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Giving Effect to Policy in Legislation: How to Avoid Missing the Point*

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1. Introduction

When describing the importance of the work of Parliamentary Counsel, I follow the Office's own document 'Working with Parliamentary Counsel'[1] by saying that there are five reasons why our work is important.

They are:

- Government policy which depends on the enactment of legislation will not be delivered unless the legislation is properly drafted and effective.
- Unless legislation is clearly expressed and simple to apply, large amounts of both public and private resources can be wasted on unnecessary litigation.
- Proposals for legislation are at the heart of Parliament's business and of the democratic process, with Government Ministers spending much of their time in both Houses defending and explaining the policy and wording of Government Bills.
- The drafting of primary legislation sets both the context (by providing the powers) and the standard (by example) for the drafting of all other legislation, including, in particular, statutory instruments.
- The way legislation is structured and expressed is essential to the preservation of a stable constitutional relationship between Parliament and the courts. It is important that the way legislation is drafted does not debase the coinage of communication between Parliament and the courts; for

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[1] http://www.cabinetoffice.gov.uk/resource-library/working-parliamentary-counsel (accessed 9 November 2010).

example, through obscurity or the inclusion of extraneous, unnecessary matter.

This paper concerns the first of these reasons, but it must do so in the context provided by the other four reasons. I propose to examine the process by which legislative effect is given to political programmes and objectives; and to draw attention to some of the inherent tensions in that process, and to the need for those tensions to be managed by Parliamentary Counsel. My objective is to illuminate how what is essentially a political idea mutates into a proposition of law. I should emphasise that in discussing the process of turning policy into law, I do not seek to be normative, but only to analyse what I see as happening in practice.

2. Implementing Policy in Legislation: Avoiding the Obtuse

My thesis is that there are technical and conceptual aspects of the process of turning policy into law that have an inherent, and sometimes irresistible, tendency to make the policy maker think that maybe the legislative drafter has 'missed the point', or is being obtuse. Although these aspects are a part of a wider phenomenon by which both legislative and non-legislative effect is often given to high-level policy in a relatively indirect way, it is a responsibility of Parliamentary Counsel to keep obtuseness in legislation to a minimum. It is essential for Parliamentary Counsel to have a clear understanding of how translating policy into legislation may produce obtuseness: in order for the drafter to make a judgment about when the tendency is resistible and how, when irresistible, its effect can be minimized. Such an understanding will also provide Parliamentary Counsel with the wherewithal to make the judgment that must always be made (though in different ways with different legislative projects) about how far to become involved in policy formulation.

There is a particular recent context to this discussion. The extent to which policy implementation requires a direct or indirect approach has been under consideration in different ways. These include, first, the controversy there has been in relation to primarylegislation to enact statutory policy objectives or 'targets' for Government.[2] That is a controversy that adds to the long-running debate in drafting circles about the value of purpose clauses.[3] There is also, the current inquiry by a sub-committee chaired by Baroness Neuberger of the House of Lords Science and Technology Select Committee into the use of socio-economic

[2] As in the case of the Climate Change Act 2008, the Child Poverty Act 2010 and the Fiscal Responsibility Act 2010.

[3] http://www.publications.parliament.uk/pa/ld200304/ldselect/ldconst/173/4062304.htmQ338 and http://www.opc.gov.au/calc/docs/CALC%Newsletter%20April%202009.doc.

interventions, rather than legislative regulation, to achieve policy aims involving behaviour change.[4]

It is obvious, and appropriate, in a society in which legislative change is under democratic control, that the majority of legislation is drafted to give effect to policy aims. Our Parliamentary system gives the bulk of the Parliamentary time available each year for making primary legislation to the Government of the day. Nevertheless that time is still in short supply; and competition between Government departments for a place in the legislative programme is intense. When it comes to the allocation of the limited Parliamentary time, decisions are generally made according to political priorities, subject of course to legal necessities, and emergencies.

The overwhelming majority of legislation that reaches the statute book each year is enacted in order, directly or indirectly, to improve things for citizens in ways that are defined by the political priorities that the Government has been elected to pursue. It may be to fulfil a promise or, perhaps, as a response to events. But even a proposal that is confined to providing additional protection or security in relation to what are thought to be the existing arrangements is a change designed to produce an improvement. It is axiomatic that legislation can have only one function and that is to change the law.[5] In practice too, the policy to which legislation gives effect also always involves an intention that the legal change should produce a change in the practical world. The two need to connect and it is the intention to produce that practical change that logically comes first. This paper is about whether and how to make the connection clear enough for the legal change to be effective.

