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THE IRISH STATUTE BOOK: A CONSTRAINT ON THE FUNCTIONING OF A TRUE DEMOCRACY

VOLUME 2 OF TWO VOLUMES

BY

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Chapter 8

Legislative Audience, Public Interest and Plain Language

Introduction

For some time now, within the field of legislative drafting, a debate has been taking place on the subject of plain language. The calls for the use of plain language are not by any means restricted to the legal world. It transcends many disciplines[676] and plain language is being implemented at all levels.[677] In this debate, considerable emphasis has been placed on the need for legislation to be drafted in plain language. The more enthusiastic proponents of plain language are promoting it on the basis that its use in the context of legislative drafting will render the law more accessible to the public. While the merits of using more modern and plain language are without question, it must be asked whether plain language really is the panacea that its proponents make it out to be?

In order to assess the feasibility of plain language in the context of legislative drafting, it is necessary to address the factors which gave rise to the turgid and verbose approach to legislative drafting and also the factors which have meant that the same approach endures today.

The tension between accuracy and simplicity is one of the central arguments which is used by drafters who oppose plain language in the context of legislative drafting, and this issue is addressed in some detail. This Chapter

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[676] Banks, insurance companies, telephone companies, and a wide range of other service providers, including state bodies, have made a determined effort to use plain language on their standard form contracts, application forms etc. See further, Kimble, "Writing for Dollars, Writing to Please" (1996-1997) 6 Scribes J. Legal Writing.

[677] In 1978 U.S. President Carter signed an order which directed that regulations should be as simple and clear as possible. In June, 1998 the U.S. President, Bill Clinton issued a memorandum on plain language, setting a deadline for the use of plain English in many of the Government's new documents.

also looks at what comprises the legislative audience and whether legislation is, or should be, drafted with a particular audience in mind.

In this Chapter it is argued that the advocates of plain language make two major assumptions, first that ordinary people have a desire to read legislation; and secondly that plain language legislation will function as effectively as legislation drafted in the traditional style.

Some possible alternatives to plain language are examined before going on to consider whether or not plain language should be adopted in legislative drafting. Before concluding, the Chapter examines the role which explanatory documents accompanying legislation can play in communicating the meaning of legislation in plain and straightforward terms.

What Does "Plain Language" Mean?

The term "plain language" has a broad meaning - it is a multi-faceted creature. The calls for change emanating from the plain language school range from the moderate to the extreme. For convenience it seems helpful to divide the demands of those who fall within the plain language school into three categories: language; structure; and style.

Language - The first, and largest category refers to the calls for the adoption of the following: simple language, shorter sentences, shorter words, the avoidance of double negatives, the avoidance of words with similar meaning such as, "give, and bequeath" and "null and void", the use of the positive rather than the negative, the use of the active rather than the passive voice, the non-use of provisos[678], the non-use of words like "shall", "notwithstanding", "heretofore" and the avoidance of Latin terminology.

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[678] Spring Yuen-Ching Fung, "The Rise and Fall of the Proviso" (1997) 18 Stat. L.R. 104; Berry, "A Content Analysis of Legal Jargon in Australian Statutes" (Clarity 33, London) 26.

Structure - The second category refers to appeals for structural changes to be made to legislation so as to render it more visually accessible and reader-friendly. Suggestions in this regard call for the arrangement of provisions in temporal sequence, grouping together provisions which have a common subject, the use of enhanced side-notes, the use of running heads, the use of full stops in sub-sections, the highlighting of key provisions within the legislation and the use of visual aids and formulae.

Style – the final category is referable to the calls for the abandonment of traditional style of drafting in favour of drafting in general principles, or alternatively the adoption of the drafting by reference style.

Part of the problem with the present traditional style of drafting is said to be the use of specialised legal language, the problem being that few outside the world of law can readily access this language. According to one proponent of plain language, this development of a specialised legal language "is a social phenomenon, as language is used to distinguish jurists from other sections of the population".[679] Needless to say, the reasons for the use of specialist terms are far more compelling than this commentator suggests.

Origin of Today's Style

Down through the Middle Ages, Latin was used as the legal language. In the U.K., laws continued to be drafted in Latin until 1487.[680] This was mainly due to the significant contribution which the church made to the drafting of legislation during this period. The drafting style was also quite different then. At that time laws tended to be casuistic, in that they would describe a set of circumstances illustrating where a penalty would befall the actor. In terms of ease of understanding, legislation drafted in this way would seem to be preferable, particularly as it allowed the reader to actually visualise a situation

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679 Blume, "The Communication of Legal Rules" (1990) 11 Stat. L.R. 189 at 199.

680 *The Preparation of Legislation,* (London, 1975) Cmnd. 6053 at para. 2.4.

in which that provision would operate.

In contrast, the predominant drafting style in use today could be described as being quite abstract in that it is devoid of any illustrative aspect and does not provide the reader with an insight as to how that legislation would interact with day-to-day life. However, the shift towards the traditional style of drafting appears to have arisen out of necessity rather than from any desire to complicate legislation. In the face of growing complexity of policy, the casuistic style of drafting did not lend itself well to fulfilling the drafters' main goals of accuracy and clarity.

The initial calls for the use of plain language and simplicity in general appear to have come from dissatisfaction expressed in the 16th and 17th Centuries. At the ripe old age of 14, Edward VI is believed to have expressed the wish that "the superfluous and tedious statutes were brought into one sum together, and made more plain and short, to the intent that men might better understand them".[681]

The passing of centuries has seen a number of significant changes in legislative drafting – such as in the UK, the change from Latin to English[682] and also the change from casuistic to traditional style of drafting. However, to a great extent the phraseology and choice of words in legislation have largely remained Victorian and antiquated. This assertion forms one of the key criticisms of the predominant style of legislative drafting employed in the common law world today. One lawyer articulated the essence of the problem:

> "We lawyers cannot write plain English. We use eight words to say what could be said in two. We use old, arcane phrases to express common place ideas. Seeking to be precise, we become redundant.

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[681] *Discourse on the Reformation of Abuses – Literary Remains of Edward VI,* ii. 486. See Burnet, *History of Reformation* at p. 272.

[682] In the intervening period between this change, some legislation was drafted in Anglo-Norman.

> Seeking to be cautious, we become verbose. Our sentences twist on, phrase within clause, glazing the eyes and numbing the minds of our readers. The result is a writing style that ... is wordy, unclear, pompous and dull."[683]

The fact that the language of the law has remained static for quite some time may, as one commentator suggests, be due to the fact that legislative drafters learn how to draft by looking at existing laws – and it is this which has given rise to the "freezer effect" and has perpetuated the use of turgid and archaic language[684].

The criticism of the language of legislation became more intense from the early 19th Century. Since that time, it appears that the language of legislation has never been truly reflective of the language in common usage. So it is clear that the language of legislation became frozen somewhere in the late 18th or early 19th Century. This is what has led to legislation being criticised, with good reason, as being turgid, verbose and antiquated.

A sentence which might seem today to be verbose and turgid, may well have been regarded as a good example of plain language in the 19th Century. In 1875 a Select Committee of the House of Commons was appointed to consider how legislation could be improved. Having examined the matter, the Committee expressed satisfaction that the simplicity and clearness of legislation was far superior to the verbose and obscure language of former enactments! Writing in 1901, Sir Courtenay Ilbert was of a similar frame of mind:

> "Acts of Parliament will always form the subject of adverse comments by the Bench, the Bar, and the public. But if the Statute Book of the present day is compared with the Statute Book of forty or fifty years

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683 Wydick, "Plain English for Lawyers" (1978) 66 *California Law Review* 727.

684 Turnbull, "Clear Legislative Drafting: New Approaches in Australia" (1990) 11 Stat. L.R. 161.

ago, it is impossible to deny that the language of statutes has become more concise, uniform, and accurate"[685]

What has also strengthened the freezer effect is the fact that much of the legislation of earlier times was drafted by conveyancers who drafted legislation in addition to their every day work.

Many people who advocate plain language in legislative drafting would have us believe that the style of writing used to create stories like Cinderella should also be used in the drafting of legislation. This is a fundamental error which plain language proponents make. Drafting legislation is not a literary exercise. In contrast to the fairytale of Cinderella, statutes were never intended to be a bed-time read. They were never intended to be entertaining, browsed through, or read from cover to cover. Books like Cinderella, Ulysses and Catcher in the Rye are written to entertain, captivate or even teach the reader. Statutes are drafted for an altogether different purpose - statutes are drafted so as to give effect to policies and principles in law – which will invariably be subject to close scrutiny and interpretation by the Courts.

The authors of books, brochures, letters etc. enjoy a far greater freedom than that enjoyed by the legislative drafter. This is evident from reading any book - the free style of writing, the mode of expression, the words chosen, the emphasis and the atmosphere are all apparent. In legislation, words are chosen for a specific purpose too – but an altogether different purpose. Those words are not chosen for entertainment value or ease of reading – rather, they are chosen for their precise meaning and consistency of meaning – so that ideally, all who read those words will be united in their understanding and interpretation.

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685 Ilbert, *Legislative Methods and Forms* (Oxford, 1901) at p. 96.

In their book[686], Butt & Castle set out some of the main factors which influence traditional legal drafting. For example:

1 Familiarity and habit - the security that comes from adopting forms and words that have been used before and are seen to be effective;
2 Conservatism in the legal profession, allied to the common law tradition of precedent;
3 The litigious environment of legal practice;
4 The desire to avoid ambiguity.

In Butt and Castle's view[687], these factors have operated as a hindrance to "innovative legal drafting". However, it is important to emphasise that these are all legitimate and very real factors of influence. They cannot be written off or simply ignored. In response to a letter from Martin Cutts, a plain language expert, Peter Graham the then UK First Parliamentary Counsel, articulated the reality:

> "We do not needlessly make things complicated: we have as great a love of the English language as the next man: we do draft against a background of judicial decisions, rules of interpretation, the basic premise that statute law is an intrusion into the common law and, perhaps most important, the salutary rule that all enactments are construed against the Crown (using that expression in its widest sense) and in favour of the subject."[688].

The reasons why legislation needs to be to be expressed in a precise and accurate manner are well established. This point was succinctly expressed

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686 Butt & Castle, *Modern Legal Drafting: A Guide to Using Clearer Language* (Cambridge, 2001) at p. 5.
687 *ibid.*, at p. 13.
688 An extract of this letter is set out in Cutts, *Lucid Law* (2nd ed., London, 2000) at p. 44.

by another UK First Parliamentary Counsel[689] in a memorandum submitted to the Select Committee on the Modernisation of the House of Commons[690]:

> "A Bill's sole reason for existence is to change the law. The resulting Act is the law. ... A consequence of this unique function is that a Bill cannot set about communicating with the reader in the same way in which other forms of writing do. It cannot use the same range of tools. In particular, it cannot repeat the important points simply to emphasise their importance or safely explain itself by restating a proposition in different words. To do so would risk creating doubts and ambiguities that would fuel litigation. As a result, legislation speaks in a monotone and its language is compressed. It is less easy for readers to get their bearings and to assimilate quickly what they are being told than it would be if conventional methods of helping the reader were freely available to the drafter.".

Legislative drafters and other lawyers understandably take great comfort from using terms that have a well established meaning and which have also been reinforced by judicial interpretation. However, Butt & Castle fail to recognise the importance of this fact and dismiss it as a mere "notion"[691]. As so often recounted, Reed Dickerson[692] once described ambiguity as "the most serious disease of language", and nowhere is the absence of this disease more important than in legislation. The avoidance of ambiguity is aided in a very significant way by the drafter's reliance on words that have a well established meaning.

The desire to avoid ambiguity can, at times, give rise to what is known as defensive drafting. Defensive drafting is said to arise when the drafter seeks

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689 Sir Christopher Jenkins.

690 First Report "The Legislative Process" House of Commons Session 1997-98 (Cmnd. 190).

691 Butt & Castle, *Modern Legal Drafting: A Guide to Using Clearer Language* (Cambridge, 2001) at p. 14.

692 Dickerson, *The Fundamentals of Legal Drafting* (2nd ed., Boston, 1986) at p. 32.

to cover every possibility in circumstances where he is drafter for future, unknown conditions. Lowell's[693] reasoning as to why a defensive drafting style prevails in jurisdictions such as ours is as follows:

> "When an English or American legislator drafts a statute, he tries to cover all questions that can possibly arise. He goes into details and describes minutely the operations of the Act, in order that every conceivable case may be expressly and distinctly provided for. He does this because there is no one who has power to remedy defects that may appear. If the law is vague or obscure, it can receive an authoritative interpretation only from the courts by the slow process of litigation. If it is incomplete, it must remain so until amended by a subsequent enactment."

This kind of drafting can also arise where the drafter is seeking to be exhaustive. A defensive drafting style is sometimes necessary and can in some circumstances be justified. While drafting of this kind can be detailed and informative, it can also prove to be very difficult to discern. However, it is but just one of the factors which influences the style of drafting used.

Accuracy or Simplicity? – The Drafter's Dilemma

> "Legislation by its very nature, and because of the demands it has to meet, does not lend itself to simplicity. But that is not to say it cannot be made simpler in some degree, or that we should not try."[694]

It would be relatively easy to draft legislation in plain language so that it could not be misunderstood. However, the compelling reason as to why accuracy is

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693 Lowell, *Governments and Parties in Continental Europe* (Boston, 1896) at 44.

694 Hon. Mr Justice Nazareth, "Legislative Drafting: Could Our Statutes be Simpler?" (1987) Stat. L.R. 81 at 92.

so essential to drafters is because of the ingenuity of lawyers who are only too willing to apply their enterprising minds to manipulating and working the laws in the interests of their clients. The search and exploitation of loopholes forms a considerable part of this ingenuity.

Drafters are faced with two competing interests – on the one hand it is the determination to express the law in a simple and clear manner as against the inherent desire to achieve certainty of meaning and accuracy on the other. In a speech delivered as Attorney General of Britain, Sir Patrick Mayhew[695] spoke of attempts to reconcile these competing interests, and was of the view[696] that it was a "moral certainty" that Parliament will not accept a simplification if it means potential injustice in any class of case, however small. This point had also been expressed by the Renton Committee, who in their report[697] stated:

> "... the draftsman must never be forced to sacrifice certainty for simplicity, since the result may be to frustrate the legislative intention. An unfortunate subject may be driven to litigation because the meaning of an Act was obscure which could, by the use of a few extra words, have been made plain."

Judicial pronouncements on the plain language debate have been relatively rare and modest in tone. Of some considerable surprise therefore are the views of Lord Donaldson MR[698] who effectively suggested that if a government find that their policy is not capable of being expressed in basic English, then the policy should be modified so as to facilitate ease of expression.[699] Clearly, a less than ideal solution.

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695 Sir Patrick Mayhew, "Can Legislation Ever be Clear, and Certain?" (1990) 11 Stat. L.R. 1.

696 With reference to the First Parliamentary Counsel's evidence to the Renton Committee at para. 10.6.

697 *The Preparation of Legislation,* (London, 1975) Cmnd. 6053 at para. 11.5.

698 *Merkur Island Shipping Corp v Laughton* [1983] A.C. 570 at 595.

699 "... when formulating policy, ministers, of whatever political persuasion, should at all times be asking themselves and asking parliamentary counsel: Is this concept too refined to be capable of

Many plain language proponents would be quite critical of the drafting style in use in Ireland and a number of other common-law jurisdictions. In fact some would go so far as to suggest that the language is turgid and something more fitting to the 19th Century, and not the 21st. The traditional style of drafting has been criticised on the grounds that it is loaded with "long, convoluted sentences, archaic legal expressions, Latin words, and pompous language". Despite this, it is widely recognised that the effect of the traditional style is "usually very precise".[700] However, some proponents of plain language would argue that the traditional style of drafting is far too concerned, or even obsessed with precision – to the detriment of the intelligibility of legislation.

In Thring's view, "[c]learness is the main object to be aimed at in drawing Acts of Parliament."[701]. To this end, he later suggests:

> "In the selection of words, Latin words and, where possible without a sacrifice of accuracy, technical phraseology should be avoided; the word best adapted to express a thought in ordinary composition will generally be found to be the best that can be used in an Act of Parliament."[702]

The difficulties encountered in the interpretation of legislation framed in turgid terms have been expressed many times, however, none so evocative as the words of Harman L.J.[703]:

> "To reach a conclusion on this matter involved the court in wading through a monstrous legislative morass, staggering from stone to stone

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expression in basic English? If so is there some way in which we can modify the policy so that it can be so expressed".

700 Turnbull, "Legislative Drafting in Plain Language and Statements of General Principle" (1997) 18 Stat. L.R. 21 at 22.

701 Thring, *Practical Legislation* (London, 1902) at p. 61.

702 *ibid.*, at p. 81.

703 *Davy v Leeds Corporation* [1964] 1 W.L.R. 1218, 1224.

and ignoring the marsh gas exhaling from the forest of schedules lining the way on each side. I regarded it at one time, I must confess, as a Slough of Despond through which the court would never drag its feet but I have, by leaping from tussock to tussock as best I might, eventually, pale and exhausted, reached the other side ..."

Though all documents, regardless of their audience, should strive to be both clear and accurate, these requirements become ever more important in the realm of legislative drafting because of the gravity of the subject matter, such as rights etc. which a piece of legislation may confer, and in some cases restrict. Consequently, there are those of the view that these key requirements - clarity and accuracy - should not be sacrificed in the interests of plain language or ease of understanding. Thring urged drafters never to aim at conciseness "when conciseness is placed in competition with or in antagonism to clearness of expression, or fullness in working out the details of the law."[704].

While recognising that the plain language approach does indeed carry some benefits, those who are sceptical of the plain language approach often argue that a shift to plain language will inevitably detract from level the precision which the present form of drafting allows. Consequently, such persons are more inclined to favour a simplification of language rather than fully adopting the plain language school and all which it entails.

One argument commonly used in the defence of the traditional style of drafting is that parliamentary counsel have become so fearful of willful misinterpretation and its ensuing litigation that it has deepened their determination to make their drafts as water-tight as possible, and this in turn has had the effect of rendering some legislation unintelligible to many. The

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[704] Thring, *Practical Legislation* (London, 1902) at p. 48.

drafter's fear[705] in this regard is quite legitimate in that it may be said to stem from, first, the increasing litigious tendency of citizens and, secondly, the possibility of judicial misinterpretation of a legislative provision. The contention that the latter consideration is one which exercises the mind of drafters was supported by a parliamentary counsel in his submission to the Renton Committee[706], where he said:

> "The object is to secure that in the ultimate resort the judge is driven to adopt the meaning which the draftsman wants him to adopt. If in doing so he can use plain language, so much the better. But it is often easier said than done".

The uncertainty of future developments is something which weighs heavily on the mind of the drafter. A drafter seeks to achieve a certain degree of timelessness.

In *Fothergill v Monarch Airlines Ltd*, Lord Diplock[707] appeared to accept that at least some of the blame for the level of complexity found in legislation lay at the door of the judiciary, by alluding to the fact that this complexity has to some extent arisen from the narrow and restrictive interpretation of legislation. However, plain language drafting may not necessarily be the most appropriate means of addressing this issue. In *R v Ottwell*[708], Lord Reid aptly pointed out that the imprecise nature of the English language renders it very difficult to draft any provision in such a way that it is not capable of having two different meanings ascribed to it. However, the English language is not unique in this regard, this view could of course be equally valid of most other languages too.

The reasons why the widespread use of plain language is unsuitable in

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705 Described as "drafting by fear" by Jim Kennan, former Attorney-General of the Sate of Victoria, Australia in a statement made to the Victorian Legislative Council in May, 1985.

706 *The Preparation of Legislation,* (London, 1975) Cmnd. 6053 at para. 6.5.

707 [1981] A.C. 251 at 280.

708 [1970] A.C. 642.

legislative drafting was succinctly expressed by Stephen J. in *Re Castioni*[709], where he emphasised the need for precision as:

> "people continually try to misunderstand, and in which therefore it is not enough to attain a degree of precision which a person reading in good faith can understand; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it".[710]

In their report, the Renton Committee also alluded to the fact that, invariably, the use of plain language in legislative drafting will not suffice:

> "If any room is left for argument as to the meaning of an enactment which affects the liberty, the purse, or the comfort of individuals, that argument will be pursued by all available means. In this situation, Parliament seeks to leave as little as possible to inference, and to use words which are capable of one meaning only."[711]

Some opponents of the plain language school would go so far as to say that there is already evidence to illustrate that acceptance of the viewpoints of those advocating plain language has had a negative effect.[712] One of the great downfalls of plain language drafting is its inherent ambiguity. For example, in the Australian Broadcasting Act 1942, the phrase "commercially viable" was inserted in the 1980's without any accompanying definition. Following demands, this phrase was defined in 1991 in a provision 13 lines long and was later again defined in a provision 17 lines long.[713]

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709 (1891) 1 Q.B. 149.

710 *ibid.*, at 167 – 168.

711 *The Preparation of Legislation,* (London, 1975) Cmnd. 6053 at para 7.5.

712 One such opponent being Stark, "Should the Main Goal of Statutory Drafting be Accuracy or Clarity", (1994) 15 Stat. L.R. 205.

713 As highlighted in Turnbull, "Legislative Drafting in Plain Language and Statements of General Principle" (1997) 18 Stat. L.R. 21 at 27.

Attempts by proponents of plain language to illustrate in a practical way its benefits have not been entirely successful. The common practice is to take a piece of legislation and translate it from its enacted form into plain language form, while emphasising the great ease with which it has been carried out. Inevitably, along with the benefits of plain language, this exercise also exposes weaknesses in the use of plain language. One such illustrative exercise was carried out by Martin Cutts[714], a plain language proponent who claimed to have translated the U.K. Timeshare Act 1992 into plain language. A response to this translation came in the form of considerable criticism by the Parliamentary Counsel who drafted the Act, Euan Sutherland.[715] In his opinion, the translation had resulted in altering the meaning of many of the provisions of the Act considerably, it had omitted some provisions and had rendered the Act misleading is some respects. In a newspaper article, Francis Bennion[716] also levelled some criticism at Mr Cutts, by advising that "reformers like Mr Cutts need to start by understanding that law is an expertise".

Although the sole and legitimate aim of plain language drafting may be to render the text more comprehensible without changing its meaning, that aim is not always realisable. The conversion of legislative passages into plain language often has the unintended effect of changing the meaning of legislation. However, plain language proponents would dismiss any suggestion that this is a fatal flaw which renders plain language unsuitable for legislative drafting. Rather, they contend that these changes in meaning only occur because non-drafters, whose minds are set on simplicity rather than accuracy, nearly always carry out these re-drafts/conversions.[717] However

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[714] Cutts, "Unspeakable Acts? Clarifying the Language and Typography of an Act of Parliament", a discussion paper published under the auspices of Words at Work in (January, 1993).

[715] Sutherland, "Clearer Drafting and the Timeshare Act 1992: A Response from Parliamentary Counsel to Mr Cutts", (1993) 14 Stat. L.R. 163.

[716] Bennion, "Don't Put the Law into Public Hands" *The Times*, 24 December, 1995.

[717] Turnbull, "Legislative Drafting in Plain Language and Statements of General Principle" (1997) 18 Stat. L.R. 21 at 25.

this defence does not necessarily hold true as Mr Cutts[718] has admitted that the re-write was carried out with the help of two lawyers at Linklaters & Paines, a highly regarded international law firm.

In response to the inevitable criticism of legislation which has been translated into plain English, the Law Reform Commission of Victoria[719] had this to say:

> "Any errors in the plain English version are the result of difficulties in translation, particularly difficulties in understanding the original version. They are not inherent in plain English itself. Ideally, of course, plain English should not involve translation. It should be written from the beginning."[720]

One of the great difficulties with the appropriateness of plain language in a drafting context is that the legislative intent can only be achieved by using special language. The adoption of plain language is not (as its proponents would have us believe) a mere exercise in replacing some turgid words with simple and understandable ones. It is all too easy to become facetious and deride the apparent "inability" of some drafters to accept in full, the contentions of the plain language school.[721] Even those who accept that some change in the traditional style of drafting is needed, offer words of caution that those who are "berating drafters, ... should bear in mind that a convincing case has yet to be made out".[722]

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718 Cutts "Plain English in the Law" (1996) 17 Stat. L.R. 50.

719 Law Reform Commission of Victoria, "Plain English and the Law" (1987).

720 *ibid.*, at 49.

721 An example of this flippancy may be found in Rodney, "Legislative Drafting Style" paper delivered at a conference entitled "Legislative Drafting – Emerging Trends" 6th October, 2000 Dublin, Ireland. A more extreme example of facetiousness can be found in an article by Richard Thomas, a legal officer with the National Consumer Council in the U.K., entitled "Plain English and the Law" Stat. L.R. Autumn (1985) 139 – where he suggests that ridicule is a useful means of promoting the use of plain language. This ridicule manifests itself the annual Plain English Awards and the Golden Bull Awards which are awarded to the "six worst examples of gobbledegook".

722 Hon. Mr Justice Nazareth, "Legislative Drafting: Could Our Statutes be Simpler?" (1987) Stat. L.R. 81 at 92.

Rather, if the adoption of plain language is a process to be taken seriously, it places an onerous task on the drafter in that it requires an analytical process to be carried out so as to ensure first, that the choice of plain word has a clear and widely concurrent meaning and secondly, that the use of that plain word would achieve the very same legislative intent as the use of the alternative term of art.

In a newspaper article, in which he expresses reservations about the adoption of plain language, Francis Bennion[723] acknowledges that terms of art, references to legal rules and doctrines cannot be fully understood by non-experts in law, but likewise, he says, medical language cannot be fully understood by non-experts in medicine.

In supporting his argument in favour of the use of plain language, Joseph Kimble[724] cites the results of a study in the U.S. which show that technical terms and terms of art make up less than 3 percent of the average legal document[725]. Opponents of the plain language school might also like to refer to this study and say that this low incidence of the use of terms of art further strengthens their argument that there is no need for such a drastic change of approach as proposed by the plain language school.

One of the problems with plain language is that it often requires compressing what might be a complex policy into a small number of words. Consequently, this can lead to difficulties with interpretation and give rise to uncertainty. However, one suggested means of surmounting this difficulty is by shortening the length of the provisions, while increasing the actual number of provisions used to express a policy.[726] However, on this very point Sir John Fiennes[727]

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723 Bennion, "Don't Put the Law into Public Hands" *The Times*, 24 December, 1995.

724 Kimble, "Answering the Critics of Plain Language" (1994-1995) 6 Scribes J. Legal Writing. Also appears at www.plainlanguage.gov/library/kimble.htm

725 See further, Benson Barr et al., "Legalese and the Myth of Case Precedent" (1985) 64 Mich. B.J. 1136; Johanson, "In Defense of Plain Language" (1992) 3 Scribes J. Legal Writing 37.

726 As suggested by Berry "Legislative Drafting: Could Our Statutes be Simpler?" (1987) Stat. L.R. 92 at 96.

had this to say to the Renton Committee:

> "Shorter sentences are easier in themselves, and it would probably help overall to have them shorter, but of course you are then faced with having to find the relationship between that sentence and another sentence two sentences away, which, if you have it all in one sentence, is really done for you by the draftsman".[728]

In their paper, Legac and Tremblay[729] are highly critical of what they call the "over-valuation" of short sentences. They are of the view that the tendency to limit a sentence to the expression of one thought "may result in an extremely fragmented text ...".[730] They conclude by saying that the fragmentation of ideas flies in the face of a basic thought process to the extent that "[i]t decomposes ideas to the point of disintegrating them and altering their content".[731]

In circumstances where an experienced drafter encounters difficulty in seeking to express complex policy by using precise English and legal terms, how can anyone seriously suggest that this task could be made easier if expressed in plain language? Realistic proponents of plain language will admit that plain language drafting is not the complete solution and accept that plain language may not be suitable in situations where the policy is complex. One of the more moderate proponents of plain language, Turnbull, acknowledges that plain language drafting is not a complete alternative to traditional style drafting. In his article[732], he points out that in situations where complex concepts are at issue, plain language might well give rise to

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727 Former UK First Parliamentary Counsel.

728 *The Preparation of Legislation,* (London, 1975) Cmnd. 6053 at para. 11.9.

729 Legacé & Tremblay, "The Fragmentation of Ideas: A Current Form of Legislative Deconstruction" published in Bergeron (ed.), *Essays on Legislative Drafting* (Ottawa, 1999) at 129.

730 *ibid.,* at 132.

731 *ibid.,* at 144.

732 Turnbull, "Legislative Drafting in Plain Language and Statements of General Principle" (1997) 18 Stat. L.R. 21 at 25.

ambiguity and might render the legislation disjointed or absurdly long. In situations such as this, he proposes that precision must prevail over simplicity, as was the approach favoured by the Renton Committee. He sees the drafter as having a constant duty to consider alternative forms of expression and choose the simplest by balancing different degrees of precision against different degrees of simplicity.

The Legislative Audience[733]

In examining issues surrounding the legislative audience, three distinct questions arise. First, to whom is legislation addressed? Secondly, who are the users of legislation? Thirdly, to whom should legislation be addressed? None of these questions can be answered with any degree of certainty. However, it is possible to bring some clarity to the matter.

Looking at each of these questions in brief and later on in detail, the answer to the first question is that on the whole, it seems fair to say that in Ireland, the legislation is addressed to the judiciary. With regard to the second question, at this stage, it can be tentatively suggested that the users of legislation may be divided into three broad categories. First, the legislators – who create and debate the legislation and in doing so, rely on existing legislation. Secondly, the persons who administer or are otherwise concerned with the legislation or their advisers. Finally, members of the judiciary.

Finding the answer to the third question is entirely more difficult. In Ilbert's view, legislation should be all things to all people:

> "An Act of Parliament has to be interpreted, in cases of difficulty, by legal experts, but it must be passed by laymen, be administered by

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[733] See further: Bennion, *Statutory Interpretation: A Code* (4th ed., London, 2002) at p. 16 et. seq.; Ede & Lunsford, "Audience Addressed/Audience Invoked: The Role of Audience in Composition Theory and Pedagogy" (1984) 35(2) *College Composition and Communication.*

laymen, and operate on laymen. Therefore it should be expressed in language intelligible by the lay folk."[734].

But is Ilbert's view is merely aspirational. Is it ever possible to draft a piece of legislation which can adequately meet the needs of all the layperson which providing the accuracy demanded by the Courts?

In the Foreword to Justice Hanna's book on Free State legislation, Chief Justice Hugh Kennedy commended the book to members of the legal profession, students and historians, but went on to add:

> "There is another class to whom I would like to introduce this book, the class of classes, the ordinary citizen . It is a curious thing, but a fact, that a man who will expend his intellectual powers on, say, the problems of a game of cards governed by an elaborate code of rules, will blanche, tremble and become semi-conscious, if confronted with the most ordinary Act of parliament." [735]

Significantly, Kennedy C.J. went on to reason that:

> "This is no doubt an inherited trait from the days when the laws were veiled from the multitude by obscurity of language and form. In our time of universal suffrage an Act should be deemed politically bad which cannot be read intelligently by the citizen who is the source of its authority, and I think that the Acts of the Oireachtas have been, for the most part, marked by a high degree of lucidity and freedom from that jargon which is obscure save to the specialist. The citizen should be urged to read them, but he may need to be encouraged, and his way can be made easy by putting this volume in his hand as an

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[734] Ilbert, *Legislative Methods and Forms* (Oxford, 1901) at p. 247.

[735] Chief Justice Kennedy writing in the Foreword to Hanna, *The Statute Law of The Irish Free State 1922 to 1928* (Dublin, 1929) p. viii.

introduction."[736]

The latter comments of Kennedy C.J. give us an insight into first, the perceived readability of the post-independence legislation and secondly, the low level of public interest in reading legislation even at that time.

Thring's view on this issue as expressed in 1902 serves as a gentle reminder that the law is for the people, and its preparation and form should reflect that:

> "Law is made for man, and not man for law; and it is too often forgotten by lawyers and draftsmen that the greater number of Acts of Parliament contain rules of conduct to be observed by illiterate persons, and to be enforced by authorities unacquainted with the technical language of Coke and the year of books"[737]

This point was reflected by Senator Fergal Quinn in his introductory speech as Chairman of a conference[738], where he emphasised that the law is for the people, not the lawyers; adding that the law is too important to be left to just lawyers.[739] The narrow scope of the legislative audience was in earlier times alluded to by Mr Declan Costello, the then Attorney General, in the Seanad in the context of the Bill to establish the Law Reform Commission:

> "Law reform is not a concept of interest only, or indeed primarily for, lawyers. It is true that the complexity of modern society produces complex laws and the knowledge and skills which lawyers have acquired are frequently necessary for the purpose of modernising, consolidating, simplifying, or codifying much of our law. ... such a

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736 *ibid.*

737 Thring, *Practical Legislation* (London, 1902) at p. 82.

738 Conference Organised by the Law Society of Ireland, "Towards Better Regulation: The Implications for Statute Law" 3 December, 2002.

739 Similar sentiments were expressed by Robert Bergeron, Senior General Counsel, Legislation Section, Department of Justice of Canada at that conference where he said that legislation is not drafted just for lawyers.

programme need not, and indeed should not, be a matter of interest only to members of the legal profession or to small exclusive groups in our society."[740]

While Costello was undoubtedly genuine in expressing a wish that the law would become more accessible to ordinary people, the political will to give effect to this wish has never materialised.

"We are writing not for each other but for the layman. Let us not lose sight of that."[741]

Is this a grave misconception, an idealistic view, or a fact? - A definitive answer to the question – "to whom are our laws to be addressed" – seems as elusive as ever. The hypothesis of plain language proponents is that legislation must be intelligible to its key audience – the ordinary citizens. To suggest that legislation should be both accessible and understandable to the ordinary man is a most laudable aim and few would disagree with that sentiment. One New South Wales Parliamentary Counsel[742] believes that the ordinary people are and should be the intended audience:

"The ordinary person of ordinary intelligence and education [should] have a reasonable expectation of understanding ... legislation and of getting the answers to the questions he or she has. This is of critical importance.".

If it is established that the key audience of all legislation in a country are, indeed, lay-persons, then the reasons for adopting plain language are compelling. Where this is established, any true democracy has a duty to ensure that all legislation is addressed to those people in a clear and readable

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740 80 *Seanad Debates* Col. 204 (10 April 1975).

741 Rodney, "Legislative Drafting Style" paper delivered at "Legislative Drafting – Emerging Trends" 6th October, 2000 Dublin, Ireland.

742 Murphy, "Plain Language in a Legislative Drafting Office" (Clarity 33, London) at p. 3.

fashion. If on the other it is to be concluded that the key audience of legislation are not lay persons, but rather are lawyers, judges, regulators, law enforcers, interest groups etc., then the arguments in favour of using plain language seem less convincing.

While the level of public interest in a particular piece of legislation will vary greatly, depending on the subject matter which it addresses, the task of communicating the content and meaning of the law is an entirely separate function, as distinct from that of the drafter.[743] These sentiments were expressed by Francis Bennion who in a newspaper article said:

> "No law can be directly comprehensible by non-experts because law is and has to be an expertise. It needs to be explained to the lay person, whether by officials or professionals in private practice."[744]

He re-iterated these views in the following year in another article[745]:

> "... the man, or woman, in the street should not attempt to interpret legislation. I refer, of course, to legislation still in the form which it was enacted. What the lay person need is explanations and summaries."

In Bennion's opinion, the primary audience of our laws are the lawyers and he says "Unless they are clear about the nature and characteristics of legislative texts there is not much chance that anyone else will be". He goes on to suggest that we should not become overly concerned with adopting a plain language approach, rather we should be striving to make the law easier for lawyers to use. While recognising that plain language does have a small part to play in achieving this aim, Bennion appears to adopt a more broad and pragmatic approach where he says that we should in fact be focussing on

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[743] The predominant function of the drafter being to articulate the policy as instructed by the department.

[744] Bennion, *The Times,* 1 February, 1994.

[745] Bennion, "Don't Put the Law into Public Hands" *The Times,* 24 December, 1995.

improving the arrangement of the law – more consolidation and codification and improving the methods of finding the law.

Even though there are divergent views as to who the actual audience of our legislation are, the search for the answer to this question is one which has captivated the minds of a number of commentators. One suggested way of determining the legislative audience is that of "audience analysis". Devised as a concept which could be applied in the legal and non-legal world, Schriver[746] favours an audience focused approach. She highlights three different approaches which may be used to identifying the audience of a particular piece of work. The first approach, the "classification-driven audience analysis" involves classifying audience by reference to their features, while the second approach, known as the "intuition-driven audience analysis" requires the author to visualise and reflect on the audience. The third approach is the "feedback driven analysis" and this involves ascertaining the actual views of the readers of the text. In his article, Berry[747] takes the concept and advocates its use in the legislative drafting process. He suggests that an audience analysis would be carried out by the drafter in the early stages of drafting a piece of legislation. Berry suggests that when beginning to draft a piece of legislation, on asking the following questions, the drafter should have a broad view of the future effect of the document:

> "What audiences are affected?
> What is the purpose for which each audience will use the legislation?
> Is the audience's interest(s) friendly or hostile to those of the Government?
> How long will an audience use the document – short-term or long-term?

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[746] Schriver, *Dynamics in Document Design* (New York, 1997). See also Sullivan, "Some Implications of Plain Language Drafting" paper delivered at "Legislative Drafting – Emerging Trends" conference 6th October, 2000 Dublin, Ireland.

[747] Berry, "Audience Analysis in the Legislative Drafting Process" (June, 2000) *The Loophole* 61. Also available at www.opc.gov.au/calc/docs/calc_june/audience.htm

What is the audience's educational background and experience?"[748]

While recognising that the pressures on drafters to produce a draft document within a short time-frame might preclude parliamentary counsel from conducting an audience analysis, he is a strong advocate of the benefits of adopting this approach. Though in favour of this approach, Professor Ruth Sullivan concedes that the public are not particularly interested in reading statutes.[749]

A major premise of the plain language proponents is that the audience are lay people and as such the language used should be plain and understandable. However, Jack Stark, a critic[750] of the plain language school contends that the plain language school is a reader-response school and he argues that acceding to the demands of the plain language school requires the devotion of one's attention to the reader.

Another approach that sits comfortably within the plain language school is the reader expectation theory as devised by George Gopen.[751] The basis of his theory is that the reader has a limited amount of energy to invest on a passage of writing. So according to Gopen, if the reader spends too much time trying to understand the structure of the document, then he or she will not have sufficient energy to understand the content of the document. As its name suggests, the theory requires the writer to conform to the reader's expectations concerning structure. The application of this theory in a

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748 *ibid.*, at 6.

749 Sullivan, "Some Implications of Plain Language Drafting" paper delivered at "Legislative Drafting – Emerging Trends" conference 6th October, 2000 Dublin, Ireland where she says, at 14: "Plain language drafting also tries to accommodate the tendency of members of the public to read as little of the statute as possible. Unlike legal insiders, who are professionally interested in the law ... a member of the public is interested only in the parts of the statute that relate to her circumstances.".

750 Stark, "Should the Main Goal of Statutory Drafting be Accuracy or Clarity", (1994) 15 Stat. L.R. 205 at 210.

751 Gopen, "Let the Buyer in the Ordinary Course of Business Beware: Suggestions for Revising the Prose of the Uniform Commercial Code" 54 U. Chi. L.R. 1178.

legislative drafting context is fully explored in an article by Jack Stark[752]. In his article, Stark examines Gopen's application of his theory in a revision of the Uniform Commercial Code. Stark finds that there are so many errors in Gopen's revision that he suggests categorising them. His criticism is based on the claim that the structural changes, poor word choice, syntactical errors have resulted in a change of meaning. He goes on to criticise Gopen's reader focussed approach and concludes that Gopen's theory is counterproductive.

In response to the audience focused approach, one could argue that by changing the drafting style of each piece of legislation so as to match the audience, this would clearly lead to inconsistencies of approach within the statute book and would also have grave implications for interpretation. An audience focused approach to drafting legislation can greatly detract from both the consistency and quality of legislation. This is particularly apparent where a piece of legislation is believed to have a range of addressees who have varying degrees of understanding. To some the audience focused approach essentially requires the drafter to become all things to all people – and this, as has been well established, is an unattainable ideal.

Aside from audience related considerations, there remains the question as to whether all laws should be drafted in the same way. It must be stated that, irrespective of the kind of legislation being drafted and irrespective of the anticipated audience, all legislation should be drafted with a great degree of clarity and a great degree of certainty so as to prevent willful misinterpretation. While maintaining these standards throughout in all pieces of legislation, the overtones of the language may be heightened or reduced depending on the legislation's relationship to its readers. For example, a piece of social welfare legislation conferring benefits is likely to enjoy a mainly friendly readership, whereas a piece of criminal legislation which is prohibitive in its nature is likely to be greeted with hostility by those against whom it is enforced. Accordingly,

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752 Stark "Reader Expectation Theory and Legislative Drafting", (1996) 17 Stat. L.R. 210.

the latter type of legislation must be drafted with increased vigilance, and an eye towards any possible weaknesses so as to guard against any possible loopholes. Invariably the circumstances and the subject matter will dictate whether the legislation needs to be drafted using technical language.

In Ireland, the lay person does not seem to concern him or herself directly with the intricacies of the law. The principal readers of our laws are those who implement, administer and enforce the law. Some of those who fall into this category are regulatory authorities, the police force and the judiciary, all of whom would approach a legal text with a considerable understanding of the law. So the contention that laypersons are a key audience in the context of legislation simply does not stand up to anything more than a fleeting glance.

Linguistic Differences

The linguistic debate over the suitability of one word as against another similar word is but one of the many aspects of legislation which needs to be addressed if we are going to see any material improvement in the expression of legislation.

While a welcome step in the overall process, debates over individual words are just that - individual words. Criticising the use of the word "such" to mean "the", Ilbert believed that "this departure from the English of ordinary life seems unnecessary...". He was equally critical of the use of the expression "the same" to refer to antecedents on the basis that "this form of expression would be considered clumsy or archaic in ordinary English..."[753].

Like so many aspects of legislative drafting, the use of "shall" owes its present existence to tradition and its use had a long history. Even today, there are many who will willingly defend its use and advocate intricate arguments in

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[753] Ilbert, *Legislative Methods and Forms* (Oxford, 1901) at p. 248.

favour of its retention. However, its continued use seems to lie in a deep-rooted affinity and tradition of use rather than in any substantiated linguistic arguments.

In *R v Bishop of Oxford*[754], Cockburn C.J. felt that "must" is not the only word which can be of a mandatory effect:

> "So long ago as the year 1693, it was decided in the case of *R v Barlow*, that when a statute authorises the doing of a thing for the sake of justice or the public good, the word 'may' means 'shall'...".

On the use of "shall", Hughes[755], in a comment which is indicative of the thinking of some drafters today, informed us of the importance of the word:

> "The word 'shall' can be termed the legislative copula: it is an essential word, and a grammatically constructed law always contains either 'shall' or 'shall not'."

The legislative drafting manual in Ireland discourages the use of words like herein, hereinafter, hereinbefore, herewith, wheresoever - which are described as verbose, obsolete or vague terms and are often unclear or unnecessary.[756]. In recognising that some aspects of the traditional style of drafting can give rise to unnecessarily complex legislation, it seems to indicate that in Ireland, at least some steps are being taken in the right direction[757].

While much has been made of the importance of choosing individual words as

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754 (1879) 4 Q.B.D. 245, 258.

755 Hughes, The British Statute Book (London, 1957) at p. 69.

756 *Legislative Drafting Manual* (Dublin, 2001) at para. 5.2.

