The Comparative Method and Law Reform

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THE COMPARATIVE METHOD AND LAW REFORM

by

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under the supervision of

Arnaud Cras

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SUMMARY

This thesis examines law reform, the comparative method, and the combination of these two elements. A broad definition of law reform is adopted, to include law reform by legislators and judges, and proposals for law reform from law reform agencies and from academics. It is explained that the comparative method (commonly referred to as comparative law) is still at an experimental stage, and that no particularly rigid method of comparison has been adopted for the purposes of this thesis. The theory of reception and legal transplants is discussed, from Montesquieu to date. Particular emphasis is placed on the debate as to the need to adapt foreign ideas to suit the needs of the donee's present system. It is argued that Montesquieu's strict views are counterproductive. The use of the comparative method in the preparation of legislation is considered -- the role of government departments, parliamentary committees and academics; the choice between codification and special statutes.

Law reform agencies (LRA's) are discussed at length. Useful data was provided by a survey, conducted for this thesis, which was sent to most of the common-law LRA's in the world. 29 completed questionnaires were returned, from the U.K., Ireland, Canada, Australia, U.S.A., Africa and elsewhere. The common-law LRA's are compared with European ministries of justice. Observations are made on the distinction between lawyers' law and social-policy law, the appointment of non-lawyer members to LRA's, the consultation process, implementation rates and finance of LRA's. A table of LRA budgets and a Table of LRA implementation rates are set out. There is a study of the use of the comparative method in LRA's.

It is argued that judges have a significant law reforming role, despite their dicta to the contrary. The combination of the comparative method and judicial law reform is then considered, as is the suggestive role of judges in law reform (when judges suggest remedial action to the legislature).
ACKNOWLEDGEMENTS

The staff and members of many law reform agencies are to be sincerely thanked for the information which they supplied in reply to queries. In particular, the respondents to the survey went to great pains to clarify the exact position in their jurisdictions. The names of these people will be found in Appendix 5, at the beginning of each reply to the survey. Where replies by letter were received, these are mentioned in Chapters III and IV.

Norman S. Marsh, Q.C., lent copies of the unpublished national reports to the Fourth European Conference of Law Faculties (1976) for photocopying. He remained admirably patient while there were delays of various kinds. Bernadette Kearns photocopied these reports in London. William H. Hurlburt, Q.C., responded within a day to an urgent request for a copy of Professor Andrew Martin's unpublished paper, Law Commissions Bill: Some Comparative Notes (1964).

Arnaud Cras, supervisor of this thesis, was always helpful and supportive. The UCD Inter-Library Loan staff provided an efficient service, despite the cutbacks. Marieva Coughlan assisted in the design of the questionnaire. Angela O'Reilly and Tony Fitzpatrick, fellow-LL.M. students, helped lift the spirit and enliven the library. My Pupil-Master, Michael O'Shea, tolerated repeated absences over the last six weeks. Fionnuala O’Driscoll helped with proofreading. Máire Hearty saved the day one Saturday.

Extra special thanks are due to Brenda Donohue.

This thesis would not have been possible but for my parent's continued kindness and support.

This thesis is dedicated to the memory of Tomás Whelan.
**ABBREVIATIONS**

Some abbreviations of periodical titles are explained below.

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Title</th>
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<tbody>
<tr>
<td>AJCL</td>
<td>American Journal of Comparative Law</td>
</tr>
<tr>
<td>Ark.LR</td>
<td>Arkansas Law Review</td>
</tr>
<tr>
<td>Aust.LJ</td>
<td>Australian Law Journal</td>
</tr>
<tr>
<td>Camb.LJ</td>
<td>Cambridge Law Journal</td>
</tr>
<tr>
<td>Can.B.J.</td>
<td>Canadian Bar Journal</td>
</tr>
<tr>
<td>Can.B.Rev.</td>
<td>Canadian Bar Review</td>
</tr>
<tr>
<td>Col.L.R.</td>
<td>Columbia Law Review</td>
</tr>
<tr>
<td>Curr.L.Probs.</td>
<td>Current Legal Problems</td>
</tr>
<tr>
<td>DULJ</td>
<td>Dublin University Law Journal</td>
</tr>
<tr>
<td>Harv.LR</td>
<td>Harvard Law Review</td>
</tr>
<tr>
<td>ICLQ</td>
<td>International and Comparative Law Quarterly</td>
</tr>
<tr>
<td>ILT (ns)</td>
<td>Irish Law Times (new series)</td>
</tr>
<tr>
<td>ILTSJ</td>
<td>Irish Law Times and Solicitors Journal</td>
</tr>
<tr>
<td>Ir.Jur. (ns)</td>
<td>Irish Jurist (new series)</td>
</tr>
<tr>
<td>JSPTL</td>
<td>Journal of the Society of Public Teachers of Law</td>
</tr>
<tr>
<td>LQR</td>
<td>Law Quarterly Review</td>
</tr>
<tr>
<td>LaLR</td>
<td>Louisiana Law Review</td>
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<tr>
<td>MLR</td>
<td>Modern Law Review</td>
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<tr>
<td>Melb.ULR</td>
<td>Melbourne University Law Review</td>
</tr>
<tr>
<td>NCL Rev.</td>
<td>North Carolina Law Review</td>
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<tr>
<td>New LJ</td>
<td>New Law Journal</td>
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<tr>
<td>NZLJ</td>
<td>New Zealand Law Journal</td>
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<tr>
<td>NZULR</td>
<td>New Zealand University Law Review</td>
</tr>
<tr>
<td>QLSJ</td>
<td>Queensland Law Society Journal</td>
</tr>
<tr>
<td>RabelsZ.</td>
<td>Rabels Zeitschrift für ausländisches und internationales privatrecht</td>
</tr>
<tr>
<td>Rev.Dr.Int. et de Dr.Comp.</td>
<td>Revue de Droit International et de Droit Comparé</td>
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<tr>
<td>Rev.Int.Dr.Comp.</td>
<td>Revue International de Droit Comparé</td>
</tr>
<tr>
<td>Reform</td>
<td>Reform: The Journal of the Australian LRC</td>
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<tr>
<td>Sask.LR</td>
<td>Saskatchewan Law Review</td>
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<td>Statute Law Review</td>
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<tr>
<td>U.Tas.LJ</td>
<td>University of Tasmania Law Journal</td>
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<tr>
<td>U.Tor.LJ</td>
<td>University of Toronto Law Journal</td>
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</tbody>
</table>
"You are the only young man that I know of who ignores the fact that the future becomes the present, the present the past, and the past turns into everlasting regret if you don't plan for it!"

AMANDA, Scene 5, *The Glass Menagerie* by Tennessee Williams
INTRODUCTION

This thesis examines law reform, the comparative method, and the combination of these two elements. These subjects are addressed in different sequences as the chapters progress, all of which sequences seem to naturally follow from the particular topics involved.

In this Introduction, some introductory observations are made on the two elements in isolation, and on constant change as a necessity of modern legal systems. Chapter I then discusses the theory of the combination of the two elements. Section I (Home Thoughts from Abroad) looks at the positive aspects of the combination, while Section II (Limitations and Dangers) looks at the negative aspects. In Chapter II, there is a discussion of the combination of legislation and the comparative method. The discussion moves from reception/major transplants, to special commissions/committees, pre-drafting stage, parliamentary committees and plenary sessions, the choice between special statutes and codification, and finally to the role of academics. In Chapters III, IV and V, the focus shifts to law reform proposals submitted by law reform agencies. First, there is a discussion of the law reform agencies on their own. Much of this discussion is based on a survey carried out of various law reform agencies throughout the world (see Appendices 1 to 5 below). For the sake of convenience, the discussion divides the law reform agencies into two groups. Chapter III discusses the agencies of Group One (U.K., Ireland, Canada, Australia and New Zealand). Chapter IV discusses the agencies of Group Two (U.S.A., Africa, Other Jurisdictions), contains a comparison with European Ministries of Justice and includes some observations on particular topics which arise from the discussion of law reform agencies. In Chapter V, the combination of law reform agencies and the comparative method is examined. In the final Chapter (Chapter VI), the focus shifts to judicial law reform. Again, a natural sequence seems to follow from the particular topic. First, the question as to whether judges can properly be considered
as law reformers must be discussed. Second, the combination of the comparative method and judicial law reform must be examined. A third section has also been inserted, which looks at the suggestive role of judges in law reform. Strictly speaking, this is an aspect of the mechanism for reform by legislation. However, to the extent that in performing the suggestive function judges are catalysts or initiators of reform, it seems fitting to examine this topic as part of Chapter VI.

A preliminary point which must be made is that there is a frighteningly immense number of potential avenues of exploration with respect to these subjects, and as a result it is hard to pin them down, to keep them within manageable bounds. Difficulties of classification are another obstacle - unfortunately the two elements (the comparative method and law reform) do not come neatly wrapped or tidily pigeon-holed. It might even be argued that it would have been just as fruitful to narrow the topic further and thus increase its manageability and usefulness. But the advantages of such a narrowing of the field of inquiry would be offset by its disadvantages, the chief disadvantage being that the study would lose its broad scope; it would become more like an encyclopaedia than an attempt to address some fundamental questions. There is nothing inherently wrong with encyclopaedias. But to narrow the topic and write such a text would go firmly against the grain of two of the main strands of thought in this thesis. The first is that comparative law of an encyclopaedic fashion is the least useful form of that branch of legal studies. The second is that the topic of law reform should not be confined to law reform agencies (LRA's), but should be extended to encompass law reform by the legislature, by the judiciary and proposals for law reform from academics and practitioners.

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1 Similarly, John Farrar, *Law Reform and the Law Commission* (Sweet & Maxwell, London, 1974), p.x: "It has been difficult in writing this book to trap such a dynamic subject into a satisfactory text."

The Comparative Method

Comparative law enquiries have always existed, but the term "comparative law" only began to be used in the nineteenth century. There has always been hostility to comparative lawyers, summed up in Lord Bowen's pleasantry that "a jurist is a man who knows a little about the law of every country except his own".3 The average lawyer's unease with comparative law is not due to the fact that it is a difficult subject. "Comparative law is a difficult subject, but so are the British law of real estate and the French law of torts."4 But it may well be because he cannot avail himself of his training in the 'system' of municipal law; he has instead to develop his own method of dealing with legal questions.5 As Gutteridge says, "there is no 'comparative' branch or department of the law in the sense in which a lawyer speaks of 'Family Law' or 'Maritime Law'".6

The truth of the matter is that Comparative Law may in fact be a misnomer.7 It just happens to be the traditional label given to this method. It is perhaps more accurate to speak, as the Germans (Rechtsvergleichung) or the Russians (Sravnitel' noe pravovedenie), of the 'comparison of laws' or of 'comparative study of laws'.8 Even the French droit comparé (law compared) is slightly more accurate than the English version.9

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5 Ibid.

6 Gutteridge, supra n.3, p.1


9 Schlesinger, supra n.7, loc.cit.
According to Constantinesco, the Germans employ an interesting distinction in terminology whereby the term *comparative law* indicates the method and the autonomous science, *comparative method* is used to signify comparative law as a method, and the autonomous discipline is referred to either as *Theory of Comparative Law* or *Science of Comparative Laws*. This distinction is helpful in explaining the subject-matter of this thesis. "The comparative method" has been chosen for its title since it is concerned with the practical use of comparison of laws in law reform. But the autonomous discipline of comparison of laws is used in studying the subjects of law reform, the comparative method and the combination of these two elements. This thesis is not simply a study of these subjects in one or two jurisdictions; it is a study of these subjects in various different legal systems in a comparative manner. The title could have been lengthened to become "a comparative study of the comparative method and law reform", but that would have been unnecessarily verbose.

Gutteridge says with regard to comparative law that "not the least of its merits is its flexibility .... The comparative method is on trial, it is still in the experimental stage". Zweigert and Kotz state that comparatists all over the world "see themselves as being still at the experimental stage". Koopmans states that "comparative law is still lacking a fixed method; we have more or less to invent it". No particularly rigid technique of comparison has been adopted, but two definite methodological choices have been made from the outset.

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10 Léontin-Jean Constantinesco, *Traité de Droit Comparé* (Libraire Générale de Droit et de Jurisprudence, Paris, 1972), tome I, p.6, fn.1

11 Gutteridge, supra n.3, p.10


12 Koopmans, supra n.4, p.8
Firstly, as already stated, there is very little point to comparative studies of an encyclopaedic style. In fact, strictly speaking, such studies are not "comparative law" at all:

Modern legal comparison is critical in its attitude. The comparatist is not interested in the differences or similarities of various legal orders merely as facts, but in the fitness, the practicability, the justice and the why of legal solutions to given problems. The mere description of a certain legal order might be interesting and illuminating; however such 'foreign legal data' are not comparative law.  

Gutteridge agrees that "comparative law involves a great deal more than a mere description of the laws of a foreign country". He refers to the generally accepted distinction between descriptive comparative law (comparison instituted for the sole purpose of obtaining information as to foreign law) and applied comparative law (comparative research carried on with some other aim in view). Descriptive comparative law is not directed to the solution of any problem of an abstract or a practical nature. This thesis, however, does not merely comparatively describe law reform, the comparative method and the combination of these two elements. Questions are also raised as to the merits of particular methods of law reform and as to the usefulness of the comparative method to law reform.

Secondly, one would be forgiven for believing that the only valid form of comparison is that between the common law and the civil law. Gutteridge specifically confines his book to the technique involved in such comparison. However, this writer believes that comparison within the common law family is extremely important as well. Gutteridge mentions in passing that he doesn't wish to ignore or belittle the importance of comparison between the laws of the different English-speaking nations, only that no special form of technique seems to be called for for such comparison. So there is nothing wrong with such comparison: This thesis includes much com-

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15 Ibid., p.xi and p.72, fn.1
parison amongst common law countries, but also comparison between common law and civil law countries. Furthermore, no restriction to comparison between countries only has been imposed. Comparison between California and New York or between New Brunswick and Manitoba is still comparative law; the laws of one or more jurisdictions are being compared with one or more jurisdictions outside it or them. This thesis is concerned with external comparison only, however.17

**Law Reform**

Ireland's Law Reform Commission Act 1975 (No.3 of 1975) states at section 1 that in that Act

'Reform' includes, in relation to the law or a branch of the law, its development, its codification (including in particular its simplification and modernisation) and the revision and consolidation of statute law, and kindred words shall be construed accordingly.

That definition was obviously intended solely to define the functions of the Commission created by that Act,18 and therefore cannot be relied upon to define the scope of the present study. The nearest dictionary states that the verb "reform" means "make or become better by removal or abandonment of imperfections, faults or errors", etc., and the noun means "removal of abuse(s) esp. in politics; improvement made or suggested".19

The dictionary definition is obviously wide and all-embracing. If we adapt it for legal purposes, it becomes "make law better" and "law improvement". But what have the lawyers to say of this term? There is no one meaning given to it by them. William H. Hurlburt's 1986 study of law reform commissions19a is an indispensable contribution to the topic. In it, he points out that any

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16 Ibid., p.xi

17 Cohn (supra n.14, pp. 78-84) contrasts external comparison with inventive, internal and historical comparison. See Chapter I, Section I below.

18 S.4 obliges the Commission to "keep the law under review", to "undertake and conduct research with a view to reforming the law" and to "formulate proposals for law reform". The English provision is substantially similar - s.3(1) Law Commissions Act 1965 (c.22).

discussion of law reform is bedevilled by the fact that different speakers and writers mean different things by the term. Some usages are almost, if not entirely, mutually exclusive. The differences in usage cause not only semantic difficulty but misunderstanding.\(^{19b}\) Often, lawyers have imposed unnecessary limits on law reform. They often assume that it relates only to legislative law reform.\(^{20}\) Sometimes it is confined to fundamental recastings of the law and is said to not to apply to mere technical changes.\(^{21}\) On rare occasions, it has been pointed out that "if there is no pre-existent law on a particular topic then it is arguable that one cannot logically have law reform".\(^{22}\) Finally, many attempts have been made to narrow the scope of law reform to reform of "lawyers' law" only.\(^{23}\)

Farrar\(^{24}\) maintains that there are two senses to the term. The first sense is a broad one, encompassing many instances of lawmaking by the courts or the legislature. The second sense (which has only arisen over the last 150 years) is a narrow specialised meaning which covers "the situation where the inherent tendency of the courts to develop the law is accelerated by increased legislative intervention" and "comprehends reform of the substance and the form of the law and the institutions of the legal system."


\(^{19b}\) Ibid, p.3.


\(^{22}\) Farrar, supra n.1, p.1.

\(^{23}\) See Chap. IV below, Observations (a) Lawyers' Law vs. Social-Policy Law.

\(^{24}\) Farrar, loc.cit.
It is submitted that the use of the term should not be confined in any of the ways mentioned above and Farrar's first broad sense of law reform should be adopted. As Bell has said, "law reform is too important to be the exclusive prerogative of commissions assigned that name". Law reform is a term which evokes a refreshing sense of renewal and improvement. It means not merely change but change for the better. It is a word of approbation. It is a question of the utmost importance, "the really great task of jurisprudence in the second half of the twentieth century", a "question d'actualité which is more urgent than most of us realise", and it is dangerous to confine it within limits which are too strict or it will lose much of its vitality.

Furthermore, by confining it within strict limits, one loses the opportunity of addressing the fundamental question of which method of law reform is most effective, either generally speaking, or with respect to a particular branch of the law, or a particular problem within a particular branch.

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28 Michael D. Kirby, Reform the Law: Essays on the Renewal of the Australian Legal System (Oxf.U.P., Melbourne, 1983), p.7. Kirby continues: "We may oppose change, particularly change for its own sake. But, virtually by definition, reform is desirable because we all desire advance, improvement, change for the better" (p.7).

Law reformers are sometimes considered as a breed apart, even a band of revolutionaries.\(^{31}\) The average lawyer wonders why they do not settle down and be content with the law that is rather than wasting their time suggesting improvements to it. But the law reformers have contracted a kind of bug which does not allow them to rest\(^{32}\) and they are convinced that the law as it is is unsatisfactory, that it causes a problem which could be solved if carefully considered. Perhaps a helpful definition of law reform would emphasise this problem-solving function as follows:

Law reform is the solution of a problem which arises because law, legal institutions or legal methods are outdated and obsolete.

