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Book Reviews by John Bell

Note On 28 October 2013 Stefan Vogenauer, now Linklaters Professor of Comparative Law in the University of Oxford, sent Francis Bennion the following message: 'I am delighted to hear from you. I wrote a comparative book on statutory interpretation a decade ago (unfortunately in German) and relied heavily on your pioneering work in the field'. This was the first book referred to below. [Reproduced by permission of Professor Vogenauer.]

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Die Auslegung von Gesetzen in England und auf dem Kontinent by STEFAN VOGENAUER Tübingen: Mohr Siebeck Verlag, 2001,2 volumes, xlix + 1333 + (bibliography and index) 148 pp (189 euros hardback) ISBN 3 16 1476050.

Understanding Common Law Legislation by FRANCIS A R BENNION
Oxford: Oxford University Press, 2001, xxx + 222 + (bibliography and index) 15pp (£30.00 hardback). ISBN 0 19 924777 3.

The chance to review the work of two distinguished experts in the field of statutory interpretation, whose work demonstrates a very detailed study of the subject, provides an opportunity to reflect on the nature of statutory interpretation. The two works are different in character. Vogenauer's *Habilitationschrift* reflects its genre -it is a monumental, highly structured and very detailed work, a mine of information for any future researcher. It demonstrates the remarkable breadth of the author's understanding of his subject, not only in his own jurisdiction, but especially in relation to England. Bennion has written his 1,000-page volume Code of principles and rules, supported by detailed references.[1] But in *Understanding Common Law Legislation,* he has deliberately sought to write a shorter, more discursive and reflective work, which focuses on issues rather than detail. In genre, they offer contrasting formats for discussing statute law in a profound way. The purpose of this review is to focus on some of the common themes which emerge from these different treatments of the subject, viewed by experts from different jurisdictions.

Bennion focuses on contemporary statutory interpretation in England as the example of the 'Global' method of interpretation, which is his label for the common law tradition. Vogenauer offers a heavily historical study of England, France, Germany and the EU. For him, there is a core of commonality within these different national or supra-national traditions, which is exhibited over time. Both are therefore arguing that the approach to statutory interpretation is not just a national matter. There are common elements found across different countries.

A significant question debated by the authors is the nature of the norms of statutory interpretation. For Bennion (p 85), there is an elaborate system consisting of *rules, principles or legal policy, presumptions* and *linguistic canons.* These are norms which guide the interpreter in making a proper interpretation. Bennion is strongly critical of the impression, which is given by much writing on statutory interpretation, that there is a range of rules, and the judge simply picks whichever suits his favoured solution. Vogenauer sees the norms of statutory interpretation as criteria of the correctness of a justification offered for an interpretation. There is no structure of strong priority between the different arguments. Each carries weight, and the function of a justification is to offer sufficient

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[1] FAR Bennion *Statutory Interpretation* (London: Butterworths, 3rd edn, 1997, with supplement 1999).

weight. Vogenauer, like Bennion, thinks that some arguments come before others, notably the grammatical meaning, but there is no algorithm which sets out all the steps in the reasoning in sequence. It is a

matter of judgment where the balance of weight lies, upon which reasonable people disagree. But, whereas many writers seem to give up at that point, Bennion and Vogenauer both think that one can say much more about the appropriate range of options available to the judge or lawyer. In this way, the norms of statutory interpretation are not just a set of tools from which a judge will select, but do serve to structure, to some significant extent, the process of providing justifications that can be offered for an interpretation.

Conceptions of statutory interpretation

The idea of a commonality across a number of jurisdictions depends, at the core, on a conception of the practice of statutory interpretation. A number of conceptions are possible, of which I will highlight merely four.

First, one might conceive of statutory interpretation as a *local craft*. Each legal community develops its own approach and methods in the light of the character of the statutory materials available in the jurisdiction and the traditions and practices of the legal community. Rather like artisan potters dealing with local clay and local traditions, on this analysis, there develop national traditions of statutory interpretation, rather as Delft-ware and Wedgwood developed in different places. The plates may serve a similar function, but their styles, manufacture and materials are distinctive. Any commonality depends on a similarity (if not direct dependence) of craftsmanship.

