This is as printed in the fourth edition, with some slight alterations

Page 1

Introduction

The search is for order.[1] That has been the opening sentence of this book since its first edition in 1984. However the search is being made increasingly difficult. Some have suggested it is anyway illusory.[2] If that is so we are in trouble. Order, coupled with justice, is surely the first object of law.

However early in the third millennium it is scarcely right to look any more on British statute law as one formulation. A system of law corresponds to a political system. In the past we had the principle that each sovereign state has its own law, which might or might not resemble the law of a given other sovereign state. Britain no longer has its own law in this sense. The United Kingdom, though still looked on as an independent sovereign state, is less so than it was in say the middle of the twentieth century. Now we have various interminglings. Britain is part of the European Union, which brings an intermingling with the system of Community law and the civil law, based on Roman law. The Human Rights Act 1998 explicitly connects British law to the requirements of the European Convention on Human Rights. We have much more powerful and extensive treaty links than in the past, which require our courts to take increased notice of other countries' systems of law, of the United Nations, and of international law generally.

In the other direction the UK Parliament has recently conferred, under the process known as devolution, limited legislative powers on individual portions of the sovereign territory of the United Kingdom.[3] This too produces consequences for the homogeneity of British law. Scotland, which already had its own system of common law and procedure, now has its own semi-autonomous Parliament. In the laws it makes this also harks back to civilian roots and continental connections. Devolution in Wales has been less extreme, but there are inevitable murmurs that it should be made more like that relating to Scotland.[4]

So in many areas we now have multiplex systems. Formerly we had single-level law, where for a particular case there is one text (say an Act of Parliament) or a series of same-type texts which need to be conflated (say a group of Acts on the same topic). Now we have two or more levels. Typically, the provisions of the Act of Parliament itself have first to be tentatively construed, perhaps with difficulty, and then the (provisional) result has to be tested against an 'upper' text such as a European Union directive or the European Convention on Human Rights. Whatever values are served by this, order is not one of them. Legal certainty, and ability to find out what the law is, inevitably suffer.[5]

---

[1] For critical comments on this opening sentence see Jeffrey W Barnes, 'Statutory Interpretation, Law Reform and Sampford's Theory of the Disorder of Law' Pt I (1994) *Federal Law Review* (Australia) p 116 at 117 and Pt II (1995) *ibid* p 77 at 128-129. William Trevor has said 'the practice of any art has to do with establishing order': *Excursions in the Real World* (Penguin Books 1995, p xi.

[2] See eg Charles Sampford, *The Disorder of Law: A Critique of Legal Theory* (1989).

[3] See Scotland Act 1998, Government of Wales Act 1998, Northern Ireland Act 1998. A kind of devolution for Greater London is effected by the Greater London Authority Act 1999. See generally *Devolution: Its Effect on the Practice of Legislation at Westminster* HL Paper 192, 18 November 2004.

[4] See *Report of the [Richard] Commission on the Powers and Electoral Arrangements of the National Assembly for Wales* (2004).

[5] See F A R Bennion, 'Human Rights – a Threat to Law?' 26(2) UNSWLJ (2002) p.418.

Our various legislatures attempt to achieve order by their enactments, but not always with success: order can be elusive. That is why nine-tenths of all cases decided by our highest court, the Appellate Committee of the House of Lords, turn on statutory interpretation.[6] Professor Robert S Summers, co-editor of a 1991 comparative study of how statutory interpretation is practised in numerous countries, remarked of decisions involving this form of intellectual manipulation–

> 'The published justifications appearing in opinions of the higher courts in Western legal systems comprise what is perhaps the greatest repository of recorded practical reasoning known to humankind. We remind the reader also of the absolutely central importance of statute law in modern legal systems; and thus of the equal importance of statutory interpretation . . . In our view, scholars have traditionally underestimated the demands of the subject.'[7]

In the United States Professor Eskridge has put together his articles written over several decades in a collection entitled *Dynamic Statutory Interpretation*.[8] His introduction is sub-headed 'Why Statutory Interpretation Is Worth a Book'.