This, therefore, is the definition of law reform which will be used throughout this thesis.

The definition does not include every alteration in the law. It excludes such things as legislation imposing a tax or creating a new government department,\(^{32a}\) since that legislation does not arise from a perceived outdatedness and obsolescence in the law. It should also be noted that the definition includes problem-solving by legislators, by law reform agencies, by judges and by academics.

### Constant Change

A mistake which has sometimes been made as regards law reform has been the assumption that it is a process which is finite, that it will end when the legal system is sufficiently modernised to safely be left unreformed. Francis Bennion has stated this as follows:

\(^{30}\) Graveson, supra n.25, p.354 (Rev.Int.Dr.Comp.), p.128 (One Law).

\(^{31}\) However, Kirby explains that, far from being revolutionary, "reform implies some degree of preservation or conservation of the object of the reform exercise. What is produced at the end of the day is 're-formed'" - supra n.28, p.8. Hence, Lord Macaulay urged "reform that you may preserve". (Debate on the First Reform Bill, 2 Mar. 1831). See also Hurlburt, supra n.19a, p.434.


\(^{32a}\) Similarly, Hurlburt, supra n.19a, p.7.
In the relatively tranquil state of society in Britain the pursuit of legal reform should not need to be a permanent activity. It will, however, on any view, be a necessary activity for a considerable time to come.\textsuperscript{33} Similarly, the White Paper which led to the establishment of the British Law Commissions\textsuperscript{34} commented that "the task of the Commission will be immense and will not be completed for many years", implying that a time would come when its work would be complete.

However, it is submitted that there will never come a time when law reform would be unnecessary. Times are changing so quickly nowadays that it seems likely that new problems for which the law has not provided will constantly continue to arise from now on. Roscoe Pound believed that "law must be stable and yet it cannot stand still".\textsuperscript{35} Cohn submits that "law cannot exist otherwise than by constantly changing - as do all living things".\textsuperscript{36} The idea that law reform would somehow come to an end (if that is what was seriously meant) is untenable. No matter how up-to-date the law ever became, it would still need constant change as conditions changed and as inevitable problems with the existing framework presented themselves.

One way of explaining the need for constant change is to represent the situation by a graph (See Graph: The Permanent Need for Constant Change). The area marked "Period 1" shows a legal system which is not faring very well. The laws are too complicated and outdated. What has happened in Period 2 is that there has been a massive push for reform, resulting in a situation where laws are quite up-to-date and quite complicated. This is a satisfactory position not to be underestimated. But it is crucial to realise that in order to simply maintain it (Period 3), constant


\textsuperscript{34} Proposals for English and Scottish Law Commissions 1965, Cmnd. 2573; reproduced in Donald Railstick (ed.), \textit{Law Commission Digest} (Professional Books 1979), pp.3-6.


\textsuperscript{36} Cohn, supra n.14, p.81. "Legal reform is the constant companion of any, but a dying, legal system" -- Ibid., p.144.
change is necessary. Otherwise, the system would gradually begin to become outdated and the graph would show up-to-dateness decreasing and complication increasing. However, let us assume that it is sought to improve on the satisfactory position in Period 3. Another push for reform would be needed, as in Period 4, where the law would become extremely up-to-date and uncomplicated. The result would be the "ideal" at Period 5. Even in the ideal situation, constant change would continue, but happily the reward for the superhuman push in Period 4 is that the degree of constant change is reduced.
GRAPH - THE PERMANENT NEED FOR CONSTANT CHANGE

- Up-to-dateness of law
- Complication of law
- Constant Change

Introduction

Period 1

Period 2

Period 3

Period 4

Period 5

(Satisfactory)

(Ideal)

TIME

---
CHAPTER I - THE THEORY

This chapter deals with the theory of the combination of the comparative method and law reform. An attempt will be made to discover when the two come into contact in theory and why this combination comes about. The limitations and dangers of the combination are also considered. Cohn has rightly said that "nothing could be more dangerous to the cause of both critical and comparative jurisprudence than a naive enthusiasm which would exaggerate the value of the combination." There are two sides to the coin, and both sides must be evaluated. Section I of this chapter examines its obverse side, while Section II discusses its reverse side.

SECTION I: HOME THOUGHTS FROM ABROAD

In the Introduction, law reform was defined as the solution of a problem which arises because the law, legal institutions or legal methods are outdated and obsolete. To the question, "where should we turn for the new law?", some natural answers would seem to be: "Look at what they do in X country, repeal your own laws and follow their example", or "What do they do in other places?", or "The United States (or Germany) could achieve this by legislation, therefore so can we", or "why not look abroad for some ideas to use at home?" (Home Thoughts from Abroad).

2 Critical jurisprudence, in Cohn's terminology, is the science of law reform. It is not to be confused with the modern Critical Legal Studies movement.
5 Alan Watson, 'Legal Transplants and Law Reform' (1976) 92 LQR 79 at 82.
These are natural answers because it is a natural reaction when faced with any problem to try and ascertain how others have solved the same problem. An Irish doctor who is trying to treat an AIDS victim will quite naturally investigate how the victims have been treated in America and other countries, since those countries have had a lot more experience with the disease. Gutteridge asks

What would have been the fate of the art of healing if our physicians and surgeons had disregarded the research of foreign workers in the same field? It is inconceivable that a surgeon should hesitate to carry out a particular type of operation merely because it emanates from the hospitals of Paris or Vienna.  

Standardisation of Life:

Just as the same medical problems can arise all over the world, so can the same law reform problems. Graveson has referred to "the increasing standardisation of life that we face today". Kahn-Freund gives a detailed description of what he calls the "flattening out of economic and cultural diversity". Firstly, there is the assimilation of economic conditions:

Over wide areas only a tiny proportion of the gainfully employed population works on the land, and ... in the developed countries most people earn their living in industry, commerce and public service in ways almost indistinguishable from one country to another ... Owing to the evolution of trade, of mass production and of advertising, their manner of spending what they have earned [has] become equally uniform. In all industrialised countries the legal problems arising from employment have become as similar as those arising from housing: the blocks of flats in which so many people live look very much alike in Manchester or Lenin­grad, in Cincinatti or Buenos Aires, in Yokohama or in Dusseldorf.  

Then, there is the growing uniformity of the cultural environment: The role of religion in people's lives is diminishing (he says), the mass media occupies a central place, and

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everywhere people read the same kind of newspaper every morning, look at the same kind of television every night, and worship the same kind of film stars and football teams everywhere.\(^9\)

There are various examples of how the standardisation of life means that the same legal reform problems arise. The "ombudsman explosion"\(^{10}\) was one of universal attractiveness as a reaction to the growth of the power and influence of "big government".\(^{11}\) The need to protect the rights of employees from their employers as regards wages and hours of work, safety and health, holidays and pensions is a worldwide necessity; hence the impressive achievements of the International Labour Organisation in these areas.\(^{11a}\) The rapid development of computer technology led to the adoption of data protection legislation in numerous jurisdictions. With respect to civil delictual liability,

precisely the same problems of insurance, of risk and fault, of producer's liability, of the relation between private liability and social security are discussed wherever you go.\(^{12}\)

Comparative Method an Alternative Supplementary Method:

What are the options open to a legislator, a member of a law reform agency, a judge, or an academic faced with a problem of law reform? He/she discovers that the law, legal institutions or legal methods are outdated and obsolete and he/she wishes to solve that problem. There would appear to be four options open to him/her, which can be used independently of each other or in combination.

\(^9\) Ibid., loc. cit. He recognises that his description applies mainly to the developed countries, but insists that even in relation to the developing world there is a tendency to assimilate the law to that of developed countries (p.10 MLR; pp. 302-303 Sel. Writ.)

\(^{10}\) This description comes from the former Chief Ombudsman of New Zealand, Sir Guy Powles in 'Citizen's Hope: Ombudsmen for the 1980's' (1979) 5 Commonwealth Law Bulletin 522 at 525.


\(^{11a}\) Kahn-Freund, supra n.8, pp.20-21 (MLR), p.313 (Selected Writings).

\(^{12}\) Kahn-Freund, supra n.8, p.9 (MLR), p.314 (Selected Writings).
Firstly, he/she could try and invent a solution, create it in a vacuum, so to speak. He/she would compare the potential solutions which his/her mind envisages with the current situation. If there were no such native geniuses, the result would be worldwide stagnation, but it is to be remembered that such geniuses are very rare indeed. Cohn calls this process that of "inventive comparison".¹³

Secondly, he/she can use "internal comparison"¹⁴ to produce a suggestion to help him/her solve the problem. The same sort of problem may have already been solved in a different branch of the law in the same legal system. For instance, equity may have provided a more progressive solution than the common law.

Thirdly, the reformer can look at solutions adopted by the legal system in the past (historical comparison.)¹⁵ This will widen greatly his/her field of view.

Fourthly, he/she can try and ascertain how the problem has been solved in other jurisdictions. If he/she considers a foreign solution to be appropriate, he/she can borrow it for his/her own system, a technique which has paradoxically been referred to as "heureux plagiats".¹⁶ This depends, of course, on the recognition on his/her part that many law reform problems are the same worldwide due to the increasing standardisation of life described above.

Although this thesis is about the combination of the comparative method and law reform, and hence it focusses on the fourth option open to the reformer, it must be remembered that the comparative method is merely an alternative method. The first three options still remain of sub-

¹³ Cohn, supra n.1, p.78. At p.2, Cohn laments the fact that the reformer is destined to remain unknown. If his/her reform is not accepted, he/she vanishes into obscurity. If it is accepted, the reform itself becomes better known than the reformer.

¹⁴ Ibid., pp.79-80.

¹⁵ Ibid., pp.80-81.

It is of great importance to remember that the part that comparative jurisprudence can play in the solution of the task set to critical jurisprudence [i.e. law reform] should not be exaggerated. It is probably not right to say that comparative jurisprudence constitutes the last tool to which the critical jurist ought to resort. But it would certainly be wrong to consider it as the first or the most important tool. All that can be claimed is that comparative law furnishes a valuable alternative method. It forms a valuable supplement to, but under no circumstances a substitute for, the other alternatives.  

Role in Law Reform Only One Function of Many:

Any listing of the functions of comparative law would be incomplete if it did not include the comparative method's role in solving law reform problems. Hence, virtually all the theorists include it on their list of the functions of comparative law. There is an incredible volume of opinion as to what this list of functions contains and as to which functions are most important. In 1973, for example, Professor Mario Rotondi invited papers on the aims and methods of comparative law and received 42 articles, in 5 languages, which varied enormously in the emphasis they attributed to the practical function of the comparative method in law reform. Fairly typical lists of the functions of comparative law can be found in the writings of David, Gutteridge and Kamba. David says that the interest of studies of foreign law and comparative law derives from five sources:

a) Interest in knowledge of foreign laws
b) Better understanding of positive law
c) Improvement of national law
d) Unification and harmonisation of laws
e) Application of the comparative method to studies of legal history and legal philosophy.

17 Cohn, supra n.1, pp. 82-83.


Gutteridge\textsuperscript{20} adopts the broad distinction between Descriptive Comparative Law and Applied Comparative Law, and his list of functions might be summarised as follows:

\begin{itemize}
  \item[a)] The obtaining of information on foreign law (Descriptive Comparative Law)
  \item[b)] Comparison to aid a legal philosopher to construct abstract theories of law (e.g. re the "common core" of civilised legal systems)
  \item[c)] Comparison to assist the historian in tracing the origins and evolution of legal concepts and institutions
  \item[d)] Comparison for law reform purposes
  \item[e)] Comparison for the purpose of the unification of divergent laws.
\end{itemize}

Kamba's list\textsuperscript{21} is really only a list of general headings, which he particularly expresses not to be "exhaustive or in any way watertight compartments".\textsuperscript{22}

\begin{itemize}
  \item[a)] Academic studies
  \item[b)] Legislation and law reform
  \item[c)] The judicial process
  \item[d)] Unification and harmonisation
  \item[e)] International law
  \item[f)] International understanding
\end{itemize}

It is important that in each of these lists the function of comparative law as a source of ideas for law reform is only one of many functions which it has. It is incomplete and one-sided for any theorist to confine its functions to one particular object alone. Lévy-Ullman confined its functions to the unification of law by defining comparative law as

\begin{quote}
Branche spéciale de la science juridique qui a pour objet le rapprochement systématique des pays civilisés.\textsuperscript{23}
\end{quote}

There were various authors (e.g. Kohler, Pollock)\textsuperscript{24} who identified comparative law with comparative legal history. And Sir Henry Maine, whom Gutteridge describes as having "more profound-

\textsuperscript{20} Supra n.6, pp. 7-9.
\textsuperscript{22} Ibid., p.490.
\textsuperscript{23} Lévy-Ullman, \textit{Droit Mondial du XXe Siècle}, cited by Gutteridge, supra n.6, p.3, fn.1. Translation: "A special branch of legal science, the object of which is the systematic bringing together of civilised countries."
\textsuperscript{24} Gutteridge, supra n.6, p.3.
ly influenced the development of comparative law than any other English lawyer", was unduly restrictive when he said that it would be

universally admitted by competent jurists that, if not the only function, the chief function of Comparative Jurisprudence is to facilitate legislation and the practical improvement of law.

Cohn is surprised that such a distinguished scholar as Maine could seriously hold such a view:

Comparative law ..., has its own tasks in its own field. Assistance to critical jurisprudence [i.e. law reform] is only one of its functions. It is neither its sole, nor its main, function.

Cohn criticises the belief that comparative law's role in law reform is the main justification for its existence on three grounds:

a) If that were so, the majority of all comparative legal studies were lacking that justification because they were written without any regard for the needs of a critical utilisation of their results.

b) Frequently, for one or the other reason, such utilisation would anyhow be either impossible or very difficult.

c) Comparative jurisprudence, like every other science, can serve so many purposes that it is quite impossible to enumerate them.

Transplantation and Reception:

Even though assistance in the solution of problems of law reform is only one of many functions of comparative law, nevertheless it can be said that this practical function is one which makes comparative law more easily acceptable to lawyers generally and practitioners in particular. In the Introduction, reference was made to hostility amongst lawyers to comparative law. Its practical role in law reform has helped to change this attitude towards it. In an inaugural lecture delivered

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25 Ibid, p.v (Dedication) and p.xii. Later, (pp.15-16, p.38), Gutteridge refers to Lord Mansfield as "perhaps the greatest of English comparative lawyers", with no mention of Maine.

26 Maine, Village Communities in the East and West (3rd ed. 1871), p.4. This view was also held by Ottelisanu in Die Aufgaben und die praktischen Anwendungsmoeglichkeiten der vergleichenden Rechtswissenschaft, vol.6 (1941), pp.259ff. and Zahn, Wirtschaftsfuehrerum und Vertragsethik im neuen Aktienrecht (1934), p.11; both cited in Cohn, supra n.1, p.83, fn.133.

27 Cohn, supra n.1, p.83.

28 Ibid., pp.83-84
in the University of Birmingham in 1967, Professor L. Neville Brown said that
it is its [comparative law's] practical application to law reform, I suggest, that has
been chiefly responsible for the widespread change of attitude towards it in the
last 15 years or so.\(^2^9\)

This change in attitude has been helped in Britain by the statutory recognition of comparative law
in paragraph (f) of section 3(1) of the Law Commissions Act 1965 and in Ireland by paragraph
(b) of section 4(3) of the Law Reform Commission Act, 1975.\(^3^0\)

Gutteridge says that comparative research with a practical aim in view, such as law reform
or the unification of divergent laws, "is the most vigorous and fertile in output").\(^3^1\) It is now
almost inconceivable in the majority of countries that any attempt at reforming national law
should not be preceded by an examination of foreign solutions to the same problem, although nat-
urally the quality of this research and the importance attributed to it varies considerably.\(^3^2\) Thus,
comparative law has become the "handmaid" of law reform.\(^3^3\) Norman S. Marsh, Q.C. was the
Director of the British Institute of International and Comparative Law before he was appointed as
one of the first members of the Law Commission for England and Wales in 1965, and has written
extensively on the practical, as opposed to the theoretical, use of the comparative method in law
reform. In his view, the practical comparatist/ law reformer uses what he calls the "eclectic
reformer" approach:

Il [use] de sa science de plusieurs systèmes juridiques de manière éclectique,
avec le projet de trouver des solutions plus satisfaisantes aux problèmes de son
propre système.\(^3^4\)

\(^2^9\) Brown, supra n.4, p.3.

\(^3^0\) See Chapter V below.

\(^3^1\) Gutteridge, supra n.6, p.9.

\(^3^2\) See below, Chapters II and V.

\(^3^3\) Marsh, supra n.3, p.86 (Proceedings), p.667 (RabelsZ); Brown, supra n.4, p.9.

\(^3^4\) Marsh, 'Quelque Réflexions Pratiques sur l'Usage de la Technique Comparative dans la
Réforme du Droit National' (1970) 47 Rev.de Dr.Int. et de Dr.Comp., 81 at 81. Translation:
"He uses his own knowledge of many legal systems in an eclectic manner, with the object of
This is a "rigorously practical" conception of comparative law, he says, and

Il peut sembler à l'homme de science que cette approche implique un mode assez dégradé du droit comparé, un équivalent de la "science appliquée" par rapport à la "science pure".

Reasons for Transplantation and Reception:

The transplantation or reception of a foreign legal idea can occur for various reasons.

Firstly, on an involuntary basis, due to chance or due to colonisation. This will be dealt with in more detail in Chapter II (Reception/Major Transplants).

Secondly, on a voluntary basis, due to a great respect on the part of the donee for the donor's laws. ('The Transplant Bias'). This will be discussed in part c of Section II below.

Thirdly, to further the cause of unification of law, or because there is a harmonisation convention on the topic to which the state has acceded. Examples of the latter are the obligations of member states of the European Communities, commercial law conventions, conflicts of laws conventions and the Data Protection Convention 1981.

