



ANNUAL LORD RENTON LECTURE 2011

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LORD NEUBERGER OF ABBOTSBURY MR

GENERAL, EQUAL AND CERTAIN: LAW REFORM TODAY AND TOMORROW

LONDON, 28 NOVEMBER 2011

**(1) Introduction<sup>1</sup>**

1. It is both an honour and a pleasure to have been asked to give this year's Lord Renton lecture. David Renton was a first class public servant, and a classic one-nation Tory, worthy of great respect and great affection from everyone, whatever their political views.
2. He was one of draftsmen of the European Convention on Human Rights, of which he remained a staunch supporter throughout his life. In 2003 he became the oldest person to pass the driving test, at the age of 95, although he had been driving since 1934. In the intervening years, he was an MP for the National Liberals and then for the Conservatives, he sponsored Margaret Thatcher's entry to the Bar, he was a Minister of State for Fuel and Power, and then a Minister in the Home Office, whence he moved on to be Recorder of Rochester and then of Guildford; his final resting place in public life was as Deputy Speaker of the House of Lords<sup>2</sup>.

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<sup>1</sup> I wish to thank John Sorabji for all his help in preparing this lecture.

<sup>2</sup> John Biffen, *Lord Renton, Obituary* (The Guardian, 25 May 2007); and *Obituary* (The Independent, 25 May 2007) (<http://www.guardian.co.uk/news/2007/may/25/guardianobituaries.obituaries1>) and (<http://www.independent.co.uk/news/obituaries/lord-renton-450260.html>)

3. I have many happy memories of sitting next to him on the Benchers' lunch table in Lincoln's Inn between 1993 and 2007. I remember him well as a dapper, intelligent, modest, smiling man, full of interest in contemporary events in the law and politics, but equally full of anecdotes and information about life in the courts and the House of Commons between 1935 and 1985. He managed to be informative without being indiscrete, amusing without being malicious, and interesting without name-dropping – very unusual for anyone, but particularly for someone who was a barrister or a politician, and above all for someone who was both. One of my sons worked in the House of Lords in 2004, and well remembers the great respect in which Lord Renton was held – a fluent and concise speaker, despite being well over 90, and a person combined shrewdness, wisdom and a wealth of experience. However, my son tells me that one of Lord Renton's interventions in the House received a less than enthusiastic reaction: during the hunting debate, he revealed that the fox actually enjoys the chase, as one could tell from its smile.
4. So, a fine public servant, with many strings to his bow. Particularly relevant to this evening was Lord Renton's keen interest in improving legislative drafting. He was thus a natural choice in the early 1970s to chair the Committee on the Preparation of Legislation. As he observed when addressing your Society in 1978, he was responsible for producing the '*first full study made officially for exactly 100 years into our methods of drafting*'.<sup>3</sup> The terms of reference of the Committee were to make recommendations with

*' . . . a view to achieving greater simplicity and clarity in statute law, to review the form in which public Bills are drafted, excluding consideration of matters relating to policy formulation and the legislative programme; to consider any consequential implications for Parliamentary procedure; and to make recommendations.'*

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<sup>3</sup> Lord Renton, *Renton and the Need for law Reform*, (06 April 1978) (Statute Law Society Annual Lecture) (<http://www.francisbennion.com/pdfs/fb/1979/1979-004-002-renton-part1.pdf>).

5. The Committee's deliberations resulted in the 1975 Renton Report, which made 121 proposals for the improvement of legislation<sup>4</sup>. I think it is worth quoting what the Duke of Atholl, who had served on the Committee, said in the House of Lords about the Report:

*'Before I started work on [the] Committee I did not realise the complexity of the job we were being given. It seemed to me that it must be very easy to prepare legislation, but I was speedily disillusioned . . . I realised it was indeed a task which I think ... the Lord Chancellor described as being beyond Hercules; ... I must congratulate my chairman, Sir David Renton, for achieving something which is beyond what Hercules could do, and, not only that, but taking the other 13 members of the Committee along with him, so that we produced a unanimous Report, except for three very minor reservations.'*<sup>5</sup>

6. Not only did the contents of the Report represent a super-Herculean task, but they also found favour with my most famous twentieth century predecessor as Master of the Rolls. Lord Denning observed in the House of Lords' debates on the Report that, 20 years earlier, he had suggested in the Court of Appeal that it might '*consider the intention of Parliament*' when construing legislation, and should '*seek [to] fill in the gaps, to do what Parliament would have done if it had thought about [the particular] circumstance*'. He went on to explain that he was frustrated in this aim by what were in his opinion the archly-conservative Law Lords, who took the view that such an approach would amount to '*a naked and patent use of the legislative power*'. Lord Denning continued:

*'How glad I am, therefore to find one sentence in this Report expressing a new principle; so much so that I shall invite notice to be put in front of every one my Lords Justices [I rather like "my Lords Justices"; I don't think I would dare describe my colleagues that way today. Lord Denning continued:] and perhaps I may add, if I may dare do so in front of my noble and learned friends sitting here judicially, they should note this sentence: "The courts*

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<sup>4</sup> Report of the Renton Committee on the Preparation of Legislation (Cmnd. 6053) (May 1975).

<sup>5</sup> Duke of Atholl, Hansard (HL Deb, 10 December 1975) vol 366 c965, and see c955 per Elwyn-Jones LC (<http://hansard.millbanksystems.com/lords/1975/dec/10/renton-committee-report-on-legislation>).

