Review of the 1st edition of *Statutory Interpretation*

by D. R. Miers

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BOOK REVIEWS

Statutory Interpretation by Francis Bennion.[1]

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THE interpretation of statutes is an activity with which we are all familiar; yet the writer who chooses to identify and to formulate its constituent properties quickly discovers that these are, in many fundamental respects, critically uncertain. This uncertainty exists at many levels. There are recurrent and profound problems of theory associated with such central aspects of statutory interpretation as the "intention of Parliament", "the purpose of the legislation", and the role of the interpreter. Recent writing has, moreover, challenged the epistemological cogency of the traditional segregation for interpretative purposes, of the draftsman, text and interpreter.[2] Despite the considerable accumulation of judicial dicta since the last editions of *Maxwell* (1969) and *Craies* (1971),[3] specific interpretative techniques may still be formulated in a variety of ways. The continued judicial preference for a broad measure of individual discretion within a framework of purposive interpretation suggests a cautious reception be given to any claims that a writer has discovered "the" judicial approach to the interpretation of statutes. There have, of course, been many suggestions for reform of the judicial interpretation of statutes, but less attention has been given to the questions, in whose opinion and with what effect could interpretation be "better"? At root, uncertainty persists about what constitutes good interpretative practice. Put shortly, this contemplates firstly, being able to identify how and why problems of statutory interpretation arise and, secondly, being able to formulate good justificatory arguments for and against particular interpretations of statutory words. Some of those who have attempted an answer to the question of what constitutes the characteristics of a good interpreter of statutes have nevertheless emphasised the inevitable indeterminancy of statutory interpretation and the consequence this has for the evolution of agreed better methods.

The interpretation of statutes is affected by many technical points of drafting and of legislative procedure. These may have as significant an impact upon the legal effect of the words in issue as the kind of compromise or cloak for indecisiveness that characterises politically sensitive legislation, and which, as for instance in *Bromley Borough Council v. Greater London Council* [1983] 1 A.C. 768, often receives greater publicity. It is also an activity which, as this case illustrates, can have significant financial and social implications for thousands of people. It is not only judges who are interested in the results encouraged by the application of particular interpretative techniques: the person who chooses to write about the interpretation of statutes has an audience as broad as those affected by, or who pronounce upon, the rights and duties that those statutes define.

Set against these briefly outlined considerations, Bennion's *Statutory Interpretation* is undeniably ambitious in its aspirations and execution. The book is intended to be a code. It is multi-layered, the narrative being pitched at different levels of detail and of comprehension. It is aimed, like legislation itself, at an audience comprising many different kinds of interpreters who are invited to read the book at different levels according to their purpose. The text depends upon several key organising principles to which, like a well-crafted statute, the narrative cross-refers each time they are used. At the risk of over-simplification, the central themes of this very substantial book may be summarised as follows:

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[1] *Public Law* Spring 1986, pp. 160 – 164.

[2] See the continuing Dworkin-Fish debate which originated in the participation in a symposium on politics and interpretation in 1981. The original papers are reproduced in various places including Vol. 60 (1982) of the *Texas Law ReviewI*, pp. 527-550 and 551-567. *See* generally D. Miers, "Legal Theory and the Interpretation of Statutes" W. Twining (ed.), *Legal Theory and Common Law* (forthcoming, 1986).

[3] *Maxwell on the Interpretation of Statutes* (12th ed.) and *Craies on Statute Law* (7th ed.).

There is no "golden" or single rule of statutory interpretation. To the contrary, there are many interpretative criteria, one or more of which will be relevant to the

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resolution of any particular issue of statutory interpretation. The task is to organise a systematic approach to interpretation that, while recognising the frequently persuasive but ultimately non-dispositive character of these criteria, does not treat the enterprise as a process in which they are manipulated to produce the result which satisfies the court's sense of justice in the case before it.[4] "The biggest single mistake made about statutory interpretation is that the court selects the 'rule' it prefers, and then applies it in order to reach a result" (p.259). A systematic approach to statutory interpretation involves *inter alia*, the development of a set of intellectual procedures, firstly for analysing exactly that part of the statute which is in dispute—"the unit of enquiry"—and secondly for formulating and weighing the general and specific interpretative criteria relevant in the instant case. While it recognises that these criteria cannot be lexically ordered[5] this approach does insist upon their integrity and independence from the interpreter, and invests them with the authority to persuade him to adopt particular interpretations irrespective of his wishes. There may be no single rule of statutory interpretation, but there is a basic rule: "it is taken to be the legislator's intention that the enactment shall be construed in accordance with the general guides to legislative intention laid down by law; and where these conflict the problem shall be resolved by weighing and balancing the factors concerned" (p.259).

