Bennion on Statute Law

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Part IV - Dynamic and Static Processing of Texts

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The Nature of Dynamic Processing

Dynamic processing is the authoritative resolving of *doubt* as to the meaning and application of a legislative text. In the previous Part we surveyed the need for processing raised by the user's problems of text collation, text comprehension and doubt resolving. The first two are tackled by static processing, to which we turn later in this Part. First, because it is juristically more important, we look at the dynamic process of doubt resolving.

It was pointed out above that there are two aspects to this question. The law on a topic may need to be stated as a whole (and cannot be satisfactorily stated if areas of it are infected by doubt). Or the doubt may arise in connection with the application of an enactment to a particular set of facts. The doubt is unlikely to relate to that set of facts alone; it will probably exist whenever facts of that type occur. Dynamic processing operates on both aspects, which of course interact. But the processor tends to be working with the latter aspect, whether as the administrative official handling an application for the exercise of his discretion, or as the judge hearing a particular case, or otherwise. For convenience we refer to these two aspects of processing as wide and narrow processing respectively.

The doubt-factors

Before examining the nature of dynamic processing, we need to weigh up the doubt-factors explored in the last five chapters. This is necessary because we cannot understand the processor's function unless we understand the basis of the authority possessed by him, and this relates closely to the nature of the doubt-factors. Where the doubt-factors are *intentional* there can be no doubt that the processor has authority to resolve them. Difficulty arises where a doubt-factor is *unintended*. It is a difficulty that lies at the heart of our long-standing problems with statutory interpretation. The intentional doubt-factors were explained in chapters 15 to 17. By use of ellipsis or the broad term, or by politic uncertainty, the legislature openly delegates the function of resolving doubt to the processor. He must therefore proceed to carry out that function,

acting within the legal framework governing the exercise of his functions generally.

But what of the case where the legislator did not intend to delegate? As we have seen, this may arise where unforeseen developments have overtaken the text (chapter 18) or where the drafter has erred (chapter 19). Either way the text is defective as an expression of currently operative law. Can Parliament be taken to have given a general delegation covering such defective texts? There is no sign of it. Or does the processor's function, particularly where the processor is a court, necessarily involve tidying-up operations of this kind? Judges have given few indications that they think so, and many that they do not.

Two things stand as obstacles to processing as a cure for defective texts. One is the predictability principle. This states that the statute user is entitled to be able to rely on the letter of the legislative text. The other is the reluctance of modern judges to usurp the legislative function, which in a democracy belongs only to elected representatives assembled in Parliament. These considerations, while of fundamental importance and worthy of the highest respect, are not sufficient to dispose of the matter. Faced with a defective text, both statute user and processor are necessarily obliged to surmount the defects as best they can. The defects put the user on enquiry. Unless they have been already processed, he must seek guidance from what it may be expected future processors will do to resolve the doubts they arouse. Basically, he needs to know whether the processor's approach to the defective text will be literal or remedial.

Back to the duplex approach

In understanding the juristic nature of dynamic processing of defective tests, we need to return to the discussion in chapter 1 of the duplex approach to legislative meaning (pp 14-15). The dichotomy between text-creation and text-validation was there outlined, together with a suggested reconciliation of the conflict between the idea of the infallible legislature and the fact of the fallible drafter.

Into the gap between the clear commands of the ideal legislature and the defective texts of actual law the processor steps. His function is to perfect the texts with due regard to the predictability principle and to democratic propriety. This is a difficult task, requiring to be scientifically approached.

Who are the processors?

Statute law itself appoints the processors; they do not intervene from outside. Even a written constitution is an emanation of statute law; Britain of course does not possess one. The principal processors are the judges. In British constitutional theory judicial power, like

executive power, originates with the monarchy: 'All jurisdiction exercised in these kingdoms that are in obedience to our King is derived from the Crown' (Bacon's Abridgment, 'Prerogative' (D)(l)). The judges stand in the place of the sovereign in whose name they administer justice *{John Russell & Co Ltd* v *Cavzer, Irvine & Co Ltd* [1916] 2 AC 298, 302).

Nevertheless it is by statute that modern courts are set up and administered. Little is said directly in the Acts about the nature of the judicial function. The Supreme Court Act 1981, reproducing provisions originating in the Judicature Act of 1873, confers jurisdiction indirectly. The High Court is given the jurisdiction formerly vested in the Court of Queen's Bench, the Court of Common Pleas at Westminster, and so on (s 19(2)(6)). The Court of Appeal succeeds to the powers of the Court of Appeal in Chancery and the Court of Exchequer Chamber (s 15(2)(6)).

