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REFORMING STATUTORY DRAFTING

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This is not a sermon, but I have a text. Since it is not taken from the Bible, it must of course come from Shakespeare; and it does. It is Hamlet's remark about "the insolence of office and the law's delays". To some extent the law's delays are caused by inefficient communication between the legislature and the citizen. There are other factors which cause delay, but as I understand it we are not here concerned with those. It would be more than enough if in our deliberations here we together put forward realistic and constructive proposals for removing so much of the law's delays as are attributable to this inefficiency of communication.

In a democracy the process of legislation is designed to convey the people's will to the people. We presume that because a legislature is democratically elected its decisions reflect the opinions of the citizen. The task of the legislature is therefore to translate those opinions into law which will ensure that they are carried into effect. The function of law is to provide a *general* rule for *particular cases.* It is fundamental that, knowing the facts of a particular case, one should easily be able to discover the relevant general rule. In Britain, and in many democracies which derive their legislative modes from Britain, this is far from being so.

I have been explicitly asked, in the remarks I am making to this symposium, to be outspoken and to pull no punches. As your guest, I feel constrained to obey these instructions and I propose to do so. I have for some time been campaigning for improvements in the system of statute law. Mostly this

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campaigning has been carried out in Britain with the usual courtesies, which can mask or indeed obscure the realities of the situation. Today I propose to take the gloves off.

I speak to you as a draftsman of legislation, a process I have been involved in for some eighteen years. I must acknowledge, therefore, a sense of loyalty to my brethren toiling in the same vineyard. Hitherto this sense of loyalty has inhibited me (although not altogether) from expressing a deep disquiet about the attitudes and methods adopted by many of them. Today I have been elected to discard these inhibitions. I trust that my colleagues will accept, as is the case, that I do so solely from a pressing sense that we are not serving the community as we should.

There has just been published in Britain the Report of the House of Commons Select Committee on Procedure which has been examining the process of legislation.[1] I had the honour to be invited to give evidence to that Select Committee whose terms of reference were considered to be wide enough to embrace the subject of our discussion today. I shall refer to it in these remarks as the "1971 Select Committee". Here I might perhaps break off and say that I consider the subject of drafting and statutory interpretation as wide enough to cover almost every aspect of the process of legislation, which must surely be looked at as a whole. I do not think it is sensible to consider these matters in a narrow sense. We must surely have regard to the entire process, so far as it concerns the users or consumers of legislation - in other words the person who is supposed to conduct himself in accordance with statutory requirements.

[1] *Second Report* from the Select Committee on Procedure, London HMSO, 1971

One of the other witnesses before the 1971 Select Committee was Mr.Ian Percival, Q.C., M.P. He had some very pertinent remarks to make about the drafting process and the Parliamentary draftsmen. I would like to quote to you one of those remarks now, because it sets the tone for all I have to say:

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> One sometimes wishes that the Parliamentary draftsmen, who are of very high intellectual ability, were able to look at their product from the point of view of somebody of less intellectual ability. I know that it is very difficult for a concert pianist to play a piece badly, but one sometimes feels that if such a gentleman, for whose capabilities one has so much admiration, were able to play it down a little - to play it down to the consumer - that might help.

This is part of what I mean by the insolence of office. It is very easy for an official of high intellectual capability to say that a draft which is comprehensible to him must be acceptable, and that if ordinary mortals of lesser intellect do not share his ease of comprehension that is just too bad. This is to some extent the position we have reached in Britain and I have come across it in other countries across the Commonwealth, though not in Canada. It contravenes Montesquieu's principle that laws should not be subtle "for they are made for people of mediocre understanding; they are not an exercise in logic, but in the simple reasoning of the average man".[2]

Of course, being a draftsman myself, I shrink from imputing blame to fellow draftsmen. In many ways they do a magnificent job and certainly they are victims of their environment. They have to draft within the context of existing law, and in accordance with established rules and practices. This at any rate is true of all except the most senior members of any drafting office, who do have some scope for manoeuvre and the opportunity to promote reforms. I know that most draftsmen display a high degree of skill and conscientiousness; but I say regretfully to my colleagues that I am not really here today to defend them, because I think the position is too serious to be circumscribed by loyalties within a profession. An attack on drafting practices from a fellow draftsman might be listened to. I propose therefore to launch an attack, though it is limited to those draftsmen who are in a position of authority. First, however, itis necessary to embark on a historical excursion to explain

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how, in Britain at any rate, the present seriously defective situation arose.

Mr Gladstone's Hearthrug

In their standards of drafting and rules of interpretation, all countries which formed part of the British Empire must owe a great deal to the methods originally evolved in Britain. Most former colonies had applied to them the English statutes of general application which were in force at the date of assumption of British rule. There were also Imperial Acts of the Westminster Parliament applying directly, and Imperial Orders in Council, Letters Patent and other instruments. Moreover the Colonial Office frequently drafted ordinances intended to be passed by the local legislatures. Although these practices seem far distant today, we all know how tenacious custom and habit is with lawyers, and particularly the draftsmen of legislation.

We are accustomed today to an enormous output of legislation. It was not always so. Tudor statutes were so few that it was possible for the Monarch to do some at least of his own drafting. Henry VIII did this, which must have made commentators less ready to criticise the results than they are today. At the close of one Parliamentary session Queen Elizabeth I asked the Speaker what its members had passed. "An it please your Majesty", he replied, "We have passed two months and a half." Dissatisfaction with statute law in Britain mounted during the early years of the nineteenth century, and a body of Commissioners was set up to examine the position. Their report, published in 1835, was outspoken:

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[2] L'Esprit des Lois, xxxix, ch. 16. Cited ALLEN *Law in the Making* (7th edn.), p.483 (Oxford University Press, 1964)

> The imperfections in the statute law arising from mere generality, laxity or ambiguity of expression, are too numerous and too well-known to require particular specification. They are the natural results of negligent, desultory and inartificial legislation; the statutes have been framed extemporaneously, not as part of a system, but to answer particular exigencies as they occurred.

At this time every Government department employed its own draftsman and, in the words of Sir Carlton Allen, "the result

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was a great deal of overlapping and confusion".[3] Other legislative drafting was done by Chancery barristers in ordinary practice, as indeed it continued to be, though to a diminishing extent, for a further century or so.

The judges continued to be exasperated by the problems posed by inartistic wording. A typical outburst came in 1854 from Vice- Chancellor Kindersley:

> Now I have gone carefully through this Act of Parliament, and to say that it might have been made more clear and precise than it is, or even to say that there is at least one passage in it which is absolute nonsense, is only to say of this Act what I am afraid may be predicated of nine out of ten Acts of Parliament which come before courts of justice for consideration.[4]

To remedy matters the Statute Law Commission was established in 1868 and in the following year Robert Lowe, the Chancellor of the Exchequer, established the office which to this day has carried out almost all the drafting of Government legislation in England. Its full title is the Office of Parliamentary Counsel to H.M. Treasury. Mr. Lowe stated that

> it was his object to have a considerable drafting department and thus to train up young men in this *very peculiar branch of business*, so that wherever a vacancy occurred in the headship, or in one of the principal branches, we might have men to fill it up, because you know as a lawyer, *it is a peculiar duty and a man may be very well qualified as a lawyer, in many respects, who would not be fit for this kind of work unless he had been trained up to it.*[5]

More than one Head of the Parliamentary Counsel Office has endorsed this opinion. Sir William Graham-Harrison, in an unpublished monograph in 1931, stressed that "a man may be an admirable lawyer in many respects, but without any aptitude at all for this 'peculiar duty'". He went on to say:

Skill in advocacy and argument is one thing, drafting is quite another. A person may be so skilful an advocate

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> as to draw tears from a north country jury, or so attractive an exponent of a point of law as to keep all the members of the Court awake all the time, he may even be an acute critic of the drafting work of others, and nevertheless may know know more about the constructive side of drafting than David Balfour knew about womenkind or Lady Allardyce about sow- gelding; the comparison unfortunately stops here - Lady Allardyce was well aware of her inadequacy in the aforesaid art.

