Bennion on Statute Law – Part 1

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Statutory Texts

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What Statute Law is

Not inappropriately, we meet at the outset a term with a core of firm meaning and a penumbra of uncertainty. We are concerned mainly however with the core meaning of the term statute law, that is the primary legislation of a parliament or other legislature together with subordinate legislative instruments made under powers delegated by the primary legislation. In Britain, until the coming into operation of the European Communities Act 1972 (and ignoring the complications of Northern Ireland), this broadly meant Acts of the Westminster Parliament and statutory instruments as defined by the Statutory Instruments Act 1946. Our discussion, though mostly conducted in relation to these Acts and instruments, will be applicable generally to other instances of statute law in Britain and the remainder of the Commonwealth. We shall need to take account however of special factors arising in connection with the European Communities and other federal or quasi-federal systems.

The statute law of a modern legislature on the British model displays certain key features. It is largely promoted and wholly administered by the government (or executive), enacted by a parliament broadly supporting the government (senatorial quirks of an upper house being set aside), and interpreted by, and enforced on the orders of, an independent judiciary. The judiciary however lacks any *general* interpretative power. Statute law, piecemeal rather than systematic, is produced over the years in response to needs as they arise in society. It is inert, tending to remain stranded after the needs have passed or changed. Parliament, too congested with business to keep its legislation updated, is forced to rely on law reform agencies. These however are not organised and financed on a scale sufficient for the task.

Statute law is universally binding (subject only to the doctrine of *ultra vires* in the case of subordinate instruments). Nevertheless it is not self-operative but, if it is to be effective, needs to be continuously applied and enforced. It is not however subject to any doctrine of desuetude. Deductive in character (whereas case law is inductive), it lays down general rules for application to particular facts. In this it suffers acutely from the drawbacks of language as a medium of precise communication. Here we come to the nub.

Modern statute law consists of a set of written texts which (in themselves) are difficult to understand if you are a lawyer and impossible if you are not. Yet misapprehension will not avail as a shield: *ignorantia juris non excusat.*

It is strange that free societies should thus arrive at a situation where their members are governed from cradle to grave by texts they cannot comprehend. The democratic origins are impeccable; the result far from satisfactory. While minor improvements in the basic texts are always possible, the real answer to this problem lies in adequate processing.

Categories of **law**

There are many ways of dividing up the Acts on the statute book. One is to sort them into groups according to subject-matter. This is done by the official publication *Statutes in Force* and the private compilation *Halsbury's Statutes* (published by Butterworths). It is significant that there are wide differences between the two editions over the titling of the groups. As the government-appointed Renton Committee found, it is a major problem to settle a generally acceptable division of the corpus of the statute law into subjects (Renton 1975, para 14.7). For this reason (among others) they rejected the idea that Britain, like other Commonwealth countries, should have a statute book on a one Act-one subject basis arranged under titles (Renton 1975, para 20.2(47)). This denied the strong preference shown in a survey of users' wishes (Statute Law Society 1970, para 68).

In evidence to the Renton Committee I had argued strongly for a statute book divided under titles, with one Act for each tide. I suggested that there might be 300 to 400 Acts, each with a convenient scope and title, adding:

> This is meant to amount to what the 1835 Statute Law Commissioners referred to as Acts 'framed as part of a system', to which the Select Committee of 1875 added the proposition that it should involve a 'proper classification of public statutes'. This was the system adopted in this country for colonies. It has been retained, in much more sophisticated form, by all the independent countries which were formerly British colonies (Bennion 1979(4), p 86).

The Renton Committee were not moved by this argument. Yet they found words of praise for the new official edition *Statutes in Force* which, as stated above, is arranged under titles (Renton 1975, para 20.2(88)).

There is a great difference between printing a number of separate Acts in chronological order under one title (as is done in *Statutes in Force)* and drafting an Act as one comprehensive title (on the modern Commonwealth pattern). The 1835 Commissioners complained that the statutes had been 'framed extemporaneously, not as parts of a system, but to answer particular exigencies as they

occurred' (Statute Law Society 1974, para 78). The modern practice of repealing some Acts and re-enacting them in consolidated form meets only very inadequately this ancient criticism.

The Marshall Committee set up by the Statute Law Society graphically remarked in 1974: 'The statute law of the United Kingdom at the present time can he likened to a large number of Gordian knots located in an Augean stables situated at the centre of a labyrinth'. They advocated as a first step that all concerned in the legislative process should adopt a fresh outlook towards statutes, regarding them not as individual Acts dealing with particular situations but as, potentially, parts of a coherent whole 'which for convenience can be divided up under a number of subject-headings but which are nevertheless interrelated' (Statute Law Society 1974, para 79). A year later the Renton Committee echoed this plea for a fresh outlook when they said that little could be done to improve the quality of legislation 'unless those concerned in the process are willing to modify some of their most cherished habits' (Renton 1975, para 1.10). Yet, as we have seen, the Renton Committee rejected the plea for a statute book arranged systematically under titles. It remains as far from being implemented as ever.

Text creation and validation

This book is written from a drafter's standpoint, but is not primarily concerned with drafting technique or its improvement. It takes the basic texts as given. Nevertheless some knowledge of how the basic texts come into existence is needed if statute processing, and the possibilities of its development, are to be understood. Processing is concerned with curing *incomprehensibility* and elucidating *doubt* as to the meaning of a text—either in general, or in its application to a particular set of facts. The general meaning may be sought by a teacher or student, or by some person involved in changing the law. The particular meaning is needed by a person concerned with the factual situation in question. He may wish to resolve the doubt in his favour (the litigant) or have the duty of deciding between conflicting views (the judge). Whether general or particular meaning is in question, some knowledge of the method by which the text comes into existence is essential.

On the model chiefly taken for this book the basic legislative text gains its validity, under the relevant 'rule of recognition' (Hart 1961, pp 92-6), from enactment by Parliament, from a procedure followed by some other body (eg the Privy Council) or person (eg a Minister of the Crown), or by a combination of the two (eg a ministerial order requiring confirmation by affirmative resolution in Parliament). Whichever the method, validating procedures have to be followed if the text is to be recognised as law. We are not here concerned with difficulties that arise if it appears that these procedures may not have been followed correctly. Such cases are

extremely rare and can be studied in specialist textbooks (eg Bennion 1984(1), pp 124-129).

It is necessary to distinguish carefully between the validating procedures and the text creation procedures. Under modern systems a text is first created by a legislative drafter and then put through the validating procedures (in the course of which it may or may not be altered). Since the drafter is a technician and not a legislator, the validating procedures embody the concept of a legislator who consciously approves the text as finally authenticated. This may or may not correspond with fact. Either way, the text is officially taken to represent the ***intention*** of the legislator.

The typical course of events in legislating can be represented as follows:

POLICY DECISION
PREPARATION OF DRAFTING INSTRUCTIONS TEXT CREATION
VALIDATION AS LAW

Policy decision This is the political decision, taken by or on behalf of the government, to initiate the proposed legislation. The reasons for taking such decisions vary widely. The persons involved are politicians and their advising administrators (civil servants). The source of the initiative may lie with the politicians (say a general election pledge), or with the administrators (reform of some area of government for which their department is responsible), or outside the public service altogether (a lobby or vested interest). Sometimes outside interests carry their initiative to the point of persuading a non-government politician to introduce a measure they desire to become law. In such a case the policy decision becomes one of whether the government is to support or resist the measure, or remain neutral. Usually this decision is crucial to the success or failure of the promoters.

Whatever the origin of a government's decision to legislate, the administrative civil servants concerned are active in shaping the policy. When the main outline is settled (with ministerial approval) they call in colleagues from the relevant legal department of the civil service to help in working out how the policy is to be given legal effect, and precisely what modifications of existing law are required.

Preparation of drafting instructions If an outside drafter is to be used, as is usual with Acts of Parliament (and also with statutory instruments of unusual importance or difficulty), the departmental

lawyer will prepare written instructions. These should not contain legislative drafts, but convey in ordinary language the details of the policy and the legal changes required.

Text creation Either an outside drafter or the departmental lawyer, as the case may be, will now create the text which is to form the new law. He may need to hold many discussions, and revise his draft frequently, before he satisfies the politicians, and the other civil servants, who are his clients.

Validation If the legislator is a Parliament, the text will need to go through successive stages, at one or more of which it may be amended. It is of crucial importance whether the practice is for MPs themselves to draft amendments to the Bill or whether (as is the modern British system) the original drafter also drafts the amendments. Only on the latter basis can there be any hope of preserving a coherent structure and internal consistency. Furthermore a government tends to lose control of the policy of a Bill where its officer does not draft the amendments made to it. Each substantive amendment requires stages corresponding to those shown in the diagram. There must be a policy decision on whether to make or allow the amendment, then the working out of policy details and legal repercussions, then the instructing of the drafter, then the drafting of the amendment, and finally its addition to the Bill by consent signified in the required manner.
Validation differs according to whether 'the legislator' is one or more groups of persons or one individual. In the former case it again differs according to whether or not the text is capable of amendment. For our purpose validation can be categorised as follows:

Full parliamentary validation On the British model, the text is presented successively to two Houses of Parliament and is debated and amended in each (the debates being reported). It is then finally validated by the royal assent procedure (or a comparable procedure in the case of a republic).

Parliamentary non-amendable validation The text is presented successively to two Houses of Parliament and may be debated in each but not amended (any debate being reported). If approved by both houses it is validated without further action.

Non-parliamentary group validation The text is presented to a body such as the Privy Council or the former Board of Trade, and may be debated but not amended (any debate *not* being reported). In practice debate does not occur. On approval the text is validated without further action (unless *ultra vires).*

Non-parliamentary individual validation The text is presented to

a minister and approved by him. On approval it is validated without further action (again unless *ultra vires).*

In the light of this analysis what are we to make of the usual judicial pronouncement that what matters when doubts arise is 'the intention of the lawgiver' *(Sussex Peerage Claim* (1844) 11 Cl & F 85, 143) or 'the intention of the legislature' *(Warburton* v *Loveland* (1832) 2 D & Cl (HL) 480, 489)? Who is the lawgiver or legislature? Whose intention really counts? Very little detailed attention has been paid to this question. The tendency is to murmur 'myth' or 'fiction' and hurry past. Thus Dr JA Corry says 'The intention of the legislature is a myth' (Corry 1935, p 205).

Legislation is a process central to democracy. We should not have to resort to fictions to explain it, and this is not in fact necessary. We cannot properly impute to modern judges construing democratic legislation anything but a desire to proceed in strict accordance with reality. What is the reality here?

The duplex approach

I have tried to spell out the essential dichotomy which is relevant whenever doubts as to meaning arise. Broadly it is a dichotomy between the official approach and the political approach. The official approach provides the actual text, based on a thorough working out of policy, a full assessment of the practical considerations and a detailed foresight of consequences. The political approach combines ministerial policy and the views of the nation's representatives in the legislature. The elected politician tells the civil servant what the public will not stand for, and also what the public want. The parliamentarian validates the result or not as (subject to the whipping procedure) he thinks fit.

In construing legislation it is necessary to bear both these aspects constantly in mind and produce a synthesis between them. We have gone beyond the crudities of early Acts and early judicial attitudes. A sophisticated modern society demands a sophisticated approach to its laws. This requires a full awareness of how the validated text comes into existence as law, and a precise weighing of the relevant factors.

This may be called the duplex approach to legislative meaning because it is composed of two parts. It is necessary to bear in mind the text creation process, but also to remember that the drafter is merely a technician. The validating process is usually a genuine one, and not a question merely of administering a rubber stamp. Between the two the answer lies. The drafter is fallible, and invariably inadequate to his imposing task. The legislator is armed with the people's vote and speaks in their name. That Parliament in one sense should err, and bungle its commands, is acceptable (and must be accepted) provided it is recognised that in the other sense Parliament is infallible. It was in the latter sense that Grove J

remarked in *Richards* v *McBride* (1881) 8 QBD 119, 122, that we cannot assume a mistake in an Act of Parliament.

Although the duplex approach has not been worked out as such by the courts, it is implicit in many judgments. For example in referring to the provisions of an Interpretation Act, Lord Morris of Borth-y-Gest said 'Prima facie it can be assumed that in the processes which lead to an enactment both draftsman and legislators have such a provision in mind' *(Blue Metal Industries Ltd* v *RW Dilley* [1970] AC 826, 846).

The working out of this dichotomy between text-creation and validation, and the definition of how the duplex approach to legislative meaning operates (or should operate) are principal themes of this book and will be fully explored. But first we consider some further aspects of the question of what statute law is.

Historical

The Chronological Table of the Statutes, a most valuable official work, lists all the public Acts, and says what happened to them in the way of amendment and repeal. It starts with Statutes of the Parliaments of England, beginning with the Statute of Merton (1235). This starting point may cause surprise, because we think of Magna Cam as the earliest statute and that was first promulgated 20 years earlier. The answer is that the Chronological Table records Edward I's confirmation of Magna Carta, dated 1297. It was thought in medieval times that a statute lapsed on the death of the king who made it. If it was to endure, it had to be confirmed by the next king. That no longer applies of course. An Act now remains in force until it is repealed, or (if it is a temporary Act) expires.

The Chronological Table also includes Acts of the Parliaments of Scotland beginning with James I of Scotland (1424), though there were earlier Scottish Acts. Statutes of the Parliaments of Great Britain start in 1707, following the union of England and Scotland. Statutes of the Parliaments of the United Kingdom start in 1801, following the temporary union with Ireland. Acts of the Parliaments of Northern Ireland are not included in the table, but do of course form part of the statute law of the United Kingdom. Stormont, consisting of a Senate and House of Commons, was set up in 1920 and abolished in 1973. Northern Ireland is now regulated by a combination of Westminster Acts and Orders in Council.

Our earliest statutes are not Acts of Parliament at all. They are royal decrees or ordinances or charters (such as Magna Carta). Usually they were drawn up in consultation with the king's principal subjects, the great barons and prelates. The statutes are in Latin for the first two centuries after the Norman Conquest. For the next two centuries they are in Norman French. They are not printed, for printing has not been invented. The labour of copying them by hand keeps the text short.

Ancient statutes, that is those of the period commencing with Magna Carta in 1215 and ending with the death of Edward II in 1327, are known as ***vetera statuta*** or ***antiqua statuta.*** They include some which are described as ***incerti temporis*** (of uncertain date). Acts passed between 1327 and 1483 are known as ***nova statuta.***

By the middle of the fourteenth century it is established that the assent of the Commons as well as the assent of the Lords and the king is necessary to the validity of a statute. Editors begin to put together collections of statutes. With the introduction of printing late in the fifteenth century these editions are printed, many of the statutes being translated into English. Often things are included which are not statutes at all, for example bits of lawyers' commonplace books. This is because the editions are working manuals for lawyers. (As to later published editions see chapter 7 below.).

Some of these early statutes remain of everyday interest and concern to us. The law of treason is still centred on the Treason Act 1351. Binding-over in magistrates' courts is done every day under the Justices of the Peace Act 1361. The Forcible Entry Act 1381 was repealed only as recently as 1977.

Categories of Acts

A declaratory Act is presumed not to change the law. A penal Act must be strictly construed. On the latter point Blackstone cites the example of the statute 1 Edw 6 c 12, which enacted that those convicted of stealing 'horses' should not have benefit of clergy. The judges held that this did not apply to him who should steal but one horse (Blackstone 1765, I 63).

While there is link point in dividing up the entire statute book according to subject matter, we can usefully distinguish some further categories in addition to those mentioned above.

Financial Acts These are subject to a special enactment procedure, which reflects the constitutional principle that grants of supply for public expenditure, and the raising of taxation ('ways and means'), are within the province of the House of Commons alone.

Adoptive Acts While they have a place on the statute book they do not apply in a particular area or for a particular purpose unless they have been adopted for that area or purpose by some appointed machinery. The Town Police Clauses Act 1847 is one of the category of adoptive Acts known as Clauses Acts. These were a nineteenth- century phenomenon. Parliament does not pass them nowadays. By setting out once and for all common form provisions, Clauses Acts greatly shortened the language needed in individual local or personal Acts. They incidentally produced a useful standardisation in the law.

