THE CONTRIBUTION OF LEGISLATIVE DRAFTING TO THE RULE OF LAW

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ABSTRACT. Drafters of legislation occupy an important position of constitutional significance, involving the translation of political will into legal form. They help clarify and refine the instructions from politicians and create statutory schemes which are internally coherent and have external coherence with wider legal and constitutional values. They begin the process of disciplining and refining political will through application of constitutional reason, which is then continued at the stage of interpretation of statutes by the courts. Drafters of legislation thus contribute to the formal rule of law values of predictability and certainty and also to more substantive values of fairness and respect for constitutional principles and rights. The better the drafting of legislation, the smoother the integration of democracy and the rule of law and the less need there is for interstitial law-making by judges in the interpretive exercise.

KEYWORDS: Legislation, statutes, rule of law, constitution, drafting.

The “Rule of Law” is shorthand for a cluster of ideas and values at the heart of the modern democratic constitutional state. It comprises both the need for clarity and predictability in the law and respect for other more substantive values of fairness and equal treatment of cases which are alike.¹ Clarity and predictability in law are necessary to render the social world calculable in a way critical for modern economic life – especially in a capitalist society, as Max Weber emphasised.² They are also necessary for the legal-bureaucratic rationality identified by Weber as the legitimising principle of the modern state.³ At the same time, respect

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³ Weber, Economy and Society, pp. 215–16; K. Tuori, Ratio and Voluntas: The Tension Between Reason and Will in Law (Farnham 2011), 154–57, 165. For discussion of Weber’s ideas of political legitimacy,
for substantive values of fairness helps to legitimise governance through the law.4

The modern world is the Age of Statutes, as it has been called.5 The legal environment in every area is filled with legislation. Judges have to deal with it day in, day out. They become rather blasé about it, forgetting the intellectual debt they owe the drafters. They can also become rather grumpy about it, because in the nature of things they tend to find themselves dealing with the hard cases where the legislation happens not to make the outcome crystal clear. The legislator and the drafter cannot anticipate every context in which a rule formulated with one end in view falls to be applied outside that clear intended case.

But most of the time, legislation does achieve what it sets out to do. The legal world which the judges do not usually see is one of easy cases where the people subject to the legislation do understand from it what should be done. With modern legislative drafting, the law is generally stated clearly and with precision. At the same time, proper effect is given to the intention of Parliament. Thus, good legislative drafting is central to both of the principal constitutional values of our time: the rule of law and democracy. Indeed, the drafter is pivotal in bringing those two values into a proper relationship with each other in a way which respects both of them.

The legislative will can only be effectively expressed by using a lexicon and grammar supplied by the drafter, drawing on their skill and knowledge of the existing legal rules, principles and culture. Legislation will only be understood by those subject to it – and the lawyers who advise them – if a means and register of expression is employed which engages with the conceptual frameworks with which they are already familiar and in which they are culturally embedded. As Christoph Möllers puts it: “The meaning ascribed to a legal text emerges from a practice of interpretation which the text cannot itself determine. But that does not mean that the law is not capable of stabilizing such practices through process, the training of legal practitioners, or even sanctions.”6

So part of the skill of the legislative drafter is that of a translator. They take the instructions of a government department as to the policy to be achieved and convert it into legal form. The instructions are couched in the language of politicians and administrators and reflect their priorities. The drafter enables their policy to be expressed in the purer, more crystalline7 and precise language of the law. The drafter contributes to the rule of

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5 G. Calabresi, A Common Law for the Age of Statutes (Cambridge, MA 1982).

law by enabling law to be stated with precision by the legislator and in a way which can be properly understood by those to whom it is directed. They therefore mediate the relationship between Parliament and the courts. The better and more precise the drafting, the less there is for the courts to do in making sense of it and the more the norm-specifying space is truly filled by Parliament.

The legislative drafter also serves other, more substantive rule of law values. The will of the legislator is subject to the discipline of the drafter’s craft. Drafters are in the front line in converting democratic will into law which respects standards of fairness and coherence. That is before the law as stated by them arrives at the courts. Elsewhere I have emphasised the joint legal endeavour between the courts and Parliament, whereby the courts “operate in a sort of partnership with Parliament, to carry through the intention of Parliament as identified by them to the outcome of the particular case”.8 But it might be more accurate to say that in reality the partnership includes the legislative drafters as a major participant. It is they who first seek to subject the democratic will to the discipline of reason, in the form of conceptual coherence and respect for established values in the law. The courts complete that process when they come to interpret and apply legislation.9

The legislative drafter contributes to rule of law values in various subtle ways. They receive instructions regarding the policy objectives of a government department which it wishes to achieve through legislation. The drafter interrogates the instructions as necessary, to tease out the full legal effects desired to be produced and to explore the implications and limitations of what is proposed. They can alert those instructing them to the range of background assumptions and implied limitations which will be taken to qualify the meaning of the text which is to be set out in an Act, for example by reference to the range of constitutional values grouped together under the rubric of the principle of legality or as a result of application of section 3 of the Human Rights Act 1998.10 So even before the law is drafted, the politician and the administrator are educated in a way which enables them to be more precise in marrying up their policy objectives and the law to be created on their initiative.

