

The Tortoise and the Lettuce Leaf, or Turning Words into Laws

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The meaning of words

I got interested in the meaning of words at an early age. I remember as a child witnessing the following interchange. A young man was walking along the road when a car stopped beside him. 'Would you like a lift?' the driver asked. 'No thanks, the young man replied. "I live in a bungalow". It took me quite a while to figure that out. Here is another example.

When I was very small we had a pet tortoise. One day I decided to feed the tortoise a piece of lettuce. I got a lettuce leaf from the kitchen and tore a strip from it. This I carefully worked into a long cigarette-shaped roll. Then I walked into the garden and found our pet tortoise. I offered him one end of my long roll of lettuce. He seemed interested, but every time I tried to make him eat the lettuce he quickly withdrew his scaly head inside his shell.

After trying for a few minutes to persuade the tortoise to eat my roll of lettuce without success, I decided that different tactics were needed. Every time I prodded, the tortoise's mouth kept withdrawing into its shell. Could I get the roll of lettuce inside the tortoise through its tail instead? To my very young mind there seemed no obvious reason why not. So I tried that. At least the tail didn't withdraw inside the shell. Nor however did the tail seem to want to take a bite at my nice long roll of lettuce leaf. It did indeed stay outside the shell, but it seemed depressingly indifferent to what I was offering it. Still, I kept poking away with the roll of lettuce at the tortoise's tail.

Just then my father strolled up. He saw what I was trying to do, and called out some fatherly advice. He said: 'Try the other end'. Being an obedient child, I did what he said. I turned the roll of lettuce round in my hand and pushed the other end of it at the tortoise's tail. I could not understand why my father burst out laughing.

These were my first lessons in what is called grammatical ambiguity, and I have never forgotten them. Indeed they still worry me today. If one finds verbal ambiguity and misunderstanding in simple domestic settings like those, what hope can there be for legislation?

Legislation depends entirely on words. If you communicate with a friend, whether orally or in writing, you depend on much more than mere words. You know each other, for a start. There is a shared past. You can express volumes in a smile or a grimace. A great deal can be left unsaid, yet still get across. If you are very, very close, there may even be thought-transference or telepathy.

Legislation is quite different. It can make no allowance for personal acquaintance. Its language is necessarily impersonal. Moreover it has to remain operative for a long period of time, during which things are bound to change. It is forced to make words bear a quite extraordinary burden. Before I try to tell you something about how the legislative draftsman copes with this, it might be helpful to stand back and consider the nature of law, as seen from the draftsman's viewpoint.

As a draftsman, I see law as a form of communication. It communicates to citizens and others who need to conform to it, to their professional advisers, and to enforcement agencies such as policemen and judges. It is saying something to all these people. It carries a message.

This message can be categorized in various ways. The basic distinction relevant to our purpose tonight is between automatic and discretionary provisions. An automatic provision works all by itself. It delivers its message without doubt or delay. It tells you what income tax you must pay on a specified income, or what the penalty for murder is, or how much child allowance you are entitled to.

The discretionary provision is quite different. It is not automatic, but requires the interposition of some human mind. It does not work all by itself.

How do you draw the line between these two types of provision? That is a crucial question. Palm-tree justice, or the Chancery Court's discretion in the early days of Equity (which was said to vary according to the length of the Chancellor's foot), make all law discretionary. On the other hand it is possible to reduce almost all law to rigid and inflexible rules. That is the other extreme.

At one extreme then, we have the Cadi under the palm tree. He may be benevolent or tyrannical. Either way we won't know in advance what his mood is likely to be on the day when we get before him. It was said of the Irish common law courts in the 1880s that if you had some merit on your side but thought the law was against you, you issued your writ in the Queen's Bench, whose Chief Justice, known as Mickey Morris, had ideas of jurisprudence that were peculiarly his own. On the other hand if you thought that, however iniquitous your client was, he had the law on his side, you went to the Court of Exchequer, presided over by the great Christopher Palles. (Serjeant Sullivan said of him that he always decided strictly according to law, and paid no attention to any other consideration.) If you had neither law nor merits on your side you went to the Court of Common Pleas. This was presided over by Chief Justice May 'before whom no case was certain, and no case was hopeless'.

