CHAPTER II

HISTORY OF STATUTE LAW IN ENGLAND

Since India, follows the Common law tradition, the evolution of statute law[1] in England is worth referring to. A statute is a formal act of the Legislature in written form. It declares the will of the Legislature. It may be declaratory of the law, or a command which must be obeyed or a prohibition forbidding a course of conduct or a particular act. We normally refer to the whole body of law as enacted by Parliament as the Statute Book. For a single enactments, the term Act of Parliament is usually used. According to Courtenay Ilbert, the early English Statutes often declare rather than enact and combine general enactments or declarations with particular decision. The great bulk of the petitions which were presented during the first two hundred years of its existence were complaints of the breach of old customs, or requests for the confirmation of new customs, which evil-disposed persons will not observe, were the basis of the Parliamentary legislation of the period.[2]

LANGUAGE OF LAW – LATIN AND FRENCH

Another important feature of law was its language. According to Elliott[3] the language of the law at the time of the Battle of Hastings in 1066 was English and Latin, with Latin predominant. It took some time before French became part of the official language of the law after the Norman Conquest. The first use of French in an official document is not until the thirteenth century, in the year of the Magna Carta . Latin continued as the

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1 The term Statute Law is used to distinguish the law passed by Parliament from Common Law or Equity. Common Law is almost, but not quite, judge-made law. It derives its authority from the usages and customs of time immemorial, affirmed and enforced in the judgments and decrees of the courts of law. V.C.R.A.C Crabbe, *Understanding Statutes*, Cavendish Publishing Limited Great Britain, 1 (1994).

2 Courteney Ilbert, *Legislative Methods and Forms,* Oxford at the Clarendon Press, London, 4 (1901).

3 David C. Elliott,(Edt.) *The Origins of Statues,* Extracts from various sources about the Origins of Stuart Law (1989) www.davidelliott.ca/papers/origins.htm

language of English statutes through the first half of the thirteenth century (with sometimes a French translation). In the second half of the thirteenth century, Latin statutes predominated but there were also statutes in French. In the fourteenth century French became the regular language of the statutes; yet there was some Latin on the statute books until 1461. Elliot cites Mellinkoff's reference to a 1650 Act "for turning the Books of the law, ... into English". It was principally aimed at court proceedings but it included a requirement that "statutes ... shall be in the English tongue" The Act was not happily accepted by the legal profession and with the restoration was repealed in 1660. But the statutes had largely been written in English since 1489, shortly after the invention of printing in 1476. Legislation was passed again in 1731 requiring statutes to "be in the English tongue and language only, and not in Latin or French or any other tongue or language whatsoever, and (court proceedings) shall be written in such a common legible hand and character. The rationale for the requirement that laws should be in English was due to the fact that many and great mischiefs do frequently happen to the subjects of this kingdom, from the proceedings in courts of justice being in an unknown language, those who are summoned and impleaded having no knowledge or understanding of what is alleged for or against them in the pleadings of their lawyers and attorneys, who use a character not legible to any but persons practising the law".[4]

4 Professor David Mellinkoff's book, *The Language of the Law*, at 133, cited in Elliot, *Origins of Statutes op.cit.* It provides as follows:
"Whereas many and great mischiefs do frequently happen to the subjects of this kingdom, from the proceedings in courts of justice being in an unknown language, those who are summoned and impleaded having no knowledge or understanding of what is alleged for or against them in the pleadings of their lawyers and attorneys, who use a character not legible to any but persons practising the law: To remedy these great mischiefs, and to protect the lives and fortunes of the subjects of that part of Great Britain called England, more effectually than heretofore,from the peril of being ensnared or brought in danger by forms and proceedings in courts of justice, in an unknown language, be it enacted by the King's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal and commons of Great Britain in Parliament assembled, and by the authority of the same, That from and after the twenty-fifth day of March one thousand seven hundred and thirty-three, all writs,process, and returns thereof, and proceedings thereon, and all pleadings, rules, orders indictments, informations,inquisitions, presentments, verdicts, prohibitions, certificates, and all patents, charters, pardons, commissions,records, judgements, statutes, recognizances, bonds, rolls, entries, fines and recoveries, and all proceedings relating thereto, and all proceedings of

