# Bennion on Statute Law

# Part III - The Need for Processing of Texts



## Doubt-factor III: Politic Uncertainty

The final deliberate doubt-factor is seldom used, and so requires only brief discussion. There are various reasons why it may be considered politic to shroud a legislative text in obscurity. They can be condensed into the following propositions:

(1) If the parties to a proposal cannot agree, it may be necessary to fall back on putative agreement by propounding an imprecise formula to paper over the cracks.
(2) Where a government's proposal is politically contentious the government may sneak it on to the statute book under a cloak of bland and harmless phraseology.
(3) On some politically sensitive issues certain forms of words acquire the quality of a shibboleth, which it is felt *must* be advanced regardless of resulting obscurity.
(4) Officials who desire a free hand in administering a regulatory Act favour imprecise language. If no one can be sure what the Act means, there can be no proof that the officials have exceeded their powers.

### Treaty provisions

The commonest example of the first proposition is the international treaty. As the Renton Committee remarked, in such documents 'clarity is sometimes sacrificed to expediency' (Renton 1975, para 9.11). When representatives of many nations seek to hammer out agreement they may feel bound to resort to spurious compromise. Either there is agreement or there is not. To pretend to agreement by the use of ambiguous language is ignoble. But it is done. As Brinkhorst and Schermers say in *Judicial Remedies in the European Communities* (p 22): 'Political compromises are often attained by the use of ambiguous words' (quoted Renton 1975, para 9.11).
Every treaty contains compromise of this sort. If the treaty is converted into municipal law, the ambiguity is spread. That is one objection to the idea of making the European Convention on Human Rights part of domestic law. To secure agreement, many important principles were watered down when the wording of the Convention was settled.

An example of an international treaty converted directly into municipal law is the Warsaw Convention, as amended at the Hague in 1955. This is given the force of law in the United Kingdom by s 1 of the Carriage by Air Act 1961. The result is to apply directly a number of obscure provisions. Article 18(3) is an example. It begins by saying that the period of the carriage by air does not extend to 'any carriage by land, by sea or by river performed outside an aerodrome'. Then it qualifies this by saying that if such carriage does in fact take place 'any damage is presumed, *subject to proof to the contrary,* to have been the result of an event which took place during the carriage by air' (emphasis added). The italicised phrase seems to contradict the purpose of the qualification.

A case where treaty obligations were implemented indirectly was the Oil in Navigable Waters Act 1955. Reproducing the obscure wording of the treaty, s 1 of the Act said that if oil were unlawfully discharged from a British ship 'the owner or master' of the ship would be guilty of an offence. In *Federal Steam Navigation Co* v *Department of Trade and Industry* [1974] 1 WLR 505, *both* the owner and the master of a ship were convicted. In dismissing their appeals, the House of Lords split three to two.

An extraordinary example of deliberate obscurity induced by a treaty concerns the 1961 Vienna Convention on Diplomatic Relations. By the Diplomatic Privileges Act 1964, certain articles of this are made part of the law of the United Kingdom. One of them is art 31, which gives immunity from jurisdiction except in the case of a 'real action' relating to private immovable property. Now (Admiralty jurisdiction excepted) there are no such things as real actions in English law, so what can this exception conceivably mean? We have an Act of Parliament solemnly legislating about things that simply do not exist. It is as if the Act gave immunity in respect of 'dodos, unicorns and gryphons'. For a valiant attempt by the court to grapple with this difficulty see *Intpro Properties (UK) Ltd* v *Samel* [1983] 2 WLR 1 (reversed [1983] 2 WLR 908).

**Politically contentious provisions**

Enactments which 'paper over the cracks' are not limited to the field of international conventions. For a domestic example relating to the Marine Insurance Act 1906 see p 75 above. Another possible example was referred to by Lord Wilberforce in the 1982 case about the cheap London fares policy, *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768. Speaking of the duty imposed by s 1 of the Transport (London) Act 1969 to provide 'integrated, efficient and economic' facilities, Lord Wilberforce said (p 814): 'There has been a good deal of argument as to the meaning of these words, particularly of 'economic'; no doubt they are vague, possibly with design.' An acutely controversial point may be left deliberately uncertain

despite the fact that MPs debating the Bill point to the doubt. This happened on the question of whether the 1968 Race Relations Bill applied to working men's clubs. Lord Simon of Glaisdale said in 1981 that it was notorious that such clubs practised racial discrimination but Parliament shrank from making clear whether the Bill applied to them or not because 'a decision either way was bound to attract some odium' (HL Deb 9 March 1981 col 77).