The first to be appointed to the newly created office of the Parliamentary Counsel was one of the most distinguished holders of that office, the man who subsequently became Lord Thring. He had direct access even to the Prime Minister, who apparently followed Henry VIII's practice of to some extent drafting his own statutes. In his book, *Practical Legislation*, Lord Thring describes how, when drafting Bills, he used

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[3] Ibid.
[4] *Trevillian v Exeter Corpn*., De G.M. & G. 828.
[5] *Report of the Select Committee of the House of Commons on Acts of Parliament,* 1971 (Q. 1454).

to go alone to 10 Downing Street and discuss the details with Mr.Gladstone in an atmosphere of somewhat alarming informality:

> I never hesitated to tell him my mind, "This will not do"; he would then stand up with his back to the fire and make me a little speech urging his view of the case; I then replied shortly till the point was settled. [...] He understood and revised every word of the Bill and even settled the marginal notes.[6]

Although the Parliamentary Counsel office has grown considerably in size since Mr.Gladstone's days, it has grown reluctantly. Until 1917 there were only two counsels. By 1932 there were only four, and outside members of the Chancery Bar were still occasionally employed on the old basis. Today the number of counsel is about 18, but this is still relatively small considering that the Office is responsible for the drafting of literally all Government Bills (except purely Scottish one) and has many other duties, including the preparation of the more important statutory instruments. It is probably true to say that the desire to keep the Office small has come more from within than outside. The intimacy of a small office, resembling a set of Chambers at the Bar, has been cherished from Lord Thring's day as facilitating consistency in drafting

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technique and an awareness by the head of the Office of all that is going on. The Office has now passed its centenary but the system established by Mr.Lowe in 1869 has never been reviewed or examined. There are many in Britain today who feel that the time is right for such examination. One after another, all our venerable institutions are coming under close scrutiny, and such scrutiny nearly always leads to comprehensive proposals for reform. The direct line of development from the days when Mr.Gladstone straddled the hearthrug at 10 Downing Street may well have exhausted its fruitfulness. Perhaps there is need for a new start, and a new approach envisaging that the product of the legislative machine should, like products of most other machines, be designed for the consumer.

Who is Master?

Humpty Dumpty said "When *I* use a word it means just what I choose it to mean - the question is who's to be master that's all." I am not suggesting that Parliamentary draftsmen usually take that line, but it is an important question to know who is master when it comes to Parliamentary drafting. To whom is the draftsman responsible? There are several possible answers. If, as is usual, he is a civil servant, the draftsman will in one sense be responsible to his civil service superiors and through them to the Minister responsible for justice. In another sense, since it is his function to translate into law the policies of the ruling party, he is responsible to the Government. Others would say, as did Sir David Renton in evidence to the 1971 Select Committee, that "it is Parliament itself which has to be concerned with the drafting of Bills".[7] Yet another possible view is that since it is the Courts which in the long run have to construe legislation, they should be regarded as the main legislative audience. Finally, there is the citizen himself, who is actually governed by these laws, and his professional advisers.

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Who is the master in practice? Mr.Ian Percival, whom I have quoted above, told the 1971 Select Committee that "there is very little, if any, direct Ministerial responsibility for the quality of the law.[8] In Britain, at any rate, we have reached the position where, while the Government is undoubtedly the master so far as concerns the substance and timing of Bills, the master in relation to drafting technique is the draftsman himself, or at any rate the Head of the drafting office. This is because the subject is (or has been made) so technical that no one who is not an experienced draftsman himself has the ability to dispute with

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[6] *Practical Legislation* (John Murray, 1902).
[7] 1971 *Select Committee Report*, Q. 236.
[8] *Ibid.*, Q.472.

the draftsman on points of technique or instruct him on the methods he must use. As I remarked in a recent book: "Statute law today is what Parliamentary counsel have made it. Its virtues and defects reflect their own, and their responsibility is correspondingly great."[9] There are many complaints about the quality of drafting but the complainants feel themselves impotent.

Complaints and Complainants

Governments usually do not complain about the quality of drafting because, in Britain at any rate, drafting is usually efficient in the sense of achieving the government's object. The draftsman regards it as his main job to get the government's business through. The main stress is on producing a Bill which will effectively achieve the policy result desired, and will be legally watertight and proof against evasion. Even a Minister who was a keen law reformer, Lord Chancellor Gardiner, was heard to say in Parliament during a debate on the Bill to set up a Land Commission: "I would be the last person to say that I understand the Bill." Ordinary back bench members of parliament frequently complain about bad drafting, but with little result. Other complainants are judges, professional practitioners and the man in the street himself. Indeed the Duke in *Othello* might have been referring

to the British Statute Book as it is today when he said to Brabantio:

> .... the bloody book of the law
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> You shall yourself read in the bitter letter...

The judges are particularly vitriolic. One said recently:

> To reach a conclusion on this matter has involved the Court in wading through a monstrous legislative morass, staggering from stone to stone and ignoring the marsh gas exhaling from the depths. I regarded it at one time as a slough of despond, through which the Court would never drag its feet; but I have, by leaping from tussock to tussock as best I might, eventually, pale and exhausted, reached the other side.[10]

The draftsman is the main target of criticism, as emphasised in the following gibe:

> I'm the Parliamentary draftsman,
> I compose the country's laws,
> And of half the litigation,
> I'm undoubtedly the cause.

In one case Lord Justice Scrutton said:

> I regret that I cannot order the costs to be paid by the draftsmen of the Rent Restriction Acts, and the members of the Legislature who passed them, who bear responsibility for the obscurity of the Acts.

The legal and other practitioners who have to apply statute law are loud in their complaints. A petition was recently sent to the appropriate Minister which read:

> We, the undersigned, being solicitors, accountants, architects and surveyors practising in the City of Birmingham and the Midlands area consider that the Land Commission Bill is too complex in its present form and as we find it impossible to advise our clients we ask that the Bill be deferred.

Naturally this plea fell on deaf ears. The Law Society, the professional body representing solicitors in England, recently complained that "A great deal of modern legislation is barely comprehensible even to a highly trained and experienced lawyer. We are sure that much can be done to remedy this

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[9] F. A. R. BENNION, *Tangling with the Law* (London, Chatto & Windus, 1970), p.9.
[10] *Davy v Leeds Corporation* [1964] 1 WLR 1218 at 1224.

by the improvement of drafting techniques..." [11] An eminent witness before the 1971 Select Committee, asked by the Chairman whether he considered "that the Bills which we turn out at present are sufficiently well drafted to make them intelligible to other than the members of the Bar", answered: "I think, on the whole, no, and sometimes not even to them." [12]

What are the errors in drafting of which people complain? It would be tedious to set out extended examples, but one or two brief instances might be given here. Circumlocution and involved, if not tortuous, expression is often complained of. Here is a brief example: By Section 139(2) of the Transport Act 1968 (an Act of the United Kingdom Parliament) a definition is given of the phrase "direct access" as used in the Act. The definition is:

> "Direct access" means access otherwise than by means of a highway which is not a special road and "indirect access" is access by means of such a highway as aforesaid.

The critic remarks with some justification that it is difficult to see why the definition was not worded:

> "Direct access" means access by means of a highway which is a special road, and "indirect access" means access by means of a highway which is not a special road.

From the Wills Act of the same year comes another example. The object was to enable a beneficiary who had witnessed a will to take under the will provided that there were two other witnesses who were not beneficiaries. The relevant section reads: "The attestation of a will by a person to whom [...] there is [...] made [any testamentary disposition] shall be disregarded if the will is duly executed without his attestation." A witness to the Committee on Statute Law Deficiencies set up by the Statute Law Society under the chairmanship of Sir Desmond Heap (which reported in 1970) complained that

> the use of the word "without" suggests that the attestation is not there, whereas the whole point of it is that it *is* there.