In Britain it has long been thought worth a book. Daines Barrington wrote his *Observations on the Statutes* in 1760, and was not the first. Sir Fortunatus Dwarris wrote the first edition of his *General Treatise on Statutes* in 1831.[9] Sir Peter Maxwell published the first edition of his famous work on interpretation in 1875.[10] Lord Thring, founder of the Parliamentary Counsel Office in Whitehall, wrote *Practical Legislation* towards the end of the nineteenth century.[11] W F Craies followed with his version in 1907.[12] Sir Charles Odgers wrote on the construction of deeds and statutes in the 1930s, and his work ran to five editions.[13] Sir Rupert Cross published his seminal book for students in 1976.[14] My own earlier book *Statute Law* first appeared in 1983.[15] The first edition of the present work appeared in 1984, and I attempted to condense the argument in a further work published in 2001.[16] There have been valuable works published in the Commonwealth, eg *Statutory Interpretation in Australia* by D C Pearce, first published in 1974 and *The Construction of Statutes* by Elmer A Driedger, first published in 1974.[17] Theodore Plucknett wrote his enlightening work on the medieval picture in the early

---

[6] *Johnson v Moreton* [1980] AC 37, *per* Lord Hailsham of St Marylebone LC at 53. In his 1983 Hamlyn lectures, Lord Hailsham amplified this by saying that over nine out of ten cases heard before the Court of Appeal or the House of Lords either turn upon or involve the meaning of words contained in enactments of primary or secondary legislation: *Hamlyn Revisited: the British Legal System Today* p 65.

[7] D Neil MacCormick and Robert S Summers (eds), *Interpreting Statutes: A Comparative Study* (1991) pp 1–4. This neglect is not confined to the United Kingdom. Graham Parker of York University, Toronto, commented that statutory interpretation is 'a topic sadly neglected by our legal writers and law schools' (60 Can Bar Rev (1982) 502 at 503). However the imbalance has been to some extent redressed since then.

[8] Harvard University Press, 1994. Earlier American treatments were by Platt Potter in his editing of F Dwarris, *General Treatise on Statutes* (W Gould, 1871) and Reed Dickerson, *The Interpretation and Application of Statutes* (Little, Brown 1965). As to Eskridge's theory of dynamic construction see Appendix H, p 0000 below.

[9] Second edition 1848.

[10] The latest edition, edited by P St J Langan, was published by Sweet & Maxwell (for some reason in Bombay) in 1969.

[11] Published by John Murray, 1902.

[12] *Statute Law.* The latest edition, edited by S G G Edgar, was published by Sweet & Maxwell in 1974.

[13] The fifth and latest edition was published by Sweet & Maxwell in 1967.

[14] *Statutory Interpretation*, Butterworths. The third edition, edited by Professor Bell and Sir George Engle, was published by Butterworths in 1995.

[15] The third edition was published by Longman in 1990.

[16] F A R Bennion, *Understanding Common Law Legislation* (OUP, 2001).

[17] For a comparative analysis of the content of the various systems of statutory interpretation prevailing

1920s.[18] This showed that the subject of statutory interpretation had been of crucial importance in England since the early Angevin period in the twelfth century, when the law courts began to break away as separate entities. Plucknett sketches the medieval development–

> 'When the law maker is his own interpreter the problem of a technique of interpretation need not arise. Only when he is forced to delegate the function of interpretation to a different person does the matter become urgent . . . First, the legislature issues its own interpretation of its acts, or else the Judges interpret statutes in the light of their own intentions when they themselves drew them — in either case the situation is the same, for the legislator and the interpreter are one. The second stage is an attempt to continue this practice under changing conditions; the legislator and the interpreter are drifting apart, but still maintain close communication by means of informal conferences. Where the original legislator had passed away, his intentions were preserved in judicial traditions. Finally, both these expedients failed, and the courts had definitely to assume the task of interpretation, which the legislature had to relinquish.'[19]

That the present work, largely confined as it is to the common law system of statutory interpretation, should find it necessary to devote more than a thousand pages to the subject is a measure of its expansion and present complexity. The mounting impact of European Community law on the British system led to the addition to the work of a new Part XXIX, dealing with that matter.[20] Finally the passing of the Human Rights Act 1998 led to the necessity of adding in the present edition a new Part XXX.[21]

The clue that should not be missed is that statutory interpretation keys into the whole system of law; indeed that whole system is subject to the relevant scheme of interpretation and in turn feeds into it. This means that statutory interpretation, when treated comprehensively as it is in the present work, forms perhaps the best modern introduction to a country's entire legal system. A related question has to do with United Kingdom membership of the European Community (now known as the European Union). Why has it never been suggested that EC legislation be interpreted according to the common law method, rather than the comparative absence of method prevailing on the continent?[22] There is a measurable difference in the democratic content of the law as administered by the two systems.

