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***LEGAL CERTAINTY:
A CASE OF KEEPING THE STATUTE BOOK UP-TO-DATE***

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Table of Contents

ACKNOWLEDGEMENT	i
DEDICATION	ii
CHAPTER ONE - INTRODUCTION	1
1.1 Overview.....	1
1.2 Hypothesis.....	7
1.3 Methodology	7
1.4 Structure	8
CHAPTER TWO - INTRODUCTION AND DISCUSSION OF CONCEPTS	10
2.1 Concept of Legal Certainty	10
2.2 Clarity as a means of achieving legal certainty.....	13
2.3 The role of the drafter in the quest for clarity in legislation	16
CHAPTER THREE - MECHANISMS OF TIDYING UP THE STATUTE BOOK.....	20
3.1 Codification.....	20
3.2 Consolidation.....	26
3.3 Rewrite	30
3.4 Restatement	31
3.5 Reprint.....	32
3.6 Statute Law Revision.....	34
CHAPTER FOUR - ANALYSIS OF THE TIDYING UP MECHANISMS AND THEIR IMPACT ON THE STATUTE BOOK IN RELATION TO LEGAL CERTAINTY	38
4.1 Effect on the Architecture of the Statute Book.....	38
4.2 Better Understanding of Legislation in Context.....	40
CHAPTER FIVE - CONCLUSION.....	44
BIBLIOGRAPHY	51

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DEDICATION

To my family, especially Prof and Mrs Israel Djokoto and Mr. and Mrs. Edward Tetteh – I appreciate your support and prayers for me throughout, I cannot thank you enough. Akpe kaka, Meda won'ase, Merci, Danke,

May God continue to bless you.

CHAPTER ONE - INTRODUCTION

“[A]nother obvious advantage of establishing as soon as possible [clear and definite rules]: predictability. Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law. Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes.”¹

1.1 Overview

Legislation is a necessity in contemporary times as it confers rights and imposes obligations, prescribes powers and duties and more importantly, salient elements of state policy are formulated in terms of legislation.² Governments need legislation to effect changes in the law, to impose taxes and duties, excise and imposts.³ Legislation establishes and delimits the law as well as communicates the law from the law making authority to society and in particular to user of legislation who is affected by it.⁴ Furthermore, in the management of their country's economic, political, social, administrative and legal affairs, governments do so based largely on statutory powers granted to Ministers and public authorities.⁵ Characteristically, legislation is an anecdote to address social, economic, environmental issues among others. The genesis of legislation lies in the political process and the sources of legislation in most countries including Ghana originate from a commitment by a winning political party in their manifesto, response to new developments, international commitments and government departments⁶ as well as pressure from interest groups and court decisions. Due to the binding nature of legislation, it forms the basis of the relationship between the Government and the society. It is not merely a "technical body" of rules nor an agency of social control, it is the organizing principle for the reconfiguration of society and

¹ Antonin Scalia, 'The Rule of Law as a Law of Rules', (1989) 56 UChiLRev, 1175, 1179.

² Ann Seidman, Robert Seidman and Nalin Abeyesekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (Kluwer Law International, 2001), 13.

³ Crabbe V, *Legislative Drafting* (Cavendish Publishing Limited, 1993), 1.

⁴ Ibid.

⁵ DR Miers & A Page, *Legislation*, (Sweet & Maxwell, 1982), 211.

⁶ R Rogers and R Walters, *How Parliament Works* (5th Edition, Pearson Longman 2004), 173 -175.

articulates the values by which persons in a society seek to live.⁷ As long as a nation continues to live and grow, nothing can stop the growth of its legislation.⁸

Legislation collectively put together is referred to as the 'statute book'. The statute book is a part of a larger set of books containing a complete body of statutory law,⁹ a notional book¹⁰ in which to find legislation. It is referred to as such by legislators and others as a convenient term for speaking of the sum total of laws that are enacted.¹¹ The statute book does not have to be in a book form as it would be so extensive that it could never be reduced to a single volume.¹² It is the source of all primary legislation printed under parliamentary authority and contains the original text of statutes as enacted.¹³ It does not incorporate judicial rulings, even on statutory provisions nor does it include secondary or delegated legislation, though they are also enacted under the authority of the legislature.¹⁴ The growth of legislation due to changing societal needs necessitates that the statute book be managed in a way which ensures that users of legislation know with certainty the particular legislation that applies to that person's situation at any particular point in time. Thus a perfect statute book should set forth the intent of the legislature accurately and clearly.

From the perspective of both the state and the users of legislation, it is vital that up-to-date versions of legislation relevant to an issue that concerns them are capable of being identified and its contents clearly assessed¹⁵ and understood with certainty. The electorate, as in this case, the users of

⁷ J Turner, "Law for the Seventies: A Manifesto for Law Reform", (1971) 17 McGillLJ I, 2.

⁸ C Ilbert, *The Mechanics of Law Making*, (Columbia University Press, 1914), 173.

⁹ BA Garner, *Black's Law Dictionary*, (10th Edition, Thomas Reuters, 2014), 1635.

¹⁰ GW Bartholomew, 'The Singapore Statute Book', (1984), 26 MalayaLRev, 1.

¹¹ 'The "Statute-Book" Myth', (1948-1950) 8 NirLegalQ, 154.

¹² Jonathan Teasdale, 'Statute Law Revision: Repeal, Consolidation or Something More?', (2009) EurJLReform, 157, 157-8.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Duncan Berry, 'Keeping the Statute Book up-to-date—A Personal View', (2007) October Issue, The Loophole, 33, 33 www.opc.gov.au/calc/loophole.htm, (accessed 24th May, 2015).

legislation, directly or by representative parliamentary decisions, are the legislators and should know what, how and why, it regulates on a matter. This presupposes that the statute book ought to be a handbook usable by the persons whom it regulates¹⁶ and should be flexible, making room for new legislation. Ideally, the statute book should be divided according to the subject matter easily understood by users, rather than intricate classification which is the product of acute logic.¹⁷ Users of the statute book ought to find in one place, as nearly as practical convenience will permit, all legislation enacted to control and govern any one class of people, or any separate portion of human activity.¹⁸ Legislation should be published in a manner which facilitates its identification and location by users.¹⁹

A messy statute book is not just a question of aesthetics, it rather makes legal work dearer, because it is more time-consuming to find legislation which is of relevance to a particular situation and this may sometimes lead to downright mistakes.²⁰ This is because the user who attempts to find a solution to a particular legal problem by the use of messy statute book often finds that relevant legislation is difficult to find, or when found, is expressed in language is difficult to interpret; or may find that what appears to be the law is no longer in force, or has never been in force, or that legislation is not even compiled in the statute book, but must be sought elsewhere.²¹ Given the state of the problem, it is pertinent to highlight the merits of a well-managed statute book in order to provide a justification for this thesis.

Legally, a person who is affected by legislation should know the what, how and why, of the legislation that affects him or her. In other words, laws should be validly made and publicly promulgated, stable, clear in meaning, consistent, and prospective. The rudiments of the rule of law advocates for

¹⁶ Weightstill Woodst, 'Making the Statute Book a Better Tool', (1935 – 1936) UChiLRev, 470.

¹⁷ Ibid, 478.

¹⁸ Ibid, 478.

¹⁹ Berry (N15), 33.

²⁰ George Gretton, 'Of Law Commissioning', (2013) 17 EdinburghLRev, 119, 131.

²¹ JF Wheeler &TB Wheeler, 'Statute Revision: Its Nature, Purpose and Method', (1941-1942) 16 TulLRev, 165, 166.

certainty in legislation. Legal certainty, as an established legal concept both in the civil and common law legal systems, is a "general principle" of jurisprudence and a basic tenet of the rule of law. It emphasises that legislation must be known and understood and to be understood it must be sufficiently precise and foreseeable as to provide legal certainty to its recipients.²² In totalitarian regimes, the meaning of legislation is less important than the will of the rulers, but in a democratic dispensation, a person who is affected by a particular legislation has a right to know precisely what the legislation says may or may not be done likewise a company in the same jurisdiction for instance has to know the precise extent to which it may for instance hold interests in a company owning a television licence; a public servant needs to know the precise extent of that public servant's rights in respect of service being rendered; a taxpayer needs to know the precise amount of tax that the taxpayer has to pay,²³ to give but a few examples. Accordingly legislation needs to be accessible and predictable, so that those affected can reasonably anticipate the consequences of their actions.²⁴ Legal certainty is therefore not just one among several ideals by which legal practices can be assessed; it is a fundamental value of the legal domain as a well-developed system of laws cannot ignore the principle of certainty because no legal order can fulfil its essential tasks and be regarded as legitimate unless its legal requirements are certain.²⁵

Furthermore as legislation incorporates the norms by which a society operates, its availability in an up-to-date, accessible and coherent form is crucial for the orderly and effective functioning of society. The knowledge of the legislation can only be effectively acquired when the content of the legislation is accessible to persons who are affected by the legislation and the content understood. Consequently, it is pertinent that persons who are affected by legislation in these various ways know what is required of

²² I Predescu and M Safta, 'The Principle of Legal Certainty, Basis for the Rule of Law: Landmark Case-Law', <http://www.ccr.ro/ccrold/publications/buletin/8/predescuen.pdf>, (accessed 19th June, 2015).

²³ IML Turnbull 'Problems of Legislative Drafting', (1986) *StatLRev*, 67, 68-69.

²⁴ P Popelier, 'Five Paradoxes on Legal Certainty and The Lawmaker', (2008) 2 *Leg*, 47, 48.

²⁵ S Berteau, 'Towards a New Paradigm of Legal Certainty' (2008) 2 *Leg*, 25.

them by the legislation.²⁶ For “*ignorantia juris non excusat* or *ignorantia legis neminem excusat*”, in other words, ignorance or mistaken understanding of legislation is not accepted in law as an excuse for failure to comply with the law.²⁷ This is the working hypothesis on which the rule of law rests.²⁸ In contemporary times, Lord Steyn puts it in the following words, ‘*the rule of law requires that a constitutional state must accord to individuals the right to know of a decision before their rights can be adversely affected.*’²⁹ Likewise, this principle places on government which is responsible for producing vast quantities of legislation, to make legislation easily available in a readily accessible form. To merely print and keep in print each statute is not a sufficient discharge of this obligation because as statutes are amended and re-amended, partially repealed and re-enacted, it becomes increasingly difficult to work out precisely what is the exact state of the written law on any given subject.

In addition, the economic benefits of keeping an up-to date statute book is also worthy of mention though, it is not the focus of this thesis. Occasional references are found in impact assessments of the costs and benefits of consolidation and simplification of legislation. An example of this is the recent enactment of the Companies Act, an Act consolidating company law, in the United Kingdom. The Department for Business, Enterprise and Regulatory Reform estimated that it will result in savings to an estimated tune of £150 – £340 million a year for companies.³⁰ With respect to the costs for the reformers, Donelan cites as an example the codification work undertaken by the European Commission in 2007 which cost an estimated 2.15 million Euros.³¹ Though it is not easy to determine the spending of an

²⁶ A Quartey-Papafio, “Drafting Conventions, Templates, and Legislative Precedents and their Effect on the Drafting Process and the Drafter” (2013), EurJLReform, 371.