*should, in our view, approach legislation determined above all to give effect to the intention of Parliament.”<sup>6</sup>*

7. Hercules and Lord Denning aside, the Renton Report and its recommendations were predicated on the need to secure the rule of law. Lord Renton himself made this point in his 1978 address, when he said this:

*‘. . . [I]f our Acts of Parliament cannot be understood, even by experts, it brings not only the law into contempt, it brings Parliament in to contempt – and it is, moreover a disservice to our democracy. It weakens the rights of the rights of the individual, it eases the way for wrongdoers and it places honest people at the mercy of the bureaucratic state.’<sup>7</sup>*

8. In other words, where law is not readily capable of being understood, because it is badly expressed or unnecessarily complex, it is incapable of providing a proper framework within which the state and its citizens can operate. It fails to provide a secure framework for a country committed to the rule of law. This is one of the two main points on which I want to focus this evening. In particular I want to look at what has been called the formal aspect of the rule of law.

9. The rule of law has two aspects: formal and substantive. The formal aspect, as Paul Craig has explained, is concerned with the way in which law is made, whether it is prospective, and importantly whether it is ‘*sufficiently clear to guide an individual’s conduct so as to enable a person to plan his or her life.*’<sup>8</sup> The substantive aspect focuses on constitutional, civic and human rights, and is illuminatingly discussed by the late Lord Bingham in his magisterial but accessible *The Rule of Law*. Thus, the formal aspect focuses on ‘*the*

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<sup>6</sup> <http://hansard.millbanksystems.com/lords/1975/dec/10/renton-committee-report-on-legislation>. Lord Denning MR, Hansard (HL Deb, 10 December 1975) vol 366 c1006

<sup>7</sup> Lord Renton, *ibid*.

<sup>8</sup> Craig, *Formal and Substantive Conceptions of the Rule of Law*, (1997) Public Law 467 cited in Tamanaha, *On the Rule of Law* (CUP) (2004) at 91 – 92.

*proper sources and form of legality*<sup>9</sup>, while the substantive aspect focuses on its content. This distinction can be drawn out in another way, through comparing the rule of law with democracy. It has been well expressed in this way by Brian Tamanaha, in his book, *On the Rule of Law*:

*‘The relationship between the rule of law and democracy is asymmetrical: the rule of law can exist without democracy, but democracy needs the rule of law, for otherwise democratically established laws may be eviscerated at the stage of application by not being followed.’*<sup>10</sup>

The point is this: on its own, the rule of law in its formal aspect is equally compatible with democracy or dictatorship. The formal aspect of the rule of law tells us no more than whether a country has laws to keep, and whether it keeps them – it is rule by law, if you like. By way of example, the institution of slavery, as noted by Raz, is perfectly compatible with rule by law<sup>11</sup>. In the eyes of 21<sup>st</sup> century lawyers, philosophers, and politicians, a liberal democracy needs more than rule by law. It requires the laws through which we are ruled to be underpinned by, and to give expression to, certain moral and philosophical values. A liberal democracy needs both the formal and substantive aspects of the rule of law.

10. How the substantive content of the rule of law is given expression is to a large degree through individual statutes and regulations and thereafter through their effective interpretation and enforcement; that is to say through rule by law. In this the rule of law’s substantive aspect relies on its formal aspect. The former gives content to the latter, the latter gives life to the former. The question thus becomes one which underpinned the

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<sup>9</sup> Tamanaha, *ibid*, at 92.

<sup>10</sup> Tamanaha, *ibid*. at 37.

<sup>11</sup> Raz, *The Rule of Law and its Virtue*, in *The Authority of Law* (Oxford) (1979) at 221, ‘*The law may . . . . institute slavery without violating the rule of law*’, by which he referred to the rule of law’s formal aspect.

Renton Committee's Report: how best should a legislature approach its role of ensuring that individual laws give life to democracy and the substantive rule of law.

11. I want to approach that question through an examination of the features which Hayek identified as necessary elements of any system committed to the rule of law in its formal sense, namely that the rule of law requires that, '*laws must be general, equal and certain.*'<sup>12</sup>,

## **(2) General and Equal**

12. What did Hayek mean by 'general' and 'equal'? 'General' carries with it the idea that laws should not be targeted at one particular case, but should contain abstract prospective principles which can be applied widely and to many particular cases. By 'equal', he had in mind the idea that laws should generally apply equally to all: they should not provide specific benefits or disadvantages for particular individuals; so no Acts of Attainder. No doubt, Queen Caroline, the last individual to face the prospect of such an Act through the Pains and Penalties Bill of 1820 (which was never enacted) would have agreed – although she was famously left banging on the doors of Westminster Abbey in the following year after having been refused entry to her husband's coronation, but that was not pursuant to any statute. Today, if not 190 years ago, any departures from equality are only justifiable if applied to groups not individuals, and are normally only then legitimate, as Hayek would have it, where they are for the public benefit and are consented to by the majority of those both outside and within the group identified for particular treatment<sup>13</sup>.

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<sup>12</sup> Hayek, *The Political Idea of the Rule of Law*, cited in Tamanaha, *ibid*, at 66.

<sup>13</sup> Tamanaha, *ibid*, at 66.

