Plain Law

[Portion of projected book]

by Francis Bennion

Author's Note

This is a personal book, because it is about a struggle I have waged. Most people find the subject unenticing, yet for all of us it is important. Democracy works through statute law, but it cannot work if statute law is obscure.

The reader is entitled to know on what experience this work is based. At Oxford University I learned nothing about statutes - saving only some excellent lectures by C. H. S. Fifoot on statutory interpretation. I also remember being struck by remarks of Professor G. W. Paton[1] which remain valid:

> 'There is still a tendency in English legal education to treat statute law too lightly .... not enough emphasis is placed on the technique of "drafting statutes and the problems of their interpretation ... It is a delicate task to work out a new balance between common law and statute and only the fullest knowledge of the technique of the drafting and interpretation of statutes will succeed in retaining some consistency in English law as a whole.'

On coming down from Oxford I gained experience of statute law while working with Butterworths for a year writing editorial notes for *Halsbury's Statutes of England*. Later (in 1953) I joined the Westminster Parliamentary Counsel Office. Since 1869 this Office has drafted almost all public Acts passed by the Westminster Parliament, and I felt some awe at being numbered among those whose words have formed British statute law for over a century.

Shortly after I arrived in the Office, Sir John Rowlatt (son of the High Court judge) became First Parliamentary Counsel. I was privileged to work with him, and found it inspiring. He was generous to my youthful enthusiasm and welcomed ideas. Despite his senior position we were on the same wavelength. Unhappily, he died on Westminster underground station in 1956 of a heart attack. Few deaths have moved me as much.

Just before his death Rowlatt sent me on secondment to Karachi. The Pakistan government had asked for help in drafting their first constitution. I worked with Mr. Justice Abdul Hamid, a doughty Pathan renowned throughout West Pakistan for his integrity. In 1959 I went on two years' secondment to Ghana, then newly independent. One of my tasks was to draft the constitution turning Ghana into a republic. I remember that the instructions for this consisted of notes scrawled by Kwame Nkrumah in green ink on one side of a sheet of paper. So many new laws were drafted at this period that I thought it only fair to provide the Ghanaians with some explanation of them, which I did.[2] Among my activities in Ghana was the devising and execution of a new system of publishing primary and subordinate legislation. This involved my reading the entire statute book so as to divide powers to make statutory instruments into two categories: legislative and executive.[3] Under the new system statutes and legislative instruments were published in separate loose-leaf series, in place of the previous Colonial system using bound volumes.[4]

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[1] G. W. Paton: *A Text-book of Jurisprudence* (2nd edn.) p. 194-5.
[2] F. A. R. Bennion, *The Constitutional Law of Ghana* (Butterworths 1962).
[3] Described in *The Constitutional Law of Ghana*, pp.265-269.
[4] See *ibid*, pp. 293-297.

Apart from these spells abroad, I worked until 1965 in the Parliamentary Counsel Office in London, mainly as an assistant to a senior draftsman.[5] During this period I lectured in legislation at the Treasury Centre for Administrative Studies (now the Civil Service College), where one of my students was a bright young principal named Peter Jay. I also helped to prepare, and lectured at, the first courses held for Commonwealth legislative draftsmen at Marlborough House.

Normally draftsmen remain in the Parliamentary Counsel Office throughout their career, officially retiring at sixty but usually remaining, on an unestablished basis, for some years after that. I resigned in 1965, at the age of 42. There are many reasons for such a move. Prominent among mine was a frustrated sense that we were not serving the community as we should. The work was arduous, the hours were long, devotion to duty was absolute. A high-class product was turned out, but was it the right product? I felt it was not. The PCO was geared to implementing the legislative programme of the Government of the day. It did this effectively, producing laws that technically achieved their purpose. But, with the ever-growing volume of post-war social legislation, the state of the statute book was becoming chaotic. Mounting complaints were heard from practitioners; the ordinary citizen was nowhere.

I found myself in fundamental disagreement with those in charge of the PCO. Clearly there was need for major reforms in the way statute law was produced, published and amended. My superiors appeared to see no such need. I could not face the prospect of spending the rest of my working life wrestling with an archaic, chaotic statute book and adding my contribution to the confusion. I took the job of Secretary to the Royal Institution of Chartered Surveyors, who appointed me in the hope that I could do something to ease the task of practitioners in coping with legislation. There is a dining club of secretaries of professional institutions. I quickly learned that dissatisfaction with statute law was widespread among their members.

