Website: www.francisbennion.com
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For full version of abbreviations click 'Abbreviations' on FB's website.

Statute Law. By FAR Bennion MA (Oxon), Barrister, formerly one of the Parliamentary Counsel, Chairman Statute Law Society 1977-1979. London: Oyez Publishing Limited. 1980. xxii & pp 276. UK price £10.

Francis Bennion has written a most interesting book. He is well qualified academically and professionally — he was a lecturer and tutor in law at Oxford and is an experienced drafter of legislation. This combination of talents makes his book eminently practical, while at the same time — and this is rare — it is clear throughout that his analysis is informed by a firm political philosophy.

Bennion claims that in common-law countries the study of statute law is not given the weight it deserves. The ignorance and confusion about statute law that are the results of this failure have their most dangerous consequences in the approach of the judges to the interpretation of legislation.

In the course of the book Bennion makes many useful suggestions about the methods appropriate to the identification and resolution of what can be called cases of technical doubt. That is, how the problems that arise from putting together one's materials wrongly, bad draftsmanship or too elliptical draftsmanship can be cured. H L A Hart's core penumbra metaphor is used as an explanatory model, and it is clear that these technically remediable faults do not fall within the penumbra — where the judge is given discretion to interpret — because there is no room for conflicting interpretation in this area.

These contentions would, if they were accepted, have the effect of considerably reducing the penumbral area, and so must be understood as an important part of the general political argument of the book. For Bennion would consider illicit the use of the technically created spaces for judicial activism. The judge's first duty in a case of statutory interpretation is to close all such spaces — most of the book is devoted to telling him how to do this — and only when this process is over can he begin to interpret.

Genuine spaces arise when the draftsman intentionally introduces doubt into a statute. This occurs where power is delegated to the judge through the use of a broad term (for example, 'vehicle' or 'reasonable') or where political uncertainty is for one or other reason thought desirable by the draftsman's political masters. Another area in which there is genuine space is the result of a statute's being out of touch with social life because of the passing of time.

Bennion does not provide the judge with much guidance in the case of political uncertainty. He considers the delegation of interpretation on political matters to judges as 'improper': 'Issues of party politics should be resolved by parliament itself . . .' (p 202). This is in accordance with his general view, expressed at various points in the book, that judges are merely the servants of the polity and should not be asked to take an active role in interpreting political or social legislation (see pages 23, 178, 191-2).

However, to take the judge's democratic role for granted is to beg the question what is his role; and the major rival to Bennion's Hartian conception of the judge's role, Ronald Dworkin's theory of judicial duty, is conspicuous only by its complete absence from the book. A Dworkinian would argue that a judge's democratic duty is to be faithful to the most important principle of democracy — the right that individuals have to be treated with equal concern and respect. In the face of legislation that attempts, no matter how clearly, to tamper with this right, a judge would betray his duty if he did not do his best to mitigate the effects of the legislation by using all the interpretative space at his disposal, including the technical space, and even creating space where there may seem to be none.

There are good reasons for finding Bennion's notion of the democratic duty of judges more appealing than Dworkin's. One is that giving support to judicial activism is dangerous in that judges may adopt as a basis for their activism a political philosophy which the proponent of activism finds distasteful. Dworkin tries to solve this problem by more or less assuming that there is only one political philosophy legitimately available to judges. This, in my opinion, is the weak point of his theory. Nevertheless, he does provide an analysis of judicial decision-making that seems to account far more convincingly for the dynamic nature of the judicial process in liberal democracies than do his positivist rivals, such as Hart. It is a pity that in a book that will be deservedly influential Bennion did not confront the problems that Dworkin raises for positivist theory.

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