²⁷ Oliver Jones, *Bennion on Statutory Interpretation*, (6th Edition, Lexis Nexis, 2013), 22.

²⁸ Scot LJ, *Blackpool Corporation v Locker* [1948] 1 ALLER 85, 87.

²⁹ *R (Anufrijeva) v. SSHD* [2004] 1 AC 604.

³⁰ Companies Act 2006, RIA, <http://webarchive.nationalarchives.gov.uk/20090609003228/http://www.berr.gov.uk/files/file29937.pdf> (accessed 10th June, 2015)

³¹ E Donelan, ‘European Approaches to Improving Access to and Managing the Stock of Legislation’, (2009) StatLRev, 147, 152-153.

institution on a given reform effort, it is even tougher to put a figure on the benefits without an extensive study of the time. However subliminally, it can be argued that the costs associated with consulting codified texts must be less than those associated with consulting multiple texts.³²

The legal and economic significance of managing the statute book notwithstanding, the difficulty in its management arises mainly because the overall coherence and accessibility of legislation is not the responsibility of one person or institution. In jurisdictions such as Ghana, governments propose new laws, parliaments enact them, presidents sign them, official printers print and promulgate them, but, in general, no one makes sure that legislation enacted are made available in an orderly or mutually coherent fashion.³³ When the statute book has relevant provisions scattered among a number of statutes and statutory rules, the problem compounds with time so that, lawyers and judges just guess at what the law may be, citizens cannot work out what law applies and are left in the dark or reliant on lawyers if they can afford them, legislatures find it easier and safer to enact new laws hoping to smother the problem but often creating confusion around the edges and problems with consistency and compatibility.³⁴

It should be noted that keeping the statute book up to date is a difficult task. In this regard, the keepers of the statute book have developed a number of mechanisms to ensure that the statute book is kept current and uncluttered by legislation which has become obsolete, unnecessary or 'deadwood' in the statute book: codification, consolidation, rewrite, restatement and reprint, and law revision. These mechanisms have the collective objective of simplifying the statute book so as to ensure that statute law remains clear and certain.

³² Ibid, 149.

³³ Ibid, 149.

³⁴ N Adsett, 'Aspects of law revision in the Commonwealth' (2007) October Issue, *The Loophole*, 18, 18-19 www.opc.gov.au/calc/loophole.htm, (accessed 24th May, 2015).

1.2 Hypothesis

From the forgoing, the problem of defective or inadequate statute books results in the statute book often containing legislation that is not in force and as a result, the user of the statute book is uncertain as to what provision applies to the situation at hand. For this reason, this thesis argues in favour of the proposition that 'A statute book which is current and in a coherent form ensures certainty in legislation'. This thesis intends to demonstrate that a statute book which is up-to-date and devoid of unnecessary clutter ensures the certainty of legislation and in turn facilitates accessibility of legislation.

1.3 Methodology

The approach of this thesis is to assess the ways in which the statute book is kept up-to-date and comprehensible by the drafter and how this ensures certainty in legislation. In the analyses of the hypothesis, this thesis intends to examine the concept of the legal certainty within the context of keeping legislation up to date.

What this dissertation seeks to do is

- to map the various mechanisms that the drafter utilises in keeping the statute book up-to-date and to analyse the need for such mechanisms, their purpose and their effect;
- to identify the component parts of each mechanism so as to form an understanding of its ingredients and to compare those parts and their interaction with each other; and
- to establish, by analysis which mechanisms or combination of mechanisms best serve the aim of making the content of the statute book more certain and accessible in order to facilitate the rule of law.

In order to analyse the various mechanisms logically, the optimum sequence for the discussion is to scrutinize the mechanisms of codification, consolidation, rewrite, restatement and reprint, and law revision in that order. That will be followed by a comparison of the various mechanisms and how they interact with each other to ensure that the statute book is kept up-to-date and accordingly ensures legal certainty.

This paper relies considerable on original source material, academic articles in journals and publications among others to support the arguments put forward in this thesis.

1.4 Structure

This dissertation is divided into five Chapters in order to provide a coherent sequence of discussion and examination of concepts denoted in the Methodology. Accordingly, the trajectory of this thesis is mapped out as follows: the first chapter introduces the concepts upon which the thesis is based. It gives an insight of the trend of discussion that the subsequent chapters entail, by giving a general introduction, a statement of the hypothesis upon which the thesis is based as well as providing the methodology by which the hypothesis will be substantiated.

The second, third and fourth chapters constitute the parts of this thesis that critically scrutinises the issues that are central to this thesis. Chapter two describes and discusses the major concepts that are the central focus of this thesis, namely the concepts of legal certainty and clarity in legislation as well as

their usefulness in the legislative scheme. The chapter also throws more light on the drafter's role in the quest for clarity in legislation.

Chapter three examines the various mechanisms that the drafter utilises in keeping the statute book up-to-date, why the need for such mechanisms, their purpose and their effect of each of the mechanisms. The fourth chapter analyses the impact of the tidying-up mechanisms on certainty in legislation in terms of internal coherence of legislation and the holistic structure of the statute book as well as the comprehension of legislation in context.

This thesis ends with the final chapter, Chapter five. This Chapter concludes the entire discussion on the thesis, recollects the critical issues scrutinized in the preceding chapters and provides conclusions based on the discussions.

CHAPTER TWO - INTRODUCTION AND DISCUSSION OF CONCEPTS

2.1 Concept of Legal Certainty

The jurisprudential community adopts as a fair statement of central elements of the rule of law ideal, Fuller's eight principles he sets out in chapter two of his book *'Morality of Law'*³⁵. He calls the eight principles namely; generality, publicity, prospectively, intelligibility, consistency, practicability, constancy and congruence, 'the internal morality of law'.³⁶ Fuller's introduces these principles with a fable about King Rex, who failed to make law by ignoring these eight elements,³⁷ but rather subjected his subjects to decrees which were ad hoc, secret, retrospective, unintelligible, contradictory, impossible, etc.³⁸. Since the laws of King Rex were bad, the analogy is that legislation which is good should follow Fuller's eight principles.

Radin summarises these principles into what she termed colloquially as "know-ability" and "perform-ability."³⁹ She continues that those to whom the rules are addressed must be able to know what they are commanded to do and understand what they are expected to do. Accordingly, the rules must be public, congruent, and non-contradictory, clear enough to understand, and must not change quickly, be prospective and not retroactive, not contradictory or non-congruent, and not physically, mentally, or circumstantially impossible for persons to follow.⁴⁰ In other words, the rule of law requires accessibility and predictability of the law, so that those affected by the law can reasonably anticipate the consequences of their actions.⁴¹ "Accessibility" concerns publicity and clarity of the law, "predictability"

³⁵ LL Fuller, *The Morality of Law*, (New Haven, Yale University Press, 1965), 95.

³⁶ *Ibid*, 95.

³⁷ HM Kramer, 'On the Moral Status of the Rule of Law' (2004) *CambridgeLJ*, 64.

³⁸ J Waldron, 'Legislation and the Rule of Law', (2007), *2Leg*, 91, 109.

³⁹ MJ Radin, 'Reconsidering The Rule Of Law', (1989) *69 BULRev*, 781, 781-2.

⁴⁰ *ibid*.

⁴¹ Popelier (N24) 47-48.

requires that laws are calculable and reliable and also that laws can be executed and maintained.⁴² Hence, the rule of law calls for legal certainty, a fundamental principle of the modern legal order. Various constitutions and courts acknowledge the existence of the "principle of the certainty of the law".⁴³ This principle is aimed at all branches of government, for a government must be by "settled, standing laws," not by "absolute arbitrary power."⁴⁴

A number of reasons account for the appeal of certainty in legal reasoning. For one thing, it comports with a variety of political theories that emphasize the limited role of courts. Certainty in law enforces democracy, not only in the sense that it leaves issues open for democratic deliberation, but also and more fundamentally in the sense that it promotes reason-giving and ensures that certain important decisions are made by democratically accountable actors,⁴⁵ as opposed to the situation where judges are left with ample discretion for the future in situations where legislation is uncertain.

For another thing, legal certainty goes to emphasise the superiority of rules over human judgment for it is an aspiration to be ruled by law rather than by men. Alexander emphasises this point and maintains that, the problem that law is meant to solve is that of information, not immoral motivation - which men are not gods, rather than that men are not angels.⁴⁶ Consequently in order to solve this problem, legislation must consist of determinate rules.⁴⁷

⁴² Popelier (N24), 47.

⁴³ Article 19(11), 1992 Constitution of Ghana states: '*No person shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed in a written law*'; *R (Anufrijeva) v. SSHD* [2004] 1 AC 604.

⁴⁴ J Locke, 'Of the Extent of the Legislative Power', (1948) 1 John Locke & JW Gough The Second Treatises Of Civil Government and a Letter Concerning Toleration 66.

⁴⁵ RL Brown, 'Liberty, The New Equality', (2002) 77 NYULRev, 1491, 1534.

⁴⁶ L Alexander, "'With Me, It's All er Nuthin'": Formalism in Law and Morality', (1999) 66 UChiLRev, 530, 534.

⁴⁷ *ibid.*

Furthermore legal certainty accentuates formally for equal treatment under the law. In that every human being has an inalienable right to the enjoyment of rights and fundamental freedoms without distinction on such grounds as race, colour, sex, language and social status, religion and political and other opinion and this is solidly anchored in various legislation and international conventions.⁴⁸ Legislation guarantees the existence of liberty and prevents its unlawful and arbitrary deprivation. Adherence to legislation is *sine qua non* in a democratic society governed by the rule of law and ensures that compliance with the law is without any discrimination.

This last point suggests an added recognisable plus of legal certainty: predictability. Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law. Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes. An element of predictability and permanence contributes greatly to the role of law in preserving social cohesion and doing justice.⁴⁹ With the increase in the number of laws and as people have become ever more prepared to punish their adversaries in the courts, it is not in the best interest of society for the meaning of legislation to be protracted in uncertainty.⁵⁰ Predictability or, as Llewellyn put it, "reckon-ability"⁵¹, is a necessitating characteristic of any law worthy of the name. There are times when even a bad rule is better than no rule at all.⁵²

On the other hand where there is an element of uncertainty in legislation, it creates room for a person who violates the law to escape punishment and this reduces the incentive to comply, a result which is more prevalent with criminal legislation. Craswell and Calfee explain further that, uncertainty

⁴⁸ Chapter Five, 1992 Constitution of Ghana, on Fundamental Human Rights and Freedoms; International Covenant on Civil and Public Rights.

⁴⁹S Laws, 'Plus ça change? Continuity and Change in UK Legislative Drafting Practice', (2009) 11 EurJLReform, 139, 140.

⁵⁰ Scalia (N1), 1180.

⁵¹ KN Llewellyn, *The Common Law Tradition* 17 (Little Brown, 1960).

