

OPTIONS IN LAW REVISION: EMERGING PROBLEMS AND EMERGING TRENDS — A ZIMBABWE PERSPECTIVE

A paper prepared by the Government of Zimbabwe

Historical Perspectives

In Britain and many other Commonwealth countries statute law revision is a relatively recent phenomenon. Thus, although in Britain, the earliest English statute on record is dated 1235, we are told by the authors of Craies on Statute Law that it was not until 1856 that the process of statute law revision began in that country. That process appears to be still in progress because as recently as 1965, the Law Commission established in that year, had as part of its principal objects, the task of "systematic development and reform, including in particular the codification of the law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law..."

2. For most of the other Commonwealth countries, however, statute law revision could have started only as soon as practicable after 1856 as each acquired a local legislature and a collection of local statutes. As in other aspects of colonial administration, through the use, on the one hand, of colonial office personnel, such as the colonial legal officers, namely, the Attorneys-General and the judges of the superior courts, and the use of the colonial Instructions on the Preparation and Printing of Revised Editions and the Annual Volumes of the Statutes, on the other, the form and development of statute law revision generally followed identical patterns for a long time in Britain and the other Commonwealth countries. Indeed, after the emergence, during the period under reference, of legislation as the principal source of law, statute law revision, often referred to as the reform of the statute book, became the most widespread and the single most important form of law reform in these countries. Of the supersession of the common law by statute law, a noted American writer, Albert J. Harno, has observed that "... legislation came largely to replace the judicial process as a means for rapid and radical change of law. The legislature has machinery, such as the standing committees, the appointed investigation commission, and the special investigating organisations within the executive branch for securing requisite information...". It can engage in social planning of long-term, wide-ranging policy in fields such as taxation, housing, penology and prison reform, child welfare, co-ordinating of production and purchasing power, improvement in the administration of justice. The paramount issues of our time lie within its domain rather than that of the common law.

3. We are however warned by Professor Allen in his landmark work, Law in the Making, that law revision started in Britain almost by accident and of necessity had to grow slowly. At page 259 of the Second Edition of that work, he gives the following account of the circumstances in which statute law revision started in England:

"Uncertainty as to its authority cannot exist in regard to a modern Act of Parliament; but when we speak glibly of the "statute book" we do not always realize what a curiously formless document it is. Until the Statutes of the Realm were published [1011-1713], our enacted law was disorderly to an almost incredible degree...[In] the intricate maze of statutes repealed, partially repealed, and re-enacted in whole or in part, it was sometimes almost impossible to ascertain what the true statute law was on any uncertain point. The most absurd results were sometimes produced. A statute, 21 and 22 Vict., C.26 [The Property Qualifications for Members of Parliament Act, 1875],

was solemnly passed to repeal 6 Anne, C.5 [The Taxation Act, 1706], and 33 Geo II, C.20, [The Admission of Vassals Act, 1751], both of which had been repealed by 1 and 2 Vict., C.48 [The House of Commons Qualification Act, 1838]. In 1842, in the case of *Reg. v G.W. Railway Co.*, 3Q.B. 333, the Court of Queens Bench carefully considered the statute 2 and 3 Ed. VI., C.24 which had been repealed fourteen years previously. Counsel not infrequently went into Court relying on Acts which neither they nor the Judge knew, nor could reasonably be expected to know, had been abrogated. At last a move was made for extensive revision. A number of commissions sat from 1834 onwards, and though many of their recommendations never got beyond the stage of pious wishes, one result was a series of Statute Law Revision Acts which began in 1861 and got rid of an enormous quantity of obsolete matter. One Act of 1867 alone repealed 1,300 statutes. This salutary process of expurgation has gone on more or less continuously up to the present time. The Revised Statutes were [first] published 1870-85 and the second edition 1888-97. We now have reasonably manageable collections of legislation. But we are still far off perfection, and much might yet be done to reduce the statutes to a more systematic form..."

