Bennion on Statute Law

*** *Page 008*

Part 1- Statutory Texts

*** *Page 009 - Chapter One*

What Statute Law is

Not inappropriately, we meet at the outset a term with a core of firm meaning and a penumbra of uncertainty. We are concerned mainly however with the core meaning of the term statute law, that is the primary legislation of a parliament or other legislature together with subordinate legislative instruments made under powers delegated by the primary legislation. In Britain, until the coming into operation of the European Communities Act 1972 (and ignoring the complications of Northern Ireland), this broadly meant Acts of the Westminster Parliament and statutory instruments as defined by the Statutory Instruments Act 1946. Our discussion, though mostly conducted in relation to these Acts and instruments, will be applicable generally to other instances of statute law in Britain and the remainder of the Commonwealth. We shall need to take account however of special factors arising in connection with the European Communities and other federal or quasi-federal systems.

The statute law of a modern legislature on the British model displays certain key features. It is largely promoted and wholly administered by the government (or executive), enacted by a parliament broadly supporting the government (senatorial quirks of an upper house being set aside), and interpreted by, and enforced on the orders of, an independent judiciary. The judiciary however lacks any *general* interpretative power. Statute law, piecemeal rather than systematic, is produced over the years in response to needs as they arise in society. It is inert, tending to remain stranded after the needs have passed or changed. Parliament, too congested with business to keep its legislation updated, is forced to rely on law reform agencies. These however are not organised and financed on a scale sufficient for the task.

Statute law is universally binding (subject only to the doctrine of *ultra vires* in the case of subordinate instruments). Nevertheless it is not self-operative but, if it is to be effective, needs to be continuously applied and enforced. It is not however subject to any doctrine of desuetude. Deductive in character (whereas case law is inductive), it lays down general rules for application to particular facts. In this it suffers acutely from the drawbacks of language as a medium of precise communication. Here we come to the nub.

Modern statute law consists of a set of written texts which (in themselves) are difficult to understand if you are a lawyer and impossible if you are not. Yet misapprehension will not avail as a shield: *ignorantia juris non excusat.*

It is strange that free societies should thus arrive at a situation where their members are governed from cradle to grave by texts they cannot comprehend. The democratic origins are impeccable; the result far from satisfactory. While minor improvements in the basic texts are always possible, the real answer to this problem lies in adequate processing.

Categories of **law**

There are many ways of dividing up the Acts on the statute book. One is to sort them into groups according to subject-matter. This is done by the official publication *Statutes in Force* and the private compilation *Halsbury's Statutes* (published by Butterworths). It is significant that there are wide differences between the two editions over the titling of the groups. As the government-appointed Renton Committee found, it is a major problem to settle a generally acceptable division of the corpus of the statute law into subjects (Renton 1975, para 14.7). For this reason (among others) they rejected the idea that Britain, like other Commonwealth countries, should have a statute book on a one Act-one subject basis arranged under titles (Renton 1975, para 20.2(47)). This denied the strong preference shown in a survey of users' wishes (Statute Law Society 1970, para 68).

In evidence to the Renton Committee I had argued strongly for a statute book divided under titles, with one Act for each tide. I suggested that there might be 300 to 400 Acts, each with a convenient scope and title, adding:

> This is meant to amount to what the 1835 Statute Law Commissioners referred to as Acts 'framed as part of a system', to which the Select Committee of 1875 added the proposition that it should involve a 'proper classification of public statutes'. This was the system adopted in this country for colonies. It has been retained, in much more sophisticated form, by all the independent countries which were formerly British colonies (Bennion 1979(4), p 86).

The Renton Committee were not moved by this argument. Yet they found words of praise for the new official edition *Statutes in Force* which, as stated above, is arranged under titles (Renton 1975, para 20.2(88)).

There is a great difference between printing a number of separate Acts in chronological order under one title (as is done in *Statutes in Force)* and drafting an Act as one comprehensive title (on the modern Commonwealth pattern). The 1835 Commissioners complained that the statutes had been 'framed extemporaneously, not as parts of a system, but to answer particular exigencies as they

occurred' (Statute Law Society 1974, para 78). The modern practice of repealing some Acts and re-enacting them in consolidated form meets only very inadequately this ancient criticism.

