How to Do Things with Legislation, or, 'Everything depends on the context'[1]

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This text is an update to chapters 7 and 8. It picks up the principal themes that are pursued in those chapters and brings their detail up to the date of the Queen's Speech on 4 June 2014.

The Political Context: legislation is a political activity[3]

'Legislation affects us all';[4] and the ways in which the content, organisation and the political, social or economic significance of any public general Act are selected and promoted have, with two significant exceptions – the formation of a Coalition Government following the General Election in May 2010, and the enactment of the Fixed-term Parliaments Act 2011 – hardly changed in the four years since the last edition of *Rules* was published in 2010. Since then, and at the time of writing (June 2014), 146 public general Acts had been passed all marked by the same diversity in origin, subject-matter and intended effects.[5] Apart from the annual financial essentials, legislation was enacted during this time to give effect to international treaties (Antarctic Acts 2010 and 2013) and conventions (Cluster Munitions (Prohibition) Act 2010, Wreck Removal Convention Act 2011, Deep Sea Mining Act 2014), United Nations' resolutions

[1] Lord Steyn, *Effort Shipping v. Linden Management* [1998] 1 All ER 495, 508.

[2] I am grateful to Sir Stephen Laws for his comments on an earlier version; remaining errors or omissions are mine.

[3] 'Legislation – as a process rather than as the product from that process – is essentially a political activity', Sir S. Laws, 'Legislation and Politics', in D. Feldman (ed.), *Law in Politics and Politics in Law* (2013; hereafter, *Feldman*), p. 87.

[4] Office of the Parliamentary Counsel and the Cabinet Office, *When Laws Become Too Complex: A review into the causes of complex legislation* (March 2013) p. 1. This succinct observation both echoes and demonstrates the pervasiveness of the theme captured in the extract from the Renton Report (*The Preparation of Legislation*, 1975, Cm. 6053, quoted at *Rules*, p. 196).

[5] 'Public policy implemented by legislation seems to involve three different sorts of practical change'; while they may overlap, 'these are regulatory change (affecting the behaviour of natural and legal persons), resource allocation and fiscal change (altering the way in which the public sector collects or spends public money), and constitutional and organisational change (amending the governance and accountability of public sector bodies)'. See Sir S. Laws, 'Giving Effect to Policy in Legislation: How to Avoid Missing the Point', *Statute Law Review*, 32(1) (2011), 1–16. There are examples of all three in the Acts reviewed in the text.

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(Debt Relief (Developing Countries) Act 2010), and the United Kingdom's European Union obligations (European Union (Croatian Accession and Irish Protocol) Act 2013). Concerning these obligations, the Coalition Government agreed in 2011 that Ministers would be required to seek Parliament's approval before the United Kingdom agreed to changes to Treaties and Decisions relating to the European Union (EU); since its commencement the European Union Act 2011 has been applied three times, in 2012, 2013 and 2014. Some Acts have sought to restate in one document the extensive range of primary and secondary legislation governing a particular subject (Equality Act 2010), some to give effect to recommendations of the Law Commission (Bribery Act 2010, Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011, Consumer Insurance (Disclosure and Representations) Act 2012, Inheritance and Trustees' Powers Act 2014), while others have sought to rectify earlier omissions (Video Recordings Act 2010), or errors and unforeseen judicial interpretation revealed by litigation or public enquiries (Equitable Life (Payments) Act 2010, Police (Detention and Bail) Act 2011) or by reference to the European Court of Human Rights (Terrorism Prevention and Investigation Measures Act 2011), or simply to repeal earlier legislation (Identity Documents Act 2010). Some Acts are very short (Personal Care at Home Act 2010), some formidably long (Health and Social Care Act 2012) and some highly controversial (Marriage (Same Sex) Act 2013). Private Members' Bills, which succeed only where they enjoy government support, continue to average a small proportion (11%) of non-financial legislation (Live Music Act 2012, Mental Health (Discrimination) Act 2013, Mobile Homes Act 2013, Citizenship (Armed Forces) Act 2014), though with nine successful Bills, 2013 was unusual; some, in essence government hand-outs, having significant social, economic or regulatory effect (Disabled Persons' Parking Badges, Prevention of Social Housing Fraud, Scrap Metal Dealers).[6]

The vast majority remain products of government policy, some of which, such as the setting of targets for the eradication of child poverty (Child Poverty Act 2010),[7] were enacted by New Labour, or, following the 2010 General

[6] This appropriation of the time that Standing Orders provide for non-Government business continues to be a matter of criticism, also calling in question whether they can properly be called 'private Members' Bills'; House of Commons, Procedure Committee, *Private Members' Bills* (2013–14, HC 188–1).

[7] Ministers and other public authorities have long been subject to statutory operational, procedural, consultative and purposive duties, enforceable *via* judicial review. This Act (and the Climate Change Act 2008) imposes a radically new (and politically potentially troublesome) duty to achieve a specific outcome, whose distinctive character raises novel questions about its enforcement; see C. Reid, 'A New Sort of Duty? The Significance of "Outcome" Duties in the Climate Change and Child Poverty Acts', *Public Law* (2012), 749–767. Governments may set policy targets in legislation as a way of being seen to be 'doing something' about a difficult but politically charged issue. 'Legislation is perceived as a sign of action and therefore as a powerful communication tool'; 'policy-making and legislation happen in a political context, and are influenced by events and unforeseen circumstances … one result is that legislation may be introduced for demonstrative or declaratory purposes, perhaps with the aim of signalling

Election, and unlike any previous British peacetime parliamentary experience, by the Coalition Government.[8] Much of its legislation comprised elements of its 'Programme for Government' (Local Government Act 2010, High Speed Rail (Preparation) Act 2013), but in form and content its legislation was very much in the mould. In many cases the Act was principally concerned with a single or connected policies and their implementation; for example on such matters as education (Education Act 2011), reform of the energy market and the promotion of 'green' energy (Energy Acts 2011 and 2013), of pensions (Pensions Act 2011, Public Service Pensions Act 2013, Pensions Act 2014), and of welfare benefits (Welfare Reform Act 2012, Jobseekers (Back to Work Schemes) Act 2013),[9] and 'although legislation cannot of itself generate economic activity',[10] responding to the 2008 financial crisis and its economic impact on the country (Budget Responsibility and National Audit Act 2011, Financial Services Act 2012, Infrastructure (Financial Assistance) Act 2012, Enterprise and Regulatory Reform Act 2013, Growth and Infrastructure Act 2013). This broad mix of policies is likewise seen in the Queen's Speech at the opening of the final year of the Coalition Government's five year Parliament: further reform of private pensions, business and infrastructure projects (fracking), and, as a further legacy of the expenses scandal, a Bill giving voters the right to recall their MP.

Long regarded as an obstacle to clarity in the organisation of the statute book, a number of Acts grouped together a wide range of matters connected only by virtue of being to do with a broad conception of departmental policy.[11] This is particularly seen in the case of the Home Office,[12] which, though constrained by the Coalition Government, has remained a dominant legislative force: the Anti-Social, Crime and Policing Act 2014 deals with fourteen separate policy matters,[13] the Crime and Security Act 2010 with eleven, the Immigration Act 2014

Parliament's attachment to certain ideals or principles, rather than of achieving specific legal effects'; *When Laws Become Too Complex,* pp. 8 and 26, and *Rules*, pp. 74 and 109.

[8] With the exception of the 'Lib-Lab' pact of the 1970s, Parliaments have since the Second World War comprised single party government with an opposition coalition of parties; in May 2010 this became a coalition of parties in government and a single party opposition.

[9] Although the deficit was subsequently corrected the Supreme Court held that the initial regulations made under the Act had failed to provide a prescribed description of any scheme and so was *ultra vires*. In *R (Reilly and another) v. Secretary of State for Work and Pensions* [2013] UKSC 68 [48] the Court approved Sir Stanley Burnton's observation in the Court of Appeal, 'Where Parliament in a statute has required that something be prescribed in delegated legislation, it envisages, and I think requires, that the delegated legislation adds something to what is contained in the primary legislation. There is otherwise no point in the requirement that the matter in question be prescribed in delegated legislation'.

[10] Lord Marland, Minister of State, HL Debates, vol. 740, col. 1517 (14 November 2012).

[11] Colloquially and critically described as 'Christmas tree bills'; House of Commons, Political and Constitutional Reform Committee, *Ensuring Standards in the Quality of Legislation* (2013–14, HC 85), paras. 11–15.

[12] 'Between 1883 and 2009 Parliament approved over 100 criminal justice Bills, and over 4,000 new criminal offences were created'; *When Laws Become Too Complex,* p. 6.

[13] In addition to providing for civil injunctions to apply to anti-social behaviour, the Act includes amendments to the Extradition Act 2003, creates a new offence of forced marriage, abolishes the defence of marital coercion, tightens the law governing the control of dangerous dogs, amends

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with seven and the Police Reform and Social Responsibility Act 2011 with six. Legislation in cognate areas, now the responsibility of the Ministry of Justice, has been equally prolific: the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the Protection of Freedoms Act 2012 dealing with twelve separate policy areas each; while the Crime and Courts Act 2013 (six policy areas), introduced changes in judicial proceedings, which, in the case of the Justice and Security Act 2013 (four) touched upon aspects of the rule of law and the separation of powers.

Changes to other features of the United Kingdom's unwritten constitution are seen in the Constitutional Reform and Governance Act 2010, which implemented in the 'wash-up' prior to the 2010 General Election a further seven of the agenda items of constitutional reform set by the previous government in 2007,[14] notably the establishment of the Civil Service Commission. This agenda also included the Fixed-term Parliaments Act 2011, which ended the Government's power to call a general election at a time of its own choosing, and unless repealed, fixes the dates of all future general elections,[15] and the Parliamentary Voting System and Constituencies Act 2011, which authorised the holding of a referendum on the use of the alternative vote system for parliamentary elections. In common with the earlier reforms on devolution,[16] human rights, and freedom of information, these further elements in a decade of constitutional change attracted no formally distinct parliamentary procedure,[17] a deficit of which the House of Lords Constitution Committee was highly critical. 'We believe that constitutional legislation is qualitatively different from other

the test for determining when compensation is payable for a miscarriage of justice, and creates a range of new powers designed to protect a local community.

[14] *The Governance of Britain* (2007, Cm. 7170). 'Wash-up' is the colloquial description of the hurried efforts to enact all Bills that have otherwise almost completed their parliamentary stages before Parliament is prorogued. This process may well result in the loss of controversial clauses.

[15] The Act's immediate effect was to protect the untried and potentially fragile Coalition Government from the destabilising uncertainty surrounding the timing of the next General Election. For an analysis of the Act, see M. Ryan, 'The Fixed-term Parliaments Act 2011', *Public Law* (2012), 213–221, and House of Commons, Political and Constitutional Reform Committee, *The Role and Powers of the Prime Minister: The impact of the Fixed term Parliaments Act 2011 on Government* (2013–14, HC 440). Elections to the devolved bodies were from the outset subject to fixed dates.

[16] *AXA General Insurance Ltd v. Lord Advocate* [2011] UKSC 46 noted in the last edition (*Rules*, p. 194), is a decision 'of the highest constitutional importance', relevant not only to the Scottish Parliament, 'but also the other devolved legislatures in Northern Ireland and Wales', C. Himsworth, 'The Supreme Court reviews the Review of Acts of the Scottish Parliament', *Public Law* (2012), 205–213; and see also J. McEldowney, 'The Impact of Devolution on the UK Parliament', in A. Horne, G. Drewry and D. Oliver, *Parliament and the Law* (2013; hereafter, *Horne et al.*), pp. 196–219. Parliament does not normally legislate within a devolved area without the consent of the devolved administration; *Guide to Making Legislation* (2013), section 14.

