

Introductory Note by Francis Bennion

The following is a review of the first edition of *Bennion on Statute Law*, which was followed by two further editions. The [third edition, published by Longman](#), is the definitive version of the book. I have added to what follows various footnotes mainly updating references by Lord Cross to the first edition so that they refer instead to the third edition. The [third edition text](#) may be accessed and/or downloaded from this website.

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**Book Review by the Law Lord the late Lord Cross of Chelsea
(brother of Sir Rupert Cross, the Oxford law don who inspired FB's
later work *Statutory Interpretation*)**

***Statute Law* (1st edn) - Francis Bennion**

Oyez Publishing. 1980. Hardback £10.

As time passes more and more of our *corpus juris* comes to consist of statute law and our lives are more and more governed by statutes and by rules and orders made under statutes. Consequently such questions as (a) the way in which statutes are drafted and enacted, (b) how the Courts deal with the doubts which even in the best ordered system are bound often to arise as to their meaning and effect and (c) whether the vast bulk of statute law is presented in such a form that anyone concerned to know what the relevant statute law on any point is can ascertain it with reasonable ease, are all very important questions. Yet despite its importance statute law excites little interest and this is the first general account of it to have been written for over 70 years though legislative techniques have changed enormously in the interval. Mr. Bennion is very well qualified for the task which he has undertaken. In the first place he was for many years one of the Parliamentary Counsel and so knows every aspect of his subject thoroughly from the inside. Secondly, he has the gift—not too common in writers on legal subjects—of making rather dry bones live.

In this country statutes have always been drafted by lawyers. In early times, when they usually came into being in response to Petitions to the Crown, they were drafted by judges and other lawyers in the service of the Crown. In later centuries when the power of the central executive was weak in comparison with the power of the legislature, statutes were often enacted on the initiative of members of Parliament representing some private or local interest. Such statutes were normally drafted by conveyancers in private practice and displayed all the vices of contemporary conveyances—notably extreme verbosity. In the course of the nineteenth century the pendulum swung the other way and the legislation enacted by Parliament came to consist more and more of Bills promoted by the Government. For a century or more these have been drafted by lawyers in the full-time employment of the Government who normally devote the whole of their working lives to Parliamentary drafting. Governments today wish the Bills which they promote to be worked out in detail but at the same time to be as brief as possible. In response to these demands Parliamentary Counsel have gradually developed their own peculiar legislative style which abounds with—to quote the Renton Committee—'skilfully compressed phrases which are nothing like ordinary English' and at times can be fairly described as 'telegraphese' (see the example quoted by Mr. Bennion on p. 104).¹

¹ Pages 217-218 in the third edition.

Elsewhere other methods prevail. Mr. Bennion describes, and is, I suspect slightly shocked by, the haphazard and amateurish ways in which legislation is drafted in the United States of America (see pp. 196-197)² and since we joined the Common Market and directives and regulations emanating from the Commission in Brussels have become part of our law, English lawyers have begun to consider the merits and defects of what is called 'civil law drafting.' Its ideal, derived from the French civil code, is, as I understand, to set out clearly in simple language intelligible to any educated man or woman

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the general purport of the piece of legislation in question leaving the details to be supplied by the decisions of judges or administrators in particular cases. In arriving at their decisions they are not bound by the literal meaning of the text if that conflicts with what they consider to be the underlying intention of the law and though a judge will naturally pay regard to the views expressed by other judges in similar cases, as he will pay regard to the views of academic writers, he is not bound by any doctrine of judicial precedent. The idea of laws being couched in language intelligible to the ordinary man is undoubtedly attractive and 'civil law drafting' has distinguished advocates such as Sir William Dale and Professor Clarence Smith. The objection to it is, of course, that it leaves so much to the discretion of individual judges. Some English judges, notably Lord Denning, might welcome this, but others (I suspect the majority) would, whether from humility or timidity or a mixture of both, shrink from the burden. Further, and more importantly, I doubt very much whether the average Englishman for whose benefit the laws are intended would approve of such wide powers of interpretation being given to judges, let alone to administrators. I think that Sir Courtenay Ilbert was probably right when he said in 1901, 'Englishmen prefer to be governed (if they must be governed) by fixed rules rather than by official discretion' (see p. 182)³. Mr. Bennion prefers common law to civil law drafting because of its 'much greater degree of certainty and democratic control' (p. 20)⁴. For myself, I will only say that I doubt whether in a modern developed community the ideal of civil law drafting is really attainable. Certainly such draft directives and regulations of the Community as I have had to consider as a member of the Law Subcommittee of the House of Lords Select Committee on the European Communities fall short - sometimes very far short - of what I take to be the civil law ideal. They tend to be at once both detailed and imprecise (see the example, which I well remember, referred to on p. 22)⁵. But in truth the debate as to the respective merits of the two systems is somewhat academic because although our courts will have to construe Community legislation as it would be construed by the European Court there is not the remotest likelihood of Parliamentary Counsel voluntarily abandoning their system of drafting or of the Government compelling them to do so.