Like others in the West, our British system produces a set of written texts (acknowledged to express the will of the legislature) which have the remarkable ambition of directing the conduct of citizens in all sorts of ways. They create and support our structure of government, including Parliament, the executive and local government, and control the exercise of the judicial power of the state through the courts system. They govern the imposition and collection of taxes and other sources of essential state revenue. They create and regulate other public institutions. They control industrial, commercial and professional activities through such means as company and insolvency law, and requirements for the health and safety of workers. They provide for social welfare through health services, social security, housing provision and education. They regulate relations between individuals through family law and the law of contract and tort. And so on.

---

in Western countries see MacCormick and Summers, *op cit*, chap 12.

[18] *Statutes and their Interpretation in the first half of the Fourteenth century*, Cambridge University Press, 1922.

[19] *Op cit*, p 165. See further Code s 6.

[20] See Code pp 1093–1126, added in the third edition (1997).

[21] See Code pp 1127–1159.

[22] For the method of construing European Union Law see Code s 410. I have called it the Developmental method: see F A R Bennion, *Understanding Common Law Legislation* (OUP. 2001) pp 153-158.

To aspire so to direct, for years into the future, the endlessly varied actions of millions of people by a brief verbal formula, necessarily bearing the cramping impress of its own day, is remarkably ambitious. That the product must be an approximation does not detract from its validity, or lessen its social importance. Law consists of statements and elucidations of statements. Each legislative formula is imperfect, as all things human are. Elucidation, often but not always by the courts, has the function of alleviating this; but needs to be conducted according to a known and coherent system.

The natural and reasonable desire that statutes should be easily understood is doomed to disappointment. Thwarted, it shifts to an equally natural and reasonable desire for efficient tools of interpretation. If statutes must be obscure, let us at least have simple devices to elucidate them. A golden rule would be best, to unlock all mysteries. Alas, as this book demonstrates, there is no golden rule. Nor is there a mischief rule, or a literal rule, or any other cure-all rule of thumb. Instead there are a thousand and one interpretative *criteria*. Fortunately, not all of these present themselves in any one case; but those that do yield factors that the interpreter must figuratively weigh and balance. That is the nearest we can get to a golden rule, and it is not very near. If striving could do it, a true golden rule would here be presented to the reader. It can't.

Licking the wounds, let us face the truth. Acts of Parliament are prepared unscientifically and in haste. They seek to regulate a future which is certain only of constant surprise. Some embody a Civil Service response to the lessons of practical administration. Others are the product of partisan politics, and liable to swift reversal. Others again spring from shifting moralities, or embattled religions, or other fancied certainties in an always uncertain world. Furthermore society is a coalition; and compromise invests almost all of these well-intentioned measures. Here and there deals have been done. The drafter has then striven to paper over the cracks.[23]

Acts so faultily engendered pass in rapid succession before busy judges, assisted by busier advocates. Few of these have the time, or are equipped, for cool and deep analysis. Yet judges lean to the delivery of impromptu and pithy (and therefore doubly inaccurate) descriptions of the nature of statutes and the principles governing their interpretation. Often quotable, these get quoted. Not being based, as a rule, either on profound research or blinding insight, they tend to agree neither with each other nor with the real nature of the subject matter. Yet we are obliged respectfully to recognise, and humbly to accept, that principles of interpretation, when not laid down by Parliament itself, are devised or adopted by the courts and no one else. It is the self-imposed task of the commentator to reconcile them.

This work, framed as a Code with comments, accordingly sets out the current principles governing the construction of Acts and other legislative instruments, as laid down or adopted by the courts (with some slight help from Parliament). The intention is that the Code should be self-consistent, since two contradictory utterances cannot both be right and so cannot both be law. The explanatory comments are occasionally critical of judges. It is the legal scholar's basic attribute to question, to challenge, to sift and weigh, and to take nothing he or she is told for granted. A book on statutory interpretation that sets out to be a mere pottage of dicta is, like any other law book so planned, of little use. To be critical is not to be immodest, or lacking in respect for learned judges. A bold appraising legal writer can take comfort and courage from Lord Cockburn's long-ago assessment of Hume's *Criminal Commentaries*. When dealing with statutory interpretation, the jurist of today writes about a vital subject in disarray. Seeking to expound this in an enlightened and helpful fashion, one hears an echo of that scholarly voice from the old Edinburgh bench–

[23] In this work the term 'drafter' is now used instead of 'draftsman'. Although the courts still invariably refer in their judgments to 'the draftsman', it is opportune to draw to judicial notice the fact that for some years persons of both sexes have been employed in drafting our laws.