[17] Nor, although it has been suggested that when interpreting devolution statutes the courts could usefully look at parallels in federal constitutions, do they currently attract distinct interpretive procedures; Rt Hon Lady Justice Arden, 'What is the safeguard for Welsh Devolution?' *Public Law* (2013) 189–207. But as Lord Bingham observed, the interpretation of constitutional rules and conventions imports greater evaluation of the impact of the court's decision than is normal in domestic law; *The Rule of Law* (2010), p. 167.

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forms of legislation and that the process leading to its introduction should recognise this difference.' It recommended that 'a clear and consistent process should apply to all significant constitutional change', requiring the promoting Minister to make a statement on the Bill's introduction in each House on such matters as its impact, extent of public consultation, Cabinet scrutiny, and arrangements for pre- and post-legislation scrutiny.[18] In its response the Coalition Government acknowledged that clarity in the presentation of the Bill's effects is of central concern, but 'in this respect, constitutional change is no different from any other public policy. All policy development, whether or not leading to legislation, should go through a process of rigorous analysis.'[19] No special treatment was called for. Moreover, as the Committee itself recognised, there is no watertight definition of what is constitutional.[20] There is here a theme that will repeat: there is little, if any, incentive for the executive to agree to reforms in the preparation or the scrutiny of legislation that may delay or otherwise constitute an obstacle to the application of the iron law of government, that it should always 'get its business'.

The Preparatory Context: precision and clarity in legislation

Along with the 'better legislation' agenda,[21] the good law initiative stands in the tradition of calls by parliamentary committees, academic writers and pressure groups to improve the clarity of legislation that commenced with the influential *Renton* Report, but it is unique in being publicly led by the OPC. Its analysis of the causes of complex legislation centre on three key dimensions: 'the volume of the statute book, the quality of legislation, and the perception of disproportionate complexity.'[22] I consider these three dimensions, as we did in *Rules*, in reverse order.

[18] House of Lords, Constitution Committee, *The Process of Constitutional Change* (2010–12, HL 177), paras. 115 and 126.

[19] *The Government response to the House of Lords Constitution Committee report The process of constitutional change'* (2011, Cm. 8181). It was equally clear that the Government did not wish to tie its hands on such matters as Cabinet discussions.

[20] This is undoubtedly the case, but there are serious parliamentary concerns with both the pace and the future of constitutional change in the United Kingdom, the second concern being particularly accentuated by the 2014 referendum on Scotland's independence. See House of Lords, Constitution Committee, *The Government's Constitutional Reform Programme* (2010–11, HL 43) and *The Process of Constitutional Change* (2010–12, HL 177); House of Commons Political and Constitutional Reform Committee, *Do we need a constitutional convention for the UK?* (2012–13, HC 371). Although the existential threat to the United Kingdom implicit in the Scottish referendum question has been averted, the constitutional consequences of the 'No' vote on 18 September 2014, embracing further devolution and an attempt to resolve the West Lothian question, are profound.

[21] *Rules*, pp. 206–208. This agenda was a particular objective of the House of Commons Modernisation Committee, established in 1997 but discontinued after the 2010 General Election. Its activities now fall within the wide terms of reference of the Political and Constitutional Reform Committee, discussed below.

[22] *When Laws Become Too Complex*, p. 6. 'Legislation which is unduly complex, or poorly aimed or formulated, and in consequence produces results which people regard as unfair or silly weakens the authority of both government and Parliament'; D. Feldman, 'Beginning at the Beginning: The Relationships between Politics and Law', in *Feldman*, p. 11.

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The perception of disproportionate complexity in legislation: who, what and why

One of the major developments in our understanding of the factors that bear on achieving precision and clarity in legislation has been the increasing transparency surrounding the conditions under which it is prepared. This is in part due to public accounts by current and former First Parliamentary Counsel, but substantially to the Government's publication of the procedures to be followed from a department's wish to translate policy into law, through the drafting process to the management of the Bill through Parliament.[23]

While the OPC's clients are the instructing government departments, the drafter's audience is much wider than that client relationship implies. 'What the target audience is is something that we wrestle with quite a lot. The reality is there are a number of different target audiences': parliamentarians, who want to see what the Bill does, the judiciary, who need to review it and determine whether it achieves in law what is claimed for it, members of the general public, and people who are working for local authorities or other bodies, who want to be able to look at a piece of legislation and understand it immediately for their particular purpose. Reinforcing our own analysis,[24] this abbreviated extract from evidence given by Second Parliamentary Counsel to the House of Commons Political and Constitutional Reform Committee captures the breadth of the legislation's audience and of their expectations.[25] The difficulty for the drafter is that the same document – the Bill or Act – has to be used both for political (achieving a given policy goal) and legal (achieving precision and clarity in the policy's legal expression) purposes. As between these various audiences the drafter's first responsibility is to the client department. This means ensuring that those whose behaviour is to be affected by the Act will, by means of sanction or remedy, behave as the policy desired. In an echo of Stephen J.'s encomium, while clarity in the drafting of laws is important, so that those who wish to comply with or rely on the legislation will be able to understand what is provided for, 'from a legal point of view, law is written with those who might break it in mind.'[26]

The finished Act of Parliament thus has many audiences: 'It gives effect to policy, translating abstract principles and very specific provisions into legal remedies, while mediating between the (often) conflicting objectives, views and expectations of legislators and users.'[27] Its life commences as a departmental policy whose implementation requires (possibly among other instruments such

[23] The Office of the Parliamentary Counsel, *Working with Parliamentary Counsel* (2011), and Cabinet Office, *Guide to Making Legislation* (2013).

[24] *Rules*, p. 208.

[25] House of Commons, Political and Constitutional Reform Committee, *Ensuring Standards in the Quality of Legislation* (2013–14, HC 85), Evidence, EV 13, Q.36 (14 June 2012).

[26] Laws, in *Feldman*, pp. 92–94. Stephen J. is quoted in *Rules*, p. 142.

[27] *When Laws Become Too Complex*, p. 2; and see the Table on p. 21.

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as fiscal or administrative action) a change in the law that can only be achieved through primary legislation. In its turn, that requires a slot in the government's legislative programme, an annual bidding round conducted by the Leader of the House of Commons and the Cabinet's Parliamentary Business and Legislation (PBL) Committee.[28] Success in the competition for places triggers the setting up of the departmental Bill team and the preparation of instructions for Parliamentary Counsel.[29] Assuming that the department has secured collective, that is, Cabinet, agreement on the policy and properly understands the substance and foreseeable implications of its policy, these instructions' extent, complexity and impact on existing legislative or common law rules will vary from Bill to Bill. But the preparation of any Bill requires attention to its compatibility with the ECHR and with any EU legislation, to its impact on the devolved administrations, and to the conferral of any delegated powers likely to attract parliamentary scrutiny.[30] For these purposes the Bill team must prepare memoranda for the PBL Committee, as well as Explanatory Notes and an Impact Assessment, both of which will become public documents,[31] and all of which can be very useful aids to interpretation, for both judicial and non-judicial interpreters.

The instructing department is expected to produce a clear and detailed statement of what the Bill is to do in policy terms. These are the 'policy instructions' which its legal advisers will scrutinise and turn into drafting instructions for Parliamentary Counsel. For large Bills, this process may involve a number of officials in different policy areas, and possibly spread across more than one department. Drafting instructions' main purpose is to say what is wanted: they 'should consist of one, single document containing a clear articulation of everything the department want the Bill to do, and of why they want the Bill to do it.'[32] OPC's guide, *Working with Parliamentary Counsel*, suggests that these instructions' best structure emulates 'the elements of the so-called mischief rule of statutory interpretation', at whose core is the following analysis: 'This is something we want to happen; This is why it cannot happen without legislation; This is how we think the law needs to be changed in order for it to happen.' For this last purpose the instructions should identify the basic legal

[28] *Guide to Making Legislation* (2013), ch. 5.

[29] Departments may on occasion undertake preparatory work on a Bill before Cabinet agreement is secured, such as spending public money or reorganising administrative functions. This is not objectionable, but any expenditure in advance of legislative authority towards the implementation of a legislative proposal must comply with HM Treasury, *Managing Public Money*. House of Lords, Select Committee on the Constitution, *The Pre-emption of Parliament* (2012–13, HL 165).

[30] See generally House of Lords, Delegated Powers and Regulatory Reform Committee, *Special Report: Quality of Delegated Powers Memoranda* (2014–15, HL 39), and text below. This scrutiny includes the Joint Committee on Human Rights' assessment of the Bill's impact on human rights as they are secured both by the ECHR and other provisions of international law; M. Hunt, 'The Joint Committee on Human Rights' in *Horne et al.*, pp. 223–249, 227–236.

[31] *Guide to Making Legislation* (2013), chs. 10, 11, 13 and 15.

[32] *Working with Parliamentary Counsel* (2011), para. 138.

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concepts that are to be engaged, the existing state of the law, and mention any relevant judicial decisions; but it remains important for the team preparing the instructions to ask themselves: is legislation the only way this can happen?[33]

A former First Parliamentary Counsel recently identified four particular risks that attend the process of reducing policy to legislation – of the narrowing down of high-level policy goals to precise, clear, and enforceable rules of law. Of these – that the legislation is typically only one element in the implementation of the policy, that the best place from which to commence the legislative solution is not necessarily the one from which the department started or that looked most attractive to it, or that what appears to be a useful legislative precedent may turn out to be a dead end – the fourth is perhaps the most challenging. 'The problem of hitting a moving target from a moving platform' describes the process by which the drafter, in giving effect to policy, has to take account of how those whose behaviour is to be changed will respond, and possibly then adjust what the legislation will prescribe in order to correct their response to the desired course. But this adjustment must itself be calibrated to the underlying policy with the result that the legislative solution now differs from the drafter's starting point, or becomes more complex. And because primary legislation 'is usually prepared on the basis that it will continue in place until it has been repealed, rather than expire when its purpose has been fulfilled', the drafter has to anticipate 'not only the immediate consequences of a change but also its longer term effect.'[34]

It is in part for these reasons that very few Bills remain unamended (by the government) as they proceed through Parliament; amendments may be needed as unforeseen implications emerge in debate or as a result of further policy consideration. In addition, the government may table amendments on a different matter (though within the Bill's scope) as a convenient opportunity to enact a more recent policy decision. All of this can add to a Bill's complexity, on the causes of which the good law initiative has provided a detailed and highly informative analysis. In an echo of a point we made in the last edition, the OPC's analysis commences with the observation that 'often, when complaining about poor legislation, commentators are really criticising the political and ideological considerations that lie behind the Bill.'[35] Nevertheless, 'every year legislation and amendments result in over 15,000 (over 30,000 when considering secondary legislation) legislative effects';[36] and, while clearly no one group of users will be affected by all of them, their cumulative impact on even one subject area within the statute book can be formidable even for the experienced user.

[33] *Working with Parliamentary Counsel* (2011), paras. 165–166.
[34] Laws, Giving Effect to Policy in Legislation: How to Avoid Missing the Point', pp. 7–8.
[35] *When Laws Become Too Complex*, p. 6; *Rules*, pp. 213–214.
[36] *When Laws Become Too Complex*, pp. 14–16.