⁵² Scalia, (N1), 1180.

allows a person to reduce the probability of punishment even further by "playing it safe" and modifying his behaviour by more than the law requires and thus the probability of being held responsible for the social cost of such behaviour is significantly reduced⁵³.

Accordingly, the importance of the principle of legal certainty for the existence of the rule of law requires more attention to the quality of legislation.⁵⁴ Thus the drafter in achieving quality in legislation employs the tools of clarity, precision and ambiguity in drafting and for the purpose of this thesis emphasised is placed on clarity in legislation.

2.2 Clarity as a means of achieving legal certainty

Clarity, is defined as freedom from indistinctness or ambiguity.⁵⁵ It is the quality or state of being clear or lucid⁵⁶; coherent and intelligible⁵⁷. Clarity depends on the proper selection and arrangement of words as well as the construction of sentences.⁵⁸ Bennion advocates for simplicity, which means 'to put into a form which is as clear (that is intelligible and free from elaboration) to the intended reader as, is practicable'.⁵⁹ Lord Simon argued that 'people who live under the Rule of Law are entitled to legislation which is intelligible'.⁶⁰ The place of clarity in the language of law ensures that legislation is made easier

⁵³ R Craswell & JE Calfee, 'Deterrence and Uncertain Legal Standards', (1986) 2 JLEcon&Org, 279, 279-280.

⁵⁴ Predescu (N22), 18.

⁵⁵ C Soanes (ed), *Compact Oxford English Dictionary* (Oxford University Press, 2003), 3.

⁵⁶ Merriam Webster, <http://www.merriam-webster.com/dictionary/clarity>, (accessed 18th April, 2015).

⁵⁷ <http://www.oxforddictionaries.com/definition/english/clarity>, (accessed 18th April, 2015).

⁵⁸ H Thring, *Practical Legislation: The Composition and Language of Acts of Parliament and Business Documents* (John Murray, 1902), 61.

⁵⁹ F Bennion, 'The Readership of Legal Texts' (1993) 27 April, Clarity 18, <http://clarity-international.net/journals/27.pdf> (accessed 19th April, 2015).

⁶⁰ Lord Simon of Glaisdale, 'The Renton Report – Ten Years On' (1985) StatLRev, 133, 133.

for the reader to understand what is being said,⁶¹ transparent⁶² and predictable⁶³. Clarity, according to Lord Gardiner of Kimble, is at the heart of accessibility; and accessibility is at the heart of the efficacy of the rule of law.⁶⁴

Clarity as one of the virtues of effective legislation ensures that legislation is certain⁶⁵ and accessible⁶⁶. Its significance to statutes consequently needs little urging.⁶⁷ Clarity is not only important to the substance of the legislative message but also to its adequacy as a means of transmission of the regulatory message.⁶⁸ This is because legislation as a form of communication is governed by the principles applicable to communications.⁶⁹ Clarity in legislation guarantees its apposite application⁷⁰ and provides governments the opportunity to achieve transformation by means of legislation.⁷¹

Secondly, it improves the quality of decision making as it ensures political accountability of the various branches of government.⁷² Zeppos succinctly explains that clear statement of rules provides legislators with incentives to deliberate transparently about important values, to provide satisfactory reasons for decisions, and to set forth clearly articulated laws so that the electorate can learn and follow them.⁷³ This paves the way to enable the government achieve transformation by means of legislation.⁷⁴ That is why the expression of legislation in a language that is clearly understood and in a form that makes

⁶¹ E Turatsinze, 'The Pursuit of Clarity, Precision and Unambiguity in Drafting Retrospective Legislation', (2013) 15 EurJLReform 206, 212.

⁶² H Xanthaki, 'On Transferability of Legislative Solutions: The Functionality Test' in Stefanou and Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate Publishing Company, 2008), 9.

⁶³ Seidman (N2), 255.

⁶⁴ Editorial, 'Gender Neutrality in the House of Lords (and Ladies)', (2014) StatLRev, 1, 2.

⁶⁵ E Majembere, 'Clarity, Precision and Unambiguity: Aspects for Effective Legislative Drafting' (2011) 37 CLB 417, 417.

⁶⁶ B Bekink & C Botha, 'Aspects of Legislative Drafting: Some South African Realities (or Plain Language Is Not Always Plain Sailing)', (2011), StatLRev, 34, 65.

⁶⁷ R Dickerson, 'The Diseases of Legislative Language' (1964) 1 HarvJonLegis 5, 5.

⁶⁸ *ibid.*

⁶⁹ Crabbe (N3), 27.

⁷⁰ H Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation*, (Hart Publishing, 2014), 86.

⁷¹ K Klare, 'Legal Culture and Transformative Constitutionalism', (1994) 14 SAJonHumRts, 147.

⁷² NS Zeppos, 'Justice Scalia's Textualism: The "New" New Legal Process' (1991) 12 CardoLRev. 1597, 1637.

⁷³ *ibid.*

⁷⁴ Klare, (N71).

it readily accessible is of paramount importance, for as observed by Lord Oliver, unclear laws are the worst form of tyranny.⁷⁵

Thirdly Hadfield observes that uncertainty in legislation costs both socially and economically.⁷⁶ There are high costs to inaccessible law related to enforcement, application and interpretation of legislation whose meaning is unclear.⁷⁷ Legislation which is clear may cut the time spent on them by the users of legislation including lawyers to half.⁷⁸

Notwithstanding the importance of clarity in legislation, it is sometimes vital for the drafter to draft legislation in such a way as to promote vagueness. Vagueness connotes uncertainty in meaning⁷⁹ and can also serve the purpose of effectiveness when among others the drafter attempts to express in legislative terms a political disagreement that may endanger the existence of the legislation,⁸⁰ thus if there is a choice between no legislation and inadequate legislation, the drafter whose primary aim is to give effect to government policy,⁸¹ can side with inadequate legislation as a way of introducing a certain level of regulation. As put by Christie, "importance of the flexibility that vagueness gives to all normative methods of social control can scarcely be overestimated and is recognised by all. It allows man to exercise general control over his social development without committing himself in advance to any specific concrete course of action."⁸²

⁷⁵ Lord Oliver of Aylmerton, 'A Judicial View of Modern Legislation', (1993) 14 StatLRev 1, 2.

⁷⁶ GK Hadfield, 'Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law', (1994) 82 CalLRev, 541, 553.

⁷⁷ S Krongfold, 'Writing Laws: Making Them Easier to Understand', (1992) Ottawa Law Review, 495, 501.

⁷⁸ RD Eagleson, 'Taking the Gobblegok Out of Legal Language' (1990) Queensland Law Society Journal, 103, 115.

⁷⁹ Crabbe (N3), 47.

⁸⁰ Xanthaki, (N70) 87.

⁸¹ E Sutherland, 'Clearer Drafting and the Timeshare Act, 1992: A Response from Parliamentary Counsel to Mr Cutts' (1993) 14 StatLRev, 163, 163.

⁸² G Christie, "Vagueness and Legal Language" (1964) 48 MinnLR 885, 890.

Similarly, the very nature of language and the legislator's incapability of envisaging all possible circumstances that the legislation will be applicable to,⁸³ makes it necessary for the introduction of a degree of vagueness in legislation to address such eventualities. Legislation cannot be drafted 'with divine prescience and perfect clarity'.⁸⁴ There is however a danger in this as pointed out by Xanthaki⁸⁵, as judges are eventually called upon to legislate instead of applying the law. Furthermore, it opens the door for corruption on the part of government officials and enforcers of the legislation.⁸⁶

Consequently, legislation does not, in fact, everywhere require precision in order to command compliance in a modern legal system.⁸⁷ Clarity as a single concept is seen by the drafter as a compromise between competing concepts.

2.3 The role of the drafter in the quest for clarity in legislation

The drafter's role in the legislative scheme is to translate government policy into effective laws,⁸⁸ which is capable of producing regulatory results albeit legislation which is efficient and effective.⁸⁹ In the performance of these duties, the drafter is described by Bennion as "the keeper of the statute book" a phrase which echoes the attributes of custodianship, preserver and protector of the statute book as well

⁸³ D Greenberg, *Craies on Legislation*, (9th Edn, Sweet and Maxwell, London, 2008), 336.

⁸⁴ *Seaford Court Estate Ltd v Asher* [1949] 2KB 491, 499.

⁸⁵ Xanthaki (N71), 88.

⁸⁶ *ibid.*

⁸⁷ Hadfield (N76), 553.

⁸⁸ RC Nzerem, 'The Role of the Legislative Drafter in Promoting Social Transformation' in Stefanou and Xanthaki (eds) *Drafting Legislation: A Modern Approach* (Ashgate Publishing Company, 2008), 131.

⁸⁹ H Xanthaki, 'Duncan Berry: A Visionary of Training in Legislative Drafting', (2011) Special Issue, The Loophole, 18 www.opc.gov.au/calc/loophole.htm, (accessed 22nd December, 2014).

as accepting the responsibility of ensuring that the statute book is kept in the best possible condition juridically as well as verbally.⁹⁰

The drafter ensures the logical and principled development of the law and the legal system; and the coherence of the statute book.⁹¹ In giving a practical effect to these duties, the drafter ensures that legislation is drafted in clear, unambiguous language and integrates properly with existing legislation on the subject.⁹² In other words, the drafter ensures that legislation is in harmony with all the existing legislation as well as common law or the customary law; a single Act of Parliament does not stand alone but forms part of the law as a whole hence referred to as a chapter in the Statute Book.⁹³ The drafter appreciates the full scope of the statute law and drafts to achieve the consistency in language that will support consistency in interpretation and as well recognize the need for coherency, both in language and substance between its component Acts.⁹⁴

Within the fluidity of intellectual engagement of the legislative text, the structure of legislation plays a vital role in the quest for clarity by the drafter. According to Xanthaki⁹⁵ structure is not merely a technical concern as the legislative text is meant to convey a message to the reader and thus prioritising provisions within the text ensures that the prime message of the legislation is conveyed. In drafting legislation, the drafter ensures that whatever the abilities of the users, the primary message of the legislative text as an expression of the regulatory choice comes out unequivocally.⁹⁶ In the observance of the prescribed behaviour, the user of the legislative text must be able to understand what it is that they

⁹⁰ J Erasmus, 'Keepers of the Statute Book: Lessons from the space-time continuum' (2010) January Issue, *The Loophole*, 6 www.opc.gov.au/calc/loophole.htm, (accessed 24th May, 2015).

⁹¹ C Wilson, 'Managing Increasing Government Expectations with Respect to Legislation While Maintaining Quality', (2009) January Issue, *The Loophole*, 21, 23 www.opc.gov.au/calc/loophole.htm, (accessed 24th May, 2015).

⁹² *Ibid.*

⁹³ Crabbe (N3), 19-20.

⁹⁴ Erasmus (N90).

⁹⁵ Xanthaki (N70), 61.

