

Legislation as Aspiration: Statutory Expression of Policy Goals

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David Feldman

Rouse Ball Professor of English Law, University of Cambridge, and Fellow of Downing College, Cambridge

I. What does legislation do?

My purpose tonight is to consider several forms of non-law-bearing legislation, and their implications. We are used to thinking of legislation as a source of law, and as changing the law. Not all legislation does this. Consolidation legislation, for example, is not generally intended to do so (unlike codifying legislation). As lawyers, we also tend to think of legislation as aimed at judges. Indeed, when thinking about sources of law John Chipman Gray, the American realist, thought that no statutory provision was law until a court had decided how it was to apply in practice.¹ This view of law and legislation is related to that of Oliver Wendell Holmes that statements of law are predictions as to the way a court will decide a legal dispute.²

But most legislation is not aimed at judges, and does not invite judicial interpretation. Legislation which establishes institutions and confers functions on them, or regulates public programmes and services such as the National Health Service, is aimed in two directions: first, at the institutions themselves, those who have to set them up and those who will operate them; secondly, at departmental and organisational accounting officers, at the National Audit Office, the Comptroller and Auditor General, and the House of Commons Public Accounts Committee, providing statutory authority for a function to which public money may be appropriated. In this way, it provides a basis for financial accountability. If judges get involved, something has probably gone seriously awry. Judges are unlikely to be able to do anything to improve the position, and might make it worse.

Even if legislation is not always a source of law in the sense of law as applied in courts, one might expect it to be in some sense 'law-bearing'. That is, after all, the literal meaning of 'legislative': legislation carries law, even if it is not itself law. A legal norm may be part of a legal order even if not justiciable. Can we say, then, that legislation is normative, in that it imposes obligations on people or at least limits what they may do in pursuit of the functions conferred on them?

This is sometimes so, but increasingly often legislation is designed to have no such effect. For example, in the field of social security, primary legislation is mainly designed to confer very broad power on the Secretary of State to make subordinate legislation. It is recognised that some provision is required, but Parliament is not asked to spell out the details. The substance of the primary legislation consists first of the conferral of power, or sometimes obligation, to make

¹ J. C. Gray, *The Nature and Sources of the Law* (New York: Columbia University Press, 1909).

² O. W. Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457-478 at 457-8, 461.

subordinate legislation, secondly provision as to the legal force which such subordinate legislation is to have, and thirdly enumeration of material which the subordinate legislation must contain or the matters with which it must deal. Often, these matters are minimal, and are expressed in ways which seem calculated to leave a virtually unlimited discretion to the maker of individual decisions or subordinate legislation. This type of legislation not only creates great latitude in a delegated law-making power, but also gives scope for a variety of forms of subordinate legislation and ‘soft law’ to be employed to fill in the holes in the statutory scheme in a more or less, often much less, law-like way. One can find examples in relation to immigration, devolution, education, military law, prisons and health, as well as social security. Other examples include much of competition law, where there is heavy dependence on market regulators, the ‘best interests of the child’ in family law, and the ‘General Anti-Abuse Rule’, or GAAR, in tax law. I am not going to deal with this category of legislation this evening; it raises significant problems of its own in terms of the rule of law and the principle of legality.

I. Legislation which does not change law

Legislation which is non-law-bearing hovers on the boundary between law, politics and morality. In it, the legislation of the kind I am thinking about, the political class appropriates the formal authority of legislation to give special psychological gravitas to its political or moral commitments. There is no serious suggestion that the legislation gives rise to norms which can be enforced. Nevertheless, it is thought to be helpful to express political or moral commitments in the form of legislation.

I want to talk about four kinds of such legislation. I call call legislation ‘**promissory**’ where it reflects a political commitment, ‘**declaratory**’ when it purports to say what the law is (often to hide or suppress a serious disagreement on the matter), ‘**aspirational**’ where it embodies a hope, and ‘**statements of political support**’ when it merely emphasises that the political elite favours certain kinds of behaviour or a particular view on a contested issue. Some provisions, or groups of provisions, can perform two or more of these roles simultaneously.

