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STATUTE LAW OBSCURITY AND THE DRAFTING PARAMETERS

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Coke expressed a legal truism in the phrase *ignorantia facti excusat; ignorantia juris non excusat*.[1] The growth of strict liability means that ignorance of fact is no longer invariably an excuse (if indeed it ever was). In general however the second half of the proposition remains true. No legal system can afford to allow its citizens the easy escape of pleading ignorance of the law. Yet if the state insists on treating people as if they knew its laws it has a duty to render that knowledge accessible to them. Our modern state does not fulfil that duty, and Coke's maxim has assumed tyrannous pro-

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portions. Statute law, growing all the time in bulk and importance, is the prime target for criticism.

There has been much recent debate on the causes and cures of statute law obscurity, but the problem remains intractable. This may be because there is insufficient understanding of its formidable complexity. The parliamentary draftsman is the scapegoat, but few people realise the difficulties of his task. Indeed few people make any serious attempt to understand the essentials of the drafting operation. In view of the importance of the subject this is disturbing.

As a contribution to understanding, this paper attempts to unravel the factors which bear upon the draftsman's task. Unless these factors are grasped, reforms cannot be devised — much less carried through.

We begin with the *corpus juris*, the body of enacted and judge-made law upon which the draftsman has to operate. His function is to express changes in this law. (This is true even where his Bill is a consolidating or codifying one, for then he is changing the form if not the substance and will have difficulty in avoiding changes in substance however hard he may try). For the draftsman the *corpus juris* is a given thing; he has to work it as the farmer has to work his land. The less satisfactory its condition, the less well he can perform his task. Moreover the draftsman needs effective means of access to the *corpus juris*. Technology exists to give him this (in the form of computer-based search and retrieval systems), but as yet he has not got it.[2]

Other given factors are the extent of the draftsman's skill and experience, the adequacy of his instructions and the effectiveness of his support services. In all these matters the state gets the standards it pays for. It is a field where economy is apt to be false economy, since tasks not done centrally will usually have to be done (with less efficiency and greater total cost) by each individual statute user. Further given factors, about which virtually nothing can be done, are the inadequacy of language as a precise means of communication, the inability of the human imagination to foresee every eventuality, and the vagaries of individual judges, officials and others whose task it is to construe and apply statute law. All this is obvious enough, and is mentioned here merely for completeness.

More interesting, because less apparent as such, are what I will call the drafting *parameters.* These are factors operating with varying degrees of intensity on each drafting assignment. They are what give rise to the special techniques of the legislative draftsman, which in turn produce the obscurities of which

[1] Sir E. Coke, *Institute of the Laws of England* (1797), vol. 1, p. 177.

[2] The Computer Sub-Committee of the Statute Law Committee has had this matter under review since 1974, but appears to have made little progress. Currently, The Commission of the European Communities is conducting an enquiry the results of which will be made available to member States.

complaint is made. The parameters are not all of the same potency. Although some are ineluctable, others (while representing desirable aims from the Government's point of view) can if necessary be

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treated lightly or even disregarded altogether, Some parameters are in conflict with each other. From this springs much confusion.

It may surprise the reader that I speak here of the Government's point of y)e»> father than Parliament's, since the courts in construing legislation are apt to refer their rulings to the intentions of Parliament. I do so because legislation in Britain today is a vehicle for the implementation of the Government's economic and social policy. It is the Government and not Parliament which decides how to resolve conflicts between the parameters and bears responsibility for the results. (This is true notwithstanding that the actual decisions are frequently taken by the draftsman; he is a Government servant and from his experience is able to judge what answers ministers would give if there were time and opportunity to ask them).

What then are these parameters? We are considering a Parliamentary Bill as a text prepared by the draftsman to serve two successive purposes; first as a medium for debate and amendment in Parliament and subsequently as an expression of enacted law. Under our system the draftsman of the Bill also (with rare exceptions) drafts the amendments made to it in Parliament, so we can for the purpose of this discussion treat his final text as a whole even though brought into existence at different times. The parameters apply at all stages of preparation of the text. Some relate only to the Parliamentary or pre-Parliamentary processes, others only to the working of the Act after it has come into force. One applies in both of these ways. I refer to them respectively as preparational, operational and mixed parameters. It is important to grasp that they all have to be taken into account by the draftsman (even though he may feel compelled in a particular case to give some of them scant respect).