A second variant of this idea is that statutory interpretation should be viewed as essentially determined by *national constitutional policy*. The constitutional authority of statute law among the sources of law and the role of interpreters (especially courts) in relation to the legislature provide the justification for a strict or a liberal approach to interpretation. Such a constitutional setting is determined predominantly nationally, though the influence of supra-national and international laws may also be important, depending on the national constitutional position. Countries with similar national constitutional policies might be expected to have similar approaches to statutory interpretation, perhaps despite differences in other aspects of local legal tradition.

A third approach would conceive of statutory interpretation as an issue of *general legal method*. The emphasis is on the basic similarity of the lawyer's task in any jurisdiction. Bennion points out that one can be a competent lawyer even though one does not know every branch of law, but one cannot be a competent lawyer at all, if one cannot handle statutes.[2] Now, the third approach would suggest that, although there may be specific differences from country to country, there is a commonality of issues and approaches which lies at the heart of the exercise of interpreting statutes.

A fourth approach would be to see approaches to statutory interpretation as part of a *general mood of the times*. Attitudes to the sovereignty of the legislature and social development are not the preserve of lawyers. Such broader social expectations affect how lawyers work. On this analysis, there would be no reason for major differences between socially similar countries in their approaches to the interpretation of statutes. Societies may not be exactly the same at any given point in time, but, in the long run, there is a broad similarity of development.

Although neither Vogenauer nor Bennion explicitly set out their conception of the practice of interpreting statutes, it becomes apparent from their books.

The distinctiveness of the common law method

So, is there a deep difference between the methods of interpretation adopted by civilian lawyers and

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[2] Bennion, p 8.

those of the common lawyer? Bennion's book offers several reasons for thinking this may be the case. At the level of rules of interpretation, he identifies the 'developmental' approach which is specific to European law, since it pays attention to the 'spirit' of the legislation. This theme is developed particularly in chapter 15, where he contrasts the purposive approach of the Global or common law method, with the 'developmental' (or teleological) approach adopted by the European Court of Justice, and the 'compatibility' approach required by the Human Rights Act 1998.[3] The common law method is a two-stage test:

> (1) It must be decided, on an *informed* basis, 'Whether or not there is a real doubt about the legal meaning of the enactment.
> (2) If there is, the interpreter moves on to the second stage, which is resolving the doubt.

Any strained purposive construction belongs to this second category. In the European Court of Justice's method, a literal approach makes no sense when faced with a multiplicity of authentic texts in different languages. An effort to give effect to the objective of the legislation becomes the primary approach.[4]

The 'compatibility' approach required by s 3 (I) of the Human Rights Act 1998 requires that priority is given to ensuring the implementation of what is, to all intents and purposes, essentially a constitutional text in priority to the intention of the national legislator as exhibited in the grammatical meaning of the words used in a statute. Both the teleological and the constitutionalist approaches are facets of the 'continental' approach to interpreting statutes, which contrast with the traditional common law method as practised in the UK.

Bennion's book highlights a number of apparently significant differences. One lies in the notion of legal meaning and the importance of courts in determining it. A second difference lies in the tradition of drafting.

The very notion of 'legal meaning' which Bennion espouses seems to mark a contrast with the continental European approach adopted by Vogenauer. For Bennion:

> 'Legislation is what the legislator says it is. The *meaning* of legislation is what the court says it is. So those whose task is to find out and apply the

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> meaning need to know how judges are supposed to arrive at it, and what their conclusions are likely to be in the case that is currently of concern to the practitioner. A technique of what might be called law handling or law management is required' (p 16).

