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HAS PARLIAMENT AN INTENTION?

by

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In all societies - primitive, ancient and modern - law and order are the basis of social cohesion. Primitive societies may have governments which are rudimentary; governments they are, nonetheless. For when men live in society it becomes the accepted norm that society imposes upon its members certain standards of conduct. These are standards of what may be done or may not be done by the members of the society. The things that should not be done may be referred to as taboos. The taboos help to ensure peace between man and man. Ideas of what is right and what is wrong take root. Acceptance of taboos leads to the creation of customs. Customs in turn become laws, because society imposes sanctions in order to prevent breaches of the customs.

In a modern state, legislation is now the great source of law. Increasingly, Acts of Parliament contain provisions which confer discretionary powers on subordinate authorities to make delegated legislation. Sir George Engels¹ has stated that in 1984 the number of pages of primary legislation in England and Wales was 2,861. In contrast, the number of pages of subsidiary legislation was 6,060.

However, Acts of Parliament remain as the pre-eminent source of law. Legislation as used in this paper is the corpus of the written law. The doctrine of parliamentary sovereignty gives pride of place to an Act of Parliament. It is appreciated that decisions of the courts form part of the corpus of the written law. It is not unknown for an Act of Parliament to supplement the common law. It is not unknown for an Act of Parliament to change or clarify rules of law derived from the common law. It is not unknown for an Act of Parliament to set the record straight after the courts have given a decision. In the United States, Congress must enact legislation within the constitutional framework. The Supreme Court of the United States can - and sometimes does - strike down an Act of Congress as being unconstitutional. This is also the case in many Commonwealth jurisdictions which have written constitutions. In the United Kingdom an Act of Parliament cannot be

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¹ This Article is intended to deal primarily with the Parliament of the United Kingdom. I am indebted to Miss Margaret DeMerieux and Dr. Kenny Anthony of the Faculty of Law, U.W.I., for their very valuable criticisms.

¹ "The Legislative Process Today", *Statute Law Review*, Summer 1987, p. 72.

struck down as being unconstitutional. No court sits as a court of appeal from Parliament.² It is not unknown for the courts, by a process of analogical reasoning, to adopt a statutory rule designed to deal with a particular subject-matter in order to apply it to another subject-matter.

Our lives are now at the mercy of Parliament. Modern Constitutions give power to the Parliament to make laws, subject to the Constitution, for the order and good government of the State.³ But, *what* is Parliament? *Who* is Parliament?

Parliament is an unidentifiable person, faceless perhaps. True it is to say that it is a representative legislature. The individual members of Parliament can be identified. It is an institution set up by the body politic to act on behalf of the people as a whole. And thus one session of Parliament cannot fetter the hands of a subsequent session of Parliament. By its very nature, it is a collection of different and differing individuals. Its acts are supposed to reflect the will of *all* of its members. And that, even though the Opposition abstains. Not *all* of the members vote on any measure at any particular time. Some speak of their *feelings*. Others are glum. There are conflicting intentions among those who speak on a measure. Who speaks for those who are absent? What is *their* intention? Some of the members who take part in the debates know what they are talking about. Others know not whereof they speak. *Quot homines, tot sententiae*. And so when we speak of an Act of Parliament, whose act are we referring to?

In the United Kingdom, and in many Commonwealth countries, the Executive is drawn from Parliament. Ministers are members of Parliament. In Guyana the President is the "Head of State, the Supreme Executive ..." and Parliament consists of the President and the National Assembly.⁴ Malawi has similar provisions in the Constitution.⁵ Parliament is thus the Executive *and* the Legislature - separation of powers notwithstanding.⁶ With the majority of the members of

Parliament, the political party which wins the general election forms the government of the day - the Executive. It cannot now be denied that the executive controls "the use of Parliament's time" and therefore the legislative machine - and thereby controls Parliament. "The Opposition never introduces official bills ... it is not done. They simply attack the Government for not introducing a bill."⁷

It is interesting that in the modern state⁸ the enactment of legislation is a primary function of the Government. Without the capacity to legislate, the Government in any meaningful sense cannot govern. The Executive, in essence, constitutes the source of legislation. It is not denied that a private member can introduce legislation. The Executive, however, can - and sometimes does - easily stifle a private member's bill.⁹ As Sir Noel Hutton put it,

"... there are about 55 days available in the session for Government legislation and the Government controls the use of all that time. Consequently, there is no point in anyone other than a Government draftsman getting a bill ready because it won't be introduced and it won't be passed. Conversely, when the Government does introduce a bill, the bill is almost always going to get through since the Government controls not only the time but the vote on all important matters.¹⁰ How far then can it be said that legislation is more a function of the Government than the function of Parliament?

Let us take, for example, the conception of an Act of Parliament. Three basic processes are involved. First, the formulation of the policy that leads to the enactment of an Act of Parliament. Secondly, the research undertaken by the sponsors of the bill that becomes the Act.

² There is limited judicial review of subsidiary legislation.

³ See, for example, The Independence Constitutions of India, 1949, Jamaica, 1962, and Kenya, 1963.

⁴ Arts. 51 and 89 of the Constitution of Guyana.

⁵ Arts. 18 and 47 of the Constitution of Malawi.

⁶ The enacting formula at the head of an Act of the United Kingdom Parliament states that the Act is enacted by

"... The Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and of the Commons in this present Parliament assembled ..."

The Queen is Head of State. The Prime Minister is the Head of the Government. The Lord Chancellor, the highest judicial officer, presides in the Upper Chamber, the House of Lords, and he is as well a member of the Government.

⁷ Sir Noel Hutton, former First Parliamentary Counsel to the United Kingdom Government, *Professionalizing Legislative Drafting*, ed. Reed Dickerson, p. 113.

