Bennion on Statute Law

Part III - The Need for Processing of Texts

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Doubt-factor IV: The Unforeseeable Development

As we saw from the discussion of updating construction (pp 181- 186), the longer a statute remains in operation, the more likely it is that doubts will arise as to its application. It is a static text amid constant flux. Changes in language, technology, social practice and in the surrounding law are bound to be continual.

The static text

We may usefully consider some examples. It is truly remarkable how long-lived English statutes are. In magistrates' courts throughout the land, people are still being bound over to keep the peace under an Act passed more than six centuries ago. It is still 'speaking'. Can its voice be comprehensible today? This is how it begins:

Primement q en chescun Countee Dengletre soient assignez, p[1] la garde de la pees, un Seign[1], & ovesq lui trois ou quatre des meultz vauez du Countee, ensemblement ove ascuns sages de la ley, & eient poer de restreindre les mesfesours, rioto[r]s, & touz auts baretto[r]s . . .

Even that is not the oldest criminal statute operative. The law of treason, an offence still carrying the death penalty, is embodied in an Act of 1351. This begins as follows:

Auxint p[r]ceo q divses opinions ount este einz ces heures qeu cas, q[a]nt il avient doit estre dit treson, & en quel cas noun, le Roi a la requeste des Seign[r]s & de la Coe, ad fait declarissement q ensuit, Cest assavoir; q[a]nt home fait compasser ou ymaginer la mort nre Seign[r] le Roi, ma dame sa compaigne, ou de lour fitz primer & heir . . .

It is true that for both these fourteenth-century statutes an official translation is provided. But the wording, even in translation, is redolent of times long past. There can be no justification for a modern state still expressing its law against attacks on the head of state by imposing sanctions 'when a man doth compass or imagine the death of our lord the King, or of our lady his companion or of their eldest son and heir; or if a man do violate the King's companion, or the King's eldest daughter unmarried, or the wife of the King's

eldest son and heir; or if a man do levy war against our lord the King in his realm, or be adherent to the King's enemies in his realm, giving them aid and comfort in the realm, or elsewhere . . .' (Treason Act 1351).

Nor can there be any justification for subjecting today's citizens to the risk of binding-over by saying that 'in every country of England shall be assigned for the keeping of the peace one lord, and with him three or four of the most worthy in the county, with some learned in the law, and they shall have power to take of all them that be [not] of good fame, where they shall be found, sufficient surety and mainprise of their good behaviour towards the King and his people . . .' (Justices of the Peace Act 1361).

Apart from obvious archaisms, the texts of these two Acts abound with doubts and defects. It is doubtful whether the word 'not' is really present in the passage just cited, there being a respectable argument for saying that not only was that negative never included but that other words (not cited above) render its omission necessary! Blackstone it is true felt confident that 'not' was properly included. He gives us an engaging picture of the sort of people who in his day fell within the ambit of a provision that was already more than 400 years old:

> Under the general words of this expression, *that be not of good fame,* it is held that a man may be bound to his good behaviour for causes of scandal, *contra bonos mores,* as well as *contra pacem:* as, for haunting bawdy-houses with women of bad fame; or for keeping such women in his own house; or for words tending to scandalize the government, or in abuse of the officers of justice, especially in the execution of their office. Thus also a justice may bind over all night-walkers; eaves-droppers; such as keep suspicious company, or are reported to be pilferers or robbers; such as sleep in the day, and wake in the night; common drunkards; whore-masters; cheats; idle vagabonds; and other persons whose misbehaviour may reasonably bring them within the general words of the statute, as persons not of good fame: an expression, it must be owned, of so great a latitude, as leaves much to be determined by the discretion of the magistrate himself.' (Blackstone 1756, IV 268. See further 133 SJ (1989) 498. As to broad terms generally see chapter 16 above.)

Other Acts still in our statute book, though not as ancient as the two just mentioned, nevertheless govern today's citizens by the language of the past. Here are just a few examples at random. All are in force today.

The Pedlars Act 1871 contains a definition of'pedlar' stating that it means 'any hawker, pedlar, petty chapman, tinker, caster of metals, mender of chairs, or other person who, without any horse or other beast bearing or drawing burden, travels and trades on foot . . .'.

Section 4 of the Vagrancy Act 1824, still in constant use, punishes 'every person wilfully, openly, lewdly, and obscenely exposing his person with intent to insult any female'. It was decided only in

1972 that the reference to a person exposing his 'person' means the penis and nothing else: *Evans* v *Ewels* [1972] 1 WLR 671. The section goes on to penalise the carrying of any gun, pistol, hanger, cutlass or bludgeon, and renders such weapons forfeit to the King's Majesty. Then the section says that anyone apprehended as an idle and disorderly person and violently resisting any constable or other peace officer shall be deemed a rogue and vagabond. We are not surprised to find that such a rogue and vagabond is to be committed 'to the house of correction'.

Section 4 of the Statute of Frauds 1677 remains an important element in the law of contract. It provides that 'noe action shall be brought whereby to charge the defendant upon any speciall promise to answere for the debt default or miscarriages of another person unlesse the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writeing and signed by the partie to be charged therewith . . .'

The Gaming Act 1710 is still important to gamblers and those who exploit them. It renders void any security given in respect of 'gaming or playing at cards dice tables tennis bowles or other game or games whatsoever or by betting on the sides or hands of such as do game at any of the games aforesaid . . .' The effect is somewhat reduced by the Gaming Act 1835.

How doubts arise

It is clear that the static text, enduring through changing conditions, must raise uncertainty as to how it is to be interpreted at a given time. Looking only at examples quoted above, we feel doubt as to how they are to be construed today. Is it really punishable to 'imagine' the death of a monarch? Suppose the monarch's heir is not the 'eldest son' but the eldest daughter, or the second-born son? Does 'violating' the consort mean only taking her by force, and exactly what sexual conduct is proscribed? Can a person who w 'of good fame' be bound over? What does 'surety and mainprise' mean? Does the *ejusdem generis* rule (p 196) apply to the 1871 definition of 'pedlar' and if so to what effect? Does s *6(b)* of the Interpretation Act 1978 ('words importing the feminine gender include the masculine') now mean that it is an offence for a person to expose his person with intent to insult a *male?* What conduct is 'idle and disorderly' today? The way courts deal with such questions is described above in the discussion of updating construction (pp 181-186).