Bennion on Statute Law

Part 1 - Statutory Texts

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Statute Consolidation and Revision

The British have never adopted for themselves the idea of a scientific statute book, by which I mean one kept up to date and arranged under Titles on a one Act-one subject basis. We have not changed from the system under which Acts are produced as required, with the subject matter of each being determined by the political and administrative convenience of the moment. Yet strangely a far superior system was imposed by Britain on the territories which formed part of the British Empire. The independent countries of the Commonwealth who inherited and developed this system, are the beneficiaries today.

As an example of the Colonial system, we may take the West African colony of the Gold Coast (now Ghana). British rule dated from 1827. The first collected edition of legislative texts was published in one volume in 1860. Thereafter, until British rule ended a century later, no fewer than nine collected and revised editions were promulgated. The practice was to enact in advance of each edition a Revised Edition of the Laws Ordinance. This authorised the editor (usually a retired judge or law officer) to combine texts into unified Titles, omit spent matter, and carry out other improvements. On being approved by the Governor, the new edition became 'the sole and only proper Statute Book'. (For details see Bennion 1962, pp 284-291.)

Instead of this admirable practice, we have had in Britain an erratic system of bringing forward ad hoc consolidation and statute law revision Bills. The subject is complex, and can be dealt with here only in outline. We begin with a brief historical survey.

History of consolidation in Britain

To have a single topic dealt with by numerous texts, passed at different times and not designed to interlock, is a system so obviously inconvenient that we are not surprised to find that constant complaints have been made about it. These date from the beginning of the system. As early as 1549 the House of Commons proposed that the statute laws should be digested into one body under Titles and heads, and put into good Latin. In 1550 Edward VI desired

that 'the superfluous and tedious statutes were brought into one sum together, and made plain and short'. Neither of these was done.

One of the earliest consolidation Acts was the Statute of Labourers 1562. Lord Keeper Bacon then drew up a scheme: 'First, where many laws be made for one thing, the same are to be reduced and established into one law, and the former to be abrogated'. It was not adopted. In 1609 James I complained of'divers cross and cuffing statutes'. The following year a Commission was set up. It made some proposals for repeals and changes, but nothing substantial emerged. Nor did anything happen when in 1616 Bacon, now Attorney-General, made further proposals for improving the statute book.

In the Cromwellian period a committee was appointed to consider how the statutes 'may be reduced into a compendious way and exact method for the more base and clear understanding of the people', but its labours bore little fruit. In 1796 a House of Commons committee presented a report dealing with consolidation and the problem of obsolete statutes. It condemned the practice of legislating in one Art on a variety of subjects, citing as an example 20 Geo 2 c 42. Sections 1, 2 and 4 dealt with the window tax, while s 3 contained a general provision that Arts mentioning England should also extend to Wales and Berwick-on-Tweed. Section 3 remained in force until repealed by the Interpretation Art 1978.

In 1816 both Houses of Parliament passed resolutions that an eminent lawyer with 20 clerks under him be commissioned to make a digest of the statutes, which was declared 'very expedient'. The resolutions were ignored, but from time to time certain topics were consolidated in part, for example anti-slavery law and customs duties. In 1826 Sir Robert Peel presided over the consolidation of criminal statutes of widespread importance, including those relating to malicious damage and larceny.

The modern era began with the appointment of a Royal Commission in 1835. This had the duty of preparing a criminal law consolidation and reporting on how far it might be convenient to consolidate the other branches of law. The Commission sat for 12 years and produced eight reports. Not one Act was passed as a result of its labours. A further Commission was appointed in 1845 but was equally ineffective. The Statute Law Board was briefly set up in 1853. It disagreed, and was abolished. The following year a prestigious Statute Law Commission was established. It presented four reports, the last of which stated that the whole of the existing statute law might be usefully consolidated into three or four hundred statutes. It optimistically added that if 10 or 12 drafters were employed the work could be done in two years. None of the consolidation Bills prepared by this Commission was passed.

