

INAUGURAL STATUTE LAW SOCIETY LECTURE

**THE EVOLUTION OF MODERN STATUTE LAW
AND ITS FUTURE**

by

The Rt. Hon. Lord Renton, KBE, QC.

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UNIVERSITY COLLEGE, LONDON
1st NOVEMBER 1995

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The Evolution of Modern Statute Law and its Future

On behalf of the Statute Law Society I wish to thank Lord Mishcon, one of our distinguished Vice-Presidents, for so generously arranging for an annual lecture to be given in the name of our society. Victor Mishcon, besides being a famously successful London solicitor, was the first practising solicitor to be appointed an Honourary Q.C., and for the past 17 years has played a notable part in the Lords, especially in debates on law reform. It is a great privilege to be invited to give this inaugural lecture.

Our society was started nearly 30 years ago, "to procure technical improvements in the form and manner in which statutes, and delegated legislation, are expressed and published, with a view to making them more intelligible, and to further the education of the public in these matters". Our membership is widespread: we have members in each part of the British Isles, in the Commonwealth and in several EC countries. Most of our members are lawyers, including several members of the higher judiciary and professors of law, and I am glad to say that a number of accountants are members, especially our secretary and our treasurer.

I propose to examine how our Statute Law has evolved, to what problems it gives rise and what should be done about them. I shall not deal with secondary legislation, such as royal proclamations, orders in council or statutory instruments, voluminous and far reaching though they are and always have been. I shall confine myself to Statute Law; not its substance but its enactment, form and drafting, and its application.

No civilised society can survive without the rule of law, and no democracy is worthy of the name unless the representatives of the people have the last word in deciding what the statute law should be and how it is drafted, made known and enforced. It took 7 centuries to achieve this.

Our Parliament started in the late 13th century but Queen Anne in 1707 was the last monarch to refuse royal assent. Since then Parliament has had the last word. Even so, to this day every act of Parliament still starts by saying, "Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this Parliament assembled, and by the authority of the same,...". There's a charming tribute to the monarch, which our Queen so well deserves although she cannot stop us! However, it was not until the Parliament Act, 1911, that the democratically elected House of Commons was able to outvote and overrule the Lords but only after a delay of two sessions, reduced to one session by the Act of 1946. Of course on Finance Bills the Lords have no power to overrule the Commons.

We still regard Magna Carta as our oldest statute. It started as an ultimatum by the Clergy and Barons to King John in 1215 but became a statute when ratified by Simon de Montfort's Parliament in 1265 and again by the Model Parliament in 1297. Only 4 of its chapters remain. The rest have been repealed and replaced. The Late Lord Gardiner got into real trouble when he tried to have the rest of it repealed!

Magna Carta was in Latin and so were all statutes until Edward I came to the throne in 1272, when Norman French was often used as well, until Henry Tudor, a Welshman, became King in 1485. He robustly

insisted that only English should be used. Even so, Norman French is still used for informing Parliament of the royal assent: "La Reine le veult", says the Clerk of the Crown in the House of Lords.

Apart from Magna Carta, the earliest statute still partly in force is Chapter I of the Statute of Marlborough of 1267 dealing with distraint of chattels. The most important medieval statute still partly in force is the Justices of the Peace Act, 1361, which in a dozen lines requires the appointment of magistrates and gives them the wide powers they still have.

Under the Tudors, although most legislation continued to be introduced by the King's Ministers, each House of Parliament became free to amend it and even to initiate legislation. Of course Henry VIII decided to amend statutes himself and Ministers increasingly in the past 30 years have tried to copy him! More about this later.

By the time Edward VI came to the throne in 1547, statutes had become so numerous and so obscurely drafted that the highly intelligent royal teenager must have echoed public opinion when he said, "I would wish that ... the superfluous and tedious statutes were bought into one sum together and made plain and short to the intent that men might better understand them". In other words he mainly wanted consolidation, and so later did James I and Francis Bacon but there was no serious attempt to repeal obsolete statutes until the mid-19th century and, although in the late 19th century there were some major pieces of consolidation, there was no systematic and regular consolidation until the Act of 1949.

In the 17th Century Parliament was mainly concerned with constitutional and religious conflicts and matters of principle. Oliver Cromwell, whose first constituency I had and the Prime Minister now has, was not much interested in legislation, although as a backbencher he tried to prevent parts of the Fens from being drained. When he became Lord Protector, however, he dissolved Parliament and governed largely by detailed and restrictive proclamations and decreed that the Fens should be drained!

By contrast, legislation which followed the Restoration in 1660 dealt well with matters of principle: the Clarendon Code, the Statute of Frauds, the Habeas Corpus Act, and the later the Bill of Rights, the Act of Settlement and the Act of Union with Scotland in 1706: all of these contained well drafted statements of principle which have stood the test of time.