How does complexity, or, as the OPC characterises the question, the perception of complexity, arise? In part, as the current First Parliamentary Counsel put it, it is because 'the legislation that we produce covers an enormous area, and the area occupied by the statute book gets bigger and bigger year after year. That is for all sorts of reasons—partly European law, human rights law, the desire for society to solve mischief and to get things regulated and to remove sources of injustice and so on. So the body of statute law grows year after year.'[37] As this suggests, there is no single cause. Complexity depends in part upon the user's standpoint, in particular their experience with those areas of statute law with which, for reasons of their profession, appointment or employment, they have familiarity. As already noted, 'the likely audience for a specific law depends on the context.'[38] In mapping the causes of unnecessary complexity the good law initiative focuses on the development of departmental policy and its conversion to drafting instructions, what it describes as 'upstream causes of unnecessary complexity',[39] and on the impact of the parliamentary stages on a Bill's content and integrity, with which we deal later.

The quality of legislation

Given the broadly accepted diagnosis that legislation can be disproportionately complex, the good law initiative, pursued at the preparatory and, later, the parliamentary stages of a Bill, prescribes remedies that contemplate, first, standards designed to satisfy fundamental constitutional norms that apply to any law making in a liberal democracy, and, secondly, more specific drafting standards designed to promote clarity alongside precision in the legislative text. As to the first, considerable attention has of late been given to the development of a code of constitutional standards to be applied to the preparation of legislation. Based on the criteria used by the House of Lords Constitution Committee in its examination of the constitutional significance of any government Bill,[40] these standards prescribe how clauses dealing, for example, with

[37] *Ensuring Standards in the Quality of Legislation,* Evidence, EV 13, Q.34 (14 June 2012).

[38] *When Laws Become Too Complex*, p. 19. 'We need to understand better the expectations of the new users of legislation. This group includes a variety of people who access legislation for professional or personal reasons and who may not be familiar with the architecture of the statute book, may not know how to find and access legislation and guidance about legislative changes. [T]hose new users could be, for example, human resources staff from a mid-size company who need to understand what impact the Pensions Act 2011 can have on the company; policy advisors from a local authority, keen to keep up to date with environmental regulation; landlords who are in dispute with their tenants and may want to represent themselves in court; Law Centre volunteers who want to understand better the Welfare Reform Act 2012.'

[39] *When Laws Become Too Complex*, pp. 24–28.

[40] 'The criteria that we shall normally apply to determine significance will be the two p's test: principal and principle. That is, the issue must be one that is a principal part of the constitutional framework and one that raises an important question of principle.' House of Lords, Constitution Committee, *Reviewing the Constitution: Terms of Reference and Methods of Working* (2001–02, HL 11), para. 52.

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retrospective legislation, delegated powers, access to justice and the timing of pre-legislative scrutiny, should be formulated.[41] To the extent that a number of these standards reflect particular expectations about the effects of legislation that are implicit in such basic constitutional principles as the rule of law or the separation of powers, they also reflect Lon Fuller's jurisprudential analysis of what gives law its 'law-ness': its internal morality.[42] And in a considered review, a former First Parliamentary Counsel concluded that Fuller's eight routes to failure in law making, which include such deficits as an unclear or obscure text, unjustifiable retroactivity, contradiction or constant change, provide 'a useful pragmatic guide to drafters on how to avoid legislation that cuts across the grain of the law'.[43]

More recently the House of Commons Political and Constitutional Reform Committee proposed a somewhat different approach to the matter of improving the quality of legislation, but which nevertheless resonates at some points with both the Constitution Committee's analysis and that which proceeds from Fuller's critique. It proposed that a Code of Legislative Standards for good quality legislation be agreed between Parliament and the Government, and that a Joint Legislative Standards Committee of Parliament be established to ensure that Bills comply with agreed technical and procedural criteria. The Code's purpose would be 'to set standards based upon existing evidence of good practice that ensures quality legislation'.[44] The specific drafting techniques that the Committee identifies in order to make legislation 'understandable and accessible', such as purpose or overview clauses, new definitions of existing legal concepts, index clauses for definitions and formulae, invite two comments. First, a number of them have been in use for some years, and are seen in recent enactments; for example, the Bribery Act 2010 and the Immigration Act 2014 continue the use of symbols to identify the persons to whom a section refers.[45] Other examples include ss. 1–6 of the Flood and Water Management Act 2010 (a response to the floods of the summer of 2007), which are titled 'key concepts and definitions'; s. 1 of the Sunbeds (Regulation) Act 2010 (a government

[41] These standards are helpfully summarised in J. Caird, R. Hazell and D. Oliver, *The Constitutional Standards of the House of Lords Select Committee on the Constitution* (2014). The Committee's 'five basic tenets of the United Kingdom Constitution are: Sovereignty of the Crown in Parliament; The Rule of Law, encompassing the rights of the individual; Union State; Representative Government; Membership of the Commonwealth, the European Union, and other international organisations'; *ibid*., para. 51.

[42] L. Fuller, *The Morality of Law* (1964).

[43] Laws, in *Feldman,* p. 96; see also Feldman, in *Feldman,* p. 12, and Lord Neuberger, 'General, Equal and Certain: Law Reform Today and Tomorrow', *Statute Law Review*, 33(3) (2013), pp. 323–328. It may also be argued that in its retroactivity (the law was always thus), unpredictability and often uncertain formulation (*Rules*, pp. 293–294), judicial law reform fails to meet Fuller's inner morality; Laws, *ibid*., pp. 98–99. On differing views of the scope of and constraints on permissible judicial law making, see discussion in A. Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (2013), ch. 7.

[44] *Ensuring Standards in the Quality of Legislation* (2013–14, HC 85), Annex A.

[45] The use of such symbols assists gender neutrality in drafting as much as it assists clarity.

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backed Private Members' Bill), 'main interpretative provisions'); the interpretation section of the Local Audit and Accountability Act 2014, which italicises the words to be construed; in a clear echo of an explanatory leaflet, s. 4 of the National Insurance Contributions Act 2014 is titled, 'How does a person who qualifies for an employment allowance receive it?; and s. 1 of the Corporation Tax Act 2010 is headed 'Overview of Act', the Act itself being a further instalment of the *Tax Law Rewrite Project*, whose purpose is to tax legislation so that it is clearer and easier to use but without changing its general effect.[46]

Secondly, the use of these and such other devices as preambles and purpose clauses (s. 1(2) of the Anti-Slavery Day Act 2010) is not uncontroversial.[47] It is useful, initially, to distinguish two kinds of purpose clause. There are, first, those that set out a framework for the exercise of regulatory or executive discretion: for example, the purpose of a statutory agency responsible for a given area of public policy. This kind of purpose clause, which is quite commonly used to set the parameters by which regulatory or executive decisions are to be made,[48] should be distinguished from those purpose clauses whose function is to resolve ambiguities in interpretation that the drafter ought to have resolved. In this instance, the public policy task is, in effect, being left to the judiciary to determine.[49] In the last edition we discussed the theoretical and operational hazards that attend the use of purpose clauses of this second kind;[50] debate about their value continues. For their supporters, purpose clauses can improve the Bill's drafting, assist parliamentary scrutiny, guide other users through the Bill's content, and aid interpretation. For their critics, inasmuch as they tend to be stated at a relatively high level of generality, they are of little value in assisting a detailed understanding of the Act,[51] and may themselves be a potential source

[46] These Acts' parliamentary stages are expedited by virtue of automatic referral to a Second Reading Committee (that is, not 'on the floor' of the House). Nor, once enacted, is the responsible government department required to prepare a memorandum on its implementation and operation for the purpose of post-legislative scrutiny. See *Guide to Making Legislation*, paras. 28.20 and 40.11.

[47] In his analysis of 'The Form and Language of Legislation' the late Lord Rodger of Earlsferry noted that a preamble might be used, as in the case of His Majesty's Declaration of Abdication Act 1936, to draw attention to the significance of what was being enacted, and wondered whether a preamble would preface an Act to abolish the rule of male primogeniture in relation to the succession to the Crown; *Feldman*, pp. 65–83, 70. On news of the Duchess of Cambridge's pregnancy, the Government enacted the Succession to the Crown Act 2013. Lord Rodger would have been disappointed that no preamble prefaced the bland, yet constitutionally remarkable, terms of s. 1: 'In determining the succession to the Crown, the gender of a person born after 28 October 2011 does not give that person, or that person's descendants, precedence over any other person (whenever born).'

[48] See for example Part 1 of the Communications Act 2003, setting out the functions of the statutory body, OFCOM, and Part 1A of the Financial Services and Markets Act 2000 listing the functions and objectives of the Financial Conduct Authority, inserted by Part 2 of the Financial Services Act 2012.

[49] I am grateful to Sir Stephen Laws for this distinction.

[50] *Rules*, pp. 222–224.

[51] See Laws LJ.'s observation in *Hainsworth v Ministry of Defence* [2014] EWCA Civ 763 [32], 'that great care needs to be taken in deploying provisions which set out broad and basic principles as

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of doubt about its interpretation.[52] And, as one critic has commented, the literature here 'has two large gaps in it. The first is that there is little empirical evidence of the operation of objects provisions. The second is that there is very little treatment of the administration – where numerically far more application of the law occurs than in the courts.'[53] More promising is the considered use of plain language drafting, where the OPC 'has worked to make legislation more accessible … They have also made changes to the formatting of legislation, including breaking down sentences into shorter paragraphs, together with increasing amounts of white space to improve readability.[54]

But there are constraints. 'It is axiomatic that legislation can have only one function and that is to change the law';[55] the use of plain language may be the direction of travel, but only provided that it does not perversely obscure precision in what is to be achieved.[56] A second is political. These various drafting techniques are helpful but governments of all persuasions have always been reluctant to elevate the prudential to the prescriptive;[57] and in this the Coalition Government is no different. Its response firmly rejected both proposals. Accepting that improvements in the quality of legislation are both desirable and possible, the Government pointed to the value of the practices currently followed and regularly revised, and to the opportunities provided by

determinative tools for the interpretation of a concrete measure [such as Article 5 of the Directive]'.

[52] 'The view of the Office of the Parliamentary Counsel has been historically against purpose clauses, because they risk introducing "a conflict between the specific provision and the purpose as expressed and therefore creating some sort of legal doubt"'; *Ensuring Standards in the Quality of Legislation,* para. 68; and House of Lords, Constitution Committee, *Parliament and the Legislative Process* (2003–04, HL 173), paras. 82–87. There are no references to 'purpose clauses' in the *Guide to Making Legislation*.

[53] J. Barnes, 'Statutory Objects Provisions: How Cogent is the Research and Commentary?', *Statute Law Review*, 34(1) (2013), 12–31, 29.

[54] *Ensuring Standards in the Quality of Legislation,* para. 39. Giving evidence, First Parliamentary Counsel said, "In terms of the drafting style, I was looking at the legislation that attracted the criticism of the Renton Committee in the 1970s. If we legislated now in the style that we did then, the statute book would be incomprehensible. It would just be utterly impossible to follow. We have massively improved the technical plain English quality of the legislation we produce"; Evidence, EV 12, Q.33 (14 June 2012). See P. Butt, *Modern Legal Drafting* (3rd edn, 2013), and for a comparative analysis of drafting style, W. Voermans, 'Styles of legislation and Their Effects', *Statute Law Review*, 32(1) (2011), 38–53.

[55] Laws, 'Giving Effect to Policy in Legislation: How to Avoid Missing the Point', 3.

