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Should Non-Lawyers Have Power to Change the Law?

by Francis Bennion

Introduction

The primary constitutional function of members of parliament is to change the law by amending what is popularly known as the statute book. Yet most legislators are not lawyers. Many of them have but the slightest awareness of the technical aspects of law. Is it right that state constitutions should entrust to such uninformed people the heavy responsibility of deciding on legal changes?

Brian Hunt recently questioned me on this topic. He has been appointed to the new academic post of Parliamentary Fellow in the *Oireachtas* (the Irish Parliament). As the Parliamentary Fellow he has been asked to produce a monograph on the role of that body in the scrutiny of legislation, and wishes to cite my views in it. On a number of occasions, he said, in the context of the plain language debate you have made the point that lay persons should not try to interpret legislation unaided, but should seek the assistance of experts. In the context of the competence of individual legislators, he went on, how does that view sit with the fact that in Ireland most of our legislators are not lawyers but are drawn from many other sections of society including farmers, auctioneers, teachers, economists etc? If you argue that lay people should not seek to understand legislation, is it in your view not possible or credible for our parliamentarians (who are mostly lay people) to devise, debate and enact the laws?

Finding an answer

As a former legislative drafter I have written many times on the topic of statute law, beginning in 1966.[1] The main concern, throughout my work, has been to bring about improvements in the form of legislation with a view to helping professional users.[2] Perhaps the most helpful item here is my 1993 article 'The readership of legal texts'.[3] In it I said:

> 'What is clear to a skilled professional cannot be expected to be always clear to a lay person. Indeed if the text is intended for a professional audience it would often be inappropriate, and in some cases impossible, to try to word it as if a lay audience were intended. Too much would need explaining.'

I went on to cite what the Association of First Division Civil Servants told the Hansard Society Commission on the Legislative Process, and the Commission accepted:

> 'What appears clear to the layman may not be certain in meaning to the courts; and much of the detail in legislation, which can appear obfuscatory, is there to make the effect of the provisions certain and resistant to legal challenge.'[4]

My 1993 article elaborates the point.

> 'One of the inexorable constraints on legal language is the need to fit into the language of the existing law. An Act intended to amend the law (as most Acts are) must fit into the existing *corpus juris* or body of law as well as expressing the reforming intention of

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[1] 'Suggestions on the form and publication of statute law', RICS 28 May 1966, *www.francisbennion.com/1966/001.htm.*

[2] For a summary of users' difficulties and their causes see *Bennion on Statute Law* Longman, 3rd edition 1990, (hereinafter referred to as *Bennion on Statute* Law), ch 13, *www.francisbennion.com/1990/002/209.htm.*

[3] *Clarity* 27 Apr 1993, page 18, *www.francisbennion.com/1993/001.htm.*

[4] Cited in para 219 of *Making the Law,* the report of the Commission, issued on 2 Feb 1993.

> the legislator. It must fit not only the existing language (which may well be unnecessarily complex if we could start again) but also the existing concepts . . . I say this remembering desperate occasions when I strove to draft a Finance Bill clause so that it fitted effectively into the frightful mess that is the Income Tax Acts and did not cost the country millions in lost tax revenue.'

Brian Hunt refers to my oft-repeated contention that lay persons should not seek to interpret legislation unaided. But this is intended primarily to apply to private citizens seeking to understand the law for their own purposes. Special considerations govern the case of a lay person who is acting as a legislator. I will now try to explain these.

If the people who devise, debate and enact parliamentary laws consisted entirely of lay persons without knowledge of the law I would say it was not possible or credible for them to perform this function adequately. However that is not the case. Like many parliaments of states which are members of the Commonwealth, the two Houses of the *Oireachtas* are combined lawyer and non-lawyer assemblies. Mixed with the lay members are a considerable number of persons with legal expertise, and the members also have officials with such expertise to advise them. Most parliamentary bills are devised by the executive, who also have legal staff to advise them in so doing. Such bills are drafted by legally-qualified staff,

Page 23

who have a responsibility to ensure that they are correctly drawn from a legal viewpoint. The texts of bills are widely publicised and come under the notice of lawyers and legal bodies corresponding to (in England) the Bar Council and the Law Society. All these factors constitute safeguards against the production of legislation that is defective from a legal viewpoint.

