.
- *Liyanage v Gampaha* – "for anything that is contrary to or inconsistent with the general purpose of the Parliament, anything that is contrary to or inconsistent with such general purpose should not be held valid by the courts in an exercise of statutory interpretation".
- *Sriyani Silva vs. Iddamalgoda* – The wife of the aggrieved party was allowed to institute a fundamental rights action under Article 126(2), as the aggrieved party was unable to do so due to circumstances beyond his control.
- *Pepper vs. Hart* – The UK Courts allowed references to be made to the Hanzard for the purpose of interpreting a particularly ambiguous provision in the Finance Act.

- *Trinidad Cement Company Limited vs. AG of Guyana* – Official records of negotiations and recommendations made by the Ministers of Justice and Legal Affairs were referred to when determining whether a jurist person has a locus standi under Article 222 of the Revised Treaty of Chaguaramas. Thus, it's apparent that the purposive rule was fundamental in this determination.

(2) Subjective Theory

- This theory is based on the distinction between the language of the statute on the one hand and ideas and thoughts on the other.
- This theory does not assume that the expressed intention is equivalent to the authentic intention of the legislature.

(3) Value Coherent Theory

- English judges in the 16th and 17th centuries developed a system of "equitable interpretation".
- Judiciary is required to interpret statute in accordance with the value or principles behind it.
- This theory is favoured by Lord Denning who stated that "when there is a choice, choose the meaning which accords with reason and justice".

(4) Judicial or Free Theory

- Interpretation is essentially a process of election in which the judge chooses one rule of interpretation over another
- This theory emphasises both the creative rule and the element of subjectivity inherent in the process of interpretation employed by individual judges
- Denning who advocates this theory in its moderate form has stated that "a judge must not alter the material of which the statute is woven but he can and must iron out the creases".

(5) Objective Theory

- Once the legislation has been enacted, the legislature‟s task is complete and the text of the statute acquires and existence of its own.
- This theory is against the "fiction" of intention of the Parliament
- The words of an Act of Parliament are "delegations" to the courts to interpret within their authority
- The words do not mean what the author intended for them to mean, but what they mean to the person to whom they are addressed.

Secondary Rules of Interpretation

The following can be considered to be secondary principles of interpretation as they consist mainly of linguistic cannels which govern the elaboration of individual words and phrases by drawing certain inferences.

(1) Noscitur a Sociis principle (the meaning of a word can be gathered from the context)

- The meaning of a phrase... like that of any other ambiguous expression depends on the context in which the words appeared
- A word may be limited by looking at the context in which it appears
- *Prior v Sherwood* – prohibition against betting in any "house, office room or place" did not extend to a public lane. The word "place" was limited by its use in conjunction with "house, office, room" which the court considered to be an enclosed area.
- *Westminster City Council v Ray Accan* – an Act penalised the making of false statements regarding "any services, accommodation or facilities provided". The court did not consider a false statement regarding a closing down sale to be captured by the term "facilities" because, in the context of the Act, "facilities" did not extend to include shopping facilities.
- *Rex v Harris* – the use of the words "shoot at or to stab, cut or wound a person" led the court to limit the interpretation of the word "wound" to mean wounding by an instrument and not to cover biting or burning.
- *Gunasinghe vs. De Silva* – A person was prosecuted under a statute which made cutting, stabbing or wounding an offence for having bitten another. It was held that as 'biting' is different from cutting, stabbing or wounding, the charges against the accused under this act cannot be justified by applying the Noscitur a sociis.
- *AG vs. Prince Earnest Augustus of Hanover (UK*) – Reference was made to the preamble and this maxim was utilized as the words of a statute are capable of two different interpretations.
- In a decided case, the phrase "manufactured beverages including fruit juices and bottled water and syrups" was held not to include fresh unsweetened orange juice because of the context in which the words "fruit juices" appeared.
- *State of Rajatan v Sripal Jain* – a rule provided that all dismissals, removals and compulsory retirements should be made by the Governor. The phrase "compulsory retirement" was interpreted to mean compulsory retirement by way of a punishment and therefore, normal retirement did not have to be ordered by the Governor.
- *Dr. Devendru Surty v State of Gujarat* – definition of commercial establishment which was "an establishment which carried on any business trade or profession" did not mean that the Act applied to private dispensaries of

professionals such as doctors because the word "profession" was used in the context of "business" and "trade"