In relation to the four types of provision which I am going to discuss, I can best explain the difference between them by providing some examples.

II. Declaratory and promissory legislation

Take first declaratory legislation. Sometimes it has no normative effect, but merely describes something to which a label attaches, such as a national flag.³ Even when it appears to have normative effect, as where a legislature is given power to legislate for the ‘peace, order and good government’ or ‘peace, welfare and good government’ of the people,⁴ the words have been held not to be words of limitation.⁵ If anything, they can be seen as hortatory words, expressions of

³ See e.g. Flags Act 1953, as amended by Flags Act 1998 (Commonwealth of Australia).

⁴ See e.g. New Zealand Constitution Act 1852, s. 53; Colonial Laws Validity Act 1865; Constitution Act 1867 (Canada), forming part of the British North America Act 1867 (UK); British Settlements Act 1887; Constitution Act 1900, ss. 51, 52 re the Commonwealth Parliament’s legislative powers (Australia), forming part of the Commonwealth of Australia Constitution Act 1900 (UK); South Africa Act 1909; Government of Ireland Act 1920; West Indies Act 1962.

⁵ *Union Steamship Co. of Australia Pty Ltd v. King* (1988) 166 CLR 1, High Court of Australia; *R. (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 62, [2009] AC 453, HL, at [50]-[51] *per* Lord Hoffmann, [108]-[109] *per* Lord Rodger of Earlsferry, [127]-[130] *per* Lord Carswell.

encouragement to work for the public good. But they are also in a government's self-interest, helping to legitimate executive and legislative activity through a solemn declaration of public spirit. Only rarely would a government publicly admit that it was acting without regard to the peace, welfare and good government of the governed population, and if it did so it would expect to lose power. It is significant that the UK's government, when it made this admission, was concerned with an overseas population (the Chagossians) which had no say in its ability to get re-elected; the government obviously felt that it was more important in those circumstances to stay on the right side of the US Government than to worry unduly about its responsibilities towards inhabitants of its dependent territory.

Declaratory legislation generally attempts to encapsulate in legislative form what is said to be already the law or, sometimes, the constitution. The legislation may be directed towards a contested point of law, seeking to resolve it in a particular direction, as in the European Union Act 2011, section 18: 'Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.' One may question whether an assertion of this kind can actually resolve the contest over the question, which depends (potentially) at least as much on EU law as on UK law.

Another example is the Jobseekers (Back to Work Schemes) Act 2013, retrospectively validating regulations which the Court of Appeal had held to be invalid, while the Government continued an appeal against the Court of Appeal's judgments. When the Supreme Court upheld the Court of Appeal's view of the validity of the regulations, the retrospective legislation gave rise to some interesting problems as to the appropriate remedy.⁶

Slightly different declaratory legislation appears in the form of 'for the avoidance of doubt' provisions. A Westlaw search on 8 June 2014 came up with 1,019 examples of 'avoidance of doubt' provisions in UK legislation. Repeating the search on 16 May 2015, the total was 1308. These are spread across many forms of legislation, including Acts of Parliament, Acts of the Scottish Parliament, statutory instruments, and Church of England measures. A typical example is section 29JA(2) of the Public Order Act 1986 (Protection of freedom of expression: sexual orientation), inserted by Marriage (Same Sex Couples) Act 2013, Sch. 7, para. 28: 'In this Part, for the avoidance of doubt, any discussion or criticism of marriage which concerns the sex of the parties to marriage shall not be taken of itself to be threatening or intended to stir up hatred.' It is not clear what change, if any, this could make to the law.

Another form of declaratory legislation arises from a genuine attempt to articulate in a formal way a political agreement which is regarded as particularly significant by all parties. The content is often designed to constrain the exercise of an unbounded discretion, either on the part of the executive or on the part of the legislature, but by way of declaration and promise rather than legal remedies. Frequently the reason for not attempting to put in place a legal obligation is that it would be inconsistent with the legislative sovereignty of Parliament to do so.