The Revised Edition of the Laws System

4. The Statute Law Revision Acts referred to by Professor Allen were the work of the Statute Law Revision Committee set up in 1868. Unfortunately the repeals with which the Statute Law Revision Acts were concerned were not express or specific repeals but only the implied ones. They were concerned with cleaning the Statute Book of, to use the words of the Bill to the 1927 Act, "enactments which are expired, spent, repealed, [impliedly] superseded or obsolete," and the Committee was therefore often held to ransom by interest groups opposed to the repeal of various statutes they found reason to hang on to. Furthermore, the cleaning of the Statute Book by the Statute Law Revision Acts, was only a prelude to the more important task of compiling and publishing the Revised Edition of the Statutes. Lord Thring has noted in Practical Legislation, published in 1902 that

"In 1868 Lord Cairns appointed a statute law committee of which I am the only original member still surviving. The duties of the committee are to make arrangements for, and to superintend the publication of a revised edition of the statutes. The first step was to free the Statute Book from obsolete and repealed statutes. This has been done under the superintendence of the committee down to the present time. Two revised editions have been published, the second is a cheaper edition than the first, and is contained in sixteen volumes brought down to the year 1886, the last volume of which was published in 1894..."

According to Halsbury's Laws of England, 4th Edition Vol. 44

"The third edition was published in 1950 under the title "The Statutes Revised". Publication of a fourth edition retitled "Statutes in Force", and for the first time grouping the statutes according to their subject matter rather than chronologically, was completed in 1981."

By a plan drawn up by Sir Nicholas Bacon, in 1557, the revised edition is always case-bound. Under this plan, reproduced in Allen, Law in the Making

"First, where many laws be made for one thing, the same are to be reduced and established into one law, and the former to be abrogated ... Where there is but one law for one thing, that these laws are to remain in case (emphasis added) as statutes ... Where part of one acte standeth in force and another part abrogated, there should be no more printed but that that standeth in force".

Defects of the Revised Edition System

5. The system of revised edition of the statute described above had several defects which were apparently noted in Britain long before it was handed down to the Commonwealth countries in their colonial days. Part of the problem was the case-bound form in which the editions were compiled. In that form only noting-up of the changes occurring in the law could be effected, leaving the editions surrounded by a veritable sea of the annual statutes and other legislation virtually threatening to drown it. Consequently the temptation was either to leave the laws in that perplexing state of scatter and fragmentation until the next periodic revision, which was by no means predictable, or to alleviate the situation temporarily and at great expense through the expedient of reprinting with amendments under an Amendments Incorporation Act such as we have currently in force in Zimbabwe. The experience with reprints is that, like the original laws, they cannot be up-dated without another reprinting.

6. The chaos created by the revised edition system of the laws is indeed well documented. As far back as 1921, in a short work entitled Delegated Legislation, Dr. Cecil T. Carr, one-time Editor of the Revised Statutes, had lamented that

"In its least inconvenient form [the Statute Book] consists of

- (a) twenty substantial volumes... containing all Acts passed down to the end of Queen Victoria's reign;
- (b) annual volumes from 1900 onwards; and
- (c) single unbound copies of any Acts passed since the last annual volume was issued."

"There are few branches of law in which it will not be necessary for the practitioner to consult several of these volumes at once. As a collection our Statute Book might be summed up as beyond the average citizen's pocket to purchase, beyond his bookshelves to accommodate, beyond his leisure to study and beyond his intellect to comprehend..."

Is it any wonder that the enormity of the task in terms of labour and expense has often either delayed or postponed the periodic revisions indefinitely? It is indeed noteworthy that in Britain, since the process of law revision began in 1856, there has been only four revised editions, an average of one edition every thirty-two and half years.