Fourthly, to solve a problem of law reform which was shared by the donor and the donee and which has been solved more successfully by the donor. Kahn-Freund breaks this reason into two parts:

finding more satisfactory solutions than those of his own system." Marsh contrasts this approach with the "highest common factor" approach, where a comparatist tries to extract a common core of legal systems, the only real result of which is to prove that the majority of the legal systems studied treat plain situations in a similar manner, but that they tend to diverge in solving more difficult problems.

35 Ibid., p.83.

36 Ibid., p.82. Translation: "It can seem to the man of science that this approach implies a fairly reduced fashion of comparative law, an equivalent of 'applied science' as opposed to 'pure science'."
a) To give adequate legal effect to a social change shared by the donor with the donee
b) To promote at home a social change which foreign law is designed either to express or to produce. 37

But it is submitted that this distinction is unhelpful and extremely difficult to draw in practice. When there is no question of transplantation or reception, it is difficult to distinguish between legal reforms which give legal effect to a social change and those which promote a social change. If homosexual acts were legalised by the Oireachtas or by the courts in Ireland, would that come under heading (a) as an adjustment of the law to the social change that homosexuals account for a certain percentage of the population (a fact which was not recognised in the past) or would it come under heading (b) as "educative" law reform, whereby the Oireachtas or the courts would be promoting social change, i.e. promoting the acceptance by the community of homosexuals within its midst? Similar problems would arise in trying to classify the abolition of capital punishment. The difficulty in making the distinction continues if there is a question of transplantation or reception. Marsh 38 points to the example of the transplantation of the ombudsman idea (in a rather watered-down fashion) 39 to Britain. At first it seemed as though its introduction would be impossible under heading (a); but after extensive reports, tours of Britain by the Danish ombudsman, favourable newspaper publicity and a change of government, a wide measure of general support was secured for the scheme. Was this a reform which reflected a social change or a reform which brought about social change?

The fourth reason explains why comparative research is so important to law reform in these days of rapid change. The reformer (legislator, LRA member, judge or academic) can only be sure that the proposed reform is the best solution possible if he/she looks to possible advances which have been made abroad:

37 Kahn-Freund, supra n.8, pp.2-5(MLR), pp.295-298 (Selected Writings).
38 Supra n.3, p.86 (Proceedings), pp.667-668 (RabelsZ.)
39 See Britain's Parliamentary Commissioner Act, 1967.
There are too many good solutions of difficult problems which remain confined to a few or even to an individual legal system because nobody outside this system has heard of the happy solution that has been found.40

The question of the reception of foreign legal institutions is "simply one of expediency, of need. No one will fetch a thing from abroad when he has as good or better at home".41 Cohn says of comparative studies:

Such studies reduce the amount of creative ability that is required for the research on problems of legal reform. It places at the disposal of the student the result of the creative hearts and brains of all the nations and all the times. It means nothing less than the full utilisation of all those legal talents that in the course of time have been granted mankind. If mankind is under a moral duty not to neglect his talents, mankind is under a moral duty not to neglect comparative critical [i.e. law reform] studies.42

Fifthly, transplantation or reception can occur because a foreign solution is seen to have functioned effectively in practice. In other words, comparative law helps to solve the problem of practicability and enforceability of the proposed law.43 All reformers know only too well that a reform may look very well on paper, but may be totally impractical or unenforceable in reality. Kamba points to the fact that the American experience regarding prohibition served a strong warning to any other country which might have passed similar legislation.44 Much modern legislation is a "process of trial and error",45 and

we can profit from the experience of other systems, even if we merely learn in this way how to avoid the mistakes which they have made.46

40 Cohn, supra n.1, p.78
42 Cohn, supra n.1, p.52. In the same vein, David believes that if a reformer doesn't consult foreign solutions, he/she can be accused of rashness/ arbitrariness. Supra n.19, p.114 and p.118.
43 Kamba, supra n.21, p.497.
44 Ibid., loc. cit.
45 Gutteridge, supra n.6, p.36.
46 Ibid., p.33.
Cohn places great emphasis on the requirement of practicability in proposals for law reform. It is a major part of his threefold test which any new rule must satisfy: justice, consistency/compatibility and practicability. With regard to the latter, external comparison offers one considerable advantage over all other methods. It is able to supply not only solutions, but also experience with the practical working of the solutions in question. If he/she is lucky, the reformer will discover that the foreign solution works well in reality as well as looking well on paper. But sometimes he/she will discover that its enforceability and practicability were disastrous. Even in such cases, however, the use of the comparative method has not been in vain: It does at least show how not to do it. It will prevent the repetition of errors committed. It will frequently indicate the direction in which fresh innovation is required simply by demonstrating that possibilities in other directions do not exist.

This fifth reason can be compared to a doctor's or a scientist's reliance on experimentation as a means of testing whether a given cure will actually work. The doctor treating the AIDS victim can look to experiments done abroad to see which treatments are most successful. Similarly, the reformer seeking to solve a problem of law reform in his own jurisdiction can look abroad to see how experimental foreign solutions have functioned in practice:

As legal science has no laboratories, some societies may ... serve as grounds for experimenting in law reform. These values have been acknowledged even in an integrated federation such as that of the United States of America. In matters where under the Interstate Commerce Clause of the Federal Constitution the Union might have claimed to exercise exclusive jurisdiction, the federal powers, and among these the US Supreme Court, have preferred to stand aloof and not interfere with state legislation. One reason for this has been the wish to see how a

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47 Cohn, supra n.1, p.17.
48 Ibid., p.88.
49 Ibid., p.87. At p.50, he states that "injustice is more easily discovered than justice."
50 Brown, supra n.4, p.6: "The comparative method is for the lawyer what the experimental method is for the scientist"; Gutteridge, supra n.6, pp.156-7: "The common fund of human wisdom and experience has been enriched from the individuality of experiment which is a characteristic of the existence of several competing systems of law."
certain legislative approach worked in practice in order to learn whether it might serve as a model for later federal legislation.\footnote{Ole Lando, 'The Contribution of Comparative Law to Law Reform by International Organisations' in \textit{Proceedings} (supra n.3) 59 at p.61; reprinted (1977) 25 AJCL 641 at 645-646.}

However, Cohn disapproves of this sort of an analogy with experimentation. He believes that a law reformer cannot use experimentation, as this would be to use human personalities as means to an end, that is to abuse them.\footnote{Cohn, supra n.1, p.48} In reply, it might be said that the kind of experimentation included in the analogy is often not consciously experimental at all. The jurisdiction which first adopts a new solution does not consider itself as using its people to test that solution. It considers itself as trying to improve its people's legal system. It is only as a byproduct of that attempt at improvement that the solution is used by other countries as a model to be studied as to how it functioned in practice. Even in rare cases of frank experimentation, such as the establishment of neighbourhood justice centres in New South Wales on a trial basis,\footnote{See Community Justice Centres (Pilot Project) Act 1980 (NSW); cited by Kirby, supra n.11, p.19, fn.32.} it is untrue to say that people are being abused. On the contrary, as with all laws, there is just as much likelihood that they will benefit from the change as that they will suffer due to it. At any rate, even Cohn concedes that the comparative method does for legal science what experiment can do for the natural scientist.\footnote{Cohn, supra n.1, p.48} And his warning as to the dangers of taking the analogy with experimentation too far cannot be denied. Obviously, it would be barbaric to use capital punishment on a consciously experimental basis to see whether it would reduce the level of crime.
 SECTION II: LIMITATIONS AND DANGERS

The reverse side of the coin must now be considered: the limitations and dangers in combining the comparative method and law reform. They will be considered under the following headings:

a) The Danger of Getting the Foreign Law Wrong
b) Misuse of the Combination because it is Fashionable
c) Excessive Respect for a Certain Jurisdiction (Transplant Bias)
d) Legal Isolationism/ Xenophobia
e) The Need for Adaptation to Suit the Donor's Present System.

Particular attention will be paid to the last of these headings, as this aspect of transplantation has caused lengthy theoretical debates.

a) The Danger of Getting the Foreign Law Wrong

It is very easy when making a statement about the law in the donor's system to get it wrong: "Error of law is probably more common in comparative law than in any other branch of legal study".55 Rabel warns comparatists of the danger of coming upon "natives lying in wait with spears" in their explorations of foreign territory.55a Gutteridge says that the "greatest bugbear" of comparative study and research is "the difficulty in discovering the exact state of the law of a country at any given moment".56 In the first place, the comparatist's library may be unable to assist. He/she may have to rely on what secondary sources of law he/she can find, which sources may well be inaccurate or out-of-date. If he/she is lucky enough to have access to primary sources, they may well be out-of-date too. In addition, there is the problem of languages.57 Translations of foreign legislation, case-law and academic opinions are often virtually impossible to

56 Gutteridge, supra n.6, p.136.
57 "More than other legal scholars, the comparatist feels the loss of a common language, the role played by Latin for so long and by French until the nineteenth century." - Richard J. Cummins, book review (1984) 58 Tul. L. Rev. 1277 at 1280. See also Gutteridge, supra n.6, chapter IX (The Problem of Legal Terminology).
come by. If the comparatist is familiar with a foreign language, he/she must be extremely careful not to misinterpret the foreign terminology. A word often has a quite specialist meaning in one language which is lost in translation. For example, the French contrat is not a 'contract', and 'domicile' is anything but domicile.\(^{58}\)

While Marsh agrees that "a little knowledge of a foreign legal system can ... have its special dangers for law reform", citing Holmes' opinion that "ignorance is a great law reformer",\(^ {59}\) he also believes that difficulties of language are often overemphasised:

Differences of language ... have been with us since the Tower of Babel and, although important, can at a cost usually be surmounted.\(^ {60}\)

It may also be added that the introduction of on-line computer databases such as LEXIS ensures that the risk of getting the foreign law wrong is greatly reduced.

The surest way to improve accuracy of information on foreign law is the personal contact or the written enquiry to the Ministry or other body in the jurisdiction concerned. Often "the right man in the right place" can "prove decisive".\(^ {61}\) Marsh says that personal relationships across frontiers are "an important aspect of the practical influence of comparative law".\(^ {62}\) There are numerous examples of this phenomenon. Karl Llewellyn was the right person in the right place as chief draftsman of the American Uniform Commercial Code and it was influenced by continental law because of his familiarity with the subject.\(^ {63}\) And the New Zealand Royal Commission on the Electoral System took the trouble of sending a five-person team to Canada, Ireland and West

\(^{58}\) Examples from K.-Freund, 'Comparative Law as an Academic Discipline' (1966) 82 LQR 40 at 52.

\(^{59}\) Supra n.3, p.80 (Proceedings), p.659 (RabelsZ). No reference is given for the Holmes quote.

\(^{60}\) Ibid., p.79 (Proceedings), p.657 (RabelsZ).


Germany in order to study the voting systems in those countries.\textsuperscript{64} Watson has argued that whilst a reformer should do his/her utmost not to get the foreign law wrong, even inexact knowledge may inspire worthwhile ideas. This will be considered in more detail in subsection (e) below.

\textit{b) Misuse of the Combination Because it is Fashionable}

Reference has already been made to the fact that in most countries it is now almost inconceivable that any attempt at reforming national law should not be preceded by an examination of foreign solutions to the same problem (Section I above). Professor Tallon has said that "comparative law is popular, just now, even fashionable" and speaks of the new state of affairs of "the penetration of comparative law in the activity of every jurist", particularly the law reformer.\textsuperscript{65} According to Professor Brown, comparative law

\begin{quote}
has become something of a bandwagon on which academics and practitioners alike scramble for seats, so much so that the older passengers may sometimes be surprised at the company in which they now travel.\textsuperscript{66}
\end{quote}

The danger with the fashionability of combining the comparative method and law reform is that the combination may become distorted and is liable to be misused.\textsuperscript{67} There are two particular dangers which can arise from the fashionability of the combination.

Firstly, there is the danger that a foreign solution will be adopted merely because it is foreign. Emerson believed that it was "suspicious" when a reform was adopted from abroad as opposed to being the result of native genius.\textsuperscript{68} It is obviously a misuse of the comparative method if it is

\textsuperscript{64} \textit{Irish Times}, Sat. 19 Apr. 1986, Weekend p.6, 'Voting Survey'.

\textsuperscript{65} D. Tallon, 'Comparative Law - Expanding Horizons' (1968-69) 10 J.S.P.T.L. (n.s.) 265 at p.265 and p.266. See also David, supra n.19, p.117, speaking of France: "Pour toute réforme de quelque importance il est devenu courant de s'enquérir de ce qui se fait a l'étranger." (For every reform of some importance, it has become fashionable to inquire what has happened abroad.)

\textsuperscript{66} Brown, supra n.4, p.2.

\textsuperscript{67} Kahn-Freund, supra n.8, p.1(MLR), p.294 (Selected Writings).
used "merely as an artifice to enable foreign rules to be introduced surreptitiously into a national system of law". At the very least, foreign solutions should not be used when the existing solution at home is as good or better. For a higher standard of reform, it is also essential that the native genius be allowed to do his/her best to invent an even better solution than any foreign solution. Otherwise, as was said before, the result would be stagnation all over the world.

Secondly, foreign solutions may be consulted at length because it is fashionable and because public opinion demands it, but no practical use may be made of them at the end of the day. In situations where this happens, it would be better for the reformer to have been honest and not have referred to the foreign research at all, rather than wasting so much precious time, energy and money on it. Marsh is particularly critical of this kind of tokenism due to the fashionability of the combination. He says that a gap often exists "between very extensive comparative research in connection with a legislative project and a practical result on the proposals made". In the case of one particular report he cites, the Committee itself seems to have admitted that the research was irrelevant and did not use any of the foreign suggestions. Another example is the famous Pearson Report on accident compensation, in volume 3 of which there was assembled a vast amount of information on foreign systems. It has been noted that the Commission "then seemed to ignore this in many of its conclusions".

68 "Every project in the history of reform, no matter how violent and surprising, is good when it is the dictate of a man's genius and constitution, but very dull and suspicious when adopted from another." : Essays, Second Series, 'New England Reformers'.

69 Gutteridge, supra n.6, p.20.

70 Marsh, supra n.3, p.82 (Proceedings), p.662 (RabelsZ).


action on it applies not only to legislative law reform, but also often arises in the case of law reform by judges or suggestions for law reform from academics.

c) Excessive Respect for a Certain Jurisdiction (Transplant Bias)

It is said that in the fifth century B.C. the Romans engraved in Bronze and set up in the market place in Rome a set of legal rules known as the "XII Tables." The story says that a mission had been sent to Greece to study the code (594-593 B.C.) of Solon and that the Tables were heavily influenced by Greece, since Greece was unquestionably the most advanced state of the times. Marsh has used this story to illustrate how laws may be transplanted merely because the donee has excessive respect for a certain jurisdiction:

I think it important for law reformers who are tempted to adopt some law or institution of another society to ask themselves whether it is the appropriateness of the law or institution to their own society which attracts them or whether it is in fact some broader-based approval of the foreign country which makes them look on the particular law or institution with favour.74

The Romans adopted the Greek laws because the culture and political reputation - if not the actual power - of the Athenians long occupied a dominant position in the Mediterranean.75 Marsh terms this "Kahn-Freund in reverse". Kahn-Freund had argued that transplantation cannot take place where political and cultural backgrounds are fundamentally different,76 but Marsh maintains that such transplantation will take place if the donee has great respect for the donor's system.

Watson has used the phrase 'Transplant Bias' as a label for this:

The term Transplant Bias is used to denote a system's receptivity to a particular outside law, which is distinct from an acceptance based on a thorough examination of possible alternatives. Thus, it means for instance a system's readiness to accept Roman law rules because they are Roman law rules, or French rules because they are French rules.77

74 Marsh, supra n.3, pp.73-74 (Proceedings), p.650 (RabelsZ).
76 Kahn-Freund, supra n.8, passim.
Obviously, there are times when the law imported due to high respect for a certain jurisdiction will be of inherent value. But on the whole, the danger with great respect for certain jurisdictions is that it is usually excessive. Due to this excessive respect, solutions from that country may be adopted although they are not the best solutions available. A prime example of transplant bias is the excessive respect in Ireland for English statutes and case-law, a topic to which further reference will be made in later chapters.

Watson has conveniently summarised the reasons for the existence of a transplant bias as follows:

Its extent will depend on such matters as linguistic tradition, the general prestige and accessibility of the possible donor, the training and experience of the local lawyers.\(^78\)

Those three factors have obvious applications to the Irish situation. Linguistically, English is the common language of both Ireland and England. English law's prestige is unquestionable; and its statutes, case-law and textbooks are very easily accessible in Ireland. The Irish lawyers are trained in the common law tradition and are highly experienced in researching English law. By way of contrast, the transplant bias in the United States towards English law is weaker, due to differences in training, accessibility of English law and prestige of English law.

d) Legal Isolationism/Xenophobia

Ptolemy was a celebrated astronomer who lived in Alexandria in the 2nd century, A.D. He developed a theory whereby the relative motions of the sun, moon and planets were explained to take place round the earth, which was supposed to be stationary. There is a tendency amongst lawyers to believe that their system of law is like the earth in Ptolemy's theory - their system remains stationary and all the other systems revolve around it. The ptolemaic character of the law\(^79\) is a fac-

\(^78\) Ibid., loco cit.

tor in discouraging the combination of the comparative method and law reform. If there is a generally held belief that one's own legal system is at the centre of the legal universe, then the borrowing of ideas from abroad will seem unnecessary. In fact, it will be expected that foreign reformers will learn from one's own system since it is so "central". The result is legal narcissism, insularity, provincialism and isolationism, combined with a fear of foreign influences (Xenophobia) and a horror alieni juris.

All of this stems from Inertia, which can be defined as

the general absence of a sustained interest on the part of society and its ruling elite to struggle for the most 'satisfactory' rule.