3. Implementing Policy in Legislation: The Nature of Change

Public policy implemented by legislation seems to involve three different sorts of practical change. These may overlap and combine to achieve practical, political objectives. First, there is 'regulatory change': that is intended to have a specific and *direct* effect on the behaviour of individuals and other legal persons by modifying the legal consequences of their behaviour. Secondly, there is 'resource allocation and fiscal change' which alters the ways in which the resources of the executive (including any of its emanations within the public sector) may be applied and are collected. Finally, there is 'constitutional and organisational change' to governance and to the accountabilities within the British constitution or more widely in the public sector.

[4] See the request for evidence with a deadline for comments of 8 October 2010. http://www.parliament.uk/documents/lords-committees/science-technology/behaviourchange/CfEBehaviourChange.pdf See also Mindspace report on influencing behaviour through public policy, which was produced jointly by the Cabinet Office and the Institute for Government in March this yearhttp:www.instituteforgovernment.or.uk/content/133/mindspace-influencing-behaviour-through-public-policy.

[5] http://www.cabinetoffice.gov.uk/sites/default/files/resources/working-with-parliamentary-counsel.pdf (accessed 9 November 2010).

Changes affecting resource allocation or taxation, as well as changes to governance or accountabilities may overlap with, or supplement, regulatory change because they may be intended *indirectly* to provide incentives for behavioural change, sometimes within the executive, but also more generally. They may also be intended to produce behavioural change by facilitating, for instance, socio-economic or other interventions designed to produce such change without a more direct incentive in the form of particular legal consequences. So they may provide the authority for the expenditure on socio-economic interventions where that is needed because of the 'new services' principles in the Treasury guidance 'Managing Public Money'.[6] Or they may raise the funds needed for such expenditure. Or they may provide the legal capacity, and the management and accountability, for the activities of the executive or others, when they are influencing behaviour using incentives other than in the form of legal consequences. A resort to such methods is not necessarily an alternative to legislation. It is only an alternative to using legislation to effect regulatory change directly.

However, policy priorities and objectives also often address public expenditure and taxation, or governance and accountabilities, in their own right. This may be because there is an issue of fairness, or it may be with a view to devolving responsibilities to others closer to the subject-matter of the decision.

A change to governance or accountabilities (e.g. of a regulator) may be intended to change the behaviour of those who are regulated by changing the behaviour of the regulator. However, it may rather be aimed at improving the efficiency of the regulatory process (freeing up resources for other purposes) or (perhaps by increasing the transparency or democratic control of the regulator) at improving the level of acceptance of the regulatory process amongst the regulated, or at raising their level of satisfaction with it.

It follows that the purpose of legal change is not confined to creating incentives for people to do things or not to do things. Observably legislation has been used extensively in modern times for purposes other than the imposition of that sort of regulatory change. In practice, the law does also deal with the mechanisms by which priorities are decided and other managerial decisions taken within the public sector.

There are clear risks in making the assumption that legislation is a tool to be used only for the purpose of changing behaviour. For a legislative drafter asked to amend the law affecting, say, resource allocation or governance and accountabilities, there is a risk in inferring an intention to produce a behavioural change, just because that seems to be the natural and probable consequence of the proposed amendment. What appears neutral to the policy maker can appear weighted in favour of a particular outcome to the drafter. In this way, a choice of

[6] Under these principles, a provision may be needed in primary legislation to 'frank' expenditure for the purposes of the PAC concordat of 1932 (see Managing Public Money http://www.hm-treasury.gov.uk/d/mpm_annex2.1.pdf) on something constituting a new service (see ibid., http://www.hm-treasury.gov.uk/d/mpm_annex2.5.pdf). This is sometimes called a 'Baldwin agreement' provision.

structure for the legislation to reinforce or guarantee a particular outcome may produce a result that was not intended.

The likely practical effect of a proposed legal change can be ascertained partly from social research; but the legislative drafter also has a role, using legal analysis, to consider if other particular outcomes would be implicit in the proposal. The drafter's consideration of anti-avoidance risks, for this purpose, will often involve an assessment of the extent to which legislation needs to be flexible enough to allow for different, unforeseen circumstances, and of the extent to which it should be ratcheted to deny enough flexibility to secure the maintenance of the status quo.

