DISSERTATION - 1993

TOPIC:

Of the controversy of strained and purposive statutory construction: A Jurisprudential Demystification

Dissertation submitted in partial fullfilment for the award of a degree in Law (LL.B.).

Dedication,

To the late Inspector TOM OMONDIH NGOYA,
who died after a short illness on the
sixteenth July 1993.

"A man has only one youth, considering the riches that he might derive from it, if he employs it properly, there is no reason why he shouldnt be proud."

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The acknowledgments notwithstanding, I take full responsibility for errors or heresies in this manuscript.

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ABBREVIATIONS

E.A.	-	East Africa Law Reports
A.C.	-	Appeal Cases
K.B.	-	Kings Bench
Q.B.	-	Queens Bench Report
L.T.	-	Law Times
W.L.R.	-	Weekly Law Reports
ALL E R	-	All England Reports
C.A.	-	Civil Application or Appeal

LIST OF STATUTES

1. JUDICATURE ACT CAP. 8 S 3 [2]
2. SUNDAY CLOSING WALES ACT 1881 - S. 3
3. BASTARDRY LAW AMMENDMENT ACT 1872 - 57 [1]
4. EAST AFRICA ORDER IN COUNCIL 1897
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6. NORTH - AMERICAN TELEGRAPHS ACT 1867
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8. RESTRICTION OF OFFENSIVE WEAPONS ACT 1959
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11. PENAL CODE CAP 63 S 9 & 11
12. BANKRUPTCY ACT CAP 53 S 2
13. INTERPRETATION AND GENERAL PROVISIONS ACT CAP 2

LIST OF ARTICLES

1. Huber: "Use of Marginal Notes in East Africa", 2 Eastern Africa Law Review 107 (1969)

2. Friedman: "Statute Law and its interpretation in the modern states", 26 Canadian Law Review 1277 (1943)

3. Friedman: "Judges, Politics and the Law", 29 Canadian Law Review 2811 (1951)

4. Stanford Law Review: Vol. 42 No. 2 at p. 321 (1990)

TABLE OF CASES:

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2. A.G. Abdula [1960] E.A. 672
3. Shah Varshi Devshi & Co. Ltd V Transport Licencing Board [1971] E.A.289
4. Visram & Karsam V Bhatt [1965] E.A. 789
5. Mugo V R [1966] E.A. 124
6. Motibai Manji V Khursid Begum [1957] E.A. 101
7. F.F. Ishmail V R [1963] E.A. 55
8. Jefferdi Alibhai V Commissioner of Income Tax [1961] E.A. 610
9. Opoya V Uganda [1967] E.A. 752
10. Jivraj V Devraj [1963] E.A. 263
11. Somaniś V Shirinkhana [1970] E.A. 580
12. Day V Simpson [1865] 34 L.J. M.C. 149
13. Wicks V D.P.P. [1947] A C 362, per Lord Thankertons J
14. Johnson V Moreton [1980] A C 37
15. Seeford Courts Estates V Asher [1949] 2 K B 481
16. Bewlay V British Bata Shoe Co. [1959] 1 WLR 45
17. Attorney General V Sillem [1864] 2 H & C 431
18. Re - Gilligan [1950] p. 32
19. Seaford Courts, Estate V Asher [1949] 2 K B 481
20. Inspector of taxes V Hudson [1955] A C 696
21. Virginia Wambui Otieno V Omollo Sirenge & Joash Ochieng Ougo [1987] Civil Appeal No. 1 at Nairobi
22. Richards V MacBride [1881] 51 LJMC 15
23. River Wear Commissioners V Adamson [1877] 2 A C 743
24. Hydons case [1584] 3 Co Rep 7a
25. Beswick V Beswick [1968] A C 58

26. Re - Rippon Housing order [1939] 2 K B 838

27. Fisher V Raven [1964] A C 210

28. S.E. Railway Co. Ltd V The Railway Commissioner [1880]5 QBD 217

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Introduction:

The search is for clarity. Parliament attempts to achieve this in its enactments, but not always with success. That is why, as Lord Hailsham of St. Maryleborne LC observed in Johnson V Moreton,[1] nine tenths of all cases reaching the House of Lords turn on statutory interpretation. Nine out of ten cases heard on the appeal before the court of appeal or the House of Lords either turn upon, or involve, the meaning of words contained in the enactment of primary or secondary legislation. A similar proportion no doubt applies in cases reaching the Kenyan appellate courts.

The above notwithstanding, statutory interpretation is still notregarded as a subject meriting thoroughgoing research, or serious academic exposition in East Africa in general, and Kenya in particular. Legal practitioners still are not grounded in it. People who think about these things sense that something is wrong.

Statute Law is the will of the legislature; and all the objects of all judicial interpretation of it is to determine what intention is, either, expressly or by implication conveyed by the language used, so far as neccessary for the purpose of determining whether a particular case or state of facts, which is presented to the interpreter falls within it.[2] The parliament has therefore entrusted the courts with the task of spelling out its imputed intention, even where no actual intention existed. Accordingly, the courts in their bid to discharge this task endowed to them by the parliament have devised several approaches (rules) to help them ascertain the intention of the parliament. These approaches are, inter alia, the Literal approach,which provides that the court is not to add words to a statute or read words, into it that are not

there. There is also the Golden rule approach which empowers the court to go out of the literal or grammatical meaning of the words used by the Parliament, if emphasis on the literal meaning of the words would lead to manifest absurdity.

Lastly, there is the Mischief rule, which on its part enables the court to hunt for the intention of the parliament and on discovery of the same, to enforce it in such a way that the the intention of the parliament will not be defeated.

However, these aside, there is one recent gain in this area of statutory construction. Our courts have moved on from these old simplistic views. No longer is a problem of statutory construction settled by applying some talisman called the literal rule, or the golden rule, or the mischief rule. Nowadays we have purposive construction, coupled with respect for the text and a recognition by the judges that interpreting a modern act is a matter sophisticated and complex.[3]

It is this so called purposive or stained construction that gives rise to the problem before hand. The purposive or strained construction has raised alot of arguments as to whether such construction is just but the courts novel lawmaking guise or a mere act of augmentation.

The purpose of this research is to evaluate whether strained (purposive) construction, is the courts novel lawmaking guise. It is the authors sincere hope, that at the end of the day, the reader will have a conclusion for himself.

Further, it is the authors hope that the reader will come to the conclusion that strained construction is not the courts novel lawmaking guise, but a mere act of augmentation. But as the saying goes, solve one problem and you create another, the reader will find that the solution to the problem as to whether strained construciton is or not the courts novel lawmaking guise, creates the questions to what extent is strained construction allowed? or How far can the court go with the so called strained construction without infringing on the legislators toes? or can the courts re-write a clause (statutory provision) under the guise of strained construction?

0:1 Reasons for research

Statutory interpretation is one area that requires a thoroughgoing research, if not a serious academic exposition. Yet this has not been the case in East Africa in general and Kenya in particular.

This however, doesnt mean that no author has ever trode this path. In fact Harvey did cover this area of statutory interpretation in his book.[4] However, Harveys work to say the least, was and still is, not exhaustive. It only provokes the mind and stimulates further research.

Besides textbook, quite a number of previous students have also written on this area. The fact nevertheless, is that none of the previous students did explore this particular area to its conclusive end. That is to say, none of them was bold enough to

tell the readers whether strained or (purposive) construction infringes on the legislators toes or not, and if it doesnt, how far can the courts be allowed to go without neccessarily appropriating the legislatures duty?

Notice however, must be taken that to be critical is not to be immodest, or lacking in respect for the previous authors, for a bold appraising legal writer can take comfort and courage from Lord Cockburns assesment of Huumes criminal Commentaries, where the Lord said,"before anyone can deserve the praise of being an enlightened expounder of a system of law not previously explained or methodised, the past actings of courts and authors need not be merely stated but criticised, so that future writers maybe guided and the public instructed on defects and remedies".[5]

The authors criticisms of the previous works on this particular area, should therefore not be construed as contemptous to the persons and dignity of those previous authors. In deed the author is persuaded tosay, attention must be paid to the learning of the past, without knowledge of which our present system (add research) cannot be understood. The old lawyers still have much to teach.

The aim of this research, it can be gleaned from the foregoing, is to describe this modern common law system of statutory interpretation, presenting it in a coherent, self-consistent way and at the end of the day analysing its far-reaching consequences on the province of the legislature, if any.

0:2 Chapter break-down

This research is expected, as already said, to yield a coherent and self-consistent end. In order to achieve the end it`s therefore neccessary to divide the work into various chapters and where possible into sub-chapters.

Consequently, the work will be divided into five chapters; of which the first chapter will concern itself with definition, historical development of statutory interpretation, circumstances where the same is neccessary and lastly the reasons for interpretation.

Chapter two will explore the various approaches to statutory interpretation. It will deal with the so called literal, golden end the mischief rule. The same chapter will also consider the circumstances where each rule is applicable and expose the shortfalls attendant to the application of each and every rule.

Chapter three will expose and discuss other aids to statotory interpretation. Here, the essence of statutory definations, doctrine of stare decisis, the rule of Ejusdem generis, presumptions and extrinsic & intrinsic aids, will be examined. A critical appraisal of each and every one of them will also be given.

Chapter four will form the heart of this research work. Having discussed the rules of statutory interpretation and other aids to statutory interpretation, the author will evaluate in order to bring out the case clearly whether strained statutory construction infringe on the legislative

function or not.

Chapter five will be devoted to suggestions and recommendations. That is what needs to be done to alleviate the confusions created by the application of the so called rules of interpretations.

Footnotes: Chapter One

1. Johnson V Moreton [1980] AC 37, 53

2. Maxwellŝ Interpretation of statutes, (Butterworths, London, 12th Ed. N.M. tripathi, Bombay 1969) p. 34

3. Benion F.A.R: statutory interpretation (Butterworths, London, 1st Ed 1984)pxvi

4. Harvey W.B.: Introduction to Legal systems (East African Bureau 1975, 1st Edition) p 735

5. Cockburn LJ: Memorials of his time, (1856) p 102.

CHAPTER ONE

1.1 Definition of Statutory Interpretation:

Some people talk of statutory interpretation. Others prefer the term construction. A few, however, seek to attach different meanings to each.

The author draws no significant dichotomy between the two words. In the view of the Canadian expert, Professor Driedger[1], statutes are in general to be construed. Driedger, posits that only where there is some ambiguity, obscurity or inconsistency is the term interpretation `fitting.

Dias,[2] on his side regards interpretation as relating to what the legislature meant to refer to. He proceeds to affirm that Construction, unlike interpretation, refers or applies to the purpose the parliament meant to accomplish. It is evident that Dias seeks to draw some distinction between the two words.

However, it is the authors contention that there is no difference between what the Parliament meant to refer to"and "what it meant to accomplish."

The two phrases, its submitted, zero to point to one thing. This is the intention of the parliament or the purpose of the legislation.

Such differences as exist in the use of these two words or terms in contemporary English is a matter of nuance rather than of distinct meaning. The choice of whichever of the two terms that one

prefers to use or apply, is so often, in the linguistic field a matter of "feel".

Statutory interpretation in a narrower sense refers to, the ascertainment of the meaning of the words formally used in the statutes.[3] However, interpretation is not only used in statutes but also in wills, and written contracts, where more than one meaning is possible.

Experience shows that, owing to imperfection of language, different people will often interprete the same words in different ways.

Perhaps, Lord Denning`s words, while addressing his mind to the issue of imperfection of language would suffice. The Lord observed; "whenever a statute comes up for consideration, it must be remembered that it is not within human powers to forsee the manifold set of facts which arise and even if it were, it is not possible to provide for them in terms free from all ambiguities".[4]

Given that Acts of parliament are made to regulate a future that is only constant of surprise, the natural and reasonable desire that statutes should be easily comprehensible is doomed to disappointment.

1:2: Development of a technique of Interpretation

O.H. Phillips in his book,[5] gives a brief historical development of the technique of interpretation.

