Legislative Technique

Dictating Draftsman

I promised to return to Sir Harold Kent's important book ***In on the Act***. The importance lies in the fact that this is the only autobiographical work produced by a senior member of the Parliamentary Counsel Office in the entire 111 years of its existence. The book throws a unique light on how and why our statute law assumes the form it does. We have before us a rich mine. I will bring up occasional nuggets from time to time.

This time I propose to examine the curious phenomenon of the dictating draftsman. Dictation is used by ordinary people for business letters and ephemeral memoranda. Who would suppose the law of the land would be created in this way? Yet it frequently has been, and for all I know still is. Yet it was condemned by the founder of the Parliamentary Counsel Office, Lord Thring-

> ‘As a detail it may be well to warn the inexperienced draftsman against an intellectual danger incident to the employment of shorthand writers. The essence of business composition is to think before you write, whilst the effect of employing shorthand writers too soon is to induce the novice to write before he thinks.’1

The hapless statute user supposes that the convoluted phrases he strives to understand have at least been planned with deliberation and composed with utmost care. Kent shows this not to be so. Off the cuff is the normal routine; off the eyebrow the far from rare emergency response. Sir John Rowlatt often said ‘We’ll have to take a flying fuck at this one”. The drafting atmosphere is frenzied, the mood febrile. A frenetic cleverness pervades the supposed haunts of Solon and Justinian.

Kent tells us that it was rare in his day for a formal and comprehensive "Instructions for a Bill" to be prepared by the instructing department. It was common for the draftsman's brief to be entirely the product of oral discussion. Obscurity was often the deliberate intention: "I remember a clause of mine receiving the dubious compliment of 'nice and vague' from a bureaucrat of seasoned experience". Everything was done in a rush. It was the pride of the Parliamentary Counsel Office that there were insufficient draftsman to handle the workload. That way the note of high drama could be maintained.

The India Bill of 1935 was the biggest Bill that had ever been drafted in the Office. G R Hill was the main draftsman. He is described as the most remarkable King's Scholar that Eton had ever had, and a classical scholar of Balliol to boot. At Oxford he took a double first. He waded into the instructions that came pouring from the India Office.

"The sheer bulk of them would have intimidated some, but Hill had been the draftsman of the Local Government Act 1933, and he was not afraid of bulk. He dictated all day, and the printing presses at Drury Lane worked most of the night, and the piles of clauses mounted up."

Another formidable character was Sir Granville Ram, known as The Maestro. Kent tells us about his way of dictating Parliamentary Bills:

> "When he was in the mood, everybody suffered, and the poor girl was soon floundering. After taking a few lines she would be asked to read it out, and then corrections would be made, and the

1 Lord Thring, ***Practical Legislation*** (London, John Murray, 1902) 8.

corrected version read. More corrections and more readings, until she hardly knew what she had got on her pad."

Kent rejoices that after World War II drafting got back to normal: "The proud discipline of the Office was in full force again; nothing was undraftable, and if Bills were demanded by Ministers by a certain date, they would be delivered, right or wrong". Nationalisation is in the air. Sir John Rowlatt drafts the Transport Bill: "Rowlatt dictating a big Bill against the clock was a memorable spectacle...the words and phrases would emerge, sometimes fluently, sometimes agonisingly."

Kent's complacent verdict is that "the talented office of my day drafted their Bills pretty well and no one has yet thought of a much better way to do it". The talent is undoubted. The question is, was it properly used?

Magic Wand

Law is an instrument of social policy; its twin techniques being legislative and judicial. The precise ambit of the latter is the subject of continual dispute, even though as the primary modern technique for adjusting social policy, legislation has attained supremacy. Some judges are restive under this supremacy. Lord Denning has always felt it more important to do justice in the instant case than to respect established principles of law, and is not prepared to wait for Parliament to remedy defects in those principles. Lord Scarman's viewpoint is different: he wishes to establish the judges as a safeguard for the citizen against parliamentary excesses. Both have many followers. In this context the study and improvement of legislative technique (in the widest sense) gains importance. Social policy should be shaped by elected representatives in Parliament, but if the technique available to them is defective the claim of judges to step in becomes more persuasive.

A recent article in this Journal by R.D.Oughton ((1979) 129NJJ 1193) reminds me that it is nearly 30 years since I first made these points in print. I was criticising Denning LJ (as he then was) for trying to abolish the doctrine of consideration in contract by judicial means. The doctrine had just been examined by the Law Revision Committee, whose chairman, Lord Wright, described it as "established by authorities which not even the House of Lords could distinguish or disregard" (49 Harv LR 1226). This did not deter Denning LJ. I felt moved to remind him that to administer justice it is necessary to administer law. My article concluded with words still applicable:

"...it may be said with all respect that those who, from motives of compassion, show a want of consideration for principles of high and long-standing authority - either by choosing to ignore them or by formulating unreal distinctions - do only disservice to the true cause of justice. To usurp the function of the legislature in the name of a developing jurisprudence is surely to destroy the reality of the common law, to make its doctrines undependable and to leave those whom it should serve bereft in costly uncertainty." (1953) 16 MLR 441)

Lord Denning failed in his attempt to abolish the doctrine of consideration. But his chosen instrument, the development of equitable estoppel, has continued to plague the law and was indeed the subject of Mr Oughten's article. I respectfully agree with his devastating criticisms. It does not serve the ends of justice for judges to create a species of proprietory right the characteristics of which are so ill-defined that without litigation an individual cannot know its extent in his case - or even whether he possesses it at all. Mr Oughten feels the same exasperation as I did all those years ago. He ends his article by saying justly that this type of estoppel "should take its place as a principled remedy in the law of obligations and not be used as a magic wand to vanquish those whom the courts think guilty of bad behaviour".

The correct scope for judicial technique is indicated by Lord Devlin in his recent book ***The Judge***. He distinguishes between judicial activism on the one hand and judicial creativity or dynamism on the other. The former is operation within the consensus, and is proper. The latter is operation in advance of the consensus, and is not. A judge who is in any doubt about the support of the consensus "should not

advance at all". When operating on the common law, judges should observe two conditions: "first, that they do it in the traditional way, ie in accordance with precedent, and second, that parliamentary interference should be regarded as unobjectionable". Lord Devlin adds: "in relation to statute law, by contrast, there can be no general warrant authorising the judges to do anything except interpret and apply" (*The Judge*, p.9)

Common Law Drafting

In his excellent survey *Inequality, Crime and Public Policy*, the Australian criminologist John Braithwaite makes a point that bears on the conflict between common-law drafting (precise and detailed) and civil-law drafting (vague general statements). Much white-collar crime, he says, is caused by people abusing a position of power. The answer is to refrain from giving more power than is strictly necessary. To reduce opportunities for bribery or other corruption, bureaucrats should be confined within narrow limits.

Braithwaite draws on J.K.Lieberman's 1973 study of American malpractices, *How the Government Breaks the Law*:

"Lieberman argues that public bureaucracies are given too much discretionary power. Policies are exposed to wide public scrutiny at the legislative stage but virtually none at the executive stage. And most of the real power resides in the executive, since legislation typically permits the public service unbridled discretion in implementation. Lieberman then argues that the legislature should draw firm guidelines to limit the ways in which the public service can exercise its power, and that these guidelines should then be open to public scrutiny. He points to vague blank-cheque statutes - such as 'disloyalty to the state', 'immoral behaviour', 'public nuisance', 'suppression of Communism' as being particulary corupting of the public service..."

130 New Law Journal (1980) 243.