II

I have identified nine of these drafting parameters. The three most important place demands on the text which cannot be gainsaid and are not mutually inconsistent; I call them *legal effectiveness*, *procedural legitimacy* and *timeliness*. The first is operational; the second and third preparational.

Legal effectiveness (operational): The draftsman must ensure, so far as he is able, that the text is apt to carry out the intentions of the Government in promoting the legislation. If the Act comes before a court, the aim is that the court shall interpret it in the desired way. If possible the court must be left no opportunity or pretext for deciding it in any other way. Similarly with the other functionaries, such as tribunals or officials, whose duty it may be to apply the new law. This parameter extends as far as firm Government intention itself extends. That intention cannot extend to unforeseeable contingencies, and even on questions which can be foreseen the Government may be content to leave the decision to others, or to itself on a future occasion. The first occurs for example where the Act authorizes the making of a judicial order "if the Court thinks just". The second occurs where a Minister is empowered to make subordinate legislation. Crucial to

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legal effectiveness is the draftsman's knowledge and correct use of that part of the *corpus juris* which governs the construction of statutes, namely the Interpretation Act and the judicial canons of interpretation.

Procedural legitimacy (preparational): In addition to his function of drafting the text, the draftsman is responsible for ensuring that the text (whether of the Bill itself or amendments to it) complies with the procedural requirements laid down by each House of Parliament. Before the Bill is introduced, the draftsman must satisfy the requirements of Government procedure, for example, by submitting the text to the Law Officers of the Crown (who supervise the draftsmen) and later to the Legislation Committee of the Cabinet (who under current practice must approve the text before publication). Earlier still, the

draftsman will have had to obtain approval of his text at each stage from Ministers and civil servants in the department promoting the Bill and in other departments affected by it. From the earliest moment in the drafting process there are various procedures which must be complied with.

These procedures have an effect on the text. In the pre-Parliamentary stage the draftsman may (sometimes against his better judgment) be required to alter his text to meet or forestall objections by Ministers and civil servants. After introduction of the Bill further such objections may be raised (particularly in relation to the drafting of proposed amendments), and in addition objections from opposition members and Government backbenchers are likely. It seems best in this analysis to separate the effect all such objections have on the text from the effect exerted by procedural requirements affecting legitimacy. The former are considered later in discussing the parameter of *acceptability*.[3] [3]

The legitimacy parameter is mainly related to rules of Parliamentary procedure. If the draftsman omits a step in the pre-Parliamentary procedure laid down by the Government this will not invalidate his Bill. It may however cause difficulty or delay, and is to be avoided. In this sense therefore it may be said to affect legitimacy. The draftsman fails in his job if he does not take all the steps he is expected to take. They involve time and trouble, and may leave him insufficient opportunity to attend adequately to the other parameters.

Parliamentary procedure affects the text in a number of ways. It entirely governs the *form* of the Bill and of the accompanying explanatory and financial memorandum. It decrees that the Bill must begin with a long title and be composed of one or more clauses. It allows a preamble and Schedules, but no other type Of formulation. It requires amendments to be in a certain form, and lays down the various stages through which the Bill must pass. On financial aspects it requires certain resolutions to be drafted and passed. It governs timetable or .guillotine motions and the closure of debate. The draftsman must ensure that all these cornplex rules of order are

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complied with or he risks involving the Government in embarrassment and delay. In extreme cases a defective Bill, amendment or motion may have to be withdrawn.