C.J. Haughey, then Minister for Justice, defended inertia as being a "practical, pragmatic approach" resulting from "the feeling that any system that works reasonably well is good enough". Whatever the reasons for this inertia, it often leads to unjustified rejection of foreign solutions merely because they are foreign.

The most potent influence at work would seem to be a dread of the polluting or disruptive effects which it is feared might result from the infiltration of legal ideas from abroad. Lawyers are prone to regard the institutions and the rules of the legal system in which they have been trained, not necessarily as perfect, but as affording the best solution which can be arrived at in the conditions in which rules of law are called upon to function in a workaday world.

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79a Zweigert and Kotz, supra n.55a, p.15.
80 See Cohn, supra n.1, pp.93-100 ("Legal Universalism, Legal Isolationism and Legal Regionalism").
81 Hans Dolle, 'Der Beitrag der Rechtsvergleichung zum Deutschen Recht' in M. Rotondi (ed.), supra n.18, 123 at 151.
82 Watson, supra n.77, p.331.
83 Haughey, 'Law Reform in Ireland' (1964) 13 ICLQ 1300 at 1311.
85 Gutteridge, supra n.6, p.25. "A mythology of fundamental superiority (for the particular society
Legal tradition can be a serious limitation on law reform. 'Legal Tradition as a Limit on Law Reform' was a topic for the tenth Congress of the International Association of Comparative Law held at Budapest in 1978, while Graveson has criticised "legal idolatry" (worship of ancient precedents for their own sakes) and the subconscious barrier which tradition raises against imaginative legal pioneering. Legal tradition not only limits law reform generally, but also limits the consultation of foreign solutions in law reform:

All systems of law are to some extent rooted in tradition, and this traditional aspect of national law has, in all countries, produced an intransigent attitude towards any attempt to promote the study of foreign legal institutions and foreign rules of law.

In this writer's view, it would seem that legal isolationism and xenophobia are unjustified in the modern world, given the increasing standardisation of life which has been referred to in Section I of this chapter. Ptolemy was proven wrong by Copernicus, who established that the planets, including the earth, move in orbits around the sun as a centre. Similarly, it is wrong for any legal system to reject foreign influences merely because they are foreign in these days of international commerce and communication, with increasing talk of the "global village". Jhering put it succinctly when he said:

Nur ein Narr wird die Chinarinde aus dem Grunde zurückweisen, weil sie nicht auf sein em Krautacker gewachsen ist.

at least) grows up around law, among lawyers and laymen alike; in France for the Code civil, in England for the common law, and in Scotland for Scots law": Watson, supra n.77, p.331.


88 Gutteridge, supra n.6, p.24.

89 Copernicus is the Latinized form of Koppernik, the astronomer, a native of Prussian Poland (1473-1543).

90 Jhering, supra n.41, p.8. Translation: "Only a fool would refuse quinine just because it didn't grow in his back garden."
Finally, the law's isolationism and xenophobia lags behind the opinions of the general public and leads to the danger that non-lawyers will lose all respect for law:

If the raison d'être of our case law be that it provides an attractive and amusing puzzle, the men and women of the twentieth century will impatiently sweep it aside - and with it the legal profession.

e) The Need for Adaptation to Suit the Donee's Present System

Comparatists have repeatedly stressed that a solution which has worked in one jurisdiction may not work in another. In the words of Arminjon et al,

Telle institution ... qui fonctionne ... bien dans son pays d'origine ... donne parfois un très mauvais rendement dans certains autres. Il en est des institutions comme des espèces de végétales ou animales. La transplantation des cépages américains en Europe y a introduit le phloxera, l'acclimatation des lapins en Australie y a causé des ravages incalculables.

The reformer who borrows a solution from abroad must be careful to discover whether and to what extent the solution needs to be adapted. Adaptation may be necessary due to differences between the donor and the donee - differences of a legal nature, or of a historical, political, social, economic, cultural or environmental nature. The danger of foolish imitation would seem to necessitate scrutiny by the reformer of two factors:

a) The legal/ historical/ political/ social/ economic/ cultural/ environmental context of the proposed rule within the donee's system
b) The legal/ historical, etc., etc., context of the existing rule within the donor's system.

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91 Gutteridge, supra n.6, p.25.


93 Arminjon et al, supra n.16, p.20. Translation: "An institution which functions well in the country where it originated can sometimes give a very bad profit in certain others. Some institutions are like types of vegetables or animals. The transplantation of American vine-plants to Europe brought about phyloxera there; the importation of rabbits to Australia caused incalculable havoc there."
Diagram 1:

- Diagram 1 shows two circles labeled CIRCLE A (Donee) and CIRCLE B (Donor) connected by a line labeled "Transplant".

Diagram 2:

- Diagram 2 has subcircles with labels:
  - CIRCLE A (Donee):
    - 1-Legal context
    - 2-Historical context
    - 3-Political context
    - 4-Social context
  - CIRCLE B (Donor):
    - 5-Economic context
    - 6-Cultural context
    - 7-Environmental context

Subcircles:

- Legal context
- Historical context
- Political context
- Social context
- Economic context
- Cultural context
- Environmental context
Factors (a) and (b) can be roughly represented as Circle A and Circle B as in Diagram 1. Circle A represents a portion of the donee's system and Circle B represents a portion of the donee's system. The dot in the centre of each circle represents a particular rule or institution and the circle round it represents its context within the system. In the case of Circle B, the rule is an existing rule. In the case of Circle A, the dot represents the locating of the new transplanted rule within the donee's system. It is often easy to lose sight of the fact that (a) and (b) are separate factors and so it is best to bring that distinction out into the open as soon as possible and to bear it in mind throughout the whole of the discussion that follows.

Many questions of great importance arise from the need in legal transplantation for adaptation to local conditions. When can a foreign law be transplanted? How much adaptation is required to local conditions? How detailed must the reformer's scrutiny be of factor (a)? Of factor (b)? Which elements in each of the factors are most important - the legal context? The historical context? The political context, etc.?

Amongst those who have tried to answer these questions, three of the most interesting writers have been Otto Kahn-Freund, Alan Watson and Norman S. Marsh. Their arguments have contained constant references to Montesquieu's *De l'Esprit des Lois* (1748) and so that would seem to be a convenient starting point for this discussion.

Montesquieu:

Montesquieu took more than twenty years to write his monumental *De l'Esprit des Lois*.
it from a specialist, comparative law, angle. His ideas on comparative law are scattered throughout the work. They are not presented as a complete theory and do not form a complete theory. Some have said that Montesquieu was the father or ancestor of comparative law, but it is submitted that this is a dangerous overestimation. He certainly was instrumental in drawing attention to the exploration of foreign concepts, but so were many others. It would seem that too many modern comparatists have given Montesquieu too much uncritical respect with too little justification.

Attention has often been drawn to a "purple passage" which comes less than ten pages into the book, and particularly to certain words in that passage (which are in italics below):

La loi, en général, est la raison humaine, en tant qu'elle gouverne tous les peuples de la terre; et les lois politiques et civiles de chaque nation ne doivent être que les cas particuliers où s'applique cette raison humaine.

Elles doivent être tellement propres au peuple pour lequel elles sont faites, que c'est un très-grand hasard si celles d'une nation peuvent convenir à une autre.

Il faut qu'elles se rapportent à la nature et au principe du gouvernement.... Elles doivent être relatives au physique du pays, au climat [etc., etc.] C'est ce que j'entreprends de faire dans cet ouvrage. J'examinerai tous ces rapports: ils forment tous ensemble ce qu'on appelle l'ESPRIT DES LOIS.

95 Shackleton, 'Montesquieu in 1948' (1949) 3 French Studies 299-323 at 299: "Montesquieu was a polymath and has been interpreted by specialists."


97 Montesquieu "attempted too much, and his work is disconnected, unsystematic and marred by eccentricities. Great as was the success of De l'Esprit des Lois it was not the means of placing comparative legal research on a lasting foundation." - Gutteridge, supra n.6, p.12. Sir Frederick Pollock: "He [Montesquieu] took his examples from universal history and travellers' stories, without worrying about the enormous differences between the contexts from which he detached them." - 'Le droit comparé, Prolégomènes de son histoire', Rapport présenté au Congrès int. de droit comparé tenu à Paris en 1900 (Procès-verbaux des séances et documents, Paris 1905) I, 253 at 256.

98 Zweigert and Kotz, supra n.55a, p.49 refer to Fortescue, Struve, Strycl, Bacon, Leibniz, Grotius, Pufendorf and Hugo. Gutteridge (supra n.6, p.12) adds Vico.

99 Livre I, chapitre III (Des Lois Positives). Translation: "Law in general is human reason, inasmuch as it governs all the inhabitants of the earth: the political and civil laws of each nation
Earlier in the chapter, he has defined "le droit politique" as "les lois dans le rapport qu'ont ceux qui gouvernent avec ceux qui sont gouvernés" i.e. public law and "le droit civil" as laws regarding "le rapport que tous les citoyens ont entre eux" i.e. private law. The third paragraph in the quotation above is an abbreviation of his assembly of causes, the factors which link laws so closely with their habitat. The list includes geographical, climatic, political, sociological, cultural, religious and economic factors. Certain factors will be more important in certain countries than in others.

It is important to make it clear that he never actually discusses in detail whether or not legal borrowing is possible or desirable. Even Niboyet, who is very supportive of the Baron's views, admits this. Montesquieu says he believes in particularism as opposed to uniformity (dismissing ideas of uniformity as ones which "frappent infailliblement les petits [esprits]"), and that laws are best understood by taking the whole of the legal/ historical/ political, etc., etc. context 

ought to be only the particular cases in which human reason is applied. They should be adapted in such a manner to the people for whom they are framed that it should be a great coincidence if those of one nation suit another. They should be in agreement with the nature and principle of the government .... They should be relative to the physique of the country, to the climate [etc., etc.] This is what I have undertaken to perform in the following work. These relations I shall examine, since all these together constitute what I call the SPIRIT OF LAWS."

laws regarding the relationship between the governors and the governed.

the relations between the citizens.

The list is abbreviated in Book XIX, chap.4 to "le climat, la religion, les lois, les maximes du gouvernement, les exemples des choses passées, les mouers, les manières" (the climate, the religion, the laws, the maxims of government, the example of past events, morals and customs). This is "perhaps the most significant chapter of the whole work" - Robert Shackleton, Montesquieu: A Critical Biography (Oxf.U.P. 1961), pp.316-317.

Book XIX, chap.4: "À mesure que, dans chaque nation, une de ces causes agit avec plus de force, les autres lui cèdent d'autant." (In proportion as, in every country, any one of these causes acts with more force, the others are weakened to the same extent).

Niboyet, supra n.96, p.257.

"infallibly make an impression on little minds" - Book XXIX, chap. 18 (Des idées d'uniformité).
into account. It can easily be deduced that he is against transplantation of laws without adaptation to factor (a) and close scrutiny of factor (b), but this is only an implied deduction.

Kahn-Freund:

While he does not agree with Montesquieu completely, Kahn-Freund is highly enamoured of the Baron's writings. He refers to the contrast between kidney transplantation (with problems of 'adjustment' or 'rejection') and the transference of a carburettor from one vehicle to another. "The kidney and the carburettor are the terminal points of a continuum, and any given legal rule or institution may be found at a different point on it". He admits that there are some laws which are very easily transplantable, such as the law of shipowner's liability, but says that in most cases there are questions of adaptation to be considered. Turning to Montesquieu, Kahn-Freund states that obviously he believed that "legislative transplantation was much closer to the organic than to the mechanical terminus of our continuum". Laws can hardly ever change their habitat, due to the assembly of causes. While Montesquieu says that certain elements will be more important in certain categories than in others, Kahn-Freund adds that certain elements will be more important at certain times than at others. In particular, the political factors have greatly gained in importance in recent times. Kahn-Freund recognises the increasing standardisation of life referred to in Section I above, but says that "the fact of political differentiation is as obvious as that of cultural and social integration" in three respects:

106 Book XXX, chap. 11 (De quelle maniere deux lois diverses peuvent être comparés) and chap. 12 (Que les lois qui paraissent les mêmes sont quelquefois réellement différentes).

107 Kahn-Freund, supra n.8, p.6 (MLR), p.299 (Selected Writings).

108 Ibid., p.7 (MLR), p.299 (Sel.Writ.).

109 Ibid., p.7, fn.29 (MLR), p.300, fn.29 (Sel.Writ.): "Montesquieu adds the significant observation that the more potent one factor is in a given country, the less important are the others. What he puts in terms of space (country) can also be put in terms of time (period)."

110 Ibid., p.11 (MLR), pp.303-4 (Sel.Writ.). Constantinesco is of the opinion that while the world has become more copernican, legal science has remained paradoxically ptolemaic - supra
i) the gulf between communism and non-communism
ii) the variations on the democratic theme
iii) the role of organised interests in the making and the maintenance of legal institutions (the power factor)

He says that family law is generally surprisingly amenable to transplantation nowadays. But one of the exceptions is Ireland's refusal to introduce divorce, and this is only to be explained in terms of the political power of the Catholic hierarchy, i.e. factor (iii) above.\(^{111}\) The power factor is even more strongly in evidence as regards the law of procedure in the widest sense of that word. The jury could not be introduced to France because it went too much against the grain of the inquisitorial method of criminal procedure.\(^{112}\)

In conclusion, Professor Kahn-Freund reiterates that "we cannot take for granted that rules or institutions are transplantable", that the use of the comparative method "requires a knowledge not only of the foreign law, but also of its social, and above all its political, context" and that this use becomes an abuse "only if it is informed by a legalistic spirit which ignores this context of the law".\(^{113}\)

Watson:

Professor Alan Watson is very critical of Montesquieu and Kahn-Freund on various grounds. He believes that

one simply cannot accept Montesquieu's claim that it is "un grand hasard" if the rules of one nation can suit another.\(^{114}\)

Montesquieu badly - very badly - underestimated the amount of successful borrowing which had been going on, and was going on, in his day.\(^{115}\)

\(^{111}\) Ibid., pp.15-16 (MLR), p.308 (Sel.Writ.)
\(^{112}\) Ibid., pp.17-18 (MLR), p.310 (Sel.Writ.)
\(^{113}\) Ibid., p.27 (MLR), pp.318-319 (Sel.Writ.)
\(^{114}\) Watson, supra n.5, p.80.
\(^{115}\) Loc. cit.
And indeed, as Watson says, the reception of Roman law in Western Europe is the prime example of successful borrowing which Montesquieu seems to have ignored. The reception also illustrates that, in spite of Montesquieu, transplantation may occur even when the donee's legal, historical, etc., etc. context is very different from that of the donor.\textsuperscript{116}

Watson thinks that a law reformer, in looking at foreign solutions, "should be after ... an idea which [can] be transformed into part of the law of his country".\textsuperscript{117} The reformer's knowledge of the donor's legal, historical, etc., etc. context (factor (b)) need not necessarily be systematic and detailed. He gives the example of someone whose function is to consider possible improvements in the law of bankruptcy in Scotland:

\begin{quote}
[He] may well set out to discover the legal approach in England, France, Sweden, South Africa, New Zealand, and so on. He may have no knowledge of those systems to begin with, and at the end may know little about them except for an outline of their bankruptcy laws. He may, indeed, have little idea of how well or how badly these laws operate. But his concern is with the improvement of bankruptcy law in Scotland. What he is looking for in his investigation of foreign systems is an idea which can be transformed into part of the law of Scotland and will there work well.\textsuperscript{118}
\end{quote}

Even if the reformer gets the foreign law wrong (see I(a) above), that does not detract from the usefulness of the idea. Here, Watson's example is that of how the framers of the U.S. Constitution took over the inexact ideas of Montesquieu on the separation of powers in England:

\begin{quote}
Whether Montesquieu was or was not was or was not known to be inexact is irrelevant.\textsuperscript{119}
Foreign law can be influential even when it is totally misunderstood.\textsuperscript{120}
\end{quote}

\begin{flushright}
\textsuperscript{116} Loc. cit.
\textsuperscript{117} Ibid., p.79
\textsuperscript{118} Watson, supra n.55, p.17.
\textsuperscript{119} Supra n.77, p.315.
\textsuperscript{120} Supra n.55, p.99.
\end{flushright}
As regards the power factor, Watson specifically addresses Kahn-Freund's example of the Irish rejection of divorce by saying that should an attempt be made to introduce divorce in Ireland, it would be enough to look at the Irish power structure (the political power of the Catholic hierarchy) to know that the attempt would fail and the English power structure would be irrelevant. In other words, as regards the political context, it is enough to look at factor (a) (the political context of the proposed rule within the donee's system) and factor (b) is irrelevant. Watson also says that factor (a) is easier to discover than factor (b), if one is dealing with a rule which is firmly established and working efficiently in the donor's system. Factor (b) is difficult to discover, in his view, because as the rule becomes older, its link with the people, time and place becomes less obvious.

In other words, to a large extent law possesses a life and vitality of its own; that is, no extremely close, natural or inevitable relationship exists between law, legal structures, institutions and rules on the one hand and the needs and desires and political economy of the ruling elite or the members of the particular society on the other hand. If there was such a close relationship, legal rules, institutions and structures would transplant only with great difficulty, and their power of survival would be severely limited. Changes in societal structure would always entail changes in the law.

Marsh:

121 Supra n.5, p.82.

122 Ibid., loc.cit. "When a legal rule is firmly established and working efficiently in one country it is not always easy to see how closely it is linked with the power structure [factor (b)]. This will be particularly true when the rule in question is of some considerable antiquity. But on the other hand, when a legal change is suggested for a particular country, it is not so difficult to spot the factors which would favour, or militate against, the success of the reform [factor (a)]."

123 Ibid., p.81. At fn.12, he explains that this was the main point he was trying to make in Legal Transplants. See also Watson, Society and Legal Change (Scot. Academic Press, Edinburgh, 1977).