I would say the crucial question on legislative technique is whether you go for making the law automatic or discretionary. If Parliament makes as much as it can automatic there are considerable advantages. The democratically-elected politician then settles the detail, rather than the appointed career lawyer issuing discretionary judgments from the bench. Those affected by the law know where they stand. It is spelt out in the Act, and therefore it is predictable - an important quality in law.

On the other hand discretionary law is flexible. It can take account of the facts of the case before it, and give a decision in accordance with abstract justice. But then it is said that hard cases make bad law. I will return to this crucial question of predictability versus simple justice. But first I must say something about how our statutes are drafted.

How statutes are drafted

Parliamentary Bills are divided into public Bills and private Bills, which each go through a quite different procedure. Private Bills, which may be either local or personal, are founded on a petition to Parliament. This has to be advertised, so that people who might be prejudicially affected by the private Act can be heard. Private Bills are drafted by Parliamentary agents, and dealt with in Parliament by barristers who are members of the Parliamentary bar.

Public Bills are introduced either in the House of Commons or the House of Lords by a member of that House. They become, on royal assent, what are called public general Acts. Usually they are promoted by the Government.

Private Bills must not be confused with private members' Bills. The latter are public Bills which are sponsored by backbench MPs. They have no chance of passing unless the Government decides to support them, or at least not hinder their passage.

Public Bills sponsored by the Government are all drafted by Parliamentary Counsel, unless they relate exclusively to Scotland (when they are drafted by Scottish lawyers in the Lord Advocate's Department). Parliamentary Counsel are located in a building at 36 Whitehall called the Parliamentary Counsel Office. Last time I counted, when I was preparing the second edition of my book *Statute Law*, which has just appeared, there were 13 draftsmen and 4 draftswomen in the Office. In addition, 4 draftsmen and 2 draftswomen are on secondment to the Law Commission, whose law reform Bills they draft. So the total output of non-Scottish public Bills, numbering about 70 a year, is produced by a couple of dozen people. That may strike you as rather strange.

The story of the Parliamentary Counsel Office starts with Lord Thring, the only member of it who has ever been elevated to the House of Lords. From 1850 to 1861 Thring drafted government parliamentary Bills in the course of his practice at the Bar. He sought to improve the technique of drafting, notably by introducing uniformity of method and logical arrangement. He inaugurated the system of dividing long Bills into Parts. He provided a table of contents, a glance at which 'would convey to the reader a correct idea of the effect of the Bill'. This table is now described as the arrangement of sections.

In 1861 Thring was appointed counsel to the Home Office. This post, he tells us, was afterwards converted into the office of Parliamentary Counsel. During this period some government Bills were drafted by parliamentary agents. A notable example was the Reform Bill of 1867, though Thring afterwards redrafted it. The Parliamentary Counsel Office was set up by Treasury Minute in 1869, with Thring as the sole counsel. The Chancellor of the Exchequer, Robert Lowe, announced that his object was 'to have a considerable drafting department, and thus to train up young men in this very peculiar branch of business'.

The Parliamentary Counsel Office has had many homes. When I was for the first time invited to join it 30 years ago, it was located in Old Palace Yard - across the road from the House of Lords. It was housed in that white stone-fronted Queen Anne house that faces towards Parliament Square. The room I was given is no more. It was part of an addition stuck on the back. Its site is now incorporated in the lawn of the restored Jewel Tower, last remnant (apart from Westminster Hall) of the ancient Palace of Westminster. I still remember the cosy coal fire in that little back room, assiduously tended by respectful uniformed stalwarts of the First World War whose like is no more.

My first post was as devil to The Fish. This was Sir Alan Ellis, First Parliamentary Counsel. He had a round rubicund countenance and constantly wore a tattered office jacket that was falling to pieces. When visitors came for conferences I was ashamed of him. He smoked a pipe of which the bowl was so burnt down that the smouldering tobacco perched insecurely on a flat plane of briar. In retrospect I love him dearly. The Fish was a kindly, vague (but astute) bachelor who quite soon vanished into retirement.