Under our system what is called, generally pejoratively, the 'literal' approach to the construction of legislation is fundamental. With us the first question must always be 'What would the words of the statute be reasonably understood to mean by those whose conduct it regulates?' (See *per* Lord Diplock in *Black-Clawson International Ltd. v. Papierwerke Waldorf-Aschaffenburg A.G.* [1975] 1 All E.R. 810 at p. 836.) This principle, which he calls 'the Diplock principle,' Mr. Bennion accepts wholeheartedly. In applying it a judge ought obviously not to be influenced by any light as to the probable intention of Parliament derived from some outside source, say the report of a Royal Commission, or by the fact that the natural meaning of the words used produces an unjust result. It is, after all, not reasonable to expect that the ordinary man affected by the statute or order, or his legal adviser, will look beyond the words used if their meaning is clear and he is not likely to be in the least surprised at their producing an unjust or even an absurd result. On the other hand when there is a real

² Pages 315-316 in the third edition.

³ Page 288 in the third edition.

⁴ Pages 23-24 in the third edition.

⁵ Page 25 in the third edition.

doubt as to the meaning of the words used read in their context the literal approach obviously fails one.

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At this point one has to face a difficulty to which Mr. Bennion devotes a chapter entitled 'Differential Readings' (Chap. 24)⁶. This is, that words which seem clear to one man may seem obscure to another or that both may think the words clear but each attach a different meaning to them. It is here that counsel plays his part in the interpretation or misinterpretation of statutes. Looking back on my career at the Bar I think that the work which I found most enjoyable and intellectually stimulating was trying to persuade judges that some statutory provision which I personally thought to be obscure was clear or conversely that what I thought clear was in fact ambiguous. As Mr. Bennion remarks (p. 206)⁷ the weight to be attached to each supporting argument and the offsetting weight of each counter argument are in the last resort a question of 'feel' and there will always be cases in which one judge 'feels' that there is an ambiguity while another 'feels' that there is no ambiguity.

Assuming that the judge or a majority of the judges thinks that the text in question is fairly susceptible of more than one meaning then he or they must embark on the task of what Mr. Bennion calls 'processing' the text, that is to say 'treating the basic text in ways which elucidate its meaning and effect' (see p. 3)⁸. How are judges to set about this task? There are, of course, a number of so-called 'Rules of interpretation' to which Mr. Bennion devotes a chapter (p. 79—92)⁹ but he thinks, as my brother thought (see *Statutory Interpretation* by Sir Rupert Cross) that these traditional rules and presumptions, which are set out in *Maxwell*, are of little practical value today. I am sure that they are right. These so-called 'rules' are only very general considerations, often conflicting with one another, enunciated by judges centuries ago when the methods of drafting statutes were quite different from the methods employed today. How useless they are to a judge today is neatly illustrated by some words used in 1969 by the editor of *Maxwell* which Mr. Bennion finds so apt to his purpose that he refers to them twice (see pp. 79-80 and 193¹⁰). They run as follows: 'It is, I trust, not taking too cynical a view of statutory interpretation in general, and this work in particular, to express the hope that counsel putting forth diverse interpretations of some statutory provision will each be able to find in *Maxwell* dicta and illustrations to support his case.'

But if the traditional rules are useless what is the judge to do? Mr. Bennion says, quite truly, that the present position is chaotic and that judges take any line they choose. Some of them inveigh against the literal approach without recognising, or at least acknowledging, that unless and until there is a real 'doubt situation' the literal approach is of the essence of our system. Others on the other hand are unwilling even when there is an admitted 'doubt situation' to seek help in resolving the doubt from the report of a Royal Commission on which the Act was based. Can nothing be done to improve matters? Mr. Bennion thinks that something could be done. It is the main theme of his book that judges should abandon the pretence that they do not make law and recognise that when Parliament has created a 'doubt situation' either intentionally, as for example by what Mr. Bennion calls 'politic uncertainty,' or unintentionally by enacting a statute which is defectively drafted, Parliament has in effect delegated to the judges the task not simply of deciding a particular case which comes before them but of filling out and

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⁶ In fact this is chapter 23 in the first edition In the third edition it is made part of chapter 22 (see pp. 316-320)

⁷ Page 317 in the third edition.

⁸ Page 4 in the third edition.

⁹ The third edition rewrites this passage, paying more attention to proposed improvements to the system of interpretation: see chapter 8 (pp. 83 to 103).

¹⁰ See footnote 9.

making sense of the relevant portion of our statute law. He thinks that if they would study the way in which statutes come into being and the reasons for the various 'doubt situations' which arise a 'workable scheme' of statutory interpretation could be evolved.

