

# Review of the 1st edition of Statutory Interpretation

## by B. J. Davenport

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Statutory Interpretation by Francis Bennion, M.A., Barrister, former U.K. Parliamentary Counsel, sometime Lecturer and Tutor in Jurisprudence at St. Edmund Hall, Oxford. Butterworths, London. (1984, cii and 854 pp., plus 30 pp. Appendices and 20 pp. Index). Hardback £85.

At 36 Whitehall is to be found the Office of Parliamentary Counsel, where, in a small set of rooms, work those who actually draft the Bills which become Acts of Parliament. Users of statutes may perhaps have wondered, from time to time, just how many human attributes the draftsmen of our statutes possess. Indeed, are the draftsmen even human? And, if human, surely their native language is not the English tongue. The truth, as so often happens, is much more mundane. Parliamentary Counsel are a group of 20 or so men and women, all either solicitors or barristers, all formerly in practice, who are required to carry out an enormously difficult task, generally given far too little time to do it in and subject to pressures which would drive an ordinary lawyer into asking his clients whether they would not prefer to go to someone else next time. Not only must a Bill give effect to the precise policy intended, even when construed by implacable political opponents or (as it may sometimes seem to the draftsman) by invincibly ignorant judges, but it has to go through a parliamentary procedure which

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almost seems designed to avoid an objective consideration of the text. Given the system under which we operate, the statutes we get are probably slightly better than we deserve.

Francis Bennion, the author of *Statutory Interpretation*, was formerly a Parliamentary Counsel. Most of us have only had to wrestle with the interpretation of statutes from the user's point of view but he has also had to wrestle with it as the maker of the text which the rest of us have to try to interpret. His book is, at the same time, maddening, immensely learned, over-lengthy and indispensable to any practising lawyer.

Mr Bennion takes as his text (with due humility) the opening words of the first edition of *Maxwell on Statutes*:

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.

This quotation illustrates the first difficulty of the author of any book on this subject. Is there a subject at all, save for a sound understanding of the English language? There may be a few general statements of principle (e.g., that the legislature does not intend to impose criminal liability other than by clear words) and there are the famous maxims, mostly still shrouded in the decent obscurity of a learned language (e.g., *bona fides non patitur, ut bis idem exigatur*). An understanding of the technical processes of legislating may occasionally be of assistance in construing a statute. All these matters Mr Bennion explains in full and helpful detail. However, the problem remains of finding what, if anything, makes up a subject which can justify a lengthy book on statutory interpretation. -

Mr Bennion has attempted to answer the problem by presenting his book in the form of a code, consisting of 396 clauses and a detailed commentary on them. This structure has the welcome effect not only of imposing order but also of extracting principles from the vast number of reported cases in which judges have had to construe statutes and have given some explanation other than "this is what the words mean". Of course, the reader is left wondering whether some of the statements of principle may not really be either false generalizations or merely an explanation of the normal grammatical meaning of words. However, Mr Bennion's code has the undoubted advantage of imposing a supposedly logical structure on a subject in which order can easily be thought to be lacking.

The logical approach has its disadvantages. Mr Bennion evidently supposes that some readers will read the book from cover to cover or, at least, will read the code from beginning to end. (Some Parliamentary Counsel have a similar belief that lawyers will read the whole of an Act through from beginning to end) But the book is essentially one for practitioners (the extensive citation of authority and the high price both compel such a conclusion). Few practitioners will have the time or energy to read so vast a book from cover to cover or even substantial parts of it. Practitioners want help on particular points of difficulty as and when such points arise. Will they get such help from this work? In other words, is it a Good Buy for a lawyer concerned with

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commercial law? A distinguished commercial judge once said that there were four possible answers to a question put in cross-examination—"Yes", "No", "Yes, but . . ." and "No, but . ..". The answer to the question posed is "Yes, but . . .".