The text itself consists of twenty-two Parts arranged in two Divisions, the first setting out the recommended procedures, the second containing supplementary material. Each Part comprises a number of principles (396 in all), and the narrative proceeds by way of a statement of each principle followed by a "critical commentary" that elaborates and exemplifies it. Some of these principles, together with their accompanying commentary, are entirely dealt with in one or other of the two divisions. Many receive a preliminary airing in Division One, to be substantially articulated into a subset of principles in Division Two. For example, in Division One, under Part VI (Guides to Legislative Intention, comprising principles 115— 163), principle 129: "that persons should not be penalised under a doubtful law" is stated and followed by four pages of commentary. The principle against doubtful penalisation reappears in Division Two as the whole of Part XIII where its application to specific instances is elaborated in principles 289-299 (a further twenty pages). Such other familiar aspects of statutory interpretation as the presumptions against absurdity and evasion and in favour of the incorporation of ancillary legal maxims, or the linguistic canons of construction applicable to words and phrases receive similar treatment.

This brief description may suggest an awkward, fractured narrative. On the contrary, Bennion has achieved a substantial degree of coherence within the text. This results, firstly, from the order in which he recommends that the interpretative enterprise be conducted. Here the central messages are: understand the different role expectations of different interpreters and the different kinds of legislative text that they may be called upon to interpret (Parts I and II); formulate an effective method for isolating the proposition of law expressed in the text which constitutes the unit of enquiry (Part III); distinguish the legal from the literal meaning of the text (though they may in many cases be coterminous); understand the various nuances of the phrase, "the intention of the legislator" (Part V); and then isolate and formulate in an orderly way the various interpretative criteria (rules, principles and presumptions, canons of construction) to be weighed and balanced for and against competing interpretations (Part VI and VII). Coherence is achieved, secondly, by the author's reliance on several central organising concepts which constantly reappear in the text. For example, what Bennion calls the "informed interpretation rule"—"that the interpreter is to infer that the legislator, when settling the wording of the enactment, intended it to be given a fully informed, rather than a purely literal, interpretation. ..." (principle 119)—appears at various stages throughout the narrative, reminding the reader of one of the main features

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[4] The phraseology is from J. Willis, "Statutory Interpretation in a Nutshell" (1938) 12 *Can. Bar Rev.* 197
[5] J. Rawls, pp. 42ff. *A theory of Justice* (1972).

of the structure with whose details he is presently concerned. The reader should seldom fail to see the wood for the trees.

This is a weighty book, both literally and metaphorically, and contains much to admire. There is an immense wealth of detail on a variety of matters touching upon statutory interpretation, and the author's experience as a draftsman is evident in a number of places. The judicial authorities cited are, for the most part, recent. This is particularly important given the changes in judicial attitudes to statutory interpretation that have occurred in the past two-to-three decades, and which are not therefore reflected in the latest editions of Maxwell and Craies. One of the most attractive features of Bennion's book by comparison with these is that he treats his subject matter (as it so obviously should be treated) as an activity taking place in the twentieth century.

In such a substantial book, it is perhaps invidious to single out one aspect for praise; but I particularly liked Bennion's approach to the analysis of the unit of enquiry; what he calls "selective comminution". It is axiomatic that interpretation must commence with an accurate statement of that part of the statutory law that is in dispute. "For the purposes of statutory interpretation, the unit of enquiry is an enactment whose legal meaning in relation to a particular factual situation falls to be determined" (principle 72). Bennion further defines (principle 73) an "enactment" as "a *proposition* expressed in an Act or other legislative text [whose] effect is that, when facts fall within an indicated area (in this code called the factual outline), specified legal consequences (in this code called the legal thrust) shall ensue." A familiar (and often difficult) feature of modern drafting is its high degree of compression: many individual propositions may be embedded in a single section. To analyse any combination of protasis and apodosis, Bennion argues for and exemplifies the technique of selective comminution, in which "the statutory provision in question is set out in a way which spatially separates its constituent grammatical clauses" and from which those parts of the provision having no relevance to the case may be omitted. Though Bennion is not explicit, this technique is commonly used in linguistics to analyse the structure of complex sentences, and there are many examples of attempts to introduce this and other techniques of linguistic analysis into the analysis of legislative language.[6] Nevertheless, Bennion's examples show very well the value of such techniques and could, with profit, be routinely employed.