757 As advocated by the Chief Parliamentary Counsel in Ireland in the Drafting Manual: "Generally, short words are preferable to long words. A simple sentence is easier to understand than a complex or compound sentence. If the meaning of a complex sentence can be precisely stated in two or more simple sentences, use the simple sentences. If a word has the same meaning as a phrase, use the word. Omit needless words." Legislative Drafting Manual (Dublin, 2001) at para. 4.3.

illustrated in the "shall v must" debate, legislation needs far more drastic contests in order to make some headway into improving how it is expressed. People can squabble over this word and that, but when all is said and done, the problem of turgidity lies in many of the other words too.

Those who enthusiastically advocate the use of plain language in legislative drafting make two serious assumptions and they use these assumption to justify the need for plain language.

First Assumption: "Ordinary people have a desire to read legislation"

Public Readership Dimension

A primary feature of most materials which are identified as being suitable for plain language is what I call the "public readership dimension". Books, leaflets, forms and documents are designed to communicate directly and convey information to members of the public – to be informative. However, absent from legislation is the public readership dimension. If it were shown that legislation was widely read by ordinary citizens, I have no doubt that the style of drafting would be altered so as to take account of that audience. However, in discussing plain language in legislative drafting, I fear that we are effectively talking in the dark. Those who advocate the use of plain language in legislative drafting are making one very large – and I say, unwise – assumption. That assumption is that members of the public are interested in reading raw legislation. However, this premise is less than well established. In the absence of substantive evidence that such public interest in legislation exists, I believe that the arguments in favour of plain language legislative drafting are very weak indeed.

In the absence of research on the extent of public interest in legislation in Ireland, there are few guides by which we can test their level of interest. One

such barometer is the publication by the Law Reform Commission of their Consultation Paper[758], entitled *Statutory Drafting and Interpretation: Plain Language and the Law,* and subsequent Report[759]. Their publication generated little public interest and the muted public reception could certainly not be regarded as being indicative of an appetite for plain language legislative drafting.[760] The publication of the *Towards Better Regulation* Consultation Document[761] by a High Level Group appointed by the Government – a perfect opportunity for the cries for plain language to be amplified - was greeted with similar apathy by the wider public.[762]

From the perspective of an ordinary citizen, the significance of the enactment of a new piece of legislation has greatly declined. Part of this change in attitude is referable to the increased recognition that both civil and personal rights enjoyed in the 20th Century. Today's citizens know their basic rights. The rights and freedoms of individuals are no longer at the whim of the legislature. Individuals are aware that many of these rights cannot be defeated by the operation of law, and it is the comfort of knowing this that precludes them from becoming overly concerned with the activities of the legislature. It is for this reason that despite the increasing availability of legislation to citizens[763], their desire and need to familiarise themselves with the intricacies of raw legislation has waned considerably.

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758 Law Reform Commission Consultation Paper, *Statutory Drafting and Interpretation: Plain Language and the Law* (CP14-1999).

759 Law Reform Commission Report, *Statutory Drafting and Interpretation: Plain Language and the Law* (LRC61-2000).

760 The Report was however the subject of some media comment: Wood, "Why Plain English Could Spell the End for Latin Lovers" (August/September 1999) *Law Society Gazette* 5; Bourke, "Nice and Easy Does It" (October 1999) *Law Society Gazette* 18; Wood "Sesquipedalian Solicitors Censured for Verbosity" *Sunday Business Post* 16 April, 2000; Bourke "Report's Backing for Wider Use of Plain English in Law is in Interest of Justice" *Irish Times* 28th May, 2001; King, "Statutes and Limitations" (August/September 2001) *Law Society Gazette* 26.

761 (February, 2002). See www.betterregulation.ie

762 Approximately 12 members of the public chose to make submissions during the consultation process. See www.betterregulation.ie

763 Such as governments' internet web sites setting out legislation, or a fully searchable set of legislation on cd-rom.

The harsh reality for many plain language proponents concerning legislation is that, for the most part, legislation is not read by members of the public. Professor Ruth Sullivan concedes that the public are not particularly interested in reading statutes.[764] If this is indeed true, I have to ask, is it reasonable to ask drafters to play to an audience who are not even in the auditorium?

The Irish experience would seem to suggest that the public readership dimension is absent from legislation. The lay person does not seem to concern him or herself directly with the intricacies of legislation. The principal readers of our laws appear to be those who implement, administer and enforce the law. Some of those who fall into this category are regulatory authorities, the police force and the judiciary - all of whom would approach a legal text with a considerable understanding of the law. The contention that laypersons are a key audience in the context of legislation simply does not stand up. If it is established that the key audience for legislation are not lay persons, but rather are lawyers, judges, regulators, law enforcers, interest groups etc., then the arguments in favour of using plain language seem unconvincing.

Second Assumption: "Plain language legislation will function as effectively as legislation drafted in the traditional style"

Does Plain Language Equate with Clear Language?

Clear language is that which is unambiguous and is capable of only bearing the meaning intended by its author. Plain language in not necessarily clear

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764 Sullivan, "Some Implications of Plain Language Drafting" paper delivered at "Legislative Drafting – Emerging Trends" conference organised by the Office of the Attorney General 6 - 7 October 2000 Dublin, Ireland where she says, at 14: "Plain language drafting also tries to accommodate the tendency of members of the public to read as little of the statute as possible. Unlike legal insiders, who are professionally interested in the law ... a member of the public is interested only in the parts of the statute that relate to her circumstances.".

language. A concept expressed in plain language will not always carry a clear and unambiguous meaning. Utilising plain language in legislative drafting is likely to increase the incidence of vagueness and ambiguity in legislation – this is a consequence which drafters cannot allow to occur.

If legislation is drafted in terms which are wide and general, this is likely to give rise to different interpretations and inevitable challenge. At the other extreme, the more one tries to be exhaustive, the more vulnerable the legislation will be to omissions and potential challenge. So achieving a healthy balance between the two extremes represents a great challenge to any legislative drafter. It is in this context that the Chief Parliamentary Counsel to the Government in Ireland warns against "over drafting":

> "Precision in drafting is a worthy goal, but can be taken too far. It is frequently unnecessary to name every single thing you are forbidding or requiring. An overzealous attempt at precision may result in redundancy and verbosity. Drafting too precisely may create unintended loopholes."[765]

Equally he cautions against "vagueness":

> "Just as overdrafting can affect a provision in unforeseen ways, underdrafting is equally dangerous. Although it is often necessary or desirable to create a general or broad legislative standard or directive, beware of language that is so indefinite that it is meaningless or begs a challenge in court as invalid for vagueness. Generally, courts loathe declaring a law invalid on this ground, but careful drafting can eliminate the need for judicial scrutiny."[766]

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[765] Legislative Drafting Manual (Dublin, 2001) at para. 4.4. The Drafting Manual has not been published in the real sense and is not available externally.

[766] *ibid.*, at para. 4.5.

In their book, Butt & Castle[767] recommend that "legal documents should be written in modern, standard English – that is, in standard English as currently used and understood.". This seems to amount to a recognition on the part of the authors that words, especially "modern, standard" words, do not have a fixed and uniform meaning.

The generic character of most words is of concern to anyone trying to express themselves with precision. This point was succinctly expressed by Potter[768] who said that "Few words have fixed significations like the pure numbers of mathematics." This is the primary reason why the adoption of plain language in legislative drafting must be approached with a great degree of caution. As expressed by Professor Bates[769], one of the fundamental constraints which plain language drafting is subject to is that language is not plain - as a word may well have a number of meanings. So for example, "attend" cannot be replaced by "turn up", "notify" cannot become "tell" etc.

At a legislative drafting conference in Dublin two years ago, Peter Rodney[770] sought to illustrate just how easy it is to translate some "pompous" old legislation into plain English. The example he used was a convoluted legislative provision dealing with gratuities to the driver of a taxi. Mr Rodney suggested that it would have been much better to just speak in terms of tipping a taxi driver. In a question and answer session, a Judge from our High Court[771] pointed out that the plain English translation did not have the same meaning, but rather was very very different. He pointed out that the word "tip" could have several different meanings – it could mean: 1. A place where rubbish is dumped 2. Top/apex of an object 3. To tilt/incline 4. To empty/pour 5. To touch gently 6. A Hint 7. A warning 8. A gratuity/reward

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767 Butt & Castle, *Modern Legal Drafting* (Cambridge, 2001) at p. 129.

768 Potter, *Our Language* (London, 1959) at p. 104.

769 T St J N Bates, "Drafting for the User of Legislation" published in Bergeron (ed.), *Essays on Legislative Drafting* (Ottawa: 1999) 77.

770 Rodney, Senior Legislative Draftsman for the Government of Gibraltar at "Legislative Drafting – Emerging Trends" conference 6-7 October, 2000 Dublin, Ireland.

771 Hon. Mr Justice Daniel Herbert.

– this example clearly illustrates just how difficult it would be if we were to use plain language in our legislation. Ambiguity and uncertainty would rein, the Courts would be overwhelmed by cases because each party to a case could legitimately put forward their own interpretation and in the meantime, the law would be devoid of credibility and totally ineffective.

Words – Vehicles of Many Meanings

The task of parliamentary counsel is to encapsulate policy within the legal framework and this requires them to facilitate communication of the intent of the legislature. This must be done through the use of precise language. The challenge to the drafter is that he or she must use words and words alone. The drafter cannot lend atmosphere to the legislation. He or she cannot use colourful language, or repetition to illustrate a point. Rather, his or her written words stand alone as monuments to clarity of thinking – or carelessness. Written communication needs to be effected with greater care than oral communication. The drafter of any document needs to anticipate and take cognisance of the range of perspectives from which the readers of the legislation will emerge. For example, the drafter must ensure that the reader who is not prepared to take a reasonable view, or who is hostile towards the legislation, reaches the same conclusion as to the meaning of the legislation as the drafter had intended.

Where a word is capable of having a number of different meanings, the drafter must ensure that the word chosen will carry the same meaning for each reader. Another problem faced by drafters is the challenge to find and use words which are not vague. Some words have clear meanings: numbers, days of the week, periods of time are all capable of precise expression. Some words become vague in accordance with their usage. Some words are designedly imprecise and permit of a subjective interpretation by a third party such as a judge. Examples of these words are: “satisfactory”, “necessary”, “fair”, “reasonable” and “viable”. It is also salutary to point out that words take

on the character of those in whose company they are to be found. This point was succinctly expressed by Holmes J. in a much quoted passage from *Town v Eisner*[772] where he said:

> "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in colour and content according to the circumstances in which it is used."[773]

Language itself is not a very precise medium. Words have no "proper" or "absolute meaning". In *Carter v Bradbeer*[774], in a somewhat fatalistic tone, Lord Diplock said that:

> "Words mean whatever they are said to mean by a majority of the appellate committee dealing with the case, even though a minority might think otherwise."

A similar lesson was taught by Humpty Dumpty to Alice in Through the Looking Glass[775]:

> "'When I use a word,' Humpty Dumpty said, in a rather scornful tone, 'it just means what I choose it to mean- neither more nor less.' 'The question is', said Alice, 'whether you can make words mean so many different things.'"

Simplicity – Apparent or Real?

The simplicity of a document is mainly an aesthetic feature. The question as to whether a document is useful is an entirely different issue. In the context of the Land Obligations Bill 1968, Lord Wilberforce wrote to the Law Commission to express his views on the Bill. He was concerned by a number of aspects of

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772 245 U.S. 418.
773 *ibid.*, at 425.
774 [1975] 1 W.L.R. 1204, 1203.
775 Lewis Carroll, *Through the Looking Glass* Chapter 6.

the Bill, but in particular he stated:

> "The language of the draft Bill, is in itself, simple and reasonably untechnical, and as such is to be welcomed: but the question is whether the simplicity is apparent rather than real ..."[776]

The translation of documents drafted in a traditional style into plain language is the customary way in which proponents of plain language seek to illustrate its benefits. An expert in the plain language field, Martin Cutts has carried out numerous translations of legislation drafted in the traditional way. On an initial glance, the translations are always easier to read and more straightforward. Or is this a classic case of simplicity being more apparent than real?

The translation of documents drafted in the traditional style, into plain language also exposes weaknesses in the use of plain language. The conversion of legislative passages into plain language often has the unintended effect of changing the meaning of legislation. However, plain language proponents would dismiss any suggestion that this is a fatal flaw which renders plain language unsuitable for legislative drafting. Rather, they contend that these changes in meaning only occur because non-drafters, whose minds are set on simplicity rather than accuracy, nearly always carry out these re-drafts/conversions.[777] In 1993, Martin Cutts[778] translated the U.K. Timeshare Act 1992 into plain language, with the acknowledged assistance of a leading international law firm. The translation was subject to considerable criticism from the Parliamentary Counsel who drafted the Act, Euan Sutherland.[779] In his opinion, the translation had resulted in

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[776] Extract from a letter of 23 February 1968 from Lord Wilberforce to Karl Newman of the Lord Chancellor's Office. See Nugee, "Legislation form the User's Perspective" a paper delivered at Clarity/Statute Law Society Conference, Cambridge 12 – 14 July 2002.

[777] Turnbull, "Legislative Drafting in Plain Language and Statements of General Principle" (1997) 18 Stat. L.R. 21 at 25.

[778] Cutts, *Unspeakable Acts? Clarifying the Language and Typography of an Act of Parliament*, a discussion paper published under the auspices of Words at Work in (January, 1993).

[779] Sutherland, "Clearer Drafting and the timeshare Act 1992: A Response from Parliamentary

considerably altering the meaning of many of the provisions of the Act. It had omitted some provisions and had rendered the Act misleading is some respects. However, these matters were addressed in the second edition[780].

In their text, Butt and Castle[781] state that plain English documents are easier to read and understand, more direct and more easily absorbed. They seek to illustrate this by setting out a traditionally drafted provision, followed by a plain English version of the same provision:

> "Traditional
>
> The Builder shall at his own expense construct sewer level pave metal kerb flag channel drain light and otherwise make good (including the provision of street name plates in accordance with the requirements of the appropriate District Council and road markings and traffic signs in accordance with the requirements of the Council) the street.
>
> Plain
>
> The Builder must construct the street to Council specifications."

Few could disagree that the plain language version is shorter, easier to read and understand. But is it clear? Does it convey the same meaning? Seemingly not. It is vague and ambiguous, devoid of the helpful guidance which the traditional version carries in its detail. One of the problems with plain language is that it often requires compressing what might be a complex policy into a small number of words. Consequently, this can lead to difficulties with interpretation and give rise to uncertainty – as this translation has shown. So one must ask, when is a reader likely to be more fully informed and aware of the obligations of the Builder? By reading (and even re-reading, if

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Counsel to Mr Cutts", (1993) 14 Stat. L.R. 163.

[780] Cutts, *Lucid Law* (2nd ed., London, 2000).

[781] Butt & Castle, *Modern Legal Drafting: A Guide to Using Clearer Language* (Cambridge, 2001) at p. 86.

necessary) the traditionally drafted provision, the reader will be confidently aware of the obligations of the Builder. In contrast, by reading the plain language version, the reader will only know that the Builder must construct the street to the Council specifications. This puts the onus on the reader to look elsewhere – have the Council specifications been articulated? Are they available to read? Or are they vague, subjective and ambiguous aspirations? Also, the reader of the plain language version will not know who is to pay for the works and what works must be carried out. Effectively, by redrafting this provision in plain language, the authors have removed some helpful detail and have, instead, inserted a little black hole. At a closer look, the simplicity of the plain language version seems more apparent than real. In short, the reader of the plain language provision is less informed. We should not underestimate the intelligence of members of the public. We should not presume that they are unable to understand a provision of this kind.

Plain language proponents would have us believe that the adoption of plain language legislative drafting would result in legislation which would be clear and understandable to all who set eyes on it. Martin Cutts' decision to incorporate a "Citizen's Summary" into his Clearer Timeshare Act[782] is significant. Could it possibly be interpreted as an admission that the nirvana of plain language legislation does not function as they would have us believe?[783]

Some Possible Alternatives to Plain Language

Before going on to assess the merits or otherwise of plain language in the context of legislation, it is perhaps helpful to briefly linger over the possible alternatives to plain language in order to consider whether there are any other

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[782] Cutts, *Lucid Law* (2nd ed., London, 2000).

[783] He explains the reasoning behind the inclusion of such a summary by saying: "... I believe non-lawyers should be enabled to grasp the background of an Act and its key points without having to read the Act itself." (at page 29). This, in my view, is like talking about people who want to learn how to drive a car, but couldn't be bothered getting into a car.

approaches which would meet some of the concerns raised by the proponents of plain language.

There are two approaches in particular which would go some way towards addressing some of the issues raised by those in favour of plain language as a means of improving the accessibility of the statute book. These approaches are: General Principles Drafting; and secondly, Purpose/Object Provisions.

General Principles Drafting

One of the main alternatives to drafting in plain language is the possibility of drafting in statements of general principle - often referred to as the "European style of drafting".[784] In short, the main feature of this style of drafting is that the drafter deliberately states the law in general principles and leaves the details to be filled in by the courts. The Renton Report quotes from the joint evidence of Lord Emslie and Lord Wheatley who were critical of the legislature's attempts to draft in exhaustive terms and in doing so, they alluded to the benefits of drafting in general principle:

> "Most of the problems encountered by the courts flow directly from the tendency of Parliament to ignore the virtue of enacting broad general rules in which the principal and over-riding intention can be readily seen, and to try to legislate in detail for particular aspects of the mischief which presumably the statute intended to curb. It is an eternal truth that one can seldom foresee every combination of circumstances which may arise, and the practical consequences of attempting to do so and of drafting a statute so as to concentrate unduly on foreseen examples is more often than not to conceal the general intention ..."[785]

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[784] See further: Turnbull, "Plain Language and Drafting in General Principles" (July, 1995) *The Loophole* 25.

[785] *The Preparation of Legislation,* (London, 1975) Cmnd. 6053 at para. 6.5.

General principles drafting is the most favoured style of drafters in continental Europe. The Renton Committee made some observations on general principles drafting in their report[786]:

> "the traditional approach in Europe has been to express the law in general principles, relying upon the courts ... to fill in the details necessary for the application of the statutory propositions to particular cases ... This approach appears to result in simpler and clearer primary legislation where detail is omitted, but equally it lacks the greater certainty which a detailed legislative application of the principles would provide."

The Renton Committee went on to say that while recognising that general principles drafting places a heavy responsibility of the legislature, they expressed a desire that this approach be "adopted wherever possible".[787]

In *R v O'Connor*[788] the Supreme Court of Victoria, Australia were emphatic in their opposition to any moves towards general principles drafting, where they said:

> "... the legislation is couched in general terms which omit to make Parliament's intention clear and thus greatly increase the work of the courts. If Acts of Parliament are couched in general terms which do not make Parliament's intention clear much time is taken up in the courts by arguments as to the meaning of the section and how the court should apply it. Costs and delays are increased and injustice may follow ..."[789]

The Court went on to say that its function was to interpret and apply the law,

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786 *ibid.*, at para 9.14.
787 *ibid.*, at para. 10.13.
788 [1987] V.R. 496.
789 *ibid.*, at 499.

adding that "[t]he courts cannot be legislators".[790] A further criticism of this style of drafting is that citizens would be displeased to see the legislative power held by elected representatives being shifted to the judiciary.

Further judicial unease with the idea of the judiciary having to fill in the gaps in legislation was expressed by Lord Hailsham L.C.:

> "If the subject matter of the statute is so lacking in clear propositions, that the burden of ascertaining the meaning of the legislature is thrown completely onto the judges, this can only bring the judges and hence the law into the field of political controversy with consequent grave implications for the law itself and for the Constitution".[791]

The adoption of a wide general principles style drafting in Ireland might be precluded, or at least restricted in its effect, by the doctrine of separation of powers which exists under the Constitution.[792] The adoption of this style of drafting is likely to encounter similar difficulties in other jurisdictions also[793].

In fact, some of the more measured proponents of plain language would contend that drafting in general principles is a method devoid of the clarity required of legislation. In contrast to the complicit role which the traditional style of drafting serves, general principles drafting considerably diminishes the role of the legislature – it is akin to the artist handing his oils, brushes and canvas to the curator of an art gallery and asking him to add the colours to his sketch.

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790 *ibid.*, at 500.

791 In his address to the Statute Law Society – Rt. Hon Lord Hailsham of St. Marylebone, "Addressing the Statute Law" (1985) Stat. L.R. 4 at 7.

792 In particular, Article 15.2.1 of the Irish Constitution which reads: "The sole and exclusive power of making laws for the state is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State."

793 The Supreme Court of Victoria alluded to this difficulty in *R v O'Connor* [1987] V.R. 496 where it said "The courts cannot be legislators."

One advocate of plain language counsels caution on the use of general principles drafting, saying:

> "So far as practicable a legislative instrument should contain sufficient details to enable persons affected by the legislation to ascertain the law and its consequences without the need to resort to expensive litigation".[794]

The length and complexity of a particular piece of legislation tends to be reflective of the subject with which it is dealing. In circumstances such as this, general principles drafting would prove wholly inadequate. This method of drafting seems to pose far more questions than it answers, by delegating the intricacies of legislation to the court. Reading a piece of legislation drafted in this way will not be as informative as legislation drafted in the traditional way, as it will have to be read in conjunction with a collection of judgments. And case-law is practically unattainable for the ordinary reader. It would render the law disjointed and incoherent. In practice, the true content of a piece of legislation could not be ascertained until a succession of points have been raised before the courts.

Purpose/Objects Provisions

Irish legislation does not contain purpose provisions as such. However, each Irish statute contains a "long title" at the beginning. This title effectively expresses the object of the Act and can be of assistance to both the reader and the courts in the interpretation of the legislation. In its report, the Irish Law Reform Commission[795], found one of the only recent and rare examples of the use of a purpose provision in the Taxes (Consolidation) Act 1997.[796]

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[794] Berry, "Legislative Drafting: Could Our Statutes be Simpler?" (1987) Stat. L.R. 92.

[795] *Statutory Drafting and Interpretation: Plain Language and the Law* (LRC 61-2000) at para. 6.32.

[796] Section 806(3) reads: "This section shall apply for the purpose of preventing the avoidance by individuals ordinarily resident in the State of liability to income tax by means of transfers of assets by virtue or in consequence of which either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the State.".

Purpose provisions are becoming a more frequent feature of British legislation and are a standard feature in E.U. law.

Although practitioners are clearly divided on the efficacy of purpose provisions[797], their use has the potential to avert many contentious disputes concerning interpretation. However, there is equal merit in the contention that in its passage through the legislature, a purpose provision might well become the vehicle for populist amendments. This could give rise to discrepancies between the actual meaning of the legislative provision itself and the potentially misleading impression given the purpose provision.

Is Plain Language The Way Forward?

The adoption of plain language appears to have worked particularly well in situations where there is a high degree of interface between consumers and documents such as standard form contracts, insurance policies etc. which have a substantive legal element. It seems that plain language is best suited to situations such as this where ordinary citizens are directly concerned with the legal aspects of a document. However, the question as to what degree plain language can realistically be adopted in the context of legislative drafting really remains to be seen.

A variety of initiatives have been taken in different countries. The Irish position on plain language has been the subject of considerable scrutiny by the Law Reform Commission. In its report entitled *Statutory Drafting and Interpretation: Plain Language and the Law*[798], the Commission advocate the adoption of a number of key policies in this area. As its title would suggest, a substantial portion of this Report is concerned with statutory interpretation. On the question of plain language, the Report is measured in its tone and

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[797] The Law Reform Commission, *Statutory Drafting and Interpretation: Plain Language and the Law* (LRC 61-2000) at para. 6.34 & 6.35.

[798] LRC 61-2000.

proposes moderate reforms.

Amongst other proposals, the Commission recommended that a programme of reform of Irish law be embarked upon with a view to expressing the law in plain language.[799] It also advocated the use of familiar vocabulary and the use of shorter sentences. However, fundamental to the Commission's recommendations in this regard is its caveat that "Plain language should never be utilised at the expense of legal certainty ..."[800].

The publication of this Report was welcomed by the Office of the Parliamentary Counsel to the Government who have already moved to incorporate many of the Commission's proposals in this area into its Drafting Manual.[801] While the adoption of policies such as the use of familiar vocabulary, shorter sentences and the use of the active rather than the passive voice will make Irish legislation more readable, it is clear that a more radical approach towards the adoption of a plain language policy is required in order to bring plain language legislation to fruition.

In Denmark, the difficulty with the unintelligible nature of its laws from its citizen's perspective was first discussed by Parliament in 1890.[802] A committee was then established so that all bills would be examined with a view to ensuring that the language used was intelligible. However, in the absence of any significant achievements, the committee was dissolved in 1918. However, a more recent initiative in Denmark was taken in 1969 (and supplemented in 1987) with the issuing of a set of guidelines dealing with the language in acts. Despite this, one commentator protests that "legal rules are still written in a style far from the language of the common man".[803]

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799 *ibid.*, at p. 76.
800 *ibid.*
801 At the time of writing, the Drafting Manual is being finalised for publication.
802 See further, Blume, "The Communication of Legal Rules" (1990) 11 Stat. L.R. 189.
803 *ibid.*, at 200.

In the U.K., the Renton Committee was established to review the form of Bills drafted, with a view to achieving greater simplicity.[804] In its 1975 Report, the Committee expressed 121 conclusions, 81 of which were recommendations. Ten years after the publication of the Report, Lord Renton commented on how relatively little of it had been implemented.[805]

In Sweden, the Legal and Linguistic division of the Ministry of Justice reviews all draft statutes so as to ensure that plain language is being used,[806] whereas in Slovenia, also a civil law jurisdiction, the drive towards plain language has not arisen to any great extent, as that country has been drafting in relatively straightforward language since its independence just over 10 years ago.

In recent years, both the Parliamentary Counsel of Queensland and of New South Wales have responded favourably to the drive for the adoption of plain language.[807] In 1985, the Attorney General for the Australian State of Victoria proclaimed that all legislation in Victoria must be drafted in plain English. Two years later, the Law Reform Commission of Victoria produced a report[808], a drafting manual and some plain English versions of some legislation and a selection of legal documents. The report states that statutes and also other legal documents can and should be written in plain English. Having adopted plain English drafting, the State of Victoria has amended the Acts Interpretation Act 1901, by inserting section 15AC.[809]

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804 *The Preparation of Legislation* (London, 1975) Cmnd. 6053 at para. 1.1.

805 Remarks made by Lord Renton at a reception to mark the Report's 10th anniversary. His remarks are reported at "The Renton Report's Tenth Birthday" (1985) Stat. L.R. 60.

806 Ehrenberg-Sundin, "Plain Language in Sweden" (Clarity 33, London) at 16.

807 Office of the Queensland Parliamentary Counsel, Annual Report 1992 – 1993 (1993) at 2 – 3; Parliamentary Counsel's Office & Centre for Plain Legal Language, "A Discussion Paper: Review and Re-design of New South Wales Legislation" (1994) 3 at 9.

808 *Plain English and the Law* Report No. 9 (June 1987).

809 "Where: (a) an Act has expressed an idea in a particular form of words; and (b) a later Act appears to have expressed the same idea in a different form of words for the purpose of using a clearer style;the ideas shall not be taken to be different merely because different forms of words were used."

As a pre-cursor to any proposed change in drafting style, various jurisdictions have commissioned reports on these and related topics. One thing which is clear is that any significant change in the style of drafting – be it plain language, general principles, or otherwise - will require that the rules governing interpretation also undergo something of a transformation. What is clear is that if plain language or even simplification of legislation is to happen, it must be matched by the same level of commitment as that given to this cause by people at all levels in the private sector.

Communication of the Meaning of Legislation: Explanatory Materials

Where it is established that the primary audience of legislation are not lay-persons, the benefits of adopting plain language lose considerable weight. It is in this context that the focus should then turn to establishing some kind of formalised structure to effect the dissemination of the content of laws in ways which take cognisance of the citizens needs and abilities. Dissemination of the content of the law is the real way in which we can serve the needs of the citizens, not through distracting stratagems.

In Ireland there is a requirement that the fact of a Bill having been signed into law by the President appear in the State's official journal.[810] This requirement arises from Article 25.4.2 of the Constitution of Ireland[811]. The Constitution does not in any way direct the dissemination of the legislation which has been passed. Each Bill is accompanied by an Explanatory Memorandum which is prepared by the Government Department sponsoring the Bill. It sets out in non-legal terms a summary of the object of the legislation and the general effect of each provision as it stood on the initiation of the Bill. However, the explanatory memoranda are not revised to reflect changes made to the Bill during its passage through parliament. The explanatory memoranda are available on the Government web site and are also available for purchase.

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[810] This journal is called *Iris Oifigiúil* in the Irish language.

[811] Officially called "Bunreacht na hÉireann" in the Irish language.

However, they are not directed solely at members of the public. The diffusion of the law in Ireland is not as formal as it might be. Unfortunately, there is no centralised body with responsibility for communicating the content of the law to the citizens. Consequently, the diffusion role is played by a number of different groups entirely at their own discretion, ranging from state bodies[812] to various interest groups.[813] The dissemination of the law as carried out by these bodies tends to take the form of information leaflets, public announcements and, in the case of commercially oriented interest groups - briefings to members.

Some would contend that a truly democratic society is one in which its laws are binding on all of its citizens only after those laws have been publicly announced or distributed. Is the validity and enforcement of our laws dependent on the ability of everyone to understand those laws? In an ideal world, the answer is likely to be "yes". However, in reality, the answer is a firm "no" and this is borne out in practice. It is clearly beyond the bounds of reasonableness to require that laws be understood by all members of the public before such laws may be said to be enforceable. In his paper entitled "Clear Legislation"[814], Grard Caussignac recognises that drafting legislation which will be comprehensible to everyone is an unattainable ideal but adds that "this is an ideal that, as far as we possibly can, we should attempt to attain.".[815]

A further issue of concern is the previously discussed principle – ignorance of the law is no excuse.[816] This principle derives its origins from Roman law, at a time when laws were considerably less complex and citizens were actively informed of legislative developments.[817] In Denmark, information leaflets on

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812 Such as the Office of the Director of Consumer Affairs.

813 Such as the Licensed Vintners Federation, Irish Council for Civil Liberties.

814 Caussignac "Clear Legislation" published in Bergeron (ed.), *Essays on Legislative Drafting* (Ottawa: 1999) 109.

815 *ibid.*, at 110.

816 Discussed earlier in Chapter 3.

817 Fritz Schultz, *Principles of Roman Law* (Oxford, 1936).

the content of particular pieces of legislation are distributed through the public libraries. This method of distribution is believed to reach many citizens. In contrast to this, in societies where the law or the content of the law is not available, or has not been disseminated, (as is the case in many countries) the vast majority of its ordinary citizens will, in reality, be plainly unaware of the great body of law produced by its legislature on an on-going basis. How then, in circumstances such as these, can the application of this maxim be sustained in any truly democratic society? If a court were to find that the turgid language of a piece of legislation had the effect of depriving a member of the public from ascertaining its affect, this could have grave consequences for any democracy. One means of avoiding such consequences is to provide the public with a document explaining the effect of complex legislation in simple and straightforward terms.

Bennion has expressed the view that the dissemination of the content of our laws is a function as distinct from that of drafting. This view is also shared by Peter Blume[818] who proposes that the content of our law should be disseminated by a variety of means. For example, he suggests that special channels of communication should be used in order to disseminate the content of our laws. In preparation for this, he suggests that the laws should undergo a process of reformulation so as to avoid too much detail. While recognising that there should be a distinction between drafting and dissemination of laws, Blume also suggests that:

> "The two aspects should be seen as a whole and Parliament has not performed its work satisfactorily if the dissemination function is neglected. When proposing a Bill it should be made clear what dissemination arrangements are planned and what they cost."[819]

From the perspective of an ordinary citizen, the significance of the enactment

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818 Blume, "The Communication of Legal Rules" (1990) 11 Stat. L.R. 189.

819 *ibid.*, at 209.

of a new piece of legislation has greatly declined. As already mentioned, part of this change in attitude is referable to the increased recognition that both civil and personal rights began to enjoy in the 20th Century.

Concluding Remarks

In circumstances where an experienced drafter encounters difficulty in seeking to express complex policy by using precise English and legal terms, how can anyone seriously suggest that the articulation of this policy could be made easier (for the drafter or the reader) if expressed in plain language? Realistic proponents of plain language will admit that plain language drafting is not the complete solution and accept that plain language may not be suitable in situations where the policy is complex. One of the more moderate proponents of plain language, Turnbull acknowledges that plain language drafting is not a complete alternative to traditional style drafting. In his article[820], he points out that in situations where complex concepts are at issue, plain language might well give rise to ambiguity and might render the legislation disjointed or absurdly long. In situations such as this, he proposes that precision must prevail over simplicity, as was the approach favoured by the Renton Committee[821]. He sees the drafter as having a constant duty to consider alternative forms of expression and choose the simplest by balancing different degrees of precision against different degrees of simplicity.

Where there are words, there will be misinterpretations. The use of plain language in legislative drafting considerably increases the scope for misinterpretation. Conversely, the use of what are often described as turgid, complex, verbose and wordy provisions arising from traditional legislative drafting considerably limits the scope for misinterpretation and in this way restricts the potential for challenge. Legislation drafted in this way is by far the more odious of the two sisters in Cinderella – functional, but not so easy

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820 Turnbull, "Legislative Drafting in Plain Language and Statements of General Principle" (1997) 18 Stat. LR 21 at 25.

821 *The Preparation of Legislation,* (London, 1975) Cmnd. 6053.

on the eye.

The calls and demands for plain language legislative drafting derive from the turgid and complex nature which characterises so much legislation. Plain language proponents purport to lend legitimacy to their calls for plain language legislation by assuming that ordinary people actually want to read raw legislation. Having said that, it must be recognised that there is a need to modernise and simplify the language of legislation to the extent that it will not give rise to uncertainty. There is a clearly established need for the adoption of more reader friendly language in legislation so as to achieve the level of regulatory quality of which the O.E.C.D. speak so often[822]. The use of plain language in legislative drafting is to be encouraged, but only in so far as it does not alter the meaning and does not give rise to ambiguity in the legislation.

The motives and work of people like Professor Butt, Martin Cutts and Professor Kimble are to be admired, but there must be a recognition of the limitations of plain language in legislative drafting – a recognition that, like the glass slipper in Cinderella, plain language is not a "one size fits all" device. A failure to recognise this fact has been, and will continue to be, damaging to the credibility of the drive for plain language in legislative drafting. As already

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[822] For example, "Today, quality regulation is crucial for government effectiveness. Member countries have, as a consequence, increased their attention to the quality of regulatory instruments. More broadly, they have also focussed on the functioning of the administrative processes through which regulations are developed, implemented, adjudicated, and revised. Concerns about regulatory quality have emerged at national and subnational levels of government, and also at international levels, as international bodies increasingly set rules or coordinate national regulations to address problems that cross national borders.". Background Note to the O.E.C.D. Reference Checklist for Regulatory Decision-Making, published as Appendix 2 in 'Recommendation on Improving the Quality of Government Regulation' which may be found at www.oecd.org/puma/regref/pubs/rco95/backgr.htm

repeatedly stated, explanatory materials, specifically directed at members of the public, illustrating in plain and simple language the nature and effect of the law in question, is a far more realistic and desirable objective.

Chapter 9

The Amendment & Publication of the Statute Book

Introduction

The purpose of this Chapter is to determine to what extent does responsibility for the state of the statute book lie in the approach which we take to amending and publishing the statute book.

The Chapter begins by looking at the way in which we make new legislation and how that impacts on existing legislation. The two principal approaches to amendments, textual and non-textual, are examined in detail, as are other factors which affect the coherence of the statute book, including legislation by reference.

This Chapter also looks at the complexity of legislation and does so by asking whether the Supreme Court decision in *Cityview Press* has had the effect of increasing the complexity of legislation. It also looks at whether the exclusionary rule regarding the use of parliamentary debates has had the effect of increasing or reducing the complexity of legislation.

There then follows an examination of the different types of errors which can occur in legislation. As responsibility for the legislation enacted in any one year largely rests with the Government, this Chapter goes on to examine the impact which other people can have on the statute book, such as members of the opposition through Private Members' Bills, Private Bills and also amendments to Government Bills.

The Chapter also looks at the approach and attitude which has been taken towards the publication of legislation. The publication of legislation has

traditionally been viewed as being secondary and ancillary to the task of enactment. Once legislation is enacted, successive Governments have obviously taken the view that their task has been completed and that publication is merely an offshoot. Consequently we have the routine publication of Acts in their enacted form, along with rare consolidations and restatements and even more rare statute law revision. This gives rise to the question as to whether the neglect of the publication of the legislation has contributed significantly to the poor state of the statute book.

Factors Which Affect Coherence

"Once begin the dance of legislation, and you must struggle through its mazes as best you can to its breathless end – if any end there be". – Woodrow Wilson[823]

Aside from the system of effecting legislative change, there are many other reasons why our statute book is in its present poor state. The way in which the legislation is drafted – its language[824], style, structure and features[825] - have contributed in no small way to the inaccessibility of our statute book. The problems arising from this have been exacerbated by the way in which we compile and publish our legislation, such as the lack of revision, consolidation and restatement.

The sheer volume of legislation which now stands on the statute book is a factor which has greatly inhibited the order and accessibility of the statute book. There is a series of other factors which impinge on the coherence of legislation, such as the way in which those amendments are effected ie. textual or non-textual. Similarly, where an enactment is reliant on references

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823 *Congressional Government: A Study in American Politics* (Boston, 1913).

824 Discussed in Chapter 8.

825 Discussed in Chapter 7.

to previous enactments for its meaning, this can impact negatively on the accessibility of legislation. The practice of an enactment dealing with unconnected topics is not conducive to an orderly statute book and is perhaps symptomatic of the scarcity of parliamentary time.

Excessive Legislation

Legislation is being used to influence and, in many instances, change people's behaviour. Ireland is more heavily legislated than ever before. Professor Bruno Leoni was unforgiving in his criticism of those who believe that legislation is the answer to all of life's ills:

> "Substituting legislation for the spontaneous application of nonlegislated rules of behaviour is indefensible unless it is proved that the latter are uncertain or insufficient or that they generate some evil that legislation could avoid while maintaining the advantages of the previous system. This preliminary assessment is simply unthought of by contemporary legislators. On the contrary, they seem to think that legislation is always good in itself and that the burden of proof is upon the people who do not agree. ..."[826].

Similarly, Lord Radcliffe was critical of the infinite and cyclical nature of the law making process. He felt that the rate at which we make and re-make laws is having an affect on people's respect for the law. He pointed out:

> "The respect for the law, without which it will certainly never be readily obeyed, cannot survive the spectacle of its continual making and remaking before our eyes. Human nature is not so constituted."[827].

The incessant flow of legislation which we have seen in Ireland, particularly in

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826 Leoni, *Freedom and the Law* (New York, 1991) at p. 14.

827 Lord Radcliffe, "Some Reflections on Law and Lawyers" 10 C.L.J. 361 at 366.

recent years, would have undoubtedly irked Professor Leoni. The problems which this brings about are exacerbated by the fact that policy makers operate in a climate where zero account is taken of the burden which endless legislation has on business and to a greater extent on society in general.

Better Regulation

A realisation that this situation had to change came in the early 1990's. As part of the Strategic Management Initiative, a process designed to reform the public services, a Regulatory Reform Working Group was set up following the publication of Delivering Better Government[828]. The 1996 Report marked the commencement of a process which would become known as "Better Regulation". This Report proposed a detailed programme of action, based on the recognition that having quality regulation in an economy is an important contributor to economic growth, competitiveness and job creation. The recommendations of the Working Group were subsequently adopted by the Government who published *Reducing Red Tape - An Action Programme of Regulatory Reform* in Ireland in July 1999.

It was this Report which led to the development of a set of guidelines for use by Departmental officials when anticipating the need for new legislation. When preparing a Memorandum for Government on proposed legislation, Departmental officials are required to ensure that their proposal accords with the Quality Regulation Checklist as set out in Appendix VI of the cabinet Handbook. It requires officials to think through various issues by posing a series of questions, some of which are as follows:

> "1. Is the proposed legislation and/or regulation absolutely necessary? Is the problem correctly defined and can the objective be achieved by other means (i.e. improved information, voluntary schemes, codes of practice, self-regulation, procedural instructions)?

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828 (Dublin, May 1996).

2. Will the legislation affect market entry, result in any restrictions on competition or increase the administrative burden?

...

5. Outline the consideration which has been given to application of the following principles:

(a) Sunsetting i.e. establishing a date by which the measure will expire unless renewed

(b) Review date i.e. a predetermined date on which the efficacy and impact of the proposed new measure will be reviewed

(c) the "Replacement" principle i.e. where the body of regulations/legislation in a particular area will not be added to without a corresponding reduction through repeal of an existing measure."

The questions asked by the checklist raise fundamental issues that must be asked every time we propose to make a new law, or change an existing one. Habitual questioning of this kind will at least ensure that the sponsors of legislation will have given sufficient thought to such a basic question. If members of the legislature continue to push for alternatives to legislation to be employed, this would at least ensure that the Acts that are enacted on an annual basis are actually justified and necessary.

The recognition that improved regulation was an essential aspect of good governance came in the form of an O.E.C.D. Report in 2001, entitled Regulatory Reform in Ireland.[829] The Report recommended a wide range of reforms from deregulation type policy reforms to a strong recommendation that Irish policy making would benefit from more rigour. In particular, it advocated the view that Irish policy making would benefit from a more consistent and systematic approach to consultation with those likely to be affected by laws. Another proposal was that Ireland should make use of more

[829] (Paris, 2001).

systematic tools to assess the true costs and benefits of proposed laws, through the introduction of regulatory impact assessments.

In their Report on Ireland, the O.E.C.D. were not encouraged by the progress which had been made in the improvement of the attitude and approach towards legislation. They noted a tendency to rely on the traditional methods of effecting change in society:

> "Reform authorities must take a clear leading and supportive role, if alternatives to traditional regulations are to make serious headway into the policy system. Ireland in this respect has been slow in promoting the use of policy instruments that have been proved to work more efficiently. In general, regulators still tend to rely on, 'command and control' mechanisms. This may reflect the conservatism of the Irish administration." [830]

However, the O.E.C.D. were pleased with the development of the Quality Regulation Checklist and its incorporation into the Cabinet Handbook:

> "Progress nevertheless is seen in some areas, and this may be accelerated if the Regulatory Quality Checklist embedded in the new regulatory policy is adequately implemented and enforced."[831]

The recommendations of the O.E.C.D. were largely welcomed by the Government and in response, a High Level Group was established to oversee the implementation of the Report. In February 2002, the High Level Group published a consultation document entitled *Towards Better Regulation*[832].

The publication of the consultation document marked the first step towards

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830 *Regulatory Reform in Ireland* (Paris, 2001) p. 153.
831 *ibid.*, at p. 153.
832 (Dublin, 2002).

the development of a national policy statement covering the issues raised in the document. The document was designed to stimulate public interest and it invited submissions on the matters raised. Following the process of consultation, the next stage in the Towards Better Regulation process was marked by the publication of a White Paper entitled *Regulating Better* early in 2004.

This White Paper identified principles which the Government sees as underpinning good regulation. For example, necessity - the legislation must be deemed to be necessary. Effectiveness – is the legislation aimed at the right sector and will it be enforced? Proportionality – has the burden been weighed against the advantages of the legislation? Transparency – has there been consultation with stakeholders prior to regulating? And is the legislation clear and accessible to all? A key proposal contained in *Regulating Better* was a commitment to improve the internal consistency of regulation and to implement a programme of Statute Law Revision, including a review and updating of pre-1922 legislation. As part of this White Paper, the Government undertook to pilot a system of Regulatory Impact Assessment in a small number of Departments to be followed by the full introduction of regulatory impact assessment.

While the development of the Better Regulation Agenda is to be welcomed and should encourage better regulation in the future, the focus and direction of that process is such that it is neither intended to, or likely to, effect the kind of intensive and radical changes which our statute book now needs.