⁹⁶ Xanthaki (N70), 61.

must do or refrain from doing. Thus if the message of the text is a prohibition, that is what the drafter must clearly spell out. The legislative text should never be a clever puzzle which the reader has to solve to extract the meaning.⁹⁷ Thus it is the function of the drafter to ensure that the structure of legislation is not rendered incoherent internally, within the Act and externally within the whole architecture of the statute book.

It is pertinent to ask, what a drafter seeks to achieve with a good, clearly articulated and logical architecture of legislation both internally and externally. The aim of the drafter in drafting a legislative text is to achieve the desired regulatory results. This requires the observance of the prescribed behaviour by users of the legislative text. In order for users to observe the prescribed behaviour in the legislative text, the user has to have a clear understanding of what is required of them. Structure of the legislation thus comes into play to convey the regulatory message and to enable the user identify the message. Ultimately, structure of legislation is used to identify the regulatory message as users of legislation including the courts tend to rely on the structure for comprehension of the legislation.⁹⁸

Without an adequate structure, legislation will only accidentally serve its purposes.⁹⁹ A deficient structure makes it difficult for users of legislation to comprehend the provisions as the ideas presented do not reflect the logic of the legislation. Thus unless users of the legislation know and understand the content of the legislation, they only obey its prescriptions accidentally and if by chance they do obey them, they do so woodenly.¹⁰⁰ With a good legislative structure it is easier for various actors involved to interact.

⁹⁷ M Adler, *Clarity for Lawyers: the Use of Plain English in Legal Writing*, (De Madus Print Limited, 1990), 23.

⁹⁸ E Garrett, 'Legal Scholarship in the Age of Legislation' (1993) 34 *TulLJ*, 679, 688.

⁹⁹ Seidman (N2), 208.

¹⁰⁰ Seidman (N2), 209.

Furthermore an inadequate structure hinders the ease of the use of legislation by users. Accessibility of the legislation depends on the structure of legislation. Where the contents of legislation are scattered over several acts, contain a lot of cross-referencing and involve numerous page turnings, it becomes unapproachable to the user, as the user is not able to decipher and comprehend which prescription applies to their circumstances.

In line with this, the changing nature of the society with its ever changing laws necessitates that the drafter often upgrade the legislative text in order that the users of legislation can immediately identify and understand the content of the legislation. For legislation to be efficient and effective, clarity of legislation in the statute book is one of the requirements that the drafter needs to adhere to as it promotes and contribute to legislative effectiveness¹⁰¹ and in turn ensures that legislation is certain at any given time. Consequently, drafters should always seek clarity, simplicity and brevity in the drafting of legislation, but certainty in the text of the legislation should be paramount.¹⁰² The drafter when faced with an inconsistent, incoherent and incomprehensible statute book is duty bound to use mechanisms in the nature of codification, consolidation, rewrite, restatement and reprint, and law revision which contributes in the removal of clutter from the statute book and at the same time ensure that legislation achieves the necessary regulatory results by bringing consistency, coherence, comprehensibility and predictability in the legislative text.

¹⁰¹ Xanthaki (N70), 85.

¹⁰² Rt Hon Lord Rippon, 'Making the Law; The Report of the Hansard Society Commission on the Legislative Process', (2013) Clarity, Vol 19, No 3, 11, 12, <http://clarity-international.net/journals/27.pdf> (accessed 10th August, 2015).

CHAPTER THREE - MECHANISMS OF TIDYING UP THE STATUTE BOOK

As stated in the previous chapter, the legislative drafter, as the keeper of the statute book, in drafting legislation accepts and acts on the responsibility of ensuring that the statute book is kept in the best possible condition, juridically as well as verbally.¹⁰³ In line with this, legislative drafter has in mind the logical and principled development of the law and the legal system coupled with the need to ensure coherence of the statute book.¹⁰⁴ In the attainment of this standard, drafter utilise techniques which enhance clarity of the statute book in order to guarantee certainty in legislation and simultaneously make legislation accessible. 'Accessible' in this context is not limited to only physical accessibility, as in where can it be found, but encompasses the ease with which users navigate their way through the text, and how comprehensible and plain is that text to an educated but nonprofessional user. This chapter thus maps out the various mechanisms that the drafter utilises to achieve a 'tidy' statute book, analyses the need for such mechanisms and discusses their purpose and their effect for the purposes of legal certainty.

3.1 Codification

In looking at the purpose and effect of codification, it is pertinent for our purposes to identify what codification of legislation involves. The authorities do not seem to agree on what constitutes codification. In the words of Létourneau and Cohen, codification is a process of making an authoritative text of legal norms in respect of a defined body of law, and "code" is the four-letter word that describes the text thus made.¹⁰⁵ This is similar to that of Ilbert's, who sees codification as the reduction into a systematic form the whole of the law relating to a given subject.¹⁰⁶ Clive describes it as a more or less comprehensive,

¹⁰³ Erasmus, (N90).

¹⁰⁴ Wilson, (N91).

¹⁰⁵ G Létourneau & SA Cohen, 'Codification and Law Reform: Lessons from the Canadian Experience' (1989) 10 StatLRev, 183.

¹⁰⁶ Ilbert (N8), 150.

well organised, legislated statement or restatement of the rules of law in a particular area, whatever the source of the rules and whether or not they are changed in the codification process.¹⁰⁷ Thus, it can be assessed that codification is a term interchangeably used to signify either of two things. The process of arranging, rationalising and enacting the collection of laws of a jurisdiction in a field of law or the systematic arrangement, exhaustive collection, updating and enactment of the collection of primary legislation in a field of law in a specific jurisdiction.¹⁰⁸

Codification is considered as mechanism for tidying up the statute book as the statute book might be saddled with duplicate, contradictory, ambiguous and obscure provisions as well as provisions which are obsolete.¹⁰⁹ This is mainly due to the fact that legislation is drafted by different persons at different times. These have contributed to legislation being in a confused state and, in some cases, unintelligible, not only to the ordinary man who is held accountable for following it, but also to the legislator, judge and lawyer.¹¹⁰

Historically, a code describes legislative effort to state legislation in an organised, systematic and complete way.¹¹¹ It is a *prima facie* evidence of existing law as it condenses various areas of law such as equity, common law, orders of the executive and judicial decisions.¹¹² It is a species of enacted law which purports to formulate the law, the entire law on a particular subject matter as extracted from case law and any other relevant enactments,¹¹³ which then becomes within its field an authoritative, comprehensive

¹⁰⁷ E Clive, 'Current Codification Projects in Scotland', (2000) 4 EdinburghLRev 341.

¹⁰⁸ Xanthaki, (N70), 278.

¹⁰⁹ Crabbe (N3), 191

¹¹⁰ FF Stone, 'A Primer on Codification', (1954-1955) 29 TuLLRev 303, 304.

¹¹¹ JP McCutcheon, 'Codifying Criminal Law in Ireland', (1998) 19 StatLRev, 131.

¹¹² Crabbe (N3), 191.

¹¹³ *ibid.*

and exclusive source of that law.¹¹⁴ It seeks to preserve the common law together with many topics of doubt and difficulty.¹¹⁵

Gilmore in distinguishing a code from a statute is of the view that a statute is unable to legislate on all foreseeable situation, whilst a code pre-empts the field of law covered and is assumed to have all answers to all possible questions.¹¹⁶ Thus unlike other common law legislation "a code is not the arbitrary and spontaneous product of a legislative thought in the enactment process. A code sums up in its provisions the results achieved by the labour of reason in the past centuries."¹¹⁷ Furthermore a subsidiary distinction between "statute" and "code" is observed in terms of interpretation in that when courts are called upon to interpret statutes, the judge needs to consider judicial opinions in relation to that statute as those opinions themselves become part of the statutory complex, whilst a code remains at all times its own best evidence of what it means with cases decided under it being of interest, persuasive, cogent,¹¹⁸

A code is further distinguished from a digest in that a digest in as much as its language is the language of the legislature and therefore authoritative, the propositions of a digest merely express what is, in the opinion of an individual author, the law on any given subject whilst the code is a systematic plan, of the whole of the general principles applicable to any given branch of the law.¹¹⁹

Codification may take various forms ranging from mere compilation to full-fledged codification.¹²⁰ A distinction of codes into creative, consolidating and, consolidating and creative is made by Charkrabarti.¹²¹ Crabbe

¹¹⁴ Justice Scarman, "Codification and Judge Made Law: A Problem of Coexistence", (1967), 42 IndLJ 355, at 358.

¹¹⁵ Crabbe (N3), 192.

¹¹⁶ G Gilmore, 'Legal Realism: Its Cause and Cure', (1960 – 1961), 70 Yale LJ, 1037, 1043.

¹¹⁷ La Toya James, 'Restructuring the Labour Code in Lieu of Quality in Legislation Principles: Will the Use of a Code Prove Beneficial?' (2009), 11 EurJLReform 259.

¹¹⁸ Ibid.

¹¹⁹ JO Carss, 'The Codification of Laws', (1920) 40 CanLTimes 14, 21.

¹²⁰ D Tallon, 'Codification and Consolidation of the Law at the Present Time', (1979) 14 IsrLRev, 1.

¹²¹ NK Chakrabarti, *Principles of Legislation and Legislative Drafting*, (Kolkata, R Chambray and Co Private Ltd, 2007), 204-5.

also advocates for two type of codes: the code based on the French Civil Code which uses broad principles and leaves the courts to fill in the gaps and the code based on the German Civil code which is more definitive and detail-oriented.¹²²

As a legislative measure, its principal characteristic is that it provides an authoritative and comprehensive formulation of a particular body of law.¹²³ A code works by replacing (and repealing) the various sources of law that preceded it. It involves the collation of the relevant body of law in a single textual source and its articulation in the form of a coherent system and this might take the form of a restatement where the existing legal rules, both common law and statutory, are re-enacted in the code.¹²⁴ In the words of Hawkland, a code is “pre-emptive in that it displaces all other law and its subject areas saves only that which the Code excepts; systematic in that all of its parts are arranged in an orderly fashion and stated with a consistent terminology, form an interlocking, integrated body, revealing its own plan and containing its own methodology; and comprehensive in that it is sufficiently inclusive and independent to enable it to be administered in accordance with its own basic policies.”¹²⁵

Ultimately, the object of a code is that the user may consult the law of which he stands in need in the least possible time.¹²⁶ Indeed, codification is useful in that it brings certainty and easy access to the law¹²⁷ and generally improves the law. In other words it makes legal rules and principles more accessible to judges or lawyers as well as facilitates the teaching and learning of the law as well as guaranteeing justice where similar cases are treated alike.¹²⁸

¹²² Crabbe (N3), 193.

¹²³ McCutcheon (N108), 133-134.

¹²⁴ *ibid.*

¹²⁵ WD Hawkland, ‘Uniform Commercial “Code” Methodology’, (1962) *UILLForum*, 291, 292.

¹²⁶ Ilbert (N8), 151.

¹²⁷ B Fauvarque-Cosson, ‘Modern Developments in French Codification’, (2000) 4 *EdinburghLRev*, 350.

¹²⁸ M Haase, ‘What Does it Mean to Codify Law?’ (2011), www.jura.uni-freiburg.de/institute/asien/Homepage/ (accessed 22nd June, 2015).