> ‘ . . . before any one can deserve the praise of being an enlightened expounder of a system of law not previously explained or methodised, the past actings of courts ought not to be merely stated, but criticised, so that future tribunals may be guided and the public instructed on defects and remedies.’[24]

The present author has not felt such lack of respect for learned judges as to suppose they would wish to silence his findings of error, at whatever level. We all make mistakes, in the law as elsewhere; and we can all learn and improve. The only failing is to pretend it is not so. The operation of a book like this merely repeats what must be done every time any of the judicial dicta come up for consideration in the lawyer’s chambers or the courtroom itself. The method of reconciliation was indicated by a Canadian voice echoing Cockburn’s: we must look more closely at what judges do than at what they say.[25]

When Lord Goddard CJ remarked[26] that a court cannot add words to a statute or read words into it that are not there, he echoed what many judges have said. Yet the fact is that the express words of every Act have the shadowy accompaniment of a host of implicit statements. Either these statements are taken to be implied by law (because not expressly disapplied), or they arise from the words of the enactment or its context. In many cases of doubtful construction the real question, often not perceived, is whether the manifold implications include one that settles the doubt; and if so, which it is.

Furthermore Acts by implication delegate to the authoritative interpreter what must be recognised as a law-making function. Through the dynamic processing effected by their decisions, judges fill in gaps Parliament has unavoidably left. Later interpreters construe the larger text.[27]

The whole idea of governing by fixed words inscribed on tablets is fascinating and strange. The words, which because of the inadequacy of language and the infinite variety of circumstance can from the beginning never be better than approximate, are frozen in their imperfect state unless and until amended. Parliamentary amendment is difficult, and subject to the same constraints. Meanwhile the inadequate words grow less and less apt. The temptation the court feels is to depart from the literal meaning in order to do justice or make sense.[28] Yet this natural urge marks a failure in communication. Words are designed for no other purpose than to transmit a message. If what the words say is rejected in favour of a meaning reached by other means, the message has not got through. Those who trustingly read it, and in good faith acted accordingly, are confounded.

Between the grammatical meaning and the overall legal meaning, courts now draw a conceptual distinction. The two usually correspond, but sometimes there is doubt. Here concepts are useful. The question is always: does the grammatical meaning truly give effect to Parliament’s imputed intention? If it does not, the legal meaning will be something else. In searching for the legal meaning of a doubtful enactment, the court now proceeds by identifying, determining and weighing. It identifies the general interpretative criteria that are relevant in the instant case (of which there may be many). It determines by reference to these criteria the specific factors that, on the wording of the enactment and the facts of the instant case, are decisive. It weighs the factors that tell for or against each of the opposing constructions put forward by the parties. Then it gives its decision.[29]

---

[24] Lord Cockburn, *Memorials of His Time* (1856) p 102.
[25] J A Corry, ‘The Interpretation of Statutes’ (reprinted in revised form in E A Driedger, *The Construction of Statutes* (2nd edn, 1983) App I p 251).
[26] *R v Wimbledon Justices, ex p Derwent* [1953] 1 QB 380 at 384.
[27] For interstitial articulation see Code ss 177-179.
[28] For updating construction see Code s 288.
[29] For the legal meaning of an enactment see Code ss 2, 3.

The aim of the Code is to describe this modern common-law system of statutory interpretation, presenting it in a coherent, self-consistent way. Attention is also paid to the learning of the past, without knowledge of which our present system cannot be understood. The old lawyers still have much to teach, even if, as Maitland said, the only direct utility of legal history is to show that 'each generation has an enormous power of shaping its own law'.[30]

Philosophy of this book

This book has been described as 'both descriptive and prescriptive',[31] which suggests that the book not only describes the prevailing rules but says they ought to be complied with. I have no quarrel with that, but it is helpful to expand it. The accepted system of statutory interpretation ought to be complied with not because it cannot be improved but because it *is* the system. Those operating within it should conform to it because otherwise they will be failing in their duty and will not be doing what people have a right to expect of them.
I aim in this book not only to present the law governing statutory interpretation as it exists, but also to explain how it forms a consistent whole and what the underlying theory is. I explain the processes of interpretation, and the various interpretative techniques, which I think are or ought to be used in relation to British legislation. If it seems complacent thus to accept the existing regime, rather than advance suggestions for its improvement, I can only say that describing the system adequately is a very large task in itself. I have nothing against reform, but it needs another book.[32]