> Modern usage would call for "apart from", and if these words had been substituted for "without", it would not be necessary to read the Section several times in order to find out what it is trying to say. [13]

It may be of interest if, with due diffidence, I quote a further example nearer home. I have had occasion recently to consult an Ontario Statute, the *Securities Act* 1966. Section 19(1) begins "Subject to the regulations, registration is not required in respect of the following trades:" It then goes on to list eleven different transactions in the securities by reference to the types of person entering into the transaction. Subsection (2) makes the same kind of provisionn but this time by reference to the type of securities involved in the transaction. Then, quite unexpectedly, one finds that there is subsection (3) which ought, as I understand it, to have been included as one of the paragraphs in subsection (1). Its omission from subsection (1) forms a trap for the reader. Furthermore the wording of subsection (3) seems to me, with respect, to be defective in saying "...registration is not required in respect of a trade where the purchaser is a person, other than an individual, or company who purchases for investment only.." Does the reference to purchase "for investment only" apply only to companies or to all persons other than individuals?

Legislative drafting is full of infelicities like these, and not all of them are the fault of the draftsman. The reasons for them are examined later. Much more fundamental defects exist in our system of statute law. One of them, deriving from the ancient idea that the function of a statute is merely to modify the common law to remove comparatively minor blemishes, is the reluctance to lay down principles. The chairman of

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[11] 1971 *Select Committee Report,* p. 289.
[12] *Ibid.,* Q. 471.
[13] *Heap Report on Statute Law Deficiences* (printed on behalf of the Statute Law Society by Sweet & Maxwell Ltd., 1970), p. 35.

the English Law Commission, Mr.Justice Scarman, has complained about this and so too has Professor Gower, who said of the *Companies Act,* 1948:

> One of the reasons for the complication and difficulty of the English Act is its lack of completeness. No one by reading it could glean any real understanding of Company

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> Law. Nowhere are the fundamental principles enunciated. Exceptions are laid down to rules which are never stated and which have to be found from the study of the decided cases. The true position emerges, if at all, only when the Act is read against the background of a vast number of decisions, some of which are virtually irreconcilable. All this makes for complication and confusion, not for simplicity and certainty.[14]

I must confess that as a draftsman I have been guilty of the same error. Some years ago I drafted an Act amending in various respects the rule against perpetuities. I know that, by teachers of English Land Law, especially, this is regarded as one of the most incomprehensible statutes ever enacted. The reason is that my assignment was to modify a rule of the Common Law, not to codify it. A codifying statute, embodying the full rule against perpetuities as proposed to be amended, would have met Professor Gower's criticisms, but it would have taken very much longer to draft. Needed reforms might have been held up for years while agreement was secured on how to express in codified language a particularly difficult rule.

Of course there should be a great deal more codification, which is the process by which unenacted law and its statutory modification are combined together in a single Act. Even consolidation, in Britain at any rate, falls far behind what is required. All this calls for is the single combination of existing Acts on one subject into a single statute, but at the rate of progress we have seen in Britain during recent years it would take a further sixty years to consolidate the entire statute book, even disregarding new laws passed in that period. This despite the fact that when the Statute Law Committee was set up in 1868 it was required "to consider the steps necessary to bring the Statute Book up to date by consolidation, revision and otherwise...".

Even where the law is in consolidated form the work of the consolidator is, by the British method of amending statutes, speedily undone. As Mr.Justice Scarman has said:

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> Amending statutes are sometimes very short, sometimes long and complex. They are never capable of proper understanding, save in the context of the statutes they amend. They make intelligible law if drafted in a way which enables the amending section, or sections, to be substituted for the words whose place they take, or to be added in the appropriate place to the statute being amended. This process, which far too rarely used by Parliament, is known as textual amendment and must be increasingly used if we are to avoid chaos in the arrangement of statutes.[15]

I realise that most countries in the Commonwealth are more enlightened than Britain and do use the system of textual amendment to retain the law on one subject in consolidated form. Sooner or later we must fall into line over this but at present we seem immovably set in our ways. Consequently amending Acts stand independently, and while they repeal earlier provisions that are directly inconsistent, they do not fit into a pattern of enactments dealing with the subject in question. The technique resembles the playing of a hand of cards rather than the assembling of a jigsaw. The earlier Act is as it were "trumped" by the later, and the user is left to work out for himself the relationship between the two.

Another frequent complaint concerns legislation by reference, which to some extent is embraced by the system of amendment just described. It is not, however, limited to the case where an Act is being amended. A recent British example was to define "recognized stock exchange" as used in a taxing Act by reference to another Act which was not a taxing Act, and which was therefore unlikely to be in the possession of a

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[14] *Report of the Commission of Enquiry into Company Law of Ghana* (Accra, 1960)
[15] Sir Leslie SCARMAN, *Law Reform,* pp. 53-4

tax specialist. Legislation by reference cannot always be avoided, but clearly its use should be sparing. Not only does it make life difficult for the user of legislation but it has its pitfalls for the draftsman. There have been several recent instances where the legislation referred to in an Act or Statutory Instrument had already been repealed.[16] The matter

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was summed up by the 1875 Select Committee, whose words, after nearly a century, are still appallingly apt (at least in Britain):

> Among intentional imperfections [of drafting] we include one kind of referential legislation, viz. the method of legislating by means of a reference to parts of one or more Acts of Parliament, some of these repealed, some amended and others kept alive subject to the provisions contained in the amending Bill. This practice seems to be increasing, and when carried to excess makes the Statute so ambiguous, so obscure and so difficult of comprehension that the judges themselves can hardly find a meaning to it, and the great mass of people for whom, of course, it is primarily intended, are unable to follow it without legal advice. Such a mode of legislation has been described as a Chinese puzzle.

I appreciate that these remarks have little relevance to Canadian practice or the practice of other Commonwealth countries who have adopted a more enlightened approach than we in Britain. You, as I understand it, have adopted a system which was described by two distinguished comparative lawyers as follows:

> Where substantive enactments are drafted relating to specific matters upon which legislation already exists, it is the practice not to pile a new and independent Act indiscriminately upon the existing legislation, but to endeavour to integrate the new provisions with the old, either by amendment of the old Act or by the enactment of a completely new and comprehensive Statute, embodying the new and the old, and by the repeal of the existing Act.[17]

In Britain frequent complaints are also heard about the system of publication of statute law, where the authorities rely on commercial publishers to supply their deficiencies. The third annual Report of the Law Commission held the official edition of the Statutes to be "in a sad state", and observed that it was no longer obtainable in its entirety as one volume was out of print. "It is not too much to say that

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this official edition is now in disarray", the Report concluded. In Britain the official Statute Book comprises the edition of Statutes Revised, published in 1948, and the annual volumes containing the Acts passed in the ensuing twenty-three years. These are all bound volumes and can only be kept up to date by manual alterations. The process has been described in bitter terms by Mr.Justice Scarman, the head of the Law Commission:

> If you have the time, the staff and the patience, you may in theory keep this formidable quantity of published material up to date by buying annually from the Stationery Office a volume produced by the Statutory Publications Office and happily entitled "Annotations to Acts". Under the guidance and with the paper provided by that Office, you or your staff may insert into your collection of statutes, written amendments, text cancellations, and gummed slips of paper as additions to the text. The resultant mess has to be used to be believed. Up to 31st December 1965, 9,603 pages out of a total of 26,087 of the 32 volumes of the Statutes Revised had been cancelled, i.e. 36.8 per cent of the published material in those volumes. I have done a similar analysis of the twenty annual volumes from 1949 to 1965. Some 4,360 pages out of 21,250 of those volumes had been cancelled

[16] For examples, see *Heap Report*, p. 39.

[17] See paper by H. H. MARSHALL, C.M.G., and Norman S. Marsh, *Case Law, Codification and Statute Law Revision*, p. 32 (Presented at Third Commonwealth and Empire Law Conference, Sydney, 1965

> when I did my sums a few months ago, i.e. 20.5 per cent. The overall total of cancellations for the fifty-two volumes of our collected statutes in force is a figure of 29.6 per cent. The 70 per cent or so of pages which remain in force are, many of them, physically disfigured by amendments, annotation slips and erasures. This is a disgrace, which no amount of commercial compilations can cure. [18]

The fact that this system pays scant regard to the wishes of the user is illustrated by the fact that a questionnaire sent out by the HeapCommittee revealed that 57 per cent of those replying favoured a loose-leaf system with replacement pages issued as and when amendments were made; only 5 per cent favoured the present noting up system described by Sir Leslie Scarman. Plans are now afoot to publish a new official edition of the Statutes, but it is likely to be many years before it is available to the user in its entirety.