⁶ *R. (Reilly) v. Secretary of State for Work and Pensions* [2013] UKSC 68, [2014] AC 453, SC.

The English Parliament's Act of Union 1706 contained this kind of provision. In preparing the ground for the union of England with Scotland, the English Act entered two provisos which on any view are promissory rather than normative. Section 18 included this proviso: '...But that no alteration be made in Laws which concern private right Except for evident Utility of the Subjects within Scotland'. Section 25(5) provided that the provisions in the Act for preserving the Church of England and the Church of Scotland intact 'are hereby enacted and ordained to be and continue in all times coming the complete and intire Union of the two Kingdoms of England and Scotland'. None of this could bind anyone as a matter of law; it was a statutory encapsulation of a political agreement.

Why, one may ask, was it included? The answer, I think, lies in the psychological, rather than legal, effects of an Act of Parliament. Solemnly reciting the agreement and the hope for the future within a form of literature which has especially solemn, symbolic significance in the political as well as legal sphere was taken both of the seriousness with which the parties to the Treaty of Union regarded their agreement and of the weight which the parties attached to their commitments. Despite the absence of any legal effect, attempting to repeal or amend the (non-legal) provision would be regarded as seriously as—perhaps more seriously than—attempting to repeal a fully legal provision in a statute.

Another example of legislation encapsulating a political agreement is the Statute of Westminster 1931.

The Act, as its long title announced, was 'to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930'. The issue was whether the UK (Imperial) Parliament should continue to be sovereign over the locally elected legislatures in the Dominions (Canada, Australia, New Zealand, South Africa, the Irish Free State and Newfoundland) which formed part of the British Empire, so that the UK Parliament could enact any legislation it wanted in respect of any of the Dominions, and legislation of Dominion legislatures was liable to be held invalid insofar as it was repugnant to any provision in Imperial Acts of Parliament.

The preamble to the Act recited that 'it is in accordance with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any part of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion', and that 'it is necessary for the ratifying, confirming and establishing of certain of the said declarations and resolutions of the said Conferences that a law be made and enacted in due form by the Parliament of the United Kingdom', and that such a law had been requested and consented to by the various Dominions.

These preambular declarations are factual statements as to past and present events and states of affairs. As factual rather than normative statements, they do not rank as legislation (not even declaratory legislation). But when we turn to the body of the Act, we find the following provision in section 4: 'No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless

it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.⁷

The language is prescriptive and normative ('shall extend'), not predictive ('will extend'). It has, therefore, law-bearing power, and clearly changes the law, but of the Dominions, not of the United Kingdom. So far as the law of the United Kingdom is concerned, it cannot have law-changing status, since that would be contrary to the principle of the UK's constitution that one Parliament cannot, by legislation, legally bind its successors. As far as the UK is concerned, therefore, it can be regarded as adding a defeasible promise to a declaration as to the constitution; it is both declaratory and promissory.

Where the legislation is to take effect on a part of the United Kingdom, this way around the doctrine of parliamentary sovereignty is not available. Several pieces of legislation purport to take the apparently impossible step of limiting the power of the Queen in Parliament to make certain legislative provisions in the future. An example is section 1 of the Northern Ireland Act 1998, headed 'Status of Northern Ireland':

- (1) It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.
- (2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland.

If one carefully analyses these provisions, the apparent inconsistency with parliamentary sovereignty disappears. The first clause of subsection (1) is declaratory of a state of affairs; it is not really law-bearing at all. The next clause is an undertaking; in fact it reflects an undertaking consistently given to the Northern Ireland unionists since the Government of Ireland Act 1920. The language ('shall not cease') is prescriptive, although, being couched in the form of an intransitive verb with Northern Ireland as the subject of the verb, it leaves unspecified the people or institutions whom the commitment binds. Is it Her Majesty's Government of the United Kingdom, or Her Majesty's Government of Northern Ireland, or the Parliament of the United Kingdom?