The Part 1 of Mr. Bennion's book is entitled 'The Texts.' Most of this covers familiar ground, but Chapter 3, which bears the curious title 'Drafting Parameters,' could only have been written by someone with long experience as a Parliamentary Draftsman and I found it most interesting. In it the author describes in detail the conflicting requirements which the draftsman may be called upon to satisfy. On the one hand he may be under pressure to produce a Bill so framed and worded that the Minister can pilot it through Parliament as quickly and smoothly as possible; but on the other hand he must do his best to ensure that his handiwork will be legally effective when it becomes an Act. 'We in England,' he complains (see p. 35)¹¹ 'have never been able to get away from the idea that the language which is destined to form part of the law of this land must also be framed so as to be comprehensible and palatable to laymen in Parliament. This is an inherent contradiction; indeed an absurdity, from which flow many of our troubles.' I have no doubt that this problem is a real one and the more one appreciates it the more chary one should be of criticising Parliamentary draftsmen but I cannot see that Mr. Bennion offers any solution to it¹². He rejects 'civil law drafting' on the ground of its 'lack of certainty and democratic control.' But it appears that the requirements of 'certainty' and 'democratic control' are not themselves ultimately compatible since, according to Mr. Bennion and few are better qualified to judge, democratic legislators cannot be made to understand or tolerate statutory provisions couched in the language which would be best adapted to secure the legal effect which they wish to achieve.

Mr. Bennion, though very ready to admit that draftsmen constantly make mistakes, does not think that the drafting techniques which they employ are susceptible of much improvement. The only major improvement which he suggests is the use of standardised forms (see pp. 23-24)¹³. In this connection he refers in particular to statutes creating offences. Such statutes as drafted today are almost always silent on two points which constantly arise and give the courts a great deal of trouble. The first is whether the offence is an 'absolute' one or involves some, and, if so, what degree of *mens rea*; the second is whether the statute does or does not confer on a person injured by a breach of it a right to recover damages from the wrongdoer. Degrees of criminal responsibility are a thorny subject and there is, perhaps, some excuse for those responsible for the drafting of the statute fighting shy of it; but, so far as I can see, there is no excuse whatever for the constant failure to say whether or not the statute is intended to give a civil remedy to a party injured by a breach of it. Lord du Parc complained of this over twenty years ago in *Cutler v. Wandsworth Stadium* [1949] A.G. 398 at p. 410 and in the recent case of *Island Records Ltd.* [1978] Ch. 122 the failure played some part in encouraging Lord Denning to go off on a characteristic frolic of his own.

Part II of the book¹⁴ is headed 'The need for processing.' In it the author sets out with abundant illustrations the various types of case in which Parliament must be taken to have delegated to the judiciary the power to fill up blanks in or to amend its handiwork. The first, which he calls 'Ellipsis,' arises when

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the draftsman in search for brevity creates doubt by leaving out what he thinks is not necessary to state because it is implied in what he has stated. Statute users, however, may not all agree as to the nature of the implication and so a 'doubt situation' is created. The second type of case arises when the draftsman uses a term of wide import and intentionally leaves to the judge or other processor the task of working out in detail by decisions in particular cases

¹¹ Pages 37-38 in the third edition.

¹² The solution I offer to the difficulty caused by the 'four corners doctrine' is textual amendment plus full explanatory material. This has largely been adopted.

¹³ Pages 26-27 in the third edition.

¹⁴ Part III in the third edition.

what situations do or do not fall within it. The third type of case Mr. Bennion calls 'politic uncertainty.' It may facilitate the smooth passage of a contentious Bill if some of its provisions are couched in vague or obscure language. Here the legislature simply 'passes the buck' to the judges. The fourth type of case is 'the unforeseeable development.' Unless they are repealed or amended, statutes go on living though the conditions in which they operate may have changed enormously since they were enacted and the very language used in them may have become more or less unintelligible. Such changes are obviously liable to create 'doubt situations.' Finally in three chapters each entitled 'The fallible draftsman' Mr. Bennion sets out the chief types of mistake which draftsmen are liable to make and the reasons for them.¹⁵ All this part of the book makes most interesting reading.

Part III of the book, 'Dynamic Processing,' is chiefly concerned with the role played by judges in the interpretation of statutes. In Chapter 21¹⁶, 'A failed system,' Mr. Bennion shows how unsatisfactory the present system is. He then passes on to his suggested remedies. The first question to be faced, as I see it, is the extent to which a judge can look beyond the text which he is construing. Here Mr. Bennion draws, rightly as I think, a distinction between cases in which the words themselves read in their context leave the reader in doubt as to their meaning and cases in which they do not. In civil law systems what is sometimes called the 'purposive' approach holds sway from the start. We, on the other hand, start with the literal approach.