⁸ This may even be true of a country such as the United States of America.

⁹ But there are honourable exceptions, such as A.P. Herbert's bill for the Matrimonial Causes Act, 1937 1, Ed. VIII & Geo. 6 c. 57; also the bill for the Adoption Act, 1967, c. 87. Governments will not introduce legislation which is likely to lose them votes. Hence the success of private members' bills such as A.P. Herbert's.

¹⁰ *Professionalizing Legislative Drafting*, op. cit., p. 113.

Thirdly, the technical aspect of the matter, that is to say, the drafting of the bill which becomes an Act of Parliament.

An individual or a group of persons may be interested in a particular measure. That measure may call for the exercise of the legislative power of the state. That individual may or may not be a member of Parliament. Whoever he is, behind his interest there lurks a motive, social, or political, or economic, or personal in character. Legislation becomes a means to an end for the achievement of some, at least, of all of his purposes. A group of persons may be a political party which seeks to have its political philosophies translated into law. It is the party in power. Departmental officials make recommendations to the Minister for legislation to be introduced to deal with specific issues. Committees of Parliament make recommendations for legislation. Public and private organizations make suggestions which result in legislation. In all these instances there is the conviction that a situation exists which calls for legislation.

This leads to the investigation of the social devices which would suggest the remedies for the problems that call for legislation. In this investigation, recourse may be had to legislative committees, to lobbyists, to any person or persons directly or indirectly interested. At each stage of the investigation there will be studies commissioned, conferences and consultations constituted, and conflicts of interests resolved. There may be public debate generated by a Government White Paper. When ideas have crystallised, a decision will be taken that there is need for legislation. A summary of the various proposals will be submitted to, say, the Minister under whose portfolio the subject-matter of the proposals falls. In some cases the public may not be aware of all these happenings until a hint is given in the "Speech from the Throne", when what is involved is a major piece of legislation.

Lastly, after Cabinet approval has been obtained, instructions are sent to parliamentary counsel to draft the required bill. Parliamentary counsel prepares the draft of the bill. It is sent to the sponsoring Ministry for comments. Others, in special circumstances, may be asked for their comments. There may be a few revised drafts. Finally, the bill as settled between parliamentary counsel and the sponsoring Ministry is sent to the Cabinet Committee on Legislation - and then to the Cabinet as a whole for approval for introduction in Parliament. In all these stages, Parliament, in the vast majority of cases, has had no hand. The Cabinet,

which is in essence the Executive,¹¹ handles policy considerations. It reviews the draft of the bill. It calls for amendments. It makes suggestions. But the final product is the work of parliamentary counsel. After the publication of the bill, more comments may be made on it. Suggestions are put forward for consideration by the responsible Minister. Parliamentary counsel will consider all these comments and suggestions.

But Parliament is the legislature. It is the arm of the State vested with the law-making power. Its approval and the assent of the Head of State turn the bill into an Act of Parliament. Though a Bill passed by Parliament and assented to becomes an Act of Parliament, it is, in essence, an *act* of the government of the day.

The legislative programme of Parliament depends upon the legislative programme arranged by the Government. The Cabinet Committee on Legislation is the organ of the Cabinet which is responsible for co-ordinating the legislative programme. It also examines draft bills to ensure that they conform to government policy and that they comply with the decisions of the Cabinet. Its aim is the prompt and efficient despatch of the business in Parliament of the government of the day. This it does by

- (a) ensuring that legislation considered by the Government as being essential to the implementation of its policies is dealt with in Parliament at the most appropriate and effective time, keeping the flow of less essential legislation to the progress of essential legislation;
- (b) organising the introduction of legislation in Parliament to allow sufficient time for debate.¹²

In a number of Commonwealth jurisdictions parliamentary counsel attend the meetings of the Cabinet Committee on Legislation and, at times, meetings of the Cabinet. They deal with issues that arise when a bill is dealt with clause by clause at that Committee or at Cabinet. They may redraft certain provisions of the bill there and then, or submit a revised draft to the Committee for further scrutiny before the bill is considered by Cabinet and before publication of the Bill in the *Gazette*.

¹¹ The Prime Minister and his Cabinet are servants of the Crown. They act in the name of the Crown. Hence the term, "Her Majesty's Government of the United Kingdom."

¹² The Australian Government publishes a *Handbook on Legislation* which is very useful in these matters.

When a bill is introduced in Parliament¹³ it is read a first time. First Reading means that the Clerk announces the title of the bill. The Minister responsible for the bill rises in his place and bows. That is First Reading. It is a reminder of the days when bills were actually read in Parliament as most members then could not read or write. There is no debate on the bill at this stage.

The next stage is Second Reading. At this stage the principles of the bill are fully debated. No amendments are permitted. However, a member in the course of his speech may give an indication of his intention to move an amendment at the appropriate stage. In recent years, the Second Reading of a bill may be referred to a special second reading committee. The committee reports to the Whole House which then formally resolves that the bill be read a second time.

The Committee Stage follows the Second Reading. The Committee Stage is the most important part of the procedure. At this stage the bill is debated clause by clause. The principles of the bill cannot be debated. A motion is moved in respect of each clause to "stand part of the Bill". There is usually an informal atmosphere. A member may speak more than once to the same question. Amendments put down usually come from the Minister sponsoring the bill, departmental officials, even parliamentary counsel. Where amendments are accepted, parliamentary counsel drafts the required amendments. In the words of Sir Noel Hutton, when a bill is introduced in Parliament,

"... the draftsman's work is by no means over. He settles the notice of introduction and any parliamentary resolutions, including any guillotine resolutions. He attends all stages at which the bill can be amended. He is there in order to advise the Minister in charge, and the Speaker, or the Chairman when the bill is in a standing committee, about amendments. The draftsman examines all proposed amendments to the bill and on these advises the department and the officers of the House as necessary. He drafts all Government amendments, which because of changes in policy are often very extensive.¹⁴

At the Report Stage the Bill as amended in Committee is reported to the House. Where the House is not satisfied, the Bill may be sent back

¹³ Where there are two Chambers the procedure is repeated. When the Upper and the Lower Chambers do not agree on amendments, usually a committee of both Chambers is constituted to resolve the differences.

