Bennion on Statute Law

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Part III - The Need for Processing of Texts

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Difficulties of the Statute User

In the remainder of this book we consider the processing of the text. Processing is necessary because the statutory text by itself is insufficient as a means of communication between legislator and citizen. It is not even sufficient as a means of communication between the legislator and citizen's professional adviser. It is drafted as if to stand alone, but the reader who looks at nothing else has small chance of understanding it. It is all cutting edge, doing little to reveal the purpose of that edge. Drafters learn that unnecessary words lead to trouble. Like an appendix, what is not needed to achieve legal effect can become gangrenous. Drafters' explanations give hostages to fortune. Mistakes will creep into them (since mistakes creep into everything). They cannot allow for future development. They are liable to conflict with the text itself.

For these reasons and others (such as lack of time), the drafter concentrates on the cutting edge. Explanations must be provided by other people, and in other ways. We begin this Part by considering in detail just why explanations are necessary, and in what respects. This requires us to examine the difficulties experienced by the user in attempting to rely on the legislative texts alone. First we must ask: Who is the user?

Who is the statute user?

Many people have thought (and many still think) that in a democracy the laws should be such as can be understood directly by the citizen. He cannot plead ignorance of law as an excuse for his trangression. Common fairness requires that knowledge of law should therefore be accessible. Here, as elsewhere, life defeats fairness. The truth has been expressed by a distinguished drafter, and expounder of drafting principles, Professor Driedger:

> There is always the complaint that legislation is complicated. Of course it is, because life is complicated. The bulk of the legislation enacted nowadays is social, economic or financial; the laws they must express and the life situations they must regulate are in themselves complicated, and these laws cannot in any language or in any style be reduced to kindergarten level,

any more than can the theory of relativity. One might as well ask why television sets are so complicated. Why do they not make television sets so everyone can understand them? Well, you can't expect to put a colour image on a screen in your living-room with a crystal set. And you can't have crystal set legislation in a television age (Driedger 1971, p 78).

In a paper written in 1966 I attempted to describe the statute user, beginning by pointing out that the legislative audience will differ according to the type of legislation. The paper continued:

In the case of administrative legislation the Act will principally be the concern of the civil servants or local government officials responsible for administering it. On the whole, judges and other lawyers will have relatively little to do with the working of this type of legislation while the general public will rely mainly on advertisments and leaflets summarising ±e effect of the legislation in simple language. The main legislative audience here is therefore the official who will implement the Act.

With other types of legislation judges and other lawyers will be more closely concerned. Few, if any, laymen desiring information as to their tax position, for example, will go direct to the Act. They will probably take advice from lawyers or accountants, or at least will look at a text- book. The main legislative audience here is therefore the professional one, with the courts to the forefront (Bennion 1966, p 2).

The paper went on to conclude that for practical purposes the user is principally the practising lawyer (on the bench, at the bar or in a solicitor's office), the public official, or the non-legal professional adviser (such as the accountant, planner or estate agent) whose services call for knowledge of some branch of statute law. (See also Bennion 1971 (2), pp 132-4).

Apart from adding a reference to company lawyers on the receiving end of administrative or regulatory legislation, I see no reason now to alter this description; and in this book that is what I mean by the user of legislative texts.

Text-collation

When the user seeks to discover and apply the statute law relevant to a subject area, or to a particular point, he first needs to find out which are the relevant texts and to assemble them. This is often a difficult task in itself. The user's failure to perform it correctly gives rise to *a wrong understanding of what the relevant law is.* It can be demonstrated by a simplified model. Suppose the statute law relevant to a point consists of four texts, as follows:

A — an Act of Parliament

B — another Act of Parliament

C — an order made under a power conferred by A

D — regulations made under a power conferred by B If a user has ABCD available, he has all the statutory texts needed

to work out his problem. He may not be able to construe the material properly, but at least he has it before him. Now suppose the user has done some research into what the relevant material is, but has failed to do it successfully. He comes up with the idea that the relevant texts consist only of ABD. He is under a misapprehension consisting of a wrong understanding of what the relevant law is. This may be because the system provides him with inadequate tools for finding the answer.

Now let us complicate the model slightly. Suppose there is a leading case on the meaning of A. In the language of this book the court has 'processed' A, and the result is a reported decision and set of judgments which we may call X. It is clear that the user now needs not only the statutory texts ABCD but the reported case as well. Even if his researches have produced the answer ABCD, he is still under a wrong understanding of what the relevant law is because the relevant law is ABCDX. Here the system that may have let him down is a different one. It is not the system that tells the user which statutory texts are relevant to certain subjects or points. It is the system that tells the user which reported cases have processed a particular text, and in what way.