It seemed that an active campaign for reform was needed. The complaints were sporadic; they needed to be orchestrated in order to be effective. Inept remedies were proposed because few practitioners had detailed knowledge of the intricacies of producing legislation. Only a draftsman who had worked on the inside could really be expected to frame practicable remedies, I began to make plans.

One day in 1967 I invited John Robins, a solicitor who had been a close friend of mine since Oxford days, to dinner at the Oxford and Cambridge University Club. I unfolded to him my scheme for a reform campaign. An organisation of statute users, to be called the Statute Law Society, would be set up. It would in succession appoint two committees. The first, a large committee of statute users, would collect all the grievances about the statute book and publish a report. The second, a small and expert committee, would work out remedies for the grievances and publish another report. Finally a Government inquiry would be instituted. All this came to pass. Frank Layfield, Q.C. (now Sir Frank Layfield) became the first chairman of the Statute law Society and nursed it along with quiet skill. Sir Desmond Heap (later President of the Law Society) chaired the first of its committees and Lord Stow Hill (formerly Sir Frank Soskice) the second. I acted as vice-chairman of the Stow Hill Committee. Finally, the high-powered Committee was appointed by the Lord President of the Council in May 1973. It included Mr. Justice Cooke, chairman of the Law Commission, the present C1erk of the Parliaments (Sir Peter Henderson), a duke, a baroness and six QCs. There was one practising solicitor but no one from the other professions, the universities or (ominously) the commercial publishers. I believe the appointment of this committee owes much to the interest taken by the then Prime Minister, Mr. Edward Heath, with whom I had a long interview on the subject when he was Leader of the Opposition.

[5] The Office operates what the Americans call the buddy system, under which draftsmen work in pairs. In this way the junior learns his trade on the job - a process which takes around ten years.

I gave written and oral evidence to the Renton Committee, which accepted one of my two main proposals, on the need for textual amendment, but rejected the other. This was that an official body should be set up whose only function was to be keeper of the statute book. I remain convinced that without such a body we shall never have satisfactory statute law. This is a big subject, vital to the citizen. We have learnt by now that a big subject does not prosper unless those in charge of it are single-minded.

The Statute Law Society set up a computer committee, of which I was the first chairman. The committee included pioneers whose work on computers and law had led the way. Norman Atkinson, Richard Morgan, Brian Niblett, Colin Tapper and others. It achieved useful results, but in time we realised that the study of computer potential needs to be carried out in the context of the whole of law - case law as well as statute law. This led to the setting up of the Society for Computers and Law.

My drafting career was resumed in 1969, when I took up private practice as a legislative draftsman. One of my clients was the Government of Jamaica, for whom I drafted a series of tax statutes. During this period I served on the official committee which devised the system of titles used for the new edition of the United Kingdom statute book entitled *Statutes in Force*. I spent the year 1972 consolidating the Housing Acts for the Law Commission. It was a year completely wasted. The responsible department, the Department of the Environment, found they had no one spare to check and process the draft Bill resulting from my labours (consisting of 314 printed pages). The Bill was scrapped, and the Housing Acts had to wait some years more for consolidation.[6]

I was then invited to rejoin the Parliamentary Council Office but left again in 1976. I then devised the system of composite restatement I have explained elsewhere and in 1976 produced the four-volume looseleaf book *Consumer Credit Control* applying the system to an Act I had drafted, the Consumer Credit Act 1974.

In the Parliamentary Counsel Office I was able to carry out an experiment where for the first time in Britain a computer was used in the drafting of legislation.

[6] The remedy I proposed to the Renton Committee for avoiding a repetition of this kind of occurrence was ignored.

INTRODUCTION

England and the countries which adopted the common law system first developed by English courts have a similar legislative pattern. Legislation supplements and adjusts common law rules: it seldom entirely replaces them. It consists of primary legislation enacted by a legislature and subordinate legislation made by ministers under powers contained in primary legislation. During the twentieth century the sphere of statute law greatly widened, and it now regulates most areas of life. Government policy is implemented through the medium of legislation, since in no other way can the necessary powers of compulsion be secured.