¹⁴ *Professionalizing Legislative Drafting*, op. cit., p. 118.

to the Committee. Occasionally, but not usually, amendments may be made at the Report Stage.

Finally, the bill is read a third time. At Third Reading debate is brief. General comments on the bill as a whole may be dealt with. The bill as then passed by Parliament is submitted for the assent. When the assent is given, the bill becomes an Act of Parliament.

Due to its importance a little more needs to be said about the Committee Stage. Normally, bills are dealt with at this stage by a Committee of the Whole House. Increasingly, standing committees are chosen by the Committee of Selection. A standing committee reflects the strength of the political party structure in the House itself. It is a miniature Parliament. Amendments are put down for the Committee's consideration. These amendments are drafted by the parliamentary counsel who drafted the bill before the Committee. The language used is that of parliamentary counsel. Each amendment is fully debated. At the end of each debate there is a motion that the clause as originally presented or as amended stand part of the Bill.

Amendments moved by the Opposition or the Government's own backbenchers are sometimes accepted. Most probably the amendments are withdrawn when the Minister in charge of a bill gives an undertaking that he will reconsider the substance of the provision to meet a point raised on the particular clause. Many are the situations when the Government will not agree to an amendment, however controversial the bill is.¹⁵

Gerald Kaufman¹⁶ gives us a very graphic idea of how the committee system works in the House of Commons:

"Once a Member goes into the committee room, he or she is encapsulated in a private world, his life governed by the hours the committee sits and the party to which he belongs. If he is a Government backbencher, the sole expectation of him is that he sits silently, except when votes take place and he is required to call out "Aye" or "No", as instructed by his harassed but unrelenting whip; ... Apart from monosyllabic voting utterances, nothing whatever is expected from supporters of the administration, who sit at their desks, studying their constituency

¹⁵ An example is the European Communities Bill - de Smith, *Constitutional and Administrative Law*, 5th edn., p. 291.

¹⁶ *The Listener*, March 29, 1984.

correspondence, from time to time looking up in case something interesting might be happening.

Ministers in charge of piloting the bill are amply, indeed almost excessively, briefed. They are issued with one set of folders marked 'Notes on Clauses', which explain to them what each clause of their bill is supposed to, and in some cases actually does, mean. As Opposition MPs rise to move amendments, the Minister due to reply consults another folder, entitled 'Notes on Amendments'.

Some of these notes are headed 'Resist', which means that at the end of the debate the backbencher will have to be on hand to call out "No." Others - a much rarer genus - have the heading 'Accept'. The third heading, 'Consider', imposes on the Minister the testing responsibility of actually listening to the debate and making up his own mind on the merits of the arguments. When Opposition members irritatingly ask awkward questions, answers to which are contained neither in 'Notes on Clauses' nor in 'Notes on Amendments', solicitous civil servants (two of whom sit on the chairman's dais, with others huddled in a corner) will pass the Minister little notes ..."

He continues-

"... A Minister in charge of the Trade Union Bill has just disgraced himself by demonstrating ignorance of the name of one of the most famous trade unions. A committee has suspended the sitting because an Opposition MP has discovered a rare procedural flaw. Another Opposition MP on another committee has just completed a six-hour speech on the subject of strawberries, on a bill that has nothing whatever to do with strawberries. From time to time, these reports will be interrupted by stentorian cries of, say, "Division in Fourteen", as the policeman stationed at the entrance of Room 14 holds open the door while MPs from that committee scald the roofs of their mouths by bolting their coffee and hasten to vote."

Sir Noel Hutton has also stated that,

"In general the only amendments that are actually made in the Government bill are those amendments which are proposed by the Government and those which were agreed to by the Minister in charge of the bill. The former are always drafted by the parliamentary counsel in charge of the bill; and as to those proposed by other members, his advice is nearly always taken and acted on. If a proposed amendment is acceptable to the

Minister as a matter of policy but is defective in form, then either the amendment will be made and sorted out at a later stage by further Government amendments, or it will be withdrawn on a promise by the Minister to promote a Government amendment at a later stage. The latter practice in turn leads to the accusation that the Government draftsmen, sheltering behind the Minister, exercise far too much control over the language and structure of legislation, thus making a mockery of the true democratic process."¹⁷

And Michael Zander¹⁸ gives another telling example:

"The Official Secrets Act 1911, which is still law today and has given rise to endless controversy, passed all its stages in a single day in August of that year. Twenty years later, the junior minister who piloted the bill through the House of Commons described the event:

'I got up and proposed that the bill be read a second time, explaining, in two sentences only, that it was considered desirable in the public interest that the measure should be passed. Hardly a word was said and the bill was read a second time; two men got up to speak, but both were forcibly pulled down by their neighbours after they had uttered a few sentences, and the Committee Stage was passed. The Speaker walked back to his chair and said: 'The question is, that I report this bill without amendment to the House.' Again two or three people stood up; again they were pulled down by their neighbours, and the Report Stage was through. The Speaker turned to me and said: 'The Third Reading, what day?' 'Now, sir,' I replied. My heart beat fast as the Speaker said: 'The question is that this bill be read a third time.' It was open to anyone of all the members in the House of Commons to get up and say that no bill had ever yet