The lack of consideration about the impact of excessive or unjustified legislation has been exacerbated by the absence of any system of regulatory impact assessment.

Regulatory Impact Assessment[833]

Regulatory impact assessment (R.I.A.) is a means of evaluating a policy which is intended to become part of law. It can involve not just an analysis of the financial cost, but can also involve a more wider analysis – such as the effect that the new law will have on sectors of society. R.I.A. can be a continuing process, as it can require the operation and effect of the law to be analysed after its enactment/making.

Currently, in Ireland, before becoming law, policy proposals effectively receive a one-dimension analysis – with the emphasis very much on function and enforcement – with little regard being had for the financial cost of the law on the government and citizens and its effect on society in general.

In its Report on Regulatory Reform in Ireland[834], the O.E.C.D. found that Ireland needed to take a number of steps so as to enable it to produce high quality regulation[835]. To this end, the O.E.C.D. strongly recommended that Ireland consider implementing R.I.A.[836]. The O.E.C.D. state that R.I.A. gives rise to an improvement in the empirical basis for regulatory decisions.

In a follow up to the O.E.C.D.'s Report, the Government's consultation document entitled *Towards Better Regulation*[837], identified four common characteristics of an R.I.A. system[838]:

1 An attempt to quantify the likely impacts or outcomes arising from regulatory proposals;
2 A built-in consultation requirement whereby affected parties and wider society can offer views before regulations are enacted;

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833 Also known as regulatory impact analysis.
834 (Paris, 2001).
835 All references to "regulation" in this context are intended to refer to both primary and secondary legislation.
836 In 1996, more than half of the O.E.C.D. countries had adopted an R.I.A. programme.
837 February, 2002. See www.betterregulation.ie
838 *ibid.*, at p. 63.

3 A report on the alternatives which were considered before deciding on regulation as the means to achieve the goals in question and;

4 A report on how the regulation will be enforced and what problems may be anticipated with achieving compliance.

This consultation paper was followed up by a White Paper, entitled *Regulating Better*[839]. It confirmed that Ireland would introduce a system of regulatory impact assessment, first on a pilot basis. This was confirmed by the Taoiseach in response to a Dáil question:

> "With regard to Regulatory Impact Analysis (RIA), it is proposed to first pilot and then mainstream a system, whereby Government Departments and Offices can gain a better understanding of the likely impacts of proposed legislation. My Department has a role in developing the overall system that will be used."[840]

According to the Taoiseach, there would not be a requirement to carry out a regulatory impact analysis in respect of all pieces of proposed legislation, but only in relation to those which have "very significant or widespread affects". This of course is an indicator that an arbitrary assessment will be made before a decision is made to subject a legislative proposal to the full rigors of regulatory impact analysis. This practice could, in itself, serve to defeat the very purpose of regulatory impact analysis.

A system of R.I.A. has yet to be fully implemented in Ireland. The model chosen will be crucial. In other O.E.C.D. countries, the method of overseeing R.I.A. varies. Some countries have established special bodies to oversee R.I.A., while some countries place this role in care of bodies responsible for budgeting and general public sector management. Others have placed this

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839 *Regulating Better: A Government White Paper* (Dublin, 2004).

840 588 *Dáil Debates* Col. 471 (29 June 2004).

responsibility at central government level. Experiences in O.E.C.D. countries show that R.I.A. will fail if it is left entirely to regulators, but it will also fail if it is too centralised.[841]

An effective R.I.A. system has the potential to reduce the volume of legislation which might otherwise be enacted. Conducting a broad assessment of the necessity for the legislation and the impact of the legislation means that expediency alone would no longer dictate whether a Bill is published on an issue. This should contribute in no small measure to a move away from a culture of excessive legislation which prevails.

The piloting of regulatory impact analysis commenced in June 2004 in relation to the following five pieces of proposed legislation:

1 Medical Practitioners Bill – Department of Health and Children;
2 Coroners Bill – Department of Justice, Equality and Law Reform;
3 Export Control Bill– Department of Enterprise, Trade and Employment;
4 Betting Duty Regulations – Office of the Revenue Commissioners;
5 EU Groundwater Directive - Department of the Environment, Heritage and Local Government.

Early in 2005, a Report entitled Report on the Introduction of Regulatory Impact Analysis[842] on pilot project was published by the Taoiseach. It contained twenty recommendations which it is intended should lead to the introduction of a full system of R.I.A.

Amendments

The need for new legislation to amend previous legislation arises from the

841 O.E.C.D., "An Overview of Regulatory Impact Analysis in O.E.C.D. Countries" .
842 (Dublin, 2005).

detailed nature of our legislation and also the fact that the power to make new laws has been vested in the Oireachtas.[843] Our legislation is specific in its terms and limited in its effect. Any desire on the part of the legislature to expand its scope and effect requires an amendment.

New legislation often effects amendments to existing statutes. Amending legislation can add new text or new provisions to an existing Act. Likewise, amending legislation can remove text from a pre-existing Act, or even repeal a whole Act. The way in which these amendments are shaped can have a significant influence on whether they will fit seamlessly into the existing framework and be suited to revision, consolidation and restatement. There are two primary approaches to effecting an amendment to the statute book: textual amendments and non-textual amendments.[844]

Textual Amendments[845]

Textual amendments effect legislative change with absolute precision. Often a textual amendment will replace an old provision with a new one – by removing one provision and inserting another exactly into its place. It has been described as "the direct substitution of one form of words for another."[846].

A textual amendment is intended to effect a change seamlessly. This ensures that, in theory at least, the integrity of the earlier statute remains uninterrupted. Whilst it is well accepted that textual amendments represent best drafting practice, the philosophy behind their use lies in the expectation that one day, the pieces of legislation involved will be assimilated into each

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[843] Article 15.2.1 of the Constitution states: "The sole and exclusive power for makings laws in the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.".

[844] On amendments generally, see Bennion, *Statutory Interpretation: A Code* (4th ed., London, 2002) at p. 238 et. seq.

[845] See generally, *The Preparation of Legislation: Report of a Committee Appointed by the Lord President of the Council* (1975) (Cmnd. 6053) at p. 79 et. seq.

[846] Byrne & McCutcheon, *The Irish Legal System* (4th ed., Dublin, 2001) at para. 13.93.

other. Like the notional statute book, this too, regrettably, remains theoretical. The failure to publish revised statutes perhaps causes drafters to question the efficacy of taking the time to effect textual amendments or drafting Statute Law Revision Acts.

Textual amendments are expressed in a technical form, similar to the way in which amendments at Committee Stage are framed. For example, they direct that a particular section or subsection be deleted and replaced with a new text which it sets out; or it might insert a new section into an Act; or a textual amendment might direct that all occurrences of a particular word be replaced with another word which it proposes. It is a mechanical and precise method of making an amendment. It means, in theory at least, that the old or undesired text is deleted from the text and is replaced with new text.

A textual amendment which is inserting a completely new section will ascribe a new section number (ie. the number of the preceding section) accompanied by a letter. So for example, where it is desired to insert a new section after section 23, the newly inserted section will be section "23A". This is referred to as "posting" and it is particularly conducive to incorporation, and subsequent consolidation, with ease.

Textual amendments are effected by setting out the content of the amendment within inverted commas and it will be accompanied by a direction as to the precise location of the amendment. For example, section 25 of the Central Bank Act 1997 effects a textual amendment in the following way:

> "25.—Section 8 of the Act of 1942 is hereby amended by the insertion of the following paragraph after paragraph (b)—
>
> > '(bb) provide advice and assistance to the Central Statistics Office in regard to the collection, compilation, analysis or interpretation of balance of payments, national accounts or any

other financial statistics relevant for these purposes, including where appropriate to undertake the collection of data for this purpose;'."

This is an example of a typical textual amendment. It inserts text into a specified location in existing legislation and as such it is lauded as best practice in Ireland and elsewhere. However, following the above example through, the reader of section 8 of the actual Central Bank Act 1942 is unlikely to be aware of the fact that the Act was amended in this way some 55 years later – in 1997, and most likely amended piecemeal a number of times in years previous and subsequent to that.

The difficulty faced by readers of a Bill which effects textual amendments is that that very Bill is itself often unintelligible without having sight of the enactments which it is designed to amend. This shortcoming can be redressed to some extent by attaching a Table to the amending Bill, setting out the provisions of the previous Act as amended by the Bill.[847] Alternatively, the text of the previous provisions as amended could be set out in the Explanatory Memorandum which accompanies the Bill.

In the U.K., some use has been made of Keeling Schedules in Bills. A Keeling Schedule[848] is a schedule in a Bill which shows the impact which each amendment in the Bill will have in the Act being proposed for

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[847] An example of a Bill which makes textual amendments and uses a Table to set out the sections as amended is the Proceeds of Crime (Amendment) Bill 2003.

[848] The very title of these schedules has an interesting origin. It arises from the name of the parliamentarian who pushed for their use. On 26th July 1938, in the House of Commons, Mr Keeling, the Member for Twickenham, asked the Prime Minister: "whether he has considered a memorandum on the evils of legislation by reference submitted to him by a number of Members; and whether he has any statement to make".--[Official Report, 26/7/38; col. 2919.] #he Prime Minister, Mr Neville Chamberlain, said at col. 2920:"I have considered the memorandum with interest ... The suggestion made is, in effect, that a Bill amending or applying an existing enactment by reference should contain a Schedule setting out the enactment as it will read when amended by the Bill ... This method is not, I understand, put forward as a panacea to be used #n all cases ... There are, however, undoubtedly some cases where the method suggested by the memorandum would be both practicable and advantageous; and I have instructed the Parliamentary Counsel to proceed experimentally on the lines suggested in suitable cases".

amendment. Their use in the U.K. has faded out[849], with the last one having featured in the Criminal Evidence (Amendment) Act 1997.

Crucially, however well intentioned as the approach of using textual amendments may be, their value is very much limited unless the amendments are ultimately assimilated into the location to where they are intended, either through revised Acts, consolidation or even restatement.

Non-Textual Amendments[850]

The second, and until quite recently, more favoured means of amending existing legislation is by way of non-textual amendments. A non-textual amendment is described as one which does not direct the insertion of text, but instead in a discursive or narrative way, instructs the reader to interpret a word or phrase in a particular way. A non-textual amendment is made where an amending Act instructs the reader to read a particular provision or phrase in the Principal Act, or some other Act, in a particular way.

In contrast with textual amendments, non-textual amendments cannot be easily incorporated into a revised or consolidated text. Their impact can often be greater than what at first sight it might appear to be.

Section 10(3) of the Defence Amendment Act 1998 is a typical example of a non-textual amendment. It reads:

> "10(3) (a) References in sections 11 and 40 of the Principal Act to the Adjutant-General shall be construed as references to the Deputy Chief of Staff (Operations).
>
> (b) References in the said section 11 and 40 to the Quartermaster-General shall be construed as references to the Deputy Chief of Staff

[849] Between 1939 and 1949, 23 public Bills had Keeling schedules. Between 1966 and 1993, 24 public Bills had Keeling schedules.

[850] See generally, *The Preparation of Legislation: Report of a Committee Appointed by the Lord President of the Council* (1975) (Cmnd. 6053) at p. 77 et. seq.

(Support)."

Very often, as in this case, the non-textual amendment could very easily have instead been framed as a textual amendment, if it had been drafted in the following way:

> "The principal Act is amended in sections 11 and 40 by substituting -
>
> (i) 'Deputy Chief of Staff (Operations)' for every occurrence of 'Adjutant General', and
>
> (ii) 'Deputy Chief of Staff (Support)' for every occurrence of 'Quartermaster-General'.".

When a drafter is faced with the task of preparing a series of amendments to existing law, the use of a non-textual amendment as a means of amending existing law is invariably the most convenient approach from the drafter's perspective. They are particularly useful where the drafter is instructed to make a series of similar changes to a number of Acts. Rather than having to draft a textual amendment for each amendment in every Act requiring change, instead by using the non-textual approach, the drafter can effect all of the desired changes in just one narrative amendment.

Non-textual amendments can also prove very useful to the drafter where it is desired to make an identical change to an unknown number of Acts across the statute book particularly in circumstances where it would be very difficult to identify each location where amendment is required. They are particularly suited to situations where a universal or widespread change is required. For example, the drafter might be instructed to insert the words "or mother" after every occurrence of "father" in family law legislation. Rather than having to identify and effect each change on an individual textual basis, the drafter can make all of the changes in one stroke of the non-textual pen.

Aside from the lack of consideration for the reader of statutes, because the identity of each location requiring change has not been ascertained, the danger in this approach is of course that the drafter could be amending some Acts or provisions unintentionally. For example, an amendment of family law legislation as just discussed, could effect an undesired change in legislation where the specific rights or obligations relating solely to fathers are addressed.

Complexity of Legislation

As alluded to previously, the increasingly complex nature of society and technological developments are just two factors which have combined to give rise to the need for more complex legislation. Those factors, as well as others, look set to prevail. Accepting that then, a question arises as to whether the Court's acceptance of parliamentary debates as an aid to interpretation in all circumstances would have the effect of reducing the complexity of legislation? A further question to be addressed is the extent to which the increasing complexity of legislation can be attributed to the decision of the Supreme Court in *Cityview Press Ltd v An Chomhairle Oiliúna*[851] - and that is the first issue to address in this context.

The Supreme Court decision in *Cityview* was significant because it established that secondary legislation must derive its authority from the principles and policies of its parent Act, but perhaps equally significant are the implications which that very aspect of the decision has had on the statute book.

The establishment of the principles and policies test meant that legislation post-Cityview would have to made on the basis that the legislature could not abdicate its legislative function to be performed by a Minister acting alone in

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851 [1980] IR 382.

the making of regulations.[852] This meant that matters once believed to be trivial and understood to be well-suited to be addressed in secondary legislation could, post-Cityview, no longer regarded as being such. The effect was, and continues to be, that primary legislation has to encompass more matters of detail, and in particular, it has to take great care to adequately articulate the principles and policies of the legislation, particularly in circumstances where the making of secondary legislation is envisaged.

This requirement has undoubtedly added to the volume of the statute book and, in some respects, to the complexity of the statute book. However, it is arguable that the disadvantages resulting from the implications of *Cityview* are perhaps outweighed by the advantages which flow from that decision.

If the legislature had continued to abdicate its responsibility by continuing to allow substantive matters to be addressed in secondary legislation, this would have caused a large body of law to be found in secondary legislation, in addition to primary legislation. This would have greatly exacerbated the problems associated with an already inaccessible statute book. So in many respects, we are to be grateful for the Supreme Court bringing an end to the practice of the legislature's abdication of its legislative function in that way.

The next question which arises is whether the Court's acceptance of parliamentary debates as an aid to interpretation in all circumstances, would have the effect of reducing the complexity of legislation, as it stands today.[853]

Before one can determine whether or not the habitual use of parliamentary

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[852] The principles and policies test is discussed more fully in Hogan & Whyte, *Kelly The Irish Constitution* (4th ed., Dublin, 2003) at para. 4.2.20.

[853] For a considered analysis of the Court's treatment of parliamentary debates in the context of statutory interpretation, see Hogan & Whyte, *The Irish Constitution* (Dublin, 4th ed., 2003) para. 6.2.270 to 6.2.285; Law Reform Commission (Report), *Statutory Drafting and Interpretation: Plain Language and the Law* (December 2000) (LRC 61-2000) at p. 63. See also, Breyer, "On the Uses of Legislative History in Interpreting Statutes" 65 S Cal L Rev (1992) 845; Kerr, "Parliamentary History as an Aid to the Interpretation of Statutes" 11 (1993) ILT & SJ 72; Lyell, "Pepper v Hart: The Government Perspective" [1994] Stat LR 10.

debates would reduce the need for complex legislation, it is necessary to understand what is precisely involved in the judicial interpretation of legislation[854]. The role of the courts in interpreting legislation was very helpfully characterised by Lord Nicholls in *R v Secretary of State for the Environment*[855], as follows:

> "Statutory interpretation is an exercise which requires the Court to identify the meaning borne by the words in question in the particular context. The task of the Court is often said to be to ascertain the intention of parliament expressed in the language under consideration. This is correct and maybe helpful, so long as it is remembered that the 'intention of parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the Court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the Minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members about the house. These individuals will often have widely varying intentions. Their understanding of the legislation and the words used may be impressively complete or woefully inadequate. Thus when the Courts say that such and such a meaning 'cannot be what

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[854] On statutory interpretation, see generally, Bennion, *Statutory Interpretation: A Code* (4th ed., London, 2002); Law Reform Commission (Consultation Paper), Statutory Drafting and Interpretation: Plain Language and the Law (July 1999) CP14-1999; Law Reform Commission (Report), Statutory Drafting and Interpretation: Plain Language and the Law (December 2000) (LRC 61-2000); Byrne & McCutcheon, *The Irish Legal System* (4th ed., Dublin, 2001); Coode, *On Legislative Expression* (2nd ed., Ottawa, 1976); Côté, *The Interpretation of Legislation in Canada* (3rd ed., Toronto, 2000); Cross, *Statutory Interpretation* (London, 1976); Devenish, *Interpretation of Statutes* (Capetown, 1992); Dickerson, *The Interpretation and Application of Statutes* (Boston, 1975); Gifford, *How to Understand an Act of Parliament* (7th ed., Sydney, 1994); Maxwell, *Interpretation of Statutes* (12th ed., 1969); Pearce, *Statutory Interpretation in Australia* (4th ed., Sydney, 1996); Sullivan, *Driedger on the Construction of Statutes* (3rd ed., Toronto, 1994); Sutherland, *Statutes and Statutory Construction* (5th ed., Chicago, 1984); Bennion, "The Science of Interpretation" 130 NLJ 493; Casey, "Statutory Interpretation - A New Departure" (1982) 4 DULJ 110; Dickerson, "Statutory Interpretation in America: Dipping Into Legislative History" [1984] Stat LR 76; Posner, "Legislation and Its Interpretation: A Primer" (1989) 68 Neb L Rev 431; Samuels, "The Interpretation of Statutes" [1980] (1) Stat LR86; Stark, "On Language Games and Statutory Interpretation: An Inside Narrative" [1999] 20 Stat LR 144.

[855] [2001] 1 All ER 195, 216.

> Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning. As Lord Reid said ... 'We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used'."

This dictum also incorporates the principle which operates against the use of parliamentary debates in the courts interpretation of legislation. This principle, known as the exclusionary rule, has been part of the common law since before 1769.

The Irish Courts have traditionally been reluctant to resort to the use of parliamentary debates as an aid to the interpretation of statutes.[856] This has been reiterated by the Courts a number of times in recent years. In *The People (DPP) v Quilligan (No. 1)*[857] Walsh J. stated: "Whatever may have been in the minds of the members of the Oireachtas when the legislation was passed ... their intention must be deduced from the words of the statute". A similar view was expressed by Finlay CJ in *Howard v Commissioner of Public Works in Ireland*[858], where he said:

> "... it would not be permissible to interpretate a statute upon the basis of either speculation or indeed, even of actual information obtained with regard to the belief of individuals who either drafted the statute or took part as legislators in its enactment with regard to the question of the appropriate legal principles applicable to matters being dealt with in the statute"

The House of Lords decision in *Pepper v Hart*[859] represented a major

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856 See, Hogan & Whyte, *Kelly The Irish Constitution* (4th ed., Dublin, 2003) at paras.3.2.97 and 6.2.270 et. seq.; Bennion, *Statutory Interpretation: A Code* (4th ed., London, 2002) at p. 545.

857 [1986] IR 496, 511.

858 [1993] IR 101.

859 [1993] 1 All ER 42. For an in-depth analyses of this case, see Mullan, "Purposive Interpretation

departure from pre-existing judicial policy regarding the interpretation of statutes. That case concerned an ambiguous legislative provision regarding taxation. The Court found that the exclusionary rule ought to be modified so as to enable the Court to take cognisance of the expressed intention of the Minister who proposed the legislation in question. Lord Browne-Wilkinson who gave the leading judgment, proposed that the modification of the exclusionary rule should be subject to the following three conditions:

> "(a) legislation is ambiguous or obscure or leads to an absurdity; (b) the material relied on consists of one or more statements by a minister or other promoter of the Bill together if necessary with such other parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied on are clear."

In the U.S., the exclusionary rule has been diluted to such an extent that, according to one Justice of the U.S. Supreme Court, the resort to parliamentary history has become so common that reality has overtaken the parody in the popular quip that "one should consult the text of a statute only when the legislative [parliamentary] history is ambiguous."[860].

Perhaps inspired by the decision in *Pepper v Hart* rather than the U.S. approach, Irish Courts' reluctance to entertain parliamentary debates in the context of statutory interpretation was relaxed somewhat, albeit temporarily, in the context of some more recent cases. In *Wavin Pipes v Hepworth*[861], a case concerning the interpretation of the Patents Act 1964, Costello J stated:

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and Parliamentary Materials" in O'Dell (ed.), *Leading Cases of the Twentieth Century* (Dublin, 2000) 467; Miers, "Taxing Perks and Interpreting Statutes: *Pepper v Hart*" (1993) 56 MLR 695; Mullan, "The Impact of Pepper v Hart" in Dickson & Carmichael (eds.), The House of Lords - Its Parliamentary and Judicial Roles (Oxford, 1999); Oliver, "*Pepper v Hart:* A Suitable Case for Reference to Hansard" [1993] PL 5; Styles, "The Rule of Parliament: Statutory Interpretation After *Pepper v Hart*" (1994) OJLS 151; Lord Lester, "Pepper v Hart Revisited" (1994) 15 Stat LR 10; Jenkins, "Pepper v Hart: A Draftsman's Perspective" [1994] Stat LR 23.

860 As quoted by Murray J. in *Crilly v Farrington* [2001] 3 IR 251, 290.

861 [1982] 8 FSR 32. For an in-depth analysis of this case, see Casey, 1981 (3) DULJ 110.

> "The arguments against the use by the courts of the parliamentary history of a statute for the purpose of its construction must apply with equal force to the history of the adoption of an international convention by an international organisation. And so, if the courts can properly look at the legislative history of the adoption of an international convention for the purpose of ascertaining the meaning of the words used in it there would appear to be no reason in principle why in appropriate cases they should not be free when construing the words of a statute to obtain assistance from the history of its enactment by parliament. As I do not find persuasive the arguments against the use of the legislative history in the interpretation of statutes ... I believe I am entitled to seek assistance from the legislative history in appropriate cases ...".

In delimiting the circumstances in which recourse could be had by the Courts to parliamentary history, Costello J. did not venture beyond stating that such materials could be used in "appropriate cases". Some light was shed on the matter by Keane J. in *Wadda v Ireland*[862], a case concerning the interpretation of the Child Abduction and Enforcement of Court Orders Act 1991. Keane J. declined to have recourse to parliamentary debates on the basis that:

> "... there is no obscurity, ambiguity or potential absurdity in the relevant provisions which would justify the court having recourse to what was said in the Oireachtas in order to ascertain the legislative intention."[863].

In effect, Keane J. set down some limitations on the principle developed by Costello J. in *Wavin Pipes*. However, the issue would come again before Costello P. a few years later in *People (DPP) v McDonagh*[864], wherein he stated as follows:

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862 [1994] ILRM 126.
863 *ibid.*, at 137.
864 [2000] 1 ILRM 548.

> "It has long been established that a court may, as an aid to the construction of a statute or one of its provisions, consider its legislative history, a term which includes the legislative antecedents of the provisions under construction as well as pre-parliamentary material and parliamentary material relating to it. ... It was urged on the appellant's behalf that the court should not consider the legislative history of s.2 of the 1981 Act because the court can only do so when construing a section which is ambiguous, which this section clearly is not. I cannot agree with this submission; our courts do not and should not adopt such a rigid exclusionary rule (see for example *Bourke v. Attorney General* [1972] IR 36 in which the Supreme Court not only used the European Convention on Extradition to assist in the construction of the Extradition Act 1965 but also its *travaux preparatoires*) and it seems to me that the court should have regard to any aspect of the enactment's legislative history which may be of assistance."[865]

The significance of Costello P.'s statement is that he asserted that legislative history, including parliamentary debates, may be looked at by a court in construing a statute, even in circumstances where the meaning of the section being considered is in fact unambiguous.

The increasing complexity of legislation, some of which contains provisions which are ambiguous, which combines to make the task of the Courts in interpreting legislation increasingly difficult, were probably significant factors which influenced the decision of the Courts in this regard.

The decision of the Supreme Court in *Crilly v Farrington*[866] was significant, but particularly so as it signalled that Court's wish to row back on Costello P.'s acceptance of parliamentary debates as an aid to interpretation.

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865 *ibid.*, at 570.

866 [2001] 3 IR 251.

This case concerned the imposition of a charge under the Health Acts and how that charge was to be interpreted. The High Court had found that section 2 of the Health (Amendment) Act 1986 should be interpreted by reference to a Ministerial statement in the Dáil as to the nature of the charge contemplated under that section. The Supreme Court's consideration of the issues raised in this case gave rise to some enlightening *dicta* on the efficacy or otherwise of the Courts having resort to parliamentary debates when seeking to ascertain the meaning of legislation.[867]

Murray J. prefaced his consideration of this issue by stating:

> "Any proposal that the Courts should go behind the constitutionally expressed will of the Oireachtas so as to rely on the statement of one member of one house, whatever his or her status, must be approached with circumspection and constitutional prudence. To go behind a will so expressed so as to look at such statement and impute an intent expressed by one member to the Oireachtas as a whole may, and I use that word guardedly, risk compromising the legislative process and the role of other members of the Oireachtas."[868]

In emphasising the importance of the statute and not the words of parliamentarians pertaining to that statute, he candidly stated:

> "men, and women, may intend what they will; but it is only the laws which they enact which bind us."[869]

Having referred to the dicta[870] of Geoghegan J. at first instance, Murray J.[871]

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867 Murray J. aptly summarised the issue before the Court, in the following terms:"...whether as a matter of judicial policy recourse to debates in the Houses of the Oireachtas should be had generally or in certain circumstances as a useful, efficient and neutral aid to the interpretation of Acts enacted by the Oireachtas." [2001] 3 IR 251, 288 – 289.

868 *ibid.*, at 296.

869 *ibid.*, at 297.

870 Geoghegan J. at p. 265: The court would not be precluded from looking at such a ministerial

described this as "too broad a portal through which to allow parliamentary material to enter into consideration in the interpretation of Acts of the Oireachtas.". Having considered the practical implications of a decision by the Courts to place a general reliance on the content of parliamentary debates, Murray J. concluded[872] that "The disadvantages of permitting recourse to Ministerial statements greatly outweigh potential benefits.".

So concerned was he of the dangers of allowing parliamentary debates to be used as an aid, Murray J. was not even disposed to the use of such debates in limited circumstances – such as where the legislative provision in question was ambiguous.

Despite the clarity of the Supreme Court's views on the use of parliamentary debates in the interpretation of legislation, demands were made during the course of the Seanad Committee Stage debate on the Interpretation Bill 2000 to include a provision which would allow the Courts to resort to parliamentary debates when interpreting legislation. Proposals in this regard were rejected by the Minister of State on the basis that the Courts thinking in this area is still in the process of development.[873]

Leaving aside the Court's view as to the propriety of having resort to parliamentary debates as an aid to interpretation, the whole issue is best considered in the context of whether a policy change in this area is required, and whether such a change would somehow reduce the complexity of legislation.

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statement or explanation merely because the statutory provision was unambiguous using the traditional canons of construction. If the statement or explanation supports a construction of the section which would be just about open under ordinary rules of construction but which would not have occurred to the judge, he is entitled at least to take it into account. Putting it another way, counsel is entitled to produce a ministerial statement to the judge with a view to persuading the judge that the view he appears to be taking is wrong.".

871 *ibid.*, at 298.

872 *ibid.*, at 299.

873 180 *Seanad Debates* (29 June 2005).

However, it quickly becomes clear that if a change in policy on this matter were to be brought about, an approach which would permit the courts to rely on parliamentary debates in any circumstances would have grave implications for the legislative process and also, the accessibility of the statute book.

What then is the likely impact that such a policy change would have on the legislative process? If it were to become normal practice for the courts to rely on the debates of the Dáil and Seanad on a particular Bill, this would undoubtedly, fundamentally change the purpose of such debates. The Minister would perhaps feel obliged to respond to every issue and clarify every conceivable interpretation put to him by the opposition for fear that some absurd interpretation would be taken up by the Courts upon reading a record of the debates.

This possibility was alluded to by Murray J. in *Crilly*, where he felt that:

> "A minister or promoter of a bill may feel constrained when intervening in the cut and thrust of parliamentary debate to choose her or his words carefully for fear of giving rise to any misunderstanding as to her or his intent on a subsequent parsing of those words in a court of law."[874]

This, he later added, would "place an onus on other members of the Oireachtas to examine his or her spoken words for its implications as to the ultimate effect of a Bill when it becomes law. They would have to do so from a perspective which they have never had to do and which does not currently arise."[875]. He recognized that the Courts' reliance on parliamentary debates "could have implications for the conduct of the legislative process"[876].

It must be remembered that the purpose of a parliamentary debate on a

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874 [2001] 3 IR 251, 297.
875 *ibid.*, at 297 – 298.
876 *ibid.*, at 298.

particular piece of legislation is to openly scrutinize each provision. Such debates can often involve discussion and exploration of tangential, but related matters. If the purpose of the debate was to shift from its present purpose, to one where members focused on to the elucidation and clarification of the various provisions, this would have the effect of fundamentally altering the nature and purpose of such debates.

It is also true to say that much of the content of debates on legislation are highly political, especially the contributions from the opposition. They may have little interest in the meaning or merits of a particular provision, aside from using it as a basis for attacking the Minister or the Government. It is hardly appropriate for the Courts to be seeking to have recourse to parliamentary debates uttered in a context such as this.

If the Courts were to habitually have regard to parliamentary debates when faced with the interpretation of a statute, this would allow a Minister to present to the Oireachtas a fairly anodyne looking piece of legislation and to then attribute a materially different meaning to it by way or parliamentary explanation. This would in effect give rise to what I term "schizophrenic legislation", whereby the legislation would on its face appear to say one thing, while on the other hand, when read in conjunction with the parliamentary debates, it would have an altogether different meaning.

In addition to the impact which a policy change in this area would have on the legislative process, such a change would also have grave implications for the coherence of the statute book.

The task of interpretation would be far more involved – requiring the interpretation of parliamentary debates in addition to the interpretation of the Act. Ordinary people, and also lawyers, would have to read the debates of each House before they could regard themselves as being in a position to

form a view as to the meaning of a particular Act or section of an Act. Over many years, the Courts have devised a series of canons of construction and approaches towards the interpretation of legislation. Legislation is framed with certainty and clarity in mind. In contrast, debates are by their very nature, free and without limitations. Developing a series of canons of construction applicable to debates seems barely possibly and also impractical. The task of interpreting debates could also become problematic, particularly as statements made by the Minister or other members would have to be interpreted in the light of subsequent amendments or even subsequent conflicting statements. This point was recognised by Minister of State Kitt during the course of the Seanad Committee Stage debate on the Interpretation Bill 2000, where he said:

> "The courts examine Oireachtas debates but the danger of stipulating that they should do so is that it would make the law more imprecise."[877].

A further problem likely to arise would be, whether one would rely only on statements by the Minister or statements made by all Government Deputies, or statements made by all? To only consider those of the Minister would be at variance with Article 15.2.1 which states that the Oireachtas as a whole is the legislature. However, if you were to be obliged to consider the statements of all who contributed on a particular point, one could be faced with great conflict between what the members from the government side say regarding a particular provision, as opposed to what members of the opposition would say about the same provision.

A policy change such as the one being discussed would significantly alter the very meaning what constitutes our law. When a person asks today, what is the meaning of a particular piece of legislation, one can reasonably expect

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[877] 180 *Seanad Debates* Col. 2287 (29 June 2005).

that the meaning of an Act is to be found within its four corners, or its meaning can be garnered by looking a little further afield at amending Acts or even statutory instruments. So in plain terms, the meaning of the law if to be found by looking at the law.

However, if we were to move to a situation where parliamentary debates were to effectively supplement the terms of an Act, the information-value of a piece of legislation would be greatly reduced, as a reader would have to construe the statute in conjunction with the debates of the Houses. The meaning of the legislation would become very opaque, particularly if the drafter and the legislature had deliberately framed the legislation in vague terms with a view to having its meaning explained and expanded upon by the parliamentary debates.

It is clear that any advantages that would be brought to bear by the Courts being able to rely on the terms of parliamentary debates would be greatly outweighed by the disadvantages that would arise. The habitual reliance on parliamentary debates as an aid to interpretation could also have the effect of introducing uncertainty to a provision whose meaning was otherwise unambiguous. Also, it is important to be mindful of the fact that the number of situations in which the courts are faced with the task of interpreting an ambiguous provision remains very much the exception.

Rather than reducing the complexity of legislation, a change to the exclusionary rule which would see the use of parliamentary debates being used to supplement the terms of an Act would complicate legislation and, in turn, exacerbate the problems which are currently being experienced with an inaccessible statute book.

Legislation by Reference[878]

Legislation by reference is a device or approach sometimes used by drafters as a short-cut. In simple terms, legislation by reference is where earlier legislation, or a provision of it, is applied to a later enactment. This is achieved by expressly referring to a specific aspect of that earlier enactment, without actually repeating the text of which it is intended to incorporate or refer.

In practice, legislation by reference can effectively send the reader on a journey of exploration, some longer and more complex than others. This approach can require the reader to look to any one of four possible locations. First, readers of all Acts are required to consult the Interpretation Acts. Though it might not be viewed as such, the Interpretation Acts are in fact a form of legislation by reference. While the provisions of those Acts will rarely if ever rely on the provision of another enactment, it is the case that almost every other enactment relies on the Interpretation Acts – legislation by reference, in reverse! Almost without exception, this reliance will be without any express reference whatsoever to that fact.

Secondly, legislation by reference might refer the reader to another section within the Act being read. Thirdly, it might refer the reader beyond the four corners of the existing Act, to another Act. Fourthly, it may even refer the reader beyond the four corners of the statute book to other legal instruments.

Lord Thring, a great exponent of the four corners principle, articulated his opposition to legislation by reference:

> "Above all, referential legislation must, as far as possible, be avoided. It is not fair to a legislative assembly that they should, as a general

[878] See generally, *The Preparation of Legislation: Report of a Committee Appointed by the Lord President of the Council* (1975) (Cmnd. 6053) at p. 69; Thring, *Practical Legislation* (London, 1902) at p. 48 et. seq.; Bennion, *Statutory Interpretation: A Code* (4th ed., London, 2002) at p. 647 et. seq.; Thornton, *Legislative Drafting* (4th ed., London, 1996) at p. 68.

rule, have to look beyond the four corners of the Bill in order to comprehend its meaning."[879]

He condemned the practice, noting that it was designed to ease a Bill's passage through the Parliament and not designed to ease the plight of the reader:

"This is done with a view of facilitating the passing of an Act through Parliament by partially withdrawing from the consideration of the legislature the subject-matter with which it has to deal. Such a system is calculated to make Acts of Parliament unintelligible to the ordinary reader, who is, nevertheless, called upon to obey the law."[880]

There are many examples of legislation by reference on the Irish statute book. It is common for Acts to contain internal references or signposts. These are a form of legislation by reference, as they require the reader to search for the provision in question before the meaning of the first provision can be ascertained. Very often the device is resorted to in the case of definitions. An example of legislation by reference at its most basic level may be found in section 2 of the Taxi Regulation Act 2003 which defines the term "authorised person" by referring the reader to another section within the same Act.[881]

While internal references of that kind may be acceptable, references which require the reader to look beyond the immediate Act are clearly unhelpful for the reader. A typical example of legislation by reference of this kind can be found in section 2 of the Planning and Development Act 2000 which defines "seashore" as follows: "'seashore' has the same meaning as in the Foreshore

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879 Thring, *Practical Legislation* (London, 1902) at p. 8.

880 *ibid.*, at pp. 55 – 56. However, on the same subject, somewhat perplexingly, he seemed to deviate his position, as earlier in his text he stated that a mode of legislation "in which enactments in one Act refer to or incorporate wholly or partially another Act or Acts … is proper or improper according to the circumstances.".

881 "authorised person" has the meaning assigned to it by *section 49*.

Act, 1933".

However, a more extreme example may be found in section 22 of the Intoxicating Liquor Act 1960. This reference is particularly unhelpful, as in order for the reader to understand what the terms distillation and warrant mean[882], he or she must look to an Act of 1831. It would be very difficult for a reader today to locate an Act dating back to 1831, and in 1960, it would have been close to impossible.

Also at the extreme end of the scale, the negative effects of legislation by reference are compounded where the reliance on the device is repeated in the provisions which it is intended to refer to. A rare example of this is to be found in section 30(2) of the London Government Act 1899 which makes reference to section 81(7) of the Local Government Act 1894, which in turn refers to section 120 of the Local Government Act 1888, which then refer the reader to section 7 of the Superannuation Act 1859.

While references which require the reader to look beyond the four corners of the Act impose an undue burden on readers, references which require the reader to look beyond the statute book itself are totally unacceptable. An example of this may be found in section 3 of the Oireachtas (Allowances to Members) (Amendment) Act 1994 which defines the term "Leader of the House" by reference to the Standing Orders of Seanad Éireann.[883]

Legislation by reference can also have the effect of reducing an Act to being a mere outline of the law, devoid of any substantive law, but replete with references to other laws. In contrast with most other Acts, an Act of this nature fails to provide the reader with a clear picture of the law. The points of reference simply act as directional signposts on the reader's journey to

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[882] "distillation" has the meaning it has in the Act of 1831; "warrant" has the meaning it has in section 17 of the Act of 1831.

[883] "Leader of the House" has the meaning it has in the Standing Orders of Seanad Éireann.

ascertaining the state of the law on a given topic.

When taken to its extreme, legislation by reference can render a piece of legislation virtually meaningless when read on its own. Recourse to legislation by reference is not a recent development. It is an approach which has been in use for many years. The interpretation of provisions of the Elementary Education Act 1876 became the focus of Field J. in *R v Eaton*[884]. In interpreting a section of the Act, which purported to incorporate by reference "all enactments relating to guardians" Field J. said:

> "It is impossible to exaggerate the inconvenience of this mode of legislation. Instead of the legislature referring specifically to any previous Acts or sections of Acts which it proposes to incorporate in this section, the only incorporation is that of 'all enactments relating to guardians' rendering it necessary, therefore, for any tribunal required to construe the Act to search through every Act of Parliament in which guardians are referred to ..."[885]

In 1875, the UK Select Committee appointed to examine the possibility of improving the form and language of legislation commented that legislation by reference made legislation ambiguous and obscure to such an extent that judges were finding it difficult to ascertain its meaning.[886] The Select Committee were scathing in their criticism of the practice:

> "Among intentional imperfections [of drafting] we include one kind of referential legislation, viz., the method of legislating by means of a reference to parts of one or more Acts of Parliament, some of these repealed, some amended and others kept alive subject to the provisions contained in the amending Bill. This practice seems to be

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884 (1881) 8 QBD 155.

885 *ibid.*, at 160.

886 *Report of the Select Committee of the House of Commons, 1875* (Parl. Pap. 1875 C 208) at p. iv.

increasing, and when carried to excess makes the Statute so ambiguous, so obscure and so difficult of comprehension that the judges themselves can hardly find a meaning to it, and the great mass of people for whom, of course, it is primarily intended, are unable to follow it without legal advice. Such a mode of legislation has been described as a Chinese puzzle."[887]

The exact legal status of this means of effecting legislative change has been the subject of judicial consideration. In the case of *In Re Wood's Estate*[888] Lord Esher M.R. stated:

> "If a subsequent Act bring into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen, or printed in it ..."[889]

Clearly, the courts' imprimatur for the practice of legislation by reference has undoubtedly secured its lengthy lifespan. If the Courts had cast doubt on the practice, or struck it down in its infancy, the statute book would be suffering from one less ailment.

Legislation by reference is yet another factor which has contributed to the inaccessibility of our legislation. It requires the reader to search for that earlier piece of legislation in order to ascertain the meaning of the term used. This approach serves to confuse and, in many cases, isolate readers. It represents poor drafting practice and impedes both the reader and also impedes the drafter seeking to put together a discrete consolidation.

Referential legislation also gives rise to problems when the legislation referred

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887 *ibid.*
888 (1886) 31 Ch.D 607.
889 *ibid.*, at 615.

to is subsequently repealed. In those circumstances, the Act which makes reference to the repealed legislation will itself have to be amended, or at least adapted. The incidence of such references could be substantial, leaving very many Acts with a referential hole in them. This is most unsatisfactory to say the least.

In spite of its palpable failings, legislation by reference does have its advocates. The principal justification for employing this device appears to be the avoidance of duplication. Drafters would contend that legislation by reference reduces the length of an Act. Undisputedly, it is bad legislative practice to deliberately repeat substantive law which is already in place. To do so would be confusing and unhelpful. However, this is not to say that peripheral aspects of legislation, such as definitions, should not be repeated for pure convenience or to assist the reader.

As with the incidences of legislation dealing with unconnected topics, legislation by reference is yet another symptom of the pressures on parliamentary time, coupled with the political desire to avoid treading old ground, which could prove controversial. Some would purport to justify the mode of legislation by reference on the basis that it ensures that the legislature do not have to spend time discussing principles or details which are already provided for in the statute book. This view was shared by Craies, who believed that legislation by reference is usually the outcome of "the foibles of Parliament, and is excused on the ground that it lessens political difficulties and simplifies the process of getting Bills through committee by lessening the area for amendment.".[890]

Legislation by reference may well be justifiable in circumstances where a well ordered, codified or at least consolidated statute book is maintained in an up to date state. It is not suited in jurisdictions whose legislation consists of layer

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[890] Edgar, *Craies on Statute Law* (7th ed., London, 1971) at p. 29.

upon layer of amendments, coupled with repeals, applications and dis-applications. It therefore follows that legislation by reference has no place whatsoever in the Irish Statute Book.

Unconnected Topics Addressed in One Enactment

It is not uncommon, particularly in recent years, to find an Act that addresses subjects which are well beyond the traditional scope of the Act. The statute book does have some semblance of order in that topics tend to be addressed in discrete sets of Acts. For example, all issues relating to guns, their licensing, use, etc. will be found in the Firearms Act 1929, as amended by a series of Firearms (Amendment) Acts.

This approach has meant that, without having recourse to the Chronological Tables, a person who reads the Act of 1929 along with the subsequent amendment Acts could reasonably believe that he or she is examining the law relating to firearms in its up to date state. However, this presumption has been weakened in recent years by the practice of lumping different topics together in one enactment. An example in point is section 30 of the Criminal Justice Bill 2004, which makes important changes to the Firearms Act 1929. On the enactment of the 2004 Bill, the reader of the Firearms Acts would now be wrong in thinking that those Acts resembled some form of code containing all the details he or she needed to know.

A further example of unconnected topics or issues being addressed inappropriately in one piece of legislation arises in relation to the Vocational Education (Amendment) Act 2001. Aside from making changes to earlier related Acts, the Vocational Education (Amendment) Act 2001 makes a series of miscellaneous and unconnected amendments to the Education Act 1998; the Regional Technical Colleges Act 1992 and the Dublin Institute of Technology Act 1992. A perhaps more extreme example is to be found in the

Civil Liability and Courts Act 2004, sections 50 to 53 which inappropriately make changes to the regime for imposing rates on property.

In addition to the problems caused by addressing unconnected topics in one enactment, ambiguity is but another ailment from which our statute book suffers.

Ambiguity

Ambiguity in the context of legislation can be categorised as follows:

1. Ambiguity as to whether a statute applies to a particular set of circumstances;
2. Ambiguity as to the meaning of a statute.