Legislative drafting in common law countries is contrasted with that found in the continent of Europe. As Professor Paton put it:

> In England statutes are a gloss written around the common law, and hence we can regard the common law as primary except in so far as it is specifically altered by legislation. On the Continent the influence of the work of Justinian led lawyers to regard enacted law as the primary type, and today of course the real foundation of the law of Western Europe is the codes. Hence the continental statutes are more broadly drafted and more sympathetically applied.[7]

The difference between drafting in common law and continental countries is more than a difference in styles. Common-law drafting goes into minute detail; conventional continental drafting contents itself with broad principles which the courts fill out in applying them. This difference has two important consequences. First, in the common law countries it is the legislator who determines precisely how the law applies in particular cases; on the continent it is the judge. Second, those affected by common-law drafting can find out from the beginning exactly where they stand: on the continent they have to wait and see. The way a broad principle applies to a factual situation is often difficult to determine in advance. One judge may take one view; a different judge may take another. Since the doctrine of precedent has little application on the continent the position is scarcely more clear even where there have been previous decided cases on the point in question.

These two differences show the superiority of common-law drafting. In a democracy it is right that the elected legislator and not the appointed judge should determine not only the principle to be applied but also its detailed application to particular cases. In a closely-governed society it is right that people should know where they stand legally *before* they arrange their affairs, and not have to wait until a judge pronounces on them in subsequent litigation. Opponents of common-law drafting argue that these advantages are theoretical and unreal.

Our legislature do not draft their own laws. They are drafted by government officials acting (or deemed to be acting) on the instructions of ministers. It is untrue that the citizen can discover his position in advance. Copious detail on complex subjects makes statute law difficult if not impossible to decipher. There is force in these criticisms.

The mass of modem legislation threatens to clog the parliamentary machine. Elected members lack time to scrutinize all aspects of primary legislation. Subordinate legislation escapes them almost entirely, despite the power of parliament to annul statutory instruments. Even in the rare case where an affirmative vote is required to give force to an instrument there is usually but a brief debate, with no power to amend any provision which members dislike. Nevertheless democratic control is a reality. Primary legislation passes through several parliamentary stages, at each of which debate is possible. There are many opportunities for scrutiny, not only by members of parliament themselves but also by their constituents. Interests affected by proposed legislation lobby members to seek clarification or alteration of the proposals. Usually these interests have been consulted by the government department responsible for the proposals before drafting began.

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[7] *op. cit.,* p. 190.

Nor is debate, lobbying and consultation confined to broad principles; on the contrary the settling of minute detail often takes up much time. Clearly the system is far more democratic than leaving it to the judges would be. Furthermore judges can deal only with points that happen to be litigated (and the costs and uncertainties of litigation make it very unpopular). Even when litigation begins it is usually settled without any judgment being pronounced. Where there is a judgment it may be unsatisfactory, and again the aggrieved party may decline the burden of taking it to appeal. Only a House of Lords, or since 2010 Supreme Court, judgment is a final precedent (and nowadays even these decisions can be departed from in rare cases). Few litigants have the resources required for taking a case to the topmost court.

The gravamen of the case against common-law drafting lies then in the second complaint: obscurity. It is a valid complaint, and in Britain little has been done to meet it. The nature and volume of our statute law has been transformed in modern times, yet a hundred years were allowed to pass (from 1875 to 1975) without any systematic attempt being made to overhaul our system. When it was made the results were disappointing.

There are several causes of obscurity. Where common-law rules have been supplemented by statute there may be difficulty in reconciling broad principles derived from case law with the minutiae of legislation.[8] Codification is the answer to this, but since the great work of Chalmers in codifying commercial law towards the end of the nineteenth century little progress has been made with this difficult operation.

This book is mainly concerned with the problem of obscurity *within* statute law, whether primary or subordinate. Indeed, statute law on one topic needs to be considered as a whole even though some parts are enacted by the legislature itself and others by ministers. Factors which contribute to obscurity include the following.

1. Statutes and statutory instruments are published in different series and not adequately updated.
2. Consolidation of statutes dealing with one topic is not carried out often enough. The same applies to statutory instruments.
3. The present British statute book consists of many Acts which have been amended by a defective method. Instead of direct, textual amendment, they have been subjected to indirect or referential amendment. (This does not apply to Commonwealth countries.)
4. Compression of language, distortion of structure and lack of signposting are caused by parliamentary factors, mainly shortages of debating time, the rules of parliamentary procedure governing the form of Bills, and political obstacles to acceptance of a measure.
5. The historical system used for our statute law is inadequate, so that there is undue difficulty in discovering the *history* of a particular provision (the date, and by what, it was enacted; the date it came into force; the date, and by what, it was amended or repealed).