The method that Bennion proposes in order to reach an informed interpretation is also court-centred:

> 'So what do you do when you need to find out the legal meaning of an enactment? First, read it through. Secondly, search out what if anything the courts have said about it. Thirdly consider its legislative history and overall context. All this enables you to give what is necessary, namely an *informed* construction' (p 19).

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[3] For some unexplained reason, in *Understanding Common Law Legislation,* Bennion argues that s 3 (1) , drastically alters existing methods [of interpretation] , without referring to the (weaker) presumption of compatibility of national legislation with the European Convention on Human Rights, with which the courts had been operating for some time, and the *Marleasing* jurisprudence of the European Court of Justice: see Bennion *Statutory Interpretation,* n 1 above, ss 411-413; P Birks (ed) *English Private Law* (Oxford: Oxford University Press, 2000) s 1.39. (In his works, Bennion uses the unusual abbreviation 'CJEC' for the title 'Court of Justice of the European Communities' , rather than the standard term 'ECJ' .)

[4] See *Cross on Statutory Interpretation* (3rd edn by J Bell and Sir G Engle, London: Butterworths,1995).

For Bennion, the real interpretation is an authoritative one given by a court:

> Sooner or later the enactment may come before the courts who will pronounce what its legal meaning is. Until that happens, there is nothing but the notional, ideal 'legal meaning' together with a collection of non-authoritative, non-judicial conjectures (usually by practising or academic lawyers) as to what that amounts to' (p 20).

In addition, Bennion makes the point that precedents have great authority in relation to the interpretation of statutes. This approach represents the importance of the judge as a role model and as an influence on attitudes within the legal community. Such a role has been documented empirically by Alan Paterson[5] and represents a distinctive feature of the common law systems.

By contrast, for Vogenauer (p 43), court decisions provide *evidence* of legal reasoning, but they are not in themselves authoritative. Thus, he is happy that, for some systems and periods, he is able to draw predominantly only on scholarly writings, rather than judicial decisions. (In many countries, the reporting of decisions before the nineteenth century was poor. Even today ,judicial decisions in a number of countries will be reported or written very briefly.) He is concerned to provide (often ample) reference to cases which judges have decided as illustrations, but this is not the same as Bennion's approach. For the medieval period, scholarly writers did provide the model of correct legal interpretation and, to a lesser extent in modern France and Germany, they still do. The leading courts do not have the same status within their legal community as the authoritative exponents of legal method. By contrast, in the supra-national jurisdictions of Strasbourg and Luxembourg, an authority of the courts can be found similar to that in the common law. It thus seems appropriate to conclude that the focus on courts is a matter of the institutional structure of the legal community, rather than a difference in the craft of interpretation.

Drafting tradition

A major difference in craft, which Bennion highlights, lies in the drafting style of legislation in the common law. There has been a tradition that the legislator expresses extensively its requirements in a single document, including detailed

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definitions. By contrast, other systems in Europe are much briefer, especially in the way in which codes are drafted.[6] But, actually, the picture is more complex. In many continental European systems, the drafting of legislation and codes may, indeed, be at the level of principles, rather than very detailed rules. But there is an expectation that the administration will produce decrees which are every much as detailed as some UK legislation. A similar difference can be seen when one compares the style of drafting of the treaties of the EU, and the text of regulations or directives.[7] As a result, the issue of differences in drafting may be less of a problem in relation to legal interpretation and be more of a matter concerning what Bennion helpfully describes in chapter 18 as 'law management' the techniques of dealing with statutory materials.

Law management

In terms of 'learning the craft of law', techniques of law management may be more significant than techniques of legal interpretation. Bennion' s work is at its clearest in describing the procedures to be followed for processing an enactment, especially the importance of the Interpretation Act 1978, and other matters which must be taken into account in construing the enactment to be interpreted and coming to an informed view on it. As he suggests (p 61), the process of understanding and compiling a statute depends on understanding how it was drafted in the first place. In that the styles of drafting and the extent of secondary legislation and general principles vary from country to

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[5] *The Law Lords* (London: Macmi11an, 1982) ch 2.
[6] See J Bell *French Legal Cultures* (London: Butterworths, 200 1) p 57.
[7] See Council Directive 93/77/EEC of21 September 1993,011993 L 244/23.

country, the process of law management differs from country to country.