Nevertheless it may strike one as strange that lay persons should act in any way as legislators. Lawyers are traditionally described as being learned in the law and one might expect that only persons who are so learned could be trusted to alter the law by legislation.[5] In early days that was indeed the case, hence Chief Justice Hengham's famous fourteenth century rebuke: 'Do not gloss the statute; we know it better than you do because we made it'.[6]

It was the advent of democracy that made lay persons into legislators; and we need to remember what a paradox this is – even if a necessary one under modern conditions.

The 'four corners' doctrine

In common law countries it was for many years thought by legislative drafters that a parliamentary bill should be so drawn that legislators considering it could understand the bill without going beyond the four corners of the bill itself. This was known as the 'four corners' doctrine. I described it as follows in *Bennion on Statute Law*:[7]

> '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"[8] . . .
>
> The four corners doctrine required the drafter to make the text of his Bill fully self-explanatory. An unfortunate consequence was that Bills amending existing legislation were almost invariably expressed in indirect or non-textual form, because textual

[5] The first President of the new United Kingdom Supreme Court, Lord Phillips of Worth Matravers, recently confirmed to me in a letter that he believes the law is still a learned profession, despite all recent efforts to demote it from that status.
[6] YB 33–35 Edw 1 (1305-1307) (RS) 82 at 83.
[7] P 32, *www.francisbennion.com/1990/002/020.htm*.
[8] Lord Thring, *Practical Legislation* (2nd edn, 1902) p. 8.

amendments require accompanying explanatory material in order to be comprehensible. This was contrary to the essential function of a parliamentary bill, which is to provide the *ipsissima verba* of the new law and not a kind of paraphrase of it.[9] Since the report of the Renton Committee condemning non-textual amendment, and the commencement of publication of the official 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.'

The Renton Report supported textual amendment and rejected the four corners doctrine:

> 'We recommend that in principle the interests of the ultimate users should always have priority over those of the legislators: a Bill, which serves a merely temporary purpose, should always be regarded primarily as a future Act, and should be drafted and arranged with this object in view.'[10]

In an earlier passage the Renton Report said:

> '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.'[11]

A formidable problem

I touched on the subject of Brian Hunt's question in a later passage in *Bennion on Statute Law:*

> '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.'[12]

Page 24

Brian Hunt's question ends by asking: 'is it in your view not possible or credible for our parliamentarians (also lay people) to devise, debate and enact those laws?' Since as mentioned above the Houses of the *Oireachtas* are mixed lawyer and non-lawyer assemblies, to answer in the affirmative would be to flout the modern principles of parliamentary democracy. So that answer is unavailable in practical terms. The drafter, whom I have called the keeper of the statute book[13], must accept primary responsibility for ensuring that it is both

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[9] For an example of indirect amendment see *Bennion on Statute Law* pp. 228-229, *www.francisbennion.com/1990/002/020.217.*

[10] *The Preparation of Legislation*, report of a committee appointed by the Lord President of the Council, Cmnd 6053, 1975, para. 10(3).

[11] *Ibid*., para. 7.15.

[12] *Op. cit*., p. 33.

[13] See the article by Janet Erasmus, Chief Legislative Counsel of British Columbia, which opens: 'Francis Bennion has named legislative counsel as "keepers of the statute book". What a lovely word, that – keeper – with its echoes of custodian, preserver and protector. As Bennion has it, this is a role that encompasses the linguistic and the juridical state of the statute book.' (See Janet Erasmus, 'Keepers of the Statute Book: Lessons from the space-time continuum', *Loophole* (Journal of the Commonwealth Association of Legislative Counsel), Jan 2010, p 7.)

possible and credible for lay parliamentarians to assist lawyer members in devising, debating and enacting parliamentary laws. The drafter is joined in this task by officials employed by the legislature and, in the case of bills initiated or supported by the executive, by civil servants and others employed or consulted by it.

