Legal writing: specificity

Specification in legislative writing: accessibility, transparency, power and control

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Introduction

Legal discourse is different from most other professional discourses, in that the nature of its interpretation process, whether spoken or written, is very much dependant on the context in which it is likely to be applicable. In most professional and disciplinary contexts interpretation of discourse is largely hearer- or reader-based, in that there is some freedom for variable interpretation, of course, with some relevance to the context in which it has been used, but interpretation of legal discourse is most often based on its relevance and hence application to critical moments in specific ‘sites of engagement’ (Scollon 1998), and is often irrespective of the participants involved, and every effort is made to ensure consistency of interpretation. It is particularly so in the case of legislative writing, which is drafted to correct a specific social ‘mischief’ and hence invariably interpreted in the context of relevant descriptions of such instances of ‘mischief’, often treated as the material facts of the case to which a specific legislative statement is applied. Seidman, Seidman and Abeyesekere point out that the ‘mischief rule’ holds that

in construing a statute, a court should first examine the social problem at which the statute aims (the ‘mischief’), determine the means that the statute ordains to address that mischief, and then construe the statute to further those objectives ... Of all the general principles of interpretation, the mischief rule seems best adapted to ensuring that courts construe statutes to carry out the legislative purpose.

(Seidman et al. 2001: 293)

In a court of law, particularly in an adversarial system of justice, maximum effort is made to establish the material facts of the case and this is invariably done in the light of the applicable law, including the precedents established through relevant earlier judgements. It is therefore crucial for the negotiation of justice that precedents as well as legislative
statements are clearly, precisely, unambiguously and adequately specified (Bhatia 1982, 1983, 1993).

**Clarity, precision, unambiguity and inclusiveness**

Legislative rules, as far as possible, should have clarity of expression, in that the legislative intentions are clearly textualised without any vagueness. Vague expressions, though not very uncommon in this writing, are often strategically used for specific reasons, some of which, we will take up later in the chapter. One important resource for clarity is the use of terminological explanation, as indicated in example (1) from the UNCITRAL Model Law Article 2:

(1)

For the purposes of this Law:

(a) ‘arbitration’ means any arbitration whether or not administered by a permanent arbitral institution;

(b) ‘arbitral tribunal’ means a sole arbitrator or a panel of arbitrators;

(c) ‘court’ means a body or organ of the judicial system of a State.

(Gotti 2005)

Another device used for clarity is complex-prepositional phrases, such as *in accordance with* or *in pursuance of*, instead of simple prepositions.

The second quality of this genre is precision, which requires the use of as few words as possible, which is often achieved through the use of nominalised expressions (e.g. *No will shall be revoked by any presumption of an intention on the grounds of an alteration in circumstances*, s.14 of the Wills Act, Republic of Singapore (Quoted in Bhatia 1993: 107)) to make sentences shorter and keep clause proliferations under control.

The third desirable characteristic of legislative sentences is unambiguity, which means certainty of legal interpretation and application, which is often achieved by inserting relevant qualifications at specific syntactic positions, as in example (2) from s.1 of the Housing Act, 1980, UK:

(2)

A secure tenant has the right—

(a) If the dwelling-house is a house, to acquire the freehold of the dwelling-house;

(b) If the dwelling-house is a flat, to be granted a long lease of the dwelling-house.

(quoted in Bhatia 1993: 112)

The final and perhaps the most controversial characteristic is what I have called ‘all-inclusiveness’, which deals with adequacy of specification of legal scope. This requirement of adequate specification further leads to the identification of other important issues of accessibility (comprehensibility and interpretability) and transparency, which have important implications for the interpretation of legal discourse. In this chapter, I would like to argue that whereas over-specification in legislative expression creates problems of comprehension, especially for the uninitiated readership, under-specification, on the other hand, creates an even more serious issue of transparency in the construction and
interpretation of legislative intent. Specification of scope in legislative statements also has interesting implications for power and control in different socio-political and legal systems. However, before I take up the issue of specification, I would like to discuss, though briefly, the related notion of ambiguity, which is crucial for this chapter.