Another feature of early Parliamentary legislation according to Ilbert was that it was difficult to draw the border line between laws made by the Crown in the exercise of the Royal prerogative and laws made by Parliament with the assent of the Crown, between Charters, Ordinances and Orders in Council on the one hand, and Acts of Parliament on the other. When Parliament was first taking shape as a legislative body, laws were made, not by the King, Lords, and Commons in Parliament assembled, but by the King, with the counsel and assent of the great men of the realm. A broad distinction between statute law and judge-made law was non existent and both forms of law were at that time practically made by the same persons. The King listened to the petitions which were presented to him in Parliament.[5] It was not until the comparative decline of royal power under the Lancastrian dynasty that Parliament asserted its right of dictating the terms on which the laws for which it asked should be made, and marked the change in the character of legislation by making a significant addition to the legislative formula. From this time laws are expressed to be made, not merely with the advice and consent, but by the authority, of Parliament. As the legislative and judicial authorities became distinct from each other, so statute law and common law tended to flow in separate channels. The word 'Statute' is in ordinary English usage treated as equivalent to Act of Parliament, and the English Statute Book might therefore be expected to include all Acts passed by the Parliament of England, or, since the union with Scotland and Ireland respectively, by the Parliament of the United Kingdom. But the Statute Book includes certain enactments which are not, in the strictest sense, Acts of Parliament, and

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courts leet, courts baron and customary courts, and all copies thereof, and all proceedings whatsoever in any courts of justice within that part of Great Britain called England, and in the court of exchequer in Scotland, and which concern the law and administration of justice, shall be in the English tongue and language only, and not in Latin or French, or any other tongue or language whatsoever, and shall be written in such a common legible hand and character, as the acts of Parliament are usually engrossed in, and the lines and words of the same to be written at least as close as the said Acts usually are, and not in any hand commonly called court hand, and in words at length and not abbreviated; any law, custom, or usage heretofore to the contrary thereof notwithstanding: and all and every person or persons offending against this Act, shall for every such offence forfeit and pay the sum of fifty pounds to any person who shall sue for the same by action of debt, bill, plain, or information in any of his Majesty's courts of record in Westminister hall, or court of exchequer in Scotland respectively, wherein no essoin, protection or wager of law, or more than one imparlance shall be allowed."

5 *Supra* note 2 at 20.

excludes certain enactments which are. In the period after the Restoration, the judges, who at that time assisted the House of Lords, not only in their judicial but in their legislative business, and habitually attended the sittings of the House for that purpose, appear to have been occasionally employed by the House as draftsmen of Bills or clauses. Sometimes the heads of a Bill were agreed to by the House, and a direction was given either to the judges generally or to particular judges to prepare a Bill. In other cases a judge would attend a Grand Committee of the House as a kind of assessor, and do such drafting work as was required. At various times a distinction is drawn between statutes and ordinances. Down to the middle of the fourteenth century the words are used interchangeably, and it is only in the latter part of the century that some sort of distinction begins to appear. It seems to take the line of discriminating between those Acts which received the consent of the King, the Lords and the Commons, and those in which one of these consents was absent. Historically the line between Royal Ordinances and Acts of Parliament is not easy to draw in the first stages of Parliamentary legislation, and some of the most important among the early enactments in the English Statute Book, including the Statute 'Quia Emptores' would not comply with the tests applied to a modern Act of Parliament.[6]

Evolution of Statute Law-Plucknett

In 1100, Henry I, issued a Charter of Liberties and from that time onwards the Charter becomes a frequent form of legislation. According to Plucknett it is in the reign of Henry II that there is a great outburst of legislation. The forms which it took were various. The ancient and solemn charter is replaced by the assize. In the middle of Henry III's reign a revolutionary body of barons established a special machinery for the purpose of legislation, and the Provisions of Westminister (1259) were the result; and when finally the revolution came to an end, most of the Provisions of Westminister were re-enacted in a more regular form in the great Statute of Marlborough (1267). The forms and methods of legislation during the period of Edward I were extremely varied. The form of the charter which was really a conveyance, was the standard form and the various charters of liberty were drawn in identically the same form as a conveyance of real property. However the charter under went some change and evolves into a form which is half-way between the charter which technically moved from the King alone, and the later statute which was made in Parliament. Till this