In the days of the so-called railway mania, when entrepreneurs such as George Hudson were promoting one new company after another, Parliament was asked to pass, by the private Bill procedure, a great many authorising Acts. They were seen to be all on the same lines. So Parliament passed the Railway Clauses Consolidation Act 1845. This contained the common form provisions, and could be incorporated in each special Act promoted by an individual company. The same was true of the Lands Clauses Consolidation Act 1845, and the Companies Clauses Consolidation Acts, and of others—for example the Harbours, Docks and Piers Clauses Act 1847. All these are still on the statute book.

This idea of the adoptive Act had other applications. Local authorities could adopt an Act for their area or not, as they chose. There were the Baths and Washhouses Acts 1846 to 1899—the days before almost every house had its own bathroom and kitchen. There were the Burial Acts 1852 to 1906, and the Public Libraries Acts 1892 to 1919. When the cinema came in, it was left to each locality to decide whether it wanted Sunday cinemas, notwithstanding the Lord's Day Observance Acts. This local option was provided for by the Sunday Entertainments Act 1932. Although Clauses Acts are no longer passed, the adoptive system, which may appply to a part of an Act as well as to a whole Act, is still very much alive today. Thus the Highways Act 1980, provides for the adoption of an advance payments code for private street works (see s 204(2)). A list of adoptive and clauses Acts is given in the official Index to the Statutes (see headings Adoptive Acts and Clauses Acts and Clauses Consolidation Acts).

Acts of indemnity, amnesty or oblivion These are passed to relieve named individuals or groups from penalties imposed for the transgression of some public law. The statute 12 Car 2 c 11, known as the Act of Oblivion, was passed on the restoration of Charles II in 1660 to give certain persons an indemnity for illegal acts done during 'the late interruption of government'. Modern indemnity Acts have relieved government ministers from inadvertent breaches of law, MPs from sitting and voting while disqualified, service- men from dubious activities in defence of the realm, and so on. (For an example see the Housing Finance (Special Provisions) Act 1975.)

Validation Acts These declare some specified action or procedure to have been valid even though it is known or suspected that it was in fact invalid or otherwise legally defective. (For an example see the National Health Service (Invalid Direction) Act 1980, reversing the decision in *R* v *Secretary of State for Social Services, ex pane Lewisham, Lambeth and Southwark London Borough Councils* (1980) *The Times,* 26 February.)

Section 3 of the Interpretation Act 1978 tells us that 'Every Act is a public Act to be judicially noticed as such, unless the contrary is expressly provided by the Act'. This seems to be saying something quite straightforward. Every Act is a public Act. Unfortunately it is not true. Every Act is not a public Act. There are public Arts and private Acts, according to the procedure by which they were enacted by Parliament.

A public Act results from a public Bill, ie one introduced by a Member of the House of Commons or the House of Lords. A private Act results from a private Bill, ie one introduced in a quite different way on the petition of its promoter (who may be anyone except a member of the House of Commons or the House of Lords). Brief details of the various types of Bill are given below (for a fuller treatment see Miers and Page 1982, chapter 5).

A public Bill goes through various stages in each House of Parliament, always under the wing of a member of that House. If at any stage no member can be found who is interested, the Bill drops.

A private Bill goes through a different procedure. It must be advertised, and its promoter must satisfy a Parliamentary committee that it deserves to be enacted. It changes the law in a limited way purely for the benefit of its promoter, and Parliament has to make sure no one else will be unfairly prejudiced by it. Usually the promoter appears by counsel, who is a member of the Parliamentary Bar and is instructed by parliamentary agents. This is a vestige of the ancient idea that a Bill is a petition presented to the king in Parliament by his subjects, craving some benefit.

A hybrid Bill is a public Bill which has something of the nature of a private Bill because it affects a particular private interest in a way different from its effect on such private interests generally, for example because it regulates a named industrial or commercial undertaking. Bills of this kind have first to go through a modified form of private Bill procedure so that objections can be heard. (For a judicial reference to this procedure see the remarks of Lord Diplock in *Jones* v *Wrotham Park Settled Estates* [1980] AC 74, 106.)

So why does s 3 of the Interpretation Act say that every Act is a public Act when it is not? The key lies in the phrase 'to be judicially noticed as such'. We get a clue from the sidenote, which refers only to judicial notice. So the section which appears to be so general is in fact concerned with nothing else but the doctrine of judicial notice.

All s 3 means is that no Act, whether public or private, need be proved in court. Unless, that is, the final limb of the section applies, and the Act otherwise provides. To account for this it needs to be explained that private Acts are divided into *local* and *personal* Acts. There are a great many local Acts, usually promoted by local

authorities. They regulate matters such as behaviour in public parks or the licensing of coffee bars or massage parlours. They are local and private Acts, but for the purpose of judicial notice only they are by virtue of s 3 of the Interpretation Act 1978 public Acts— because they do not say otherwise.

Personal Acts do say otherwise. They only concern named individuals, for example by regulating their family trusts or estates, or granting them naturalisation, or allowing them to marry within the prohibited degrees of affinity. Here the practice is for the personal Act to declare itself not to be a public Act. Judicial notice is not taken of it. It requires to be proved in court.

The two meanings of 'statute law[9]

Lord Hailsham of St Marylebone LC pointed out that nine cases out of ten reaching the House of Lords concern statutory interpretation *(Johnson* v *Moreton* [1980] AC 37, 53). A similar proportion no doubt prevails in respect of reported cases generally. This justifies the statement that every lawyer now needs to be a statute lawyer (see Bennion 1982(1) and (2)). What does this involve?

We see that the term 'statute law' really has two meanings. The older and perhaps more established meaning is that statute law is the body of *enacted law* or legislation (as opposed to unwritten law consisting of common law, equity and custom), together with the accompanying body of judicial decisions explanatory of the individual statutes. Statute law in this sense forms a very large proportion of the whole *corpus juris.* It is from that point of view that we have so far discussed it in this chapter. (For a very interesting study of the impact of modern statutes on the society they regulate see Miers and Page 1982, Chapter 8.)

The other meaning of statute law is that it is the body of knowledge or expertise which tells people how to handle the statute law (in the first meaning of the term). This covers the legislative processes, the nature of the various types of enacted law, and the principles governing the interpretation and operation of statutes. It is in this second sense that lawyers of today need to be, or to become, competent and efficient statute lawyers.

The Drafting of Legislation

As I have said, this book is not primarily concerned with drafting technique. Yet it is difficult to understand an Act without some knowledge of how it comes to be the way it is. The work of the drafter is crucial to statute processing, but is little understood outside the drafting office. It seems necesary to spend a little time on this therefore. I propose here to single out four aspects relevant to our theme: the drafter's function, the drafting office, the controversy over whether civil-law drafting on the continental model is superior to common-law drafting on the English model and the question of standardisation. Later I shall also discuss what I call the drafting *parameters*, the factors behind the special techniques of British drafters.

The drafter's function

By saying in chapter 1 that the drafter is merely a technician, denigration of his function was not intended. When helping to frame the report of the Heap Committee I ventured to write: 'Although, like the plumber or the electrician, the draftsman provides a necessary service for the user, he is not employed, as they are, by the consumer' (Statute Law Society 1970, p 17). I said this to make the point, thereafter spelt out, that the needs of the statute user are in practice subordinated to governmental interests. My reference to the plumber or electrician has at times been misunderstood. For example, the former New Zealand legislative draftsman and anti-positivist, NJ Jamieson wrote that if the drafter of legislation is treated as a plumber or electrician then 'open societies are likely to be doomed' (Jamieson 1976, p 550). He argued that if the drafter is to be considered as a craftsman at all he should be seen as an industrious clockmaker who never makes the same clock twice. In his view the drafter is 'engaged in an infinitely more venturesome and skilful enterprise than the judge who accepts by his own judicial doctrine of Parliamentary sovereignty that he is being at the most taught, and at the least merely told, how to tell the time by it' *(ibid* p 546). He later wrote *(ibid* p 558) that to compare drafting with plumbing 'naturally results in inadvertent clowning more tragic than funny'.

Describing the drafter as a technician, I adverted to the skill he must undoubtedly possess. Only because the capacity to acquire the skill is rarer than that needed by an apprentice plumber or electrician can it be inapt to make the comparison. But Jamieson is right to feel uneasy: the legislative drafter's function is basic to democracy. Though merely a technician he should not be an unaware technician. He operates only as a technician, but the democratic process requires that he does so as an ardent democrat. He needs to be fired by a sense of the public importance of his function. The drafter who is a wage-slave, seeing the job as just another well- paid occupation, is a disaster. (See further Bennion 1962, pp 339- 346.)

The drafting office

Drafting can be organised in various ways. In early times the judges did it, hence the famous rebuke to counsel by Hengham CJ in 1305: *'Ne glosez point le Statut; nous le savoms meuz de vous, qar nous les feimes'* ('Do not gloss the statute; we understand it better than you do, for we made it', YB 33-35 Edw I (RS) 82, 83). Six hundred years later judges were still making comments in court about their drafting of statutes (now very rare), but the sublime confidence had evaporated. In 1902 Lord Halsbury LC abstained from delivering judgment because the case concerned an Act he had drafted himself. He said: 'I believe the worst person to construe it is the person who is responsible for its drafting' *(Hilder v Dexter* [1902] AC 474, 477). For a rejoinder by the present author see Bennion 1962, p 346. Sir Courtenay Ilbert, a former head of the Parliamentary Counsel Office, also sided with Hengham CJ:'. . . the Parliamentary Counsel can often, from his knowledge of the history and intention of an enactment, give a clue to its true construction' (Ilbert 1901, p 93). Between 1487 and 1869, when the Parliamentary Counsel Office was established in Whitehall, drafting of Westminster Acts was done either by Chancery barristers or by counsel attached to the government department in question. Lord Thring, who in 1869 became the first to be appointed as Parliamentary Counsel (with one assistant), had drafted Acts of Parliament during his private practice at the Bar till 1861, when he was appointed draftsman to the Home Office (Thring 1902, p 5). The Parliamentary Counsel Office, where all government Bills (except purely Scottish ones) are now drafted, grew in size but very slowly. A third draftsman was added in 1917. It was only in 1930 that the number of counsel was increased to four, when a more formal system became necessary. Up till about 1935 it was the practice to allow unestablished draftsmen in the Office to undertake outside drafting work for a fee. At the same time outside practitioners were also employed to carry out drafting assignments. Currently the Office employs around 20 drafters.

The Parliamentary Counsel Office has raised the technical efficiency of legislative drafting to a standard far superior to that prevailing when it was set up in 1869. A corresponding drawback is thus expressed by Lord Renton: 'But the trouble is that the need to achieve certainty of legal effect causes the brilliant men who have to draft the Bills to resort to skilfully compressed phrases which are nothing like ordinary language' (Renton 1980, p 6). I discuss this question of compression in detail below (chapters 3 and 14) and conclude that it is inescapable and can be dealt with only through subsequent processing by text-manipulation methods such as Composite Restatement (chapter 23).
The Office was set up as the Office of Parliamentary Counsel to the Treasury though the last three words have now been dropped. Although answerable to the Law Officers on technical matters of drafting, it is in practice an adjunct of the Cabinet Office. This is because its primary function is to serve the government of the day, the head of which is still First Lord of the Treasury. The government must get its Bills on time and they must be in a form which will first stand up in Parliament and then stand up in court. This is difficult enough to achieve without worrying too much about users' chronic complaints of obscurity (or such is the Office's traditional attitude). My own view on this is discussed elsewhere (see Bennion 1980(1) and (5)) where I criticise in detail the characteristics identified by Twining and Miers at the end of the following passage

> … the Parliamentary Counsel Office appears, at least to outsiders, to have developed a rigorous, arcane and somewhat inflexible craft-tradition. They have an enviable reputation for technical proficiency and, in some of their relatively rare public pronouncements, a less enviable reputation for *hubris* (Twining and Miers 1981, p 203; for a choice example of this *hubris* see (1982) *Times Lit Supp* 1009).

Other defects which the heads of the Office have collectively displayed since the death of Sir Granville Ram in 1952 are timidity, reluctance to innovate and lack of leadership. It was regrettable that when the Law Commission was set up in 1965 it was found necessary to include statute law among its functions in addition to the reform of lawyer's law. This betrayed my ideal of the drafter as the keeper of the statute book — an ideal which Ram certainly subscribed to. He established a separate consolidation branch in the Parliamentary Counsel Office and instigated the passing in 1949 of an Act that considerably aided the process of consolidation (see chapter 6). He was a man full of resource who never lost his nerve and was a doughty champion of the Office (Kent 1979, p 73).
Two examples may be given of the reluctance to innovate. In 1974-75, in conjunction with the Central Computer Agency I conducted in the Office an experiment in the use of a computer for legislative drafting (see Bennion 1975(4)). This was done in

relation to what subsequently became the Children Act 1975 and the Sex Discrimination Act 1975. It was the first time a computer had been used in the drafting of British legislation, but, except for the late Sir Anthony Stainton, my colleagues in the Office displayed little interest.

The other example concerns the Interpretation Act 1978. A disgracefully long period had elapsed since the passing of the previous Act (the Interpretation Act 1889). Much complaint had been expressed over this quite unnecessary delay, which meant that many obsolete provisions continued to encumber the statute book. Other countries had developed this useful tool to a considerable degree. Even Northern Ireland, with exiguous resources, had been able to produce a very sophisticated model (the Interpretation Act (Northern Ireland) 1954 — see Leitch and Donaldson 1955 and Leitch 1965). The adoption of these improvements by the United Kingdom Parliament was confidently looked forward to. The Renton Committee for example, after pointing out that without the 1954 Act subsequent Northern Ireland statutes would, upon a conservative estimate, be one-third larger than they are, called for a comprehensive revised Interpretation Act (Renton 1975, paras 19.4-19.11, 19.31, 19.32). What happened? The 1978 Act, produced under the inspiration (if that is the word) of the Parliamentary Counsel Office, amounted to little more than straight consolidation of existing British enactments.

My own belief is that, while legislative drafting is a difficult art requiring a lengthy apprenticeship, it is not the best arrangement to make it what Sir Noel Hutton has called 'a life engagement' (Hutton 1979, p 253). Most drafters join the Office in their 20s and remain involved in its work until well past the official retirement age. They do little else but drafting. Alec Samuels has commented that under our present system the drafter 'gets further removed from the day-to-day application and use of statutes in legal practice' (Samuels 1974, p 532). For a Canadian view see Bennion 1980(7).

Common-law drafting *v* civil-law drafting

In Canada, where they have a bilingual legal system in English and French, the British style of complex drafting has been dubbed 'common-law drafting'. Professor Clarence Smith of Ottawa University had this to say about its relation to civil-law drafting:

> . . . if we take any random example of this drafting of either side we do not seem to be even in the same world. A civil-law draft is likely to be simple and short — a common lawyer is inclined to say disdainfully, conversational — so that at least you think you understand it easily. A common-law draft is likely to be a writhing torrent of convoluted indigestion (Clarence Smith 1972, pp 158-9).

Clarence Smith is not impressed by the argument (to which I

subscribe) that the complications of common-law drafting are justified by its much greater degree of certainty and democratic control. He does however admit the danger that drafting in wide terms may encourage the litigation which detailed precision makes absolutely hopeless *(ibid* p 162; for examples see Bennion (1971(2), pp 140-1).

The theme is taken up by Sir William Dale in a book published in 1977, *Legislative Drafting: A New Approach.* He supports the view that the British should go over to the continental system of drafting. The book, commissioned by the Commonwealth Secretary General to help developing countries draft their laws, compares recent United Kingdom statutes on copyright, divorce, adoption, labour law and other topics with corresponding statutes in France, Sweden and West Germany. Dale 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 landowner a statute on land law, and so on (Dale 1977, p 331).

This sounds fine until we look more closely. Copyright law applies to every sort of creator or performer, down to the writer of an article in a parish magazine and the man who does lightning sketches on the pier. We are all family men or women and most of us at some time own or rent a dwelling. Thus Dale's thesis really means that statutes should be drafted so that they can be understood by all. Though many people hold this view, and it has the ring of fairness, it could be achieved only by giving to judges and officials a degree of discretion unlikely to be aceptable in a democracy. Even then, the law would not really be 'understood by all'. Only the very broad principles would be understood. Their application to particular cases would depend on how the discretion happened to be exercised. The Code Napoleon enacted the whole law of tort in two sentences:

> Any act whatsoever by a man that causes damage to another obliges the person at fault to make good the damage. Everyone is responsible for the damage he causes not only by his act but also by his negligence or imprudence.

