BOOK REVIEWS

Francis Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (Oxford, New York, 2001). Pp. xxx + 237. Price Rs. 375.

Even after the de-colonization, there are a number of countries in the world that still use and apply the system known as the common law in their legal regimes. In these countries statutes enacted by their respective democratic Legislature are, to a great extent, construed according to uniform system of rules, presumptions, principles, and canons evolved over centuries by common law judges. The former legal regimes collectively are described as 'common law world' while the latter one, premised on the 'interpretative criteria', is called 'common law statutes'.

The book under review[1] basically deals with the interpretative techniques of 'common law statutes' in the 'common law world', drafting techniques and the judicial techniques for unraveling the legislative intent.

However, Francis Bennion, who, in his earlier publication argued that the common law rules, presumptions, principles and canons, which are over centuries produced by the judges case by case and which can be termed as the 'interpretative criteria', need to, for modern use, be reduced to order and who attempted to put them in order, in his book under review, perceives that construing common law statute, for a variety of reasons, has been found difficult as an analytical concept. One of the reasons, that also constitutes the subject-matter of the book under review, is the 'insufficient

Francis Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (Oxford, New York, 2001). [2] Francis Bennion, *Statutory Interpretation* (Butterworths, London, 1997).

attention', considering its importance, given to 'interpretation of (common law) statutes' by 'those' who are 'in charge of legal education'. 'Often they have paid the subject no attention whatsoever' and 'when they have paid it any attention', the author says, 'they have often done so in a mistaken way'. And he feels that it is 'serious matter for democratic societies wishing to live under the rule of law'. Substantiating and elaborating his concern for such an 'inadequate attention' and effects thereof in a legal regime, the author observes that appearance of lawyers who have not been taught statutory interpretation before judges, who labor under the same handicap of ignorance, results in 'incoherence' and 'chaos'. The author, as elsewhere has demonstrated, also feels that it is wrong to teach law students, as has been done in almost all the law schools, that interpretative criteria solely consist of the literal rule, the mischief rule and the golden rule, and that courts simply choose between them. The book under review also addresses itself briefly to the issue. With a view to acquiring the skill of threading the windings of the legislative labyrinth, which is spun in many common law countries honestly wishing to observe and preserve the rule of law, the book under review presents the 'global or common law method' of statutory interpretation that requires the interpreter to take into account innumerable circumambient strands of law, values, culture and previous court decisions.

With this perspective in mind the book under review is designed to give tips to its readers to thread the maze constituted by the body of law. It delves, *inter alia,* into a few basic concepts pertaining to interpretation of law, grammatical and strained meanings of law, contradictory enactments and updating construction, drafting techniques, transitional provisions, rules of interpretation, interpretative presumptions, techniques of law management, the jurisprudential basis of the common law method of statutory interpretation.[3]

The author asserts, and rightly so, that legislation is what the Legislator says it is; the legal meaning of legislation is what the court says it is. He, with equal assertion, also feels that successful

[3] *Ibid.,* chap. 1 & 2.

handling or management of legislation by a law practitioner requires mastery of certain essential concepts. A prominent among the suggested ones are: (i) an enactment must be given an informed construction, that one which takes account of its context, its legislative history, and court rulings on it, (ii) where these facets of informed construction differ, what matters more is the legal rather than the literal meaning of an enactment, and the legal meaning of an enactment is the one that corresponds to the legislator's intention, (iii) the legal meaning, to be acted upon, must be real, that is substantial and not merely conjectural or fanciful, (iv) an existing court decision on the legal meaning of an enactment does not necessarily represent the law as it may latter be held incorrect, (v) although the rival advocates put forward opposing construction, the court may reject both and substitute its own or it may hold that there is no real doubt as to the legal meaning, and (vi) the formulation and resolution of opposing construction of an enactment, and the exercise of judgement or discretion, are aspects of the central function of a legal practitioner who is involved in a particular case, which essentially goes through the mental process of reaching a legal conclusion by applying the relevant law to the relevant facts.

However, the author, with a view to understanding in proper perspective the technique of handling or managing statutes, poses a fundamental question as to the exact role of the interpreter of a particular legislative text. The poseur reads: 'is the interpreter's task to arrive at the literal or grammatical meaning of the text and appiy that every time? Or is it, at least occasionally, to go further and apply a purposive but strained meaning? Or is the remit wider still, sometimes requiring the interpreter to depart altogether from the text, using it merely as a starting point for developing the underlying judicial idea?' The question, which occupies a central place in interpretation of a statute, essentially touches upon the so-called 'literal construction', 'purposive construction', and 'developmental construction' of a statute.[4] In fact this question, in turn, leads a set of questions: What basic approach did the drafter intend the statute user to adopt? Did the drafter intend the user

[4] *Ibid.,* at 37.

