Different Styles of Statutory Expression

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In writing about lawyer's language, Matson[1] deplores the drafting of section 96 of the Income Tax Act 1976, which, taken randomly, he describes as a typical provision:

> (2) Where—
>
> (a) Any person transfers (otherwise than by will) the right to any income to any other person for a period that is less than the prescribed period; and
>
> (b) In any case where the right so transferred ... is a right arising from the ownership by the transferor of property, the transferor remains the owner of that property, or, where the ownership of the property is transferred, the transfer provides—
>
> (i) That the property shall revert to the transferor or to a relative of the transferor or to a company in which the transferor or a relative of the transferor is a shareholder, or, where the transferor is a company, shall revert to the company or to a shareholder or a relative of a shareholder in the company; or
>
> (ii) That the right to dispose or direct or control the disposition of the property shall be reserved to the transferor or to a relative of the transferor or to a company in which the transferor or a relative of the transferor is a shareholder, or, where the transferor is a company, shall be reserved to the company or to a shareholder or relative of a shareholder in the company, —
>
> that income shall be deemed to be income derived by the transferor and by no other person as if the transfer had not been made.

It is doubtful whether any taxing statute should be considered as containing typical provisions, although it is important for the rest of this paper to recognise that this provision is typical of taxing statutes. Matson would redraft it as follows:

> (2) If you transfer the right to any income to somebody else for a period that is less than the prescribed period the income will be treated as your income alone, in the following cases:
>
> (a) If the right to the income arises from owning property and you remain the owner of it.
>
> (b) If you transfer the ownership of the property but the transfer provides that it will revert to you or to a person connected to you. (The meaning of a "person connected to you" is given below.)
>
> (c) If you reserve for yourself or a person connected to you the right to dispose of the property, or to control the disposition of it.

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1 J N Matson, "Lawyer's Language" [1990] Canterbury LR 302, 331

> This subsection applies to transfers made by companies as well as those made by human beings, but it does not apply to transfers made by will.
>
> A "person connected to you" means a relative of yours, or a company in which you or a relative are a shareholder. If the person who transfers the right to income is a company, it means a shareholder or a relative of a shareholder in the company. ("Relative" is defined in section 2.)

We shall return to Matson's critique of these provisions later in this paper. What we wish to draw attention to from the outset is that each draft represents vastly different styles of drafting. To substitute the redrafted provision for the original in its principal Act would be like transplanting sixteen bars of Shostakovich into a Bach oratorio or a Beethoven symphony—never mind the risk that the transplant is merely by Andrew Lloyd Webber or Jerome Kern.

There is more to the issue than a matter of style. The music of Shostakovich differs from Bach, just as Bach differs from Beethoven, not just in style but in syntax. The same goes for drafting statutes: there are as many different styles of legislative drafting as there are of musical composition, but because the style, syntax and substance of statute law are all intimately related, the question is how to choose the right style not just for the Statute Book as a whole but for each particular provision of the Statute Book. This paper attempts to analyse the process. It does so by conforming to what is legally required of the statute user. Construing, as distinct from interpreting, a statute requires clear standards of grammatical construction mutually understood and applied by both draftsman and statute user. "The rule of law upon the construction of all statutes is to construe them according to the plain, literal and grammatical meaning of the words"[2] It is "the grammatical and ordinary sense of the words [that] is to be adhered to".[3]

It is usual to distinguish the syntax of any statutory provision from its drafting style. Thus Bowers[4] devotes 104 pages to syntax, but only 27 pages to style; and Ward, whose presumably oral comments for New Zealand statutes are quoted by Chan[5], allows a very individual approach to style which would be very different from the grammatical requirements of syntax. This makes drafting style a matter of personal preference as distinct from the more objective standards of propriety for syntax. The thesis of this paper is that one's choice of syntax has a very real input into one's drafting style; that one's drafting style in turn affects one's choice of syntax; that the combined effect of style on syntax and syntax on style has an outcome for the Statute Book; and that objectively impersonal standards of style result from the appropriate choice of syntax to express any statutory provision.

As a matter of comparative law, there is no difficulty in distinguishing between the different styles of expressing legislation, say in Russia, France, Germany and Britain. Indeed the differences of language, culture, and legal system between

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2 *Alderson B. Attn Gen* v *Lockwood* (1842) M & W 378, 398

3 *Grey* v *Pearson* (1856) 6 HLC 61, 10 ER

4 Frederick Bowers *Linguistic Aspects of Legislative Expression* (Vancouver 1989)

5 T.Y. Chan "Changes in Form of New Zealand Statutes" [1975] 8 Victoria University of Wellington LR 318, 331

these jurisdictions are such that it would be naive to equate their different styles of legislative expression. Even as between English language jurisdictions, the diversity of style is extreme—as in the case of Canada from the United States, India from England, New South Wales from Tasmania or Hong Kong from New Zealand. Instead of contrasting international styles—which are all too obvious no matter how often legislators overlook them in making legal transplants—this paper deals only with issues of domestic concern. Every example is chosen from our own Statute Book. The aim is to concentrate attention on some of the many different, originally exotic but now indigenous styles of statutory expression employed within New Zealand.

When equally valid but different styles of legislative expression are overlooked, there are certain consequences for statutory interpretation. The obvious dilemma is that which arises from construing a provision drafted in a continental style according to common law expectations. This problem reaches national proportions with our Treaty of Waitangi. Those who oppose common law traditions would argue that it becomes less and less of a problem the more we legislate in a continental way. This explains much of our 'new-look' legislation. Because this continental trend frustrates the common lawyer by tranferring tension from the legislature to other branches of the legal system, however, it is worth looking at what can happen. First, in keeping with the common law tradition there is likely to be a rise in litigation. As the change from common law to continental drafting gains momentum, this rise in litigation resulting from more open-textured legislation swings the balance of constitutional power, first from the legislature to the judiciary in terms of decisive interpretation, and finally to the executive in terms of positive enforcement. Jurisprudence confirms what has always been antithetical to the common law, that European legal systems, whether in France, Italy or Russia, rely more on an efficacious executive than on an innovative legislature or an independent judiciary for their operation. Be that as it may, this paper is not aimed at arguing the constitutional or jurisprudential implications of our change from common law to continental styled legislation so much as trying to identify, isolate, and as neutrally as possible describe the various styles of legislative expression which we as often overlook because we habituate ourselves to their employment. We shall deal first with some of the different common law forms of statutory expression because these forms, as distinct from continental forms, constitute the context of law traditionally associated with our Statute Book.

I Categories of Sentence Construction in Statutory Composition

Apart from titles, marginal notes, and headings, legislative prose presumes the single sentence to be the smallest unit of literary expression. The rules of propriety presumed by this endeavour are those, in our own language, of English grammar. Accordingly, the smallest unit of legislative expression can be classified in terms of its grammatical construction first, as being either a *simple*, *compound* or *complex* sentence, and secondly, as being either a *loose* or *periodic* sentence. In choosing either a simple, compound, or complex sentenced construction, parliamentary counsel rely on different forms and positions of the English verb as appropriate for the legislative task. In choosing either a loose or periodic

sentence construction, parliamentary counsel either rely on or renounce the principle of suspense to secure the requisite legislative effect.