Reference has already been made to Marsh's conclusion that there are many examples of "Kahn-Freund in reverse" (II (c) above) - transplantation can take place even if political and cultural backgrounds are fundamentally different. Marsh also uses his eleven years of experience in the Law Commission to show how difficult it may be in practice to apply the guidelines of a "detached scholar" like Kahn-Freund. 125 Three of Marsh's observations are of relevance here. Firstly, shortage of time limits the amount of comparative researches which can be undertaken. If reference to foreign systems would be misleading (due to differences in socio-political structure between the donor and the donee), it may be better to omit it. The reformer may of course be wrong in this, but that often cannot be helped. Secondly, the reformer often cannot rely on articles in journals, etc., since the information has to be tailored to the particular needs of the project in hand. Thirdly, the reformer must consider whether his/her reforms will have any chance of implementation by the legislature. It is often better to suggest many small improvements rather than a fundamental pulling up by the roots on the basis of comparative researches.

Montesquieu, Kahn-Freund, Watson and Marsh:

The arguments of Montesquieu and Kahn-Freund are unsatisfactory for a number of reasons. The principal reason is that they appear to be demanding far too high a standard of scholarship of reformers, with the result that reformers may decide not to refer to foreign solutions at all since the risks are so high. In other words, their theories are counterproductive.

Certainly, there are dangers of misuse of comparative law if a reformer uses it as an excuse to import a totally alien rule which simply cannot function in the existing national system. But the primary danger is with factor (a), not factor (b). The reformer need only primarily look at factor (a), his/her own system. Furthermore, he/she need only primarily look at the legal context of the proposed rule within his/her own system, and to a certain extent within the donor's system. He/she will presumably be an expert as regards his/her own system, and need not necessarily aspire

125 Marsh, supra n.3, p.84 (Proceedings), p.665 (RabelsZ).
to be an expert in the donor's system. As Watson stresses, he/she is looking for an *idea* from abroad. He/she will be more efficient the more he/she knows about the foreign system, but knowledge of that system is not theoretically necessary. Even if the reformer gets the foreign law wrong, the idea may be of inherent value anyway. Montesquieu and Kahn-Freund are placing too many obstacles in the way of a reformer's search for inspiration\textsuperscript{126} from foreign solutions.

In deciding what adaptation is needed to the donee's present system, the reformer's primary concern should be that present system and not the donor's system. The legal context of the donor's system is primarily of concern only as regards enforceability of the proposed rule. Within the donee's system, the legal context is obviously the most important. The rule must not be inconsistent with an existing rule (unless that existing rule is to be repealed as part of the reform). After that, the other elements in factor (a) as first explained above decrease in importance as one moves further and further away from the actual rule or institution itself.

Diagram 2 is a more elaborate version of Diagram 1, and can be used as an aid to understanding all of this. The simple circles in Diagram 1 have become subdivided into 7 subcircles. The legal context of the rule is the most important, and so it is subcircle 1, the subcircle closest to the dot. The contexts diminish in importance from circles 2 through 7 (historical, political, social, economic, cultural and environmental contexts respectively). This order of priority would differ for different rules. It is this writer's view that as a bare minimum, a reformer need only consider the two dots and subcircle 1 of Circle A (the legal context of the new rule within the donee's system). Thereafter, his/her priorities should be subcircle 1 of Circle B, followed by subcircles 2 through 7 of Circle A, followed finally by subcircles 2 through 7 of Circle B.

\textsuperscript{126} David, supra n.19, p.114, p.116, p.117.
CHAPTER II - LEGISLATION AND THE COMPARATIVE METHOD

In the Graph accompanying the Introduction, the permanent need for constant change in the law was illustrated. Legislation is a significant means of changing the law, and the combination of legislation and the comparative method will be examined in this Chapter.

In examining this combination, the particular attributes of legislation must be borne in mind. Firstly, it is normally prospective rather than retrospective. Secondly, it can comprehensively change the whole area of law which it concerns. Thirdly, it is very difficult to amend it once it has been passed:

A statute, once passed, possesses an obstinate life.... It is easy for any law to become what Schiller has called an "incurable disease".1

Because of these attributes, it is important that legislation be prepared conscientiously and carefully. Rousseau summed up the formidable nature of the legislator's task when he said "Il faudroit des dieux pour donner des lois aux hommes".2

RECEPTION/ MAJOR TRANSPLANTS

Some mention must be made of major transplants which occur when a large part of one legal system is received into another country. The most famous "reception" was the reception of Roman law in most European countries.3 It is common to classify receptions as either voluntary or involuntary, as occurring either imperio rationis or ratione imperii.4 More recently, there has been

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2 Jean-Jacques Rousseau, Du Contrat Social (1762), Livre II, Chapitre VII (Du Législateur). Translation: "It would take gods to give men laws."

3 See Turpin, 'The Reception of Roman Law' (1968) 3 Ir. Jur. (n.s.) 162.

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some discussion of the "imposition" of law by colonisers on their colonies.⁵

While reception/ major transplants are an example of the combination of legislation and the comparative method, it would be unwise to launch into a detailed examination of the factors influencing them. As Marsh says,

Each of these is a very large topic in itself.... They primarily invite essays in socio-political analysis of historical events rather than a direct application of the skills of the comparative lawyer.⁶

It is sufficient to remember some basic facts: The Common Law system was received, in a variety of means, by Ireland, U.S.A., Canada, Australia, India, various African countries, etc., etc. The spread of the common law has been well documented elsewhere,⁷ but one point worth noting is that in "conquered" or "ceded" colonies (as opposed to "settled" colonies), it was a firm principle of English colonial policy to leave intact the law already in force in the territories.⁸ (But if the local law had no appropriate rules or the rules they had were undesirable in the eyes of the English, the colonial legislature filled the gaps by following the model of the Common Law). The result of the British colonisation has been that at the present time nearly a third of all people alive live in regions where the law is more or less strongly marked by the Common Law.

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⁵ Sandra Burman and Barbara Harrell-Bond (eds.), The Imposition of Law (Academic Press, 1979). Contrast Glenn's view that all reception is necessarily voluntary, that in the absence of local adherence or acquiescence to the external model, there can be no reception, only ongoing struggle -- 'Persuasive Authority' (1987) 32 McGill LJ 261 at 265.


⁸ Zweigert and Kotz, ibid., p.228.
The French Civil Code of 1804 has been the inspiration of numerous foreign codes. The Code spread by means of conquest, persuasion and inspiration to a vast amount of jurisdictions, from Europe to Africa to Latin America. In common-law-dominated North America, there remain two "islands" of French influence, Louisiana (Civil Code of Louisiana, 1808) and Quebec (Code Civil de la Province de Québec, 1886).

A remarkable example of wholesale reception is the total reception of the Swiss Civil Code (ZGB, 1907) in Turkey in 1926.

**SPECIAL COMMISSIONS/ COMMITTEES**

Apart from studies by law reform agencies (see Chapters III, IV and V below), legislation may be preceded by a study conducted by a special commission established to enquire into the need for reform and to propose a new legal solution. Such commissions can vary substantially in their functions and methods. A Commission may be appointed to study a huge area of the law or a tiny point of one branch of the law. It may produce a large report running to several volumes or it may produce no report at all. The report may be implemented in total or may be totally ignored by the legislature.

However, if the report of a special commission or committee is published, it often includes comparative research on the area in question. Such research will be included firstly, because such commissions/ committees will often contain distinguished jurists who conduct such research and secondly, because the very act of producing a published report justifying its conclusions encourages a commission/ committee to clarify the comparative law justification (if any) for its proposals.

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Even though reports of commissions/committees are often criticised as a waste of time and money, the inclusion of comparative research in them demonstrates their advantages in comparison with most legislative proposals. Most legislative proposals do not involve the opinions of distinguished jurists and do not involve any public comparative law justification.

A remarkable example of detailed comparative research being used in a commission report is the third volume of the Pearson Commission's report,10 already mentioned in Chapter I (section II (b)). Hondius says of the Netherlands that

if a royal commission or a less formal commission, without outside participation, is appointed, the comparative law-ratio equally seems to be higher than that of strictly departmental bills. The higher the number of jurists (especially the university teachers), the better the comparative basis for their proposals.11

That conclusion reflects the observations above. In Ireland, the Advisory Committee on Law Reform based its suggestions for reform of the law on occupiers' liability on a detailed study of the topic by Dr. Bryan McMahon, which included comparative references to solutions adopted in New Zealand, Australia, South Africa, U.S.A., Scotland and Canada.12 The 1958 Report of the Company Law Reform Committee did not include any lengthy comparative analysis, although the Committee claimed it had "not neglected to give consideration" to company law in civil law countries.13


In France, the special commission set up in 1945, under the chairmanship of Professor Juillot de la Morandière, to reform the Civil Code, carried out a considerable amount of comparative research before producing its draft Preliminary Book and Book One (1954) and its draft Book Two (1961). (Neither of these drafts has been adopted.) More recently, reforms have been drafted by other special commissions, and comparative law was also useful in their preparation.

**PRE-DRAFTING STAGE**

Most legislation is prepared in a government department, and it would be extremely helpful if we could discover the quantity and quality of comparative law research which precedes legislation, given the seriousness of the process. However, a huge obstacle to our understanding is the "iceberg effect" i.e. the preparation of legislation in most countries is essentially a secretive process, in the sense that what we know of it is only the tip of the iceberg. For example, when a Bill is published, the research which went along with it is not summarised. Cohn has observed:

The secrecy surrounding the preparation of legislative innovations is [not] wholly democratic.... It is an obvious waste of a rich store of experience and knowledge which the [legal] profession demands.

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14 See Juillot de la Morandière's two articles: 'Preliminary Report of the Civil Code Reform Commission of France' (1955) 16 Louisiana LR 1 ("Comparative law has in my opinion been of great service to us" -- p.55) and 'The Draft of a New French Civil Code: The Role of the Judge' (1956) 69 Harv. LR 1264.


17 Cohn, supra n.1, p.124. See also Hondius, supra n.11, p.14 (concealed foreign information gives government unfair advantage) and René David, Droit Civil Comparé (Libraire Générale de Droit et de Jurisprudence, Paris, 1950), p.117, fn.1 (inaccessibility of Ministries' foreign law libraries).
Van Dunne's interviews with staff of the Dutch Ministry of Justice revealed that the preparation of legislation is as a rule policy-oriented: what kind of regulation do people want? Presumably this is true of most other countries as well. His interviewees also told him that it is almost a standard procedure that the first step in the preparation of legislation is a comparative survey of the subject by way of orientation. It is impossible to say whether this is true of other countries too, and it is submitted that the fact that we cannot tell should be remedied by a policy of informing the public and interested persons of the extent of comparative research conducted. Surely this would be more democratic and would be a recognition of the seriousness of the legislative process. The Swedish practice should perhaps be adopted in other countries.

The likelihood of comparative law research may well depend on the particular department involved. If a project is prepared in a country's Ministry of Justice, comparative research may be more likely.

Comparative research is also more common if the government department decides to call in a jurist to assist in the project. For example, the U.S. Department of State utilised Professor Sweeney's comparative law expertise in the preparation of the Foreign Sovereign Immunities Act 1976. German government departments often commission research from the famous Max

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18 Van Dunne, supra n.16, p.48.

19 Ibid., p.49.

20 In Sweden, the rule is that all official minutes and other documents are open to the public, unless specifically excepted by law -- Sir William Dale, Legislative Drafting: A New Approach. A Comparative Study of Methods in France, Germany, Sweden and the United Kingdom (Butterworths, London, 1977), p.101. These documents include the voluminous reports of the drafting commissions, who collect material from all sources, including material from abroad -- Ibid., p.99. See also Frank MacDonald, 'In Sweden They Don't Have Official Secrets', Irish Times, Fri. 16 Sept. 1988 (Less than 5% of a Ministers' letters are withheld from the public.)

21 Hondius, supra n.11, p.14.

22 George A. Zaphirou, 'Use of Comparative Law by the Legislator' (1982) 30 AJCL (Supp.) 71 at 87.
Planck Institutes, a system which is envied by many non-Germans. In fact, many professors of law faculties figure amongst the highest functionaries in the German Ministry of Justice.

However, even if the department does not call in a jurist, academics may indirectly influence the extent of comparative research. This indirect influence will arise if the current legal literature on the topic includes many comparative references. After all, the "Ombudsman explosion" was assisted by the fact that academics drew attention to the Swedish and New Zealand models and proposed their adoption in their own jurisdictions.

It might be thought that if legislation is being introduced as a result of an international convention, then comparative research is more likely. In fact, however, the reverse may be the case:

In practice [an international convention] gives the ministry responsible for a bill on a subject dealt with in a treaty or convention an excuse for refraining from a motivation for legislation and from comparative research.

**DRAFTING STAGE**

There is a marked contrast between the mechanism employed for drafting legislation in common law countries and that employed in civil law countries. In France, the initial drafting is done in the ministry originating the law, by an officer in the section responsible for the topic. That officer...

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24 Hahn, ibid., p.34. Similarly, Dale (supra n.20, p.110) found that lawyers of high quality (e.g. with Dr.iur. degrees) were quite common in all the German ministries.

25 Hondius, supra n.11, p.13: "Even when the legislature only takes up proposals submitted by domestic writers, it may be that in fact it applies ideas which originated abroad.”

26 Van Dunné, supra n.16, p.58.

27 See Dale, supra n.20, chap. 4. (Lawmaking in France).

28 Occasionally, an outside expert or ad hoc commission will prepare the first draft. For example, Prof. Carbonnier is sometimes called in, and a high official of the Banque de France drafted a decree of importance to banks -- Ibid., p.86.
cer may or may not be a lawyer, but he/she is never a draftsperson. As Dale has observed:

The assumption is that if you are a man of education, and have received the training and the high qualifications necessary to pass into the top division of the civil service, you are able to express what you have to convey in clear and exact language. ... Article 2 of the Constitution declares that La France est une République indivisible, latine, démocratique et sociale. In France the principle and practice of laicity is not restricted to non-clericalism. 29

The ministerial draft is eventually sent to the Conseil d'État for advice. Dale says that it is essential to remember that "French drafting expertise ... resides in the members of the Conseil d'État". 30 The Conseil is a consultative organ for the Government, but it has the advantage of restraining precipitation in legislation, of disciplining the ministries to explain their intentions and bare themselves to questions. 31 The Conseil's advice is kept secret and the Government need not accept it. However, in practice, its influence is considerable. The Conseil d'État has served as a model for other civil law countries, e.g. Belgium. 32 In Sweden, the "Law Council" performs broadly the same services to legislation as does the French Conseil d'État. 33 In Germany, there is no Conseil d'État or Law Council. Legislation is drafted by ministry officials and probing is carried out by Bundesrat and Bundestag committees. 34

29 Ibid., p.86 and p.87.
30 Dale, supra n.20, p.87.
33 Dale, supra n.20, p.102. However, two important differences are (i) reference to the Law Council is no longer compulsory (ii) the Law Council's advice is public.
34 Ibid., p.115. For further information on the drafting stage in Germany, France, the Netherlands, Sweden and Denmark, see Andrew Martin, Law Commission Bill: Some Comparative Notes (Unpublished, Copy in Law Commission (UK) Library, October 1964), pp.26-38.
In common law countries, the fundamental difference is that there are specialist parliamentary draftspersons. These people have developed their own special ways of dealing with drafting of legislation. Another major difference is that the common law lawmaking process is basically in two stages (the drafting and the enacting), whereas in civil law countries there are three: the drafting, the revising and the enacting.35

As a result of these differences in the lawmaking mechanisms, comparative research, if conducted, is conducted at different times and by different people. From what we know of the civil law system, it is tempting to conclude that there are more opportunities for comparative research since more stages and more people are involved.36 However, it is too early to so conclude without hard evidence (which, unfortunately, is not available). The "iceberg effect" again figures prominently and hinders our understanding of the processes (except, as usual, in Sweden).

There are also differences in the styles of drafting between civil law and common law countries. It is well known that civil law codes tend37 to be shorter, formulated in plainer language and stated in terms of general principles. As a result, they tend to be more accessible. On the other hand, common law statutes tend to be longer, formulated in more technical language and stated in terms of detailed rules and exceptions. As a result, they tend to be less accessible. Both systems have their disadvantages. The common law system has been derided by many in the common law

36 Of course, comparative research plays a very important role in law reform agency projects (see Chapter V below) of common law countries, but only a minority of common law legislation passes through law reform agencies.
37 The word "tend" is used purposely, and I am aware of Professor Dreidger’s arguments that there is no civil law "style" or common law "style" and that if a comparison is to be made, it should be of like with like. See Dreidger, ‘Canadian Common Law’ in John A. Clarence-Smith (ed.), Proceedings of the Ninth International Symposium on Comparative Law (Centre Canadien de Droit Comparé, 1972), 71 at 77-78.
38 See Harold A. LLoyd, ‘Plain Language Statutes: Plain Good Sense or Plain Nonsense’ (1986) 78 Law Library Journal 683, quoting from Benjamin Franklin, Dean Swift and Ben Donne. See
The chief criticism is that common law statutes tend to be so complex that the law cannot be understood even by the lawyers. This makes legal advice more expensive and brings the law into disrepute. On the other hand, it can be said that if one studies a statute closely enough, one will understand it and find that by its very detail and technicality it is in fact clearer. There is much truth in A.P. Herbert’s poem, particularly the last line:

I'm the parliamentary draftsman and I make the country’s law
And of half the litigation I'm undoubtedly the cause...
I'm the parliamentary draftsman and they tell me it's a fact
That I often make a muddle of a simple little Act.
I'm the parliamentary draftsman and they take me in their stride.
Oh how nice to be a critic of a job you've never tried.  

The civil law system also has disadvantages. For example, the codes and legislation are sometimes actually too short, and therefore unclear due to the lack of detail.

This is not the place to decide which of the two systems is preferable. The point to be made is that the difference in legislative drafting style is a major hindrance to comparative research. Civil lawyers can find common law statutes so different from their own codes and legislation that they may give up on a comparative study and revert to the more familiar civil law ground:

It is tempting to say that the common-law style of drafting is the laughing-stock of Europe and also of the Province of Quebec; but this would perhaps be wrong .... Where civil lawyers... look outside their own style... the reaction is not laughter. It is exasperated stupefaction.... A special word of sympathy is due to those charged with the translation of English drafting into French: they cannot contemplate the result with any other sentiment than loathing, and it is not pleasant to loathe the product of one's own pen.  