The former is self-explanatory and theoretically is likely to arise even where a statute is exhaustive. This is because of the fact that it is not always possible for a piece of legislation to cover every particular set of circumstances. The Court's role in these instances is to make a finding of fact regarding the circumstances, then to interpret the legislation, and having done so, to determine whether the circumstances of the matter before it, fall within the terms of the statute.

However, ambiguity as to the meaning of a statute, or to put it another way, ambiguity arising from the face of the statute, is of particular interest in the context of examining the coherence of the statute book. It can occur for a number of reasons.

Ambiguity can arise as a result of a desire to build-in a degree of flexibility into a statute. For example, as compared with a provision which is tightly framed, a provision drafted in general terms is more likely to be capable of covering unforeseen developments or circumstances that arise in the future. This

desire to cover unforeseen circumstances, (described earlier as the requirement to strive for timelessness) can lead to ambiguity. Unintentionally or not, bestowing a provision with fluidity risks giving rise to ambiguity.

Ambiguity can also arise purely as a result of poor drafting. This can arise from a careless choice of words, or it can arise from the failure of the drafter to fully think-through the provision or to foresee and provide for certain matters. And so it may be said that there is a thin line between a drafter's error, and ambiguity created by the drafter.

On occasion, the presence of ambiguity can be at the behest of the Minister, who may feel that a specific issue should be left vague. An example of this is the deliberate decision on the part of the Minister not to provide a definition of the term "political offence" in the Extradition Act 1965. When the Extradition Bill 1965 was being debated in the Houses of the Oireachtas, the absence of a definition was of concern to members of the opposition, one of whom expressed their concern in the following terms:

> "The question of defining what is a political offence and of deciding on it is one which should be taken by the Government rather than by an individual Minister. I am quite sure the Minister for Justice is prepared to shoulder the responsibility, if it is put on him, and I know we have a system of collective responsibility, but under the Bill as it stands, it is open to the Minister for Justice, whoever he may be, to give his own ruling, to make up his own mind without consultation with the Government or anyone else. It would be preferable that the question of deciding what is a political offence or whether an offence is a political offence should be for the Government rather than the Minister."[891]

The Minister explained that the omission of a definition was deliberate and he

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[891] 215 *Dáil Debates* Col. 1890 (20 May 1965) Mr. M.J. O'Higgins.

sought to justify this decision on the following basis:

> "On the question of political offence, raised by all three speakers, I feel that it is much better to leave this very sensitive matter open rather than seek at this stage when legislating for many years ahead to tie down or pin down an exact definition which may not have relevance to future circumstances and that on this occasion the phrase 'political offence' itself, subject as it is to the ultimate interpretation here, in our circumstances, by the High Court, is the best way to meet it and, indeed, this was the view also of the other countries which subscribed to the European Convention. It is significant that they also decided unanimously not to come down on the side of a specific detailed definition and left the definition in Article 3 as an open one, as we have left it in this Bill."[892]

The Minister's decision in this matter was to lead to considerable confusion as to the meaning of the phrase, which ultimately led to its meaning having to be determined by the Supreme Court in *Bourke v Attorney General*[893].

Ambiguity may be desired by a Minister if he or she fears that a debate on a particular point is likely to become controversial or receive undesired attention. Similarly, ambiguity may arise as a result of the insistence of the opposition who have set themselves against the Minister's position on a particular point. Rather than concede the point, as a compromise, the Minister may well instruct his officials to come up with a more anodyne wording so as to address the opposition's concerns.

There are very many examples of pieces of legislation, the meaning of which seemed perfectly clear to the Minister and even members of the opposition when it was being debated in the Houses of the Oireachtas, and yet gave rise

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892 *ibid.*, at Col. 1898 - 1899 (20 May 1965) Mr. B. Lenihan.

893 [1972] IR 36.

to disagreement over its interpretation on its application.

One such example is section 53 of the Education Act 1998[894] which stated, in what appeared to be very clear terms, that notwithstanding any other enactment, the Minister could refuse to release certain information. The particular provision was inserted at Report Stage in the Dáil. While some debate took place on the meaning of the provision, no aspect of the discussion focussed on the relationship or likely interaction between section 53 and the provisions of the Freedom of Information Act 1997. It may have been clear to Deputies that the effect of section 53 was to supersede the 1997 Act in the specific circumstances provided for. On the other hand, it may have been clear to other Deputies that section 53 was to be read in conjunction with the 1997 Act. In the absence of debate on that particular point, it is not possible to reach a definitive conclusion on the matter. However, the matter did come before the Supreme Court in *Sheedy v Information Commissioner*[895].

In that case, it was argued on behalf of the appellant that the introductory words of section 53 – "Notwithstanding any other enactment" operated to disapply the provisions of the Freedom of Information Act 1997 to the information being sought by the second Notice Party. Fennelly J. (dissenting) was of the view that in enacting the 1998 Act, the Oireachtas could not have intended such a result as contended by counsel for the appellant.[896]

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[894] 53.—Notwithstanding any other enactment the Minister may— (a) refuse access to any information which would enable the compilation of information (that is not otherwise available to the general public) in relation to the comparative performance of schools in respect of the academic achievement of students enrolled therein, including, without prejudice to the generality of the foregoing—(i) the overall results in any year of students in a particular school in an examination, or(ii) the comparative overall results in any year of students in different schools in an examination,and (b) refuse access to information relating to the identity of examiners.

[895] Supreme Court, unreported, 30 May 2005.

[896] It should be noted that one of Fennelly J.'s reasons for reaching this conclusion is somewhat skewed. He stated (at p. 6): "It [the 1997 Act] was also intended, except for those restrictions and limitations contained within it, to have universal application ...". What Fennelly J. appears to be saying is that the 1997 Act ought to be interpreted as though the only limitations to be placed on the freedom of information are those contained within the four corners of the 1997 Act, and that accordingly, the 1997 Act ought to be interpreted as matters stood at the time of its enactment.

Focussing on the use of the word "notwithstanding", Kearns J. had this to say:

> "The use of a 'notwithstanding' clause is a convenient form of drafting which skirts or avoids textual amendments to existing legislation but nonetheless operates by implication to bring about amendments or repeals of such legislation. ... Such a clause can clearly operate to nullify or override other provisions of the same piece of legislation or inconsistent provisions contained in previous legislation. Because of the 'notwithstanding' clause in s. 53 it seems to me impossible to construe the Acts of 1997 and 1998 together, or as forming part of a continuum. The word 'notwithstanding' is in this instance a prepositional sentence-starter which unequivocally means, and can only mean, 'despite' or 'in spite of' any other enactment. It underlines in the clearest possible manner the free-standing nature of the provision thereafter set out in s.53."[897]

He added that "the court cannot force a construction on s. 53 of the Act of 1998 in some way so as to yield up an interpretation which fits the aims and policy of the Act of 1997 when there is no ambiguity whatsoever in the opening words of s. 53.". He went on to note that section 53 may well have been inserted in the Act of 1998 with the unspoken intention of "batting off" the application of the Freedom of Information Act 1997.

The circumstances surrounding Intoxicating Liquor Act 2003 are an example of the meaning of a provision appearing to be clear to the Minister, and not intended to have the effect it was subsequently found to have. The problematic provision was contained in 14(1) of the Intoxicating Liquor Act

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However to make such an assertion is clearly wrong as it fails to acknowledge the fact that the Education Act 1998 post-dated the 1997 Act, as indeed did the Freedom of Information (Amendment) Act 2003.

[897] At p. 12.

2003[898] which was intended to prevent children from being in a public house after 9pm. However, the Act also had the unintended effect of imposing a ban on teenage discos. Despite the Minister's insistence that the Act did not have, and was not intended to have this effect[899], in view of the imminence of prosecutions on foot of that provision, the Minister moved to clarify the earlier provision through the enactment of section 1(1) of the Intoxicating Liquor Act 2004[900].

Errors Arising in the Statute Book[901]

The system of effecting legislative change is so complex and contrived that it inevitably gives rise to loopholes and errors. Errors in a statute which give rise to a loophole have traditionally been described as allowing one to "drive a coach and four" through an Act. The types of errors to be found in legislation can range from gaping shortcomings in the policy; to errors arising from amendments; to technical drafting errors; to typing and printing errors.

Shortcomings in Policy

Because of the depth of thinking which goes into it, coupled with the unique approach and mindset of the legislative drafter, the drafting process can often highlight weaknesses and gaps in policy. This allows the gaps to be addressed by the instructing officials so that a watertight draft can be produced. However, on occasion, shortcomings in policy are missed by the drafter's sharp eye. One such example of recent years gave rise to

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[898] "(1) The holder of a licence of licensed premises shall not, subject to subsections (2) to (4) of this section, allow a person under the age of 18 years to be in the bar of the licensed premises at any time.".

[899] The Minister went so far as to issue a statement reiterating his view of the law, stating that his view had been affirmed by the Attorney General (10 September 2004).

[900] "(1) For the purposes of section 34 of the Intoxicating Liquor Act 1988 (in this section referred to as the 'Act of 1988'), it shall not be unlawful for the holder of a licence of licensed premises to allow a person under the age of 18 years to be on the licensed premises or any part of those premises at a time when—(a) intoxicating liquor is not being sold, supplied or consumed on the premises or, as the case may be, that part, and(b) physical access to intoxicating liquor on those premises or, as the case may be, that part is securely prevented.".

[901] See generally, Hogan & Whyte, *Kelly: The Irish Constitution* (Dublin, 4th ed., 2003) para. 6.2.299 et. seq.; Ilbert, *Legislative Methods and Forms* (Oxford, 1901) at pp. 7 & 119; Edgar, *Craies on Statute Law* (7th ed., London, 1971) at p. 514 et. seq.

considerable controversy[902] surrounding the Government's attempts, through the Electoral (Amendment) Bill 2001, to introduce a ban on the taking and publication of opinion polls in the seven days before a general election.

When the Electoral (Amendment) Bill 2001 was being debated in the Dáil, the Minister of State at the Department of the Environment accepted in principle, an opposition amendment, tabled by Deputy Olivia Mitchell, which proposed a ban on opinion polls 14 days prior to polling day. This proposal was subsequently inserted, into the Bill, as section 59 (a seven day ban), at Report Stage in the Dáil. Section 59 proposed to impose a ban on opinion polls in the following terms:

> "(3) A person shall not carry out or cause to be carried out an opinion poll on any of the 7 days immediately preceding the polling day at an election or referendum.
> (4) A person shall not publish or cause to be published on any of the 7 days mentioned in subsection (3) the results of an opinion poll, being a poll that –
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> (a) has been carried out on any of those days, or
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> (b) has been carried out before the first of those days and the results of which have not already been published before that time.".

On Report Stage in the Seanad, Senator Shane Ross led the challenge to the new section 59 on the basis that a poll taken up to eight days before an election could in fact be published on polling day itself, thus driving a coach and four through the very purpose of the section. Senator Ross explained:

> "The Bill states there should be no polls taken for seven days beforehand. Will the Minister of State indicate where that will leave us

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902 "Politicos failed to notice loophole that Ross found", *Sunday Business Post,* 15 July 2001; "Possible loophole delays vote in Seanad", *Irish Times,* 11 July 2001.

on polling day? ... What I am envisaging is that eight days beforehand a poll could be taken on a scientific basis with the express purpose of the results being read out on the news at midnight on the night before polling day or taken one or two hours after midnight on the night before polling day and the results read on the news at 8 a.m. on polling day. That would have a bigger influence than the results of any poll taken just beforehand because it would inform the people about the state of opinion as they go to the polls. ... I understand the references in the Bill to timing are all to do with the preceding seven days. What is to stop a polling organisation breaching this by taking a much more up-to-date poll and publishing the results of an eight day old poll? What will happen to it if it publishes a poll taken in the seven forbidden days before polling day?"[903]

In reversing the Government's decision to proceed with the implementation of a ban on opinion polls, in the Seanad[904], the Minister for Defence Michael Smith proposed the deletion of the controversial section 59:

"The amendment relating to section 59 was tabled and passed in the Dáil in response to a Committee Stage amendment from the Fine Gael spokesperson and was supported by the Labour party spokesperson. The amendment concerned the taking and publishing of opinion polls within seven days of polling day. ... The Government proceeded initially on the basis of all-party support for the prohibition. As this is no longer forthcoming, an amendment will be proposed to delete section 59."[905].

A further example of a policy error relates to an experience in the U.K., where the Bankruptcy Consolidation Act set a date for bringing the Act into force in

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903 167 *Seanad Debates* Col. 1323 – 1324 (10 July 2001).
904 167 *Seanad Debates* Col. 1434 (11 July 2001).
905 *ibid.*.

the year following enactment. However, on its passing the Act had the effect of repealing all previous related Acts. Consequently, this left a substantial hole in that area of law!

Transitional and savings provisions, or rather their absence have given rise to controversy and inevitably, judicial comment.[906] According to Bennion[907], the absence of transitional provisions in the Offences Against the State (Amendment) Act 1998, passed to enable arrests relating to the Omagh bomb to be made, meant that that no arrests could be made on the basis that the drafter of the Bill had "overlooked the need to give the Act some retrospective effect..."[908].

Errors Resulting From the Acceptance of Amendments

Amendments are an inherent part of the legislative process. With sections being taken out and sections being added in, the whole Act can be knocked off balance. Cross-references can very easily become invalid. The acceptance of opposition amendments in the heat of parliamentary debate is generally unwise. Proposed amendments to a Bill are best considered following any parliamentary exchanges. The acceptance of amendments without adequate consideration can give rise to errors.

The error in the Artisans and Labourers' Dwellings Act 1875, is most likely to have arisen as a result of an amendment. Section 22(3) required that loans for the purpose of the Act should be secured by a mortgage in accord with the form as provided in the Third Schedule to the Act. However, the Act did not contain a Third Schedule or any Schedule setting out the required information. A later Act subsequently declared that a mistake had occurred and clarified the matter.

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906 See Chapter 7 where transitional and saving provisions were discussed.

907 Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (Oxford, 2001). See also, *Sunday Times,* 6 September 1998.

908 *ibid.,* at p. 69.

Amendments made to the Judicature Act 1873 in its passage through the House of Commons are reputed to have caused a serious error regarding the number of judges, which had to be corrected by a further Act in 1875.[909]

Ilbert's reasoning as to why legislative amendments become the subject of contention and inevitably require the attention of the Courts is because they take the form of exceptions from rules which themselves were indefinite or imperfectly formulated. He argues that:

> "If the rules were formulated, their statutory modifications would fit more easily and naturally into the general system, instead of being awkward excrescences, which tend to embarrass the Courts in their application and development of general principles, and are consequently regarded with jealousy and suspicion by the judges."[910]

Finding errors in legislation is not the preserve of the judiciary. As long as Bills are drafted, there will be oversights and omissions. It is an inescapable reality which reflects not on the drafter, but rather on the mammoth task that is the encapsulating of policy in legislation.

Some of the oversights, if nothing else, are entertaining. For example, an old UK Act[911] provided that penalties under the Act were to be apportioned as follows – half to the informer and half to the poor of the parish. However, the only penalty imposed by the Act was transportation for 14 years!

Drafting Errors

For as long as we enact legislation, drafting errors and oversights, however slight, will appear. While some errors can arise through amendments made in the course of the legislative process, drafting errors can be in the Bill from its

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909 Edgar, *Craies on Statute Law* (7th ed., London, 1971) at p. 28.
910 Ilbert, *Legislative Methods and Forms* (Oxford, 1901) at p. 160.
911 52 Geo. 3. c. 146.

inception.

Loopholes and errors can arise from overdrafting. Legislative provisions which seek to list every item or deal with every circumstance are almost certainly destined to be troublesome. This is because it is virtually impossible to be exhaustive and under the maxim *expressio unius est exclusio alterius*, an accidental omission is bound to be interpreted as a deliberate exclusion.

The Treasury Minute which established the Office of the Parliamentary Counsel to the Treasury in the UK in 1869 required Parliamentary Counsel to advise on all cases before the Courts involving legislation drafted by him. This is in stark contrast to the position in Ireland, where today the drafter of a piece of legislation which is before the Courts is not consulted by his peers for his or her view on the legislation, and is certainly never asked to give his or her opinion to the Courts.

The Courts have shown a reluctance to involve themselves in rectifying errors which are brought to their attention.[912] The practice of remedying errors could be regarded by some as crossing the line between the legislature and the judiciary and quite rightly, the Courts are anxious not to tread on that line.

In general, the Courts are not permitted to change the language of legislation in order to give it a particular meaning, and this is the case even in circumstances where the language of the legislation is incapable of conveying a meaning and where it is apparent that a mistake has been made.

In *Richards v McBride*[913], Grove J. warned against the dangers of making a general assumption of there being an error in legislation:

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[912] See, Hogan & Whyte, *Kelly: The Irish Constitution* (Dublin, 4th ed., 2003) paras. 3.2.94; 4.2.60; and, 7.2.61.

[913] (1881) 8 QBD 119, 122.

> "... we cannot assume a mistake in an Act of Parliament. If we did so, we should render many Acts uncertain by putting different constructions on them according to our original conjectures."

Grove J. firmly believed that it was for the legislature, and not the courts to remedy any errors in legislation:

> "The draftsman of the Act may have made a mistake. If so, the remedy is for the legislature to amend it."[914].

This view was echoed ten years later by Lord Halsbury L.C. in *Income Tax Commissioners v Pemsel*[915], where he stated:

> "That, in fact, the language of an Act of Parliament may be founded on some mistake, and that words may be clumsily used, I do not deny. But I do not think it is competent to any court to proceed upon the assumption that the legislature has made a mistake. Whatever the real fact may be, I think a court of law is bound to proceed upon the assumption that the legislature is an ideal person that does not make mistakes."

In more recent years this issue has come before the Irish Courts a number of times. In *The State (Murphy) v Johnston*[916], the Supreme Court were effectively asked to rectify a drafting error in a statute. Section 23 of the Road Traffic (Amendment) Act 1978, dealing with driving offences, incorrectly referred to "Part III of the Act of 1968", which dealt with driving licences. Despite having been urged to find otherwise, O'Higgins C.J. was unfaltering in finding as follows:

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914 *ibid.*
915 [1891] AC 531, 549.
916 [1983] IR 235.

> "Whatever the reason for the apparent error may be, the reference in s. 23 sub-ss. 1 and 2, of the Act of 1978 is to 'Part III of the Act of 1968.' That reference is clear and unambiguous. To read it as being something other than it is would be, in effect, to amend the sub-sections. That is not within the competence of the Courts and cannot be done."[917].

Griffin J. was of the same view, and his conviction in this matter was underpinned by the separation of powers doctrine:

> "It is for the Oireachtas alone to make laws; the function of the Courts is to interpret and construe them. Under the common law, broad rules of construction of statutes were laid down. These still apply, subject to the reservation that we now operate under a written Constitution. Under these rules, the Courts should not proceed on the assumption that the legislature has made a mistake, as there is 'a strong presumption' that the legislature does not make mistakes. However, mistakes do occasionally occur in printing or in drafting and, if it is possible, the words of a statute must be construed so as to give a sensible meaning to them *ut res magis valeat quam pereat*."[918].

However, he went on to say that to substitute one phrase for another, as the Court was being asked to do, would "amount to amending s. 23 of the Act of 1978 (and not interpreting or construing it) which is a function reserved solely to the Oireachtas. Therefore, any such correction of the error in s. 23 of the Act of 1978 would require intervention by the Oireachtas and not by the

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[917] *ibid.*, at 239. O'Higgins CJ went on to state that this error should be rectified immediately: "I wish to add that in my view so clear an error in the text of a statute should not be permitted to remain. It may be that in relation to other prosecutions the existence of this error may prove an insurmountable obstacle. I express the hope that immediate amending legislation be introduced and passed." (at p. 240). Despite this, the provision was never rectified, but the entire 1978 Act was repealed more than ten years later by the Road Traffic 1994.

[918] *ibid.*, at 240.

Courts."[919].

A similar issue arose in *The State (Rollinson) v Kelly*[920], which also turned on whether the Courts could rectify an error in a statute which formed the basis of a successful prosecution against a bookmaker. The provision in question was regulation 29 of the Betting Duty (Certified Returns) Regulations 1934 which stated:

> "Not later than the Thursday next following the week ending Saturday to which the daily returns required by number 27 of these regulations relate, the bookmaker shall forward to the Collector of Customs and Excise ..."

The reference to regulation 27 gave rise to contention, as regulation 27 was not concerned with making daily returns. Instead, it was argued, regulation 26 was a more appropriate reference. While agreeing that this clearly was an error, O'Higgins C.J. felt that he did not have the jurisdiction to rectify it:

> "While it may be conceded that the reference in regulation 29 to 'number 27' was intended to be a reference to 'number 26', this error cannot be ignored in a penal regulation and the result is that the regulation is inoperative."[921]

He stated that as regulation 29 imposed an obligation, the breach of which gives rise to the commission of an offence, it must be strictly construed. He added:

> "In my view, it would not be possible to ignore the obvious error in regulation 29; to attempt to do so would be to attempt something which

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919 ibid.
920 [1984] I.R. 248.
921 *ibid.*, at 254.

is not within the competence of the Courts. In my view, as it stands, so it must be read."[922].

However, this view was not shared by all members of the Court. Henchy J. dissented and, with reference to the argument that the error was real and material, he found:

> "This submission has a certain superficial and technical attraction but, like Mr Justice Gannon [in the High court], I consider that it lacks substance. ... I find this objection to the validity of the summonses to be without force."[923].

The facts of this case bear some resemblance to the controversy which surrounded the enactment of the State Airports Act 2004. The State Airports Bill began its life in the Dáil on the 24 June 2004 and it was passed by both Houses, less than a month later, on 14th July. The Bill was introduced with very little notice and made its way through the Houses with some speed. On that basis, it seems reasonable to infer that the Bill was drafted within less than adequate time.

It was contended by the opposition that there was an error in section 12(2) of the Bill, part of which provided: "... the terms and conditions of service and of remuneration of the chief Executive must be determined in accordance with section 29(4) of the Act of 1998.". However, section 6(4) and the Schedule amended section 29 of the Act of 1998 in such a way that it is section 29(3) of the Act of 1998 (as amended) that addresses terms, conditions and remuneration and not 29(4) as indicated.

When the Bill reached the Seanad, a number of opposition Senators highlighted a possible error in the Bill. Senator Brian Hayes raised it on the

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922 *ibid.*, at 255.
923 *ibid.*, at 258.

Order of Business:

> "I understand from one of the newspapers that a defect identified in the State Airports Bill 2004 requires amendment. Does the Leader have information from the erstwhile Minister for Transport on whether he intends to introduce the amendment in this House tomorrow or if he will wait to deal with the matter until the Bill returns to the Dáil in the autumn? What is the Government's intention in terms of resolving the defect outlined in yesterday's newspapers?"[924]

This concern was echoed by Senator O'Meara, who expressed some unease:

> "It has now emerged that there are drafting and technical errors in the Bill so it is clear that even if we pass this legislation over the next two days the Dáil will have to reconsider it in the autumn. The question once again arises: why are we here? The Leader herself pointed out publicly over the weekend that this is a rushed Bill and her description of it has proved to be true. It is also premature and there are serious difficulties with it."[925].

In his second stage speech, the Minister responded to the contention that the Bill was flawed in some way:

> "I would like at this early point to clarify a technical issue on the drafting of the Bill which was raised in press reports this morning. Aer Rianta wrote to me concerning section 12(12), querying whether there might be a drafting error in this subsection. I confirm to Seanad Éireann that the references in this section are in order and that there is no drafting issue. I understand this matter is being raised for discussion on Committee Stage tomorrow, where I can give a fuller explanation.

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924 177 *Seanad Debates* Col. 1169 (13 July 2004).

925 *ibid.*, at Col. 1171.

> However, I am assured by the Attorney General's office and by the legal advisers to the Department of Transport that there is no error and no drafting issues have to be dealt with in this legislation."[926]

Senator Fergal Browne concluded that the Minister would not concede that there was an error as this would have necessitated the recall of the Dáil:

> "My party will table an amendment tomorrow in this regard and, if the Minister accepts it, the Bill will have to go back to the Dáil. Obviously this will be impossible because the Dáil will be in recess until 29 September. If the amendment is accepted, will the Minister ensure the Dáil is recalled during the recess or will he wait until the end of September to deal with the issue?"[927]

Despite this challenge to the Minister, the Minister, at Committee Stage was adamant that the Bill was not flawed:

> "Amendment No. 43 is not necessary because the drafting in section 12(12) is in order. The reference to section 29(4) of the 1998 Act is correct as this refers to the position before 'the Dublin appointed day'. The new text of section 29, as inserted by paragraph 14 of the Schedule, only applies after that day so, therefore, that matter is correct."[928]

The Government are not always unwilling to concede that an error has been made in legislation. The effect of section 14(1) of the Intoxicating Liquor Act 2003, discussed previously, was to prevent children from being in a public house after 9pm. The Act also had the unintended effect of imposing a ban on teenage discos. The controversial provision was as follows:

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926 *ibid.*, at Col. 1183.
927 *ibid.*, at Col. 1194.
928 177 *Seanad Debates* Col. 1338 (14 July 2004).

> "(1) The holder of a licence of licensed premises shall not, subject to subsections (2) to (4) of this section, allow a person under the age of 18 years to be in the bar of the licensed premises at any time."

The prospect of prosecutions coupled with public disquiet across the country led the Government to concede that the legislation needed to be amended to as to remove any doubts. This came in the form of the Intoxicating Liquor Act 2004, section 1(1) of which provided:

> "(1) For the purposes of section 34 of the Intoxicating Liquor Act 1988 (in this section referred to as the 'Act of 1988'), it shall not be unlawful for the holder of a licence of licensed premises to allow a person under the age of 18 years to be on the licensed premises or any part of those premises at a time when—
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> (a) intoxicating liquor is not being sold, supplied or consumed on the premises or, as the case may be, that part, and
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> (b) physical access to intoxicating liquor on those premises or, as the case may be, that part is securely prevented."

A similar unintended effect arose as a result of section 21(1) of the Road Traffic Act 2002. This section provided:

> "(1) The onus of establishing prima facie proof of a constituent of an offence committed after the commencement of this section (including the speed at which a person, whether the accused or another person, was driving) ... may be discharged by tendering evidence from which that constituent can be inferred of measurements or other indications which were given by electronic or other apparatus (including a camera) and are contained in a record produced by that apparatus, ..."

In dealing with speeding cases, some District Judges were interpreting this section in a mandatory fashion – meaning that where no permanent record of the speed was produced, then the prosecution could not proceed. In contrast, other judges were interpreting the section more liberally, in the belief that it was permissive. In order to resolve the ambiguity, the Government addressed this issue in section 15 of the Road Traffic Act 2004 which provided that evidence of the speed could be given by measurements or other indications read from, but not necessarily produced by, the machine.

Section 3 of the Health (Nursing Homes) Act 1990, contained three subsections which prohibited a person from carrying out certain acts, yet despite this, nowhere did the Act provide that to act in contravention of those three prohibitions would give rise to the commission of an offence. Accordingly, no consequences would have flowed from the breach of any of those statutory prohibitions. In recognition of that fact, the legislature enacted the Health (Amendment) (No. 3) Act 1996. It added a further subsection to section 3 of the 1990 Act which provided that a contravention of any of the three subsections would constitute an offence.

A relatively recent example of errors being rectified may be found in the British-Irish Agreement (Amendment) Act 2005, the entirety of which was enacted to remedy a "possible" defect in the British-Irish Agreement Act 1999. The reputed error arose as a result of the reference to an amending provision[929], rather than the original provision[930] – an error which indisputably arose as a direct result of the poor state of the statute book.

The Courts and Court Officers Act 1995 is yet a further example of an Act which contains an error. Part of the Long Title states that one of the aims of the Act is "to prohibit the wearing of wigs by barristers or solicitors in court", when this is clearly not one of the intentions of the Act. However, this error

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929 Landlord and Tenant Act 1980.

930 Landlord and Tenant (Ground Rents) (No. 2) Act 1978.

seems to have arisen as a result of an oversight. The Courts and Court Officers Act 1995 has its origins in a Private Members Bill introduced by Michael McDowell T.D., which was accepted by the Rainbow Government. The drafter and the legislature failed to ensure that the long title was amended so as to accurately reflect the content of the Bill upon its enactment.

Typographical Errors

A further type of error which can be found mainly in Bills are typographical errors. Errors of this nature must be distinguished from the type of errors which are now inherent in our electronic version of the Irish Statute Book – both online and on cd-rom. The transfer of the statute book onto cd and website format gave rise to many typographical errors which were not intrinsic in the printed version. These errors most likely arose when the original texts were being scanned in the transmogrification process.[931]

Due to the frequency at which the text of a Bill has to be re-keyed, the opportunities for the occurrence of such errors are considerable. For example, errors of this kind can occur when the Bill is being typed at the O.P.C., it could also arise in the Bills Office, and it could also occur at the printing stage. However, due to the level of proof reading to which each bill is subjected, most errors are caught before the Bill is published. Even if an error appears in the Bill as published, the scrutiny to which each Bill is subjected to during the legislative process will invariably bring any such errors to light.

An example of this occurred in relation to the Criminal Justice (Terrorist Offences) Bill 2002, where during the course of the Committee Stage debate on the Bill in the Seanad, a member of the opposition tabled an amendment to replace the phrase "terrorist-inter activity" with "terrorist linked activity". By way of response to the amendment, the Minister explained:

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[931] See, Editorial, "Errors in Statute Book CD-ROM" 12 (2001) *I.L.T* 186; Donaghy "Laptop Law Judged Not to Be the Whole Truth" *Irish Independent,* 4 August 2001.

> "The word 'inter' will be removed because it is a printing error. ... Therefore, a formal amendment is not necessary. ... [T]his is a totally haphazard printer's error. The phrase should be 'terrorist activity' rather than 'terrorist-linked activity'."[932]

Following the adoption of the In-Vision package upon which E-Government is based, and also the Parliamentary Workbench system, the opportunities for errors of this kind have been greatly diminished. Under the present system, the use of the uniform XML computer language has ensured that all the parties who interact with a Bill - from its initial draft to publication – view and use the same document in the same XML format, thus removing the need to repeatedly re-key the document.

NON-GOVERNMENTAL INFLUENCE ON THE STATUTE BOOK

Successive Governments bear a substantial degree of responsibility for the state of the statute book. It is they who persisted in the system of effecting legislative change and the inadequate arrangements for the publication of the statute book, both of which have had such a lasting and negative effect on the state of the statute book. Even with the limited opportunities which the opposition have to make a contribution to the legislative process, they are invariably neutered by the weight of a Government majority. As a result, the contribution of members of the opposition to the legislative process, and ultimately the state of the statute book, is neither as valued or palpable as it might otherwise be.

Private Bills

[932] 179 *Seanad Debates* Col. 372 – 373.

A Private Act is one which changes the law in a very limited and specific way purely for the benefit of its promoter. For example, the Royal College of Surgeons in Ireland (Charters Amendment) Act 2003 was enacted to amend the Charters or letters patent and statute under which the Royal College of Surgeons had been incorporated. In Ireland, the enactment of a Private Act is a relatively rare occurrence, the most recent one having been enacted in 2003. In the ten years since 1995, only two Private Bills have been passed.[933] Under the Standing Orders of the Dáil[934], a special procedure exists for Private Acts. As such, its journey through the Houses is different from that of a Public Act.

Because these Bills are not promoted by a Government party, or even by any members of the Houses of the Oireachtas, the usual political haranguing tends to be absent from the debates on these Bills.

Private Bills are also different in that they are not drafted by the Office of the Parliamentary Counsel, as they have no official role in either the preparation or examination of Private Bills. The Bills are invariably ably drafted by firms of solicitors who for this purpose, are also registered as Parliamentary Agents.

Private Bills are examined by the relevant Government Department. Such a Bill is also examined by the Bills Office to ensure that it conforms with the protocol on the structure and layout of Bills, and it would also be examined by the Ceann Comhairle's Office in order to ensure that the Bill complies with the Standing Orders.

Private Members Bills[935]

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933 Royal College of Surgeons in Ireland (Charters Amendment) Act 2003; The Trinity College Dublin (Charters and Letters Patent Amendment) Act 2000.

934 Standing Orders Relative to Private Business.

935 See generally, Clifford, *History of Private Bill Legislation* (London, 1885); *The Preparation of Legislation: Report of a Committee Appointed by the Lord President of the Council* (1975) (Cmnd.

There are two ways in which a member of the opposition, or other member may have a Bill published in the Dáil or the Seanad. First, a Party may, at any one time, have on the Order Paper two Bills which have been presented at their own discretion. Secondly, a private member may seek the leave of the House to introduce a Bill. Traditionally, this has been granted without any difficulty.

In the past, private members' Bills played a far more important role than they do today, as in days gone by, they accounted for a respectable portion of the amount of legislation passed in a parliamentary session. This was particularly true up to the late 19th Century[936], when it was common for legislation introduced by private members to become law. Many of the measures which are introduced by the Government today would, in the past, have been introduced by private members. At that time, Parliamentary Counsel had a formal role in examining private members' bills.[937]

This is in stark contrast to the way in which private members Bills are received in the Houses of the Oireachtas now. Members of Government and their officials instinctively view private members bills with a great degree of scepticism. Their insecurities perhaps inform them that acceptance of one could amount to an admission of failure to act on their part. A significant influence too is the political "one upmanship", which dictates that opponents should never be allowed to be seen to be getting it right. This mindset was portrayed by Sir Francis Bennion, a former English Parliamentary Counsel, who commented, in a less than partial manner, that: "Private Members' Bills often deal in piecemeal fashion with a corpus of existing law and this can

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6053) at p. 16.

[936] Writing of the experience of Private Member's Bills in the parliament of the late 19th century, Sir Courtenay Ilbert wrote: "In practice, most private members' Bills are, for some reason or other 'blocked' at some stage of their progress buy some private member, and consequently there is much practical difficulty in getting a private member's Bill through, except by general consent.". Ilbert, *Legislative Methods and Forms* (Oxford, 1901) at p. 91.

[937] Evidence of this practice can be found in the Treasury Minute of 1869 which established the Office of the Parliamentary Counsel to the Treasury directed that Parliamentary Counsel should examined private members bills when requested to do so by Treasury.

introduce complications ..."[938].

The frustration and anger of members of the opposition at having the private members bills routinely rejected was palpable in the following exchange[939]:

> "Miss Harney: Would the Taoiseach accept that all the expertise in this area does not rest in the parliamentary draftsman's office? Would he consider in certain circumstances contracting-out the drafting of Bills? Is the Taoiseach aware that already in this Dáil more new Bills have been drafted by Deputy Shatter and Deputy McDowell than by the parliamentary draftsman's office?
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> The Taoiseach: Private Members' Bills have to be opposed by the Government time and time again because they are very badly drafted. That is the main reason the Bills have to be opposed.
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> ...
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> The Taoiseach: Deputy Shatter could do with the help of draftsmen in drafting his Bills so that they do not contain any gaping holes.
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> Mr. Shatter: Perhaps the Taoiseach would agree that Government Bills often have to be substantially redrafted by Members on this side of the House to make them work. Would the Taoiseach agree also that it would greatly speed up the legislative process if his Government changed its approach and stopped its kneejerk reaction to measures coming from this side of the House and automatically opposing them regardless of their merits?
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> The Taoiseach: The Deputy can take it that the Government does not oppose Bills merely for the sake of opposition. I think that practice was

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[938] Bennion, "Reforming Statutory Drafting" *Proceedings of the Ninth International Symposium on Comparative Law* (Ottawa, 1971) at p.11.

[939] 430 *Dáil Debates* Cols. 1007 – 1009 (11 May 1993).

developed by the Deputies on the opposite side of the House when they were in Government.".

Now the principal benefit for members bringing forward a private member's Bill is to draw the attention of the Government to a particular subject. Members of the opposition in the Houses of the Oireachtas have become accustomed to the habitual rejection of private member's Bills. In recent years, it has become most unusual for Government to accept a private member's Bill – or even to accept the principle behind it.[940] Governments do not want to be seen to be accepting something as substantive as a Bill from members of the opposition.

Despite the foregoing, there are some rare instances of Governments having accepted private members bills. The Prohibition on Ticket Touts Bill 1998 is an example of a Bill which was accepted by the Government. At Second Stage, the Government supported the Bill[941], but failed to have the Bill discussed at Committee Stage. Similarly, the Whistleblowers Protection Bill 1999, was supported by the Government at Second Stage and similarly never progressed to Committee Stage.[942]

It is for that reason that the responsibility for the poor state of the statute book can be said to rest almost entirely on the shoulders of successive governments, as distinct from the legislature as a whole.

The legislative role which private members' Bills played in the legislative schedule of parliaments of the not too distant past was significant. It meant that in addition to considerably lightening the load of Government drafters, members of the opposition had a real role in adding to the body of law that

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940 For example, in response to Fine Gael private member's Bill entitled Private Security Services Bill 1999, dealing with the regulation of door men, the FiannaFáil/PD Government published the Private Security Services Bill 2001.

941 501 *Dáil Debates* Col. 572 (2 March 1999).

942 506 *Dáil Debates* (15 June 1999).

constitutes the statute book. The decision to reject private member's Bills on a wholesale basis has safeguarded the Government's monopoly on matters legislative.

If the old system were to have prevailed, few would disagree that the Houses of the Oireachtas would have been a more interesting legislative forum and its members would have been a great deal more engaged with their work – that of a legislature.

Opposition Amendments

The tabling of amendments to Bills represents a rare opportunity for members of the opposition to table amendments to make a contribution to the shape of legislation. Perhaps it is the combination of fresh perspective, and eagerness to expose any weaknesses, that makes the role of the opposition all the more important when it comes to the Committee Stage and Report Stage debates on legislation. For the opposition, these stages of the legislative process represent an opportunity to perhaps make a meaningful contribution to the shape of a Bill.

In addition to opposition amendments, the Minister may, on his or her own initiative, wish to amend the Bill and might submit amendments at either stage. The Parliamentary Counsel will be requested to draft any such amendments. The Minister is more likely to seek to amend the Bill where there has been a long delay between the initiation of the Bill and its debating at Committee Stage.

In the same way as private members bills are dismissed by the government, amendments which emanate from the opposition are rarely if ever given the credibility which they deserve, and this occurs for similar reasons. First, Departmental officials can be of the mindset that the acceptance of an

amendments amounts to an admission of a flaw or weakness in the Bill. This way of thinking is often mirrored by the drafter of the Bill who will reject opposition amendments in turn. Similarly, the Minister might be reluctant to be seen to be giving way, particularly on a Bill that is urgent or controversial. Opposition amendments were also frequently rejected on the basis that they were poorly drafted. However, this excuse is really no longer tenable as all of the main opposition parties now engage dedicated legislative counsel of their own.

This is what has led to the situation in which we are in today, whereby fewer and fewer opposition amendments are accepted. The furthest a Minister might go at Committee Stage is to accept an amendment in principle, with an undertaking to revert at the next stage with the Department's own version of what the opposition are proposing. Invariably, the Department's version is nothing more than a tweaked version of what the opposition originally proposed.

Despite this, there are a number of examples where the Government have accepted opposition amendments. Undoubtedly one of the most significant amendments ever brought about by the opposition was the amendment to Article 49, (eventually Article 50) of the Constitution of Saorstát Eireann Bill.[943] The opposition succeeded in having an amendment made to Article 49 which had the effect of allowing the Oireachtas to amend the Constitution by ordinary Act, without referendum, for a period of eight years after the introduction of the Constitution[944]. It is undisputed that this provision was pivotal in the sequence of events which led to the 1922 Constitution being slowly chipped away.

There are further examples of amendments which were brought about by the

[943] 1 *Dáil Debates* Col. 1236 *et seq.* (5 October 1922).

[944] The words which inserted at the end of Article 49 were: "Any such amendment may be made within the said period of eight years by way of ordinary legislation and as such shall be subject to the provisions of Article 47 hereof.".

opposition. For example, at Report Stage of the Civil Liability and Courts Bill 2004, the Minister for Justice accepted[945] opposition amendments which had the effect of setting the Statute of Limitations at 2 years, instead of the one year period proposed by the Minister in a number of sections of the Bill.

At Committee Stage of the Commissions of Investigation Bill 2003 in the Dáil, the Minister for Justice accepted in principle opposition amendments which would have required all Commissions of Investigation appointees to first go through a competitive tendering process. Subsequently, at Report Stage[946], the Minister brought forward an amendment modelled on that tabled previously by the opposition.

Once members of the opposition have prepared and submitted their amendments to the Bill for consideration at Committee Stage and Report Stage, the Department involved may formally ask the drafter to examine these amendments to indicate whether they are fit for acceptance. Members of the opposition have become accustomed to having their amendments rejected on a wholesale basis. Sometimes it is evident that the Department have not given any, or any serious, consideration to what is being proposed. However, this approach is not new to parliaments. Writing towards the end of the 19th Century, John Morley, then Chief Secretary for Ireland, once described how the Parliamentary Counsel and Solicitor General would wrestle with clauses, only then to find how Gladstone would "pick up the paper of amendments, put on his glasses, make up his mind in the twinkling of an eye with little thought of outlying consequences from a concession here, a refusal there."[947].

As with private members' bills, the failure of successive administrations to give serious consideration to amendments tabled by members of the opposition has, in effect, curtailed all opportunities which members of the

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945 Tabled by Senator Sheila Terry, *Seanad Debates* (15 June 2004).
946 588 *Dáil Debates* (29 June 2004).
947 Morley, *Recollections* (London, 1917) at p. 361.

opposition have had to make a contribution to legislation, and in turn, the statute book.

PUBLICATION OF THE STATUTE BOOK

The disorderly system which the legislature employs as a means of effecting legislative change is matched only by the inadequate arrangements for the publication of legislation.[948] Chapter 2 examined the publication of legislation, as it relates to individual Acts. That Chapter showed that subject to minor exceptions, legislation in Ireland is published only in its enacted form.

Inadequate publication of legislation, combined with the deficient system of effecting legislative change, has had such a negative effect on the state of our statute book that it has given rise to the need for band-aid type solutions which, in the short term and in a small way, help to alleviate some of the difficulties faced by those who wish to ascertain the up to date position of the law on a given topic. Some of those solutions are now discussed.

Electronic Publication of Statute Book

The Office of the Attorney General first published the Statutes on cd-rom and on the internet[949] in 1998. The latest cd-rom release covers the period 1922 to 2001 and the Acts available on the website cover the period 1922 to 2003.

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[948] On law reform and the improvement of the statute book, see generally *The Preparation of Legislation: Report of a Committee Appointed by the Lord President of the Council* (1975) (Cmnd. 6053) at p. 19 et. seq.; Devlin, "The Process of Law Reform" 63 (1966) Law Society's Gazette 453; Donelan, "Recent Developments in Statute Law Revision in Ireland" 22 Stat. L.R. 1; Hutton, "Mechanics of Law Reform" (1961) 24 MLR 18; Keane, "Law Reform in Ireland – The European Perspective" (1987) Ir Jur 1; Lord Simon of Glaisdale and Webb, "Consolidation and Statute Law Reform" [1975] PL 285; Manchester, "Simplifying the Sources of the Law: an Essay in Law Reform" (1973) 2 Anglo-American Law Rev. 395; Graham-Harrison, "An Examination of the Main Criticisms of the Statute Book and of the Possibility of Improvement" [1935] JSPTL 9; Granville Ram, "The Improvement of the Statute Book" (1947-51) 1 JSPTL 452; Jenkins, "Progress in Improving the Quality of Legislation" a paper delivered at the Statute Law Society 16th Annual Conference, London (1996); Ram, "The Improvement if the Statute Book" Journal of the Society of Public Teachers of Law (1951) 442; Wilson, "The Consolidation of Statutes" Law Society's Gazette (1980) 84.