These deficiencies make things difficult for the drafter as well, so reducing the quality of new legislation. Nevertheless the actual standard of drafting in Britain is high, and there is probably little that can be done to improve it (apart from insistence on direct textual amendment).

Those who rightly seek reforms to reduce the obscurity of statute law have hitherto directed their attention to the wrong remedy. For this they are scarcely to blame, for it is the obvious remedy. If Acts of Parliament are obscure it seems right to attempt to simplify them. In general this is mistaken, though it is a mistake I took years of practice to perceive myself. The truth is that not very much can be done to improve the drafting of a modern Act of

[8] Company Law is a good example.

Parliament. The obscurities flow from the very nature of a legislative instrument in today's complex conditions. It is rarely complete in itself, and cannot be. It amends existing law. It requires to be filled out by subordinate legislation (or is itself subordinate legislation, requiring reference to the parent Act for full comprehension). An Act starts as a Bill, and is amended piecemeal during its parliamentary progress. It is inescapably affected by parliamentary rules and pressures. What then is the answer?

In my submission the answer is *a further process*. Under the system now prevailing in common-law countries this further process has to be carried out by each individual user of the legislation. Where one enactment has indirectly amended another, each individual user must work out for himself (perhaps with help from textbooks) what the combined effect is. Where the original enactment has been affected, as so often happens, by a long succession of indirect amendments, each individual user must puzzle out the result. Where the law is partly in one or more Acts and partly in statutory instruments, the individual user must keep a finger in each volume (if he has enough fingers). Where one provision applies another provision to a fresh situation with specified modifications, the individual user must make his own synthesis. Where statutory language is highly compressed in lengthy sentences, the individual user must spot for himself where one grammatical clause ends and another begins. Where an Act contains defined terms, the individual user must remember for himself what they are as he reads the Act. And so on.

Now it is clearly a waste of effort for each individual user to have to do all this and more. Furthermore it is likely to lead to mistakes where people lack the time or the ability (or both) needed to master such abstruse intellectual problems. The answer is clear. Some competent agency should carry out this further process and publish the result for the benefit of individual users generally. Of course it could not remove *all* difficulty from the task of consulting statute law. Close regulation of complex matters can never be made altogether simple. But it could take some of the work from the shoulders of individual users. It could obviate some of the errors. It could improve the presentation and coherence of our statute law. The method by which this further process could be carried out I call composite restatement. It is discussed above. I believe it works, and that together with the general use of direct or textual amendment it could make a major contribution to resolving the problem of statute law obscurity.

Since 1966 I have waged a personal campaign for improvements in the method of drafting and publishing statute law. Some details of this campaign are given above. Others include evidence I gave to a House of Commons select committee in 1971 and my evidence to the Renton Committee on the preparation of legislation in 1973-4. They also include material on the use of computers in the legislative field, and illustrations of the drafting difficulties involved in having a legislature largely composed of non-lawyers and entirely composed of people who are not professional draftsmen.

I am constantly aware that, while statutory obscurity is a major obstacle to the efficient running of a democratic state, tackling it presents almost insuperable difficulties. The subject is technical, and for most people uninteresting. It is, they feel, the content of the law that matters, and not the technique of its exposition. Even the few who are interested find difficulty in arriving at the true nature of the problem and understanding why one remedy is preferable to another. The experts disagree among themselves and, most inhibiting of all, it is a subject where no votes are at stake.

I conclude this Introduction with brief references to the five principal reforms I have advocated, apart from restatement.

1. Like other Commonwealth countries, Britain should have a systematic statute book arranged under titles. Each title should be equipped with a detailed schedule showing its history. (Rejected by the Renton Committee.[9])
2. There should be a crash programme of consolidation. (Reasonably rejected by the Renton Committee on the ground of shortage of skilled drafters.)
3. The form of legislation should be governed by the needs of the user, not the needs of Parliament (which should be catered for in other ways). (Accepted by the Renton Committee.)
4. A Statute Law Commission should be set up, which would act as 'keeper of the statute book'. (Rejected by the Renton Committee.)
5. Direct, textual amendment of statutes should be used wherever practicable (in place of indirect or referential amendment). (Accepted by the Renton Committee.)

References:

None

[9] *The Preparation of Legislation*. Report of a Committee appointed by the Lord President of the Council, May 1975 (Cmnd. 6053), Recdn.(47), p. 152.