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So far in this summary of the complaints made against legislation, I have confined my remarks to Acts of Parliament, and public Acts at that. There are also vociferous complaints about the system of drafting and publishing subsidiary legislation and private Acts. It would lengthen this paper unduly if I were to embark in any detail upon these complaints, and I will not do so. I would stress nevertheless that this does not mean that I do not attach importance to them; indeed, in many ways the deficiencies in this field are even more disquieting. While subordinate legislation tends to be of less importance it can nevertheless be highly significant in individual cases, and it is if anything even less accessible and more obscure than statute law proper. Not infrequently there is interaction between the two, as where an Act of Parliament is stated to come into operation on a date specified by Ministerial Order. Sometimes different provisions of the same Act are brought into effect in this way on different dates, a practice of which the Law Society has remarked:

> It is hardly necessary to stress the problems which are caused for practitioners by a multitude of different commencement dates for different parts of statutes. The confusion which often results is amply attested by the continuous flow of enquiries [...] on whether various recently enacted statutory provisions are yet in operation. [19]

When I was drafting in Ghana I came across a Road Transport Licensing Ordinance which had been passed in 1946, some fifteen years earlier, and administered as if it were in force. In fact, however, it had never been in force because no one had remembered to make the necessary commencement order. In another similar case I had to unscramble the position by drafting a provision which you might be amused to read:

> 9. (1) In consequence of the provisions of this Act the following enactments are hereby repealed -
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> (a) the Excise (Amendment) Ordinance, 1957 (No.38) (which shall be deemed not to have amended the Excise Ordinance 1953 (No.31);

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> (b)the Excise (Amendment) Act, 1958 (No.5) (which shall be deemed never to have had any effect at all); and
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> (c)the Spirits (Distillation and Licensing) Act, 1959 (No.80) (which was never brought into operation).
>
> (2) The Excise (Spirits) Regulations, 1958 (L.N.13 of 1959) are hereby revoked and shall be deemed never to have been made.

It is all very well to be light-hearted but the position, in Britain at any rate, is grave. When the Law Commission was set up in England in 1965 the Government justified it by saying it was necessary to enable the law to be "recast in a form which is acceptable, intelligible and in accordance with modern

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[18] *Law Reform*, pp. 50-1.
[19] Cited *Heap Report*, p. 24.

needs".[20] Yet we find Sir David Renton, a former Home Office Minister, saying in 1971 that "never a month goes by without the Courts, when having to interpret laws, finding reasons to criticise them".[21] The 1971 Select Committee found that "there has been an increasing volume of criticism of the legislative work done by Parliament to the effect that many statutes are difficult to interpret, to comprehend and to apply in practice". [22]

The position is clearly a grave one. Indeed we are faced with the breakdown of a rule which is fundamental to the whole administration of our law. This is the principle *ignorantia juris neminem excusat* - ignorance of the law is no excuse. I know of at least one instance where the breakdown of this principle has been explicitly recognised in legislation. This is in an Act passed in the United Kingdom in 1967, the *Companies Act*, 1967, section 27 (3)(b). This provision requires a director of a company to notify the company of the occurrence of certain events connected with his holding of the company's shares. The obligation only arises, however, when the director becomes aware of the fact that the occurrence of the event in question gives rise to the obligation to notify. It seems therefore that if he remains in ignorance of the law he is immune from the obligation.

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It hardly needs saying that such a provision gives a positive encouragement to remain ignorant of the law, whereas the whole policy of the law demands the opposite.

The User and His Needs

We may accept it as a fiction that every citizen is supposed to know the law, while striving to make knowledge of legal rules as available to him as is practicable. This brings us to the question of who is to be regarded as the "user" of legislation. It is pointless to attempt to devise improvements in drafting technique unless we have clearly in mind the sort of person who will be making use of the legislative product.

The 1875 Select Committee, in the extract quoted above, indicated that in their view properly-drafted legislation should be capable of being understood by "the great mass of people", without recourse to legal advice. In his famous textbook, *Legislative Drafting and Forms*, Sir Alison Russell said that "the draftsman should bear in mind that his Act is supposed to be read and understood by the plain man". [23] Professor Driedger, on the other hand, says in his book, *Legislative Drafting*: "It must not be supposed [...] that Statutes can be written so that everyone can understand them [...] It is not the function of the legislative draftsmen to write treatises for the education of the uninformed." [24] Who is right? The clue is given in another remark by Professor Driedger:

> A reader who has no knowledge of the subject-matter of a statute cannot be expected to understand it; nor can a draftsman be expected to write it so that he will. Could a person who knows nothing about banking, bills, cheques, promissory notes understand the Bills of Exchange Act? Some statutes are, indeed, frightfully complicated, but it is not the draftsman who made them so. Laws must sometimes be enacted to deal with very complex situations, and obviously no one can understand the statute unless he understands those situations. The Income Tax Act, for

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[20] *Heap Report*, p. 12.
[21] 1971 *Select Committee Report*, Q. 241.
[22] *Ibid.*, p. vii.
[23] Sir Alison RUSSELL, *Legislative Drafting and Forms*, p. 13.
[24] *Legislative Drafting*, p. 295.

> example, is undoubtedly complicated, but the reason is that modern business methods are complicated. Most people cannot make any sense out of the provisions dealing with undistributed income of corporations, interlocking directorates, related companies and so on. Nor would the man in the street understand the financial statement of a modern railway company. [25]

My own conclusion is that there are very few statutes it would be safe to give to the man in the street and expect him to understand without professional help. In the main, the legislative audience is a professional one, consisting of experts in the field dealt with by the statute in question. In the case of administrative legislation the Act will principally be the concern of the civil servants or local government officials responsible for administering it. On the whole, judges and other lawyers will have relatively little to do with the working of this type of legislation while the general public will rely mainly on advertisements and leaflets summarising the effects of the legislation in simple language. Tax legislation is the concern of specialist lawyers and accountants. Planning legislation may be read largely by surveyors, planning consultants and architects. The legislative audience differs accordingto the nature of the legislation, but in the last resort it is of course the judges who must make the definitive interpretation of a doubtful statute.

What does the user, in this sense, want from the statute book? Ideally he would like a simple system to tell him where to find the law on any particular point, and that it should be comprehensively dealt with in that one place. While the Common Law system continues and until all our laws are reduced to written form, it is plainly not possible to realise this ideal for any point which is not exclusively dealt with by statute. Many points are, however, so dealt with, and yet we are manifestly far from this ideal.

For most people it is a matter of indifference whether the law on the particular point they are concerned with is

contained in an Act of Parliament, a Statutory Instrument, or a rule of Common Law. They just want to know what the law is, and where to find it. We might therefore state the ideal requirement in the form that all *written* law dealing with a particular point should be found in one place, and when found should be in its most up-to- date form. The enquirer may, of course, want to look at the law as it existed at some past time but this is one of the many problems which interfere with the realisation of the ideal and will be dealt with later in this paper.

Reasons for Deficiencies

There are many reasons why the user does not get what he wants. Some are inescapable features of the legislative process; others might with good will and effort be remedied.