It left the aggrieved citizen uninformed as to whether in a particular case he might receive compensation from a tortfeasor, and to what amount (Renton 1980, p 6). Dale quotes approvingly a sample of civil-law drafting from Sweden: 'The performance of a work at a place of business for a comparatively large closed group of people shall be considered a public performance' (Dale 1977, p 2). It would be interesting to hear non-lawyers discussing whether a hotel room hired by a firm for its staff party is a 'place of business' or whether 43 party-goers consisting of the firm's staff with a few relatives and friends is 'a comparatively large closed group'. Only a judge's discretion could give the answer, and in court there could be fevered argument on practically every word of the provision.

What are the essential features of civil-law drafting? Dale's 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' *(ibid* p 334). Such a code is not of course present in British law. 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 *(ibid* p 332).

The contrasting English practice was described by Professor Gower in relation to the Companies Act 1948:

> One of the reasons for the complication and difficulty of the . . . Act is its lack of completeness. No one by reading it could glean any real understanding of Company Law. Nowhere are the fundamental principles enunciated. Exceptions are laid down to rules which are never stated . . . (Gower 1960).

The truth is that the pragmatic British are chary of statements of principle. They distrust them because they almost invariably have to be qualified by exceptions and conditions to fit them for real life. What is the use of a principle that cannot stand on its own?

In any case, continental drafting is far from consisting entirely of statements of principle. Many of its manifestations are as lengthy and complex as anything issuing from the Parliamentary Counsel Office. Nor are they likely to be as thoroughly thought out and self-consistent. British lawyers are becoming more familiar with the continental style through reading directives and other products of the European Commission (described in chapter 5). This tends to lead to greater respect for our own drafters. The Law Commission found, for example, that a proposed directive on the law relating to commercial agents suffered from the following defects:

(1) It laid down rules without specifying what consequences flowed from their breach.
(2) It used a number of different words to express the same idea.
(3) It used the same word to express a number of different ideas.
(4) It tended to make the same point twice, once positively and once negatively.
(5) Statements of principle were followed by non-exhaustive, ill- chosen and misleading lists of illustrations.
(6) Particular instances were given of a general principle which was nowhere stated.
(7) It used a technique of descriptive drafting which did not exhaust all the possibilities.

The Law Commission felt that these defects and others meant

that the text was badly drafted, unclear, ambiguous and internally inconsistent. Their conclusion was that 'the directive in its present form is quite unworkable' (Law Com No 84, pp 11-12).

Perhaps the most telling argument in favour of common-law drafting is its greater degree of democratic control. In his 1973 study of American malpractices, *How the Government Breaks the Law*, JK Lieberman argued that public bureaucracies were given too much legislative power. This was done by over-use of what in this book we call the broad term (see chapter 16). Lieberman cited phrases like 'immoral behaviour', 'public nuisance' and 'disloyalty to the state' as being particularly corrupting of the public service.

The Australian criminologist John Braithwaite argued that much 'white-collar crime' is caused by people abusing a position of power, and that to reduce opportunities for bribery or other corruption discretion should be confined within narrow limits (Braithwaite 1979, chap 10). Even without contemplating the commission of criminal offences such as bribery (which do nevertheless occur), one can see that to vest decision making in a non-elected judge or official by bestowing wide discretionary powers on him is undemocratic. This is a vice of much human rights legislation.

I suggest that the key to the controversy between upholders of common-law and civil-law drafting is to be found in the following passage from Sir William Dale's book: '. . . one may say on behalf of the draftsmen that, when once one understands a United Kingdom Act, one can usually ascertain the answer to one's question. But what time, toil and trouble may be needed to get to the bottom of the Act!' (Dale 1977, p 82). It is to save such time, toil and trouble that one looks to adequate processing of the legislative text.

Standardisation

Drafting technique, like any other, is always capable of minor improvements here and there. The only improvement of major significance I envisage however is in the use of standardisation. Far too much unnecessary confusion is caused by the tendency of drafters to say the same thing (or virtually the same thing) in different ways. This is no fault of theirs. The drafter of a particular Bill (usually wanted in a hurry) drafts the common type of provision in his own words for the simple reason that standardisation clauses simply do not exist. They ought to be brought into existence and updated as necessary by some body charged with that function. In England it would no doubt be the Law Commission, in default of there being a body whose only task is to look after the statute law. Statute law cannot serve the community effectively if it is no one's job to look after it. For over a century that function has nominally been performed in Britain by the Statute Law Committee, which I once described in a newspaper article (accurately if disrespectfully) as an august body that meets once a year and consists of people

whose job it is to do something else. This criticism has recently been supported by Lord Justice Ralph Gibson (see Zellick 1988(2), p 53). In what follows I refer to the body whose function it is to look after statute law (whatever it may be called in a particular country) as the keeper of the statute book.

I suggest then that the keeper of the statute book should produce standardised clauses wherever it is possible to do so. These could either be embodied in the Interpretation Act, to be attracted automatically by use of the term defined, or in the form of model clauses, to be inserted bodily in each Bill making use of them. They would be most effective if they were not simply definitions but were thoroughly worked out and comprehensive statements of the relevant portion of law. On this limited scale codification is practicable. Take as an example the question, so often needing to be determined, of whether a new statutory offence creates absolute liability or requires *mens rea*. There should be model clauses available which set out in a codified form the full consequences of each alternative so that all the drafters of the new offence need do is 'plug in' to one or other model clause. Indeed it might be advantageous to have several alternative clauses available, giving progressively stricter offences.

The scope for comprehensive model clauses in modern legislation is enormous. An Act imposes obligations, which immediately raises questions about the consequences of a breach of the obligation. Is it a criminal offence, and if so of what type? Does it give rise to civil liability, and if so what remedies are available? Can duties imposed on ministers or officials be enforced, and if so how? If the Act sets up a new tribunal to hear complaints of breach of duty what are its powers and procedure? If the duty of policing the Act is given to an inspectorate what are its powers? Can it use force to enter premises? Must information it acquires be kept confidential? And so on. There is no need to work these things out afresh every time a new Act is drafted. Standardisation would save time in drafting and shorten Bills. It would simplify the law and help the citizen to find out what his rights and duties are.

Standardisation is an area where cooperation between Common- wealth countries would be fruitful. Model clauses on topics like strict liability or powers of entry could be drawn up in uniform terms applicable to any common law country.

A Statute Law Institute?

In default of the production of model clauses by an official keeper of the statute book, the job could be done by an unofficial body. Here the history of the American Law Institute is relevant. In 1923 a meeting attended by judges and representatives of the American Bar Association resolved:

That we approve the formation of the American Law Institute, the object of which shall be to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work (Lewis 1945).

The great success of the restatements, codes and model laws produced by the Institute has fully justified this joint initiative by the American bench and bar. A non-official body of this kind has greater freedom than a state organism like our Law Commission, but can possess no less authority. It may prepare codes for enactment by the state, or merely promulgate restatements and model provisions for the service of the profession (including law publishers). Either way lawyers are contributing in a professional way to the efficiency of their operations, rather than depending altogether on the state.

There is today general dissatisfaction with the administration of justice. The feeling of dissatisfaction is not confined to that radical section of the community which would overthrow existing social, economic and political institutions. If it were, we as lawyers could afford to ignore it. But the opinion that the law is unnecessarily uncertain and complex, that many of its rules do not work well in practice, and that its administration often results not in justice, but in injustice, is general among all classes and among persons of widely divergent political and social opinions. It is unnecessary to emphasise here the danger from this general dissatisfaction. It breeds disrespect for the law, and disrespect for law is the cornerstone of revolution . . . (1 *American Law Institute Proceedings* (1923 1).

This might be said in Britain today, as well as having been said in Washington 70 years ago. The professional people whose utterance it was added that they intended to tackle the problem with 'a consciousness of the obligation which *rests upon the profession* to take informed action to better existing conditions' *(ibid;* emphasis added). Why should the legal profession in Britain today feel any less obligated in this respect than did the American legal profession of 70 years ago?

The drafting parameters

The more important statutory texts become law by the method described above as *full parliamentary validation*. The text is prepared by the drafter for consideration by legislators, who may amend it. But it also has to be in a form suitable for subsequent operation as law. The same text must serve two distinct purposes. Each purpose requires the text to possess certain characteristics, sometimes conflicting. These requirements may be called the drafting parameters. They control the form of the text. If they are not known and understood by the reader he can scarcely be expected fully to understand the text. The typical characteristics of the text cannot

be recognised and allowed for. Furthermore, text processing and the need for it cannot be grasped, and the development and improvement of processing methods is likely to suffer neglect.

The drafting parameters give rise to the special skills and techniques of the legislative drafter. The parameters operate, with varying degrees of intensity, on every drafting assignment. Some are more important than others.

The parameters can be divided into two groups, broadly corresponding to the two purposes mentioned above. The first group, which may be called ***preparational,*** is concerned with the procedures which prepare the way for the text to emerge as part of the law. The second group, which may be called ***operational,*** is concerned with the subsequent working of the text as law. The groups are made up as follows:

Preparational drafting parameters	*Operational drafting parameters*
Procedural legitimacy	Legal effectiveness
Timeliness	Certainty
Comprehensibility	Comprehensibility
Debatability	Legal compatibility Acceptability Brevity

It will be noticed that comprehensibility appears in both groups. As will appear, it does not operate in quite the same way for each.

Preparational parameters

These govern the drafter's task in preparing successive drafts of the text to satisfy the ministers and officials who are his clients, and subsequently in steering the resulting Bill and any amendments to it through Parliament. In other words, they relate to what happens between the inception of the project and the signifying of assent to the Bill. (By contrast the operational parameters, which the drafter must also bear in mind from the inception of the project, relate to what happens or may happen once the Bill becomes law.)

Procedural legitimacy As part of his function of drafting the text, the drafter is responsible for ensuring that the text (whether of the Bill itself or amendments to it) complies with the procedural requirements laid down by Parliament. Before the Bill is introduced, the drafter must satisfy the requirements of government procedure for example (in Britain) by submitting the text to the Law Officers (who supervise the drafter) and later to the Legislation Committee of the Cabinet (who under current practice must approve the text before publication). Earlier still, the drafter 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 drafter 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 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.*

The legitimacy parameter is mainly related to rules of parliamentary procedure. If the drafter 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 drafter 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. In Britain 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 drafter must ensure that all these complex rules of order are 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 This parameter is mainly constituted by the government's timetable for legislation. At the beginning of each session in Britain (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. 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. This means that departments with Bills in the programme are expected to conform meticulously to the timetable, and the drafter

must follow suit. The timetable will allow for the fact that lengthy or contentious Bills must be ready for introduction early in the session, since otherwise they may fail to pass through the necessary stages before the session ends. This 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 drafter 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 drafter a breathing space since all current Bills fall on a dissolution of Parliament.

The Renton Committee reported that drafters were the first to recognise that time pressures may affect the quality of their output. They quoted Sir Anthony Stainton: 'By the time instructions are received, there may not be much room for the draftsman to take decisions which will make for simplicity or clarity . . . The pressure to get things done is usually great' (Renton 1975, para 8.3). This is strikingly illustrated in a story told by Sir John Fiennes:

> There was one occasion, on a Financial Bill, when I sat down on a Sunday at home and rewrote a whole Part of a Finance Bill. It went to the printer on Monday night, and the text was handed in at teatime on Tuesday. The Revenue never saw the final version of that until the Bill was published (Renton 1975, para 7.12).

The drafter 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. As Sir Noel Hutton has said:

> Under any system of programming, the date of introduction will eventually become more important than the precise content of the Bill when introduced and the process of drafting will have to be continued after introduction by means of government amendments moved in Parliament. This is not the best method of constructing a Bill, and it adds fuel to the complaint that Parliament is given no sufficient chance to consider the legislation placed before it. . . (Hutton 1967, p 294).

Another aspect of the importance of the date of publication is that once the wording of the Bill is 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 rules of procedure inhibit the drafter. The Bill is in the possession of Parliament and even though a major change may be required, the drafter 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 Parliament. The majority of amendments made to Bills would have been incorporated in the 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 drafter 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. His only consolation may be to reflect on Sir Noel Hutton's remark that time can be the friend of drafters 'for they are always striving after the perfection which . . . is usually in fact unattainable; and the last bell, even if it comes too soon, does at least release them from that vain endeavour' (Hutton 1961, p 19).

Comprehensibility The government will incur criticism in Parliament if the Bill is not comprehensible to members, and so the drafter 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' (Thring 1902, p 8). The Renton Report contains the following passage:

> How far Members of Parliament are able to understand the general purpose of many Bills without reference to other documents we could not discover, but one of our witnesses, Mr Francis Bennion, has expressed the view that: 'if Members were asked whether as a contribution to clarity they would be prepared to give up the four corners doctrine, provided adequate alternative means of providing information were designed, my own feeling is that they would readily accept'.
> If this is so, it would make it easier to amend existing enactments by the textual amendment method (Renton 1975, para 7.15).

The four corners doctrine required the drafter 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 offical revised edition *Statutes in Force* (the method of publication of which necessitates use of the textual amendment system), the four corners doctrine has happily lost much of its effectiveness. We discuss this aspect more fully in chapter 14.

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 public officials or members of professions (such as accountants or architects) whose work brings them into frequent contact with enacted law. Most MPs on the other hand are neither lawyers nor familiar with law; they are politicians. 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 drafter. When the other parameters are brought into consideration also (as they must be) the drafting problems can become considerable.

Debatability 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. In evidence to the Select Committee on Procedure, I 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 (see Bennion 1978(2)).

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 drafter needs to be constantly on guard. One device for restricting amendment is to draw the long title tightly (see p 42).

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 put 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. The parameter of ***debatability*** is summarised in the following statement by Sir John Fiennes to the Renton Committee (Renton 1975, para 7.9):

> One of the jobs of the draftsman is to present changes in the law to Parliament in a debatable form . . . You have to arrange a Bill, be it a new Bill or an amending Bill, in a form in which it is capable of rational debate in the House all through its stages; if possible so that the main debates occur at the right places, mopping up the subsidiary debates which will therefore not occur. If you have the subsidiary debates first they will probably blow up into the main debates, and you will then have the main debates again in their proper places afterwards.

Sir Courtenay Ilbert has written to similar effect (see Ilbert 1901, pp 241-3).

Acceptability In framing his text, the drafter 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 minimise objection from them. 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 in Britain it has to be approved by the Law Officers and the Legislation Committee of the Cabinet. Then it runs the gauntlet of scrutiny by MPs, political and professional commentators, and by representatives of vested interests. The drafter 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 MPs 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 drafter has an opportunity to add new meanings, or even new words, to the language. For example I did this with 'custodian' and 'custodianship' in the Children Act 1975. 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 rejected 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 is exactly the same, and greater precision is not attainable. In the House of Commons Gordon Oakes described the phrase as 'amateurish', while Denis Howell thought it a 'headmaster's phrase' and demanded that 'better phraseology' be provided in the House of Lords ((1974) 867 HC Deb cols 1545, 1551, 1573; for a comment see Renton 1975, para 11.3). I stood firm against this, and the phrase remained (see General Rate Act 1967, s 17A).

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 (Thring 1902, p 6). 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 drafter 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 For 100 years or more—in fact since British MPs adopted the practice of close scrutiny and lengthy debate of Bills—drafters have been encouraged to make their Bills as brief as possible. In particular, the number of clauses is kept down. This is because MPs have the right to debate each clause if they wish, preparatory to the putting of the motion that the clause stand as 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 drafter 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. Drafters are usually hard-pressed, and are not looking for work. The same applies to those instructing them. Again, MPs would rather study a brief text than a lengthy one. They are apt to complain if confronted with too many bulky Bills. Printing resources are always at full stretch. Each Bill has to be reprinted several times as it goes through Parliament, so as to incorporate amendments made. Proof reading (which is done by the drafter 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 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 drafters 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. We return to this point in chapter 14.

Besides leading to compression of language, the ***brevity*** parameter induces the drafter to use the technique of ***ellipsis*** (discussed at length in chapter 15). It also requires employment of the ***broad term*** (see chapter 16).

Operational parameters

Having completed our consideration of the ***preparational*** parameters which govern the drafting of the Bill in relation to what happens between the inception of the project and the signifying of assent to the Bill, we turn to the other group of parameters. As stated above, these ***operational*** parameters govern the drafting of the Bill in relation to things which happen or may happen once the Bill becomes law.