It is the responsibility of the legislative drafter to ascertain whether a proposed legislative proposition is intended to be understood—legally, as well as politically—as an *indirect* attempt to change behaviour, or is intended, to be something which (for instance, by producing better decision-making) is of value in its own right and to be neutral so far as eventual outcomes are concerned. Where there is an intention to affect behaviour by indirectly facilitating a non-regulatory intervention, a question will arise about whether the connection between the policy and the legislation needs to be spelt out and, if so, how. And if the intention is to produce neutrality as to outcomes, is *that* something that needs to be signalled, and, if so, how?

According to the circumstances, it may be more or less difficult for legislation to produce a change to governance and accountabilities which guarantees (or at least tends to encourage) a particular sort of behaviour or to produce a change that is neutral; but the task is even more difficult if the legislative drafter does not know which is intended. In these circumstances, a decision about whether obtuseness about policy objectives is unavoidable requires initial clarity about what exactly the objectives are. Technical, conceptual or political reasons may mean that an obtuse approach is unavoidable.

Obtuseness may also be the inevitable result of a need to balance the competing claims of the five matters which I initially mentioned as making the work of Parliamentary Counsel important. However, it is important that what goes in the Bill is not obtuse about the objective just on the basis of false assumptions about what it is possible and safe for legislation to contain. And if obtuseness is not always bad, or avoidable, it is always something that needs to be questioned.

4. Reducing Policy to Legislation

I earlier identified three categories of change for which legislation is used: regulatory changes, resource allocation and fiscal changes, and constitutional and organizational changes. However, there is a more complex process by which policy at that high level is reduced to more detailed legislative policy, in the form of decisions about what legal changes are necessary to implement the high-level policy. There are several aspects of this narrowing-down process which create

risks of introducing obtuseness. I shall consider four of them in particular: (i) the necessary incompleteness of legislation; (ii) the risks from extrapolating a legislative solution from a failed non-legislative solution; (iii) the precedent trap, and (iv) the difficulty of hitting a moving target from a moving platform. I will then turn to one other very significant factor which impacts on all these considerations—the inherent differences between policy issues and legal issues.

(A) Necessary Incompleteness

Legislation must be confined to the legal changes that are necessary to give effect to policy. The risks of changing the law when it is unnecessary to do so have been discussed elsewhere, and are widely understood. In practice, many of the things that need to be done to achieve a policy objective will be possible without legal changes. There will be existing mechanisms that can be used. The policy makers will often find themselves needing a Bill to cover only part of the picture. From their perspective, the Bill will constitute only a number of discrete fragments from a bigger picture. It is the function of the legislative drafter to be aware of this and, if necessary, to arrange the fragments in a way that can best be presented as contributing to the bigger picture.

Other factors, considered below, may all contribute to any apparent incompleteness of a Bill from the policy maker's point of view. But the fact that new legislation is always just a further layer built on a pile of existing law is certainly also another significant factor.

(B) Legislative Policy Produced by Extrapolation

There is also a potential for creating obtuseness in the assumption that the limited availability of Parliamentary time makes primary legislation a last resort for policy makers.

Much legislative policy begins with a search for a non-legislative method for implementing the policy. It is common for considerable ingenuity to be deployed in that search. It is then human nature, when the search has proved unsuccessful, to continue the thinking towards the legislative solution from where the non-legislative route reached a dead end. The 'last resort' theory, and the pronouncements of Parliamentary Counsel, might, wrongly, be thought to encourage that. We frequently quote the aphorism that unnecessary matter in statutes, as in humans, tends to turn septic.[7] However, where there is a more straightforward route to what is wanted—the rule against redundant provisions does not require the legislative route to begin at the place closest to that destination that was capable of being reached by non-legislative means.

[7] Quoted by Sir G Bowman KCB, QC, LLD 'Why is there a Parliamentary Counsel Office?' (2005) 26 Statute Law Review 69 at 77.

A direct route from the problem to the desired solution will be the one that will produce the greatest clarity about the intention of the policy maker and is preferable, even if it contains a larger legislative element. The directness of the route needs to be assessed by reference to the original starting point, disregarding any intervening but abandoned meanderings in search of a non-legislative route. There is a clear risk of obtuseness in a provision that starts from the wrong place: from a starting place chosen out of sight of those who will need to understand the intended route.

Parliamentary Counsel have both the experience and the authority to be able to challenge the policy by asking whether 'we should be starting from here'. This is one of the important policy functions they have in practice. Interestingly, however, it did not emerge as such in Professor Page's valuable research on the involvement of Parliamentary Counsel in policy making.[8] Perhaps this is because it is the function that needs to be discharged early in the process. In the past though it has also inhibited Parliamentary Counsel from that necessary early involvement. They have wanted to retain their objectivity until the eventual solution could be tested against the original problem. However, there is also an obvious practical difficulty in waiting until the building is largely constructed before testing the soundness of the foundations. Recent practice has taken this into account to produce a little more flexibility and pragmatism from us in deciding at what stage to become involved in policy questions.