Such reservations as I have can be grouped under four main headings. Firstly, Bennion does not sufficiently stress the indeterminacy of interpretation; there is too much dogmatism sometimes in his statements of principle, or the commentary upon them is not critical enough to admit the role of indeterminacy. For example, when dealing with the presumption that Parliament does not intend absurd consequences to flow from the application of an Act (principles 141 and 321-326), Bennion does not cite the *dicta* of Lords Simon of Glaisdale and Scarman in *Stock v. Frank Jones* [1978] 1 All E.R. 948, 952 and 955[7] which, while purporting to identify the criteria of absurdity and of appropriate judicial rectification of the text, illustrate in their dissimilarities, the uncertainties that attend any analysis of this presumption. Similarly, when exemplifying the linguistic canon of construction, *noscitur a sociis* (principle 377), its underlying indeterminacy could more forcefully have been Drought home by citing Lord Diplock's remark in *Letang v. Cooper* [1965] 1 Q.B. 232, 247 "the maxim *noscitur a sociis* is always a treacherous one unless you know the *societas* to which the *socii* belong." At a more abstract level, Bennion relies upon the existence of a "real doubt" as indicating the need to resort to the interpretative criteria: "If, on an informed interpretation, there is no real doubt that a particular meaning of an enactment is to be applied, that is to be taken as its legal meaning. If there is real doubt, it is to be resolved by applying the interpretative criteria. For this purpose a doubt is 'real' only where it is substantial,

and not merely conjectural or fanciful" (principle 3). The concept of doubt is a complex one, and is not adequately brought out in the commentary which reiterates this "difference" between the

[6] Irreverently titled, but of serious substance, R. Benson, "Up a Statute with Gun and Camera:Isolating Linguistic and Logical Structures in the Analysis of Legislative Language" (1984-5) *8 Seton Hall Legislative Journal* 279, is a recent example. See generally M. Halliday and R.Hasan, *Cohesion in English* (1976).

[7] See also the discussion in E. Driedger, *The Construction of Statutes* (1974) pp. 27-43.

substantial and insubstantial and cites *dicta* to the effect that judges shouldn't invent doubts. Does doubt exist *in the text, in the interpreter*, or in some combination of the two? Is the existence of a doubt a question of agreement among professionals? In *Davis v. Johnson* [1979] A.C. 264, 272 Lord Denning had no doubts about the application of section 1 of the Domestic Violence and Matrimonial Proceedings Act 1976 to the facts; for others there were doubts, and they were substantial. Not infrequently cases come on appeal in which "doubts" are canvassed and taken seriously that did not figure at all in the lower court. The implications of these common experiences for a notion of "real doubt" are not explained, nor are the relevant philosophical uncertainties inherent in "doubt" confronted at all in the text.

Readers of Statutory Interpretation might, secondly, hesitate over some of the author's theoretical assumptions. The main orientation is traditional positivist, but apart from some Dworkinian influences (see Bennion's discussion of rules, principles and policies on pp.285, 288) the discussion at times seems both dated and limited in scope. In his discussion of the presumption that "Parliament intends to endeavour to apply the remedy provided by [the enactment] in such a way as to suppress the mischief" (principles 138, 300-312), Bennion draws a distinction between social and legal mischiefs on the one hand and "party-political" mischiefs (principle 304) on the other. These are "so-called" mischiefs "considered to be such only by the political party with a majority sufficient to secure the passing of the Act in question. Their opponents may well consider the circumstances against which the Act is directed to be a *benefit* rather than a mischief. They may accordingly determine to restore the status quo if they should later attain power." By implication social and legal mischiefs are "really" serious, attract consensus as to their existence, diagnosis and remedy, and are not subject to party-political preference. This remarkable (quaint?) distinction has little foundation in reality: there is a hardly any social or legal mischief upon which there is not some disagreement and in respect of which party-political preferences are not important. By this distinction most legislation on industrial relations, education, social services and the (de) nationalisation of economic activities reflects "so-called mischiefs". It is unlikely that those affected (one way or the other) would agree to this disparaging classification. Empirically unsound, this distinction is also suspect in other ways. In older times (before the days of "so-called mischiefs"), legislation was "largely concerned with repelling the nation's enemies, keeping the Queen's peace, financing the administration and holding the ring between citizens" (p.642). The "critical commentary" fails to advert to any of the substantial literature which challenges this rather naive conception of the benign role of law in our political and social history.[8] Likewise, judges are advised "not to enter the jungle of politics", but there is little acknowledgement of the serious problems that lie behind this superficial admonition.