The first group of parameters is thus concerned with the government's desire to change the law, and Parliament's consideration of its proposals for doing so. The second is concerned with the functioning of the new Act as part of the statute book. The only connection between the two is that everyone involved in the preparational stage must have regard to how the proposed measure will work as enacted law. Yet the same text has to serve both purposes. As the Renton Committee said: 'The draftsman must therefore carry out his work with one eye to the drafting of proposals that will commend themselves to the favour of a critical legislature, and the other to the eventual product as it will appear in the hands of the user' (Renton 1975, para 7.9). Unfortunately British drafters, and those influenced by them, have tended to acquire Cyclopean tendencies. (Cyclops, it will be remembered, belonged to a race of one-eyed giants who forged thunderbolts for Zeus.)

Legal effectiveness Whether or not he is otherwise Cyclopean, the drafter must always put in the forefront of his mind the need for legal effectiveness. He must ensure, so far as he is able that the text of his Bill is apt to carry out the intentions of the government in promoting the legislation. If the resulting 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 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 leave the decision to others, or to itself on a future occasion. The first occurs for example where the Act authorises the making of a judicial order 'if the court thinks just'. The second occurs where a government official is given a discretion. The exercise of either type of delegated power is an example of dynamic processing, examined at length in Part IV.

Crucial to legal effectiveness is the drafter's knowledge and correct use of that part of the *corpus juris* which governs the construction of statutes, namely the Interpretation Act and the technique of interpretation. But he must also know and understand the area of law within which he is operating. (For examples of error in this respect see pp 262-263).

Certainty 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 slightly different and so is accorded separate treatment. The justification for this separation is illustrated by the occasional 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 treaty is to be given the effect of law by an Act of Parliament, the drafter of the Act will perceive that legal effectiveness is at odds with certainty and be forced to sacrifice the latter. Intentional uncertainty is discussed in chapter 17.

Comprehensibility Except in the rare case of intentional uncertainty, both legal effectiveness and certainty are aided by *comprehensibility*. We discussed above the problem of making a Bill comprehensible to MPs. They need to see as easily as possible what the proposals will amount to. Most lack legal training so cannot be expected to understand proposals purely framed as legal instruments. Nor can such instruments be understood even by lawyers without reference to other materials. Yet legislators, being hard pressed for time, are reluctant to look at other materials in addition to the Bill they are considering.

It is a paradox, if a necessary one, that the people concerned with approving legislation are mostly ill-equipped by training and experience to understand it. The paradox places the drafter in an impossible position. It is impossible because he just cannot satisfy both audiences. On this dilemma I put forward the following view at the Ottawa Symposium in 1971:

We in England have never been able to get away from the idea that the

language which is destined to form part of the law of the land must also be framed so as to be comprehensible and palatable to laymen in Parliament. This is an inherent contradication; indeed an absurdity, from which flow many of our troubles. I would venture to suggest that it should be a prime axiom of legislation that, unless there are overriding reasons to the contrary, language which is destined to form part of the law should be framed solely with that end in view. In other words, it should be worded in the most effective way possible to secure that it fits properly into the structure of the statute book (Bennion 1971(2), p 143).

I am glad to say that the Renton Committee accepted this 'prime axiom' (see Renton 1975, para 10.3).

Although the comprehensibility parameter in its operational aspect requires the Bill to be drafted so that it can be understood when it becomes law, this is often hard to achieve. While legal effectiveness and certainty are aided by comprehensibility the reverse rarely applies. To be sure that an enactment will have the desired effect it is usually necessary to enter into specific detail which is often difficult for the reader to follow. This problem is at the root of the controversy between common-law and civil-law drafting discussed above (pp 23-26). It leads to the need for processing by text manipulation (chapter 23).

Comprehensibility, in both its preparational and operational aspects, involves the drafter in problems 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 the 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?—the drafter of para 24 of Sched 6 to the Finance Act 1965 evidently thought so). Since the object of statute law is to communicate Parliament's wishes to those bound by them, the question of comprehensibility is crucial; though it has received little study.

Legal compatibility The final drafting parameter concerns the way the Bill, after assent, will fit into the *corpus juris*. Here the British drafter possesses a heady power. The sovereignty of Parliament ensures that its latest word overrides all previous enactments and rules of law, apart from the new restrictions under the Treaty of Rome (see chapter 5). 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 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

(though not strictly necessary) 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 drafter 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, and delays in printing updated official texts. Until very recently, British drafters were also hindered by lack of access to computerised research and retrieval systems.

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. Drafters 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. Inconsistent terminology has produced flaws comparable to those of European directives. The position is particularly bad in the tax field.

While statute law is in such a chaotic state, the parameter of compatibility, though it normally places certain demands on the drafter, 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. . .' (Renton 1975, para 14.7). In fact it is both reasonable and feasible, provided there is adequate cross-referencing.

Conflicting parameters

It is obvious that situations will frequently arise where not all these nine parameters (one, *comprehensibility*, being found in both groups) can be complied with. ***Procedural legitimacy*** may conflict with ***comprehensibility*** or (though rarely) with ***timeliness***. ***Legal effectiveness*** may preclude ***brevity*** and reduce ***acceptability***. Comprehensibility as a preparational parameter may be inconsistent with ***legal compatibility***. And so on.

Legal effectiveness conflicts with ***comprehensibility*** where (as frequently happens) the drafter is uncertain of the precise situations his wording must cover. To be on the safe side he then devises a wide formula, which may lack identifying features. Typically, the drafter has a particular situation in mind but fears to commit himself

by describing it. He knows from experience that if he links his wording to this specific situation it may prove too narrow. Similar cases (that he cannot at present think of) will come along, and not be within the words. His provision will then be *narrower than the object* (see p 264 below).

Since the drafting parameters conflict in these ways, it is obvious that there must be an order of priority. The order is fixed by the government rather than Parliament. In practice it is usually fixed by the drafter, acting as the government's servant. From his experience the drafter is able to judge what answers ministers would give if there were time and opportunity to question them on their wishes as to priority.

The three most important parameters are not usually in conflict with each other. They place demands on the text which cannot be gainsaid. Two are preparational: *procedural legitimacy* and *timeliness*. The third, *legal effectiveness,* is operational. In describing these as the chief parameters I am not making a value judgment, but merely seeking to reflect 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* or *legal compatibility*, should be accorded greater importance. The relationship of these two parameters to the remainder lies at the heart of the problem of statute law obscurity and its solution.

Statutory instruments

As to the application of the parameters to the drafting of statutory instruments see chapter 4 (p 57).

The Arrangement of an Act of Parliament

No one should expect to understand a provision of any Act of Parliament without thorough knowledge of the *form* of an Act. The long-standing failure to include statute law in their training syllabus has had unfortunate results in the way lawyers (including judges) handle statutes and determine their meaning. Since almost every legal point is now affected by statute law, the need for such training is obvious (it is spelt out in Bennion 1982(1) and (2)). This need was recognised by the Council of Legal Education, who in 1982 introduced for Bar students at the Inns of Court School of Law a preliminary course in statute law (conducted by the present author). As yet the authorities of the solicitors' branch of the profession have not followed suit.

The arrangement of the text of an Act of Parliament reflects its validating procedure. We take as our model current public general Acts (as opposed to local or private Acts) of the United Kingdom Parliament. Acts passed by the parliaments of other Commonwealth countries display similar features. (For a historical survey of the distinction between public general Acts and local or private Acts see Holdsworth 1924 XI, pp 287-303 and 324-364.) To provide concrete examples I use in this discussion and subsequently the Consumer Credit Act 1974, an Act I drafted myself and later expounded in two textbooks *(Consumer Credit Control* (1976 and updating releases) and *The Consumer Credit Act Manual* (3rd edn 1986), both published by Longman).

Preliminary material

Starting at the beginning of an Act, we find the year and chapter number. Thus the Consumer Credit Act is headed '1974 CHAPTER 39'. Acts were formerly regarded as chapters of the part of the statute book passed in a particular parliamentary session (usually running from November to July). Since the enactment of the Acts of Parliament Numbering and Citation Act 1962, chapter numbers have been assigned instead by reference to the calendar year. The first Act to receive royal assent after 31 December is numbered chapter

1, and so on to the end of the year. An Act may be cited either by its year and chapter number or by its short title.

Next comes the *long title*. The drafter is apt to regard the long title of his Bill rather differently from the way a user regards the long title of the subsequent Act (though on royal assent the one becomes the other). The drafter is concerned to comply with parliamentary rules of order under which the long title must be wide enough to embrace the contents of the Bill. At the same time he may be anxious to keep the long title as *narrow* as possible. This is because it is often politically desirable to restrict the range of amendments that can be moved. Under the doctrine of *scope* prevailing in the British House of Commons an amendment is out of order if beyond the scope of the Bill. While the long title does not entirely determine the scope, it influences the judgment of House officials in advising the Speaker on whether proposed amendments are in order.

So for the drafter the long title is a procedural device. For the practitioner, who knows little if anything of parliamentary procedure, the long title is what it appears to be: a description of the Act's contents and an aid to its construction. The dangers of one party not bearing the other's viewpoint in mind are obvious. For example the inexpert may go astray if they do not know that parliamentary rules require the long title to be amended where the Bill is altered so as to go beyond it.

The long title of the Consumer Credit Act 1974 runs:

> An Act to establish for the protection of consumers a new system, administered by the Director General of Fair Trading, of licensing and other control of traders concerned with the provision of credit, or the supply of goods on hire or hire-purchase, and their transactions, in place of the present enactments regulating moneylenders, pawnbrokers and hire- purchase traders and their transactions; and for related matters.

Note at the end the sweeping-up words 'and for related matters'.

The long title of an Act is immediately followed by a date in square brackets. This is the date of passing of the Act, that is the signifying of *royal assent*. In Britain it has not been signified by the Sovereign in person since 1854 (though it has elsewhere in the Commonwealth). The procedure is now governed by the Royal Assent Act 1967, replacing the Royal Assent by Commission Act 1541. The form and manner customary before 1967 is however preserved by the Act (for details see Bennion 1984(1), pp 106-123). Royal assent cures procedural defects. The United Kingdom is not subject to procedural restrictions imposed by a written constitution, breach of which may invalidate legislation (see *Bribery Commission* v *Ranasinghe* [1965] AC 172). This has important consequences, which are not always fully understood by judges interpreting legislation. The Act in the form to which royal assent is signified is in its entirety the product of Parliament. That applies to such

matters as headings, marginal notes and punctuation as much as to the substantive text. We return to this point below (p 51).

Next comes the ***preamble,*** where used. This is often confused with the long title. Even judges are not immune from error. In *Ward* v *Holman* [1964] 2 QB 580, Lord Parker CJ referred to the long title of an Act as the 'preamble'. Goff LJ did the same thing in *Re Coventry deed* [1980] Ch 461, 484. In fact, however, there is a clear distinction between preamble and long title. The preamble begins 'WHEREAS' and continues with an explanation as to why it is expedient to pass the Bill. It was often used in former times to explain to MPs the reasons and objects of the legislation. Its place is now partly taken by the explanatory memorandum which is affixed to the front of a Bill on introduction. The advantage of this is that it does not form part of the Bill and therefore no possibility can arise of inconsistency between the objects stated in the preamble and the provisions of the Bill.

Modern public Acts usually do without preambles, but they are still obligatory in an Act originating as a private Bill. I last used a preamble when drafting the Performers' Protection Act 1963. It reads:

WHEREAS, with a view to the ratification by Her Majesty of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations entered into at Rome on 26th October 1961, it is expedient to amend and supplement the Dramatic and Musical Performers' Protection Act 1958 (in this Act referred to as 'the principal Act').

Sometimes a preamble consists of more than one paragraph. The preamble to the Parliament Act 1911, contained a second paragraph which still mocks the frailty of human intentions:

AND WHEREAS it is intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of hereditary basis, but such substitution cannot be immediately brought into operation:

Eighty years later, the substitution is no more likely to be 'immediately brought into operation'! Next the *enacting formula* is set out. In Britain this normally reads:

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Where a preamble is used these words are preceded by 'Now Therefore'. The formula is different in the case of financial Bills for aids and supplies. These are known as 'Most Gracious Sovereign' Bills from the opening words of the enacting formula. Also different is the enacting formula for Bills passed without the consent of the

peers under the Parliament Act 1911 (see s 4 of that Act). Formerly an enacting formula preceded each provision of an Act, but Lord Brougham's Act of 1850 abolished the need for this (see now Interpretation Act 1978, s **1).**

Division into sections

The preliminaries over, we come to the body of the Act. This consists of *sections.* The practice of arranging an Act in this way was introduced by Lord Brougham's Act of 1850, which said that every Act containing more than one enactment should be divided up into sections. Where a section contains distinct propositions the modern practice is further to divide it into *subsections*. Every section has a *marginal note* indicating its content, but marginal notes are not affixed to subsections.

Each section should deal with one topic. Sir Courtenay Ilbert advised drafters: 'If the marginal note cannot be made short without being vague, or distinctive without being long, the presumption is that more clauses than one are required' (Ilbert 1901, p 246). An exception arises where for political reasons the number of clauses must be kept down. Only if the Act is later consolidated with others (see chapter 6) will there be an opportunity to divide up the over- long clauses. It is likely not to be taken.

The Consumer Credit Act 1974, contains 193 sections. Since it is a typical modern regulatory Act it is of interest to note its employment of subsections, as follows:

No of sections	
Not divided into subsections	37
Divided into 2 subsections	39
Divided into 3 subsections	27
Divided into 4 subsections	26
Divided into 5 subsections	25
Divided into 6 subsections	15
Divided into 7 subsections	12
Divided into 8 subsections	8
Divided into 9 subsections	3
Divided into 10 subsections	0
Divided into 11 subsections	1

When it is realised that over 80 per cent of the sections are divided into subsections it becomes apparent that the lack of marginal notes to subsections is a serious handicap to comprehension.

Each section or, where there is division into subsections, each subsection, normally consists of one sentence only — however long it may be. Defending this practice before a Select Committee of the House of Commons in 1971, Sir John Fiennes, then head of the Parliamentary Counsel Office, said:

Each subsection must be, up to a point, self-contained, or else the reader must be warned that it is not self-contained. This is a reason why, when you start breaking up the longer sentences, you very often double the overall length, because you have to put into each separate short sentence express words to indicate its link with the rest . . . You cannot have a discursive paragraph of the sort one puts into a letter, where each sentence supports the one before and the one after, and rely on people to read the whole thing and spell the meaning out from the overall effect. (Select Committee 1971, p 201. For my not very successful attempt to counter this see *ibid* pp 224-5.)

The very long sentences of modern British statute law have a history going back to the origins of voluminous parliamentary legislation. Maitland pointed out that the mass of eighteenth century statute law is enormous, and bears 'a wonderfully empirical, partial and minutely particularising character' rarely rising to the dignity of a general proposition. Parliament was endeavouring to govern the nation directly, without the aid of the permanent civil servants of today. Lengthy statutes did much of that work of detail which would now be delegated to ministers and other public authorities. 'Moreover,' adds Maitland, 'extreme and verbose particularity was required in statutes, for judges were loath to admit that the common law was capable of amendment.' Judges sought to protect it 'by a niggardly exposition of every legislating word' (Maitland 1911, p 605). Judges have long since dropped this attitude but the legacy remains: indeed Maitland himself approved of it, criticising the fact that in his own day too many statutes had been passed 'whose brevity was purchased by disgraceful obscurity' *{ibid* p 606).

A legislative sentence can be divided up as indicated by the following simplified example:

Case	— Where a person is in charge of a vehicle
Condition	— if so required by a constable
Subject	— that person
Declaration	— shall produce his licence
Exception	— unless he is exempt from holding a licence

Note that the exception, which may be expressed as a proviso, is really a modification of the Case. The latter could be rewritten: 'Where a person who is not exempt from holding a licence is in charge of a vehicle'. This is all right when the exception can be briefly expressed. In other cases it is better stated separately, either as a proviso (beginning 'Provided that . . . ') or as a separate sub- section. Note also that the Declaration is the only element which is invariably present. It appears by itself in a declaratory provision making clear the existing law (see further p 223 below).

Where the sentence exceeds a certain length the modern practice is to aid comprehension by using indented paragraphing. As a brief

example of a section we may take the following from the Consumer Credit Act 1974:

Conduct of business.

26. Regulations may be made as to the conduct by a licensee of his business, and may in particular specify —

(a) the books and other records to be kept by him, and

(b) the information to be furnished by him to persons with whom he does business, and the way it is to be furnished.