6 *Ibid.*

period it is clear that these legislative Acts ran in the name of the King and very probably were initiated by him or by his most intimate councilors; there is as yet no necessary connection between legislation and Parliament. In the reign of Edward I some extremely important legislation emanated from the King in Council alone, or at most from a Council in Parliament.[7] In the fourteenth century, Parliamentary legislation in England becomes more and more general. Not only does the King use Parliaments for the purpose of giving authority to his own decrees, the Parliament merely ratifying decisions which have really been reached by the Council. In the early stages general complaints are reduced into the form of a petition, either by particular members, or outsiders and local bodies. Next, come petitions by the whole Commons. Such petitions will state grievances and pray for a remedy. When the Parliament is over, the council will consider these requests at its leisure, and if it thinks legislation is necessary it will prepare it according to its discretion and publish it as a statute with Parliamentary authority. As the Commons grow more powerful politically they express increasing dissatisfaction at the working of this method.[8] In the fifteenth century, the beginnings of a new system which had in fact first been used for government business comes into vogue. This consisted of presenting a Bill which contained the exact form of words which it was proposed to enact. Even at this late date, however, there were occasional doubts whether the consent of the Commons was always necessary. At this stage it can be rightly regarded that Parliament was acting like a legislature. In the fifteenth century it also becomes the regular practice for statutes to be written in English, instead of in French as in the fourteenth century, or Latin in the thirteenth century.[9] The Tudor period saw clear traces of modern Parliamentary procedure, the system of three readings and so on. In mere bulk, the change is striking, for the thirty-eight years of Henry VIII's reign produced a volume of statutes equal to the combined output of the previous two and a half centuries.

The Tudor Period

When the Tudor dynasty came to the throne, the legislative as well as the executive powers of the Crown were materially strengthened. Henry VIII was a monarch who entertained views about the functions of the legislature not unlike those of the first Napoleon. He held that Parliament ought not

7 T.F.A. Plucknett, *A Consise History of Common Law*, Butterworths, 318-321 (1956).
8 *Id.* at 323.
9 *Id.* at 324.

to be a master, but could be made a very useful servant. And he discovered – this was his great feat in the craft of statesmanship – he discovered how to use it. He treated Parliament not as any enemy or as a rival, but as an instrument. He found that it was a very useful instrument if it could be persuaded to play the right tune, and he took good care always to call the tune. He accepted his predecessor Henry VII's principles that the King should rule through Parliament, but worked that principle in an entirely different way. He made Parliament the engine of his will. He persuaded or frightened it into doing anything that he pleased. Under his guidance Parliament defied and crushed all other powers, spiritual and temporal, and did things which no King or Parliament had ever attempted to do, things unheard of and terrible. And, not content with this, he took a step further, and in the year 1539, when he had been 30 years on the throne, he persuaded Parliament to pass the Statute of Proclamations which gave the King power to legislate by proclamation. If this innovation could have been maintained, it would have revolutionized the character of English legislation, and would probably have introduced the system of legislation by orders and decrees, which now prevails on the continent of Europe. But the Statute of Proclamations was repealed in the next reign and was never revived, and in 1610, in the reign of James I, a protest of the judges "established the modern English doctrine that royal proclamations have in no sense the force of law; they serve to call the attention of the public to the law, but they cannot of themselves impose upon any man any legal obligation or duty not imposed by Act of Parliament." So it was gradually recognized that a law made by the authority of Parliament could not be altered except by the same authority.[10]

The Tudor period, is also the great age of the preamble. Statutes were not only proclaimed, as in the middle ages, but were now printed and published through the press. Uses, wills, charities, conveyancing, bankruptcy, commercial law and criminal law are all conspicuous in Tudor legislation. Not only did legislation become more detailed, but it also flowed at a more rapid pace. Parliament having once taken up a subject was apt to return to it again and again, piling Act upon Act, sometimes with confusing results.