(C) The Precedent Trap

Another related risk of obtuseness arises from the process by which the solution to a problem is often sought first amongst solutions that have already been used for other problems. When that is done, the case to be dealt with may have to be manipulated to fit a solution that was originally intended for something else. Parliamentary Counsel think as professionals whose job it is to draw the line rather than just to find it.[9] In this context, what that requires in practice is a willingness to depart from the apparent safety of precedent to deal more clearly with the unique features of the problem in front of them.

(D) The Problem of Hitting a Moving Target from a Moving Platform

The Office of the Parliamentary Counsel's guidance for drafting instructions for Parliamentary Counsel makes the identification of the mischief an essential

[8] 'Their Word Is Law: Parliamentary Counsel and Creative Policy Analysis' [2009] Public Law 790.
[9] See 'Drawing the Line'—Chapter 2 of 'Drafting Legislation: A Modern Approach' (2008) ed C Stefanou and H Xanthaki.

element of any drafting instructions.[10] The same is true of policy making at the political level, where a situation will have been identified as requiring a practical change in order to make things better. However, primary legislation is usually prepared on the basis that it will continue in place until it is repealed, rather than expire when its initial purpose is fulfilled. Potentially, it has an indefinite life, and it may need one to prevent the revival of the mischief. But this, together with the complexity of life in general, means that legislation is very likely to have an effect beyond its immediate objective.

Legislation must also be effective in relation to the consequences of its own operation. So, taking a simple case of a regulatory change to stop people engaging in activity A, it may be that individuals forbidden from engaging in activity A will choose to start engaging in activity B instead. Even though B is rare now (because activity A is a more attractive and legal alternative), that may change as a result of a prohibition on activity A. Activity B could be equally objectionable if it became more common. Policy making needs to be able to work through all the consequences of forbidding activity A: including if necessary prohibiting activity B, and then working through the consequences of that, and so on.

As the range of permutations will ultimately depend on the terms of the prohibition on activity A, Parliamentary Counsel is inevitably drawn into consideration of the matter and may need to remove some of the clarity of a clear prohibition on A in order to extend it to the possibility that resort might be had to B instead. This phenomenon leads to descriptions of what is covered that are more abstract than might seem appropriate to the policy makers. They, like the drafter when making the extension, will wish to put the emphasis on the existing problem with A, rather than the hypothetical one with B.

A comparison can be drawn with the need for the helmsman of a yacht to allow for the flow of the tide, or for a golfer to allow for the wind on a drive or the borrow on a putt. Policy starts from now and broadly speaking defines a destination that must be reached. Legal policy, however, has to allow for the fact that every change on the way to the destination is a move away from the starting place and itself changes the context which defined it. So the process of change may itself create the need for an adjustment of direction to secure eventual arrival at the proposed destination. The implementation of the solution itself will interact with the problem to require perhaps a different solution or a more complex one. This is particularly the case where time is also taken into account: the need for legislation to anticipate, not only the immediate consequences of a change but also its longer term effect.

It is the number of potentially moving pieces in the process that create the need, sometimes, for the legislative drafter to aim at a moving target from a moving platform, with the consequence that the initial aim may appear wide of the target, and destined to miss the point.

[10] http://www.cabinetoffice.gov.uk/sites/default/files/resources/working-with-parliamentary-counsel.pdf (accessed 9 November 2010).

5. The Inherent Differences between Policy Issues and Legal Issues: The Limits of Adjudication

The undoubted limit on the extent to which a policy proposition can be reduced to something that can be satisfactorily decided by a court is a related phenomenon to the foregoing.

Policy formulation invariably involves proposing solutions to 'polycentric' problems. These, as explained in the seminal essay of the US jurist Lon Fuller on the Forms and Limits of Adjudication,[11] are problems that give rise to the sort of questions which, depending on the extent to which the polycentric elements are significant or predominant, may approach or pass the limits of what it is possible to submit to adjudication by the courts.[12]

For present purposes, and as the concepts will be familiar to the reader, a polycentric problem can be briefly described as one where the answer to each question to which the problem gives rise depends on the answers to the others. Fuller gives the example of the selection of a football team. The premise is that judicial adjudication requires a process for arriving at a decision in which the affected parties participate by presenting proofs and arguments to be tested against established rules. It is impractical to select a team by having such an adjudication for each of the different field positions, because the choice of each team member needs to depend on who is chosen for the other positions, and there is no necessary starting place for that selection process.