**Ambiguity**

Ambiguity is an inherent property of language; it may stem from a text-internal linguistic source, e.g. lack of semantic clarity in the use of a particular lexico-grammatical feature, or from a text-external resource, such as features of context in which the discourse is interpreted or to which it is considered applicable. This is particularly so in the case of legislative discourse, where interpretation is almost entirely dependent on the context in which it is interpreted and to which it is applied. Ambiguity resulting from text-internal factors can be viewed as vagueness and indeterminacy, which have considerable overlap. Without making any detailed attempt in this chapter to identify and differentiate these notions, I would like to suggest that both of the terms have potential for the negotiation of meaning based on the use of a word or expression in a legislative provision, and hence have been effectively and somewhat creatively used by legal draftsmen in legislative discourse. Engberg and Heller (2008) illustrate vagueness resulting from text-internal use of a particular lexico-grammatical feature in example (3) from the Arbitration Act of England 1996.

(3)

If without showing *sufficient* cause a party fails to comply with any order or directions of the tribunal, the tribunal may make a peremptory order to the same effect, prescribing such time for compliance with it as the tribunal considers appropriate.

(Arbitration Act of England 1996, section 41, 5; emphasis added)

‘This sentence’, they claim,

is inherently vague in that a reader, on the basis of the statute’s wording, will be unable to decide or describe what amount of justification will be adequate in concrete cases. This difficulty is due to the use of the word *sufficient*. Being one of the key words in the sentence, it leaves it up to the recipient (here the tribunal) to decide whether in a concrete case the cause is sufficient or not; there is no single answer to be found, without knowledge about the case in question or subjective interpretation of the utterance through knowledge of previous uses of the expression.

(Engberg and Heller 2008: 148)

Legislative discourse can also be ambiguous because of lack of specification or of clarification of semantic information in specific expressions, in which case we encounter vagueness, or it may be because of the unpredictability of the scope or the force of legislative expressions. If it stems from a linguistic source, it is often referred to as *vagueness* or *indeterminacy* (see Engberg and Heller 2008 for a detailed discussion of these aspects); however, when it stems from the fact that law is inherently contestable
and hence ambiguous, as it is invariably interpreted in the context of specific descriptions of cases, which are almost impossible to predict, it will be viewed as ambiguity (Bhatia 1982, 1993; White 1982). One of the main advantages of vagueness and indeterminacy in language as well as ambiguity in legal interpretation is that all of them allow the legal draftsman to bring in often necessary elements of flexibility and discretion by using vagueness, and precision through the use of qualifications inserted at various points in the syntactic structure of legislative provisions (Bhatia 1982, 1993; Maley 1987, 1994; Channell 1994; Engberg and Heller 2008).

Legislative provisions describe legal action and the cases to which this legal action applies, which typically state what should be done under what circumstances. However, it is rare that such a proposition can be captured simply in terms of an ‘if X, then Y’ kind of syntactic structure; there are often additional qualifying or explanatory conditions imposed on the doing of such an action (Coode 1845; Crystal and Davy 1969; Bhatia 1982, 1993). There is always a possibility that ambiguity and vagueness will occur in all the three aspects of the legislative sentence (i.e. the legal subject as well as the legal provision), case description, or qualifications (Bhatia 1982) and make it difficult to interpret or execute a certain kind of legal action. Let me now turn to the main topic of this chapter, which is, the source of ambiguity that results from inadequate specification of legal scope in legislative discourse.