¹⁷ *Professionalizing Legislative Drafting*, op. cit., p. 118

¹⁸ *A Matter of Justice*, p. 261. And see Hugo Young, "Parliament's conspiracy of deception", *The Guardian Weekly*, Vol. 141, No. 21, week ending November 26, 1989: "... Parliament exerts little control over Ministers, in any field. Their accountability is a thin and painless phenomenon. Ministers and backbenchers have an identical interest in denying that this is so. But they enter a conspiracy of deception. Parliament may sometimes be a nuisance, but to the Government with a strong majority it is never a threat ... Nor is there any refined or reliable thread running between Parliament and the people's wishes. Mandate and Manifesto are important words in the vocabulary of illusion ..."

passed through all its stages in one day without a word of explanation from the Minister in charge ... But to the eternal honour of those members, to whom I now offer, on behalf of that and all succeeding Governments, my most grateful thanks, not one man seriously opposed, and in a little more time that it has taken to write these words that formidable piece of legislation was passed."

In the United States of America, a legislative committee of Congress commands the presence, under pain of punishment, of any person it feels would be of assistance in the deliberations on a bill in committee. It calls for documents that would assist. It conducts investigations into the necessity and scope of legislation before it. It holds sittings in private as well as in public to receive oral evidence from all manner of persons who evince an interest in the bill before the committee. This procedure in the Congress of the United States seems to be gaining ground in some Commonwealth jurisdictions.

Throughout all the stages of a bill in Parliament, Parliament gives its stamp of approval to the "art of the parliamentary counsel". How true is the assertion that,

"The legislature, when they intend to pass, to constitute, or to repeal a law, are not bound to use any precise form of words?"¹⁹

That assertion is but a reminder that in days gone by Acts were drafted by Judges and Privy Councillors. By 1487, barristers in private practice as well as counsel in government departments were the draftsmen of bills. It was William Pitt who attempted to organise the preparation of statutes by standing counsel.²⁰ It was not until 1869 that, as a result of a Treasury Minute dated the 8th February, the Office of Parliamentary Counsel was set up. A select committee was appointed in 1875 to consider the means that could be adopted to improve the manner and language of legislation. In its report, the committee stated that the object of the Treasury Minute of 8th February, 1869 was

"to establish an official department, at the head of which should be a parliamentary counsel of great experience, to whom all the Government Departments in England should have a right to go,

¹⁹ Said the twelve judges in *Longmeads case* (1795) Leach C. C. 694, 696, quoted in *Craies on Statute Law* (7th edn.), p. 21.

²⁰ Ibert, *Legislative Methods and Forms*, p. 77.

so that there should be some person directly responsible for all their bills if anything went wrong."²¹

This, however, did not lead to the immediate establishment of the Office of Parliamentary Counsel being solely responsible for the preparation of legislation. For many years thereafter, practising counsel drafted many bills in their own chambers. They were paid fees according to the amount of work done. But the Treasury Minute did have effect.

Be that as it may, the drafting of legislation is indeed a tradition which is deeply rooted in the past. The hand that wrote the Ten Commandments we shall never know. We do know that the *juris prudentes* of Rome, with the help of the *scribae*, drafted legislation. The "jurists left the drafting of the statutes to the *scribae*, who neither desired to give up their involved style, nor were capable of doing so."²² Tribonian also appears to have had a great deal to do with the legislation of Justinian.²³ But long before Rome and Greece we had the laws of Manu. The Code of Manu is described as, in the original,

"Written in verse and divided into twelve chapters. In most Parts, the rules are so clearly and concisely stated that nothing can be gained by attempting to summarise or condense."²⁴

We have had the codes of Hammurabi - the "completest and most perfect monument of Babylonian Law."²⁵ And Ashoka in India issued edicts carved in rock and metal. "Those edicts spread out all over India are still with us, and conveyed his messages not only to his people but to posterity ..."²⁶

A statute has been defined as "the will of the legislature."²⁷ The function of a court of competent jurisdiction in relation to an Act of Parliament is to interpret that Act "according to the intent of them that made it."²⁸ This statement by Coke has, to a great extent, down the ages, influenced the judges in the interpretation of an Act of Parliament.

²¹ *Ibid.*, p. 77. Italics supplied.

²² Schutz, *Principles of Roman Law* (1936), p. 80.

²³ Buckland, *A Textbook of Roman Law*, 2nd edn., p. 39.

²⁴ S. Allen, *The Evolution of Governments and Laws* (1916), p. 1005.

²⁵ *Encyclopaedia Britannica* (1968), Vol. II, p. 41.

²⁶ Nehru, *The Discovery of India*, p. 79.

²⁷ *Maxwell on the Interpretation of Statutes*, 11th edn., p. 1.

²⁸ Coke, 4 Institutes 330, quoted in *Maxwell*, op. cit., p. 1.

The judges have always maintained that it is their function to give expression to the intention of Parliament.²⁹ And in *Warburton v. Loveland*³⁰ it was stated that,

"Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature."

In *S.E. Rly. v. Railway Commissioners*,³¹ Cockburn C.J. thought that where the meaning of an Act was doubtful the judges were at liberty to refer to the circumstances under which the Act was passed into law as a means of solving the difficulty. Lord Reid³² has stated that there was room for exception where examining the proceedings in Parliament would almost certainly settle the matter immediately one way or the other. There is the 18th century view³³ that the sense and meaning of an Act of Parliament must be collected from what it says when passed into law, "and not from the history of changes it underwent in the House where it took its rise."