[56] *Ensuring Standards in the Quality of Legislation,* Evidence, EV 13, Q.35 (14 June 2012). 'The elementary point is that, however much the draftsman strives to make the language of the statute book more popular, it will never be the same as ordinary language because statutes are designed to operate in a particular way and their language is chosen accordingly'; Lord Rodger, in *Feldman*, p. 75. See also J. Barnes,' When "Plain Language" Legislation is Ambiguous – Sources of Doubt and Lessons for the Plain Language Movement', *Melbourne University Law Review*, 34 (2010), 671–707.

[57] Government drafters, too, are wary of prescriptive drafting manuals, preferring practical and pragmatic examples that can be used as the instructions require; see D. Greenberg, *Statute Law Review*, 34(3) (2013), 303–4 review of R. Martineau and R. Martineau Jr, *Plain English for Drafting Statutes and Rules (*2012 and *Statute Law Review*, 35(1), 101–3 review of H. Xanthaki, *Thornton's Legislative Drafting* (5th edn, 2013).

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other parliamentary committees to scrutinise the quality of Bills.[58] But it did 'not believe that a Code of Legislative Standards is necessary or would be effective in ensuring quality legislation.' And in its absence, 'the case for a Committee, part of whose remit is to monitor compliance with the Code, weakens significantly.' The threat posed to the executive's constant desire to manage the legislative process similarly explains its objections to the use of statements of principle in Bills. They are objectionable because as a matter of drafting, it may be very difficult 'to encapsulate in sufficiently brief form, the exact principle' behind any piece of legislation, and, secondly, that their inclusion simply gives the ammunition to the government's parliamentary opposition.[59]

The volume of the statute book

The Commons' Political and Constitutional Reform Committee noted that many of its witnesses were concerned about what they saw as a steady increase in the volume of legislation, thus making its content less easy to grasp. But even if it is the case that there are more pages of legislation per year than used to be the case, it does not follow that they are more difficult to understand. Modern drafting styles and publishing formats have increased the amount of white space and therefore the page count; conversely, short statutes may rely heavily on the making of secondary legislation in order to give them effect. There are pressures to legislate, one of which is the need to implement international and EU obligations. But as noted earlier, 'one of the key reasons for the increased volume of legislation may be that interest groups and individuals are becoming increasingly demanding of each other and expect the legislature to arbitrate on respective rights and duties, defining rules of engagement and setting boundaries to the unpredictability of life.'[60] In short, there is a demand for legislation that is unlikely to be staunched by observing that to satisfy that demand is to increase the volume of legislation to controversial levels.

One of the ways in which accumulated provisions in a number of statutes can be made clearer and more accessible is by means of consolidation (Charities Act 2011, Co-operative and Community Benefit Societies Act 2014), a process

[58] House of Commons, Political and Constitutional Reform Committee, *Ensuring Standards in the Quality of Legislation: Government Response to the Committee's First Report of Session 2013–14* (2013, HC 611), paras. 12, 18 and 21, which pointed to the work of the House of Lords' Delegated Powers and Regulatory Reform Committee, the Joint Committee on Human Rights, and of departmental select committees, all of whom assess the quality of legislation according to a wide variety of criteria.

[59] Lord Rodger, in *Feldman*, pp. 82–83. See also his comment, 'No Minister will thank [the drafter] for preparing a Bill which is so splendidly drafted that it might win plaudits from the Plain English Society or the Hansard Society, if its form is such that it will not go through and so never actually becomes law'; *ibid.*, p. 80.

[60] *When Laws Become Too Complex*, p. 7. The number of Acts has fallen since 2010 (41) to 25, 23 and 31 (including all financial legislation) in the succeeding three calendar years.

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performed by the Law Commission (over 200 Acts since 1965), which also has responsibility for proposing the repeal of outdated legislation (more than 3,000 Acts entirely repealed since 1965).[61] That these are not simply technical or substantively neutral exercises can be seen in the criteria for their use, and in a more pronounced way in the Commission's law reform programmes. For nearly half a century the Law Commission of England and Wales has been responsible for recommending change to what has commonly been called 'lawyer's law' – typically private law governing contractual, matrimonial and property relationships between citizens, and some aspects of company and criminal law – with the implication that its reforms are politically neutral and thus more likely to be enacted than contentious areas of public law.[62] The reality is somewhat different. Paradoxically, '"nice to have" technical reform' can prove far more difficult to enact than Bills giving effect to government policy precisely because they command no political commitment.[63] Even so, as government Bills they still require the OPC's attention and departmental management. Conversely, it will be rare that a Law Commission Bill does not involve some value judgement about the proposed reform that may be politically sensitive. The Commission does not 'turn politics into law', but its relationship with politics has changed over the years, with greater corporate engagement with departments and their Bill teams (Trusts (Capital and Income) Act 2013).[64]

Overall, 70% of the Commission's 195 reports have been accepted and implemented in whole or in part,[65] but in its 2007 review the House of Lords Procedure Committee commented that because opportunities to include Law Commission Bills in the government's programme were limited, the rate of conversion to enactment had not kept pace with the production of reports. Following its recommendations, from 2010 an expedited procedure in the House of Lords has applied to Law Commission Bills which, though they propose a more significant change in policy than would be the case with a consolidation Bill, are still 'uncontroversial'.[66] These changes in parliamentary procedure were followed by a more radical statutory obligation on the government to agree a protocol, *inter alia*, 'about the way in which Ministers of the Crown are to deal with the Law Commission's proposals for reform,

[61] Law Commission, *The Work of the Law Commission 2011–2015, Incorporating the Eleventh Programme* (July 2011), Part 3, and *Annual Report 2012–13* (Law Com 338), Part 2, Statute Law. Although it was not a consolidation Act, the Equality Act 2010 brought nine major pieces of anti-discrimination legislation, 100 statutory instruments and more than 2,500 pages of statutory codes of practice under one roof.

[62] *The Work of the Law Commission 2011–2015, Incorporating the Eleventh Programme*, Part 2.

[63] Laws, in *Feldman*, p. 88.

[64] E. Cooke, 'Law Reform in a Political Environment', in *Feldman*, p. 145.

[65] *Annual Report 2012–13*, para. 3.2.

[66] House of Lords, Procedure Committee, *Law Commission Bills* (2007–08, HL 63); *Guide to Making Legislation,* paras. 42.13–42.15; the Commission's Bills have an expedited Second Reading in the House of Commons; *ibid.*, para. 28.20.

consolidation or statute law revision.'[67] The 2010 Protocol requires the Commission to seek the relevant department's agreement to the inclusion of projects in its programme of law reform, and the department's duty, if it agrees, is 'to give an undertaking that there is a serious intention to take forward law reform in this area (if applicable in the case of the particular project).'[68] In common with the changes to parliamentary procedure this initiative is designed to address the problem of unimplemented law reform proposals by committing the government to act upon them. But, as a Law Commissioner has pointed out, the irony is that 'we *cannot* take on a project in which the relevant department is not able to express a commitment to reform.'[69]

The Parliamentary Context

The widespread public disengagement with parliamentary government particularly occasioned by the MPs' expenses scandal triggered a period of intense self-scrutiny within the House of Commons, resulting in the creation of the Independent Parliamentary Standards Authority (IPSA), responsible for MPs' expenses, salaries and pensions. We reviewed these developments in Appendix 8 and do not rehearse them here.[70] But we may note the continuing issues concerning peers' expenses and the daily allowance, as well as the unintended consequence of public disquiet in a time of public austerity concerning IPSA's proposed increases in MPs' salaries.[71]

A second major aspect of this period of self-scrutiny was the *Wright* report, an enquiry into the reform of the House of Commons whose purpose was to give backbench MPs greater influence in its work; for example, in being able to elect the Chair and members of select committees instead of them being selected by the party Whips. There is no doubt but the changes that followed the report's recommendations have been welcomed by MPs and have largely met their purpose.[72] But these changes probably succeeded only because there

[67] Law Commission Act 2009, s. 2.

[68] The Law Commission, *Protocol between the Lord Chancellor (on Behalf of the Government) and the Law Commission* (2010; HC 499, Law Com No 321), para. 8.

[69] Cooke, in *Feldman*, pp. 141–145, 143.

[70] Available on the Cambridge University Press Resources website, http://www.cambridge.org/gb/academic/subjects/law/legal-skills-and-practice/how-do-things-rules-5th-edition?format=HB.

[71] See Hansard Society, *Audit of Political Engagement* (2013), ch. 5. See also the revised Code of Conduct for MPs concerning such matters as the registration of Members' financial interests; House of Commons, *The Code of Conduct together with The Guide to the Rules relating to the Conduct of Members* (2012, HC 1885).

[72] House of Commons, Political and Constitutional Reform Committee, *Revisiting Rebuilding the House: the impact of the Wright reforms* (2012–13, HC 82). Implemented reforms also included an improved ability of backbenchers and select committees to secure debates on the floor of the House on substantive motions via the Backbench Business Committee, and the introduction of a new opportunity to debate e-petitions in Westminster Hall. The Speaker of the House of Commons has since suggested that the democratisation of select committees could be extended to Public Bill Committees; the Rt Hon John Bercow MP, The Michael Ryle Memorial Lecture (30

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was here a 'constitutional moment',[73] that is, the fallout from the expenses scandal, which no government could politically sensibly block and in the context of which it was possible for the Leader of the House to press for their adoption before Parliament rose for the 2010 General Election. For the most part the diagnosis of and the remedies for Commons reform are well known, but action requires a willingness 'to put Parliament before Government'.[74] To understand the impact of the parliamentary context in which Bills are enacted, it is necessary to recognise that the principal driver is the executive's desire to control the process of enactment. A reform minded opposition might well in its first years of government implement some change, but once settled into government it is executive rather than parliamentary sovereignty that prevails. Thus, while the *Wright* report's recommendation for the creation of a Backbench Business Committee has been successfully implemented,[75] the Coalition Government firmly rejected the associated recommendation for a House Business Committee, which would have backbench representation reflecting the composition of the House and including minority parties, despite the fact that the Coalition Agreement included a commitment to establish this Committee.[76] It may be observed that Parliament can if it wishes establish new formal structures in the absence of executive approval,[77] but for the most part it is the executive, through the usual channels, that continues to approve or reject change.

As the length of parliamentary sessions varies, there is no fixed number of sitting days per session. In what might be regarded as the three standard (non-

June 2014); www.parliament.uk/business/commons/the-speaker/speeches/speeches/michael-ryle-memorial-lecture-/.

[73] This is a term used by an eminent constitutional lawyer to describe 'both large and relatively minor changes in the UK's constitutional arrangements', D. Oliver, 'Politics, Law and Constitutional Moments in the UK', in *Feldman*, pp. 239–256, 241. Lord Steel of Aikwood's limited but useful House of Lords Reform Act 2014 provides for peers to cease to be members for non-attendance throughout a whole Session or for conviction of a serious offence, and the House of Lords (Expulsion and Suspension) Bill [HL] 2014–15 provides that Standing Orders of the House of Lords may make provision under which peers may be expelled or suspended. But given the failure of yet another Bill designed to bring about a mostly elected House, no such moment has arisen for House of Lords reform, nor does one look likely. See House of Commons Library, *House of Lords Reform Bill 2012–13: decision not to proceed*, Standard Note SN/PC/06405 (2012), House of Commons, Political and Constitutional Reform Committee, *House of Lords reform: what next?* (2013–14, HC 251), and generally, M. Russell, *The Contemporary House of Lords: Westminster Bicameralism Revived* (2013), chapters 10 and 11, and C. Ballinger, *The House of Lords 1911–2011: A Century of Non-Reform* (2012).