For the purposes of this paper it is more profitable to take grammatical examples from our own Statute Book than from literature at large. Occasional exceptions, footnoted from the literature of Jane Austen, Walter Scott or J R R Tolkien, will allow for contrast and avoid our reliance on legislative expression being taken to extreme.[6] Some standard work on English composition such as *Nesfield's Grammar*[7] will not only provide the reader with general examples, but account for the way in which the principle of suspense works in English composition. A strong feeling for this principle is presumed for anyone in moving from ordinary to legislative composition. Likewise, we shall concentrate only on the gross morphology of sentence construction, reserving for some later examination the ways in which parenthetic inclusion, verbal extension, nominal enlargement, and different degrees of subordination work in statute drafting. This restriction will keep a bold front on the exposition, and give a clear outline to the topic of stylistic differences in statutory expression. To ease the analysis for readers less familiar with English grammar, finite verbs (including auxiliaries) ***are rendered*** in bold print throughout the statutory text *to distinguish* them from other verbs (being gerunds and participles) *appearing* in italics. Pivotal conjunctions between co-ordinate OR collateral clauses of compound constructions are rendered in capitals. This typographical highlighting is restricted to principal as distinct from subordinate clauses, the further highlighting of which would only cause confusion.

1 The simple statutory sentence

Section 6 of the Department of Justice (Restructuring) Act 1995 provides as follows:

> 6. **Abolition of Department of Justice**—(1) The Department of Justice **is** hereby **abolished.**

At first sight, nothing could be simpler! Short simple-sentenced construction affords strong stylistic support for any provision's substantive content. The risk is that this style diverts the draftsman and seduces the statute user away from critical semantic and syntactic issues. In the present context we shall ask whether this example can be further simplified. One way seems obvious — by deleting the word 'hereby'. This word serves as an adverbial modifier conveying a sense of immediacy. Removing it would eliminate all verbal extension—but at the expense of that immediacy. As we have restricted stylistic discussion to the gross morphology of the Statute Book, we shall avoid debating what the proponents

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6 It will be recalled that Macauley incorporated Shakespeare's plays into the Indian Penal Code, and by defining degrees of murder by reference to *Macbeth*, began a tradition of expository drafting continued still today.

7 J C Nesfield, *Manual of English Grammar and Composition* (London 1898, 1905)

of plain language would dismiss as a noise word but which we would retain as a modal extension of the present indicative. Retaining 'hereby' as a modal extension is substantiated by the fact that omitting the modifier makes the provision far less sensational as an instrument of reform. Law reform often resorts to the shock tactics of the simple sentence (as required by the substantive content of the reform). Instead, we shall be content to classify this provision as a paradigm of simple sentenced construction for the Statute Book.

Section 36(1) of the International War Crimes Tribunals Act 1995 provides a slightly more complicated example of the simple sentence:

> **36. Tribunal sittings in New Zealand**—(1) A Tribunal **may sit** in New Zealand for the purpose of *performing* its functions.

The linguistic transparency sought by plain language drafters often poses problems for substantive content. In being so transparent to the point of stating the obvious, a provision casts doubt on something else which would have been just as obvious, but now is no longer so as a result of being left unstated. What a tribunal may do, when voiced in terms of express provisions, itself raises doubts about what else a tribunal may do by implication. May a tribunal sit elsewhere in New Zealand for any other purpose than performing its functions? If not, then why is sitting in New Zealand limited to the performance of its functions? If a tribunal has not been exercising its functions, can it be said to be sitting in New Zealand? In the abstract, this argument can be dismissed as sophistical; but it is not until concrete facts prove stranger than fiction—when hard cases make for hard law—that philosophy establishes its credentials.[8] This point will become clearer and the issue minimised by redrafting the provision in periodic as opposed to loose sentence construction. There are two ways of doing this, either —

> For the purpose of exercising its functions, a Tribunal may sit in New Zealand.
>
> or -
>
> A Tribunal may, for the purpose of exercising its functions, sit in New Zealand.

By removing "for the purpose of exercising its functions" from the end to the beginning, or to midway through the sentence, is to emphasise the provision as an enabling rather than a restrictive one. As the provision stands it must be

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[8] The question then becomes one of deciding whether section 36(1) is permissive or empowering, declaratory or innovative, restrictive or enlarging. Of course these and other substantive issues raised by a simple-sentenced construction are often answered by the rest of the Act. Indeed, those who are familiar with the statutory context of the International War Crimes Tribunals Act 1995 from which this simple provison is excised may find this line of questioning ridiculous. What we point out here, is merely that when we give full marks for clarity, brevity and simplicity of expression in one area of law we are often throwing a shadow over and increasing the complexity of explaining another. In other words, if I rule 'no dogs allowed', does that permit lions and tigers?

construed as a restrictive one, and the draftsman will be justified in his choice of loose construction only if that restriction be intended.

The spurious simplicity of simple-sentenced construction arises more particularly with legislating for international conventions.[9] These are situations where sovereignty is ceded beyond one's own jurisdiction, where several other legal systems may be involved, and where the complexities, as in the case of authorising a tribunal's functions, are ultimately an extraterritorial matter. This creates an area of continental jurisprudence in which ambiguity is cherished.[10] The outcome tells not so much against the common law draftsman being pressured by the terms of the treaty but against the proponents of a plain language for legislation which foregoes substantive precision for rhetorical simplicity.

Aside from treaty negotiations the spurious simplicity of simple-sentenced construction also provides a tempting cutting edge for purpose and objects clauses of increasingly continental styled legislation.[11] Even when reduced to the simplest form of syntax, however, this sentence structure may be endowed with the deepest semantic significance and the widest breadth of meaning. The resulting semantic overload of continental simple-sentenced construction is dealt with later in this paper, but it is vital to see at the outset that simple syntax can be used to skate over the surface of complex semantic issues in ways that would be anathema to the common law. "Jesus wept"[12] is the shortest, simplest sentence in the Bible—yet many thousands of sermons have been preached as to its different meanings. Section 5(1) of the Resource Management Act 1991 is eight times longer—yet in providing that "the purpose of this Act is to promote the sustainable management of natural and physical resources" the expression "sustainable management" is not likely to be clearer than God's word that "Jesus wept".

The common law convention is to downplay semantic issues by concentrating on adjectival rather than substantive law. Dull by continental standards, section 3(2) of the Department of Justice (Restructuring) Act 1995 provides as follows:

> (2) The Minister **may** from time to time, for the purpose of *providing* guidance in relation to the provisions of any document or for any class of documents, **make** a statement *indicating* the identity of a responsible Minister or of a responsible department.