Subsection (2), by contrast, is duty-bearing. The first (implied) duty is on HMG to negotiate with the Government of Ireland (not the people of Northern Ireland) in the event of a poll favouring merger of Northern Ireland with Ireland. The second (express) the duty is conditionally imposed on the Secretary of State, not on the Queen in Parliament, which remains free to accept or reject any bill. (In reality, of course, that freedom would be very limited, because, as when the Northern Ireland Bill in 1998 was introduced to Parliament to give effect to the Good Friday Agreement, the two Houses could not enact anything inconsistent with the Agreement without throwing the whole of the peace process into confusion. This was a cause of frequent complaints from MPs, not least those representing Northern Ireland constituencies, during the passage of the Bill. When a bill is drafted

⁷ Section 10 provided that sections 2, 3, 4, 5 and 6 should not apply to Australia, New Zealand or Newfoundland unless the Act were adopted by the Parliament of the Dominion concerned. Australia adopted the Act in 1942.

to give effect to an international treaty, concluded by Her Majesty's Government under the royal prerogative, the ability of Parliament to review the terms of the treaty is limited.⁸

As a final example of legislation which is declaratory and promissory rather than, or as well as, truly law-bearing, we can take the devolution settlement draft clauses recently published by the Government earlier this year to give effect to the undertakings given to voters in Scotland in the days before the referendum on Scottish independence in September 2014. The draft clauses would, if enacted, amend section 1 of the Scotland Act (establishing the Scottish Parliament) and section 44 of the Act (establishing the Scottish Ministers), and put a constitutional convention (the Sewel convention) on a statutory basis. These amendments to the 1998 Act would be a formal reflection of a multi-party commitment to upholding the centrality of Scottish Home Rule under the devolution settlement to the structure and constitution of the United Kingdom. To that end, draft new section 1(1A) would provide, 'A Scottish Parliament is recognised as a permanent part of the United Kingdom's constitutional arrangements', and section 44 would be amended to make a similar recognition of a Scottish Government. There has been some speculation as to whether these provisions would be attempting to tie the hands of the United Kingdom Parliament. The language does not expressly do so; it is neither prescriptive nor imperative in tone, and can be seen as being as being descriptive of a state of political affairs and prediction that that state of affairs will continue (like the non-legislative preamble to the Statute of Westminster 1931). It is not law-bearing in any way, but is politically important as a declaration in solemn form of a political accommodation.

Draft clause 2 is similarly non-prescriptive. Headed 'The Sewel Convention', it would insert a new subsection (8) in section 28 of the 1998 Act. That section currently preserves the power of the United Kingdom Parliament to legislate for Scotland. New subsection (8) would provide, 'But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.' In some ways, this echoes the sense of section 4 of the Statute of Westminster 1931, but (as already noted) the elegant way round the problem of parliamentary sovereignty adopted there, by severing the Dominions' legal orders from those of the United Kingdom, cannot work in relation to a constituent part of the United Kingdom. The drafter has therefore carefully ensured that the provision would have no legal effect. That has been done partly by using the predictive form of the main verb, 'will', rather than the imperative form, 'shall', and partly by qualifying it with the adverb 'normally', which is calculated to provide wriggle-room for all concerned.

Is all this legislation useless, then? In some way, the inclusion of the words in an Act of Parliament works magic at the level of political psychology. The important question in that realm is not 'Can this give rise to legal obligations?' but 'How far can we rely on other politicians to abide by the agreement?' The public, solemn incantation in the legislation would be accepted by politicians as reflecting a strong, and more than transitory, political obligation.

III. Aspirational legislation

Let us turn to aspirational legislation.

⁸ See now Constitutional Reform and Governance Act 2010, sections 20 to 25.