The guides for the interpretation of legislation are mostly common law principles. These common law principles can be traced back to the 14th Century. The civilian and cannonists doctrine was that, interpretation was the province of the legislature. In the 13th and the first half of the 16th centuries, the civilian and cannonists doctrine were acted upon in England.

Henry III and Edward I, in consultation with the council, issued explanations of doubtful statutes and these would be accepted as authoritative by the court. Indeed. at a time when the judges were members of the council they would often have first-hand knowledge of what a statute was meant to mean. In those early times, statutes were interpreted freely, as laying down a policy within the limits of which the court had considerable direction.

It was not until the middle of the 14th century that the common law courts began to develop a technique for objective interpretation of statues. This development was neccesitated by the growth of parliament as the law-making body, of which the judges were not members in place of the small council. At the same time the court of chancery was emerging as the body for exercising the discretion of the council in exceptional cases.

By the end of the 16th century an embarrasing complexity of rules of interpretation (or interpretative criteria) had been elaborated.

1:3: Circumstances where Interpretation is neccessary

1:3:1: Where the meaning is plain

Rules of construction have been laid down because of the obligation imposed on the courts of attaching an intelligible meaning to confused and unintelligible sentence. However, where the words of an Act of Parliament are clear, there is no room for applying any of the principles of interpretation which are merely presumptions in cases of ambiguity in the statute.

Lord Evershed MR, in references to construction of clauses (provisions) in statues; which clauses are clear, said; "I prefer to avoid exegesses of the statutory language unless they are absolutely neccessary; for the result would otherwise tend thereafter to substitute for the problem of construction of parliamentary language, the problem of construction of the judgements of the court".[6]

The author is persuaded to think that what the Learned Lord Evershed MR, is trying to put across is that whenever the wordings of the statute are clear, their primary meaning must be presumed to corespond to the legal meaning. Hence, in such circumstances, what the legislature intended to be done or not to be done can only be legitimately ascertained from what it has chosen to enact, either in express words or by reasonable and neccessary implication.

Pollock C.B., echoing the same sentiments as those of Lord Evershed MR, said; " If a statute, in terms reasonably plain and clear, makes what the defendants have done a punishable offence

within the statute, we want not the assistance which maybe derived from what emminent statesmen have said or what learned jurists have written... We want not the decision of the Americans to see whether the case before us is within the statute."[7]

It is clear from the words of the above justices that where the meaning of the statutory words is plain and unambiguous, the court must give the words their primary meaning and should not invent fancied ambiguities.

1:3:2 Construction where the meaning is obscure and ambiguous.

The second and the most important circumstance where statutory interpretation is neccessary is where the meaning of the provision (clause) is obscure. In such circumstances, the court will labour to extract the intention of the parliament by applying certain interpretative criterias.

As Pilscher J. observed; "the first bussiness is to make sense of the ambigous language and not to treat it as unmeaning, it being a cardinal rule of construction that a statute is not to be treated as void, however oracular[8]

Noting that no construction is free from difficulty, and as construction carries out a clear defined and well-indicated policy on the part of the parliament; The court in her wisdom must therefore proceed to detect the intention of the parliament and give effect to it.

It is agreeable, as Lord Denning puts it, "... the English language is not an instrument of mathetical precision."[9] This, coupled with the fact that acts of parliament are prepared unscientifically and in haste and that they seek to regulate a future which is certain only of constant surprises, makes interpretation a pre-requisite.

Nevertheles, the courts are not to treat such statutes as in valid but will however, set upon them to ascertain the meaning so as to give effect to the intention of the parliament. Be this as it may, itś the courts bounden duty to interpret (or is it to construe) the statute(s) and accordingly give effect to the purported intention (objective) of the parliament.

This duty, the author contends, is more demanding and inevitable, particularly in situations or circumstances, where the meaning of the statute is obscure by virtue of a slight inexactitude in the language.

1:4: Why statutory interpretation

The major problem with words is their lack of precision. Few or none posses the neccessary precision as do mathematical symbols. Language draws a series of mental pictures in the mind of the person hearing them. These pictures are sometimes well-defined and sometimes blurred in outlines but they are never precise.

Lord Halisbury,[10] once had the following to say about the lack of precision in words,"I doubt whether any one of us has not more than once found that human language is, but an imperfect

instrument for the expression of human thought:"

The above words of Lord Halisbury were later on reiterated by Holmes J[11], "Ideas are not often hard, but the words are the devils".

From the foregoing, it is evident that words are not often precise. It is this basis hence that propels the courts, who are charged with the duty to give practical application to the statutes to interpret the enactments.

Statutory interpretation is therefore neccessitated by quite a number of reasons, inter alia.

(a) Imperfection of language.

Lord Denning[12] observed, "Whenever a statute comes up for consideration, it must be rembered that it is not within human powers to forsee the manifold sets of facts which may arise and even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision."

The term ambiguity, it must be borne in mind from the outset, is not synonymous to vagueness. It is strictly used in a situation where the word or words used are capable of more than one literal meaning. A provision however, is not ambiguous merely because it contains a word which in different contexts is capable of different meanings. Surely, it would be hard to find anywhere a sentence

of any length which doesn't contain such a word or a phrase which in that particular context is capable of two or more meanings.[13]

It is in the light of the above position that the Kenyan court of appeal elaborated on the clause of S 3(2) of the Judicature Act,[14] which provides inter alia,"... the courts shall be guided by customary law so far as the customary law in question is not repugnant to Justice and Morality`(Emphasis mine). The word "Justice and Morality " are abstractions which are incapable of any objective defination. The defination to be ascribed to these two abstractions are therefore subjective and depend on the circumstances of each particular case or region. No wonder therefore, Wilson J when faced with the same intransigence posed to ask, "to what standard then does the order in the council refer to"? To the British standard or to the African? The Learned Justice Wilson after posing these questions went ahead to hold, "I have no doubt that the only standard of morality and justice to which a British court in Africa will refer to, is that of the British."[15] This was the courtś view when interpreting a similar phrase to the one contained in S 3(2) of the Judicature Act Cap 8, which phrase is contained in East African order in council of 1897.

Be that as it may, the words morality and justice are incapable of an objective defination. The court of appeal of Kenya in the case of Virginia Wambui V Omollo Siranga & Joash Ochieng Ougo[15], therefore aware of the ambiguity posed by the two abstractions of justice and morality held, "We are persuaded from our perusal of the evidence and from a summary of the ebb and flow of the argument on this aspect of the case that there is nothing in Luo law which a reasonable person in Kenya would find to be repugnant to justice and morality."

The court in the case of A.G. of Uganda V. Kabakaś government of Uganda[16], confronted with schedule of 9 of Uganda (Independence) constitution had the following to say, "the words of paragraph one, far from being plain and unambiguous, are capable of atleast three widely differing interpretations."[17]

Ambiguity of words used by the draftman is therefore one of the strongest cause for statutory construction. This is neccessarily so to attain the legal meaning of the statute which the draftmen has delberately or inadvertently made obscure.

Because ambiguity is one of or perhaps the commonest cause of interpretation, it would suffice if the author goes a little bit further to examine its causes. Ambiguity can be caused by either the use of a word which has several meanings. Ambiguity caused by use of such words is called Semantic ambiguity.

Another cause of ambiguity may be due to grammatical relationship of words as they are chosen and arranged by the draftman. This is what commentators term syntactic ambiguity. A good analogy of this type of ambiguity was underlined in the case of Richards V. MacBride.[18] The statute in question in this case was the Sunday closing (wale) Act of 1881. The draftman of the said enactment deferred the coming into operation of the act by an unintended 12 months when in the commencement provision (S. 3) he tied this to, the day next appointed for the holding of the annual licencing meeting. Instead the draftman ought to have refered to,"the next day appointed".

It is evident from the above case that the manner in which

the words are chosen and arranged by the draftman also affects their meanings. It is not uncommon therefore to find quite a number of statues like the sunday closing,[16] being deferred or alternatively being in operation before their anticipated date.

Another cause of ambiguity is the conflict between the enactment and its internal or external context. This type of ambiguity is occassionaly refered to as contextual ambiguity. However, the major cause of ambiguity arise from the use of ellipsis by the draftman. Ellipsis can take two forms in implications or delegations.

The foregoing notwithstanding, the courts have resolved ambiguities by adopting oppossing construction. In such circumstances, a grammatical ambiguity in an enactment is best resolved by considering it in the light of opposing construcitons of the enactment on the particular facts of the instant case. This view was properly underlined by the court in the case of Kruhlak V Kruhlack.[20] Here the issue was whether the word "single woman",[21] included a married woman living separately separated by a court order. The court was of the opinion that a married woman living apart from the husband under a separation order was in the construction of the Besterday Law Ammendment Act a single woman.

b) Unforseen situations

Having examined ambiguity as a cause of statutory interpretation, the author now wishes to canvass unforseen situations, as another fundamental cause of interpretation. As Lord Denning rightfully observed,"...`it must be remembered that it is not with human powers to foresee the manifold sets of facts which may arise. ..".[22]

Harvey in his book, an introduction to legal systems in East Africa, agreed with Lord Denningś position. Harvey observed,ìn responding to the pressing demands for new law or modification of the old, legislators labour under severe handicaps. While they may see one fact of a problem reasonably clearly, or one specific context in which the problem may arise, it is frequently difficult in anticipation fo see the various guises in which the problem may appear and to state the legal solution in a language form that will embrace all the cases that the draftman wants to with.[23]

Because of the inherent incapability of a human being to foresee all the facets of a problem and due to pressure of work and time, the parliament is unable to focuss on all the possible facets of the problem. Because of this, the courts therefore find themselves in a stalemate when confronted with the ominous task of providing for such omissions. An analogy of such an omission was seen in the case of Smith V Hughes.[24] In this case, the statute provided, verbatim; "it shall be an offence for a commom prostitute to loiter in a street or public place for the purpose of prostituting; The court in this case was confronted with a unique facet of this problem. In the instant case, the appellants were soliciting men from a window or a balcony. They kept on tapping the window attracting the attention of passersby. The issue was whether the appellants were loitering òn a street or a public place hence contrary to the street offences Act 1959. The court in this case, held,"It would make no difference whether the prostitute solicited while on the street or standing in a doorway or a balcony or a window, or whether the window is shut or open".

It can be seen that, albeit the dratfman didnt focus his mind on such incidents where a common prostitute could solicit without

walking on a street or on a public place, the court did provide for that omission through interpretion. The court in this case was therefore not concerned with from where the solicitation was done but with to whom it was directed. Itś undisputed that the courts judgement was the way it was just because it was concerned with the intention of the draftman, hence in the court was obssessed with intention then form hence the judgement.

Under such omission, there are also occassions when the parliament has given a general indication but has failed to include a particular issue probably due to unforserbility. In such circumstances the court will apply the rule of èjusden genens`and thus provide for the such omission subject to whether the unforseen situation falls under the class of items provided for by that particular provise of the statute.

The court demonstrated such a situation in the case of Re - Radio Communications.[25] Here the judicial committee was of the opinion that wireless broadcasting was covered by the Telegraphs Act, 1867.[26]

In this case the court flexibly interpreted the statute to provide for a situation that was unforseen at the time of legislation of the statute.

(c) A third cause of statutory interpretaiton is uncertainty. Harvey in his book, An introduction to Legal system, observed, "it is wrong to view a statute as a product of a wholly scientific, detached and uneventful deliberations".[27]

The same position as above is also reinstated by Benion in his book, where he observed, "licking the wounds, while manfully concealing our disappointment let us face the truth; Acts of parliament are prepared unscientifically and in a haste."[28]

The author agrees with the above observations. This is because even after being drafted by some eminent draftman, whose eminence carry the day, statutes still have to be passed. More often than not certain politically instructed changes are introduced into the bill without the legislation having time to consider the repercussions of the changes on the bill as a whole. No wonder therefore certain provisions are inconsistent with other provisions in the same act (statute).