This second example of simple-sentenced statutory construction is complicated by the way in which an auxiliary and principal verb make up the finite verb. The construction is also complicated by the presence of two other, non-finite

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9 See *Federal Steam Navigation Co Ltd* v *Department of Trade & Industry* [1974] 1 All ER 97; B M Dickens, "Law Making and Enforcement - A Case Study" [1974] Modern LR 297; M A Brown, "Enforcement of Oil Pollution Legislation" [1976] Modern LR 162.

10 R Plender "In Praise of Ambiguity" [1983] European LR 313, 314 in which "the ambiguity of plain speech is merely the price paid for widespread if imprecise intelligibility".

11 S D Upton "Purpose and Principle in the Resource Management Act" Stace Hammond Grace Lecture, University of Waikato 26 May 1995

12 John 11:35: *cf* Ephesians 1:1-14 as one of the longest

verbs. These are the gerundive and participle forms, *providing* and *indicating*. The presence of parenthetic material inserted between the auxilliary and principal components of the sole finite verb, together with extended verbal and nominal phrases also complicate the construction.

It is worthwhile noting that this added complexity of structure does not detract from the straightforwardness of the continuing simple-sentenced construction. This is accounted for by the delicate balance and euphony of the provision, in which the postponement of the comma from after *may* to after *time* plays an important part. It is not just the look, but the sound of the simple sentence (including the rhythm of the syllables) that contributes to the forcefulness of its extended usage in statutory prose.

For the purposes of legislative expression it is a mistake to equate the so-called simple-sentence with brevity of discourse any more than with substantive simplicity. The simple-sentence can be of any length whatsoever. Section 7 of the Resource Management Act 1991 makes this clear.

> **7. Other matters**—In *achieving* the purpose of this Act, all persons *exercising* functions and powers under it, in relation to *managing* the use, development, and protection of natural and physical resources, **shall have** particular **regard** to—
>
> (a) Kaitiakitanga:
>
> (b) The efficient use and development of natural and physical resources:
>
> (c) The maintenance and enhancement of amenity values:
>
> (d) Intrinsic values of ecosystems:
>
> (e) Recognition and protection of the heritage values of sites, buildings, places, or areas:
>
> (f) Maintenance and enhancement of the quality of the environment:
>
> (g) Any finite characteristics of natural and physical resources:
>
> (h) The protection of the habitat of trout and salmon.

Section 7 of the Resource Management Act is also a typical example of simple syntax associated with sophisticated semantics. An unfortunate conflict between law and politics occurs when simple syntax diverts attention away from abstruse semantics. As a political ploy the syntactic simplicity of the simple sentence can operate as a cover up for semantic complexity. In this use of linguistic style to subvert law by politics the strict syntactic drumbeat of each itemised paragraph operates to hide the deep-seated but ongoing syncopation of semantic issues. It is a real giveaway that in most such cases what is being done is expressly downplayed. In this case the semantic difficulties are literally marginalised by describing the section as relating to "other matters".

2 *The compound statutory sentence*

Compared with simple and complex sentences, compound sentences are rarely encountered in statute drafting. The reason for this is that most non-simple sentences express some kind of subordination. Take section 5(j) of the Acts Interpretation Act 1924 for example. On first sight it is a compound sentence of

two co-ordinate principal clauses joined by the cumulative conjunction "and".

> (j) Every Act, and every provision or enactment thereof, **shall be deemed** remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, AND **shall** accordingly **receive** such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit:

The two apparently co-ordinate clauses are first, "Every Act shall be deemed remedial ..."; and secondly "Every Act shall receive such fair, large, and liberal construction ... as will best attain its object ...."

What stands in the way of this classification, however, is the one word "accordingly". By virtue of this adverb the second clause is not coordinate but subordinate to the first. One could argue grammatically in favour of "accordingly" being an illative conjunction. The better view is to see that a "fair, large, and liberal construction" is subordinated to every Act being deemed remedial. Any attempt to subdivide section 5(j) into two subparagraphs would therefore be mistaken. The test for a compound sentence in English grammar is the presence of two or more co-ordinate or collateral clauses. For the purposes of statute drafting we can always recognise a compound sentence by the syntactic opportunity it presents for redrafting the original provision into separate sentences. This opportunity does not exist in the case of section 5(j).

One reason for the increasing rarity of compound sentence construction in today's statutory prose is the pressure on parliamentary counsel to employ simple rather than extended sentences wherever possible. Section 15 of the Constitution Act 1986 provides an example

> **15. Power of Parliament to make laws**—(1)The Parliament of New Zealand **continues** to have full power to make laws.
>
> (2) No Act of the Parliament of the United Kingdom *passed* after the commencement of this Act **shall extend** to New Zealand as part of its law.

Were section 5(j) to be re-drafted today it would be likely that the subtle nuance of subordination revealed by the adverb "accordingly" would be dropped in favour of the disparate construction of section 15 of the Constitution Act. Possibly this simplistic solution is justified by the increasing inability of statute users to explore and discover the subtle nuances of diffferent linguistic constructions. It also saves the draftsman time in working out intricate relationships. The dynamics of statute drafting has moved from an earlier extreme of prolixity to a present extreme brevity. Would the separate sentences from section 15 of the Constitution Act 1986 once have been conjoined together as one compound sentence of co-ordinate or collateral clauses? Indeed, one wonders, as section 15 now makes both sentences appear as separate subsections of the same section, what the intended but unexpressed relationship ought to be between them and

whether there would be any difference were these subsections of the same section expressed as separate sections.

The continuing format of compound construction can still be found routinely in interpretation and appointment clauses. Section 692A of the Local Government Act 1974 provides an example of compound construction with collateral[13] rather than coordinate clauses. In this type of compound construction, no conjunctions are used:

> **692A. Interpetation**—In this Part of this Act, unless the context otherwise **requires**,—
>
> "Commissioner" **means** a Commissioner for Disaster Recovery appointed under section 692B of this Act:
>
> "Deputy Commissioner" **means** a Deputy Commissioner appointed under section 692C of this Act.

The standard form of definition in which the definiendum of any term is expressed both "to mean" and "include" is also statutory common form; as for the definition of "Commonwealth" in the Companies Act 1955:

> "Commonwealth" **means** the British Commonwealth of Nations; and **includes** every territory for whose international relations the Government of any country of the Commonwealth is responsible:

Sometimes the straightforwardness of the conjunction in more substantive provisions is fudged by prescriptive words which tend to subordinate one or more of the coordinate clauses. The adjective "such" has this result in section 12 of the Constitution Act 1986:

> **12. Election of Speaker**—The House of Representatives **shall**, at its first meeting after any vacancy occurs in the office of Speaker, **choose** one of its members as its Speaker, AND every such choice **shall be** effective on being confirmed by the Governor-General.