A more pertinent example of a polycentric problem is one relating to the allocation of limited public funds. An adjudication by the application of established rules on the use of resources for a particular purpose needs to consider the validity of all other adjudications on the application of those resources for other purposes. The problem is too complex to be subject to judicial adjudication. It is more managerial in nature. The parties cannot all make a case to the tribunal on the basis of rules that determine each allocation separately from the others.

Both policy making and the drafting of legislation themselves present those involved in them with polycentric problems. For the policy maker, different interests will invariably have to be balanced against each other. Seldom is the answer to a policy problem clear cut or simply two sided, and a balancing of different and potentially unrepresented interests is fundamental to the process. For the legislative drafter, a polycentric problem can also arise at a technical level. The structuring of legislation, like all writing, often depends on a choice of the best starting place.

An example of the need to address polycentric issues at the technical, drafting level arose when one of my colleagues was asked, a little while ago, to provide the test for deciding whether an activity required a licence. The proposed test was whether or not, in a particular case, the benefits of requiring a licence outweighed

[11] Published in (1978) Harv LR 355.
[12] Ibid at 398.

the disadvantages. On analysis, that was a polycentric question because the answer depended on the answers to a whole series of subordinate and logically subsequent questions about the terms of the hypothetical licence. In the event, the drafter suggested the imposition of the test on decisions about each condition of a licence, rather than on the decision whether licensing itself was required.

However, there is also a more fundamental tension between the inherently polycentric features of most policy and the characteristics of questions that are the most suitable subjects of legislation. A question arises whether the appropriate subject-matter of legislation must always be confined to something that is capable of adjudication by a court. There are some I am sure who will argue that it should; but if that is a rule, it is certainly one to which there are numerous practical exceptions. Nevertheless, it is certainly the case that, for most legislation, the legislative policy must, in practice, depend on the assumption that disputes relating to both its meaning and its application will need to be decided upon by the courts, and so should be framed with that in mind. And to the extent that this is a rule, does it become an unavoidable factor that will always tend to make legislation obtuse?

What Fuller suggested happens when an attempt is made to deal by adjudicative forms with a problem that is essentially polycentric is one or more of three things. First, the solution to the problem fails or is ignored, because it has consequences that were unforeseen. Secondly, the adjudicator abandons adjudicative methods and adopts what is essentially a trial and error method of negotiating different solutions, stepping outside the process to involve affected persons who are not parties to the adjudication. Thirdly, as an alternative to changing the method of decision to fit the problem, the adjudicator reformulates the problem to make it fit the adjudicative method.

It is, of course, the duty of Parliamentary Counsel to avoid the first of Fuller suggested outcomes—solutions that fail. But both the second and the third of his suggested outcomes do give clues as to how in practice legislation tends to tackle the political and practical need to provide the solution to a polycentric problem in a *legislative* form. Both, however, create a tendency to obtuseness. I shall deal with them in reverse order.

(A) Reformulating the Problem to Allow for Judicial Adjudication

Reformulating the problem by breaking it down into issues capable of judicial adjudication is Fuller's third suggestion. This is how legislation very often deals with a polycentric problem. The separate issues may then be determined in series, or, alternatively, in parallel but in an unconnected way. This method of tackling these issues is most obvious when the chosen method of implementing the policy involves private law or the use of the criminal law. Furthermore, there is a reciprocal principle that private law and criminal law are more likely to be adopted as the legislative route to a policy objective when the issues are those that are most easily broken down into adjudicable issues.

Adjudicable issues are essential in any modification of private law or in any use of the criminal law, because the courts are involved in those aspects of law in the most direct way. The determination of private law rights and liabilities and of criminal liabilities is a matter exclusively for the courts.

So in those contexts, it is important for Parliamentary Counsel to question any concept in the instructions that depends on balancing different interests that will not be represented before the court. This includes challenging the application of a discretion that is essentially managerial, rather than judicial. An example of the effect of this analysis can be seen, perhaps, in the way the legislation on 'anti-social behaviour' has operated by requiring a court to make the prohibition specific in the form of an order before criminal liability is imposed for contravention of the order.

Nevertheless, even in the case of private law and criminal law, where the intention is to produce some general behavioural shift, that effect may still rely on other matters that will not be covered by the legislation. One may be the extent to which an enforcement mechanism is within the control of the policy maker, and can be operated to further the policy objective.