13. Moreover, to ensure that a law satisfies the general and equal tests, it should not be the product of what might be described as a knee-jerk reaction to a one-off event or a ‘*transient public mood*<sup>14</sup>’, as was said of the infamous Dangerous Dogs Act 1997. In a sense, such legislation is retrospectively aimed at a one-off event, even though it can be said to be general and equal in that it only has future application, and will apply to all dogs, or, to be more accurate, to all dog-owners.
14. A much earlier and much more flagrant instance of such a statute, which not only breached all Hayek’s criteria, but also breached the substantive principle that penal legislation should not be retrospective, is the *Acte for Poysonyng* of 1530. This Act was hastily enacted after Richard Roose, cook to the Bishop of Rochester (more than 400 years before David Renton was Recorder of that city), had ‘*caste a certain venym or poison into a vessel replenysshed with yeste or barme stondyng in the kechyn of the Reverend Father in God*’. As the very lengthy recital went on to explain, “*xvij persons of [his] famylie which dyd eate of that porrage were mortally enfecte*’. The Act not merely declared that this poisoning was retrospectively “*demed high treason*”, for which Roose was to be “*boyled to deathe*”, without benefit of the clergy, in the very vessel in which he had prepared his poisoned porridge<sup>15</sup>, but it provided that all future murders by poison should be so deemed and all future poisoners punished by being boiled to death and escheat of their property to their feudal lords. This hasty piece of legislation was effectively sidelined by a statute in 1547<sup>16</sup> but it was not finally repealed till 1863<sup>17</sup>.

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<sup>14</sup> Editorial, *The Lords is the more democratic house*, The Telegraph (13 April 2004) (<http://www.telegraph.co.uk/comment/telegraph-view/3604787/The-Lords-is-the-more-democratic-house.html>).

<sup>15</sup> See Miller, *Where There’s Life, There’s Lawsuits* (ECW Press) (2003) at 178 – 179.

<sup>16</sup> 1 Edw 6, c 12, 1547, s 13.

<sup>17</sup> Statute Law Revision Act 1863.

15. Although there are modern instances of legislation which breaches the general and equal rule, it is fair to say that my warning against such legislation is largely proleptic. There have been relatively few occasions when the legislature has departed from Hayek's approach to generality and equality over the past 125 years. In the main, legislation does not breach Hayek's first two formal rules. I would like to mention three arguable exceptions - the Vexatious Actions Act 1896, Part I of the Leasehold Reform Act 1967, and seven sections of the Serious Organised Crime and Police Act 2005.
16. The 1896 Act created the civil proceedings order, which prohibits individuals from bringing vexatious claims. Its provisions are now, of course, set out in modified form in section 42 of the now dismally renamed Senior Courts Act 1981. Professor Taggart explains that the inspiration for the 1896 Act was Mr Alexander Chaffers, who for more than thirty years from 1863 conducted a campaign of vexatious litigation against the great and the good<sup>18</sup>.
17. Thus the 1896 Act might be said to have been aimed at dealing not with a general issue, but rather with a specific, particular case – Mr Chaffers –, and not to have been of equal application to all. As Mr Oswald MP said during this Bill's passage through Parliament, *“For the first time in the history of Parliament a Bill had been brought in practically shutting the doors of all Courts of Justice to particular subjects of the Queen, and that because one individual had made himself somewhat obnoxious in bringing proceedings ..*

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<sup>18</sup> For a description of some of those proceedings and those individuals he initiated proceedings against see: Hansard, HL Deb 14 July 1896 vol 42 cc1410-3 ([http://hansard.millbanksystems.com/lords/1896/jul/14/vexatious-actions-bill-hl#S4V0042P0\\_18960714\\_HOL\\_8](http://hansard.millbanksystems.com/lords/1896/jul/14/vexatious-actions-bill-hl#S4V0042P0_18960714_HOL_8)); and Taggart, *Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896*, Cambridge Law Journal, 63 (3), 2004, 656.

.. .<sup>19</sup>” The 1896 Act was also arguably aimed at protecting certain individuals, the Lord Chancellor and the Archbishop of Canterbury were suggested, who were at the time suffering from Mr Chaffers’ attention<sup>20</sup>.

18. However, the 1896 Act applied to all vexatious litigants and all their victims. The problem of such litigants may have been highlighted by Mr Chaffers’s actions, but, as the experiences of the past 115 years have shown, the vexatious litigant jurisdiction has been a very beneficial weapon to ensure that the legal system is not abused and brought into disrespect. The legislation protects not only the direct victims of the litigant, but also court time and consequently the interests of other bona fide litigants. I would accordingly acquit it of breaching Hayek’s rules.

19. Graver concerns are justified in relation to sections 132 to 138 of the 2005 Act, which enabled the police to exercise special control over demonstrations which take place within 1 kilometre of Parliament Square. The spur for their enactment was to control the late and indefatigable Mr Brian Haw’s Parliament Square demonstration against Iraqi sanctions and then the war in Iraq. As Counsel for the Secretary of State in proceedings against Mr Haw submitted, the Parliamentary debates ‘*made it clear that it had been the Government’s intention that Mr Haw should be caught by the Act.*’<sup>21</sup>,

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<sup>19</sup> M. Oswald MP, Hansard HC Deb 10 August 1896 vol 44 cc455-6

(<http://hansard.millbanksystems.com/commons/1896/aug/10/power-of-court-to-prohibit-institution>)

