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## ELEMENTS OF LEGISLATION

In *Elements of Legislation*, Neil Duxbury examines the history of English law through the lens of legal philosophy in an effort to draw out the differences between judge-made and enacted law and to explain what courts do with the laws that legislatures enact. He presents a series of rigorously researched and carefully rehearsed arguments concerning the law-making functions of legislatures and courts, the concepts of legislative supremacy and judicial review, the nature of legislative intent and the core principles of statutory interpretation.

NEIL DUXBURY is Professor of Law at the London School of Economics and Political Science.

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## P R E F A C E

There is no shortage of very good studies of statute law and statutory interpretation. These studies fall into two broad types: those which explain the rules, procedures, principles and conventions relating to the enactment, drafting and interpretation of statutes, and those which offer broadly jurisprudential perspectives on, usually, one or the other side of the process: on how legislatures make laws, or on how courts and other decision-making bodies handle the laws that legislatures make. *Elements of Legislation* is a title perhaps best suited to the type of work belonging to the first of these two categories – a treatise on parliamentary procedure, say, or on professional drafting. But while certain treatises belonging to this first category were sometimes close to hand while this book was being written, the book cannot be counted among their number. Rather, it fits squarely within the second category of studies: it sets out a number of arguments concerning what legislatures create and what courts do with those creations.

The account of legislation that I set forth is by no means comprehensive, and I come up with no overarching thesis. My objective in writing the book, rather, has been to explore certain questions about legislation – about the distinction between statute law and case law, about the ideas of parliamentary authority and legislative intent, and about the core principles of statutory interpretation – which I think invite not quite new but certainly significantly revised versions of old answers. My primary interest is in, and my main intended audience is academics and students interested in, English law – albeit English law as part of the law of the United Kingdom. The statute law about which I write is not the product of a single legislature, and while the cases on which I draw for the purpose of developing arguments about legislation are mainly English cases, there are some instances where the arguments depend on case law illustrations from other legal systems. References to ‘statutes’ are normally to instances of primary legislation; in the sections of the book dealing with statutory interpretation, the word sometimes serves as shorthand

for ‘statutes and/or statutory provisions’. The term ‘parliament’ is generally confined to Westminster parliament (none of the arguments in the book specifically concerns the devolved assemblies of Scotland, Wales and Northern Ireland), though ‘legislature’ is used sometimes to refer to Westminster, sometimes to refer to other specific legislative assemblies and sometimes – most often – to refer to legislative assemblies in general. ‘Statutory interpretation’ and ‘statutory construction’ are used interchangeably.

I have found it useful to draw some specific comparisons with legislative practices and conventions in other jurisdictions, and sometimes I engage with theoretical literature concerned either with other legal systems (especially the United States) or with no legal system in particular. The book does not purport to speak to the constitutional and legislative arrangements of other jurisdictions, though it may be that some of the arguments it presents will resonate with common lawyers generally. In Part III, statutory interpretation is presented as an exclusively judicial activity; since courts in the United Kingdom are not accustomed to deferring to administrative agencies on matters of statutory interpretation, questions about the correct interpretive role of agencies, and the balance of interpretive power as between expert agencies and generalist courts, receive no attention.

Early drafts of Chapters 1 and 2 of the book were presented at the University of Virginia School of Law in April 2011, and a late draft of Chapter 1 was presented to the Law Department at the London School of Economics in February 2012. I am grateful to colleagues who provided valuable comments on these occasions, to Grégoire Webber for his detailed observations on the entire manuscript, to Jacco Bomhoff, Conor Gearty, Guy Holborn, Martin Loughlin, Jo Murkens, Thomas Poole, Mike Redmayne and Ted White for their criticisms of particular chapters, and to Richard Ekins for sharing with me his doctoral thesis on legislative intent (the book version of which is forthcoming with Oxford University Press). There is one particular debt I wish to highlight. I appreciate, given that I am only an occasional visitor at Virginia, that the law library staff there would be perfectly within their rights to tell me, on the occasions when I turn up at their desks, that all research-related enquiries ought to be addressed elsewhere. But this has never been their attitude, and in relation to this project there are two members of staff in the UVA law library, Kent Olson and Bryan Kasik, who have been immensely helpful in tracking down and supplying all manner of relevant materials. That they need not have done this did not escape me. That they still took the trouble impressed me no end.