There are two major factors on which any modification of private law or criminal law relies for its effectiveness. The first is respect for the law amongst the law-abiding classes and the second is the risk amongst the less law-abiding classes of being subjected to the consequences of enforcement.

Both of these factors make the use of private law changes a less-attractive mechanism for producing an intended behavioural change. Even amongst the law-abiding, private law liabilities are not necessarily regarded as things that have to be avoided at all costs. Many may be regarded as risks that have to be run. They may need to be insured against; but they may have to be accepted. Furthermore, the enforcement of private law rights is also made unpredictable by being dependent upon commercial assessments of the benefits likely to accrue from enforcement.

So, it is relatively uncommon for policy making to choose modifications of private law as a means of changing behaviour. Most modern law of that sort is confined to certain specific areas such as consumer law, employment law, and the law of landlord and tenant, where the policy objective is ultimately to restore balance to a legal relationship in which one party has an inherently superior bargaining position.

Criminal law, on the other hand, may more easily be used directly to address a problem requiring behavioural change. Certainly, criminal law does attract a significantly greater level of respect from the law abiding. However, in practice it too may operate only indirectly. In order to impose obligations that both are capable of judicial adjudication and identify conduct that will be recognized as inherently wrong, criminal law may concentrate on the perceived causes or, sometimes the most unacceptable symptoms, of the behaviour it is seeking to change. This is particularly true if the real mischief may be seen as a misfortune, such as unhealthy drinking or smoking.

Furthermore, the rule of law and the democratic scrutiny of legislation both involve assumptions about the need for proportionality. This requires criminal

conduct to be defined in a way that ensures that the distinction between the circumstances in which it may be justifiable and those in which it is undesirable are clear and capable of judicial determination.

Nevertheless, the circumstances that make criminal sanctions legitimate, or indeed effective, in policy terms may still in practice give rise to polycentric issues that cannot be dealt with in this way. Where that happens the policy maker may need, in practice, to rely on other factors such as the way in which prosecuting or sentencing discretions are exercised to achieve the policy objective. Both prosecuting and sentencing discretions may themselves involve polycentric issues, for example about resource allocation. That inhibits making them subject to legislative direction, quite apart from the inhibitions resulting from the constitutional relationship between the executive, on the one hand, and the prosecuting authorities and the courts on the other.

What can be taken from this is that the natural tendency of the legislative drafter to insist on clarity and certainty, carries extra weight, in relation to private law and criminal offences, specifically because adjudication by a court is the primary consequence of the inclusion of a proposition in that sort of law. It is also clear that, in the process of achieving that clarity and translating the policy into legislation, some clarity is likely to be lost about the objectives of the policy and the polycentric nature of the issues to which achieving those objectives gives rise.

(B) Abandoning the Adjudicative Method

It follows that reducing policy to questions that are suitable for judicial adjudication will sometimes seem to fall short of adequately implementing policy in law.

What then happens, it seems to me, is that those preparing legislation turn to Fuller's second suggestion: the abandonment of the adjudicative method. There is a mass of evidence that this method is adopted in practice, particularly where the legislative change is implemented by a provision relating to governance or accountabilities or to the use of resources. Provisions of that sort do constitute a very large part of Parliament's annual legislative output.

The legislative policy maker is relying in those cases on the existing extent to which the law makes governance and resource allocation provisions less subject to judicial adjudication than, say, propositions of private law or criminal law. When a matter is submitted to decision making that is administrative, rather than judicial, the effect may be to allow decision making by trial and error, broad consultation or perhaps a managerial discretion. The principles applied by the courts when considering the matter will not generally allow for the simple substitution of a court decision for one reached by administrative means.

There is, as we know, a clear-cut distinction between the way in which the courts will adjudicate on legal rights and duties arising under private or criminal

law and the extent to which they will interfere, under the principles of administrative law, with a discretion exercised by a public body.[13]

Of course, for this purpose, it also has to be accepted that there is not always a clear distinction between what is judicial and what is administrative decision making. There is a spectrum between, at one end, say, the quasi-judicial functions of administrative tribunals and, at the other, the resource allocation decisions of democratically constituted assemblies. Nevertheless to move an issue on to that spectrum does allow a polycentric issue to be decided more easily within the framework of the law, without a court being required to do something beyond its natural competence. Both the legislature and the courts recognize the inappropriateness of judicial adjudication methods for decisions that are more or less executive or managerial in nature. In this way, legislation is also addressing polycentric issues by simplifying the questions for proper judicial adjudication to questions about, for example, procedural correctness and rationality. The courts will review decisions but will defer, in many respects, to the judgment of the designated administrative decision maker.