<sup>20</sup> Hansard, HC Deb 08 August 1896 vol 44 c259

([http://hansard.millbanksystems.com/commons/1896/aug/08/vexations-actions-bill-hl#S4V0044P0\\_18960808\\_HOC\\_191](http://hansard.millbanksystems.com/commons/1896/aug/08/vexations-actions-bill-hl#S4V0044P0_18960808_HOC_191));

T. M. Healy MP, Hansard, HC Deb 10 August 1896 vol 44 cc456-7

([http://hansard.millbanksystems.com/commons/1896/aug/10/extent-and-short-title#S4V0044P0\\_18960810\\_HOC\\_276](http://hansard.millbanksystems.com/commons/1896/aug/10/extent-and-short-title#S4V0044P0_18960810_HOC_276))

<sup>21</sup> *R (Haw) v Secretary of State for the Home Department* [2005] EWHC 2061 (Admin), [2006] QB 359 at [35]; *R (Haw) v Secretary of State for the Home Department* [2006] EWCA Civ 532, [2006] QB 780.

20. Of course it can be said that the 2005 Act applied to all those who demonstrate near Parliament, and that it benefited all who work or travel in the vicinity, but it was a far more personally directed piece of legislation than the 1896 Act. Judging by what has happened however, it does not seem to have made much difference, and it did not significantly added to the grounds for dealing with those who have acted wrongly in the area concerned. Indeed, the Act did not even result in Mr Haw's removal from Parliament Square: sadly, that was effected by his death six years later. So maybe the Act did not infringe the principles of generality and equality as, in essence, it has been enforced against nobody, but, if so, it broke another principle of good legislation: the principle of effectiveness.

21. The seven sections did not have a long life: they were repealed by section 141 of the Police and Social Responsibility Act 2011, and, although the eight sections of that Act impose new controls, they are limited to Parliament Square. In a sense the new legislation is even less general and less equal, as it covers a much more limited and specific location, but to those of libertarian inclination, that may be more than made up for by the very substantial reduction in the area covered by the new legislation.

22. The 1967 Act enables tenants living in relatively modest houses let under long leases at low rents to acquire their freeholds from their landlords at what the long title to the statute calls a "fair price", although it is a somewhat reduced market value. (Subsequent legislation has extended the ambit of the legislation to many more tenants under long leases.) If ever legislation was enacted to confer a benefit on a particular group of citizens at the expense of another group, this was it. The legislature's intention was to come to the rescue of long leaseholders who had, as they saw it, "bought" their homes but had in fact

acquired a wasting asset. The 1967 Act was challenged at Strasbourg on the ground that it wrongly interfered with landlords' right to peaceful enjoyment of their property contrary to Article 1 of the first protocol to the Convention<sup>22</sup>. The Strasbourg court rejected the complaint, holding that it was lawful for the legislature to require a property-owner to sell to a third party not merely for a publicly beneficial project (e.g. a road, railway or hospital) but for the third party's benefit, where the measure was justifiable on the basis of social justice, and in this case Parliament's valid aim was greater social justice in the field of housing<sup>23</sup>.

23. Despite the Strasbourg court's franking of this legislation on the basis that it is founded on social justice, and despite the fact that one can see the grounds for it, it does seem to be in breach of, or perhaps one might say it is an exception to, Hayek's first and second rules. It is hard to think of any other legislation which enables A to deprive B of B's property not so as to enable A to ensure it is put to some publicly beneficial use, but solely to benefit A. Depending on your view of the 1967 Act, it either shows that the statute was substantively unprincipled, or it shows that the general and equal rule is subject to exceptions.

24. Statutes are sometimes activated by concerns over specific actions or individuals, but they can also be the product of competing interests. Competition in such circumstances is a good way to confuse the purpose, much to the detriment of the drafting. It is sometimes the case that where two such interests are involved in negotiating the precise terms of a statute whose basic aim is to implement Government policy problems arise. One example of this is the Landlord and Tenant (Covenants) Act 1995.

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<sup>22</sup> *James v United Kingdom* app 8793/79 (1986) 8 EHRR 123

<sup>23</sup> *ibid*, para 46

25. The policy behind the 1995 Act was to remove original tenant liability – i.e. the common law rule that the original tenant remained liable under his covenants, e.g. for the rent, even after he had assigned the tenancy. The precise terms by which that policy was to be expressed and the compensating or balancing provisions were, I believe, to a significant extent left by the Executive and the Legislature to be thrashed out between organizations representing landlords and tenants. The result reflects the fact that the Act was the outcome not merely of statutory drafting, but also of such negotiations. As anyone who has negotiated a contract knows, it often suits the parties to have provisions which are vague, ill-expressed or ambiguous. Each party fears that insisting on spelling out a provision more clearly will lead to a break-down now, and each party hopes that the consequently obscure provision will provide the opportunity for argument or negotiation in the future: understandable for a contract, but not so appropriate for a statute.

26. In such a case, the interested groups are negotiating the terms of a statute to try and reflect their own individual interests, whereas it should be the legislature, through parliamentary drafting, seeking to ensure that legislation is drafted in a way which benefits the public interest. Although it is perfectly proper to draft legislation to protect a class of persons, e.g. tenants, the reason for doing so is not to favour tenants for their own sake or for their own specific benefit: it is because it is in the public interest that such legislation enacted.