Complicating the model still further, we may now suppose that the user's point is dealt with partly by the statutory provisions mentioned and partly by common law. Call the leading reported case at common law Z. The complete kit for the user to solve his problem is now ABCDXZ. If his researches produce only ABCDX he is once more under a wrong understanding of what the relevant law is. This time a third system may be at fault, namely that which tells people which reported cases are relevant for arriving at a rule of common law. That system is not however within the scope of this book.

The problem of text-comprehension

A further type of user's misapprehension is a *failure to understand* the statutory texts. Taking our model before its final complicating development, let us assume that the relevant material consists of ABCDX. This time our user has succeeded in his researches. He has before him the statutory texts ABCD and the reported case X. He studies this material, but either comes up with the wrong answer or retires baffled. Why?

Assuming the user has the intelligence and legal training needed, and has been able to devote sufficient time to the operation, the answer must lie in the form and arrangement of the materials and the nature of the task. If the user is concerned with the *entire* subject matter covered by ABCDX (say because he is the legal officer of a trade association concerned to draw up proposals for changing the law) his task is to work out the general effect of ABCDX. In practice he may rely on the efforts of someone else (say a textbook

writer) who has already worked this out and published his conclusions. But it is unsafe to rely entirely on the labour of others. It is also unprofessional. The conscientious user wishes to work things out for himself. If he is to assume personal responsbility, in accordance with his professional duty, he should if possible arrive at his own conclusions. (On this aspect of general professional ethics see Bennion 1969, chap 7.)

What is the nature of the task of the user who is concerned to work out the overall effect of ABCDX? It is governed by the fact that he has to handle five seperate texts, which under our system are likely to be only tenuously related textually. They will not be organised as a single coherent structure. Nor is it possible that in their original form they could be, since their timing and origins are different. A and B were passed by Parliament at separate times. C was made by a Minister some time after the passing of A. D was made by another Minister some time after the passing of B. X perhaps consists of three judgments, given by a court at a time later still.

The task of a reader faced with arriving at the combined meaning of disparate texts in this way is called *conflation.* As I said in evidence to the Renton Committee, conflation of statutory material is usually difficult, sometimes extremely difficult, and occasionally impossible (Bennion 1979 (4), p 32).

Nor is conflation the only problem. Acts of Parliament start life as Bills. As we saw in chapter 2, their form is subject to parliamentary considerations irrelevant to the needs of the ultimate user. The arrangement is distorted, the text compressed, and the headings and other signposts relatively few. These considerations do not apply to statutory instruments, but their standard of drafting tends to be less expert and they can only tell part of the story—the remainder always being in the parent Act. Court judgments are different in nature to statutory texts. The two can be combined only by *codification,* a difficult process rarely achieved in Britain.

What of the user merely faced with finding in ABCDX the answer to a *specific* problem? He has first to go through the procedure outlined above in relation to the general user. If the whole of this is not needed, he must at least work out the principles governing his own particular case. Then he must apply them to the facts of the case and work out the conclusion.

When it is remembered that our model is a very simple one, the scope for failure in text-comprehension under actual working conditions is seen to be formidable. The factors causing it are examined in greater detail in the next chapter.

Doubt-resolving

Suppose the user avoids a wrong understanding of what the relevant law is, and also avoids a failure to understand the statutory texts.

He assembles all the relevant texts, and none that are irrelevant. He accomplishes the difficult task of conflating them, and correctly extracts their combined meaning. Does he then have his solution? If he has sought a general view of that area of statute law does he achieve it? If he required the answer to a specific problem has he found it?

The answer is not necessarily. This is because statute law contains areas of doubt, which can only be resolved by processing. There are various reasons for this—all inescapable, and all linked to the drafter.

The drafter cannot say everything. We saw in chapter 2 how he is under a duty to keep his text as brief as possible. Even if it were not so, he could not as a creative writer do without implication. He would be bound to assume a knowledge of the surrounding legal system (including of course the Interpretation Act). He would have to leave the obvious unsaid (though aware that what is obvious to one person is far from obvious to another). The technique of ***ellipsis*** is a necessary tool of any author, and the drafter brings it to his aid. We discuss it further in chapter 15.

Another source of doubt is that, just as the drafter cannot say everything, so Parliament cannot decide everything. There are points beyond which it cannot exert its will, and must leave the choice to others. The name for this process is ***delegation.*** We have seen how Parliament delegates its powers to ministers, to be exercised by means of statutory instruments. There are other forms of delegation. Officials may be left to work out, by the use of their discretion, the detailed operation of an enactment. Or the task may be entrusted to courts or tribunals. Either way, the drafter is likely to effect this statutory delegation by use of what we may call a ***broad term.*** The effecting of delegation in this way is explored in chapter 16.