But perhaps the most serious defect of the revised edition system introduced in Britain is the intrinsic tendency to obsolescence of the revised statutes produced thereby. The reasons for this were, firstly the length of time required to complete each work of revision and secondly, the fact that by its very nature a waiting period of at least one year, or "five or six years" (to go by Sir Alison Russell's prescription) or "ten years" (to go by Sir Mackenzie Dalzell Chalmers prescription), is always required before any revision of the laws can take place. Invariably, the body of unrevised legislation created during the intervening period is so great that neither time nor the necessary resources are found to bring the whole body of statute law into any reasonable state of currency. As a result, a noted authority on the statute law in Britain, Sir Mackenzie Dalzell Chalmers, drew attention to the fact that the revised edition system and updating of the statutes were actually incompatible. In an article in the *Edinburgh Review* of April 1924, cited in Carr, Revised Statutes, 45 *Law Quarterly Review* (April, 1929) at page 177, he is reported to have observed regrettably that

"It seems scandalous that a citizen, bound at his peril to obey the law, cannot go

into a public library and find an edition of the statutes for the time being in force which is approximately up to date. No revised edition could be kept actually up to date (emphasis added).... but a reasonable course would be to re-edit the public general Act every ten years..."

Of course, as demonstrated above, no amount of re-editing or reprinting can solve the problem of obsolescence in the revised edition system. A recourse to that expediency only postpones the day of disillusionment. But, in Britain, change came so slowly that it was only in 1965 that a new beginning was made, with the establishment of the Law Commission, towards the "systematic development and reform [of the Law], including in particular... the elimination of anomalies... the reduction of the number of separate enactments and generally the simplification and modernisation of the law..."

The Loose-leaf form of Compilation and Revision - Early African initiatives

7. Meanwhile with the British experience, no doubt, as background, a number of Commonwealth African countries had begun to take steps to alleviate the problems of the revised edition system by resort to the loose-leaf form of compilation.

8. By 1962, in Judicial and Legal Systems in Africa, edited by Professor Allott, it was noted at page (xi) in the following "Guide to Statutes" that

- (1) Each territory has a periodical revision and consolidation of its laws (e.g. that for Sierra Leone is dated 1959); in the revision each principal law is given a chapter number (usually abbreviated to "Cap"), by which number the law is often cited. In addition annual volumes of legislation are issued, containing the principal laws made during the previous year; each such law is given a serial number, (e.g. "No. 22 of 1959), by which it is sometimes cited.
- (2) Certain territories (e.g. Ghana, Northern Rhodesia [Zambia] have abandoned the system of periodical revision in favour of a loose-leaf system involving the annual editions of all the laws in force..."

The following entries are then made against the names of the countries which have adopted the loose-leaf system at the time

- "(1) Ghana - Acts of the Republic of Ghana, 1960 - current
(loose-leaf : in continuous revision).
- (2) Tanganyika [Tanzania] - Tanganyika Revised Laws, 1959
Revision (loose-leaf : in
continuous revision).
- (3) Northern Rhodesia [Zambia] - Laws of Northern Rhodesia,
1961 Edition (loose-leaf:
in continuous revision).
- (4) Nyasaland [Malawi] - Laws of Nyasaland, 1958 Revision
(loose-leaf : in continuous
revision)."

The Commissioner for the Revision of the Laws in Zambia has explained in the Preface to the Laws of Zambia, 1972, that the loose-leaf system was adopted with the hope "that the preparation and printing of the supplements... will thereby be simplified, and also that

eventually it will be unnecessary for any person to have to make extensive [noting-up or] amendments to his set of the Laws..." The mechanics of the system set out in sections 10 and 11 of the Laws of Zambia (Revised Edition) Acts, give further indication of the sort of improvement the loose-leaf system was intended to achieve on the case-bound system, namely -

- (1) each law was to be wholly contained in a separate chapter; and
- (2) "The volumes shall be bound in such a manner as will enable any page and any chapter to be easily removed and replaced."

But the date or time for any revision is required by section 9 of the Act to be fixed by the Minister, apparently, depending upon the need and availability of resources. It is therefore a periodic revision.

9. Similarly, the Malawi scheme is also a periodic revision, with yearly intervals. This is again made clear in the Preface to the current edition where it is stated that the edition - "has been published in loose-leaf so that it may be revised periodically (it is hoped, annually.)"