27. This illustrates a wider consideration which is sometimes overlooked in the context of legislative drafting and which links together Hayek's call for clarity and certainty with the need to ensure proper generality and equality in legislation: namely party interest. There are many potential party interests. The most obvious are the interests of specific groups

who are directly affected by the particular legislation (e.g. landlords and tenants under the 1995 Act) and, more generally, the interest of legislators, as guardians and promoters of the public interest and the public will. Those interests properly shape legislative aims and guide policy choices. They should not however intervene in the process to render less clear and certain in scope and application than would otherwise be the case.

28. With that in mind it is to clarity and certainty, Hayek's third test to which I now turn.

### (3) Certain

29. Party-interest can adversely affect legislative clarity. So can the draftsman's interest. This has been clearly explained by David Marcello, who has noted that, '*... few acknowledge the legislative drafter as an important policymaker in the process by which society's laws are enacted.*<sup>24</sup> He does not suggest that legislative draftsmen have what he calls '*Machiavellian tendencies*', or that '*legislative drafting personnel are . . . a fifth column of subversives who pursue personal . . . objectives in everything they do.*<sup>25</sup> What he does suggest though is that in drafting clauses to achieve the legislator's policy objective, they too exercise 'personal judgment' and that is frequently, either consciously or unconsciously, influenced by their own views and beliefs<sup>26</sup>. As he sees it, the draftsmen play a more active role than is appreciated by those who mistakenly view them as a '*stereotypical scribe, laboring in nameless and faceless obscurity to produce a bill draft.*<sup>27</sup> That active role can for certain avoidable reasons unwittingly lead to a lack of legislative clarity and certainty.

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<sup>24</sup> Marcello, *The Ethics and Politics of Legislative Drafting*, [1996] Tulane Law Review 2437 at 2439.

<sup>25</sup> Marcello, *ibid* at 2463.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

30. Marcello points out that a legislative drafter can influence the development of legislative policy through the way in which they interpret their drafting instructions, or through any questions which they raise about the nature of those instructions. They can also do so through the drafting process itself. The choice of words to achieve a goal may not only define that goal but may also subtly refine it. As the drafting process progresses through its various stages, choice of language and such refinement can shift the focus from the original intent to a different one. Shifting the focus may not only change the nature of the legislation, but equally it can render it unclear.

31. This can often be exacerbated because draftsmen operate under severe time pressure. As Reed Dickerson put it,

*‘How long does it take to draft a legal instrument? Abraham Lincoln’s answer is as good as any. When asked how long a man’s legs should be, he answered, “Long enough to reach the ground.” For the legal draftsman this means, “As long as it takes the particular draftsman to do the particular job.” Unfortunately, the draftsman is often under time limitations that he cannot control, and he has to compromise accordingly. The real answer therefore is, “Longer than he has time for”.’<sup>28</sup>*

Quite apart from resulting in rushed drafting, time limits can adversely affect the draftsman’s ability to obtain clear instructions, and indeed the legislator’s ability to formulate such instructions. As a result time constraints limit the ability of legislators and draftsmen to consider the various possible issues and the various possible drafting choices, and even to understand the ramifications of particular drafting choices. Clarity can be lost, but equally generality can be lost this way.

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<sup>28</sup> Dickerson, cited in Marcello at 2441, fn. 17.

32. Limited time can therefore force a draftsman to make drafting choices based on imperfect knowledge and imperfect instructions. There may, for instance, be a choice between a wider, more discretionary provision, and a narrower provision whose scope is strictly limited, when, on the face of it, either choice might meet the legislative intent. If a wide interpretation was what Parliament had intended, but the language chosen indicates a narrow interpretation, the courts may well and unwittingly misconstrue the intention. As Marcelllo puts it the use of precise language may well ‘*effectively kill a bill*<sup>29</sup>’. So, unintended choice of language can produce problems, as any gaps or lack of clarity in the draftsmen’s instructions, which cannot be cured in the time available, can lead to a draftsman filling those gaps, often unconsciously, with his own policy choices. This is all the more acute during the Parliamentary process where amendments are put forward or become necessary and drafting takes place at a speed where, as Kramer put it, ‘*five minutes is too much time*.’<sup>30</sup>

33. The point to draw from this is that in an ideal world the drafting process should be afforded more time so that the one party-interest which takes precedence is that of the legislature. As Marcelllo has it lack of legislative time leads to a lack of legislative clarity<sup>31</sup>, as indeed does negotiated legislation, such as the 1995 Act. In the present day where Bill time competition in Parliament is intense, and there is often an impending General Election to accommodate MPs and peers generally-speaking have insufficient time to consider and scrutinise legislation. Political compromise in Parliament is another factor which militates against clarity as indeed do amendments at the eleventh hour.

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<sup>29</sup> Marcelllo at 4554.

<sup>30</sup> Kramer cited in Marcelllo at 2455.

<sup>31</sup> Marcelllo, *ibid* at 2453.

34. But without a reasonable time in which to draft, reasonable legal certainty in the law is sacrificed, and greater uncertainty, an increased lack of clarity, undermines the court's ability to give effect to Parliament's intention, and risks elevating judicial blood pressure. Greater legislative clarity carries with it a number of obvious advantages: less litigation, lower legally-driven compliance costs, a more straightforward framework within which businesses can operate, and a more readily understandable and accessible framework within which people can lead their lives. Sometimes, though, a legislator may wish to avoid clarity because a clear provision would stand less of a chance of passing through the legislative process, and sometimes clarity may be unachievable given the nature of the provision.