In the rest of the 18th century, however, and well into the 19th, there was much legislation which was too detailed and incomprehensible. The drafting varied. There was no consistent style or method. It was done mainly by lawyers in each department of state, especially in what became the Home Office, which was and is responsible for everything not allocated to any other department.

An astonishing thing about our legislation was that from earliest times until 1796 it was not regularly promulgated to the people, in spite of the rule that ignorance of the law is no defence. Statutes were sent to the Sheriffs each session but until printing started in 1484 few people saw them. The judges were kept informed about them and, as there was no parliamentary system of repeal and consolidation, it was for the judges to decide which laws had become obsolete and could be disregarded. Sometimes judges ignored statutes altogether, or declared them to be void because they were "against common right and reason or impossible to be performed". I daresay some judges these days feel tempted to declare some of our statutes void for various reasons! In 1796 Parliament at last required its legislation to be promulgated throughout the land.

After the great Reform Act of 1832 dissatisfaction grew and several Statute Law Commissions were appointed. The first, in 1835, criticised "the imperfections in the statute law" but nothing was done about it until the Statute Law Revision Acts were started in 1861. The Act of 1867 repealed 1,300 statutes. It was not until 1887 that it even became the regular practice to publish the annual volume of statutes.

As to drafting: in 1869 the Parliamentary Counsel Office was started, by the Treasury. The Home Office lawyer, Henry Thring, who later became a peer, was appointed with only one assistant. They drafted

most government legislation but practising barristers later drafted some statutes, notably Chalmers, the Sale of Goods Act 1893, and Chitty and Underhill, the Law of Property Acts in the early 1920s. Not until 1917 was a third Parliamentary Counsel appointed, and a fourth in 1930. Now there are 33 in Whitehall and 9 in Edinburgh.

In 1875 the House of Commons appointed a Select Committee to consider, "Whether any and what means can be adopted to improve the manner and language of current legislation". They thought things were improving with the appointment of the then small Parliamentary Counsel Office but criticised the habit of legislation by reference. They recommended that there should be explanatory memoranda; that model clauses might be prescribed for general use; and that there should be an Interpretation Act, which followed in 1889. Explanatory memoranda were eventually attached to Bills when first introduced to each House but not at later stages. Legislation by reference continued unabated.

Since 1946 the quantity of legislation has grown and grown: the number of statutes each session, and the length and detailed complexity of most of them have increased. In one full volume with 1,230 pages of modest size are the statutes of 1946 but in three volumes are those for 1993 with 2,667 much bigger pages, plus the table of contents of 66 pages.

In 1965 the two Law Commissions were started, to propose law reforms and "keep under review all the law with a view to its systematic development, including in particular codification, elimination of anomalies, repeals, reduction of the number of separate enactments - and the simplification and modernisation of the law". They have many achievements to their credit but it has been impossible for them to keep up with the ever increasing amount of Government legislation. In recent years, with Mr Justice Brooke as Chairman, the Commission has made real efforts to simplify drafting.

In November 1971 a House of Commons Select Committee on Procedure recommended that the Government should appoint a Committee to review the form, drafting, amendment and preparation of legislation, and in May 1973 the Committee on the Preparation of

Legislation was appointed with 14 members, of whom I had the honour to be made Chairman. It was of course the first inquiry of its kind for 100 years. The other members had a variety of valuable expertise and experience and included a former First Parliamentary Counsel in Whitehall and a former Chief Parliamentary Draftsman in Scotland. The then Chairman of the Law Commission for England and Wales was another, so was a Scottish Duke who was an early expert on the use of computers.

Our terms of reference were: "With a view to achieving greater simplicity and clarity in statute law, to review the form in which public bills are drafted".

We heard evidence from the most senior Judges on both sides of the Border, each of whom complained of the detailed complexity of statutes and said that the intention of Parliament should be made clear by stating the purpose of each statute or part of a statute, even when some detailed provisions are necessary, as in Finance Acts or when the rights and duties of people have to be spelt out.

After two years hard labour, we put forward 81 recommendations most of which involved making changes but only 40 of them have been wholly or mainly implemented.

Our most important proposals were:-

Recommendation (13) which says, "The use of statements of principle should be encouraged; where detailed guidance is called for, in addition, it should be given in schedules". And even more important is no.(15) which says, "Statements of Purpose should be used when they are the most convenient method of clarifying the scope and effect of legislation; when so used they should be contained in clauses and not in preambles ...". We added in recommendation (74): "Detailed financial provisions should be made easier to understand by broad statements of intention".

These recommendations were inspired by the evidence the senior Judges gave us. They have been largely ignored, although the present Lord Chancellor has sometimes introduced useful purpose clauses: eg. in the Children Act, 1989, and the Courts & Legal Services Act 1990.