The assumptions Bennion makes about language also seem out of touch with mainstream linguistic theory. He defines the "grammatical meaning" of an enactment as "its linguistic meaning taken *in isolation*, that is the meaning when, as a piece of English prose, it is construed according to the rules and usages of grammar, syntax and punctuation, and the linguistic canons of construction" (principle 86, emphasis added). In isolation from what? Its legal context, presumably, since Bennion posits a conceptual difference between "grammatical meaning apart from legal considerations and the overall meaning taking those considerations into account" (p.201). But no "piece of English prose" has any meaning in the absence of some context, and what constitutes this for any enactment may be controversial but is left unconsidered in the book.[9]

These matters of theory would, therefore, have been better addressed had Bennion referred more frequently to the appropriate sources. Indeed, there are

many issues both of theory and of detail where Bennion omits to refer to relevant modern academic work. There are plenty of references to Pufendorf, but given the considerable amount of recent

[8] *E.g.* E. P. Thompson, *Whigs and Hunters* (1975) and D. Hay *et al, Albion's Fatal Tree* (1975)
[9] See, *e.g.* C. Belsy, *Critical Practice* (1981).

writing^on statutory interpretation, Bennion's rather slighting references to the academic contribution to his subject are regrettable.[10]

Finally, while there are bound to be some authorities not cited which particularly appeal to the reviewer, there are others whose omission seems less excusable. For example, the dicta of Lord Simon of Glaisdale in *Farrell v. Alexander* [1977] A.C. 59[11] on the interpretation of consolidation Acts are not cited. Given that his Lordship was Chairman of the Parliamentary Joint Committee on Consolidation etc. Bills for some years, these are of importance. Other important observations not cited are those of Lord Diplock and Viscount Dilhorne in *Davis v. Johnson* [1979] A.C. 264, 330 and 337 on the judicial use of the pre-enacting and enacting history of an Act in interpretation (although both points are well covered in the text and from other judicial authorities), and of Lord Lowry in *Hanlon v. Law Society* [1980] 2 W.L.R. 765, 821-2 on the use of delegated legislation as a guide to the interpretation of the Act which authorised it. In his discussion of the role of precedent in statutory interpretation, Bennion refers to the House of Lords' 1966 Practice Statement, but does not cite any of the cases in which, on a matter of interpretation of a statute, the use of the powers conferred by the Statement has been canvassed before the House. This is surprising particularly as in *Jones v. Secretary of State for Social Services* [1972] A.C. 944, 966, Lord Reid specifically adverted to the use of the Practice Statement on such a matter: "it should only be in rare cases that we should reconsider questions of construction of statutes. . . ." There are many omissions from the Index of items mentioned in the text; one of the most obvious is .that of the Renton report on the preparation of legislation (1975; Cmnd. 6053), though it is referred to on a number of occasions. A bibliography would have been helpful too, given the size of the text.

Statutory Interpretation is a book involving issues both of great detail and technicality and of considerable legal and epistemological complexity. Given the reservations mentioned, I am not sure that Bennion has produced the sustained level of compelling argument that justifies his claim to have written a code of statutory interpretation. On the other hand, I have no doubt that the approach he has taken is basically right[12] and that on many specific points his book will be regarded as authoritative.[13] It is an immensely valuable work of reference which eclipses earlier books on statutory interpretation.

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

[10] The *Statute Law Review* for example, contains many articles written by leading authorities on topics germane to Bennion's subject. Few are cited.
[11] See also Lord Diplock in *R. v. Chard* [1984] A.C. 279.
[12] See W. Twining and D.Miers, *How to Do Things with Rules* (2nd ed., 1982).
[13] Compare , for example, Bennion's treatment of the interpretation of statutes giving effect to international conventions (principle 242) with the remarks of Lord Brandon in *The Antonis P. Lemos* [1985] 1 All E.R. 695, 699; of the judicial glossing of statutory words (principle 111) with the cautionary remarks of Stevenson LLJ in *Bonalumi v. Secretary of State for the Home Department* [1985] 1 All E.R. 797, 802; and of the presumption against the retrospective operation of (penal) statutes with the decision of the Court of Justice of the European Communities in *R. v. Kirk* [1985] 1 All E.R. 453,462

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