As I said at the beginning of this Introduction, it is scarcely right to look on it any more as one system of interpretation. Peter Birks said in 1998-

> 'So here we are, facing all sorts of new and peculiarly legal challenges. A new Europe has to be made. The common law has to keep on equal terms with the civilian legal systems The institutions on which we have so long relied are to be reformed. The Act of Union is to be loosened. Human rights are moving into the foreground.'[33]

All these influences need to be reflected in this book, increasingly so as it continues to be updated in new editions and supplements. At the time of writing in early 2005 I can say that the treatment presented here is still securely based in the common law, and that an indication is given in those places where it departs from this. But we should be on guard. In our courts and elsewhere there is increasing osmosis between common law and civil law.[34]

As said above, the basis of this book is that there are available to judges and others seeking to arrive at the legal meaning of an enactment a large number of different interpretative criteria or guides to legislative intention. One would not think so from a study of most current textbooks. Despite what is written above on the topic (which appeared in the first edition in 1984), they continue to trot out the literal rule, the mischief rule and the golden rule as virtually the whole sum of the matter.[35] Let me briefly explain why they are wrong to do so.

---

[30] Cited by Lord Roskill in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 417.
[31] W Twining and David Miers, *How To Do Things With Rules* (4th edn, 1999), p 371n).
[32] Many suggestions for reform of techniques of statute law and interpretation are given in my book *Statute Law* (3rd edn, 1990). See also the numerous articles etc listed, and in some cases set out, on my website www.francisbenbnion.com.
[33] Peter Birks, 'The academic and the practitioner' 18 *Legal Studies* (1998) p 397 at p 405.
[34] For example in *R v Oxfordshire County Council, ex p Sunningwell Parish Council* [1999] 3 All ER 385 Lord Hoffmann readily cited systems based on Roman law as a basis for his arrival at the current legal meaning of the phrase 'as of right' in the Commons Registration Act 1965 s 22(1)(c).
[35] See, eg, Michael Zander, *The Law-Making Process* (5th edn, 1999) pp 109-130.

I first heard of these three deluding so-called 'rules' when I read a little book, also entitled S*tatutory Interpretation,* written by an old friend, the late Sir Rupert Cross. He had been Vinerian Professor of English Law in the University of Oxford, so spoke with authority. As mentioned above, his brief monograph first appeared in 1976. It was the preface that stimulated me to write the present work. In it Cross said-

> 'When teaching law at Oxford in the 1950s and 1960s I treated my pupils as I had been treated and told them to write essays criticising the English rules governing the subject . . . Each and every pupil told me that there were three rules - the literal rule, the golden rule and the mischief rule, and that the Courts invoke whichever is believed to do justice in the particular case. I had, and still have, my doubts, but what was most disconcerting was the fact that whatever question I put to pupils or examinees elicited the same reply. Even if the question was What is meant by the intention of Parliament? or What are the principal extrinsic aids to interpretation? back came the answers as of yore: 'There are three rules of interpretation - the literal rule, the golden rule and the mischief rule.' I was as much in the dark as I had been in my student days about the way in which the English rules should be formulated.'

Obviously Cross did not think these three so-called rules provided the answer. Having thought about the matter closely over the intervening years, I am convinced he was right. So where does the truth lie? I believe it starts with what I have worked out to be the basic rule, which is this. It is taken to be the legislator's intention that an enactment shall be construed according to the numerous general guides laid down for that purpose by law; and that where these conflict (as they often do) the problem shall be resolved by weighing and balancing the interpretative factors concerned.[36] This is not my own invention. A distinguished nineteenth century judge laid it down by saying that those on the bench 'are bound to have regard to any rules of construction which have been established by the Courts'.[37]

Contrary to what is sometimes said, the court does not 'select' any one of these many guides and then apply it to the exclusion of the rest. What the court does (or should do) is take an overall view, weigh ***all*** the interpretative factors that are relevant, and arrive at a balanced conclusion. This may be called the global method of statutory interpretation from the definition of 'global' given in the Oxford English Dictionary (second edition), namely 'pertaining to or embracing the totality of a number of items, categories, etc; comprehensive, all-inclusive, unified; total'. It is an approach which has been called pluralistic. So it is by comparison with the old literal rule, in early times regarded as universal. The modern development, useful though it is, has been said to deepen the contingency or uncertainty of the law-