A good illustration of this can be found in the various mechanisms set up in the privatization legislation of the 1980s, where the policy required various interrelated factors to be balanced for ensuring that newly privatized monopolies did not abuse their monopoly positions. The technique was to create a regulator to control the provision of the monopoly service. The regulator was subjected to a general duty to balance various competing interests in determining how to exercise his or her functions.[14] The monopoly provider was required to be licensed to provide the monopoly.[15] The provider was then subjected to various obligations (relating to, for instance, pricing and supply) by the conditions of the licence.[16] Those obligations had to be imposed in accordance with the regulator's general duties, formulated to address the polycentric questions inherent in determining what constitutes the abuse of a monopoly position. Enforcement of the licence conditions was then a matter for the regulator and gave rise to liabilities to customers only once the regulator had made an order requiring compliance on the basis of a determination the making of which was also subject to the general duties.[17] In this case, the law is able to cope with the general duties imposed on the regulator, because the regulator is not required to act in a wholly judicial way in determining how they apply. The application of the duties is in some respects

[13] A separate issue may arise in relation to the extent to which conferring a 'managerial function' on a public authority should be capable of giving rise to a private law remedy in respect of the way in which that function is exercised or performed. See Lord Hoffman's Bar Law Reform Lecture in November 2009 'Reforming the Law of Public Authority Negligence' http://www.barcouncil.org.uk/assets/document/Lod%20Hoffman's%20Transcript20171109.doc. The relationship between these issues and those discussed in this lecture requires more space than is available here; but they are issues that need to be borne in mind in a way that is consistent with the rest of what I say.

[14] See e.g. section 3 of the Telecommunications Act 1984, as originally enacted.

[15] Ibid. section 5.

[16] Ibid. section 7(5).

[17] Ibid. sections 16–18. The liability to customers was in section 18(5)–(8).

outside the scope of the question subjected to judicial adjudication, but is acceptable as a mechanism for articulating the policy because of the limited extent to which it is capable of judicial revision.

This casts an interesting light too on the drafting controversy about 'purpose clauses'. Setting out an objective for a change to private law or for the imposition of a criminal liability will usually be challenged by a legislative drafter on the grounds that its only effect is to add an element of uncertainty to the interpretation of the carefully framed and specific rights and obligations created in the law. But underlying that objection is also the notion that purposes giving rise to polycentric issues would tend to create an issue for the determination of a court that was outside the limits of adjudication.

Different considerations apply where the decision is made in a non-judicial context and accountability for it is not wholly to a court. So far this analysis has assumed that there are only two levels of adjudication in the current law: that in which the court takes full responsibility for determining all questions under consideration and that in which the court confines itself, particularly in circumstances in which polycentric issues are likely to have been considered, to reviewing another's decision, in the context of its application to an individual—but without re-opening every element of the decision.

Paul Daly in his recent article on 'Justiciability and the "Political Question" Doctrine'[18] suggested, however, a more nuanced approach to the function of the courts in determining political questions. According to this concept of secondary justiciability, 'judges should not open their toolboxes fully on all occasions',[19] and he proposes different reasons and circumstances in which different approaches might be taken. This certainly seems to me to be the premise on which much legislation on governance and accountabilities, and certainly on resource allocation, is drafted in practice. It is certainly true that constitutional legislation also operates on the basis, which Paul Daly discusses, that the level of justiciability on constitutional matters, including, for example, matters within Parliament's exclusive cognisance, is kept to a minimum, even without, for example, any entrenchment for Article IX of the Bill of Rights 1688/89.

However, this whole area does create a dilemma for Parliamentary Counsel. What assumptions can be made about the limits of justiciability that the courts will accept in practice? Polycentric issues will nearly always involve a tension between the general issue and the way it impacts on an individual. Do the courts or Parliament decide the priorities between the two? How can Parliamentary Counsel be certain of avoiding an inappropriate delegation of a policy decision to the courts? How can they ensure an issue is put on the appropriate part of the justiciability spectrum? Are the answers to these questions affected by the fact that the courts will inevitably be considering a polycentric issue in circumstances in which the arguments in the case, and the limited number of parties, will tend

[18] [2010] Public Law 160.
[19] Ibid at 173.

to suggest that the issue has already been reduced to one that is suitable for judicial adjudication?