An Act of Parliament does not take "its rise" from Parliament. It takes its rise, as has been demonstrated, from other sources. Willes J. strikes a worthy note when he says that we must not take into account the history of changes an Act underwent in the House. Can what happened during the progress of a bill in Parliament really be a guide to the interpretation of a provision of the Act? Parliamentary debates, at best, reflect the political, social and economic forces behind the bill. They may indicate how the other side would want to deal with the same matter had it the power to do so. For the motive behind legislation is to realise a purpose, be it social or economic. Both the Government and the Opposition seek to satisfy the demands of their respective political parties. The debates also show how members of Parliament clear their consciences, bearing in mind that the general election may not be far away.

And so "examining the proceedings in Parliament" would not "almost certainly settle the matter". But if "the circumstances under which it passed into law" mean the objects and purposes of the Act, then there is

²⁹ *Sussex Peerage case* (1844) 11 Cl. & F. 85, per Tindal C.J.

³⁰ (1832) 2 D & C 1, (H.L.) 480, 489. See also the *Sussex Peerage case*, *ibid*.

³¹ (1880) 2 Q.B.D. 217, 226.

³² *Beswick v. Beswick* [1968] A.C. 88.

³³ *Millar v. Taylor* (1769) 4 Burr. 2303, 2332.

room for improvement. The Act was not enacted for the sake of its details but to achieve a purpose. And, therefore, when it is settled that the meaning must be collected from what the Act says, attention, it is submitted, must be directed towards the problems that gave rise to its introduction into Parliament in the form of a bill. And since we cannot take into consideration what Parliament said during the passage of a bill in Parliament, how can we talk of the intention of Parliament?

So what is the "intention of Parliament"? It is a myth encouraged by the doctrine of separation of powers. It is a mere dogma, fundamental though it may be considered to be in the study of the science of government. To begin with, Parliament never had an intention to introduce legislation. Others had. Most probably, the government of the day. Parliament did not, in the nature of things, write what is called its Act. Parliamentary counsel did. According to de Smith,³⁴

"... a very large majority of Government bills introduced into Parliament by Ministers are passed into law substantially in their original form."

Gerald Kaufman³⁵ has also demonstrated how ineffective Parliament is - through its committee system, *where the real work of legislation should be done* - to put its intention into legislation brought by the Executive. Has not the time come for us to abandon the deceptions of political or constitutional theory and of mythology, and acknowledge that the judges in interpreting an Act of Parliament seek to find solutions to the problems that arise within society - social problems posed by social questions? We may argue till the end of time whether or not judges make law; whether or not they usurp the functions of Parliament through the process of the interpretation of an Act of Parliament; whether or not their judgments are based upon principles or policy. We shall, at the end of the day, come to appreciate that the facts that lead to the interpretation of a piece of legislation were not - or may not have been - in the contemplation of those who sponsored that legislation, nor of those who drafted it; nor of those who enacted that piece of legislation.

Legislation is introduced to deal with *situations that have arisen*. There is then the hope that those situations will not occur in the future since the law has provided a solution for them. What happens is that

³⁴ *Constitutional and Administrative Law*, 5th edn., p. 247.

³⁵ See p. 39 *ante*. Paul Meredith, in the Introduction to his article, 'Legislation: Educational Reform', refers to the "elective dictatorship" of Parliament: (1989) 52 *Modern Law Review*, pp. 215-216.

when *other* situations arise in the future we seek to bring them within the ambit of what has been provided for. And the judges do their best to relate the law to the facts of the situation that has now arisen in order to reflect the conscience of society as a whole.³⁶

Although a piece of legislation deals with the past, it also speaks to the future in the hope that a problem dealt with would not occur again. If it does occur again there is legislation to deal with it. Legislation is thus but a reflection of social progress in any given society. It is a mirror of that society.

Was Coke really referring to Parliament as we know it today in his use of the celebrated phrase, "according to the intent of them that made it"? How effective was Parliament in the sixteenth and seventeenth centuries? Parliament in Coke's day was, in essence, the Sovereign. And was not legislation in those centuries drafted by the judges? They not only drafted the statutes; they voted on them as well. There is that celebrated remark,

"Do not gloss the statute. We know better than you, for we made it."³⁷

So surely, when Coke refers to the "intent of them that made it," he was referring to the "lions under the throne". The judges used to sit as members of the House of Lords.

Experience has taught us that Parliament has no mind. And if Parliament has no mind, how can it have an intention? Nor can we talk of "the collective intention of members of Parliament". Is there such an intention? To find the intention of Parliament,

"it may be more realistic to accept the Act as printed as being the product of the whole legislative process, and to give due weight to anything found in the printed Act ...

If we take these matters into consideration, then we are in effect searching for the intention of the draftsman rather than the intention of Parliament. And then it becomes very relevant to ask - could any competent draftsman have adopted this form of drafting if he had intended the result for which the appellant

³⁶ This will depend to a great extent on the view of interpretation adopted.

³⁷ Year Book 33 and 34. Ed. 1, 82.

contends? If the answer is no, then there is such doubt that it must be resolved in favour of the accused."³⁸

Students of Parliament know that Parliament today is a constitutional development of the *curia regis* of the Norman kings. With the creation of the separate courts for the judicial business of the *curia regis*, the consideration of extra legal questions was left to the Council in Parliament. In mediaeval times a meeting of the King in Council was a *parlement* or *parlamentum*. To the *parlement* the judges were summoned for the consideration of pleas and petitions. This *concilium regis ad parlamenta* or *in parlamentum* had as its purpose the task of improving the law. But law then was not legislation as we know it today. It was custom.

In the 14th century the separation of the King's Council from Parliament was established. The Council was part of Parliament even then, as the Executive today is part of Parliament. Meetings of Parliament were very infrequent. The result was that the Council dealt with minor grievances. By the end of Henry V's reign, "Council" and "Parliament" had established themselves as different bodies.

