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Book Review. Dale, William, Legislative Drafting: A New Approach

Reed Dickerson

Indiana University School of Law

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Legislative Drafting: A New Approach. By Sir William Dale. London: Butterworths, 1977. Pp. xix, 341.

It is hard for an American to evaluate a book that criticizes the drafting of statutes in the United Kingdom on the basis of "the continental system" as exemplified by France, Germany, and Sweden. Being unfamiliar with the latter and only generally familiar with the former, I can only comment on the author's analysis and recommendations in the light of American experience.

Legislative tradition being what it is, the title of the book gives little hint that the author is focusing on much-neglected aspects of legislative drafting, such as the allocation of drafting functions, the deployment of personnel, and the procedures that interlink them, while giving minimal attention to the materials usually found in books on "legislative drafting". Persons interested in the specifics of what a legislative draftsman should put into a statute must look elsewhere. Since almost two-thirds of the book is devoted to extended statutory quotations and much of the material in the remainder is of only marginal relevance, Sir William has little opportunity for more than sweeping generalization. However, some of his generalizations are well worth pondering. The legal profession is indebted to him for delving into an aspect of legislative drafting that is known to few and only rarely written about¹: the organizational and procedural context in which legislative drafting takes place.

Sir William's main complaint against English statutes is that they are hard to read and understand. To provide examples, he quotes extensively from copyright laws, family laws, labour laws, limitation of actions laws, and several other kinds. Unfortunately, the typical reader, like this reviewer, is unlikely to rise to the challenge of verifying their total usefulness, because Sir William has burdened him with excessively protracted examples. (I would have preferred fuller drafting principle and more persuasive recommendations.) Even so, the reader seems justified in concluding that the persons who put together statutes in the United Kingdom and elsewhere would do well to emulate some of the practices typical of France, Germany, and Sweden.

¹ E.g., Dickerson (ed.), *Professionalizing Legislative Drafting — The Federal Experience* (1973).

Sir William is at his best when tracking down deficiencies in English statutes, the most important of which seem to be the following:

- (1) a general lack of clarity;
- (2) the failure to disclose at the beginning of a statute its basic thrust;
- (3) the needless introduction of qualifications and conditions before a general rule is stated;
- (4) the inclusion of unnecessary words and other extraneous matter;
- (5) excessively long and involved sections;
- (6) too many definitions and too much reliance on them or on "interpretation" clauses;
- (7) too many provisos;
- (8) too many and too much reliance on schedules;
- (9) unnecessary repetition;
- (10) unnecessarily convoluted or otherwise bad arrangement;
- (11) too much incorporation by reference; and
- (12) too much cross-referencing.

In his opinion, the United Kingdom's trouble is largely attributable to "a system under which the drafting is entrusted to specialist technicians", which tends "to produce texts of growing legal technicality, complexity, and length".² This calls for a "change of style".³ The continental style of codification is a good way to accomplish this, because it helps to extricate statutes from "the matrix of the common law",⁴ thus making way for a more felicitous style and a more accessible arrangement.⁵ "A more profound change is also desirable: a determination to seek the principle, to express it, and to follow up with such detail, illuminating and not obscuring the principle, as the circumstances require."⁶

If Sir William's evaluation of English statutes is correct (and from the evidence he has assembled I have no cause to deny it), much of what he says makes good sense. At least, it fits with what Professor Mellinkoff and others have concluded about legal gobble-dygook: that most of it is an unnecessary hangover from times (1)

² P. 333.

³ *Ibid.*

⁴ P. 335.

⁵ It is not clear whether Sir William advocates not only immediate adoption of the codification style but also ultimate adoption of a general codification program: see, e. g., p. 335.

⁶ *Ibid.*

when Old English or Middle English was being enriched to meet legal needs by words or phrases from Norman French, Old Norse, Celtic, or Latin, many of which persist today only in the language of the law while having usable plain-English counterparts,⁷ (2) when draftsmen pitted their wits against unfriendly, precedent-oriented judges who viewed statutes as unseemly encroachments on the common law,⁸ or (3) when the language of litigated instruments was thought to be judicially sanctified. Certainly, the emancipation of statutes from these still lingering judicial prejudices should be aggressively sought. Another cause of legislative obscurity may be serious inbreeding in an office that, having a monopoly on legislative drafting, has failed to maintain a sensitive editorial point of view.

Sir William also points out that there is more to clarity than a readable style; there is sound arrangement. It is in this respect that English statutes seem the most deficient. First, it is hard to find and understand core statements of what English statutes are requiring. Such statements, of course, belong at or near the beginning. They should also be sufficiently self-contained that the reasonably knowledgeable reader can get their gist without turning to another statute or even to another part of the same statute. Nevertheless, English statutes, being the product of highly skilled lawyers, have a high level of logical coherence.

