

## Codification

by

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1. Codification seems to be such an obviously "good thing" that it is surprising that there is so little in the UK. Great jurists such as Blackstone, Bentham, Brougham and Stephen have all extolled the merits. The consolidation and codification work of Chalmers on the sale of goods 1893 and marine insurance 1906 and Pollock on partnership 1890 has long been recognised as a signal success. Many Commonwealth and common law countries have codes, often inherited from the UK, e.g. Canada and Australia and India. For very many centuries the code has been the hallmark of continental statute law, Justinian, Napoleon, Germany 1900, the entire civil law system. The European Convention on Human Rights 1950 is a code, as are many international legal instruments, and in the UK the Human Rights Act 1999, incorporating the European Convention. The enormous influence of EU law today, regulations and directives under the treaty, require observance in the UK, and incorporation, and harmonisation of style and content must be a merit within the European Union, subject always to essential national interests.

### 2. Law Commissions

It shall be the duty of each of the Commissions to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law... Law Commission Act 1965 s 3.

### 3. Merits

The positive merits of codification in statute law readily spring to mind:

3.1. The relevant law is gathered together in one place.

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- 3.2. The law is set down in an orderly and systematic way.
- 3.3. The law is user-friendly for all users.
- 3.4. The law is accessible.
- 3.5. The makers can either "start from scratch" or take stock of the existing situation, and proceed from there.
- 3.6. The code represents a rational, coherent, consistent, clear and comprehensible statement of the law. The common law can lack clarity and coherence and certainty.
- 3.7. The language is contemporary and certain and free from ambiguity and obsolescent language. Plain English is used, so far as is consistent with the purpose.
- 3.8. The code concentrates on principle not detail, leaving the application to individual cases to the discretion of the judge in the event of dispute.
- 3.9. The complexity, the multiplicity of sources, the obscure language, the excessive detail, the time required to interpret and apply, the anxiety, and the costs of the existing system, are all eliminated or greatly reduced. A code promotes efficiency and economy. The public general acts, Current Law Statutes and Halsbury's Statutes (over 50 volumes), endlessly take up the shelves, and require very detailed indices. Statutes pile upon statutes, each one amending the earlier one. Even the titles of statutes can be very confusing. Such is the complexity of the statute law that solicitors and counsel can all too easily overlook vital provisions, and judges are led into error, e.g. over sentencing procedures and powers.
- 3.10. The necessary institutions for code-making exist, namely the Law Commission, the Universities, the Research Institutes, specialist groups, Government Departments and Parliamentary Counsel. Naturally political commitment and public resources are necessary for success.
- 3.11. Codes of practice, or protocols or guidance, commonly accompany modern statutes, and seem to work reasonably well in practice.

#### 4. Consolidation

One cannot draft a new law without a good working knowledge of the old law. Experience shows that consolidation can eliminate anomalies, inconsistencies and multiple fragmentation, and is a good prelude to statutory law reform and codification. Consolidation is welcome so far as it goes, e.g. Powers of the Criminal Courts (Sentencing) Act 2000, the Charities Act 2007, the Companies Act 2006, but such legislation very soon becomes "encrusted" with amendment, addition, repeal, and needs an overhaul after a decade or so, or less.

#### 5. Obstacles

There are many obstacles to codification, the process is not at all easy.

- 5.1. There is a lot of pragmatic common law distrust and suspicion of "continental" methods.
- 5.2. Parliament is always heavily engaged in politics and the issues of the day to give much attention to code-making. Codification can be seen as controversial, too controversial for the government or politicians or the executive of the day.
- 5.3. Codification may be seen as largely the re-enactment of existing law, and to be not of any great consequence.
- 5.4. The parliamentary Jellicoe procedure for non-controversial Law Commission "lawyers' law", enabling special public bills to be examined in committee in the House of Lords off the main floor, has possibilities, but has not been much used.
- 5.5. "Starting from scratch" is generally not practical and anyway a formidable task. "Starting from here" is likewise a formidable task. The Law Commission and the Society of Legal Scholars have worked on a criminal code for many years, and produced a draft code in the 1980s, taken up by the Law Commission in the 1990s. But it was not well received. The Law Commission moved to "piecemeal" reform, taking one specific area at a time, over a long period. The company law work took too many years; the tax law review has been ongoing for many years.

- 5.6. Lack of resources is a particularly poignant problem at this time of economic stringency; the work could be outsourced.
- 5.7. The astonishing advance of information technology has greatly eased the problem, and the existing relevant statutory provisions can be readily accessed on the computer - though patient use of the search engine may be not infrequently required.

## 6. Risks

There are certain risks in a code.

- 6.1. The language may be general and lacking in sufficient detail for practical application.
- 6.2. A new code could represent a shock and upheaval, as we are all accustomed to the existing statute book and the methods of interpretation and can generally find our way around reasonably competently and confidently, knowing where to find what we need, understanding it when we find it.
- 6.3. A code can be or become rigid, inflexible, stale, uncertain, not subject to the vibrant common law approach with which UK lawyers and others are thoroughly familiar.

## 7. Keep up to date

A code must be kept under continuous review by a suitable commission or similar body. All new statutes and significant judicial decisions must be incorporated into the code, preferably on an annual re-issue or even running review (rather like the Civil Procedure Rules Committee).

## 8. Failure

The great Victorian vision for codification has very largely failed to be sustained into C20 and C21. The Theft Act 1968 and the Bribery Act 2010 have been useful restatements in modern terms, combining features of consolidation and codification. The Consumer Credit Act 1974 set up the consumer credit legal regime; the Tribunals Act 2007 established a unified tribunal structure; and the Equality Act 2010 sought to rationalise the equality strands in the law. A new and

radical approach is required if statute law is to become a user-friendly instrument of which we could be proud.

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LQR 570-590 - a characteristically Scottish, scholarly, gentle and sceptical approach to the "dread topic" of codification, which has generally failed to materialise - "the great vessels of codification have foundered in the past" - and which he says is now less advantageous because of the excellent textbooks and the infiltration of European law.