Review of "*Legislative Drafting: a New Approach*" by Sir William Dale KCMG

This is a timely book. We all want to be able to find out the law on any point with as little trouble as possible. Under our present system we cannot do it. We need to change the system, but how? Like some others, Sir William Dale thinks we should go over to the continental style of legislative drafting. In this book he shows us what that would mean.

The book was commissioned by the Commonwealth Secretary General to help developing countries draft their laws. It compares recent United Kingdom statutes on copyright, divorce, adoption, labour law, limitation of actions and a number of other topics with corresponding statutes in France, Sweden and West Germany. It describes the drafting process and the rules of statutory interpretation in the four countries concerned and concludes with suggestions for reform in Britain. Since considerably more than half the book consists of texts extracted from the various statutes under discussion (translated into English in the case of the foreign statutes) it may be regarded as basically a source book. IN this respect it performs a most valuable function. The extracts are skilfully chosen to enabl the reader to make a fair comparison between the characteristics of British and continental drafting. The author was for many years on the legal staff of the Colonial Office (later the Commonwealth Office, where he headed the legal staff from 1961 to 1966).1

Sir William holds that a statute should be drafted so that it can be understood by all affected by it. An author should be able to understand a statute on copyright, a family man a statute on family law, a land owner a statute on land law, and so on. This sounds fine until we look more closely. Copyright law applies to every sort of creator or performer, from the writer of an article in a parish magazine to the man who does lightening sketches on the pier. We are all family men or women, and most of us are at some time landowners or tenants. Thus Sir William might as well have said statute law should be drafted so that it can be understood by all. That only has to be stated for its impracticability to be apparent. Yet the Swedes don't find it impracticable. They draft in layman's language, Sir William tells us. His first extract from a Swedish statute deals with copyright. "The performance of a work at a place of business for a comparatively large closed group of peaple shall be considered a public performance."

It would be interesting to hear laymen discussing whether a public hall hired by a firm for a staff party is a "place of business," or 43 persons consisting of the firm"s staff with a few relatives and friends is a "comparatively large closed group." To find the answer, the Swedes might go, like most continental users, to the *travaux preparatoires*. For Sir William tells us that the "legislature has often deliberately left it to the inquirer, whether citizen, lawyer or judge, to go to the legislative material to find out more precisely what was intended."

What are the essential features of continental drafting? The book does not give a clear answer, perhaps because the concept is not as definite as is sometimes thought. One element is the background presence of a general code: "Codification, willy nilly, involves-nay, is-the continental style." Another element, leading from the first, is the tendency to state a principle.

"The continental lawmakers, influenced by their heritage of codes, think out their laws in terms of principle, or at least of broad intention, and express the principle or intention in the legislation. This is the primary duty of the legislator - to make his general will clear. An orderly unfolding of the concepts and rules follows..."

Sir William castigates the British Copyright Act of 1956, for example, because it nowhere states the principle of what copyright is, but merely lists the acts restricted by the existence of copyright in a work.2

He overlooks the fact that the pragmatic British are chary of statements of principle. They mistrust them because they invariably have to be qualified by exceptions and conditions before being fitted for real life. Sir William, quoting the rule in *Leviticus* that when one man strikes another and kills him, he shall be put to death, adds: "We observe the complete generality, and the utter certainty." In fact of course, as to some degree he admits later, there is no such certainty. Supposing the striking is accidental, or the striker is insane? Suppose death occurs after a long interval, or the sufferer was already mortally ill? What does "strikes" mean? Does it include riding a horse at a man, or pulling down his house about his ears? And so on. What is the value of a statement of principle that later has to be qualified almost out of existence? In the rare cases where statements of principle are possible without suffering this defect they are often made by British draftsmen. Sir William recognises this when he praises the long title to the Consumer Credit Act 1974.