**Specification of legal scope**

As mentioned earlier, legislative expressions are required not only to be clear, precise and unambiguous, but all-inclusive too. Although it appears to be a contradiction in terms, a close analysis will reveal that a clever balance between the two is the essence of the craftsmanship of legislative intent. Before taking up a detailed illustration of this tension between precision and all-inclusiveness, I would like to give a brief contextual analysis of the constraints on legislative construction and interpretation. Draftsmen have always been conscious of the institutional conflicts involved in the specification of legislative intentions as well as the legislative authority, especially in parliamentary democracies. In parliamentary democracies, legislative authority is invested in the legislature as it represents the people who elect them, and they zealously guard this right (Renton 1975) and would not like to hand over this role either to the judiciary or the executive. This creates the possibility of a three-way institutional conflict.

The first dimension of this potential conflict is between the legislature (the parliamentary institution responsible for making socio-political and economic policies) and the executive (the government bureaucratic institution responsible for executing policies discussed and framed in the legislature) especially in parliamentary democracies. The essence of this conflict is the tension between political power that is invested in the legislature by virtue of the fact that they are elected by the people, and the bureaucratic privilege that is often available to the members of the government, who have a duty to implement the socio-political and economic policies of the government and who often believe that they have the privilege to interpret legislative intent in the context of the implementation of policies. Since members of the executive are not present in the legislature when government policies are discussed and formed, there is always a danger of conflict between the interpretations viewed as authoritative by the two institutional players.
The second dimension of this potential conflict is between the legislature and the judiciary. The basis for such a conflict stems from the question, ‘Who has the ultimate power to give the most authoritative interpretation of legislative intent?’ In parliamentary democracies, the courts at various levels seem to have wide-ranging freedom to authorise final interpretations of the legislative intent, but on the part of the legislature, one often finds maximum control over the way legislative intentions are expressed. A senior parliamentary counsel frames it nicely when he points out that no effort is spared ‘to box the judge firmly into a corner’ (Edward Caldwell, quoted in Bhatia 1982) from which he cannot escape.

There’s always the problem that at the end of the day there’s a system of courts and judges who interpret what the draftsman has done. It is very difficult to box the judge firmly into a corner from which he cannot escape ... given enough time and given enough length and complexity you can end up with precision but in practice there comes a point when you can’t go on cramming detail after detail into a bin. (Reported in Bhatia 1982: 25)

The third dimension of this potential conflict, therefore, is often between the judiciary and the executive, which allows absolute freedom to interpret legislative intentions to the system of courts, and at the same time gives unlimited power to the legislature to give voice to peoples’ socio-political rights and privileges, on the one hand, and obligations on the other.

Within and across these institutional conflicts, it is the job of the legal draftsman to guard against any possible misinterpretation or misapplication of legislative provisions not only by any of the institutional players, but also by other citizens in conflict who often are prone to extend their rights and privileges and shrink their obligations to unexpected limits. It is almost an impossible task to find an appropriate degree of balance by giving expression to legislative intentions in a way to minimise any chance of such misadventures. Another factor that makes their task even more difficult is that they also need to construct their legislative provisions in such a way as to avoid any potential conflict with any preceded or preceding legislation. Caldwell points out,

Very rarely is a new legislative provision entirely free-standing ... it is part of a jigsaw puzzle ... in passing a new provision you are merely bringing one more piece and so you have to acknowledge that what you are about to do may affect some other bit of the massive statute book. (Quoted in Bhatia 1982)

To make matters more complex, these draftsmen are almost universally criticised for making their provisions inaccessible to ordinary citizens, often questioning their loyalty to their so-called ‘real readers’. In fact, one may, with some justification perhaps, claim that legal discourse, especially in common law jurisdictions, is an instance of conspiracy theory, according to which legislative provisions are purposely written in a complex and convoluted manner, so as to keep ordinary readers out of accessible range and to perpetuate dependence on the specialist legal community. Danet (1980b) points out:

Critics claim that the professions use language in ways that mystify the public or at least stultify critical thinking ... Critics argue that the language of the professions is
both a symbol and a tool of power, creating dependence and ignorance on the part of the public. In Gusfield’s view, it creates the illusion of authority.  