Then, in an exercise which combines imagination and systemic rigour, the drafter devises a conceptual framework through which the policy intent is to be given effect. This is done in a way which achieves both internal

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9 See Tuori, Ratio and Voluntas.
coherence and external coherence with the existing legal environment into which the new law is to be inserted. It is in the creation of an internally coherent conceptual scheme that the drafter makes perhaps their greatest contribution to the rule of law. This is because it is law’s systematic quality which serves the core rule of law values of legal certainty, predictability, formal justice and equality, in the sense of the treatment of like cases alike.11

At the same time, aiming for external coherence of the proposed law with the background legal environment contributes to wider substantive values inherent in the rule of law concept. The drafter respects the principle of the non-retrospectivity of law and basic standards of fairness in the application of legal powers and discretions.

It has been said that the courts discipline the exercise of legislative will by filtering the interpretation and application of the law by reference to the legal principles and substantive values inherent in the wider legal culture. In the language used by Kaarlo Tuori, the voluntas of the legislator is tempered in the interpretive exercise by the ratio of the legal system and the legal culture which sustains it.12 But in practice the first part of that filtering process occurs when the legislative drafter draws up the new legislative scheme. That is the first stage of a wider process of interpretation. This begins when the drafter receives instructions regarding legislative policy in the raw form of political will, proceeds by the drafter interpreting those instructions and recasting them in the form of law for transmission to society, and ends with a final stage of interpretation by the courts when the law’s application is in issue. In fact, the work of the drafter can also be seen as a critical stage in a wider process of filtering and transformation. This moves from opinion formation in the course of public debate in civil society, identifying and thematising problems and conflicts in society at large, through to decisive will-formation by government and Parliament, involving the drafting and promulgation of laws, and on to the application of laws to citizens by the administration and, as necessary, the courts.13

The expertise and professionalism of modern drafters and their distinct role in the process of the conversion of political goals into coherent legal norms means that it is not an exaggeration to say that they occupy a position of constitutional significance. This should be recognised more widely. That process of articulation between politics and law is smoother, and the integration of the distinct values of both ends of the process more effective, as a result of the application of the drafters’ skills. It is in society’s interests to recognise their constitutional role and to invest in a cadre of drafting

11 Tuori, Ratio and Voluntas, p. 154.
12 Ibid., at p. 190 and chs. 7, 8.
specialists. Where the drafting function is performed well, the scope for tension between judges and politicians is reduced. Well-drafted legislation reduces the need for judges to exercise a supplementary, interstitial lawmaking function through trying to make sense of legislative provisions in the process of interpretation. It means that the relationship between Parliament and the courts can tack more towards a principal/agent paradigm than towards a model in which they find themselves in competition over values. This in turn enhances predictability in the interpretation and application of legislation.

For a judge to appreciate fully the contribution made by modern legislative drafting to the rule of law, it can be salutary on occasion to have to deal with statutes drafted in older and less familiar styles. This happens when a judge has to grapple with legislation drafted prior to the foundation of the Office of the Parliamentary Counsel in 1869.

That Office created a cadre of dedicated drafting specialists. It introduced an entirely new discipline and order in the drafting of legislation. It achieved this both across drafters and across time, as coherent and standard drafting techniques were developed and then promulgated within the close community of drafters in the Office. This cadre of expert drafters is a little known and perhaps under-appreciated part of the legal community. But it makes a vital contribution to the rule of law. The achievement has been real and profound.

In a case in 2012 turning on application of an Act of 1860 governing the operation of Smithfield Market, I made this comment: “The 1860 Act is a Victorian statute enacted before the creation of the Office of the Parliamentary Counsel in 1869 (the office of dedicated statutory drafters now available to the Government), which is not drafted with the precision and clarity which has come to be expected of statutory drafting since then.”

I was also a member of the Court of Appeal in a case in 2015 which concerned the interpretation of an Enclosure Act of 1801 in which we repeated this observation. As we said there, “the 1801 Act is not drafted with the degree of accuracy and consistency of language that is found in modern statutes.” Grappling with the interpretation of a statute which used language and concepts without internal consistency, let alone with any attempt to integrate them with the wider law, posed problems which judges applying

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15 Within the UK, the devolved administrations and Crown dependencies also have their own cadres of expert drafters. Secondary legislation is generally drafted by lawyers in the Government Legal Department rather than the Office of the Parliamentary Counsel, and that Department also takes steps to group drafting experts in its so-called S.I. Hub.
16 Edwards & Walkden (Norfolk) v The City of London [2012] EWHC 2527 (Ch), at [24].
statutes drafted by specialist professional drafters do not have to wrestle with. It also, obviously, posed problems for the parties in trying to work out what it meant and what their rights and obligations were. The effect of poor drafting is to transfer practical law-making power to the courts. They have to do their best to make sense of the legislation and will inevitably bring their own preconceptions to that task. With poorly drafted legislation, they will inevitably be drawn into injecting their own values into the construction of the Act.

Legislative drafting in a state which places the value we do on democratic will and the rule of law should aim for standards of internal and external coherence which are higher than those achieved in 1801 or 1860. We are fortunate as a society that the small group of expert drafters who draw up our primary legislation does just that. I can say as a judge that I am indeed grateful for the Office of the Parliamentary Counsel and the rigorous standards of drafting which they seek to apply.