HOW THE JUDGE'S INTERPRETATION RIGHT IS EXERCISED IN QUEENSLAND[1]

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Introduction

The expression "the judge's interpretation right" is not one which is familiar to most Australian judges. On hearing it, most would react by asking, what do you mean? By contrast, in China, I understand, the expression has a fairly well-known meaning and it is a topic which is widely debated in academic literature.[3] It is therefore important to understand clearly what is meant by the expression.

In one sense judges in every country interpret laws every time they decide a case. Reading a law, comprehending its meaning and applying it to the facts of the particular case necessarily involves interpreting the law. When the law is clear, that presents no problem. Often, however, the meaning of the law is not clear. A law may be ambiguous or obscure; or its literal application to unforeseen facts may make no sense; or it may conflict with other laws. What right of interpretation does a Queensland judge have in such a situation?

Interpretation of statutes in the Chinese sense

May I begin by identifying some "rights of interpretation" in the Chinese sense which an Australian judge does not have. Four different formats for interpretations in Chinese law have been identified – interpretation, provision, reply, and decision:

> "An 'interpretation' is to be used when a judicial interpretation is formulated to explain how to apply specifically a piece of legislation at trial or how to apply the law to a particular type of case or issue. The format of 'provision' should be used when it is necessary to formulate norms and opinions for administration of justice based on the spirit of law. 'Reply' refers to a judicial interpretation formulated in response to the request of a High People's court or military court for direction on the specific application of law at trial. A 'decision' should be used when a judicial interpretation is amended or repealed. … the Supreme People's Court has issued judicial interpretations to provide a complete set of answers to questions with respect to the application of a particular statute."[4]

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1 Paper delivered as part of the Queensland/Chinese courts seminar, May 2009.

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3 See for example **陶建国**; **何秉群** : **抗与和 — 法官的 明权**, **河北法學** 25 **卷** 8 **期** (2007/08) (Tao Jian-Guo and He Bing-Qun: "Confrontation and Harmony - On the Judge's Interpretation Right", 25 *Hebei Law Journal* 8 (2007/08).

4 Lo, Vai Lo and Tian, Xiaowen: *Law for Foreign Business and Investment in China* (New York: Routledge, 2009), pp 14-15.

No Australian judge at any level of the judicial hierarchy has power to make an interpretation in the first, second or fourth of those formats. In the Australian legal system, those activities would be regarded as legislative, not judicial. Any attempt by an Australian court to give interpretations in any of those three formats would be ignored by the government and the people and by other judges and courts. The High Court of Australia (our supreme national court) held long ago that national courts do not even have power to give advisory opinions to governments.[5]

The format of interpretation, the first format referred to above, is available to all Australian judges; but only in the course of deciding a particular case. A judge may determine the correct interpretation of a statute to the extent necessary to decide a case before him or her. A judge has no general power to make a ruling about how law applies to a particular type of case or issue.

The format of reply does have an equivalent in Australia. In Queensland, for example, a judge at first instance may state a case for the opinion of the Court of Appeal (the second instance court). The stated case may set out facts as actually found or may state possible hypothetical facts, and must set out the questions of law to be decided. The Court of Appeal will give an interpretation of the law as it is to be applied to the particular facts.

Use of this procedure is unusual. That is because it results in considerable delay in having the case decided and often substantially increases the cost of the case. Occasionally there will be a case where the facts are very complicated and it is likely to take a long time and cost a lot of money to resolve the disputed facts. The stated case procedure can be helpful in such a situation because sometimes, resolving the point of law makes it unnecessary to determine many of the disputed facts - on the proper interpretation of the law they become irrelevant.

History of the interpretation of statutes in the West

Queensland law is derived from English law. To understand how English judges gained the power to interpret statutes, it is necessary to go back in history to the time of the enactment of the earliest of what are now recognised as statutes, in the 13th century.[6] England was ruled by a feudal monarchy. All power was exercised by the King through his court. His Council formed the government, his judges determined disputes and from time to time they all assembled in a Parliament. There was little separation of powers. All officials acted in the King's name.[7] When the occasion to interpret the King's statute arose, the King's judges gave the interpretation on his behalf. The Chief Justices were part of his court and they knew what those who made the statute intended.[8]

The institution of Parliament as a body separate from the King's court and not necessarily under royal control evolved over the next 300 years. By the beginning of the 17th century parliamentarians were demanding that statutes be enacted only by the King in

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5 In *Re The Judiciary Act 1903-1920 and In Re The Navigation Act 1912-1920* (1921) 29 CLR 257. In theory state courts could be given such a power, but that has not happened.

6 See generally Windeyer, W J V: *Lectures on Legal History* (Sydney, The Law Book Company, 1957), pp 93 ff.

7 Plucknett, F T, *Statutes and Their Interpretation in the First Half of the Fourteenth Century* (Cambridge: Cambridge University Press, 2005), pp 20 ff. The judges even copied the word "court" to describe their place of work.

8 See the famous statement to counsel by Chief Justice Hengham in 1305, "Do not gloss the statute. I know it better than you, because I made it", Year Book 33-35 Edw I (RS) 83, cited in Holdsworth: *A History of English Law*, vol 2, p 308, n 5.

Parliament. For most of that century, English politics were consumed by a struggle for power between the Stuart dynasty and the Parliament. The Kings and their Councils still controlled (or heavily influenced) the judges[9] and many parliamentarians were punished for their activities. After the overthrow of the dynasty, the Parliament legislated to ensure the independence of the judges from the executive government of the King. That independence enabled the judges to interpret legislation without fear of retribution from the government. They were, and still are, careful to recognise the supremacy of Parliament and the right of Parliament to change any judicial interpretation of a statute by amending it. As far as I am aware, Parliament made no attempt to remove the power of the judges to interpret statutes.

