Bingham's Finger

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Introductory

It was a sunny afternoon in 1941. Standing on an airfield in Canada, I was an 18-year old cadet RAF pilot receiving a scolding (he would have called it something else) from my instructor Flying Officer Forrester-Paton. We had just landed, and he was not satisfied with my performance. 'You've got to pull your finger out', he said. I was puzzled, not having heard this expression before. What did it mean? I had no idea.

Later I found that it had an indelicate reference, to do with the pleasure a feckless youth is supposed to get from inserting his finger into one of his intimate body orifices, gently moving it about, and coming over all dreamy.

We have heard other metaphors to do with the finger. There is the fickle finger of fate. Othello spoke of the slow and moving finger of scorn. Omar Khayyam said-

> The moving finger writes; and having writ,
> Moves on: nor all thy piety nor wit
> Shall lure it back to cancel half a line,
> Nor all thy tears wash out a word of it.[1]

The latest finger to achieve fame, or rather infamy, is that used by Peter Bentham to stick inside his jacket and make believe it was a gun, thereby terrifying the householder he was engaged in burgling. And the one who now needs to pull his finger out is my old Balliol friend Lord Bingham of Cornhill, the senior Law Lord (we are used to straight talking).

Have I Wasted Thirty Years?

Recently I wrote an article in this journal entitled 'Does the Attorney General Know His Job?'[2]. Now I feel like writing another with a similar title about my old chum Tom Bingham. My immediate reason for saying that is the following dictum by him in the recent pointed-finger-as-imitation-firearm case ***R v Bentham***[3]-

> '1. Rules of statutory interpretation have a valuable role when the meaning of a statutory provision is doubtful, but none where, as here, the meaning is plain.
>
> 2. Purposive construction cannot be relied on to create an offence which Parliament has not created.'

I have turned Lord Bingham's dictum into two numbered paragraphs for ease of reference. As I will show, paragraph 1 is untrue and paragraph 2 is nonsensical.

For the past thirty years, since I was rendered free to write by giving up my official drafting post in the Whitehall Parliamentary Counsel Office, I have churned out books and articles on the subject of

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[1] *The Rubáiyát of Omar Khayyám* trans. Edward Fitzgerald (4th edn 1859), st. 51.

[2] 173 JP (2 Apr 2005) 248.

[3] [2005] UKHL, [2005] 2 All ER 65, at [10].

statutory interpretation. *Bentham*, and the dictum cited, make me wonder (not for the first time) whether I have been wasting my time. Except when it was cited to him in court, I doubt if Lord Bingham has read one word of what I have written on the subject of statutory interpretation, despite the encomia it has been accorded by numerous commentators and reviewers worldwide. More importantly, the changes made by the judiciary, reflected in my writings, (notably the switch from literal to purposive construction), seem to have passed him by.

I have thought for a while that Lord Bingham was deficient in clinging to the old judicial idea that, as Lord Wilberforce once put it, statutory interpretation is a non-subject.[4] The latter went on-

> 'I do not think that law reform can really grapple with it. It is a matter for educating the Judges and practitioners and hoping that the work is better done.'

Where Lord Bingham is concerned, trying to educate the Judges simply does not work. He is not interested in being educated on this topic. He is like the old-time lawyers of whom I have written-

> '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.'[5]

To put it more simply, there are far too many Judges (and Lord Bingham is one of them) who continue to think that, if a piece of legislation is involved in a case, all you need do is read it through, keeping in mind a vague notion of 'purposive construction' (because that's fashionable). If people like Bennion choose to sully hundreds of pages in books explaining this 'non-subject', well, there's no accounting for tastes. It's a free country. People can write

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what they like. But don't expect me to read all those pages and struggle to understand what the deluded old man is trying to say. I've better things to do with my time.

