Some Aspects of the Work of the Law Commission

The Law Commissions Act 1965 makes a decisive step in the progress of law reform in Great Britain. The Act set up two Commissions, one for England and one for Scotland,[1] "for the purpose of promoting the reform of the law." Each Commission is charged with the duty of taking and keeping under review all the law with which it is concerned with a view to its systematic development and reform, including in particular the codification of that law, the elimination of anomalies, the reduction of the number of separate enactments and generally the simplification of the law.

Of course, there were agencies for law reform in Great Britain before the advent of the Law Commissions. The courts themselves for many hundreds of years developed and reformed the greater part of the law without aid from the legislature and in more recent times, when the evolutionary powers of the common law[2] were hampered by the increasing amount of statute law, government departments were responsible for promoting many law reform measures. First in importance, however, were the Royal Commissions and ad hoc committees set up to examine particular problems and the three permanent agencies of review - the Lord Chancellor's Law Reform Committee, the Home Secretary's Criminal Law Revision Committee and the Lord Chancellor's Private International Law Committee. The three permanent agencies in particular were responsible for a large number of reports on a wide variety of subjects, some of which resulted in legislation and some of which did not, but they also worked under a number of disadvantages. First, they had to operate in the time which their very busy members, judges, practising lawyers and law teachers, could spare from their other activities. Secondly, their inquiries were limited to those matters which were referred to them by the appropriate Minister. In both respects the establishment of the Law Commission marks a new departure.

The Commission has its own office accommodation and a small staff of lawyers, mostly recruited from the legal civil service, who are assigned to teams working on the items in the Commission's Programmes. The resources are at last available which make it possible to work on a sufficiently large number of subjects at a sufficient pace to offer some hope of a thoroughly rethought and harmonious legal system. At least as important as the resources of manpower, however, are the Commission's powers of initiative. The Commission is required by the Act to prepare programmes of law reform, consolidation and statute law revision which, subject to the approval of the Lord Chancellor, are to form the basis of its work.[3] The requirement of Ministerial approval means of course that the Commission is not entirely independent but it is unlikely that there will ever be any serious disagreement in this area. In any case the primary importance of this part of the Act is that it accords with and gives effective means for the exercise of the Commission's responsibility for the whole of the law.

When a Programme Item is under way the progress of the Commission's work follows no formal pattern, but certain general characteristics are discernible. Preliminary research nearly always precedes

---

1. The Law Commission and the Scottish Law Commission. I confine my observations in this article to the experience of the Law Commission, though many of them would be applicable to the Scottish Law Commission.
2. By which I mean to include the rules of equity.
3. The Commission is also required to consider law reform proposals which are put before it, to advise government departments and other agencies concerned, at the instance of the government with law reform. Matters which are brought to the Commission's attention in this way may, of course, lead to full-scale Programme Items.

any form of consultation and this research will usually be embodied in a Working Paper of the Commission which seeks to state the present law and to put forward possible solutions. Comparative material will also usually be incorporated in the Working Paper. Consultation then proceeds on the basis of the Working Paper with the legal profession, with government departments and with interested lay organizations, and I think it hardly needs to be said that the Commission attaches the utmost importance to this process. It is the basis of all real law reform, for time and again in the course of the two and a half years of the Commission's existence we have found that it was these consultations which exposed defects and weaknesses in provisional proposals which at first sight seemed to us to provide an adequate solution to a particular mischief. Where the scope of the Item warrants it the Commission may be assisted in its preliminary consideration of the problems and the preparation of a Working Paper by a Working Party or Advisory Panel composed of experts from outside the Commission's ranks; and in exceptional cases the work on an Item may even be shared between the Commission and an outside agency, as is the case with the present project for the codification of the criminal law, in which the Home Secretary's Criminal Law Revision Committee is playing a substantial part.