The Marshall Committee set up by the Statute Law Society graphically remarked in 1974: 'The statute law of the United Kingdom at the present time can he likened to a large number of Gordian knots located in an Augean stables situated at the centre of a labyrinth'. They advocated as a first step that all concerned in the legislative process should adopt a fresh outlook towards statutes, regarding them not as individual Acts dealing with particular situations but as, potentially, parts of a coherent whole 'which for convenience can be divided up under a number of subject-headings but which are nevertheless interrelated' (Statute Law Society 1974, para 79). A year later the Renton Committee echoed this plea for a fresh outlook when they said that little could be done to improve the quality of legislation 'unless those concerned in the process are willing to modify some of their most cherished habits' (Renton 1975, para 1.10). Yet, as we have seen, the Renton Committee rejected the plea for a statute book arranged systematically under titles. It remains as far from being implemented as ever.

Text creation and validation

This book is written from a drafter's standpoint, but is not primarily concerned with drafting technique or its improvement. It takes the basic texts as given. Nevertheless some knowledge of how the basic texts come into existence is needed if statute processing, and the possibilities of its development, are to be understood. Processing is concerned with curing *incomprehensibility* and elucidating *doubt* as to the meaning of a text—either in general, or in its application to a particular set of facts. The general meaning may be sought by a teacher or student, or by some person involved in changing the law. The particular meaning is needed by a person concerned with the factual situation in question. He may wish to resolve the doubt in his favour (the litigant) or have the duty of deciding between conflicting views (the judge). Whether general or particular meaning is in question, some knowledge of the method by which the text comes into existence is essential.

On the model chiefly taken for this book the basic legislative text gains its validity, under the relevant 'rule of recognition' (Hart 1961, pp 92-6), from enactment by Parliament, from a procedure followed by some other body (eg the Privy Council) or person (eg a Minister of the Crown), or by a combination of the two (eg a ministerial order requiring confirmation by affirmative resolution in Parliament). Whichever the method, validating procedures have to be followed if the text is to be recognised as law. We are not here concerned with difficulties that arise if it appears that these procedures may not have been followed correctly. Such cases are

extremely rare and can be studied in specialist textbooks (eg Bennion 1984(1), pp 124-129).

It is necessary to distinguish carefully between the validating procedures and the text creation procedures. Under modern systems a text is first created by a legislative drafter and then put through the validating procedures (in the course of which it may or may not be altered). Since the drafter is a technician and not a legislator, the validating procedures embody the concept of a legislator who consciously approves the text as finally authenticated. This may or may not correspond with fact. Either way, the text is officially taken to represent the ***intention*** of the legislator.

The typical course of events in legislating can be represented as follows:

POLICY DECISION
PREPARATION OF DRAFTING INSTRUCTIONS TEXT CREATION
VALIDATION AS LAW

Policy decision This is the political decision, taken by or on behalf of the government, to initiate the proposed legislation. The reasons for taking such decisions vary widely. The persons involved are politicians and their advising administrators (civil servants). The source of the initiative may lie with the politicians (say a general election pledge), or with the administrators (reform of some area of government for which their department is responsible), or outside the public service altogether (a lobby or vested interest). Sometimes outside interests carry their initiative to the point of persuading a non-government politician to introduce a measure they desire to become law. In such a case the policy decision becomes one of whether the government is to support or resist the measure, or remain neutral. Usually this decision is crucial to the success or failure of the promoters.

Whatever the origin of a government's decision to legislate, the administrative civil servants concerned are active in shaping the policy. When the main outline is settled (with ministerial approval) they call in colleagues from the relevant legal department of the civil service to help in working out how the policy is to be given legal effect, and precisely what modifications of existing law are required.

Preparation of drafting instructions If an outside drafter is to be used, as is usual with Acts of Parliament (and also with statutory instruments of unusual importance or difficulty), the departmental

lawyer will prepare written instructions. These should not contain legislative drafts, but convey in ordinary language the details of the policy and the legal changes required.

Text creation Either an outside drafter or the departmental lawyer, as the case may be, will now create the text which is to form the new law. He may need to hold many discussions, and revise his draft frequently, before he satisfies the politicians, and the other civil servants, who are his clients.

Validation If the legislator is a Parliament, the text will need to go through successive stages, at one or more of which it may be amended. It is of crucial importance whether the practice is for MPs themselves to draft amendments to the Bill or whether (as is the modern British system) the original drafter also drafts the amendments. Only on the latter basis can there be any hope of preserving a coherent structure and internal consistency. Furthermore a government tends to lose control of the policy of a Bill where its officer does not draft the amendments made to it. Each substantive amendment requires stages corresponding to those shown in the diagram. There must be a policy decision on whether to make or allow the amendment, then the working out of policy details and legal repercussions, then the instructing of the drafter, then the drafting of the amendment, and finally its addition to the Bill by consent signified in the required manner.
Validation differs according to whether 'the legislator' is one or more groups of persons or one individual. In the former case it again differs according to whether or not the text is capable of amendment. For our purpose validation can be categorised as follows:

Full parliamentary validation On the British model, the text is presented successively to two Houses of Parliament and is debated and amended in each (the debates being reported). It is then finally validated by the royal assent procedure (or a comparable procedure in the case of a republic).