Other statutes conferring jurisdiction are slightly more illuminating. The House of Lords, when hearing an appeal, is required to 'determine what of right, and according to the law and custom of this realm, ought to be done in the subject-matter of such appeal' (Appellate Jurisdiction Act 1876, s 4). County court jurisdiction is conferred item by item. For example, s 16 of the County Courts Act 1984 gives jurisdiction to 'hear and determine' any action for the recovery of money due under any statute where the amount claimed does not exceed a specified sum.

An Act dealing with a particular matter often confers jurisdiction expressly in relation to that matter. For example, Pt IX of the Consumer Credit Act 1974, headed 'Judicial Control', confers detailed functions on county courts as to the settlement of disputes under the Act. Either because of a general provision conferring jurisdiction, or under some specific enactment, a court finds itself with the function of determining a dispute governed by a statutory text. If it considers the meaning doubtful, the court, even if it is only a court of first instance, is not permitted to say 'Non liquet' (it is not clear). Provided the doubt is relevant to the cause before it, so that the cause cannot be determined without resolving the doubt one way or the other, the court cannot dodge resolving it. By his judicial oath or affirmation, the judge has bound himself to 'do right to all manner of people *after the laws and usages of this realm'* (Promissory Oaths Act 1868, s 4). Where a relevant law is doubtful the judge must make up his mind what it is. His *ratio decidendi* has the effect of declaring the law.

Under the doctrine of *stare decisis,* accepted in our system, the law is not declared for that case alone. To stand by things decided is:

> to abide by former precedents, *stare decisis,* where the same points come again in litigation, as well to keep the scale of justice even and steady and not liable to waver with every judge's opinion, as also because, the law

in that case being solemnly declared and determined, what before was uncertain and perhaps indifferent is now a permanent rule which it is not in the breast of any subsequent judge to alter or vary from according to his private sentiments, he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land, not delegated to pronounce a new law, but to maintain and expound the old one, *jus dicere el non jus dare' (Broom's Legal Maxims,* (1st edn, 1845), p 61).

Administrative authorities

Judges are not the only processors of statute law, though they are the ultimate ones. Any public official charged with the function of administering an Act or statutory instrument must resolve relevant doubt as to its meaning. Where by a broad term it confers on him a discretion, the way he uses the discretion may have the effect of setting up detailed rules of law. The official differs from the judge in being 'on the inside'. He is part of the government system that originated the law in question. His function is not judicial and impartial, but administrative. It is his duty to help ensure that the Act achieves its governmental aim.

Professional and academic commentators

Vitally connected with dynamic processing of legislative texts are the experts who write textbooks, learned articles and other commentaries. The busy judge has little time for reflection: it is his main duty to decide the case before him. The official too is distracted by the need to ensure that the administrative machine works efficiently, and that he does not arouse political criticism of his actions.

The commentator, whether a practitioner writing from the depths of his experience or an academic accustomed to handle theoretical considerations, performs as an invaluable auxiliary to the processor. Few modern judges share the opinion of Lord Hanworth MR, who once said that problems of statutory interpretation 'cannot be solved by reliance upon the opinions of writers of text-books, however able, who are yet living' *(Re Ryder and Steadman's Contract* [1927] 2 Ch 62, 74). The current view was expressed by Lord Denning in an article written in 1947. He said that the notion that academic lawyers' works are not of authority, except after the author's death, has long been exploded. He added: 'Indeed, the more recent the work, the more persuasive it is' (63 LQR 516). We have discussed above (p 21) the status of commentaries by the drafter himself.

The contribution made by the commentator to the process of doubt-resolution has several aspects. First, he can present a rounded explanation of the object aimed at by the Act. For this he can draw on materials not permitted to be directly cited in court. Next, the

commentator can analyse the nature of the doubt and suggest ways of resolving it. The higher the academic or professional standing of the commentator the more weight will be attached to his observations.

Finally, the commentator can marshal the cases bearing on a disputed point and by doing so demonstrate how far processing has already got. He can convert narrow processing to wide. All this can be of great help to the profession. In the field of criminal law, for example, the *Criminal Law Review* has proved itself invaluable in this way. Indeed, if dynamic processing is defined as the authoritative resolving of doubt it is arguable that the commentator himself qualifies as a processor.

Nevertheless, reserving the term for those charged by law with this duty, we will now examine in more detail the role of the administrative and judicial processor respectively.