Craies includes among the causes of defective statute law: 'More or less intentional obscurities, perplexities, or imperfections, inserted or permitted with a view to facilitate the passage of the Bill through Parliament' (Craies 1971, p 28). Sir Courtenay Ilbert explained how in his day counsels of perfection urged by the drafter from the legal view were ignored by politicians. He added that 'whether the Minister who had to decide between the risk of losing his Bill and responsibility for leaving the law obscure adopted the right course is a nice question of political ethics' (Ilbert 1901, pp 18, 22).

It might be a nice question of political ethics, but no realist would suppose for a moment that a minister would be prepared to lose his Bill, or have it delayed, on any grounds except political ones— and then only when they were compelling. This highlights a central paradox: the true arbiters of legal change and content are not lawyers but politicians, whether they be ministers or back-benchers. So it is not surprising that the *corpus juris* assumes erratic shapes.

Another political factor is the party shibboleth. This has been particularly obvious in the protracted battles over trade unionism. Labour hatred of the Industrial Relations Act 1971 was so acute and bitter that it distorted the Act which followed, the Trade Union and Labour Relations Act 1974. Although Labour wished to retain many features of the 1971 Act, its *total* repeal had been a leading general election issue. How do you repeal an Act totally, while retaining large parts of it?

The way it can be done is to be seen in s 1 of the 1974 Act:

> (1) The Industrial Relations Act 1971 is hereby repealed.
> (2) Nevertheless, Schedule 1 to this Act shall have effect for re-enacting … the under-mentioned provisions of that Act, that is to say …

Simple, when you know how!

Another party-political distortion in the 1971 Act derived from Labour adherence to the historic fact that trade unions were unincorporated associations and not bodies corporate. Although for practical reasons unions needed to be given most of, if not all, the attributes of corporate status, the drafter was not allowed to turn unions into corporations. How the resultant contradictions misfired was recounted on pp 183-185 of the second edition of this book (now omitted).

Sir Harold Kent, a former drafter, has described in his book of reminiscences *In on the Act* the conflict of interest between the drafter on the one hand the the Minister and his department on the other. The drafter seeks to confine the Bill strictly to matters requiring an alteration of the law. On the other hand:

The department is conscious that the Minister would like to make a Parliamentary splash; it also knows that administration is sometimes helped by being able to refer to an Act of Parliament; so it wants to put as much as possible into the Bill' (Kent 1979, p 44).

Kent goes on to point out that other occasions of conflict are when the Minister wants a clause to look as attractive politically as possible, or is 'impatient of the detail needed for precision'.

**Convenience of officials**

The development of legislation as an instrument of social policy has brought a corresponding increase in bureaucracy. Regulatory legislation requires officials to administer it. They are then in the public eye, and the subject of constant probing and attack. Everything they do is open to challenge, and often is challenged. So it is not surprising that the officials take advantage of what refuge they can find. If the Act which officials administer is obscure, their antagonists have less opening for attack. Even when not afflicted with megalomania (and few officials are) it is more comfortable to be covered by wide, vague powers. Then you can get on with the job without fear of challenge.

The departmental official has a guiding hand in the preparation of legislation. Usually its shape is a reflection of his views. They are not idiosyncratic personal views; but the demands of his work colour his approach. The official does not think it important that the statute user should be able to understand the law from the text alone: he is always ready with advice.

The legislative drafter opposes this view. If not particularly concerned about the plight of the statute user, he does at least want to express the law he intends to make. Sir Harold Kent describes the conflict by recollecting occasions in his own experience 'when the department wants its administrative powers drawn widely, or even obscurely, so as to avoid risk of legal challenge, an attitude which hardly pleases a self-respecting draftsman'.

Kent's last word on this really says it all. 'I remember a clause of mine receiving the dubious compliment of "nice and vague" from a bureaucrat of seasoned experience' (Kent 1979, p 45).

It should perhaps be added in conclusion that the rise of judicial review since the above was written in 1979 has rendered it less likely that challenge will be avoided by the use of obscurity in drafting.