Sir William's laudable skill at uncovering "the mischief" is not fully matched by his skill in tracing efficient causes. Of course, he is on solid ground in attributing much of bad legal style to the common law matrix within which English statutes still exist, and to a devotion to its conceptual structure and traditional terminology. These matters, he thinks, can be cured by switching to codification, or at least to its style.

Sir William finds the English lawmaking process defective in that "there is no examination or revision by a central body of experts, and there is no scrutiny by working committees of Parliament";⁹ that is, the process lacks the "revising stage" provided in France, Germany, and Sweden. He prefers the continental system, in which the initial drafting is done by persons who are fully knowledgeable in substantive policy without necessarily having the

⁷ Mellinkoff, *The Language of the Law* (1963), chs. 2 and 3.

⁸ Conard, *New Ways to Write Laws* (1947) 56 Yale L.J. 458. See also Dickerson, *The Fundamentals of Legal Drafting* (1965), 32.

⁹ P. 335.

expertise peculiar to legislative drafting. This tends to avoid "legalese" and produce clarity. How the latter is achieved he does not explain. Presumably, the general run of lawyer or policy expert in those continental countries is highly literate and, if untainted by legislative drafting expertise, tends to write clearly. The approach has certainly not worked in the United States, where writing inadequacies lurk even in high places and where the traditional approach of lawyers (and laymen trying to write as lawyers) is to emulate the most turgid products of the past.

Sir William accordingly recommends a three-phase system: (1) initial drafting by persons other than drafting specialists; (2) revision by an Advisory Law Council, independent of government, consisting of judges, practitioners, a professor of law, professors of literature, members of consumer councils, representatives of local bodies or authorities, and a *rapporteur*, in consultation with ministers and civil servants, followed by revision by parliamentary committees; and (3) debate and passage by Parliament.

At this point, I lose touch. The critical step for Sir William is the second (revisionary) phase, during which the ideal of clear drafting, launched during the first phase, would be consummated. Somehow during this second phase, the special legislative drafting skills needed for adequate legislation but withheld during the first phase would be supplied. How? "The Law Council should possess sufficient expertise, and authority, and be sufficiently catholic in its composition, to command attention, respect and confidence."¹⁰

Here, Sir William begs the question by taking for granted the existence, ready availability, and particular contributions of persons whose technical expertise is needed for adequate legislation. What is this expertise, who has it, and when and how is it to be introduced? General clarity is introduced in the first phase by persons freed of the common law tradition. But is this all? Beyond it, I find only a vacuum.

On the one hand, Sir William concedes that legislative "experts of ... high but specialised skills [that is, trained draftsmen]" can produce "a general consistency of method and style",¹¹ and that they have "*unique command of the needed skills*".¹² In other words, these legislative experts, who are to be omitted during the first phase, can do something that is needed for adequate legislation, and

¹⁰ P. 336.

¹¹ P. 337.

¹² P. 338 [emphasis added].

only they can do it. I fail to see how a Law Council constituted as Sir William would constitute it would or could provide the necessary ingredient. Of course, it is possible that I have underestimated the rank and file of English judges, practitioners, professors, and representatives. In the United States, such groups have amply exhibited their drafting inadequacies.

On the other hand, Sir William says that maybe the English do not need specialized draftsmen after all. They can return the responsibility for legislative drafting to the ministries "so long as there is a Law Council to maintain consistency and the required standards".¹³ What specific standards are these?

But if drafting "experts of this kind, of high but specialised skills, scientists in their field, tend like most scientists to develop an esoteric language and method, understood by the initiated, but obscure to the many",¹⁴ what assurance is there that drafting in the ministries will not fall into the hands of non-legislative scientific specialists who will inject their own brands of technical jargon? What Sir William calls a "new" approach has been common practice in Washington for many years and, in its American environment, it has been a dismal failure. Perhaps he should rest his case on his initial explanation, because the obfuscation process is more closely linked to unwholesome aspects of the common law matrix (or possible administrative inbreeding) than to dangers inherent in specialization.

I remain skeptical of the efficacy of the proposed Law Council for achieving the desired clarity. Although important legislation in Washington is normally reviewed in a series of rigorous examinations made from many points of view, these examinations remain almost wholly substantive. Indeed, there is nothing in the present Congressional system to guarantee that an important piece of legislation is drafted, reviewed, or even seen by a person with drafting expertise.

For me, Sir William's complaints come down to this: despite his professed admiration for its personnel and contributions to logical coherence, he does not like the way the Parliamentary Counsel's office has been drafting statutes. Even assuming that his dissatisfaction is well founded, I see nothing relating to clarity in the English system (which has much to commend it) that could not be as fully cured by reforming the office's editorial attitude with

¹³ *Ibid.*

¹⁴ Pp. 337-38.

particular regard to arrangement, cross-referencing, referential amendment, and some matters of style, without undertaking a comprehensive codification program or transferring basic lawmaking functions to other agencies.