The introduction of changes aside, statutes have also been subjected to several ammendments which add inconsistent and often confused provisions that do not tally with the statutory pattern. One such situation was evident in the Kenyan constitution when the constitution ammendment act 1982 brought in section 2A (now repealed) which was inconsistent with the general pattern of the constitution. In deed the constitutional ammendment[29] was the subject of many litigations, inter alia, Gitobu Imanyara V A.G.,[30] which sought a declaration that the seciton 2A was null and void to extent of the inconsistency.

(d) Legislative intention:

It is undisputable, the sole object in statutory interpretation is to arrive at the legislative intention. The term legislation intention is a slippery one and is sometimes used interchangeably with will. No wonder therefore Maxwell started his famous

treaties on the interpretation of statutes by saying, statute law is the will of the legislature[31]

Lord Radcliffe observed, "there are many so called rules of construcition that courts of law have resorted to in their interpretation of statutes but the paramount rule remains that every statute is to be expounded according to its manifest and expressed intention.[32]

The point therefore is, the true end and design of interpretation is to gather the intent of the legislature from the signs used in the statute. Signs can either be by words or other conjectures. It is therefore the courts duty to ascertain and give effect to the will of the parliament as expressed in its enactments. As expressed by Lord Blackburn, "in all cases the object is to see what the intention of the parliament was".[33]

The courts have vehemently carried out this duty. One such circumstance where the court vividly showed its duty was in the case of Smith V Hughes.[34] In this case, the court was concerned with the intention of the parliament and not the form the intention took. In ascertaining the intention of the parliament, Lord Parker CJ observed, "if the intention is to enable people to walk along the streets without being molested or solicited by the common prostitutes it would make no difference whether the prostitute solicited while on the streets or standing on a balcony or at a window or whether the window was closed or open, in each case her solicitation was projected to eand at somebody walking on the street."[34]

The same position was also demonstratede by the court in the case of Rodger V Dodd. In this case again, the Lord Parker said, "It seems to me that the mischief aimed at by the act of 1966 is the congregation of the public in the premises where no doubt they are served with refreshments and where abuses are likely to occur in the sense of undue noise to the neighbourhood". The chief justice went further to hold that the coffee bar was hence open and in contravention of the act.[35]

The courts in the foregoing cases therefore vehemently demonstrated what the courts duty is? In fact, whenever the interpretation is not done and the legal intention ascertained, the courts will only be condoning the mischief that the parliament intended to do away with.

(e) Abuses or evasion of the statue:

Statutory interpretation has also been neccessitated by avoidance and evasion of statutory requirements. There are certain circumstances that are not expressly provided for by the statue and which cunning persons (read individual human beings and corporations) may take advantage of.

An illustration of such a situation was discussed in the case of Day V. Simpson.[36] The question in this case was whether the theatre Act 1843 which prohibited, under a penalty, the performance of plays without a licence was applicable to the instant facts.
The facts in this case were, the players themselves did not come out on stage, but performed in a chamber below it, their figures being reflected by mirrors so as to appear to the spectators to be on stage. The court held, the Act could be extended to apply to such

situations.

From the foregoing case, it is evident that there are persons who are cunning and ambitious enough and hence capable of manipulating the law to their benefit. It is because of this that interpretation is absolutely neccessary so that such circumstances as above[37] can be brought under control.

The same path as above was also followed by the court in the case of Lafano V Smith.[32]

(f) The sense of natural justice.

"Audi alteran partem", strictly interpreted means that all parties to a case must be heard and their evidence weighed accordingly. However, in the present context the Latin phrase is used to connote a situation where the literal meaning must be construed in the light of all opposing construcitons; and that the meaning which occassions least inconvinience and greater harmony must be the one intended.

More often than not, the literal meanings of statute do not correspond to the legal meaning of the statute, or in certain occassions the literal meaning albeit clear, poses quite a number of hardships and injustice. In such circumstances, the courts are obliged to construe the literal (grammatical) meaning in the light of opposing constructions so as to see which of the conflicting constructions the draftman intended. When such happens, it is done in the quest for justice. The position perhaps can be clearer

if reference is made to the words of Lord Reid. Lord Reid observed "where applying words literally would lead to injustice, some violence must be done to them"[39]. The Learned Lord uses the word must to emphasise the need for justice

1. E.A. Driedger: The Construction of statutes (Sweet & Maxwell, Canada, 1965) at p ix.

2. R.W.M. Dias: Jurisprudence (4th Edition, London, 1976) at p 220 .

3. O.H. Phillips: A First Book on English Law at p. 132.

4. Seaford Courts Estates V Asher 1949 2 KB 481 at p 498 per Lord Denning.

5. O.H. Phillips: Supra, note, note 3, at p 132-133.

6. Bewlay V British Bata Shoe Co. Ltd [1959] 1 W.L.R. 45 at p 54.

7. A.G. V Sillem 1864 2 H & C 431 at 508

8. Re - Gilligan [1950] 1 Q B 32 at p 38

9. Seaford Courts Estates V Assher [1949] 2 K B 481 at p 498

10. Tubes Ltd V Perfecta seamless steal Tubes Ltd [1902] 20 R.P.C. 77 at p 96

11. Holmes - Laski letters at p 45

12. Seaford courts Estate V Asher [1949] 2 K B 481.

13. Inspector of Taxes V Hudson [1955] A C 696 AT P 735

14. S. 3 (2) of Judicature Act, Laws of Kenya

16. Virginia Wambui Otieno V Joash Ochieng & Omollo Siranga [1987]C.A. No. 1[Unreported]

17. A.G. of Uganda V Kabakas Government [1965]E.A. 395 at p 396

18. Richards V MacBride 1881 51 LJMC 15

19. Sunday closing [Wales] Act 1881

20. Kruhlack V Kruhlack [1958] 2 Q B 32

21. Bastardry Law, Ammendment Act [British] 1872

22. Seaford courts Estate V Asher [1949] 2 K B 498

23. W.B. Harvey: An Introduction to Legal Systems in East Africa at p 749

24. Smith V Hughes [1960] 1 WLR 830

25. R. V. Radio Communications [1932] A C 304

26. North America Telegraphs Act, 1867

27. Harvey, op. cit. at 749

28. F.A.F. Benion: op. cit, at xxviii

29. Constitution [Ammendment] No. 7 of 1982

30. Gitobu Imanyara V Attorney General [1991] Misc. C.A. No. 7 [Unreported]

31. Lagan J: Maxwells interpretion of statutes (Bombay N.M. Tripathi, 1969) at p. 1

32. A.G. for Canada V Hallet & Carrey Ltd [1952] 427 at p 449

33. River Wear Commissioners V Adamson (1877) 2 A.C. 743 at p. 763

34. Smith V Hughes [1960] 1 W.L.R. 830

35. Rodgers V Dodd [1968] 2 ALL ER 22 at p 23

36. Day V Simpson 1865 34 LJMC 149

37. Ibid, at 149

38. Lafone V Smith 1859 LJ Ex. 33

CHAPTER TWO:

Interpretative rules:

The basic rule of statutory interpretation is that, it is taken to be the legislatorś intention that the enactment shall be construed in accordance with the general guides to general intention laid down by the law. The so called rules of interpretation are common law rules which have thrived over the years and are nowadays recognized by the common law and even the continental legal systems.

2:2 Literal rule of construction

The literal rule may be expressed as a rebuttable presumption that the parliament intends the ordinary and natural meaning of the words it employs. Lord Mersey J observed, "It is a strong thing to read into an act of parliament words which are not there, and in the absence of a clean neccessity, it is wrong to do".[1]

Proponents of the literal rule argue that the legislation puts its intention in the enactment by the use of certain words and that the courts should only apply what intention the parliament has put down and not try to find out the intention that was in the mind of the parliament. Perhaps the point can be clear by posing Lord Goddardś observation, that a court cannot add words to a statute or read words into it that are not there."[2]

Lord Thankerton L J was also of the opinion that the courts duty is to effect the intention of the parliament as expressed in the

statute. The learned Lord had this to say, "The intention of the parliament should not be judged by what is in its mind, but by its expression of that mind in the statute itself".[3]

The literal rule has been widely applied and on certain occassions it application has done justice. An analogy where its application can be said to have done so is in the case of Fisher V Bell[4]. The facts of this case were, A shopkeeper displayed flisk-knife in his window with a price tug behind it. One day a police constable on seeing the knife decided that it fell under the restricted offensive weapons which were restricted by the Offensive Weapons Act 1959. The police constable reported the shopkeeper for offering for sale a flisk-knife. The respondent contended that he didnt at any time offer for sale within the meaning of the Act of 1959. However the Act in question did not contain a definition of the word "offer for sale". In the absence of a definition in the Act, their Lordships were of the opinion that the word must be construed according to the law of contract. The law of contract is in pari materia, with the Kenyan Sales of goods Act,[5] which provides that display of goods on a shop window doesnt ammount to offer, but to a mere invitation to treat (Or offer to Chauffeur). Be that as it may, the court in the above case,[6] dismissed the appeal. The ratio decidend; for the dismissal being that mere display of goods on a shop window does not ammount to offer. The court gave the word òffer for sale` its strict and literal meaning.

The author submits that reaching the decision that the court reached, justice was done to the respondent, whose life was hanging on balance should the court have decided otherwise.

The author did mention in the foregoing paragraph that literal rule has occassionally done justice. Strict interpretation of the word òccassionally` would therefore show that the author does

have certain occassions where its application has done great injustice. True.

Such occassions are abound. One such circumstance can be gleaned from the case of Gitobu Imanyara V A.G. .[6] Suffice it to say, the applicant, a promient Nairobi advocate applied to the high court of Kenya, seeking that the court declare the constitutional ammendment No 7 Null and void to the extent of its inconsistency. The substantive issue before the court was whether section 2A (now repealed) by the Constitutional Ammendment Act was inconsistent with section 80 of the constitution.[8] It would be of great advantage if I provide the contentious sections. The repealed Section 2A provided, there shall be only one party, Kenya Africa National Union (KANU)

Section 80 provides, Except with his own consent no person shall be hindered in the enjoyment of his freedom of assembly, that is to say, his right to associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests; Section 80 (2) has divisions (a), (b) (c) and (d) which qualify the rights refered to in section 80 1

The Learned Dugdale J, after enumerating the facts of the case went ahead to hold, "the applicant requires the court to put the word political before associations or to believe he is entitled to plead political association as one of the association refered to in section 80 (1) of the constitution ."

The learned judge proceeded, "As far as the intention for the legislators are concerned there can be no other construction other than that the words in the section are correct as intended".

The words, "correct as intended", signifies the courts

application of the literal rule. One may argue that the court held as it did because of the political climate of the time. Further the author sympathises with the trial judges situation. But these notwithstanding, justice must not only be done, but seen to have been done.

The author contends the courts judgement on the ground that on the trial judge misdirected his mind as to the meaning of the word "assembly". Oxford advanced learners dictionary defines the word in the following words, "The coming together of persons for a specific purpose". Further the judge erred in holding that, "other associations`did not include political associations.

The author submits that the word àssembly`if read together with òther associations" include political association, and that it would have been sensible had the judge found for the applicant.

The case above epitomises a situation where the literal rule occassioned injustice. It must therefore, accordingly be said that albeit there are quite a number of cases where the rule has applied, it must also be said that its application has produced many a perverse decisions.

Because of the foregoing, there has been a modern judicial tendency to apply strained construction or alternatively purposive construction. The former refers to where an enactment though clear grammatically, is strained (on constructed) to yield a meaning different from the literal one. This method of construction has been used especially where the literal meaning of a statute if applied in the instant case, becomes capable of more than one meaning or produces an absurdity .

2:2 Golden rule:

It is alternatively refered to as the strained construction. Notice should therefore be taken that whenever the word strained construction is used, the concern is on the golden rule.