[949] www.irishstatutebook.ie

Both versions include all statutory instruments covering the same period, as well as an updated version of the invaluable Chronological Tables of the Statutes. All statutes and statutory instruments are in their enacted form.

One would expect that making the statute book fully available in electronic format is just one step to be taken in the journey towards modernising the statute book. The next step should be towards the conferral of authentic status on that version. As part of this process, the usual disclaimer that one sees on the Irish Statute Book would have to be abandoned. The removal of disclaimers from the electronic version of the statute book would have to be preceded by a detailed review of the electronic text of all Acts so as to ensure that that accurately reflect the printed law. Once reviewed in this way, each electronic Act could then be accompanied by a certificate of authenticity from the Attorney General or Chief Parliamentary Counsel.

The Tasmanian Government have led the way in the development of the electronic statute book and they have broken new ground in designating the electronic version of the statute book as being the authentic version under section 6 of the Legislation Publication Act 1996. This represents a great leap of faith on the part of the Tasmanian Government and it is evidence not only of the priority and resources which they have allocated to this project, but also the accuracy and reliability of their system. The fact that the Printing Authority of Tasmania uses the repository for producing authorised versions of legislation is further testament to this.

Statute Law Revision Acts

Statute Law Revision Acts are those which repeal Acts which are either dormant, spent, ineffectual or simply out of date. Their purpose is to purge away dead matter from the statute book. In Ireland, sadly their purpose ends there. In England, the purpose of such Acts is to pave the way for the

publication of a new edition of Revised Statutes. Just in the same way as textual amendments are neatly and precisely made to the mythological "Statute Book" in the hopes that some day the changes effected will be incorporated into their intended locations, Statute Law Revision Acts are passed with a view to ensuring that any newly published series of statutes will be more relevant and reflective of statute law at that time.

However, in Ireland the real benefits of this practice can not be fully appreciated, as the repeals effected by a statute law revision Act can really only be realised on the publication of a set of revised statutes. The publication of revised statutes would enable the reader to see the law exactly as it stands. The publication of revised statutes would enable the statute book to transcend from a notional existence to reality.

Statute law revision was first advocated by Edward VI, James I, and Lord Bacon. Despite that, it was many years later – in 1856 – before the process actually began. When introducing the Statute Law Revision Bill 1863, Lord Westbury in 1863 (then Lord Chancellor), articulated that the aim of the expurgation of the statute book was to remove the following[950]:

1. Acts which are no longer applicable to the modern state of society;
2. Acts which have become wholly obsolete;
3. Acts which have been repealed by obscure or indirect processes, but which until extirpated, would be constantly the cause of uncertainty.

The determination as to whether a statute should be repealed by way of a Statute Law Revision Bill is likely to be reached by reference to the following criteria:

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[950] Hansard, 171, p. 775.

1. enactments, all or part of which have ceased to have effect;
2. enactments which have become obsolete; and
3. enactments which have become unnecessary or spent.

The need for clarity and coherence to be afforded to the statute book has been recognised for a long time. In 1950, the then Minister for Justice, General MacEoin highlighted the need for statute law revision[951]:

> "Our statute law, as is well-known, is badly in need of consolidation and modernisation and Senators will recall in this connection that only a few years ago special Orders were passed for both the Dáil and Seanad to facilitate the passage of consolidation Bills. The scheme then envisaged has not, unfortunately shown any great results in practice to date. With the single exception of the recent measure dealing with local government law, there has been no statute law revision in this country since 1922, a fact which speaks for itself."[952]

This need was again alluded to in 1975 by Declan Costello, Attorney General in his Second Stage speech on the Law Reform Commission Bill 1975 in the Seanad:

> "Most informed members of the public are quite satisfied of the need to improve, modernise and reform many of the laws of this country. Most lawyers would agree with them. So do the Government. And so to set about the task of reforming, simplifying, modernising, codifying and consolidating our laws in a planned and systematic way it seeks the enactment of the Bill which the Seanad is now considering. ... Law

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951 39 *Seanad Debates* Col. 108 (13 December 1950).

952 In welcoming the Bill, Senator O'Brien had this to say: "While welcoming this Bill I would say that I welcome still more the Minister's statement that we are going to have a complete revision of the laws of this country. This is a work which has been necessary for almost 30 years, and has been neglected in this country by successive administrations. In the last 50 years many changes have taken place which have rendered revision of the laws in many directions desirable, and in fact necessary." 39 *Seanad Debates* Col. 110 (13 December 1950).

reform is not a concept of interest only, or indeed primarily for, lawyers. It is true that the complexity of modern society produces complex laws and the knowledge and skills which lawyers have acquired are frequently necessary for the purpose of modernising, consolidating, simplifying, or codifying much of our law. While a programme of law reform will therefore necessitate the assistance of specialists with legal training and knowledge such a programme need not, and indeed should not, be a matter of interest only to members of the legal profession or to small exclusive groups in our society."[953]

Later on in the course of the debate, Senator Alexis FitzGerald went somewhat further when he stated:

"It might be correct to say more expressly than the Attorney General has said in his address, though he has implied it, that really our record with regard to law reform is nothing short of lamentable. It has been extraordinarily bad."[954]

And they had very good reason to complain. In the recent history of the Irish

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[953] 80 *Seanad Debates* Cols. 202 – 204 (10 April 1975).

[954] *ibid.*, at Col. 218 (10 April 1975). And to illustrate this, he cited several examples of committees which had been established to examine various aspects of law, who went on to produce excellent reports – but which had been ignored for years. For example, the Bankruptcy Law Committee which was set up in August, 1962; the Committee on Court Practice and Procedure since 1962. "In addition to that, there was the consumer protection law paper, the National Prices Commission: we had the National Consumer Advisory Council report; and the Kennedy report.". This view was shared by Senator Lenihan (former Minister for Justice) who said: "what has been happening heretofore is that what one might charitably call an administrative blockage has been occurring between the Department of Justice and the Attorney General's office so that excellent reports on which people have given excellent service over many years were rarely implemented." 80 *Seanad Debates Col. 225* (10 April 1975). Senator Robinson also contributed on this point: "I should like to reinforce very strongly what Senator Fitzgerald said about the very bad record of implementation of the recommendations of our own Committee on Court Practice and Procedure. Perhaps we should ask ourselves why the reports of this Irish committee, including the many important recommendations for reform contained in them have not been implemented. If one looks at this record one must contrast it with the record of the Law Reform Commission in England which has a remarkable record of success in having its reports implemented into specific legislation. I think the reasons behind this contrast provide the justification for establishing a Law Reform Commission." 80 *Seanad Debates* Col. 228 (10 April 1975). The success of the Irish Law Reform Commission to date is best illustrated by examining the Table of Reports implemented which is available on its web-site, www.lawreform.ie .

Statute Book we have had the Statute Law Revision (Ireland) Act 1878 and also the Statute Law Revision (Ireland) Act 1879. Post independence, four Statute Law Revision Acts have been enacted in Ireland. They are: Fisheries (Statute Law Revision) Act 1949; Fisheries (Statute Law Revision) Act 1956; Statute Law Revision (Pre-Union Irish Statutes) Act 1962; and the Statute Law Revision Act 1983.

As can be seen from their titles, some are broad and general in their effect, whilst others are limited to a specific area of law. The Acts of 1949 and 1956 are somewhat unusual in that they are specific to one area of law. The purpose of the 1949 Act, as expressed in the long title, was to facilitate the consolidation of fisheries legislation. The 1956 Act was enacted to facilitate consolidation and "clarifying certain of the said enactments". That consolidating legislation was enacted some ten years later, and it repealed the revision Acts of 1949 and 1956.

Another revision Act of a different kind, this time specific to a particular period as opposed to a particular topic, was enacted in 1962. The Statute Law Revision (Pre-Union Irish Statutes) Act 1962 was enacted with a view to repealing spent and unnecessary pre-1922 legislation. The Statute Law Revision Act of 1983 was of much more broad and general application – it was not confined to a subject matter or period. Though in reality, its effect was confined to repealing a whole range of pre-1922 legislation. It was described as "An Act to promote the revision of the statute law by repealing enactments which have ceased to be in force or have become unnecessary.".

However, an important first step towards the improvement of the statute book is being taken by the Statute Law Revision Unit of the Office of the Attorney General who, since mid-2003, has been engaged in a process of preparing for statute law revision. It began by identifying legislation enacted prior to 1922

which remains in force[955]. The process revealed that there are 500 pre-1922 Acts which are in force in the State and a further 3,000 post-1922 Acts in force. Of the 500 pre-1992 statutes, 100 have been ear-marked for repeal. Following a process of public consultation in 2004, the Statute Law (Revision) Bill 2004 was published.[956]

As for the remaining 400 or so Acts, they may well undergo a process of repeal and re-enactment so as to remove absurdities and irrelevant aspects of them. As a system of effecting legislative change, a process of repeal and re-enactment is good for the coherence of the statute book. However, from a practical point of view, it can be problematic. For example, the process of re-enactment exposes all of the previously enacted provisions to parliamentary scrutiny and the inevitable proposals for amendment. It multiplies the potential for attack from members of the opposition and consequently the progress of such Bills are likely to be delayed.

The development of some modified fast-track procedure for repeal and re-enactment in the Houses of the Oireachtas would greatly enhance the efficacy of the process. A fast-track system could enable the new provisions of the Bill to be subject to the normal level of parliamentary scrutiny, while the pre-existing provisions of the Bill would not be open to debate – much in the same way as the fast track procedures which already exist for a consolidation Bill.

The repeal and re-enactment procedure has so far never been formally adopted in Ireland. The absence of fast-track procedures have no doubt deterred the use of this approach towards improving the statute book.

Statute Law Revision Acts become spent immediately upon their promulgation

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[955] On pre-1922 legislation in Ireland, see generally Osborough, *Introduction to the 1995 Reprint of The Irish Statutes: Revised Edition* (Dublin, 1995); Donaldson, *The Application in Ireland of English and British Legislation Made Before 1801* (May 1952, Queens University, Belfast); *Essays on the Spirit of Legislation* (Multiple Authors) (London, 1772).

[956] See, *Irish Independent,* 19 September 2005.

by the President. Once enacted, its provisions have taken effect and the Act effectively dies. This is because of the instant nature of the operation of a revision Act – moments after its enactment it is spent. It therefore follows that any efforts to repeal a Statute Law Revision Act, or any other Act for that matter, will not have the effect of reviving the very Acts or provisions which it was designed to repeal[957].

Despite the fact that these Acts have been enacted in Ireland, their true benefit has yet to be seen – and will remain unseen until an updated series of statutes is published. Statute Law Revision Acts are an essential preparatory measure which should be passed in advance of any new set of Revised Statutes.

It is a folly to see the enactment of a Statute Law Revision Act as an end in itself. There is little point in embarking on the costly and time-consuming process of enacting a Statute Law Revision Act if the end result does not witness the publication of a set of revised statutes.

Consolidation[958]

According to Ilbert, the term "consolidation" as applied to statute law means "the combination into a single measure of enactments relating to the same subject-matter, but scattered over different Acts."[959]. The purpose of consolidation was expressed rather quaintly in the preamble to the Statute of Labourer's of 1562 – one of the earliest examples of consolidation – as follows:

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[957] This occurs by virtue of the Interpretation Act 2005.

[958] See generally, Law Reform Commission (Report), *Statutory Drafting and Interpretation: Plain Language and the Law* (December 2000) (LRC 61-2000) at p. 77; *The Preparation of Legislation: Report of a Committee Appointed by the Lord President of the Council* (1975) (Cmnd. 6053) at p. 85 et. seq.

[959] Ilbert, *Legislative Methods and Forms* (Oxford, 1901) at p. 111.

> "So yf the substance of as many of the said Lawes as are meet to bee continued shall be digested and reduced into one sole Lawe and Statute,"

The object of consolidation is to combine in one single measure, enactments relating to the same subject matter, so as to improve the form of the law without altering the substance. In this context, improving the form will invariably require a good degree of re-writing. The drafter engaged in consolidation will be aware that every statute speaks with the language and carries the colour of its time. A mere "mechanical" merger of a number of enactments which span the centuries would result in a difficult and troublesome piece of legislation. The drafter engaged in consolidation must also ensure that inconsistencies between terms in enactments are removed – particularly where the same term has been used in two Acts, carrying a distinct meaning in each. This is one reason why a mere scissors and paste approach to consolidation rarely if ever suffices. Consequently, in some cases, what is required is that the law be rewritten, whilst taking care to preserve its substance. Preserving its substance will require particular vigilance, especially when altering an expression on which a judicial construction has been placed.

Though it has been a "buzzword" of Irish legislators for a number of years, consolidation is not the sole answer to legislative related problems. Consolidation can achieve a lot when it is carried out often enough and across the statute book. Take for example the Taxes Consolidation Act 1997. The text of 40 different Acts have been combined into that one Act. The process led to a near 50% reduction in the number of sections, from over 2,000 down to approximately 1,100.

Consolidation is to a large degree a laborious manual process, which requires departmental officials and a drafter to go through the text of the relevant Acts

section by section, incorporating the effect which each amendment has on the principal Act.

The impact which consolidation can have on the statute book is quite limited, principally because it can only address discrete topics, based on a principal Act and amending Acts, including any miscellaneous amendments. In order to have any real impact, there needs to be a dramatic increase in the number of consolidations each year, not just the one or two which we see every five years or so.

Consolidation can be particularly helpful in circumstances where a principal Act has been followed by amending Acts and also by miscellaneous amendments. In addition, consolidation can be effective in areas of legislation where case-law has not (and in particular, does not) develop, and the statute law stands alone. Regrettably, consolidation is a much under-used device in the tool-box of the Irish legislature.

Special Dáil Procedures

Because the purpose of this kind of legislation is solely to change the form of the law, not the substance, there are special fast-track parliamentary procedures in place to ensure quick passage through the Oireachtas. The consolidation procedure is one which has to date, been under-used. Since 1922, only seven consolidation Acts have been enacted.[960] This is a staggeringly low number. Regrettably, Governments of recent years have only committed to consolidating – at ten yearly intervals - the Tax Acts and also the Social Welfare Acts. So far, the Social Welfare Acts have been consolidated in 1981 and 1993. The Tax Acts have only been consolidated in 1997 and also 2003.

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[960] They are as follows: Capital Acquisitions Tax Consolidation Act 2003; Stamp Duties Consolidation Act 1999; Taxes Consolidation Act 1997; Social Welfare (Consolidation) Act 1993; Social Welfare (Consolidation) Act 1981; Fisheries (Consolidation) Act 1959; Destructive Insects and Pests (Consolidation) Act 1958.

Under these procedures, the Attorney General certifies the Bill to the effect that there has been no material change in the law. This inevitably gives rise to the question as to what constitutes a change. A consolidation Bill will invariably adopt a completely different layout, a different sequence etc as compared with the Acts being consolidated. As already stated, the consolidation process will illuminate some errors which must be rectified if the exercise is to be of any real worth. Just how far the drafter can go in remedying any defects very much depends on the circumstances. What one might regard as being an "amendment necessarily incidental to the consolidation process" might well constitute an amendment of the law to another.

The existence of a dedicated procedure for pure consolidation Bills should be a real factor in encouraging more consolidations. Regrettably, it is a vastly under-used procedure and as a consequence, the Statute Book is less accessible and less coherent than it might otherwise be. Consolidation is a process which has the potential to greatly impact on both the form of legislation, but also the publication of the statute book itself.

Because a pure consolidation Bill can do no more than consolidate, in Ireland pure consolidation Bills are a thing of the past. The last pure consolidation Bill was the Capital Acquisitions Tax Consolidation Bill 2002. There are a number of reasons as to why pure consolidation Bills have become extinct. First, the very exercise of consolidating can reveal weaknesses in, or omissions from, the existing law and remedying those defects usually requires further amendments. Secondly, a pure consolidation can irk members of the opposition, particularly if it deals with an area of law in which they contend change is required. For this reason, Governments would rather avoid introducing a consolidation Bill where to do so would attract criticisms. Thirdly, time is a major reason why pure consolidations no longer occur. The increasing demands on Government Departments has meant that they have

little time to commit to the work of consolidation, which is largely regarded as delivering no political kudos. Despite the decline in pure consolidation Bills, consolidation Bills which also amend the law do occasionally arise.

Even a Consolidating Bill which encompasses amendments or additional reforms can attract criticisms from members of the opposition. Because it is not a pure consolidation measure, Bills of this nature must go through the normal rigours of Committee and Report Stages. This means that in addition to the wholly new measures, all of the previously well-settled aspects of the law being consolidated are open for debate. This can give rise to well established principles being the subject of unnecessary and protracted debate, as occurred with provisions of the Interpretation Bill 2000 at Committee Stage in the Dáil. This was problematic as regards consolidation in the U.K. also. As stated by Thring:

> "To such a codification or consolidation the House of Commons too often creates insuperable obstacles by reviving old subjects of controversy, and by insisting on discussing settled principles."[961]

The Interpretation Act 2005 is largely a consolidating Act but it also encompasses some new provisions. As a result, it could not be taken through the Houses on the fast-track consolidation procedure. Consequently, some well established principles were re-opened to debate. For example, section 10 of the Interpretation Bill 2000 modified and essentially proposed to re-enact section 7 of the Interpretation Act 1937. Despite this, the opportunity to re-open what was a well-settled part of our law led to a convoluted and protracted debate on the part of the opposition in which a well-settled principle, dealing with the citation of enactments, was traversed at length.[962]

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961 Thring, *Practical Legislation* (London, 1902) at p. 18.

962 *Debates of the Select Committee on Finance and the Public Service,* 22 January 2003.

Consolidation & Amendments

Consolidation Bills should consolidate and do no more than that. The UK experience suggests that consolidation Acts which seek to consolidate and also amend the law experience difficulty in their passage through Parliament – it is acknowledged as a recipe for failure.[963]

Where it is desired to both amend the law and consolidate that law, because of the existence of the fast-track legislative procedure, it is eminently sensible to precede any planned consolidation Bill with a Bill effecting any amendments. The effect of that amending Bill can then be incorporated into the pure consolidation Bill which can then avail of the fast-track procedure through the Houses.

Reason for Lack of Consolidation

Such is the reluctance to consolidate that it can give rise to a mindset where consolidation must wait for amendment and amendment must wait for consolidation. And thus, neither is done when required.

The reason why consolidation was all but abandoned in England of the late 1800's is justified on the basis of consistent opposition to such measures:

> "... so great an opposition has recently been shown by certain members of the House of Commons to the passing of such measures, that the attempt to carry further Bills of the kind has been abandoned for the present."[964]

It was envisaged that the Law Reform Commission would have an active role in promoting consolidations. Section 1 of the Law Reform Commission Act

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[963] Ilbert, *Legislative Methods and Forms* (Oxford, 1901) at p. 253; Hughes, *The British Statute Book* (London, 1957) at p. 106.

[964] Thring, *Practical Legislation* (London, 1902) at p. 11.

1975 defines "reform" so as to include revision and also consolidation. Section 4(1) of the Act therefore confers some responsibility for consolidation proposals upon the Commission, where it provides:

> "The Commission shall keep the law under review and in accordance with the provisions of this Act shall undertake examinations and conduct research with a view to reforming the law and formulate proposals for law reform."

During the Second Stage of the Law Reform Commission Bill in the Seanad, Senator Ryan[965] welcomed the fact that the Commission would have responsibility for consolidation proposals and outlined the need for consolidation:

> "In many branches of the law there were numerous Acts over the years which together make up the law on the subject and it is imperative to have consolidation so that one can get a picture of what the law is on that particular subject. It is not until one can get a fairly comprehensive picture of the total law on the subject that one can get around to deciding what amendment and reforms are necessary. I am glad that consolidation will be something that the commission will be dealing with.

In response to matters raised by the Senators during the debate, Attorney General Costello clarified:

> "The question of consolidation of statutes is an important aspect of the work which I hope the Commission will undertake and give advice on. As I indicated at the outset in my remarks on moving the Second Reading of this legislation, it is not a question of assisting lawyers and

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[965] 80 *Seanad Debates* Col. 215 (10 April 1975).

easing their burdens. It is a question of making the law more easily accessible to the concerned and interested lay person."[966]

He went on to outline the role which he envisaged that the Statute Law Revision and Consolidation Office might play in consolidation:

"... the Law Reform Commission might well decide that their resources would be better employed in family law matters and might recommend that they rather than the Walsh Commission would undertake a particular aspect of that branch of the law. In this connection I should say that there is a Statute Law Revision and Consolidation Office attached to the Attorney General's Office and the Law Reform Commission may well say that that office should undertake a particular aspect of consolidation rather than undertake it themselves."[967]

The failure to consolidate in the early 1990's was attributed to "the increased throughput of legislation" which the Office experienced at that time[968]. Regrettably, due to the increasing demands which Government Departments and the Office of the Parliamentary Counsel have to meet, consolidation has never been seen as a priority. It is for this reason that we are so far behind in this regard. This uncaring attitude towards the state of the statute book is greatly attributable to the myth that consolidation bears no political fruit. This is the nub of the problem. The very notion of having to "make time" for consolidation is alien to many of the Departmental officials who are responsible for legislation. Time needs to be made, and priority needs to be given, to progressive measures such as consolidation. Consolidation should not be something to take up when work pressures are slack, nor should it be a category of work which gives way to other matters.

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966 *ibid.*, at Col. 246.

967 *ibid.*, at Col. 252.

968 See *Review of the Office of the Attorney General as announced by the Taoiseach on 15 November 1994.* (Dublin, 1995) at p. 25.

The Irish Government's disposition towards consolidation and the state of the statute book generally is not too far removed from the attitude of the British Government, as expressed by one writer over forty years ago:

> "... expurgation and consolidation have become a matter of normal routine, whenever Parliamentary Counsel have had time on their hands, and desire a respite from the normal work of original drafting."[969]

It is this attitude which pervades the Departments and Offices to this day. There are some who hold the view that consolidation is not worth the time and trouble that it involves.[970] They would somewhat spuriously contend that with a good index, it is always possible to find what you are looking for in the Statute Book. Despite that, and despite the fact that it is not the sole answer to restoring order to the Irish Statute Book, it seems reasonable to say that the diligent legislator, the harried District Judge, and the burdened official would prefer occasional consolidation to constant disarray.

Codification

Codification is the process under which law contained in case-law, (what may be called un-enacted law), is combined with existing legislation to form one body of law[971]. The resulting code should be an orderly and authoritative statement of the main rules of law on a given subject, which originally derive from statute law, common law and case-law. The Sale of Goods Act 1893, which is still in force in Ireland, was one of the earliest codifying Acts to be passed in Britain.

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[969] Hughes, *The British Statute Book* (London, 1957) at p. 114.

[970] "It is time-consuming and demanding of resources, both political and administrative, to consolidate primary legislation." *Reducing Red Tape:* An Action Programme of Regulatory Reform in Ireland (July, 1999).

[971] McCutcheon & Quinn, "Codifying Criminal Law in Ireland" [1998] 19 Stat LR 131; O'Connor, "The Law Reform Commission and the Codification of Irish Law" (1974) Ir Jur 14.

It is believed that Bentham is responsible for introducing the word "codification" into the English language.[972] He was a very strong advocate of codification. He advocated that all of the laws on a particular matter be recorded in one repository. Bentham's objective in alluding to such a code was that everyone could consult an area of law which he or she needs, in the least amount of time. This is how he illustrated its use:

> "'Citizen,' says the legislator, 'what is your condition? Are you a father? Open the Chapter 'Of Fathers.' Are you an agriculturalist? Consult the chapter 'Of Agriculture.' A complete digest, such is the first rule. Whatever is not in the code of laws ought not to be law."[973]

He went on further to give some insight as to the need for such a concept:

> "The great utility of a code of laws is to cause the debates of lawyers and the bad laws of former times to be forgotten."[974]

He explained that a central characteristic of such a code would be its simplicity:

> "A code framed upon these principles would not require schools for its explanation, would not require casuists to unravel its subtleties. It would speak a language familiar to everybody; each one might consult it at his need. It would be distinguished from all other books by its greater simplicity and clearness."[975]

Bentham's explanations are interspersed with idealistic visions, with little

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[972] Ilbert, *Legislative Methods and Forms* (Oxford, 1901) at p. 122. See also, Bentham, *General View of a Complete Code of Laws* (London, 1843).

[973] Bentham, *General View of a Complete Code of Laws* (London, 1843) at p. 205.

[974] *ibid.*, at p. 207.

[975] *ibid.*, at p.208.

regard to the harsh realities regarding the language of legislation[976]. For example, he seems to have assumed that all of the readers of the code would be compliant, law abiding citizens. He seems to have taken no account of the person who will seek to misinterpret or misread the code, abetted by its apparent simplicity. Despite this, the principles behind Bentham's ideas are not without merit. Idealistic though he was, his proposals, when taken in conjunction with necessary modifications, are worth working towards.

Codification is intended to make legislation more accessible and more coherent. There are two main types of codification: organic codification and mechanical codification. Organic codification refers to those codifications which encompass both the statute and case-law on a particular subject in one text. Mechanic codification is where all of the statute law on a particular subject is gathered into one single document, the vital distinction being that this is done without the inclusion of any case-law. In this respect, it is very similar to consolidation.

Though it has been around for quite some time, codification is a relatively new concept to the Irish legislature. The present Government has plans to codify areas of criminal law:

> "We will ensure all substantive criminal law will be codified into a single Crimes Act, dealing with homicide, violence, property offences, dishonesty, corruption, public order, arrest, criminal procedure and court jurisdiction, uniform sentencing procedure and policies, defences such as insanity and incapacity."[977]

Plans are afoot to also codify the law relating to licensed premises which currently is governed by the Intoxicating Liquor Acts.

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[976] The language of legislation is discussed in detail in Chapter 8.

[977] *An Agreed Programme for Government between Fianna Fáil and the Progressive Democrats* (Dublin, 2002) at p. 27.

This new tendency to favour codification gives rise to the question as to which is a better system – the common-law system of legislation which exists in Ireland and in many other jurisdictions, or the codified system of law which prevails in much of continental Europe.

Much of our statute law has its roots in common law. Many aspects of common law have been encompassed in, and articulated by, statute law. In practice however, our system of legislation does not concern itself with seeking to incorporate the affects of case-law. This dualism of case law combined with statute law is the essence of our system. Our legislation stands on its own, and the body of common law stands beside it. In contrast, codification is very much concerned with legislation which encompasses the affect of case law – an all embracing code.

Because of the dualism which operates here and in many other common-law jurisdictions, any codification which takes place in Ireland may be codification in name, but it is not codification in the real sense. The Intoxicating Liquor Code which is currently being drafted at the direction of the Department of Justice is closer to a consolidation than it is to a code.

Referred to earlier, the Sale of Goods Act 1893 was a codification measure in that it gathered together the old laws and case-law on the topic and enacted it as one stand-alone code. The same can be said of the Succession Act 1965.

Codified legislation gives rise to the need for a different approach to interpretation – different from that applied to traditional statutes. Aspects of the code will have been drafted and enacted at different times; the interpretation of some provisions by the courts may even have given rise to further new provisions.

Even if we compile our legislation on one topic into a code, that cannot be described as codification. The role which case-law and precedent plays in our common law legal system prevents the adoption of a system of codification in its truest sense.

Leaving aside the puritanical and technical arguments about when a code is not a code, codes which emanate from a process of codification are bound to be helpful to those who wish to consult the statute book. Any measures which alleviate the difficulties which one experiences when reading statutes can only be assisted through the publication of codes. As with consolidations, codes can become out of date within two or three years of their creation. So if it is to have any lasting value, the enactment of a code needs to be accompanied by a commitment to constantly maintain it.

Form of Legislation in Civil Law Jurisdictions

While all around the world there are a number of different legal systems, the two principal legal systems which exist are the civil law system which originated in Rome and the common law system which originated in England.

While these systems have much in common with each other, there is much which differentiates them. Take for example the common law system's reliance on precedent. In civil law jurisdictions, they do not have the same regard for the doctrine of precedent as we do under our common law system. This is one factor which impacts on the certainty of the civil law. The reliance on the doctrine of precedent in our courts means that one can bring a matter to the court in the knowledge that there are some previous decisions of a higher court, which that court is bound to apply.

However, one aspect which differentiates them in a very plain sense is the way in which the legislation which forms part of each system is drafted.

Though it is not always so[978], civil law jurisdictions tend to set out their legislation in the form of a code. One of the principal characteristics of a code is that it is comprehensive in the sense that it deals with all aspects of the law on a particular topic. The use of a code is based on the assumption that it serves as the sole source through which all questions and issues of contention can readily be resolved. The flexibility inherent in a code is conducive to this purpose. According to Macdonald, "A civil code seeks to present legal rules at a degree of abstraction that ensures the relative permanency of the formulation chosen."[979] However, the generality and abstract nature of a code can give rise to ambiguity, to such a degree that it can often be the case that matters cannot be satisfactorily resolved by parties in a dispute, without recourse to the courts.

While accepting that Bentham had shown the "utility" of codes, but not the "necessity", Ilbert[980] expressed his opposition to the use of codes for a number of reasons:

> "We no longer believe either in the practicability or in the desirability of a code which shall be complete and self-sufficing, which shall absolve from the necessity of researches into the case law or statute law of the past, which shall preclude the judicial development of law in the future, and which shall provide a simple rule applicable to every case with which the practical man may have to deal."

The differences between legislation emanating from common law jurisdictions as against legislation of civil law jurisdictions were articulated in a memorandum submitted by the UK Foreign and Commonwealth Office to the

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[978] The civil law systems of Scandinavian countries remain largely uncodified.

[979] Macdonald, "Encoding Canadian Civil Law" published by the Canadian Department of Justice at http://www.bijurilex.org/site/Export/Recueil(1997)/_e/premier-recueil(1997)_e/04-MACDO.htm#_edn1

[980] Ilbert, *Legislative Methods and Forms* (Oxford, 1901) at p. 125.

Renton Committee:

> "The drafting of Community legislation is largely influenced by traditions of legislative drafting which have for long prevailed in other European countries, but which do not prevail in the United Kingdom. The tradition in many other European countries is to draft in more general terms than is customary in this country, and consequently to leave more scope for the interpretation of the law by the courts; the continental judge is accustomed to interpret legislation in the light of official or academic commentaries. Because of this difference of approach, the form and language of Community legislation does not readily lend itself to emulation in the United Kingdom where the courts and legal professions are accustomed to more precise drafting, and interpretation or construction keeps more strictly to the statutory text."[981]

With virtually any piece of law, even codes, there can be conflicting interpretations, which ultimately must be addressed by the Courts. This reality is something which perhaps weakens one of the major arguments in favour of the use of codes in civil law jurisdictions, because just as with legislation such as our own, the assistance of the courts occasionally has to be sought in deciphering the meaning of some codes.

The apparent simplicity of the general principles style drafting employed by civil law drafters was favoured by the Renton Committee, though it had grave reservations regarding the necessity to involve the courts which is so much a feature of the fruits of general principles drafting:

> "The adoption of the 'general principle' approach in the drafting of our statutes would lead to greater simplicity and clarity. We would, therefore, like to see it adopted wherever possible. We accept,

[981] The Preparation of Legislation (London, 1975) Cmnd. 6053 at para.9.6.

however, that this approach to a large extent sacrifices immediate - though not eventual - certainty and places upon the courts a heavier responsibility in identifying the intention of the legislature when applying legislation to particular circumstances. We recognise that this is unlikely to be acceptable to the executive and the legislature in certain types of legislation, particularly fiscal and other public law which defines the rights and obligations of individuals in relation to the State, and we consider that it would in any event be unreasonable to draft in principles so broad that the effect of the statute could not be assessed without incurring the expense of litigation to determine an issue."[982]

The Hansard Society Commission also gave some consideration to the merits of the possible adoption of general principles style drafting in the UK. The Committee recommended as follows:

"We begin by rejecting the idea that the European style of drafting should be generally adopted in this country ... we would be strongly opposed - as we believe most Members of Parliament would be - to making statute law as general as it often is in other European countries, with the almost certain consequence that there would have to be much more recourse to the courts to settle disputed interpretations of Acts. Court proceedings are expensive for all concerned and the need for people to go to court should not be expanded ... We firmly believe that certainty in the law must be the paramount aim in the drafting of statutes."[983]

The difficulties which can be experienced by a court which is faced with the difficult task of deciphering the true meaning of legislation couched in general principles was expressed by the Supreme Court of Victoria, Australia in *R v*

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[982] The Preparation of Legislation (London, 1975) Cmnd. 6053 at para.10.13.
[983] *Making the Law,* Report of the Hansard Society Commission on the Legislative Process at p. 60.

O'Connor[984]:

> "... the legislation is couched in general terms which omit to make Parliament's intention clear and thus greatly increase the work of the courts. If Acts of Parliament are couched in general terms which do not make Parliament's intention clear much time is taken up in the courts by arguments as to the meaning of the section and how the court should apply it. Costs and delays are increased and injustice may follow..."
>
> "In drawing attention to the problems created by legislation of this kind we do not wish to be understood as being critical of the draftsman of the legislation. We recognise the difficulties involved: but we do wish to draw attention to the consequences of drafting in general terms. No doubt such drafting is often prompted by a desire to simplify legislation. Unfortunately attempts to do so usually leave a number of questions unanswered. They also very often leave the courts without guidance as to how the questions should be answered and when dealing with legislation the court's only task is to interpret and apply the law laid down by Parliament. The courts cannot be legislators."

Hesselink[985] is highly critical of the impression of simplicity of the law, which codes give to people. A person, he says:

> "... is hardly ever confronted with the problematic match between the harmony of the abstract system of categories and the chaotic character of concrete reality. In other words, a neat, logical and harmonious system communicates the wrong message with regard to the real character of the law and dispute resolution which is more chaotic,

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[984] [1987] V.R. 496, 499 – 500.

[985] Hesselink, "The Structure of the New European Private Law" 6(4) *Electronic Journal of Comparative Law* at p. 20.

illogical, unpredictable, unfair, and complex than the system of the code might suggest."

Hesselink seems to be suggesting that the simplicity of codes is more apparent than real: the simplicity is merely a façade. One would find it difficult to disagree with Hesselink's assertion in this regard. Codes do give the impression that the law is more straightforward than it in fact is. However. this in itself is not at all objectionable. On that basis then, I disagree with Hesselink in so far as he is saying that the complexity of a nation's laws ought to be reflected in an suitably inaccessible collection of legislation. Applying Hesselink's logic then to our own statue book, he might suggest that the complexity and inaccessibility of our own Statute Book is one which befits the complexity of the laws contained within it!

It is possible to identify a number of ways in which legislation drafted in civil law jurisdictions differs from legislation drafted in common law jurisdictions. Differences in eleven areas been selected for consideration here.

Form

As previously mentioned, in civil law jurisdictions, legislation is couched in broad and general terms, whereas, in a common law jurisdiction such as ours, statutes are regarded as carefully considered attempts to set out in a detailed written form the specific legal principles which will govern a particular set of circumstances. This difference in drafting style has its origins in the 18th Century when the courts still viewed legislation as being inferior to the common law and consequently was to be interpreted narrowly. Accordingly, drafters attempted to be as specific as possible so that the courts could not avoid following the legislation rather than existing common law. They felt that only highly detailed legislative provisions could ensure this. In response to the drafter's approach, the Courts become even more literal and restricted in their interpretation of statutes, thus resulting in what might be termed a

"vicious circle" of convoluted detail which has resulted in the lack of accessibility of our own statute book.

Role of the Judiciary

The absence of binding precedent and the generality of legislation emanating from civil law jurisdictions means that the judge in civil law systems enjoys a considerable degree of freedom in adjudicating cases.

The difference between the role of the judiciary in the two jurisdictions was characterised by Herman[986] in the following terms:

> "Thus the division of labour between common law judge and legislator is almost the converse of that embodied in the civil law tradition. Not surprisingly, the judicial approach to statutory construction in the two traditions differs significantly."

Similar views were expressed by Campbell[987], where he said:

> "There is, of course, the danger of encouraging an activist judiciary, as we have witnessed in the last decade in the area of constitutional interpretation. The courts through their interpretation of general principles could take to themselves spheres of power for which they have neither the competence nor the accountability to deal to the impoverishment of the democratic political system."

The role of the judge in civil law today, was greatly influenced by the distrust of judges who had resisted all attempts at reform before the French revolution. This gave rise to the idea that civil law legislation ought to be complete and certain, and that the role of the judiciary should be confined to

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[986] Herman, "Quot judices tot sententiae: A Study of the English Reaction to Continental Interpretative Techniques", (1981) 1 *Legal Studies*, pp 165-89, at p 179.

[987] Campbell, "Legal Drafting Styles: Fuzzy or Fussy?" (1996) 3(2) MUEJL at para. 30.

interpreting, rather than making, the law.

The role of the judge in France is articulated in the following terms on the website of the Cour de Cassation:

> "Cour de cassation a pour mission de contrôler l'application des règles de droit par les juridictions judiciaires et d'assurer l'unité de la jurisprudence. Elle a ainsi le pouvoir, quand le dossier l'impose, de "casser" les décisions irrégulières qui lui sont déférées. Des générations de magistrats ont édifié et édifient encore la doctrine et la jurisprudence, cette œuvre en perpétuelle évolution."[988]

This text indicates that the judges of this Court see themselves as having a role in the application of the rules of law, the unification of case-law, and the edification of academic writings and case-law.

According to Cooter[989]

> "Judges allegedly make law in civil law systems by interpreting codes, not finding social norms. Compared to common law countries, the codifiers in civil law countries apparently have more influence and the judges allegedly have less influence. Interpreting some codes, however, looks a lot like finding social norms. Comparative lawyers, consequently, debate whether the apparent differences in the two systems are real or illusory."

Cooter makes the point that compared to common law countries, judges in civil law countries have less influence. This point bears closer scrutiny. It may be true to say that judges in a civil law jurisdiction have less influence in

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[988] http://www.courdecassation.fr/_COUR/VISITE/introduction/introduction.htm

[989] Cooter, Robert D. (1996a), "Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant", 144 University of Pennsylvania Law Review, 1643-1696.

an enduring sense, in that an individual court decision, or even a series of court decisions will never have the same binding effect as they do in common law jurisdictions. However, the degree of flexibility which is inherent in codes means that judges in civil law jurisdictions can exercise significantly more discretion and influence in the individual decisions that they reach. This is not only due to the flexibility of codes, but is also due to the fact that judges in civil law jurisdictions are not hamstrung by any binding precedents.

The civil law judge may be a less central figure in the sense that one of his or her decisions, on its own, does not automatically become binding in its effect. However, by virtue of the fact that a succession of cases may, in accordance with jurisprudence constante, acquire binding effect, civil law judges do have some, albeit much more limited, role in making law.

Article 4 of the Code Civil states that a judge who refuses to come to a judgment, under pretext of the silence, obscurity, or insufficiency of the law, may be prosecuted on the basis of a denial of justice. In a similar vein, Article 5 of the Code states that judges are forbidden to make pronouncements of a general or normative kind in the cases brought to them. According to Turcotte:

> "The stipulation of arts. 4, 5 and 7 that the law is to be found in legislative provisions and that judges are not law makers creates a legal fiction."[990]

In view of the acceptance of jurisprudence constante, as well as the heavy reliance on doctrine, one would find it difficult to disagree with Turcotte. It is true to say that in determining a dispute, the starting point of any civil law court is the written law. But it is only the starting point, as in all likelihood, he

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[990] Turcotte, "Why Legal Flexibility is not a Threat to either the Common Law System of England and Australia or the Civil Law System of France in the Twenty-first Century" [2005] 1(2) Hanse Law Review 190, 195.

or she does not reach a decision in a vacuum, but instead goes on to consider, in what may be regarded as a clandestine way, the previous case-law in the area, as well as the relevant doctrine. This can hardly be said to evidence adherence to the letter of Articles 4, 5 and 7 of the Code Civil.

While the role of the judiciary in civil law jurisdictions is not as restrictive as it might appear at first glance. As compared with their common law counterparts, it is true to say that the role played by the judiciary in civil law jurisdictions is evidently far less central.

Closely connected with the more restrictive role to which judges in civil law jurisdictions play, the legislatures in civil law jurisdictions are far less likely to accuse members of their own judiciary of misapplying or interpreting the law. This is because the precedential value of a judge's decision is very limited, and therefore is nothing for the legislature to get too upset about.

If however, the legislature were to witness a series of decisions which run counter to their intention when enacting the legislation, this is likely to upset them, because in accordance with jurisprudence constante, a series of decisions on the same point do acquire some prcedential weight.

However, even in circumstances where judges are believed to have gone too far, both jurisdictions can enact, what is known in civil law jurisdictions as posterior or interpretive law, or in common law jurisdictions, as curative or remedial legislation.[991]

Rather than engaging in any duel like actions, since 1969, the Cour de Cassation has a formal role in engaging with the legislature in a constructive way. This manifests itself through the publication of the Annual Report of the Cour, in which it identifies to the legislature, specific areas of law in which it

[991] Legislation of this nature is discussed in Chapter 3.

believes the legislature should intervene and act upon. Unsurprisingly, a forum for engagement such as this, greatly reduced the potential for conflict between the French legislature and French judiciary.

Principles of Interpretation

Another factor which differentiates common law legislation from civil law legislation is the fact that in common law, the principles of interpretation are fixed and identifiable. It is not so in the case of civil law, where the approach taken towards interpretation may be said to be a recipe for inconsistencies.

Because of its flexible and generally fluid form, the interpretation of civil law is very much a task of identifying and applying its spirit, whereas, because of its restrictive form, the interpretation of legislation in common law is very much a task of reading and applying the law according to its letter.

The words of Portalis, one of the four drafters of the Code Civil, give us some insight into the thinking of the creators of that Code in terms of how they envisaged that the Code would be interpreted:

> "the function of statute is to establish through a broad view the general maxims of the law; to establish principles rich in consequences and not to descend into the detail of questions, which could arise on every question. It is up to the judge and the jurist imbued with the general spirit of the laws, to direct their application."[992]

The Civil Law approach to interpretation was aptly characterized by Lord Denning in *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd*[993] in the following terms:

> "[European judges] adopt a method which they call in English by

[992] Bell, *French Legal Cultures* (Cambridge, 2001) at p. 72.
[993] [1977] 2 WLR 107 at 112.

> strange words – at any rate they were strange to me - the schematic and teleological method of interpretation. It is not really so alarming as it sounds. All it means is that the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose . . . behind it. When they come upon a situation which is to their minds within the spirit - but not the letter - of the legislation, they solve the problem by looking at the design and purpose of the legislature - at the effect it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means they fill in gaps, quite unashamedly, without hesitation. They ask simply: what is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation? They lay down the law accordingly."

In addition to the assistance which a judge can gain from jurisprudence constante, academic writings, referred to as "doctrine", plays a very important role in civil law jurisdictions. It may be said that in civil law jurisdictions, the debates of jurists take place in universities rather than in court rooms. Historically, in civil law jurisdictions, academic lawyers have been tasked with the dissection and analysis of decisions of the court, with a view to establishing whether the decisions of courts depart from, or are consistent with previous decisions.

In France, since 1991, judges of the lower courts may ask the Cour de Cassation[994] (the highest court) for advice on how it would rule on a particular case which raises a new question of law. The lower court is not bound to adhere to the opinion of the higher court.

To varying degrees, civil law jurisdictions tend to permit reliance on custom.

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[994] The Cour de cassation is the main court of last resort in France. It has its seat in the Paris Hall of Justice. In total, the Court includes about 85 judges (conseillers) and about 40 assistant judges (conseillers référendaires), who are assigned to six different chambers.

In France for example, the Courts consider customary law to supplement, but not abrogate written law. Whereas, in Germany, customary law is on occasion, permitted to oust written law. In Thailand, Article 4 of their Civil and Commercial Code permits custom to be relied upon where there is a dearth of written law:

> "Where no provision is applicable, the case shall be decided according to the local custom.".