[74] Rt Hon John Bercow MP, supra. n. 73.

[75] House of Commons, Procedure Committee, *Review of the Backbench Business Committee – Government Response to the Committee's Second Report of Session 2012–13* (2012–13, HC 978).

[76] *Revisiting Rebuilding the House,* paras. 41–70.

[77] The Joint Committee of the House of Lords and House of Commons, *Parliamentary Commission on Banking Standards*, was established in July 2012, in the wake of the LIBOR scandal, to conduct an inquiry into professional standards and culture in the UK banking sector and to make recommendations for legislative and other action. In seizing this 'constitutional moment' it broke new ground in appointing its own counsel to conduct a forensic examination of the bankers called before it.

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election) sessions 2006–07 to 2008–09, the number of days was 146, 165 and 139;[78] of these, around a third would be given over to the management of the government's legislative programme. A Bill's formal stages remain fundamentally unchanged;[79] the principal advance being the work of Public Bill Committees, which in 2006 replaced Standing Committees for the Commons' committee stage (when its detail is examined) and which, like pre-legislative scrutiny, may consider written and oral evidence on the content of a Bill. Similarly, most of the informal workings of the Commons and of the Lords remain much as they have been for some years. The key elements are the central importance of the usual channels,[80] the relationships between the Chief Whips and the Leaders of each House (and, in the Coalition Government, their Deputies), and party management, especially in the case of the 650 MPs in the Commons, to ensure that enough Members are present (or paired) to vote on government business. In the Lords, where there is now no government majority and fewer rules governing the conduct of business, there tends to be a less politically charged but nevertheless close and often expert scrutiny of legislation. Ministers are advised to prepare a 'parliamentary handling strategy', to include a list of those peers 'likely to take a particular interest and what engagement with them is planned.'[81] The Lords' approach is to revise and improve government Bills,[82] ultimately acknowledging that it must 'get its business.' A particular application is the Salisbury convention, which provides that the House should not reject at Second or Third reading government Bills brought from the House of Commons for which it has an electoral mandate.

[78] House of Commons Library, *Number of Commons sitting days by session since 1945,* Standard Note SN/PC/04653 (2013).

[79] House of Commons Library, *House of Commons Background Paper: Public Bills in Parliament,* Standard Note SN/PC/06507 (2012). A Bill's stages are helpfully visualised and documented on the parliamentary website: www.parliament.uk/about/how/laws/passage-bill/. Some Bills are, because legislative action is urgently required, 'fast-tracked' (Loans to Ireland Act 2010, Police (Complaints and Conduct) Act 2012). The Government rejected the Constitution Committee's recommendation that in such cases there be a certification requirement along the lines of s. 19 of the Human Rights Act 1998, or any formal role for the Speakers of the two Houses. In common with its response to the Committee's recommendation on 'constitutional' Bills, the Government did not wish to tie its hands. But it did agree to an obligation on the responsible Minister to make an oral statement to the House of Lords outlining the case for a fast-tracking requirement; House of Lords, Constitution Committee, *Government Response to Fast-track Legislation: Constitutional Implications and Safeguards* (2009–10, HL 11), Appendix, p. 7.

[80] The House of Lords *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords* (2013), para. 3.29 is explicit: 'The Government Chief Whip is responsible for the detailed arrangement of government business and the business of individual sittings. The smooth running of the House depends largely on the Whips of the main political parties. They agree the arrangement of business through the "usual channels"'.

[81] *Guide to Making Legislation*, section 19.

[82] 'Scrutiny of legislation is arguably the most important task of the House of Lords. It is here that the House exercises the most direct influence over the Government, promoting and defending the interests of the public.' The task occupies just over half of its time; House of Lords, Leader's Group on Working Practices, *Report of the Leader's Group on Working Practices* (2010–12, HL 136), paras. 70–71.

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The application of this convention in the case of the Coalition Government raised novel challenges; while the Marriage (Same Sex) Act 2013, which had not been a manifesto commitment for either party, generated considerable debate and some opposition in the Lords, including failed attempts to block the Bill by moving amendments that were wholly inconsistent with its purpose.

Pre-legislative scrutiny conducted by departmental select committees and joint committees of the Lords and Commons, and the now better informed Public Bill committees in the Commons all carry the potential for and have in some instances proved to be significant improvements in the scrutiny process.[83] But their effectiveness depends upon the willingness of Members,[84] and inevitably, of government, to make them work. For example, while successive governments have accepted the value of pre-legislation scrutiny in principle,[85] the Coalition Government rejected the recommendation of the Political and Constitutional Reform Committee that it should be mandatory, unless exempted by a decision of the Speaker, on the ground that such a rule would reduce flexibility in the management of a government's legislative programme; rather, the scrutiny of each Bill should be considered 'on a case by case basis.'[86] Though a Bill's progress is facilitated by the use of the 'programme order', which sets a fixed end-time for proceedings on the debate of any public Bill,[87] the government's desire to get its business means that it remains its default position to reject the Opposition's late tabling of amendments. To give a commitment 'to look again', which the government may do if that would enhance the Bill's political acceptability or be better understood in practice,[88] is 'a complicated and cumbersome process' in which officials have to consider and Ministers to agree upon the policy implications,[89] and Parliamentary Counsel has to draft new clauses to fit in with the Bill's overall scheme.

[83] J. Smookler, 'Making a Difference? The Effectiveness of Pre-Legislative Scrutiny', *Parliamentary Affairs*, 59 (3) (2006), 522–535; J. Levy, 'Public Bill Committees: An Assessment Scrutiny Sought; Scrutiny Gained', *Parliamentary Affairs* 63(3) (2010), 534–544, R. Kelly, 'Select Committees: Powers and Functions', in *Horne et al.*, pp. 162–196, 168–174; and House of Commons, Liaison Committee, *Select committee effectiveness, resources and powers* (2012–13, HC 697). For a wider perspective see J. McEldowney, 'J.A.G. Griffith: Parliament and Legislation', *Public Law* (2014), 85–99.

[84] L. Thompson, 'More of the Same or a Period of Change? The Impact of Bill Committees in the Twenty-First Century House of Commons', *Parliamentary Affairs*, 66(3) (2013), 459–479.

[85] House of Lords, Constitution Committee, *Pre-Legislative Scrutiny in the 2008–09 and 2009–10 Sessions* (2009–10, HL 78), and generally, House of Commons Library, *Pre-Legislative Scrutiny,* Standard Note SN/PC/2822 (2010, 2011), and *Pre-Legislative Scrutiny under the Coalition Government,* Standard Note SN/PC/5859 (2013).

[86] *Revisiting Rebuilding the House,* paras. 15–18.

[87] House of Commons, Procedure Committee, *Programming* (2013–14, HC 767). But because the order fixes the conclusion of proceedings, if time runs out before a group of amendments tabled at Report is reached, 'any questions which are to be put under the programme order are decided, and the opportunity for debate and scrutiny is lost'; *ibid.*, para. 7.

[88] Laws, in *Feldman*, p. 100.

[89] P. Regan, 'Enacting Legislation – A Civil Servant's Perspective', *Statute Law Review*, 34(1) (2013), 32–38.

There are very few Bills that do not (apart from commencement orders) confer power on a Minister to legislate, typically by means of a statutory instrument. The 3,500 or so instruments that are made each year necessarily add to the volume of the statute book, meaning that every interpretive exercise must commence with an enquiry into the making and content of instruments authorised by the Act in question. Many instruments become law simply by being made; some, as specified in the parent Act, are subject to parliamentary approval, being either negative (about 90% of such instruments) or affirmative resolution procedure.[90] Parliament's institutional arrangements for their scrutiny have focussed separately on their technical qualities and on their merits. In the case of the former, the terms of reference of the Joint Committee on Statutory Instruments (JCSI), where most instruments are examined,[91] authorise it to examine them against nine criteria; for example that the instrument appears to be an unusual or unexpected use of the parent Act's power, that it appears to have retrospective effect without the express authority of the Act, or that its drafting appears to be defective. In an extension of the pre-legislative scrutiny of Bills, the JCSI now operates a process of pre-scrutiny of draft instruments subject to the affirmative procedure in order to 'help to avoid difficulties about powers, drafting, etc.' at a later stage.[92] The Committee reports on those instruments that raise an issue according to these nine criteria, or simply lists those that are blameless. No instrument is amendable in either House, so a report that 'draws the special attention of the House' to it will be a matter for debate and for the Government to respond.[93] But in respect of both negative and affirmative procedures, Parliament's use of its statutory power either to annul or to decline to approve SIs is, in the House of Lords, seen as a "nuclear option", to be used rarely or not at all.[94]

Consideration of an instrument's merits is of more recent origin (2003) and has been exercised by the House of Lords Merits of Statutory Instruments Committee, reporting on instruments that are politically or legally important or give rise to issues of public policy likely to be of interest to the House, are inappropriate in view of changed circumstances since the enactment of the parent Act; inappropriately implement European Union legislation, or

[90] House of Commons Library, *Background Paper: Statutory Instruments*, Standard Note SN/PC/6509 (2012).

[91] The House of Commons has a Select Committee on Statutory Instruments which primarily considers instruments dealing with financial matters, over which the House of Lords have no authority; the Committee's members sit with JCSI.

[92] www.parliament.uk/business/committees/committees-a-z/joint-select/statutory-instruments/prescrutiny/prescrutiny-of-affirmatives/.

[93] In the Commons debates may take place on the floor of the House, or in a Delegated Legislation Committee convened for a particular instrument. In the House of Lords debates take place on the floor of the House.

[94] *Report of the Leader's Group on Working Practices,* para. 146. See also House of Lords, Library Note, *Delegated Legislation in the House of Lords since 2000* (LLN 2012/012), paras. 3.4 and 3.8 on new procedures for dealing with negative resolution instruments.

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imperfectly achieve their policy objectives.[95] There has, however, been a significant escalation in the intensity of parliamentary scrutiny of delegated legislation as successive governments have sought to provide for executive law making without the paraphernalia of promoting a Bill. The threat posed to parliamentary sovereignty by government legislation conferring on Ministers the power by order to dispense with primary legislation that imposes 'a burden on anyone in the carrying out of any activity' (Regulatory Reform Act 2001), later replaced by 'any burden, or the overall burdens, resulting directly or indirectly for any person from any legislation' (Legislative and Regulatory Reform Act 2006),[96] was met by the development of the 'super-affirmative procedure', itself imposing consultative burdens on Ministers wishing to promote a (regulatory, but later a) legislative reform order.[97] To manage these orders and to ensure that Ministers complied with this new procedure, complementary parliamentary supervision was created; in the Commons, the Regulatory Reform Committee, whose work is confined to the new orders, and in the Lords, the Delegated Powers and Regulatory Reform Committee, which has an additional and wider remit, to report 'whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny'.[98]

The threat to parliamentary sovereignty posed by 'Henry VIII powers' is well illustrated by two Coalition Government initiatives.[99] One was the Draft Deregulation Bill, which underwent pre-legislative scrutiny during the 2013–14 session of Parliament. In an echo of the test used in Statute Law (Repeals) Acts – that the primary legislation to be repealed is 'no longer of practical

[95] The Committee's remit does not (nor does its successor's) include remedial orders, and draft remedial orders under s. 10 of the Human Rights Act 1998, which are dealt with on the floor of the House, or draft orders under ss. 14 and 18 of the Legislative and Regulatory Reform Act 2006, which are dealt with by the Delegated Powers and Regulatory Reform Committee.