38 Zweigert and Kotz, supra n.7, pp.270-272 (CHECK).


41 J.A. Clarence-Smith, '[Legislative Drafting:] Comparative Summing-Up' in J.A. Clarence-Smith (ed.), supra n.37, 155 at 159.
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Common lawyers are similarly discouraged from investigating civil law solutions since they are not accustomed to such brevity and statements of principle.

On this ground alone, then, it is submitted that the two systems should learn from each other and that some form of middle ground should be reached to aid comparability of common law and civil law legislation/codes. On the common law side, movements in this direction have begun. The American Restatements of Law, drafted by the American Law Institute, are extremely lucid and accessible.42 There has also been a "Plain English" movement in drafting.43 The Australian government established a Legislative Drafting Institute in 1974.44 In Canada, Prof. Dreidger, working in the Federal Ministry of Justice, did much to eliminate jargon and make statute law more presentable, readable and understandable, particularly by the production of his widely-read book on The Composition of Legislation.45 In the UK, however, criticisms of drafting style appear to have fallen on deaf ears. The Renton Committee46 and the Law Commissions47 proposed some modest changes, but these remain unimplemented. Francis Bennion, a draftsman from 1953 to 1965 and from 1973 to 1975, has repeatedly called for basic reforms in drafting, which suggestions have also been ignored.48 The Statute Law Review, published since 1981, contains numerous suggestions for reform. Finally, there is little hope for the adoption of any of Sir

42 Of course the Restatements are not legislation as such, but they are of very strong persuasive authority.

43 Lloyd, supra n.35.


46 Renton Report, supra n.38.


William Dale's major proposals for change in his 1977 study which was commissioned by the Commonwealth Secretary General. 49 (He proposed, inter alia, the setting up of a "Law Council" similar to the French Conseil d'Etat, and the adoption of parliamentary working committees as in Germany.)

**PARLIAMENTARY COMMITTEES AND PLENARY SESSIONS**

The usage of parliamentary committees varies enormously from jurisdiction to jurisdiction. 50 In the U.S.A., the Congressional committees are extremely powerful and it is in the committees that all the real work of legislation is carried out. 51 There are hearings of testimony from experts and representatives of interested groups. The lobbyists often use comparative law to support their arguments. 52 The Law Library of the Library of Congress provides invaluable expert research on foreign solutions. The members of the Congress do not have to conduct this research themselves. There is a special Congressional research Service which carries out the work for them when requested. An extraordinary amount of comparative research was conducted in the preparation of a proposed new Federal Criminal Code. The Chairman of the subcommittee on Criminal Laws and Procedures sent a letter-questionnaire to professors of comparative law. The subcommittee collected information on the law in most European countries and the U.S.S.R. 53 The subcommittee on Antitrust and Monopoly studied the law of the European Community, the Commonwealth and even Ireland. 54 Of course, the committees will conduct interstate comparative research


51 "The Committee system in the American Congress is not only the strongest system in the present study; it is by far the strongest" -- Shaw, 'Conclusion' in Lees and Shaw, ibid., 361 at 387.

52 Zaphirou, supra n.22, p.93.

53 Ibid., pp.85-86.
(amongst the States of the U.S.A.) more often than international research.

Germany also has a powerful committee system. All Bills are referred to the Bundesrat committees and later to the Bundestag committees. The Bills are studied by means of free discussion round a table between members and representatives of the Government. Persons and bodies outside government may also be questioned. The French committee system was formerly (during the Fourth Republic) so strong that it may have been even stronger than the American system. The system is still quite strong. There are six permanent "commissions" (i.e. parliamentary committees) and ad hoc committees are also appointed. A rapporteur is appointed for each draft law, and their reports are not dull documents in official language, but are documents of the greatest value which form part of the travaux préparatoires. In Sweden, the Riksdag has 16 permanent committees whose reports are published and considered by the House on the Bill's second tabling. When van Dunné investigated the use of comparative law by the Dutch legislator, he said:

One of the outcomes of the present study and a surprise to this author, is the active role of the House of Commons [Staten-Generaal], especially the Standing Committee on Justice, in the use of comparative law.

The Committee on Justice rejected a 1975 draft of the Misleading Advertising Bill on the basis that a more detailed survey of foreign legislation was necessary. Similarly, the Committee rejected a 1974 draft on succession, citing, inter alia, the lack of comparative law justification for

54 Ibid., p.86.
55 Dale, supra n.20, p.112.
56 Shaw, supra n.51, pp.388-389: "In some ways the nineteen, specialized committees in the Fourth Republic, together with their subcommittees, were more formidable than American committees in dealing with the executive."
57 Dale, supra n.20, pp.90-91.
58 Dale, supra n.20, p.102.
59 Van Dunné, supra n.16, p.58.
60 Ibid., p.53.
the changes proposed. Finally, in its work on the draft for a Basic Law on human rights, the Judicial Committee of the Knesset (Israeli parliament) relied heavily on foreign and comparative material which they asked to be supplied to them, partly by the Faculty of Law of the Hebrew University of Jerusalem and partly by the Ministry of Justice.

The committee systems in Britain, Ireland and Canada are much weaker. For instance, Canada and Britain ranked 5th and 6th respectively in Shaw's table of relative importance of the committee systems in the eight legislatures in the 1979 study. In these countries, the executive and the ruling party want the legislature to operate on a once-over-lightly basis. They want the detailed work to be done in executive departments or in committees of the ruling party from which legislators belonging to other parties are excluded. They want to inhibit the acquisition of specialized knowledge by members. Organised interests are therefore not heard as often by these committees as by the continental and U.S. committees. Since the committee systems are weaker, comparative research is bound to be rarer and of an inferior quality.

One does not often hear of comparative law discussions in the course of plenary sessions of parliaments. Such discussions are less likely to arise in the formal atmosphere of debates on the floor of a parliament. The British-style parliaments are at a disadvantage in this regard. They do not have the advantage of detailed criticism and revision from the committees as the continental

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61 Ibid., p.56.


63 Shaw, supra n.51, p.384.

64 Ibid., p.367.

65 Wheare notes that organised interests tend to present their views to legislative committees in continental countries and the U.S.A.; in the process these committees "carry out part of the function which in the United Kingdom, for example, is confined to royal commissions, committees of inquiry, and other types of [executive] advisory bodies" -- K.C. Wheare, Legislatures (Oxf.U.P., London, 1968), pp.57-8. Wheare's generalisations fit in with the committee-specific findings in the 1979 study -- Shaw, supra n.51, p.366.
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and U.S. system provides.\textsuperscript{66} It is true that the British-style parliaments spend more time in plenary session than the U.S. and continental parliaments.\textsuperscript{67} But when there are strong committees there is less need to "clock up" so many hours, since the real work is done in those committees. Hence, one writer has classified the Bundestag as a "working parliament" and Westminster as a "talking parliament", without pejorative intent.\textsuperscript{68}

\textbf{SPECIAL STATUTES OR CODIFICATION?}

To the non-lawyer, the idea of codification seems the natural means of laying down the law. As Pound has said:

\begin{quote}
To the common sense of the layman nothing would be more clear than that the whole body of the law, the whole body of precepts by which justice is administered, by which relations are adjusted, by which conduct is regulated in civilized society, may be and ought to be reduced to definitely formulated statements and set down in chapter and verse of a published code.\textsuperscript{69}
\end{quote}

Codification is not merely a civil-law concept, since Codes have been adopted in common-law countries.\textsuperscript{70} However, codification has been most successful in civil-law countries and so the question as to whether to legislate through special statutes or through codification is often a question of reception of a civil-law idea.

\textsuperscript{66} Dale, supra n.20, p.340.

\textsuperscript{67} See table in Shaw, supra n.51, p.369. The figures quoted from the 1960's showed that while the Canadian House of Commons sat 180 days and the British 160 days (1,480 hours) per annum, the U.S. House of Representatives only sat 139 days (726 hours) and the West German Bundestag only 49 days (273 hours).


\textsuperscript{70} For example, the U.S. "Field Codes", the Anglo-Indian Codes and various common-law statutes which can be regarded as codes (e.g. Bills of Exchange Act 1882, Canadian Criminal Code 1892 (revised 1955)).
The question was most recently debated when the U.K. Law Commissions Act 1965, and other statutes establishing law reform agencies, included codification as a means of developing and reforming the law.\textsuperscript{71} There was a certain amount of excitement generated by this, with some writers envisaging a drastic change in the methodology of common law legislators.\textsuperscript{72} Unfortunately, that initial excitement was replaced by disillusionment when the law reform agencies actually began their work. Three British plans for codification have failed.\textsuperscript{73} Only two seem to have any chance of success.\textsuperscript{74} Professor Hein Kotz has concluded that it was counterproductive to have put codification on the agenda of the Law Commissions.\textsuperscript{75} There has also been a debate as to whether codification is an outmoded form of legislation.\textsuperscript{76}

\textsuperscript{71} Law Commissions Act 1965, s.3(1).


\textsuperscript{73} (1) In the early days a joint project of the British Law Commissions to draft a uniform contract code failed. (2) The attempt by the Law Commission for England and Wales to codify Landlord and Tenant law has had to be converted to a mere project of restatement [Hon. M. Kerr, \textquoteleft Law Reform in Changing Times\textquoteright (1980) 96 LQR 515 at 527-530]. (3) The Scottish Law Commission's attempt to codify Evidence law has also failed [C.G.B. Nicholson, \textit{Codification of Scots Law: A Way Ahead or a Blind Alley} (1987) Stat.LR 173].


\textsuperscript{76} This topic was item I.B.1 at the Eleventh International Congress of Comparative Law. See Edgar Bodenheimer, \textquoteleft Is Codification an Outmoded Form of Legislation?\textquoteright (1982) 30 AJCL (Supp.) 15; U. Yadin, \textquoteleft Is Codification an Outmoded Form of Legislation\textquoteright in Goldstein (ed.), supra n.62, p.1; P.Delnoy, \textquoteleft La Codification, Forme Dépassée de Législation?\textquoteright in Centre Inten­niversitaire de Droit Comparé, \textit{Rapports Belges au Xlle Congrès de Droit Comparé} (Kluwer,
There is no hard and fast definition of the term "codification". It can perhaps be described as a "humpty-dumpty word"77 -- everyone is free to make it mean exactly what they wish it to mean. Pound has distinguished three different ideas of a code.78 Firstly, the Benthamite idea regards a code as a complete legislative statement of the whole body of the law so as to put it authoritatively in one self-sufficing form.79 A second view, at the other extreme, sees a code as (a) republication in systematic form of the whole mass of existing law of every kind, and (b) separate codification of statute and common law, adhering as closely as possible to the language, conceptions, and methods of the old law. A third view (taken by the framers of the French Civil Code and the German Code) is that the purpose of a code must be primarily to provide so far as possible a complete legislative statement of principles so as to furnish a legislative basis for juristic and judicial development along the modern lines, laying down rules sparingly except in the law of property and inheritance.

The debate as to the advantages and disadvantages of codification can be traced back to Savigny's arguments against codification, to which Austin replied.80 Kotz81 has persuasively argued for a practical, balanced approach to the question: The vices sometimes ascribed to codification may not be quite as harmful as suspected; nor are its virtues as shining as the authors of the Law Commissions Act may have believed. He points out that some English statutes are already formulated in terms of general principle and that English case-law states general principles; that

77 Leslie Scarman, Codification and Judge-Made Law: A Problem of Co-existence (U. of Birmingham lecture, 20 October 1966), p.10; reprinted in (1967) 42 Indiana LJ 355 at 360-1. See also Hurlburt, supra n.74, p.29n. -- "'Code' is a word of protean meaning."


79 Lord Scarman adopted the Benthamite view -- Supra n.72, p.5; supra n.77, p.7 (U. of Birmingham), p.358 (Indiana LJ).

80 See Pound, supra n.69, pp.728-732 (Jurisprudence), pp.284-7 (Code Nap. and C.L.World).

81 Kotz, supra n.75.
the Codes differ markedly *inter se* in the style of drafting; that it is misleading to derive neat arguments, either for or against codification in England, from the characteristics of codes produced in other countries, at other times, for other reasons; and that it is an over-statement to say that codes are exclusive sources of law. Interestingly, while Kotz criticises the codification debate as "leading nowhere", he does point out the advantages of codification -- it keeps the law manageable, orderly, accessible and teachable without depriving it of the needed flexibility; it may also reduce the expense of providing legal services. 82

It is suggested, therefore, that codification of some form is still the ideal solution to many of the problems of the common law system. Disillusionment with the failure of codification by some law reform agencies should not blind us to the obvious merits of codified laws. Arguably, codification is inevitable given the current difficulties of discovering the law. 83 Also, Weber saw codification as the last of three stages of legal development, a stage in which law reaches maturity. 84 Interestingly, there have been movements towards codification in the United States 85 and African countries are also involved in projects to codify their customary laws. 86 The economic argument may eventually be recognised as justifying wholesale codification in common-law countries:

82 Ibid., p.14.

83 Historical experience shows that codes are demanded where (1) the traditional element of the law for the time being has become sterile, (2) the law is unwieldy, full of archaisms, and uncertain, (3) the growing point has shifted to legislation and an efficient organ of legislation has developed, (4) there is need of one law in a political community whose several subdivisions have developed divergent local systems -- Found. supra n.69, pp.704-5 (Jurisprudence), p.278 (Code Nap. and C.L., World).


85 See Chapter IV below as regards the Restatements of Law produced by the American Law Institute and the Uniform Acts produced by the National Conference of Commissioners on Uniform State Laws.

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No-one who has never seen a puzzled Continental lawyer turn to his little library and then turn out at least a workable understanding of his problem within half an hour will really grasp what the availability of the working leads packed into a systematic Code can do to cheapen the rendering of respectably adequate legal service. 87

Meanwhile, a realistic interim target should be the improvement of drafting style in common law countries. As Dale says, "we cannot wait for codification to bring a change in our drafting methods". 88

THE ROLE OF ACADEMICS

As a rule, comparative research will be more likely if academic lawyers are consulted in the law reform process. On the continent of Europe, "doctrine" has long been given a high status, 89 but comparative research is more likely when an academic expert is called in by the continental legislators. It appears to be quite common to call on the academics to prepare comparative law reports. In Germany, the Max Planck Institutes are regularly consulted and they provide high-quality comparative information. The Ministries will often consult specialists in comparative law. 90 In France, information on foreign law may be asked of external experts. 91

In common law countries, experts on comparative law will be consulted less often. However, in the U.S.A., academics have begun to play a crucial role in law reform through the drafting of the Restatements of Law (see Chapter IV below). Academics engaged in the work of the Institute hold a position comparable to the civilian law teacher writing doctrine. 92 The Restatements are

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87 Karl Llewellyn, "The Bar's Troubles, and Poultries -- and Cures?" (1938) 5 Law & Contemp. Probs. 104 at 118; cited in Kotz, supra n.75, p.Y.
88 Dale, supra n.20, p.335.
89 See F.H. Lawson, Many Laws (North-Holland, 1977), chap.10 ("Doctrinal Writing: A Foreign Element in English Law?).
90 Hahn, supra n.23, p.33. See also Chapter V below.
91 See Chapter V below.
92 Mitchell Franklin, 'The Historic Function of the American Law Institute: Restatement as Transitional to Codification' (1934) 47 Harv.LR 1367 at 1371.
preceded by comparative study of an interstate nature, but with some international comparison also.

It is important that academics recognise their responsibilities in preparing their writings. Obviously, they must strive to attain the highest standards in quality of research and presentation. In particular, they must ensure that their information is up-to-date (e.g. through use of computerised data bases). Even if they are not writing with law reform in mind, their works may be used as a basis for law reform projects. If their writings do not contain any references to foreign law, then it is less likely that comparative research will be carried out by the legislator.\(^9\) If they wish, they can in their writings openly campaign for law reform.\(^9\) Their writings can be a source of the international unification of law.\(^9\) The old common law rule that authors could only be cited if dead has now almost disappeared, and so living authors can exert quite an influence in the courts as well.

The role of academics in law reform has been described in detail elsewhere.\(^9\) The advantages of involvement of academics are the amount of time they have to think and write, the comprehensiveness of their libraries and their experience of teaching at the universities. However, the

\(^9\) Hence, van Dunne's interviews at the Dutch Ministry of Justice revealed that the drafters relied on the lack of comparative study in local literature as a deterrent to comparative study in the Ministry -- Supra n.16, p.60.


academic also has disadvantages. His/her view may be too theoretical and lack the insight gained from practical experience. Judge Turner of New Zealand has said that there has been a lessening of the average quality of the proposals of academics, and in their importance:

[Their proposals] are now generally received by practising lawyers with some caution. Particularly, there is an inclination to inquire regarding academic recommendations for law reform: has this writer worked in the world of practice, in the field to which his proposal or paper relates? And if so, for how long, and how responsible a part did he play in it?97

He adds that this stems from the "rat-race" in the universities, the frantic necessity for the younger academic to "publish, publish and publish again, even if he has nothing to say, and what he has be not particularly sound".98

However, it is probably better that academics make deficient contributions to law reform debates than make no such contributions. Sometimes, academics are accused of narcissism, personal bias and self-interest.99 U.S. writers have been said to be largely preoccupied with giving "an account of what is happening amongst themselves".100 This trend should not be allowed to continue. Academics must come down from their ivory towers and contribute to law reform debates, not just through their writings but also through lawyers' organisations, submissions to legislators and participation in the work of law reform agencies. They must be prepared to abandon any temptation to "publish, publish, publish" and replace it with constructive contributions.

