Reviewing the stock of legislation: Renovation is as important as innovation

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This paper explains the fact that all countries build up a stock of legislation. Since the time of Hamurabi there have been different approaches adopted to the management of this stock. No one best practice stands out as being the solution to the problems associated with the management of this stock.

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Attention needs to be paid to 'stock' as well as to the 'flow' of legislation

Times change and we change with them but the rate of change in societies and economies is not always reflected in the rate of change of the rules that govern us. Each new government inherits stocks of laws inherited by its predecessors. Many countries have large stocks of laws inherited from past legal regimes. After independence from colonial or other foreign powers, there are many priorities to be addressed and, in order to minimise disruption to established rights, it is often administratively simpler to retain laws on the statute book which are not totally inconsistent with the new political order.

The problem is, therefore, how to maintain the stock of legislation up to date and relevant to the needs of the day. In any given country, power to make regulations may exist at a number of levels. In countries where there is not a central stock of legislation stored electronically it is possible to enact a law that is inconsistent with laws already in operation. The original purpose for which laws are enacted may no longer exist. Few countries have someone responsible for ensuring that spent or outdated laws are repealed and removed from the stock of legislation of a country.

The problem is not a new one.

5 main trends may be observed in managing the stock of legislation

Five main trends or approaches may be observed from looking at a wide range of legal systems in the world today. The first is Codification which for historical reasons is referred to in this article as Hamurabi type reform. The second is that associated with modernising areas of law. The third type

[1] The views in this article are personal and do not represent the policy of the OECD or the European Commission.

of reform is that which necessitates changes in the legislative process. Also necessary are reforms of the stock of legislation for the improvement of its accessibility. A further type of reform may be classified as 'sharp shock' reforms.

These reforms are not addressed in order of importance as they have been introduced at different times for different purposes in different countries.

Hamurabi type reforms

In about 1750 BC, the Babylonian King Hammurabi issued a legal code, in 282 sections. It set out in written form many of the customary laws which had developed up to that time. This exercise was also accompanied by the drafting of significant reforming amendments.[2]

Some religious systems developed codification of their laws. One example of this is the Torah. There were many examples of codification to be found during the different stages of the Roman Empire. To some extent, the Civil Law legal systems of Continental Europe are the successors of that legal heritage. However, these codifed laws were the exception rather than the rule and much Roman law remained uncodified.

The first *permanent* system of codified laws was found in China, with the compilation of the *Tang Code* in CE 624. This formed the basis of the Chinese criminal code. In turn, this was repealed and re-enacted by the *Great Qing Legal Code*. It was then repealed in 1912, following the Xinhai Revolution and the establishment of the Republic of China.

Another early system of codified laws is Hindu law, framed by Manu, and called Manu Smriti. The Qur'an and Sunnah are also used, to some extent, as civil codes in Islamic Sharia law.

An early example of codification is to be found in the statutes of Lithuania in the 16th century. The codification movement developed out of the philosophy of the Enlightenment and began in several European countries during the late 18th Century.

Codification in Western Europe is most significantly associated with the codification at the direction of Napoleon of certain laws in 1804.

Generally, codifications were less usual in the common law. However, there were some codifications in common law countries. For example, the codification by Sir Mackenzie Chalmers of sale of goods law (Sale of Goods Act 1894). The codification of the Criminal Law of India was reputedly prepared by Sir Ninian Stevens on the boat from England to India in the late 19th century.

Specific reforms

In the period of history leading up to the middle of the 20th century, the emphasis in law and policy in Western legal systems was on trade promotion and protection. Each geographic and economic area had its own rules to protect its own trades. Echoes of these can still be seen in modern times with laws on fairs and laws on opening hours of shops. The main object of law during much of

[2] See generally Walker, *The Oxford Companion to Law* (Clarendon Press, 1980) p.104, which notes that, for example, blood feud and private retribution were prohibited under the Hammurabian Code.

history was the maintenance of central power and control. Punishments were severe and focused on physical punishment, fines or loss of property rights.

In the mid 1960's there was an outpouring of rights-based laws. As a result of a change in culture and attitudes, laws were enacted to provide for equality of treatment. This was markedly so in the case of gender matters but laws were subsequently enacted to prevent discrimination on grounds of race, physical disability or age.

Many laws were enacted for the purpose of consumer protection. These included laws to create a better balance in relationship between buyers and sellers in the sale of goods or the supply of services. There were also laws passed to promote product safety and to ensure that consumers were better informed about goods and services being purchased. Laws were also passed to protect and promote and health and safety at work. Many laws were also passed to assure the quality of the environment and to guard against pollution of air, water and even to prevent noise pollution.