Avoiding the prescriptive force of such[14] noise words as "hereinafter" "aforesaid" and "such" can help to clear away the inherent insecurity of statutory prose. It can also enable a clearer distinction to be drawn between compound and complex sentences, and encourage a further division into simple sentences, should that be the ongoing direction of travel in statutory prose. It will be obvious, however, that cleaning up unfashionable styles of legislative prose is not as mechanical a process as the proponents of plain language propose—brevity of

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13 *Cf* "The way was long; the wind was cold; the minstrel was infirm and old; / The harp, his sole remaining joy, / Was carried by an orphan boy." Sir Walter Scott, *The Lay of the Last Minstrel*

14 Readers will recognise this as being an extensive instead of an intensive, and thus a different use of 'such'.

legislative expression more than often gives rise to prolixity of argument in court.

Section 692B(2) and (3) of the Local Government Act 1974 provide fairly straightforward examples of compound construction:

> (2) The Commissioner **shall hold** office for such term, not exceeding 3 months, as shall be specified in the Order in Council by which he is apointed, AND **may** from time to time **be reappointed.**
>
> (3) Any Commissioner **may** at any time **be removed** from office by the Governor-General for disability, bankruptcy, neglect of duty, or misconduct proved to the satisfaction of the Governor-General, OR **may** at any time **resign** his office by writing addressed to the Minister.

Despite this straightforward format we may still ask of subsection (3) whether it is appropriate to have the concept of resignation so closely associated with removal from office? A Commissioner resigning by reason of ill-health might well think not: here is a compound construction fit at least for paragraphing if not for separate subsections. Section 56(2) of the Smoke Free Environments Act 1990 provides a more complicated example of compound construction. This instance is valuable in demonstrating the way in which paragraphing can simplify the syntax of compound construction:

> (2) Every person or organisation that applies to the Council for the provision of sponsorship and that satisfies the Council that he or she or it is a person to whom or an organisation to which this section applies,—
>
> (a) **Shall be entitled** to have made available to that person or organisation, by the Council, not less than the amount of sponsorship that the Council is satisfied is equivalent to the amount or value of the future financial or other assistance referred to in subsection 1(b) of this section which that person or organisation reasonably expected to receive, and which that person or organisation is unable to obtain from some other source, during the period of 2 years immediately following—
>
> (i) The date on which that person or organisation ceases to receive the financial or other assistance referred to in subsection (1)(a) of this section; or
>
> (ii) The 30th day of June 1995,—
>
> whichever occurs first; AND
>
> (b) **Shall**, unless the Council considers that there is good reason not to do so, be entitled to have made available to that person or organisation, by the Council, not less than the amount of sponsorship that the Council is satisfied is equivalent to the amount or value of the future financial or other assistance referred to in subsection (1)(b) of this section which that person or organisation reasonably expected to receive, and which that person or organisation is unable to obtain from some other source, during the period of one year immediately following the period of 2 years referred to in paragraph (a) of this subsection.

The reduced readability of such construction is often deplored for its cumbersome prolixity. There are doubtless many different ways of redrafting this provision to reduce its prolixity but the addition of "he, she or it" (instead of

relying on the masculine to import the feminine gender) does little to facilitate direct drafting. In any case, readability depends on whether the statute user knows what to look for by way of grammatical construction, and where to find the substance in the accustomed format of legislative expression. However much some may dislike the style and abhor the incorporation of so much parenthetic material, this provision is readily readable by those qualified to read statutes.

3 The complex statutory sentence

As befits the cardinal rule of statutory interpretation, section 5(j) of the Acts Interpretation Act 1924 also provides the cardinal example of one of the most frequent of common law sentence constructions. This is the complex sentence construction. Superficially section 5(j) appears to be an instance of compound sentence construction. The section appears to have two conjoined principal clauses rather than having its second clause subordinated to its first and only principle clause. All the consequences of interpretation attendant on a compound construction, have already been rejected by correctly construing the word "accordingly". It would be revealing to consider the compound reconstruction of section 5(j), had the legislature not intended to make the "fair, large, and liberal" interpretation subservient to the "remedial" principle:

> (j) Every Act, and every provision or enactment therof **shall**—
>
> (i) **Be deemed** remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good; AND
>
> (ii) **Receive** such fair, large, and liberal construction and intepretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true, intent, meaning, and spirit:

There are proponents of the plain language movement who will claim this compound construction as a vast improvement on the complex construction, but let them first accept that this legislative form means something vastly different from that enacted.

Section 54C(1) of the Judicature act 1908 (as inserted by section 5 of the Judicature Amendment Act 1985 (No 2)) exemplifies a less clear instance of complex sentence construction. In this case the principal clause first encountered in the section is logically subordinated by, or grammatically made to depend on the adverbial phrase "so far as". The resulting mode of dependence is one of extent.

> **54C. Procedure in respect of *habeas corpus***—(1) The practice, pleading, and procedure in the High Court on an application for a writ of habeas corpus **shall be** the same as in England SO FAR AS the English practice, pleading, and procedure **are** applicable to New Zealand and consistent with any other rules of the High Court and with the laws of New Zealand.

Section 295 of the Resource Mangement Act 1991 substitutes condition for extent in taking a complex construction:

> **295. Planning Tribunal decisions are final**—A decision of the Planning Tribunal under this Act, or another Act, or regulation, on any matter other than an inquiry, **is** final UNLESS *it* ***is*** *reheard* under section 294 or *appealed* under section 299.

This construction pivots on the use of "unless" which operates as a subordinative conjunction of condition. There is a sense of anti-climax conveyed by the subordinate clause which takes away from the finality secured by the principal clause. From the rhetorical point of view, the decision is final—unless it is not final. It will be seen that this rhetorical shortcoming can be repaired by reconstruction within a simple sentenced framework by providing that—

> Unless *reheard* under section 294 or appealed under section 299, and apart from all decisions made on matters of enquiry, every decision of the Planning Tribunal under this or another Act or regulation **shall be** final.

A reconstruction within a compound sentenced format is also possible, and more in keeping with retaining the present indicative verb of the original; but in the author's opinion the present indicative is legislatively inappropriate. That which "is" lacks the correlative legal duty of "shall". Bearing in mind how far courts have gone in construing the mandatory "shall" to mean the permissive "may",[15] it is legislatively unwise to encourage courts to drive a horse and carriage through the present indicative, for given the right circumstances, the courts can correctly say, '"is" does not mean "shall"'

The same point of implicative command inappropriately appears in section 16 of the Resource Mangement Act 1991. This time an explicit duty expressed by the marginal note relies only on the implied intention[16] conveyed by the substantive text:

> **16. Duty to avoid unreasonable noise**—(1) Every occupier of land (*including* any premises and any coastal marine area), and every person *carrying* out an activity in, on, or under a water body or the coastal marine area, **shall adopt** the best practicable option *to ensure* that the emission of noise from that land or water **does** not exceed a reasonable level.