Parliamentary non-amendable validation The text is presented successively to two Houses of Parliament and may be debated in each but not amended (any debate being reported). If approved by both houses it is validated without further action.

Non-parliamentary group validation The text is presented to a body such as the Privy Council or the former Board of Trade, and may be debated but not amended (any debate *not* being reported). In practice debate does not occur. On approval the text is validated without further action (unless *ultra vires).*

Non-parliamentary individual validation The text is presented to

a minister and approved by him. On approval it is validated without further action (again unless *ultra vires).*

In the light of this analysis what are we to make of the usual judicial pronouncement that what matters when doubts arise is 'the intention of the lawgiver' *(Sussex Peerage Claim* (1844) 11 Cl & F 85, 143) or 'the intention of the legislature' *(Warburton* v *Loveland* (1832) 2 D & Cl (HL) 480, 489)? Who is the lawgiver or legislature? Whose intention really counts? Very little detailed attention has been paid to this question. The tendency is to murmur 'myth' or 'fiction' and hurry past. Thus Dr JA Corry says 'The intention of the legislature is a myth' (Corry 1935, p 205).

Legislation is a process central to democracy. We should not have to resort to fictions to explain it, and this is not in fact necessary. We cannot properly impute to modern judges construing democratic legislation anything but a desire to proceed in strict accordance with reality. What is the reality here?

The duplex approach

I have tried to spell out the essential dichotomy which is relevant whenever doubts as to meaning arise. Broadly it is a dichotomy between the official approach and the political approach. The official approach provides the actual text, based on a thorough working out of policy, a full assessment of the practical considerations and a detailed foresight of consequences. The political approach combines ministerial policy and the views of the nation's representatives in the legislature. The elected politician tells the civil servant what the public will not stand for, and also what the public want. The parliamentarian validates the result or not as (subject to the whipping procedure) he thinks fit.

In construing legislation it is necessary to bear both these aspects constantly in mind and produce a synthesis between them. We have gone beyond the crudities of early Acts and early judicial attitudes. A sophisticated modern society demands a sophisticated approach to its laws. This requires a full awareness of how the validated text comes into existence as law, and a precise weighing of the relevant factors.

This may be called the duplex approach to legislative meaning because it is composed of two parts. It is necessary to bear in mind the text creation process, but also to remember that the drafter is merely a technician. The validating process is usually a genuine one, and not a question merely of administering a rubber stamp. Between the two the answer lies. The drafter is fallible, and invariably inadequate to his imposing task. The legislator is armed with the people's vote and speaks in their name. That Parliament in one sense should err, and bungle its commands, is acceptable (and must be accepted) provided it is recognised that in the other sense Parliament is infallible. It was in the latter sense that Grove J

remarked in *Richards* v *McBride* (1881) 8 QBD 119, 122, that we cannot assume a mistake in an Act of Parliament.

Although the duplex approach has not been worked out as such by the courts, it is implicit in many judgments. For example in referring to the provisions of an Interpretation Act, Lord Morris of Borth-y-Gest said 'Prima facie it can be assumed that in the processes which lead to an enactment both draftsman and legislators have such a provision in mind' *(Blue Metal Industries Ltd* v *RW Dilley* [1970] AC 826, 846).

The working out of this dichotomy between text-creation and validation, and the definition of how the duplex approach to legislative meaning operates (or should operate) are principal themes of this book and will be fully explored. But first we consider some further aspects of the question of what statute law is.

Historical

The Chronological Table of the Statutes, a most valuable official work, lists all the public Acts, and says what happened to them in the way of amendment and repeal. It starts with Statutes of the Parliaments of England, beginning with the Statute of Merton (1235). This starting point may cause surprise, because we think of Magna Cam as the earliest statute and that was first promulgated 20 years earlier. The answer is that the Chronological Table records Edward I's confirmation of Magna Carta, dated 1297. It was thought in medieval times that a statute lapsed on the death of the king who made it. If it was to endure, it had to be confirmed by the next king. That no longer applies of course. An Act now remains in force until it is repealed, or (if it is a temporary Act) expires.