Timeliness (preparational): This parameter is constituted by the Government's timetable for legislation. At the beginning of each session (usually in November), the Queen's Speech sets out the principal Bills which the Government intend to introduce during the session. It does not specify the order in which they will be introduced, or the projected dates.[4] Behind the scenes however the Future Legislation Committee of the Cabinet will have laid its plans long before the Queen's Speech is delivered. Modern Governments almost invariably find themselves with inadequate Parliamentary time for all the measures they wish to see passed into law.[5] This means that departments with Bills in the programme are expected to conform meticulously to the timetable, and the draftsman must follow suit. It raises particular difficulty at the beginning of a new Parliament, especially where there is a change of Government. There are few acceptable Bills in the pipeline, yet the new Government is anxious to put before Parliament the measures for which the voters are taken to have given it a mandate. Another case where the draftsman finds himself the victim of a tight timetable is the emergency Bill, suddenly required to meet some unforeseen national or international development. On the other hand, an unexpected general election may give the draftsman a breathing space since all current Bills fall on a dissolution of Parliament.[6]

The draftsman is expected to be timely at all stages of the preparation and enactment of a Bill, but the shoe tends to pinch most as the date fixed for publication draws near. Once the wording of the Bill is

[3] See *infra* p. 242.

[4] For a suggestion by a former Law Officer that the Queen's speech should specify these, and the present author's rejoinder, see (1977) 121 *Solicitors' J.*, 637, 674.

[5] The 1976-7 session was a rare exception, thanks to the space left by the collapse of the Scottish and Welsh Devolution Bill.

[6] This occurred with the massive Consumer Credit Bill of 1973-4. An agreed all-party measure, it was introduced by a Conservative Government and reintroduced by the Labour Government after the general election of February 1974. The interval gave the draftsman an opportunity to tighten up the drafting in several places.

public property it is much more difficult to alter it. Not only does valuable Parliamentary time have to be taken in debating amendments, but the constraints of the Parliamentary rules of procedure inhibit the draftsman. The Bill is in the possession of the House, and even though a major change may be required, the draftsman will not be able to recast his draft as he could freely do before it had seen the light of day. He must content himself with the minimum of alteration, to the prejudice very often of the finished product. There is moreover the risk that defects in the Bill as published will be damaging to the Government. These factors explain why time pressure is most powerful immediately before introduction of the Bill. In most cases the time allowed is inadequate, and drafting of the Bill perforce continues in the House. The majority of amendments made to Bills would have been incorporated in the

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Bill as first published if sufficient time had been allowed. The remainder are in response to public pressure, and here again sufficient time for their preparation is rarely available.

The Renton Committee recommended that unless there is special urgency two weekends at least should elapse between publication of a Bill and second reading, fourteen days between second reading and the start of the committee stage (when amendments can first be considered), and (except for simple Bills) a further fourteen days between publication of the Bill as amended in committee and the start of the report stage.[7] In most cases these periods are inadequate for thoroughly satisfactory amendments to be prepared, yet even they are often not given.

The draftsman will protest at the insufficiency of time allowed him. He will point out that compliance with the drafting parameters requires the necessary time, or the product will suffer. He will be heard, but it will make little difference. In the end he will comply with the Government's timetable, doing the best he can. It is what he is paid for.

The chief preparational parameters are therefore the need to comply with procedural rules and the need to observe the Government's timetable. The chief operational parameter is the requirement that the finished product shall be effective to carry out the Government's intentions. In describing these as the chief parameters I am not making a value judgment, but merely seeking to reflect the political realities. Many who are not politicians or civil servants will think that for the health of society other parameters, such as those of *comprehensibility* and *legal compatibility* (described below) should be accorded greater priority.

III

I go on to discuss the six remaining drafting parameters in diminishing order of their importance to the Government. This order is by no means obvious but I have tried to indicate by the arrangement which of any two parameters the draftsman is likely to prefer in an instance where they conflict. Again I stress that the order reflects political realities rather than social values.

Certainty (operational): It is usually (but not invariably) desired that the text should be open to one construction only, that is, that its meaning should be certain. It is arguable that this should be treated as an aspect of the legal effectiveness parameter discussed above, but conceptually it is different and so is accorded separate treatment. The justification for this separation is illustrated by the not unusual case where the Government *intend* the text to be ambiguous. For example, clauses of international treaties are sometimes deliberately drawn so as to be capable of interpretation in each of the varying ways favoured by the respective high contracting parties. If such a

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treaty is to be given the effect of law by an Act of Parliament, the draftsman of the Act will perceive that *legal effectiveness* is at odds with *certainty* and be forced to sacrifice the latter.