Much of the difficulty in construing this provision arises from ellipsis. The result is an extremely truncated and telescoped provision in which the specific steps required to discharge the duty are difficult to ascertain. In this instance it

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15 J Evans, "Mandatory and directory rules" (1981) Legal Studies 227. B Russell, "Shall, Must, May: The Logic of Legal Obligation and Permission" [1994] Alberta LR 93

16 The impasse between legislature and judiciary over the mandatory or permissive meaning of "shall" arises from confusing the Old English *sceal* (shall) meaning "I must" or "I owe" with its modern auxillary usage to express future time.

is only the superlative form of the adjective, "best", that hints at subordination between clauses sufficient to support a complex construction.

The last example of a complex sentence construction is section 16 of the Criminal Justice Act 1985. This is one in which complex construction is abused as an instrument of confusion:

> **16. Offender may call witness as to cultural and family background**—(1) Where any offender appears before any court for sentence, the offender may request the court to hear any person called by the offender to speak to any of the matters specified in subsection (2) of this section; AND the court shall hear that person UNLESS it is satisfied that, because the penalty that may be imposed is fixed by law or for any other special reason, it would not be of assistance to hear that person.
>
> (2) The matters to which a person may be called to speak under subsection (1) of this section are, broadly, the ethnic or cultural background of the offender, the way in which that background may relate to the commission of the offence, and the positive effects that background may have in helping to avoid further offending.

The first point to make is that apart from considerations of length, subsections (1) and (2) could be incorporated within the same provision. The second is that although the strict grammatical form of subsection (1) based on the conjunction AND is that of compound-sentenced construction, the semantic entailment of the condition relating to the satisfaction of the court, based on UNLESS, has the effect of subordinating the syntax to that of complex construction. At the outset, giving an offender the right to call a witness would be backed by the duty of the court to hear the witness. In this most metaphysical sense the right to speak in court and the right to be heard in court are tautologous. Only one right need be expressed to imply the other. It would be jurisprudentially bizarre to create a right to call a witness who had no right to be heard, yet this provision attempts to walk — not so much a tightrope — but a slack wire hung between these reciprocal rights. If the legislator really meant to create the opportunity to call a witness, the tautology should be drafted as a compound conjunction of two principal clauses. Otherwise the tautology appears for what it is — a confused instance of Indian-giving with risks for similar areas of statute law where rights are presumed to have correlative relationships. In defence of the legislature, one might dispute abuse of process (by subverting a compound for a complex construction) by pointing to the creation of a severely restricted privilege. The legislature would do so, though, at the expense of the substantive content of the provision. This is left so confused that who can say apart from the discretion of the court as to why it would not be of assistance to call the witness?[17] Secondly,

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[17] You've got a right until you find out you haven't got a right, and you won't find out whether you've got a right until you get into court and the judge who takes your case decides there's no special reason to deprive you of that right. A worse example of "catch 22" legislation is described by Cosgrove J in *Browning* v *Barrett* (Sup Ct Tas) 9 Oct 1987 No 49/87 at p 8 (unreported) as "legislation from fantasy land [in which] the Government says '"I will give you a licence to fish but only in a way which will result in the taking of undersized fish. You will then be guilty of an offence and I will take your boat." But it says, "Don't worry, if you take such fish accidentally (which you

it operates at the emotional expense of those offenders whose requests to call witnesses have been refused. Since the evidence disallowed is of an ethnic, cultural or family nature, exercising the right of refusal built into the formula is bound to provoke ethnic, cultural and family mistrust. The opportunity will be taken a little later in this paper to overcome these criticisms by redrafting this loose-sentenced provision in periodic form.

4 The loose statutory sentence

Loose-sentenced construction occurs where the substantive content of any communication is allowed to hang over and trail behind the grammatical completeness of the communication. From a legal point of view, as every well-informed critic of the worst legislative proviso knows, this can be the tail that attempts to wag the dead dog, the exception that rescinds its own rule, the proviso that ridicules its own provision.[18]

Loose-sentenced construction has many virtues for different literary genres, but hardly any for legislative expression. Humour frequently relies on the gentle aside, the sudden anti-climax or the paradox of self-contradiction, but law-making is too serious for that. Likewise the relaxed flow of travelogue or the domesticity of diary notes may rewardingly employ loose, and even non-sentenced construction. But law-making is, as Helvetius[19] described, the highest form of human endeavour. Legislation looks to periodic construction not just for dignity,[20] but to make sure that, if the citizen is being given a right he will not be disappointed to find out by the end of the provision that he has much less than he was first led to believe. From this point of view, most modern arguments directed against the draftsman's use of the proviso are misdirected. There is nothing too much wrong with the proviso as a drafting form. On the other hand, there is everything against most instances of loose-sentenced construction that underlie the proviso. The anti-climax, self-contradictoriness, and ridiculousness attributable to definitions, savings clauses, and provisos are really the result of loose-sentenced construction. They have little to do with the format of the savings clause, the proviso, or the definition as such. Indeed, if loose-

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will not because we both know that you intend to take them) you will still be guilty but you will not incur any penalty of forfeiture if you return the fish to the water immediately." "Immediately after what" says the poor fisherman. "Ah" says the Government. "That's for you to find out."'

18 *Leveridge* v *Kennedy* [1962] NZLR 1

19 *De L'Espirit* (1758), *De L'Homme* (1773)

20 Jane Austen, a great reader of Gibbon, employed the same technique of raising the reader up to dignified heights as Gibbon had done, but then dropping the reader back into everyday reality with her own gentle irony. Cf "In addition to what has been already said of Catherine Morland's personal and mental endowments, when about to be launched into all the difficulties and dangers of a six weeks' residence in Bath, it may be stated, for the reader's more certain information, lest the following pages should otherwise fail of giving any idea of what her character is meant to be; that her heart was affectionate, her disposition cheerful and open, without conceit or affectation of any kind - her manners just removed from the awkwardness and shyness of a girl; her person pleasing, and, when in good looks, pretty - and her mind about as ignorant and uninformed as the female mind at seventeen usually is": *Northanger Abbey* ch 2

sentenced construction is being employed, it is legislatively better to clearly identify what you are subtracting from your first concept of the provision by way of proviso, definition, or savings clause than to telescope everything within the text.