Our ever-increasing volume of legislation contains a vast amount of detail, much of which cannot be avoided when people's rights and duties vis-a-vis the state are defined, as in legislation concerning the activities of statutory bodies, local authorities and companies. But such detailed provisions are generally better understood when accompanied by statements of purpose to make clear the intention of Parliament. Also, that would sometimes make it less necessary to include some of the details.

There is also a large amount of detail which is intended to cover hypothetical cases, which civil servants instructing the draftsman insist should be covered. Also MPs often ask Ministers piloting Bills what would happen in hypothetical circumstances which they describe, sometimes because constituents want to know. When dealing with such matters 30 years ago one used to say, "The principle is clearly stated and it will be for the Courts to decide whether your constituent's case comes within it or not". In those days one "got away with it" but Ministers now feel compelled to cover such hypothetical cases by amending the Bill at its next stage; and there is still a great reluctance to use statements of purpose. Peers too occasionally are hypothetically curious. The trouble about trying to cover every imaginable situation is that in practice we fail to anticipate some of those cases which actually occur and come before the Courts. So it really is essential for us to move from the particular to the general: from detail to principle. The great Sir Edward Coke said 400 years ago, "The lawmakers could not possibly set down all cases in express terms". But we go on trying to do it.

Our Committee also dealt with legislation by reference and recommended that previous statutes should be amended by the textual method as generously as possible. This has been done, and the preparation of Statutes in Force, Halsbury's Statutes and Consolidation Acts has become easier as a result.

Of course we considered in depth the eternal conflict between the public demand for clear and simple language and the need to achieve certainty of legal effect. We decided that the draftsman should not be required to sacrifice legal certainty for simplicity of language. Those who draft

our statutes have an exceedingly arduous and difficult task. They are highly skilled and well trained people who are obliged to follow the instructions given by departmental civil servants. They have to work under tremendous pressure of time. When things go wrong and obscurity or ambiguity results, the draftsmen are generally "more sinned against than sinning", and are mostly not to blame. But they do seem a bit obstinate sometimes in resisting good suggestions for improvement.

It is often possible to achieve legal certainty in simple language, and they do so increasingly in Australia, Canada and New Zealand, where our Report has received a much more favourable reception than it has had in Whitehall.

I am not being entirely frivolous when I remind you that Moses was an excellent draftsman. When he said, "Thou shall not steal", everyone knew what he meant. But we have the Theft Act, 1978, with 36 sections, which have given rise to many problems of interpretation, which have had to be considered many times by the Court of Appeal.

Since our Committee reported in 1975 our own legislation has increased enormously in volume, in detail and in complexity. So much so that even specialist professional advisers are sometimes perplexed by it: accountants in particular are worried by Finance Acts. The Hansard Society in 1991 decided to hold its own inquiry with Lord Rippon of Hexham, one of our Society's Vice-Presidents, as Chairman, assisted by 18 other distinguished people. They dealt at length with subordinate legislation as well as with statutes. Their many recommendations included some which went further than some of ours. Their recommendation (35) was especially valuable: "Some means should be found of informing the citizen, his lawyers and the courts of the intention underlying the words of a statute". Of course, my own view is that this would be best done by statements of purpose in the statute itself but they said it should be done by publishing notes, explaining the purpose and intended effect of each section and schedule. These notes would be laid before Parliament but would not require parliamentary approval. With deepest respect, may I say that I would rather have the intention of Parliament clearly declared in the Statute, instead of having to be explained afterwards.

However, I do strongly agree with their recommendation that the Parliamentary Counsel Office and its policy should be the responsibility of the Attorney-General instead of the Prime Minister. In Scotland the Parliamentary Draftsmen are the responsibility of the Lord Advocate, who is now always in the Lords, as recommended by our Committee. Scottish legislation (dare I say it?) is sometimes better drafted! Prime Ministers are much too busy with great affairs of state to argue much with the officials who advise them on these matters. Prime Ministers are too busy with great affairs of state to deal with drafting and massive legal problems. Prime Ministerial responsibility should pass to the Attorney-General. In theory each Minister is responsible for the drafting of the Bills he introduces but in practice no Minister has time to master the mass of detail which lengthy Bills contain.

In the House of Lords last year we appointed a Delegated Powers Scrutiny Committee: "To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of Parliamentary Scrutiny". We were worried about Henry VIII clauses, which gave Ministers power to amend statutes by subordinate legislation. I am glad to say that Lord Rippon became the first Chairman of it and that Lord Alexander of Weedon is now doing it. Their reports are proving extremely valuable in our scrutiny of Government legislation.