Having said that, I wish now to say quite a feew words about this rule. Principally the golden rule is a modification of the literal rule, in the construction of a statute . The golden rule was impliedly echoed by Lord Mersey when he held, "nothing is to be added or taken from a statute unless there are adequate grounds to justify the interference that the legislature intended something which it omitted to express".[9] Emphasis mine.

What the learned Lord Mersey was saying in essence is that adherence should be made to the literal rule, unless that is at variance with the legislatures intention, to be collected from the statute itself; or leads to absurdity or repugnance. In such cases, the Lordship impliedly, was of the opinion, that the language maybe varied or modified so as to avoid the inconviniences.

Lord Parke B (later Lord Wenslydele) observed, "This rule permits departures from the literal meaning of the language". He went further, "infact it is a combination of the literal and the mischief rule".[10]

It is clear that before the court applies the golden rule, it must first endevour the literal rule and the latter must have led to absurdity, repugnance or total inconvinience. This position was underscored by the court in the above case", where the court held, "one applies the literal approach first and it is only if it results into a manifest absurdity that the courts will consider whether there is a secondary meaning possible which is prefered".

The application of golden rule was also lauded by Blackburn

J, in River wear Commissioner V Adamson.[12]

The application of golden rule has enhanced the courts ability to render justice to the litigators. In the case of National & Grindlays Bank and Company V Knetiles Ltd,[13] the court applied the golden rule inorder to avoid the uncertainty which would arise if the word person in section 7 of Land Control Act,[14] was held to exclude a company.

The facts of this case were, Kenboard and company owned land in the Kenayan highlands. A scheme was adopted whereby Kenboard would transfer the land to Kentiles and company.

The appellant bank would then advance the sum Kshs. 90,000 to Kentiles, in exchange for which Kentiles would give the bank a mortgage on the land. Kentiles gave the bank the requisite mortgage,but didnt obtain the consent of conveyance by way of mortgage as are required by section 7 of the Lands control Act. The court held, The absence of the consent invalidated the purported conveyance by way of mortgage and so the bank lost its mortgage and hence priority over the other creditors on Kentiles insolvency.

The bank appealed to the Judicial Committee (Privy Council). The Privy Council after hearing the appeal were of the same opinion as that of the lower court. The judicicial committee held, if the bank was to be exempted from obtaining consent, it would give companies more freedom as regards dealings in land in the highlands than to individuals."

The essence of the golden rule can also be gleaned from the case of Otto Milk Company Washington.[15] Here the facts were as follolws; An ordinance required that milk should be sold in bottles. The otto milk Co. used to put milk into fibre-boards containers and residents of the city challenged this practice by the milk company of putting

milk in containers made of fibre-board as being contrary to the requirements of the ordinance since they were not bottles. The court held, "The fact that to most people nowadays the word `bottle` may convey the idea of a container made of glass was not decisive" The court further held, "nowadays not all bottles, as well as those ones in this case, which serve the same purpose as ordinary bottles which are made of glass".

The author submits had the court found otherwise the life of the company would have been jeopardised, either temporarily or permanently. Further, the residents of washington would have gone without milk for sometimes pending exercution of the courts order. Be that as it may it can be seen that the golden rule proved absolutely important is rendering justice to the `company`whose life was hanging on balance.

The capability of golden rule to alleviate looming absurdities was also underscored in the case of Perron V Morgan.[16] The issue before the court was whether the meaning of the word "money" was limited to the cash in the bank or whether it included the whole estate of the deceased tastetrix. In his landmark judgement, Lord Russel (later Russel MR) said, "The meaning of the word `money`is not restricted by any hard and fast rule, but depends on the context in which it occurs, properly construed in the list of all relevant facts, and, given such sufficient context, it may include more than what is `money`in strict sense."

What a plausible judgement who takes the credit, the golden rule or Lord Russels. The author submits, both.

Despite its efficacy in alleviating looming absurdity and inconviniences, the rule like others also has its weaknesses. Moreso, the judge cannot strain every piece of statute to suit his own intention.

The first problem with the golden rule is what ammount to an absurdity? And who should determine an absurdity? The former is difficult to attest, but nonetheless, what ammounts to an absurdity depends on the circumstances of each and every case, and to lesser extent on the trial judge. It is therefore noteworthy to realize that there is no objective test as to what ammounts to an absurdity. The lack of objective test therefore makes the determination of what is absurdity discretionary and subject to the personal whims of the trial judge. What a disadvantage.

Further, the application of the golden rule leads to the inclusion of extrinsic matters in the construction of the statute which matter the parliament might not have intended. The golden rule permits the use of dictionary, marginal notes and the preamble, inter alia. The extrinsic materials therefore might create a meaning different from that intended by the legislature.

Another problem of the rule is that it usurps the function of the legislature. This however, is the crux of this research, and I would therefore defer this discussion to Chapter four.

No wonder therefore Lord Simmon Said," the power and duty of the judge to travel outside the statutes on a voyage of discovery are strictly limited".

2:3 Mischief rule:

Mischief rule is alternatively refered to as the purposive construction. It is termed purposive because, in its application, the court hunts for the intention of the parliament and when found it is to be effected.

The rule is predicated on the ground that the law is to be applied with reference to the intention of the parliament. The mischief rule (also rule in Hydons case) is based on the principle that law is to be applied in terms of its objectives, consequences and results.

The application of this rule entails the consideration of four resolutions. The resolutions viz.

a) What was the position of common law before the making of act?

b) What was the mischief and the defect for which the common law didnt provide?

c) The remedy the parliament had resolved and appointed to cure the disease (read mischief)

d) The true reason(s) of the remedy

The purposive construction therefore demands that the office of the judge should always make such construction as shall always suppress the mischief and advance the remedy.

Lord Halisbury observed, "We are to see what was the law before the Act was passed and what was the mischief or defect for which the law had not provided, the remedy the parliament has appointed and why that remedy."

Perhaps the situation is brought out clearly by Parker CJ in the case of Republic V Males[17].

The court in applying the word of the statute to the instant case held that a person charged with attempted house-breaking was not

entitled to be acquited because it appeared from the evidence that he had committed the complete offence. Parker CJ observed, "when one considers the mischief aimed at by the act, it seems to me that; that is really the only interpretation that can be put on these words."

Mischief rule empowers the court to make inquiry as to the intention of the parliament and that once it finds the intention, effect should be given to it. The case of Smith V Hughes,[18] brings this out. In this case the statute provided, "It shall be an offence for a common prostitute to loiter in a street or public place for the purpose of prostitution." emphasis mine.

The appellants , in this case were soliciting from a window on a balcony. They kept on tapping on the window attracting the attention of passersby on the street. The question that arose for determination was whether this was soliciting on a street or public place and hence contrary to the street offences Act 1959. Surely, that could not be soliciting on a street or a public place for one, the prostitutes were not on a street and neither in a public place. A strict constructionist should have founded for the appellants. That was not the case. Parker CJ said that, the intention of the Act was to enable people to walk along, the streets without being molested or solicited by common prostitutes. The learned CJ went ahed, "it would therefore make no difference whether the prostitutes solicited while on the streets or standing on a doorway or a balcony, or at a window or whether the window was open or closed; in each case her solicitation was projected to and addressed to somebody walking on the street".

What a plausible argument from the chief justice. From the chief justice arguements, I am persuaded that in applying the purposive construction, the courts become obsessed with the

intention of the statute other than its form. The same position was also expounded by the court in the case of Rodger Dodds.

Coincidentally the case was before Lord Parker CJ who as above, observed, "It seems to me that the mischief aimed at by the Act of 1966 is the congregation of the public in premises where no doubt they are served with refreshments and where abuses are likely to occur in the sense of undue noise, drug peddling and such other matters."

Consequently, the court found that through the doors of the coffee bar were closed, the bar was open and in contravention of the Act.

In mischief rule the courts are required to observe the maxim, ut res magis valest quam percat. This latin word means that the courts are to construe the enactment in such a way as to implement, rather than defeat, the legislative intention.

Infact this has been the courts position as explained by the C.J. (Parkers) judgement in both Smith V Hughes[19] and Rodger V Dodds.[20]

Like its counterpart rules, the purposive approach also suffers serious defects. The first of the defects that gauge the operation of this rule which was founded in Heydons case,[21] is the use of both intrinsic and extrinsic matters. In using the purposive approach, the courts look,not only to the various intrinsic aids mentioned, but also to previous statutes (law) and the case law dealing with the same matter.

The position was underscored in the modern case of Sweet V Parsley[22] In this case, the issue concerned the meaning of the word "Concerned in the management of the premises used for the purpose

of smoking cannabis", in the Dangerous Drugs Act, 1965.[23] In this case Lords Pearce and Wilberforce reached their judgement, partly on interpretation of a similar expression in the Dangerous Drugs Act.[24]

The use of these extrinsic matters apart from making the courts work cumbersome has far-reaching consequences some of which the draftman didnt intend.

Difficulty of determining the legislative intention perhaps I should start by giving a definition of legislative intention. The intention of the legislation is a phrase that has produced much heat, but less light. This is because quite a number of authors have doubted its reality. Dias[25] in reference to legislative intention says, it seems to be superflous.

The biographer of Lord Atkin,[26] in a chapter devoted to statutory interpretation, goes far to say that the very parliament whose intention must be discovered is an imaginary one.

Cross in his book,[27] calls it a linguistic convinience. He goes further to say, "the intention of parliament is, in a sense, a fiction. It is not an intention formulated by the mind of the parliament, for parliament has no mind; and its not the collective intention of the members of parliament for no such collective intention exist". Cross goes further to add, "the only real intention is the intention of the sponsors and the draftman of the bill that gave rise to the Act, but that is not the intention of the parliament".

Despite the foregoing argument, it is an inescapable point that the intention of parliament can be defined as, an agreement by the majority that the words in the bill express what should best be

known as, the intention of the parliament.

Infact it is a thought-provoking phrase. If it exist the better. But its existence further requires the determination of what it is. I must say that just as its definition is slippery so is its determination.

Usurpation of the legislative function. Under the guise of hunting for the, always elusive intention of the legislators, the courts many a times find themselves in dilemma. This dilema; the author contends, leads to the substitution of the legislators intention by that of the trial court.

The issue is, the courts in seeking for intention of the legislators are ,more often than not, influenced by their whims other than the words used by the legislator. Hence what is enforced by the court is not strictly the legislators intention, but that of the court or perhaps that which the court in its wisdom thinks might have been in the mind of the legislature at the time of enactment.

Footnotes:

1. Thompson V Gould & Co. [1910] AC 409 at p 426.
2. R V Wimbledon JJ Ex-p Derwemt [1953] 1QB 380 at p 384
3. Wicks V D.P.P. [1947] AC 361 at p 366
4. Fisher V Bell [1961] 1QB 394
5. Sale of Goods Act Cap 31 Laws of Kenya
6. Gitobu Imanyara V A.G. [1991] mISC. C A No. 7 [Unreported]
7. Constitutional [Ammendment] No 7 of 1982
8. Constitution of Kenya
9. Thompson V Gould & Co. [1910] A C 409
10. Beake V Smith 1836 2 M & W 191
11. Ibid at p. 195
12. River Wear Commissioners V Adamson 1877 1 A.C. 743
13. National Grindleys Bank & Co.V Kentiles Ltd [1963] E A 17
14. Section 7 (1) of Land Control Act, cap 302 Laws of Kenya
15. Otto milk Co. V Washington [1949] 363 69A 2nd 399
16. Parrin V Morgan [1949]AC 399
17. Rex V Male, Modern Legal history, A H Manchester, at p 33.
18. Rodger V Dodd [1962] 2 ALL ER 22 at p 23
19. Smith V Hughes [1960] 1 WLR 830 at p 832
20. Rodger V Dodd [1962] 1 ALL ER 22
21. Hydons case [1584]3 Co. Rep. 7
22. Sweet V Pfearsely [1970] AC 132
23. Dangerous Drugs Act, 1920
24. Ibid
25. Dias, op. cit. at p. 219.
26. Lewis G: Lord Atkin (Butterworths, London, 1983) at p 118

27. Cross, R: statutory Interpretation (Butterworths, London, 1985) at p. 35.

CHAPTER THREE:

Other Aids of Construction

The use of the word `other `signifies guides which are used to construe a statute, which guides are foreign (read entranous).