(Danet 1980b: 452)

However, legal discourse written in civil law jurisdictions, which may appear to be simple and plain as compared with similar discourse in common law jurisdictions, presents a different kind of accessibility issue, which is the other side of the coin (Bhatia 2005).

It is necessary to recognise that civil and common law systems have developed from different sources. The civil law system relied almost entirely on legislation, whereas the common law system relies on legal precedents as well as legislation. Most of the European community nations and the People’s Republic of China follow some version of the civil law system, whereas most of the countries of the Commonwealth, primarily because of historical reasons, have adopted the British common law system. Let me take two instances of legislative provisions from these two systems to illustrate the differences in drafting styles. First take example (4) from the People’s Republic of China’s Arbitration Law:

(4) An arbitration agreement refers to an arbitration clause provided in the contract or other written agreements requesting arbitration concluded prior or subsequent to the occurrence of disputes.

An arbitration agreement shall have the following contents:

1. an expressed intent to request arbitration;
2. items for arbitration; and
3. the choice of arbitration commission.

Compare this to a similar clause (5) from a Commonwealth jurisdiction, that is, India.

(5) (1) In this Part, ‘arbitration agreement’ means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
(3) An arbitration agreement shall be in writing.
(4) An arbitration agreement is in writing if it is contained in–
   a. a document signed by the parties;
   b. an exchange of letters, telex, telegrams, or other means of telecommunication which provide a record of the agreement; or
   c. an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

The crucial issue here is whether there is a conspiracy of the other kind in civil law jurisdictions, by which simple enactments are used as instruments of socio-political
control. Relevant to our discussion here is also the current debate about the use of plain language in legislative contexts, which, on the one hand, makes legal discourse more accessible to ordinary readers, but, on the other hand, has a tendency to reduce transparency. Transparency is reduced by removing the detailed specification of legal scope in the expression of legislative intentions, and thus gives unlimited power of interpretation to either the judiciary or the government at the cost of the legislature and, by implication, of ordinary citizens.

**Specification, easification, simplification and plain English**

Let me now give substance to this argument by taking examples from legislative discourse from different legal jurisdictions to examine the extent to which under-specification of information leads to greater accessibility of legal information and to what extent the detailed specification of legal scope leads to greater transparency in legal contexts. I will then discuss the issue of power and control in such interpretations when legal information is either under- or over-specified. Who gets the power and control? Are these members of the judiciary, who make court decisions everyday, or the decision makers in the government, who otherwise are only responsible for carrying out the decisions of the judiciary, or the ordinary people, who constitute the ‘real’ readership for these legislative provisions? Let me take a simple example (6) of legislative provision to illustrate this issue.

(6) Registration of Clubs (Ireland) Act, 1904 (Original Version)

If any excisable liquor is sold or supplied in a registered club for consumption outside the premises of the club, except as provided in section four, paragraph (h), every person supplying or selling such liquor, every person who shall pay for such liquor and every person authorising the sale or supply of such liquor shall be liable severally, on summary conviction, to a fine not exceeding for a first offence seven pounds, for a second offence fifteen pounds and for a third or subsequent offence thirty pounds, unless he proves to the satisfaction of the court that such liquor was so sold or supplied without his knowledge or against his consent, and, where it is proved that such liquor has been received, delivered or distributed within the premises of the club and taken outside the premises, it shall, failing proof to the contrary, be deemed to have been so taken for consumption outside the premises.