Ellipsis and this form of delegation are techniques by which the drafter deliberately causes doubt or, as we may call them for convenience, ***doubt-factors.*** The third deliberate doubt-factor, thankfully much rarer, is ***intentional obscurity***. For various reasons the legislator feels unable or unwilling to express a precise and clear meaning, and requires that the provision be 'fudged'. Where it is an operative provision, and not mere window-dressing, the drafter knows that this inevitably means that some agency, probably the court, is liable one day to be called on to give an interpretation. Intentional obscurity, which is thus a form of delegation by the legislator, is discussed in chapter 17.

A further doubt-factor, this time not deliberate, is ***unforeseeable development.*** A statute is to be treated as always speaking. While it remains unrepealed it remains law, day in day out. But its language belongs to the period of text-creation. Every passing year brings changes in the nuances of our language. There are developments also in inventions, and in social practices and values. Our society

is always in a state of flux. These points are explored in chapter 18.

The final doubt-factor, again not deliberate, is *error*. Drafters make a great many errors, a fact which drafters (being human) are apt not to acknowledge in public. As a drafter myself I see no need for this coyness, which gets in the way of a just assessment of the workings of statute law. There is not necessarily any blame to be attributed. To err is human, and the person who never makes a mistake never makes anything. Furthermore, errors causing doubt are not always made by the drafter—another member of the team may be at fault. Even where they are made by the drafter, and he discovers them in time, he may not be allowed a *locus poenitentiae*. Still, he has an overall responsibility for the product, second only to that of Parliament itself. The concept of parliamentary infallibility was discussed in chapter 1, in a brief survey of the duplex approach to legislative meaning. The drafter's fallibility, linked to it in a way crucial to the duplex approach, is examined in detail in chapter 19.

Differential readings

Even when the statute user has successfully surmounted all the difficulties previously outlined in this chapter, a further hazard awaits him. He may have collected all the relevant texts, understood them, resolved any doubts correctly, and still fail. This is because it is possible for different minds to reach opposing views about the plain meaning of a text. One person entertains no doubt that the text has one meaning, while another person feels equally sure that it has another. The process of applying a general rule to particular facts can only end in a mental 'feeling' that one interpretation or another is 'correct'. Such feelings are justified in presentation by magnifying the supporting arguments and diminshing the others. The weight to be attached to each argument, and the offsetting weight of each counter-argument, are in every case a question that ultimately can only be subjective.

A practitioner advising a client may thus feel sure about the answer the law gives to the client's case. Yet he could be confounded if the matter came to court, for the judge may confidently find for the opposite view. Then the only hope is an appeal. This problem is further discussed in chapter 22.

Processing as **a remedy**

It is a principal theme of this book that problems of text-collation, text comprehension and doubt resolving fall to be dealt with by processing. *Text-collation* becomes less difficult as the number of different texts relevant to a subject is reduced by combining them into a unified whole. Consolidation and composite restatement are

two methods of doing this. The subject of ***text-manipulation*** is explored generally in chapter 23. To the extent that texts remain separate, adequate indexing and other aids assume greater importance, and this aspect is also dealt with in chapter 23.

Text-manipulation is also an answer to failure in ***text- comprehension.*** The vices of statute law described in the next chapter can be alleviated, if not removed, by suitable treatment of the text— as chapter 23 again demonstrates.

The dynamic processing of ***doubt factors*** is carried out in various ways by government officials, by academic and professional commentators, and of course by judges. The contribution made by each is discussed in chapters 20-22.

We have reached the point where we can begin working out in detail a new approach to statute law. Already we have seen that there is more to the problem of understanding statute law than rules of 'interpretation'; important though these are. Methods of text-creation and text-validation need to be grasped. The user must tackle the problems of text collation. The subjective comprehension of the texts, quite apart from any doubts that may exist objectively, is a major topic in itself.

But the main opportunity for a new approach lies in the area of doubt-resolving. First comes diagnosis. We find the meaning unclear, and are satisified that this is not due to our own failure in text collation and text comprehension. There is an objective area of doubt. Instead of applying the rules of interpretation, or the presumptions, or any other general aids discussed in Part II, let us take a different approach. Precisely what, in the text we are examining, causes the doubt? What is its etiology, as a medical practitioner would say? Only when we understand that can we proceed further along the road to resolving it.

I have explained how in this Part the various doubt factors are examined. I conclude this summary of the difficulties of the statute user by showing the ***deliberate*** doubt factors in diagrammatic form (see p 216).

The circle depicts the whole area of legislative meaning and intention in a particular text. The dark areas represent those parts of the meaning and intention that are ***expressed.*** The white areas represent the parts that, by the technique of ellipsis are to be ***implied.*** The hatched area indicate parts which the drafter has not felt able to work out in detail. Instead, by the use of a ***broad term,*** he has left the detail to be elaborated later. The agents for this are the ***processors,*** whether administrative authorities (chapter 21), or the courts (chapter 21). The dotted area stands for ***politic uncertainty.***

The diagram does not include the two ***unintentional*** doubt factors, namely the unforeseeable development and the drafting error. These superimpose confusion on the intended plan.