The reader may wonder why the section does not say by whom the regulations are to be made. The answer is to be found in the *interpretation section* (s 189), which says that 'regulations' means regulations made by the Secretary of State.

Definition sections are very frequent in modern Acts. Apart from explaining the meaning of terms used, they shorten the Act by enabling repetition to be avoided. Sometimes they are inappropriately worded. Amusement was caused by the definition of 'short lease' as meaning 'a lease which is not a long lease' (Income Tax Act 1952, s 172(1)), though the definition was perfectly sensible because 'long lease' was fully defined elsewhere. A choice example is to be found in the Darlington Improvement Act 1872:' "new building" means any building pulled or burnt down to or within ten feet from the surface of the adjoining ground'. Definitions are either comprehensive (using 'means') or enlarging (using 'includes'). As to the difference see *Earl of Normanton v Giles* [1980] 1 WLR 28, 31. Sometimes, on the elephant principle, a well understood term is not defined even where, being a technical term of art, it strictly needs a definition. An example is 'magistrates' court'. It receives a fairly elaborate definition in s 148 of die Magistrates' Courts Act 1980, which is expressed to be for the purposes of that Act only. Nevertheless it is frequently used in other Acts without definition.

Statutory definitions are further discussed below (pp 131-135).

Short and collective titles

A modern Act sets out the short title by which it may be referred to. Where there are two or more Acts with similar short titles the practice is also to bestow a collective title. For example s 5(1) of the Performers' Protection Act 1963 reads: '(1) This Act may be cited as the Performers' Protection Act 1963, and the principal Act and this Act may be cited together as the Performers' Protection Acts 1958 and 1963.' The short title should really be short. The following example from Africa is not recommended: 'This Act may be cited as "The Law for the people who do not pay their taxes before the end of the year for which it *(sic)* is due, 1910" ' (Cited Alison Russell 1938, p 33).

These are required purely for the purposes of House of Commons procedural rules, but there is nothing on the face of the Act to indicate this. In the Consumer Credit Act 1974, s 190 is the expenditure clause. It is too long to reproduce here but its gist is that there shall be defrayed out of money provided by Parliament all expenses incurred by Ministers under the Act, and that licensing fees received by the Director General of Fair Trading shall be paid into the Consolidated Fund. These are the usual provisions.

An expenditure clause is only needed where the Bill is introduced in the House of Commons. The clause is printed in italics to indicate that notionally the Bill contains no expenditure provisions (the italicised words being treated as not present). The Bill can therefore proceed to second reading without infringing the House rule that financial supply can be debated only in committee. An expenditure clause should not be included in a Bill introduced in the Lords, though sometimes this rule is overlooked. It is not even needed when the Lords Bill reaches the Commons, because so-called privilege amendments are first made by the Lords.

It follows that an expenditure clause has no legislative effect, and should not be reproduced when the Act is consolidated. This rule too is often disregarded (see for example the Wages Councils Act 1979, s 30). The Renton Committee recommended that the practice of italicising expenditure clauses should be abolished (Renton 1975, para 18.22). This would require an amendment to House of Commons practice however, and there would then be no point in having an expenditure clause anyway. It is not needed to satisfy the procedural requirement that new heads of public expenditure require legislative sanction because the general provisions of the Bill do this. The only possible exception is where there is already power to incur the expenditure, and the sole purpose of the Bill is to satisfy the procedural requirement. Apart from declaratory provisions, this is the one case where an Act of Parliament does not change the law (Hutton 1961, p 20).

Repeals

Where the Act replaces a number of existing enactments the practice is to effect the consequential repeals by means of a columnar repeals Schedule introduced by one of the supplemental sections found at the end of the Act. If a repeal is important enough to be drawn to the attention of Parliament the British practice is to effect it in the body of the Bill by saying that the enactment in question shall 'cease to have effect' and then insert it also in the repeals Schedule. This habit of repealing an enactment twice over has led judges ignorant of statute law into trouble (see ***Commissioner of Police of the Metropolis*** v ***Simeon*** [1982] 3 WLR 289). It can create ambiguity

where the drafter fails to ensure that the effect of the two repeals is identical. For an example see the Criminal Law Act 1977, s 56(2) which, in repealing certain provisions relating to coroners, includes a saving not reproduced in the repeals Schedule to that Act (Sched 13).

This leads us to the rule in *A-G v Lamplough* (1878) 3 Ex D 214, and very deep waters indeed. The principle of textual amendment requires one to be able to treat the amended text as definitive and forget about repealed parts of it. But will *Lamplough* let us do this? The point is dealt with below (p 330).

Extent

Where a British Act contains no extent clause it is taken (unless there is some indication to the contrary) to operate throughout the United Kingdom (ie England, Scotland, Wales and Northern Ireland) but not beyond. It does not therefore extend to the Channel Islands or the Isle of Man, nor to any other British possession. It follows that there is no need to say, as for example s 193(2) of the Consumer Credit Act 1974 does, 'This Act extends to Northern Ireland'. However, by a convention designed to aid the legal officials of that province (who tend to be somewhat fewer in numbers than the workload requires) the words are inserted where appropriate.

Evidence to the Renton Committee complained that the fact that the full extent of an Act may not be specified (because to do so is legally unnecessary) is a source of obscurity. For example, an Act carrying no express statement of its extent may in fact extend only to England and Wales because it consists solely of amendments to Acts which themselves extend only to England and Wales. The Committee recommended that extent clauses should ordinarily be included whether necessary or not (Renton 1975, paras 6.11 and 18.14). Like most Renton recommendations, this has been ignored by the Parliamentary Counsel Office (for Lord Renton's complaints about the ignoring of his Committee's report see Statute Law Society, 1979, pp 2-8). The reason is no doubt that it tends to increase a busy drafter's workload.

Commencement and transitional provisions

Until 1793 the rule was that all Acts passed in a parliamentary session were deemed to have come into force on the first day of the session unless the contrary was stated in a particular Act. Reciting that this retrospectivity produced 'great and manifest injustice', the Acts of Parliament (Commencement) Act *\192>* (which is still in force) required the Clerk of the Parliaments to endorse in English on every Act the date of royal assent. As mentioned above (p 42) it is to be placed 'immediately after the title' (nowadays usually called the long title) and is to be the date of commencement 'where

no other commencement shall be therein provided' (see now Interpretation Act 1978, s 4).

Frequently nowadays another commencement *is* therein provided, either by specifying a date or dates or giving a minister power to make one or more commencement orders. It is felt that people should if possible be given time to prepare for the coming into force of an enactment which affects their conduct and affairs. Furthermore modern regulatory Acts require time for the erection of necessary administrative machinery. Often they are skeleton structures, requiring to be fleshed out by ministerial regulations and orders. It is the wise modern practice to conduct extensive consultations with the trade and other interests concerned before making these. All this induces delay, as the example of the Consumer Credit Act 1974 illustrates. Section 192(2) of the Act provided for the making of commencement orders bringing the operative provisions of the Act into force. The complication of the position is indicated by the fact that in my book *Consumer Credit Control* a table included as an outline guide to the commencement situation of the various provisions of the Act occupies no less than 11 pages. The final commencement order was made only in 1989, 15 years after the Act was passed!

Complaints are frequently made about the difficulty caused to practitioners by complications over the commencement of statutory provisions. One difficulty is the tracking down of commencement orders. Her Majesty's Stationery Office now publishes these in a separate series with its own numbering (preceded by the letter C), but they are often complicated by the inclusion of transitional provisions. It may be necessary, both in the Act itself and in commencement orders, to include detailed directions bridging the transition between the periods before a provision first becomes operative and the time when it is fully in force. In an attempt to assist in this problem I devised a special procedure for the Consumer Credit Act 1974. The commencement and transitional provisions are set out in a Schedule (Sched 3), of which the following paragraph is a brief sample:

Credit reference agencies

48. Sections 157 and 158 do not apply to a request received before the day appointed for the purposes of this paragraph.

Section 192(2) requires every commencement order to include a provision amending Sched 3 so as to insert an express reference to the day appointed. Accordingly this paragraph has been amended to read: 'Sections 157 and 158 do not apply to a request received before 16th May 1977'. Sometimes the position is more complicated than this. A provision may be brought into force on different dates for different purposes, for example. Whatever is done, Sched 3 must be amended accordingly so that it gives a complete picture. The result is that a practitioner who consults an updated reprint of

Sched 3 has no need to bother with the commencement orders. (See further p 328 below.)
Before ending this account of the *sections* of an Act reference should be made to *recitals.* Occasionally these are placed at the beginning of an individual section and serve a purpose similar to that of the preamble to an Act. Modern examples are: Government of India Act 1935, s 47; Public Works Loans Act 1947, ss 3 and 4; Superannuation (Miscellaneous Provisions) Act 1948, s 13. Sometimes a mere subsection has a recital — see Income Tax Act 1952, s 444(3).

Parts and headings

In a major Act the practice is to group sections together to form *Parts.* Thus in the Consumer Credit Act 1974, the 193 sections are distributed among 11 parts each with a descriptive heading. Part III, consisting of 22 sections, is headed 'Licensing of Credit and Hire Businesses'. In his book *Legislative Drafting: A New Approach,* Sir William Dale welcomed the innovation by which in the Consumer Credit Act 1974, there is printed, at the top of the margin on each page, the title of the Part (Dale 1977, p 272). Like the innovative commencement provision it has not since been followed however.
Where an Act is not large enough to justify division into Parts each fasciculus of clauses may for convenience be given a cross- heading. This is also done within Parts. For example in Part III of the Consumer Credit Act 1974, the first six clauses have the cross-heading 'Licensing principles'. As with marginal notes, cross- headings are not subject to amendment in the Westminster Parliament. If any alteration is necessary it is made informally on the advice of the drafter.

Schedules

Finally in this description of how the text of an Act is laid out we come to *Schedules.* It is a common practice to relegate matters of detail to a Schedule placed at the end of the Act. The Schedule is introduced by appropriate words in one of the sections. For example, Sched 1 to the Consumer Credit Act 1974, groups together all the new criminal offences created by the Act. It is introduced by s 167(1), which begins: 'An offence under a provision of this Act specified in column 1 of Schedule 1 is triable in the mode or modes indicated in column 3 . . . '. Normally in British Acts the practice is to qualify every reference such as 'Schedule 1' by adding 'to this Act' or similar words. I find this repetitious and irritating, so the Consumer Credit Act 1974 includes in s 189(7) a general provision making this qualification once and for all. In most Commonwealth countries such a general provision is included

in the Interpretation Act (eg Interpretation Act (Northern Ireland) 1954, s 11(6); Interpretation Act 1967-68 (Canada), s 33(2) and (3)). In the new British Interpretation Act, passed in 1978, the opportunity to incorporate this useful feature was neglected.

Schedules are usually equipped with titles in the form of an opening heading. If not tabular in form they normally consist of ***paragraphs***. These are like sections in that they may if long be subdivided. The subdivisions are known as ***subparagraphs***. Neither paragraphs nor subparagraphs have marginal notes. Like the sections of an Act, the paragraphs of a Schedule may be grouped into Parts or under cross-headings. It is sometimes said that the headings in a Schedule have more authenticity than those between sections because the adducing words bring in the entire Schedule. The sections are 'stood part' of the Bill individually in the form of clauses. The better view is that such distinctions are unsound. The entire Act receives royal assent, and no one outside Parliament has the right to challenge any part of it. Indeed to do so is to contravene a fundamental provision of the Bill of Rights (1688), namely that proceedings in Parliament 'ought not to be impeached or questioned in any court or place' outside it. Sir William Dale says that 'Excessive scheduling is a besetting fault in United Kingdom drafting' (Dale 1977, p 59). The Renton Committee takes the opposite view, endorsing the Law Society's submission that all detailed provisions should be relegated to Schedules (Renton 1975, para 11.25).

A special type of Schedule is that known as a Keeling Schedule, after a Member of Parliament of that name. It was first used in 1938. The purpose is to help MPs understand a Bill which makes textual amendments in an enactment. The Keeling Schedule sets out the wording of the enactment, indicating by bold type the changes proposed. For lengthy examples see Town and Country Planning Act 1947, Sched 11 and Cinematograph Films Act 1948, Sched 2. The words adducing the Schedule say that in accordance with amendments made earlier in the Bill the enactment in question shall have effect as set out in the Keeling Schedule. This has the unfortunate result that a device intended merely for the enlightenment of MPs remains in the Bill as enacted (though in printing the Bill as an Act the passages in bold type are reset in ordinary type). Awkward results have been known to follow. If you further amend the enactment on a later occasion must you also amend the Keeling Schedule? Suppose an error in transcription is made when writing out the Keeling Schedule — which version then constitutes the law? This actually happened with the Cinematograph Films Act 1948. Indeed *two* errors were made, one of which seriously affected the meaning. Further objections to the Keeling Schedule are that it cannot reflect non-textual modifications made by the Bill containing it (eg by s 9(2) and (3) of the Cinematograph Films Act 1948) and that it uselessly clutters up the statute book. The same purpose, without these drawbacks, is served by the textual

memorandum (see my evidence on this to the Renton Committee, reprinted in Bennion 1979(4), pp 43-4 and 74-9). The Renton Committee accepted the value of a textual memorandum (Renton 1975, para 20.2(45)).

Punctuation

Finally a word should be said about *punctuation* in Acts. In *Crates on Statute Law* it is said that 'punctuation forms no part of any Act' (Craies 1971, p 198). This cannot be accepted. It was true only of private Acts up to 1960. Modern drafters of public general Acts take great care with punctuation, and it undoubtedly forms part of the Act as inscribed in the royal assent copy and thereafter published by authority (note that the Interpretation Act 1978, s 19 requires citation of one Act by another to be read as referring to it *as printed by authority)*.

Nor can the historical justification for the statement in *Craies* (namely that on the Parliament Roll there is no punctuation) be supported, even in the case of older Acts. As Mellinkoff has shown, this is a mere canard: 'English statutes have been punctuated from the earliest days' (Mellinkoff 1963, pp 157-170). Usually worthy of high respect, Lord Reid must be disregarded when he says in *IRC v Hinchy* [1960] AC 748: 'Even if punctuation in more modern Acts can be looked at (which is very doubtful), I do not think one can have any regard to punctuation in older Acts'. I am afraid this is just one more judicial pronouncement based on inadequate knowledge of the nature of Acts of Parliament. The truth is that punctuation in an act should be regarded the way it is in any other text, as an aid to understanding. Drafters are taught that it is bad workmanship to make your meaning depend on a comma or a bracket — or any other punctuation mark. Punctuation is to facilitate comprehension not alter meaning.

For further details as to the arrangement of an Act, and its significance in interpretation, see the discussion of the functional construction rule at pp 119-131 below.

Statutory Instruments

The last chapter began with the statement that no one should expect to understand a provision of any Act of Parliament without thorough knowledge of the *form* of an Act. In chapter 2 a similar remark was made about the parameters which govern drafting. Now we complete the picture by describing briefly the main type of delegated legislation, the statutory instrument. The object will then be accomplished of giving the reader a sufficient understanding of the nature of the *basic texts,* preparatory to going on to deal with their promulgation, interpretation and processing. The special attributes of European Community texts are described in the next chapter. (For fuller accounts of delegated legislation sees Miers and Page 1982, Chapter 6 and Bennion 1984 (1); pp 131-158.)

What are statutory instruments?

The definition of the term statutory instrument is contained in s 1 of the Statutory Instruments Act 1946. Orders in Council made under statutory authority are automatically comprised in the term, but the inclusion of other instruments depends on the wording of the Act under which they are made.

Pre-1948 empowering Acts

If the empowering Act was passed on or before 31 December 1947, the position largely turns on the Rules Publication Act 1893 (a measure replaced by the Statutory Instruments Act 1946). The 1893 Act was the first to regularise and control the system of delegated legislation in Britain. It coined the phrase 'statutory rules', and defined it to cover delegated legislation made by what it called 'rule-making authorities'. Any document by which such a power is exercised after 31 December 1947 is now known as a statutory instrument, provided it is of a legislative and not an executive character. (For the difficulties involved in drawing this distinction see Bennion 1962, pp 262-269).

Post-1947 empowering Acts

Section 1 (1) of the 1946 Act provides that where by any Act passed after 31 December 1947 a power is conferred on a Minister or government department to make, confirm or approve orders, rules, regulations or other subordinate legislation, and the power is stated by the empowering Act to be 'exercisable by statutory instrument', then any document by which the power is exercised is to be known as a statutory instrument.