The principal advantage of codification lies in the fact that it can be used to introduce order and system into the mass of legal concepts and ideas and so present the law as a homogeneous, related whole rather than as a series of isolated propositions.¹²⁹ It creates a unique document in the field of law that it refers to which encompasses legislative regulation as interpreted by statute as a result the code reflects the whole picture of the legislative field.¹³⁰

Another end which is achieved by codification is rejuvenation of a legal system, which has become clogged up with the accumulated silt of centuries of jurisprudence and doctrine case law and academic debate.¹³¹ Gower quoting Goudy elaborates further that when the law becomes "over weighted by its superabundance of materials . . . inconsistencies, obscurities and contradictions make themselves felt to such a degree that it becomes almost a necessity to reduce the mass to order, precision and uniformity."¹³² Thus codification rids the statute book of obsolete laws and ensures that order and precision is brought into the legal system.

Ultimately, codification brings the law together in one place or book. It simplifies and facilitates the work of users of legislation by substituting for the numerous and conflicting laws and usages, a harmonious orderly and authoritative set of leading rule.¹³³ As a result the ordinary man can find and read the law that governs him. There is no need to rely solely upon professional advice. This is not to say that the user is guaranteed an understanding of what the words mean, nor that will he not be well advised to seek trained counsel. It is to say that insofar as words are capable of conveying meaning, the average

¹²⁹ Stone, (N110), 307.

¹³⁰ Xanthaki, (N70) 279.

¹³¹ LCB Gower, 'Here Lies the Common Law: Rest in Peace' (1967) 30 ModLRev, 241.

¹³² *ibid.*

¹³³ Ilbert (N8), 178.

user of legislation with a well-drawn code can feel less a stranger in his own land than when he is left with little guide except the "brooding omnipresence in the sky" or the determination of what the particular judge had for breakfast on the particular day.¹³⁴ Thus certainty of legislation is a guarantee.

What then are if any are the shortcomings of this mechanism? "Massive" codification; "illusory" codification; "dangerous" codification: such are the terms that have been used by some scholars at attempts to codify the law over the past half century years.¹³⁵ Thus not only is codification incapable of reducing the volume of laws, but also, it alters or modifies the law, in substance and in style. In the words of Bennion, 'A code as respects a particular area of law is a comprehensive statute which produces systematically, *with or without modification* the current principles, rules and other provision of that area of law whether that differ from common law, statute or any other source.'¹³⁶

Furthermore it is argued that it is an illusion that a code can encompass all legal norms.¹³⁷ This is because society by its nature is not static but changes thus, as soon as a code comes into force, there is a necessity to modify the content otherwise, they simply become museum pieces.¹³⁸ In other words, it creates gaps and ossifies the law¹³⁹. One may then ask where is the certainty in all this? Besides, though codification improves the substance of the law it does not necessarily make it simpler or uniform for the user.¹⁴⁰

¹³⁴ Stone (N110), 307-8.

¹³⁵ Cf ADM Forte, "If It Ain't Broke, Don't Fix It: On Not Codifying Commercial Law", in H L MacQueen (ed), *Scots Law into the 21st Century, Essays in Honour of WA Wilson* (Edinburgh, Sweet & Maxwell, 1996), 92.

¹³⁶ FAR Bennion, *Statute Law*, (Longman, 2nd Edition, 1983), 83.

¹³⁷ Crabbe (N3), 193.

¹³⁸ Fauvarque-Cosson (N127), 356.

¹³⁹ Crabbe (N3), 193.

¹⁴⁰ Ilbert (N8), 57.

Codification for all it worth has been praised and condemned, declared inevitable and impossible, pronounced necessary and futile, timely and premature¹⁴¹ but it is a valuable technique for the rational, organisation and presentation of whole areas of law. It does not solve all the problems, but it provides more security than "scattered legislation".¹⁴² It is a tool for the improvement of access and legibility of regulation because it allows the regrouping of dispersed text while clarifying them as well as assessing the coherence of texts and facilitating the harmonisation of the state of law.¹⁴³ Codification is likely to achieve the constitutional value of accessibility and intelligibility of law.¹⁴⁴ Thus even with its defects, codification which is adopted to the modern age with provision for periodic revitalization, appears to be the most useful tool for accomplishing the task of stating the law clearly and concisely that man may know the rules and principles that are to govern his actions.¹⁴⁵

3.2 Consolidation

Under modern conditions, statute law is in a constant state of evolution as additions, amendments and partial repeals modify the original Act at frequent intervals, and ultimately the resulting jumble of legislation need to be consolidated.¹⁴⁶ Consolidation has been defined in different ways by different people, but ultimately it all boils down to much the same core. Teasdale describes consolidation as a mechanism designed to bring together the texts of existing statutes, usually within a single generic topic, and to integrate them so as to ensure that all the amendments are integrated into the new single text.¹⁴⁷ Xanthaki describes it as the process of arranging in a single text the current laws of jurisdiction in a field of law or the end result of the process, namely the systematic arrangement and exhaustive

¹⁴¹ N Isaacs, 'The Aftermath of Codification', (1921) 92 CentLJ, 61.

¹⁴² E Clive, 'A Scottish Civil Code', in MacQueen (eds), *Scots Law into the 21st Century, Essays in Honour of W. A. Wilson* (Edinburgh, Sweet & Maxwell, 1996), 84.

¹⁴³ H Xanthaki, (N70), 278 – 281.

¹⁴⁴ *Ibid.*

¹⁴⁵ Stone (N110), 310.

¹⁴⁶ P Breuer, 'Consolidation and Confusion Current Developments: Comment', (1988) StatLRev, 62.

¹⁴⁷ Teasdale (N12), 161.

collection of primary legislation in a field of law in a specific jurisdiction.¹⁴⁸ It is described by Gretton as the restatement of statutory law, by the repeal of the grimy old enactments and replacing them with shiny new ones.¹⁴⁹ Whilst Dickerson, equating the United States codification to United Kingdom consolidation describes it as the unified restatements of existing statutory law.¹⁵⁰ Miers refers to it as the process of combining the legislative provisions on a single topic into one coherent enactment.¹⁵¹

The common denominator from these is that consolidation takes the texts of various Acts of Parliament on the same or similar subject matters and combines them in a single new Act rationally arranged and, as far as possible, expressed in modern language.¹⁵² This approach is used in cases where the text of existing law is badly cluttered with inconsistencies and irrationalities resulting from successive layers of legislation. It basically consists of a start-from-scratch attempt to restate what is believed to be the substance of existing law, without attempting to account for each provision of current text.¹⁵³ This takes place without altering or changing the essential wording of the Acts. A consolidation Act is in itself a legislative text which has gone through the procedures which bestow validation as law and as a result replaces in the *corpus juris* the text it embodies.¹⁵⁴ Currently, the importance of consolidation is less than it used to be due to the introduction of databases, which give statutes in their amended form, which are not always accurate. But despite this, consolidation is still valuable in the digital age.

¹⁴⁸ Xanthaki, (N70), 281.

¹⁴⁹ Gretton (N20), 131.

¹⁵⁰ Reed Dickerson, 'Legislative Drafting in London and In Washington', (1959) CambridgeLJ 49, 51.

¹⁵¹ Miers (N6).

¹⁵² Norman Marsh, 'Law Reform in the United Kingdom: A New Institutional Approach', (1971-1972) 13 Wm&MaryLRev 26, 28.

¹⁵³ Dickerson (N150), 49.

¹⁵⁴ F Bennion, '*Bennion on Statute Law*', (3rd Edition, Longman Group UK Limited, 1990), 69.

There are a number of factors which make it necessary for the re-organisation and re-enactment of a body of statutory law. The proliferation of legislation, coupled with the frequency of change, the practice of textual amendment, especially its cumulative effect, the mass and complexity of statute law, and the diverse not to say misleading titles of many statutes, make consolidation imperative.¹⁵⁵ Furthermore, the need to integrate statutory material which is derived from more than one source, for instance in colonies and dependant territories, where law is applied both generally and specifically by the imperial legislature, and where that law needs to dovetail-in with local devolved legislation¹⁵⁶ add to the necessity of consolidation. As a result it is necessary that on a frequent basis existing legislation on a particular subject matter is replaced with a new Act which makes no substantive change but presents the material in an organised and structured manner and in language that is modern and internally consistent.¹⁵⁷

Consolidation may take several forms and in the United Kingdom for instance the techniques adopted are summed in fourfold," the use of 'pure' consolidation; "the use of consolidation involving minor textual amendment only, 'the use of a more radical consolidation approach (per the Law Commissions) and " the promoting of bills which 'consolidate with amendments'.¹⁵⁸ This is similar to the kinds of techniques used in the European Union states where Donelan identified the following types: consolidation as part of the promulgation of laws, consolidation with amendments but without changes to substance; consolidation with amendments and minor corrections and finally, there may be informal consolidations in circulation in a country that are in circulation and widely used but have no legal status.¹⁵⁹

¹⁵⁵ A Samuels, 'Consolidation: A Plea', (2005) 26 StatLRev, 56.

¹⁵⁶ Teasdale (N12), 160.

¹⁵⁷ Greenberg, (N83), 77.

¹⁵⁸ Teasdale (N12), 161.

¹⁵⁹ Donelan (N31), 170.

The need for consolidation is perpetual as the very object of consolidation is to collect the statutory law bearing upon a particular subject and to bring it down to date, in order that it may form a useful code applicable to the circumstances when the consolidation Act was passed.¹⁶⁰ Though it has been recognised that legislation "does not stand still" however, the need for consolidation still remains and, as Edward Caldwell has pointed out, the law has to remain "relatively settled" whilst the consolidation process is in train.¹⁶¹

Consolidation reorganises and restates the law so as to improve clarity and intelligibility without altering its substance.¹⁶² It assists in text collation, as a typical consolidation Act embodies the texts of a number of previous Acts.¹⁶³ This invariably addresses the volume of statute, the frequency of change, the multiple amendments, drafting errors within the text and the cumulative effect on the statute book.¹⁶⁴ Consolidation, within the generic pursuit for updating legislation adds to the reliability of the text. It cuts short the quantity of law in force as the legislator enacts only laws that are included in the collection of consolidated law in force and invalidates all other laws.¹⁶⁵ As a result it serves the interests of citizens, administrative authorities and the business world by providing a more accessible and more transparent legislative framework and has the advantage of making the law more reader-friendly.¹⁶⁶

The dearth of consolidation Bill is due to the lack of commitment of time and personnel required in the preparation of such legislation. This is coupled with the lack of political appetite for consolidated

¹⁶⁰ The Preparation of Legislation: Report of a Committee Appointed by the Lord President of the Council Chairman Sir David Renton (Cmnd 6053, May 1975, HMSO, London), 17.

¹⁶¹ E Caldwell, 'A Vision of Tidiness: Codes, Consolidations and Statute Law Revision', in B Opeskin & D Weisbrot (eds) *The Promise of Law Reform* (Federation Press, 2005) 40-52.