[7] Report of the Committee on the Preparation of Legislation (1975; Cmnd. 6053) (Renton Report) recdn. 105.

Comprehensibility (mixed): The Government will incur criticism in Parliament if the Bill is not comprehensible to members, and so the draftsman strives to make it so. Until recently, Bill drafting in Britain was governed by the "four corners" doctrine, expressed by Lord Thring as follows:—

> It is not fair to a legislative assembly that they should, as a general rule, have to look beyond the four corners of the Bill in order to comprehend its meaning.[8]

This doctrine required the draftsman to make the text of his Bill self-explanatory. An unfortunate consequence was that Bills amending existing legislation were almost invariably expressed in indirect or non-textual form, because textual amendments require accompanying explanatory material in order to be comprehensible. Since the report of the Renton Committee condemning non-textual amendment, and the commencement of publication of the official revised edition *Statutes in Force* (the method of publication of which necessitates use of the textual amendment system), the four corners doctrine has lost much of its effectiveness.[9]

Comprehensibility in its preparational aspect fights with several of the other drafting parameters. This is partly because the composition of the parliamentary audience differs markedly from the general run of statute users. Most statute users are lawyers. Where they are not lawyers they are officials or members of related professions (such as accountants or architects) whose work brings them into frequent contact with enacted law. Most members of Parliament on the other hand are neither lawyers nor familiar with law; they are politicians.[10] The task of making legislative proposals understood by non-lawyer politicians while securing their *legal effectiveness* is one of the most formidable faced by the Parliamentary draftsmen. When the other parameters are brought into consideration also (as they must be) the problems can assume nightmare proportions.[11]

In its operational aspect also, *comprehensibility* presents severe difficulties to the draftsman. Indeed this parameter lies at the heart of the

subject of statute law obscurity and its reform. The relationship of this parameter with others such as *legal effectiveness*, *certainty* and (yet to be discussed) *legal compatibility* is the nub of the problem.

Comprehensibility, in both its preparational and operational aspects, involves the draftsman in considerations for which his training as a lawyer may not have fitted him (and in Britain he receives no other training). The skills of a creative writer are needed, with ability to overcome so far as practicable the limitations of language as a means of communicating ideas. Communication theory and linguistics are two related studies, while devices such as algorithms and flow-charts can sometimes be usefully employed. Occasionally arithmetic, geometry or algebra may find a place (but is it fair to expect users of Acts of Parliament to understand algebra ?) Since the object of statute law is to *communicate* Parliament's wishes to those bound by them, the question of comprehensibility is crucial; and it has received little study.

Acceptability (preparational): In framing his text, the draftsman must do his best to ensure that the wording chosen is acceptable to those involved in the legislative process. Even though the policy of the Bill may be unacceptable to political opponents, the wording must be such as to minimize objection from them.

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[8] H. Thring, *Practical Legislation* (1902), p. 8.

[9] For a full account of the four corners doctrine and its disastrous effects on the quality of legislation see the present author's evidence to the Renton Committee, reprinted in *Renton and the Need for Reform* (1979). See also the Renton Report op.cit., paras. 7.14 and 7.15.

[10] Since 1945 the proportion of members of the House of Commons who are or were lawyers has varied between 15% and 20%; "Lawyers and Politics" (1977) *British J. of Law and Society* 155, 160. In the House of Lords the proportion is much lower.

[11] This language is not entirely figurative. I recall that on one occasion when I was the assistant draftsman of the Town and Country Planning Bill of 1954, a flaw in the Bill was revealed to me one night in a dream. Next day, we put down a Government amendment to cure the defect.

This factor applies from the start of drafting, when the audience to be satisfied consists of administrators and legal advisers within the sponsoring department. Later, Government Ministers may be shown the text. Before publication it has to be approved by the Law Officers and the Legislation Committee of the Cabinet. Then it runs the gauntlet of scrutiny by Members of Parliament, by political and professional commentators, and by representatives of vested interests. The draftsman has to keep a low profile, and offer the smallest possible target.