> 'Because pluralism in statutory interpretation embraces more approaches than literalism, the contingency appears to have deepened in the sense that it is "grounded" in the values of plural concepts and approaches. However, another way to view this shift is to see it as a shift from the values of literalism to those of pluralism. The difficulty with accepting pluralism's values as the new basis for statutory interpretation is in identifying them.'[38]

As I have said, there is increasing osmosis between common law and civil law. So there is greater need to attempt at least a brief summary of the jurisprudential basis of the system of statutory interpretation here put forward. There is growing recognition that the whole basis of our law is interpretative. Andrei Marmor said in 1995 that interpretation 'has become one of

---

[36] See Code s 193.

[37] ***Ralph v Carrick*** (1874) 11 Ch. D 873, ***per*** Cotton LJ at 878. One should add to the judicial rules any laid down by Parliament, for example in the Interpretation Act 1978 (see Code s 200).

[38] Jeffrey W Barnes, 'Statutory Interpretation, Law Reform and Sampford's Theory of the Disorder of Law' Pt II (1995) ***Federal Law Review*** (Australia) p 77 at 127.

the main intellectual paradigms of legal scholarship in the last fifteen years'.[39] Peter Birks speaks of a partnership in interpretative development of the law.[40] Ronald Dworkin based a whole book on this concept.[41]

Without some consideration of jurisprudential theory there is a gap in this book. Even if the rules it sets out are correct, who is to say that judges and officials will obey them? If they do obey them, will it be willingly and constructively or reluctantly, with the constant taking of petty objections? Will they on the other hand disregard them, perhaps in ignorance? It is time to take a look at the theoretical underpinning and the judicial attitudes. Dworkin is the current leader among thinkers on this topic. His writings are densely if elegantly argued and it is impossible to summarise them. I venture to suggest that *Law's Empire* ought to be read in full by everyone seriously concerned with the matters dealt with in this book.[42]

Summary of the Code

The Code presented in this book spells out rules, principles, presumptions and canons currently prescribed by law.[43] The Code consists of thirty Parts, arranged in seven Divisions. *Division One* deals in turn with the interpreter, the instrument that he or she interprets, and the part of the instrument, known as an enactment, which forms the unit of inquiry in a particular case requiring statutory interpretation. *Division Two* discusses the *legal* meaning of an enactment, which is the meaning a court must apply. It is arrived at by discovering, weighing and balancing the interpretative factors which, in the light of the facts of the instant case, are applicable to the enactment under inquiry. *Divisions Three to Six* deal in turn with the four types of interpretative criteria which produce these factors, namely rules of construction laid down by statute or the common law, interpretative principles derived from legal policy, interpretative presumptions based on the nature of legislation, and linguistic canons of construction. *Division Seven* addresses European aspects.
Each Part of the Code begins with a brief introduction. What now follows amounts to a précis of these.

Division One

Part I explains who the interpreter is, and why he or she occupies that role. Broadly, there are four types of interpreter: the legislator, the court or other enforcement agency, the jurist, and the subject (or his or her adviser). The interpreter's duty is to arrive at the *legal* meaning of the enactment. Either this is plain, or there is a real doubt. The subject must obey, and is not excused by ignorance. If he or she disobeys there may be criminal or civil sanctions, or both. Acts are enforced by various functionaries, including government departments, local authorities, the police, prosecutors, courts and tribunals, sheriffs and bailiffs. All, in varying degree, need to interpret statutes. The powers and functions of the courts are examined. Then Part I concludes with the vital matter of judicial legislation under the doctrine of precedent, otherwise known as *stare decisis* or dynamic processing.

Parts II and III examine the nature and provenance of the three kinds of legislative text under the British system: Acts of Parliament, prerogative instruments, and delegated legislation. No

---

[39] *Law and Interpretation, Essays in Legal Philosophy* (Oxford, 1995) p. v.
[40] *Op cit* p 407.
[41] *Law's Empire*, 1986.
[42] I have dealt more fully with this aspect elsewhere: see F A R Bennion, *Understanding Common Law Legislation* (OUP, 2001), chap 16.
[43] It would be unnecessary to state this if one academic critic of the first edition had not inferred that the book is no more than a series of *suggestions* of what might be or ought to be, rather than what is: see Alida Wilson, 'Statutory Interpretation' (1987) 7 LS 62 and the present author's rejoinder at (1988) 8 LS 134.