The next head of the Office was Sir John Rowlatt, son of a celebrated tax judge. Him I loved not in retrospect but at the time. He also took me as his devil. I was, he comfortingly said, one of his 'bright young men'. When the Government of Pakistan asked for someone to vet the constitution that nine long years after Independence was to turn that country into an Islamic republic I was the one he despatched to Karachi (doubtless no one else could be spared). Unhappily Sir John Rowlatt died on Westminster underground station of a heart attack in 1956. He was succeeded by Sir Noël Hutton, who took over as First Parliamentary Counsel at the unusually early age of 47. Such are the chances and fortunes of a career in the Parliamentary Counsel Office.

Soon after Sir Noël Hutton took over, we were dealt an ignominious blow. The Office was ejected from the elegant white Queen Anne mansion in Old Palace Yard and installed in rooms above a men's clothing shop. This shop had a name that was appropriate, in view of the fact that Sir Noël Hutton was head of our little band of draftsmen. It was called Noel Brothers.

The Parliamentary Counsel Office is unique in the Civil Service. No one is in effective control of it. Nominally, it comes directly under the Prime Minister. On drafting points it is very loosely answerable to the Attorney General, who acts as its de facto Minister. When he was Lord Chancellor under Harold Wilson, Lord Gardiner tried to take it over. He had no success. The reason was hinted at by the present Lord Chancellor, Lord Hailsham, in his book *The Door Wherein I Went*-

‘Lord Gardiner has more than once expressed the view that the Lord Chancellor should assume responsibility for the training and administration of parliamentary draftsmen, who at present live in a sort of Arcadia of their own under the nominal tutelage of the Prime Minister. If ever a Lord Chancellor attempted to add this province to his empire, I fancy he would have a fight on his hands. Those wily men vastly prefer King Log to King Stork.’

I am not sure if the young are still brought up on Aesop’s Fables. For anyone who was not, perhaps I should say that in the Fable Lord Hailsham refers to the frogs in a pond asked Zeus to give them a king. Zeus nominated a log that lay half submerged in the water. After a while the frogs got tired of King Log, who just lay there and did nothing at all. So they asked Zeus for another king. This time he nominated a stork who lived in the pond and was very partial to frogs. Filled with delight, the frogs paid court to their new monarch. After a little while there were no frogs left in the pond. They were all inside King Stork.

How then is a Bill drafted? It is easier to put this over briefly if I tie it to an actual example. I will use an Act I drafted myself, the Consumer Credit Act 1974.

The story begins, as it so often does, with the report of a departmental committee. It would be more accurate to say that the immediate story begins there. Ultimately you could trace it back to the first time anyone ever wanted to borrow money, and on from there through the biblical prohibition on usury to the nineteenth-century abuses which led to the Pawnbrokers Acts and the Moneylenders Acts. Then there were the hire-purchase abuses in the 1930s, about which the Labour MP Ellen Wilkinson got very upset, and which led to the Hire-Purchase Act of 1938. That, by the way was a private Member’s Bill, promoted by Miss Wilkinson.

There you have three aspects of the consumer credit problem, all dealt with by disconnected groups of legislation. By 1968 the Government thought there should be a uniform treatment of the subject. It appointed an expert committee to look into it, headed by Lord Crowther, a former editor of *The Economist*. They produced a three-volume report, which the Government accepted with minor variations. The lawyers in the Department of Trade and Industry drew up drafting instructions. These were assembled in 35 parts, each separately bound. Authority was obtained from the appropriate Cabinet committee for a Bill to be drafted.

Draftsmen are like cabs on a cab-rank. They do not specialize in particular subjects, but take whatever comes along. The First Parliamentary Counsel allocates the instructions that come in. It fell to my lot to get those for the Crowther Committee Bill. Before reading the instructions, I read the Crowther Report. It is very helpful to have the whole subject surveyed by experts in this way. Then I read the instructions. It was an exciting project because it meant a brand new start in an important area of law. It covered not merely credit but hire and hire-purchase, and affected over 100,000 businesses.

My devil also had a copy of the report and instructions. We work in pairs, one senior and one junior. That is how you learn the technique of drafting. There is no training as such. You learn by experience, on the job.