Applying the 'Diplock' principle we ask ourselves what the words of the statute would be taken to mean by the citizen or the adviser of the citizen affected by it. It is only if one thinks that he would feel a real doubt as to their meaning that we look beyond the words. On the other hand Mr. Bennion considers, again I think rightly, that once the words themselves raise a doubt the judge should be entitled to look at any material, including his knowledge of modern drafting methods formed by reading Mr. Bennion's book, that he thinks will assist him in resolving his doubt. This approach to the problem if it came to be generally accepted might put an end to the rather sterile debate between 'literalists' and 'purposivists' since it gives each side a semblance of victory.

In Chapter 22¹⁷, 'A new approach to the doubt factors,' Mr. Bennion considers how each of the 'doubt factors' which he described in Part III should be approached by a judge who had studied modern legislative methods. He does not suggest that such a judge would often reach a different result from that which would be reached by a judge innocent of such knowledge; but he contends that by such an approach the subject of statutory interpretation would gain a rational basis and the judgments would become more systematic and decisions more predictable. He thinks, and I incline to agree with him, that all the changes in approach which he advocates could be effected by the judges themselves without the aid of Parliament but to meet

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the not unlikely event of their declining the task which he sets for them Mr. Bennion discusses in Chapter 24¹⁸ what a new 'processing' Act should contain and sets out in an appendix the text of a draft Bill 'To declare the powers of courts and other persons or bodies in relation to the interpretation of Acts and statutory instruments.' In the light of the fate which befell the Law Commission's Bill on the same topic one cannot rate the chances of Mr. Bennion's Bill reaching the Statute Book very high. I have, however, no doubt that if it became law it would be a far more useful measure than the Law Commission's effort since it

¹⁵ In the third edition these three chapters are combined into one chapter (Chapter 19, pp. 255-282).

¹⁶ Omitted in the third edition.

¹⁷ See the reworded chapter 22 in the third edition.

¹⁸ Chapter 22 in the third edition (see pp. 320-324).

grapples with and offers sensible solutions for concrete problems which constantly arise in practice.¹⁹

As the reference to ‘other persons or bodies’ in Mr. Bennion’s Bill shows the judges, though the chief, are not the only ‘processors’ of statutes. Even in this country a statute sometimes entrusts officials with the power to resolve doubts as to its effect in certain circumstances and, even when the ultimate decision is left to the courts, policy guidelines or instructions issued by the relevant Government department will determine in practice how the Act is applied unless and until a court decides in a particular case brought before it that the construction adopted by the department was in fact wrong. Mr. Bennion devotes an interesting chapter to the ‘Administrative processor’ and also points out (see pp. 180—181)²⁰ that academic lawyers if only they would turn their attention to the subject of statute law might in time come to exercise a considerable influence on the subject of statutory interpretation. He also has some very sensible things to say (see p. 9) on statute law as an ingredient in legal education.

Finally in Part IV, which is subtitled ‘Static processing,’ Mr. Bennion turns to a subject on which he clearly feels strongly, the presentation of the corpus of our statute law in such a form that anyone concerned to find out exactly what is the law on any given point can find the answer to his question with reasonable ease. In Chapter 7²¹ in Part I he had described the provision at present made for the consolidation and revision of statute law, noting with satisfaction that the habit of drafting amending Acts so as to make the amendments indirectly and not by textual amendments of the principal Act appeared to be on the wane, but deploring our refusal to adopt the system, which the Colonial Office imposed on several colonies in the nineteenth century, of a Statute Book arranged under titles on a one Act one subject basis and kept regularly up to date. In Part IV, accepting the deficiencies of the present system as ineluctable, he describes two aids to ready ‘text comprehension’ which he has devised. The first is a method of text manipulation by way of what he calls ‘algorithms’; the second a method of ‘composite restatement’ by which all the relevant texts on a given topic are assembled in a coherent way. He illustrates both methods by reference to the Consumer Credit Act 1974 (c. 39) of which he was the draftsman. In these last two chapters of his book I am frankly out of my depth; but I am sure that Mr. Bennion’s two aids to text comprehension are excellent tools for those able to grasp how to use them.

I hope that I have said enough to show that I regard this as a very good and important book. It ought to be read and, I do not doubt, will be read, by Parliamentary Counsel. It ought also to be read, though I am less confident that it will be read, by judges in appellate courts who are constantly called

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upon to wrestle with problems of statutory interpretation. Finally I hope that it may be read by many academic lawyers and encourage those who do not already do so to include the study of statute law in their courses.

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References

¹⁹ As to the Law Commission’s unsuccessful Interpretation Bill see [‘Another reverse for the Law Commission’s Interpretation Bill’, 131 NLJ \(13 Aug 1981\) 840.](#)

²⁰ Pages 286-287 in the third edition.

²¹ Chapter 6 in the third edition.

None