Having got that off my chest I turn to the facts and decisions in *Bentham.*

The Legislation and the Courts Below

Peter Bentham appealed to the Court of Appeal against his conviction on 30 July 2002 in the Preston Crown Court before Judge Badley of the offence of possession of an imitation firearm contrary to the Firearms Act 1968 s 17(2), which reads-

> 'If a person at the time of committing [robbery] has in his possession a firearm or imitation firearm, he shall be guilty of an offence . . .'

Section 5(4) of the Act defines an imitation firearm as 'any thing which has the appearance of a firearm'. The facts were given as follows[6]-

> On 24 May 2002 at about 6.20 am, at a time when he believed he was owed money by Mr Angus, Bentham went to the home of Mr Angus and into his bedroom where he was asleep in bed with his partner. Bentham had his hand inside his jacket, forcing the material out so as to create the impression that he had a gun. In a loud and aggressive manner he said: 'I want every penny in the house and all the jewellery off her neck, or else I'll shoot you.' In fear, Mr Angus handed over a significant amount of money.

Before the commencement of the trial proper a ruling was sought from Judge Badley on whether a finger inside a jacket could constitute possession of an imitation firearm. She said-

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[4] Lord Wilberforce, House of Lords debates, quoted in the Report of the Law Commission, *The Interpretation of Statutes*, Law Com No 21 at p.48.
[5] F.A.R. Bennion, S*tatutory Interpretation*, 4th edn, 2002, p. 4.
[6] [2003] EWCA Crim 3751, [2004] 2 All ER 549, at [2].

> 'Of course, an unadorned finger cannot have the appearance of being a firearm. But any piece of cloth which was puckered or gathered in such a way that could, to the eyes of a terrified person, look like being a firearm is another matter entirely . . .'[7]

When Judge Badley therefore ruled that a finger inside a jacket could constitute possession of an imitation firearm Bentham pleaded guilty and was convicted. The sole issue before the Court of Appeal was whether that ruling was correct in law. The court held that it was. This was a collegiate decision, and the sole judgment was delivered by Kennedy LJ.

To the objection that one could not be in possession of one's own finger, Kennedy LJ robustly countered that it is commonplace to say a person is in possession of his faculties or has 'lost' a part of his anatomy such as his leg. 'So the concept of possession is in fact frequently applied and understandably applied to various parts of the human body'.[8]

Kennedy LJ went on to say that the section 'is clearly designed to protect victims presented with what they reasonably believed to be a firearm or imitation firearm', adding that one has to adopt, to some extent, a purposive approach to the interpretation of the 1968 Act, many of whose sections deal with imitation firearms 'and the protection which the Act seeks to afford is protection to the public who are being put in fear'.[9] He added-

> 'If the matter had gone to trial (and what is important is the view of the jury), the jury would have had to consider whether when at the critical time when threatening Mr Angus and his partner the appellant had in his possession an imitation firearm. That is to say, having regard to the statutory definition, anything which had the appearance of a firearm. We cannot see that it mattered whether or not that item was made of plastic, or wood, or simply anorak fabric stiffened by a finger, if in the opinion of the jury at the relevant time it had the appearance of a firearm then, in our judgment, they were entitled to find that the offence was made out. Accordingly, we dismiss this appeal against conviction.'

Short, sharp and convincing in my respectful submission. But Lord Bingham of Cornhill and his colleagues thought otherwise.

A Preposterous Finding

Apart from Lord Bingham, the Appellate Committee in *Bentham* consisted of Lord Steyn, Lord Phillips of Worth Matravers, Lord Rodger of Earlsferry, and Lord Carswell. Only Lord Bingham delivered a full speech. The hearing was again collegiate. The verdict was unanimous: Judge Badley and the Court of Appeal had got it wrong.

Obviously it was a serious matter to reverse the unanimous opinion of four judges, but few reasons were given by Lord Bingham. The judgment was short and sharp (less than three pages), but not convincing. It was in my respectful submission a travesty of what it ought to have been[10].