I begin with the factors it is difficult to do much about, and foremost among these are the facts of political life. Where the provisions of any law have political significance, there is a likelihood that they will subjected to frequent change owing to changes in the political complexion of the Government. Under our present democratic system this invariably means that if there is a change of government after a General Election major legislation is required at very short notice. A new government comes into office with a mandate for carrying out certain policy measures. Almost invariably these require legislation for their implementation and no government is prepared to have its programme delayed, and its popular image thereby diminished, by a draftsman's insistence on being given sufficient time to do his work properly. And yet, as Professor Driedger has said in a passage I have frequently quoted: "There is for each Bill an irreducible period for preparation [...] as the time is cut down the quality deteriorates so that ultimately the point is reached where no Bill fit for introduction can be produced." [26] This problem is likely to grow worse. We have a political system which seems to involve the imposition of more and more

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[25] *The Composition of Legislation* (Queen's Printer, Ottawa, 1957), p. xxii.
[26] *The Composition of Legislation*, p. xvi.

regulations on the citizen, producing what Lord Justice Danckwerts recently described as "the over-governed State in which the citizens of this country live". Sir Noel Hutton who has recently retired after some thirteen years as Chief Parliamentary Draftsman in England, has accepted defeat on this point:

> In a more perfect world, draft Bills would be prepared at leisure and matured in bottle before introduction, but this ideal is not a practical one. Under any system of programming, the date of introduction will eventually become more important than the precise content of the Bill when introduced and the process of drafting will have to be continued after introduction by means of government amendments moved in Parliament. This is not the best method of constructing a Bill, and it adds fuel to the complaint that Parliament is given no sufficient chance to consider the legislation placed before it… [27]

Political factors do not end here. There have been many instances of the shape and content of a Bill being distorted purely for political motives. A classic example is the *Children Act* of 1908, which was put forward by the new Liberal Government as a "Children's Charter". The proper method of legislation would have been to deal with the various matters involved by amendment of the legislation relating to them - for example, the Acts governing the sale of intoxicating liquor, variation of trusts, criminal procedure and public health. Instead, the whole was dressed up as something it clearly was not: a comprehensive reform of the legal position of children. Another form of distortion dictated by political factors is the placing of the contents of a Bill in a smaller number of clauses than would be natural, simply in order to reduce the number of debates on "Clause stand part". The growing desire of back bench MPs to participate actively in the legislative process also complicates matters. In former days the ordinary back bencher wasoften content to be mere "lobby-fodder" and many did not open their mouths in the Chamber from one year's end to the next. All that has changed, so that attempts to reach compromises on the many disputed

points arising during the passage of a complex Bill add even further to its complexity. In England there has grown up a practice of having an annual Finance Bill, which when introduced contains many modifications of the law, but which has added to it, in the course of its progress through Parliament, a number of further modifications at the instance of back benchers to deal with what they regard as anomalies in the tax system. Such amendments, often put forward with the best of motives to provide, for example, a particular tax relief for persons suffering from a specific disability, in fact create anomalies of a different kind, since a special provision for a special case can only complicate the law. Private Members' Bills often deal in piecemeal fashion with a corpus of existing law and this can introduce complications, though the principle has now grown up that no Private Members' Bill reaches the Statute Book unless it has had the skilled attention of the arliamentary draftsmen. Moreover, on Government Bills back benchers often insist unreasonably on minute points of detail being expressly dealt with, thus adding further complications.

Finally, in this review of the political factors, we mention the occasional deliberate obscurity to paper over irreconcilable differences or unpalatable provisions. Craies comments in *Statute Law* on the "more or less intentional obscurities , perplexities, or imperfections, inserted or permitted with a view to facilitate the passage of a Bill through Parliament".[28] Sir Courtenay Ilbert, drafting early in this century, pointed out that,

> There are often good reasons, political or tactical, sometimes more easily appreciated by the politician than by the lawyer, but in many cases very sound and cogent, against the adoption of counsels of perfection urged, and properly urged, by the draftsmen from the legal point of view [...] whether the Minister who had to decide between the risk of losing his Bill and responsibility for

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[27] *The Law Society's Gazette,* June 1967, p.294.
[28] CRAIES, *Statute Law,* p.28 of the 7th edition (1971).

leaving the law obscure, adopted the right course is a nice question of political ethics.[29]

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It might be a nice question of political ethics, but no realist would suppose for a moment that a Minister would be prepared to lose his Bill on any grounds except political ones - and only where these were compelling. This highlights a central paradox: the true arbiters of legal content and change are not lawyers but politicians, whether they be Ministers or back benchers.

Another basic fact we have to live with is the inheritance from the past. Reformers in any country have to begin with the state of the law as they find it, and with the habits of mind of those responsible for producing and administering it. There is a great weight of inertia to be overcome, and a great body of existing law to contend with. It would not be physically possible to carry out major reforms, and transform systems, in less than a generation. The important thing is to make a start and make progress as vigorously as the practical situation situation permits. Even if a perfect system were devised there would still of course be occasional lapses by both draftsmen and those instructing them. Sir David Renton, in his evidence before the 1971 Select Committee, remarked that the draftsman had a difficult, sometimes almost impossible task, because of the complexity of the subject, "and his task is made more difficult by the instructions which he is given". Sir David acknowledged that the draftsmen frequently point out difficulties raised by their instructions, but in the last resort they are required to carry out what departmental officials,acting as conveyors of the Government's will, insist upon.[30] Lord Thring remarked:

> The sum of the whole matter is this, that to prepare a good Bill the draftsman must receive sufficient instructions but they will necessarity by short, and he must exercise a very large discretion in filling up the gaps.[31]

Finally, among the defects which it is difficult to remedy is the fact that a draftsman has to be a specialist, and needs many years of experience to perfect his art, so that he inevitably finds himself out of contact with ordinary legal practice.

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Mr.Ian Percival, in his evidence to the 1971 Select Committee, said on this point:

> Practice is a funny thing. You are either in practice or you are not. Even if you have been in practice for some years, I imagine that you have only to be out of practice for a year or two and you have lost the feel of it.[32]

Turning now to reasons for the deficiencies of statute law which *are* capable of remedy, I would put first the attitude of those responsible for the drafting of legislation. As indicated above, this means in effect those who are in charge of drafting officies. In England at any rate the chief Parliamentary draftsman, and other officials, such as those in the Lord Chancellor's Department, who have the real authority in these matters have resolutely refused to recognise that any problem exists. Or rather, it would be more accurate to say, that they have refused to recognise that for such problems as do exist there are any available remedies. Obviously this attitude must be changed, and I return to this later.

Within the field of drafting itself I would say that the main reasons why current methods do not measure up to present-day needs is simply that no attempt has been made by those in authority to promote the systematic study of the technique of drafting and the improvements in communication made possible by the computer and other technological developments. The problem of how best to communicate the legislative decisions of Parliament to the citizen of our "over-governed" society is one of immense complexity and

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[29] *Legislative Methods and Forms* (London, 1901), pp. 18, 22.
[30] Q. 233-400
[31] *Practical Legislation*, p. 8.
[32] Q. 489.

very great importance. One would expect it to be taken seriously but, in England at any rate, it is not. The research into new methods of search and retrieval of law by computer carried out by such pioneers as John F.Horty in Pittsburg and Colin Tapper and Bryan Niblett in England are regarded, so far as I can discover, with complete lack of interest by the English authorities. Happily this is not so everywhere in the United Kingdom. Mr.W.A.Leitch, until recently Chief Parliamentary Draftsman in Northern Ireland, is an enthusiastic supporter of the use of computers in relation to statute law, following

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his attendance at the conference in Kingston, Ontario, in June 1968, about which he wrote a most illuminating article published in the *Northern Ireland Law Quarterly* in the following year.

Allied to the subject of computer-application in typesetting of Bills and statutes and in search and retrieval techniques, is the development of aid to comprehension of statutes by the use of such methods as algorithms and flow-charts. A great deal of work has been done on this in the University of Kent at Canterbury by Professor Fitzgerald and Dr.Pratt.[33] This, too, has been coolly received by officialdom.