It seems that the optimum system is (1) a bill drafted so as to serve the interests of the ultimate users of the contemplated legislation, so that it fits adequately into the system of law which is being amended by the bill and leaves the statute book in the best possible condition from the angle of so-called lawyer's law (I am not of course talking about policy), coupled with (2) sufficient written and oral explanations furnished by the promoters of the bill (usually the government) for the enlightenment of the parliamentarians (whether lay or expert) who are asked to debate and enact it.[14]

One way or another lawyers have a good deal to do with every parliamentary bill in its origin and enactment, even though lay persons may also play a part. Nor should one dismiss as necessarily unimportant or even harmful the contribution of lay parliamentarians. Many non-lawyers have played useful parts in improving the working of the legislature. One thinks of the radical nineteenth-century MP Charles Bradlaugh who secured after much effort the introduction of affirmation as an alternative to oath-taking. In the twentieth century the layman Sir Alan Herbert MP, better known by his initials APH, secured the passing of a number of useful Acts, notably the Matrimonial Causes Act 1937 which put an end to the type of marital contretemps popularly known as holy deadlock. A substantial contribution from non-lawyers was hinted at by the Edinburgh philosopher Dugald Stewart (1753-1828) when he observed that 'a great part of the political order which we are apt to ascribe to legislative sagacity is the natural result of the selfish pursuits of individuals . . .'[15]

Lawyer's law

Having taken all that into account, a reservation remains. Brian Hunt cites three concepts: the devising, the debating and the enactment of parliamentary law. Let us take them one by one.

When considering the devising of a legislative project one needs to distinguish lawyer's law from other kinds. In England reform of lawyer's law is primarily the business of the Law Commission. This was set up, together with the Scottish Law Commission, by the Law Commissions Act 1965. There is an interesting ambiguity in the terms of reference of the two Commissions, which are laid down by section 3(1) of the Act:

> 'It shall be the duty of each of the Commissions to take and keep under review *all the law with which they are respectively concerned* with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law, and for that purpose [to do various things].'[16]

The ambiguity lies in the words I have italicised. It might be said (1) that the law with which the Law Commission is concerned is the law of the United Kingdom except Scotland, and the law with which the Scottish Law Commission is concerned is the law of Scotland. Or it might be said (2) that the law with which the Law Commission is concerned is such of the law of the United Kingdom except Scotland as constitutes lawyer's law, and the law with which the Scottish Law Commission is concerned is such of the law of Scotland as constitutes lawyer's law.

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[14] In some cases the executive may be estopped from departing later from assurances given during the passage of the bill as to its intended legal meaning and effect. As to executive estoppel see F A R Bennion, *Bennion on Statutory Interpretation* (5th edition, 2008), section 217(7), pp. 616, 633-640.

[15] Sir William Hamilton (ed.), *The Collected Works of Dugald Stewart* (Edinburgh, 1854); cited by Ferdinand Mount in *Times Literary Supplement,* 12 Nov 2010, p. 3.

[16] Italics supplied. As to the words in square brackets see below.

I was involved in the drafting of the 1965 Act and believe the ambiguity to have been deliberate. The term 'lawyer's law' is an elephant term. Everyone knows what an elephant is, but it is very difficult to define. Similarly with lawyer's law. The Law Commission was set up to reform lawyer's law only. No one would argue that the Law Commission should enquire into the proper rate of income tax or the way the National Health Service should be financed. These are high questions of policy and no business of a law reform body. But there would be endless arguments over the right definition of lawyer's law, and this was not attempted. Instead we have this clever

Page 25

ambiguity. It creates what in *Bennion on Statute Law* I called politic uncertainty.[17]

A complication associated with the concept of lawyer's law is this. One cannot simply look at a piece of legislation and say whether or not it is lawyer's law. One may say of a collection of Acts setting up and regulating the National Health Service that this is not lawyer's law since it contains a large element of policy. However an Act to consolidate the National Health Service enactments undoubtedly is lawyer's law in so far as it is a consolidation Act. The terms of reference referred to above end by saying it shall be the duty of the Law Commission

> '. . . and for that purpose . . . to prepare from time to time at the request of the Minister comprehensive programmes of consolidation and statute law revision, and to undertake the preparation of draft Bills pursuant to any such programme approved by the Minister . . .'

All this has to do with lawyer's law, and it is clear that lay members have very little business concerning themselves with any aspect of that sort of law. Indeed in the early days of consolidation bills the desire of lay members to disregard the question of consolidation and put down amendments altering the substantial policy of the law was a threat to the very existence of this type of law reform, necessary as it is.

The debating function

Brian Hunt's question mentions the functions of devising, debating and enacting legislation. I pass to consider the second of these.