Statutory instuments are required by the 1946 Act to be published by Her Majesty's Stationery Office in a numbered series. The numbering begins afresh at the commencement of each calendar year.

The text of a statutory instrument

A statutory instrument is an extension of the Act under which it is made. It is to be construed as one with the Act, and expressions used in it have, unless the contrary intention appears, the same meaning as they bear in the Act (Interpretation Act 1978, s 11).

It is reasonable to ask why, if this is so, the instrument is made separately and not incorporated into the Act. Would it not be more satisfactory to have the material set forth in a single unified text, rather than split between the Act and one or more statutory instruments? The answer is yes, but two points have to be made. First, relevant material may under our system be spread between two or more *Acts*, never mind statutory instruments. Second, there are compelling reasons why it may be necessary to produce statutory instruments separate from the parent Act.

The need for statutory instruments

Statutory instruments enable the final detail of a regulatory scheme to be separated from the main legislation requiring parliamentary scrutiny. Since they do not need to go through the full process of parliamentary validation, statutory instruments provide a quick and flexible method of statutory control. They can be easily altered to meet contingencies. This usually applies whether or not Parliament is in session. In the case of commencement orders the Act, or the part of it in question, can be brought into force at a convenient time when all necessary preparations have been completed. If an instrument proves defective, or a new situation arises, an amending instrument can be rapidly produced.

Parliament retains control of statutory instruments in various ways. At the beginning of each session it appoints (in Britain) a Joint Select Committee to scrutinise all new instruments and report on any which need to be drawn to attention, for example because they

constitute an unusual or unexpected use of the power. The use made by a minister of such powers is subject to questioning and debate in Parliament in all cases. Where however a power is of unusual importance, say because it enables a tax to be imposed or an Act to be amended, Parliament may word the power so that it requires a draft of the instrument to be approved by each House before the instrument can come into force. A less stringent control is to make the instrument subject to annulment by Parliament. These methods are respectively known as affirmative resolution procedure and negative resolution procedure. The former requires the government whips to keep the House. Under the latter it is the government's opponents who must persuade sufficient members to attend the debate and vote in their favour.

The arrangement of a statutory instrument

A statutory instrument may be an Order in Council or other order, or it may consist of regulations or rules. These are the principal types, though others are possible (for example a scheme or warrant). The name depends on the wording of the empowering Act. The drafter of this will have selected the term which seems most appropriate, though there are no fixed principles. An Order in Council can be made only at an actual meeting of the Privy Council attended by Her Majesty or a Counsellor of State. This procedure is reserved for statutory instruments which are of constitutional importance or otherwise deal with matters of weight. The term 'order' is used for instruments embodying executive acts, such as the bringing of an Act into operation, the making of an appointment, or the disapplying of an Act in certain cases. Many orders nevertheless have legislative effect. The term 'regulations' is generally used for provisions which have a continuing regulatory effect, but procedural instructions relating to a court, company or other body are called 'rules'.
In describing the arrangement of a statutory instrument, we first deal with the introductory matter, and the explanatory notes, which are common to all types of instrument, and then go on to describe the body of the instrument.

Introductory matter

Under the heading STATUTORY INSTRUMENTS printed between parallel lines there appears first the number of the instrument, then an indication of the subject matter, then the title. This is followed by the date of making, and any other relevant dates. Here is an example:

1980 No 54 CONSUMER CREDIT

The Consumer Credit (Advertisements) Regulations 1980

Made	*17th January 1980*
Laid before Parliament	*29th January 1980*
Coming into Operation	*6th October 1980*

After this comes a recital naming the person making the instrument and the powers under which it is made. To safeguard against accidental omission of a relevant power, the recital of powers ends with sweeping up words in an ancient formula. Thus the opening given above continues as follows (after setting out the arrangement of regulations):

The Secretary of State, in exercise of powers conferred on him by sections 44, 151(1) and 182(2) and (3) of the Consumer Credit Act 1974 and of all other powers enabling him in that behalf, hereby makes the following Regulations:—

Then follows the body of the instrument, ending with the signature and description of the minister making it. A government department must not issue a statutory instrument unless the minister responsible for the department has personally approved it, or it conforms to his known views or is of secondary importance. It is a rule of constitutional practice that a minister cannot be expected to give his personal attention to matters of secondary importance arising in the ordinary course of administration *(Local Government Board* v *Arlidge* [1915] AC 120).

Explanatory note

After the conclusion of the instrument there is printed an explanatory note, stated to be 'not part of the instrument. The practice of including these notes dates from 1943, though it was done in individual cases much earlier. The practice was regularised by the House of Commons in June 1939 by a ruling which stated that the memorandum must represent the facts, must be essentially of an uncontroversial and explanatory nature, and must be not predjudice readers in favour of the instrument.

Body of the instrument

This follows a form very similar to that described in the previous chapter in relation to Acts. There can be the same allocation of subsidiary matter to Schedules, and the same division into Parts. The only significant difference is that instead of being called sections the main divisions are named according to the type of instrument. In an order they are called articles. If the instrument consists of

a set of regulations or rules each division is a regulation or rule accordingly. In all cases, subdivisions are called paragraphs. The divisions do not have marginal notes in the same way as Acts. Instead, they have headnotes. By contrast with Acts, formal provisions (such as those giving the title of the instrument or containing definitions) are placed at the beginning.

Prerogative instruments

Instruments made under the Royal prerogative are not within the category of statutory instruments. They are a form of primary legislation, though of little importance now. Usually they take the form of Orders in Council. For an example see the Territorial Waters Order in Council 1964, discussed in *Post Office v Estuary Radio Ltd* [1968] 2 QB 740.

Drafting

In Britain, nearly all statutory instruments and prerogative instruments are drafted by lawyers employed in the government department responsible for the instrument or (where this does not have its own legal branch) in the office of the Treasury Solicitor. Only instruments of exceptional importance or difficulty are drafted in the Parliamentary Counsel Office.

This division of labour constitutes a basic weakness in the system. As we have seen, the parent Act and its statutory instruments form one unit of law. They should hang together coherently and consistently. Yet, the person who drafts the Act normally has nothing to do with the instruments made under it. He is not even called on to advise. Furthermore the instruments are not even drafted in the same office as the Act. The Parliamentary Counsel Office has existed for more than a century and developed its own doctrines and approach. These are not known to the departmental lawyers, who receive no training as drafters. The risks of going astray are obvious. The Canadian draftsman Mel Hoyt agreed that all legislative drafting should be done in one office: see Bennion 1980(7).

Drafting parameters

Since statutory instruments cannot be amended in Parliament, and are rarely debated, the drafting parameters described in chapter 2 have a restricted application. ***Debatability*** is of little relevance. ***Procedural legitimacy*** imposes fewer demands, though the new factor of compliance with the ***ultra vires*** doctrine emerges. Care must be taken to ensure that the terms of the instrument are within the powers conferred by the parent Act (as amplified by the Interpretation Act). ***Timeliness*** too is less demanding, since the making of subordinate legislation is not constricted by the limits

of the parliamentary session. ***Acceptability*** is not a potent factor. Parliament has already approved the principle of the legislation, and will not scrutinise statutory instruments in detail. The instrument must be acceptable to the Joint Committee however (see p 54). The only relevance of ***brevity*** lies in the need to avoid unnecessary strain on the resources of the administering department and the outside interests affected.

When it comes to the operational parameters, we see that all these apply to statutory instruments as they apply to Arts. Only the greater ease of amendment when things go wrong makes them less constricting on the drafter of the former.

Legislation of the European Communities

Since 1972 there has been added to the basic legislative texts applying in the United Kingdom a further category. In addition to Acts of Parliament and statutory instruments, we now have Community legislation. As respects accessibility and comprehensibility it is a complicating factor of major proportions.

The status of Community legislation

There are two ways of regarding the status of Community legislation in United Kingdom law. One is to treat it as incorporated in that law solely by virtue of s 2(1) of the European Communities Act 1972. The other is to regard it as essentially emanating from an independent source of law having power by treaty to legislate for the United Kingdom. The position is an indeterminate one. Nobody supposes that the political organisation of Europe will remain as it is now. Either Britain is in transition to a European federation (in which legislative powers will be allocated by a new federal constitution) or it is in a temporary alliance. For the practical purpose of considering legislative texts and their processing it seems best to base our approach on the 1972 Act, taking care to respect the political realities so far as relevant.

The 1972 Act

The long title of the European Communities Act 1972 is of studied vagueness: 'to make provision in connection with the enlargement of the European Communities to include the United Kingdom . . .'. Section 1 defines 'the Communities' as meaning the European Economic Community (EEC), the European Coal and Steel Community (ECSC) and the European Atomic Energy Community (Euratom). As subsequently amended, it defines 'the Treaties' as meaning the Treaties establishing these three Communities, together with the 1965 Treaty establishing a single Council and a single Commission for the Communities. Also included in the amended defmition are the United Kingdom accession treaties and various ancillary treaties, agreements and protocols, including those

providing for the accession of Spain and Portugal in 1985 and the relevant provisions of the single European Act of 1986.

Section 2(1) runs to a mere eight lines. Yet by it was incorporated into our system a vast mass of law estimated to exceed ten million instruments, many unpublished. In determining what these instruments consist of, and the categories into which they are to be divided, it is necessary to study s 2(1) with care. Accordingly its main provisions are given below not as printed in the Act but broken up into clauses in the way used by the Composite Restatement method described in chapter 23.

European Communties Act 1972, section 2(1)

(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties *and*
(2) all such remedies and procedures from time to time provided for by or under the Treaties
(3) as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom
(4) shall be recognised and available in law, and be enforced, allowed and followed accordingly.

Even when it is broken up in this way, we are left to struggle with the typical compressed language of common law drafting. In view of the importance of s 2(1) it is worth attempting to decompress it without altering the basic language. The resulting repetitiveness is a small price to pay for greater clarity.

RIGHTS AND POWERS

(i) All such rights and powers from time to time created or arising by or under the Treaties (ii) as in accordance with the Treaties are without further enactment to be given legal effect in the United Kingdom (iii) shall be recognised in law, and enforced accordingly.

LIABILITIES, OBLIGATIONS AND RESTRICTIONS

(iv) All such liabilities, obligations and restrictions from time to time created or arising by or under the Treaties
(v) as in accordance with the Treaties are without further enactment to be given legal effect in the United Kingdom
(vi) shall be recognised in law, and enforced accordingly.

REMEDIES

(vii) All such remedies from time to time created by or arising under the Treaties (viii) as in accordance with the Treaties are without further enactment to be given legal effect in the United Kingdom

(ix) shall be available in law, and allowed accordingly. PROCEDURES
(x) All such procedures from time to time provided for by
or under the Treaties (xi) as in accordance with the Treaties are without further
enactment to be used in the United Kingdom (xii) shall be recognised in law, and followed accordingly.

When s 2(1) is broken up in this way we see clearly that it is a strange way of importing foreign instruments into British statute law. Article 189 of the EEC Treaty requires the Council and the Commission to make regulations. It continues: 'A regulation shall have general application. It shall be binding *in its entirety* and directly applicable in all Member States' (emphasis added). But s 2(1) does not say that such regulations shall be part of British law, in their entirety or otherwise. If a regulation creates a right, the right is to be recognised and enforced in the United Kingdom. Similarly if it imposes a liability, or gives a remedy, or lays down a procedure. But is it certain that a regulation must do these things, and only these things? As often happens, decompression of a compressed text reveals that the drafting is misconceived. Section 2(1) is now taken to mean not what it actually says, but what it would mean if worded as follows: 'The Treaties, and all such instruments as are without further enactment to be given under the Treaties the force of law in the United Kingdom, shall have effect as law accordingly.' Lord Denning went to this extent in *Re Westinghouse Uranium Contract* [1978] AC 547, 564 when he said that s 2(1) had the effect of incorporating the Treaties and all provisions made under them 'lock, stock and barrel' into British law. This was in line with his statement in *Application des Gaz* v *Folks Veritas* [1974] Ch 381, 396, that arts 85 and 86 of the EEC Treaty 'are part of our law'. Lord Diplock has also said that art 85 'forms part of the law of England' *(Re Westinghouse Uranium Contract* [1978] AC 547, 636).

There has grown up under the Treaties a body of law usually referred to (together with the Treaties) as Community law. The guardian and enunciator of this law is the Court of Justice set up by the Treaties (referred to in the European Communities Act 1972, as the European Court). Section 3(1) of the Act firmly states that as far as Britain is concerned Community law is to be taken as being whatever the European Court says it is. This is in line with art 164 of the EEC Treaty which, as interpreted by the European Court, places upon that Court the duty of ensuring that, in the interpretation and application of the Treaty, Community law is observed.

The combined effect of ss 2(1) and 3(1) is therefore to make Community law (as expounded by the European Court) part of British law. Moreover Community law overrides inconsistent British

law, whether made before or after the accession of the United Kingdom (1 January 1973). Section 2(4) of the Act states that existing and future British enactments are to be construed and have effect subject to Community law. (The problems of interpretation to which this may give rise are discussed in chapter 9.)

It seems right to regard Community law as a type of statute law. Yet not only is it a type new to British jurisprudence, but it falls to be interpreted and applied along different lines. This means that from the point of view of the processing of British-type statute law, a main concern of this book, Community law is irrelevant. The principles of processing applicable to British type law do not apply to Community law, which is a product of Continental jurisprudence. The differences are twofold. First, under the Continental system regard is not paid to the literal meaning of the text if it conflicts with the underlying purpose or intention. Second, the absence of the doctrine of *stare decisis* means that judicial processing (in the sense of filling in and elaborating the textual meaning) does not occur. The court superimposes its view on the text, but that view does not form a binding precedent. It merely serves as guidance.

The concept of processing involves a textual approach to statute law. It is based on the idea that statute users can normally rely on literal meaning, as filled in and elaborated where appropriate by reported decisions and other forms of processing. This approach is not possible with Community law, and yet in Britain we now have a legal regime where the two systems co-exist. In these circumstances we can do little more here than describe what the relevant Community texts are. Their method of publication is described in chapter 7 and their interpretation briefly discussed at the end of chapter 8.

The European texts

The following texts are it seems to be treated as effectively incorporated into the body of United Kingdom statute law. Each type is briefly discussed below.

1 The texts of the Treaties themselves.
2 The texts of *regulations* made under the Treaties by the Council or Commission.
3 The texts of *directives* issued by the Council or Commission.
4 The texts of *decisions* taken by the Council or Commission.

Article 189 of the EEC Treaty also authorises the Council and the Commission to make *recommendations* and deliver *opinions*. Since however it goes on to state that these shall have no binding force they do not form part of the law.

Although the Treaties may be said to form part of the Community law imported into British law, not all their provisions have direct effect. This is because their wording is inapt for this. As Lord Denning has put it, an article of a Treaty can only have direct if it is 'sufficiently clear, precise and unconditional as not to require any further measure of'' implementation' *(Shields* v *E Coomes (Holdings) Ltd* [1978] 1 WLR 1408, 1414). This is the result of rulings by the European Court which, as stated above, has the final say on these matters.

In applying this principle the European Court has defined the literal meaning of the Treaties to an extent far beyond what an English court would have dreamed of doing. Many articles clearly contemplate, for example, that the rights they require will be conferred only by the detailed legislation of member states. Thus art 119 of the EEC Treaty says: 'Each Member State shall. . . ensure . . . that men and women shall receive equal pay for equal work'. This contemplates the passing of legislation. But the European Court has held, in this and similar cases, that individuals can obtain the right in question from their own courts even where the state has failed to pass the legislation or has framed it inadequately. (See the examples cited by Lord Denning, *ibid.)*

One consequence of this is that the careful provisions of Acts such as the Equal Pay Act 1970 and the Sex Discrimination Act 1975 are disrupted. The jurisdiction of courts and tribunals to entertain cases of sex discrimination must be treated as widened to include situations which art 119 covers but the Acts do not. The remedies provided by the Acts have to be widened to correspond. Unless Parliament steps in to amend the Acts, this widening has to be done by the courts themselves. We have the strange spectacle of English courts deliberately setting out to amend an Act of Parliament!

The direct effect of Treaty provisions means that we have entered a period when British courts, acting under the guidance of the European Court, have the task of converting vague statements into practical law. This is an openly legislative function, going far beyond the usual type of judical processing.