Things went differently in continental Europe. In 18th century France, the judges were seen to be closely aligned with the King and the aristocracy. They were much hated and after the French revolution steps were taken to curb their power. Laws were codified and judges were prohibited from issuing binding interpretations of them. French law, particularly the Napoleonic Code, spread across Europe in the wake of French military victories in the early 19th century and it remained a major influence after the French defeat. That approach is influential in Europe and China today.

Interpretation of the Constitution

The British approach to statutory interpretation was taken even further in the British colonies. Britain has never had a written Constitution, but almost invariably when the colonies of its former empire became independent nations, they acquired written Constitutions. The United States of America led the way. In 1803, the Supreme Court of the United States asserted the power to interpret not only statutes but also the Constitution in the famous case of *Marbury v Madison*.[10] By the time the Australian Constitution was drafted in the 1890s, that seemed a natural thing to do.

The Australian continent was populated by Europeans for more than 100 years before the six colonies united into one nation. In 1901 they formed a federation with a Constitution which guaranteed the continued existence of those colonies as six provinces within the federation. With power divided between the central and provincial governments, the courts were seen as the natural arbiters of disputes between the two. But the Australian Constitution differed from that of the United States in an important respect. In Australia the power to interpret the Constitution was not limited to federal courts. Nor did Australia follow the European model and create a special constitutional court. Instead, national judicial power was vested in the existing state courts. Today in Queensland even the lowliest local court has the power (and the duty) to interpret statutes and even the Constitution if it is necessary to do so to resolve the case before it. No other organ of the state has the power to make legally binding interpretations of statutes.[11]

The ambit of the judicial interpretation power in Queensland

It is essential to bear in mind that, with one important exception, a judicial interpretation has effect only in the case in which it is given. It binds no one except the parties to that

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9 Although there were occasional confrontations.

10 (1803) 5 US 137; (1803) 1 Cranch 137.

11 It is different in the United States, where the Supreme Court has recognised that some specialised government agencies can give binding interpretations; see *Chevron USA Inc v Natural Resources Defences Council Inc* (1984) 467 US 837. The High Court of Australia has not followed that approach: *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; 199 CLR 135; *Truth About Motorways v Macquarie* [2000] HCA 11; 200 CLR 591.

case. If the parties are dissatisfied with the interpretation of the court, the usual appeal processes apply. The power is regarded as judicial, not legislative. Unless a case happens to be brought before the court, it has no power to issue an interpretation.

The exception derives from the doctrine of precedent. That doctrine is a fundamental part of our legal system. It applies to all decisions of the courts, not just decisions involving the interpretation of statutes. It obliges any court in the hierarchy of courts to apply any interpretation of the law made in a previous case by a higher court in the same hierarchy if that interpretation was necessary for the decision in the previous case. That means that courts of second and third instance jurisdiction do sometimes give interpretations of statutes which will apply in future cases. In that sense it can be said that the judges have made the law. Queensland judges are very respectful of the decisions of higher courts. That is important because people become very dissatisfied with the law if they see different people receiving different results from the courts in the same sort of cases. For this reason judges will also sometimes defer to earlier decisions of courts of equal standing in the hierarchy, even if they might otherwise themselves adopt a different interpretation.

It is important to remember that an interpretation by a higher court is binding on lower courts only if the interpretation was necessary for the decision in the case. Common law judges give extensive reasons for their decisions. Sometimes their reasoning is expressed more widely than is necessary for the determination of the case before them. The doctrine of precedent does not require a subsequent lower court to adopt the wider interpretation. It is the *decision* of the higher court which is binding, not its *reasoning*. Of course lower courts always treat the reasoning of a higher court with respect and will usually follow it because they find it persuasive. There is no point in giving a decision which you know is certain to be reversed on appeal. Higher courts have ways of reprimanding judges lower in the hierarchy if they adopt too narrow a view of what was necessary for the determination of an earlier case!

In one respect governments in Australia are no different from governments anywhere in the world: they do not like being deprived of power. They have not responded to adverse interpretations by legislating to remove the judges' power of interpretation (that would be politically very difficult) and they have not attempted to confer concurrent power to make binding interpretations of statutes on any other organ of government. What they have done is to draft legislation in greater and greater detail. Statutes which once might have occupied 20 or 40 pages now occupy thousands of pages. Where the statute is clear, the judges have little scope for interpretation in any sense different from what the government wants. But the modern prolix style of drafting has not eliminated ambiguities, obscurities and conflicts of laws. I would not recommend its adoption in China.

In summary of the major differences between Queensland and China in relation to the judicial power of interpretation are:

- Only courts may make binding interpretations of statutes in Queensland; in China, as I understand it, that power is vested in the Standing Committee of the National People's Congress, the Supreme People's Court, the Supreme People's Procurate and the State Council in relation to national laws; and in the local standing committees and government departments in relation to local laws.[12]
- In Queensland interpretations are binding only on an the parties to the particular

[12] *Constitution of the People's Republic of China*, art 67; *Organic Law of the People's Courts of the People's Republic of China 1979*, art 33; *Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law 1981*, ss (1) – (4).

case in which the interpretation is given and, if the interpretation is given by an appeal court, on courts lower in the hierarchy of that court in future cases where exactly the same point arises; in China interpretations are often legislative in nature by Australian standards.

- Statutes in Queensland are expressed in much greater detail than statutes in China, so the subject matter of interpretation is different.