Although this provision was enacted more than a century ago, it is still somewhat typical of much of the legislative writing practised within common law jurisdictions, in which it is still considered advantageous to condense all the necessary information in a single sentence. No doubt, it has the advantage of not allowing the user to interpret any part of the provision out of context, but, at the same time, it tends to carry too much of an information load and hence adds to the problem of lack of accessibility for its intended readers. Much of this is a function of syntactic complexity, which makes cognitive processing almost beyond uninitiated non-specialist readers. Bhatia (1982, 1993, 2004) suggests a number of ‘easification’ devices (Bhatia 1983, 1987b, 1993), one of which clarifies cognitive structuring by simplifying syntactic complexity. Let me present another version of the same provision using one such device.
(7) Registration of Clubs (Ireland) Act, 1904 (Easified Version by Bhatia)

If any excisable liquor is sold or supplied in a registered club for consumption outside the premises of the club, except as provided in section four, paragraph (h), then every person supplying or selling such liquor, every person who shall pay for such liquor and every person authorising the sale or supply of such liquor shall be liable severally, on summary conviction, to a fine not exceeding

(a) seven pounds, for a first offence,
(b) fifteen pounds, for a second offence and
(c) thirty pounds, for a third or subsequent offence,

unless he proves to the satisfaction of the court that such liquor was so sold or supplied without his knowledge or against his consent, and, where it is proved that such liquor has been received, delivered or distributed within the premises of the club and taken outside the premises, it shall, failing proof to the contrary, be deemed to have been so taken for consumption outside the premises.

This easified version does not compromise on the degree of specification of legal scope in any way; it is as detailed and all-inclusive as the original, yet it displays syntactic complexity in a way that can be processed in chunks favourable to easy accessibility. The use of this and other similar linguistic devices is becoming increasingly common in modern-day legislative drafting, although this is not the main concern of this paper. What is significant here, though, is the fact that this device maintains an adequate level of specification of legal information within a single sentence and yet makes it relatively more accessible to all the stakeholders and wider readership, both within and outside the legal profession.

Let me now turn to the issue of the specification of legal information, and identify the kind of information that is often sacrificed in an attempt to make the provision simpler, and the implications of such a move. To illustrate what I have in mind, let me take a simplified version of the same provision (8), which is conceptually different from the earlier easified version.

(8) Registration of Clubs (Ireland) Act, 1904 (Simplified Version by Bhatia)

If any excisable liquor is sold for consumption outside the club, then every person who either pays for or authorises the sale of such liquor shall be liable to a maximum fine of

(a) seven pounds, for the first offence,
(b) fifteen pounds, for a second offence,
(c) thirty pounds, for a third or subsequent offence.

The most notable aspect of this simplification process is that it makes the provision more accessible to its intended readership by reducing the level of specification of complicating legal qualifications (Bhatia 1982, 1993), particularly of three different kinds. First of all, the possibility of a potential conflict between this provision and another one in the same Act has not been specified, and hence it is left for the interpreter or the authorised user of the
Act to resolve, if the occasion demands. Secondly, there could be exceptional circumstances such that someone might have sold excisable liquor without the consent or knowledge of the person who holds the license to sell it. Once again, the exceptional circumstances are left for the authorised interpreter to make a decision to figure out, if such an exceptional behaviour should be taken into account in the process of negotiation of justice in a court of law. Finally, this simplified version is also silent on yet another foreseeable case scenario where a person receives liquor within the premises of the club and then takes it out for consumption. The interesting question is whether this act is covered by the provision. The original and the easified versions clearly state that in a case like this, it will be ‘deemed to have been so taken for consumption outside the premises’ and hence it is covered by the provision. In the simplified version, however, such an exceptional case is not mentioned at all, and it is left to the judiciary to draw its own conclusion. Let me now move to yet another version of the same provision in plain English to make it accessible to ordinary readers.

(9) Registration of Clubs (Ireland) Act, 1904 (Plain Version by Bhatia)

It is unlawful to sell or buy excisable liquor for consumption outside a club and is punishable by fine to a maximum of thirty pounds.