Section 6 of the enabling Act, the Revision of the Laws Act (cap. 1:02) provides that "As soon as practicable after the 1st January, 1969, and after each subsequent revision date the laws of Malawi shall be revised... to the intent that the laws of Malawi shall contain all the written laws which are required or authorized by this Act to be included therein and are in force on the relevant revision date."

10. In reality the Zambia, Malawi and Tanzania schemes are revised editions in loose-leaf. As such, revision under those schemes can be done only in arrears, generally. However, through the facility of the replacement page mechanism there is no reason why a fairly current updating in the form of incorporation of amendments cannot be done. This should be possible in Malawi where the basis for that possibility should exist if the revisions had faithfully followed the one year intervals prescribed by the enabling statute. Be that as it may, from this short appraisal of the loose-leaf systems in Zambia, Malawi and Tanzania it should be clear that contrary to their appraisal in the Allott Survey none of them can be described as a continuous revision system. The loose-leaf form of compilation certainly makes it possible to undertake current as distinct from bulk or comprehensive revision on the revision dates. In other words none of these countries is compelled to revise and reprint all the laws at the same time as would have been the case if they had retained the case-bound form of compilation. In those circumstances the advantage of the loose-leaf was more in terms of savings of production costs and labour. None of the three African systems concerned was a continuous one.

11. But in Ghana more was gained from the loose-leaf. Since the system there was more concerned with updating of the laws, it is the one system which could be described as continuous revision. There, the loose-leaf system, according to the Preface to the first Volume of the Acts, was based on a system of continuous numbering of the laws which dispensed with the traditional practice of starting a fresh numbering at the beginning of a calendar year or a new Parliament etc. Under this system, it is possible to file all laws passed by Parliament, including amending Acts, in their numerical sequence. The text of each amending Act is then incorporated into the relevant principal Act, as soon as may be after the passing of the amending Act, through the replacement page mechanism, which also offers the facility for the correction of printing and other errors of a verbal nature. As a result, each set of the Ghana statutes was expected continuously to contain all the living law up to the latest published Act, and each Act, to be consolidated with all amendments, if any, and therefore contained in one document, brought up to date accordingly. This was the true continuous revision system, if by revision is meant the process of consolidating amendments with the principal Acts. But obviously, statute law revision could mean more than this. There are

many, like Alison Russell, who believe that, at a minimum, statute law revision must also take account of similarity of the subject matter of the laws so that similar laws may be grouped as closely as possible to each other for the ease or convenience of reference by the reader and where necessary, to make it possible for Acts dealing with the same matter to be consolidated into "one complete revised ordinance" to borrow the words of Sir Alison Russell. This is done through the classification of the statutes by subject-matter groups. This, the Ghana scheme completely ignored, but apparently, not without reason, for classification in law revision is not without its own special problems. As Robert K. Cullen, Law Revisor for the American State of Kentucky, and a leading authority on the subject, has written in the Oregon Law Review of December, 1944

"If the system of classification is not logical, or if good logic has not been used in fitting legislation into the classification system, the necessary reclassification may require a complete renumbering of the statutes. This will destroy the working knowledge of the user of the statutes who has committed certain section numbers to memory..."

Yet in the view of the same author, and admittedly most Western authorities on the subject

"Without question, the most important object of a revision of statutory law is the bringing together of those laws and parts of laws which, from similarity of subject matter, properly belong together. Only by so doing can the implied repeals, inconsistencies, conflicts, duplications, and repetitions be readily identified [for elimination or expurgation]. So long as the statutes dealing with the same subject remain scattered through the statute book, it is wasted effort to undertake to improve the language and style of the individual laws. Each section in the body of the statute law must be considered as a unit of the whole; its construction and application may depend upon or be controlled by a dozen other sections; it cannot be lifted out and its language revised without reference to the other sections upon the same subject..."

Although there is a lot of logic in the Cullen prescription, there is no doubt that its application will make the notion of continuous revision and the updating of the laws only a figment of the imagination.