Matters then improved. In 1861 seven important criminal law consolidation Bills were passed. In 1868 the present Statute Law Committee, still today responsible for the quality of our statute law,

was set up. The following year saw the establishment of the Parliamentary Counsel Office, while in 1875 a Select Committee of the House of Commons recommended that 'the work of consolidation should be carried on upon a regular system, and by skilled hands, acting under the authority of some permanent government force . . . '.

No such government force was forthcoming, but the Statute Law Committee persevered. It worked out a systematic long-term programme of consolidation. In the 30 years from 1870 to 1900, 101 consolidation Bills were prepared, though only 49 became law. This was due to poor liaison with the relevant government departments and lack of parliamentary time. By 1894 the convention had become established that consolidation Bills recommended by the Joint Select Committee of both Houses should pass without debate. The Joint Committee pronounced itself free to make 'such alterations only as are required for uniformity of expression and adaptation to existing law and practice'. This proved too wide for Parliament to accept however, and the pace of consolidation slowed. The Statute Law Committee lost interest in consolidation, and the initiative passed to those government departments who were concerned to have their legislation consolidated. Between 1900 and 1934 a further 60 consolidation Acts were passed. In 1937 a sub- committee of the Statute Law Committee was appointed to consider 'the priority according to which consolidation should be undertaken'. It compiled a list of 41 subjects, many of which have still not been consolidated. In 1947 Sir Granville Ram procured the setting up of a consolidation department within the Parliamentary Counsel Office. An Act of 1965 passed the function to the Law Commission, where it rests today.

The pace of consolidation altered very little in the 100 years following the report of the 1875 Select Committee. The third edition of ***Statutes Revised***, published in 1948, contained only 166 consolidation Acts out of a total of 4,065 Acts (6,549 pages out of 26,089). From 1949 to 1965 the average number of consolidation pages in the annual volume of statutes was 361 (out of 1,204). From 1965 (when the Law Commission assumed its duties) to 1,972 the average was 512 pages (out of 1,927). Thus during the first Law Commission period the consolidation share of total output dropped from 30 per cent to 24 per cent (Bennion 1979(4), p 45). Updating these figures, we find that from 1973 to 1978 the average of consolidation pages annually was 444 out of 1,965 (or 23 per cent). From 1979 to 1981 the annual average rose to 755 out of 2,193 (or 34 per cent). From 1982 to 1986 it was 830 out of 2,476 (or again around 34 per cent). It seems therefore that the Law Commission have settled down to an average of about one-third of consolidation Act pages out of a total of Acts tending to increase year by year.

I sought unsuccessfully to persuade the Renton Committee that

a Statute Law Commission should be set up to act as keeper of the statute book, with functions including consolidation (Bennion 1979(4), pp 46-51 and 82-96). However, a recent Chairman of The Law Commission, Lord Justice Gibson, has expressed support for this idea (Zellick 1988, p 53). For a fuller account of the history of consolidation see Simon and Webb 1975.

The modern technique of consolidation

Consolidation can be looked on as a form of processing. It takes the texts of various Acts of Parliament and, without altering the essential wording, combines them into a coherent whole. But we do not regard that as processing within our definition of the term. The consolidation Act is itself a legislative text. It has gone through the procedures which bestow validation as law. It replaces, in the *corpus juris,* the texts it embodies.

Nevertheless, consolidation performs certain functions which we do ascribe to processing. It materially assists the process of *text- collation.* A typical consolidation Act may embody the texts of a dozen or more previous Acts. Under the former British practice of indirect amendment (which one hopes is now obsolete) these texts would all have been disparate. That is, no one of them would have been drafted so as to fit textually with another. In these circumstances consolidation is a great benefit, even though it tells only part of the story. Under our system Acts are never consolidated with statutory instruments.

One of the bugbears of consolidation has lain in the fact that legislative texts are frequently defective. As we shall see spelt out in detail in chapter 19, drafters often err. Their errors give rise to doubt, and in former times it was necessary to 'consolidate the doubt'. If the consolidating drafter sought to resolve the doubt, he was liable to be accused by MPs of indulging in 'draftsman's legislation'. The danger then was that his Bill would not be allowed to pass without debate, and consequent consumption of government time.