always to adopt a literal interpretation, or where necessary depart from this and use a purposive but strained interpretation, or even on occasion arrive at a developmental interpretation departing altogether from the text and using it merely as a starting point? The book under review delves into, with apt illustrations, these questions to derive at home the basic approach in the modern common law world or Global system that legislative drafter nowadays never intends the literal rule to be adopted. The legislator now intends the interpreter to adopt, wherever necessary, a purposive-and-strained construction.[5] A strained interpretation of a statute, according to the author, can be justified for the following reasons: (i) where the consequences of applying a literal construction are so obviously undesirable that Parliament cannot really have intended them, (ii) an error in the text which falsifies Parliament's intention, (iii) a repugnance between the words of the enactment and those of some other relevant enactment, and (iv) changes in external circumstances since the enactment was originally drafted. [6]

With a view to enabling reader of the book under review to know drafting techniques and thereby to clarify the intended legislative meaning, the author, realising that drafting techniques have a profound influence on the 'way' law operates [or should operate] and recalling that different types of Acts are drafted in different ways, also offers a reasonably good explanation, with apt illustrations, of different types of statutory definitions and words used in legal expressions in a statute.[7] A good deal of discussion on different statutory definitions that figures in the book are: 'labeling definition', 'referential definition', 'exclusionary definition', 'enlarging definition', comprehensive definition', and 'weightless definition'. However, he advises the legislator 'to think carefully' and 'to visualize' that 'how the legislative scheme will work out in practice'.[8]

[5] Chapt. 3.
[6] For further analysis and different facets of these reasons, see *ibid,* chapts. 4 & 5.
[7] Chapts. 6-8.
[8] *Ibid.,* at 70.

'Rules', 'principles', 'presumptions', and 'canons' of the 'interpretative criteria'- common law and statutory *rules, principles* derived from legal policy, *presumptions* based on the nature of legislation, and general linguistic *canons* are discussed in the book. Deliberating on these 'interpretative criteria', the author reminds his readers that the 'basic rw/e' of statutory interpretation is that Acts be construed according to the numerous general guides laid down for that purpose by the Act, and that where these [general guides] conflict the problem be resolved by 'weighing and balancing' the relevant interpretative factors-legal policy, constructive interpretation, holistic interpretation of the Act. He also reminds us that people are entitled to a coherent law and that the claims of law as integrity are premised on the two practical principles, namely, (i) the 'principle of integrity in legislation', that asks those who create law by legislation to keep that law coherent in principle, and (ii) the 'principle of integrity in adjudication', which asks those responsible for deciding on the legal meaning of legislation to see and enforce it as coherent.[10]

Author of the book under review, in the last chapter captioned 'techniques of law management'," opines, and rightly so, that 'handling of statutes is not just a matter of interpretation.' He therefore asserts that 'the handler needs to understand the entire nature of an enactment, and the nuts and bolts which hold related enactments together'. And 'officials, lawyers and judges' in his opinion, 'must know how to deploy essential techniques when

[9]Chapts. 9-12.
[10]*Ibid.,* at 170. The author, with approval, quoted from Dworkin, *Law's Empire,* (Oxford, 1998) and further concentrated on the 'principle of integrity in adjudication'.
" 'Law management', according to the author, 'is the essential skill, applied in the context of particular facts, whether actual or hypothetical, and supplemented where necessary by detailed knowledge of the particular area of law in question in a case, of identifying the legal issues involved, formulating the relevant legal rule(s) and, by intellectual manipulation of the materials (witness statements, case reports, legislative enactments etc.), reaching the legal resultant (or arguable legal resultant) of applying the rule(s) to the facts. All this needs to be accompanied by the working out and formulation of explanations and arguments'. [At p. 189].

dealing with legislation, if they are to handle properly'. However, commenting on the current state of affairs, the author further observes that 'Ability effectively to manage the relevant law is central to any lawyer's or law students functioning. It is a complex intellectual skill, to which neither academia nor the legal profession has so far paid full attention. This neglect extends to the development of and refinement of the skill both in practice and by academic research, and its teaching. There is an element of vicious circle here: what is little taught is not much researched. This central intellectual skill is what Americans call 'layering'. It needs, deserves, and is capable of, improvement both in its practice and its teaching.'[1] Referring to, and relying upon, a few well-known writings,[14] the author stresses that direct learning of 'skills' should be made a central component of every stage of legal education and training. To overcome the problem, the author, in the instant chapter, suggests that techniques and ways in which court handles issues should be included in legal education curricula to enrich teaching and techniques of law management.

The book under review not only makes a good reading on understanding common law legislation but also delves into 'global techniques' of interpretation of statutes. It also offers a blue print of law curriculum on interpretation of statutes.

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[n] *Ibid., at* 183.
[13] *Ibid.,* at 183-184.
[14] Williams Twining, Legal Skills and Legal Education, 22 *Jr. of the Association of Law Teachers* (1988) 4; *Review of Legal Education: First Consultative Conference,* Discussion Group 3, 9 July 1993, and Lady Marre, *A Time for Change,* Report of the Committee on the Future of the Legal Profession.
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