Another feature of continental drafting is willingness to leave more to the courts. Sir William extols this, but it has two undesirable aspects. One is that until a court has had an opportunity of pronouncing on the point the law is uncertain. The other is that too much of the legislative power may thereby pass from Parliament to the judges. Those who hanker for a revival of judge-made law need to remember that the greatness of the common law lay in its defence of the citizen against despotic monarchs. A democratic Parliament cannot sensibly be likened to a despotic monarch. We do not need, nor do most of desire, to be saved by our judges from the intentions of our Parliament. 3 Sir William records that the French, on the other hand, "have under the influence of Geny, allowed the judge to soar from the text into the headier region of ethics, political science, sociology and the like." There are those, led by Lord Scarman (widely expected to be the successor to Lord Denning as Master of the Rolls), who aim at a similar ascent by the British judiciary.

The value of Sir William's book is that it enables these matters to be debated against an informed background. There is much in the European material reproduced here that is admirably drafted. The French use of the present tense in order to avoid the solecism of giving directions to judges is felicitous. Take this for example, from the divorce law:

"Article 231. The judge examines the application with husband and wife separately, then with both together. He afterwards calls in counsel. If both spouses persist in their intention to divorce, the judge tells them that they are to renew their application after a three months period of reflection."

The common lawyer might be less happy about such passages as the following, chosen at random from Sir William's texts (the italics are added).

"when copies of a work are produced... the name of the author shall be stated *to the extent and in the manner required byproperusage.*" (Sweden)

"A work may not be changed in a manner which is prejudicial to the author's literary or artistic reputation, *or to his individuality.*" (Sweden)

"Copyright shall protect the author with respect to his *intellectual and personal relations* to the work, and also with respect to the utilization of the work." (Germany)

"A published work may be publicly performed at divine services and in connection with education." (Sweden)

"If the application of a condition in a contract concerning transfer of copyright *obviously is contrary to proper copyright usage or otherwise unfair,* the condition may be *changed or disregarded.*" (Sweden)

"Everyone has the right to *respect for his private life.*

The judges may, without prejudice to the making good of damage suffered, order any measure, *such as sequestration, seizure or others,* necessary to prevent or terminate a violation of the intimacy of private life; in cases of urgency the measures may be ordered summarily." (France)

"For the purposes of the present law 'financial loss,' means economic damage which arises without any person having concurrently sustained loss of life, personal injury or loss of or damage to property." (Sweden)

Sir William does not tell us what practical difficulty drafting of this kind causes continental users, particularly lawyers who wish to advise their clients without forcing them to litigate. He says that the general verdict in Germany is that the drafting of legislation is satisfactory and clear, but cites no research findings in support of this remarkable encomium. Elsewhere he finds that more problems of interpretation have arisen under continental than British copyright law but draws no conclusion from this.

The book gives no proof that we would benefit from going over to the continental system; it could scarcely be expected to. It does show the formidable objections to adoption of that system in Britain. These may be summarised as follows:

It requires the background presence of a code, which we do not have and are not likely to get.

It requires legislation to be prefaced by the statement of principles, which foreign to British temperament.

It produces a considerable degree of uncertainty.

It does not enable Parliament to assert its will with the particularity British political conditions require.

It gives too much legislative power to non-elected judges.

Also to be considered is the fact that if a change-over were made we would have a dual system for many years while the existing body of statute law was replaced.

What then is the solution? The clue is given by Sir William"s admission that "when once one understands a United Kingdom Act, one can usually ascertain the answer to one's question." It is surely better to have a law that contains the answers than a law that does not. But, Sir William rightly goes on, "what time, toil and trouble may be needed to get to the bottom of the Act!" Here is the nub. Much of that time, toil and trouble is expended solely because the Act and its accompanying regulations, orders, etc. have not been put into a form which leaves the practitioner merely with applying them to his own particular case. He has to hunt out and conflate the relevant texts, break them up into their grammatical sections, discover their commencement dates, and do a host of other jobs which a properly organised system of legislation would do for him, making the results available in the form of continually updated comprehensive texts. It is coming to be realised that processing of that kind is the true answer to the problem posed at the beginning of this review.

Sir William Dale and his sponsor the Commonwealth Secretary General deserve our gratitude for having produced at exactly the right time a source book and commentary of very great value in the continuing debate over improving the form and publication of our statute law.

F.A.R.Bennion

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