## P R E A M B L E

This book examines the idea of legislation. It builds on, and sometimes seeks to correct, certain assumptions that are made about the idea, and in the process of doing so draws on history, on philosophy and – for the purpose of supporting particular arguments – on illustrations from many different areas of the law. The upshot of this is a book which one might think should have the word ‘disparate’ at the beginning of its title. But variety lies in the sources used and the directions taken, not in the elements of legislation. The book in fact attends to those elements in a fairly straightforward way. Part I (Chapters 1 and 2) begins with an explanation of what legislation is, and how enacted law and judge-made law might be distinguished. To legislate is to make law. ‘Legislation’ is, nevertheless, a term commonly reserved for enacted law: since, in English law, judicial law making is meant to be confined to the development of the common law – since it is not within the remit of the courts to invent new legal rules – it makes sense not to speak, and indeed English lawyers commonly do not speak, of judge-made law as legislation other than when describing how a court has overextended its law-making function (such as when the judicial construction of a statute yields a meaning which cannot be reconciled with either the enacted text or with the known or reasonably hypothesized intentions of the legislature).

The distinction between enacted and judge-made law has not always been clear, and one of the objectives of the first two chapters is to show how the distinction emerged. That parliament and the courts acquired their own legal functions needs no spelling out. But not all contemporary commentators are agreed as to whether, under the common law, the courts have the power to invalidate statutes which are inconsistent with fundamental constitutional principles. That there should be uncertainty on this matter is not surprising. Anyone with so much as a passing familiarity with the history of the common law knows that English judges have, from time to time, declared themselves capable of treating as void statutes which are contrary to reason. Is this not tantamount to judges claiming

for themselves a common-law capacity to review the legality of what parliament enacts? Not quite. The argument with which Chapter 2 concludes is that the distinction between declaring a statute void and declaring a statute invalid is slight but real. One cannot convincingly extrapolate from English legal history the conclusion that judges are able to strike down acts of parliament as unconstitutional. What the history reveals is that judges will sometimes – exceptionally – avoid giving effect to statutory provisions, but that in such instances they still stop short of challenging the authority of parliament.

In Part II (Chapters 3 and 4), the question of the proper scope of judicial review takes on a different form. Legal philosophers, indeed academic lawyers generally, can often seem less inspired by statute law than they are by case law. However, reflection on the process by which statutes are typically enacted raises an intriguing jurisprudential question: given that legislative assemblies are, by virtue of their size and diversity, generally better equipped than are courts to make well-informed, carefully deliberated, democratically representative decisions, why should judicial review of the legality of statutes ever be considered permissible? The question is worth posing in the abstract if only because the case against judicial review raises a conundrum: if it is argued that courts ought not to be permitted to review the legality of statutes, and if it is also conceded that the legality of statutes will sometimes need to be reviewed, how – if not by the courts – is the process of review to be carried out?

Jurisdictions which endorse the principle of legislative supremacy tend to rely on executive bodies to advise the legislature on the legality of statutes; in some systems, these bodies exercise reviewing functions similar to those of a constitutional court. In the United Kingdom, legislators certainly take advice on legislative proposals from executive and other committees, and the courts themselves have the power to declare primary legislation incompatible with human rights norms. But – this is the argument with which Chapter 3 closes – those who detect a drift towards ‘strong’ judicial review in the United Kingdom are probably misreading the signs. It may well be, as judges occasionally speculate, that if parliament were to enact a statute contrary to fundamental democratic commitments then the appropriate judicial reaction would be to declare that statute inapplicable according to principles of ‘higher law’. However, it seems rash to infer from such speculation that legislatively unauthorized strong judicial review is a genuine possibility. The principle of parliamentary supremacy remains (which is not to assert that it has to remain) firmly rooted, and the question why courts might ever be allowed to review the

legality of statutes, although interesting in the abstract, does not resonate in the United Kingdom quite as it does in those jurisdictions where this form of judicial review is part of the constitutional landscape.