Thus, Farrar has advised the academics as follows:

The English Legal System depends more than ever upon the work and active involvement of academic lawyers to write "doctrine", initiate creative reform ideas, serve on or with law reform bodies and measure the social effectiveness of law reform.... They must no longer be content with the inferior and impotent role into which as a group they have been cast by some of the more blinkered of their practising brethren.... However, before academics educate and reform society


98 Ibid., loc.cit.

99 Glenn, supra n.5, p.287.

100 C. Stone, 'From a Language Perspective' (1981) 90 Yale LJ 1149 at 1151; cited in Glenn, supra n.5, p.287.
they must educate and reform themselves so that individually and collectively they render the most positive contribution to law reform.\textsuperscript{101}

It is important that this involvement in law reform should be linked with increased expertise in the comparative method:

[Academics] must be prepared to spend time, learn more about legislative drafting, assimilate more ideas from foreign systems and literature in germane disciplines, co-operate with social scientists and re-organise their rather ineffective law reform committees.... Such work is, and ought to be regarded as, equally if not more important than the production of another gratuitous thesis, article or text book.\textsuperscript{102}

\textsuperscript{101} John H. Farrar, \textit{Law Reform and the Law Commission} (Sweet \& Maxwell, London, 1974), p.x. Similarly, Prof. Yuri Grbich calls for a "much needed academic renaissance" through greater involvement in law reform -- \textit{Institutional Renewal in the Australian Tax System} (Monash Univ., 1984), Preface. See also Prof. Thomas W. Mapp: "Unless we marshal a substantial share of our academic production for systematic law reform, we will have failed to perform one of our most important tasks" -- 'Law Reform in Canada: The Impact of the Provincial Agencies on Uniformity' (1983) 7 Dalhousie LJ 277 at 302.

\textsuperscript{102} Farrar, ibid., loc.cit. Emphasis added. Sheridan also emphasises the link with comparative law -- Supra n.96.
CHAPTER III - LAW REFORM AGENCIES: GROUP ONE

Most common law jurisdictions now have a law reform or law revision agency of some sort. In fact, one would be forgiven for thinking that these agencies are the only institutions concerned with law reform, given the tendency to regard law reform as synonymous with law reform agencies. It has already been submitted that such a narrow view is unwise and unhelpful and that the subject of law reform concerns not only law reform agencies but also judicial lawmaking and law reform by legislation. The description which follows should be read in light of that conclusion.

The discussion of law reform agencies has been divided into two groups. Group One consists of the agencies in the United Kingdom, Ireland, Canada, Australia and New Zealand. These agencies are summarised in this Chapter. Group Two consists of the agencies in the U.S.A., Africa, and Other Jurisdictions. The agencies of Group Two are summarised in Chapter IV. That Chapter also contains a comparison with European Ministries of Justice and some observations on particular topics which arise from the summary of law reform agencies. The combination of the comparative method and law reform agencies will be examined in Chapter V.

It is extremely difficult to obtain up-to-date information about law reform agencies. In 1972, Dr. J.L. Robson, New Zealand Secretary for Justice, conducted a basic survey of ten law reform agencies.¹ That survey was the inspiration for the survey which was conducted for this thesis. A questionnaire was devised which was sent to 64 addresses in November 1987. The addresses had been obtained by writing to the Australian Law Reform Commission and the Connecticut Law Revision Commission. In the end, 29 completed questionnaires were returned and six replies by letter were received.² Those replies have been extremely helpful and the agencies are thanked for

the surprising amount of trouble which they took for the survey.

It is perhaps best to regard this survey as a pilot study which provides lessons for any future surveys of this kind. The questionnaire was devised with a limited knowledge of law reform agencies gained from John H. Farrar's *Law Reform and the Law Commission*,3 Dr. Robson's survey referred to above, various academic articles and correspondence with the Australian LRC and the Connecticut LRC. From the replies received, it was found that some questions should have been phrased differently, others were asked which need not have been asked and others were not asked which should have been asked.

Originally, it was thought that the results of the survey would be represented in the form of various charts comparing the answers received from the agencies. However, the replies did not lend themselves to this sort of analysis and only two tables have been drawn up. (Appendix 1 compares Budgets; Appendix 2 compares Implementation Rates). This serves to emphasise that statistical comparisons would be wholly misleading and counterproductive. What has emerged from the survey is that the 60 or so law reform agencies are quite different from each other in many respects, but it would be pointless to methodically compare statistical differences which are of little consequence. It is far more helpful and more interesting to collect together information on each agency from the survey and other sources and give a brief summary of its structure, its work and its effectiveness.

At least three respondents recommended William H. Hurlburt's book, *Law Reform Commissions in the United Kingdom, Australia and Canada*.4 This 500-page study is an invaluable contribution to the literature on law reform, dealing with 18 of the most important agencies in the

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2 The covering letter and questionnaire are reproduced below (Appendix 4), as is a printout of the 29 full replies received (Appendix 5) which includes some further information obtained from other sources (material in square brackets).


4 Juriliber, Edmonton, Canada, 1986.
world. Mr. Hurlburt wrote the book in the course of a sabbatical year at the Centre for Socio-Economic-Legal Studies at Wolfson College, Oxford. He drew on his seventeen years of experience with the Alberta Institute of Law Research and Reform, on interviews with 150 or so judges, ministers, officials, lawyers and law reformers and on a wealth of articles and lectures to write what must be the definitive work on the topic. However, even in the two years since the book was published, quite a lot has happened in the field. What is more, the book does not deal with the American, African or Asian agencies and contains no information on the Irish LRC or the New Zealand Law Commission.

There are seven other sources of information of note. In 1983, the Commonwealth Secretariat published a 128-page booklet listing the reports of Commonwealth law reform agencies and their legislative implementation up to December 1982. It was originally intended that this booklet would be regularly updated, but this has not happened. The Commonwealth Secretariat also publishes the quarterly *Commonwealth Law Bulletin*, which contains a section on law reform in each issue. The Australian Law Reform Commission has published two volumes of its *Law Reform Digest*, which summarises reports of agencies in Australia, Fiji, New Zealand and Papua New Guinea from 1910 to July 1985. The Commission also publishes a quarterly journal, "Reform", which contains reports in journalistic fashion on the activities of Australian agencies,

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5 It may also be added that for many of the agencies the most up-to-date information given by Hurlburt is for the year 1983-84, and for some agencies his information is up to the end of 1982 only.


7 In 1987, volume 13, there were approximately 1,500 pages on law reform.


9 Issue 1 appeared in 1976. There are approximately 200 pages per annum. "Reform" is indexed in the *Current Australian and New Zealand Legal Literature Index*, and an index of issues 1 to 35 appeared in issue 36 (October 1984).
with sporadic information on the activities of other agencies. The activities of the U.K. Law Commissions are summarised in *Law Commission Digest*\(^{10}\) and *Law Under Review*.\(^{11}\) Finally, the Law Reform Commission of Canada publishes a newsletter, *Law Reform*, 3 or 4 times a year, containing news from the various agencies in Canada.\(^{11a}\)

The emphasis in the description which follows is on the present agencies of law reform functioning in each jurisdiction. The list of addresses given in Appendix 3 is a rough guide to the functioning agencies in common law jurisdictions. However, some addresses have been included which perhaps should not have been listed, whilst others have been omitted which perhaps should have been listed. For example, it is doubtful whether many of the African and Asian agencies exist in anything other than name and it is arguable that no United States jurisdiction (even New York or California) has a body which can be classified as a law reform agency. Conversely, perhaps the list should have included the U.K. Law Reform Committee and Criminal Law Revision Committee, the Victorian Legal and Constitutional Reform Committee, etc. However, to include the latter committees would have added unnecessary lumber to the business of understanding the more important law reform agencies. Finally, the existence of some agencies was not known until after the survey had been sent out and those agencies were not sent the questionnaire.

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\(^{11}\) The first issue of this quarterly bulletin appeared in March 1987 (See (1987) 137 NewLJ 423). It lists all ongoing law reform projects, not only of the Law Commission, but also of other government Departments and similar bodies. Its aim is to prevent duplication of research into reform of the law in any particular field. It also contains a list of foreign law reform agencies' reports received by the Law Commission.

\(^{11a}\) No.1 was published in March 1985. The newsletter has about 5 pages per issue. It is edited by Judith Rubin. Although it advertises that it seeks material from law reformers all over the world, it appears that so far it has only included information from Canadian agencies.
THE AGENCIES - GROUP ONE

UNITED KINGDOM

The history of law reform in the U.K. up to 1965 has been well documented elsewhere, and need not be repeated here. Our primary concern is the Law Commissions Act 1965 (c.22), which established the Law Commission and the Scottish Law Commission. While the Lord Chancellor's Law Reform Committee and the Criminal Law Revision Committee still exist on a part-time basis, they are of minor importance in comparison with the Law Commissions.

The 1965 Act had its origins in a 1963 book edited by Gerald Gardiner and Professor Andrew Martin, entitled *Law Reform NOW*. In it, the authors stated that in their view it was "axiomatic" that much of the law was out of date, some of it shockingly so. They believed that the problem of law reform was largely one of machinery. They proposed the setting up of a full-time group of Law Commissioners presided over by a junior minister in the Lord Chancellor's office. Harold Wilson appointed Lord Gardiner as Lord Chancellor after the 1964 election, and so the latter had the power to put his ideas into action. A White Paper was produced which explained his views. Meanwhile, Professor Martin visited Denmark, France, the Netherlands, Sweden and West Germany whilst developing the Law Commissions Bill. He was interested in the continental approach to law reform and found that all of those countries had Ministries of Justice and in all of them, with the exception of Sweden,

permanent and ad hoc committees have (in contrast with British practice) ceased to be the principal agencies of Law Reform. They have a part to play, but only by assisting ministries of justice with research and advice directed to the details

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12 Hurlburt, supra n.4, pp.15-50; Farrar, supra n.3, pp.1-17. It should be mentioned that an M.A. written at UCD in 1947 by one John Kenny (later Mr. Justice Kenny) concerned *Law Reform in England Since 1921*.


14 Ibid., p.1

15 *Proposals for English and Scottish Law Commissions* (Cmnd. 2573); reproduced in Railstick (ed.), supra n.10, pp.3-6.
of reform, the need for, and tendency of, which has been pre-determined by a central planning body (such as our proposed Law Commission would be). It has been another basic feature of our thoughts about the Law Commission (a thought which appears in somewhat attenuated form in our draft) that the central planning agency should be responsible for making sure that legislation initiated in other government departments will not run counter to the overall direction in which the legal system is intended to develop.\footnote{Andrew Martin, 'Law Commission Bill: Some Comparative Notes' (Unpublished, 1964), p.iii.}


Two Commissions are established - the Law Commission\footnote{The Law Commission will be referred to as the English Law Commission, although it covers the law of Wales as well.} and the Scottish Law Commission. They are established "for the purpose of promoting the reform of the law" (s.1(1), s.2(1)) and their functions are set out in Section 3(1):

\begin{quote}
It shall be the duty of each of the Commissions to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments and generally the simplification and modernisation of the law ...
\end{quote}

The phrase "all the law" was considered crucial and Lord Scarman hailed the Law Commission as a new part of the Constitution.\footnote{Leslie Scarman, 'Law Reform - Lessons from English Experience' (1968) 3 Manitoba LJ 47 at 51.} However, as Hurlburt has said, "it has not been able to realize that hope".\footnote{Hurlburt, supra n.4, p.85.}
The Law Commissions do not have an unfettered discretion as to the areas of law which they can examine. Each Commission must prepare programmes for examination of different branches of the law (and also programmes for consolidation and statute law revision). Their respective law ministers\(^ {23}\) have a power of veto over these programmes. The Commissions may only examine branches of the law pursuant to an approved programme. Their approved programmes, their proposals for reform and their annual reports are laid before Parliament (but tabling in Parliament is a very different matter to actually obtaining a debate on a Bill).\(^ {24}\) It is also envisaged that the Commissions will play a central planning function in that their programmes recommend the agency (whether the Commission or another body) by which examinations of particular branches of the law should be carried out (s.3(1)(b)) and they provide advice and information to government departments etc. concerned at the instance of the Government with law reform (s.3(1)(e)). The Act also empowers the Commissions to undertake comparative law studies (s.3(1)(f)) and to receive and consider proposals for reform which may be made or referred to them (s.3(1)(a)). Finally, s.3(4) states that in the exercise of their functions under the Act the Commissions shall act in consultation with each other.

It is interesting to note the very different replies received from the two Commissions to question 10 of the survey. The question was headed "Initiation of Projects" and was in two parts. Firstly, "does the agency have power of initiation of projects?" and secondly, "who else can initiate projects?" To the first part, the English Commission basically answered "yes", whilst the Scottish Commission answered "no". In fact, both answers are correct. The detailed answer from England (see Appendix 5) shows that the Commission considers that it has an initiative "within the ambit of any agreed law reform programme". (The Commission prepares the programme and the ministerial veto is rarely used). The Scottish answer is also correct -- it simply places more


\(^ {24}\) Hurlburt, supra n.4, p.360, fn.3.
emphasis on the existence of the veto power. The Scottish Commission goes on to say "But the Commission can receive and consider proposals for reform which may be made or referred to them." This is true, and this power can be interpreted as a form of initiative. As regards the second part, the Scottish Law Commission simply answers "Lord Advocate", but the English Commission does not simply answer "Lord Chancellor". It adds that any other Minister has power of initiative under s.3(1)(e) and that any other body has such power under s.3(1)(a). Again, this is technically true and can be considered as a limited power of initiative. (The Commission adds that in practice the Lord Chancellor is the only other person with such power.)

(1) The English Law Commission

The Law Commission consists of five members (Chairman and four Commissioners) appointed by the Lord Chancellor (s.1). All the members must be lawyers.25 The first members were appointed on 16 June 1965. The first four ordinary Commissioners were Professor L.C.B. Gower, Norman S. Marsh, Professor Andrew Martin and Neil Lawson, Q.C. These were men of obvious integrity and expertise, and their appointments were widely welcomed as indicating the importance of the Commission in the Government’s eyes. The Chairman was Sir Leslie Scarman (now Lord Scarman), a judge of the Family Division of the High Court. His personality was ideal for the job:

It appears to have been his inspirational addresses on the subject of law reform and on the subject of the Law Commissions and his ability to attract the help and support of those influential in legal and political life which enabled him to establish a position from which to influence the adoption of his commission’s proposals.26

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25 Section 1(2): "The persons appointed to be Commissioners shall be persons appearing to the Lord Chancellor to be suitably qualified by the holding of judicial office or by experience as a barrister or solicitor or as a teacher of law in a university."

26 Hurlburt, supra n.4, p.387.
The first years of the Commission were exciting times. Two ambitious law reform programmes were approved,\(^{27}\) although Lord Gardiner excised from its first programme the subject of liability for personal injuries and excluded the Commission from the field of administrative law.\(^{28}\) The Law Commission engaged in extensive consultation and developed the device of the Working Paper. These activities were new to England, and to law reform generally.\(^{29}\) Professor Gower characterised the Working Paper as the Commission's "major contribution towards the methodology of law reform"\(^{30}\) and Lord Scarman called it "perhaps the greatest contribution to the public life of the nation made by the Commission" since governments had borrowed the method to invent the idea of "green papers".\(^{31}\)

Twenty-three years later, there is far less excitement. Hurlburt believes that this is only natural -- The enthusiasm of Scarman et al has "settled down into professionalism and mundane beaver- ing on complex and useful but often uninspiring tasks".\(^{32}\) Others are not so positive. Scarman said in 1979:

> The enthusiasms of 1965 have been replaced by a chiller attitude towards law reform. Some doubt its wisdom: others its efficacy: and there is a general feeling that society suffers from too many laws, too many lawyers, and would be re-invigorated by less legislation and fewer lawyers.\(^{33}\)


\(^{29}\) Hurlburt, supra n.4, p.60.

\(^{30}\) Gower, supra n.28, p.263.


\(^{32}\) Hurlburt, supra n.4, p.485.

\(^{33}\) Scarman, supra n.31, p.2.
The Law Commission has achieved a great deal in the twenty-three years of its existence. It has five full-time Commissioners and a Secretary, four parliamentary counsel, 13 other civil servants, 14 research assistants and 4 consultants. Its administrative and secretarial staff numbers twenty-one. Up to the end of 1987, it had produced 3 programmes of law reform, 2 programmes of consolidation and statute law revision, 22 annual reports, 103 working papers and 144 reform reports. Allowing two years for implementation, 77.9% of the reform reports up to the end of 1985 which called for legislation had been implemented in full by the end of 1987, 4.9% had been implemented in part and 17.2% had not been implemented. (Details at Appendix 5). Its budget for 1986/87 was £2,062,300 sterling, which is the second highest in Appendix 1.

While this may seem an impressive record, there are problems which have not been surmounted. The Law Commission's attempts at codification have been scaled down, as reported in Chapter II above. It has not had the resources to supervise a coherent strategy for law reform by government departments, royal commissions and the Commission itself. Nor has it had the resources to collect as much empirical data as it requires. Recently, there has been some disillusionment with the consultation process, with the usefulness of lengthy working papers and with the Commission's implementation rate.

Peter M. North was a member of the Law Commission from 1976 to 1984 and said in 1985:

I am highly sceptical whether all or any of the legitimate purposes of consultation are adequately achieved. 


He says it seems that consultation is seen as more important than the end results. Consultation is time-consuming, breeds bureaucracy and consultees are showing signs of wilting under the burden of excessive consultation, since the government often conducts a "second round" of consultation after the Law Commission's report. Consultation papers are perhaps too long and commentators do not have time to master them, he says. Selective consultation is more effective than generalised distribution of consultation papers. It is useless to send papers to academics; it is far better to ask them to be a member of a working party etc. He believes that any claim to some form of democratic legitimacy due to widespread consultation is spurious. Pamphlets may produce a substantial response but it is not necessarily stastically relevant.37

In reply, Hurlburt believes the note sounded by North is "too melancholy".38 It is better to tap some wisdom than none at all. Lack of widespread response to wide-spread invitations does not demonstrate the failure of consultation. He says that on the whole the consultation process has the effects which it is intended to bring about, namely improving the quality of law reform proposals, making them more acceptable and giving those affected by law reform proposals an opportunity to be heard.