Judicial interpretation: I do not know to what extent it influences drafting but drafting greatly influences judicial interpretation of statutes. From earliest times Judges have found it difficult to interpret them, and most of the time of Appellate Judges is now taken up in doing so. Parliament has never required the Judges to do so in any particular way. The Interpretation Acts merely provide some definitions and minor assumptions. So the Judges have made their own well known rules of interpretation. The first was the Mischief Rule in 1584: to find out the intention of Parliament it was necessary to discover the mischief for which the Common Law did not provide and what was the remedy Parliament chose to cure it? That rule still applies when relevant. Later came the Golden Rule, which said that, if the whole statute leads to inconsistency, absurdity or inconvenience, the Court should give it another meaning that makes more sense. This caused problems and led

to the Literal Rule: if the words of the statute which apply to the case being tried are clear, they must be followed, however unjust the result. Then came "the Diplock principle," that the Court must give effect to what the words would mean to those whose conduct the statute regulates. But in the past 50 years the Judges have gradually adopted the Purpose Rule, and under it they try to discover what Parliament intended but it was subject to the Exclusionary Rule, which forbade Judges from considering "travaux préparatoires", including White Papers and Hansard reports. Although they could not be quoted in Court, there was nothing to prevent Lord Denning from reading himself to sleep with Hansard. He was one of the first to favour the Purpose Rule, which two years ago reached its climax in the case of *Pepper v. Hart* when six Law Lords outvoted the present Lord Chancellor in deciding that where legislation is ambiguous or obscure, or leads to uncertainty, the Court may try to discover the intention of Parliament by referring to the speeches of Ministers or others who piloted the Act in either House of Parliament. None of the Law Lords who decided that had ever had to pilot a Bill. If they had, they would have known that in doing so one often had to change one's mind on particular clauses, or even on a principle, in order to get the Bill passed. So Hansard inevitably contains contradictions or ambiguous statements by those responsible. How much better it would be to make the drafting clear, so as to avoid consulting Hansard! *Pepper v. Hart* causes the work of the courts and of barristers to be longer and more expensive, and will one day be superseded.

There is still a growing concern over the complexity of our statutes, especially those which affect the rights and duties of the citizens. Those statutes which dealt with constitutional matters in the distant past, and in the recent past were well drafted in broad terms and were expressed as matters of principle. They are well understood and have scarcely ever given rise to problems of interpretation.

What are we to do to persuade the powers that be to improve matters: the Government of the day, whatever its politics, the ladies and gentlemen in Whitehall, and Members of Parliament? Don't worry about the Lords! Ours is mainly a Revising Chamber and for some years we have found it necessary to make about 2,000 amendments a

session to Bills sent to us by the Commons, many of them made to improve the drafting.

Lest you think my approach has so far been too negative, I now venture to put forward some constructive proposals for improving our statute laws in future:-

- I. Governments should allow much more time for the preparation of major Bills, preferably two years, so that the draftsman is not rushed and so that there is enough time for thorough consultation with outside experts.
 - II. The Law Commission, which is making a great effort to simplify statute law, should be asked to consider many more of the Government's proposals to legislate and to publish a draft Bill on each one.
 - III. As we do not have a system of scrutiny of Bills by an independent body of experts, like they do in France with the *Conseil d'Etat*, it would here be a real advantage if the Law Commission were also to be asked to consider other Bills before they are published.
 - IV. Some matters should be excluded altogether from primary legislation:-
 - (i) Unenforceable provisions: including these results in enacting "a dead letter"
 - (ii) Matters relating solely to the internal administration of government, such as requiring departmental Ministers to consult the Treasury.
 - (iii) Directions for controlling the procedures of public bodies. These are best contained in secondary legislation.
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(iv) Although detailed provisions are necessary to define people's rights and duties in fiscal and some other legislation (and should often be preceded by statements of principle), attempts to cover separately every hypothetical circumstance should be avoided.

V. In recent years unavoidable details, instead of being written into a statute have sometimes been included in Codes of Practice (as in the Employment Act 1980 and the Police and Criminal Evidence Act 1986). This is justifiable when the Codes are approved by Parliament.

VI. The intention of Parliament should be expressed, making full use of statement of principle or of purpose; it must not be left to be inferred from a mass of detail. The EC requires the reasons for each legislative instrument to be expressed in its preamble, and that is helpful although we would put them in clauses.

One could put forward many more suggestions but in my opinion those I have mentioned would be the most helpful steps to take. Perhaps I should add that we should try to do more to "educate our masters", who are now the Members of the House of Commons. If they were prepared to trust the Courts, hypothetical details in legislation could be replaced by statements of principle. Our Parliament spends more time discussing legislation than any other Parliament in the world.

Legislation which cannot be understood even by experts, or which is of uncertain legal effect, brings the law into contempt and Parliament which makes it. This is a disservice to democracy. It blurs and weakens the rights of the individual. It eases the way for wrongdoers and places honest people at the mercy of the state. We must all try to do better.