Here, modest as I am, I am forced to draw on the interpretative criteria laid out in my own textbook *Statutory Interpretation*. The book is composed of 462 sections. It might surprise the reader to know that I have marked no less than 24 of these as having something to say about *Bentham*, though I'm not going to deal with them all in this article.[11]

The first part of Lord Bingham's dictum was that rules of statutory interpretation have a valuable role when the meaning of a statutory provision is doubtful, but none where, ***as here***, the meaning is plain. I italicise those two words to stress the preposterous nature of the dictum. When four Judges below have found the meaning of the relevant enactments plain in one direction it must be preposterous for an appellate Judge to declare that the

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[7] [2005] UKHL, [2005] 2 All ER 65, at [5].
[8] [2003] EWCA Crim 3751, [2004] 2 All ER 549, at [15].
[9] Ibid at [24].
[10] The Oxford English Dictionary (2nd edn) defines 'travesty' as 'a grotesque or debased imitation or likeness'.
[11] For those interested, the relevant sections I have picked out (there are others) are:143, 158, 163, 169, 174, 190, 193*, 197, 199, 204*, 264, 271*, 287, 289*, 292, 300, 301, 303*, 306, 315*, 319, 326, 344 and 397. The starred sections are particularly important.

meaning is *plain* in the opposite direction. He or she might, after carefully weighing the relevant considerations, end up by begging to differ. That happens not infrequently. But to say roundly that it is *plain* that the Judges below were wrong is simply to insult their intelligence; it cannot really be plain. Moreover Lord Bingham did not weigh all the relevant considerations, far from it. On the contrary his judgment was of the 'because-I-say-so' variety. All he gives us is the following assertion-

> 'One cannot possess something which is not separate and distinct from oneself. An unsevered hand or finger is part of oneself. Therefore one cannot possess it. Resort to metaphor is impermissible because metaphor is a literary device which draftsmen of criminal statutes do not employ. What is possessed must under the definition be a thing. A person's hand or fingers are not a thing. If they were regarded as property for purposes of s 143 of the 2000 Act the court could, theoretically, make an order depriving the offender of his rights to them and they could be taken into the possession of the police.'[12]

This is riddled with holes. It disregards the persuasive dictum of Kennedy LJ cited above. The final sentence can be dismissed as hyperbole. Metaphor is much more than a literary device: it is a form of analogy which is a constant component of everyday speech. As a draftsman of criminal statutes I have often used metaphor. It is certainly arguable that one 'possesses' one's liver and kidneys, and any other part of one's body. Finally the passage overlooks the vital fact that the courts below were not entering a positive finding that the finger-in-a-jacket was an imitation firearm within the Act. All they were doing was saying it should be left to the jury to decide.

Statutory Interpretation and Plain Meaning

My next target is Lord Bingham's statement, which I said was untrue, that rules of statutory interpretation have no role to play when the meaning of a statutory provision is plain. The truth is that those rules have not merely a valuable but an essential role where on the surface the meaning is plain. They may indicate factors which show that the apparently plain meaning is grammatically ambiguous. If on the other hand the meaning is grammatically plain they may show that nevertheless a different, strained, construction must be given.

A distinction is now drawn between the grammatical meaning of an enactment and its legal meaning, that is the meaning it bears as a legislative pronouncement. When an appeal goes to the House of Lords on the meaning of an enactment, what we end up with is a declaration of the legal meaning not the grammatical meaning. The meanings may both be the same, but often they are different. That is one thing the rules of statutory interpretation say in every case.

Another thing they say in every case is that it is necessary for the court to make an *informed* interpretation. Lord Upjohn said 'you must look at all the admissible surrounding circumstances before starting to construe the Act.'[13] Sir Rupert Cross perceived that there are two stages of the Judge's deliberations: 'that at which he enquires whether the words are in themselves precise and unambiguous, and that at which . . . he is seeking to resolve doubts arising from the terms employed by the legislature . . . no one is entitled to assert that statutory words are unambiguous until he has read them in their full context.'[14]

We have seen that the full context reveals that the protection which the Act seeks to afford is protection to the public who are being put in fear. That shows the mischief at which Parliament was aiming. A basic rule of statutory interpretation, for which in the interests of brevity I will not give authority, is that the courts should strive to remedy this mischief. If necessary this may require a strained construction. Which brings me to the second half of Lord Bingham's dictum.