It appears that custom was, and in fact continues to be, an important factor in commercial, administrative, and family law in Thailand.[995]

According to Germain, in civil law jurisdictions:

> "Statutory interpretation is very flexible, and there are no strict canons of interpretation."[996]

However, in so far as any principles of interpretation may be said to exist, they have been characterized in the following terms:

> "1. When a text is clear, it should be applied and not interpreted, unless an absurd result would follow.
>
> 2. When a text is ambiguous or obscure, courts look for the will of the legislature. For that, a judge first examines the text itself with care, and considers commentaries written about the text. This is not limited to the provision to be applied but includes the chapter or the entire law. Often a provision is obscure only if separated from its context.

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[995] See, Prasitmonthon "A Comparative Legal Study Between the Common Law and the Civil Legal Tradition of Thailand" http://www.geocities.com/elaw_edu/papers/comparative_law.pdf

[996] Germain, "Approaches to Statutory Interpretation and Legislative History in Franc" 13 Duke J. of Comp. & In'tl L. 195.

3. If this study is insufficient, courts often go to the *travaux préparatoires* to discover the legislature's thinking. The Cour de cassation agrees with this process, but also states that the *travaux préparatoires* never bind the court. René David, who calls this process the historical method of interpretation, cites its frequent use by the courts.

4. When a text does not directly provide the solution for a dispute, judges need at least to start from a text to situate the rule that they will design. French judicial decisions almost always invoke a text, and it is exceptional for a court not to refer to a legal text. However, sometimes courts invoke general principles of law.

5. If the legislative history is confused, or the law is too old, the judge will look at other considerations and use what the scholarly writers call the teleological interpretation method. This approach is mostly used by the highest courts, the Cour de cassation and the Conseil d'Etat, rather than the lower courts."[997]

The absence of fixed principles of interpretation in civil law jurisdictions means that the drafter is in no way constrained by the existence of such principles, and he or she enjoys a large degree of freedom in how those laws are couched. In contrast, the drafter of legislation in a common law system always has to be mindful of the principles of interpretation, and consequently must take extra care as to how each provision is framed. As I understand it, when drafting a Bill, this causes drafters to often test their draft provisions through the application of those principles of interpretation, in order to see whether the correct interpretation is likely to be arrived at.

Uncertainty in Interpretation

[997] Germain, "Approaches to Statutory Interpretation and Legislative History in Franc" 13 Duke J. of Comp. & In'tl L. 195, 198.

Also on the issue of interpretation, the role of the judiciary in civil law jurisdictions gives rise to a difference in how statute law, as compared with civil law, is interpreted. Because legislation of the civil law jurisdiction is heavily reliant on general principles of law as its form of expression, there is a degree of uncertainty inherent in it. This means that the task of attributing a meaning to specific provisions often falls to the judges.

The Standing of Case Law

Legislation drafted in a civil law system forms a composite statement of the law on a given topic and it will have incorporated all of the judgments of the courts which it considered appropriate. In contrast, in a common law system, legislation and judge made law subsist alongside each other, and in many ways, supplement each other.

The starting point in the determination of a matter in a civil law jurisdiction is the written law. However, being only a starting point, judges in civil law jurisdictions can and do look beyond the written law to previous court decisions which are likely to be of assistance.

While civil law jurisdictions do not adhere to the principle of stare decisis, there is a way through which the decisions of the courts in civil law jurisdictions can have some influential and lasting effect. This is achieved through what is termed "jurisprudence constante" [998]. This system of adherence to precedent developed when civil law jurisdictions gradually began adhering to a series of precedents which had been consistent on a particular point. A series of such cases are then regarded as being of persuasive force. According to Fon and Prisi, "Considerable authoritative force therefore stems from a consolidated trend of decisions on any given

[998] This principle forms part of other civil law jurisdictions, such in Germany, where it is referred to as "standige Rechtsprechung".

legal issue."[999]

Rather than formally adopting an approach such as jurisprudence constante, Thailand has quite a different way of ensuring that courts are consistent. The "promotion and punishment" of judges is administered by the Judicial Commission which was established under the Thai Constitution. It is said that in order to avoid any confrontation with their peers, the junior ranks of the judiciary are eager to adhere to the decisions of their peers in the higher courts, as in this way, they believe that they are more likely to be promoted.[1000]

Perhaps one reason why the doctrine of precedent has not been developed in civil law jurisdictions to the extent that it has in common law jurisdictions, is because of the ideals of certainty and completeness that are believed to be so much a part of codes, have mitigated the need for such a doctrine. However, the development of jurisprudence constante is evidence which supports the assertion that codes are, in fact, not all-encompassing and that, as with legislation in common law jurisdictions, codes need to be supplemented and interpreted by reference decisions of the courts.

It is perhaps arguable that jurisprudence constante is in fact superior to the common law doctrine of stare decisis. In order to fall within the terms of jurisprudence constante, consistency must be evidenced in a series or succession of decisions on a similar point. In contrast, in accordance with stare decisis, a sole decision acquires precedential value upon its delivery.

The true and rigid adherence to precedent, as we have in common law jurisdictions, has the effect of freezing the law in a certain state. This rigidity would run counter to what lies at the heart of civil law – flexibility. Some may

[999] Fon & Parisi, "Judicial Precedents in Civil Law Systesm: A Dynamic Analysis" American Law & Economics Association Annual Meetings (2005) at p. 5.
[1000] See, Prasitmonthon "A Comparative Legal Study Between the Common Law and the Civil Legal Tradition of Thailand" http://www.geocities.com/elaw_edu/papers/comparative_law.pdf at p. 4.

argue that the adherence to the doctrine of stare decisis, has the effect of hindering the development of common law. By adopting a less rigid, perhaps optional, adherence to precedent, the courts in civil law jurisdictions are well placed to deliver judgments which are consistent, while at the same time, having sufficient room to maneuver around or depart from, those decisions if desired – thus retaining their much prized flexibility.

In civil law, judgments are invariably much shorter than those found in common law jurisdictions. The names of judges are not given, and no dissenting opinions are recorded. The thinking behind the decision is not set out or analysed, and so by their nature, judgments in civil law jurisdiction are, of far less value in terms of precedent, than reasoned and developed judgments in common law jurisdictions.

With German speaking countries being noted exceptions, brevity in the judgments of the courts is a defining characteristic of a civil law jurisdiction. This is the result of the theory that the courts are only interpreting, not creating, the law. Being true to the principle that the written law is the first port of call for judges, a court decision of a civil law court, will never refer to decided cases. Nor will it illuminate the thinking behind the decision, or the arguments that were made before the court. This brevity, in itself mitigates against the possibility of such decisions acquiring any real precedential value. In this way, decisions of civil law judges are perhaps more appropriately thought of as a solution to the dispute at which it was directed, and not, as something which creates new law.

When being reported, cases are sometimes analysed and the fruits of such analysis are set out in the form of a Note to the law report. This Note will usually discuss how the case either follows or departs from previous cases.

Flexibility

This flexibility inherent in civil law legislation means that it is better equipped than our legislation to cope with changes which occur over time, such as social or technological changes. Many of our Acts become obsolete with the passing of time, whereas, in a civil law jurisdiction, this is less likely to occur.

In civil law jurisdictions, their codes are infused with a generous degree of flexibility, which affords considerable scope to the presiding judge. Added to this, is the fact that the judge is not bound to adhere to previous decisions, even those of a higher court.

The flexibility of the civil law system as compared with the rigidity of our own system, is illustrated by looking at a recommendation of the Law Reform Commission regarding need for our courts to attribute an updated construction to existing legislation:

> "In the final analysis, the Commission is of the view that the principle of dynamic interpretation of legislation, whereby an updated construction is applied to old statutory provisions, should be adopted, and this should take the form of a statutory provision in a new Interpretation Act."[1001]

This recommendation led to the enactment of section 6 of the Interpretation Act 2005 which provides:

> "In construing a provision of any Act or statutory instrument, a court may make allowances for any changes in the law, social conditions, technology, the meaning of words used in that Act or statutory instrument and other relevant matters, which have occurred since the date of the passing of that Act or the making of that statutory instrument, but only in so far as its text, purpose and context permit."

[1001] Law Reform Commission (Report), *Statutory Drafting and Interpretation: Plain Language and the Law* (December 2000) (LRC 61-2000) at para. 3.36.

Such is the construction of legislation under the civil law systems, that a provision such as this is unlikely to ever be deemed necessary.

Task of Drafting

The task of the drafter faced with the drafting a piece of legislation in a civil law jurisdiction is likely to be considerably less onerous than the task of the drafter who must draft legislation in this jurisdiction. The absence of detail in civil law legislation means that otherwise difficult issues can be avoided, and issues of controversy can be glossed over. This does not mean that such issues do not ever have to be addressed in a civil law jurisdiction, however, what it does mean is that these issues have, instead, to be addressed by the courts.

Approach to Amendment

In Ireland, our approach towards the amendment of the Irish Statute Book is piecemeal and fragmented. When we amend existing laws, those amendments are directed to the theoretical Irish Statute Book. In the absence of the publication of a set of revised statutes, readers will themselves have to slot the new amendments into the existing legislative framework. In contrast, in civil law jurisdictions, the new amendments are directed at the existing code, and shortly after enactment, the new provisions are actually slotted into the existing code so that the reader can, with ease, consult the law in its up to date form.

Publication

The approach taken towards the publication of legislation in a civil law jurisdiction differs greatly from the approach taken to our own legislation. Legislation in civil law jurisdictions is invariably collated in the form of codes. Codes represent a composite body of law on a particular topic.

In contrast, in Ireland, save for rare exceptions (such as the occasional consolidation, or statute law restatement), laws are available only in their enacted form. Civil law jurisdictions are far more disposed to the systematic and orderly publication of their legislation.

Accessibility

As a result of the approach taken towards publication, codes tend to be much more accessible than our own statute book. Also, codes also tend to be updated on a frequent basis. Accordingly, they represent an authoritative source of the applicable law for the reader. In contrast, the Irish Statute Book is comprised of several thousand individual pieces of legislation, many of which stand alone, and some of which can be pieced together, but that task of piecing together falls to the reader.

Language

Allied to the topic of accessibility is the question of language. The language in which our legislation is termed, as compared with a civil law jurisdiction, is very different. Our legislation is drafted in what may be called a defensive style, whereby the drafter seeks to narrow the potential for misinterpretation. This is achieved through the use of precise and often turgid language. In contrast, the legislation of civil law jurisdictions tends to use easily comprehensible and plain language. The reason for such differing approaches is due in large part to the fact that in our jurisdiction, drafters are driven by the need to achieve absolute accuracy and precision, whereas in civil law jurisdictions, a level of generality and flexibility in legislation is desirable.

Principal Distinguishing Features Considered

One of the main advantages which flow from precise and detailed drafting is the certainty which its provisions confer. This certainty enables parties to foresee the results which will flow from the application of the law to particular

circumstances. Whilst it may be initially difficult to decipher the legislative text but, once understood, it tends to give definite answers in the matters at issue.

In contrast, the readers of legislation drafted in the civil law style will be more heavily reliant on legal advisors as the legislation alone will not provide sufficient clarity on a given issue. The difficulties encountered in this regard are exacerbated through the non-adherence to the doctrine of precedent, as is the norm in civil law jurisdictions.

However, some would counter that the greater certainty which legislation drafted in the common law style provides, comes at a very high price, that being, intelligibility.

Another disadvantage of legislation emanating from common law jurisdictions is that the legislation itself tends to be voluminous. This point is closely related to the previous one concerning defensive drafting and precision. Because of the tightly framed nature of such legislation, wherever the legislature identifies a gap or weakness in the existing law, a further new law will need to be enacted. And so the statute book grows endlessly, with new laws giving rise to the potential need for yet more new laws.

However, one advantage of legislation drafted in the common law style is that it enables the legislature to retain its normative degree of control. Article 15.2.1 of the Constitution states that the "The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State." The looseness which is so inherent in legislation of civil law jurisdictions in many ways enables judges to perhaps venture beyond the boundaries intended by the legislature.

The rather vast body of clear blue water that once separated the civil law tradition from the common law tradition is narrowing. The less attractive features of the civil law are less pronounced that they once were. For example, The flexibility and ambiguity which has been so much a part of civil law drafting is fading away in favour of an approach which strives towards greater clarity and certainty, similar to that already inherent in common law drafting.

The publication of legislation in civil law jurisdictions is undeniably far superior to the approaches which have, until recent times, been employed by common law jurisdictions.

While it may be said that the slavish adherence to stare decisis that we have in common law jurisdictions is good in that it confers a considerable degree of certainty on a principle which has been enunciated by a court, the considered and reflective approach which is so much a part of jurisdprudence constante is, in my view superior to the doctrine of stare decisis. New legal principles which develop in a civil law jurisdiction are left for some time to mature and be supplemented by others, before being blindly followed in the way that stare decisis might direct.

A convergence between the two traditions is taking place. It is desirable that any uniting of the traditions brings together the best elements from each tradition. Until such a convergence materializes more fully, when taken as a whole, it is arguable that the common law system is superior. However, as the gap between the two traditions narrows, the civil law tradition is becoming more attractive than was previously the case.

Rather than only making theoretical distinctions between the legislation of the two great traditions, I feel that the distinctions between each might be helpfully illustrated by taking a piece of civil law legislation and by examining some of

its provisions, perhaps with some references to a comparable piece of legislation form a common law jurisdiction.

The two pieces of legislation which I have selected are first, the Intellectual Property Code of France (Legislative Part) ("the Code"). This will be examined with an occasional eye towards the Irish, Copyright and Related Rights Act 2000 ("the Act").

Enacted in 1992, the *Code de la Propriété Intellectuelle* (French Intellectual Property Code) purports to address each and every aspect of intellectual property law. For the reader, it is intended to represent a composite and authoritative statement of the entirety of the law governing that field. Its enactment has marked the achievement of what must have been a very ambitious and arduous project.

Comprised of several hundred provisions, the Code is divided up into a number of Books. Each Book is then divided up into a number of Titles. Within each title, there is a further division called Chapters, each of which contains several Articles. Some of those Articles are further subdivided into paragraphs and subparagraphs. The Code is not structured or arranged in the same way as one would expect an Act to be arranged. For example, there is no main definitions section at the beginning. The definitions are dispersed throughout the Act and even then, they are not easily identifiable. This can make the task of the reader more difficult. Take for example Article L112-2 which effectively defines "works of the mind", a concept which is relevant to many provisions of the Code. Despite this, the definition comes only after the concept has been relied upon in preceding provisions.

The approach taken to more substantive provisions is also very different from the approach taken in Irish legislation. It is perhaps worthwhile comparing Article L123-1 of the Code with section 24(1) of the Act. Article L123-1

provides:

> "The author shall enjoy, during his lifetime, the exclusive right to exploit his work in any form whatsoever and to derive monetary profit therefrom.
> On the death of the author, that right shall subsist for his successors in title during the current calendar year and the 70 years thereafter."

While, section 24(1) of the Act provides:

> "24.—(1) The copyright in a literary, dramatic, musical or artistic work, or an original database shall expire 70 years after the death of the author, irrespective of the date on which the work is first lawfully made available to the public."

Each provision deals with the same issue – the duration of copyright. However, as even a cursory glance will reveal, despite the fact that it is shorter, section 23 deals with the matter in a more informative way than Article L123-1 and this illustrates to some degree the difference in style between the way in which Code as distinct from an Act, is drafted.

Another major difference between the Code and the Act is that the Code is heavily dependent upon decrees of the Conseil d'État, particularly in relation to aspects of the Code which clearly require more detail. Article L321-5 of the Code is a typical of a provision which is reliant upon a decree of the Conseil:

> "The right to communication provided for in Article 1855 of the Civil Code shall apply to royalty collection and distribution societies, but without a member being able to obtain communication of the amount of royalties distributed on an individual basis to any other rightholder than himself. A decree by the Conseil d'Etat shall determine the conditions

of exercise of this right.

Approximately 41 Articles of the Code require the consideration, and making of decrees by the Conseil d'État. The consequence of this is that while a code purports to set out the entirety of the law on a given matter – the reality can be considerably different. The dependence of a great many provisions of this Code on the decrees of the Conseil d'État does seem to undermine to some degree, the completeness and very usefulness of a Code in the first place.

The framing of penalty provisions in the Code are also quite different from how such provisions appear in Acts. Take for example, Article L335-2, which is characteristic of the other penalty provisions in the Code:

> "Any edition of writings, musical compositions, drawings, paintings or other printed or engraved production made in whole or in part contrary to the laws and regulations relating to the property of authors shall constitute an infringement; any infringement shall constitute an offence.
> Infringement in France of works published in France or abroad shall be punishable with a two-year prison term and a fine of FRF 1,000,000.
> The sale, exportation and importation of infringing works shall be subject to the same penalties."

It can be noted that the actions described in the first paragraph do not give rise to an offence, but instead give rise to what is termed as an "infringement", and it is the infringement which constitutes the offence. It is also worth noting that an infringement is punishable by what appears to be, and what would in common law legislation be regarded as, a fixed prison term and a fixed fine. Though perhaps in practice, the prison term and fine might be regarded as being a maximum rather than constituting a fixed, mandatory level.

The continuing offence provision as contained in Article L335-9 is remarkably vague, particularly when compared with a comparable provision of the Act. Article L335-9 provides:

> "In the event of repetition of the offenses defined in Articles L335-2 to L335-4, or if the offender is or has been contractually bound to the aggrieved party, the penalties involved shall be doubled."

This is replete with uncertainty and ambiguity. A reader could legitimately ask a number of questions about this provision, such as, what exactly constitutes "repetition"? Does repetition occur where the original offender commits the offence in conjunction with a new offender? Is there any limit to the number of times which this provision will be enforced against the same person? Does the repetition of the offence two or three years later fall within the meaning of "repetition" in this Article? These are just some of the questions which can be raised about the true meaning of this provision.

Despite all of these features which distinguish a Code from an Act, there are some features which Codes and Acts appear to have in common. For example, the Code makes use, albeit rare, of provisos. Perhaps surprisingly, the Code also uses one of the much criticised, but favoured tools of the Irish drafter – legislation by reference. Consequently, many of the provisions are reliant to some degree on either other provisions of the Code, or other provisions of other Codes, for their full meaning. As is the case with regard to legislation drafted in the common law style, legislation by reference is equally unhelpful to the reader of the Code.

There are aspects of Codes which we should seek to introduce into our legislation, such as the plainness of the language. However, most importantly, what we can learn from civil law jurisdictions is the orderly way in which they approach the publication of legislation. The flaws and weaknesses inherent in our approach to legislative drafting are exacerbated by the

inadequate arrangements which are in place for the publication of the statute book. Codes can teach us many things, perhaps most importantly though, Codes reveal a lot about the value and effectiveness of putting in place a proper system for the publication of our statute book.

There is much debate around the question as to whether the two systems are gravitating towards eachother, to ultimately give rise to a convergence.

Lawson states that: "... the more one studies French law, the more one realises that in many ways it greatly resembles the Common Law"[1002]. This is a view with which I must concur. While there are many individual features which serve to distinguish civil law systems and their legislation from common law systems and their legislation, the areas of similarity ought to bring a smile to the ecumenists in each tradition.

There is some evidence of something akin to a convergence taking place between the two traditions. There is a lot of history behind each tradition, so it is likely that change will be a slow process. However, notwithstanding that factor, changes have, and continue, to take place.

Civil law legislation tends to be no longer drafted in a loose, general principles style. This is evidenced above in the illumination of some of the provisions of the French Intellectual Property Code. This has meant that the ambiguity which went hand-in-hand with the previous flexibility is fading away.

In addition, civil law jurisdictions have been moving away from a position of effectively ignoring the precedential value of case-law, to a situation whereby they now place some limited value in previous decisions of their courts. The principles of interpretation which were absent in civil law jurisdictions are beginning to emerge, as are interpretative provisions in individual pieces of

[1002] Lawson, *A Common Lawyer Looks at the Civil Law* (New York, 1988) p. 55.

legislation.

However, the movement which may eventually bring about a real convergence has not all been one-sided. There have been movements towards civil law by common law jurisdictions too. In the environment of amendment heaped upon amendment which is characteristic of so many common law jurisdictions, many common law jurisdictions, such as Australia, New Zealand, and Tasmania have, in recent years, been recognizing the value of Codes, as a composite stand-alone statement of the law on a given point. This has resulted in their embarking on projects to make their statute book more accessible, not necessarily in the form of codes, but as easily accessible databases of legislation, which rival codes in terms of the level of accessibility which they provide.

There has always been a recognition that Codes are a desirable goal to aspire to. The closest which Ireland has managed to get towards the production of codes, has been a rare consolidation Act. However, in recent times, the Government have pledged to enact Codes in the area of liquor licensing, and there has also been some discussion about the introduction of a Criminal Code[1003].

The move towards plain language, and to a lesser extent, general principles drafting is serving to render common law legislation more readable. However, there is still some distance to go before common law legislation becomes as accessible, in linguistic terms, as legislation of the civil law traditions.

International treaties and conventions have played an important role in bringing together the civil law and the common law traditions. Each of the countries which are party to a treaty or convention, are usually obliged to implement the measure at domestic level. This, in its own way, brings the two

[1003] *An Agreed Programme for Government between Fianna Fáil and the Progressive Democrats* (June, 2002) at p. 25.

traditions together. For example, in implementing a convention, a common law jurisdiction may find itself building some civil law concepts into its justice system, and in the same way, a civil law jurisdiction may find itself building some common law concepts into its justice system – with the effect that even in small ways, the gap that lies between the two traditions is slowly being bridged.

For example, when transposing EU Directives, Departmental officials and legislative drafters in Ireland are increasingly resorting to the "copyout" method. The term "copyout" is used to refer to the practice of transposing a directive by copying its exact terms, into a domestic regulation. The result is that the civil law drafting style as well as the civil law concepts of the directive, become enshrined in domestic law in Ireland.[1004]

The development and expansion of the European Union has, and continues to, contribute to the process of reconciliation between the common law and civil law traditions. The EU has managed to bring together a host of countries which function with different legal systems under a single legislature. Perhaps one of the most significant developments in this regard occurred in 1973, when the UK, the motherland of common law, along with Ireland, joined the EEC, as it then was.

As with international conventions and treaties, legislative measures such as Directives which have been adopted by the EU must be implemented at domestic level by each of the member states. This has resulted in member states adopting and implementing a substantial number of regulations and directives which are heavily influenced by civil law.

[1004] There are numerous examples of this, some being: SI 249/2000 European Communities (Consumer Credit) Regulations 2000; SI 333/2002 European Communities (Corporate Insolvency) Regulations 2002; SI 334/2002 European Communities (Personal Insolvency) Regulations 2002.

In addition to this passive trend towards the convergence of the two traditions, the Commission on European Contract Law (the Lando Commission) has prepared the Principles of European Contract Law, which attempt to reconcile the differences between the civil law and the common law in the area of contract law. While these Principles do not constitute law, they may well be the forerunner of a European Civil Code in this area. If this is eventually achieved, it would mark a further contribution towards the convergence of the civil law and common law traditions.

Statute Law Restatements

The Statute Law (Restatement) Act 2002 seeks to address the problems which arise from the "amendment heaped upon amendment" approach of effecting legislative change. This Act confers, upon the Attorney General, the power to publish a collection of directly related legislation incorporating amendments, to be known as a "Restatement". The restatement idea is to be welcomed as in political circles, a view has developed to the effect that consolidation is a time consuming process with little political appeal. Restatement offers a faster, less expensive and pragmatic alternative to traditional consolidation. The main aim of this Act is to provide a process which will make legislation more accessible and coherent for those who read it. In accord with section 4 of the Act, a restatement will not amend existing legislation. For that reason the process of restatement will not require parliamentary scrutiny. However in order to ensure that the Houses of the Oireachtas are aware of progress under the Act, Restatements will be laid before the Houses once they have been certified by the Attorney General.

The Restatement idea was devised in 1999 by Michael McDowell S.C., the then Attorney General, along with Edward Donelan, Director of the Statute Law Revision Unit. Variations on the restatement idea operate in other common law jurisdictions such as the United States, Canada and Australia.

The Irish model most closely resembles the procedures in place in New South Wales and Queensland. These procedures enable legislation which has been amended, to be reprinted so that legislation can always be read as an updated, coherent narrative.

Key Provisions of the Act

The Statute Law (Restatement) Act 2002 is a relatively short Act. Some important provisions of the Act are worth highlighting. Section 2(1) is the central provision of the Act it authorises the Attorney General to certify and publish Restatements. Section 2(2) allows a Restatement to omit spent, repealed or surplus aspects of the Acts being restated. This will improve the readability of the Restatement. However, this power is qualified by reference to section 4 of the Act, which says that a Restatement will not have the force of law and will not amend the law. Section 2(3) provides that a Restatement can include a statutory instrument. This allows the Restatement to not only set out the law as amended by other Acts, but to also incorporate the effect of statutory instruments also.

Section 3(3) provides that a Restatement may be annotated so as to show the origin or history of its provisions. It may also be annotated to show the date of commencement of any of its provisions. Significantly, the Restatement may contain any other information which the Attorney General feels is necessary. Section 4 states that a Restatement will not have the force of law and does not change the law. Section 5(1) provides that once certified, a Restatement is evidence of the law contained in it. Section 5(2) states that a Restatement will be judicially noticed. Effectively, this means that on its publication, each Restatement will be brought to the attention of members of the judiciary.

Format of Restatements

A typical Restatement consists of a number of Chapters. For example, a principal Act which was amended by two "Amendment" Acts and other

unrelated Acts will be comprised of four chapters. Chapter 1 will contain the principal Act as amended. It will be followed by chapter 2 which will contain extracts of the first "Amendment" Act which could not be incorporated into chapter 1. Chapter 3 will contain extracts of the second "Amendment" Act which could not be incorporated into chapter 1. The final chapter will feature a series of amendments to the restated Acts which could not have neatly been incorporated into the previous chapters.

Guide to Restatements

A detailed Guide as to how Restatements should be compiled has been prepared by the Statute Law Revision Unit for use by the various Government Departments. A number of Restatements have been prepared by the SLRU and it is envisaged that a comprehensive program of Restatements will be drawn up by the SLRU in conjunction with the Departments.

Advantages of Restatements

The advantages of Restatements are numerous. In particular, each Restatement should be viewed as being a comprehensive, stand-alone document setting out the statute law on a given area – which may be cited in Court. As well as rendering the law more coherent and accessible to the lay person, Restatements should save practitioners a considerable amount of time in seeking to ascertain an up-to-date version of the statute law in a particular field. The benefits of the process are probably best illustrated by way of an example. The Sale of Goods Act 1893 was amended by the Sale of Goods and Supply of Services Act 1980. In order to understand the law relating to the sale of goods, at least two sources must therefore be consulted. In 2003 the Attorney General certified a Restatement of the Sale of Goods Acts 1893 and 1980. That Restatement enables the Sale of Goods Act 1893 and the Part II of the Sale of Goods and Supply of Services Act 1980 to be read as one coherent narrative. That exercise has paved the way for the ultimate revision of the statute law governing the sale of goods and the

replacement of old Acts with new more readable formats.

The enactment of the Statute Law (Restatement) Act 2002 presents the possibility that one day an Act which has been amended a number of times will, in fact, one day be compiled as one stand-alone document.

Disappointingly, to date, only four Restatements have been published.[1005] The enactment of the Statute Law (Restatement) Act 2002 held out the prospect of doing great things for the statute book. Some were very optimistic about the impact which Restatements would have on the untidy nature of the statute book and felt that its potential to improve the statute book was far greater than the publication of annotated statutes:

> "The impending enactment [of the] Statute Law (Restatement) Bill 2000 is significantly more important. As noted earlier, the Bill ... should, in time, result in a body of up-to-date legislative texts."[1006]

However, the passing of time coupled with the meagre number of restatements published, indicates that those great expectations are very unlikely to be fulfilled. Statute law restatement is clearly an under-utilised process. If nothing else, its under utilisation points to the lack of any political appetite to seriously tackle the state of our statute book, even in circumstances where a vehicle suitable for doing so exists.

Commercial Publishers

The system by which we effect legislative change, combined with the inadequate arrangements for publication, has been recognised by commercial publishers as a substantial gap in the market, which they are attempting to fill.

1005 The Sale of Goods Acts; the Defence Acts; the Tourist Traffic Acts; Succession Acts.

1006 Byrne & McCutcheon, *The Irish Legal System* (4th ed., Dublin, 2001) at para. 13.110.

The publication of the Annotated Statutes which Round Hall Press began in 1984 continues to be published. Its detailed annotations make it an invaluable resource for the those who consult statutes. However, it simply annotates the Acts in their enacted form and makes no attempt to informally consolidate. In recent years, other legal publishers have begun publishing collections of legislation on related areas. Often, those take the form of what are effectively revised statutes, in a loose-leaf format which can be easily updated.

Revised Statutes

The previous paragraphs have all examined the different forms of publication of the statute book which we already have. However, what follows is an examination of a very particular approach to publication which has never been applied to the Irish Statute Book.

Revised statutes are volumes of statutes which have had all of the repealed and dormant Acts, or provisions of Acts, removed from them. Acts which have been amended will have been re-printed so as to incorporate the amendments – making it far easier on the reader seeking to ascertain the state of the law on a given topic.

The poor and inaccessible nature of our statute book has resulted from our system of effecting legislative change, coupled with inadequate arrangements for the publication of the statute book. The amount of expired, extant and obsolete legislation – deadwood - on our statute book also mitigates against accessibility. The random selection of a volume of the statutes and an analysis of that year, using the Chronological Tables of the Statutes as a guide, is a practical way of showing the amount of deadwood of which the statute book is comprised. This can take the form of whole Acts which have been repealed, or sections of Acts which have been repealed.

For example, an examination of the statutes for 1975 revealed that of the 29 Acts enacted that year, only 7 continue in force without amendment or modification and a further 9 continue in force having been amended. Perhaps most significantly, a staggering 45% (or 13) of the Acts put on the statute book in 1975 are no longer in force at all.

To counter this, a set of Revised Statutes would omit Acts which have been repealed; provisions of Acts which have been repealed; and Acts which have expired. This would remove a massive amount of deadwood from the statute book and would in turn, reduce the physical scale of the statute book. In order to be both authoritative and reliable, revised statutes would have to be constantly kept up to date. By removing the deadwood, and reflecting the effect of amendments, the publication of revised statutes would bring huge improvements to the current ills which befall any user of the Irish Statute Book.

Concluding Remarks

The single most serious impediment to the coherence of the statute book in Ireland is the system by which we effect legislative change. In plain terms, this is the system under which "amendment is heaped upon amendment" as a preferred means of amending the existing body of statute law. The system of effecting legislative change which we have in Ireland is based on the perpetuation of a process of supplementing and effecting amendments to this notional statute book. The practice has been to pile a new, independent Act on top of the existing legislation, without any attempt to weave the new Act into the tapestry of the old. As a consequence, each new Act stands independent of the other.

However, if a change were to be brought about to the way in which

amendments are made, in tandem with a change in the way in which legislation is published, then in those circumstances, significant progress could be made towards achieving a coherent and orderly statute book.

The words of Woodrow Wilson[1007] are a suitably apt description of the state of the Irish statute book. It does not befit a progressive democratic State such as ours to proffer a statute book which is inaccessible and incoherent to the layperson, practitioner and judge.

[1007] The words of Woodrow Wilson, recited earlier in this Chapter are as follows: "Once begin the dance of legislation, and you must struggle through its mazes as best you can to its breathless end – if any end there be".

Chapter 10

Secondary Legislation: An Adjunct to the Statute Book

Introduction

> "This type of delegated legislation is, by common accord, indispensable for the functioning of the modern state. The necessary regulation of many branches of social and economic activity involves the framing of rules at a level of detail that would inappropriately burden the capacity of the legislature. The evaluation of complex technical problems is better left to the implementing rules. They are not, in their nature such as to involve the concerns and take up the time of the legislature. Furthermore, there is frequently a need for a measure of flexibility and capacity for rapid adjustment to meet changing circumstances."

This quote, from Fennelly J.,[1008] outlines in succinct terms, the role which secondary legislation plays in Irish democracy. While the primary focus of this thesis is on the statute book as comprised of primary legislation, the increasing importance of secondary legislation, particularly in recent decades, demands that some aspects of the role of secondary legislation be considered also.[1009]

1008 *Maher v Minister for Agriculture* [2001] 2 IR 139.

1009 For a more detailed examination of secondary legislation, see Hogan & Whyte, *Kelly The Irish Constitution* (4th ed., Dublin, 2003) at para. 4.2.11 et. seq.; Bennion, *Statutory Interpretation: A Code* (4th ed., London, 2002) at p. 50 et. seq.; Ilbert, *Legislative Methods and Forms* (Oxford, 1901) at p. 94; Edgar, *Craies on Statute Law* (7th ed., London, 1971) at p. 289 et. seq.; Thornton, *Legislative Drafting* (4th ed., London, 1996) at p. 427 et. seq. See also, Allen, *Law and Orders* (3rd ed., London, 1965); Barrington, *Delegated Legislation* (London, 1921); Carr, *Delegated Legislation* (Cambridge, 1921); Graham-Harrison, *Notes on Delegated Legislation*; Pearce, *Delegated Legislation in Australia and New Zealand* (Sydney, 1977); Bennett, "Use and Abuses of Delegated Power" [1990] 11 Stat LR 23; Joseph, "Delegated Legislation in New Zealand" [1997] 18 Stat LR 85; St Jn Bates, "The Future of Parliamentary Scrutiny of Delegated Legislation: Some Judicial Perspectives" [1998] 19 Stat LR

While strictly speaking not comprising part of the statute book, secondary legislation is playing an increasingly important legislative role. Approximately 24,151[1010] pieces of secondary legislation have been made since the foundation of the State and this body of law is growing at the rate of about 700 to 900 each year. The growing complexity of society coupled with the pressures on parliamentary time have conspired to ensure that secondary legislation plays an even greater role than previously in supplementing primary legislation. As a result, more and more of our law is to be found in secondary legislation.

There are two areas in particular where secondary legislation directly impacts on the statute book: first, as a result of section 3 of the European Communities Act 1972 which allows secondary legislation to amend primary legislation; and secondly, through the use of what have become known Henry VIII provisions in legislation, which purport to allow secondary legislation to amend primary legislation. Both of these factors have given rise to a situation where secondary legislation not only serves as an appendage to, but has a very real impact on, the statute book.

What is Secondary Legislation?

The term secondary legislation[1011] is a reference to a category of legislation. Within that category, there are three kinds of secondary legislation: regulations; orders; and rules.

By far the most commonly made type of secondary legislation are regulations.

155; Taggart, "From 'Parliamentary Powers' to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century" 55(3) University of Toronto Law Journal (Summer 2005), 575; Tudor, "Secondary Legislation: Second Class or Crucial?" [2000] 21 Stat LR 149.

[1010] From 1922 to 1947, approximately 5007 statutory rules and orders have been made; and from 1948 to 2003, 19,144 statutory instruments have been made.

[1011] Often referred to as delegated legislation, or statutory instruments.

Regulations tend to be of similar effect as primary legislation in that they direct a certain type of behaviour or action. They largely supplement legislation, providing the administrative or technical detail which is not contained in the parent Act. Unlike primary legislation, regulations offer a great degree of flexibility in that they can be revoked or changed by the stroke of the Ministerial pen.[1012]

In contrast, orders are made on a far less frequent basis. Unlike regulations, they are not legislative in their effect. Orders tend to be procedural in nature and are primarily used to carry out one specific task such as the commencement of an Act or part of it. They are also used to transfer functions between Ministers and tend to be a common feature following the formation of a new Government.[1013]

As a form of secondary legislation, rules tend to be quite rare. For example, of the 740 statutory instruments made in 2003, only 16 of them were rules or amendments to existing rules. Examples of rules are the Prison Rules 2003[1014]; or the Rules of the Superior Courts 1986[1015].

The Statutory Instruments Act 1947 regulates many aspects of the making and publication of statutory instruments. Section 1(1) of the Act defines a statutory instrument as being an "order, regulation, rule, scheme or bye-law made in exercise of a power conferred by statute.". Section 3 of the Act sets down the procedures under which statutory instruments must be published and brought to the attention of members of the public. This is akin to the procedure laid down in respect of the promulgation of primary legislation as

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[1012] This freedom is of course subject to any laying or other similar requirements laid down in the parent Act.

[1013] Typically after a new Government is formed, there will be a glut of transfer of functions orders in order to give effect to the wishes of the Taoiseach to reassign responsibility for particular areas. In 1997, seven were made. In 2002 fifteen were made. While such orders effect an amendment to legislation, they are made pursuant to the exercise of a classic executive function – not that of the Oireachtas or legislature.

[1014] S.I. 730/2003.

[1015] S.I. 15/1986.

provided for by Article 25 of the Constitution.

Section 4 of the Act requires the Stationery Office to assign a number to each statutory instrument which must be printed on its face. In accordance with section 5, each statutory instrument may then be cited by its title or by its number and year.

The following Table illustrates the volume made over the ten year period 1995 to 2004. It gives an indication of the rate at which this largely unmanaged body of law grows on an annual basis.

Year	Number of Statutory Instruments
1995	385
1996	428
1997	518
1998	573
1999	465
2000	495
2001	658
2002	647
2003	740
2004	915

As this Table shows, approximately 700 to 900 statutory instruments are made in Ireland in any one year. This amounts to a substantial body of law. They constitute an ever expanding morass, worrying in terms of their scope and their inaccessibility.

Every piece of secondary legislation must derive its authority and purpose from a parent Act. As such, it may be said that secondary legislation stands

as an adjunct to the statute book. Notionally, the union of an Act and its subsidiary secondary legislation comprise one composite work. As stated by Lord Alverstone CJ, "... where a statute enables an authority to make regulations, a regulation made under the Act becomes for the purpose of obedience or disobedience a provision of the Act."[1016].

Very few Acts form a stand-alone, definitive statement of the law on a particular topic. Invariably the content of an Act is supplemented by secondary legislation. So to understand the law on a given topic, it will be necessary to look beyond the Act and to extend the search to cover secondary legislation. However, where an Act is over-reliant on secondary legislation as a means of filling in the gaps left in an Act, this gives rise to what might be regarded as an excessive or unjustified degree of delegation.

Aspects of the Water Services Bill 2003 contain several examples of what might be regarded as excessive delegation. The Bill contains 109 sections, approximately 38 of which expressly confer the power to make regulations. It seems that a sizeable number of issues, and not just those of detail, will be determined by the Minister alone, not the legislature. Where delegation occurs to such a great degree, the Act merely represents an outline of the law, with much of the detail to follow later through secondary legislation.

The availability of secondary legislation as a legislative vehicle enables the Minister to exercise a degree of discretion as regards the matters which have been delegated. In addition, the ability to delegate routine or particularly technical or complex matters to statutory instruments has relieved some of the pressures on parliamentary time. As the Dáil becomes more focussed on its legislative role, coupled with the increased scrutiny to which each Bill is subjected, there has been a growing tendency to relegate as much as possible to the secondary legislation made under each Act. Not only does

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1016 *Willingale v Norris* [1909] 1 KB 57, 64.

this spare the sponsoring Minister the time and trouble of defending each and every measure, it also ensures that the opposition are not afforded an opportunity to dilute his or her policy and plans in that regard.

For reasons of political expediency, a Minister might wish to address sensitive matters in secondary legislation rather than in the body of a Bill. Similarly, a Minister might be anxious to use secondary legislation to deal with matters which are likely to give rise to controversy on the floor of the House.

While what has been just outlined may be the reasons for the volume of secondary legislation, they also represent reasons to be concerned about the growing inaccessibility and incoherence of legislation, but also of the statute book as a whole.

Distinction between Primary and Secondary Legislation

Statutory instruments can be distinguished from primary legislation in a number of ways. For example, by virtue of their nature, statutory instruments can only deal with less substantive and procedural matters. In addition, a statutory instrument cannot create a criminal offence. However secondary legislation made under section 3 of the European Communities Act 1972 is an exception to both of these rules as not only can regulations made under that Act deal with substantive matters, they can also create criminal offences.

A further difference between primary and secondary legislation lies in the fact that secondary legislation is generally not subjected to any form of legislative process[1017] as compared to that of a Bill. This is what allows secondary legislation to be effectively made with the stroke of the Ministerial pen. Consequently, it can be said that secondary legislation generally is not subject to monitoring or scrutiny.

[1017] The imposition of a laying requirement on secondary legislation and whether that constitutes a legislative process is discussed later.

One of the primary distinctions between primary legislation and all forms of secondary legislation is that the scope of primary legislation is only limited by the terms of the Constitution, whereas secondary legislation must not exceed the scope envisaged by the parent/authorising legislation. Accordingly, the potential for challenge of secondary legislation is far greater. This distinction was perhaps best expressed by Lord Herschell LC in *The Institute of Patent Agents v Lockwood*[1018] where he said:

> "The effect of an enactment is that it binds all subjects who are affected by it. They are bound to conform themselves to the provisions of the law so made. The effect of a statutory rule if validly made is precisely the same that every person must conform himself to its provisions, and, if in each case a penalty be imposed, any person who does not comply with the provisions whether of the enactment or the rule becomes equally subject to the penalty. But there is this difference between a rule and an enactment, that whereas apart from some such provision as we are considering, you may canvass a rule and determine whether or not it was within the power of those who made it, you cannot canvass in that way the provisions of an Act of Parliament.".

This analysis was endorsed as being equally reflective of the position under Irish law by Finlay-Geoghegan J. in *Leontjava and Chang v D.P.P.*[1019], where she quoted it with approval.

It is clear that the scope of the subordinate legislation is bound by the terms of the primary enactment from which it derives authority for its making. It is well established that secondary legislation is bound by the principles and policies of its parent enactment and any attempt to exceed these limits will be fall foul of the courts.

[1018] [1894] AC 347 at p. 359.
[1019] [2004] 1I.R. 591 at 606.

Principles & Policies[1020]

The requirement for secondary legislation to accord with the principles and policies of its parent legislation was addressed by the Supreme Court in the seminal case of *Cityview Press v An Comhairle Oiliúna*[1021]. And in the Court's view:

> "... the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits – if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body – there is no unauthorised delegation of legislative power."[1022]

This *dicta* is what gave rise to the principles and policies test which was to become the benchmark against which contentious secondary legislation being examined by the courts would be tested.

Having devised and applied the principles and policies test, the Supreme Court found that there had not been any unconstitutional delegation of authority on the grounds that the 1967 Act contained "clear declarations of policies and aims".

This was arguably one of the most significant decisions regarding secondary legislation. However, this fact does not prevent Hogan & Whyte from

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1020 See, Hogan & Whyte, *Kelly The Irish Constitution* (4th ed., Dublin, 2003) at para. 4.2.20 et.seq.

1021 [1980] I.R. 381.

1022 *ibid.*, at 399.

questioning the basis of the Supreme Court's decision:

> "And yet it may be questioned whether the Court did full justice to these ringing principles in their application to the rather vague provisions of the 1967 Act. There was nothing in the 1967 Act itself which provided guidance as to the amount of the levy and it is not at all obvious that it did contain the appropriate principles and policies." [1023]

One thing which is abundantly clear is that the principles and policies test devised in Cityview was replete with ambiguity, much of which remains. It is perhaps ironic that in the very case from which the principles and policies test emerged, there are real doubts as whether the test was correctly applied. It is perhaps worth looking closer at what exactly underlies the concerns which have been expressed by Hogan and Whyte.