The rules laid down in Hydons case, allow, to a certain extent, the surrounding circumstances Which led to the passing of the act to be considered.

Turner LJ observed, "the dominant purpose of construing a statute is to ascertain the intent of the legislature, to be collected from the course and neccessity of the Act being made from a comparison of its several parts and from foreign circumstances so far as they can be considered to throw light upon the subject".[1]

From the proceeding quotation, it can be gleaned that the use of other aids to construe a statute were prevalent as early as the 14th century.

Lord Halisbury in acknowledgement of the courts ability to use other guides held, "To construe the statute now in question it is not only legitimate, but highly convinient to refer both to the former Act and to the ascertained evils to which the former Act had given rise, and to the later Act which provided the remedy"[2]

Perhaps, Lord Atkin, that eminent judge of the neighbour

principle had the clearest backing for the use of other guides. In the case of Keates V Levis Merthyr consolidated collieries Co. Ltd,[3] he observed, "In construction of a statute it is of course at all times and under all circumstances permissible to have regard to the state of things existing at the time the statute was passed and to the evils which, as appears from its

provisions, it was designed to remedy and I think nothing could be more unsafe or more misleading than to allow oneself to be detered from putting upon a statute the particular construction which the consideration of these things would lead one to adopt, by the apprehension of the prejudicial effect it might have on rights and privileges confered by subsequent legislation unthought of at the time this particular statute was passed."[4]

The rule as to the applicability of other guides to statute construction in order to discover the intention of the legislature existed prior to the 14th c. This rule was described by Lord Blackstone in 1559 as an old one.

Having looked at the extrenous circumstnaces which the courts use in their bid to statutory construction, the author now proceeds to look at the intrinsic guides. But before then, I wish to say it here and now that the examination of the extranous guides is not over. I have temporarily closed the discussion, so as to allow myself time also to generally discuss the intrinsic guides.

Notice should therefore be taken that an exhaustive discussion of the extranous guides is to follow in the next sub-

topic.

Intrinsic guides refers to such other aids contained within the statute, but which do not form part of the act. Usually when and if enacting (operative) words of the act are not clear and

unambigous in themselves, there are several intrinsic aids to which the court may look for guidance concerning the legislative intention. Under intrinsic there falls, long tittles, preambles, punctuations, headings, schedules, short titles and also marginal notes.

That be the case, the author wishes to expose and discuss in details the circumstances that constitute extranous aids. Inter alia, these include, the law before the Act was produced, Debates in Parliament, Reports of Commissioners, statutes in pari-materia and dictionaries whenever neccessary:

3:1:1 The Law before the Act was passed:

The cause and neccessity of an Act maybe discovered, first by, considering the state of the law at the time when the Act was passed. In innumerable cases the courts, with a view to construing an Act, have considered the existing law and reviewed the history of the legislation upon the subject.

One such case can be traced from the case of *S.E. Railway Co. Ltd V The Railway Commissioners*[5]. Delivering the considered judgement of the court Lush J observed, "While we are to collect

what the legislature intended from what it said, we must look not at one phrase or section only, but at the whole of the act, and must read it by the light which the state of law at the time ..... throws upon it." The principle of the admissibility of general history as an aid to construction was fully explained by Lord Halisbury in Read V Bishop of Lincoln.[6]

His Lordships pointed out that the meaning of the terms of the rubric can only be properly ascertained by being considered in relation to the circumstances existing at the time it was framed, and the works of authority on eclessiastical history and practices might properly be consulted to ascertain those circumstances.

However, I wish to put it crystal clear that, whereas the courts, in the circumstances of the preceding disucssion may refer to legal history, that is to say, the position of the law befqre the act, they are not permitted to inquire into the social and political history of the bill(s).

3:1:2 Reports of Commission

As regards reports of commissioners, the position was laid by Lord Halisbury in the case of Eastman photographic materials V Camproller of General potents.[7] His Lordship said,"for purposes of construing the Act,[8] reference could be made to the report of the commission appointed to inquire into the duties, arrangements etc of the patent office."

However, the position seems to have changed. Lord Wright is on record as having said, "the Lord chancellor, Halsbury,[9] was refering to the report of a commission which had sat to inquire into the working of the earlier Act." He went ahead to hold,

"the Lord Chancellors reference to the report of the commission was perhaps because there was no other accurate source of information as to what was the evil or defect which the Act of parliament under construction was intended to remedy."

Despite the change in position as regards the use of reports of commissioners, it is submitted that these reports still influence the courts minds in ascertaining the intention of the legislators. Authority to this effect is evident in Beswick V Beswick.[10] Lord upjorn refered to a report of a joint committee on the consolidation of Bills. He however, proceeded to observe that the reference was only to ascertain that there was nothing in the proceedings of the joint committee which had weakended the normal presumption. The Lordships reference though qualified, emphasises the essence of the report of commissioners in endeavouring to ascertaining the legislators intention.

3:1:3: Statutes in Pari-Materia

The phrase `pari-materia` must not be confounded with the word `similar `which intimates likeliness. It merely refers to public statutes or general laws made at different times but in reference to the same subject.

Hosmer J said, "statutes are in pari materia which relate to the same person or thing or to the same class of persons or things".[11]

The rule as far as statute in pari-materia is concerned was first laid down in 1785 by the twelve judges in the Re-Palmers case[12]. They laid down that "where Acts of Parliament are in pari-materia, that is to say, are related so as to form a system or code of legislation, they are to be taken together as forming one system and as interpretating and enforcing each other."

Having defined the phrase par-materia and seen the rule as to it, the next problem that confronts the court is the determination of the statutes that are in pari-materia . As to determination of statutes in pari-materia, the test was expounded by Buller J, in Crosley V Arkwright.[13] The Lordship observed, "Act relating to one subject eg stamps, must be construed to be in pari-materia."

The same position was reiterated by Lord Mansfield, in R.V. Loxdelv.[14] Mansfield held, "laws concerning bankrupts, and also all the statutes making provisions for the poor, are to be considered as one system."

The position was further enunciated by Evershed LJ in the case of Carravans and Automobiles Ltd V Southall Borough

Council.[15]

Evershed observed, it is a rule of interpretation of statutes that it is permissible to call in aid for the

construction of words or phrases used in one Act, meanings given to them in earlier Acts in pari materia..."

The court then went ahead to hold that the Rent Restriction Act[16] cannot be regarded as being in pari-materia with the Real property legislation of 1925.

3:1:4: Parliamentary Debates:

The general position is that they are inadmissible. This was expressed by Lord Willies J in the case of Millar V Taylor.[17] "The sense and meaning of an Act of parliament must be collected from what it says when passed as law and not from the history of changes it underwent in the house where it took its rise" per Lord Willies J.

The reason for this according to Lord Reid in 1968 is purely practical. He said, "debates in the House are not admissible because of the time and expense involved in the reading of all the debates on an Act, the difficulty of access by counsel also makes these debates inadmissible."

However, like reports of commissioners, parliamentary debates do influence the courts mind in endeavouring to find the intention of the parliament.

This position can be gleaned from Lord Watsons judgement in Administrator General of Bengal V Prem Ltd Mullick.[18] His Lordship observed that the two learned judges who constituted the Appellete court, although they didn't base their judgement on them, referred to the proceedings of the legislature which resulted in the passing of the Act (No. 11) of 1874 as legitimate aid in construction of the section in question.

3:1:5 Use of Dictionaries

Dictionaries are somewhat delusive guides in the construction of the statute terms. This position was illustrated by Kinderslay VC in the case of Great Western Railway V Carpalla united china clay Co.[19]

No doubt reference to the better dicionaries do afford, either by definition or illustration, some guide to the use of a term in a statute.

Lord Coleridge said, "I am quite aware of the fact that dicitonaries are not to be taken as authoritative exponents of

the meanings of words used in Acts of parliament, but it is a well-known rule of courts of Law that words should be taken to be in their ordinary sense, and we are therefore sent to these books."[20]

What the Lordship was saying in short, is the parliament often intends to give words their primary meanings. Therefore in case of doubt as to the meaning of a word, then reference can be made to the dicitonaries. He Coleridge collectively refers to them as these ` books; meaning dictionaries .

No matter therefore Lord Cozens - Hardy (MR) observed, "It is for the court to interpret the statute as best as it may. In so doing the court may no doubt assist themselves in the discharge of their duties by any literary help including, of course, authoritative dictionaries"[21]

Emphasis to Lord Cozens - Hardy observation is illustrated in the case of Re-Rippon Housing Order.[22] In this instant case, the court approved and used the meaning of the word `park`as used (read defined) in the oxford English Dictionary.

Dictionaries are therefore a source of literary help to the courts in statutory construction and their contribution in the endeavour to help the court ascertain the meanings of words or pharases employed by the legislature, cannot be mystified.

The author now wishes to turn to intrinsic aids. As I mentioned earlier at the beginning of this chapter, intrinsic aids refer to such other aids (read guides) that are in the statutes, but which do not form part of it. Therefore in circumstances where the enacting (or operative) words of an Act are not clear and unambigous in themselves, there are several

intrinsic aids to which the court may look for guidance concerning the intention of the parliament:

3:1:6 Long titles:

Formerly, it is on record, that long titles were not considered to be part of the Act. However, it could be looked at if the operation part of the Act was not clear.

The modern position is however, to the contrary. This was underscored by Lindley MR, in Fielding V Morley Corporation .[23] His Lordship observed, I read the title advisedly, because now, and for many years past the title of the Act of parliament has been part of the Act of parliament". The Lordship continued, "In the old days it used not be so, and in the old books we were told not to regard it, but now the title is an important part of the Act, and its so treated in both the Houses of Parliament."

The author submits that this drastic change with regard to the position of the long titles, must have been as a result that formerly the long titles were the product of the draftman, whereas now it is subject to Ammendment by both Houses at various stages of the Bill.

construction of charitable trusts are concerned. Thus to date, no object can be regarded as charitable unless it comes within the spirit and intentment of the preamble to the statute of Elizabeth of 1601.

That old judge, Blackstone is on record to have regarded preamble as one of the first things to look at in applying purposive approach.

Preamble of modern statutes are important to the court so the courts frequently make reference to them whenever there is doubt. A situation where a court refered to the preamble of the statute is demonstrated in the case of Attorney General V Prince Ernest Augustus of Hanover.[27] The House of Lords held that the words "all persons lineally descending from prince sophie, Electress of Hanover born or hereafter to be born" must be interpreted literally, so as to confer British nationality to the respondent. The judgement was held as it was after their Lordships had made reference to the preamble.

Summarily, I wish to say that the preamble is part of the context of a statute and use should therefore be made of them.

3:1:8 Headings

Headings were first used in 1845.[28] The use of headings like preamble can only be invoked where the words of the Act are obscure, equivocal and ambigous. This was the position of the

court in the case Fletcher V Birkenhead Corporation.[29]

The court in the case of Re carlton[30] also made reference to the heading to section 10 of Naturalization Act, 1870. The heading to the section read; "National status of married women and infant children." Lord cohen refered to the heading and held that the word `child` inthe section meant a child under 21 years of age.

Since 1845, headings have been refered to more often than not, by the courts. Their Lordships in D.P.P. V Schildkamp,[30] also made extensive reference to the heading of section 332 of Companies Act.[31]

Generally, the author has laboured to show how courts have used both extrinsic and intrinsic aids in their endeavour to ascertain the legislative intention. It is clear evidence that courts whenever in dilemma often consult other guides.

3:2 Ejusden generis

The doctrine of Ejusdem generis`demands that words must be taken in their context. It is whereby words used by way of summary after the enumeraiton of particulars forming a category are taken to refer only to things which fall within that category.

