

Statute law reform - is anybody listening?

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The purpose of legislation is to express the legislator's will in a form suitable (without or without subsequent processing by courts and others) for conveying the message to those who have to conform to it. In modern western societies the will of the legislator is exerted in many directions and over many topics. The system cannot work justly and efficiently unless the people governed by it are easily able to find out what it requires of them.

Ideally the citizen should be able to find this out directly, perhaps by consulting a book or video screen. In reality it is for the foreseeable future likely to remain necessary that the citizen should consult an adviser possessing legal expertise. Anyone else who presumes to offer advice on legislation invites reversal of the maxim that the lawyer who acts for himself has a fool for a client. His client has a fool for a lawyer.

Even if it is unrealistic at present to contemplate that legislation can be directly accessible to the citizen, it should be directly accessible to the legal adviser. Yet I have met no lawyer who denies that under the current system grave difficulties lie in the way of such accessibility (though I doubt that many lawyers seriously want anything done about this).

One problem people have experienced in putting forward sensible and workable reforms is that the subject is a difficult one, with many technicalities. Solutions that appear feasible to a person unfamiliar with these are dismissed by the expert (who rarely seems willing to respond positively with suggestions that might get round the technical objections).

Any experienced legislative draftsman, if moved to propound reforms (which few are), is likely to be in a good position to avoid making unrealistic proposals. It was for that reason I felt an obligation to frame and put forward over the years a number of suggestions of this kind. It may now be helpful to summarise these, and that is the main purpose of this article. They are set out in a number of books, articles, and other sources. The main books are *STATUTE LAW* (Longman, 3rd edition 1990), referred to below as 'SL', and *STATUTORY INTERPRETATION* (Butterworths, 2nd edition 1992, Supplement 1993), referred to as 'SI'. Unless the contrary intention appears (as the Interpretation Act is fond of putting it), publications referred to below are by me.

The proposals fall into four groups: (1) general reforms; (2) reforms in the way Acts are drafted; (3) reforms in the way legislation is interpreted; (4) reforms in the way legislation is presented to the user.

(1) General statute law reforms

Codification Produce comprehensive codifications of the general law wherever possible. (SL, pp. 74-77; [1986] Crim LR 295.) The English Law Commission has been singularly unsuccessful in carrying out its statutory duty to codify the law (*The Law Commission and Law Reform* (1988) pp 62-64).

Is codification worth while? Lord Thring, founder of the Parliamentary Counsel Office (where all United Kingdom public general Acts have been drafted since 1869), said-

'No man in his senses can doubt that a code, or the reduction to a consistent and harmonious whole of the scattered fragments of the law of a country, is the ideal perfection of legislation. No man can doubt that a code of English law is the goal towards which all English law reform should tend.

(Thring, *Simplification of the Law* (Bush, London, 1875) p 2).

Is codification possible under modern conditions? Sheldon Amos, a Victorian barrister with chambers at 9 King's Bench Walk, wrote in 1867 that-

'The three main requisites demanded in those who would codify the English law are (1) a masterly faculty of accurately comprehending the true drift of all the materials to be used; (2) a profoundly scientific knowledge of general jurisprudence; and (3) a capacity for definite, terse, unambiguous and comprehensive expression.' (Amos, *Codification in England and the State of New York* (London, W Ridgway, 1867) p 15).

This remains true. Where are the geniuses who satisfy the Amos requirements?

Statute Law Commission Set up an official Statute Law Commission, to act as the keeper of the statute book. (SL, pp. 69, 337.) Lord Justice Gibson, a former Chairman of the Law Commission, said of this proposal at a Colloquium held to mark the twentieth anniversary of the Commission-

'Francis Bennion has referred to statute law. I agree with him about the state of our statute law . . . [It] seems to me to be a part of the law which is most likely to be improved directly if responsibility for the whole of it were concentrated in one hand. The Chairman of the Law Commission has the honour of being the Vice-Chairman of the Statute Law Committee. That Committee meets once a year at 12.00 in the confident expectation that it will finish its business by 1.00 o'clock. It has promoted much useful work through sub-committees. It does not have control directly, as I respectfully think such a committee should, of all aspects of statute law. The notion of a Statute Law Commission commended itself to me when I heard it discussed.' (*The Law Commission and Law Reform* (Sweet & Maxwell, 1988) ed Graham Zellick, p 53.)