Having mentioned the vital role that full consultation plays in the Law Commission's work I think I should draw particular attention to the admirable way in which those we have called upon have responded. They have been drawn from many interests and walks of life but the burden of consultation has inevitably fallen largely upon the legal profession, and despite the amount of work which rests upon the individual members and representative bodies of the profession it has always found the time and energy to study our Working Papers and Reports and provide closely argued responses. As an example of the sheer bulk of the material with which the profession is faced in the field of law reform I would mention our Working Paper on Financial Relief in Matrimonial Causes, a closely printed document of some one hundred and thirty pages covering maintenance during and after marriage and such related matters as pension rights. At the same time the profession had to consider papers and proposals by the Commission on many other matters and keep in touch with the work of such other agencies as Lord Justice Winn's Committee on Jurisdiction and Procedure in Personal Injury Litigation and the Royal Commission on Assizes and Quarter Sessions under Lord Beeching. The startling thing about all this is that not only does the profession absorb all this material but comes back to us with law reform proposals of its own. I fear that when the project on matrimonial property under Item XIX of our Second Programme (codification of family law) comes to the stage of consultation we shall be imposing upon the profession an even greater mass of material than that contained in the Working Paper on Financial Relief but I am confident that it will respond in its traditional way - without its help the cause of law reform would very quickly founder.

Since I am addressing myself to overseas readers an aspect of the Law Commission's work upon which I would lay great stress is comparative law. Section 3(1)(f) of the Act requires the Commission

> to obtain such information as to the legal system of other countries as appears to the Commissioners likely to facilitate the performance of any of their functions.

I welcome this statutory recognition of this aspect of law reform for two reasons. The first is simply that there are so many countries in the world with a social background comparable to that of Great Britain that it would be folly to ignore their experience. Clearly this point is particularly relevant with reference to the legal systems of the United States or of those countries of the Commonwealth, such as New Zealand, Australia or Canada, which share the traditions and methods of the Common Law; but I think it is also very important in relation to Civil Law countries in any case where a systematic review of a whole area of the law is being undertaken. Of course,

the value of comparative research will vary enormously from subject to subject: no-one would suggest that a serious study of the grounds for divorce in Continental countries would pay dividends in any reformulation of the English law on this matter[4] but in the field of, say, liability for motor accidents I see no reason to believe that consideration of French or German experience would be any less valuable by reason of the fact that those systems have a Civil Law background.

The second reason for the importance of comparative law in my view of law reform lies in the ever increasing interdependence of nations and the tendency towards regional or other groupings of states for economic purposes. The difficulties which lie in the way of widespread unification of laws are of course enormous but nonetheless, with law reform in the air in so many countries, I firmly believe in the value of keeping up with current development abroad and the Law Commission is always delighted to be able to expand the system of cooperation which it has been able to develop with law reform agencies in different countries. A cross-fertilization of ideas which are still under consideration by law reformers as well as of existing principles of law may give a very substantial push along the road towards international harmonization of laws.

The advantages inherent in keeping a weather-eye on foreign systems should not, however, blind us to the very real difficulties involved in the process in the way of obtaining the necessary materials. This is the reason for the absence of comparative material from the reports of English law reform agencies in the past - it was not wilful blindness but, simply, lack of resources that made English law reform insular in its approach. The Law Commission has started with an enormous advantage over its predecessors in this field, but even with an adequate staff, with a growing library and with access to the very best law libraries in London we still run into difficulties over the collection of relevant foreign material. In many cases also the written text of foreign law is not sufficient to provide a realistic picture of its practical workings and our debt to lawyers all over the world who have kindly given their time to providing us with the practitioner's viewpoint is immense.

Some idea of the scope of the Law Commission's enquiries may be gathered from the list of items in the first two Programmes appended to this article. What does the future hold out? Is any general plan or shape of the future law discernible? To this I would answer that, though we are yet in the very early stages of a process which will take many years, certain basic landmarks are visible.