(2) Eiusdem generis principle (of the same kind or nature)

- An example of the application of the Noscitur a Sociis principle.
- The general words which follow particular and specific words of the same kind or nature as itself takes the meaning from them and is presumed to be restricted to the same genus as those words.
- *Shirani Bandaranayake's Case* – The Court of Appeal has no power to hear the legality of the termination of the Chief Justice under Article 140 of the 1978 Constitution by way of a writ application, as the Parliamentary Select Committee does not fall within the ambit of any inferior court, tribunal or institution.
- The US Supreme Court observed that this rule is not a master of the courts but rather its servant in ascertaining the intention of the legislature
- *Abdul v Asaf Ali Khan* – it is only when a generic word follows specific words that this rule applied and not when specific words follow an general term
- Cross – the draftsman must have taken the general word in case something which should have been specifically enumerated has been omitted.
- The most important feature in the application of this principle is the existence of a genus. It has been held that for a genus to be established, more than one species should be specified – ○ *Alan v Emerson* – the expression "theatre or other place of public entertainment" did not limit the general words "place of public entertainment" to the genus of "theatre"
    - ○ However in *Parker v Secretary of State for Environment* – where the phrase "building or other operation" was considered, the general term "other operation" was limited to the genus of "building" ○ *AG v Brown* - By section 43 of the Customs Consolidation Act, 1876, "The importation of arms, ammunition, gunpowder, or any other goods may be prohibited by Proclamation or Order in Council." The importation of chemicals was prohibited by Proclamation, except under licence. Held, that the doctrine ejusdem generis must be applied, and that chemicals were not included in the category of prohibited goods, and the Proclamation was therefore invalid
- An intention to exclude the ejudsem generis principle from being applied may be treated as implied where the application of the principle would produce a result contrary to the legal meaning taken to have been intended by Parliament, where it can be seen from a wide inspection of the scope of the legislation that the general words ought to be construed generally they are so construed notwithstanding they follow a more particular expression which may be grouped as a category.
    - ○ *Raan v Old Royals* – words "other matter" were not read in light of ejudsem generis but rather in a general way, having regard to the objects of the statute which was to prevent conflict of interests arising in members of local authorities.

- In a decided case the words "other place" were held to include a warehouse which was situated a mile and a half from the manufacturer‟ s dwelling house when interpreting the judge‟ s authority to issue warrants

(3) Ut Res Magis Valeat Quam Pereat (the thing may rather have effect than be destroyed)

- Courts have adopted this rule to ensure validity and attainment of the object of any legislation brought before them for interpretation.
- Where more than one interpretation is possible to adopt, adopt that interpretation which will ensure that the validity of the Act is to be adopted.
- *Nokes v Doncaster* – House of Lords had to consider whether a statutory provision empowering the court to transfer in the case of a statutory amalgamation all "property and liabilities" included the right to transfer employees. House of Lords did not use this maxim and held that personal contracts can not be transferred.
    - "If the choice is between two interpretations", said Viscount Simon L. C. "the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result."
- *Nandasena v Senanayake* - The use of the word 'may' in S. 21 of the Paddy Lands Act postulates an imperative. In interpreting statutes a purposive approach should be adopted where otherwise futility will result.
- This maxim may not always provide the answer to the problem of interpretation – it is a valuable servant but a dangerous master and should not be applied when its application having regard to the subject matter to which it is to be applied leads to inconsistency or injustice.
- *Sriyani Silva vs. Iddamalgoda* – Through the application of the ut magis maxim, the effectiveness of the implementation of fundamental rights enshrined in the Constitution was ensured.
- *Umbichy Ltd. vs. Hode Navigation Pvt. Ltd*. – When two provisions conflict with each other, ut magis maxim should be applied to resolve the resulting ambiguity.
- *McCulloch vs. Maryland (USA)* – Ut magis maxim was applied to interpret the constitution in such a way where it can operate and not perish.
- *Trinidad Cement Company Ltd. vs. AG Guyana* – A jurist person was held as having locus standi under the Article 222 of the Revised Treaty of Chaguaramas and if not, the said treaty would've been ineffective in realizing its objectives.