As its name implies, the loose-sentenced construction conveys reproach. This reproach is keenly felt in statute law where a sentence that continues to convey information—sometimes critically important information — long after the sentence has completed its grammatical course of action gives rise at least to anti-climax if not to outright confusion. Catch 22 type legislation (previously considered in terms of section 16 of the Criminal Justice Act 1985) is almost always associated with loose-sentenced construction. At best, the anti-climax results unwittingly from this construction. At worst the resulting anti-climax relies on it — sometimes even consciously to cause confusion. Loose-sentenced construction is also encouraged by the journalistic convention of punchline prose. This exaggerates substantive at the expense of adjectival law, and makes more political as opposed to strictly legal copy. The aim of applying tabloid journalism[21] to legislative drafting is to express law with its fullest possible measure of political forcefulness. The politician expects the draftsman to provide a press headline, and to do so well upfront, even though the subsequent conditions which limit that headline are more legally significant than the headline. The immediate result is to politicise, but the ultimate result is to confuse the law. Compare the catch 22 situation of section 16 of the Criminal Justice Act 1985[22] as it appears in its loose-sentenced legislative form earlier in this paper with the following redraft:

> **16 Offender may request witness as to cultural and family background**—(1) This section applies to any offender appearing before any court for sentencing.
>
> (2) Unless the court is satisfied that, because the penalty that may be imposed is fixed by law or for any other special reason, it would not be of assistance to receive the evidence provided for by this section, the court shall hear any person called by the offender to speak to any of the matters specified in the evidence.
>
> (3) For the purposes of this section, evidence may be given of matters broadly relating to the ethnic or cultural background of any offender, the way in which that background may relate to the commission of the offence, and the positive effects that background may have in helping to avoid further offending.

The whole point of redrafting the provision is to get rid of the double dealing that can affect loose-sentenced construction. The legal limitations are dealt with first. These comprise the section's restricted application (dealt with now in subsection(1)) and the need to convince the court (subsection (2)) that the evidence would assist the sentencing. This has the effect of restricting the circumstances in which the right or privilege is given, rather than subsequently

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[21] According to Emerson, in his essay on *The American Scholar*, "it was the genius of Goldsmith, Burns, Cowper, and in a newer time, of Goethe, Wordsworth and Carlyle" that is responsible for what we call 'tabloid journalism'. "In contrast with their writing" continues Emerson, "the style of Pope, of Johnson, of Gibbon, looks cold and pedantic."

[22] *Supra* pp 362-363

taking back or restricting what is first extended. It should also be possible to simplify the definition of evidence by using paragraphs to provide for the matters contained in subsection (3), but this is another issue.

Section 295 of the Resource Management 1991 has already been considered [23] as giving rise to contrariness by way of its complex, instead of simple-sentenced construction. As with section 36(1) of the International War Crimes Tribunals Act 1995, the remedial redrafting[24] required periodic instead of loose-sentenced construction. The result is achieved not just by reducing the number of finite verbs and so reconstructing the complex as a simple sentence but by reversing the sequence of information.[25]

Section 30 of the Food Act 1981 (formerly section 31 of the Food and Drug Act 1969) provides a typical example of loose-sentenced legislation gone wrong in its drafting. It double-deals and trade-offs one concept against another, and compounds the resulting confusion with a complex syntax needed to re-integrate the separate subsections into which the section is divided:

> **30. Strict liability**—(1) In any prosecution for selling a food contrary to any provision of this Act or of any regulations made under this Act it shall not be necessary for the prosecution to prove that the defendant intended to commit an offence.
>
> (2) *SUBJECT TO SUBSECTION (3) OF THIS SECTION*, it shall be a good defence in any such prosecution if the defendant proves —
>
> (a) That he did not intend to commit an offence against this Act or any regulations made under this Act; and
>
> (b) That —
>
> (i) In any case where it is alleged that anything required by this Act or any regulations made this Act to be done to or with or in relation to the food was not done, he took all reasonable steps to ensure that it was done; or
>
> (ii) In any case where it is alleged that anything prohibited by this Act or any regulations made under this Act was done to or with or in relation to the food, that he took all reasonable steps to ensure that it was not done.
>
> (3)*EXCEPT AS PROVIDED IN SUBSECTION (4) OF THIS SECTION, SUBSECTION (2) OF THIS SECTION SHALL NOT APPLY* unless, within 7 days after the service of the summons, or within such further time as the Court may allow, the defendant has delivered to the prosecutor a written notice —
>
> (a) Stating that he intends to rely on *SUBSECTION (2) OF THIS SECTION*; and
>
> (b) Specifying the reasonable steps that he will claim to have taken.
>
> (4) In any such prosecution, evidence that the defendant took a step not specified

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[23] *Supra* p 362

[24] *Supra* pp 355-356

[25] *cf* "In a hole in the ground there lived a hobbit. Not a nasty, dirty wet hole, filled with the ends of worms and an oozy smell, nor yet a dry bare sandy hole with nothing in it to sit down on or to eat: it was a hobbit-hole, and that means comfort." JRR Tolkien, *The Hobbit* p1

> in the written *NOTICE REQUIRED BY SUBSECTION (3) OF THIS SECTION* shall not except with the leave of the Court, be admissible for the purpose of supporting a defence *UNDER SUBSECTION (2) OF THIS SECTION.*

Arguably, the above provision has nothing to do with strict liability, but everything to do with the balance of proof. One must have, in criticising the form of this section, every sympathy with the draftsman. His drafting errors are almost entirely the result of his responsiveness to earlier criticism. Called to account for long periodic sentences he now breaks these up into short subsections. Criticised for misuse of the proviso, he now contradicts the concept of "strict liability" by an equivalent subsection affording "a good defence". In other ways he graciously conforms to current expectations of communication. These require sensationalism which is achieved by giving the punchline first (subsection (1)) and a certain carnivalisation of language which, despite subsections (2) to (4), still subsumes the effect of the whole section as one of "strict liability" in favour of the consumer. Indeed, when one considers the strict liability[26] as it first originated in common law to protect the consumer, this section is really about reversing that liability rather than enforcing it. To further this sensationalism the draftsman demotes the traditionally rule-oriented adjectival emphasis of the common law to an inferior position (subsections (2) to (4) vis a vis its substantive content, and generally delivers information by way of an itemised account, (subsections (1) to (4)) rather than in one or two pieces of well-integrated and strongly sequentially written prose. In this way the draftsman relies on the tabloid technique of whittling down the sensationalism of the initial headline. The pity is that the fundamental issue of loose-sentenced construction underlying most of these problems is thereby ignored. The root cause of most current statute law deficiencies is thereby allowed to remain and proliferate.

One of the consequences of giving a data-filled itemised account (subsections (1) to (4)), rather than an intimately integrated and sequential record of the entire provision, is the remarkable give and take required to re-integrate the provision. The intense intellectual sparring required for this purpose has already been considered for less intricate provisions, in which, as already pointed out, the process of coming to grips with the whole provision is left in a matter-of-fact way for the reader. The outcome is experiential—and often completely at odds with the reader's first impressions. The outcome of carefully considering the present provision, for example, is that the strict liability first headlined and provided for by subsection (1), does not really exist but is contradicted by the process of making a good defence under subsections (2) to (4). This has the effect of reducing whatever is left of strict liability to mere balance of proof.