In this case, although the main provision is drafted in simple plain English, clearly accessible to an ordinary readership, it is far from all-inclusive. It leaves a number of qualifications necessary for a precise and unambiguous interpretation in specific sites of application in which the provision is likely to be applicable. Much of this kind of accurate interpretation in real life contexts will require the use of additional specification of legal content, primarily the descriptions of cases to which the provision is likely or not likely to apply. Finally, this plain version also leaves the amount of fine to the judgment of the judiciary. Edward Caldwell, the very experienced and well-established parliamentary counsel already referred to above, underlines the value of this aspect of specification in the drafting process, when he says:

If you extract the bare bones … what you end up with is a proposition which is so untrue because the qualifications actually negative [sic] it all … it’s so far from the truth … it’s like saying that all red-headed people are to be executed on Monday, but when you actually read all the qualifications, you find that only one per cent of them are.

(Reported in Bhatia 1982: 51)

I have purposely taken four rather different versions of the same provision, ranging from 1904 to what we might find in modern-day drafting, to illustrate not simply the varying degrees of specification of legal scope in legislative provisions, but also to give some indication of the development of legislative drafting over the years. I would now like to move to the socio-political and jurisdictional implications of different styles of drafting, and identify different aspects of transparency and their implications for those who are empowered by such specification or rather lack of it.

**Implications of different drafting styles: power and control**

There seem to be different perspectives on this issue. The view from within the drafting community is in stark contrast to the view expressed by some members of the reformist
lobby, who claim that legal content can and must be expressed in everyday language accessible to ordinary people who are the real ‘recipients’ of such legal provisions. The truth, however, seems to lie somewhere in between the two extremes.

Proponents of the plain English movement, in particular Joseph Kimble in his monograph on Answering the Critics of Plain Language, claim that traditional legal writing displays ‘centuries of inflation and obscurity’. Mellinkoff (1963: 24) describes it as ‘wordy, unclear, pompous, and dull’. Friedman (1993: 5) seems to agree with this view when he says: ‘The fact is that legal writing is overblown yet timid, homogeneous, and swaddled in obscurity. The legal academy is positively inimical to spare, decent writing.’ Similarly, Lindsey (1990: 2) views legal writing as ‘the largest body of poorly written literature ever created by the human race’. Thornton, in his well-known book on drafting, also points out:

The purposes of legislation are most likely to be expressed and communicated successfully by the drafter who is ardently concerned to write clearly and to be intelligible. The obligation to be intelligible, to convey the intended meaning so that it is comprehensible and easily understood, … requires the unremitting pursuit of clarity by drafters. Clarity … requires simplicity and precision … The blind pursuit of precision will inevitably lead to complexity; and complexity is a definite step along the way to obscurity.

(Thornton 1996: 52–53)

Of course, there are many sources of obscurity, such as those resulting from vagueness, wordiness, complexity of syntax, archaic expressions, etc. all contributing positively or otherwise to the requirements of clarity, precision and unambiguity, as discussed earlier. However, the most important source relevant to our discussion here is the one that concerns the extent to which it is necessary to specify the scope of application of legal action, considering specifically the nature and function of qualifications considered essential for the implementation of the provision to a myriad of real life cases.

Any discussion of the nature and function of detailed specification, or lack of it, has to be discussed in the wider context of the legal jurisdiction as well as the wider socio-political context in which the provision is written and interpreted. In parliamentary democracies, particularly in common law jurisdictions, as discussed in the earlier sections, the real authority for legal construction rests with the legislative institution, and not with the judiciary, even though they are given the ultimate power of authoritative interpretation of what the legislative institution drafts. Similarly, the executive arms of the government have no power to construct or even interpret legislative provisions but certainly have the mandate to execute the decisions of the courts. This three-part division of power ensures that no institution can become autocratic in their use or abuse of power. Thus it is one of the major responsibilities assigned to the members of the legislative community to give voice to the people of the country they represent through the legal construction and not to give too much freedom of interpretation to other institutional players, such as the executive or the judiciary, whose job is simply to interpret and apply what the legislature constructs through the parliamentary draftsmen. If this argument is sustainable, and I believe it is, then the first concern for the drafting community is to give an honest expression to the intentions of the legislative institution as comprehensively as the linguistic resources permit. All other concerns, such as the accessibility and ease of comprehension for ordinary users of language, resulting from the
complexity of syntax, the over-specification of qualifications, etc., though important, become secondary when compared to their loyalty to legislative intentions.