Consolidating Statutes

From time to time it therefore became necessary to clarify a complicated mass of related statutes, and as early as 1563 we get an example of the

10 Ilbert, *Mechanics of Law Making*, Carpentier Lectures, Columbia University Press, 143-144 (1914).

typically modern device, the consolidating Act, which "digested and reduced into one sole law and statute" the substance of many statutes of artificiers which it repealed. Another modern feature which appears under Elizabeth is the grant of statutory powers to all and sundry for the performance of things which so far had to be done by special powers obtained *ad hoc* from the Crown. Thus in 1597 all persons were allowed to erect and even to incorporate various charitable foundations by the simple machinery of a deed enrolled in chancery.[11]

Mode of Citation of Statutes

One of the methods of citation of statutes was exactly the same as that used by the civil and canon lawyers, and consisted of calling each statute by the first words. In a few cases this practice has survived; to cite a few there was the Statutes De Donis and Quia Emptores, and in the fourteenth century there were many more. As Parliaments became more frequent, statutes were cited according to the place where the Parliament sat; we therefore have the Statutes of Gloucester, York, Northampton, etc., and numerous Statutes of Westminister. With the growth of statute law it became necessary to have a more precise system, and by the close of the fourteenth century statutes are cited by date (that is, by the regnal year). The Statute of Westminister II, therefore, may also be cited as Statute 13 Edward I. Gradually although not always, the legislation of one Parliament was published all together in one document, which will therefore contain a number of unrelated matters. For convenience such a long document is divided into chapters; the numbering of the chapters is common in fourteenth-century manuscripts although we do not find it on the rolls; and so citations will take the form of the regnal year followed by the number of the chapter. Occasionally we find more than one of these long statutes in a single year, and the modern printers have made a practice of numbering these as separate statutes. Unfortunately there was no uniformity among the many different editions of the older statutes, and indeed no official reprints at all, until the publication of the Statutes of the Realm between 1810 and 1825 in nine immense folio volumes. At the present day, citations of statutes earlier than 1713 (at which date the Statutes of the Realm end) are usually made according to the regnal years and numberings in this edition, which moreover has received a certain amount of Parliament sanction.[12]

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11 *Supra* note 7 at 324-25.

12 *Id.* at 326.

Recording Statutes-Black Letter Law

Acts between 1278 and 1487 were entered on the statute roll - a record of the statutes made when they were proclaimed and published. The last statute preserved in statute roll form is the first of which no French or Latin version is still existing. From 1487-1849 Acts were engrossed in black letter (with subsequent editions and erasures endorsed) from this a transcript was made by the Clerk of the Parliament. Black letter law derives its usage from this system of recording. From 1849 on, two prints were prepared after Royal Assent, examined and signed by the Clerk.

Origins of Statutes- David Elliot

Elliot briefly sums up the historical origins of statute.[13] The different stages in the evolution of legislative law making can according to him may be briefly summed up as follows.

First phase

Legislation was initiated by a petition exhibited in Parliament by one of the Houses usually the House of Commons. The petition was approved with or without changes by the King. When a change in the law was made as the result of a favourable Response, the new law was subsequently drafted by a committee of judges and officials, and promulgated. Promulgation is by copies being sent round the Kingdom under the Great Seal and by being entered upon the Statute Roll.

Second phase

In the fifteenth century the second phase began, in which the petition incorporated a draft of the law which was the fore runner of the modern day Bills. During this phase the drafting was carried on by private enterprise.

Third phase

The third phase can be traced back to the beginning of the nineteenth century, when the Government began to nationalise legislation. During the first half of that century various individual draftsmen had been employed as Parliamentary Counsel in the Treasury, and later in the Home Office; but the present system, under which the Government's public Bills are prepared by a body of professional draftsmen available indifferently to all

13 *Supra* note 3.

departments, really dates from 1869 when Henry Thring (who had been Parliamentary Counsel to the Home Office since 1860) was appointed by Treasury Minute as Parliamentary Counsel and funds for the employment ad hoc of other members of the Bar. More about the origins of the Parliamentary Counsels' Office in Chapter III.