Another disadvantage of disintegrating sequentially written prose into separate subsections is the increased need for syntax. Breaking up one long single provision into several short provisions seems all very well until one is faced with finding and understanding the extra syntax by which to relate them. Thus subsection (2) of section 30 is "subject to subsection (3)," subjection (3) is enacted to apply "except as provided in subsection (4)", subsection (4) is

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[26] *Chapronière* v *Mason* (1905) 21 TLR 633

referentially related to subsections (2) and (3), and subsection (1), although not so expressed, is very much subject to every other subsection.

The effect of all this added syntax is to unroll what little is meant by the marginal note in its heading of strict liability. But in the true tradition of tabloid journalism each subsequent subsection adds nothing, but on the contrary significantly subtracts from what was previously a straightforward punchline. Sure, there is an ebb and flow of semantic significance, subtly orchestrated by the legal syntax of the section. For ease of identification, we have capitalised this syntax, but if one were to answer, in terms of the way in which that syntax works, whether the outcome were one of strict liability or not, how, other than by looking at the resultant case law, could one decide? It should also be noted that the conflict of syntax versus semantics in the section is compounded by the legislature taking sides. The semantic significance of strict liability is confused over the width of meaning attributable to the defendant proving "that he did not *intend* to commit an offence" and that "he took all *reasonable steps*" to ensure this. We are drawn to infer from this example that some statute law deficiencies are not remedied by the currently assumed keys to clarity. Insofar as many of these deficiencies result from loose-sentenced construction, they are compounded by attempts to remedy them that ignore the root cause.

5 The periodic statutory sentence

The grammatical period is the paradigm for common law legislative expression. This sentence construction developed during and coincided with the golden age of both English literature at large[27] and common law reform in particular. It is true that if a series of simple sentences will accomplish the legislative purpose for our own silver age of English, then from the point of view of clarity they are preferable; but the detailed specificity and accuracy expected of legislation by common lawyers, combined with their custodial role as conservators of common law traditions, still makes the periodic sentence a paradigm for legislation in a continuing common law context. In some ways this view is supported by the history of common law legislation which has always been prefaced by something—whether by petition, preamble, recitals, enacting formula or otherwise; and suppported by the classical theory of common law drafting which in Coode's[28] words requires that

> wherever the law is intended to operate only in certain circumstances, those circumstances should be invariably described BEFORE any other part of the enactment is expressed.

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[27] The time when Sir Charles Lyell in his *Principles of Geology* could still quote from Gibbon's *Decline and Fall* ". . . if the interval between two memorable eras could be instantly annihilated; if it were possible, after a momentary slumber of two hundred years, to display the new world to the eyes of a spectator who still retained a lively and recent impression of the old, his surprise and his reflections would furnish the pleasing subject of a philosophical romance."

[28] Coode on Legislative Expression, rep E.A. Driedger, *The Composition of Legislation* (Ottawa 1957) p 185.

As Coode[29] goes on to say —

> If this rule were observed, nine-tenths of the wretched provisoes, and after-limitations and qualifications with which the law is disfigured and confused, would be avoided, and no doubt could ever possibly arise, except through the bad choice of terms, as to the occasions in which the law applied, and those in which it did not.

What Coode describes is, in grammarians' terms, simply the principle of suspense. This principle operates quite the reverse of tabloid journalism. It employs the sequential argument of serious scholarship rather than the knockdown kingpunch of the tabloid headline. This makes sense. We are engaged in making rules of law, and not just creating cheap sensations. The principle works at least to preface the rule of law with its relevant case, conditions, and circumstances, and, if possible to postpone stating that rule of law until all these coincident functions have been accounted for as the only context in which the textual rule can operate. The paradigm for this mode of communication is the periodic sentence. If it befits section 5(j) of the Acts Interpretation Act 1924 (being our cardinal principle of statutory intepretation) to provide a paradigm for complex sentence construction so it befits our Aotearoan inheritance to have the first two dignified periods of our foundational Treaty of Waitangi 1840 constitute the paradigm for periodic sentence construction:

> HER MAJESTY VICTORIA, Queen of the United Kingdom of Great Britain and Ireland, regarding with Her Royal Favor the Native Chiefs and Tribes of New Zealand, and anxious to protect their just Rights and Property, and to secure to them the enjoyment of Peace and Good Order, has deemed it necessary, in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand, and the rapid extension of Emigration both from Europe and Australia which is still in progress, to constitute and appoint a functionary properly authorized to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands. Her Majesty, therefore, being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the Native population and to Her subjects, has been graciously pleased to empower and authorize me, WILLIAM HOBSON, a Captain in Her Majesty's Royal Navy, Consul, and Lieutenant-Governor of such parts of New Zealand as may be, or here-after shall be, ceded to Her Majesty, to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

There is no doubt that the much maligned style of common law drafting, in being despised for its prolixity, particularity, and specificity, is extremely misunderstood; but this misunderstanding is so stylistically related that the same standards of legislative exposition that Coode is advocating will be deplored by critics of legislation even in a continental context. There is not a single commentator, either lay or professional, who does not deplore the drafting of

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[29] *Idem*

the Treaty of Waitangi for the very lack of all that he despises in the common law just as he fails to recognise the merits of its drafting in a continental context. The paradox of identifying our own foundational Treaty as the paradigm for periodic sentence construction at common law lies in the fact that the Treaty also provides the paradigm for the counter-system of continental drafting.

II Continental Styles of Statutory Expression

Continental drafting invariably suffers from semantic overload. On the one hand, this suits the process of reaching consensus through negotiation. The New Zealand Bill of Rights Act 1990 and the Resource Management Act 1991 are obvious examples. On the other hand the same semantic overload makes continental drafting particularly conducive to sensationalism - of the very sort needed to support law reform. The same statutes requiring consensus for enactment usually provide equivalent examples of radical law reform. The unfortunate result in a common law context is usually heightened levels of litigation. The provisions are clearly expressed with syntactic simplicity, but as for Magna Carta (1215), it takes a Petition of Right (1628) and a Bill of Rights (1688) consequent on several subsequent revolutions to work out their specificity. As with Magna Carta, a persistent issue remains as to whether the semantic content is backwards looking or forwards looking. In other words, because of semantic overload, the legal effect is usually equivocal. It will take later generations of litigants to discover whether the provisions are static or dynamic, feudal or constitutional.

The most obvious consequence of continental drafting, in achieving the opposite of what the legislator set out to do in common law, is to be found in early property legislation. Other examples are Statutes of Frauds, Uses, and Wills, whereby common law and equity responded with the growth of trusts, the doctrine of part-performance, and secret trusts. The current issue for New Zealand is whether the continental drafting of the Treaty of Waitangi is being cannibalised by the courts in a similar fashion to achieve the opposite of what the Treaty set out to do. This is not at odds with the common law which has often turned cannibal to keep the consequences of continental drafting at bay but the process of employing the courts to make the rules in consequence of their absence from continental drafting should be clearly understood for what it is by the legislature.