The doctrine ejusdem generis is alternatively known as "Noscitur a sociis".

The rule was laid down by Lord Campbell in the case of Rex V Edward[32]. His Lordship observed, "I accede to the principle laid down in the previous cases, that, where there are general words following particular and specific words, the general words must be confined to the things of the same kind as those specified".

Lord Branwell was also of the same opinion, when he said, "as a matter of ordinary construction, where several words are followed by a general expression which is as much applicable to the first and to the last, that expression is not limited to the last, but applies to all".[33]

The rule of noscitur a sociis formed the ratio dedidend in the case of Brownwea Haver Properties Ltd V Poole Corporation.[34] The facts, in the instant case were that a local authority had power for prescribing traffic routes and for preventing obstruction of the streets, in all times of public processions, rejoicing or illuminations and in any case when the streets are thronged or liable to be obstructed. The court of appeal held, the word, "in any case" must be confined to such occassions as public procession, rejoicing and illumination and therefore did not give power to prescribe one way traffic for 6 months in ordinary conditions.

The case of Ram V Accidental Insurance Company,[35] also illustrated the essence of the rule.

Here, a policy stated that the household effects were insurable and among the things enumerated were jewellery, watches,cameras etc. Rem the insured lost a fur coat and the question was whether a fur coat could be said to be in the species enumerated. The court found for the insurance company holding that a fur coat didnt fall in the enumerated species.

To invoke the principle of ejusdem generis there must exist in essence a distinct genus or category. The specific words must apply not to different objects of a widely differing character, but to something which can be called a class or kind of objects.

The principle of èjusdem generis`despite its numerous contribution to the administration of justice, however suffers one serious deficit. This rule can only be invoked where there is a genus or class of objects. Where this is lacking the rule cannot apply. Its application is thus limited.

3:3 Presumptions:

Presumptions, according to cross, can be understood in two

senses. The first limb defines a presumptions as a condition which must be drawn until the contrary is proved. This definition of presumption is contained in the Evidence Act Section 4.[36]

Under this limb, the term presumption is simply used as another way of stating the effects of the relevant rules with regard to the incidence of burden of proof.

Examples of such presumptions are, presumption of innocence it is a presumption that an accussed person is innocent until proved guilty by a competent court of law.

There is also the presumption of sanity. This is provided for by the Penal Code Section 11,[37] which provides, Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.

The second limb of the definition connotes a condition which must be drawn on the truth of a basic fact ie the presumption of marriage, presumption of legitmacy etc.

Generally, presumpstions fall under two classification, that is presumption of facts and those of law. For the purpose of this research, time will be devoted to discussion of the latter.

Presumption of law are those inferences that a reasonable person must draw in the face of the law. They, too, fall into two classes, that is the rebuttable and irrebutable.

Presumptions are rebuttable if they can be displaced. Section 72 (5) of the constitution[38] provides the rebuttable presumption of innocence. This presumption is to hold sway until and unless displaced by evidence.

The other class of presumptions of law is those that are irrebutable. This type of presumptions are provided for by section 14 (3) of penal code. It can be said of them that they are merely rules of substantive law expressed in presumptive form.

Irrebutable presumption are, inter alia, that a child below 8 years is incapable of committing on offence. This is provided for by section 14 (1) of penal code.

Having explained the meaning of the term presumption, it would therefore suffice to discuss atleast one of these presumptions and see how far it does influence the courts mind in endevouring to construe the statute before it. The presumption that mens rea is a basic neccessity in criminal liability. There is a very strong presumption that a statute creating a criminal offence does not intend to attach liability without a guilty intent

This presumption is expressed as, "Actus non facit reum nisi mens sit rea".

Lord Goddard reiterated this principle in the case of Harding V Price.[39] His Lordship observed, "it is of the utmost importance for the protection of liberty of the subject, that a court should always bear in mind that unless a statute, either expressly or by neccessary implication, rules out `Mens rea `as a constituent part of a crime, the court should not find a man guilty of an offence against criminal law unless he has a guilty mind."

This presumption was further strengthened by the unanimous decision of the house of Lords in the case of Sweet V Parsely.[40] The court in allowing the appeal of a teacher against conviction on a charge of being concerned in the management of premises used for the purpose of smoking cannabis under S. 5 (b) of the Dangerous Drugs Act, 1965, observed "Where no special state of mind is expressed in the statute creating an offence, such as "maliciously", `fraudelently `or ´wilfully`- the words are to be read as subject to the implication that a neccessary element in the offence in the absence of a belief, held honestly and upon reasonable grounds, in the existence of facts which if true, would make the act innocent."

The position enunciated above is the position of the law in England. One then might wonder why much emphasis is laid on the English position. The fact is clear, Kenya having been a colony of British upto the early 1960s much of her law is copied from the former. It is therefore not surprising to find the English position being equivalent to that of Kenya.

In Kenya as far as criminal liability is concerned, the position is provided by section 9 of penal code.

Presumptions in essence help the courts to construe certain statutes that embody them hence a court of law will not hold otherwise unless and until, the presumption is dislodged.

3:4 statutory definitions:

Statutory definitions are those definitions offered by the legislature to assist the courts in their construction bid. Quite a number of definitions are contained in the interpretation and general Provisions Act.[40]

Apart from the interpretation and general Act, nearly all other statutes do comprise of an interpretation chapter. The penal code cap 63 contains such a chapter which runs all through section 4. It is under this section that definitions of certain words used by the legislators exist. Under section 4 of penal code `felony` is defined to mean an offence which is declared by law to be a felony; `Misdemeanour`means any offence which is not a felony.

Similarly, the bankruptcy Act,[41] also contains an interpretation section, Section 2. Under the Act, "an act of bankruptcy" is defined to mean any act of bankruptcy available for a bankruptcy petition at the date of the presentation of the petition on which the recieving order is made".

Generally, it is noteworthy that such definitions be provided by the legislature to assist the courts. These definitions are therefore binding on the courts. However, such definitions are not to apply where the contrary intention appears from the Act in which it is used.

Statutory definitions can be classified under various headings depending on the purpose they are meant for. In this

respect there are such definitions which are designated clarifying, labelling, referential, exclusionary, enlarging and also comprehensive definitions.

A definition is clarifying when it is meant to clarify the meaning of a common word or phrase by stating that it does (or doesn`t) include specified matters. Thus the definition of `Wound ` in the penal code means any incision or puncture which divides or pierces any exterior membrane of the body. The definition goes ahead to say, `and any membrane is exterior for the purpose of this definition which can be touched without dividing or piercing of any other membrance;

The definition of `wound` is clarifying in as much as it seeks to clarify what the word `wound `does or otherwise include.

Labelling definition:

Definition is regarded to be labelling if a term is used as a label denoting a complex concept that can then be refered to merely by use of a label. However such definitions are rare in the Kenya statutes.

Referential definition

These serve the purpose of attracting a meaning already established in law whether, by statute or comprehensive definition.

Definition is said to be comprehensive if it provides a full statement of the meaning of the term. Thus this type of definition embraces referential and inclusive definitions. An example of such a definition is to be found in the Penal Code (interpretation section). This is the definition of `Possesion ` The Act defines possesion `or to "be in possesion of" to include not only having in oneś own personal possesion, but also knowingly having anything in the actual possesion or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or any other person.

The use of the word ` possesion `in any Act will therefore denote all that is provided by the preceding definition.

The purpose of definition is to avoid doubts as to whether the term does (or doesnt) include specified matters. The essence of definitions was underlined by Viscount Dillorne LJ,thus "It is a familiar devise of a draftman to state expressly that certain matters are to be treated as coming within a definition to avoid argument on whether they did (sic) or not".[42]

3:5 Precedents:

The doctrine of precedent alternatively refered to as the doctrine of stare decisis is one of the most important features of the common law. This doctrine permeates every branch of law and it has been greatly used and relied upon, in law.

Under the doctrine of precedents, decisions handed down by superior courts in earlier cases play a significant role in the determination of the meaning of a word or phrase of a similar nature to that which the court dealt with in the earlier case.

Such decisions become guidelines in later cases. This has been the practice of the English courts and I submit it is the practice in Kenyan courts.

A precedent by definition, as Lord Salmond observed, "is a judicial decision which in itself contains a principle". This principle which thus forms its authoritative element is often termed as the ratio decedend;. It is this ratio decidend which alone has the force of law as regards the world at large.

Before, the opinion can have the weight of a precedent, it must satisfy two things viz;

It must in the first place be an opinion given by the judge; thus an opinion given by the jury (or assesors) cannot be a precedent.

In the second place, that opinion must be an opinion the formation of which is neccessary for the decision of a particular case.

One thing to realize about precedents is that the decisions of higher courts are binding on the surbodinates, but the decision of courts of cordinate jurisdiction don`t bind one another though they are persuasive.

The doctrine of precedents may have been received in Kenya through the 1897 order - in council. Under this clause the common law principle was recieved to the country. The relevant section reads;

" The jurisdiciton of the supreme court and of the subordinate courts shall be exercised in conformity with the substance of common law."

The application of the substance of common law neccessitated the application of such principles known to and recognized by the English common law system. Salient of those principles included the doctrine of `stare decisis `.

The reception of common law as part of the laws of Kenya meant the application of this doctrine. However, the same reception clause restricted the application of the substance of common law in Kenya to the position existing in England as at 12th of August, 1987.

In modern Kenyan legal system, the reception clause is contained in the judicature Act Section 3 (1). The same provision also limits the applicability of the substance of common law subject to the permission of local circumstances.

One example of an occassion when the court examplified the limits as to the applicability of the common law was in the case of Virginia Wambui Otieno V Omollo Siranga & Joash Ochieng Ougo.[43]

In this case, the counsel for the appellant submitted that the common law was the one applicable in the determination of who was entitled to the control and disposal of the body of the late S.M. Otieno. The court of appeal, in its considered judgement, delivered by Nyarangi J.A. (now the late) Were however of the contrary opinion. The court held that common law could not apply and accordingly the customary law was prefered.

The doctrine of precedent has been frequently applied by the Kenya courts. Granting an injunction sought by the applicant, shield J observed, "The deceased in this case died intestate. His widow is plainly entitled to his corpse in accordance with Civil Appeal No. 12 of 1979".

It is crystal clear from the words of his Lordship that he (Shields J) was influenced in so·holding by the courts earlier

decision.

The doctrine of precedent though popular, has not had extensive application in Kenyan courts. The reasons are many and varied.

It is indisputable that the doctrine of precedent, flourished in England because of availibility of law reports. In Kenya the contrary exist. Law reports are scarce and had to come by. Courts canot therefore learn of what particular matters had been earlier decided by superior courts. The absence of Law reports basically is one of the most serious handicaps that haunts the operation of the doctrine.

Legal representation. Many Kenyans live in poverty. The prevalence of poverty makes it difficult for them to afford legal representation suffice it to say that it is only the legal counsels who are in a better position to use the doctrine of precedents. Most trials in the surbodinates courts are not represented. In such occassions, even if the precedent existed, the court will not have the advantage of it being pointed out.

Poor prosecution is another handicap in the operation of the doctrine. Many a police procesutors charged with prosecution are either illiterate or unaware of the law. Many magistrates in the face of prosecution by police prosecutors with limited knowledge prefer to proceed in a summary manner hence little chances are given to precedents.

The presence of lay magistrate in the surbodinate courts. In 1967 when the institution of magistrates was introduced there was acute shortage of personel to man the courts. Preference therefore was accordingly given to clerks of the former Natives courts which were abolished. It was believed that these clerks had a working experience of the law. Their training was largely in the area of use of statutes and less on common law. These class of magistrates are thus ignorant of the applicability of the doctrine of precedent.