The Chronological Table also includes Acts of the Parliaments of Scotland beginning with James I of Scotland (1424), though there were earlier Scottish Acts. Statutes of the Parliaments of Great Britain start in 1707, following the union of England and Scotland. Statutes of the Parliaments of the United Kingdom start in 1801, following the temporary union with Ireland. Acts of the Parliaments of Northern Ireland are not included in the table, but do of course form part of the statute law of the United Kingdom. Stormont, consisting of a Senate and House of Commons, was set up in 1920 and abolished in 1973. Northern Ireland is now regulated by a combination of Westminster Acts and Orders in Council.

Our earliest statutes are not Acts of Parliament at all. They are royal decrees or ordinances or charters (such as Magna Carta). Usually they were drawn up in consultation with the king's principal subjects, the great barons and prelates. The statutes are in Latin for the first two centuries after the Norman Conquest. For the next two centuries they are in Norman French. They are not printed, for printing has not been invented. The labour of copying them by hand keeps the text short.

Ancient statutes, that is those of the period commencing with Magna Carta in 1215 and ending with the death of Edward II in 1327, are known as ***vetera statuta*** or ***antiqua statuta.*** They include some which are described as ***incerti temporis*** (of uncertain date). Acts passed between 1327 and 1483 are known as ***nova statuta.***

By the middle of the fourteenth century it is established that the assent of the Commons as well as the assent of the Lords and the king is necessary to the validity of a statute. Editors begin to put together collections of statutes. With the introduction of printing late in the fifteenth century these editions are printed, many of the statutes being translated into English. Often things are included which are not statutes at all, for example bits of lawyers' commonplace books. This is because the editions are working manuals for lawyers. (As to later published editions see chapter 7 below.).

Some of these early statutes remain of everyday interest and concern to us. The law of treason is still centred on the Treason Act 1351. Binding-over in magistrates' courts is done every day under the Justices of the Peace Act 1361. The Forcible Entry Act 1381 was repealed only as recently as 1977.

Categories of Acts

A declaratory Act is presumed not to change the law. A penal Act must be strictly construed. On the latter point Blackstone cites the example of the statute 1 Edw 6 c 12, which enacted that those convicted of stealing 'horses' should not have benefit of clergy. The judges held that this did not apply to him who should steal but one horse (Blackstone 1765, I 63).

While there is link point in dividing up the entire statute book according to subject matter, we can usefully distinguish some further categories in addition to those mentioned above.

Financial Acts These are subject to a special enactment procedure, which reflects the constitutional principle that grants of supply for public expenditure, and the raising of taxation ('ways and means'), are within the province of the House of Commons alone.

Adoptive Acts While they have a place on the statute book they do not apply in a particular area or for a particular purpose unless they have been adopted for that area or purpose by some appointed machinery. The Town Police Clauses Act 1847 is one of the category of adoptive Acts known as Clauses Acts. These were a nineteenth- century phenomenon. Parliament does not pass them nowadays. By setting out once and for all common form provisions, Clauses Acts greatly shortened the language needed in individual local or personal Acts. They incidentally produced a useful standardisation in the law.

In the days of the so-called railway mania, when entrepreneurs such as George Hudson were promoting one new company after another, Parliament was asked to pass, by the private Bill procedure, a great many authorising Acts. They were seen to be all on the same lines. So Parliament passed the Railway Clauses Consolidation Act 1845. This contained the common form provisions, and could be incorporated in each special Act promoted by an individual company. The same was true of the Lands Clauses Consolidation Act 1845, and the Companies Clauses Consolidation Acts, and of others—for example the Harbours, Docks and Piers Clauses Act 1847. All these are still on the statute book.

This idea of the adoptive Act had other applications. Local authorities could adopt an Act for their area or not, as they chose. There were the Baths and Washhouses Acts 1846 to 1899—the days before almost every house had its own bathroom and kitchen. There were the Burial Acts 1852 to 1906, and the Public Libraries Acts 1892 to 1919. When the cinema came in, it was left to each locality to decide whether it wanted Sunday cinemas, notwithstanding the Lord's Day Observance Acts. This local option was provided for by the Sunday Entertainments Act 1932. Although Clauses Acts are no longer passed, the adoptive system, which may appply to a part of an Act as well as to a whole Act, is still very much alive today. Thus the Highways Act 1980, provides for the adoption of an advance payments code for private street works (see s 204(2)). A list of adoptive and clauses Acts is given in the official Index to the Statutes (see headings Adoptive Acts and Clauses Acts and Clauses Consolidation Acts).

Acts of indemnity, amnesty or oblivion These are passed to relieve named individuals or groups from penalties imposed for the transgression of some public law. The statute 12 Car 2 c 11, known as the Act of Oblivion, was passed on the restoration of Charles II in 1660 to give certain persons an indemnity for illegal acts done during 'the late interruption of government'. Modern indemnity Acts have relieved government ministers from inadvertent breaches of law, MPs from sitting and voting while disqualified, service- men from dubious activities in defence of the realm, and so on. (For an example see the Housing Finance (Special Provisions) Act 1975.)