With the establishment and development of the Court of Common Pleas, the Court of King's Bench, the Court of Exchequer, the Court of the Justices of Eyre and the Courts of Justices, the judicial work of the High Court of Parliament gradually diminished. That led to an increase in the importance of the work of Parliament as a legislature. A law might be considered in the Council. The bill to bring it about would be referred to the Lords and Commons as part of the Council in Parliament. This gradually led to the distinction between Ordinances, that is to say, laws assented to by the King in Council,³⁹ and statutes - laws assented to by the King in Parliament. Statutes were entered on the statute roll and thus assumed a high degree of authority.

Why then do we talk of the intention of Parliament? I suspect it is the influence of Coke as already stated, and of Locke and Montesquieu. Locke⁴⁰ taught us that men have certain inalienable rights; rights that were beyond the reach of any government. Life, liberty and the pursuit

³⁸ Lord Reid in *Director of Public Prosecutions v. Schildkamp* [1971] A.C. 1 at p. 10.

³⁹ Hence the term "Ordinance" as used for Colonial Statutes. They were subject to disallowance by the Governor under Letters Patent; Colonial Laws Validity Act 1865, s.4.

⁴⁰ *Second Treatise of Government*, ss. 6, 24-27, 135.

of happiness are sacred rights.⁴¹ This theory of the natural rights of man influenced the doctrine held by the judges that certain laws regarding life, liberty and property, were so fundamental that they should be placed beyond the reach of Parliament. Holt C.J. said that,

"If an Act give away the property of a subject, it ought not to be countenanced."⁴²

No judge in the United Kingdom today would say such a thing!

Montesquieu⁴³ taught us that liberty is sustained by the doctrine of the separation of powers. This the judges interpreted to mean that they did not make the law. Their function was to apply it. It is the legislature that makes the law. One effect of the 1688 Revolution⁴⁴ was to cut the royal prerogative to the bone.⁴⁵ The King's wish was no longer a command. Hobbes' sovereign had vanished. Governmental action had to be justified by the law; and that meant Parliament, a new sovereign, representative of the will of the people - if such a will there is.

Blackstone stated that,

"... if Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it."⁴⁶

Would it not be better then to talk of the legislative intent, that is to say, the object and purpose of the legislation rather than the intention of Parliament? Would it not be better to talk of the intention of the sponsors of the bill which became the Act of Parliament - the policy behind the law? The sponsors, whether they be lobbyists or individuals or a political party, are the *source* of what we now call the intention of Parliament. Would it not be better to admit that what the judges do in interpretation is to restore certainty for the uncertainties of meaning in a particular provision of an Act of Parliament in the light of social

⁴¹ This found expression in the Constitution of the United States.

⁴² *Callady v. Pilkinton* (1707) 12 Mod. 573.

⁴³ *L'Esprit de Lois*.

⁴⁴ The "Glorious Revolution" established the sovereignty of Parliament, though it can be said that Parliament represented 10% of the male population. That Parliament placed power securely in the Whig Oligarchy. It ruled Britain until the 19th century, by which time the power of the Whigs was on the decline.

⁴⁵ In the *Case of Proclamations* (1610) 12 Co. Rep. 74, judges asserted their right to determine the limits of the prerogative. And since the 1688 Revolution the Crown has not contested that claim of the judges. See also *R. v. Lewes JJ. ex p. Home Secretary* [1973] A.C. 388 (H.L.).

⁴⁶ *Commentaries* (1766), Vol. 1, at p. 91.

conditions,⁴⁷ and not to divine the intention of Parliament? Such uncertainty may be brought about by an ambiguity in the provision, an omission in the law or the vagueness in the use of words that constitute the provision which is called in question.

Would it not be better to appreciate that what Parliament did in relation to an Act of Parliament, was to give its approval, as the legislative arm of government, to an intention conceived, nurtured and brought forth by others? They that "made" the law were not the members of Parliament. *Some* members of Parliament were, most probably, dragooned into saying "Aye" to a bill that had been drafted by parliamentary counsel based on drafting instructions prepared by a Ministry.

A building inspector who approves a house as being fit for human habitation is not the architect of that house. Still less can he claim to be the person who built the house. And of the majority who vote in favour of the passing of a bill, it would be wrong to assert that they had a common intention regarding the details, whether of minor or major importance, of the detailed provisions of the bill. The votes of the majority are but an indication of the success of the Government whips.

Should the legislative draftsman give evidence as to what is meant by a particular provision which is the subject of interpretation by the court? The answer is "No." In the first place, there is the principle of Civil Service anonymity. It is a good principle which should be preserved as far as the drafting of legislation is concerned.⁴⁸

Secondly, there is grave danger in making a legislative draftsman a reliable authority on the meaning of what he has drafted. There is a vast difference between a thought and the expression of that thought in written form. In *Hilder v. Dexter* Lord Halsbury⁴⁹ said that the draftsman is the worst person in the world to consult on the intent of legislation. The reason is that the legislative draftsman would be unconsciously influenced by what he meant rather than by what he expressed. In that case, Lord Halsbury had drafted the statute. And even though we have travelled a long road since Halsbury's day, the legislative draftsman should certainly be spared the embarrassment of

⁴⁷ Much, though, will depend on the judge's philosophy of interpretation.

⁴⁸ Any serious-minded person, though, can in fact know the identity of the legislative draftsman of a particular bill by attending the Committee Stages of the bill.

⁴⁹ [1902] A.C. 474, 477.

having to face the distinction between what he *meant* and what he had *expressed* - and what he *thought* he had expressed.