Since that was said the Statute Law Committee has been converted into the Lord Chancellor's Advisory Committee on Statute Law. As its name indicates, this lacks the executive powers suggested by Lord Justice Gibson. Has there been anything more than a change of name?

Statute Law Institute In default of a Statute Law Commission, set up an unofficial Statute Law Institute, similar to the American Law Institute, with the function of preparing codes etc. (SL, pp 27-28.)

(2) Reforms in the way Bills and Acts are drafted

One title one Act Arrange the statute book under titles, with one Act for each title. (SL, pp. 10, 39, 66, 70-73, 227.)

Standardised clauses Use standardised clauses, drawn up by say the Parliamentary Counsel Office or the proposed Statute Law Commission, for constant use in Acts and statutory instruments. These will ensure that the same thing is said in the same way, and shorten drafting time. They should be updated by revision whenever necessary. (SL, pp 26-28.)

Information for MPs Do not include in a Bill passages designed only for the information of MPs, since wording intended to form part of the law should be framed solely for that purpose. (SL, pp. 37-38.) Instead use a textual memorandum. (SL, pp. 51-52.) For this reason, do not use Keeling schedules. (SL, pp 51-52.)

Amendments to Bills Alter procedural rules to enable MPs to put down a simple amendment which merely raises for debate the relevant policy point. At present they have to draft a detailed amendment that fits the structure of the Bill. (SL, p 33.)

Textual amendment Use this in preference to indirect amendment. (SL, p 32.) I have been pressing for this change since 1968, and it is now largely in operation.

Commencement and transitional provisions (1) Where different provisions are to be brought into force by order at different times, provide a commencement Schedule which is to be amended by each order so as to provide in the Act itself (when reprinted) a comprehensive commencement statement (SL, pp 48-50). (2) Include in each principal Act (that is an Act which does not merely amend other Acts) a Schedule forming a historical file of commencement dates and transitional provisions. This file would be amended by any subsequent legislation amending the principal Act. (SL, pp. 49-50; 130 NLJ (1980) 913; 131 NLJ (1981) 356, 586).

(3) Reforms in the way legislation is interpreted

Training Recognise the need to train judges, advocates and advisers in the principles of statute law and interpretation. (SL, pp. 41, 83; [1982] *The Law Society's Gazette* 219, 664.)

Drafting technique Distinguish, for purposes of interpretation, between precision drafting and disorganised composition (SL and SI: see indexes).

Dynamic processing Accept that dynamic processing of legislative texts is part of the judicial function, producing sub-rules which are more detailed than the main rules laid down by the legislator. (SL and SI: see indexes.) To aid this acceptance, pass a codifying Act that declares the powers of courts and other persons or bodies in relation to the interpretation of legislation. (SL, pp 320-324, 343-345.)

Interstitial articulation Accept that a judicial sub-rule should be expressly and precisely framed as such, so as to articulate it within the interstices of the legislative text. Such articulated sub-rules can then be used directly by the codifier (see above). The method also reduces judicial error. (SL, pp 198-310; SI, pp 373-376.)

Selective comminution To assist comprehension, break up the relevant portion of a lengthy passage into numbered clauses. (SL, pp. 218, 307; SI, see index.)

Codification of interpretative technique and criteria Codify the judge-made and statutory rules, principles, presumptions and canons of interpretation. This would best be done in an enacted code. Failing that it could take the form of an official restatement promulgated by the Law Commission or a similar body. The code would recognise that the enactment is the unit of enquiry in statutory interpretation, and distinguish the legal from the grammatical meaning. It would acknowledge interstitial articulation and the formation of sub-rules by judicial and other processing. It would distinguish the factual outline from the legal thrust of an enactment, and show how disputes arise over opposing constructions. It would state the paramount interpretative criterion, namely legislative intention.