Another important factor in present-day contexts is that although law has traditionally been considered jurisdictional in nature, because of the recent globalisation of trade, commerce and industrial practices, it is increasingly being constructed, interpreted, used and exploited in settings across jurisdictional boundaries. Sometimes it is done because of other socio-political developments, such as the return of the sovereignty of Hong Kong to the People’s Republic of China, and the subsequent establishment of the Hong Kong Special Administrative Region (HKSAR) within the PRC. A similar phenomenon in some respects is seen in Europe as a result of the establishment of the European Union. Similarly, the perception that legislative discourse is impersonal and highly formal, and that differences in linguistic, socio-political, economic and cultural factors across national and ideological boundaries will have no significant influence on its construction and interpretation no longer seems to be entirely valid. Moreover, with the increasing dismantling of international trade barriers as a result of international trade agreements and treaties, laws are often being written and interpreted across geographical and socio-political borders in different ways, such that general assumptions about meanings cannot be taken for granted in these contexts.

There is some evidence of such phenomena from the studies of arbitration laws reported in Bhatia et al. (2008). In this chapter, I would like to take a different example focusing on the construction and interpretation of the Basic Law of Hong Kong SAR, which was drafted within the frameworks of the Sino-British Joint Declaration 1984 and the People’s Republic of China’s civil law system, but was meant to be interpreted in Hong Kong within the common law system.

**A case from Hong Kong**

Popularly known in the HKSAR media as the ‘right of abode’ case, this was one of the most controversial cases involving the interpretation of the Basic Law. The case was decided on 29 January 1999; it brought into focus the unanimous decision of the Court of Final Appeal, which interpreted Article 24 of the Basic Law to allow all those ‘persons of Chinese nationality born outside Hong Kong of those residents’, who were permanent residents in Hong Kong, irrespective of the fact whether they acquired the status before or after the birth of the child. The Basic Law did not specify whether it was necessary for any of the parents to have had this status of permanent residence at the time of the birth of the child. The Court of Final Appeal took the generous view. According to the Government of HKSAR, this landmark decision opened up the floodgates for millions of mainland people to acquire the right of abode in Hong Kong.

It so happened that a large number of people from Hong Kong had moved to Mainland China prior to the transfer of power on 1 July 1997. They had children born in the Mainland who had no right of abode in Hong Kong under the immigration laws prior to the handover. Many of these children had already entered Hong Kong illegally and thus presented themselves to immigration authorities and claimed their right of abode under Article 24(2)(3). The controversy went to the courts and after a long drawn out battle, the Court of Final Appeal, the highest court in Hong Kong SAR, decided in its 1999 judgment that according to Article 24 of the Basic Law, the Chinese nationals may acquire the right of abode in Hong Kong by one of three ways:
1. if they were born in Hong Kong before or after the transfer of sovereignty (Article 24(2) (1));
2. if they have resided in Hong Kong for a continuous period of not less than seven years before or after the transfer of sovereignty (Article 24(2) (2)); or
3. if they were born outside Hong Kong to persons covered by the above two categories (Article 24(2) (3)).