This means that provocative language must as far as possible be avoided. The red-blooded terms of political controversy are toned down. The prose style is flat. This sometimes disappoints M.Ps who have campaigned for a controversial measure, and would like to see it finally enacted in ringing tones. (Such disappointment was expressed, for example, over the Sex Discrimination Act in 1975). But it is safer so. Supporters of the Bill will not carry their disappointment into action against it; opponents must not be armed gratuitously.

Also to be reckoned with is the intense conservatism of legislators. Occasionally the draftsman has an opportunity to add new meanings, or even new words, to the language.[12] Once I attempted to introduce a shortened spelling of "programme" elsewhere than in the computer field. However my use of "program" to describe a plan of official action was jumped on by the Lord Chancellor in Legislation Committee. Typically, there was no attempt at reasoned argument or discussion. On another

occasion I ran into trouble by laying down a test of whether the landlord had "tried his best" to let office property. This seemed better modern style than the well-worn phrase "used his best endeavours". The meaning of course is exactly the same, and greater precision is not attainable. In the House of Commons Gordon Oakes described my phrase as "amateurish", while Dennis Howell thought it "a headmaster's phrase" and demanded that "better phraseology" be provided in the House of Lords.[13] I stood firm against this, and the phrase remained.[14]

A good draft requires consistency of style, which can only be achieved if it is composed throughout by the same hand. This fact has led to the development of the current practice under which not only the Bill itself but virtually all amendments made to it are drafted by Parliamentary counsel. Modern Parliamentary counsel fight to uphold this position. Lord Thring, the first head of the Parliamentary Counsel Office, described how Mr. Gladstone understood and revised every word of a Bill, and even settled the marginal notes.[15] That does not happen today, though Lord Duncan Sandys came near it during his tenure of ministerial office in the 1950s. If any part of the draft is not acceptable, the draftsman himself alters it. It Follows that in self-protection he will leave himself open to as few demands for change as his experience and foresight permit.

Brevity (preparational): For a hundred years or more — in fact since Members of Parliament adopted the practice of close scrutiny and lengthy debate of Bills — draftsmen have been encouraged to make their Bills as brief as possible. In particular, the number of clauses is kept down. This is because M.Ps have the right to debate each clause if they wish, preparatory to putting the motion that the clause stand part of the Bill.

In general, it must be true that the lengthier a text is, the lengthier will be the time taken in its detailed examination. Modern Governments always have insufficient Parliamentary time at their disposal (or think they have), so the pressure on the draftsman to shorten his Bill is strong. Nor is this the only factor conducing to brevity. Given equal quality, it takes more effort to produce a long Bill than a short one. Draftsmen are usually hard-pressed, and are not looking for work. The same applies to those instructing them. Again, M.Ps would rather study a brief text than a lengthy one. They are apt to complain if confronted with too many bulky Bills. The printing resources of Her Majesty's Stationery Office are always at full stretch. Each Bill has to be reprinted several times as it goes through Parliament, so as to

[12] I did this with "custodian" and "custodianship" in the Children Act 1975.
[13] 867 H.C. Debs.,Ser. 5, cols. 1545, 1551, 1573 (22 January 1974).
[14] See General Rate Act 1967, s. 17A (inserted by Local Government Act 1974, s. 16).
[15] *Loc. cit.*

incorporate amendments made. Proof reading (which is done by the draftsman as well as the printer) becomes increasingly onerous with bulk.

All these factors conduce to brevity, and that requires (or is thought to require) compression of language. This is one of the principal sources of

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obscurity. It particularly applies where the statutory language has to be understood by lay people, such as juries. The difficulties over certain provisions of the Theft Act 1968 are a case in point. If draftsmen of criminal statutes did not feel compelled to cram a wide variety of factual situations within one formula, but were free to create separate offences for each type of situation, there would be less confusion.