Section 21(1) empowered the Minister to impose a levy by way of Ministerial order:

> "21.—(1) For the purposes of meeting the expenses in relation to the performance, as respects a designated industrial activity, of its functions under this Act, An Chomhairle may, after consultation with the relevant industrial training committee (if any), make an order (in this Act referred to as a levy order) imposing a levy on the employers in the activity, other than such employers (if any) as may be exempted by the levy order, and whenever a levy order is made there shall be paid in accordance with the levy order to An Chomhairle by each such employer on whom it is imposed a levy of such amount as may be appropriate having regard to the provisions of the levy order, and the moneys received for and on account of the levy by An Chomhairle shall be kept by An Chomhairle in a separate account."

[1023] Hogan & Whyte, *JM Kelly the Irish Constitution* (4th ed., Dublin, 2003) at para. 4.2.22.

It is perhaps helpful to look at the particular issues which this provision addresses. First, it confers a power on An Comhairle to make a levy order. Secondly it states upon whom the levy may be imposed - employers. Thirdly, it states that the purpose of the levy order is to enable An Comhairle to meet its expenses. While section 21(1) does not go on to provide guidance on how the amount of the levy order is to be calculated, in view of the discretionary nature of secondary legislation, it is perhaps arguable that such detail is not vital[1024]. What is significant is that the power was conferred at all, and that the purpose of the order was articulated.

It would perhaps defeat the purpose of delegated legislation if each and every detail were to be provided for in the primary legislation. It is not inconceivable that, in this instance, the legislature deliberately omitted guidance as to the amount of, or calculation of the levy, so as to avoid any difficulty should a change in circumstances occur in the future. A degree of flexibility in a provision, such as that in section 21(1) regarding the calculation of the levy, should not be seen as being incompatible with the presence of the principles and policies.

In *Laurentiu v Minister for Justice*[1025], a question arose as to whether it was constitutionally permissible for a Minister to introduce secondary legislation where the policies and principles which he was purporting to implement were not set out in the parent Act. In this case, the Minister had purported to confer a power of deportation upon himself under Art. 13 of the Aliens Order 1946. In the High Court, Geoghegan J.[1026] held that the Minister "is not entitled to confer on himself the power to deport ... Such a provision would have to be in the Act itself.". He added that the effect of this provision was "not in any

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[1024] The later part of this sentence is not likely to secure the concurrence of Hogan & Whyte, as at para. 4.2.22, they state: "There was nothing in the 1967 Act itself which provided guidance as to the amount of the levy and it is not at all obvious that it did contain the appropriate principles and policies."

[1025] [1999] 4 I.R. 26.

[1026] *ibid.*, at 41.

sense a purely or regulatory matter" and he concluded by stating that "Article 13 [of the Order of 1946] contains substantive legislation and that is prohibited by Article 15.2 of the Constitution.".

The case was subsequently appealed to the Supreme Court. In affirming the decision of the High Court, Denham J. stated that the Oireachtas may not delegate its power to legislate and went on to state that the "principles and policies test must be applied in accordance with constitutional presumptions as to the interpretation of legislation."[1027] She then went on to add:

> "One searches in vain to find principles and policies regarding deportation of aliens in the Act. The legislature grasped the power over aliens from the executive and then delegated inadequately to the Minister. It abdicated its power."[1028]

In also dismissing the appeal, Keane C.J. held that the power which section 5(1)(e) of the Aliens Act 1935 gave to the Minister to determine the policies and principles was inconsistent with the exclusive power to legislate as vested in the Oireachtas under Article 15.2.1 of the Constitution.

Despite Denham J.'s reference to "Standards, goals, factors, and purposes", this case failed to shed some much needed light on just what exactly constitutes the principles and policies which must be expressed in the legislation. Instead, the Court chose to apply a very restrictive interpretation as to what constitutes the principles and policies. As can be seen, the purpose of section 5(1)(e) of the Aliens Act 1935 was plain:

> "5.—(1) The Minister may, if and whenever he thinks proper, do by order (in this Act referred to as an aliens order) all or any of the following things in respect either of all aliens or of aliens of a particular

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1027 *ibid.*, at 61.
1028 *ibid.*, at 63.

nationality or otherwise of a particular class, or of particular aliens, that is to say:—

...

(e) make provision for the exclusion or the deportation and exclusion of such aliens from Saorstát Eireann and provide for and authorise the making by the Minister of orders for that purpose;"

This provision sought to confer a power on the Minister to make an order relating to the exclusion or deportation of all aliens. The principle is that the State should have the power to exclude or deport aliens and, in policy terms, this was to be achieved by the Minister making an order to that effect.

Keane J. was of a different view, as he believed that through the provision:

> "The Oireachtas had, in effect, determined that policy in this area should be the responsibility of the Minister ..."[1029].

This appears to be an overly restrictive interpretation of what exactly constitutes principles and policies. On the one hand, it is difficult to agree with such a view because if the provision were to go further and express the grounds upon which an alien was to be excluded or deported, this would have defeated the very purpose behind facilitating the making of secondary legislation in the first place.

However, on the other hand, it may be said that the legislature's abrogation of their policy making function in so far as it relates to the grounds upon which the Minister was to be permitted to exclude and deport aliens, was perhaps a step too far in terms of Article 15.2. This serves to illustrate that even where the conferral on a Minister of a particular power, is clear, it will fall foul of Article 15.2 if the principles and policies which are to inform the exercise of

[1029] [1999] 4 IR 26, 92.

that power are not articulated in primary legislation.

As a result of the decision in Laurentiu, the legislature enacted section 2 of the Immigration Act 1999. Section 2(1) of the Immigration Act 1999 provided as follows:

> "Every order made before the passing of this Act under section 5 of the Act of 1935 other than the orders or provisions of orders specified in the schedule to this Act shall have statutory effect as if it were an Act of the Oireachtas.".

Section 2 itself became the subject of contention in the joint case of *Leontjava and Chang v D.P.P.*[1030]. In the High Court, Finlay-Geoghegan J. had to consider the validity and constitutionality of section 2 of the Immigration Act 1999 and also Articles 5(6) and 15 of the Aliens Order 1946. Article 5(6) of the 1946 Order purported to empower an immigration officer to impose conditions on an alien's stay in the country, while Article 15 required aliens to produce his or her registration certificate or passport.

The Applicants contended that Articles 5(6) and 15 of the 1946 Order were, first, ultra vires section 5 of the Aliens Act 1935; and secondly, that section 5 of the 1935 Act was itself inconsistent with Article 15.2 of the Constitution.

Having found Article 15 of the 1946 Order to be intra vires, Finlay-Geoghegan J. found section 5(1)(h) of the Act of 1935 to be inconsistent with Article 15.2 of the Constitution on the basis that the Act did not set down the policies and principles which ought to underpin an Order, but instead it allowed the Minister, when making the order, to set the principles and policies unilaterally. She stated:

[1030] High Court & Supreme Court, [2004] 1I.R. 591.

"I have concluded that the Act of 1935 does not set out any policies and principles according to which the power given to the Minister under s. 5(1)(h) to require aliens to comply whilst in the State in relation to the matters set out therein with 'particular provisions' should be exercised. Rather, a consideration of the opening words of s. 5(1) indicates an intention by the Oireachtas to delegate to the Minister the policy decisions as to whether each or any of the orders made thereunder should apply to all aliens, aliens of a particular nationality, aliens of a particular class or particular aliens. Further, there is no indication, even in relation to the specific matters referred to in para. (h), as to the policies according to which the Minister should determine either those aliens to which any requirements should apply or the 'particular provisions' with which such aliens should be required to comply in any order made under s. 5(1)(h)."[1031]

With reference to the effect of section 2 of the Immigration Act 1999, counsel for the State conceded that section 2 did not have the effect of converting the 1946 Order (primary legislation) into primary legislation. Instead the State peculiarly sought to argue that as a result of section 2, the 1946 Order "now has as part of its legal status characteristics of an Act of the Oireachtas."[1032]. Having examined section 2 with the presumption of constitutionality[1033] in mind, Finlay-Geoghegan J. was perplexed by what section 2 was trying to achieve:

"There does not appear to me to be anything in the Constitution which authorises or permits the Oireachtas to determine that a provision which is ... secondary legislation made by a person other than the Oireachtas pursuant to a power conferred on him by statute should henceforth be treated in the legal order of the State 'as if it were an Act

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1031 *ibid.*, at 604.

1032 *ibid.*, at 601.

1033 The presumption of constitutionality is discussed in greater detail in Hogan & Whyte, *Kelly: The Irish Constitution* (Dublin, 4th ed., 2003) paras. 4.5.83 et. seq., and 6.2.182.

of the Oireachtas' or a law within the meaning of Article 15.2.1."[1034].

Despite the fact that section 2(2) of the 1999 Act contained a constitutional saving[1035] provision, Finlay-Geoghegan J. found section 2(1) to be repugnant to the Constitution. Finlay-Geoghegan J.'s finding in this regard was unavoidable. The combined strength of the presumption of constitutionality and a constitutional saving provision were not enough to save the validity of a provision such as this. On appeal, the Supreme Court[1036] largely affirmed the decision of the High Court, but they reversed Finlay-Geoghegan J's finding that section 5(1)(h) was inconsistent with Article 15.2 of the Constitution.

In attempting to distinguish this case from his previous decision in Laurentiu, Keane C.J. applied a more relaxed, liberal interpretation of the requirements of the principles and policies test:

> "The policy enunciated is plain: the desirability of regulating the registration, change of abode, travelling, employment and occupation of aliens while in the State and the further desirability of regulating 'other like matters'. The use of the expression 'particular provisions' in this context is, in my view, unexceptionable; it was entirely appropriate for the legislature to specify the matters which it considered required regulation, while leaving it to the Minister to put in place specific regulatory provisions. Similarly, the use of the expression 'other like matters' is what one would expect in a provision conferring a power of delegated legislation; the use of the phrase 'other like matters' is peculiarly appropriate where the broad scope of the envisaged regulations is being set out in statutory form. To require the legislature either to specify the 'particular provisions' or the 'other like matters' in the parent legislation itself would be to negate the whole purpose of the

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1034 *ibid.*, at 613.

1035 The effect of constitutional savings is discussed in more detail in Chapter 7.

1036 [2004] 1 I.R. 591.

power admittedly enjoyed by the Oireachtas to provide for delegated legislation."[1037]

On that basis, he set aside the decision of the trial judge that s. 5(1)(h) was inconsistent with Article 15.2 of the Constitution and had not survived the enactment of the Constitution.

The importance of the principles and policies test was also reiterated by the Supreme Court in *Browne v A.G.*[1038]. This case was brought by way of Judicial Review and concerned Vincent Browne, whose fishing boat had been detained on the basis that it contained illegal drift nets. Browne then faced charges in Cork Circuit Court on the basis that he had infringed S.I. 267/98 (the statutory instrument which purported to implement an EU Regulation) by having drift nets on his boat.

The statutory instrument purported to give effect to Council Regulation 1239/98, which banned the possession of driftnets of over 2.5 kilometres. The EC Regulation had been transposed under a power derived from section 223A of the Fisheries (Consolidation) Act 1959 rather than under section 3(1) of the European Communities Act 1972. On that basis, the Browne contended that S.I. 267/1998 was invalid having regard to the Constitution.

The statutory instrument sought to create an indictable offence and attempted to extend that offence beyond the territorial limits of the State without using primary legislation. Kearns J. summarised the dilemma which faces a Minister when deciding the most appropriate means of transposing an EC measure:

"The essential issue therefore when Community law is being transposed is to determine the circumstances in which Ministerial

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1037 *ibid.*, at 624.

1038 [2003] 2 IR 305.

Regulation, rather than primary legislation, may be resorted to for that purpose, and where it is permissible, to examine if the mode of implementation complies with the requirements of domestic law."[1039]

The boundaries within which secondary legislation must stay have been well established in a succession of cases. Kearns J. reiterated the well established principle that secondary legislation must be within the principles and policies of the primary legislation:

"Under Irish constitutional principles, ministerial regulations cannot make new law and are permitted only to give effect to the principles and policies contained in the parent Act under which they are adopted. They may not repeal or amend legislation. They may not go beyond the four walls of the particular Act."[1040]

In order to determine whether the statutory instrument made by the Minister was ultra vires and also unconstitutional, Kearns J. applied a series of tests as follows[1041]:

1. Was legislation of some form required? – Yes
2. Was the chosen form of implementation necessitated by virtue of our membership of the EU? – No.
3. Did Council Regulation 1239/98 set out the principles and policies so as to obviate the need for primary legislation? - The Council Regulation did set out the principles and policy.
4. Did Council Regulation 1239/98 leave a considerable discretion for the member state – in which case, primary legislation is required? - The Council Regulation allowed the member states

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1039 High Court, unreported, 6 March 2002 at para. 46.
1040 *ibid.*, at para. 47.
1041 *ibid.*, para. 56 – 60.

to decide whether to impose administrative or criminal sanctions. Kearns J. said "In my view the choice by the Minister of Regulation was constitutionally permissible, subject only to the requirement that it be carried into effect in a constitutional fashion."

5. Did SI 267/98 and its mode of implementation breach Article 15.2.1 of the Constitution – ie. the Oireachtas' power to legislate? – Yes.

So in Kearns J.'s view, the Minister clearly acted incorrectly in three respects: first, he implemented the Council Regulation by regulations made under the Fisheries (Consolidation) Act 1959. Secondly, the 1959 Act, as a parent Act, was an unsuitable choice as it does not provide necessary principles and polices which allow for the imposition of a ban on drift nets. Thirdly, in purporting to transpose the Regulation, the Minister sought to create an indictable offence in a statutory instrument, which is impermissible. This decision was subsequently affirmed by a five-nil decision by the Supreme Court.

When one stands back and looks at the succession of cases on secondary legislation which have emerged since the Supreme Court decision in Cityview, it is possible to identify a number of different approaches being employed by the Courts. Those approaches may be categorised as follows:

1. Cases in which the Courts are generous in the application of the principles and policies test (such as *Cityview; Meagher; Maher,* Keane C.J. in *Leontjava*);

2. Cases in which the Courts were restrictive in the application of the principles and policies test (such as *Laurentiu*);

3. Cases in which the Courts apply the presumption of constitutionality so as to save the validity of the provision in question (such as *Cooke*, and also *Harvey*).

A well devised test will deliver fairly consistent and, to some degree predictable results. Looking back over the succession of case law which has arisen since *Cityview*, one thing which becomes clear is that the Courts have been going from pillar to post on the principles and policies test. This, to a large degree, stems from the lack of clarity attributed to the test when it was first devised. Among other things, this jurisprudence has shown that it is not enough for the judiciary to just break new ground. Where novel legal principles are developed by the Courts, guidance as to how those principles are to apply must also be provided.

Examination of Secondary Legislation

There is no joint or select committee of the Oireachtas whose sole purpose is to scrutinise secondary legislation or even monitor the quality and extent of, or pace at which, secondary legislation is made. There is some limited monitoring of statutory instruments made pursuant to section 3 of the European Communities Act 1972. The Joint Committee on European Affairs scrutinises regulations made under section 3 and it has the power to make a recommendation to the Houses of the Oireachtas that certain regulations be annulled.

In the past, some level of scrutiny was achieved by the Seanad Select Committee on Statutory Instruments, which published a number of Reports during its existence[1042]. That Committee examined the existing body of statutory instruments and in the context of best practice, made recommendations.

[1042] First Report of the Select Committee on Statutory Instruments 11 May 1955; Second Report of the Select Committee on Statutory Instruments 28 November 1956.

In the UK, in 1929, a Committee called the Committee on Ministers Powers, which became known as the Donoughmore Committee, was established to:

> "... consider the powers exercised by or under the direction of (or by persons or bodies appointed specially by) ministers of the Crown by way of (1) delegated legislation and (2) judicial or quasi-judicial decision: and to report what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the law."[1043]

While the Committee did accept that secondary legislation is an inevitable part of a democracy, they felt that more was needed to be done to exercise control over its use. They felt that a Committee of each House of Parliament should be established which may consider every Bill which delegates legislative power, and to examine every instrument made pursuant to those powers. The Committee also recommended that secondary legislation made pursuant to delegated legislative power should be laid before the parliament. This final recommendation led to the establishment, in 1944, of the Select Committee on Statutory Instruments.

Nine years later, a further committee was established in the House of Commons. Officially named the Select Committee on Delegated Legislation[1044], (perhaps more widely known as the Davies Committee), its purpose was to determine "in what respects the existing procedures, by which the control of the House over delegated legislation is exercised, need to be improved or supplemented and by what means this can best be achieved."[1045].

1043 (1932, Cmd. 4060).
1044 (1953 HC, No. 310).
1045 *ibid.*,

Accessibility and Publication of Statutory Instruments

The law contained in secondary legislation is less well known and a great deal harder to find than the law contained in the statute book. In addition to the diverse areas of law which they address, the sheer volume of secondary legislation combined with virtually no consolidation, indexation etc. gives rise to grave concerns as to the accessibility of secondary legislation. These concerns are heightened in view of the fact that some statutory instruments effect amendments to primary legislation.

Since 1890, statutory rules in the UK have been published in a form similar to that of the annual volume of the statutes. Similarly, in this jurisdiction, statutory instruments are first published individually and are then published in bound volumes, separate from Acts.

In contrast with Acts, whose initial publication is centrally controlled by the Bills Office in Leinster House, responsibility for the publication of statutory instruments lies with each Government Department. Because of this, discrepancies can occur and as a result there are very often delays between the making of a statutory instrument and its formal publication – either on the internet or in print. Problems regarding the publication of statutory instruments was raised in the course of the Committee Stage debate on the Interpretation Bill 2000 in the Seanad.[1046]

The timely publication of secondary legislation has been an issue for some time, not only in this jurisdiction. In the UK, in 1892, the Statute Law Committee found it necessary to comment on the then practice of Departments issuing rules and orders without any publicity or notice.

[1046] As asserted by Senator Brian Hayes: "Practitioners ... say it is virtually impossible to access the statutory instruments expeditiously on a website soon after the Minister has signed them into law." 180 *Seanad Debates* Col. 2291 (29 June 2005).

One of the aims of the Statutory Instruments Act 1947 was to achieve improved speed and greater publicity for the publication of statutory instruments. Section 3 requires each statutory instrument to be distributed to specific bodies[1047] within seven days of its making. As soon as possible after that, notice of the making of the statutory instrument must be published in *Iris Oifigiúil* and copies of the statutory instrument must be printed and made available for sale.

Amendment of Acts by Secondary Legislation and Article 15.2 of the Constitution

Because of the clear and unambiguous terms of Article 15.2 of the Constitution, it is well established that, save in exceptional circumstances, primary legislation cannot be amended by secondary legislation.[1048] Article 15.2 of Bunreacht na hÉireann provides:

> "15.2.1 The sole and exclusive power for makings laws in the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State."

Article 15.2.1 makes a clear pronouncement to the effect that the Oireachtas is the sole law making body in the State. With reference to Article 15.2, Finaly P. stated:

> "Prima facie, such power of legislation is absolute and all-embracing, subject to the qualifications imposed on it by the Constitution."[1049]

[1047] National Library of Ireland, the Law Library, Four Courts, Dublin, the Incorporated Law Society of Ireland, the Dublin Chamber of Commerce, the Cork Chamber of Commerce the Limerick Chamber of Commerce, the Waterford Chamber of Commerce and the Galway Chamber of Commerce.

[1048] See, Hogan & Whyte, *Kelly The Irish Constitution* (4th ed., Dublin, 2003) at para. 4.2.09 et. seq.

[1049] *The State (Walshe) v Murphy* [1981] I.R. 275 at 284.

In *Pigs Marketing Board v Donnelly*[1050]. Hanna J., in reference to Article 15.2.1 stated:

> "It is axiomatic that powers conferred upon the Legislature to make laws cannot be delegated to any other body or authority. The Oireachtas is the only constitutional agency by which laws can be made.".

And he then went on to outline the circumstances in which it was permissible for the Oireachtas to delegate the power of making administrative rules and regulations:

> "But the Legislature may, it has always been conceded, delegate to subordinate bodies or departments not only the making of administrative rules and regulations, but the power to exercise, within the principles laid down by the Legislature, the powers so delegated and the manner in which the statutory provisions shall be carried out. The functions of every Government are now so numerous and complex that of necessity a wider sphere has been recognised for subordinate agencies, such as boards and commissions." [1051]

In *Mulcreevy v Minister for Environment*[1052], Keane C.J. was unambiguous is asserting that all legislation must be within the bounds prescribed by Article 15.2 of the Constitution:

> "It is well established that the exclusive role assigned to the Oireachtas in the making of laws by this Article does not preclude the Oireachtas from empowering Ministers or other bodies to make regulations for the purpose of carrying into effect the principles and policies of the parent

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1050 [1939] I.R. 413 at 421.
1051 At p. 421.
1052 [2004] 1 I.R. 72.

legislation. ... But it is also clear that such delegated legislation cannot make, repeal or amend any law and that, to the extent that the parent Act purports to confer such a power, it will be invalid having regard to the provisions of the Constitution."[1053].

It is now abundantly clear from Article 15.2, supported by a series of decisions of the courts, that while Article 15.2 allows for the making of secondary legislation, legislation of that kind which purports to amend primary legislation is impermissible in the context of Article 15.2.

ESTABLISHED EXCEPTIONS TO ARTICLE 15.2

As a result of the absence of any ambiguity surrounding the meaning of Article 15.2, it is clear that many of the amendments made to primary legislation by way of secondary legislation are constitutionally questionable. However, there are some limited circumstances in which it permissible for an Act to be amended by secondary legislation. Section 3 of the European Communities Act 1972 is perhaps the most clear-cut exception to the rule. Somewhat less clear are Henry VIII provisions in legislation which purport to authorise the making of secondary legislation to amend an Act.

Section 3 European Communities Act 1972

Under the EU Treaties, member states enjoy discretion as to how they give effect to obligations which arise from their membership. Implementing EU law in a domestic context often involves the State having to decide whether to implement EU law by way of primary legislation or secondary legislation. A decision in this regard is dependent on the extent of the changes required. As a result, Ireland frequently utilises both approaches. For example when

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[1053] *ibid.*, at p. 87.

seeking to give effect to Directive 95/46/EC on the protection of individual's personal data, the State opted for primary legislation and enacted the Data Protection (Amendment) Act 2003. In contrast, when seeking to give effect to Directive 96/53/EC on the safety of vehicles, the State opted to make regulations – Road Traffic (Construction and Use of Vehicles) Regulations 2003.

Many of the statutory instruments made by Ministers to transpose EU Directives etc. are made under section 3 of the European Communities Act 1972. Were it not for section 3, a great deal more primary legislation would have to be enacted. Section 3 reads as follows:

> "3.—(1) A Minister of State may make regulations for enabling section 2 of this Act to have full effect.
>
> (2) Regulations under this section may contain such incidental, supplementary and consequential provisions as appear to the Minister making the regulations to be necessary for the purposes of the regulations (including provisions repealing, amending or applying, with or without modification, other law, exclusive of this Act).
>
> (3) Regulations under this section shall not create an indictable offence.
>
> (4) Regulations under this section may be made before the 1st day of January, 1973, but regulations so made shall not come into operation before that day.".[1054]

While section 3 affords considerable scope for the amendment of primary legislation, that scope is limited. Only those amendments which are

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[1054] Section 3 follows on from the Third Amendment of the Constitution Act 1972. Article 29.4.7° (originally Article 29.4.3) now reads: No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or by institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the State. See Eighteenth Amendment of the Constitution Act 1998.

"incidental, supplementary and consequential" are permissible.[1055] In addition, regulations made under section 3 may not create an indictable offence.[1056]

Section 3 of the European Communities Act 1972 has been deemed constitutional by the Supreme Court in *Meagher v Minister for Agriculture*, where the applicant sought to challenge the validity of two statutory instruments made by the Minister pursuant to section 3(2) of the European Communities Act 1972. Both statutory instruments effected amendments to section 10(4) of the Petty Sessions (Ireland) Act 1851. In the High Court, Johnson J. held that the regulations were ultra vires on the basis that they purported to amend the primary legislation. However, the Supreme Court in reversing this decision, affirmed the constitutionality of section 3 and found that the regulations in question were necessitated by our membership of the E.C. and accordingly were permissible.

While it is, with hindsight, easy to be critical of Johnson J.'s decision in the High Court, he was merely reflecting the position which had prevailed up until that point – namely, that secondary legislation which purported to amend primary legislation was impermissible. In all likelihood, in view of the import of the matter, whatever position he endorsed was highly likely to be settled with finality in the Supreme Court.

With reference to section 3 of the European Communities Act 1972, the Supreme Court made it clear that despite its apparent breadth, the power to amend primary legislation by way of secondary legislation is not unlimited:

> "it is to be implied that the Minister shall not in exercising the power of making regulations pursuant to the section, contravene any provision of the Constitution.
>
> If therefore in such an instance challenge were to be made to the

1055 See section 3(1) of European Communities Act 1972.

1056 See section 3(3) of the Act.

validity of a ministerial regulation having regard to the absence of necessity for it to be carried out by regulation instead of legislation and having regard to the nature of the content of such regulation it would have to be a challenge made on the basis that the regulation was invalid as ultra vires being an unconstitutional exercise by the Minister of the power constitutionally conferred upon him by the section."[1057]

Similar principles were considered by the Supreme Court in *Maher v Minister for Agriculture and Food*[1058], which concerned the making of Ministerial Regulations which purported to give effect to a Council Regulation on milk quotas. The applicants had challenged the validity of the Ministerial Regulation on the basis that its making had not been "necessitated" in accord with Article 29.4.10 of the Constitution. In determining whether the Ministerial Regulation infringed Article 15.2.1 of the Constitution, Keane C.J. sought to determine the issues by asking "whether the statutory instrument does no more than fill in the details of principles and policies contained in the European Community or European Union legislation."[1059] He concluded, that: "the making of the regulation was not an impermissible exercise of the legislative role of the Oireachtas and that the applicants' contentions to the contrary are not well founded."[1060]

Keane C.J.'s pragmatic approach in Maher, which came down to a relaxed interpretation of what it is that constitutes principles and policies, is in sharp contrast to the approach which he took in Laurentiu, where he seemed to apply an overly restrictive interpretation of the same test.

With reference to the decisions in Meagher and also Maher in this area, Hogan and Whyte seem to contrast the approach of the Courts when dealing with domestic, as opposed to EU legislative needs. They are critical of the

[1057] [1994] 1 IR 326, 352 – 353.
[1058] [2001] 2 IR 139.
[1059] *ibid.*, at 183.
[1060] *ibid.*, at 186.

courts for being "excessively accommodating ... in identifying appropriate principles and policies in the Community primary legislation itself." [1061]

Regulations made under section 3 of the European Communities Act 1972 enjoy a special status. Uniquely in the constitutional framework of the State, they can amend primary legislation. As such, the power to make regulations under the 1972 Act is the best established and most utilised exception to Article 15.2.1 of the Constitution.

The following Table gives an indication of the extent of the role which these kind of statutory instruments play:

Year	Number of Statutory Instruments Made	Number of Statutory Instruments Made Pursuant to Section 3
1997	518	58
1998	572	82
1999	472	83
2000	495	75
2001	658	76
2002	647	86
2003	740	141

The increasing reliance on regulations made under section 3 is surprising. In 1997, there were 58 statutory instruments made under the section 3 exception. In 2003, this rose sharply to 141 statutory instruments which were made in reliance of the section 3 exception. In the absence of the section 3 exception, the extent to which our membership of the EU would necessitate

[1061] Hogan & Whyte, *JM Kelly The Irish Constitution* (4th ed., Dublin, 2003) at para. 4.2.44.

the enactment of primary legislation would have the effect of congesting the Oireachtas with Bills to make numerous amendments. It is the sole wholly and clearly established exception to Article 15.2.

Secondary legislation made under section 3 can potentially have the same impact as a piece of primary legislation. As such it also has the potential to result in the failure to adhere to the conventions of good drafting and consequently, exacerbate the incoherence of the statute book. On that basis, there are convincing grounds for contending that all secondary legislation made under section 3 should be drafted – or at least settled – by the Office of the Parliamentary Counsel.

Henry VIII Provisions[1062]

Introduction

It is well established that an Act cannot be amended by a statutory instrument (save as envisaged by section 3 of the European Communities Act 1972). Recognition of the principle that an Act of parliament cannot be amended except by the same authority that made it became fortified at the beginning of the 17th Century.[1063] Despite this, the legislature purports to authorise the making of secondary legislation to amend an Act, and on occasion, Ministers proceed to make such regulations.

A Henry VIII provision is a provision in primary legislation which either expressly or implicitly authorises the making of secondary legislation which amends primary legislation.[1064] The Henry VIII provision is so named because in the 16th Century, that Monarch had, through the Statute of Proclamations, claimed for himself the power to legislate unilaterally by

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1062 See generally, Bennion, *Statutory Interpretation: A Code* (4th ed., London, 2002) at p. 244.
1063 See further, Ilbert, *Legislative Methods and Forms* (Oxford, 1901) at p. 36.
1064 See generally, *The Use of "Henry VIII Clauses" in Queensland Legislation* (January, 1997).

proclamation.

Henry VIII provisions in legislation are by no means new. In fact amendments to Acts appear to have been effected in this way as far back as at least 1898 – examples being: Local Government (Application of Irish Enactments) Order 1899; Local Government Adaptation of Enactments) Order 1899; and sections 104 and 105 of the Local Government (Ireland) Act 1898. Section 48 of the Electoral (Amendment) Act 2001 is an example of how a Henry VIII provision may appear on the statute book today:

> "48.—(1) Subject to subsection (3), the Minister may by order make such adaptations of, or modifications to, the Presidential Elections Act, 1993, the European Parliament Elections Act, 1997, the Local Elections Regulations, 1995, the Referendum Act, 1994, the Seanad Electoral (University Members) Act, 1937, and the Seanad Electoral (Panel Members) Acts, 1947 to 1972, as will enable voting and counting of votes at the relevant election or referendum under the said enactment or enactments to take place using equipment approved for use under this Part."

Section 2(2) of the Health (Nursing Homes) Act 1990 is yet a further example of such a provision. It purports to allow the Minister to amend the definition contained in the Act, by way of Ministerial regulation:

> "(2) If the Minister becomes of opinion that this Act ought to apply to a class of institution for the care and maintenance of persons that it does not apply to, he may by regulations amend the definition of "nursing home" accordingly and that definition shall have effect in accordance with any regulations for the time being in force under this subsection."

Provisions of this nature give rise to two particular concerns. First, a provision

in an Act which purports to confer the power to make regulations which can amend primary legislation is itself unconstitutional as being contrary to Article 15.2 of the Constitution. Secondly, a Henry VIII provision in an Act can give rise to an action of unconstitutionality if regulations purporting to amend primary legislation are made on foot of it.

Henry VIII in Other Jurisdictions

In Britain, the use of Henry VIII clauses were examined by the Donoughmore Committee in their Report in 1932[1065]. The Committee were critical of a number of aspects of delegated legislation, particularly of instances where it impinged on matters of principle. They also expressed concern about instances where secondary legislation ventured into the realm of amending primary legislation. It seems that they were of the view that a case could be argued for the occasional use of Henry VIII clauses which are designed to help bring an Act into operation and once that power expires after a short time. The Committee added that on every occasion, their use must be demonstrably essential and fully justified. The Committee also concluded that such provisions should be time-limited so as to ensure that they do not endure for more than one year.

In their Report entitled, "The Use of 'Henry VIII Clauses' in Queensland Legislation", the Queensland Scrutiny of Legislation Committee produced a sizeable Report on this topic in 1997[1066]. They approached the issue by seeking to establish whether there may be a legitimate role for Henry VIII clauses in Queensland legislation. The Committee came to "an acceptance" that in specified circumstances and where justified, Henry VIII provisions may be acceptable. They felt that Henry VIII provisions may be justifiable where it can be shown that such a provision was required in the following circumstances: "to facilitate immediate Executive action; to facilitate the effective application of innovative legislation; to facilitate transitional

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1065 Donoughmore Report, *Report of Committee on Ministers' Powers* (1932, Cmd. 4060).

1066 Available at: www.parliament.qld.gov.au/comdocs/ scrutiny/1996/HenryVIII.PDF

arrangements; and to facilitate the application of national schemes of legislation."[1067].

While the experience of other countries in dealing with this issue is of some guidance, because of the unambiguous nature of Article 15.2, the scope for the inclusion of a Henry VIII provision in Irish legislation is extremely limited as it is likely to amount to a constitutionally impermissible delegation of legislative power.

Where Henry VIII is Permissible

Despite the clarity of Article 15.2, it is possible to identify a number of distinct instances in which the making of regulations on foot of Henry VIII provisions are likely to be constitutionally sound. Those instances are the facilitation of major constitutional change; addressing financial detail; and, dealing with emergency situations.

The Facilitation of Major Constitutional Change

Where primary legislation is enacted to facilitate major constitutional change, it will usually contain broad powers in order to ensure a smooth and effective transmission to the new circumstances. So in legislation of this kind, it is not unusual to find that the amendment of Acts by secondary legislation is envisaged. Three particular pieces of legislation are of note in this regard: the Adaptation of Enactments Act 1922 and 1931 and also, the Constitution (Consequential Provisions) Act 1937.

Section 12 of the Adaptation of Enactments Act 1922 is an early example of a provision enacted in the context of major constitutional change:

> "12.-(1) The Executive Council of Saorstát Eireann may from time to

[1067] "The Use of 'Henry VIII Clauses' in Queensland Legislation" at p.56.

time by Order make all such general or specific adaptations of or modifications in any British Statute which in the opinion of the Executive Council are necessary in order to enable such Statute to have full force and effect in Saorstát Eireann.

(2) Any such adaptation or modification as is mentioned in this section may be made notwithstanding that same is covered or effected by any general adaptation or modification made by this Act but no adaptation or modification shall be made under this section which is inconsistent with any adaptation or modification made by this Act."

This power was further enhanced by section 2 of the Adaptation of Enactments Act 1931 which reads:

"2.-The Executive Council may from time to time by order make all such general or specific adaptations of or modifications in any Irish statute having the force of law in Saorstát Eireann as are, in the opinion of the Executive Council, necessary in order to enable such statute to have full force and effect in Saorstát Eireann.".

Together, both of these provisions expressly allowed the Executive Council to amend primary legislation by way of a statutory instrument. Section 5 of the Constitution (Consequential Provisions) Act 1937 allowed the Government to make an order which would have the effect of modifying any statute so as to ensure that all laws in force before the introduction of the new constitution would continue in force. Section 5 provides:

"5.-(1) For the purpose of ensuring that the laws in force in Saorstát Eireann immediately prior to the date of the coming into operation of the Constitution shall continue to be of full force and effect in accordance with and to the extent provided by Article 50 of the Constitution, the Government may by order make all such general or specific adaptations

and modifications of any statute or statutory instrument continued in force by the said Article 50 as shall, in the opinion of the Government, be necessary for the purpose aforesaid.".

All of these provisions are unusually wide. However, due to the exceptional nature of the circumstances in which these provisions are used and invoked, their use - in this context - is unlikely to give rise to any constitutional difficulty.

Addressing Financial Detail in an Act

It seems to be generally accepted that secondary legislation may prescribe financial detail which has been omitted from an Act or that it may amend financial detail already contained in an Act. A statutory instrument which effects changes such as this is generally not regarded as amending an Act to an impermissible degree.

While the level of fees chargeable under an Act is normally a matter left to be filled in by secondary legislation (for example, by way of Fees Orders), there can be occasions where, for political reasons, it has to be included in primary legislation. In addition, where the sole purpose of an Act is to impose a levy and it is not just incidental, there is a higher likelihood that the fee or levy will in some manner be specified in the Act. For example, an Act might prescribe a 1% levy or fee, which may be subsequently increased or reduced by order[1068]. Alternatively, an Act may prescribe that "where an order has not been made, a levy of 1% shall be payable"[1069] - this is effectively a combination of approaches.

The reason why regulations of this kind are generally believed not to fall foul of Article 15.2 of the Constitution is because where an Act provides that Regulations may be made to prescribe fees etc., the subsequent making of those Regulations for that specific purpose does not amount to a direct

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[1068] See section 28 Córas Beostoic agus Feola Act 1979.

[1069] See Bovine Diseases (Levies) Act 1979.

amendment to the Act in question, rather, it amounts to the provision of an intentional supplemental detail by way of regulation. Strictly speaking, this does not amount to an amendment of the Act - this is permissible within the confines of delegated legislation. For example, in *Pigs Marketing Board v Donnelly*[1070], the Pigs Marketing Board were, under the Pigs and Bacon Act 1935 and 1937, entitled to fix prices by Order. This was held not to amount to an unconstitutional delegation of power – Hanna J. stating:

> "It is axiomatic that powers conferred upon the Legislature to make laws cannot be delegated to any other body or authority. The Oireachtas is the only constitutional agency by which law can be made. But the Legislature may, it has always been conceded, delegate to subordinate bodies or departments not only the making of administrative rules and regulations, but the power to exercise, within the principles laid down by the Legislature, the powers so delegated and the manner in which the statutory provisions shall be carried out. The functions of every Government are now so numerous and complex that of necessity a wider sphere has been recognised for subordinate agencies, such as boards and commissions. This has been specially so in this State in matters of industry and commerce. Such bodies are not lawmakers; they put into execution the law as made by the governing authority and strictly in pursuance therewith, so as to bring about, not their own views but the result directed by the Government."[1071]

On that basis, the Court concluded:

> "The Pigs and Marketing Board, in doing so, is not making a new law; it is giving effect to the statutory provisions as to how they should determine that price. It would be futile to ask the Legislature to fix the

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1070 [1939] I.R. 413.

1071 *ibid.*, at 421.

normal price ... and in my view that duty has been properly placed upon the Pigs and Marketing Board."[1072].

While the effect of the making of those regulations would amount to a direct amendment of the Act, it is one which is permissible. In the subsequent case of *Cityview Press v Comhairle Oiliúna*[1073] the Supreme Court upheld the provisions of the Industrial Training Act 1967 which empowered the Defendants to make a levy order. The Court addressed the question as to whether section 21 of the Industrial Training Act 1967 was in breach of Article 15 of the Constitution in that it amounted to an unconstitutional delegation of legislative power. O'Higgins C.J. held first, that the Order made was within the limits of section 21 and secondly, that section 21 did not have the effect of the legislature abdicating its responsibility as it exists under Article 15.

Having set down the benchmark principles and policies text and then applied it to the present case, O'Higgins C.J. stated:

> "[T]he fact that there will be a levy is provided for in s. 21 and the obligation to pay it is laid down. The only matter which is left for determination by AnCO is the manner of calculating this levy in relation to a particular industry. This is doing no more than adding the final detail which brings into operation the general law which is laid down by the section."[1074]

While the courts were satisfied that section 21 of the Industrial Training Act 1967 did not breach Article 15.2, the constitutional soundness of section 2(4) of the Mergers, Take-overs and Monopolies (Control) Act 1978 was less clear, and did not have the benefit of having been judicially considered. Section 2(4) enabled the Minister to amend the turnover threshold by substituting one

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1072 *ibid.*, at 422.
1073 [1980] I.R. 381.
1074 *ibid.*

amount for another by order – giving him effective control of the application of the Act.[1075]

Concern has been expressed about this particular provision by Maher in her text Competition Law: Alignment and Reform, where she states:

> "There are no principles and policies in the Act to guide the Minister in the exercise of her discretion. This renders the power of the Minister constitutionally suspect as it allows for the amendment of primary legislation by secondary legislation without adequate limits on Ministerial discretion."[1076]

Although the 1978 Act has since been repealed, its successor - the Competition Act 2002 clearly has attempted to address the concerns raised by Maher. Section 27 of the 2002 Act enables the Minister to increase the threshold amounts in section 18 on an annual basis. It expressly sets out the principles and policies to be considered by the Minister when considering an increase of the threshold. Section 27(2) provides that in making an order, the Minister shall have regard to such economic data as he or she considers relevant, while section 27(3) directs that each order must be laid before both Houses for a positive resolution. Both of these provisions would seem to constitute the "adequate limits on Ministerial discretion" of which Maher spoke.

Assist in Emergency Situations

The third instance in which Henry VIII provisions are believed to be permissible is in the context of emergency situations. Section 164 of the Electoral Act 1992 is an example of an Act conferring the power to amend primary legislation by way of secondary legislation in a variety of emergency

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[1075] The Minister has made orders under section 2(4) on two occasions - S.I. 230/1985 and also S.I. 135/1993.

[1076] Maher, *Competition Law: Alignment and Reform* (Dublin, 1999) at p. 234. Maher's concern was shared by Hogan & Whyte in Kelly, *The Irish Constitution* (3rd ed., Dublin, 1994) at p. 112.

situations. Section 164 provides:

> "164.-(1) The Minister may, in any case in which it appears to him that there is an emergency or special difficulty, by order make such adaptation or modification of any statute, order or regulation relating to the registration of Dáil electors, presidential electors, Seanad electors, European electors or local government electors or the conduct of Dáil elections, presidential elections, Seanad elections, European elections, local elections or referenda, as may in his opinion be necessary to enable such registration to be duly carried out or such election or referendum to be duly held, subject to compliance with the principles laid down in the relevant Acts taken as a whole.
>
> (2) Every order made under this section shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the order is passed by either House within the next twenty-one days on which that House has sat after the order has been laid before it, the order shall be annulled accordingly but without prejudice to the validity of anything previously done thereunder."

This unusually wide power was the subject of some scrutiny in *Sherwin v Minister for the Environment*[1077] where the matter at issue gave rise to an examination of section 164. In his judgment, Costello P. noted that the power conferred on the Minister to modify or adapt a statute or regulation was a discretionary one for use in emergency type situations.

[1077] High Court, unreported, 11 March 1997.

This seems to indicate that the courts will tolerate Henry VIII provisions in clearly defined and limited circumstances where it can be shown that such a provision is likely to be necessary to remedy a difficulty in what can be clearly shown to be an emergency situation.

UNESTABLISHED EXCEPTIONS TO ARTICLE 15.2.

There are however a number of exceptions to Article 15.2.1 which have not been firmly established but are, nonetheless, utilised. There is an endless number of instances to be found in the statute book of Henry VIII provisions which purport to authorise regulations to make substantive amendments to Acts. Altogether more rare however are those instances where an Act is indirectly amended as a result of secondary legislation. In addition, there are also incidents where a public Act authorises a private Act to be amended by secondary legislation.

Provisions which allow a Minister to make Regulations so as to a smooth out any teething difficulties with a new Act are generally not thought to be problematic in the context of Article 15.2, particularly as they do not purport to require or permit the amendment of primary legislation.

Making Substantive Amendments to an Act

As pointed out earlier, Henry VIII provisions can give rise to concerns in two respects. First, the Henry VIII provision itself is likely to be unconstitutional. Secondly, any regulations made in exercise of that power are themselves likely to be unconstitutional. As a consequence of the existence of Henry VIII provisions, there are many statutory instruments which purport to make substantive changes to primary legislation. The following are just some examples:

1. S.I. 422/1948 deletes two sections of the Cork Gas Act 1868;
2. S.I. 241/1977 amends the Finance (Excise Duties) (Vehicles) Act 1952 and also the Finance Act 1973;
3. S.I. 176/1985 amends the Mines and Quarries Act 1965;
4. S.I. 237/1989 repeals a provision of the Factories Act 1995 and also a provision of the Mines and Quarries Act 1965;
5. S.I. 103/1990 repeals a provision of the Dangerous Substances Act 1972;
6. S.I. 153/1991 makes some deletions from the Mines and Quarries Act 1965;
7. S.I. 357/1995 repeals sizeable portions of primary legislation.

Very often, Henry VIII provisions in legislation are not accompanied by any form of "safeguard" provisions. There are many instances of provisions which, in wide terms, permit a Minister to introduce secondary legislation to facilitate transitional matters. Consequently this kind of Henry VIII provisions are of some concern. It is not uncommon for an Act to include a provision empowering the Minister to make regulations to provide for "such incidental, consequential, supplementary or transitional provisions". In practical terms, legislation such as this purports to empower a Minister to effectively amend the Act by way of regulations.