one can properly interpret any of these without expert knowledge of their peculiar characteristics. *Part IV* deals with the temporal operation of an Act, that is its commencement, amendment from time to time, and final repeal. The account includes such difficult and often misunderstood or neglected matters as extra-statutory concessions, the practice of 'double' repeal, savings, expiry, desuetude, transitional provisions, and retrospective operation. After temporal matters, we turn in *Part V* to territorial and personal operation. We first consider the rules regarding the territory or territories in which an enactment is law, known as its 'extent'. We continue with an explanation of the principles which govern the application of an enactment to some persons and matters but not to others.

Part VI sets out the anatomy of the elements wherein a doubt as to the legal meaning of an enactment resides, with a view to showing how such a doubt is resolved. The ***enactment***, whether contained in an Act, prerogative instrument, or item of delegated legislation, is always the unit of inquiry. The doubt concerns the interaction between the facts of the instant case and the combined effect of the ***factual outline*** laid down by the enactment and the ***legal thrust*** the enactment imparts when the actual facts are within the outline. If there is doubt as to the factual outline or the legal thrust (or both), the interpreter needs to consider the ***opposing constructions*** of the enactment.

Division Two

Part VII explores the concept of the legal meaning of the enactment, that is the meaning which truly reflects the imputed legislative intention. We see that very often the legal meaning corresponds to the grammatical meaning. Grammatical ambiguity is investigated. The other type of grammatical difficulty, concerning semantic obscurity, is explained. Next we pass to the vital topic of ***strained*** construction. We see that, in the last analysis, an enactment is given either a literal or a strained interpretation. For sound constitutional reasons, judges dislike admitting this. Nevertheless it holds the key to the problem of statutory interpretation.

Parts VIII and IX show us that the sole object in statutory interpretation is to arrive at the legislative intention. We see what is meant by this concept, and that it is not a mere myth or fiction. Parliament entrusts the courts with the task of spelling out its imputed intention, even where no actual intention existed. An important aspect of this is the finding of implications.

Part X, which is the heart of the Code, shows the practical way of arriving at the legal meaning of the enactment where there is real doubt as to which of the opposing constructions should be adopted. The doubt is resolved by first assembling the relevant guides to legislative intention, or interpretative criteria. They may be divided into (1) binding ***rules***, (2) ***principles*** derived from general legal policy, (3) ***presumptions*** derived from the nature of legislation, and (4) linguistic ***canons*** of construction. From the interpretative criteria we extract, in the light of the facts of the instant case and the wording of the enactment, the relevant interpretative ***factors***. The two 'bundles' of factors respectively favouring each of the opposing constructions are figuratively weighed one against the other. Whichever, all things considered, comes out heavier in the juristic scales is preferred.

Division Three

Division Three describes the various aspects of the first type of interpretative criterion, namely binding rules. *Part XI* explains certain general rules, including the basic rule that where the interpretative guides or criteria conflict with one another, the problem is to be resolved by weighing and balancing the factors concerned. Other rules are that the interpreter must have regard to the juridical nature of an enactment, must follow a meaning which is plain on an informed construction, and must apply the basic rule in other cases. Common sense must be employed, and the court of construction must strive to implement rather than

defeat the object of the Act. *Part XII* deals with rules laid down by statute, such as definitions contained in individual Acts and the general provisions of the Interpretation Act 1978.

Part XIII states the rule that the interpreter needs to be well informed about everything relevant to construing the enactment (the informed interpretation rule) and continues with amplifying material covering such matters as the 'context' of an enactment, the need to restrict admission of historical information so as to avoid unpredictability and unjustified lengthening of legal proceedings, and the need for adequate information ***before*** any judgment is made as to whether or not the enactment is doubtful. *Part XIV* deals with the important aspect of the informed interpretation rule which is concerned with ***legislative history***. The treatment divides this history into three compartments, respectively describing the use of pre-enacting, enacting and post-enacting history.

Part XV describes the functions of the various components of an Act, with a view to the application of the functional construction rule. All the components form part of what is put out by Parliament as its Act. Furthermore s 19 of the Interpretation Act 1978 has the effect of requiring them all to be taken into account (for what they are worth). The components fall into three groups, namely operative components (mainly sections and Schedules), amendable descriptive components such as the long title, preamble and short title, and unamendable descriptive components such as headings and punctuation. Part XV concludes with four sections dealing with ways in which external provisions may be incorporated into an Act.