But what about those who conceived the idea, those who instructed the legislative draftsman? A bill which becomes an Act of Parliament is rarely, today, the work of one man. The draftsman carries out the wishes of the sponsoring Ministry.

In civil law countries the reports of those who codified the law are used as sources of interpretation of ambiguous provisions of extant codes. The memorandum to a bill does, also, under our system, supply useful information regarding the intention of the legislative draftsman and of the sponsors of a bill. The function of a memorandum to a bill is to give sufficient background information to set "in perspective and in context the facts and problems which the legislative proposal is intended to meet." It also indicates the principal objectives of the legislation and the means by which those objectives are intended to be achieved, as well as the known implications and difficulties, whether legal, social or administrative. Equally, a memorandum to a bill is intended to assist members of Parliament in understanding the bill.

The English courts, however, do not, as a rule, refer to the memorandum to a bill as an aid to interpretation. No doubt, such a memorandum, especially in the case of a bill of considerable importance, would contain very useful information as to the intention of the legislative draftsman and of the sponsors. Equally, the courts do not countenance explanatory notes issued by departmental officials for the guidance of their officers for the purpose of construing an Act sponsored by the Ministry. It could be argued that there is the danger here that a court may be unduly influenced by official opinion. But would it? Cannot the court make up its own mind in the process of which it may derive assistance from such an explanatory note?

It seems to me that what the sponsors wanted to achieve is very important in the process of interpretation. We are reluctant to appreciate this simple truth. That leads to the situation where the problem which brought the solution in the form of a provision of an Act of Parliament is side-tracked and semantics govern the day. *Heydon's Case*⁵⁰ must still have some relevance if we consider not only "the mischief and defect for which the common law did not provide" but also the problems and defects for which the law was conceived, nurtured and presented to Parliament as a bill,

⁵⁰ (1884) 3 Co. Rep. 7a.

"and then the office of all the judges is always to make such construction as shall [solve the problems which have arisen, and advance the solution to the problems] and to suppress subtle inventions and evasions [*which do not accord with the objects and purposes of the Act*] and to add force and life to the cure and remedy according to the objects and purposes of the Act, [*the demands of society and the dictates of common sense and justice*]." ⁵¹

This approach is, in my view, the one taken in *Smith v. Hughes*.⁵² In that case the words "in a street", used in section 1(1) of the Street Offences Act 1959, were construed to bring prostitutes, who attracted the attention of passers-by from balconies or windows, within the ambit of the Act. Lord Parker⁵³ stated that for his part he approached

"the matter by considering what is the mischief aimed at by the Act. Everybody knows that this was an Act intended to clean up the streets, to enable people to walk along the streets without being molested or solicited by common prostitutes."⁵⁴

Would it be wrong for a court of competent jurisdiction, when faced with a problem of interpretation of an enactment, to look at the legislative history of the enactment? The traditional view is that we seek to divine the intention of the legislature. But what is the problem here? The courts at this stage seek to concern themselves with what, it is said, the legislature had failed to provide for. The question really is, was it the legislature which had failed to provide for what appeared to be missing, or was it that those responsible for the introduction of the bill to the legislature did not anticipate the situation that had arisen and had therefore failed to provide for it? Was it that the policy makers, the departmental officials and the legislative draftsmen had all missed the boat?

If it is a question of awkward phraseology, surely the legislative draftsman primarily is to blame. What is wrong in the courts putting themselves in the position of the legislative draftsman or the departmental officials and asking what he or they would have done if his or their attention had been drawn to the problem that has arisen? Surely the

⁵¹ The italics and the words in the square brackets are supplied.

⁵² [1960] 1 W.L.R. 830.

⁵³ *Ibid.* at p. 832.

⁵⁴ See also *R. v. Males* [1962] 2 Q.B. 500. In *Lower v. Sorrell* [1963] 1 Q.B. 959, Ormrod L.J., at p. 968, adopted an interpretation that would have the effect of defeating the purpose of the Agricultural Holdings Act 1948.

"Memorandum to the Bill" or "the Objects and Reasons" of the Bill contain, or should contain, sufficient information to help, at least, solve the present problem of interpretation? That is why the legislative draftsman, in addition to the technical aspects of legislative drafting, must always make

"a conscientious effort to provide meaningful statements of purpose or policy. Judges are concerned with trying to focus on the problem that [the legislature] has not considered, and often they can get a foothold on the situation only by looking at the problems that were considered in the light of general objectives."⁵⁵

And that takes us back to the principle in *Heydon's Case*:⁵⁶ that a court should consider the history of the enactment, that is to say, the circumstances under which it was enacted. In 1958 Lord Denning⁵⁷ said that,

"We do not refer to legislative history as they do in America; we do not look at the explanatory memoranda which preface bills before Parliament ..."

But in 1964 he said,

"It is legitimate to look at the report of a committee leading to legislation so as to see what was the mischief at which the Act was directed; but you cannot look at what the committee recommended, or at least, if you do look at it, you should not be unduly influenced by it."⁵⁸

No doubt it is now recognised that the report of a committee, and for that matter of a commission of inquiry,⁵⁹ contains very useful

⁵⁵ Harold Leventhal, "How the Problem Looks to the Courts", in *Professionalizing Legislative Drafting*, ed. Reed Dickerson.

(1884) 3 Co. Rep. 7a; and see p. 50, ante.

⁵⁶ *Escoigne Properties Ltd. v. I.R.C.* [1958] A.C. 549 (H.L.).

⁵⁷ *Letang v. Cooper* [1964] 2 Q.B. 53. Lord Denning's approach to interpretation has not been free of criticism even by the House of Lords.