35. Assuming clarity is desired and achievable the question becomes how readily is it achievable? Like Andrew Marvell, given world enough and time<sup>32</sup>, I imagine anything is achievable. Legislation is rarely if ever given world enough and time. In the real world drafting with reasonable clarity is not an easy task at the best of times, as Dreidger said in 1971 in an article entitled, *Statutory Drafting and Interpretation*:

*'There is always the complaint that legislation is complicated. Of course it is [complicated], because life is complicated. The bulk of the legislation enacted nowadays is social, economic or financial; the laws they must express and the life situations they must regulate are in themselves complicated, and these laws cannot in any language or in any style be reduced to kindergarten level, any more than can the theory of relativity. One might as well ask why television sets are so complicated. Why do they not make television sets so everyone can understand them? Well, you can't expect to put a colour image in a screen in your living-room with a crystal set. And you can't have crystal set legislation in a television age.'*<sup>33</sup>

And we of course live in a digital television and internet age.

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<sup>32</sup> Marvell, *To his Coy Mistress*.

<sup>33</sup> Dreidger cited in Miers & Page, *Legislation*, (Sweet & Maxwell) (1990) at 196.

36. The judiciary has on a number of occasions recognised the great efforts which Parliamentary Counsel has gone to in order to render our complicated form of life into clear and certain legislative forms. Thus, in one case in 2002 Lord Bingham said that *‘Such is the skill of parliamentary draftsmen that most statutory enactments are expressed in language which is clear and unambiguous and gives rise to no serious controversy.’*<sup>34</sup> However, and no doubt mindful of the qualification in Lord Bingham’s statement, four years later Lord Carswell had this to say:

*‘In a judicial utopia every statute or statutory instrument would be expressed with such clarity and would cover every contingency so effectively that interpretation would be straightforward and the only task of the courts would be to apply their terms. Utopia has not yet arrived, however.’*<sup>35</sup>

37. At the Bar, I specialised in property law. In that field, we had old and new examples of good and bad legislation. The revolutionary legislation of 1925, which substantially recast the common law of property, land registration law, and the law of trusts, was a famously successful body of legislation put together by the great draftsman, Sir Benjamin Cherry. Two more recent statutes I grew up with also deserve honourable mention. Part II of the Landlord and Tenant Act 1954, which gave a degree of security of tenure to business tenants, and Part I of the Leasehold Reform Act 1967, to which I have just referred, dealt with potentially complex problems clearly and succinctly. The body of case-law they produced was redolent of a vibrant common law system, with the courts interpreting a well-drafted statute in a technical field, producing decisions of quality at every level from the County Court to the House of Lords. Many of those decisions were reportable, some

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<sup>34</sup> *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687 at [7].

<sup>35</sup> *Smith v Smith* [2006] UKHL 35, [2006] 1 WLR 2024 at [79].

of them determined significant points of property law, some of them laid down important principles of statutory interpretation, and some of them dealt with other points of importance. But nowhere do we find criticisms, or even grounds for criticism, of the statutory drafting. Clarity and certainty providing a readily accessible framework for individual conduct.

38. On the other hand, there are more recent statutes which were less satisfactorily drafted, to certainty's detriment. The draftsman of Part 1 of the Landlord and Tenant Act 1987, which gave tenants in blocks of flats the right of first refusal if their landlord wished to sell, faced a task of similar difficulty to that faced by the draftsman of the 1967 Act. Yet Sir Thomas Bingham MR, not a judge to indulge in hyperbole, and, as we have seen, an admirer of statutory draftsmen generally, said that, in an earlier case<sup>36</sup>,

*'Sir Nicolas Browne-Wilkinson V.-C., sitting in this court described the Act of 1987 as "ill-drafted, complicated and confused". The argument in this case has given new force to this understated criticism.'*<sup>37</sup>

Parliament realised that drastic action was required, but rather than putting this train crash of a statute out of its misery, in 1996 it repealed *in toto* no less than thirteen of its twenty sections and replaced them with thirty-one entirely new sections<sup>38</sup>.

39. And this is not a new or isolated phenomenon in property statute drafting. The Prescription Act 1832 has been the most criticised statute in property law, possibly the most criticised statute in any area of English law. In a recent case, Mummery LJ said this:

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<sup>36</sup> *Denetower Ltd. v. Toop* [1991] 1 WLR. 945 at 952G.

<sup>37</sup> *Belvedere Court Management Ltd v Frogmore Developments Ltd* [1997] QB 858 at 881.

<sup>38</sup> Housing Act 1996, section 92, schedule 6.

*“Professor A W B Simpson wrote<sup>39</sup>: “. . . the present state of the law on the acquisition of easements and profits is a disgrace to the law..... The Act is the classic example of an incompetent attempt to reform the law, and its retention on the statute book is indefensible.”... [T]he Law Reform Committee ... had no better view of the 1832 Act than Professor Simpson, [saying]: “The Prescription Act 1832 has no friends It has long been criticized as one of the worst drafted Acts on the Statute Book”<sup>40</sup>. . . <sup>41</sup>,*

In a judgment given last week, and without having this evening’s lecture in mind, I joined the feeding frenzy saying that:

*‘The law pursuant to which easements can be acquired through long use ... has been complicated rather than assisted by the notoriously ill-drafted Prescription Act 1832, whose survival on the statute book for over 175 years provides some support for the adage that only the good die young.’<sup>42</sup>,*

40. The Prescription Act may well be the worst offender in the property law field, but it is not in want of company. There have, for example, been many judicial criticisms of the drafting of the rent restriction legislation, the succession of Rent Acts, promulgated between 1914 and 1977. They range from Scrutton LJ’s expressed regret that he could not ‘*order the costs to be paid by the draftsmen of the Rent Restriction Acts, and the members of the legislature who passed them, and are responsible for the obscurity of the Acts*’<sup>43</sup> to Mackinnon LJ’s suggestion that the experience of having ‘*to face the horrors of the Rent and Mortgage Restriction Acts*’ was ‘*hastening many [judges] to a premature grave*’<sup>44</sup>.