Also blameworthy has been the attitude of university law departments to the subject of statute law. Professor G.W.Paton was an early exception to this when he remarked over twenty years ago that "not enough emphasis is placed on the technique of drafting statutes" and "only the fullest knowledge of the technique of drafting and interpreting statutes will succeed in retaining some consistency in English law as a whole".[34] There is no university, so far as I am aware, in the United Kingdom which has a full scale course in statute law. The nearest approaches on this are the course on "Legislation" started at Edinburgh University in 1969 and the course on "Juristic Technique" started at Queen's University of Belfast in 1965. Training courses for Commonwealth Legal Draftsmen from outside the United Kingdom were started by the British Government in London in 1964, and I believe still continue. Paradoxically there is not, and never has been, any system of training English draftsmen themselves. The 1971 Select Committee expressed surprise at this and recommended that the adoption of a training scheme should be considered.[35] It is difficult, however, to devise a satisfactory training scheme in the absence of the formulation of drafting techniques, which, as mentioned above, has never yet been attempted on an official basis, and is long overdue.

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Another reason for statute law deficiencies is the shortage of skilled draftsmen. Partly, this has been the result of a deliberate policy, as explained above.[36] The Parliamentary Counsel Office is a branch of the Treasury, and the usual reluctance of the Treasury to allow expenditure on manpower has also been a factor in keeping the complement of draftsmen small and their pay and conditions of service insufficiently attractive (though still better than those of the ordinary legal civil servant). There is urgent need for recruitment and training of additional draftsmen and others concerned with producing legislation. A school of legislative drafting should be established, perhaps attached to one of the universities or the Treasury Centre for Administrative Studies. Private practitioners at the Bar should be encouraged to take these courses and to regard legislative drafting as part of their practice. This would have immense value, because many barristers are reluctant to become civil servants but would be perfectly prepared to include this work among their practice at the Bar. Other sources of manpower (particularly for ancillary services) are university law departments and law publishers, both of which would be willing to cooperate on work of such importance and value to them. One incidental disadvantage of the shortage of draftsmen is that the existing draftsmen are kept so much at full stretch by the demands of current legislation that they often lack

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[33] See, e.g., *Rule Drafting,* in *New Law Journal* (London), 13 Nov. 1969.
[34] *A Text-book of Jurisprudence* (2nd edn.), p. 195
[35] P. xxvii.
[36] See p. 120.

the opportunities of keeping in touch with development in legal thought and of meeting and discussing with teachers and writers of law, and indeed practitioners themselves.

I have suggested above a serious and detailed enquiry into drafting techniques, in which draftsmen themselves should play a leading part. Such an enquiry would attempt, among other things, to get to the root of such perennial complaints as those against legislation by reference and over-complexity. The latter is due in part to the reluctance of draftsmen, which has increased over the years, to leave possible cases unprovided for. Drafting can be shortened by leaving the Courts to fill in detail. Admittedly there are some

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disastrous precedents for this. Among the best known are the attempts to make the original *Workmen's Compensation Act* intelligible to workmen by allowing compensation for injuries "arising out of and in the course of the employment". This was thought by the politicians of the day to be a masterly example of the use of plain English addressed to the plain man. In fact no one could be certain what the words meant until the Courts, in literally thousands of cases, had worked out the details. Another well-known instance was the use of the word "special" in relation to convictions for driving offences. Persons convicted were to be disqualified from driving in the absence of "special" reasons. Parliament vouchsafed no indication of what it meant by this, and again much litigation was required before the position became tolerably clear.

Where such gaps are left to the Courts to fill in, uncertainty is introduced into the law, which can only be resolved in a haphazard fashion by the chances of litigation. Less uncertain is the avoidance of complexity by leaving wide areas of discretion to administrative officials. There is considerable reluctance to leave too much to the discretion of officials, but in the case of administrative legislation, there comes a point where the official must be allowed to apply his own judgment to the facts of the case he is dealing with. There is a limit beyond which the legislature cannot, in practice, assert its will. It is a question of great importance where this line is to be drawn. As Sir Courtenay Ilbert said: "Englishmen prefer to be governed (if they must be governed) by fixed rules rather than by official discretion." On the other hand, the same author said: "We know that enacted law is most useful if confined to the statement of general principles, and that the more it descends into detail, the more likely it is to commit blunders, to hamper action, and to cramp development." [37] It is certainly true that administrative and financial legislation could be greatly simplified if more discretion were left to the official. The reason for not doing this may, of course, lie with the officials themselves, who are not always anxious to administer

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an act so flexible that it leaves great scope for criticism of official decisions. Or it may be considered desirable to put matters beyond argument and beyond petition by closing the door against the possibility of certain decisions. All this shows the need for painstaking and detailed research into the principles of drafting, so that consistency on matters of this kind may be achieved on lines which provide the most satisfactory practicable results.

Any major alteration to drafting techniques would need to have regard to the attitude of the Courts. If, for example, it were desired in a country using the British system to move over to the continental system of drafting this could hardly be done without some specfic instruction to the Courts as to their approach and interpretation of the new-style provisions. As Mr.Justice Scarman remarked:

> ...The draftsman is not to be blamed if the results of his labour are sometimes unintelligible. Quite apart from the complexity of the subject matter that besets him [...] he acts only on instructions. If neither Parliament nor the society which it represents has formulated any consistent policy as to what it wants from the statute book, and if - as must reluctantly be conceded - drafting statutes has become largely an attempt to restrain these "hydra-headed presumptions of the courts in favour of

[37] *Legislative Mthods and Forms*, pp. 209, 125.

> the Common Law", piecemeal, ill adjusted, and at times unintelligible legislation is bound to be the result.[38]

Another thing that might well need drastic alteration is the procedure of Parliament. This is something which it is notoriously difficult to achieve. It is an aspect of the paradox that laws are made by laymen that those laymen (i.e. members of Parliament) need a system which ensures that they are fully informed of the meaning and effect of Bills placed before them for their consideration. This has led to the prectice of trying to combine in one document information needed to inform members of Parliament of the effect of its provisions and other material which is to form part of the permanent law. The concept has been that there must be a single document (a Bill) which is in itself efficient to achieve both purposes. As Sir Noel Hutton has said:

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> The same document has to be designed to satisfy two distinct legislative audiences, first (in point of time) the Parliamentary audience, mainly composed of laymen, whose primary need is to ascertain, with the minimum of labour and preferably no reference to any document other than the Bill itself, what is the general purpose and effect of each clause or section which they are asked to pass; andsecondly, the expert lawyers and other professionals who will seek to find in the Act as passed a specific answer to each specific question upon which they have to advise of decide. [39]

This recalls Lord Thring's celebrated remark that a Bill is made to pass as a razor is made to sell. We in England have never been able to get away from the idea that the language which is destined to form part of the law of the land must also be framed so as to be comprehensible and palatable to laymen in Parliament. This is an inherent contradiction; indeed, an absurdity, from which flows many of our troubles. I would venture to suggest that it should be a prime axiom of legislation that, unless there are overriding reasons to the contrary, language which is destined to form part of the law should be framed solely with that in view. In other words, it should be worded in the most effective way possible to secure that it fits properly into the statute book. If, as may well be the case, that makes it incomprehensible to laymen in Parliament the obvious answer is to provide them with a commentary in the form of an explanatory memorandum. If this requires modification of Parliamentary rules, this should be effected. Moreover the rules of procedure should not be regarded as sacrosanct, if, as may well be the case, they stand in the way of an efficient statute book. The system by which amendments are made, and the virtual impossibility of taking back and redrawing a Bill which has been heavily amended without the new version having to run the entire gauntlet of Parliamentary proceedings over again, may well need modification.

Other factors which may cause defective legislation are inadequate consultation with those likely to be affected by the legislation or having knowledge of its subject-matter, and

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inadequate opportunities in Parliament itself for proper consideration and debate. Very often these deficiencies are unavoidable for the kind of political reasons discussed above.

In the long run the most effective bar to reform is the draftsman himself, if he chooses (as he often does) to occupy that role. For some reason the rarefied atmosphere of a drafting office seems to breed (at least in England) defects which militate against reform.

The first defect is complacency. There has been almost total unwillingness to admit, in the face of mounting criticism, that there is anything seriously wrong with the system that has been in use for over a century. The nearest approach to any admission of this kind that I have been able to trace is in an article written by Sir Noel Hutton in 1967 which he concludes with the following words:

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[38] *Law Reform*, p. 51.
[39] *Modern Law review*, Jan. 1961, p. 21.