Debatability (preparational): If a Bill is to serve its Parliamentary function, it must be so framed as to allow the main points of policy to be debated. If they are buried in confused verbiage, it becomes more difficult for Members to perceive what they are and deploy argument. The main policy debate takes place on second reading, where it is conducted on broad principles. This is followed by the Committee stage, where a different position arises. Here it is possible to propose textual amendments to the Bill, and debate whether they should be made. The rules of order require these amendments to make grammatical sense, and fit into the structure of the Bill. If the structure is excessively complex, backbench Members will have difficulty in achieving this.[16]

It should be added that the debatability parameter sometimes operates the opposite way. A government may wish its Bill to be drawn so as to *stifle* debate or render amendment difficult. This occurs with highly controversial measures. Even a non-controversial Bill may contain passages which the Government prefer to gloss over, for fear of trouble in the House. Parliamentary storms can suddenly spring up over relatively trivial points, and the draftsman needs to be constantly on guard.

Debatability also concerns the *order* of clauses. Normally each clause is debated in the order in which it occurs in the Bill (though a procedural motion may provide otherwise). It is common for more time to be spent on the first few clauses of a controversial Bill than on all the rest put together, particularly where a guillotine motion is in operation. With a controversial or "prestige" Bill it may be important to the smooth passage of the Bill, or the kudos accruing to the Government from it, to begin with the right topic. In reporting Parliamentary proceedings, the media give most prominence to the opening exchanges on a Bill.

Legal compatibility (operational): The final drafting parameter concerns the way the Bill, after Royal assent, will fit into the *corpus juris*. Here the draftsman possesses a heady power. The sovereignty of Parliament ensures that its latest word overrides all previous enactments and rules of law.[17] There is thus no technical *necessity* for dovetailing into existing law; overriding is just as effective. In former times this led to each Act being

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treated as a separate entity. An occasional "notwithstanding anything in any other Act" or "all enactments to the contrary shall cease to have effect" was a sufficient gesture towards the existence of earlier contrary legislation. Things have improved. Even in Britain, the most backward of major Commonwealth countries in this respect, the draftsman acknowledges it as his duty to seek out, and repeal or modify expressly, inconsistent provisions. His task is greatly hampered by the chaotic state of the statute book, the lack of arrangement under titles, delays in printing updated official texts, and the absence of computerized search and retrieval systems. The British draftsman of today is operating on a ramshackle structure of bewildering complexity.

[16] In invited evidence to the House of Commons Select Committee on Procedure, whose latest report is awaited, I recently suggested that a better method would be to allow Members to put down simple amendments merely raising the issue of policy. If accepted, these would be followed at the next stage by (undebatable) technical amendments giving effect to them.

[17] Subject to possible qualification in the case of European Community legislation, a subject beyond the scope of this paper.

Compatibility includes the element of comity. Subject to changes in linguistic usage, the same thing ought to be said in the same way throughout the statute book. Contrary to most people's belief, however, there are no books of precedents in the Parliamentary Counsel Office in Whitehall. Draftsmen vary in their willingness to spend time hunting for models in earlier legislation. They are discouraged by the knowledge that if they carry out this search it will throw up a variety of examples, not one of which may appear any better than the others. The result is predictable.[18]

While statute law is in such a chaotic state, the parameter of *compatibility*, though it normally places certain demands on the draftsman, can if necessary be largely ignored. It would be otherwise if we had a more orderly system, but there is a strange reluctance even among reformers to press for this. The Renton Committee thought consolidation of the statute book on a one Act — one subject basis not possible (despite the fact that it has been done in all other major Commonwealth countries). "It is not reasonable", they said, "to expect the law on a given subject to be set forth completely in a self-contained Act of Parliament . . . . "[19] In fact it is both reasonable and feasible, allowing for the use of adequate cross-referencing.

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[18] "We have ended up with a host of amendments to our tax laws which mean that the *same words* in the same Act can mean two different things. Furthermore, *different* expressions can be intended to mean the same . . . ." (*The Times* 1 July 1978, quoting the Secretary of the Statute Law Society).
[19] *Ibid*., para. 14.7.