Purposive Construction

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[12] Paragraph [8].
[13] *R v Schildkamp* [1971] AC 1 at 23.
[14] R Cross, *Statutory Interpretation* (3rd edn by J S Bell and G Engle, 1995), pp 57-58, 129.

Lord Bingham said that purposive construction cannot be relied on to create an offence which Parliament has not created. I said above that this is nonsensical, which may be thought extreme. However Lord Bingham's dictum is extremely wide of the mark because the essence of purposive construction is that it does create an offence which Parliament has not created in the sense of stating clearly that the act or omission in question does constitute an offence.

If the enactment is clear, there is no need of purposive construction; you can just apply the literal rule. As I have written-

> 'A purposive-and-strained construction is one which applies a strained meaning where the literal meaning is not in accordance with the legislative purpose. The term 'purposive construction' is usually employed by judges in this sense.'[15]

Plentiful authority for this statement is given in my book. I will select here just one example. There was a closely balanced division of opinion in the Court of Appeal and House of Lords on whether a literal or strained meaning should be given to words in the Landlord and Tenant Act 1954 s 29(3). These said that no application by a tenant for a new tenancy 'shall be entertained' unless specified time limits were observed. The question was whether the landlord, for whose benefit the time limits were imposed, could effectively waive the requirement despite its mandatory wording. It was held by a majority of the Lords that he could.

> 'Upon the literal approach, semantics and the rules of syntax alone could never justify the conclusion that the words '*No* application . . . *shall be* entertained *unless*' meant that some applications should be entertained notwithstanding that neither of the conditions which
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> follow the word 'unless' was fulfilled . . . It can be justified only upon the assumption that the draftsman of the Act omitted to state in any words he used in the subsection an exception to the absolute prohibition to which Parliament must have intended it to be subject.'[16]

Addenda

In *Bentham* Lord Rodger of Earlsferry added a trifle. In defiance of Lord Woolf's ukase against the use of Latin in the law he said (and this is the entirety of his speech)-

> 'My Lords, *dominus membrorum suum suorum nemo videtur*: no one is to be regarded as the owner of his own limbs says Ulpian (D9.2.13. pr). Equally, we may be sure, no one is to be regarded as being in possession of his own limbs. The Crown's argument, however, depends on the contrary, untenable, proposition that, when carrying out the robbery, the appellant had his own fingers in his possession in terms of the Firearms Act 1968. I agree with my noble and learned friend, Lord Bingham of Cornhill, that for this reason the appeal should be allowed.'

Comment on this seems superfluous.

As I finish writing this piece news arrives that Lord Bingham has been accorded the rare honour of being made by Her Majesty the Queen a Knight of the Most Noble Order of the Garter. On that too I shall refrain from comment.

A further thought occurs to me on reading the recent book *Watching the English* by the anthropologist Kate Fox[17]. She says-

> 'The English are rightly renowned for their use of understatement, not because we invented it or because we do it better than anyone else, but because we do it ***so much.*** (Well, maybe we do do it a little better, - if only because we get more practice at it.)'[18]

This should be borne in mind when considering what is said in this article. I myself am very English.

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[15] *Statutory Interpretation*, s 306.
[16] *Kammins Ballroom Ltd v Zenith Investments* (*Torquay*) *Ltd* [1971] AC 850, per Lord Diplock at 880 (emphasis in original).
[17] Kate Fox, *Watching the English: The Hidden Rules of English Behaviour* (Hodder, 2004).
[18] P. 66 (emphasis in original).