¹⁶² Greenberg (N83), 78.

¹⁶³ Bennion (N154) 69.

¹⁶⁴ Breuer (N146) 62.

¹⁶⁵ U Karpen 'Good Governance through Transparent Application of the Rule of Law', (2009) 11 EurJLReform 213, 223.

¹⁶⁶ Donelan (N31), 167.

bills.¹⁶⁷ Ilbert commented that *'no minister expects to obtain much credit from passing a measure of consolidation. Such measures are not eagerly demanded by the constituencies and do not figure as an item in any political programme... Hence a minister is naturally unwilling to introduce such a measure except on assurance that it will pass unopposed...'*¹⁶⁸

But the problem is not just of lack political will alone. Consolidation cannot take place unless the law remains relatively settled while the consolidation is prepared. Opeskin gives an example in the United Kingdom of Law Commission's attempt at consolidating legislation on financial services had to be abandoned because the government elected in 1997 decided to design a new regulatory scheme.¹⁶⁹ Due to the changing nature of legislation, the work on the consolidation was wasted.

Consequently, is consolidation worth all the trouble it involves? Doubtless existing statutes are numerous fragmented and ill-expressed, it may be assumed that the conscientious legislator who is expected to understand and discuss a Bill intelligibly only by reference to a score of scattered statutes or the magistrate who has to compare half a dozen cuffling statutes before he can decide an apparently simple point would prefer consolidation to the chaotic state of the statute book.

3.3 Rewrite

The rewrite mechanism was initiated by the Inland Revenue in 1996 in response to the growing unease among tax professionals at the ever-increasing complexity of the UK tax law. The Revenue

¹⁶⁷ Irish Law Reform Commission, 'Legislation Directory: Towards a Best Practice Model' (LRC CP 49-2008), para 1.89.

¹⁶⁸ C Ilbert, *Legislative Methods and Forms* (Clarendon Press, Oxford, 1901), 113.

¹⁶⁹ Caldwell (N161), 44-45.

reiterated that the project was designed to rewrite existing tax law "as it stands", which remit "excludes the possibility of making substantive changes to the law" other than "minor identified changes at the margin, intended in the main to bring clarification or consistency or to bring legislation in line with well established practice.¹⁷⁰ As Caldwell points out, the tax law rewrite project was designed to alter both the structure and the language of existing tax law.¹⁷¹

Rewrite uses several techniques to make legislation easier to comprehend including plain language, rationalisation of definitions, reordering and renumbering, omitting outdated or unnecessary material, and better signposting and layout.¹⁷² This is to address issues of complicated syntax, long sentences and archaic language, transparency and intelligibility in legislation and instances of drafting 'overkill' among others.¹⁷³

Cognisance should be taken of the fact that the rewritten legislation although uses shorter sentences evidently it is not any shorter than the existing legislation, however the benefits from a rewrite outweighs the increased pages of legislation in that it reduces the cost of compliance as legislation is clearer, easier to understand and relatively users-friendly. This is to be taken with a note of caution as in any reform process, "simplification of complex technical law can [sometimes] only be at the cost of precision and concision".¹⁷⁴

3.4 Restatement

Restatement brings together statutes on a single subject in one, stand-alone document, which is reflective of the statute law in a particular area of law as of the date of its publication. The object of

¹⁷⁰ HM Revenue and Customs, 'Tax Law Rewrite: The Way Forward', <http://www.hmrc.gov.uk/rewrite/wayforward/tlrc7.htm> (accessed 24th July, 2015), para 2.5.

¹⁷¹ Caldwell (N161) 47.

¹⁷² HM Revenue and Customs, (N 170), Chapter 1.

¹⁷³ M Arden, 'Modernising Legislation', (1998) Public Law 65, 70.

¹⁷⁴ Ibid.

restatement is to integrate subsequent amendments of an Act into a principal Act or Acts, to result in a seamless-looking principal Act or group of Acts.¹⁷⁵ It is done administratively and as a result does not have the force of law but serves as evidence of the existence of legislation in question.¹⁷⁶ With the holistic view of legislation on a particular area, a person know without doubt what the state of the law is at any point in time. This invariably aids clarity and certainty in legislation.

Restatement involves the insertion of textual and textual amendments in relation to a particular Act into the text of that Act and presents it as a single document. It excludes text of repealed provisions. An obvious benefit of a Restatement is that it provides an up-to-date account of legislation at a point in time. It will also serve to enhance accountability as legislation is more transparent. With its drawback being that a restated enactment does not have the force of law.

3.5 Reprint

Reprint or 'recast' is another approach which entails the periodic re-publication of statutes in their revised form, incorporating the amended text, purged of repealed and spent provisions.¹⁷⁷ A Reprint presents the text of legislation in a clearer and readable format which improves its accessibility and comprehensibility including numbering, orthographic or other technical corrections which improve the readability of the text without changing its meaning.¹⁷⁸ Thus a reprint provides an accessible and coherent version of existing legislation which is up-to-date. This process is usually an administrative one and there

¹⁷⁵ Law Reform Commission, 'Report: Statute Law Restatement' (LRC-91, 2008), 12, <http://www.lawreform.ie/fileupload/Reports/Report%20SLR.pdf> (accessed 27th July, 2015).

¹⁷⁶ Section 5, *Statute Law (Restatement) Act 2002*.

¹⁷⁷ Berry (N15), 33.

¹⁷⁸ Donelan (N31), 173.

is generally a leeway for changes to be made to numbers or dates from words to figures or changing long-form cross references to short-form ones.¹⁷⁹

Lord Simon recommends that statutes be officially reprinted in their amended form.¹⁸⁰ Therefore, if a new statute amends an old statute, the old statute should be immediately available in its amended form. If this is done by the official government printer, then it will have an imprimatur of authority, even if it doesn't have the authority of an Act of Parliament.¹⁸¹ Beatson refers to an example from Scotland where the government published an unofficial version of an Act as amended 'because without it the new law was utterly incomprehensible'.¹⁸² Berry after a survey of a number of jurisdictions on their approach to reprints, cites the example of the Crimes Act 1958 (Victoria) which has been reprinted twenty-one times since it was enacted.¹⁸³

Reprints are an excellent tool in theory especially in cases of an amending Act as the user can see the nature of the changes to the legislation in the amending Act.¹⁸⁴ This aids comprehensibility and certainty. Consequently if the user wants to know the legislation in its totality, they can refer to the old Act as amended by the new Act. Ultimately, reprints ensure that statutory rules are accessible, coherent and available to users as well as precludes the need to take up the time of the legislature, which is at best a scarce resource.¹⁸⁵

¹⁷⁹ Interpretation Act, 2009 (Act 792) - section (12)(6) empowers the Attorney-General to reprint enactments as amended in so far as the reprint does not alter the substance of the enactment amended.

¹⁸⁰ Lord Simon of Glaisdale, 'Statute Consolidation: Interim Techniques', (1985) Public Law, 352.

¹⁸¹ Ronan Cormacain, 'Keeling Schedules and Clarity in Amending Legislation', (2013) 15 EurJL Reform 96, 104.

¹⁸² J Beatson, 'Common law, Statute Law and Constitutional Law', (2006) Scottish Law Review, 4.

¹⁸³ Berry (N15).

¹⁸⁴ Cormacain (N181), 104.

¹⁸⁵ Berry (N15), 44.

The main deficiency of reprint is practical, in that every time a statutory rule is amended, the old law must be republished with all the amendments as soon as possible.¹⁸⁶ In addition, the database must be continually and immediately updated and this is a costly undertaking. Furthermore, publications in this manner lacks statutory or other authority as it is less authoritative¹⁸⁷ as a result reprints and databases may not have the guarantee of accuracy provided by an Act.¹⁸⁸

Despite these, reprints deliver an intelligible document¹⁸⁹ which aid the user in knowing the accuracy of a particular legislation at any point in time.

3.6 Statute Law Revision

Closely allied with consolidation is statute law revision. Society by nature is not static as a result statutes are continually being amended and re-amended, repealed and re-enacted to address the changing needs of society. Thus it becomes increasingly difficult to ascertain with certainty what the exact state of the written law on any given subject is at any particular point in time. As amendments are amended and re-amended the task of reading, or attempting to read, a statute becomes progressively difficult. As statutes 'are repealed, become spent, obsolete or expire, the amount of 'dead wood' in the statute book grows and the quantity of volumes which have to be referred to increases. It is at this point that statute law revision comes into play.

¹⁸⁶ Cormacain ((N181), 104.

¹⁸⁷ Teasdale (N12), 180.

¹⁸⁸ Cormacain (N181), 104.

¹⁸⁹ Simon (N180), 352.

Statute law revision is the process of the removal of obsolete and unnecessary enactments - the "dead wood" - from the statute book to enable the publication of a revised edition of the statutes in force in a form which will be easy to handle and consult.¹⁹⁰ Law revision goes beyond reform or even re-enactment, in an organised and modern form, of old statutes, but involves the total repeal of statutes which no longer have any practical effect, because they have, without being formally repealed, been entirely superseded by later Acts or they deal with situations which, in their nature, can never arise again, they are "spent."¹⁹¹

The aim of law revision is not only to remove materials which has become of less utility than when it was enacted or which Parliament might have come to regret having regard to modern circumstances, it is also a 'crematorium for dead bodies of law but not a lethal chamber for tiresome invalids who are still alive'.¹⁹² In other words, law revision weeds away enactments that are no longer in force, and arranges and classifies what is left under proper heads, bringing the dispersed statutes together, eliminating jarring and discordant provisions, and thus getting a harmonious whole instead of a chaos of inconsistent and contradictory enactments.¹⁹³ Marshall expresses a similar opinion in that the purpose of statute law revision is to prepare an "up-to-date set of the statutes in force in a particular territory at a particular date".¹⁹⁴ Bartholomew endorses this notion. He indicated that the purpose of law revision is to make legislation "easily available in a readily accessible form," and that means law revision up-dates the statute book in a comprehensive, concise, and readily available manner omitting the "dead

¹⁹⁰ CJ Haughey, 'Law Reform in Ireland', (1964) 13 Int'l & CompLQ, 1300, 1307.

¹⁹¹ Marsh (N152), 281,

¹⁹² Greenberg (N83), 85.

¹⁹³ Teasdale (N12), 183.

¹⁹⁴ HH Marshall, 'Statute Law Revision in the Commonwealth', (1964) 13 Int'l & CompLQ, 1407.

wood"¹⁹⁵ This is in addition to changing the language of the enactments so as to bring them in line with current usage, without making any change in the substance of the legislation.¹⁹⁶

Law revision is a challenging exercise as the legislative process cannot be paused and yet the process inevitably takes time. This makes the availability of an up-to-date statute book, a utopia. Thus a compromise between the ideal and the reality has to be reached. Thus Bartholomew qualifies the aim of statute law revision which can only be to prepare a statement of the written laws of a country in a form which is as complete, accurate, concise and up-to-date as possible.¹⁹⁷

Law revision over the years has done much good, working out its influence on the legal system.¹⁹⁸ The concise and current presentation of legislation, which is made possible through law revision improves the administration of the law unquestionably,¹⁹⁹ as legislation is more accessible and its contents clearer. As a result, the administrators and those subject to the law know what is legally required of them at any point in time.