(a) Broadly phrased obligations: London Transport

Some legislation is clearly aspirational, being drawn too broadly to impose specific obligations. Take as an example the Transport (London) Act 1969, s. 1: ‘... it shall be the general duty of the Greater London Council ... to develop policies, and to encourage, organise and, where appropriate, carry out measures, which will promote the provision of integrated, efficient and economic transport facilities and services for Greater London’. This looked like a conferral of very broad power to be exercised as a democratically accountable body, with expert advice, saw fit. It was wholly unexpected and counter-productive when the House of Lords held, on an application by a Conservative-controlled London Borough Council, that the word ‘economic’ made it unlawful for the GLC to set fares for London Transport at a level below the cost of providing the service.⁹

The responsibility of the GLC has been superseded by that of the Mayor of London to ‘develop and implement policies for the promotion and encouragement of safe, integrated, efficient and economic transport facilities and services to, from and within Greater London’.¹⁰ It is a responsibility of Transport for London, a body corporate, to facilitate the discharge of those duties in accordance with guidance and directions issued to it by the Mayor of London.¹¹

Notwithstanding the House of Lords in *Bromley*, these are wish-lists. They do nothing to shape, much less dictate, policy, except by making it necessary to consider whether, at a high level of abstraction, what is being proposed is consistent with these high-level standards. They do not preclude anything, because views of what is safe, integrated, efficient and economic can differ widely.

(b) The short-lived Fiscal Responsibility Act 2010

A very different form of aspirational legislation was section 1 of the Fiscal Responsibility Act 2010, ‘An Act to make provision for and in connection with the imposition of duties for securing sound public finances’. Instead of using vague terms like ‘sound public finances’ and leaving it to successive governments to decide what that meant, section 1 laid a series of specific obligations on the Treasury: (a) to ‘ensure that, for each of the financial years ending in 2011 to 2016, public sector net borrowing expressed as a percentage of gross domestic product is less than it was for the preceding year’; (b) to ‘ensure that, for the financial year ending in 2014, public sector borrowing expressed as a percentage of gross domestic product is no more than half of what it was for the financial year ending in 2010’; (c) to ‘ensure that ... public sector net debt as at the end of the financial year ending in 2016 expressed as a percentage of gross domestic product (centred on 31 March 2016), is less than ... public sector net debt as at the end of the previous financial year expressed as a percentage of gross domestic product’.

Not surprisingly, this section was repealed the following year by the Budget Responsibility and National Audit Act 2011, s. 10. But what was its status while it was in force? Could this ever have been judicially enforced? Certainly not directly: s. 4(1) of the 2010 Act required progress reports and reports as to compliance to be laid before Parliament, and s. 4(2) provided that the reporting

⁹ *Bromley L.B.C. v. Greater London Council* [1983] 1 A.C. 768, HL; see also *R. v. Greater London Council, ex parte Bromley L.B.C.*, *The Times*, 27 March 1984; but compare *R. v. London Transport Executive, ex parte Greater London Council* [1983] Q.B. 484, CA.

¹⁰ Greater London Authority Act 1999, s. 141(1).

¹¹ *Ibid.*, s. 184(1), (2), (3).

requirement was the ‘only means of securing accountability’ in relation to the duties under section 1 or the reporting duties themselves. Would failing to comply with the duties under s. 1 mean that appropriations, spending or borrowing undertaken by the Treasury would be unlawful so that a person adversely affected by it could assert the unlawfulness in enforcement proceedings? No; section 4(3) made it clear that non-compliance with a duty under the Act ‘does not affect the lawfulness done, or omitted to be done, by any person’.

What, then, is the legal point of the Act? It did not affect the lawfulness of anything done or not done. Was it, in any sense, ‘legislation’? Only in the psychological sense; and the fact that the Coalition Government felt it necessary to legislate to repeal the 2010 Act shows that, while it remained in force (i.e. a formally valid Act of Parliament) it was felt to impose obligations and possibly to constrain the willingness of civil servants (who generally have a well developed sense of commitment to the principle of legality in their work) and Ministers to act inconsistently with it, even though the obligations were not in any substantial sense ‘legal’.