There were many new concepts in the Consumer Credit Bill. A whole new legal terminology had to be worked out. It was very important to get the framework, the structure of the Bill right. Where one is dealing with a continuing process it is often convenient to adopt a chronological basis. That I did here, basing successive Parts of the Bill on the control of advertising and canvassing for business, entry into credit and hire agreements, matters arising

during the currency of agreements, and finally default and the termination of agreements. There were also other matters to be fitted in, such as the system of licensing.

The draftsman itches to start drafting as soon as possible, but it is fatal to start too soon. Reading the instructions gives rise to many questions. These have to be settled round the table. Some Bills concern several Government departments. When I drafted the Sex Discrimination Act 1975 for example, I had to hold huge meetings because the departments concerned included the Home Office, the Department of Education and Science, the Department of Employment and others. The people attending are mostly either administrators or lawyers, though occasionally a Minister comes. I remember having Dr David Owen at one of my meetings on the Children Bill of 1975. The tradition is maintained that people come to you rather than you going to them, in the same way as with a barrister's chambers.

The draftsman drafts his clauses, gets them printed, and circulates them to the Departments concerned. As soon as he has enough, he arranges them as a draft Bill. Successive drafts are printed, circulated, criticised, altered, reprinted. On a major Bill there may be fifteen or twenty successive prints. Finally the Bill is ready for introduction into one House or the other. It goes before a Cabinet committee so that Ministers generally can vet the drafting.

The draftsman also has to liaise with officials of the Houses of Parliament. The House of Commons has very strict procedural rules, particularly in relation to financial matters. The Bill has an explanatory memorandum on its front. This must be passed by the House officials, as there are rules about its form too. It must not contain argumentative matter.

Finally the draftsman takes the Bill to the Houses of Parliament and hands it over. It is given a formal first reading, and starts on its way. From now on it is 'in the possession of the House'. No alteration can be made except by formal amendment agreed to by each House. Under our sensible practice, the draftsman drafts the amendments too. This preserves the style and consistency of the Bill.

That is perhaps enough to give you an idea of the draftsman's role in legislation. What can one say of the product? Is it as satisfactory as it might be? Nothing human can be perfect, but might our Acts of Parliament be improved?

Might Acts be improved?

This is a very vexed subject, about which much could be said. I shall limit myself to two aspects.

First there is the question of whether the Parliamentary Counsel Office is as good as it could be. I do not happen to think it is, which is why I am the only person who has ever resigned from it twice. I think we should have a much larger and more efficient organization to produce our laws. I think the Office is too much like an Ivory Tower, remote from the world and taking pride in that fact. For example the man who is now the Number Two in the Office lists his recreation in *Who's Who* as 'remaining (so far as is possible) unaware of current events'.

I think the Office should be much more interested in reform, and in the possibilities opened by the electronic revolution. The Office has long been staffed by very, very clever people - what even in Cambridge you must have heard described as the All Souls network. This breeds intellectual arrogance. When you are a very clever person you simply cannot understand how difficult a less clever person find your productions. Being less clever myself, I do understand, and it troubles me.

Finally I return to the point I mentioned early in this talk, the distinction between automatic and discretionary provisions. An automatic provision works all by itself. It delivers its message without doubt or delay. I gave as illustrations that it tells you what income tax you must pay on a specified income, or what the penalty for murder is, or how much child allowance you are entitled to. The discretionary provision on the other hand is quite different. It is not automatic, but requires the interposing of some human mind.

I believe that in future we should work hard on this distinction. We should put as much as we can in the automatic, rather than the discretionary compartment. Why do I say this? Because that way we can really harness law to the electronic revolution.

The promise of LEGOL

The boldest idea in this regard is to frame the law from the start in a logical symbolism. Instead of storing within a computer database formulations in ordinary language, which can then be accessed as a book is taken down from a library shelf, this gives the computer the means of working out problems for itself, and delivering the answers. LEGOL, a linguistic system now being developed at the London School of Economics under Ronald Stamper, points the way.

In 1981 I wrote an article on the LEGOL project, with which I have been associated for some years. It was published in the *Guardian Gazette*, the journal which has the widest circulation of all legal journals.¹ This is because it is sent out free - to all judges, barristers and solicitors. My article aroused no response whatever. More accurately, it aroused no public response. I suspect that behind the scenes it sent quite a lot of shivers down quite a lot of legal spines. It was called 'LEGOL and the Electronic Home Lawyer'. It envisaged the partial replacement of lawyers (I stress the word 'partial') by home computer terminals.