The process of law management is more transparent in the common law system. With a traditional emphasis on the parties presenting their legal sources to the judge at a concentrated (and largely oral) hearing, a set of rules grew up about what sources parties could present in support of their claims, and under what circumstances. Rules about looking at materials extrinsic to the statute are framed in terms of this procedural setting. In legal systems where the maxim *curia novit legem* applies, it is the judge, not the parties, who will be expected to research the law. The judge never has to explain which materials he or she has looked at and in what order. The whole heuristic process of how the relevant law is discovered lies completely hidden from view.

The description of how lawyers do go about discovering the law, and suggestions about how they could do this more effectively, belong to a genre of writing which is not much in vogue in continental Europe. There are student guides which focus on how to present material in university examinations, but the processes of finding the law are not much discussed because there is no requirement in the court process or elsewhere to behave in any particular way. Continental writers, like Vogenauer, are concerned with the justification of decisions about the interpretation of law. They are concerned with the arguments which can justify a particular interpretation. A justification is concerned with persuading the reader about the correctness of the result, rather than explaining the steps one has taken in reaching it. The difference between common law judgments and those of many other jurisdictions is that the common

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law justification will seek to analyse the competing interpretations which the parties have presented and show why either or both are wrong, as well as why the result reached by the judge is right. The continental model focuses principally on this final aspect.

If one compares guides to students on how to comment on statutes in France, then one can see that the steps of typographical, grammatical and then logical construction[8] have similarities to the stages of the common law management of statutory materials. One might have to look more frequently to secondary legislation to complete one's understanding, and one might be left referring more to common sense or ordinary language for the meaning of words not defined in the text, but the basic reasoning processes are similar. But the very limited attention which Vogenauer gives to drafting style and to sources to which a judge may refer to support an interpretation demonstrates that his conception of his subject is a concern with the justification of interpretative decisions, whereas Bennion is as much concerned with training lawyers in good habits of law management.

The commonness of interpretative practice

Vogenauer's thesis is that there is a basic similarity in the interpretative practices (ie justifications) in France, Germany and England. Although the timings may have been slightly different from one legal system to the other, they have each gone through three phases. The first phase was one of a broad approach to the interpretation of a text, including concepts of equity (fairness) and a willingness to expand the text to meet problems. A second phase, beginning in the late eighteenth century and strong in the nineteenth century was a focus on fidelity to the will of the legislator and to the wording of an enactment. A third phase, appearing later in England but still noticeable, has been an emphasis on implementing the purpose of the legislation.

These trends are based on an analysis of how legal systems have developed within a broader social context. These are set out specifically in chapter 4. Christian theology and canon law provided one aspect of the need to apply 'equity' (in the sense of mercy) in the implementation of statutes. The rediscovery of Aristotle then reinforced an approach which paid attention to the corrective function

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[8] See J-L Souriouxand P Lerat *'analyse du texte'* (Paris: Dalloz, 3rdedn, 1992) pp 13-15.

of equity. The Roman law approach of the *actio utilis* and the *actio in factum* provided authoritative examples of extending enactments by analogy to deal with new situations. This combination of ideas supported a flexibility which gave weight to the reason behind the law *(ratio legis),* rather than just the wording. One might add that the need for this approach was reinforced by the extent to which the legislator was not always able to react speedily to new situations. Of course, within this general statement, there were significant differences. Criminal and taxation statutes were more strictly construed than others.