In the modern world, legislative drafting specialists are indispensable. Indeed, I surmise that a more thorough investigation would show that even the "continentals", in addition to being untainted by the common law, either have attained a higher degree of literacy or have somehow tucked away in the various ministries specialists in the drafting of legal instruments who have not been officially recognized as such. On the other hand, Sweden's statutes, in their perpetuation of the false imperative, undesignated paragraphing, inconsistencies of expression, and unnecessary words, suggest that there is room for an even higher level of professionalism. In any event, continental statutes such as these should be evaluated also on the basis of other considerations than readability.

For one with an American background, it is hard to believe that any significant number of effective reviewers could be judges. Again, I may be underestimating the quality of legal talent on the continent or in the United Kingdom. Even so, it would be risky to import an apparently successful foreign program without ascertaining whether the quality of personnel needed for success can be assumed to exist in the new environment. It certainly does not exist in the United States.

The legal professions of both countries would benefit greatly from a heavy dose of formal instruction in legal drafting. The gap is not filled by Sir William's bland assumption that all it takes to make a good draftsman is the general ability to write clearly and knowledge of "the facts and the law on the subject".¹⁵ That such a person "can pick up legislative drafting without difficulty"¹⁶ is contradicted at least by American experience, which supports a minimum training period of several years. What Sir William seems to overlook is that many legislative drafting problems transcend style and readability and even knowledge of the substantive law and the facts.

It is also possible that sending bills to parliamentary committees before (instead of after) initial consideration by the House of Commons would make possible fuller review before the bills legislatively congeal.

¹⁵ P. 339.

¹⁶ *Ibid.*

Sir William is careful not to identify the "continental system" with the avoidance of legislative detail, inasmuch as detail is common in at least the German brand of code. Accordingly, he does not recommend that the English necessarily eschew it. On the other hand, some critics of English legislation have viewed this as a feasible alternative, lured by the undeniable fact that a complicated statute is harder to read than a less complicated one. When testifying before the Renton Committee, I was asked if I favored the "continental" system of sticking to generalities. I said that the matter is normally beyond the control of the draftsman and that, in the United States at least, the outcome is determined in each case, not by broad political theory, but by how far the legislature is willing in the particular circumstances to trust the judgment and good faith of the administrator or the courts. Unfortunately, in the United States this trust is highly tentative. Even acts that begin their lives as broad mandates tend to become deeply scarred or heavily cluttered with detailed amendments. The main road to clearer statutes probably lies elsewhere.

Sir William's comments on statutory interpretation seem to overstate the legislative draftsman's appropriate concern with that area, much of which deals with the pathology of badly drafted statutes and is therefore irrelevant to drafting principles whose application obviates the need for curative interpretation. Also, I doubt that a "change in the style of statutory drafting is likely to require an overhaul of accepted rules of interpretation",¹⁷ even assuming that "style" includes the avoidance of detail. His assertion seems valid only so far as "statutory interpretation" is stretched beyond the courts' cognitive function to include delegated legislation by them. But supplementation is hardly explication; even though avoidance of legislative detail normally entails judicial (or administrative) supplementation, Sir William's statement remains misleading. So far as interpretative principles relate to cognition, the draftsman's interest is confined largely to areas in which the courts have been unfriendly under the doctrine of "strict construction".¹⁸

His analysis also suggests that the only effective escape from English judges' alleged literalism in the interpretation of statutes is to adopt, in each case, "a construction which would promote the

¹⁷ P. 292.

¹⁸ See Dickerson, *The Interpretation and Application of Statutes* (1975), 8 and 205-12.

general legislative purpose' ",¹⁹ coupled with compliance with Lord Scarman's recent plea that the "judge must be given a much wider discretion than he has now in the choice of evidence from which to infer the intention of Parliament",²⁰ which in Sir William's view includes resort to "Parliamentary material". Such a choice overlooks a third alternative: taking account of the tempering that language normally receives at the hands of external context.²¹ Ironically, resort to parliamentary material, which hardly qualifies as context,²² tends to undermine the draftman's incentive to better drafting. Why strain for perfection in a legal instrument that the court will subordinate to the largely uncontrolled material of legislative history?

Despite these reservations, Sir William has performed a valuable service in drawing attention to the fact that we need to know not only what a good statute should look like but what organizational devices and procedures are best fitted for producing it. May his book inspire further investigations in this neglected area.

Reed Dickerson*

¹⁹ P. 339. Dale is apparently quoting from the U.K. Law Commission, *The Interpretation of Statutes* (1969), but he gives no page reference.

²⁰ P. 340.

²¹ *Supra*, note 18, ch. 9.

²² *Ibid.*, 138-62.

* Professor of Law, Indiana University (Bloomington).