

THE LEGISLATIVE HABITS OF THE BRITISH PARLIAMENT

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In 1450, Parliament established that statutes were to be made, not by the King in Council drafting laws for Parliament's approval, but mainly by bills passed by both Lords and Commons being submitted for Royal Assent. Since 1708, the monarch has been obliged to give assent to such bills. The British constitution has always been flexible, and an important feature of it is that Parliament cannot bind its successors.

Legislation is the handmaiden of policy. Major changes of policy often require major changes of legislation, and under the British constitution there has been a continuous process of legislation by Parliament since the 13th century, except from 1649 to 1660. Until about 1670, most of the bills were public bills, but from then on private bills also became numerous. Public and private bills between them always covered a vast range of subjects, and as the power and responsibility of the state has grown so has the scope of our legislation. "Habits are good servants but bad masters", and we have six centuries of legislative habits, including some bad ones, but we are now striving to master them.

Much legislation requires the amendment or repeal of what went before, but until the last century both amendment and repeal were generally overlooked. When the habit of amendment caught hold, however, the Statute Book grew much faster in size and its contents became more elaborate and less readily understood!

The desire to achieve certainty of legal effect by using language, which lawyers knew or believed or hoped would do so, led from 1487 onwards to an increase in statutes drafted in verbose legal jargon, rather than in the English of Chaucer, or Shakespeare or Milton. Indeed, as early as 1552, the boy genius King Edward VI complained: "I would wish that . . . the superfluous and tedious statutes were brought into one sum together, and made more plain and short, to the intent that men might better understand them".

Sir Nicholas Bacon, Lord Keeper under Queen Elizabeth I, said there should be "a short plan for reducing, ordering and printing the Statutes of the Realm", and his son Francis, who also became Lord Keeper, spoke of the need for "the reducing of concurrent statutes, heaped one upon another, to one clear and uniform law." Thus spoke he early in the 17th century but no serious start was made for 250 years!

In 1861, we had the first of many Statute Law Revision Acts, which have cut out a lot of the dead wood by repealing statutes which were obsolete or

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spent. The 1867 act repealed 1300 statutes. The 1973 act repealed the whole or part of 350 statutes, and most ordinary acts now have a repealing schedule. So repeals are now taken care of; it is an ongoing exercise of cutting out dead wood and, to this extent, Bacon, father and son, can rest in greater peace.

In 1868, the Statute Law Committee was appointed by the Lord Chancellor to prepare "The Statutes Revised," the first edition of which occupied 18 volumes and contained public acts in force at the end of 1878. The growth of the statute book since then is shown by the fact that the third edition, containing statutes in force in 1948, occupied 32 volumes, but the Public General Acts and Measures which have been enacted since 1948 occupy no less than 42 further volumes.

Measuring the vast quantity of legislation another way, we added 11,000 pages to the Statute Book from 1953 to 1962, 18,000 pages from 1963 to 1972, and 6,000 pages from 1773 to 1975.

In 1875, a Select Committee of the House of Commons was set up to consider "Whether any and what means can be adopted to improve the manner and language of current legislation." Their report was remarkably complacent. They took the view that the evils arising from alleged imperfections in drafting had become comparatively few! But they did devote attention to the need for Consolidation Bills (i.e., repealing a number of statutes or parts of statutes dealing with a particular subject, and replacing them with one statute), which were then something of a novelty, and they made various suggestions for getting them easily through Parliament, which resulted in the appointment of a Joint Committee of both Houses which scrutinises them before being introduced. That Committee has for many years enjoyed the confidence of both Houses, and Consolidation Bills which it has approved generally go through all their stages late at night without much discussion. Although a vast amount of consolidation of statute law remains to be done, the achievement so far is not bad: by 1970 about one-fifth of "living" statute law was contained in Consolidation Acts.

Of course, if we had more parliamentary draftsmen, we could have quicker consolidation, more codification and better drafted laws. But there never have been enough draftsmen in government service. The Parliamentary Counsel Office was established in 1869, with a famous draftsman, Henry Thring, who had only one assistant! Some work was farmed out successfully to barristers specialising in the subjects of the bills, but that practice ceased some years ago. The government work is therefore now done entirely by lawyers employed whole time as members of the public service, a system which found favour in the eyes of Professor F. Reed Dickerson, of Indiana University, who when giving evidence in 1973 to the Renton Committee said,

Whereas in London the typical bill is drafted by a full-time professional, in Washington it is drafted by an inexperienced lawyer . . . or a partly experienced lawyer whose drafting duties are a mere incident to his other duties . . . Certainly the most fertile single source of confused, difficult-to-read, overlapping and conflicting statutes is the lack of uniformity in approach, terminology and style. The ravages of heterogeneous authorship appear to be large in Washington and small in London.