(4) Expressio Unius est exclusio alterius **(the express mention of one thing excludes all others)**

- Expression of one or more things of a particular class may be regarded as silently excluding all other members of that class
- This principle is not applicable where it is clear that the legislature did not intend to exclude all other things
- Maxim should be used to ascertain the legislative intent
- *R v Inhabitants of Sedgely* - A statute raised taxes on 'lands, houses and coalmines'. The court held that it did not apply to limestone mines as these were not specifically mentioned nor did the statute suggest that it would apply to other types of mines.

Directory and Mandatory Legislation

The Supreme Court of India has stressed that the question of whether a statute is mandatory (strict compliance is required) or directory (discretion may be used) is not capable of generalisation and that in each case the court should try and get the real intention of the legislature by analysing the entirety of the enactment and the scheme underlying it.

Southerland – "it can be stated as a general proposition that as regards the question of mandatory or directory operations, the courts will apply that construction which best carries in to effect the purpose of the statutes in consideration. To this end, the courts may be inquired in to the purpose behind the enactment of the legislation as one of the first steps in treating the problem. The ordinary meaning of the language may be overruled to effectuate the purpose of the statute."

Bindra has proposed two main considerations for regarding a rule as directory –

(i) The absence of any provision to provide for the rule not being complied with or followed

(ii) Serious general inconvenience and prejudice to the general public which would result if the action in question is declared invalid for non-compliance with the particular rule

Piers resolves the problem of whether a rule is mandatory or directory by considering two matters –

(i) What would be the consequence of holding a provision to be obligatory on the one hand and declaratory on the other

(ii) What interpretation would best serve the purpose or object of the statute

Devnish refers to a threefold classification rather than a twofold one i.e. directory and mandatory –

(i) Those requirements that need exact compliance

(ii) Those that require substantial compliance

(iii) Those that do not necessarily require compliance for validity

In a decided Australian case, the Registrar General of Births, Deaths and Marriages was held to have an obligation to correct errors in the register when they were notified to him even though the statute was couched in discretionary terms i.e. Registrar may correct errors. This was because the purpose of the statute was to ensure accuracy of the register.

Bee v Bee – statute provided that the "court shall not make absolute any decree of divorce or nullity of marriage unless and until the court is satisfied as to measures relating to children of that marriage". This was considered mandatory so the decree made without compliance with this provision was a nullity.

Rai Wimal Krishna v State of Bihar – statute required assessment list to be signed by executive officer and public notice to be given by beat of drums and posters. It was held that the requirement of giving public notice was mandatory but the manner of publication was directory and so the public notice in the newspapers was substantial compliance even though there was no publication by beat of drums.

The problem of interpretation in this context is not always solved by labelling a requirement either mandatory or directory and it may become much more important to focus on the consequences of non-compliance. However, this general rule that noncompliance of a mandatory requirement necessarily results in nullifying the concern is subject to two exceptions –

(a) When performing of the requirement of is impossible, performance is then excused

- *Krishna Singh v Municipal Corporation City of Ahamadabad* – mandatory to hold election in certain time and revise election rules a reasonable time before holding elections. If it is not possible to revise rules in time, the election must be held under old rules (b) Waiver
- If a person may waive and interest owed to him under a statute and no public interests are involved, such waiver would make performance of such mandatory requirement giving him an interest unnecessary

Repeal and Revival of Statutes

Repeal of an Act is to cause that Act to cease to be a part of the body of law in that country.

In Sri Lanka, the 1978 Constitution provides that this may be done only by another Act of Parliament. However there are certain Acts of Parliament which grants powers to amend the schedules thereof by instruments other than Acts of Parliament

e.g. Appropriation Act which empowers the Minister to vary the schedules by an Order.

Interpretation Ordinance ("IO") Section 15 - When any rules made under any enactment which has been repealed are kept in force by the repealing enactment, whether passed before or after the commencement of this enactment, such rules shall be deemed for all purposes to have been, and to be, made under the corresponding provisions of such repealing enactment, and shall be enforceable as if they had been so made.

IO Section 16 –

(1) Where in any written law or document reference is made to any written law which is subsequently repealed, such reference shall be deemed to be made to the written law by which the repeal is effected or to the corresponding portion thereof.