Chapter 4 defends the idea of legislative intent. The case against the idea is well known. Intentions attributed to a legislature cannot *be* the intentions of that legislature, for legislatures cannot form intentions in the way that individual agents do. Legislative intentions are not the intentions of the legislature, but of legislators. But which legislators? The text of a statute as enacted might have been amended so that it can no longer be said to reflect the wishes of any particular sponsor or faction. Among the majority who eventually voted in favour of enacting that text there may be members who did not really support it, or whose votes were susceptible to cycling. Not only is it the case that legislators, not legislatures, have intentions, so the argument goes, but all sorts of hazards attach to treating particular legislators' intentions as the intention of the legislature.

It is a mistake, however, to dismiss as unintelligible the notion of agency distinctive to legislatures. A legislature, by legislating, demonstrates the simple general intention to change the law. But a legislature must also be taken to intend to change the law in the particular ways that it does, because the intentions of its members interconnect to form specific shared plans which comply with distinct decision procedures in the form of rules on (among other things) the presentation, scrutiny and amendment of bills. It is by virtue of the operation of these decision procedures that specific law-making proposals can become *acts* of the legislature itself.

It is tempting to claim that statutory interpretation depends upon the attribution of intentions to legislatures. But this claim is best avoided. Part III (Chapters 5 and 6) begins with the distinction between intention and meaning. The meaning that the language of a statute might reasonably be said to yield is unlikely simply to mirror the intention of the legislature in enacting the text. What, then, are courts looking to interpret: the meaning of the text, or the legislature's enacting intentions? The significance of legislative intention can be overestimated. When interpreting statutes, English courts are principally concerned not with the intentions of parliament in enacting the text but with the meanings that the text can be said to bear. Furthermore, judges will sometimes resolve statutory ambiguities by relying on interpretive presumptions – for example, according ambiguous criminal provisions meanings which are the least prejudicial to defendants – which are supposed to ensure fair outcomes rather than that statutes are accorded meanings which parliament can be assumed to have intended them to have.

It would be wrong, however, to conclude that legislative intention is irrelevant to statutory interpretation. When judges find the meaning of statutory language to be plain but absurd, or not plain at all, they often adopt interpretive conventions which take account of enacting intentions that are either identifiable or reasonably presumed. Part III examines the three main interpretive conventions: the so-called plain meaning, golden and mischief rules. One has to chart a fairly tortuous path to understand the history of, and explanations for, these conventions. But the exercise yields some relatively straightforward insights. Various advantages attach to plain-meaning interpretations of statutory language. When judges accord statutory language a plain meaning, it is more likely than not that the law as applied is consistent with what was enacted. Lawyers and their clients can be confident that the meaning of statutes is to be taken at face value. Judges themselves, by adhering to plain meaning, limit the possibility of their reading and applying statutes idiosyncratically. There is, however, no sound basis for thinking that plain-meaning interpretations are fundamentally non-creative, or that judges, when they eschew such interpretations, are somehow seeking to break free of statutes. The core message to emerge from Part III is that statutory interpretation has to be understood as a disciplined activity: when judges either cannot (because the language of a statute is ambiguous) or will not (because the language demands an absurd ruling) abide by plain statutory meaning, their interpretive strategy is usually – though, as intimated already, by no means always – to settle on a principle of interpretation which yields not the legal directive they consider desirable but the one which they believe most closely connects the meaning of the statute to legislative intent (which will not always, as is emphasized at the close of the book, equate with the intention of the legislature in enacting the statute which is being interpreted).

This argument – that statutory interpretation is a disciplined activity – should not be read as a denial of the possibility of judge-made law. That possibility is affirmed in Chapter 1. It is, however, to make a specific claim about how judges prefer to make law. In English law, judges recognize that it is their responsibility to develop the common law but also that they ought not to make law from statutes. The history, certainly the modern history, of English case law shows that judicial creativity is constrained creativity; indeed, the primary forms of decisional constraint – principles of precedent-following and statutory interpretation – have been created mainly by, and partly for the benefit of, judges themselves. Properly creative judges do not approach statutes as a Rabelaisian judge might; they

do not simply cast statutes to one side and go with their instincts. Rather, they find within statutes meanings which they consider either always to have been there but previously undetected in the language of the text, or deducible from the legislature's known or reasonably hypothesized intentions (including its intentions in legislating to comply with treaty obligations). When judges are creative with statutes they tend, in short, not to be legislating from them but rather interpreting them so as to bring to the fore what the law already, if perhaps not very clearly, provides.

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