It may be argued that the only secondary legislation envisaged by provisions of this kind is that which is wholly consistent and in a sense supplementary to the existing primary legislation. On that basis, it could be argued that a provision such as this in primary legislation does not purport to permit a deviation from the policy or direction of that primary legislation.

Focussing on provisions of this kind, the Supreme Court, in *Harvey v Minister*

for Social Welfare[1078] had an opportunity to give its detailed consideration to the practice of using Henry VIII provisions in circumstances beyond those considered earlier. This case concerned a claim by a woman who had been deprived of a pension. The Supreme Court, *inter alia* addressed the power of the Minister for Social Welfare to effectively legislate by way of Regulation under section 75 of the Social Welfare Act 1952, and the court also looked at its compatibility with Article 15.2 of the Constitution. Section 75 provided:

> "75.—(1) Regulations may, ... provide for adjusting any benefit, pension, allowance or assistance such as aforesaid (including disallowing payment thereof wholly or partly) that may be payable to such person. ..."

Having examined the section, the Court found that the presumption of constitutionality applied to section 75 and came to the following view:

> "This means that it must be construed so that as between two or more reasonable constructions of its terms that which is in accordance with the provisions of the Constitution will prevail over any construction not in accordance with such provisions."[1079]

The Court then went on further to add:

> "... it must be implied that the making of regulations by the Minister as is permitted or prescribed under s. 75 of the Act of 1952 is intended by the Oirechtas to be conducted in accordance with the principles of constitutional justice and, therefore, that it is to be implied that the Minister shall not in exercising the power of making regulations pursuant to that section contravene the provisions of Article 15, s. 2 of

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1078 [1990] I.R. 232.

1079 *ibid.*, at 240 – 241.

the Constitution."[1080]

In this context, the Court in affirming the validity of section 75, found that despite the fact that it explicitly authorised the making of regulations which would have the effect of reducing or limiting one's entitlement, the Minister in making the regulations, could ensure that only "truly regulatory or administrative" matters would be addressed by them.

Hogan & Morgan note that one point which emerges from *Harvey* is that "any regulation which repeals or amends primary legislation is ipso facto unconstitutional even if (as in *Harvey*) this has been explicitly authorised in the parent section."[1081]. And they go on to add that this view is reinforced by the *Meagher*[1082] decision, where Johnson J. noted that counsel for the State had "very properly conceded" that were it not for the existence of section 3(2) of the European Communities Act 1972 and also Article 29.4.5, legislation permitting the amendment of primary legislation by statutory instrument would be unconstitutional.

As they had previously done in *Cooke v Walsh*, in this case, the Supreme Court applied the presumption of constitutionality and interpreted section 75 of the Social Welfare Act 1952 in a manner consistent with it being compatible with the Constitution. While they conceded that the section was capable of a more broad interpretation, the Court felt that "[t]he terms of section 75 do not make it necessary or inevitable that a Minister ... making regulations pursuant to the power therein created must invade the function of the Oireachtas in a manner which would constitute a breach of the provisions of Article 15.2."[1083]

While it is on the one hand tempting to criticise the Courts for smoothing over

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[1080] *ibid.*, at 241.

[1081] Hogan & Morgan, *Administrative Law in Ireland* (3rd ed., Dublin, 1998) at p. 12-13. See also, Hogan & Whyte, *Kelly The Irish Constitution* (4th ed., Dublin, 2003) at para. 4.2.26 et. seq.

[1082] *Meagher v Minister for Agriculture* [1994] 1 I.R. 329, 343.

[1083] [1990] 2 IR 232, 240.

any crack through the strident application of the presumption of constitutionality, it is a wholly justifiable approach. Many legislative provisions, if stretched to a greater or lesser degree, are capable of being construed in a way which brings their compatibility with the Constitution into question. If the Courts were to permit a flow of cases which are based on the attribution of an unjustified interpretation of legislative provisions, the volume of such cases could potentially be limitless. Applying a strong presumption of constitutionality is an effective means of ensuring that questions as to the compatibility of legislative provisions with Article 15.2 of the Constitution only arise where there are real and substantial grounds for doing so.

The test favoured by the Courts in this instance was:

1. that the discretion which is exercised is truly regulatory or administrative, and

2. that the secondary legislation does not constitute the making, repealing or amending of the law.

As first highlighted by Hogan and Whyte[1084], the decision of the Supreme Court in Harvey marks something of a departure from the principles and policies test in Cityview. The Court's approach in Harvey is perhaps evidence of a more distilled thinking. As compared with the principles and policies test, the test which derives from Harvey is arguably less stringent.

The principles and policies test is somewhat abstract, and depending on the opinion of the reader, the necessary principles and policies may, in some cases, be present or absent. In contrast, the test in Harvey is one which can be applied with more certain results. It would seem to be easier to determine whether or not a provision makes, repeals or amends primary legislation.

[1084] Hogan & Whyte, *JM Kelly The Irish Constitution* (4th ed., Dublin, 2003) at para. 4.2.27.

The presumption of constitutionality was also central in *Cooke v Walsh*[1085]. This case concerned the Minister for Health's power to make regulations under section 72 of the Health Act 1970 which had the effect of rendering ineligible for free health services those who had already been deemed eligible under the Act. Section 72(2) of the Act stated:

> "Regulations under this section may provide for any service under this Act being made available only to a particular class of the persons who have eligibility for that service."

Although the Court held the Regulations themselves to be *ultra vires*, the Court applying the presumption of constitutionality, interpreted section 72 in a restrictive way, stating that the principles and policies in the Act did not allow the Minister to alter the eligibility requirements, O'Higgins C.J. saying:

> "In my view, the National Parliament could not and did not intend to give such a power to the Minister for Health when it enacted S. 72 of the Health Act, 1970."[1086]

By so holding, the Court saved the validity of section 72 - so it was the extent of the power exercised under this provision which was illegal, rather than the provision itself.

As evidenced by both the Cooke case and also *Harvey*, the presumption of constitutionality is a very strong one. So much so that in the event that a legislative provision exceeds its bounds, the Court will rein it in and interpret it in such a way as to ensure that it does not exceed its constitutional bounds. However, the Court does not seem to be suggesting that provisions of this kind should be inserted with anything other than caution and great reluctance.

1085 [1984] I.R. 710.

1086 *ibid.*, at 729.

It seems that where something overtly offends Article 15.2 or could not possibly be exercised within the limits of Article 15.2 – then, in those circumstances, the presumption of constitutionality is likely to be rebutted.

It is rather convenient for the Court to say that there is a presumption of constitutionality and that the exercise of the power will be within the bounds of the Constitution. This allows the Court to avoid ruling on the constitutionality of this type of provision itself. So even though a power might be overtly amount to an excessive delegation of legislative power, on applying the presumption of constitutionality, based on the Cook case and also *Harvey*, the Court is likely to say that if that power is at all exercisable within the bounds of the Constitution, then the power is constitutional to that extent - ie. the provision is given a restrictive interpretation.

In expressing his frustration at the Courts' tendency to avoid ruling on the constitutional issues, Professor Casey[1087] refers to this as the "reach the constitutional issues last" doctrine. The basis of this U.S. doctrine is that the courts avoid making any decision on the validity or otherwise of the legislation, unless doing so is absolutely essential for the disposition of the case.

The lack of constructive and helpful guidance from the Courts is one of the key reasons why the amendment of primary legislation by secondary legislation is such a grey area. To date there has been neither a daring or definitive judgment focussing on this issue. As a consequence, the line between what might be permissible and what might not, is being treaded - and in many instances crossed - by our legislature for want of clarity on this issue.

[1087] Casey, *Constitutional Law in Ireland* (3rd ed., Dublin, 2000) at p. 224 & 356.

Indirect Amendment of an Act

The circumstances which gave rise to the Supreme Court decision in *Mulcreevy v Minister for the Environment*[1088] are unusual in that they were effectively concerned with the amendment of primary legislation by secondary legislation, but in the absence of any Henry VIII type provision in the primary legislation involved. This case was an appeal against a refusal to grant leave to apply for judicial review.

One aspect of the case concerned the alteration of a regime, set down in primary legislation which required the approval of three bodies – the Commissioners of Public Works; the local authority; and the Minister for Arts - for the demolition or removal of an archaeological site. Following purported changes to the regime, effected by way of secondary legislation, the approval of only two of those bodies was required.

This aspect of the case turned on whether the Heritage (Transfer of Functions of Commissioners of Public Works) Order 1996; and the Heritage (Transfer of Departmental Administration and Ministerial Functions) Order 2002 had the effect of altering or amended section 14 of the National Monuments Act 1930 (as amended by section 15 of the National Monuments (Amendment) Act 1994).

Having referred to the well established principles highlighted in the *Cityview Press*, *Cooke*, and also *Harvey* cases, Keane C.J. allowed the appeal on the basis that:

> "... the effect of that [1996] order was beyond argument to substitute for the statutory regime established under the 1994 Act, where three entirely distinct and independent statutory bodies with different remits had to give their consent or approval to the interference with the

[1088] [2004] 1 I.R. 72.

national monument before it could be lawfully effected, a different statutory scheme under which the approval or consent of two bodies only ... was required. ... The conclusion is almost inescapable, in my view, that the 1996 Order purported to amend s. 15 of the 1994 Act by substituting this new statutory regime."[1089].

The main point to be drawn from this case is the fact that the amendment of primary legislation by way of secondary legislation does not only occur in obvious circumstances such as Henry VIII provisions, and that the Courts are equally intolerant of secondary legislation which amends an Act in an indirect way.

Amendment of Private Act by Secondary Legislation

There remains a question as to whether a distinction can validly be made between a statutory instrument which amends a public Act and a statutory instrument which amends a private Act. The former, as already discussed are generally not permissible.

As their name suggest, Private Bills[1090] are promoted by private interests who are either established or governed by a Charter. Though the purpose of a Private Bill invariably bears little or no relation to the purpose of a Public Bill, the legislative process which a private Bill goes through is essentially the same as that of a public Bill, though it has been described as being "partially judicial in character"[1091]. Both must be passed by both Houses of the Oireachtas and subsequently be promulgated by the President. However, all Private Bills are initiated in the Seanad and are governed by the Standing Orders Relative to Private Business of each House.

[1089] *ibid.*, at p. 12.

[1090] Private Bills were the subject of further discussion in Chapter 9.

[1091] The intricacies of the procedures involved are explored in Byrne & McCutcheon, *The Irish Legal System* (4th ed., Dublin, 2001) at para. 13.41 – 13.46.

Section 76 of the Health Act 1970 contains a rather wide power which allows the Minister to amend a Private Act or Charter of a hospital by way of an Order. It provides:

> "76.—(1) The Minister may by order, on the application of the governing body of a hospital, amend a charter or private Act relating to that hospital.
> (2) A draft of an order which it is proposed to make under this section shall be laid before each House of the Oireachtas and the order shall not be made until a resolution approving of the draft has been passed by each House.
> (3) Before laying the draft of an order under this section before each House of the Oireachtas, the Minister shall consult the Commissioners of Charitable Donations and Bequests for Ireland."

This power has been availed of relatively recently and resulted in the making of a statutory instrument - Health Act 1970 (Section 76) Simpson's Hospital Estate Act (Amendment) Order 2003[1092] – which amended the Private Act which governed the Simpson's Hospital.

The Houses of the Oireachtas Committee which were charged with assessing the instrument after it had been laid before the Houses, were not troubled by its effect nor perplexed by its possible unconstitutionality.[1093]

Despite the technical distinctions between a public and private Act, there seems to be no substantive grounds upon which one could justify a distinction

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[1092] S.I. 516/2003.

[1093] The following is almost the entirety of the Committee's proceedings on this matter: "How many does it accommodate at present? Deputy Callely: I believe it is 80. Deputy Neville: Eighty? Deputy F. O'Malley: I think so. Chairman: Is it a type of nursing home? Deputy Callely: More or less. Deputy F. O'Malley: Does it cater for men only? Deputy Callely: Yes. Deputy F. O'Malley: They have been operating under the terms of their charter? Deputy Callely: Yes. Deputy Devins: Are all the men gouty? Deputy F. O'Malley: And decayed? Deputy Callely: I think we might need your professional opinion on that.". Joint Committee on Health and Children, 16 October 2003.

being made between a statutory instrument which amends a public Act and a statutory instrument which amends a Private Act.

Do "Safeguards" Save the Validity of Regulations?

Types of Safeguards

There are many provisions on our statute book which, in the absence of any "safeguards" whatsoever, clearly authorise the making of secondary legislation which has the potential to breach Article 15.2 of the Constitution. Very often, such provisions purport to allow the Minister to rectify by order any problems in bringing the Act into effect. Provisions of this kind are by no means a recent development. An early form of such a provision may be found in section 29 of the National Health Insurance Act 1933, which provided:

> "29.—If any difficulty arises with respect to the constitution of the Unified Society or otherwise in bringing into operation any of the preceding provisions of this Act, the Minister may by order made before the appointed day make any appointment and do anything which appears to him necessary or expedient for bringing the said provisions into operation, and any such order may modify the provisions of this Act so far as may appear necessary or expedient for carrying the order into effect."

When conferring a power such as this, the Oireachtas often reserves a degree of control over the secondary legislation in the form of supervision. They do this by providing a safeguard – by requiring some secondary legislation to be laid before the Houses, or by imposing a deadline beyond which that power cannot be exercised.

The Courts have noted the legislature's use of safeguards in this way. The words of O'Higgins C.J. in *Cityview Press v An Comhairle Oiliúna*[1094] provide some insight into how the Courts view safeguard provisions:

> "Sometimes, ... the legislature, conscious of the danger of giving too much power in the regulation or order-making process, provides that any regulation or order which is made should be subject to annulment by either House of Parliament. This retains a measure of control, if not in Parliament as such, at least by the tow Houses. Therefore, it is a safeguard. Nevertheless, the ultimate responsibility rests with the Courts to ensure that constitutional safeguards remain, and that the exclusive authority of the National Parliament in the field of law-making is not eroded by a delegation of power which is neither contemplated nor permitted by the Constitution."

The varying degrees of supervision exercised by the Houses of the Oireachtas over secondary legislation can involve any one of the following: Lay and proceed; Lay[1095] and proceed, pending possible annulment; Lay and await a positive resolution; and, No requirement to lay, but the power must be exercised within a specified time limit.

Lay and Proceed

The requirement to simply lay a statutory instrument before the Oireachtas is possibly the most basic safeguard. Section 3(4) of the Criminal Justice (Illicit Traffic by Sea) Act 2003 is a typical example of a basic requirement to lay:

> "(4) An order under this section shall, as soon as may be after it is made, be laid before each House of the Oireachtas."

1094 [1980] IR 381, 398 – 399.

1095 The practice of laying instruments before parliament grew from the practice in the UK in the 1830's, so as to draw parliament's attention to its content.

Once the instrument has been laid, the requirements of this type of provision have been fulfilled.

Lay and Proceed, Pending Possible Annulment[1096]

The requirement to lay and then proceed subject to possible annulment is where a requirement to lay is accompanied by a set period within which the instrument may be annulled. Invariably a twenty-one day period is prescribed for this purpose.

Section 3(5)(a) of the Ethics in Public Office Act 1995 explicitly permits the amendment of monetary amounts by way of regulation. Concern for the apparent potentially broad scope of this provision is somewhat alleviated by sub-section (6) which requires such a Regulation to be laid before the Houses of the Oireachtas. Section 3(5) and (6) read as follows:

> "(5) (a) The Minister may, by regulations under this section, vary, having regard to any change in the value of money occurring after the passing of this Act, any monetary amount specified in this Act (other than sections 37 and 38).
>
> ...
>
> (6) Every regulation under this Act (other than subsection (5)) shall be laid before each House as soon as may be after it is made and, if a resolution annulling the regulation is passed by either House within the next 21 days on which that House has sat after the regulation is laid before it, the regulation shall be annulled accordingly, but without prejudice to the validity of anything previously done thereunder."

In *Cityview Press v An Comhairle Oiliúna*[1097], the Court noted the safeguard

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[1096] Section 3(5) of the Maternity Protection Act 1994 provides: "(5) Every regulation made under this Act shall be laid before each House of the Oireachtas as soon as practicable after it is made and, if a resolution annulling the regulation is passed by either such House within the next twenty-one days on which the House has sat after the regulation is laid before it, the regulation shall be annulled accordingly, but without prejudice to the validity of anything previously done under the regulation."

which existed by virtue of section 21(6) of the Industrial Training Act 1967 whereby a levy order may be annulled by either House of the Oireachtas. Section 21(6) provided:

> "(6) Every levy order or order under subsection (3) of this section shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the order is passed by either such House within the next twenty-one days in which that House has sat after the order is laid before it, the order shall be annulled accordingly, but without prejudice to the validity of anything previously done thereunder.".

In *Cityview*[1098], the Supreme Court appeared to take some solace from the protections used in provisions of this kind. [1099] The Constitution Review Group also appear to have placed some significance in this kind of safeguard. However, they query whether "the approval of the Houses of the Oireachtas ought to be regarded as sufficient to cure any failure to meet the *Cityview* test. There is some support for such an approach in the *Cityview* case itself."[1100].

With reference to the power to annul statutory instruments, the Committee which reviewed the use of Henry VIII provisions in Queensland were "firmly of the view that Parliament's power to disallow a subordinate instrument does not redeem or justify the use of a 'Henry VIII clause'."[1101]. This accords with the Irish Court's position on this matter. In *Laurentiu v Minister for Justice*[1102], Keane J. dismissed the significance of the power of annulment in the following terms:

1097 [1980] I.R. 381.
1098 *ibid.*,
1099 *ibid.*, at 398 – 399.
1100 Report of the Constitution Review Group (Dublin, May 1996) at p. 39-40.
1101 *The use of "Henry VIII Clauses" in Queensland Legislation* (January, 1997) at p. 55.
1102 [1999] 4 I.R. 26.

"... even in the hands of a vigilant deputy or senator, [the power of annulment] is something of a blunt instrument, since it necessarily involves the annulment of the entire instrument, although parts of it only may be regarded as objectionable."[1103]

It is clear that despite the efforts of the legislature, the Supreme Court took little comfort from the "protection" afforded by providing an annulment procedure.

Lay and Await a Positive Resolution[1104]

As it requires an instrument to receive the approval of the Houses of the Oireachtas, the requirement to lay the instrument before the Houses and await a positive resolution is at the upper end of the scale of safeguards. Where this requirement is imposed, even when laid, the secondary legislation in question does not become effective unless and until a positive resolution is made affirming the instrument.

Section 3(5) of the Ethics in Public Office Act 1995 is an example of a provision which requires a draft of the proposed regulation to be laid before the Houses of the Oireachtas and the regulation can only be made after a positive resolution has been passed by each House:

"(5)(b) If, on any amendment of the law relating to elections, it appears to the Minister to be expedient-

(i) to amend section 2 (1) for the purpose of assimilating "commercial price" to any definition of "commercial price" in that law, or

(ii) to amend section 15 (7) for the purpose of assimilating

1103 *ibid.*, at 93.

1104 For example, section 3(3) of Adoptive Leave Act 1995 provides: "(3) Where an order is proposed to be made under this Act, a draft of the order shall be laid before both Houses of the Oireachtas and the order shall not be made until a resolution approving of the draft has been passed by each such House."

the definition of "donation" to any definition of "donation" in that law,

the Minister may for those purposes by regulations amend the definition mentioned first in subparagraph (i) or, as may be appropriate, the definition mentioned first in subparagraph (ii).

(c) Where regulations under this subsection are proposed to be made, a draft of the regulations shall be laid before each House and the regulations shall not be made until a resolution approving of the draft has been passed by each House."

Provisions of this kind are only occasionally used. The reasons for this are two-fold. First, the effect of provisions such as this are more onerous. Imposing a requirement for draft instrument to be laid would have the effect of severely limiting the speed at which a Minister could otherwise act. Secondly, the requirement for a positive resolution means that the statutory instrument is likely to attract far more attention, and inevitable criticism, which it might otherwise not.

Regulations Must be Made Within a Defined Time Limit

The Local Government Act 1994 contains a provision which has the potential to facilitate the exercise of legislative power by secondary legislation, but requires that any such regulations must be made within a three year period:

"66.-If in any respect any difficulty arises in bringing any provision of this Act into operation or in relation to the operation of any such provision, the Minister may by regulations do anything which appears to the Minister to be necessary or expedient for the purposes of removing that difficulty, for bringing that provision into operation or for securing or facilitating its operation and any such regulations may modify any provision of this Act or any other enactment so far as may be necessary or expedient for the purposes aforesaid but no

regulations shall be made under this section in relation to a provision of this Act after the expiration of 3 years from the commencement of that provision."

In some instances, two levels of protection are afforded to the Regulations to be made – first, they must be affirmed by a positive resolution of both Houses, and secondly, the power to make the Regulations is subject to a time-limit. Section 7(6) of the Waste Management Act 1996 is an example of just such a provision. It enables the making of Regulations which could potentially be in breach of Article 15.2, but purports to save the validity of such Regulations by the inclusion of a laying requirement in section 7(4)[1105] and a two time limit in the making of any regulations:

"7(6) If in any respect any difficulty arises in bringing any provision of this Act into operation or in relation to the operation of any such provision, the Minister may by regulations do anything which appears to him or her to be necessary or expedient for removing that difficulty, for bringing that provision into operation, or for securing or facilitating its operation, and any such regulations may modify any provision of this or any other enactment so far as may be necessary or expedient for the purposes aforesaid but no regulations may be made under this subsection in relation to a provision of this Act after the expiration of 2 years from the commencement of that provision."

The validity of a provision such as this would seem to be very much in doubt. Professor Gwynn-Morgan said of a similar provision – section 4 of the Building Societies Act 1989 - that "[n]otwithstanding its being confined to the

[1105] 7(4) Where regulations under section 7 (6), 39 (8) or 62, or an order under section 8 or 69 (1) or an order under subsection (5) amending or revoking such an order, is or are proposed to be made, a draft of the regulations or the order, as the case may be, shall be laid before each House of the Oireachtas and the regulations or order shall not be made until a resolution approving of the draft has been passed by each such House.

first three years of the Act's operation, it seems to be unconstitutional."[1106].

Combination of Safeguards

While most of the safeguard provisions just discussed tend to be utilised on an individual basis, on occasion a combination of safeguards has been used, perhaps out of fear that any one of them alone would not suffice.

Out of perhaps what was an abundance of caution, the legislature incorporated a series of safeguards in to the regulation making power on the Consumer Information Act 1978. This Act imposes perhaps the most stringent requirements for notice and consultation prior to making an order under the Act. In addition to requiring its laying in draft and the necessity for a positive resolution of each House, section 26 of the Act also requires two months prior notice of the intention to make the order, including a statement of its purpose, must be published in *Iris Oifigiúil* and one daily newspaper. Furthermore, the Act also directs that the order shall not be made until the Minister has consulted with "such persons as appear to him to be substantially interested in the subject-matter of the order".[1107]

Effectiveness of Safeguards

As illustrated in this Chapter, Henry VIII provisions are not uncommon. The key question is whether in the case of secondary legislation which amends an Act, is this "safeguard" procedure sufficient to mitigate against any possibility of it amounting to an unconstitutional delegation of legislative power?

[1106] Gwynn-Morgan, *The Separation of Powers in the Constitution* (Dublin, 1997) p. 249.

[1107] "(2) At least two months before the date of the making of an order under this Act there shall be published in *Iris Oifigiúil* and in at least one daily morning newspaper printed in the State notice of the Minister's intention to make the order and a brief statement of the effect of the order.(3) An order shall not be made under this Act without prior consultation by the Minister with such persons as appear to him to be substantially interested in the subject-matter of the order. (4) (*a*) Whenever an order is proposed to be made under section 9, 10, 11 or 12 of this Act, or under paragraph (*b*) of this subsection, a draft of the order shall be laid before each House of the Oireachtas and the order shall not be made until a resolution approving of the draft has been passed by each such House. ...".

One could argue that the use of provisions of this kind in legislation for over eighty years, without being struck down categorically, would seem to indicate that they are satisfactory, if not constitutionally sound. However, Hogan & Morgan do not see it this way. They expressed some concern over the use of provisions that purport to authorise the making of secondary legislation which amends and Act:

> "In view of the recent authorities, it is difficult to see how the Oirechtas can validly delegate the power to amend a statute by statutory instrument to a Minister, even if that power contains certain safeguards."[1108]

Because of the unusually wide powers which Henry VIII provisions purport to bestow, their compatibility with Article 15.2 of the Constitution, even with safeguards, seem to be very much in question.

In accord with Article 15.2 of the Constitution, the Oireachtas is a tri-partite body comprised of the Dáil, Seanad and the President. The legislative process which a Bill goes through involves all three elements of the Oireachtas. In contrast, a statutory instrument which amends an Act and is subject to a safeguard procedure does not include any involvement of the President. The fact that each House passes an order approving a draft regulation cannot be equated with the legislative process which a Bill goes through.[1109] So on any interpretation, secondary legislation which is laid before the Houses or which is approved by the Houses does not - and more importantly, nor can it be deemed to - fully satisfy the terms of Article 15.2 of the Constitution.

1108 Hogan & Morgan, *Administrative Law in Ireland* (3rd ed., Dublin, 1998) at p. 14.

1109 See, Hogan & Whyte, *Kelly The Irish Constitution* (4th ed., Dublin, 2003) at para. 4.2.08.

Concluding Remarks

Many of the problems encountered with the statute book are replicated in the context of secondary legislation and because of the greater volume, are even more conspicuous. As with primary legislation, the lack of management of this body of legislation is a problem, as is the lack of consolidation. While primary legislation is monitored, scrutinised, and enacted by the Oireachtas, in contrast, secondary legislation is made by any one of fifteen individual Ministers, with virtually no monitoring or scrutiny.

As with the Statute Book itself, there is a need to regain control over secondary legislation. One identifiable, co-ordinating body should be charged with overall responsibility for secondary legislation. This would ensure not only consistency of style, but would also ensure that the ever-growing body of secondary legislation does not conflict, but rather interweaves with the existing framework of primary legislation. This is what goes to the heart of accessibility and coherence of secondary legislation. Secondary legislation should be within the principles and policies of the parent Act and also, it should not exceed the parameters of Article 15.2 of the Constitution. Centralising responsibility for secondary legislation would ensure these limitations are adhered to.

Despite the fact that statutory instruments do not strictly comprise part of the statute book, it is clear that their role is one which is becoming increasingly important. For as long as Henry VIII provisions endure and are acted upon, secondary legislation will in this respect have a direct impact on primary legislation.

While Article 15.2 of the Constitution clearly envisaged the establishment of subordinate legislatures, it could not have anticipated the significance which some statutory instruments would assume. Easily the most significant change in the nature of secondary legislation has been brought about by the

enactment of the European Communities Act 1972. This changed utterly the role which secondary legislation had played up to that point. As a result of section 3 of the European Communities Act 1972, statutory instruments no longer merely supplement primary legislation – statutory instruments are now having a real impact on primary legislation.

The increasing complexity of society and the need for legislation to reflect that complexity, combined with the pressures on parliamentary time have collectively meant that more and more secondary legislation is required. This has resulted in a body of legislation which stands at about 24,151 individual instruments since 1922 and it is growing at the rate of approximately 700 to 900 per year. This mass of secondary legislation needs to be addressed, both retrospectively and prospectively.[1110]

In terms of dealing with the existing body of secondary legislation, a major review of secondary legislation is needed, with a view to revoking many of the obsolete and dormant instruments. The remaining body of instruments should then be consolidated and reprinted on an ongoing basis in the same way as primary legislation. If the electronic version were to be designated as the official version, this would reduce costs considerably – while also increasing availability.

Prospectively, the rate at which statutory instruments are made also needs to be addressed. A greater emphasis needs to be placed on utilising alternatives to regulation and secondary legislation should only be permissible

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[1110] Even academics in the field are at odds as to whether we need more or less secondary legislation. Dicey (Dicey, *Introduction to the Study of the Law of the Constitution* (4th ed., London, 1893) p. 50.) advocated an increase in the delegation of legislative power as he felt that it would improve legislation and in turn, the statute book:"... the substance no less than the form of the law would, it is probable, be a good deal improved if the executive government of England could, like that of France, by means of decrees, ordinances, or proclamations having the force of law, work out the detailed application of the general principles embodied in the acts of the legislature."However, Ilbert (Ilbert, *Legislative Methods and Forms* (Oxford, 1901) at p. 39), took exception to this very principle and said:"The ordinary Englishman, as represented by the average member of Parliament, would find much difficulty in assenting to [that] proposition."

in circumstances where its necessity can be clearly demonstrated.

Before any proposal for primary legislation can be put before Government, the proposal must be scrutinised in accord with the terms of the Quality Regulation Checklist which is appended to the Cabinet Handbook. The first question in the Checklist gives an indication of its importance:

> "Is the proposed legislation and/or regulation absolutely necessary? Is the problem correctly defined and can the objective be achieved by other means (i.e. improved information, voluntary schemes, codes of practice, self-regulation, procedural instructions)?"

The Checklist contains 5 further points against which draft secondary legislation could equally be tested. Particularly in view of the rate at which the body of statutory instruments is growing, an exercise such as this would have a real contribution to make in ensuring that the only statutory instruments which are made are those which are not only necessary, but justified.

The making of regulations, and the preparation which precedes the making, is not required to be subject to the same rigors as a proposal for a Bill. In this regard, it seems not only equitable but also sensible in terms of stemming the growth rate of secondary legislation that the proposal for a statutory instrument should also be tested against the Quality Regulation Checklist.

While the rate at which statutory instruments are being made may be symptomatic of a prospering society, the rate at which this type of legislation is being made is unsustainable. A Government commitment to set about reducing the rate at which statutory instruments are made by as much as 40% is what is required.

In addition to addressing the deficit of control over the management of the

existing body of secondary legislation and flow of new secondary legislation, a degree of supervision and control of the drafting of statutory instruments is required in order to ensure that statutory instruments adhere to best practice in terms of quality and also remain within the established boundaries.

A number of Government Departments have developed a capability to draft secondary legislation. At present, three of the 15 Government Departments draft their own statutory instruments entirely. They are Health and Children; Environment and Local Government; and Social and Family Affairs. So the volume of secondary legislation drafted by Parliamentary Counsel is limited. There are a number of reasons to be concerned with the arrangements presently in place for the preparation of secondary legislation. In particular, the increasing reliance on regulations made under section 3 of the European Communities Act 1972, coupled with the incidence of Henry VIII provisions in legislation warrant greater vigilance in how statutory instruments are drafted.

As a result of the present arrangements which are in place, on an annual basis, many statutory instruments are made which have not been approved by the Office of the Parliamentary Counsel. This can lead to mistakes or errors in secondary legislation some of which go unnoticed. One such statutory instrument which went unnoticed was the Road Traffic (Construction, Equipment and Use of Vehicles) (Amendment) (No. 2) Regulations 2002. This piece of secondary legislation concerned the Government's attempts in 2002 to ban the use of mobile phones by people while driving ran into real difficulties when the statutory instrument[1111] giving effect to the ban was said to be unworkable. The substantive aspect of the regulation provided:

> "The driver of a mechanically propelled vehicle that is in a public place, shall not hold or have on or about their person, a mobile phone or other similar apparatus while in the said vehicle, except when it is parked."

[1111] Road Traffic (Construction, Equipment and Use of Vehicles) (Amendment) (No. 2) Regulations 2002, SI No 93 of 2002.

A considerable degree confusion ensued as to the precise meaning and effect of this provision. The statutory instrument was widely ridiculed.[1112] Subsequent reports suggested that the Attorney General, Rory Brady had expressed concerns about the statutory instrument and suggested that new legislation would be required[1113] and it was agreed that in the interim the Gardai would not enforce the regulation.

If consistency of secondary legislation is to be achieved, all secondary legislation (with a small number of defined exceptions) should be drafted, or at the very least, settled, in the Office of the Parliamentary Counsel. Adherence to this kind of practice would also ensure that secondary legislation would not exceed the principles and policies of the parent Act – and thus reduce the likelihood of challenge before the Courts.

A former Parliamentary Counsel to the Treasury, Sir Courtenay Ilbert goes considerably further when he suggests that only the person who drafted the enabling Act should be permitted to draft secondary legislation which is to be made under that Act. He makes this argument on the basis that only that drafter will be "intimately conversant with the provisions of the Act and the objects aimed at by it"[1114].

However, in view of the present arrangements which prevail in Ireland, having the secondary legislation drafted, and not just settled by any Parliamentary Counsel would suffice. Inevitably, this would require considerable expansion

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1112 *Irish Times*, 23 March 2002; *Irish Times*, 24 March 2002; *Irish Times* 27 March 2002.
1113 *Irish Times*, 24 August 2002; *Irish Examiner*, 28 September 2002.
1114 Ilbert, *Legislative Methods and Forms* (Oxford, 1901) at p. 94.

of the Office of the Parliamentary Counsel. This could be fairly seamlessly achieved by retaining those Departmental officials who are already engaged in drafting these instruments.

Chapter 11

Conclusions

This thesis has sought to give a constructive insight into the present state of the Irish Statute Book – examining all aspects from the role and purpose of legislation to how we make, amend and publish legislation. What conclusions can be drawn from this examination of the statute book?

It is advanced in this thesis, that the role which legislation plays in governing society, along with the principle of *ignorantia juris neminem excusat*, means that citizens have the right to be able to access and understand the laws which govern them. It follows then that the State has a corresponding responsibility to ensure that that legislation is published and is accessible to the people.

A conclusion is reached to the State has failed to live up to its responsibilities in this regard. The statute book is comprised of the Acts in their enacted form. As virtually all of the Acts have been amended many times, and others repealed, the form of publication does not meet the needs of the users of legislation. Because the task of publishing the statute book has been thought to have been discharged by merely publishing Acts in their enacted form, addressing the inadequacies inherent in the statute book have never been a political priority. There has been no concerted, holistic approach towards the publication of the statute book. As a result, measures such as consolidation, statute law revision and statute law restatements have been all too rare and intermittent. Added to this is the fact that the publication of revised statutes has never been commenced in Ireland. The thesis has shown that the attitude towards the publication of the statute book has, over many years,

been at best inadequate and neglectful and, at worst, a constraint on the functioning of democracy.

A further conclusion is reached that the system of effecting legislative change is such that it mitigates to a considerable degree against the accessibility of the statute book. The approach for many years has been to heap one Act on top of the other with minimal effort at integration. The fruits of this approach have been a statute book whose characteristics are more sedimentary than ordered. It is unsurprising therefore that the need for a coherent statute book has greatly increased as a result of a combination of the system of effecting legislative change along with the inadequate arrangements for publication.

The thesis support these finding by pointing to a number of factors. First, many aspects of legislative drafting in Ireland had first been developed and then refined by the UK authorities. For example, The Office of the Parliamentary Counsel, the role of the drafter, the structure and features of legislation, the system of effecting legislative change, and ultimately the statute book all have their origins in the UK. While responsibility for the state of the statute book can in no way be attributed to the British authorities, culpability for the present state of the Irish Statute Book lies firmly with the Irish Government of the past 80 years or so. In 1922, the State acquired a very good set of structures and practices for producing legislation. However, what has happened is that those structures and practices have remained largely unchanged for many years and the result of that inaction is the present inaccessibility of the Irish Statute Book.

Secondly, the inaccessible nature of the statute book has been exacerbated by what might be termed as excessive legislation. The increasing complexity of society has meant that issues of governance are increasingly being addressed in primary legislation. The present state of the statute book is largely attributable to the fact that we enact a substantial, and increasing,

number of Acts each year. Some of those Acts stand-alone and develop new areas of law, whilst many others effect amendments to pre-existing Acts. On the other hand, very few Acts are repealed.

Thirdly, statutory instruments are having an increasing impact on the statute book. This has been exacerbated through a combination of the making of statutory instruments under section 3 of the European Communities Act 1972; the use of Henry VIII provisions and also the volume of, and inadequate publication of this type of legislation.

These failures are due in large part to two key factors: a lack of political will; and the absence of any "guardian" of the statute book.

Improving the statute book has never been a political aim. Votes and political kudos are what drive most, if not all, of our politicians. For those concerned with the state of the statute book, the harsh reality is that directing time and energies towards improving the statute book is not going to garner a raft of votes at the next election. This has meant that successive Programmes for Government undertake to add several pieces of legislation to the statute book, however without exception, none of them have evidenced a commitment improving the statute book in a meaningful way.

The task of tidying up the statute book does not lend itself to immediately visible results. Tidying up the statute book is a tedious and expensive task. The level of finance expended on this task is not always fairly reflected in the amount of progress apparent. The high cost of rendering some order to the statute book can provide ammunition for those who are cynical about the merits and effect of such efforts.

What is abundantly clear is that radical changes or even minimal improvements to the statute book cannot be hoped for if the will and impetus

of those at the highest level in Irish political life are not behind those moves. The pre-1922 statute law revision project which is currently underway in the Office of the Attorney General could not have commenced without the support of the Attorney General and possibly the Taoiseach also.

As the experience of the Irish Statute Book has shown, political-will to improve the statute book has been absent and consequently, in an atmosphere of such ambivalence, it is not surprising that responsibility for the statute book was never conferred on one particular body.

The number of partners who contribute to the legislative process has perhaps created ambiguity as to where the real responsibility for the publication of Acts lies. As matters stand, legislation is drafted by the Office of the Parliamentary Counsel; published by the Bills Office in the Houses of the Oireachtas; debated and amended by the Houses of the Oireachtas; and published in print form by the Bills Office and the Government printers; and published electronically by the Office of the Attorney General and also by the Houses of the Oireachtas. The sheer number of branches involved in the legislative process is a recipe for systematic duplication.

The present state of the statute book is also attributable to the fact that no single office or body has been conferred with responsibility for the publication and order of the statute book. It therefore follows that central to the task of improving the statute book is the designation of one State body as having responsibility for the statute book.

Political will could be underpinned by appointing an office-holder, or a dedicated Minister of State with responsibility for the statute book, or alternatively responsibility in this area could be formally conferred on the Attorney General while also ensuring that the Attorney General in this role

avails of the right to speak in the Houses of the Oirecahtas.[1115] Under section 6(2) of the Ministers and Secretaries Act 1924, the Attorney General may become a member of Dáil Éireann[1116]. In 1975, the Seanad amended its Standing Orders so as to allow the Attorney General take part in its proceedings[1117]. The person or body occupying this role would effectively be acting in a role akin to that as Editor-in-Chief with overall responsibility for the statute book – its publication and order.

The Way Forward

But what does this analysis reveal about what can be done to improve the situation at this stage?

If the necessary level of political will manifests itself and is sustained to a sufficient degree so as to demonstrate a real commitment to remedying the state of the statute book, then that task of attending to the statute book must be addressed in three respects. First, there needs to be an acceptance that the publication of the statute book is not merely secondary to the enactment of legislation, but rather is an objective in itself which needs to be achieved. Secondly, in a retrospective sense, order must be brought to the existing body of legislation. Thirdly, in a prospective sense, the way in which we create and publish any new legislation must be changed. The introduction of revised statutes is central to the delivery of any meaningful change to the state of the statute book.

[1115] At present, the Irish Attorney General cannot speak in the Houses of the Oireachtas. In contrast to the Article 30.4 restriction, in the U.K., the Attorney General is always a Member of Parliament and attends Cabinet meetings. (Edwards, *The Attorney General, Politics and the Public Interest* (London, 1984) p. 118.) Similarly, in New Zealand, the Attorney General is a cabinet Minister. While, in Canada, the functions of the Attorney General have been merged with the functions of the Minister for Justice. In Australia, the position of Attorney General has been held by people in Ministerial office concurrently.

[1116] Section 6(2) provides: The Attorney-General may be or become a member of Dáil Eireann, and if he is a member of Dáil Eireann at the time of his appointment he shall not be under any obligation to resign his seat or to submit himself for re-election. He shall hold office so long only as the President of the Executive Council by whom he was nominated continues to hold office.

[1117] The first Bill to be taken by the Attorney General through the Seanad following this amendment was the Law Reform Commission Bill, 1975. 80 *Seanad Debates* Col. 201 (10 April, 1975).

The revised statutes should be published in looseleaf format so that they can be easily updated. The revised statutes should also be published in electronic format with a facility for point in time searching so that the state of the law on a given date can be easily ascertained. As well as being able to provide the user with an up to the minute view of what the law is, a fully electronic statute book would have the capability of showing the law as it stood at a given date. This requirement is crucial, particularly in situations where the law applicable to a contract or even a murder may be the law as it stood at some time in the past – the date of the contract, or the date of commission of the offence.

Tackling the existing body of legislation in a retrospective sense would require a concentrated effort to first, remove the deadwood from the statute book. Secondly, it would require the extensive consolidation of existing Acts. Inherent in the process of consolidation must be the ability to make minor changes, such as the conversion of non-textual amendments to textual. Thirdly, it would require the repeal and re-enactment of pre-1922 statutes which are not widely available and their re-publication in more updated and plain terms. Fourthly, some repeal and re-enactment may be required where it is not possible to consolidate particular areas of law. The fruits of all these labours would then become available as a set of revised statutes.

Tackling the statute book in a prospective sense would require a completely different approach. A concerted effort towards improving the statute book in a prospective sense would first require a complete ban on the use of non-textual amendments in all future legislation. Secondly, a requirement should be introduced so that where a new Act amends an earlier one, the effect of the new amendments on the earlier Act must be printed on loose-leaf pages so that they can be inserted into the earlier Act as contained in the Revised Statutes. Thirdly, when legislation is being drafted, it should be drafted on a computer database linked to the electronic version of the revised statutes so that once a Bill is passed, any textual amendments to earlier Acts can be

automatically and instantaneously inserted.

This approach is preferable and appeals to pragmatism in that it does not seek to abolish the present system by which the legislature effects legislative change, instead it seeks to radically change the approach which is taken towards the publication of legislation.

However, if these proposals are to be ignored and if we are to retain the "amendment heaped upon amendment" approach, coupled with inadequate publication, this is most regrettable. If no radical measures are to be taken to rectify the present untidy state of the statute book, a greater commitment to six or so measures which are already in place, but under utilised, would improve, but not rectify, the statute book. Those measures are as follows.

First, the real time updating of the chronological tables, perhaps by the drafter of each Bill, so that once it is enacted, its effect on the statute book immediately becomes known. Secondly, the greater use of consolidations across a broader range of topics and at a greater frequency would contribute in a small way to improving matters. Thirdly, a greater commitment towards publishing more statute law restatements and the continuous updating of those already published. Fourthly, Statute Law Revision Acts should become a regular feature on the Government's legislative programme. Fifthly, a ban on the use of non-textual amendments ought to built in to the standing orders of the Dáil and Seanad. Sixthly, sunset provisions should become a routine feature of all legislation, ensuring that no piece of legislation can remain on the statute book for longer than ten years without a meaningful review before the end of that period. Finally, in the spirit of public-private partnerships, commercial publishers must be encouraged to participate in efforts to improve the accessibility of the statute book – either through the publication of restatements, the compilation of related Acts or through other more substantive ways.

The major conclusion of this thesis is that the statute book is so poorly arranged and inadequately published as to give rise to real concerns as to whether the State is discharging its obligations which arise under *ignorantia juris neminem excusat*. If we are to recover from this situation, we must republish all existing statutes in an updated form and prospectively, we must reform the way in which we effect legislative change and publish the statute book so that once an earlier Act is amended, the version as amended immediately becomes available. Underpinned by resilient political commitment, this new approach, should result in a statute book which is not only accessible to all, but is also authoritative and reflects the law of the day.

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