Sir Granville Ram was the first to do something about this. He procured the passing of the Consolidation of Enactments (Procedure) Act 1949, described by its long title as being 'to facilitate the preparation of Bills for the purpose of consolidating the enactments relating to any subject'. The Act enables corrections and minor improvements to be made in existing law, provided the Joint Select Committee approve them and do not consider them of such importance that they ought to be separately enacted. The term 'corrections and minor improvements' is defined as:

> . . . amendments of which the effect is confined to resolving ambiguities, removing doubts, bringing obsolete provisions into conformity with modern practice, or removing unnecessary provisions or anomalies which are not

of substantial importance, and amendments designed to facilitate improvement in the form or manner in which the law is stated . . .

The Law Commission introduced a further refinement to enable consolidation Bills to embody improvements going beyond the scope of what is permitted by the 1949 Act. If in connection with such a Bill they submit a report recommending amendments of the existing law, the Joint Committee consider the report and give their views to Parliament. It is now the practice to include in such a report amendments which could have been made under the 1949 Act, since it is pointless to use both procedures on the same Bill.

Where the amendments required are too substantial even for this Law Commission procedure to be employed, the practice is to set up an ad hoc expert committee. The Highways Act 1959 was produced in this way (the law not having been tidied up since the passing of the Highway Act 1835). The long title describes it as an Act 'to consolidate with amendments certain enactments relating to highways . . . ' In 1980 highway law again fell to be consolidated, but this time it was found sufficient to use the Law Commission procedure. (The Commission's report is set out in Law Com No 100 (Cmnd 7828).)

We see that there are thus four kinds of consolidation Bills:

1 Straight consolidation.
2 Consolidation with amendments under the 1949 Act.
3 Consolidation with Law Commission amendments.
4 Consolidation with amendments proposed by an *ad hoc* committee.

Only the first three types go before the Joint Select Committee of both Houses. The Bill is introduced in the House of Lords, and given a formal second reading. After being reported on by the Joint Committee it proceeds through the normal stages of a Bill in each House. Bills in the first two categories are not subject to amendment. Bills in the fourth category may be introduced in either House, and go through normal procedure. Although there is nothing to prevent members from putting down amendments to Bills in the third and fourth categories, it is expected that they will not use this opportunity to attempt substantial changes in the law. Otherwise the special virtue of a consolidation Bill, namely that it does not take up government time, would be lost. To facilitate this, Bills in the fourth category may be sent first to an *ad hoc* Joint Select Committee. This happened with Bills for the Local Government Act 1933, the Public Health Act 1936, the Customs and Excise Act 1952 and the Highways Act 1959.

Subject matter of consolidation Acts

It might be thought obvious that a consolidation Act should exhaustively set forth a distinct segment of statute law. If we cannot

have an orderly statute book under Titles, at least let us have consolidated law on clearly defined topics. This reasoning has not always been followed however. The Housing Act 1957 consolidated the enactments relating to housing, except certain financial ones. These were consolidated separately as the Housing (Financial Provisions) Act 1958. Similarly, the Hire-Purchase Act 1964 consolidated all the hire-purchase law except that relating to advertisements. This was consolidated separately in the Advertisements (Hire-Purchase) Act 1967. In 1979 the enactments relating to customs and excise duties were consolidated. The previous consolidations of these provisions followed the natural course and combined them in one Act (see the Customs Consolidation Act 1876 and the Customs and Excise Act 1952). In 1979 however the provisions were consolidated in no less than seven Acts!