As I have said, in relation to the devising or initiating of legislation, persons with legal knowledge play a sufficient part. When it comes to debating a bill put before them, lay members play a more prominent role, though there are likely to be enough lawyer-members also available to join in the debate. Mr Hunt points out that in Ireland 'most of our legislators are not lawyers but are drawn from many other sections of society including farmers, auctioneers, teachers, economists etc'. In the UK House of Commons this is decreasingly the case, and there is much criticism of the fact that many modern MPs have little or no work experience outside the media and politics. It is of great value for legislators collectively to have wide experience of commerce, industry, the professions, the armed forces and so on. They are then able to judge the expediency and practicability of legislative proposals from their own first-hand experience. One might say that in the main such people should judge the policy of suggested legislation while legal experts judge its lawyer's law aspects. The policy aspects of the legal system should also be borne in mind where this is relevant.

Much the same may be said of Mr Hunt's third category, the question whether the measure in question should be enacted or rejected. Here party politics come to the fore, where lawyer members tend to take a secondary place.

Other questions

Brian Hunt also put two subsidiary questions to me.

The first concerned the task of scrutinising legislation. In Ireland, he said he had found that this task is largely fulfilled by members of the opposition, with Government backbenchers

[17] *Op. cit.*, pp. 248-251, *www.francisbennion.com/1990/002/248.htm*.

adding little or nothing to the process. He asked whether the silence of Government backbenchers was repeated in the House of Commons.

I replied that the situation is similar in the Westminster Parliament. There is a simple explanation. Every government wishes to get its programme through, and there is nearly always a shortage of time available for this. If Government backbenchers are on their feet they are taking up this precious time, so the Government whips regard it as their duty to discourage them. Whips have direct and indirect control over the conduct of members who take their whip, with powerful inducements available to them to secure obedience. It is for Standing Orders and the Speaker to protect the rights of backbenchers, properly called private members because they hold no public office in Parliament.[18]

Brian Hunt replied to this by saying that his research suggests that another reason why backbenchers do not participate in debates is because they have available to them a channel which no other members have, namely the freedom to raise matters directly and privately with Ministers (who are often party colleagues). He went on:

> 'Accepting this, and accepting your point that backbenchers are in fact discouraged from participating in debates because of the shortage of parliamentary time, do you think that government backbenchers should instead be encouraged to express their concerns on the floor of the House rather than in the privacy of the Minister's office? Would this not enhance the whole process of legislative scrutiny?'

I told him I warmly agreed with this. I have often complained about the habit of Ministers of promising in debate to write to the person raising a point instead of giving their answer on the floor of the House so that it can be reported in Hansard.

The other question concerned the parliamentary guillotine. In Ireland, said Brian Hunt, this is sometimes applied to bring debates on legislation to a close, resulting in bills being passed after an unusually short parliamentary life. Did I think that

Page 26

it would be appropriate if a minimum amount of time for the length of each stage of the legislative process were to be prescribed (calculated by reference to the number of sections and schedules contained in a Bill)?

I replied that such a rule would be imposed by an amendment to Standing Orders of the House. These can always be easily by-passed if the Government so wishes. For this reason they are an inadequate safeguard against abuse. I said that in England there used to be a strong feeling among MPs that the guillotine was illegitimate as infringing both the right of debate and the duty to scrutinize closely the drafting of bills. Gradually this sentiment of opposition to the guillotine lessened in strength as people got accustomed to its use. Finally to use it became a commonplace scarcely worthy of remark. I added that in my opinion the same degenerative process would be likely to happen if a rule such as is suggested were laid down.

Brian Hunt's rejoinder was:

> 'You seem to be alluding to an acceptance amongst MPs that the guillotine is now almost a normal part of parliamentary life. Do you not view the parliamentary guillotine as being damaging to the process of scrutiny to the point where it must not be allowed to become the norm? Does the use of the parliamentary guillotine not run the risk of rendering the legislative process meaningless and turning parliament into a rubber stamp whose role is to change the word "Bill" on the front page to "Act"?'

I would answer both Brian's questions in the affirmative.[19]

Conclusion

[18] For a vivid account of the tribulations of a House of Commons backbencher see Sir Alan Herbert MP, *Independent Member* (New York, Doubleday, 1951).

[19] Brian Hunt has given his consent to the references made to him in this article.

I would conclude my answer to the main question by saying that, while it is obviously necessary that in today's world non-lawyers should form the majority of legislators and play the leading role, they do need to remember that it is a privilege to be entrusted with altering the nation's statute book and that this involves a heavy responsibility and some degree of humility. They should be ready to take advice from legal experts where necessary, while of course retaining their own independence of mind and fearlessly exercising their own judgment.

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