In the 1990's, regulatory reform laws promoted competition and the focus for law-makers was on the reduction of unnecessary interference with the free market. This led to a wave of deregulation. Deregulation created the paradox that less state involvement resulted in an increase in the number of laws. This increase was due to the fact that laws had to be enacted to secure market entry and exit and to lay down standards for the supply of services such as electricity or telecom services. Hitherto, the state was the only operator of these services and laid down the standards for them.

Recent turmoil on financial markets and a growing sense of anxiety about the future may well see a trend towards more laws and more controls as mankind seeks to protect itself against growing uncertainty and increased risks of all kinds.

Systematic reforms of specific areas of law usually necessitated a review of the laws in place and a programme of repeal of spent and unused legislation. This, in turn, necessitated the enactment of legislation to reflect the new policy obligations being put in place. These reforms helped, in part, to address problems associated with the stock of legislation.

Reform of the legislative process

One of the trends that occurred in English speaking countries, in particular, (it occurred in other countries as well) was a rebellion against pompous 'legal' language. As a result of much debate, the language of law became simpler and 'plain language' became part of the vocabulary of law drafters. The change first occurred in contracts, particularly for financial services, and was followed by a change in attitude on behalf of those who drafted legislation.

Developments such as the EU policy on Better Regulation have also had an impact on the management of the stock of legislation. Better Regulation has brought about improvements in the process of policy formulation and law drafting. There is now much more focus on having a structured agenda for the introduction of new legislation. The use of Impact Assessment, consultation, Administrative Simplification all contribute to improvements in the management of the stock of legislation.

Accessibility reforms

There have been a number of programmes to manage the stock of legislation that could be classified as 'accessibility reforms'. These include:

- Statute Law Revision (Canada)
- Consolidation (UK)
- Reprints (Australia)
- Restatement (Ireland)
- Commercial Publishers (Spain, Romania)
- Revision of forms used by public (France)
- Revision of licensing (Albania)
- Restructuring of company formations (Bulgaria)

In Canada there have been a series of programmes at Federal and provincial level to review the entire stock of legislation and re-enact it in a consolidated form with redundant and spent Acts repealed. This process does not affect the substance of the law and is a simple tidying up exercise.

Consolidation in the United Kingdom has two meanings as regards primary legislation. In the first case, it involves redrafting legislation which has been amended on a number of occasions so that it can be read as a coherent whole. A second approach, introduced in 1947, is that Consolidation Bills may include substantive amendments, with the permission of the relevant parliamentary committee.

The idea of Reprints is a simple one and is used in most states in Australia (New South Wales, 1972 and Queensland, 1992). The object of this type of activity is to allow the reprinting of legislation which has been amended, in a form that shows the amendments in place. Reprints are not enacted texts but they are recognised by the courts as prima facie evidence of the laws set out in them. In Ireland, this process is known as restatement and, as a result of the Statute Law (Restatement) Act 2002, the Attorney General may certify that a consolidation made by one of his staff is prima facie evidence of the law set out in it.

In many countries, for example Romania and Spain, the reprint activity is carried out by commercial publishers and, while the texts do not have legal validity, the commercial publications are widely used by lawyers and even cited in court.

As regards the administration of laws, there are a number of projects in hand worldwide that facilitate access to legal rights and obligations. There is an exercise underway in France to revise forms used by the public. In Albania, there is an exercise taking place to revise all licenses issued by the State to make them easier to understand. In Bulgaria, company formations are now undertaken by an agency instead of the former more complex process of having to apply to the courts for a registration.

European Union approach to managing the stock of legislation

The European Commission has taken a threefold approach to the delivery of a policy on improving the management of the stock of legislation. It has done so by:

1. Repeal of regulations that are no longer of practical utility.
2. Codification of laws.
3. Recasting of laws so that they can be more easily read.

The first exercise involved a trawl through all the legislation of the European Union to identify what was in force. The Codification exercise was undertaken in two steps. The first step involved an informal consolidation of all related legislation. In other words, when a text is amended it is necessary to read two texts to identify the law. A consolidation rewrites the two texts so that they may be read as one text. Then the consolidated text was submitted to the legal services of the European Commission to ensure its accuracy and, once the text was validated by the legal services, the text was re-enacted as a legally binding or 'codified' text.

The recasting exercise was necessary in cases where the text needed to be updated and revised or in cases where there were so many amendments that the resultant text could not be consolidated easily.

Since October 2005, 300 legal acts representing about 5,000 pages of the Official Journal have been removed from the roughly 95,000 pages of the Community acquis, as a result of the simplification programme.