In this respect, there is a different moving target problem. The extent to which the courts will interfere with a decision in a particular case is not always easily predictable, but theory says that it is capable of being influenced by legislative provision and by practice. A pessimistic assumption for Parliamentary Counsel would be that the courts will assume that, once something is in legislation, it must be assumed to have been submitted in its entirety to the law and so to be potentially fully justiciable, even if it extends beyond the limits of what is appropriate for judicial adjudication, with any attempt to mitigate that in the Bill itself likely to be ineffective. What I think is clear is that this is not in fact the assumption on which much legislation is drafted or indeed construed, even though legislative drafters do in practice need to accept that the making of that assumption is a risk that has to be managed.

If this assumption wholly governed drafting practice, those preparing legislation would have to impose a rule on themselves not to legislate in any way in relation to issues that would not be suitable (either in practice or for constitutional reasons) for judicial adjudication.[20] The consequence would be that, for instance, constitutional changes affecting the relationship between different branches of government would have to be kept off the statute book and that policy making would have to confine all polycentric decisions to mechanisms within the managerial control of the policy makers, and indeed within their current inherent powers.

In relation to private law and criminal law, there is an appropriate element of self-restraint when it comes to abandoning the adjudicative method, and an appropriate discipline in reducing the issues for determination to those that are not polycentric. It seems impractical to assume, however, that that restraint could be extended in a modern state to every other area in which policy requires legal change.

So it will continue to be necessary for a sovereign Parliament to make clear its intentions in relation to areas where decision making involves issues that cannot satisfactorily be adjudicated upon by a court. Parliamentary Counsel need to be aware of the principles on which the courts will intervene and also conscious that there are risks of putting polycentric issues on the statute book. But the reality is that the risk that dealing with such an issue in an Act will subject it to an inappropriate level of judicial adjudication needs to be balanced against the risk that a failure to mention it at all will result in legislation that is construed to be incompatible with the policy objective for which it was enacted in the first place.

In practice, it is unlikely to be practicable to manage the risks by simply avoiding them; but it is clear that the judgment made to balance them may involve some compromise between what is said and what is not. That result may, from

[20] Hints of this approach can be found, in a different context in the evidence of the Clerk of the House of Commons to the Political and Constitutional Reform Committee of the House of Commons on the Fixed-term Parliaments Bill 2010. See 'Second Report of 2010–11 Session' at EV 1–10, http://www.publications.parliament.uk/pa/cm201011/cmselect/cmpolcon/436/436.pdf.

the point of view of the policy maker, contribute to the impression that the Bill is missing the point.

(C) Role of Parliamentary Counsel in Relation to Polycentric Issues

This analysis illuminates for me the role of Parliamentary Counsel in policy making, both as regards the reduction of polycentric questions to adjudicable issues, and as regards provisions that require the judicial method to be abandoned. Parliamentary Counsel need to act in a way that is similar to the role of the translator, as it is described in Umberto Eco's book, *Mouse or Rat—Translation as Negotiation*.[21] There he describes the process of translating a literary work as one of negotiation. He gives the opening words of Moby Dick as an example of a sentence in need of negotiation: 'Call me Ishmael'. In English, this produces a subtlety about whether the name is real or hypothetical or is, perhaps, chosen as appropriately metaphorical in the context of the plot, and about whether it is creating a familiarity with the reader. These subtleties are not possible in many other languages. So a choice is required by the translator.

Parliamentary Counsel have the task of translating the language of policy into the language of the law, not in the caricature sense of transforming plain language into incomprehensible legalese, but rather in the sense of identifying the essence of the policy so that as much of it as possible can be retained when polycentric issues are reduced to adjudicable questions or when the existing structural assumptions of the law need to be used to avoid the use of the judicial method. In the translation, something is likely to be lost; but exactly what will need to be negotiated with the policy maker.

Inherent differences between different languages may mean that a translator cannot capture the essence of an original text without some cost, and so needs to negotiate that cost with the original author. Equally the tasks of the legislative drafter will often include a negotiation with the policy maker about how much of the political objective can be made express when the Bill is drafted.

6. Conclusions

In conclusion, though, the same is also true of each of the other factors I have identified as factors that may create an impression of obtuseness for the policy maker. The task of the drafter is to do the analysis and balance the risks to get as close as possible to a draft that is compatible both with legal theory and with communicating the policy objectives of the policy maker. This requires not only sound analysis but also potentially some compromises; and it always comes down to the technical ability to identify, and to set out as clearly as possible, the underlying intentions of the legislators.

[21] 2003, Weidenfeld and Nicolson.