Regulations

A regulation of the Council or the Commission (for the EEC or Euratom) is arranged in the following way. First comes the number (regulations are not given a title), then the date and subject matter. For example:

COUNCIL REGULATION (EEC) NO 222/77
of 13 December 1976 **on Community transit**

Then follows a preamble, sometimes running to considerable length. This first recites the matters to which the Council or Commission has 'had regard'. It continues with one or more recitals each beginning 'Whereas'. These contain the justification for the regulation.
The body of a regulation consists of *articles*. These are numbered, but have no descriptive sidenote or heading. When sufficiently numerous, they are grouped under *Titles*. These do have headings. The subdivisions of an article are known as *paragraphs*. At the end of the regulation there may be an *annex*.
The numbering system applied to regulations has varied. From 1958 to 1967, regulations were numbered in two separate sequences: one for the EEC and the other for Euratom. From 1968, both types have been numbered in a single sequence. Numbering was continuous throughout the first five years, but from 1963 each sequence has recommenced at No 1 with the beginning of a calendar year.

Directives

Article 189 of the EEC Treaty requires the Council and the Commission to issue directives. It goes on: 'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.' (Similar provision is contained in art 14 of the ECSC Treaty and art 124 of the Euratom Treaty, but in each case the term used is 'recommendation'.) Although it is clear from the wording of the Treaties that directives were not intended to have direct effect as law, that is not how the European Court has construed the Treaty provisions. It has treated directives as directly binding; as Lawrence Collins put it in his excellent book *European Community Law in the United Kingdom*, by a line of reasoning which starts by asking whether there is any reason why they should not be given this effect! (Collins 1980, p 56).
The fact is that the European Court regards it as its duty to build up the force and extent of Community law regardless of the literal meaning of Treaty provisions. The approach is illustrated by the case of *Van Duyn* v *Home Office* (1975) 1 CMLR 1, which concerned a Council directive as to the movement and residence of foreign nationals in member states. Did it confer on individuals rights enforceable in the courts of a member state? The United Kingdom argued that it did not. Since the language of art 189 distinguishes carefully between the effect of regulations and directives, the Council must be taken to rely on that distinction when deciding to issue a directive rather than a regulation. Such Anglo-Saxon reasoning did not appeal to the European Court.

The form of a directive is similar to that of a regulation. There is the same voluminous preamble (that in the Commission directive on elimination of customs duties dated 22 December 1969 for example contained no fewer than 18 recitals), and the nomenclature is similar. An illustration of how unsuitable the drafting can be for direct operation as law was given in chapter 2 (p 25).

There is no separate numbering system for directives. Since 1968 all directives and decisions of the three Communities have been lumped together with recommendations, opinions and financial regulations in a single sequence. The numbers recommence at No 1 at the beginning of the calendar year. The number is preceded by the year and followed by the name of the Community, eg Dir 72/182/Euratom. The pre-1968 system is too complex to be given here.

Decisions

The Treaties contain numerous provisions empowering the Council and the Commission to issue decisions on member states or individuals. By the same dubious reasoning as it has applied to directives, the European Court has enabled such decisions to have direct effect as law. Thus, even though a decision is directed to a member state, individuals can take advantage of it. Since there is no requirement to publish decisions, the consequences for the rule of law are serious.

As with directives, the form of decisions closely follows that of regulations. The policy adopted by the European Court robs these differences in nomenclature of any real meaning.

Statutory instruments implementing Community law

In addition to Community legislation having direct effect, there is in force in Britain a large body of statute law made under s 2(2) of the European Communities Act 1972. This authorises the making of statutory instruments for the purpose of implementing any Community obligations of the United Kingdom. The power does not allow sub-delegation nor does it extend to the imposing of taxation or the making of instruments having retrospective effect. It does not of course permit the overriding of Community law.

Statutory instruments made under s 2(2) are no different in juridical status from statutory instruments made under a provision of any other Act of Parliament. Indeed such other provisions have been frequently used for the same purpose as s 2(2).

Statute Consolidation and Revision

The British have never adopted for themselves the idea of a scientific statute book, by which I mean one kept up to date and arranged under Titles on a one Act-one subject basis. We have not changed from the system under which Acts are produced as required, with the subject matter of each being determined by the political and administrative convenience of the moment. Yet strangely a far superior system was imposed by Britain on the territories which formed part of the British Empire. The independent countries of the Commonwealth who inherited and developed this system, are the beneficiaries today.

As an example of the Colonial system, we may take the West African colony of the Gold Coast (now Ghana). British rule dated from 1827. The first collected edition of legislative texts was published in one volume in 1860. Thereafter, until British rule ended a century later, no fewer than nine collected and revised editions were promulgated. The practice was to enact in advance of each edition a Revised Edition of the Laws Ordinance. This authorised the editor (usually a retired judge or law officer) to combine texts into unified Titles, omit spent matter, and carry out other improvements. On being approved by the Governor, the new edition became 'the sole and only proper Statute Book'. (For details see Bennion 1962, pp 284-291.)

Instead of this admirable practice, we have had in Britain an erratic system of bringing forward ad hoc consolidation and statute law revision Bills. The subject is complex, and can be dealt with here only in outline. We begin with a brief historical survey.

History of consolidation in Britain

To have a single topic dealt with by numerous texts, passed at different times and not designed to interlock, is a system so obviously inconvenient that we are not surprised to find that constant complaints have been made about it. These date from the beginning of the system. As early as 1549 the House of Commons proposed that the statute laws should be digested into one body under Titles and heads, and put into good Latin. In 1550 Edward VI desired

that 'the superfluous and tedious statutes were brought into one sum together, and made plain and short'. Neither of these was done.

One of the earliest consolidation Acts was the Statute of Labourers 1562. Lord Keeper Bacon then drew up a scheme: 'First, where many laws be made for one thing, the same are to be reduced and established into one law, and the former to be abrogated'. It was not adopted. In 1609 James I complained of'divers cross and cuffing statutes'. The following year a Commission was set up. It made some proposals for repeals and changes, but nothing substantial emerged. Nor did anything happen when in 1616 Bacon, now Attorney-General, made further proposals for improving the statute book.

In the Cromwellian period a committee was appointed to consider how the statutes 'may be reduced into a compendious way and exact method for the more base and clear understanding of the people', but its labours bore little fruit. In 1796 a House of Commons committee presented a report dealing with consolidation and the problem of obsolete statutes. It condemned the practice of legislating in one Art on a variety of subjects, citing as an example 20 Geo 2 c 42. Sections 1, 2 and 4 dealt with the window tax, while s 3 contained a general provision that Arts mentioning England should also extend to Wales and Berwick-on-Tweed. Section 3 remained in force until repealed by the Interpretation Art 1978.

In 1816 both Houses of Parliament passed resolutions that an eminent lawyer with 20 clerks under him be commissioned to make a digest of the statutes, which was declared 'very expedient'. The resolutions were ignored, but from time to time certain topics were consolidated in part, for example anti-slavery law and customs duties. In 1826 Sir Robert Peel presided over the consolidation of criminal statutes of widespread importance, including those relating to malicious damage and larceny.

The modern era began with the appointment of a Royal Commission in 1835. This had the duty of preparing a criminal law consolidation and reporting on how far it might be convenient to consolidate the other branches of law. The Commission sat for 12 years and produced eight reports. Not one Act was passed as a result of its labours. A further Commission was appointed in 1845 but was equally ineffective. The Statute Law Board was briefly set up in 1853. It disagreed, and was abolished. The following year a prestigious Statute Law Commission was established. It presented four reports, the last of which stated that the whole of the existing statute law might be usefully consolidated into three or four hundred statutes. It optimistically added that if 10 or 12 drafters were employed the work could be done in two years. None of the consolidation Bills prepared by this Commission was passed.

Matters then improved. In 1861 seven important criminal law consolidation Bills were passed. In 1868 the present Statute Law Committee, still today responsible for the quality of our statute law,

was set up. The following year saw the establishment of the Parliamentary Counsel Office, while in 1875 a Select Committee of the House of Commons recommended that 'the work of consolidation should be carried on upon a regular system, and by skilled hands, acting under the authority of some permanent government force . . . '.

No such government force was forthcoming, but the Statute Law Committee persevered. It worked out a systematic long-term programme of consolidation. In the 30 years from 1870 to 1900, 101 consolidation Bills were prepared, though only 49 became law. This was due to poor liaison with the relevant government departments and lack of parliamentary time. By 1894 the convention had become established that consolidation Bills recommended by the Joint Select Committee of both Houses should pass without debate. The Joint Committee pronounced itself free to make 'such alterations only as are required for uniformity of expression and adaptation to existing law and practice'. This proved too wide for Parliament to accept however, and the pace of consolidation slowed. The Statute Law Committee lost interest in consolidation, and the initiative passed to those government departments who were concerned to have their legislation consolidated. Between 1900 and 1934 a further 60 consolidation Acts were passed. In 1937 a sub- committee of the Statute Law Committee was appointed to consider 'the priority according to which consolidation should be undertaken'. It compiled a list of 41 subjects, many of which have still not been consolidated. In 1947 Sir Granville Ram procured the setting up of a consolidation department within the Parliamentary Counsel Office. An Act of 1965 passed the function to the Law Commission, where it rests today.

The pace of consolidation altered very little in the 100 years following the report of the 1875 Select Committee. The third edition of ***Statutes Revised***, published in 1948, contained only 166 consolidation Acts out of a total of 4,065 Acts (6,549 pages out of 26,089). From 1949 to 1965 the average number of consolidation pages in the annual volume of statutes was 361 (out of 1,204). From 1965 (when the Law Commission assumed its duties) to 1,972 the average was 512 pages (out of 1,927). Thus during the first Law Commission period the consolidation share of total output dropped from 30 per cent to 24 per cent (Bennion 1979(4), p 45). Updating these figures, we find that from 1973 to 1978 the average of consolidation pages annually was 444 out of 1,965 (or 23 per cent). From 1979 to 1981 the annual average rose to 755 out of 2,193 (or 34 per cent). From 1982 to 1986 it was 830 out of 2,476 (or again around 34 per cent). It seems therefore that the Law Commission have settled down to an average of about one-third of consolidation Act pages out of a total of Acts tending to increase year by year.

I sought unsuccessfully to persuade the Renton Committee that

a Statute Law Commission should be set up to act as keeper of the statute book, with functions including consolidation (Bennion 1979(4), pp 46-51 and 82-96). However, a recent Chairman of The Law Commission, Lord Justice Gibson, has expressed support for this idea (Zellick 1988, p 53). For a fuller account of the history of consolidation see Simon and Webb 1975.

The modern technique of consolidation

Consolidation can be looked on as a form of processing. It takes the texts of various Acts of Parliament and, without altering the essential wording, combines them into a coherent whole. But we do not regard that as processing within our definition of the term. The consolidation Act is itself a legislative text. It has gone through the procedures which bestow validation as law. It replaces, in the *corpus juris,* the texts it embodies.

Nevertheless, consolidation performs certain functions which we do ascribe to processing. It materially assists the process of *text- collation.* A typical consolidation Act may embody the texts of a dozen or more previous Acts. Under the former British practice of indirect amendment (which one hopes is now obsolete) these texts would all have been disparate. That is, no one of them would have been drafted so as to fit textually with another. In these circumstances consolidation is a great benefit, even though it tells only part of the story. Under our system Acts are never consolidated with statutory instruments.

One of the bugbears of consolidation has lain in the fact that legislative texts are frequently defective. As we shall see spelt out in detail in chapter 19, drafters often err. Their errors give rise to doubt, and in former times it was necessary to 'consolidate the doubt'. If the consolidating drafter sought to resolve the doubt, he was liable to be accused by MPs of indulging in 'draftsman's legislation'. The danger then was that his Bill would not be allowed to pass without debate, and consequent consumption of government time.

Sir Granville Ram was the first to do something about this. He procured the passing of the Consolidation of Enactments (Procedure) Act 1949, described by its long title as being 'to facilitate the preparation of Bills for the purpose of consolidating the enactments relating to any subject'. The Act enables corrections and minor improvements to be made in existing law, provided the Joint Select Committee approve them and do not consider them of such importance that they ought to be separately enacted. The term 'corrections and minor improvements' is defined as:

> . . . amendments of which the effect is confined to resolving ambiguities, removing doubts, bringing obsolete provisions into conformity with modern practice, or removing unnecessary provisions or anomalies which are not

of substantial importance, and amendments designed to facilitate improvement in the form or manner in which the law is stated . . .

The Law Commission introduced a further refinement to enable consolidation Bills to embody improvements going beyond the scope of what is permitted by the 1949 Act. If in connection with such a Bill they submit a report recommending amendments of the existing law, the Joint Committee consider the report and give their views to Parliament. It is now the practice to include in such a report amendments which could have been made under the 1949 Act, since it is pointless to use both procedures on the same Bill.

Where the amendments required are too substantial even for this Law Commission procedure to be employed, the practice is to set up an ad hoc expert committee. The Highways Act 1959 was produced in this way (the law not having been tidied up since the passing of the Highway Act 1835). The long title describes it as an Act 'to consolidate with amendments certain enactments relating to highways . . . ' In 1980 highway law again fell to be consolidated, but this time it was found sufficient to use the Law Commission procedure. (The Commission's report is set out in Law Com No 100 (Cmnd 7828).)

We see that there are thus four kinds of consolidation Bills:

1 Straight consolidation.
2 Consolidation with amendments under the 1949 Act.
3 Consolidation with Law Commission amendments.
4 Consolidation with amendments proposed by an *ad hoc* committee.

Only the first three types go before the Joint Select Committee of both Houses. The Bill is introduced in the House of Lords, and given a formal second reading. After being reported on by the Joint Committee it proceeds through the normal stages of a Bill in each House. Bills in the first two categories are not subject to amendment. Bills in the fourth category may be introduced in either House, and go through normal procedure. Although there is nothing to prevent members from putting down amendments to Bills in the third and fourth categories, it is expected that they will not use this opportunity to attempt substantial changes in the law. Otherwise the special virtue of a consolidation Bill, namely that it does not take up government time, would be lost. To facilitate this, Bills in the fourth category may be sent first to an *ad hoc* Joint Select Committee. This happened with Bills for the Local Government Act 1933, the Public Health Act 1936, the Customs and Excise Act 1952 and the Highways Act 1959.

Subject matter of consolidation Acts

It might be thought obvious that a consolidation Act should exhaustively set forth a distinct segment of statute law. If we cannot

have an orderly statute book under Titles, at least let us have consolidated law on clearly defined topics. This reasoning has not always been followed however. The Housing Act 1957 consolidated the enactments relating to housing, except certain financial ones. These were consolidated separately as the Housing (Financial Provisions) Act 1958. Similarly, the Hire-Purchase Act 1964 consolidated all the hire-purchase law except that relating to advertisements. This was consolidated separately in the Advertisements (Hire-Purchase) Act 1967. In 1979 the enactments relating to customs and excise duties were consolidated. The previous consolidations of these provisions followed the natural course and combined them in one Act (see the Customs Consolidation Act 1876 and the Customs and Excise Act 1952). In 1979 however the provisions were consolidated in no less than seven Acts!

There are two reasons for this apparently wayward behaviour on the part of the authorities; one practical and the other theoretical. The practical reason relates to shortage of manpower. Consolidation Bills are drafted by Parliamentary Counsel on temporary secondment to the Law Commission. In giving oral evidence to the Renton Committee, I was asked what were the principal limitations on consolidation. My reply was:

First of all there is the shortage of draftsmen. Under the system of referential amendment, consolidation of the amended and amending Acts together is often extremely difficult. It requires what in my paper I call conflation, which is a useful word to describe the perplexing mental process of working out the effects of cumulative statutes piled one upon the other. This is what the consolidating draftsman has to do whenever he is faced with a referential amendment of an Act to be consolidated. If he were only concerned with textual amendments, the consolidation could be done by an assistant, I mention that because it does add to the length of time taken for consolidation; although nothing can be done about that in the case of existing Acts. The shortage of draftsmen is quite remarkable. It is highlighted by the fact that the Law Commission in their first annual report, when they were reporting the staff they had in 1965, said that there were four draftsmen on their staff of 35, and they also made the remark that 'in due course it will clearly be necessary to increase their number'. Yet in their latest annual report you find the number of draftsmen is still four, though the total staff has increased to 47. That is why we have no dramatic increase in consolidation. That is the main obstacle. Secondly, and also very important, is the shortage of staff in the Departments who operate the Acts to be consolidated. I had experience of that myself, because I did a housing consolidation which ought to have been before Parliament now, and when the first draft of the Bill, which was about 330 clauses, had been completed, the onus was then on the Department of the Environment to comment on it and say where it did not agree with what they thought the Bill should say. But owing to under-staffing in the legal department of the DOE we had no way at all of making progress, because the staff

were tied up with the current Housing Bill, and it meant the consolidation was put aside. I have made a suggestion in my written evidence to deal with that, which is that there could be attached to every major department a legal officer whose sole function it is to deal with statute law consolidation and other matters of that kind (Bennion 1979(4), p 73).