⁵⁸ Ghana has a provision in its Interpretation Act 1960 which allows the courts to look at the report of a Commission of Inquiry in these matters. Australia has a similar provision. But Sir Noel Hutton considers that, "A government report in particular is not a reliable basis for the interpretation of subsequent legislation. Very often the Act is deliberately not intended to reflect what the original report said, and this is just a method of making things worse." *Professionalizing Legislative Drafting*, ed. Reed Dickerson. See, however, *Duke v. G.E.C. Reliance Ltd.* [1988] 1 All E.R. 626 and Lord Templeman's dictum, at p. 634; *Pickstone v. Freemans plc* [1988] 2 All E.R. 803.

information as well as limits as to what was the mischief at which the Act was directed.

There may well be the nagging fear that where legislation is interpreted by reference to the objects and purposes of the Act, it may be impossible to determine with certainty what the law really is at any given time. What of it? That argument presupposes that those who advise litigants before action is taken are incapable of seeing an injustice where there is one. When a judge takes the judicial oath, he swears by Almighty God to do justice between man and the State, between man and man.

It has been indicated that⁶⁰ an increasing number of Acts of Parliament give discretionary powers to Ministers - in effect to departmental officials - to issue Regulations. In some cases there are no guidelines. In respect of expressions such as

"The Minister may by order make Regulations for the purposes of this Act,"

what is the Minister to prescribe? The Local Government Revenue Act 1988, gives power in almost every sentence to the Secretary of State to make Regulations. Those Regulations are intended to deal with exemptions, penalties, the enforcement of payments and appeals.

When a provision of a Regulation under that Act comes up for interpretation, can we sincerely talk of the intention of Parliament? There are the procedures of negative and affirmative resolutions to give Parliament effective control of delegated legislation. What is the practice? How effective is the Standing Committee on Delegated Legislation? Does it not suffer the fate of all other Committees of Parliament? Perhaps we need another Committee on Ministers' Powers⁶¹ to review the recommendations of the 1932 Committee, to investigate how far the 1932 recommendations have worked in the light of the dominance in Parliament of the political party that forms the Government, and how far we can move away from the mechanical consideration of legislation in Parliament to a system which will allow a *real* influence of Parliament as the legislative arm of Government - for us to talk of the intention of Parliament!

Granted the argument in favour of the intention of Parliament, if Parliament did not see or foresee the injustice in what it has provided, why should not judges who see it when dealing with the lives and

⁶⁰ See p. 37, *supra*.

⁶¹ Cmnd. 4060 (1932).

fortunes of fellow human beings, in the name of Justice rectify the error? If those who sponsored the legislation did not see or foresee the injustice that had arisen, *not in their proposals but in the way the proposals had become law*, why should not judges who see the injustice in a given case, in the name of Justice rectify the error? How would that undermine the sovereignty of Parliament? Which is the higher principle, Justice or dogma?

Of all those who have had anything to do with a piece of legislation called in question, it is *only the judges who have sworn to do justice*. Members of Parliament do not swear to do justice between man and State, or between man and man.

Whichever philosophy of interpretation is adopted, should Justice not be pursued in the interpretation of a piece of legislation? Should we crucify Justice at the altar of certainty, at the altar of a myth turned into a principle of government that judges do not make the law, that judges should not make the law? It is submitted that in the interpretation of an Act of Parliament the question should be, which construction would best advance the cause and course of Justice, and not what Parliament is supposed to have intended. Is Justice not worth pursuing for Her own sake?

When litigants go to court they are not interested - let us face it - in any of the fine arguments we make about the separation of powers, about the intention of Parliament. The courts exist for them, not for Parliament. They have faith that - *Justice* will be done. Should we continue to make meaningless that faith? Let us not forget the advice of Christ regarding an ear of corn on the Sabbath day,⁶² and make the place of Justice a hallowed place.⁶³ After all, we often boast about the Christian foundations of the law.

⁶² Luke 6, 1-4.

⁶³ Bacon, *Essays of Judicature*, 56.

GRENADA GOES GRUNDNORM

by

DR. FRANCIS ALEXIS

Within thirteen years of attaining independence on February 7, 1974, Grenada has had no less than six changes of grundnorm.

Nor does this tally include changes in Grenada's constitutional position from colonial times to its status as a state in association with the United Kingdom, as an associated state,¹ in 1967. It was, however, from this position as an associated state that Grenada moved on to independence in 1974.

Fortunately, these changes of constitutional or legal grundnorm were not always accompanied by extremely traumatic societal haemorrhaging.²

Still, between February 7, 1974 and August 16, 1991 Grenada saw its legal grundnorm go full circle. This makes Grenada unique among Commonwealth Caribbean countries, if not indeed among many countries the world over.

The Grenada case history is therefore well worthy of study.

DEFINING THE GRUNDNORM

The word "grundnorm" is associated with the jurist, Hans Kelsen. He postulated that in every legal system there is a rule whose source of legal authority is not to be questioned. This, Kelsen called the grundnorm, the rule that gives legitimacy to all other rules in the system.³

As the source of legal authority for all other rules, the grundnorm cannot itself depend on any other rule for its efficacy. The grundnorm

¹ The United Kingdom, under its West Indies Act 1967 (c.4), created associated status for Grenada, Antigua, Dominica, St. Christopher-Nevis, St. Lucia and St. Vincent, which have all since become independent. An associated state had full power over its internal affairs and could move unilaterally to independence; but its external affairs and defence were handled by the United Kingdom.

² There were exceptions: on March 13, 1979, as to which see text after f.n. 17 *infra*; and in October 19-25, 1983, as to which, see text after f.n. 33 *infra*. See also text after f.n. 13 *infra*.

³ Kelsen, *General Theory of Law and State* (Wedberg, transl. 1949), chs. X and XI.