It is pertinent to raise the difficulty which arises in situations where there is a discrepancy in the revised edition and the original text that was revised as 'law revision was never intended to alter the law'²⁰⁰. Thus if an issue arises as to the authenticity of the revised text and the relation between it and the original text, the text of the revised edition can only be regarded as authoritative if the alterations made by the revisers are within the powers conferred upon the reviser.²⁰¹

¹⁹⁵ GW Bartholomew, 'Statute Law Revision', (1971) 1 Hong Kong Law Journal, 274, 274.

¹⁹⁶ Crabbe, (N3), 199.

¹⁹⁷ Bartholomew, (N195), 274- 275.

¹⁹⁸ 'Statute Revision and Codification', (1871) 3 AlbLJ, 86.

¹⁹⁹ P Le Pelley, 'African Law Revision' (1971) 7 EAfrLJ, 56, 67.

²⁰⁰ *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851, 862, HL.

²⁰¹ Bartholomew (N195), 276.

Another difficulty of law revision is that old statutes that are still in operation are left untouched as the physical state of the Statute Book remains intact. The old statutes that have been repealed, and therefore no longer form part of the law, remain in the official volumes of statutes as a result the user still has to check whether a particular provision is in force or not.²⁰²

Consequently, with a background of the various mechanisms utilised by the drafter in tidying up the statute book, it is pertinent to this dissertation to analyse their effect on certainty by way of their effect on the structure of the statute book and the comprehensibility of legislation as a whole, the subject of the succeeding chapter.

²⁰² Berry (N15), 43.

CHAPTER FOUR - ANALYSIS OF THE TIDYING UP MECHANISMS AND THEIR IMPACT ON THE STATUTE BOOK IN RELATION TO LEGAL CERTAINTY

The starting point, as explained in Chapters two and three, was to explain the concepts of legal certainty, to map out the various the mechanisms of keeping the statute book up-to-date and to define, as far as practicable, their fundamental elements respectively. Consequently, it is commendable to analyse the impact of these mechanisms on clarity of legislation and consequently legal certainty.

4.1 Effect on the Architecture of the Statute Book

Codification reduces the whole law relating to a subject matter into a systematic form and this includes Common law, Case Law and Statute law; while consolidation differs from codification in this alone, that it omits the Common law and comprises only the statute law relating to a subject as illustrated by judicial decisions.²⁰³ Consequently, codification achieves more in-depth results as compared to consolidation as it brings together all existing statute and common law with a statute or group of statutes in a comprehensive and self-contained manner²⁰⁴ whilst consolidation is limited to re-organising and re-enacting a body of statutory law on a subject matter without altering the substance of the law.

As juxtaposed with rewrite, rewrite is in essence a form of consolidation as it reorders complex statutory material which is outdated and reproduces the existing legislation without, major changes.²⁰⁵

²⁰³ Thring (N58), 14-15.

²⁰⁴ Caldwell (N161), 50.

²⁰⁵ Caldwell (N161), 45.

However rewrite is more radical than consolidation as it modernizes and simplifies the language, style, format and presentation of legislation.²⁰⁶ An example is the Capital Allowances Act 2001.²⁰⁷

Furthermore, restatements and reprints are also mechanisms of consolidation in the broad sense.²⁰⁸ Restatements reproduce legislative text which have been amended piecemeal to produce a comprehensive text, and complements consolidation by offering a more immediate way of assembling a coherent picture of the law in appropriate areas²⁰⁹ whilst reprints reproduces the legislative text incorporating subsequent amendments. Despite injecting transparency and legibility into the statute book by simultaneously amending and consolidating, restatements and reprints are forms of administrative consolidation,²¹⁰ as a result, lack parliamentary authority to effect changes to the substantive law and cannot repeal obsolete legislation.²¹¹

Finally the process of law revision removes from the statute book provisions which have no possible utility in any future circumstances that can realistically be imagined.²¹² It is a truism as observed by Finlay that law revision was never intended to alter the law but merely to remove from the statute book enactments which were obsolete or unnecessary'.²¹³ As a result, it facilitates the production of revised editions of statutes, chronologically or by topic, by repealing obsolete law²¹⁴ and leaving on the statute book legislation that are in force at a particular time.

²⁰⁶ Samuels (N155), 59.

²⁰⁷ Long title 'An Act to restate, with minor changes, certain enactments relating to capital allowances'.

²⁰⁸ Xanthaki (N70), 277.

²⁰⁹ The Law Reform Commission of Ireland, 'Consultation Paper: Statute Law Restatement', (LRC CP 45-2007, July 2007, Dublin), 28 <http://www.lawreform.ie/fileupload/consultation%20papers/Restatement%20CP.pdf> (accessed 12th August 2015).

²¹⁰ Teasdale, (N12), 194.

²¹¹ Ibid.

²¹² Greenberg (N83), 85.

²¹³ *Leeds Industrial Corporative Society Ltd v Slack* (1924) AC 851, 862, HL.

²¹⁴ Teasdale, (N12), 195.

It is observed that these mechanisms in so far as they introduce a single legislative text contribute to legislative clarity by promoting a clearer structure, within the text of a particular legislation and also within the holistic framework of the statute book. Consequently, a clearly structured statute book offers the user the opportunity to assess the consequences of his or her actions in relation to a particular situation thus ensures predictability albeit certainty to legislation, a necessary component of the rule of law. Predictability allows comprehension of legislation by users as well as enforcers of legislation.²¹⁵

4.2 Better Understanding of Legislation in Context

Tidying up the statute book ensures that the body of laws and regulations are more coherent and simplified with a view to ensuring clarity²¹⁶ in the sense of quick comprehension.²¹⁷ With clarity at the forefront, legislation becomes accessible, comprehensible, consistent and above all certain.²¹⁸

Codification ensures predictability by offering legislation in a particular field of law in a single holistic text.²¹⁹ It not only brings together all rules and regulations in relation to a particular law but it does so in a scientific way, with the formulation of concepts and of general principles and the use of logical classifications.²²⁰ This in turn ensures that legislation is more accessible to the user. It further serves clarity by means of a clearer syntax, grammar and words.²²¹ As put by Xanthaki, it offers the luxury of a re-examination of not only the structure of each provision and the expression, but also the structure of

²¹⁵ Xanthaki (N70), 8-9.

²¹⁶ 'Mandelkern Group on Better Regulation: Final Report' (2001), 42, http://ec.europa.eu/smart-regulation/better_regulation/documents/mandelkern_report.pdf (accessed 4th August, 2015).

²¹⁷ J Stark, 'Should the Main Goal of Statutory Drafting be Accuracy or Clarity', (1994) 13 StatLRev, 207, 208.

²¹⁸ CGB Nicholson, 'Codification of Scots Law: A Way Ahead, or a Blind Alley', (1987) StatLRev, 173, 177.

²¹⁹ Xanthaki (N70), 285.

²²⁰ Tallon (N120), 4.

²²¹ Xanthaki (N70), 286.

each legislative part, the structure of each section and the expression of parts, sections and clauses.²²²

A codification exercise fills in gaps in legislation where necessary, resolve vagueness and conflicts between and within texts and thus presents legislation in a clearer light to its users.

Despite this, it is argued frequently that codification imposes rigidity on the codified rule of law. Code prevents the evolution of legislation in line with changing needs of society. However the amendment of a code is no more difficult than an ordinary statute, whenever there is a sufficient social pressure or a compelling political necessity.²²³

Consolidation, as like codification, contributes to clarity by introducing a single, holistic text in the field of law under consolidation and illuminating the law by means of a clearer structure.²²⁴ This is achieved by removing imprecision indirectly by the removal of repealed provisions or texts and eliminating the distorting effect that a piece of legislation may have on unrelated areas of the statute book.²²⁵ As in seen in Australian where a consolidation of business legislation led to a more stable, simpler, and more coherent business environment which optimised economic growth, promoted equity, simplicity and certainty.²²⁶ Nevertheless, the major difficulty with consolidation is that of the evolution of society, as it cannot take place unless legislation remains relatively settled.²²⁷ It however presents the reader with legislation which is easier to understand in reference to the current law at the time of its completion.²²⁸

²²² *ibid.*

²²³ Tallon (N120), 11 - gives examples of Germany and France where reform has taken place over the years in their family code.

²²⁴ Xanthaki (N70), 285.

²²⁵ *ibid.*

²²⁶ M D'Ascenzo, 'The Intent of the Consolidation Regime' (2005) 8 *Journal of Australian Taxation*, 371, 372.

²²⁷ Caldwell (N161), 44.

²²⁸ Xanthaki (N70), 285.

In its contribution to clarity, the mechanism of rewrite is similar to consolidation as it reproduces the existing legislation without, major changes. It brings consistency to the language of the rewritten law and brings the law in line with established practice.²²⁹ Though its purpose is limited, when used as a tool alongside law revision, rewrite is valuable as it improves legibility of legislation and makes the statute book more accessible.²³⁰ The major technical difficulty in rewriting is to satisfy oneself that legislation that is rewritten incorporates only minor changes in the law.²³¹ Thus in rewriting, careful analysis is required to ensure as far as possible, that legislation is not changed inadvertently.²³²

Restatement and reprints though an administrative reproduction of legislative text serves clarity by presenting users with a clearer and more organised structure of legislation. They have the potential of enhancing compliance with legislation as legal requirements are known to those affected as a result noncompliance is more visible and more exposed to community disapproval.²³³

Lastly, Law Revision in its contribution to clarity and certainty, works to modernize and simplify the stock of legislation by reducing the bulk of the statute book,²³⁴ as well as the uncertainty and complexity of the existing body of statute law.²³⁵ Generally bodies established to carry out revision work are given, by law, broad powers to change the wording of the statutes but not the substance of the law.²³⁶ Further, Johnson gives an example in Canada where as a result of revisions of legislations, almost all Latin expressions have been eliminated from the Canadian statutes and spent provisions, provisos and

²²⁹ Author unknown.

²³⁰ Teasdale (N12), 178-179.

²³¹ Caldwell (N161), 45.

²³² Author unknown.

²³³ LRC (N175), 35.

²³⁴ Donelan (N31), 173.

²³⁵ Crabbe (N3) 198.

²³⁶ Laws of Ghana (Revised Edition) Act, 1998 (Act 592) in section 2 permits the Commissioner to among others correct grammatical, typographical and similar errors in Acts and for that purpose effect alterations that are necessary without affecting the meaning of any Act.

other lengthy and archaic provisions and structures have in most cases been eliminated or reformulated.²³⁷ However in revising statutes, care should be taken in the repeal of Acts in the process as mere disuse cannot be taken as evidence of obsolesces.