> ...it could well be that after almost a hundred years we have become too set in our ways. But we suspect that if Acts of Parliament are to become simple and easy, it is the objectives of legislation and the whole of the legislative process, and not merely the techniques of the draftsman which will require an overhaul. [40]

This complacent attitude is illustrated by the fact that the need to reduce the drafting process to an ordered system, and to train draftsmen in a thorough and scientific, rather than haphazard, manner has never been recognised.

Next comes the refusal to accept responsibility for matters which properly lie within the province of the draftsman. In his 1967 article Sir Noel Hutton said that accusations that legislation is marred by government haste "do not concern the draftsman". [41] Similarly, in his evidence before the 1971 Select Committee, the present head of the drafting office, Sir John Fiennes, said that, apart from trying to secure consistency, the question of whether matters of detail should be contained in schedules to an Act or in subordinate legislation,

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he did not see as primarily the concern of the draftsman. [42] My own view is that everything that concerns the well-being of the statute book as an instrument of legal administration should be the concern of the draftsman. I would allot him the role of keeper of the statute book, simply because his knowledge and experience makes him more fitted for that role than any other person could be. If this view of a draftsman's function had been accepted there would have been no need to set up the paraphernalia of Law Commissions.

My next criticism concerns the contempt of these gentlemen for reformers, and their impatience with well-meant, if occasionally half-baked suggestions. In an attempt to collect together and give coherent effect to the continuous stream of complaints from the users, the Statute Law Society was formed in 1968 with the main object of furthering the making of improvements in the form and manner in which statutes and delegated legislation are expressed and published with a view to making them more readily intelligible. The Council of the Society includes a number of eminent people such as Lord Shawcross, Lord Stow Hill, Lord Grimston, Sir Desmond Heap, Sir John Mellor and Sir Edgar Unsworth. Indeed the Society is widely representative of professional users, including accountants, surveyors, tax consultants and other users as well as lawyers. In 1968 the Council of the Statute Law Society appointed a Committee under the Chairmanship of Sir Desmond Heap to examine the ways in which the official system of framing, enacting and publishing statute laws of the United Kingdom Parliament failed to meet the requirements of the users. Their report was published in 1970, having been produced with the usual difficulties found by any committee composed of busy people trying to fit its work into their very limited spare time. The Report of the Heap Committee purported to be more than a collecting together of criticisms of different types, it being expressly stated that another Committee would be set up to examine the justification or otherwise for these criticisms and make

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recommendations for reform. The Heap Committee was received by Sir John Fiennes at least with undisguised scorn. He ignored most of the points it had to make, and enjoyed himself picking holes in it. A similar fate is befalling the successor Committee, chaired by Lord Stow Hill, which submitted a draft report to the 1971 Select Committee. Sir John Fiennes was asked by the Select Committee to include in his memorandum to the Committee his observations onthe Heap and Stow Hill Reports. Despite the length of the two reports, and the detailed and carefully argued constructive suggestions in the Stow Hill Report, Sir John confined his observations to six brief paragraphs, together with a commentary on the Stow Hill

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[40] *The Law Society's Gazette,* June 1967, p. 295.
[41] Ibid., p. 294.
[42] P. 323.

Committee's model Bill (included in their Report to illustrate the proposed system of textual amendment). To say that these six paragraphs are hostile is an understatement. Their tone is markedly different from that of the rest of Sir John's memorandum and indeed is markedly different from the tone of any other submission included in the voluminous report of the Select Committee. The compilers of the reports are accused of being inaccurate and tendentious in their use of the term "referential amendments". This is further said to be "likely to be misleading as putting a false meaning on what is said elsewhere". Sir John further complains that the Heap Committee "misuse" Craies on *Statute Law* in a way which "is not untypical of their Report". When Sir John came to be examined by the Select Committee the Chairman had the following interchange with Sir John:

> I noted with interest and some amusement your observations on the Heap and Stow Hill Reports? - My rather partial observations, partial in two senses. [43]

This is indeed an extraordinary admission of prejudice on the part of an official whose function it is to serve the public. Unhappily, this arrogance runs through all Sir John's evidence, reaching its culmination in the following interchange with the Chairman, which occurred after a discussion on the suggestion (in fact baseless) by Sir John that it was not possible to have

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more than one sentence within a single subection or other subdivision of a statute:

> Really, therefore, there is nothing to be done about it? - I do not believe that there is an answer to this. And Bills will remain incomprehensible? - May I have leave not to answer that question
>
> Really, therefore,

The Statute law user would suffer with resignation deficiencies which he felt were unavoidable. Where, as I have suggested at some length in the preceding passages, there are many deficiencies which are avoidable he may be expected to seek to reform them. To have attempts, however clumsy, met with scorn and arrogance, rather than with sympathy and understanding, from those responsible is likely to lead him to exert such pressure as in the end will be irresistable.

Proposals for Reform

Many of the needed reforms are apparent from the previous section of this paper and I do not want to be repetitive. Some matters are of such importance, however, that they will bear further examination. I am looking for radical solutions and not mere tinkering.

The first consideration is how to secure better drafting. A start could be made by adopting the basic axiom already referred to, namely, that words in a Bill which are intended to form part of the statute book should be worded solely from this point of view, so that, for example, rules of Parliamentary procedure requiring extraneous matter such as expenditure clauses to be inserted should be changed. So also should the practice of placing explanatory words in parentheses for the information of Members of Parliament. Explanations required by Members of Parliament should be given in the form of a separate memorandum.

Again, much more use could be made of what might be called prefabricated law. By this, common-form provisions are embodied in an Interpretation Act and do not have to be restated each time they are needed. The English *Interpretation*

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Act was passed in 1889 and is hopelessly out of date and inadequate. This lengthens the task of the draftsman, who has to devise (although with the aid of precedents) provisions which are frequently needed

[43] Q. 1034

and could be dealt with once for all in an Interpretation Act. Thus we find endless variations on the same theme (for example, Powers of Entry or Procedure for the Service of Notices) instead of a single uniform provision applying in all cases. Coupled with this would be needed a willingness on the part of departmental officials to accept common-form provisions rather than introducing minute variations as refinements for each particular Bill.

The question of simplifying the language used, and reducing the amount of referential legislation, leads us into deep waters. Here I can only reiterate my suggestion for carrying out a thorough and comprehensive examination of drafting techniques on scientific lines. Even without this, however, it would I think be possible to render statutes easier of comprehension by adopting a narrative style and dropping the habit of using excessively long sentences rather than permitting a single section or subsection to be composed as a piece of ordinary English would, as a succession of sentences. [44]

Another suggestion for improving drafting technique which might be adopted immediately, though perhaps at the cost of some delay in legislation, is for the vetting of the draftsman's language by parliamentarians and practitioners before it is finally enacted. Lord O'Hagan suggested in 1877 that a department to supervise Bills should be established, and in recent times Lord MacDermott, the Chief Justice of Northern Ireland, has proposed that Bills should be scrutinised in draft by a team of "clause-tasters" who would be without any prior knowledge of the draftsman's instructions. Similarly, Mr. Justice Scarman has suggested the creation of a Department of Justice which would examine the legal quality of Bills at their formative stage — that is before their introduction to Parliament. Other countries such as Sweden have adopted systems whereby judges or special Ministers peruse the legislation in draft.