Whether the common law has bitten off more than it can chew in becoming part of Europe is the current issue for both Europe and for the reception of Roman Law in England. As Bryce once asked of these two rival legal systems, which will it be that triumphs over the other? This question, in terms of legislative drafting styles as they support different concepts of law, can be seen to apply to New Zealand every bit as much as to England; and the outcome may be decided not so much by different concepts of law as by different concepts of communication.

III Common Law Styles of Statutory Expression

Common law legislation is remarkably rule-oriented. Sir Henry Maine[30] described English law as "the most copious system of express rules known to the world". In a common law context we accordingly expect to be legislated by rules. We are unac*custom*ed to codes, which tend to rank collective over private endeavour at the expense of individual liberty. We disparage those legal systems for slovenliness that substitute proclamations of State policy and purpose for rules of law. We pride ourselves on being allowed under the common law to do whatever is not prohibited, as distinct from continental systems where everything is prohibited unless allowed. The result is that we value our "most copious system of express rules known to the world" as a very precise indicator of individual liberty. It is far easier to quantify the weight of law shouldered by a rule-oriented rather than a policy-oriented society.[31] It is far easier to evaluate the quality of a specific legal rule than it is to argue the merits of a general policy. This, as seen by the common lawyer, is the whole point of the legal process which uses the legislative context as a touchstone to weigh up both qualitatively and quantitatively the political process in terms of the Rule of Law.

Because, also according to Sir Henry Maine,[32] the substantive part of the common law "has at first the look of being gradually secreted in the interstices of procedure" we are also most ac*custom*ed to rule-oriented adjectival law. This makes the substantive function subservient to the adjectival one. Thus we tend to establish institutions — often as much a means of identifying and limiting power as of extending it. In the first case we usually focus on functions, in the second case we usually focus on powers. Occasionally, very high level institutions may even be empowered to make their own rules.

By and large the more usual rule-oriented adjectival expression of the common law eschews powers in favour of procedures, as a result of having learned caution in the conflict between Crown and Commons in constitutional law. This has consequences for our concept of legislation. One result is a high level of rule-oriented licensing provisions which probably peaked for us in New Zealand in the nineteen sixties when adminstrative began to take over from constitutional law. This is the background to choosing rule-oriented adjectival law as the firmest format for the expression of legislation in a common law context. And in the foreground, because we have a background of rule-oriented adjectival law, it is not surprising that in "the most copious system of express rules known to the world" the popular demand is to make these rules as short and as explicit as possible. The glasnost-like transparency of this singlefold construction gets full marks for its directness of expression. The clean-cut communication conveyed by a single finite verb in this as in any paradigm of simple-sentenced construction has the legislative effect of both speaking up and shutting up. The statutory mouth both first decisively opens and then decisively closes. Whatever has been declared in the interim is unmistakeably the law. The rhetorical sense of completeness conveyed by the short sharp utterance imports a decisive authority

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30 Sir Henry Maine, *Village Communities* 75

31 This, as well understood by the *Report of the Committee on Ministers' Powers* (1932), was the point made by G Hewart, *The New Despotism* (London, 1929)

32 Maine, *Early Law and Custom*, 389

with all the advantages of lapidary law in its brevity and of imperial fiat in its directness. It is this decisiveness of the statutory mouth opening and shutting that is enough to shut up the citizen. As to what the law means, as so declared, could be another question. The substantive import of abolishing the Department of Justice whether seen in the abstract or in the context of political restructuring is radical enough to be shocking. The simplest sentence construction can be shocking. Revolutionary manifestos are always enhanced by the simplest style and syntax. Our respect for the legislation, in terms of exacting obedience to authority under the command theory of law, employs the same psycholinguistics to the other extreme. In the short if not the long term, we would wish that all propositions of statute law could express the same single-minded straightforwardness. One thesis of this paper is that brevity rather than precision often defeats the purpose of a rule-oriented system and runs counter to the professional expertise by which this precision is secured. Another thesis is that short-sentenced construction has only a limited place in statute law.

The proponents of plain English for legislation[33] prescribe short-sentenced construction as the panacea for most statute law deficiencies. A study of English literature at large makes it doubtful, however, whether all the subtle nuances of meaning which the English language can clearly express would survive the mechanical repetitiousness of a staccato like simplistic style.[34] The assumption of plain language drafters that the simple sentence affords most benefit to statute drafting also overlooks, not just how complicated the so-called simple sentence can become, but how much more complicated the syntax of English legislative prose becomes with the repeated use of simple sentences. Even simple sentences may have many other verbs (not limited to number and person) which, by way of being infinitive, gerundive, or participial in form, detract from the expected straightforwardness of statutory expression. Reducing legislative prose to a simple-sentenced construction only heightens the need for periodic instead of loose sentence construction. In no other way can we accommodate the more complicated syntax. Otherwise the result is a very formal, arid, and artificial style that steals the glory of the simple sentence when properly placed in statutory prose.

In writing about lawyers' language in general and legislative drafting in particular we promised to return to a deeper consideration of Matson's re-drafting of section 96 of the Income Tax Act 1976. One of the first things to note, after our consideration of different drafting styles, is that Matson prefers a loose as opposed to a periodic sentence construction. Indeed Matson's construction is so loose as to tail gate almost all the conditions, circumstances, exceptions and defined terms, in a form utterly opposed to Coode's conventions for common law drafting, to the end of the provision. Matson expressed the hope that despite differences of style both drafts would enact the same substantive provision. For lots of vastly different reasons I believe the position to be otherwise — that the two drafts can mean different things, and that their radically different styles of statutory expression will give rise to opposing constructions in the same context.

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33 Eg R J Martineau, *Drafting Legislation and Rules in Plain English* (1991) 93–95

34 J Stark, "Should the Main Goal of Statutory Drafting Be Accuracy or Clarity" [99] Statute LR 207

What the two drafts particularly emphasise for the purposes of this paper, however, is the radically different preference for loose as opposed to periodic sentence construction by which the classical style of legislative drafting, as laid down by Coode, has fallen into general disrepute. This has been the consequence of popular but often rather shallow criticism, the rise of tabloid journalism and its effects on other forms of literary expression, the extent to which the sensationalism of cinema and television has affected other media, the degree to which the rate of technological change militates against certainty and precision in rule-oriented legal systems, and a misconceived relationship between continental and common law. These factors all give rise to vagaries of syntax and style, which are more or less explicable even if the main cause is more mysterious. We are all suffering from a lowered morale brought about by our failure to uphold the long heritage of legislative drafting in our common law. This heritage reached its zenith in New Zealand when associated with the rule-oriented provision of public health, conditions of employment, and the rise of social welfare. It took several generations of legislators and their draftsmen to implement these highly idealistic policies in rules of law. That these rule-oriented policies are now most radically in recession accounts in large measure for our lowered morale in legislative communication. To fudge the issue of legal discontinuity by reversing long established rules of law we promote instead purpose and object clauses and other statements of political principle. In such mysterious ways are style and syntax related to the substance of our law.