The simplification programme now comprises about 164 initiatives covering all policy areas. Since 2005, the Commission has taken action on, or has proposed to remove, about 2,500 obsolete Acts from the acquis.

The most recent approach has also focused on costs. So far, savings of €500m were made in 2007, thanks to the action programme launched a year ago by the European Commission with the aim of cutting the administrative burden by 25% by 2012. The action programme focuses on 40 EU laws reckoned to account for some 80% of European red tape. The Commission's priority is to free companies from reporting requirements that create unnecessary paperwork.

'Sharp shock' reforms

These are reforms that result from complete dissatisfaction with the status quo. One such example was in Sweden where the stock of municipal and local laws became so unmanageable that central government announced the repeal of all such law unless it was notified to a central authority. The result was that in one short sharp shock all relevant laws were identified, classified and stored. I understand that a similar exercise was undertaken in Turkey.

In Ireland, modernisation of the stock of legislation was prompted by dissatisfaction with the existence of laws enacted by the parliament of the United Kingdom of Great Britain and Ireland between 1801 and 1922 (Independence of Ireland) as well as laws passed by an unknown number of parliaments that sat in Ireland between 1235 and 1800. A programme of statute law revision was initiated whereby all of the old laws were identified. This exercise was then followed by a

consultation process with all key stakeholders to discuss whether these laws should be either repealed or repealed and re-enacted in a modernised form. This exercise is still underway (2008) but has resulted in the removal of hundreds of unnecessary laws.

Mexico, due to the complexity and volume of the stock of legislation, decided to stop legislating for a period of twelve months early in the twenty-first century. Problems still persist and a major project is about to start between the Government of Mexico and the OECD to review the entire stock of legislation so as to identify those laws that can be repealed or are in need of modernisation.

After the fall of communism in Eastern Europe, substantial changes were made to legal systems and the reform of the stock of legislation in Hungary, for example, merits further attention. In Croatia and Moldova, the so called ' Regulatory Guillotine' tool has been used.

Essentially, the regulatory guillotine is a methodology, developed by Jacobs and Associates,[3] to review a large number of regulations, and eliminate those that are no longer needed. It audits the regulations that exist, and then reviews them against clear criteria, using an orderly and transparent process built on extensive stakeholder input.

What works best and why?

These reforms are not addressed in this paper in order of importance as they have been introduced at different times for different purposes. However, a number of observations can be made about which institutions, policies and tools were used and what would be the critical success factors for a programme to address the stock of legislation of any given country.

What is required to have a successful programme of statute law management is that the following factors be in place, in my view:

- Responsible political leadership.
- A bipartisan or cross-party agreement on a modernisation policy.
- A recognition that efficient and effective management of economies and societies needs enlightened and clear legal directions that operate with the minimum unnecessary economic and social costs.

Countries with a complex legal history (traditional religious and customary laws overlaid with Empire laws [Ottoman, French, British, modern laws imported and domestic) have a greater need than countries with a more unitary history.

Elements of a successful policy

From my personal experience of the task of modernising statute law in Ireland and my observations of similar exercises in OECD countries, the following tasks are needed:

[3] www.**regulatory**reform.com/**Guillotine**

- A comprehensive list of all legislation (if you don't have one – draw one up, if necessary with donor assistance) is essential for the whole state or at the very least for one sector of the economy or even one subject.
- The establishment of a central body with responsibility for the management of the stock of legislation for the whole country. Examples may be drawn from the experience of the Statute Law Revisors Office (USA), Law Reform Commission (UK), Ministry for Justice (Hungary, Latvia).
- The appointment of an individual in a ministry or agency to be responsible for the management of its stock of legislation.
- The establishment of a process[4].
- A set of objective criteria to repeal or to retain.[5]
- Adequate funding (donor assisted, if necessary, but own funds better).
- Adequate mix of personnel (experience with youthful enthusiasm).
- Good IT tools – the ultimate goal should be a fully searchable data base with all laws (primary and secondary).

Finally

What is needed is the establishment of realistic goals that deliver tangible results in the short, medium and long term.

Investment in managing the stock of legislation in the short term will bring long term results in terms of the credibility, coherence and effectiveness of the legal system and will bring benefits to citizens, businesses and investors alike.

[4] Options could include a joint committee of parliament with a dedicated secretariat or a High Level Group reporting to the Prime Minister or a senior economic minister.

[5] Examples include repealing all laws that are spent or no longer of practical utility, repealing all laws that adversely affect national competitiveness, repeal and re-enactment of all laws with absurdities removed.

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Reading list

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