12. The problems of obsolescence associated with the inherited British revised edition system will be worse confounded and from the point of view of costs alone, no revision will at all be possible in the developing countries of the Commonwealth. Indeed from the recent survey of the subject undertaken for Hong Kong by Messrs Pierce and Martin it would appear that the scale of revision called for by the Cullen formula is only possible because of the computer technology, in the form of data base of statutes, which only the rich developing Commonwealth country can afford at the moment. For reasons of cost alone, this comprehensive view of revision may therefore appear to be a thing of the far distant future for the poorer countries of the Commonwealth. But perhaps a greater reason for the irrelevance of the comprehensive view is the urgency which more countries appear to be attaching to the incorporation of amendments and the reduction in the number of separate enactments as the main focus of revision especially where by so doing the law is left relatively unchanged and therefore does not require re-enactment, as is the case in the comprehensive revision systems.

Restatement of the Problems of Statute Law Revision

13. One feature which should have emerged from the account of the revised edition system so far given is the silence with which that system treats the need to bring the laws up to date. Since, however, all are agreed that bringing the laws up to date is a legitimate and perhaps an equally important object of statute law revision, the revised edition system could

therefore be said to be outdated to the extent to which it is unable to address the issue of updating. This might explain the way in which the problem of statute law revision is being stated currently. In a recent statement of the problem in the Newsletter of the Commonwealth Association of Legislative Counsel nothing was, for instance, said about the need for the logical re-arrangement and classification of the laws which as we have seen are the hall-marks of the revised edition system. The emphasis, if any, was on the need for updating. For in the view of the learned author

"No jurisdiction in the Commonwealth seems to have found an entirely satisfactory method of making available to the legal profession and other interested persons the whole of the statute law of the jurisdiction currently in force in an up-to-date form consisting of the text of each law as originally enacted and incorporating all amendments of that law up to the present. This note considers briefly the problem confronting all jurisdictions (emphasis added) of keeping the published statute law up-to-date in an easily accessible form".

More and more it would appear that the concerns of those like Chalmers who viewed updating with greater urgency are being vindicated.

The Zimbabwe Position

14. It may be fitting and proper, in concluding this contribution on the problem of statute law revision, to state that Zimbabwe has recently addressed the issue in an attempt to devise the most effective plan for a new loose-leaf system. It is perhaps sufficient to say that we found enough virtue in the concept of subject-matter classification of the laws to retain it as part of the plan finally adopted. But we also found the need to keep our laws constantly up to date sufficiently compelling to devote a large part of the plan to accommodate that need. It is our view that if any conversion from the bound revised edition volumes to the loose-leaf system is to justify the effort, it is in the extent to which the latter corrects the inadequacies of the former for updating purposes that the justification can be felt most effectively. In other words, a loose-leaf system is the more useful if, in addition to anything else, it provides the instrumentality for a system of continuous revision.

15. Therefore, one important feature of our new plan is to reduce to the barest minimum the time between the passage of an amending Act and the actual incorporation of its provisions into the relevant principal Act. To this end, where traditionally the classification of the laws for revision purposes is done after enactment, resulting in a mandatory waiting period of at least one year before revision takes place, we intend to do so at the Bill Stage so that there is no waiting time at all. Thus, simultaneously with the passing of an amending Act by Parliament, there will be produced under the new system loose-leaf pages consolidating the provisions of the amending Act with the appropriate sections of the relevant principal Act. Thereafter, it will be a simple matter to insert the loose-leaf replacement pages in the principal statute and to remove the pages which need replacement. The facility of the replacement page mechanism will also be used for correcting any errors of a verbal nature so that eventually the law is not only brought up to date in terms of consolidation but also as regards the removal of inaccuracies and inconsistencies, of course, without changing the substance.

16. We see in this plan a historic opportunity to combine some of the best features of the revised edition system with the advantages of the continuous revision concepts so as to achieve the unique result of putting the laws in some kind of orderly arrangement while getting it updated constantly, a result which to our knowledge has not yet been attained elsewhere.