There are two reasons for this apparently wayward behaviour on the part of the authorities; one practical and the other theoretical. The practical reason relates to shortage of manpower. Consolidation Bills are drafted by Parliamentary Counsel on temporary secondment to the Law Commission. In giving oral evidence to the Renton Committee, I was asked what were the principal limitations on consolidation. My reply was:

First of all there is the shortage of draftsmen. Under the system of referential amendment, consolidation of the amended and amending Acts together is often extremely difficult. It requires what in my paper I call conflation, which is a useful word to describe the perplexing mental process of working out the effects of cumulative statutes piled one upon the other. This is what the consolidating draftsman has to do whenever he is faced with a referential amendment of an Act to be consolidated. If he were only concerned with textual amendments, the consolidation could be done by an assistant, I mention that because it does add to the length of time taken for consolidation; although nothing can be done about that in the case of existing Acts. The shortage of draftsmen is quite remarkable. It is highlighted by the fact that the Law Commission in their first annual report, when they were reporting the staff they had in 1965, said that there were four draftsmen on their staff of 35, and they also made the remark that 'in due course it will clearly be necessary to increase their number'. Yet in their latest annual report you find the number of draftsmen is still four, though the total staff has increased to 47. That is why we have no dramatic increase in consolidation. That is the main obstacle. Secondly, and also very important, is the shortage of staff in the Departments who operate the Acts to be consolidated. I had experience of that myself, because I did a housing consolidation which ought to have been before Parliament now, and when the first draft of the Bill, which was about 330 clauses, had been completed, the onus was then on the Department of the Environment to comment on it and say where it did not agree with what they thought the Bill should say. But owing to under-staffing in the legal department of the DOE we had no way at all of making progress, because the staff

were tied up with the current Housing Bill, and it meant the consolidation was put aside. I have made a suggestion in my written evidence to deal with that, which is that there could be attached to every major department a legal officer whose sole function it is to deal with statute law consolidation and other matters of that kind (Bennion 1979(4), p 73).

The Renton Committee accepted all except the last item of this evidence (see Renton 1975, paras 14.15 to 14.20). They did not support the idea of having departmental officers with law reform duties.

Shortage of manpower leads to the philosophy that consolidation had better be done piecemeal as opportunity offers. Otherwise it may not get done at all. It is believed, no doubt rightly, that consolidation of even part of a subject does represent some improvement.

The theoretical reason for breaking up consolidation units in the manner used for the customs and excise legislation in 1979 was set out in the Renton Report. The Committee dismissed the plea for consolidation on a one Act-one subject basis put forward by the Statute Law Society and other witnesses. 'The proposal is, in our view, based on the erroneous assumption that every statute can be completely intelligible as an isolated enactment without reference to the provisions of any other statute' (Renton 1975, para 14.7). Their view as to what the proposal was based on was in fact mistaken. No one with any knowledge of the subject would suppose that tides could stand entirely on their own. But they would produce the inestimable advantage of organising each body of law as a coherent whole, with a unified system of internal numbering and cross- reference. Practitioners would know just where to look for what they wanted, as users of that invaluable work *Hahbury's Statutes* quickly learn which tide to consult.

The Renton Committee argued that customs and excise enactments should be split up because 'the person who is interested in duties on hydro-carbon oil will not want to pay for, and wade through, an enormous Act containing the whole of the customs and excise legislation . . . What such a person wants is the needle without the haystack' *(ibid).* That is what we all want of course, but we are not always looking for the same needle. The person whose only legislative interest throughout life is in hydro-carbon oil duties is likely to consult a guide put out by his trade association rather than the text of an Act of Parliament.

We may take it that the Hydro-carbon Oil Duties Act 1979, owes to the Renton Committee's philosophy its existence as one of the seven Acts into which the customs and excise legislation was then divided. Yet for the meaning of no less than 16 of the expressions used in that Act, the reader is expressly referred to one or other of the remaining six Acts! So the Renton Committee's mythical needle hunter, who economised by purchasing only the one Act,

would find himself cheated. Even though dealing with a non- debatable consolidation Bill, the drafter could not bring himself to incur the repetition needed to make each Act truly independent. He thus neatly proved the Renton Committee wrong — along with every one else who resists the obviously desirable reform of a one Act-one subject statute book.

Recent practice has turned away from the Renton recommendations. For example the 1985 consolidation of the Companies Acts was, following consultation with users, carried out in the form of a single Act of 747 sections and 25 Schedules rather than a number of separate Acts.