[96] See the Constitution Committee's critique of what 'came to be referred to as the "Abolition of Parliament Bill"', A. Le Sueur and J. Caird, 'The House of Lords Select Committee on the Constitution', in *Horne et al.*, 281–307, 293.

[97] This procedure was initially developed in the case of deregulation orders made under the Deregulation and Contracting Out Act 1994; see *Rules*, pp. 217–218. The 2001 Act repealed the 1994 Act and was in turn itself repealed by the 2006 Act.

[98] This wider remit reflects the House of Lords' sense that it 'has good reason to be proud of the quality of its scrutiny of delegated legislation'; *Report of the Leader's Group on Working Practices,* para. 142.

[99] 'Henry VIII powers always merit especially careful consideration, and require a persuasive explanation, because they are delegating to Ministers not merely the power to supplement the detail of policy, but the power to amend primary legislation which is otherwise the preserve of Parliament itself. Frequently, Henry VIII powers are simply incidental, consequential, updating or otherwise limited in character. But many of these powers go well beyond this. In such cases Parliament has decided it is necessary for each power to be subject to additional statutory scrutiny safeguards, so giving both Houses the opportunity for a greater level of control of the exercise of such powers.' House of Lords, Delegated Powers and Regulatory Reform Committee, *Special Report: Strengthened Statutory Procedures for the Scrutiny of Delegated Powers, Current Statutory Provisions* (2012–13, HL 19), paras. 10–11.

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utility' – clause 51 enabled a Minister to provide by order for legislation to cease to apply 'if the Minister considers that it is no longer of practical use'. Like Statute Law (Repeals), and the Law Commission's wider programme of statute law revision, its purpose was to rationalise the statute book, and the Bill proposed that the Minister should consult the Commission. Unlike its Acts, the proposed order would extend also to secondary legislation, while the order making power would itself be subject to a 'draft negative procedure' (unlike the super-affirmative procedure), meaning that parliamentary scrutiny would be inhibited by the fact that the only option would be to accept or reject the order in its entirety. For these and other reasons the Committee recommended that the power be removed from the Bill;[100] a recommendation that the Government accepted on the ground that 'that there is insufficient appetite for such a measure at this time.'[101]

The second initiative became law, but only after significant change: the Public Bodies Act 2011. As drafted the Bill contained a number of highly contentious powers authorising Ministers by order to abolish or merge public bodies and offices, or to modify their constitutional or financial arrangements; the only parliamentary control being the affirmative resolution procedure. Given the very extensive list of public bodies named in its Schedules, the Delegated Powers and Regulatory Reform Committee considered that the Bill did not amount to an appropriate delegation of legislative powers. They 'would grant to Ministers unacceptable discretion to rewrite the statute book, with inadequate parliamentary scrutiny of, and control over, the process.'[102] In response the Government amended the Bill to include an obligation on the Minister to consult,[103] a sunset clause, a requirement that the Schedules could only be amended by primary legislation, and a number of statutory conditions that must be met before a draft order can be laid.[104] In addition, the Act introduces what has been called an 'enhanced affirmative procedure'. This extends the scrutiny period for an order from 30 to 60 days, and requires a

[100] 'We consider [that the] provisions in the draft Bill appear to have the effect of reducing the scrutiny role of Parliament and increasing the power of the executive. We are principally concerned with what has emerged as one of the most controversial aspects of the draft Bill: the order-making power contained in clauses 51 to 57'; House of Lords, House of Commons, Joint Committee on the Draft Deregulation Bill, *Draft Deregulation Bill Report* (2013–14, HL 101, HC 925), paras. 18 and 67.

[101] *Government Response to the Report of the Joint Committee on the Draft Deregulation Bill* (2014, Cm. 8808), para. 14.

[102] House of Lords, Delegated Powers and Regulatory Reform Committee, *Public Bodies Bill [HL]* (2010–12, HL 57) para. 1.

[103] On consultation in respect of delegated legislation generally see Secondary Legislation Scrutiny Committee, *The Government's Review of Consultation Principles: Government Response* (2013–14, HL 111).

[104] By s. 8 these include an obligation to show that the exercise of the relevant public function will be improved, by reference to its efficiency, effectiveness, economy (the three 'value for money' criteria), and the securing of appropriate accountability to Ministers. On sunset clauses, see text below.

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Minister to have regard to any recommendations or representations made by Parliament during this period, if either House has so resolved within 30 days of the draft order being laid. Ministerial compliance with the statutory conditions is monitored in the Lords by the Merits Committee, renamed the Secondary Legislation Scrutiny Committee in recognition of this addition to its terms of reference,[105] and in the Commons by the relevant departmental select committee.

Viewed overall, parliamentary scrutiny of delegated legislation now comprises, in ascending order, and according to whether the legislation is an ordinary statutory instrument, a public bodies order or a legislative reform order, negative, affirmative, enhanced affirmative, and super-affirmative procedure. While they do provide for a strengthened scrutiny role for Parliament, this 'patchwork of procedures' has, the Delegated Powers and Regulatory Reform Committee argued, reached 'a level of complexity that is unhelpful for both Parliament and the public'; it would be better to use an existing model than create 'yet another variation.'[106] This the Government has accepted, but, and as always, has expressly reserved the right to develop a different approach where 'an existing model is not viewed as appropriate.'[107] One much broader response to the proliferation of scrutiny models and of the many parliamentary arrangements for the scrutiny of Bills is the suggestion that, should there eventually be fundamental change to the composition of the House of Lords, there should be an appointed expert body – an independent scrutiny committee – that would perform the scrutiny functions now exercised by the Constitution Committee, the Joint Committee on Human Rights and the Delegated Powers and Regulatory Reform Committee, and which could perhaps also extend to secondary legislation falling under the enhanced and the super-affirmative procedures. As its author acknowledges,[108] such a move is contingent on a major change to Parliament; but even then, as its response to other proposals concerning constitutional Bills, fast track legislation and the establishment of a code and of a committee on legislative standards demonstrates, governments are very unlikely to agree to the creation of bodies or of procedures that dilute their control over their legislative business.

And, as a coda to this section, a similar motivation lies behind the Government's cautious response to proposals made by the Constitution Committee and the

[105] House of Lords, Procedure Committee, *Merits of Statutory Instruments Committee* (2010–12, HL 283); Secondary Legislation Scrutiny Committee, *Public Bodies Act 2011: One Year On* (2012–13, HL 90).

[106] House of Lords, Delegated Powers and Regulatory Reform Committee, *Statutory Procedures for the Scrutiny of Delegated Powers* (2012–13, HL 19), para. 1.

[107] House of Lords, Delegated Powers and Regulatory Reform Committee, *Statutory Procedures for the Scrutiny of Delegated Powers: Government Response* (2012–13, HL 64), Appendix A. In this event, the Government undertakes to explain the reasons for preferring to create a new procedure in the explanatory notes to the Bill and the delegated powers memorandum.

[108] D. Oliver, 'Parliament and the Courts: A Pragmatic (or Principled) Defence of the Sovereignty of Parliament', in *Hoare et al.*, pp. 309–337, 334–335.

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Law Commission to establish post-legislative scrutiny as a routine aspect of the oversight of new legislation. Central to the issue is the question, who would conduct such scrutiny: the government of the day (which could well be of a different political complexion to that responsible for the Act) or Parliament? The Constitution Committee recommended that, as with pre-legislative scrutiny, post-legislative scrutiny could be conducted by a Joint Committee of both Houses. Given Parliament's constitutionally key role in scrutinising Bills, this was the Law Commission's preferred option, though it equally recognised that departments had both a responsibility and an obvious right to undertake reviews of their legislation. The key here would be the independence, transparency and objectivity of those assessing the legislation's impact. Not persuaded by the notion of a Joint Committee on Post-Legislative Scrutiny, the Government nevertheless accepted that a new process for post-legislative scrutiny was desirable, and that it should be based on the combination of a published departmental memorandum on the Act's implementation and its scrutiny by the corresponding House of Commons select committee.[109] In preparing the Bill, officials 'should remember that, within three to five years of Royal Assent, the Government will be required to submit a memorandum to the relevant departmental Select Committee with a preliminary assessment of how the Act has worked out in practice, to allow the Committee to decide whether it wishes to conduct further post-legislative scrutiny.'[110]

Introduced in 2008, this process, which does not preclude a Select Committee instigating its own scrutiny, was itself scrutinised in 2013. This revealed, as had been predicted, that for the simple reasons of the quantity and the scope of legislation enacted in any session, the number and length of these memoranda would far exceed the departmental Select Committees' capacity to scrutinise each Act. The 2013 review noted that 'out of the 58 government post-legislative scrutiny memoranda published so far only three have been the subject of dedicated reports by committees.'[111] As the Government's response to the Constitution Committee's call for parliamentary post-legislative scrutiny has effectively confined the exercise to the House of Commons, the House of Lords has restated its view that 'if the process of legislative scrutiny is to be seen holistically, then it should be for both Houses to review that legislation in order to learn lessons and disseminate best practice.'[112] The House is, of course, entirely at liberty to initiate such post-legislative scrutiny as it chooses, though

[109] House of Lords, Constitution Committee, *Parliament and the Legislative Process* (2003–04, HL 173-I), para. 165; Law Commission, *Post-Legislative Scrutiny* (2008, Law Commission 302, Cm. 6945); Office of the Leader of the House of Commons, *Post-Legislative Scrutiny: The Government's Approach* (2008, Cm. 7320).

[110] *Guide to Making Legislation*, para. 13.17 and Part 40.

[111] House of Commons, Liaison Committee, *Select committee effectiveness, resources and powers: responses to the Committee's Second Report* (2012–13, HC 911), p. 12. A helpful overview is House of Commons Library, *Post-Legislative Scrutiny*, Standard Note SN/PC/05232 (2013).

[112] *Report of the Leader's Group on Working Practices*, para. 138.

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its proposed Post-Legislative Scrutiny Committee, to manage the process of reviewing up to four selected Acts of Parliament each year, has yet to be acted upon.

Interpretive Contexts

The statute's temporal and spatial reach

The first task in interpreting any legislative text is to ascertain when it came or comes into force, its territorial extent, its temporal reach and its duration. Acts of the United Kingdom Parliament typically authorise Ministers to bring their operative provisions into force when the government chooses, apply throughout the United Kingdom unless they specify otherwise (for example, only to England and Wales (Marriage (Wales) Act 2010)) or throughout England and Wales with specific application to Scotland or Northern Ireland (Digital Economy Act 2010), are prospective in operation and remain law until they are repealed. But there are exceptions: for example, those Acts that extend to the whole of the United Kingdom may (European Union Act 2011) but do not necessarily explicitly so specify (Succession to the Crown Act 2013). Some Acts come into force on the day they receive Royal Assent (Prisons (Property) Act 2013) or specify a date when some sections commence leaving further commencement orders to the Government's choosing (Mobile Homes Act 2013), while the primary Acts of the devolved legislatures of Northern Ireland, Scotland and Wales may make their own provision for their commencement.[113] Under the current constitution of the United Kingdom, the primary Acts of the devolved legislatures of Northern Ireland, Scotland and Wales fall for interpretation by the Supreme Court, which, apart from a consideration of their domestic law, in the case of Acts of the National Assembly for Wales involves the co-interpretation of the Welsh language text. Bilingual legislative texts in which the two texts 'are to be treated for all purposes as being of equal standing',[114] are well known in Canada, where there is a substantial jurisprudence, but here will be a novel and significant challenge, and, because Wales is, unlike Northern Ireland and Scotland, not a separate jurisdiction, not just for the Supreme Court.[115]

One of the principles of the rule of law, and of ECHR Article 7, is that legislation should not retrospectively criminalise behaviour that was then

[113] In relation to Acts of the Scottish Parliament, 'commencement' is no longer defined by the Interpretation Act 1978 but by the Interpretation and Legislative Reform (Scotland) Act 2010; *RM (AP) v. The Scottish Ministers (Scotland)* [2012] UKSC 58.