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These ideas were taken up by witnesses before the 1971 Select Committee. Sir David Renton had this to say:

> In my experience, it has often been the case that however much trouble is taken by lawyers, experts and Ministers before Bills are presented to Parliament for First Reading, it is not until inexpert laymen have had an opportunity of scrutinising those Bills that some of their defects are revealed [...] even when [Parliamentary draftsmen] use their skill and are given opportunities to do so to the fullest extent, and given plenty of time, I think that they would be the first to agree that when a Bill first sees the light of day their work is not perfect. That leads to the importance of laymen having the opportunity to scrutinise it. It is most extraordinary thing that I have sometimes found the most unexpected people, who would not claim anything in the way of legal learning, perhaps almost by misreading a clause, pointing to a weakness in it.[45]

Mr. Ian Percival said that he wished that we could try in Britain the exercise which was carried out in many other countries, particularly Germany, of submitting a draft of a statute to a committee of lawyers for purely technical vetting before it is presented. He added: "It is no business of theirs to comment on the policy, but it is their job to go through it and say either 'what does this mean?' or 'this could mean one of three things', and so on." [46]

Improvements in drafting technique would be of limited effect while the main corpus of statute law remains in an unsatisfactory state. For this reason the Statute Law Society is urging the adopting of a "crash" programme of consolidation. This would be designed to produce the result that the entire statute law (excluding the relatively few provisions which are incapable of consolidation) would be contained in Principal Acts each dealing comprehensively with one major topic. Initially it would be necessary to draw up a scheme for the operation of this programme. This might contain the following particulars:

> (a) A list of titles of future consolidating Acts indicating which existing Acts would be included in the title.

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[44] See 1971 Select Committee Report, Q. 1007-1010, 1129.
[45] Q. 234, 239.
[46] Q. 472.

(b) A time table which would indicate the priorities for consolidation and the period within which each stage and ultimately the whole exercise might be expected to be accomplished.

(c) An indication of manpower and other requirements with suggestions as to how these might be met.

(d) An estimate of the financial implications, that is the direct costs and the expected savings which might result from the greater efficiency of a fully consolidated statute book.

Having reduced the statute book to a fully consolidated state, it would of course be necessary to maintain it in that condition by the use of the textual amendment system, so that amendments to the statute law on a particular topic were slotted in to the existing principal Act. Where an Act became heavily amended it might be necessary to revise it completely, but apart from this the system I have described produces what has aptly been called "perpetual consolidation".

The Statute Law Society considers that, while there may be difficulties in securing the adoption of this system in Britain, these can with good will and determination be overcome. Amending Bills would need to be accompanied by full memoranda explaining the effects of the proposed textual amendments. Armed with these, there is no reason why members of parliament should not find it just as easy to handle amending Bills drafted in this way as Bills using the more usual (in Britain) system of referential amendments.

Other objections are that the new system would lengthen the time needed for preparation of Bills. This could only be avoided by recruitment of a large number of additional draftsmen, who are simply not available. The method of dealing with this by the recruitment and training of draftsmen has been dealt with above.

A further difficulty with the system of having a principal Act which is constantly being modified by amendments is that, whereas this may be perfectly suitable for the person who needs to know the current state of the law, it can pose difficulties where the law at some past date needs to be

consulted. My own answer to this problem, which I have introduced in drafting Jamaica Tax Laws, is to embody as part of the principal Act a permanent schedule which records the commencement date of the Act, and of its various provisions (including those added by amendment), contains any transitional provisions included in the amending Act, and also embodies repeals. By this system, every time a provision of the principal Act is amended there would be a corresponding amendment of the schedule. All that a reader who was concerned with the state of the law at any past date would need to do therefore is to look in the schedule to see what it says about the provisions in which he is interested. The schedule would be in two parts, the first containing general provisions (such as the commencement date for the whole of the principal Act as originally enacted), while the second dealt section by section with special provisions applicable only to portions of the principal Act. The great advantage of this system is that it enables the substantive law to be kept in a "clean" state, without being cluttered up by temporary provisions. It also ensures that the principal Act is fully comprehensive: under the present practice in many countries the reader, while having a principal Act which is kept up to date, often has to look also at the amending Act if he is concerned with commencement or transitional problems.

Finally it is necessary to consider reforms in the system of publication of Acts. My own view is that the user is best served by a loose-leaf system. I introduced such a system in Ghana, both for Acts of Parliament and Legislative Instruments, and it has I believe worked very successfully. Whenever an Act is amended replacement pages are issued by the Government printer for insertion in the binders. It is important to ensure that there is a proper system of checking so that the user can be quite certain, by reference to an authoritative key, that his loose-leaf volumes are fully up to date and complete. Ultimately I would like to see the Statutory Instruments or at least those of a legislative and semi-permanent nature, included in the same binder as the Act under which they were made. This would give the user what he really wants, that is all the law on the topic in the

same place. I realise, however, that there are many practical difficulties in the way of carrying reform to these lengths, however desirable. Coupled with the production of such a loose-leaf system would be the development of the sort of technological aids to search, retrieval and comprehension I have discussed above. In the future I am sure the practitioner will have at his disposal modern tools of this kind, the value of which seems so obvious that it is remarkable that it is regarded with such indifference by official sources in Britain. The method would be to put the text of statutes, regulations and other relevant material on magnetic or paper tapes, first converting it to computer-readable form. This is fed into the computer which stores the information in a way which enables searches to be carried out on particular points. Thereafter a request made through a terminal placed in a law office or library will cause the computer to operate so as to print from the terminal the legal text required by the person making the search. This saves manual researching through many volumes and avoids the chance of accidental omissions. Searches can be facilitated by lists of key words in their context, grammatical variant of given words, and vocabularies. Magnetic tape embodying the legal texts can also be used for typesetting, and can for a suitable royalty be made available to commercial publishers and others seeking to produce printed editions of the statute law. This would have the immense advantage that the commercial editions would be using the official text, thus obviating errors.

Also of great value are suitable alternatives to the verbal formulation of legal rules. Hitherto the practice in statutes has always been to express every rule, however complex, in grammatical English. Thus in Acts dealing with taxation or valuation, where arithmetical or even algebraic forms of expression might be more readily comprehensible, the legal principles are spelt out in ordinary language. This perhaps reflects the rule, discussed above, that everyone is presumed to know the law: it is obvious that not everyone knows algebra.

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INTERPRETATION.

I have concentrated in this paper rather more on drafting than interpretation, perhaps because if the drafting is right the problems of interpretation are diminished or even eradicated. I do not propose to add to the length of this paper by embarking on a separate disquisition about interpretation. The matter has recently received detailed attention from the Law Commission who have made a number of interesting suggestions while not seeking radical alterations. Their main conclusions are as follows:

> (a) to clarify, and in some respects to relax the strictness of, the rules which in the determination by our Courts of the proper context of a provision, exclude altogether or exclude when the meaning is otherwise ambiguous, certain material from consideration;
>
> (b) to emphasise the importance in the interpretation of a provision of the general legislative purpose (or "mischief")underlying it;
>
> (c) to provide assistance to the Courts in ascertaining whether a provision is or is not intended to give a remedy in damages to a person who suffers loss as a result of a breach of an obligation created by that provision; and
>
> (d) to encourage the preparation in selected cases of explanatory material for use by the court, which may elucidate the contextual assumptions on which legislation has been passed. [47]

The Law Commission contemplated that these recommendations would require legislation. On the whole they have been coolly received. Many lawyers particularly dislike the idea that the Courts should be allowed to supplement the text of an Act of Parliament by reference to extraneous material. The main reason for this opposition is practical: it would greatly enlarge the field of research when any point of difficulty had to be resolved, and (the ordinary practitioner feels) would increase the burdens he already finds nearly intolerable.

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[47] The Interpretation of Statutes, London, HMSO, 1969.

CONCLUSION.

Jeremy Bentham was one of the many who have been irritated by the fact that the law was not only irrational but to a large extent unknowable. In his view a complete explicit body of laws, if well imagined and expressed, was the greatest blessing any country could possess. These words illustrate that we are not here today concerned, as some might think, with a dry and technical subject, but with a matter of vital importance to every citizen.

If this is true, it leads irresistibly to the conclusion that governments should devote far more attention and allot far more money, to the improvement of statute law. In this there is clearly much scope for co-operation within the Commonwealth. We share the same problems and we ought to share in devising solutions to them. I realise that in much of what I have said I have concentrated on the situation in Britain, which I know best, and many of the reforms needed there have already been carried out elsewhere. In such matters I can only plead with my more advanced colleagues for their help and sympathy in the resolution of the problems we face in Britain.

9th Int Symp on Comparative Law, U of Ottawa Press 1971 115