The main reason for answering "Yes" is that no practising lawyer today can ignore problems of statutory interpretation and, whether it is objectively desirable or not, in a system based on judicial precedent, a detailed work on the subject, supported by a vast citation of authority and the extensive experience of the author, cannot be ignored. Although the interpretation of statutes may not seem crucial in commercial law, no lawyer can pretend that he is never required to read a statute. Even the most specialized will have, at some stage, to consider the Merchant Shipping Acts, the Carriage of Goods by Sea Act, the Bills of Lading Act or the Arbitration Acts. And who is so specialized that he or she can ignore all legislation relating to taxation, companies or employment? A work of the magnitude and learning of *Statutory Interpretation* simply cannot be ignored with any safety by practitioners.

Then why "Yes, but . . ." rather than an unqualified "Yes"? There are several reasons, none of which should be sufficient, either singly or collectively, to cause those concerned not to buy the book. Most obviously, the logical approach of a complete code leads to the inclusion of material for which any practitioner would look to a more specialized work. For example, logic may require consideration of those bodies who have to interpret statutes but does the likely reader really want a detailed explanation of the English court system and of judicial review? Indeed the author's evident love of the subject and desire for perfection means that the book contains, perhaps, one-fifth more material than the ordinary user will wish to find in it

In any textbook of 904 pages there are bound to be statements which will not command universal assent. Although Mr Bennion's code is not suitable for enactment as a statute, if it ever were to be enacted some of the clauses would surely have to be amended. For example, is it really safe to say that:

No rule prevents the court from inspecting in private whatever material it thinks fit to ensure that it is well informed, whether in relation to the case before it or generally. Where those materials constitute publicly-available enacting history, the court takes judicial notice of them. (cl. 243)?

Although the principal authority for this very sweeping proposition is the Lord Chancellor, he was not speaking in a judicial capacity. Courts should not be referred to Hansard, cannot receive evidence outside the case, and should certainly keep the parties informed of any facts of which judicial notice is to be taken which might take either party by surprise.

Finally, despite its length, the book is remarkably uncritical. Is the method of "precise drafting", which is the term used by Mr Bennion to describe the method of modern parliamentary drafting (cl. 76), the best way to give effect to the will of Parliament? Precision drafting when carried out by an expert, using simple concepts, simple words and simple sentences, can be as clear as the inevitable limitations of language permit. Sometimes, however, the subject-matter is enormously complicated or the draftsman seems less than expert; precision drafting then appears to fail in its purpose. With precision drafting goes precision interpretation by the courts: which causes which is irrelevant for present purposes. An example of both is well illustrated

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by a recent criminal case in which a Law Lord described as “asinine”, and therefore declined to accept, a particular interpretation of a statute which, it is clear from the parliamentary history of the matter, was the interpretation Parliament intended. Precision drafting and precision interpretation when combined can thus lead to precisely the wrong result. Has our approach to the drafting and interpretation of statutes gone fundamentally wrong? If so, where do the faults lie? Nothing will be gained by altering drafting styles if the courts continue the approach of the past. Any changes will require improvements in parliamentary procedures and self-discipline on the part of legislators. Entry into the EEC has forced some rethinking but few would wish statutes to be drafted in the style of Directives. But are we to go into the 21st century with statutes little different from the days of Mr Gladstone?

A further problem which must be faced is that in our late 20th century democracy we actually expect John Citizen to understand the law; it often touches upon his detailed everyday activities. John Citizen cannot be expected to understand precision drafting: he needs the language of the paperback. For this reason, parastatutory codes of practice are now commonplace. These are the antithesis of precision drafting. How are we to reconcile the demands of intelligibility and accessibility for all with that of certainty?

While much criticism of the methods of Parliamentary Counsel is ill-informed, Mr Bennion’s approach tends to the conclusion that, so far as drafting and interpretation are concerned, all is for the best in the best of all possible worlds. And in that world, Mr Bennion examines each tree in the wood in minute and loving detail.

It may be, however, that the practitioner does not want such wide-ranging issues as drafting styles to be canvassed at his expense. If what he wants is a storehouse of authority and learning on an indispensable topic, Mr Bennion’s book is best, whether or not the world it describes is the best of all possible worlds.

B. J. Davenport

Q.C., a Law Commissioner for England and Wales,

Website: [www.francisbennion.com](http://www.francisbennion.com)

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*Lloyd’s Maritime and Commercial Law* (May 1986) pp. 262-265

For full version of abbreviations click ‘Abbreviations’ on FB’s website.