The increase in the power of a central sovereign (be it an autocrat such as Frederick the Great or Catherine the Great, a popular democratic assembly or a national parliament) during the eighteenth century concentrated power and legitimacy. The role of the interpreter became more clearly to give effect to the will of the legislator. The idea of the sovereign as the holder of all power was

often reinforced by the enactment of codes which forbade interpretation, or by the enactment of legislation which substantially altered the existing law. The enactment of the sovereign became an increasing point of reference. In the modern period, a number of factors have combined to weaken the authority of the legislature and to require a more active role for interpretation. The legislature has become less effective in coping with problems which arise, leaving substantial scope for executive action and for a wider interpretation of what has been laid down. In a number of countries, including the UK, the democratic legitimacy of the legislature has been called into question as well. In France and Germany, this was particularly pronounced after the First World War and, even more so after the Second. In most recent times, the legislator has been subordinated to constitutional limitations, protections for human rights, and supra-national law, notably EU law. This is most noticeable in Germany, where there is now a firm preference for an interpretation which is consistent with the Basic Law (p 130). Such factors have reduced the supreme authority of the legislature. Although the mix of factors affecting each country may not be the same, the overall impact is similar.

The similarity thesis is supported by extensive analysis. Vogenauer's argument is that this similarity in the broad picture of statutory interpretation is also reflected in more specific justificatory arguments. In all the national legal systems, there is a prima facie priority for the grammatical meaning of words. Although this was stronger in the nineteenth century, this continues to have force (see, for instance, pp 52, 152 and 604). In some fields, notably criminal law and taxation, there is a long-standing tradition of stricter construction in all the legal systems studied. Vogenauer notes a general focus on the purpose of legislation in France and Germany from the 1880s. At that period, legislative history became a more accessible source (see pp 454-457 and 647). Vogenauer then fully documents the gradual and slower steps the British have taken in this same direction, even though it took until the 1970s and 1980s for a change of approach to become effected, although the process has accelerated in the 1990s with *Pepper* v *Hart* and the Human Rights Act 1998. As a result, the systems were out of step for a very long time, even if they are now more similar.

Like many convergence arguments, the detailed evidence is, in itself, ambiguous. It depends on how the topic is most plausibly viewed. To this end, Vogenauer adds to each chapter on a particular jurisdiction an analysis of the legal culture. Despite the length of the book, this section is brief, but highlights some important factors. The culture is defined by both institutions and norms. He is careful to note the differing institutions, which help to explain the pace of change in each jurisdiction. But there are also basic values and philosophical trends. Legal positivism was strong in all three nations in the nineteenth century. It gave way to a more value-oriented approach in the early twentieth century and this accelerated after the Second World War. The French were slower to abandon positivism and parliamentary sovereignty, but moved to a more value-oriented approach as well in the 1950s, and even more so under the Fifth Republic. The European treaties and their strong value-orientations date from the same period. It is this sense of a deep-seated set of values which shape a society to which Dworkin alludes in his discussion of 'integrity'.[9] The value-orientation is said to define

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[9] R M Dworkin *Law's Empire* (London: Fontana, 1986).

society and to give rise to a 'value-oriented jurisprudence' *(Wertungsjurisprudenz).* Bennion prefers to talk of 'legal policy' (ch 10) where continental colleagues would talk of 'general principles of law', but the effect is similar legal positivism has been limited under the impact of ideas of linguistic philosophy, bad historical experiences of government, and a rise in values, such as individual freedom and social welfare. The broad social trends reinforce moves within the legal community. The cultural setting to which Vogenauer and Bennion predominantly refer is the culture of the legal community. It is influenced, but not necessarily determined, by influences from outside. The social experiences of Germany, France and Britain have not been the same over the past 200 years, especially in terms of governmental institutions. It is plausible that difference of experience, rather than commonness in lawyer's techniques or ideas of acceptable arguments, which explains the different paces of development in statutory interpretation.

But the expanding size of the legal community, as well as the pluralism of both society and the legal community which is drawn from it, leads to a greater heterogeneity. Without the authority exercised by the small dominant courts in England, Strasbourg, and Luxembourg, the diversity of approaches is hard to prevent.

JOHN BELL