Validation Acts These declare some specified action or procedure to have been valid even though it is known or suspected that it was in fact invalid or otherwise legally defective. (For an example see the National Health Service (Invalid Direction) Act 1980, reversing the decision in *R* v *Secretary of State for Social Services, ex pane Lewisham, Lambeth and Southwark London Borough Councils* (1980) *The Times,* 26 February.)

Section 3 of the Interpretation Act 1978 tells us that 'Every Act is a public Act to be judicially noticed as such, unless the contrary is expressly provided by the Act'. This seems to be saying something quite straightforward. Every Act is a public Act. Unfortunately it is not true. Every Act is not a public Act. There are public Arts and private Acts, according to the procedure by which they were enacted by Parliament.

A public Act results from a public Bill, ie one introduced by a Member of the House of Commons or the House of Lords. A private Act results from a private Bill, ie one introduced in a quite different way on the petition of its promoter (who may be anyone except a member of the House of Commons or the House of Lords). Brief details of the various types of Bill are given below (for a fuller treatment see Miers and Page 1982, chapter 5).

A public Bill goes through various stages in each House of Parliament, always under the wing of a member of that House. If at any stage no member can be found who is interested, the Bill drops.

A private Bill goes through a different procedure. It must be advertised, and its promoter must satisfy a Parliamentary committee that it deserves to be enacted. It changes the law in a limited way purely for the benefit of its promoter, and Parliament has to make sure no one else will be unfairly prejudiced by it. Usually the promoter appears by counsel, who is a member of the Parliamentary Bar and is instructed by parliamentary agents. This is a vestige of the ancient idea that a Bill is a petition presented to the king in Parliament by his subjects, craving some benefit.

A hybrid Bill is a public Bill which has something of the nature of a private Bill because it affects a particular private interest in a way different from its effect on such private interests generally, for example because it regulates a named industrial or commercial undertaking. Bills of this kind have first to go through a modified form of private Bill procedure so that objections can be heard. (For a judicial reference to this procedure see the remarks of Lord Diplock in *Jones* v *Wrotham Park Settled Estates* [1980] AC 74, 106.)

So why does s 3 of the Interpretation Act say that every Act is a public Act when it is not? The key lies in the phrase 'to be judicially noticed as such'. We get a clue from the sidenote, which refers only to judicial notice. So the section which appears to be so general is in fact concerned with nothing else but the doctrine of judicial notice.

All s 3 means is that no Act, whether public or private, need be proved in court. Unless, that is, the final limb of the section applies, and the Act otherwise provides. To account for this it needs to be explained that private Acts are divided into *local* and *personal* Acts. There are a great many local Acts, usually promoted by local

authorities. They regulate matters such as behaviour in public parks or the licensing of coffee bars or massage parlours. They are local and private Acts, but for the purpose of judicial notice only they are by virtue of s 3 of the Interpretation Act 1978 public Acts— because they do not say otherwise.

Personal Acts do say otherwise. They only concern named individuals, for example by regulating their family trusts or estates, or granting them naturalisation, or allowing them to marry within the prohibited degrees of affinity. Here the practice is for the personal Act to declare itself not to be a public Act. Judicial notice is not taken of it. It requires to be proved in court.

The two meanings of 'statute law[9]

Lord Hailsham of St Marylebone LC pointed out that nine cases out of ten reaching the House of Lords concern statutory interpretation *(Johnson* v *Moreton* [1980] AC 37, 53). A similar proportion no doubt prevails in respect of reported cases generally. This justifies the statement that every lawyer now needs to be a statute lawyer (see Bennion 1982(1) and (2)). What does this involve?

We see that the term 'statute law' really has two meanings. The older and perhaps more established meaning is that statute law is the body of *enacted law* or legislation (as opposed to unwritten law consisting of common law, equity and custom), together with the accompanying body of judicial decisions explanatory of the individual statutes. Statute law in this sense forms a very large proportion of the whole *corpus juris.* It is from that point of view that we have so far discussed it in this chapter. (For a very interesting study of the impact of modern statutes on the society they regulate see Miers and Page 1982, Chapter 8.)

The other meaning of statute law is that it is the body of knowledge or expertise which tells people how to handle the statute law (in the first meaning of the term). This covers the legislative processes, the nature of the various types of enacted law, and the principles governing the interpretation and operation of statutes. It is in this second sense that lawyers of today need to be, or to become, competent and efficient statute lawyers.