Introduction

This book, written from a drafter's viewpoint, has two purposes. One is expository, the other reforming. The first seeks to help people who have to understand statute law under the present system. The second suggests new techniques, by which their needs might be better met. Throughout, the approach is realistic.

The book deals with legislative texts on the British model, as found generally in the Commonwealth. But since 1972, a new element has been added in Britain itself. Community law now forms part of our body of law, and an overriding part. Here, if not everywhere else in Europe, Community law is acknowledged to be what the European Court says it is. Thus in the United Kingdom two systems of statute law dwell uneasily side by side. The implications of this are explored.

The main difference between the British and Continental systems of statute law lies in the way the text is regarded. The British system *(pace* Lord Denning) on the whole requires the text to be literally observed. The European system treats the text as merely a guide. When a British court processes a text of uncertain meaning by handing out a decision, this is reported and from then on used as an authoritative ruling. Europe has no such doctrine of *stare decisis*.

The difference is important for the person who seeks to find out the law. Is it fully stated in the text as enacted (or as subsequently processed)? If so the enquirer has his answer. Or does it depend finally on the discretion of a judge or official? If so, the enquirer will be without an answer unless he activates that judge or official. To do so will cause the enquirer trouble and may involve him in expense. It will certainly defer his enlightenment. What is more, one judge or official may differ from another. The law becomes subjective. That is a widespread defect of the Continental system, though no system of statute law can altogether avoid it.

In Britain, and in other Commonwealth countries which follow the British model, the good drafter seeks to word his text so that wherever possible it gives the answer. This makes the text complicated. Even the skilled reader needs help in unravelling it. But the answer is there.

The texts

The book begins by describing the texts of which statute law consists. A person who does not know how they are drafted and arranged, and how they come into existence as law, cannot expect to understand them. They are not like other literary texts. The reasons for this are discussed. There is an explanation of the way our statutes are consolidated and revised. The system of official publication of Acts, statutory instruments and European law is described.

Statutory interpretation

Having described the legislative texts, the book goes on in Part II to explain how they are interpreted.

The purpose of our system of statutory interpretation is to find the intention of the legislator as expressed in the text. For this the law lays down various guides or criteria, which can be identified as: six common law *rules,* a varying number of *rules* laid down by statute, eight *principles* derived from a legal policy, ten *presumptions* arising from the nature of legislation, and a collection of linguistic *canons.*

A rule of construction is of binding force, but in cases of real doubt rarely yields a conclusive answer. A principle embodies the policy of the law, and is mainly persuasive. A presumption affords a *prima jade* indication of the legislator's inferred or imputed intention as to the working of the Act. A linguistic canon of construction reflects the nature or use of language and reasoning generally, and is not specially referable to legislation. The unit of enquiry where a problem of interpretation arises is a legislative statement or *enactment* whose legal meaning in relation to a particular factual situation falls to be determined. The sole purpose of an enactment is to achieve a particular legal effect. The enactment lays down a legal rule in terms showing that the rule is triggered by the existence of certain facts. The enactment indicates these facts in outline form (the factual outline). All sets of facts that fall within the outline activate the legal thrust of the enactment. Problems of statutory interpretation concern either the exact nature of the factual outline, or the exact nature of the legal thrust, or both.

The interpreter's duty is to arrive at the *legal* meaning of the enactment, which is not necessarily the same as its grammatical (or literal) meaning. This must be arrived at in accordance with the rules, principles, presumptions and canons mentioned above, which are in this book referred to as the interpretative criteria or guides to legislative intention. By applying the relevant interpretative criteria to the facts of the instant case, certain interpretative factors will emerge. These may pull different ways. For example, the desirability of applying the clear grammatical meaning of the enactment under enquiry may conflict with the fact that in the instant

case this would not remedy the mischief that Parliament clearly intended to deal with. In such cases a balancing operation is called for.

There are no fixed priorities as between various factors, since much depends on the wording of the enactment and the particular facts of the case under consideration. For example, in some cases the adverse consequences of a particular construction may be very likely to arise whereas in others they may be unlikely. They may be very grave, or comparatively minor. It is for the court, assisted by the advocates on either side, to identify the relevant interpretative factors correctly and exhaustively, and then carry out any necessary balancing exercise to determine which of the opposing constructions put forward correctly embodies the legal meaning of the enactment. The technique required for this takes the interpreter to the heart of our legal system.