Codification of law has also had its impacts on the doctrine. It must be realized that the doctrine flourished in England because of the absence of codes of law. The judges in England were therefore the sole repositories of law and their pronouncement in decisions was considered important in laying down the principles of law. In Kenya there has been extensive codification of the law which has accordingly underplayed the role of precedents. Most of the common law has been codified into statute eg. the Evidence Act cap 80.

The operation of common law in general and the doctrine of precedents in particular has been undermined by the Judicature Act cap 8 which provides; " the surbodinates are to exercise their jurisdiction in conformity with the constitution and subject thereto, all other writen laws :

The ammount of work (work-load) in the surbodinate courts, has also had its implications on the doctrine. The surbodinate courts are over-loaded with work to an extent that hardly adequate time is given to each case. It is therefore not abnormal to hear a magistrate say, "Mr. Counsel take notice that the court you are addressing is also learned in Law". It looks surprising particularly given that such words came from the mouth of a magistrate employed to do justice by giving all the litigants a fair hearing. However, strong it is, suffice it to say, it did emanate from the mouth of a magistrate. What a shame.

The author sympathises with the Magistrates who find themselves in such intransigance. This is in the wake of the author's presence in the surbodinate courts and having seen the situation himself. Everybody who sees the situation knows that something is wrong and something must be done.

This doctrine, hence despite its innumerable contributions to justice has not been adequately utilized. Ways and means should be

taken to improve its use. This can only be so if certain recommendations given in chapter five of this research are implemented.

Footnotes Chapter 3

1. Hydons case (1584) 3 Co Rep 7 (a)
2. Eastman Photographic Co. Ltd V Comptroller - General of patents [1898] AC 571, at p 575.
3. Keetes V Levis Merthyr Consolidated Collieries Ltd 1911 AC 641.
4. Ibid at p 642
5. S.E Railway Co. Ltd V The Railway Commissioners (1880)5 980 217, 240
6. Read V Bishop of Lincoln [1892] AC 644 at 652 S 3
7. Eastern Photographic Co. V Comptroller General [1898] AC 57.
8. Patents Act 1887
9. Eastern Photographic Co. Ltd V Comptroller of Patents (1895) AC 571
10. Beswick V Beswick [1968] AC 58 at p. 105
11. United States V Eagle Bank (1829) 7 Conn 457 at p 470
12. Re - Palmers case (1755) 1 Leach cc 4th ed 355
13. Crosley V Arkwright (1785) 2 T.R. 603 at 609
14. Rex V Loxdale (1758) 1 Burr 445, 447
15. Carravans & automobiles Ltd V Southell Borough Council [1963] 1 WLR 690.
16. Rent Restrictions Act (1925) British Act.
17. Miller V Taylor (1769) 4 Burr 2303, at p 2332
18. Administration - General of Bengal V Prem Ltd Mullick (1895) LR 22 Ind. App 107, at 118
19. Great Western Railway V Carpalla United China Clay Co. 1910 AC 83
20. Rex V Peters (1886) 16 QBD 636 at p 641
21. Camdem (Marquis) V I.R.C. [1914] 1 KB 641 AT P 647
22. Re-Rippon Housing order [1939] 2 KB & 38

23. Fielding V Morley Corporation (1899) 1 Ch 1, 3

24. Fisher V Raven (1964) AC 210

25. Debtors Act (British) 1875

26. Charitable uses Act, (1601)

27. Attorney-General V Prince Earnest Augustus of Hanover [1957] AC 436

28. Phillips O.H. A first book of English Law, (Sweet & Maxwell, New Zealand, 7th edition, 1977) p 150

29. Fletcher V Birkenhead Corporation [1907] 1KB 205 at p 218

30. D.P.P. V Schildkamp [1971] AC 1

31. Companies Act (1948) S. 332

32. Rex V Edmundson (1859) 28 LJMC 213, at p 215

33. Great Western Railway V Swindon etc (1884) 9 App. case 787, at p 808

34. Browner Haver Properties V Poole Corporation [1958] Ch 574.

35. Rem V Accidental Insurance Company (1892) 66 LT 401

36. Section 6, Evidence Act Cap 80, Laws of Kenya

37. Section 11, Penal Code, Cap 63, Laws of Kenya

38. Section (5), Constitution of Kenya.

39. Harding V Price [1948] 1 KB 695 at 699

40. Sweet V Parsely [1970]AC 132.

41. Bankruptcy Act Cap 53

42. I.R.C. Parker [1966] AC 141 at p 161

43. Virginia Wambui Otieno V Omollo Siranga & Joash Ougo [1987] C.A. No. 1 at Nairobi.

CHAPTER FOUR

Jurisprudential Demystification:

If you ask any of the common law judges whether or not he is a lawmaker, you need not be surprised to see him shrug his shoulders and throw his hands in the air indicating that judges dont make law. He like the Blackstone of the old, will tell you, "The duty of the judge is not to pronounce new law, but to maintain and propound on the already enacted one."

This, the author submits, is the general position as far as judges are concerned, they are not to make law, but to propound the old ones. However, there has been mystification of this position to an extent that many people are on record as having said, the courts have over-stepped their limits hence usurped the legislative functions.

There have been alot of controversies in this area as the proponents of the literal rule accuse their counterparts who adopt strained or purposive (informed) approaches as usurping the powers of the legislature. The Lord Simmon is on record as having said that the duty of the court, is, "to ascertain the meaning of the intention of the legislator from the words expressed in the statute and nothing else." Lord Thankerton was also of the same opinion as Viscount Simond when he observed, "the intention of the parliament is not to be judged by what was in the mind of the parliament, but by its expression of that mind in the statute itself".[1]

The proponents of the other approaches, however do not see how the accussation from the literal proponents arise, and infact the proponents of the latter counter-accuse the former proponents of condoning injustice.

Let it be said here that the conclusion that I shall arrive at depends on the paradigm that I subscribe to ie that which appeals to me most.

Before proceeding to embark on the crux of this chapter, that is, what are the strained and purposive approaches to construction; I wish to briefly look at two paradigms of jurisprudence.

The first is the positive paradigm. This paradigm was expounded by John Austin (1701 - 1859). He is refered to as the father of jurisprudence by his proponents. According to Austin and his proponents, the positivist, law is the command of the sovereign. The proponents of this paradigm insist that there should be a clear distinction between Law and morals and also between law as it "is" and as it "ought" to be.

Positivists are not concerned with the morality of laws. It is law provided that it emanates from the `sovereign `. The existence of law is therefore separate and independent from the morality of the law. Morality as used here is to denote the merits or demerits of law.

According to positivists, judges should therefore apply the law that is already established for them either in the form of statutes or precedents and should avoid judicial adventurism which may place them into the position of saying what the law `ought ` to be.

This be the case, it is very clear that a judge should not refuse to apply any law or alter it because he thinks the law is bad or immoral.

Analytical positivism therefore encourages the application of immoral laws and also appears to deny the courts any room to mould the law to fit the changes arising out of dynamism of the society.

No wonder, analytical positivism therefore legitimates the

existence of the likes of Hitlers, Saddams, through their belief that law is what issues from the sovereign.

From analytical positivism, an inference can be drawn that whatever law the dictorial sovereign makes, that law is legitimate. The positivists position do not therefore regard law as an instrument for the promotion of the societies interests. Further, the positivists view connotates independence of law from the society, a point the author heartily disputes.

In respect of the view of the analytical positivists, judges therefore should not concern themselves with the morality of laws. Theirs should be to act as computers in enforcing what the legislature says is the law. No room exist for them to mould the law to suit the dynamics of the society.

Sad, it is. For to be a positivist is equivalent to being a monster who does care about the repercusions of his activities. Sad still if men of great eminence, whose eminence carried the day, like Viscount Simon (the man I hold in esteem) could be a proponent of this paradigm. An ecentrists or is it a megalomaniac. I say this knowing that whatever my view, the fact remains and his Lordship, if he were to read to script would have said, as did Miller CJ (as he then was) said, "I refuse to be moved by this suggestion ...."[2]

Analytical positivists, to say the least, put judges in a position where they act as automatic machines producing exactly what is fed into them. Under positivism the judges role is therefore declaratory and nothing more.

The other paradigm which will be of essence in the demystification, is that of naturalism. Naturalists refer to law as being related to human reason. They view law as being God-made and therefore any law that doesn t comply with human reason is not law. True law is therefore right reason in agreement with nature.

Natural law is an ideal form of justice through which, even a man in the streets will be able to say a law that is just and that which is unjust and will eventually be in a position to say that such and such is not law.

Naturalists and their allies are obssesed with morality of laws. They ,like their sociological counterparts see nothing wrong in a judge playing a role in the development of law so as to enable same to take consideration of the dynamics of the society which the law is to regulate.

Notice must be taken that concepts of natural law have been developed to the extent of incorporating them into constitutions of various independent states. Suffice it to say that courts can nowadays refuse to apply any statute or regulations which offends human reason.

In the Case of Madbury V Madison,[3] Marshall CJ, applied natural law and held, "the intention of the framers of the constitution was that, it shall be the fundamental law and any act of parliament shall be void if it is inconsistent with the provisions of the constitution." The American constitution that was being upheld in the instant case is an embodiment of natural law concepts and its supremacy means supremacy of natural law.

Natural law concepts are also embodied in the constitution of Kenya, which by virtues of section 3 subject to section 47 is the supreme law of the land. Chapter V of the constitution is an embodiment of the concepts of natural law. Madhwa V Nairobi City Council,[4] was predicted upon the concepts of Natural law as provided in chapter V of the Kenyan Constitution.

In modern times lawyers scrutinize every legal principle in terms of its reasonableness, fairness and thereafter give their decisions accordingly.

In the light of the embodiment of natural concepts in the modern statutes especially the constitutions, the author sees no reason why judges should not be allowed a role to play in moulding the law to suit the interest of the society.

Having dealt with the preceding, paradigms which will be essential in my conclusion, the pendulum is now swung to the examinaiton of the strained and purposive approaches and to see the extent to which they are applicable before, I eventually give my personal, or is it subjective (whichever suits the day) conclusion of whether they are courts` lawmaking guises.

4:1 Strained Construction approach:

Strained construction suffices where, on the facts of the instant case and taken by itself, an enactment has a clear and unambigous meaning, but that notwithstanding it is given another meaning. When such other meaning is given to that enactment, the method used is what is refered to in this research as strained construction. The enactment is strained as to result to a meaning different from the one which at first glance seems apparent.

It must be borne in mind that strained construction can only suffice in the situations viz, where the meaning is ambigous and where it ` is capable, if applied to the facts of the instant care, of yielding more than one meaning.

In a situation like the preceeding one, it shall be strained construction to give such a word a meaning other than one of the grammatical meanings.

The other occasion when strained construction shall be applied is where the literal meaning though clear and unambigous, will yield

absurdity, repugnance or inconvinience not anticipated by the parliament. There is often a presumption that the legislature does not intend, through it enactments to create an absurdity. The presumption must hold sway unless and until there is clear reason to justify otherwise.

As to absurdity, courts have given it a very wide meaning to include virtually anything which appears inappropriate, unfitting or unreasonable.

The court in the case of Williams V Evans,[5] illustrated the general position. Lord Grave J held, "unless a strained construction were applied, the court would in effect hold that the legislature had made an `absurd `mistake".

Field J on his part made the following observations as regards the approach, "No doubt it is a maxim to be followed in the interpretation of statutes, that ordinary grammatical construction is to be adopted; but when this leads to a manifest absurdity, a construction not strictly grammatical is allowed, if this will lead to a reasonable conclusion as to the intention of the legislature".

The modern attitude is indicated by a dictum of Mustill J. His Lordship observed, "a statute or a contract cannot be interpreted according to its literal meaning without testing the meaning against the practical outcome of giving effect to it".[6]

Lord Mustills judgement was only, but a reinforcement of what Donaldson MR had put down in the case of Re-British Concreate Pipe Association[7]. His Lordship elaborately held, "our task as I see it, is to construe the Act, and in so doing the prima facie rule is that words should have their ordinary meaning. But that is subject to qualification that if by giving words their ordinary meaning, we are faced with extra-ordinary results which cannot have been intended by the parliamant, we then have to move on to a second stage

in which we re-examine the words".