There are even now only about 25 Parliamentary Counsel, plus 8 for Scotland and 2 for Northern Ireland. They are very special people: dedicated

experts, highly skilled and heavily overworked. Each draftsman has a style of his own, and once beyond the apprentice stage he must act on his own responsibility but he follows the precedents laid down and practices he has learned. Although often blamed for the incomprehensible quality of our legislation, the draftsmen are much more sinned against than sinning. Too often they are asked by Ministers or by insistent legislators in both Houses to do the impossible, and this is especially so today.

The criticism of our legislation reached its climax in this post-war era. It has been criticised

1. for the language used, which is too often obscure and complex, its meaning elusive and its effect uncertain;
2. for over-elaboration or excessive detail;
3. for the structure and sequence of clauses within individual statutes, which is found to be often illogical and unhelpful;
4. for the arrangement or classification of the statutes, which results in a lack of clear connection between various Acts dealing with related subjects; and
5. for the method of amending existing Acts, not by altering their texts but by referring to and amending them without altering their texts, so that the reader has to work out the meaning and effect for himself with several volumes open in front of him.

Criticism has come not only from lay people, who have often to observe the law without having a hope of understanding it, but also from their professional advisers who sometimes cannot understand the statutes well enough to advise their clients confidently, and from eminent judges. Ironically enough some of the fiercest criticism has come from us legislators, who are in theory and in practice responsible for the chaos we have created. We can plead in mitigation that we are largely the slaves of the Government machine.

It was therefore not surprising that in 1971 the House of Commons Procedure Committee recommended that there should be a Committee "to review the form, drafting and amendment of legislation and the practice in the preparation of legislation for presentation to Parliament." Accordingly in 1973 the Committee on the Preparation of Legislation was appointed with me as chairman: 14 of us, including Mr. Justice Cooke, chairman of the Law Commission for England and Wales, Baroness Bacon (a Labour life peeress), a Scottish Duke, Mr. Ivor Richard (now our ambassador to the United Nations), the clerk of the House of Lords, the former Chief Parliamentary Counsel, and his Scottish counterpart. We worked for two years, reached 121 conclusions and recommendations, 87 involving change, and reported exactly 100 years after the 1875 Committee. We were unanimous, except on two relatively minor recommendations.

We heard oral evidence from the Lord Chief Justice, the Master of the Rolls, and other leading members of the judiciary; from Prof. Elmer A. Driedger of the University of Ottawa, former chief draftsman to the federal Parliament of Canada, who established and directs the first school of legislative drafting in the English-speaking world; and from F. Reed Dickerson, professor of law at Indiana University, and formerly Adviser to Congress on Legislative Drafting.

Early in our deliberations, we found that we had to resolve several inescapable conflicts:

1. The conflicting needs of the legislator and the ultimate user of legislation. This is really a conflict between the bill, which is for the temporary use of legislators, and the act, which contains laws which may last for centuries (although many are repealed or drastically amended within a few years). We decided that the interests of the ultimate users should have priority and that a bill should be regarded primarily as a future act.
2. The conflict between simplicity and clarity on the one hand, and certainty of legal effect on the other hand. Governments and parliamentarians want to feel sure that the laws they pass will in all foreseeable circumstances accurately achieve the legal effects which they intend, without the courts being required to decide what legal effects we actually produce, whether we intended them or not. Time and again, when piloting a Government Bill through the Commons, one was asked by the Opposition front bench or by backbench Members on either side to say what was the meaning of a particular phrase in a bill, or what would be its effect in a hypothetical case. If one said that it would be a matter for the courts to decide, the rejoinder would be either, "That's leaving too much to chance!", or "What decision will the Courts make?", or "It would be better to spell it out in detail in the bill, instead of leaving it to the courts." Very often the unfortunate Minister would have to agree to spell it out in detail, in order to gain support or to purchase progress in the passage of the bill.