First, I think that the Law Commission has now committed itself to moving towards codification of our law. One critic[5] in a very perceptive article has pointed out the dangers which lie in the field of codification and the difficulties inherent in charting a course between "the Scylla of vague generalties and the Charybdis of detailed, technical rules," but I hope that the prize of having all the law on an important subject within a comparatively easily accessible compass will justify the enormous effort which will be involved. Though there are four codification projects in hand under the Law Commission's Programmes (contract, landlord and tenant, family law and criminal law) I think that the codification of contract may well be the most significant. The other matters, though they are of the utmost social importance, are all very largely covered by comparatively modern statutes;[6] contract on the other hand

---

4. Australian and New Zealand experience, however, was very valuable in the Law Commission's study of the grounds of divorce ("Reform of the Grounds of Divorce, The Field of Choice" Cmnd 3123,(1966)).
5. Professor H.R.Hahlo in (1967), 30 M.L.R. 241-259.
6. This is not, of course, to say that all one has to do is to tack the various statutes together. Such a process would merely be consolidation, not codification.

provides a branch of the law where the codifier has to work almost entirely on the raw material provided by the common law[7] and the degree of success achieved in transmuting the spirit of the common law into its new environment and in applying the new code thereafter may well determine the future of codification.

Secondly, although full-scale codification may be the ideal it lies very far in the future. Meanwhile we shall have with us for quite some time a great body of case law and statute law, the latter in the form of specific enactments covering comparatively small areas. In this situation it is absolutely essential to get our statute book into a form in which it is more easily usable by the ordinary practitioner and the administrative officer. At the moment our statute book is not arranged by subjects and there has been no revised edition of the statutes in force since 1948. A commercial publisher does provide a service whereby statutes are arranged by subject matter but here again no revision has been possible since 1948; thereafter the annual volumes have to be relied on. In both cases of course, editions of the statutes may be noted up by the owner but this is a time-consuming process in which the risk of inaccuracy is high. The practical difficulties of having a statute book which fulfills all the user's requirements are of course very great and it may be that in due course many new departures from traditional methods may have to be made: greater use of the device of textual amendment, a statute book on a loose-leaf basis and even the use of computers for revision may come in time. The whole matter of the form and arrangement of the statute book is at present being considered by the Statute Law Committee and I regard its decision as being at least as important as the reform of the substantive law. The law, when you have found it, is very rarely an ass, the difficulty often lies in finding it at all.

Sir Leslie Scarman

---

7. Particular contracts are of course wholly or partly "codified" in statutes such as the Sale of Goods Act 1893 and the Hire Purchase Act 1965.

The Law Commission's Programme of Law Reform

First Programme:

I Codification of the Law of Contract

II Exemption by Contract from Common Law liabilities

III Consideration, Third Party Rights and Contracts under Seal (work on this item has been merged with that on item I)

IV Civil liability for Dangerous Things and Activities

V Civil liability for Animals (finished)

VI Personal Injury litigation-
(a) Jurisdiction and Procedure (the examining agency is a committee under Lord Justice Winn)
(b) Assessment of Damages

VII Civil liability of Vendors and Lessors of Defective Premises

VIII Codification of the Law of Landlord and Tenant

IX Transfer of Land

X Family Law

XI Financial Limits on Magistrates' Orders in Domestic and Affiliation Proceedings (the examining agency is an inter-departmental committee)

XII Recognition of Foreign Divorces, Nullity Decrees and Adoptions

XIII Imputed Criminal Intent (finished)

XIV Common Law Misdemeanours, Crime of Conspiracy (the examining agency is the Criminal Law Revision Committee)

XV Miscellaneous matters Involving Anomalies, Obsolescent Principles or Archaic Procedures

XVI Judicature Act (Northern Ireland)

XVII Interpretation of Statutes

Second Programme:

XVIII Codification of the Criminal Law

XIX Family Law (this extends and reformulates the terms of reference under Items X and XII of the First Programme)

XX Interpretation of Wills (the examining agency is the Law Reform Committee)