[114] Government of Wales Act 2006, s. 156.

[115] D. Hughes and H. Davies, 'Accessible Bilingual Legislation for Wales', *Statute Law Review*, 33(2) (2012) 103–121, and C. Huws, 'When the Supreme Court was Unable to Interpret Statutes', *Statute Law Review*, 34(3) (2013), 221–238. The analysis of how legislation should be written in the article by Hughes and Davies (also in Welsh at pp. 122–140), interestingly also relies on Fuller's eight routes by which laws may fail.

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lawful, but it is considered to be properly used to rectify earlier errors (Mental Health (Approval Functions) Act 2012),[116] or to respond to a judicial decision, for example, that calls in question the lawfulness of earlier government action seeking compliance with the United Kingdom's international obligations (Terrorist Asset-Freezing etc Act 2010). Occasionally a statute will specify a time limit for its duration. This is the case with the Armed Forces Act 2006, which will need to be renewed every five years (Armed Forces Act 2011), and is seen also in the Debt Relief (Developing Countries) Act 2010, which was due to expire one year after coming into force unless extended by order.[117] This is an example of a 'sunset clause', which provides for automatic expiry after a specified period of the Act (or a Part or sections of it), meaning that further legislative action is required for it to remain in force, with or without modifications.[118] The sunset clause inserted into the Public Bodies Act 2011 following the parliamentary criticism of what would have been a major extension in executive power to dispose of primary legislation by order provides that the bodies named in the Act's Schedules shall, after five years, no longer be subject to those provisions.

Sunset clauses have rarely figured in United Kingdom legislation, but as a result of successive governments' 'better regulation' initiative, which seeks to reduce regulatory burdens on business, they are now more widely used as an alternative to or in conjunction with a novel requirement to review new or amended regulation.[119] A 'review clause' imposes on the relevant department a statutory duty to carry out a review of such regulation to a specified timescale, commencing five years after the regulation became operative. Unlike a sunset clause this does not provide for automatic expiry,[120] but its removal may be the consequence of a review showing that the regulation is disproportionately burdensome; s. 124 of the Police Reform and Social Responsibility Act 2011 provides an extensive example. Review clauses are to be used in primary legislation imposing regulation, but by virtue of an amendment to the Interpretation Act 1978, an Act conferring a power or a duty on a person to make subordinate legislation may include a review or a sunset clause in respect of the regulation imposed by that legislation.[121]

[116] 'Thousands sectioned by unapproved staff', *The Times*, 30 October 2012.

[117] It was; the Debt Relief (Developing Countries) Act 2010 (Permanent Effect) Order 2011 No. 1336.

[118] J. Ip, 'Sunset Clauses and Counterterrorism Legislation', *Public Law* (2013), 74–99.

[119] HM Government, *Sunsetting Regulations: Guidance* (2011). 'As part of the usual pre-legislative clearance process, departments will need to demonstrate to Reducing Regulation Committee (RRC) how their proposals for sunsetting are consistent with the Government's approach to reducing regulation, and justify any departures from the approach set out in this guidance ("comply or explain")', para. 60. The good law initiative has similar aims. 'Excessive complexity hinders economic activity, creating burdens for individuals, businesses and communities. It obstructs good government'; *When Laws Become Too Complex*, p. 1.

[120] This inflexibility may be a powerful objection to its use; Crime and Courts Bill 2012–13, House of Commons, *Public Bill Committee*, 5 February 2013, col. 339 (the Solicitor-General).

[121] Enterprise and Regulatory Reform Act 2013, s. 59(2), inserting s. 14A in the Interpretation Act 1978.

Judicial interpretation: language, context and purpose

Questions concerning what is meant by and how an interpreter, including judicial interpreters, might uncover what was 'the intention of Parliament' when it enacted a particular section of the Act now under consideration continue to generate both puzzlement and discussion of its value for any interpretive exercise.[122] In respect of judicial interpretation, our approach was to analyse, within the court's overarching 'basic task' as conceived by Lord Bingham in the *Quintavalle* case,[123] decisions reported in one year of the *All England Law Reports* that illustrated how judges articulated their understanding of that task in particular cases faced with particular conditions of doubt. Our results are confirmed by a similar exercise in which, of 162 decisions recorded in *Westlaw* in 2013, 117 (72%) related to questions concerning the application of one or more statutory provisions to the facts, and around a third of the total contained specific or more general normative propositions concerning the 'interpretation of statutes' or 'statutory interpretation' as search terms. As articulated by Lord Steyn in *IRC v. McGuckian*, the modern approach to statutory construction 'is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose.'[124] While it was made in the context of the interpretation of tax legislation both the Appellate Committee and the Supreme Court have subsequently unanimously restated this *dictum* as commanding universal application, unless it is clear that Parliament did not intend a purposive interpretation.[125]

A good example of its application is seen in the Supreme Court's decision in *Bloomsbury International Limited and others v. Sea Fish Industry Authority and Department for Environment, Food and Rural Affairs.* This concerned the application of a statutory levy payable by their importers on sea fish and fish products that were, according to s. 4(3)(a) of the Fisheries Act 1981, 'landed in the United Kingdom'. The condition of doubt turned on an ambiguity in that phrase. Did it mean fish brought ashore for the first time, in this instance in the United Kingdom (the narrow meaning), or did it include fish brought into the territory of the United Kingdom, whether directly from the sea or indirectly after having been brought ashore in another country

[122] R. Ekins, *The Nature of Legislative Intent* (2012); N. Duxbury, *Elements of Legislation* (2013).

[123] *R (on the application of Quintavalle) v. Secretary of State for Health* [2003] UKHL 13; *Rules*, pp. 243–248.

[124] [1997] 3 All ER 818, 825.

[125] *Barclays Mercantile Business Finance Ltd v. Mawson (Inspector of Taxes)* [2004] UKHL 51 [28]; and *IRC v. Scottish Provident Institution* [2004] UKHL 52. These decisions, and that in *IRC v. McGuckian,* follow from the landmark decision in *WT Ramsay v. IRC* [1982] AC 300, which held that the interpretation of tax legislation was not *sui generis*, but was to be approached as in any case, from a purposive perspective.

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(the broad meaning)?[126] The importers' case, which had been dismissed in the High Court but accepted in the Court of Appeal, was that the levy could only be imposed upon fish whose first 'landing' after being caught was in the United Kingdom; that is, the narrow meaning. Rejecting this in favour of the broad meaning, Lord Mance, speaking for the majority, observed that 'in matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance. They represent the context in which individual words are to be understood.' Here, the legislation's purpose and scheme were clearly set out in the Act: to promote the efficiency of the sea fish industry, specifically including importers of sea fish or sea fish products, and to impose a levy on importers in order to fund that purpose.[127] The narrow meaning would defeat the purpose since very few of such importers would be caught and thus contribute to the levy. Accordingly the broader meaning, covering any form of bringing the fish into the United Kingdom, commonly by sea or air, wherever the sea fish or fish product may have been first landed after catch, was to be preferred.

Absent a parliamentary intention to exclude it, decisions on the interpretation of tax legislation, and in particular of anti-avoidance provisions, provide many examples of a purposive approach.[128] Rejecting a false choice between 'purposive interpretation and, on the other hand, mechanical or literal interpretation', performance of the basic task does not lie along a tired rehearsal of the literal, golden or mischief rules of interpretation. 'The question, in our view, is not whether to choose between literal or purposive construction. It is clear from the authorities that we should construe any statutory provision in a purposive manner. Instead, the question is how should the purpose of the legislation be ascertained and what consequences flow from purposively construing [the] section.'[129] The answer to the former question is, in the first place, the statutory text. The application of a purposive interpretation 'involves two distinct steps: the first, identifying the purpose of the relevant provision. In doing this, the court should assume that the provision had some purpose and Parliament did not legislate without a purpose. But the purpose must be discernible from the statute: the court must not infer one without a proper foundation for doing so.' The second step is to determine whether facts of the

[126] Adapted from Lord Phillips [2011] UKSC 25 [56]. The case also involved the question whether the levy constituted a customs duty under European Union law, in which case it would be void.

[127] [2011] UKSC 25 [10]–[11].

[128] Where, as in *Mr J P Gilchrist (as trustee of the J P Gilchrist 1993 Settlement) v. The Commissioners for Her Majesty's Revenue & Customs* [2014] UKUT 0169 (TCC) these are decided by the Upper Tribunal Tax and Chancery Chamber, they are, as it is a 'superior court of record', capable of creating precedents having the same persuasive or dispositive value as others of similar status. On the doctrine of precedent, see *Rules*, pp. 279–281.

[129] *Project Blue Limited v. The Commissioners for Her Majesty's Revenue & Customs* [2013] UKFTT 378 (TC) 51 [205]–[206]. In the particular case of tax legislation, it will, for obvious reasons, be the Revenue that would normally seek a purposive interpretation. But 'in so far as it can be said to be a rule of statutory construction it must, if the circumstances warrant it being applied at all, apply for a taxpayer's benefit as well'; *Blenheims Estate and Asset Management Limited v. The Commissioners for Her Majesty's Revenue & Customs* [2013] UKFTT 290 (TC) [85].

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case fall within the defining terms of the section (its protasis) so that the statutory consequences (its apodosis) follow.[130]

The first step is, to emphasise the point, to accord fidelity to the statutory text: 'The starting point for any exercise of statutory interpretation is that the language of the statute should be given its ordinary meaning.'[131] This is so even where the definition of the word (or words) to be interpreted is very wide and thus the consequence for a person caught by them severe. 'Despite the undesirable consequences of the combination of the very wide definition of "terrorism" and the provisions of s. 117 [of the Terrorism Act 2000] it is difficult to see how the natural, very wide, meaning of the definition can properly be cut down by this Court.' Unless the natural meaning of the legislation conflicts with the ECHR,[132] or with any other international obligation of the United Kingdom,[133] 'our function, said Lord Neuberger P in *Gul*, is to interpret the meaning of the definition in its statutory, legal and practical context.' For this purpose, the court may, though the use of Hansard within the terms of *Pepper v. Hart* be inapplicable,[134] 'find comfort' in parliamentary

[130] *Astall and Another v. HMRC* [2009] EWCA Civ 1010 [44], *per* Arden LJ; applied in *Blenheims Estate and Asset Management Limited v. The Commissioners for Her Majesty's Revenue & Customs* [86]–[97], and *DMWSHNZ Limited v. The Commissioners for Her Majesty's Revenue & Customs* [2013] UKFTT 037 (TC), 'We are not concerned with an aggressive tax avoidance scheme in the present appeal, but the principle of purposive construction remains the same' [38]. On the protasis and apodosis of a rule see *Rules*, pp. 90–92.

[131] *Crown Prosecution Service and Secretary of State for the Home Department v. Gohil and Gohil* [2012] EWCA Civ 1550 [26] *per* Lord Neuberger MR.