By a useful recent reform, consolidation Acts as officially published incorporate a Table of Derivations showing the derivation of each enactment comprised in the consolidation Act. Official annual volumes of Acts also include, for each consolidation Act included in the volume, a Table of Destinations. This operates in the reverse way, listing the enactments consolidated and showing where each is to be found in the consolidation Act.

Preserving integrity

It is important that once the drafter has gone to the trouble of producing a consolidation Act its textual integrity should be preserved. This is done by drafting future amendments, as and when they come to be required, in the form of textual and not indirect amendments. This enables the amended Act to be reprinted as one text.

Unfortunately, British drafters have paid scant respect to the integrity of statutory texts. With remarkable perverseness (since it is obviously untrue), the Renton Committee found that using the textual amendment method would not lengthen the interval between consolidations of a topic such as income tax. They did however add:

> Nevertheless, it remains in our view a matter for regret that the integrity of [recent tax consolidations] has not been preserved, as far as possible, by casting subsequent legislation on the subjects with which they deal in the form of textual amendments . . . (Renton 1975, para 17.32).

Statute law revision

The Renton Report states that the still current series of Statute Law Revision Acts began in 1861 (Renton 1975, para 2.11). In fact this is a mistake: the first such Act was 19 and 20 Viet c 64, passed in 1856. It repealed 120 obsolete statutes. The Law Commission, charged by its constituting Act of 1965 with 'the elimination of anomalies, the repeal of obsolete and unnecessary enactments and generally the simplification and modernisation of the law' now

superintends the function of preparing these Acts (see Simon and Webb 1975).

Codification

This adds to the stock of legislative texts by converting judge-made law into statute law. Since codification reduces the area of their authority, judges have not unnaturally opposed it. Apart from the successful codifications by Sir Mackenzie Chalmers of rules relating to sale of goods, partnership, bills of exchange and marine insurance, little of note has been achieved in Britain.

Codification is included among the functions conferred on the Law Commission, but it has not yet succeeded in placing a codification Act on the statute book. The Commission began immediately with proposals for codification of the law of contract, intending that the codified rules 'will later take their place in a Commercial Code or, ultimately, in a Code of Obligations' (First Annual Report, para 31). Work was also begun on a codification of the law of landlord and tenant *(ibid,* para 67).

These plans proved too ambitious. Experience in working on the latter code, for example, convinced the Law Commission that 'the task of preparing a complete code of the basic law of landlord and tenant is immense and cannot be completed for a long time unless resources are devoted to it on a scale which is at present impossible' (Law Com no 92, para 2.34). One formidable obstacle to codification is that even if the necessary Bills could be produced, parliamentary time would be difficult to find. The Bills would be fully amendable, and there are few votes in law reform of this kind. Nevertheless the Law Commission set up in 1981 a small group of academics 'to study and draft the principles upon which the General Part of a criminal code should be based' (Law Com No 119, para 2.35). For a discussion of the method which should be used in a codification of criminal law see Bennion 1986(3).

So far as a code does not alter the law, it is clear that it is equivalent to a declaratory Act. There is however lack of agreement on the degree of detail that justifies use of the term codification. Ilbert defined a code as 'an orderly and authoritative statement of the *leading* rules of law on a given subject' (Ilbert 1901, p 128; emphasis added). Chalmers, the leading English codifier, did not apply this restrictive qualification. Acting on the advice of Lord HerscheU LC, he drafted the Sale of Goods Act 1893, so as 'to reproduce as exactly as possible the existing law'. In this he followed the principle employed for his highly successful Bills of Exchange Act 1882. Chalmers clearly felt that a code should be a *full* statement of the law, and not depend on extensive litigation to clarify its details. Legislation, as he pointed out, is cheaper than litigation (Chalmers 1894, p viii).

David Dudley Field, founder of the American codification

movement, also favoured a comprehensive code rather than one limited to Ilbert's 'leading rules'. When it was objected that a code would never be truly comprehensive because it could not deal with matters that had not yet come before the courts. Field retorted: 'Because we cannot provide for all cases, should be thought a poor reason for not providing for as many as possible. To render the existing law as accessible, and as intelligible, as we can is a rational object, though we cannot foresee what ought to be the law in cases yet unknown'.