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<sup>39</sup> Simpson, *Introduction to the History of the Land Law* (1961) at 251.

<sup>40</sup> Law Reform Committee in *Acquisition of Easements and Profits by Prescription* (14<sup>th</sup> Report (1966) (Cmnd 3100)) at [40].

<sup>41</sup> *Housden v Conservators of Wimbledon and Putney Commons* [2008] EWCA Civ 200, [2008] 1 WLR 1172 at 1179.

<sup>42</sup> *London Tara Hotel Ltd v Kensington Close Hotel Ltd* [2011] EWCA Civ 1356, at [20].

<sup>43</sup> *Roe v Russell* [1928] 2 KB 117 at 130.

<sup>44</sup> (1946) 62 LQR 34.

41. Of course in the really good – or bad – old days, the judiciary had no problems about lack of clarity in a statute. In 1305, Hengham CJ is recorded in the Year Books<sup>45</sup> as interrupting counsel’s submission as to the meaning of a statute<sup>46</sup> with the words ‘*Ne glossez point le Statut; nous le savoms mieux de vous, qar nous le feimes*’ (Do not gloss the statute; we understand it better than you, as we wrote it). Some sixty years later, a different approach to an unclearly worded statute was taken by another Chief Justice. In 1366, Thorpe CJ ‘*went to the House of Lords ... and asked them, as they had lately passed [the] statute, what they intended thereby.*’<sup>47</sup> If only it were that easy today. And perhaps I should jump forward 650 years to today.

#### **(4) Recent events**

42. Legislate in haste and repent in litigation, and that is often because you are infringing at least some, but possibly all three, of Hayek’s requirements. I suggest that this is a particularly important point in the present age, which is one of instant mass communication and the consequent pressure for instant gratification, coupled with media crusades which lead to the blame game. In today’s world, it is very difficult, particularly for those who are directly democratically accountable, to resist the “something must be done – and done now” school of thought, and to legislate as a result of some one-off event which causes outrage, even hysteria. And, of course, such legislation does not merely result in a bad statute or regulation: it can result in giving legislation, and even the rule of law, a bad name. Having said that, the pressure of strong public opinion can be a force for good, and can sometimes bring reluctant politicians to do their duty.

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<sup>45</sup> YB 33-35 Edw I (RS) 82,83 (1305).

<sup>46</sup> *Westminster the Second* 1285.

<sup>47</sup> *Per Mackinnon LJ in Bismag Ltd v Amblins (Chemists) Ltd* [1940] Ch 667, 690, citing Lord Campbell’s *Lives of the Lord Chancellors* (1<sup>st</sup> ed) Vol. 1 at (272).

43. MPs' expenses in 2009 and phone hacking in 2011 provide two recent, and somewhat contrasting, illustrations of the effect of public opinion on legislators. It now transpires that things had been going wrong for decades with Parliamentary expenses, but public opinion was only informed about it in 2009. That immediately produced an outcry; MPs had known what was going on for decades, but, for various understandable (if not always forgivable) reasons, they had done nothing about the rather unsatisfactory state of affairs. Very quickly, they reacted to public opinion, and produced some hastily drafted legislation, the Parliamentary Standards Act 2009, partly to assuage public demand, and partly because there was an election in the offing. It would have been much better if far more thought had been given to the legislation. That is shown by the fact that, after more consideration, the Committee on Standards in Public Life<sup>48</sup> put forward proposals 'very substantially to rewrite' the 2009 Act. These proposals were approved by the House of Lords Constitution Committee, who described the Act as '*rushed*', '*excessively speedy policy-making*', and '*open to a range of serious and substantial constitutional and other objections*'<sup>49</sup>.

44. There are similarities and differences when it comes to phone hacking. As long ago as 2002, the Information Commissioner raided various offices and publicly stated that over 300 journalists had received information inappropriately. And in 2006 he identified well over three thousand individual instances of wrongdoing in the form of use of "illegal interception of phone messages" and the like, which were then used to run stories in national, daily and Sunday, newspapers. Although there were a few successful prosecutions, there was no public outcry, and no action from the legislature. Unlike MPs'

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<sup>48</sup> MPs' Expenses and Allowances: Supporting Parliament, Safeguarding the Taxpayer, Cm 7724, Nov 2009

<sup>49</sup> House of Lords Constitution Committee, Constitutional Reform and Governance Bill, 17 March 2010

expenses, this issue lay dormant, maybe because the interests of the media were rather different on the two issues.