The Court of Final Appeal affirmed some fundamental constitutional principles in reaching its decision, that is, the Basic Law was a living document, like any other constitution, and hence should be interpreted broadly. The Court ruled that Article 24(2)(3) of the Basic Law gives the right of abode to children born of a Hong Kong permanent resident, ‘regardless of whether that parent became a permanent resident before or after the birth of the child’. It became a landmark decision by the highest court in Hong Kong and became the battleground for the contested interpretations of the Article 24 of the Basic Law on the part of the judiciary, the government and the legislating authority based in Beijing, which was responsible for the construction of the Basic Law within the Civil Law system. The Government estimated that the additional eligible persons in Mainland China who could obtain the right of abode within ten years would reach 1.6 million, and would result in very severe social and economic problems, which prompted the Hong Kong Government to ask the Standing Committee of the National People’s Congress to reinterpret Articles 22(4) and 24(2)(3) of Hong Kong’s Basic Law, which effectively overturned the court decision. This move prompted large protests and debate over whether or not Hong Kong’s judiciary remained independent from that of the Mainland. The interpretation offered by the Standing Committee of the National People’s Congress was helpful to the Government in appealing against the earlier decision of the Court of Final Appeal, which subsequently ruled that the interpretation of the National People’s Congress of Article 24 of the Basic Law was constitutional, thereby subsequently denying the right of abode to all those who were given it in the earlier decision. This scenario presents a very interesting illustration of the lack of specificity in legislative construction which led to this serious contestation among the three institutional perspectives in the process of negotiation of justice, which raised issues of power and politics based on the use of inadequate levels of specificity. This case clearly established that the power of interpretation of legislative provisions, which in the common law system rests with the court of final appeal, was seriously compromised by the overriding power of the legislature, which in the PRC civil law system is invested in the Standing Committee of the National People’s Congress. If the Government is likely to get more power in the interpretation and execution of legislative outcomes, then most autocratic institutions would prefer to leave legislative provisions vague, indeterminate, and hence ambiguous as a function of the lack of necessary specification of scope in legal drafting.

One of the main issues brought into focus in this controversy was the question of who should have the final authority to interpret the Basic Law: the highest Court of Final Appeal within the common law system in force in Hong Kong, or the National People’s Congress, which operates within a very different civil law system? Although the Basic Law empowers the NPC as the final interpreter of the mini constitution of Hong Kong under the ‘one country two systems’ framework, the real issue at stake is that a number of such unpleasant controversies and decisions could have been avoided,
or at least minimised, by drafting the Basic Law in a legislative style that did not conflict with the normal expectations of the legal system within which it was likely to be interpreted and used. By incorporating, as far as foreseeable, the necessary constraints and qualifications operating on such provisions, one would have made the law more transparent and less controversial. Ghai, a prominent specialist on constitutional law, rightly identifies this lack of specificity in drafting as one of the main reasons for contentious interpretations.

The two broad areas on which there was considerable contention were the relations between the Central Authorities and the HKSAR and the political structure of the HKSAR. China had fought off the British during the negotiations for the Joint Declaration on these issues, and an appearance of consensus was purchased at the expense of ambiguity and obfuscation.

(Ghai 1997: 61)

The other interesting issue the case brings into focus is that social action in the courtroom often depends not simply on semantically or logically accurate interpretations (Allen 1957), but also on pragmatically appropriate interpretations, keeping in mind the socio-political, economical and cultural constraints, which are often preferred by institutions who hold executive powers. The institutions with executive responsibilities would like to exercise maximum control and power to implement administrative and social policies, and would like to have under their control a measure of flexibility in interpretation, which is often lost through detailed specification in legislative instruments. It is hardly surprising that a high degree of transparency in legislative intention is often negatively viewed by autocratic executive organisations and institutions.

Conclusion

In conclusion, I would like to reiterate that although clarity, precision, unambiguity and all-inclusiveness are the four key aspects of the construction and interpretation of legislative intentions, particularly in the context of common law jurisdictions, all-inclusiveness plays the most significant role in the specification of legal scope, which in turn has implications for accessibility and transparency in the expression of legislative intentions. I also make an attempt to demonstrate that transparency, or rather lack of it, is strategically used in different legal systems in different ways to assign power and control to different institutions which have different roles in the construction and interpretation of legislative intentions. Depending on the institutional roles and the privileges available to institutional players, for instance, the legislature, the judiciary, or the bureaucracy, invariably show preference or dispreference for greater transparency in legislative expressions.

Note

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Further reading