(2) This section shall apply to written laws and documents made as well before as after the commencement of the IO.

IO Section 6 –

(3) Whenever any written law repeals either in whole or part a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or be deemed to have affected-

  (a) the past operation of or anything duly done or suffered under the repealed written law ;

  (b) any offence committed, any right, liberty, or penalty acquired or incurred under the repealed written law ;

  (c) any action, proceeding, or thing pending or incomplete when the repealing written law comes into operation, but every such action, proceeding, or thing may be carried on and completed as if there had been no such repeal

(4) Subsection (3) shall apply in the case of the expiration of any written law in like manner as though that written law had been repealed and had not expired.

Sri Lanka Insurance Company v Ranasinghe – what is unaffected by the repeal of a statute are the rights acquired or accrued under it and not a "mere hope or expectation of or liberty to apply for a right". A distinction is drawn between a legal proceeding for enforcing a right acquired or accrued and a legal proceeding for acquisition of a right – the former is saved whereas the latter is not.

The consequences which result from the repeal of a statute are –

(i) Anything done under a repealed provision would be a nullity even though the repealed provision has been re-enacted

(ii) Repeal can not go wider than the repealing Act and as such an apparently comprehensive repeal may be limited if the Act containing it is expressed not to apply to a certain matter

(iii) *leges posteriores priores contrarias abrogant* - Later laws abrogate prior contrary laws. The applicable test is whether there has been repeal by implication by the subsequent statute.

Retrospective Legislation

Article 75 of the 1978 Constitution grants power to Parliament to make laws including laws having retrospective effect. However, Article 13(6) of the 1978 Constitution provides that no person shall be held guilty of an offence on account of any act or omission which did not at the time of such act or omission constitute such an offence on a penalty being imposed for an offence more severe than the penalty in force at the time such offence was committed.

In *Young v Adams*, Lord Watson stated that "in the present case the learned Chief justice was right in saying that retrospective operation ought not to be given to the statute unless the intention of the legislature that it should be so construed is expressed in plain and unambiguous language, because it manifestly shocks one‟ s sense of justice that an act, legal at the time of doing it, should be made unlawful by some new enactment."

Devnish states that the underlying presumption against retrospective legislation is to ensure justice to the individual.

In a 1986 decided Australian case, the court upheld the cancellation of a licence where the holder of the licence was convicted of an offence that at the time could not result in the cancellation of the licence but a subsequent amending Act made such cancellation possible.

Carson v Carson - The court echoed the description of the rule against retrospectivity in an Act so as to remove existing right, quoting Maxwell „Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect is clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.‟

The rule against retrospectivity is applied in cases where retrospectivity would prejudicially affect a vested right or the legality of past transactions or would impair contracts or would impose new duties or attach new disabilities in respect of past transactions; for example –

- The amendment to the Bills of Sales Act which declares void any bills of sale unregistered within 7 days from the execution does not apply to instruments executed before the operation of the amendment

Plewe v Chief Adjudication Officer – statute enable Secretary of State to recover overpayment of pension from either the recipient or a third party on whose misrepresentation or failure to disclose the overpayment was made. The provision creating an obligation on third parties

was a new provision. Although Court of Appeal held that this provision should have retrospective effect when applying the test of fairness, the House of Lords overturned this as the provision created an new obligation.

External Aids in Interpretation

Intention of Parliament is considered when interpretation the language of the law which is read in its "context". The context is not limited to the words of a statute but also the factual positions which were known to the Parliament at the time of enactment i.e. the historical background. These can be derived from Hansards, Parliamentary Reports and existing similar statutes. All these are "extraneous" to the text of the statute itself.

Devnish observes the use of extraneous sources giving rise to the "informed interpretation rule".