Given all the mechanisms of tidying up the statute book, it is noted that their contribution to legal certainty cannot be underestimated. In the quest for clarity and predictability to legislation, the keepers of the statute book should under a given circumstance select the appropriate mechanism(s) that will provide the apt solution, in terms of ensuring that legislation is clearly expresses and as a result certainty in the result of its application is achieved.

²³⁷ PE Johnson, 'Legislative Drafting Practices and Other Factors Affecting the Clarity of Canada's Laws', (1991) 12 StatLRev, 1, 3-4.

CHAPTER FIVE - CONCLUSION

Statute law might sound dull and an unimportant corner of the law but it is an integral part of human existence as it defines the relationship between citizen and state.²³⁸ Users of legislation, in increasing numbers, are demanding knowledge of the law and are becoming exasperated with its antiquated language, complex and tenuously-useful fictions, since they are finding more and more that they are affected by the law, that they are proper addressees and they wish to know that they may act accordingly.²³⁹ Consequently, with the need for users to get the grips with the every increasing numbers of legislation as easily as possible,²⁴⁰ this dissertation has sought to present the link between a tidied up statute book and legal certainty. Accordingly this dissertation has been presented within the context of the hypothesis that 'a statute book which is current and in a coherent form ensures certainty in legislation'.

In discussing the hypothesis, it was noted that as the statute book lengthens and ages, tracking the full status and implications of legislation becomes increasingly challenging,²⁴¹ and that the state as the major originator of legislation has a duty to ensure that legislation which is available to its citizens is accessible in terms of coherence and comprehensibility. This is a requirement of legal certainty, an integral part of the rule of law, as persons affected by a particular legislation ought to know its contents.²⁴² Thus where legislation is not readily capable of being understood, because it is badly expressed or unnecessarily complex, it is incapable of providing a proper framework within which the state and its citizens can operate and fails to provide a secure framework for a country committed to the rule of law.²⁴³

²³⁸ Arden (N173), 75.

²³⁹ Stone (N110), 310.

²⁴⁰ Caldwell (N161), 52.

²⁴¹ Erasmus (N90), 21.

²⁴² Beatson (N182), 3.

²⁴³ Lord Neuberger of Abbotsbury, 'General, Equal and Certain: Law Reform Today and Tomorrow', (2012) StatLRev, 323, 325.

Wheeler puts it this way “The statute book is the form in which legislation is brought into contact with the public and with its servants who administer the law. If it speaks plainly, the public knows the rules under which it lives, and its servants know the limits of their duties and powers; if it speaks haltingly, ambiguously or in a language that no one can understand, the way is open for ignorant or unscrupulous persons to do great harm.”²⁴⁴

Given this as a backdrop, the significance of having an up-to-date, accessible and coherent Statute Book were outlined. Apart from the removal of the frustration, the cost of savings to both the state and the private citizen in both time and effort are surely immense. Additionally, a government official, lawyer or ordinary citizen does not have to hunt for legislation scattered among umpteen different statutes which are often inconsistent with the other.²⁴⁵ The economic benefit was also worthy of mention as it reduced the cost of administering legislation as cited by Donelan.²⁴⁶ Despite all these, it was noted that the difficulty in managing the statute book stemmed from the fact that in many jurisdictions, the overall coherence of the legislation was not the preserve of one institution and as a result the citizens at a particular point in time are not capable of ascertaining which legislation applied to a particular situation. As a result a number of mechanisms have been developed to keep out the clutter in the statute book and these would contribute in the simplification of the statute book to ensure that legislative effect was predictable.

As the focus of this thesis was to establish a link between legislative certainty and a tidied up statute book, it was noted that certainty in legislation has been judicially held to imply that "a citizen, before committing himself to any course of action, should be able to know in advance what are the legal

²⁴⁴ Wheeler (N21), 197-198.

²⁴⁵ Berry (N15), 46.

²⁴⁶ Donelan (N31), 149.

consequences that will flow from it."²⁴⁷ It is highly valued as legislation should be certain and operate with a kind of mechanical regularity.²⁴⁸The goal of legal certainty is reflected in its central place in rule of law conceptions, both judicially and academically.²⁴⁹ The appeal of certainty in legal reasoning was seen as essential as it reinforces the theory of separation of powers with the courts given a limited role of applying legislation and not enacting legislation as well as ensuring equal treatment under the law. Above all certainty in law ensure predictability, a rudimentary requirement of justice. Uncertainty in legislation was regarded as a disincentive as it encouraged non-compliance with legal requirements.

It was noted that in order to achieve certainty in legislation, the drafter had to employ the tool of clarity when drafting. Clarity is regarded as being at the heart of accessibility; and accessibility is at the heart of the efficacy of the rule of law²⁵⁰ as it ensure that legislation is certain²⁵¹ and accessible²⁵². However clarity was seen not to be always paramount in legislation as certain circumstances required the need for vagueness. These included situations where the legislator is incapable of envisaging all possible circumstances that the legislation will be applicable to²⁵³ as well as the changing nature of language. However it was realised that legislation did not, in fact, everywhere require precision in order to command compliance in a modern legal system.²⁵⁴ Clarity as a single concept was seen by the drafter as a compromise between competing concepts and thus clarity, should not be sacrificed for simplicity, elegance or eloquence in legislation.²⁵⁵

²⁴⁷ Jeffrey Barnes, 'Sources Of Doubt and the Quest for Legal Certainty', (2008) 2 Leg, 119,119 -120.

²⁴⁸ Ibid.

²⁴⁹ Benjamin N. Cardozo, 'The Growth of the Law' (1924)1, 2.

²⁵⁰ Editorial (N64), 2.

²⁵¹ Majembere, (N65) 417.

²⁵² Bekink (N66), 65.

²⁵³ Greenberg (N83), 336.

²⁵⁴ Hadfield (N76), 553.

²⁵⁵ Kadija Kabba, 'Gender-Neutral Language: An Essential Language Tool to Serve Precision, Clarity and Unambiguity', (2011) 37CLB, 427.

In achieving clarity, the drafter, as the keeper of the statute book, has the responsibility of ensuring that the statute book is kept in the best possible condition juridically and verbally.²⁵⁶ In line with this, the legislative drafter has to ensure the coherence of the structure of legislation and consistency of the legislative text, both within the Act and externally within the whole architecture of the statute book. Thus the legislative drafter has to ensure that legislation is structured in a way which enables users of the legislative text identify the regulatory message. Legislation which has a good structure enhances clarity of presentation and expression for without an adequate structure, legislation will only accidentally serve its purposes.²⁵⁷

The legislative drafter thus falls on a number of mechanisms which ensure clarity in legislation. To begin with, there is the mechanism of codification which was assessed to involve two things due to the divergent opinions of authorities on the subject matter. It involved arranging, rationalising and enacting a collection of laws of a jurisdiction in a field of law, or systematically arranging the exhaustive collection, updating and enactment of the collection of primary legislation in a field of law in a specific jurisdiction.²⁵⁸ As it involves the collation of the relevant body of legislation in a single textual source, it provides an authoritative and comprehensive formulation of a particular body of law.²⁵⁹ Though many argue that codification is an elusive concept²⁶⁰ because of the changing nature of society, it provides more security than "scattered legislation",²⁶¹ as it allows the regrouping of dispersed text while clarifying them as well as assessing the coherence of texts and facilitating the harmonisation of the state of law.²⁶²

²⁵⁶ Erasmus (N90).

²⁵⁷ Seidman et al (N2), 208.

²⁵⁸ Xanthaki (N70), 278.

²⁵⁹ McCutcheon (N111), 133-134.

²⁶⁰ Crabbe (N3), 193.

²⁶¹ Clive (N142), 84.

²⁶² Xanthaki, (N70), 278 – 281.

The mechanism of consolidation was also worthy of mention in this dissertation as it involves the re-enactment of all the relevant provisions on a particular subject in one statute, making, at most, only minor amendments to the existing law.²⁶³ It was noted that the importance of consolidation in contemporary times was waning due to the introduction of the databases which provide legislation in amended format nonetheless its importance is still invaluable as it reorganises and restates the law so as to improve clarity and intelligibility without altering its substance.²⁶⁴ But the main bane of consolidation was realised to be similar to that of codification, which is the ever changing nature of societal needs.

Rewrite, restatement and reprint were also considered at length. These three mechanisms were seen to be various means of providing versions of existing legislation which is up-to-date, accessible and comprehensible. The major drawback of these were that they were merely administrative actions which lacked the force of law but only served as evidence of the existence of the particular legislation at a point in time.

Lastly, statute law revision was also considered. It was described as the process of the removal of obsolete and unnecessary enactments - the "dead wood" - from the statute book to enable the publication of a revised edition of the statutes in force in a form which will be easy to handle and to consult.²⁶⁵ It should be noted that changes that are made in the process of revision are not meant to alter the substance of the legislation but rather to enhance clarity. The difficulty arises in case where there is a discrepancy between the revised text and the original text.

²⁶³ Berry (N15), 46.

²⁶⁴ Greenberg (N83), 78.

²⁶⁵ Haughey (N190), 1307.

The dissertation concluded with an analysis of the various mechanisms and their impact on legislative certainty. The analysis was conducted under two main headings, namely their effect on the structure of the statute book holistically and on the individual legislation. Concerning the former, it was observed that the use of the six mechanisms by the legislative drafter contributed to legislative clarity, and ultimately, the predictability of legislation by facilitating a clearer structure, within the text of a particular legislation and also within the holistic framework of the statute book. This is as a result of the fact that they introduce a single legislative text. With respect to the latter, it was concluded that the mechanisms contribute in their unique way to the clarity and predictability of the legislative text. However it was observed that restatement, reprint and rewrite were mainly mechanisms of consolidation in a broader sense and thus could not be a form of tidying up mechanisms in their own right.²⁶⁶

Consequently it should be noted that improving the form of legislation, whether by codification, consolidation, law revision or by way of the reprints, restatements or rewrites is an important housekeeping that must be undertaken.²⁶⁷ Enormous benefits arise from these and these include better efficiency in public administration, the facilitation of economic activity, the prevention (or at least the easier resolution) of disputes, the facilitation of good legal advice and assistance, an improvement in the work of the courts, and a more straightforward task for legislators in the future.²⁶⁸

The benefits may be attributed to the fact that after a tidying up of the statute book, the law regarding a particular subject area becomes clear as well as predictable. In the quest for certainty however Cormacine sounds a note of caution that “lawyers and legislative drafters must not fixate upon legal precision to the extent that legislation becomes incomprehensible to citizens. Citizens on the other

²⁶⁶ Xanthaki (N70), 277.

²⁶⁷ Caldwell (N161), 52.

²⁶⁸ Samuels (N155), 63.

hand must not assume that they know with certainty what the law is, simply because they have read one particular legislative provision.”²⁶⁹ Consequently given the above discussions, it is submitted that the link between legal certainty and a coherent statute book has been established without doubt.

²⁶⁹ Ronan Cormacain, ‘Have the Renton Committee’s recommendations on electronic access to legislation been fulfilled?’(2013) Vol 19, No 3, European Journal of Current Legal Issues, <http://webjcli.org/issue/view/17> (accessed 10th August, 2015).

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