Even the Budgetary Responsibility and National Audit Act 2011, which replaced the 2010 Act, was not straightforwardly normative. Instead of leaving a complete absence of formal standards of budgetary responsibility, the Act created a new Office of Budgetary Responsibility. But it did not tell the Office what standards to apply. It left the Office to work out its own standards.

(c) Yes, repeat no: Climate Change Act 2008

A similarly hortatory or aspirational provision can be found in section 1 of the Climate Change Act 2008: ‘(1) It is the duty of the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 80% lower than the 1990 baseline. (2) “The 1990 baseline” means the aggregate amount of – (a) net UK emissions of carbon dioxide for that year, and (b) net UK emissions for each of the other targeted greenhouse gases for the year that is the base for that gas.’ It is clear, however, that the obligation of the Secretary of State is psychological only. There is no enforcement mechanism. Instead, the Act requires the Secretary of State to report annually to Parliament; accountability is to be political, not legal. It is unlikely that a mandatory order would be available in the event that the Secretary of State fails to lay a report before Parliament, as the courts do not make orders which intrude on the working of the two Houses (Bill of Rights 1688, Art. IX). To make the obligation even less obligatory, section 2 allows the Secretary of State by order to amend the percentage in section 1(1) and to change the baseline year, as long as the Secretary of State has first consulted the Committee on Climate Change and taken account of its view and of any other representations received (section 3). Section 1 is a flexible, not firm, aspiration.

IV. Statements of political support

(a) Not discouraging volunteering

There is another category of statutory provisions which seem designed simply to express the significance which politicians attach to existing law by pretending to change the law to bring it to the state it is already in. Where it is government policy to encourage people to volunteer for socially worthwhile activities, the government may introduce a Bill to Parliament to restate the existing state of the law under the guise of removing non-existent legal risks which are said to discourage volunteering. The law of tort boasts two such statutes, section 1 of the Compensation Act 2006, and the Social Action, Responsibility and Heroism Act 2015. All these provisions require courts, when

deciding whether a person has met a standard of care for the purpose of an action in negligence or breach of statutory duty, to have regard to whether the defendant was acting for the benefit of society, or volunteering, or acting heroically for someone else's benefit. Not only is that something that courts have always done;¹² it is also taken into account when deciding whether a duty of care is owed at all, in relation to the 'fair, just and reasonable to impose a duty of care' assessment. In the case of the Social Action, Responsibility and Heroism Act, it allowed the Liberal Democrats to put a tick by one of the contributions which they wanted to make to humanising the law. It is political rhetoric dressed in the clothes of statute.

(b) Disapproval of zero-hours contracts of employment

Another such provision, to which my colleague Professor Simon Deakin drew my attention, is clause 139 of the Small Business, Enterprise and Employment Bill now before Parliament, which Professor Deakin described as 'the strangest piece of labour law drafting I have ever seen...'. It provides first that people on zero-hours contracts of employment cannot be prevented by their employer from 'doing work or performing services under another contract or under any other arrangements' without the employer's consent. Under existing law, an employer has no such right, and any attempt to enforce such an obligation would be unlawful as a restraint of trade. Even more oddly, the legislation would empower the Secretary of State to make regulations to secure that zero-hours workers are not restricted from taking other work by any contractual provision *or non-contractual arrangement*.

V. Why and how does legislation produce these apparently strange effects?

The phenomena which I have outlined are easier to understand if we remember that the constitutional principle of parliamentary sovereignty merely provides that law contained in an Act of Parliament is the highest form of law (subject to EU law) in the UK. It does not provide that every provision in an Act of Parliament bears law. Some, perhaps many, statutory provisions are non-law-bearing. Nevertheless, these provisions have effects in the real world. How can that be? The important point to remember is that legislation achieves effects mainly by psychological means. To legislate is to assert a special type of authority. It is impersonal and institutional. It taps into a reservoir of respect for the legitimacy of the state and its institutions. It is most effective when not relying on coercive force to secure obedience; subjects' loyalty produces more reliable compliance than enforcement.