The demand for immediate certainty of legal effect leads to too much detail, to over-elaboration and to complexity. It may therefore be self-defeating or counter-productive, because the more the detail, the greater the risk of obscurity and therefore uncertainty.

There is a familiar ring in the words of Thomas Jefferson, one of the "revisers" appointed after American Independence to survey the Parliamentary statutes pre-dating Independence and select those which the new state should re-enact. It was decided, he says, "to reform the style of the later British statutes and of our own acts of Assembly, which, from their verbosity, their endless tautologies, their involutions of case within case and parenthesis within parenthesis, and their multiplied efforts at certainty by *said*s and *aforsaid*s, by *ors* and *ands*, to make them more plain, do really render them more perplexed and incomprehensible, not only to common readers but to the lawyers themselves." The incompatibility of certainty with simplicity and clarity is no new discovery. Jefferson's own solution, which rather begs the question, was to aim at "simplicity of style . . . so far as was safe"!

Some of our judicial witnesses pointed out that we have a habit of failing to make clear both the purposes intended by Parliament when legislating and the principles by which those purposes are to be achieved. We therefore recommended:

1. that statements of purpose should be used when they are the most convenient way of clarifying the intended scope and effects of legislation;
2. that when so used they should be contained in clauses and not in preambles;¹ and
3. that statements of principle should be encouraged, although to enact laws in the form of general principles alone does not necessarily simplify their application to particular cases.

1. Professor F. Reed Dickerson was against purpose clauses. He said that in a recent ecology Bill there was one clause which, in substance, said, "Hurray for nature!"

We have to, however, accept the fact that most Acts of Parliament apply to a complex variety of detailed circumstances, and that by relying too much on statements of purpose and of principle we might create too many uncertainties of legal effect to be resolved by the Judges, who then find themselves having to fill in the detail instead of Parliament trying to do so. It is therefore unwise to be dogmatic. Sometimes very little detailed guidance needs to be inserted in a statute, although the Code Napoleon overdid it when it enacted the whole of the law of tort in one sentence which said, "Any act whatsoever by a man that causes damage to another obliges the person at fault to repair the damage."

But there are many occasions when Parliament cannot make its intention clear and impose its will upon the people (for their own benefit of course!) or define their rights and obligations unless detailed guidance is given either in the statute itself or by means of subordinate legislation. If it is to go into the statute, we recommend that it should be put in schedules instead of cluttering up the clauses.

Subordinate legislation should be used mainly when the details necessarily change from time to time. The most important example of this is the use of "the economic regulator," which enables the Chancellor of the Exchequer to alter the amounts of some duties and taxes within specified limits at short notice, in order to meet the changing needs of the economy.

We gave a lot of thought on our Committee to the question of drafting techniques, including the language used. A law lord giving evidence said, "Desirably the language of legislation should be as near to ordinary language as precision permits." But the trouble is that the need to achieve certainty of legal effect causes the brilliant men who have to draft the bills to resort to skilfully compressed phrases which are nothing like ordinary language. A classic example of this is in Schedule 1 of the National Insurance Act, 1946:

For the purpose of this Part of the Schedule a person over pensionable age, not being an insured person, shall be treated as an employed person if he would be an insured person were he under pensionable age and would be an employed person were he an insured person.

Imagine our embarrassment when we found that it had been drafted by a member of our Committee and had since been re-enacted several times! No wonder that one of our witnesses referred to parliamentary drafting as "this arcane craft." Nevertheless we felt obliged to say that the draftsman should never be forced to sacrifice certainty for simplicity, lest the intention of Parliament be frustrated.

We ventured to make more than a dozen recommendations for improving the language and structure of bills, including the suggestions that long sentences should be avoided and that there should be as few subordinate phrases as possible before the subject of a sentence or between the subject and its verb.

As to amending previous legislation, this is one of the principal causes of complexity, and it gives rise to the complaint of "legislation by reference," which is a nuisance to the users of statutes. There are two methods of amendment: textual and non-textual. Textual amendment, as its name implies, is where the amending bill states the precise verbal amendments to be made to the text of the previous enactment: e.g., by saying that in Section 1 of the Lecturers Act, 1976, the word "good" shall be replaced by the word "bad." But the non-textual version might, for example, have read, "Section 1 of that Act, shall be deemed to apply to bad lecturers instead of to good lecturers."