Division Four

Part XVI discusses the principles of construction derived from general legal policy. Law should serve the public interest, yet be just. Subjects should not be penalised under a doubtful law. Law should be predictable, and should not in general operate retrospectively. It should be coherent and self-consistent, and not subject to casual change. The municipal law should not conflict with public international law.

Part XVII expounds, in its application to statutory interpretation, the principle of legal policy that persons should not be penalised under a doubtful law. Although often referred to as though limited to criminal statutes, this principle in fact extends in varying degrees to any form of detriment. The detriments are gone through, with attention paid to the European Convention on Human Rights (the operation of the Human Rights Act 1998 is covered in Part XXX). The treatment covers constructions of an enactment which involve danger to human life or health, restriction of freedom of the person, prejudice to family rights, interference with freedom of religion, assembly, association or speech, or detriment to property or other economic interests, status or reputation, or legal rights.

Division Five

We next have seven Parts explaining the application of ***presumptions*** derived from the nature of legislation.

Part XVIII states the nature of these interpretative presumptions, and sets out five of the most important, namely those favouring the text as the primary indication, the literal meaning as that most likely to convey the legislative intention, and consequential, rectifying and updating constructions.

Part XIX states and explains the presumption that Parliament intends the courts to apply the remedy it provides for curing a mischief, based on the 400-year old resolution in ***Heydon's Case***.

Part XX follows on by presenting the modern version of what used to be called the mischief rule, namely purposive construction. This may require either a literal or a strained interpretation.

Part XXI gives details of the presumption that Parliament does not intend 'absurd' consequences to flow from the application of its Act, one aspect of the related presumption requiring a consequential construction. In this context 'absurd' means contrary to sense and reason. The presumption leads to avoidance by the interpreter of six types of undesirable consequence: an unworkable or impracticable result, an inconvenient result, an anomalous or illogical result, a futile or pointless result, an artificial result, and a disproportionate counter-mischief.

Part XXII gives details of the presumption that Parliament does not intend its Act to be evaded. This is another aspect of the presumption that Parliament requires a consequential construction. It is necessary to distinguish legitimate ways of getting round an Act (avoidance) from illegitimate ways (evasion).

Part XXIII spells out the effect of the presumption that Parliament is taken to intend general rules of law to apply so far as relevant for the purposes of the enactment under inquiry. *Part XXIV* does the same for those principles of law that are embodied in legal maxims.

Division Six

The Code continues with four Parts dealing with linguistic canons of construction.

Part XXV discusses the nature of the linguistic canons, and explains the canon that an Act is to be construed as a whole. It also deals with the interpretation of broad terms.

Part XXVI explains the use of deductive or syllogistic reasoning. The treatment is elementary, but makes the point that it is a universal canon of the construction of verbal expressions that language is to be treated as used in accordance with the rules of formal logic.

Part XXVII deals with the linguistic canons which govern the straightforward interpretation of individual words and phrases, while *Part XXVIII* explains the linguistic canons which govern the elaboration of meaning of individual words and phrases by the drawing of certain inferences. Several of these are embedded in well-known Latin maxims, such as *noscitur a sociis*, *ejusdem generis*, *reddendo singula singulis*, and *expressio unius est exclusio alterius*.

Division Seven

Part XXIX deals with the interpretation of the treaties and legislation of the European Union, particularly so far as they impact on British law.

Part XXX deals with the consequences of the incorporation into English law of the European Convention on Human Rights by the Human Rights Act 1998.

Conclusion

As the ultimate concentrate, one can do no better than offer the opening words of Maxwell's great work–

> 'Statute law is the will of the legislature; and the object of all judicial interpretation of it is to determine what intention is either expressly or by implication conveyed by the language used, so far as necessary for the purpose of determining whether a particular case or state of facts which is presented to the interpreter falls within it.'[44]

[44] P B Maxwell, *The Interpretation of Statutes* (1st edn, 1875) p 1.

True when written, this remains true today. One imagines the learned author, as he contemplated with proper humility his first edition, struggling to get right every word of this initial paragraph, and triumphantly succeeding. It is symptomatic of the confusion that has bedevilled this vexed subject that, when preparing in 1896 the first edition to be published after Maxwell's death (the third in all), an officious editor saw fit to scrap Maxwell's opening passage. The present author, in a gesture of deserved respect, is humbly pleased to reclaim it.