The code would go on to specify the authorised guides to legislative intention, which are of four kinds: (1) rules laid down by statute or the courts; (2) principles derived from the legal policy of the state; (3) general presumptions; and (4) linguistic canons. The detailed content of these categories is as follows.

(1) Rules of construction laid down by statute or the courts The basic rule of statutory interpretation is that the legislative intention is taken to be that an enactment shall be construed in accordance with the general guides laid down by law, and that when these produce conflicting answers the problem shall be resolved by weighing and balancing the relevant factors. Other rules comprise: rules at present laid down by the Interpretation Act; the duty to have regard to the juridical nature of an enactment; the informed interpretation rule; the plain meaning rule; the rule applicable where the meaning is not 'plain'; the commonsense construction rule; the rule *ut res magis valeat quam pereat* (strive to make the enactment effective); and the functional construction rule.

(2) Principles of construction derived from legal policy These comprise the following principles: that law should serve the public interest; that law should be just; that persons should not be penalised under a

doubtful enactment; that law should be predictable; that law should not operate retrospectively in an adverse sense; that law should be coherent and self-consistent; that law should not be subject to casual change; and that municipal law should conform to international law.

(3) *General presumptions as to legislative intention* These comprise the following rebuttable presumptions: that the legislative text is to be the primary indication of intention; that the literal meaning is to be applied; that the mischief is to be remedied; that a purposive construction is to be given; that regard is to be had to the consequences of a construction; that an 'absurd' result was not intended; that legislative errors are to be rectified; that evasion is not to be countenanced; that ancillary rules and maxims of the law are intended to be attracted; and that an updating construction is to be applied where necessary.

(4) *Linguistic canons of construction* These comprise the following canons: deductive reasoning is to be employed; an Act is to be construed as a whole; broad terms are to be correctly treated, distinguishing static and mobile terms, and processed and unprocessed terms; there must be correct treatment of technical terms, neologisms, archaisms, abbreviations, homonyms, and other special cases; *noscitur a sociis*; *ejusdem generis*; the rank principle; *reddendo singula singulis*; *expressum facit cessare tacitum*; *expressio unius est exclusio alterius*; implication by oblique reference; and implication where a statutory description is only partly met.

(4) Reforms in the way legislation is presented to the user

Computer systems (1) Carry out further research into methods by which, using a special computer language such as LEGOL, legislative provisions could be initially expressed in machine-readable form (SL p 333; [1981] *The Law Society's Gazette* 1334). (2) Convert existing statutory rules which do not require the exercise of judgment or discretion for their operation into computer programmes enabling them to be directly accessed by use of a computer terminal. (For an instance of this being done see Phillip Capper and R Susskind, *Latent Damage Law: The Expert System*, Butterworths 1988.)

Algorithms etc Use algorithms, logical trees, and other graphic systems to enable statute users to find out how legislation affects them without having to understand its language (SL, pp 331-332).

Composite restatement Publish, preferably through some official body such as the Law Commission, authoritative presentations of particular subjects dealt with by statute in the form of composite restatements. A composite restatement of the legislation on a particular topic combines in one rearranged, comprehensive, updated text provisions from all relevant Acts and subordinate legislation. It uses the technique of comminution (see above), and employs typographical aids. It solves the user's problem of text-collation and, as has been said, 'does half the work for him or her'. (SL, chap. 23. For an example of its use in annotated form in relation to consumer credit law see *CONSUMER CREDIT CONTROL*, Longman 1976 to date.)

Conclusion

The would-be reformer needs to start by understanding the name of the legislation game. The whole idea of drawing up general verbal formulas to regulate future human conduct is far more complex than anyone seems prepared to allow. The situations to be regulated are complex. Getting agreement in Parliament is complex, and too many cracks get papered over. Language is complex, and hopelessly imprecise. Interpreting judges or administrators are complex creatures, each one a different individual with his or her own ideas of the meaning of legislative words. Finally, life is complex.

The only foreseeable thing is that the unexpected will happen. Yet the same imperfect words have to regulate us today, tomorrow, and through the uncertain future. There is more we could do to assist this process. There really is.

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