Processing of legislative texts

As a consequence of the predominantly *literal* treatment of statutory texts on the British model, it is possible to regard them as parts of a whole. They are not drafted or arranged that way, but conceptually that is how they can and should be treated. This falls within the realm *of processing*. For reasons partly historical and partly due to the way the drafter carries out his task, legislative texts cannot be understood as they stand. Not even the experienced practitioner can comprehend the texts without help. For the citizen they are a closed book.

Part III begins by analysing the difficulties of the statute user in seeking to apply the basic text. Chapter 13 gives a concise account of these, and may be referred to as a handy summary. The difficulties can be reduced to four heads.

Text-collation is necessitated by the fact that the law on a particular topic is likely to be contained in a number of different sources. *Text-comprehension* concerns the difficulty of understanding the peculiar prose of the legislative drafter. *Doubt-resolving* refers to the fact that statute drafting necessarily produces areas of uncertainty, deriving from the deliberate adoption of techniques for shortening the text, from deliberate uncertainty, the passage of time, or from error. Finally there is the problem of *differential readings*. Different minds reach different views, though each regards the meaning as plain.

Methods of processing

Having described the problems experienced in understanding and applying the basic texts, we pass to the methods which are or could be employed to help. A description of the methods now employed

can assist current users. A description of possible improvements may aid reform.

The term processing is used in this book as a blanket expression to mean treatment of the basic text in ways which elucidate its meaning and effect. We take the text as given. We are only incidentally concerned with improving the original production of legislative texts, which is another subject. It is necessary to distinguish two kinds of processing. One provides assistance without affecting meaning, and may be called *static processing*. The other develops meaning by resolving doubts authoritatively, and may be called *dynamic processing*.

Part IV describes the various techniques involved in each kind of processing. While static processing is an indispensable aid, dynamic processing is of greater theoretical interest.

Dynamic processing

Because the legislator cannot as a practical matter impose his will down to the last detail, it is necessary to interpose official functionaries who will do this in particular cases. These may be either administrative or judicial. The result of their work, provided it is made public, is to elucidate the texts for the future. Part IV describes how this is done. Government officials, charged with administering regulatory Acts, settle by the exercise of their judgment in particular cases how the texts are to operate. Decisions are promulgated. Circulars, leaflets and other guides are issued. In practice these are authoritative, though occasionally they are upset on appeal to the courts.

An unofficial form of processing is carried out by academic and professional commentators, whose views have an important influence in determining how the law actually operates. Judges in particular are guided by their opinions.

Judicial processing is the most important. Doubt-resolving is carried out by the courts at the instance of individual litigants. Where there are differential readings, the highest court to which the matter is taken has the final say. The opinions of judges on legislative intent carry great weight in problems of text-comprehension. Yet the dynamic function of the courts has been obscured by judicial reluctance to recognise this aspect of their role.

The obvious function of the court is to decide the dispute before it. The fact that the decision may illuminate for future litigants and others the meaning of the statutory text in question is irrelevant to this function. But it is vital to statute processing. That courts should more openly accept and act upon this truth is advocated. So is a more refined approach to statutory interpretation. By recognising that doubt may arise through the adoption by the drafter of any one of a number of specific techniques, the court could perform its task of interpretation more efficiently. In other cases, the court

would be aided by acknowledging that it was perfecting a text vitiated by a particular type of error. Adoption of these judicial practices may need authorisation from Parliament. The draft of a Bill for this purpose is included.

Static processing

This may be official or unofficial, and includes publication of indexes, textbooks and other aids. It also includes *text manipulation*, by which the legislative text, without being essentially altered, is processed to make it more readily available and comprehensible. The computer has an important part to play here.

The book ends by describing in detail a novel form of text manipulation known as *composite restatement*. This is akin to consolidation, but is more sophisticated. It takes the relevant texts on a topic (whether derived from Acts or statutory instruments) and presents them in a rearranged coherent structure, to which annotations can be added. Typographical devices aid comprehension. This system, which has already been successfully employed by the author, has the advantage of using the official text (rather than a summary, as in the normal textbook). At the same time problems of text-collation and text-comprehension are eased.

Conclusion

Our system of statute law has grown up piecemeal and it would be useful now to stand back and regard it afresh. It is a basic element in the social and economic regulation of a modern state, performing functions undreamt of by early legislators. Its techniques need to be re-examined in this light, and made more scientific.

As Sir Rupert Cross pointed out just before his lamented death, academic analysis and synthesis are required here. It is satisfactory that since the first edition of this book appeared in 1980 academics have increasingly come to recognise this, and to direct their attention accordingly.