45. Suddenly, in 2011, dormancy ceased, public outrage exploded and all hell broke loose. It was as a result of a particularly revolting incident, the apparent deleting of messages on a murdered girl's phone by journalists or investigators, which resulted in her parents being misled into thinking that she was still alive. It would seem that something as frightful as that was required to bring the public, or perhaps the media, to their senses, and it was only as a result of this that the executive and the legislature moved into action. It was right and proper that the government then acted firmly and promptly. Particularly relevantly, I suggest, it was sensible to deal with the question of the appropriate long-term response in a considered way, by referring the issues for consideration, rather than leaping in with legislation or regulation, as happened with MPs' expenses. Similarly, it seems to me right and proper that Parliament should be looking into the issues: they involve fundamental rights and the rule of law.

46. I would add this. We do nonetheless seem to have ended up in a somewhat paradoxical situation. The issue of what sort of rules should be in place in the future to regulate the press and its relations with politicians is being dealt with by a judge with assessors, whereas the question whether certain individuals were in some way privy to the hacking is being investigated by the House of Commons, through a committee. It might be thought that issues of future policy were for the legislature, whereas the question whether an individual was in some way privy to a crime was for the courts. Unusual circumstances result in unusual consequences, but at least we have do not have the threat of knee-jerk legislation, as we did when it came to parliamentary expenses.

## **(5) Conclusion: codification and less legislation**

47. The need for clearly drafted laws is obvious: unclear drafting results in uncertainty and expense: it undermines society, the economy, private interests, commercial interests, and the rule of law itself. We need a more deliberate approach to law-making. As I have already emphasised we need more considered legislation. And, I respectfully suggest, that inevitably means that we need less legislation. Like Sir Thomas Gresham's adage about money, bad legislation drives out good. That is because our old friend, lack of Parliamentary time. And we have had a welter of legislation in the past 20 years or so, pressed on with by the Government because it wants to be seen to be dealing with the problems identified in the headlines.

48. I have called this the Mikado delusion. You may recall the scene: Koko is explaining why, despite the Mikado's command to decapitate him, Nanki-Poo has been allowed to escape. He says:

*'It's like this : when your Majesty says, "Let a thing be done," it's as good as done, practically, it is done, because your Majesty's will is law. Your Majesty says, "Kill a gentleman," and a gentleman is told off to be killed. Consequently, that gentleman is as good as dead; practically, he is dead, and if he is dead, why not say so?'*

And the Mikado says: *'I see. Nothing could possibly be more satisfactory!'*

49. To the Chancery lawyers among you, it is worth pointing out that if this has shades of equity treating as done that which ought to be done, it is not surprising: WS Gilbert was a barrister, and *The Mikado* was written in 1883, the year after *Walsh v Lonsdale*<sup>50</sup> was decided. But, unlike the court in *Walsh v Lonsdale*, the Mikado was quite wrong: far from

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<sup>50</sup> (1882) LR 21 Ch D 9

nothing being most satisfactory, nothing could be less satisfactory. A deluge of legislation, quite a lot of it so misconceived that it is repealed before it even comes into force, creates the problem of law which is difficult to understand, uncertain in its effect, expensive and time consuming to apply, and unsatisfactory in its outcome.

50. In addition, is it worth considering codification? Currently, it is out of fashion. But it would assist not only clarity but also generality and equality. And the Victorians had no principled concerns about it. Sir Mackenzie Chalmers drafted the Sales of Goods Act 1893, still substantially replicated in the present Sale of Goods Act 1979. Lord Lindley drafted the Partnership Act 1890, which has stood the test of time. So has the codification of English contract law, through the Indian Contract Act 1872. If clarity in the law is to be pursued rigorously perhaps the time has come for the Law Commission to give serious consideration to codification once more. In this we may want to take inspiration from some other common law jurisdictions.

51. In particular we might want to consider trust law reform as it has recently been conducted in the United States. As John Langbein recently noted,

*‘The Uniform Trust Code the first [US] codification of the American law of trusts, was promulgated in 2000. The Code was the product of a five-year Uniform Law commission drafting process that entailed extensive consultation with the trust and estates bar and the trust banking bar.’<sup>51</sup>*

Langbein particularly notes that for the US this was on one level a ‘great departure’. If we too were to embark on such an enterprise it too would be a great departure. But he also

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<sup>51</sup> Langbein, *Why did Trust law become Statute Law in the United States?*, (58) *Alabama Law Review* 1069 at 1069.

notes that in some ways it was not so great a change, as, looked at another way, it was just one more step in a '*trend toward statutory intervention in American trust law that had been underway for decades.*'<sup>52</sup> We might say the same thing. Perhaps not to as great an extent as the US, but English trust law as seen its own statutory interventions over the years through, for instance, the Variation of Trusts Act 1958, the Trustee Investments Act 1961, Trusts of Land and Appointment of Trustees Act 1996, the Trustee Delegation Act 1999, and the Trustee Act 2000. You could also include the Charities Act 2000 and the Perpetuities and Accumulations Act 2009. If, as Langbein suggests is the case in the US, the modern trust bears little relation to the trust of former centuries<sup>53</sup>, perhaps we too should consider producing a codified law fit for the 21<sup>st</sup> Century. And what might be beneficial in respect of trust law, may be equally beneficial in other areas, such as contract, tort, unjust enrichment as well as criminal law.

52. No doubt, some will point to the failure of other such projects in the past, such as previous attempts to codify English contract law. And it may be that, after inquiry, the conclusion is that codification in the pursuit of clarity and certainty is best left alone. At the very least though the Law Commission and others, including this Society, should give serious consideration to the question whether we would be better served by embarking on a period of consolidation and codification of our law. If we do so, it should be with the goal of greater clarity and certainty.

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<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid* at 1071