It is also a matter of neccessity to see how far the courts are permitted to go with this approach. First it must be borne in mind, that the court do not just start from no point and decide to apply this rule of construction. It is provided as in Lord Donaldson`s quotation,[8] that the courts must first apply the literal rule and see the results emanating from its application. It is only after applying the literal rule and its consequential failure, that will lead the court to re-examine the words in order to give them another meaning, more likely that meaning that the legislature might have intended.

Another justification for the application of this rule is to be found where there is an error in the text which plainly falsifies the parliaments intention. Where an error is so apparent on the face of the statute there will be justification for the strained approach.

The passage of time since the act was originally drafted. Law from the sociological paradigms, is an instrument for promotion of the society`s interest, hence it`s bound to change with the dynamism of the society. It is on the face of the societys dynamism that there has emerged quite a number of ammendments to reflect such change. Where such ammendments have not been introduced, the courts as the guardians of justice are supposed to mould the law to suit such circumstances, by adopting the strained approach of construction.

Lord Gardiner aware of changes in the society and also concious of the fact that such changes do affect the status of the law held on behalf of himself and Lords of Appeal, that the House of Lords would no longer consider themselves bound by earlier decisions.

In so holding his Lordship dismissed the law in the case of London Street Tramways V London City Council.[9]

His Lordships reason for rejection of the law in the preceding case was that such freedom affords the courts opportunity to modify or adopt existing rules so that they may reflect the conditions of the time and place.

Lord Pearson in a more modern case is on record as having observed, in dismissing the position of law in Addie V Dumbrak,[10] "It seems to me that the rule in Addie, (above) has been rendered obselete by the changes in physical and social conditions and has become an encumberance impeding the proper development of the law".

This be the case, I must say that I have failed to locate even one time when the courts have unilaterally and of their own volition pronounced new laws. What I have read and/or found out is that the courts, only mould the laws issued by the parliament to reflect the circumstances of the time. I cannot even at one time help thinking that the word `mould `is synonymous to `change .` If they are, I beg for pardon. But I am convinced on a preponderance of probabilities, that they are not.

4:2 Purposive Construction

Purposive construction is used in this research to denote an approach (or construction) which promotes the remedy parliament has provided to cure a particular mischief.

Purposive rule requires that, in the construction of a statute , due attention should be paid to relevant aspects of the state of the law before the Act was passed, the history of its passing and the events subsequent to its passing.

The rule alternatively known as the mischief rule was laid down in Hydons case.[11] Lord Cocke in the preceding case submitted four resolutions which must be considered in order to arrive at the true intention of the legislature, viz.

i) What was the position of common law before the making of the Act?

ii) What was the mischief and the defect which the common law didnt provide?

iii) What was the remedy the parliament has resolved and appointed to cure the defect?

iv) The true reason of the remedy.

The courts in their application of this rule are obssesed with intention and hence the form of the Act, does not fetter their endeavours. The rule was examplified by the court in the case of R.V Male .[12] Parker CJ held, "when one considers the mishcief aimed at by the Act, it seems to this court that, that is really the intention that the parliament made".

The application of this rule was perhaps much more clearer in the case of Smith V Hughes.[13]

In this case the statute provided; It shall be an offence for a common prostitute to loiter in a street or public place for the purpose of prostituting.

The appellants were soliciting men from a window on a balcony. They kept on tapping on the window attracting the attention of the

passersby on the streets. The question that arose for determination was whether this was soliciting "on a street" or "a public place" so as to be contrary to the street offences Act (1959).

Parker CJ as he then was observed, "the intention of the Act was to enable people to walk along the streets without being molested or solicited by common prostitutes". His Lordship went ahead to say, "It would therefore make no difference whether the prostitutes solicited while in the streets or standing in a doorway or on a balcony or at a window or whether the window was open or closed; in each case her solicitation was projected to and addressed on somebody walking on the street".

The same position was followed in a 1968 case of Rodger V Dodd.[14] In respect of purposive construction I am compelled to lament that as far as it adheres to the recognised interpretative guides known to common law system, I see no way that can make the court usurp the legislative function. Perhaps, I would venture to suggest that this should be the modern paradigm to be applied by courts in the contemporary statutes. It seeks to enforce the intention of the legislation and not to defeat the same.

The mere use of extraneous aids to ascertain the intention of the legislature does not,I submit equal usurpation.

I must therefore accordingly make it crystal clear, that in as much as the extraneous aids used are recognised, as I am aware they are, no such application (or use) of them would tantamount usurpation. In reaching this conclusion, I am aware that criticisms are abound, but it is my admiration for the sociological paradigm that has neccessitated it. The positivists views or popularity therefore remains my hatred, in as much as they remain uncaring for the society of which they are part.

Footnotes Chapter 4

1. Wicks V D.P.P. [1947] AC 362 at p 366
2. Belinda Muraya & Others V Amos Wainaina [1976] Civil App. No. 46.
3. Madbury V Madison (1803) 1 Cranch 137
4. Madhwa V Nairobi City Commission [1968] EA 406
5. William V Evans [1876] 1 Ex D 277 at p 282
6. R.X. Committee of Llyodś esc p Moran [1983] The Law times of 24th June.
7. Re British Concrete Association [1953] 1 ALL ER 203 at 205.
8. Ibid at p 205
9. London Street Tramways, V London City Council (1898) AC 375.
10. Addie V Dumbrek [1920] AC 300
11. Hydonś Case [1554] 3 Co Rep. 7
12. R V Male Modern Legal History p. 33
13. Smith V Hughes [1960] 1 WLR 830 at S 32
14. Rodger V Dodd [1968] AC 2 ALL ER 22

CHAPTER FIVE

Conclusion & Recommendations:

During the course of this research, quite a number of handicaps that affect statutory construction were exposed. The handicaps run from the difficulty in the determination of the rules of construction, to the rigidity of the doctrine of precedents.

It is therefore worth to devote a chapter for the recommendation that can assist the courts in order to easen the courts`, endeavour to deliver justice.

With regard to the determination of applicable rules of construction the English courts widely put emphasis both on the possibility and desirability of pursuing a literal interpretation as far as it will go. The same position also applies to the courts in the Kenyan system. This practice ignores the fallibility of draftmen and the imperfection of language.

Literal interpretation of modern statutes is often, even more difficult than the earlier Acts. This is because legislation is now drafted in wider terms than formerly because its required to be understood by administrators and laymen as well as lawyers.

The literal interpretation also inhibits judges from looking at the wider context, which might often show that the words were reasonably capable of more than one meaning.

As to this, I venture to recommend that these rules of interpretation should only be used as descriptions of various

judicial approaches to the problems of statutory interpretation rather as justification of the courts decision.

Moreso, a synthesis of the interpretation rules should be adopted. This would allow the court to decide the meaning of the provision, taking into account, among other matters, the light which the actual words used, and broader aspects of legislative policy arrived at by strained and purposive rules, throw on that meaning.

As far as the use of extrinsic materials is concerned, it is my recommendations that the courts should relax their restrictions on the use of extranous aid. External materials which are relevant should be used as far as possible.

As to intrinsic materials I tend to recommend that more emphasis should be put to consider legislation in the light of its context. There is therefore need for the parliament to widen the limits of contextual materials which the courts may and should consult. The intrisic materials whose limits should be widened include, enlargement of preambles, provision of definitions of words used by the legislature, providing explanatory long titles that can be consulted when need arrises etc.

This if effected will alleviate some of the courts problems of looking for extraneous materials which are more often than not hard to come by and if found, cumbersome. Such a change if properly effected would offer more detailed and flexible notes, which will be more useful. The parliament should also enact a short statute indicating the materials to which the courts would be entitled to look to in determining the proper context of a statutory provision. However, it is good news to be reminded that such an Act[2] exist in Kenya. What therefore is neccessary is that it should be revised to include all new and modern terms used in the contemporary statutes.

The words like `repugnance `and `justice ` in the Judicature Act Cap 8, which posed great difficulty in the Virginia Wambui Otieno V Omollo Siranga & Joash Ougo,[2] should be defined.

As to precedents, ` it is one area that requires an overhaul. Its operation has been handicapped by many and varied defects that need proper consideration if the doctrine is to serve its purpose effectively.

The most critical recommendation is need for law reports. It is a fact not open to denial, that availability of Law reports was one of the fundamental factors responsible for the rapid development of the doctrine in England. Courts which ought to follow, cannot do so unless they are concious of the existence, and also must have the opportunity to examine it (precedent). There has been no publication of law reports in Kenya since 1979. The publication needs to be stepped up.

Circulation of law reports to the surbodinate courts by the High Court and the court of appeal, whose decisions bind the surbodinates courts. This method is in operation in Kenya and what needs to be done is to step it up.

Newspaper column reporting of cases. This is a very important recommendation since newspapers, reach very many people. Such people will therefore be acquinted with the earlier decisions of the court. This method has been provided by the nation newspaper which carries a law column in all its Monday Versions. There is therefore need for the method to be stepped up. Nairobi Law Monthly also used to carry a column of reported cases at the back, but this does not happen nowadays. The editor-in-chief should re-consider the bringing back of the cases column which used to be very popular with its readers.Other newspapers and magazines should also consider the provision of this facility to their readers.

Stepping up of legal representation so that surbodinates courts attention can be drawn to the existence of such precedents. Counsels having been trained in the use and significance of the doctrine and are in a position to give it a boost. Legal Aid Programmes, such as Kituo Cha Sheria which take law to the people etc should be emphasised and spread to reach the rural folks.

Reduction of workload. Magistrates courts do have a huge workload a factor that make them intransigent hence need to dispose of cases quickly without proper scrutiny of the evidence before it. The workload in the surbodinate courts, is owed to their accessibility to many people. There is need for more personel to help ease the workload. This would make magistrates to accord due attention to each case hence a chance to apply the doctrine.

Legal education as to the importance of the doctrine should be increased especially to the lay-magistrates. This, I submit will give them a chance to interact with the doctrine and therefore accord it due attention in disposing of cases before them.

Equally important is the need to make the doctrine flexible to avoid excessive rigidity that do characterize it. The doctrine should be flexible to permit it to reflect the dynamics of the society which it seeks to regulate. The position should be as laid down by Lord Gardiner when dismissing the rule in Addies V Dumbrak.[3] His Lordship`s quotation was refered in the preceding chapter, and the author sees no need for redundancy.

Be that as it may, I must say that it has been a long voyage of discovery. However, notwithstanding, it is my sincere hope that we have anchored safely and our concern should not be of the means used, but whether the end has been achieved.

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Footnotes: Chapter 5

1. Interpretation and general provisions Act Cap 2, Laws of Kenya

2. Virginia Wambui Otieno V Omollo Siranga & Joash Ochieng Ougo [1987] CA No. 1 at Nairobi.

3. Addie V Dumbrek [1928]AC 300

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3. C.E, odgers: Construction of Deeds & statutes, (Sweet & Maxwell, London, 4th ed, 1967)

4. O.H. Phillips: A First Book on English Law, (Sweet & Maxwell, London, 4th Ed,1970)

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6. W,B, Harvey: Introduction to Legal system in East Africa

7. R,W.M., Dias: Jurisprudence (Butterworths, London, 4th Ed, 1970)

8. E.A, Driedger: The Construction of Statutes (Sweet & Maxwell, Canada, 1965)

9. A.V, Dicey: Introduction to Philosophy of the constitution; (Macmillan & Co. Ltd, 10th Ed, 1970)

10. J. Austin: The Province of Jurisprudence Determined

11. J.H, Backer: An Introduction to English Legal History, (Butterworths, London, 1971)

12. P. Roscoe: Introduction to Philosophy of Law

13. Z. Michael: The Law-making process.

14. W. Blackstone: Commentaries on the Law of England, (Dawsons of Paul Hall, London, 1963)