The LEGOL technique involves the use of a specially-invented language. An Act of Parliament is expressed in legal English (ordinary English interspersed with technical terms having a special meaning in law). The LEGOL technique begins by expressing the subject matter of the legislative proposal in a precisely-structured form. This aims to test the proposal for logical consistency, for ambiguity and imprecision, and for likely effects in operation. It seeks to expose the uncertainty that arises from the informality of ordinary language. All this is done by translating the proposal into the LEGOL language, correcting the deficiencies thereby exposed, and then translating it back again. The LEGOL language is continually being developed by the team, and still has a long way to go before it is sophisticated enough to provide an equivalent for every element in a legislative proposal. Postulating that the real world (upon which legislation must operate) consists of 'entities', the LEGOL language embodies corresponding 'entities'. Its contribution is to define them and their interrelationships with greater logical rigour than natural language achieves.

As ultimately developed, LEGOL should equip the legislative draftsman with a tool with which to test and refine his drafting instructions. This will enable him to seek amplification of the instructions where it is shown to be needed. At a later stage he can use the tool to carry out similar tests on his draft. The tool will supplement the expertise, the common sense and the imagination the draftsman already brings to his task.

Having defined the relevant 'entities', the LEGOL technique turns the draftsman's attention to the relationships between them. For this purpose the entities are divided into things, conditions and states. The technique aims to secure precision in the way these interact, so far as the interaction is operative within the meaning of the Bill. For this purpose it provides a checklist of necessary attributes for each thing, condition or state. If any attribute is missing or defective, then doubt as to the meaning of the Bill will result. Finally, by use of a LEGOL interpreter converting the now refined concept into computer language, checks can be made and examples worked out. These will confirm the thoroughness and accuracy with which the LEGOL technique has been applied, and also illustrate the working of the legislative scheme in hypothetical real-life situations.

It will be seen that if the wording of a Bill is such that it can be computer-tested in this way, it necessarily follows that the resulting Act will also be in a form suitable for interactive treatment. Instead of trying out dummy situations in order to test and display how the

¹ F. A. R. Bennion, 'Legol and the electronic home lawyer', *The Law Society's Gazette* (1981) 1334 (1981.010).

proposed legislation would work in practice, this time the actual real-life situations can be fed into the computer. The citizen with a terminal at home will be able to feed into the computer the facts of his or her own problem without expert help. Simply by answering the successive questions appearing on the screen of the terminal he or she will be provided with the answer.

From the point of view of the citizen, if not perhaps of the legal profession, the prospect opened up by LEGOL is exciting. The citizen is required to obey the law. Ignorance of it, however excusable, is not excused. Moreover ignorance of what has become all-pervasive statute law can be a considerable handicap in a person's business and private activities. To be able to interrogate a desk-top electronic counsellor about one's income tax, or one's duty in respect of a traffic accident, or one's right of recourse against a recalcitrant travel agency, will be of distinct advantage. There is a long way to go before the major portion of the law can be made available in this way, but a start has been made.

There will always be areas where a judicial or administrative discretion must be exercised before the answer can be known. Here all the computer can do is provide the householder with information on how, in the light of relevant factors, the functionary entrusted with the discretion is likely to decide. Information so made available might indeed influence the decision itself. After all the functionary will have a desk-top terminal too!

As well as assisting the individual citizen in this way, linguistic techniques like LEGOL may be expected to enhance the general quality of law. Logical consistency and certainty of operation are not conspicuous features of our present legal system, yet they are highly desirable. Use, for example, of 'entities' tested and refined in expression by the LEGOL technique need not be confined to the Act for which they were devised. An entity of general application (as many are) becomes available to be used over and over again as required in subsequent legislation. In time the availability of what might be called prefabricated legislative units will shorten and simplify the drafting process, as well as furthering consistency of treatment in the law generally.

I began this talk with a story about verbal ambiguity. I end it with that glimpse into a future where, to a large extent if not entirely, ambiguity will cease to be troublesome. Whether as future lawyers you find that prospect pleasing or the reverse I do not know. As citizens, it seems to me you must welcome it.