The Renton Committee accepted all except the last item of this evidence (see Renton 1975, paras 14.15 to 14.20). They did not support the idea of having departmental officers with law reform duties.

Shortage of manpower leads to the philosophy that consolidation had better be done piecemeal as opportunity offers. Otherwise it may not get done at all. It is believed, no doubt rightly, that consolidation of even part of a subject does represent some improvement.

The theoretical reason for breaking up consolidation units in the manner used for the customs and excise legislation in 1979 was set out in the Renton Report. The Committee dismissed the plea for consolidation on a one Act-one subject basis put forward by the Statute Law Society and other witnesses. 'The proposal is, in our view, based on the erroneous assumption that every statute can be completely intelligible as an isolated enactment without reference to the provisions of any other statute' (Renton 1975, para 14.7). Their view as to what the proposal was based on was in fact mistaken. No one with any knowledge of the subject would suppose that tides could stand entirely on their own. But they would produce the inestimable advantage of organising each body of law as a coherent whole, with a unified system of internal numbering and cross- reference. Practitioners would know just where to look for what they wanted, as users of that invaluable work *Hahbury's Statutes* quickly learn which tide to consult.

The Renton Committee argued that customs and excise enactments should be split up because 'the person who is interested in duties on hydro-carbon oil will not want to pay for, and wade through, an enormous Act containing the whole of the customs and excise legislation . . . What such a person wants is the needle without the haystack' *(ibid).* That is what we all want of course, but we are not always looking for the same needle. The person whose only legislative interest throughout life is in hydro-carbon oil duties is likely to consult a guide put out by his trade association rather than the text of an Act of Parliament.

We may take it that the Hydro-carbon Oil Duties Act 1979, owes to the Renton Committee's philosophy its existence as one of the seven Acts into which the customs and excise legislation was then divided. Yet for the meaning of no less than 16 of the expressions used in that Act, the reader is expressly referred to one or other of the remaining six Acts! So the Renton Committee's mythical needle hunter, who economised by purchasing only the one Act,

would find himself cheated. Even though dealing with a non- debatable consolidation Bill, the drafter could not bring himself to incur the repetition needed to make each Act truly independent. He thus neatly proved the Renton Committee wrong — along with every one else who resists the obviously desirable reform of a one Act-one subject statute book.

Recent practice has turned away from the Renton recommendations. For example the 1985 consolidation of the Companies Acts was, following consultation with users, carried out in the form of a single Act of 747 sections and 25 Schedules rather than a number of separate Acts.

By a useful recent reform, consolidation Acts as officially published incorporate a Table of Derivations showing the derivation of each enactment comprised in the consolidation Act. Official annual volumes of Acts also include, for each consolidation Act included in the volume, a Table of Destinations. This operates in the reverse way, listing the enactments consolidated and showing where each is to be found in the consolidation Act.

Preserving integrity

It is important that once the drafter has gone to the trouble of producing a consolidation Act its textual integrity should be preserved. This is done by drafting future amendments, as and when they come to be required, in the form of textual and not indirect amendments. This enables the amended Act to be reprinted as one text.

Unfortunately, British drafters have paid scant respect to the integrity of statutory texts. With remarkable perverseness (since it is obviously untrue), the Renton Committee found that using the textual amendment method would not lengthen the interval between consolidations of a topic such as income tax. They did however add:

> Nevertheless, it remains in our view a matter for regret that the integrity of [recent tax consolidations] has not been preserved, as far as possible, by casting subsequent legislation on the subjects with which they deal in the form of textual amendments . . . (Renton 1975, para 17.32).

Statute law revision

The Renton Report states that the still current series of Statute Law Revision Acts began in 1861 (Renton 1975, para 2.11). In fact this is a mistake: the first such Act was 19 and 20 Viet c 64, passed in 1856. It repealed 120 obsolete statutes. The Law Commission, charged by its constituting Act of 1965 with 'the elimination of anomalies, the repeal of obsolete and unnecessary enactments and generally the simplification and modernisation of the law' now

superintends the function of preparing these Acts (see Simon and Webb 1975).

Codification

This adds to the stock of legislative texts by converting judge-made law into statute law. Since codification reduces the area of their authority, judges have not unnaturally opposed it. Apart from the successful codifications by Sir Mackenzie Chalmers of rules relating to sale of goods, partnership, bills of exchange and marine insurance, little of note has been achieved in Britain.

Codification is included among the functions conferred on the Law Commission, but it has not yet succeeded in placing a codification Act on the statute book. The Commission began immediately with proposals for codification of the law of contract, intending that the codified rules 'will later take their place in a Commercial Code or, ultimately, in a Code of Obligations' (First Annual Report, para 31). Work was also begun on a codification of the law of landlord and tenant *(ibid,* para 67).

These plans proved too ambitious. Experience in working on the latter code, for example, convinced the Law Commission that 'the task of preparing a complete code of the basic law of landlord and tenant is immense and cannot be completed for a long time unless resources are devoted to it on a scale which is at present impossible' (Law Com no 92, para 2.34). One formidable obstacle to codification is that even if the necessary Bills could be produced, parliamentary time would be difficult to find. The Bills would be fully amendable, and there are few votes in law reform of this kind. Nevertheless the Law Commission set up in 1981 a small group of academics 'to study and draft the principles upon which the General Part of a criminal code should be based' (Law Com No 119, para 2.35). For a discussion of the method which should be used in a codification of criminal law see Bennion 1986(3).

So far as a code does not alter the law, it is clear that it is equivalent to a declaratory Act. There is however lack of agreement on the degree of detail that justifies use of the term codification. Ilbert defined a code as 'an orderly and authoritative statement of the *leading* rules of law on a given subject' (Ilbert 1901, p 128; emphasis added). Chalmers, the leading English codifier, did not apply this restrictive qualification. Acting on the advice of Lord HerscheU LC, he drafted the Sale of Goods Act 1893, so as 'to reproduce as exactly as possible the existing law'. In this he followed the principle employed for his highly successful Bills of Exchange Act 1882. Chalmers clearly felt that a code should be a *full* statement of the law, and not depend on extensive litigation to clarify its details. Legislation, as he pointed out, is cheaper than litigation (Chalmers 1894, p viii).

David Dudley Field, founder of the American codification

movement, also favoured a comprehensive code rather than one limited to Ilbert's 'leading rules'. When it was objected that a code would never be truly comprehensive because it could not deal with matters that had not yet come before the courts. Field retorted: 'Because we cannot provide for all cases, should be thought a poor reason for not providing for as many as possible. To render the existing law as accessible, and as intelligible, as we can is a rational object, though we cannot foresee what ought to be the law in cases yet unknown'.

Field went on to specify the true object of a code as being: 'To cast aside known rules which are obsolete, to correct those which are burdensome, or unsuitable to present circumstances, to reject anomalous or ill-considered cases, to bring the different branches into a more perfect order and agreement . . . " (Field and Bradford 1865, p 110).

This had certainly been Bentham's view. He held that it could not be otherwise than expedient to narrow the occasion for judicial interpretation '. . . by transforming the rule of conduct from Common Law into Statute Law; that is, as I might say, into Law from no-law: to mark out the line of the subject's conduct by visible directions, instead of abandoning him in the wilds of perpetual conjecture' (Bentham 1775, p 104).

A code does not always obviate conjecture. The Bill for the Marine Insurance Act 1906, was vetted by an expert Committee which disagreed on certain points. As Lord Porter later said, these points 'were dealt with in vague terms in the hope that they would work out all right in practice, and in the knowledge that some day the Courts might make them clear' (Porter 1940, p 2).

Mill confirmed that Bentham was insistent that a code should be comprehensive. Bentham, he said:

> . . . demonstrated the necessity and practicability of codification, or the conversion of all law into a written and systematically arranged code: not like the Code Napoleon, a code without a single definition, requiring a constant reference to anterior precedent for the meaning of its technical terms; but one containing within itself all that is necessary for its own interpretation . . . (Mills 1838, p 110).

Pace Sir Courtenay Ilbert, the consensus of opinion on both sides of the Atlantic is that a code should be comprehensive, and should modify existing law where thought desirable. The following definition is offered:

> A code, as respects a particular area of law, is a comprehensive statute which reproduces systematically, with or without modification, the current principles, rules and other provisions of that area of law, whether they derive from common law, statute, or any other source. (See further Bennion 1986(3).)

The classic statement of how a codified provision should be

interpreted was given by Lord Herschell, the Lord Chancellor to whose reforming zeal the great English codes drafted by Chalmers are mainly due:

I think the proper course is, in the first instance, to examine the language of the statute, and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with enquiring how the law previously stood, and then, assuming that it was intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If... treated in this fashion it appears to me that its utility will be almost entirely destroyed and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities ... *{Bank of England* v *Vagliano* [1891] AC 107, 144).

An advantage of codification which is not always appreciated is that it impresses foreign lawyers who are used to codes in their own jurisdiction. The Foreign Judgments (Reciprocal Enforcement) Act 1933, was based on the report of the Greer Committee ((1932) Cmd 4213). This identified as a mischief requiring statutory remedy the fact that foreign courts were reluctant to enforce English judgments because they were not convinced that English courts would enforce foreign judgments. They enforced them under common law rules which, in the words of Lord Diplock, 'foreign courts suspected of being indefinite and discretionary as compared with written law embodied in a code or statute' *{Black-Clawson* v *Papierwerke* [1975] AC 591, 639).

Codification is more practicable on a smaller scale. Where there is need to reform a limited area of law, the opportunity may be taken to codify it at the same time. Having so far failed to realise their more ambitious aims, the Law Commission are proceeding where appropriate in this more modest fashion. Unfortunately they appear to have adopted the Ilbertian view of codification.

When in 1980 the Law Commission reported on reform of the criminal law of attempt, for example, they announced that their proposals, which included a draft Bill, codified this offence (Law Com No 102, p 87). The gist of the offence was however stated in a mere eight lines (see now the Criminal Attempts Act 1981, si). While the Law Commission report, which runs to more than 100 pages, deals fully and clearly with the many points that have caused difficulty in this field, the codified provisions in what is now the Act fail to mention most of them. The formulation, in other words, follows the compressed style characteristic of common law drafting (for the drawbacks of this compression see pp 217- 223 below). When I ventured to raise this objection with the Commissioner responsible he replied that in the view of the Law Commission a radical change in drafting style could be contemplated

only in the context of a complete Criminal Code (for a full account see Bennion 1980(9) and 1981(1); as to the desirability of codification whenever a common law rule is fundamentally altered by statute see Bennion 1980(10)).

Official Publication of Statutory Texts

The state has an obvious duty to promulgate its laws. In this chapter we briefly trace the history of this in Britain, and then go on to describe the present system (including that relating to Community law). We are concerned only with the basic texts. Publication of indexes and other aids is part of the story of *processing*, and is dealt with in chapter 23.

Historical

In early times, as we have seen (p 16), there was no official system of publishing Acts of Parliament. Indeed it was not until the close of the Middle Ages that it became possible to distinguish statutes from other forms of law. From the end of the fifteenth century, unofficial printed collections began to appear. As Sir William Holdsworth has said:

Lawyers were dependent for their knowledge of the contents of the Statute Book upon judicial dicta, books of authority and the work of private persons ... In the absence of official publications, the learning of the bar and the enterprise of the law publisher employed upon the Statute Book and the reports, have exercised a very real censorship upon the sources of English law (Holdsworth 1924, II, p 427).

The earliest and most authoritative of the printed texts of public Acts are found in the series known as *Sessional Volumes of Statutes,* which go back to 1483 and were printed until 1793 in Gothic 'black-letter' type. (Since 1940 the volumes have been published by Her Majesty's Stationery Office (HMSO) on an annual basis, rather than one tied to parliamentary sessions.) In 1796 it was ordered that the printed statutes should be distributed throughout the realm as speedily as possible after enactment.
The first official collection of statutes was published by the Record Commission in the early nineteenth century under the title *Statutes of the Realm.* The first edition of *Statutes Revised,* consisting of 18 volumes, was completed in 1885. The second edition was published by instalments between 1888 and 1929. It amounted to 24 volumes. Sir Granville Ram, who superintended the preparation of the third

edition, was determined that it should all appear at the same time. He achieved this aim, and the 32 volumes were published together in 1950. They are likely to be the final edition of this particular series.

Statutory *instruments* Annual editions of what were then called Statutory Rules and Orders began to be published officially in 1891. Since 1948 these annual editions have continued under the title *Statutory Instruments*. The instruments in force at the end of 1948 were published in a collected edition of 25 volumes under the title *Statutory Rules and Orders and Statutory Instruments Revised to December 31, 1948*.

Present position

Acts of Parliament As they are passed, these are published singly by HMSO. As mentioned above, the Acts (in the form in which they are passed) are also published in annual volumes.
Where authorised by a 'printing clause' in an Act which has been amended, the Act is thereafter published in the amended form. This may involve constant reprinting (see, eg the House of Commons Disqualification Act 1975, where the printing clause is s 5(2)). Printing clauses are disliked by drafters as they are held to lead to deceptive versions of Acts. The purist prefers his Act to appear as it was when originally enacted. It is contended that a reprint of the Act as amended makes it look as if amendments subsequently made were speaking from the date of first enactment. (In fact this need not be so if suitable annotations are included.) A list of current Acts with printing clauses is given under the entry ACT OF PARLIAMENT in the *Index to the Statutes* (see p 326 below).
Single copies of past Acts, where not available from HMSO, can be obtained from the Record Office, House of Lords. This applies to all Acts passed after 1497. The Acts can also be personally inspected at the Record Office.
A new official collected edition of public Acts, begun in 1972, was completed in 1981. It is called *Statutes in Force*. The Acts are arranged under 131 Titles and printed as currently amended. Each Act forms a separate booklet, a number of detachable booklets being held together in each volume. The plan is that 'heavily-amended' Acts are reprinted in amended form, the new booklet being substituted for the old. The snag is that almost every Act, within a year or two after its passing, becomes *lightly* amended. The system guarantees that users will have few Acts in up-to-date form, though an annual supplement specifying amendments is issued.

Statutory instruments All instruments of general effect, and the more important local instruments, are published by HMSO as they are

made. The position as to annual volumes and the 1948 collected edition has been described (p 79).

Commonwealth legislation As described above (p 66), the rest of the Commonwealth enjoys a superior system. In Canada for example the latest revision (the sixth since Confederation) dates from 1985. (For an account of this, see *Revised Statutes of Canada* 1985, Appendices, p v. For the titles under which it is arranged see *Revised Statutes of Canada* 1985, Vol I, pp iii-ix). Delegated legislation in Canada was last consolidated in 1978. (For an account, see *Consolidated Regulations of Canada 1978,* Table of Contents and Schedule, p 5.) The history of the statute law revision system in Canada is admirably described in *Private Law in Canada* by Clarence Smith and Kerby.

Community law The Treaties have been published by HMSO, and also by the Commission itself. Regulations, and some other instruments, are published in the 'L' (Legislation) series of the *Official Journal of the European Communities,* which usually appears daily. Copies and collected editions are sold by HMSO, and subscriptions are arranged by the Office for Official Publications of the European Communities in Luxembourg.

Statutory Publications Office This government office, now located at 28 Broadway, London SW1, is responsible under the Statute Law Committee for a number of publications relating to statute law. These include *Statutes in Force,* the annual volumes of statutory instruments, and various tables and indexes relating to legislation (described in chapter 23). It is typical of the haphazard British way that no one organisation is responsible for all aspects of statutory publication. Until 1886, the Queen's Printer of Acts of Parliament had the monopoly of the publication of Acts, and did not serve merely as an agent of the Crown. Since that year, HMSO has been the publisher of Acts. The Controller of that Office is now by letters patent known as the Queen's Printer. Such antique arrangements are not easily rationalised.