[132] In the 2013 sweep there were important decisions concerning the application of ECHR to the ban on voting rights for prisoners (*R (on the application of Chester) v. Secretary of State for Justice, McGeoch v. The Lord President of the Council and another* [2013] UKSC 63, heard by seven Justices), the confiscation of the proceeds of crime (*R v. Waya* [2012] UKSC 51, heard by nine Justices), the European Arrest Warrant (*Powierza v. District Court, Warszawa, Poland* [2013] EWHC 36 (Admin), and 'a very unusual case' involving HMRC and ECHR, concerning an unpublished HMRC concession (*H Bishop Electric Company Limited and others v. The Commissioners for Her Majesty's Revenue & Customs* [2013] UKFTT 522 (TC)).

[133] See *Ben Nevis (Holdings) Limited and Metlika Trading Limited v. Commissioners for HM Revenue & Customs* [2013] EWCA Civ 578 [16], applying the principles set out in *Fothergill v. Monarch Airlines Limited* [1981] AC 251 concerning the interpretation of international treaties to which the United Kingdom is a signatory; and *Crown Prosecution Service and Secretary of State for the Home Department v. Gohil and Gohil* [26], where Lord Neuberger MR referred to the 'strong' presumption that Parliament is presumed to legislate in conformity with the United Kingdom's international obligations. This case is of importance also as a decision in which the Court of Appeal held that an earlier decision of the Court was made *per incuriam* by reason of its ignorance of relevant clauses in the international treaty, and so was not binding on it [34]. On the application of the doctrine of precedent in the Court of Appeal, see *Rules*, pp. 285–288. At p. 277 we noted, 'Even a legal system which explicitly prohibits the citation of prior cases in court can be said to have a doctrine of precedent in that it has a rule which regulates the use of precedent.' This is illustrated by the position of Islamic, or Shari'a law. 'There has been no codification of the rules of Shari'a and there is no system of judicial precedent. Muslim scholars have, however, devised guidelines on the interpretation of Shari'a which are treated as authoritative by the courts'; *Shetty v. Al Rushaid Petroleum Investment and Cleveland Bridge Dorman Long Engineering Limited* [2013] EWHC 1152 (Ch) [66], *per* Floyd LJ.

[134] [1993] AC 593; *Rules*, pp. 260–266.

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exchanges with the government Minister,[135] as well as, more generally, reviewing the disputed section's legislative history.[136] This may show that lest the section be reduced to a dead letter, the statutory language must 'be given a sensible and practical effect that will enable it to achieve its obvious purpose.'[137] Similarly, to avoid results that otherwise would be arbitrary and potentially absurd, the court is fully justified in adopting a natural interpretation in which a section in one Act defining an offence is to be read together with a second Act imposing a minimum sentence for a repeated offence, Parliament's purpose being to protect its victims. Nor did this interpretation offend 'the well-known principle of statutory construction, that penal statutes are to be construed strictly in favour of the citizen', as 'Parliament's intention was clear in the present context.'[138] But where Parliament 'has plainly chosen not to adopt unequivocal language which was readily available' a penal statute falls to be construed strictly. This is particularly so where the offence is of the highest gravity and the consequences on conviction severe. 'The duty of a court faced with legislation is faithfully to construe its meaning. It is not to impose upon it a judicial view of what it ought to have said.'[139]

An important element in the Supreme Court's reasoning in *Hughes*, a case concerning the interpretation of s. 3ZB of the Road Traffic Act 1988, was that the principle of legality requires that where Parliament does, as its sovereignty permits it to do, legislate contrary to fundamental principles of human rights, then it must do so in clear words. 'Fundamental rights cannot be overridden by general or ambiguous words.'[140] But whereas in *Hughes* there was no unambiguous text indicating Parliament's intention to displace the principle against penalisation under a doubtful law,[141] the statutory words under consideration in *Fowler v. Commissioner of Police for the Metropolis* were 'sufficiently clear to indicate that Parliament intended them to bear their natural and ordinary meaning, despite the fact that such an interpretation involved overriding essential privacy rights.' The Court of Appeal added, 'the principle of legality is an important tool of statutory interpretation. But it is no more than that. When an issue of statutory interpretation arises, ultimately the question for the

[135] *R v. Gul* [2013] UKSC 64 [38]-[39], *per* Lord Neuberger P. In the *Sea Fish Industry* case Lord Mance similarly found comfort in Hansard without formally invoking its use: 'had it been appropriate to have regard to Hansard, the ministerial statements in response to specific questions in the course of the Bill's passage through Parliament would in my view have confirmed very clearly that [the broader meaning was intended]'; [2011] UKSC 25 [20].

[136] *The Queen (Oao) Omar & Ors v. The Secretary of State for Foreign and Commonwealth Affairs* [2013] EWCA Civ 118.

[137] *The Commissioners for Her Majesty's Revenue & Customs v. The Rank Group Plc* [2013] EWCA Civ 1289 [77].

[138] *R. v. Coleman* [2013] EWCA Crim 544 [21]-[25], *per* Singh J.

[139] *R v. Hughes* [2013] UKSC 56 [13], *per* Lords Hughes and Toulson.

[140] *R v. Secretary of State for the Home Department Ex p Simms and O'Brien* [2000] 2 AC 115, 131E, *per* Lord Hoffmann, cited in *Hughes* [27], *per* Lords Hughes and Toulson.

[141] F. Bennion, *Bennion on Statutory Interpretation* (2008), Part XVII.

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court is always to decide what Parliament intended.'[142] Similar reasoning underpinned the decision in *R (on the application of Jaspers (Treburley) Ltd and others v. Food Standards Agency*, which concerned the interpretation of regulations made to give effect to an EU Regulation imposing an obligation on Member States to collect 'charges' in respect of food businesses[143] Here, it was the collecting agency's argument that a purposive interpretation was needed, which would impose an obligation on such a business to pay the charge. But like penal provisions in statutes, 'a strict approach has to be taken to what is said to be a charging provision. This accords with the approach to the interpretation of such provisions which the Court of Justice has emphasised by reference to the principle of legal certainty.'[144]

If the principle of legality is defeasible when determining from the statute's purpose and the clarity of its language what the interpretation of a contested word or phrase ought to be, so too are the many canons of construction and other normative propositions that congregate around the matter of statutory interpretation; for example, that while statutes *in pari materia* should be construed consistently if possible, 'a later statute is not a reliable guide to the meaning of an earlier one, especially in a field [such as immigration] where social and political pressures have led to fast-moving changes in the legislation',[145] or that when used in statutory texts, ordinary words of the English language should be interpreted according to their natural and ordinary meaning in context, unless that yields a result inconsistent with the statute's purpose.[146] 'The meanings of common words, particularly (as in this case) those which are conceptually abstract, may well vary in accordance with the statutory context in which those words are to be found. Divorcing interpretation from context may tend to mislead rather than to inform.'[147] And not only may a

[142] [2013] EWCA Civ 1342 [28], [31], *per* Lord Dyson MR.

[143] See also decisions underlining the court's obligation when construing EU legislation to adopt a purposive construction even though it may involve some departure from the strict and literal application of the words which the legislature has elected to use, but cautioning also, that 'this exercise is not an untrammelled one. It does not require national courts to impose an artificial or strained interpretation of national law. The court remains engaged in an exercise in interpretation, not rewriting'; *Nemeti and another v. Sabre Insurance Company Limited* [2012] EWHC 3355 (QB) [54], *per* HH Judge Cotter. A succinct summary of the court's obligation is contained in *Jessemey v. Rowstock Ltd & Anr* [2014] EWCA Civ 185 [41], *per* Underhill LJ.

[144] [2013] EWHC 1788 (Admin) [40] *per* Singh J.

[145] *R (on the application of Fitzroy George) v. The Secretary of State for the Home Department* [2014] UKSC 28, *per* Lord Hughes [30].

[146] *Thames Water Utilities Ltd v. Bromley Magistrates' Court* [2013] EWHC 472 (Admin); *Mitsui Sumitomo Insurance Co (Europe) Ltd and others v. The Mayor's Office For Policing And Crime* [2013] EWHC 2734 (Comm); *R v. J, V, B and S* [2013] EWCA Crim 2287; *Local Government Byelaws (Wales) Bill 2012 - Reference by the Attorney General for England and Wales* [2012] UKSC 53; and see generally B. Slocum, 'Linguistics and "Ordinary Meaning" Determinations, *Statute Law Review*, 33(1) (2012), 39–83.

[147] *The Queen (Oao David Gate on Behalf of Transport Solutions for Lancaster and Morecambe) v. The Secretary of State for Transport and Lancashire County Council* [2013] EWHC 2937 (Admin) [22], *per* Turner J.

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particular canon of construction (or presumption) be displaced by the statutory language, but 'there will be many cases, where different canons will point to different answers.' As we noted in the last edition,[148] the notion of normative ambiguity is familiar enough, but, as Lord Neuberger MR continued, that does not call these canons' value into question. Provided that it is remembered that they 'exist to illuminate and help, but not to constrain or inhibit, they remain of real value, provided that they are treated as guidelines rather than railway lines, as servants rather than masters.'[149]

The Court of Appeal's overarching comment on the nature of interpretation warrants repetition. 'Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim or purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents: that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors.'[150] The judiciary's self-imposed limitations on what would otherwise constitute a 'free hand' in interpretation may be analysed in terms of the judicial interpretation of statutes being a 'disciplined activity'.[151] Our approach has been to characterise them as the product of the shared understandings of both the constraints and the freedoms implicit in the judges' position within the constitution and that are made explicit in the interpretive community of which they are members.

A number of the decisions discussed in this section well illustrate both the force and the consequences of the interaction between these constraints and freedoms to disputed matters of interpretation. Of both interpretive and constitutional significance, one of these concerns the way in which the courts apply s. 3 of the Human Rights Act 1998, which provides that 'so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.' Words may be 'read in' which change the meaning of the enacted legislation so as to make it [ECHR] Convention compliant, because 'Parliament cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. But the exercise which the court is called on to perform remains one of interpretation, not legislation: legislation must be '*read* and given effect to'. It is not a

[148] *Rules*, p. 244.

[149] *Cusack v. London Borough of Harrow* [2013] UKSC 40 [57]. See also *Snelling and another v. Burstow Parish Council* [2013] EWCA Civ 1411 [36]–[40].

[150] *Ibid.*, [58].

[151] *Elements of Legislation*, p. NN.

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quasi-legislative power.'[152] A more specific example concerned the question whether legal advice privilege (LAP) ought to be extended to the advice given by a firm of accountants to the solicitors advising a client on its tax affairs. Although LAP is a common law creation, the Supreme Court held that it would not be appropriate for the court now to extend it. One reason was that 'Parliament has relevantly legislated and declined to legislate'; together with other reasons connected with the uncertain scope of any judicially created extension, the majority held that this was a policy issue best left to Parliament, a classic statement of one of the constraints on the judicial interpretation of statutes.[153]

[152] *Benkharbouche v. Embassy of The Republic of Sudan* UKEAT/0401/12/GE [38]-[40], *per* Langstaff J., referring to *Ghaidan v. Goidin-Mendoza* [2004] UKHL 30.

[153] *R (on the application of Prudential plc and another) v. Special Commissioner of Income Tax and another* [2013] UKSC 1 [52]-[72] *per* Lord Neuberger P. See discussion on the role of a final court of appeal in Paterson, pp. 268–282.