Field went on to specify the true object of a code as being: 'To cast aside known rules which are obsolete, to correct those which are burdensome, or unsuitable to present circumstances, to reject anomalous or ill-considered cases, to bring the different branches into a more perfect order and agreement . . . " (Field and Bradford 1865, p 110).

This had certainly been Bentham's view. He held that it could not be otherwise than expedient to narrow the occasion for judicial interpretation '. . . by transforming the rule of conduct from Common Law into Statute Law; that is, as I might say, into Law from no-law: to mark out the line of the subject's conduct by visible directions, instead of abandoning him in the wilds of perpetual conjecture' (Bentham 1775, p 104).

A code does not always obviate conjecture. The Bill for the Marine Insurance Act 1906, was vetted by an expert Committee which disagreed on certain points. As Lord Porter later said, these points 'were dealt with in vague terms in the hope that they would work out all right in practice, and in the knowledge that some day the Courts might make them clear' (Porter 1940, p 2).

Mill confirmed that Bentham was insistent that a code should be comprehensive. Bentham, he said:

> . . . demonstrated the necessity and practicability of codification, or the conversion of all law into a written and systematically arranged code: not like the Code Napoleon, a code without a single definition, requiring a constant reference to anterior precedent for the meaning of its technical terms; but one containing within itself all that is necessary for its own interpretation . . . (Mills 1838, p 110).

Pace Sir Courtenay Ilbert, the consensus of opinion on both sides of the Atlantic is that a code should be comprehensive, and should modify existing law where thought desirable. The following definition is offered:

> A code, as respects a particular area of law, is a comprehensive statute which reproduces systematically, with or without modification, the current principles, rules and other provisions of that area of law, whether they derive from common law, statute, or any other source. (See further Bennion 1986(3).)

The classic statement of how a codified provision should be

interpreted was given by Lord Herschell, the Lord Chancellor to whose reforming zeal the great English codes drafted by Chalmers are mainly due:

I think the proper course is, in the first instance, to examine the language of the statute, and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with enquiring how the law previously stood, and then, assuming that it was intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If... treated in this fashion it appears to me that its utility will be almost entirely destroyed and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities ... *{Bank of England* v *Vagliano* [1891] AC 107, 144).

An advantage of codification which is not always appreciated is that it impresses foreign lawyers who are used to codes in their own jurisdiction. The Foreign Judgments (Reciprocal Enforcement) Act 1933, was based on the report of the Greer Committee ((1932) Cmd 4213). This identified as a mischief requiring statutory remedy the fact that foreign courts were reluctant to enforce English judgments because they were not convinced that English courts would enforce foreign judgments. They enforced them under common law rules which, in the words of Lord Diplock, 'foreign courts suspected of being indefinite and discretionary as compared with written law embodied in a code or statute' *{Black-Clawson* v *Papierwerke* [1975] AC 591, 639).

Codification is more practicable on a smaller scale. Where there is need to reform a limited area of law, the opportunity may be taken to codify it at the same time. Having so far failed to realise their more ambitious aims, the Law Commission are proceeding where appropriate in this more modest fashion. Unfortunately they appear to have adopted the Ilbertian view of codification.

When in 1980 the Law Commission reported on reform of the criminal law of attempt, for example, they announced that their proposals, which included a draft Bill, codified this offence (Law Com No 102, p 87). The gist of the offence was however stated in a mere eight lines (see now the Criminal Attempts Act 1981, si). While the Law Commission report, which runs to more than 100 pages, deals fully and clearly with the many points that have caused difficulty in this field, the codified provisions in what is now the Act fail to mention most of them. The formulation, in other words, follows the compressed style characteristic of common law drafting (for the drawbacks of this compression see pp 217- 223 below). When I ventured to raise this objection with the Commissioner responsible he replied that in the view of the Law Commission a radical change in drafting style could be contemplated

only in the context of a complete Criminal Code (for a full account see Bennion 1980(9) and 1981(1); as to the desirability of codification whenever a common law rule is fundamentally altered by statute see Bennion 1980(10)).