Professor Dickerson described himself as “an anti-deemer.” We found that non-textual amendment was sometimes essential for achieving brevity. For example, section 6(1) of the Agriculture (Miscellaneous Provisions) Act, 1944, reads as follows:

The Improvement of Livestock (Licensing of Bulls) Act 1931 shall apply to pigs as it applies to cattle, and for that purpose . . . references therein to bulls, cows and cattle breeding societies shall respectively have effect as references to . . . boars, sows and pig-breeding societies.

A very neat piece of drafting but a piece of non-textual amendment.

This displays again the danger of being dogmatic in advising draftsmen, but we had no hesitation in recommending that the growing practice of amending textually, wherever convenience permits, should be encouraged. We pointed out that the advantages of textual amendment are even greater when statutes have been consolidated. We also recommended that much more explanatory material should be supplied before and during the passage of bills through Parliament so that the meaning and effect of bills would be better understood by all concerned. The practice of publishing consultative or explanatory documents in advance of legislation should be extended.² More information should be given about the meaning of bills by expanding the explanatory memoranda with which they are first published, and when a bill is lengthy and complex, its provisions should be explained in detail in a White Paper.

For reasons given, improvement both in the quality of drafting and in the general condition of the statute book depends largely upon there being more draftsmen. We therefore recommended that all available methods should be used to recruit and train more draftsmen as a matter of high priority, and we were conscious of the fact that it takes three or four years before a draftsman is well enough trained to draft and guide a major bill.

I have reviewed only a few of our more important recommendations but we felt bound to add that, even if all our recommendations were accepted, we would have wasted our time if Governments continue to overload the legislative machine and Members of both Houses continue to insist on every conceivable contingency being covered by detailed provisions.

When our Report was debated in both Houses of Parliament it was welcomed by both sides but the Government have so far been slow to implement much of it. When questioned they merely say that many of our recommendations reflect “the best drafting practices.” But there is reason to hope that the draftsmen themselves are increasingly accepting our advice in the spirit in which it was given.

The main obstacle to improvement of the quality of legislation is the vast quantity of it. This has been especially so over the past two sessions under our Socialist Government. They ask the electors to judge them largely by the extent to which they have carried out the many promises made in their election programme, which resulted from decisions made at their party conferences. They use their majority in the Commons and the constitutional weakness of the Lords to push as many bills as possible onto the Statute Book, and then they proudly point to the number of new laws passed, thus trying to turn a

2. Consultative documents and explanatory documents are known, respectively, as Green Papers and White Papers.

legislative nightmare into a virtue. I am not referring merely to the substance of this mainly controversial legislation, but to the fact that the Government has turned Parliament into a machine for the mass production of ill-considered, hurriedly prepared and often badly drafted legislation. As M.P.s, we on the Opposition side do not take kindly to that. We are not elected merely to churn out legislation and to vote money for the Government to spend, although legislation and providing funds are main duties. We also have the right to deliberate, to be consulted by the Government and to criticise them: but because of the sheer weight of legislation we have little chance to exercise those other important responsibilities.

In the past three years our legislative burden has been further increased, or some would say reduced, by our joining the Common Market. An important part of the law of the United Kingdom now comes directly or indirectly from the European Communities, through the treaties themselves and the regulations, subordinate instruments and directives made by the Community institutions. Our procedures for dealing with these matters are still being evolved. This is a development of great interest to lawyers, for English and European legislative habits and methods of judicial interpretation are quite different.

The European influence upon our legislation will, I believe, become beneficial eventually, but not yet. British parliamentarians are not likely to surrender or even to limit their traditional right to amend bills by spelling out their detailed effect, until we reach an impasse of legislative chaos – which we may be slow to recognise and acknowledge.

In spite of what I have said about the legislative habits of the British Parliament, of which I am proud to have been a Member for more than 30 years, please do not imagine that we have reached the point of no return from chaos! The paradoxical truth is that steady improvement has taken place within a situation of growing chaos. If we could have even one four-year Parliament with much less legislation, great improvements could be made.

If legislation is incomprehensible, it brings the law into contempt, paves the way for evil-doers, and deprives honest people of their rights. That is indeed a disservice to parliamentary democracy, and all of us in the law have a duty to help to correct any bad legislative habits.