Piers categorises external material which the courts can refer to into two categories –

(i) Parliamentary and executive materials

(ii) Statutory and judicial materials and the International Treatise

The following is a rough list of the type of external materials which may be resorted to be courts for the interpretation of statutes –

(i) Hansards

- In English law, the exclusionary rule was an exception to the informed interpretation rule whereby the use of Hansards in interpretation was limited. The exclusionary rule was notably relaxed in the landmark case of *Pepper v Hart*, thus allowing for Hansard (the official record of Parliamentary debates) to be consulted by judges seeking to discern the purpose or intent of the relevant legislation.
- Wilkinson set out three points to be considered prior to permitting the use of Parliamentary material –
    i. There must be an ambiguity or absurdity in the language sought to be interpreted
    ii. Parliamentary material sought to be consulted must disclose the mischief or legislative intention
    iii. Material which is "clearly disclosed" is meant to be the Minister" s second reading speech which narrows down the ambit of the application of this approach
- The major concerns which have been raised by opponents of the use of Hansards as an aid to interpretation are

i. If Hansards are admissible in courts lawyers would feel obliged to consult it and this would increase legal costs ii. Reliability of what is said in Parliament is questionable

(ii) Discussion preceding the enactment of a statute

- *Gunakera v Ravi Karunanayake* – it is legitimate to make reference to the debate that preceded the Act in order to understand the intention of the legislature.

(iii) ***Explanatory Notes***

(iv) ***International Conventions or Treatise***

(v) ***Historical Background to the Statute***

- The court may consider whether the statute was intended to alter the law or to leave it exactly where it stood
- *AG Northern Ireland v Gallagher* – judges should have in mind the circumstances that existed when the law was enacted or the mischief that was sought to be remedied and used this information as an aid to construe

  the words used by Parliament. However judges can not encroach on the legislative function

(vi) Earlier or Subsequent Acts

(vii) Legal Dictionaries

(viii) Legal Text Books

(ix) Similar Statutes including definitions

Finality Clauses

Finality clauses (also known as preclusive clauses or ouster clauses) are provisions whereby the legislature seeks to exclude or oust the jurisdiction of the courts in regard to decisions made by a minister, a tribunal or any other public body or legal authority established by an Act of Parliament.

S. A. de Smith – "public authorities are set up to govern and if their every act or decision were to be reviewable on unrestricted grounds by an independent judicial body, the business of administration could be brought to a standstill."

Ouster clauses may take the form of words such as "shall not be questioned in any court of law by writ or otherwise" or a declaration that a "decision is final and conclusive".

However, in Sri Lanka and elsewhere, it can be observed that the courts have disregarded such ouster clauses in varying measures by providing access to courts.

IO Section 22 - Where there appears in any enactment, whether passed or made before or after the commencement of the IO, the expression "shall not be called in question in any court" or any other expression of similar import whether or not accompanied by the words "whether by way of writ or otherwise" in relation to any order, decision, determination, direction or finding

which any person, authority or tribunal is empowered to make or issue under such enactment, no court shall, in any proceedings and upon any ground whatsoever, have jurisdiction to pronounce upon the validity or legality of such order, decision, determination, direction or finding, made or issued in the exercise or the apparent exercise of the power conferred on such person, authority or tribunal: Provided, however, that the proceeding provisions of this section shall not apply to the Court of Appeal in the exercise of its powers under Article 140 of the Constitution in respect of the following matters, and the following matters only, that is to say-

(a) where such order, decision, determination, direction or finding is ex facie not within the power conferred on such person, authority or tribunal making or issuing such order, decision, determination, direction or finding; and

(b) where such person, authority or tribunal upon whom the power to make or issue such order, decision, determination, direction or finding is conferred, is bound to conform to the rules of natural justice, or where the compliance with any mandatory provisions of any law is a condition precedent to the making or issuing of any such order, decision, determination, direction or finding, and the Court of Appeal is satisfied that there has been no conformity with such rules of natural justice or no compliance with such mandatory provisions of such law:

Provided further that the preceding provisions of this section shall not apply to the Court of Appeal in the exercise of its powers under Article 141 of the Constitution to issue mandates in the nature of writs of habeas corpus.

The above provision laid down in the Section 22 of the Interpretation Ordinance has been followed in:

- *Weerarathne vs. Percy Colin Thome*
- *Fernando vs. Illukkumbura*
- *Withannarachchi vs. Gunawardena*

However, it can be seen in *Peter Athapaththu vs. Peoples Bank* that the Supreme Court have provided access to the court by interpreting the ouster clause without referring to Section 22 of the Interpretation Ordinance.

Another point of importance is that Commonwealth countries, including Sri Lanka, constitutional ouster clauses are more strictly compared with other statutory ouster clauses.