This type of claim to authority is reflected in the form in which legislation is promulgated. To produce psychological predisposition to compliance, the authoritative, impersonal language is important. In an Act of Parliament, the words 'Be it enacted...' are the legislator's equivalent of the magician's 'Abracadabra': it produces psychological magic, a psychological change which the words bring about on the minds of people on whom the legislation acts. When people are psychologically predisposed to treat such forms as generating a sense of obligation, legislation may have that effect even when it is not doing anything truly law-bearing. There can be a spill-over of apparent legitimacy from legislation which actually bears law to legislation which looks like something that might bear law but which actually does not. That can produce a psychological effect on the people

¹² See e.g. *Scout Association v. Barnes* [2010] EWCA Civ 1476 at [34].

or bodies at whom the legislation is aimed. This explains why it was necessary to repeal the Fiscal Responsibility Act, for example. It may have psychological significance which operates in the political and social worlds, not the legal world. This may go some way to explain most politicians' naïve yet endearing confidence that they can achieve anything by passing an Act of Parliament, ignoring the obvious social fact that there is a practical gap between ordering something to happen and its actually happening.

VI. Implications

This has a number of implications for lawyers and law-makers.

First, if the psychological effect of a provision in a statute may be significant even in the absence of any legal effect, lawyers reading legislation need to be alert to the possibility that provisions do not give rise to norms which are properly enforceable by legal means. If we miss the different significance of such provisions, we risk confusing political standards which happen to be enshrined in an Act with legal standards. The *Bromley* case is sufficient to establish this: by treating the word 'economic' in the 1969 Act as if it encapsulated a legal standard, the House of Lords embroiled itself in a political, not a legal, dispute. This could have been avoided had the lawyers recognised that not everything in an Act of Parliament is properly to be regarded as law-bearing. When drafters use broad, undefined adjectives like 'economic', or deploy descriptive rather than prescriptive language, or specify political modes of accountability, they signal that we should not assume that that particular provision is law-bearing.

Does this multi-faceted character of legislation, sometimes law-bearing, sometimes not, cause problems? Apart from the risk of mistaking non-law-bearing legislation for law-bearing legislation, I think that there is another danger of which law-makers should beware when tempted to use legislation to show that they are not simply ignoring a problem. This is the danger of debasing legislation's psychological currency.

One source of this risk is over-legislating, and occurs when provisions are included in statutes to provide social encouragement or discouragement of some conduct, but are put in a form which seems to require legal enforcement. Examples include a huge number of criminal offences and preventative schemes which are really saying no more than that people ought to treat each other less nastily. When I lecture on public order law, I tell students that there is currently virtually nothing that a person can do in public places, and in some private places, which does not make them liable to criminal prosecution or quasi-criminal preventative measures by officials. This is partly because of the sheer number of 'we must be seen to be doing something' provisions, and partly because such provisions tend to utilise open-texture language which makes it hard to predict what conduct will fall within it, or to rely on subjective standards such as 'likely to cause alarm or distress'. These are more or less norm-free provisions which none the less form the basis of intrusive and often severe sanctions or interference with people's lives. The effect is to provide very wide legal obligations and discretionary powers to courts, police officers and others.

A related source is the use of legislation to promulgate social information or exhortation instead of legal norms, using notions which give a warm feeling (such as motherhood, apple pie, economy, efficiency, integration, and so on) without offering practical guidance as to what one should actually do.

Such legislation tends to undermine the psychological commitment to law on the part of subjects. If we took these laws seriously, we should do nothing, so we continue more or less normal life in blissful ignorance of the law or hope never to have it enforced against us. Such legislation will eventually weaken the power of law to bind.

Recall that the way in which legislation works is primarily through its psychological effect on people. If people get used to the fact that much legislation is really no more than a largely unenforced but highly intrusive exhortation to behave less nastily, it may come to undermine the psychological effect of law, particularly criminal law, generally. If we are to preserve the usefulness of legislation, we need to ensure that we do not debase the currency.