- *Shirani Bandaranayake Case*
- *Aubrey Norton Case*
- *Lestrade vs. The Speaker of the House Assembly*

The decision of *Anisminic Ltd. vs. Foreign Compensation Commission* on ouster clauses too is important in this regard.

Judicial Review of Legislation

The law relating to judicial review of legislation involves the review of the legal validity of legislation enacted by Parliaments. Judicial Review is possible under two broad circumstances –

(i) When the courts review decisions of administrative or public bodies where the courts" jurisdiction is invoked by seeking a prerogative writ
(ii) When the courts" jurisdiction is invoked to question the "legality" or "validity" of an Act of Parliament predominantly on the ground that the Act is inconsistent with any provision in the Constitution.

G. L. Peiris – under the present Constitution of Sri Lanka, it is possible to challenge a Bill before it becomes law in a constitutional court on the ground that it violates the constitution. Once t becomes law, it is no longer open to challenge. Therefore, judicial review in this sense is "the practice of courts to scrutinise legislation in order to determine whether it conflicts or is inconsistent with the Constitution.

Presumptions

A presumption is a conclusion or inference as to the truth of some fact in question drawn from other fact proved and admitted to be true. However presumptions in the context of interpretation of statutes can be considered as guidance which arises out of the nature or legislation as to the prima facie intention of the legislature.

(1) All legislation is presumed not to have extra territorial application

(2) Legislation is presumed not to violate rules of international law

Ex- AG vs Theo (Australia)

Forthegill vs Monarch Airlines (UK) per Denning, MR.

- Where an Act is ambiguous which purports to give effect to an international convention, the courts will adopt an interpretation which will best facilitate the operation of the convention.
- Where an Act is clear, the courts must give effect to the Act even if it is inconsistent with the established International Law

(3) A State is presumed not to be bound by its statutes

(4) Presumption against ousting established jurisdiction. It is a rebuttable presumption.

Ex – *Anisminic Ltd. vs Foreign Compensation Tribunal (1968)*

Shirani Bandaranayake's Case (2013)

- There is a strong argument against construing a statute so as to oust or restrict the jurisdiction of superior courts

(5) Presumption against intending what is harsh, unjust or unreasonable

- In a 1966 decided English case it was stated that "an intention to produce an unreasonable result is not to be imputed into a statute if there is some other construction available. Further it is to be presumed where two constructions are available, the most reasonable construction is presumed to be accepted by the courts"

(6) Presumption against absurdity

(7) Presumption against retrospectivity.
Ex: Sepala Ekanayake vs. AG

(8) Statutes are presumed to be valid

- Courts will presume that the particular statute was intra vires

(9) Words are to be interpreted in their ordinary sense unless the words are technical

(10) Presumption in favour of preserving vested rights

- There is a presumption of taking away of vested rights by fresh legislation and a construction which involves the taking away of vested rights ought not to be adopted if the words of the enactment are open to any other construction.
- Every statute which takes away or impairs vested rights or creates new obligations must be presumed not to have retrospective effect – this applies to substantive rights but also to rights of action and rights of appeal which are both vested rights

Maxims Used in Interpretation

A maxim is an attempt to capture an essential principle of law. Devnish states that maxims are not rules of interpretation but useful devices in that they indicate for particular types of verbal difficulty one permissible solution which may be applied. Maxims also identify recurring types of ambiguity.

(1) An act of God causes legal injury to no one
(2) Generalia specialibus non derogant (the provisions of a general statute must yield to those of a special one)
(3) Audi alteram partem (or audiatur et altera pars) is a Latin phrase that means "listen to the other side", or "let the other side be heard as well". It is the principle that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them.
(4) No one should be a judge in his own course (the rule against bias)
(5) A person alleging his own wrongdoing is not to be heard

(6) Good faith does not suffer the same thing to exact twice – whenever the literal meaning of a statute would lead to the infliction of the same detriment twice, the maxim may be applied to avoid the situation e.g. doctrine of res judicata

(7) The law does not punish a person for not doing something which they lack the power to do

(8) Necessity knows no law (doctrine of necessity)

(9) No one should be allowed to profit from his own wring (public policy principle)

(10) All things are presumed to be correctly and solemnly done – establishes the presumption that Acts are properly enacted or that subsidiary legislation is correctly made.