Whilst the implementation rate is not the sole criterion of success, it is only natural that many people are interested in discovering why certain reports have not been implemented and whether anything can be done to improve the statistics. Views differ as to whether there is a problem of non-implementation at all. Michael Zander stated in 1979 that the Law Commission was outstandingly successful in getting its reports implemented39 and Stephen Cretney believes that

37 For example, the Working Paper on blasphemy (Offences against Religion and Public Worship, W.P. 79, 1981) produced about 1,000 letters and petitions with 20,000 signatures in favour of retaining the offence. However, the reaction came as a result of an orchestrated campaign of response. In the end, the final report (Law Com. 145) recommended abolition of the common law crimes of blasphemy and blasphemous libel.

38 Hurlburt, supra n.4, p.348.

39 Zander, 'Promoting Change in the Legal System' (1979) 42 MLR 489 at 502.
the extent of the problem of non-implementation is exaggerated\textsuperscript{40} However, Mr. Justice Kerr was "concerned" that the implementation rate was slowing down\textsuperscript{41} Gavin Drewry found that there were parliamentary obstacles to law reform\textsuperscript{42} and North complains of "legislative pneumoconiosis"\textsuperscript{43} as law reform reports are left on the shelf to gather dust. North points out that the complaint should not be about non-implementation as such, but about non-implementation by inaction, by lack of a publicly expressed decision. There has been a calculated non-implementation of most criminal law recommendations, he says. And Cremey has found that the Home Office and the Department of the Environment are responsible for most of the unimplemented reports\textsuperscript{44} (Suggested methods of improving implementation rates are discussed below, Section 2 (d)).

\textbf{(2) The Scottish Law Commission}

The Scottish Law Commission was very much an afterthought. Lord Gardiner did not contemplate its establishment, but protests at an early stage prompted its creation. The Earl of Selkirk referred to the Bill as "an English Bill to which has been tacked an item providing for Scotland", and accused Lord Gardiner of devoting only one sentence of his second-reading speech to Scotland\textsuperscript{45}

The Commission has far less resources than the English Law Commission. Two of its Commissioners are part-time and it has a Secretary, nine legal staff, 13 administrative and secretarial staff, one draftsman and 2 part-time draftsmen. Nevertheless, it had produced 82 reform reports

\textsuperscript{41} Kerr, 'Law Reform in Changing Times' (1980) 96 LQR 515 at 530.
\textsuperscript{43} North, supra n.36, p.354.
\textsuperscript{44} Cremey, supra n.40, p.509. See also Hailsham, 'Obstacles to Law Reform' (1981) 34 Curr. L.Probs. 279 at 287.
\textsuperscript{45} 258 H.L. Deb. 1190; Hurlburt, supra n.4, p.86.
and 74 consultative memoranda by January 1988. Allowing two years for implementation, its implementation rate is 94% (89.5% in full, 4.5% in part).45a

The Scottish Law Commission is established on the same lines as the English, except that the Lord Advocate is its law minister. It prepares many reports jointly with the English Law Commission, but it also jealously guards the civilian elements of Scots law. This function which the Commission has given to itself - the preservation of Scots law - is unique among the law reform commissions of the U.K., Australia and Canada.46 Like the English Law Commission, its attempts at codification have been scaled down. In fact Woolman found in 1982 that behind the high statistics of implementation, the Scottish Law Commission did not live up to the aspirations in the 1965 Act or in its three law reform programmes.47 Professor D.M. Walker is also extremely critical:

Do we give three hearty cheers for the Commission's twenty year's effort? It is a personal expression of view, but the writer can only acquiesce in one muted cheer.48

One achievement of importance has been the Commission's contribution to legal life which it has made through its research, its published reports and its widespread consultation. Such activities are particularly welcome in a small jurisdiction like Scotland, where there is a scarcity of legal materials.49 The Commission has also been one of the only law reform agencies to deal

45a Information from Twenty-Second Annual Report 1986-87 (H.C. 114, Scot. Law Com. No. 109). The report was completed on 4 September 1987 (p.iii). Rate calculated is implementation up to end August 1987 of reports issued up to end August 1985. 70 Reform Reports (No's 91, 94 and 96 were published from Jan.-Aug.1985); 3 do not call for legislation (No's 30, 66 and 80); 67 reports calling for legislation; 63 implemented (60 in full, 3 in part).

46 Hurlburt, supra n.4, p.92. The function is not mentioned in the 1965 Act.

47 Stephen Woolman, 'The Scottish Law Commission' (1982) Stat.LR 164. In the Commission's defence, it may be added that no Commonwealth law reform agency has lived up to its early aspirations.


49 Woolman, supra n.47, p.164.
with the constitution of its jurisdiction.\textsuperscript{50} Finally, its drafting of a Bill on judicial precedent in the House of Lords prompted the famous 1966 Practice Statement, according to Lord Kilbrandon and Lord Scarman.\textsuperscript{51}

**IRELAND**

The recent history of law reform in Ireland begins in 1962 with the publication by Charles Haughey (then Minister for Justice and now Taoiseach) of a White Paper entitled *Programme of Law Reform*.\textsuperscript{52} Haughey sang the paper's praises in Luxembourg in 1964,\textsuperscript{53} and as a result, the general impression was spread that Ireland was a progressive reform jurisdiction.\textsuperscript{54} However, while much was achieved in the early 1960's,\textsuperscript{55} the programme slowed down thereafter.\textsuperscript{56} Apart from its low implementation rate, the paper was limited by its being confined to areas within the jurisdiction of the Department of Justice and by its rejection of any form of permanent committee on law reform. Various committees were established on specific areas. For example, there were the Committee on Court Practice and Procedure,\textsuperscript{57} the Landlord and Tenant Commission\textsuperscript{58} and the

\textsuperscript{50} Memorandum No. 32, 1976, *Comments on the White Paper*, to which the Commission's earlier memorandum, *Devolution, Scots Law and the Role of the Commission*, is an Appendix; Hurlburt, supra n.4, pp.95-6.


\textsuperscript{52} Pr. 6379, 1962

\textsuperscript{53} Haughey, 'Law Reform in Ireland' (1964) 13 ICLQ 1300.

\textsuperscript{54} For example, Lord Gardiner referred to Ireland as a country in which law reform was "extremely active" -- 'Comparative Law Reform' (1966) 52 ABAJ 1021 at 1024.

\textsuperscript{55} E.G. Succession Act 1965, Guardianship of Infants Act 1964, Hotel Proprietors Act 1963.


\textsuperscript{57} The Walsh Committee. It produced 19 interim reports between 1964 and 1974.

Bankruptcy Law Committee.\textsuperscript{59} In 1966, the Advisory Committee on Law Reform was established.\textsuperscript{60} In 1969, two lecturers of Trinity College questioned the then Minister for Justice as to when the White Paper would be implemented in full.\textsuperscript{61} One of them, Kader Asmal, urged that a permanent law reform agency, similar to the U.K. Law Commissions, be set up, since there were two main weaknesses in the machinery of law reform -- it was neither comprehensive nor systematic and there was little public participation in law reform.\textsuperscript{62}

In 1974, the Attorney General, Mr. Declan Costello (now a judge of the High Court), announced that a new Law Reform Commission would be established.\textsuperscript{63} It would operate on lines broadly similar to the agencies in England, Scotland, Australia and Canada. Its programme would not be confined to technical law, but would cover areas of social policy, where legal knowledge and expertise were necessary to assist in the formulation of reforming legislation. Later, the Attorney General was reported as announcing further details with obvious enthusiasm.\textsuperscript{64}

\textsuperscript{59} The Committee was set up in August 1962 but did not report until 1972 (Bankruptcy Law Committee, \textit{Report on the Law and Practice Concerning Bankruptcy and Administration of Insolvent Estates of Deceased Persons}. 591pp.) It then took another 16 years for legislation to reach the statute book -- Bankruptcy Act 1988. (EC harmonisation moves were partly responsible for the delay).

\textsuperscript{60} The Committee was formed of representatives of the Benchers of King's Inns, the Bar Council, the Incorporated Law Society and the Law Faculties. Andrias O Caomh P. was its President. The Minister for Justice provided secretarial services. See \textit{Report of the Advisory Committee on Law Reform. Occupiers' Liability} (Prl. 4403, 1974).


\textsuperscript{62} Kader Asmal, 'The Machinery for Law Reform' (October 1969) 2 Public Affairs/ Léargas (No.2), pp.3-5.

\textsuperscript{63} Government Information Service statement, quoted by O'Connor, supra n.56, p.15; See also \textit{Irish Times} 17 September 1974, p.9. The announcement came as the Attorney General was being relieved of his prosecution duties by the establishment of the office of Director of Public Prosecutions (Prosecution of Offences Act 1974).

\textsuperscript{64} \textit{Irish Times}, 18 January 1975, p.9.
Introducing the Bill in the Dáil, he defined law reform as "the activity of reforming laws which require legal knowledge and expertise if reforms are satisfactorily to be effected". This was not confined to "lawyers' law", but would involve family law, consumer protection law, employer and employee law, landlord and tenant law, law of personal injuries and basic human rights. The Attorney General's Statute Law Reform and Consolidation Office would still exist, but could be involved in the Commission's programmes. The Bill was welcomed by all parties in the Dáil. Gerard Collins, John Kelly, Desmond O'Malley and Brendan Toal used the opportunity to point out what they considered to be the areas most urgently in need of reform. Mr. O'Malley hoped that the Commissioners would be appointed on their merits, but did not have great confidence that they would be "in the light of events of the past 23 months". Similarly, Mr. Collins thought that the Bill needed amendment since a civil servant would almost certainly be appointed, perhaps "with no very obvious claim to such an appointment." He hoped that once the Commission was set up, its independence would not be interfered with in any way, for any reason, by any member of the Fine Gael party or the Labour party in Government. Deputies Toal and Kelly defended the Bill as regards appointments, Mr. Toal saying that no matter what was brought into the Dáil, Mr. O'Malley said it was "jobs for the Boys" and Mr. Kelly saying that the Attorney General was the very person who had put an end to political patronage in the assignment of State work at the Bar by establishing the office of D.P.P.

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65 277 Dáil Debs. 1578. He continued: "Obviously many legislative changes or innovations which could properly be classed reforms in the law require no specialised legal knowledge to bring them about; an alteration in the age qualification for the old age pension, or alterations in the local authority tenant purchase schemes do not require a law reform commission to assist in their enactment."

66 Ibid., 1606. He was dissatisfied with the recent appointment of the D.P.P. since he claimed the unanimous recommendation of the committee established to vet candidates was ignored by the Government.

67 Ibid., 1595.

68 Ibid., 1612.

69 Ibid., 1596.
The Bill was then referred to a Special Committee of the Dáil. The accusations about appointments continued. Mr. David Andrews said it had become clear that the Coalition had been ruthless from the day they took office from the point of view of appointments. Mr. O'Malley said they "did not even appoint their best hacks" and

"Without exception every appointee since the Government came to office has been a Coalition camp follower."

After much discussion, the Bill was eventually amended to state that any non-lawyer who would be appointed should have "such other special experience, qualification or training, as in the opinion of the Government is appropriate having regard to the functions of the Commission". Another amendment, by which any judge appointed to the Commission would have to be its President and not just an ordinary member, was put to a vote and failed. Mr. O'Malley was also worried that the position on Commissioners' remuneration was "full of open-ended commitments and it should not be". The position regarding the Commission's functions was clarified by the insertion of a new subparagraph. It was clarified that if it happened that the government had vetoed its programme in any respect, the Commission could state this in its annual report which would be laid before the Oireachtas. Finally, Mr. O'Malley proposed the deletion of the procedure...

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70 See Parliamentary Debates, Dáil Éireann, Law Reform Commission Bill 1975 -- Special Committee, D 18, No's 1, 2 and 3 (Wednesday 12th, Tuesday 18th and Wednesday 19th Feb. 1975).

71 Ibid., p.13.

72 Loc. cit. He hoped the Law Reform Commission would not be "used as a place of refuge for disused hacks, as unfortunately some even more eminent places have been used" (p.15).

73 See 279 Dáil Debs. 396. This was in substitution for an earlier version which said "by reason of other experience or of other special qualifications or training."

74 Supra n.70, pp.23-24.

75 Ibid., p.25. He said one Commissioner might be paid £1,000 and another £10,000. It was not enough for the Attorney General to say that it would not happen in practice. This was an open invitation to haggle with the Government.

76 Ibid., pp.31-37. Under s.4(3)(g), the Commission may "indicate the desirability, priority, scope and extent of any law reform proposed."
dure whereby the Attorney General can control the method of appointment of officers, but withdrew the proposal once the drafting was tidied up and the Attorney General explained that there was nothing sinister about the procedure. 78

In the Seanad, 79 Standing Orders were amended so that the Attorney General could participate in the debate. Senators Eoin Ryan, Alexis Fitzgerald, Brian Lenihan, Mary Robinson and Noel Browne outlined the areas they thought most urgently needed reform. Mr. Fitzgerald particularly welcomed the fact that sociologists, psychologists and economists would be involved. 80 Professor Robinson emphasised the social function of law, criticised the universities and law schools for not being sufficiently interested in law reform, and blamed the practitioners and the academics for allowing the field of law itself to become very narrow, rather rigid and unresponsive to modern developments. 81 She also asked whether the reform of the Constitution was within the terms of reference of the Commission, and the Attorney General replied that it was. 82 Dr. Browne discussed the psycho-dynamics of criminality and spoke of the need for reform regarding the McNaghten rules, homosexuality, therapeutic legal abortion and contraception. He said the Commission appeared to be greatly overloaded on the side of the law, and he would be inclined to put the legal profession pretty low in the list of those with advanced or radical or even forward-looking views on sociology, psychology and psychiatry. 83 In reply, Mr. Costello said he hoped the Commission would obtain the advice of psychologists and psychiatrists in improving the crimi-

77 Ibid., pp.37-8.

78 Ibid., pp.40-45, dealing with s.10(4) and (5).


80 Ibid., 221.

81 Ibid., 230.

82 Ibid., 250-1.

83 Ibid., 238-9.
The 1975 Act is, as the Attorney General said, broadly similar to the Acts in the U.K., Australia and Canada. The Commission consists of a President and four other members appointed by the Government. The members must be either lawyers (judges, barristers, solicitors, law teachers) or persons with other special experience/qualification/training (see above). Their term of office cannot exceed five years, but they can be reappointed. The Commission's function is to keep the law under review and undertake examinations and conduct research with a view to reforming the law and formulate proposals for law reform (s.4(1)). "Reform" includes development, codification (in particular simplification and modernisation) and the revision and consolidation of statute law (s.1). The Commission prepares programmes in consultation with the Attorney General subject to veto by the Government (s.4(2)(a), s.5). The Attorney General can also request proposals for reform on particular matters (s.4(2)(c)). The Commission must publish an annual report (s.6), and may conduct comparative law research, prepare draft Bills, establish working parties, etc. (s.4(3)). Copies of approved programmes, annual reports and accounts are laid before the Oireachtas. However, in contrast to the U.K. Act, reports with proposals for reform do not have to be tabled.

Although the Act allows for five full-time appointments, this has not happened. From the beginning, there have been two full-time and three part-time members. The first full-time Commissioners were Mr. Justice Brian Walsh (President), judge of the Supreme Court and Mr. Justice...
tice Charles J. Conroy, who resigned from the presidency of the Circuit Court and the bench to become a member of the Commission. The part-time members were Mr. Martin E. Marren, Solicitor (five year appointment), Professor Robert Heuston, Trinity College Regius Professor of Laws (three years) and Mrs. Helen Burke, U.C.D. Lecturer in the Department of Social Science (two years). There was surprise in some circles at Mrs. Burke's appointment, but the appointment of a non-lawyer had been a constant theme in the Oireachtas debates. The Irish Law Reform Commission is one of the few agencies (apart from U.S. agencies) which has repeatedly included a non-lawyer member. Roger Hayes was appointed Director of Research, Frank Ryan, Secretary and William Binchy and Brian McMahon, Research Counsellors.

The Commission's first programme was published in 1976. The matters dealt with in the programme were: Administrative Law, Animals, Conflict of Laws, Criminal Law, Evidence, Family Law, Privacy, Sales, State Side Actions and Statute Law. By the end of 1984, it had produced 7 Annual Reports, 11 Working Papers (6 family law) and 9 Reform Reports (6 family law). However, only one report had been implemented (and only in part). In 1985, it pro-

89 The appointees' curricula vitae are at (1975) 109 ILTSJ 232. It may be added that Mr. Justice Walsh had been Chairman of the Committee on Court Practice and Procedure and Mr. Justice Conroy had been Chairman of the Landlord and Tenant Commission.


91 Currently, that member is Ms. Maureen Gaffney, senior clinical psychologist with the Eastern Health Board and course organiser of the E.H.B./Trinity College training scheme in clinical psychology.

92 First Programme for Examination of Certain Branches of the Law with a View to their Reform (Prl. 5984, Dec. 1976).

92a It also produced some unpublished background papers which it said it would make available to bona fide researchers (Second (Annual) Report 1978-79 (Prl.8855), p.19). One of these reports concerned Artificial Insemination and the Law.

duced 11 more Reform Reports (4 with a family law element) and its eighth Annual Report. Two Commissioners died (Mr. Hayes and Mr. John Lovatt-Dolan, S.C.), one resigned (Miss Mary Finlay) and on October 19th, 1985, the terms of office of Mr. Justice Walsh and Professor James P. Casey expired. From October 19th 1985 to January 2nd 1987, there were no Commissioners and the office was run by its Secretary (Mr. Ryan) and its two part-time Research Counsellors (Mr. Binchy and Mr. Charles Lysaght). There was speculation that its new President might be the former Attorney General, Mr. Justice Costello. On 27th November 1986, the post went to Mr. Justice Ronan Keane of the High Court. Four other new faces were also appointed. The new members began their work on 2nd January 1987. On 6th March, the Attorney General asked them to review as a matter of urgency five areas of law.

Mr. Justice Keane said:

The Commission believes that the choice of specific areas where the need for reform is urgent and widely accepted signals a new and important departure in the approach to law reform in general and the work of this Commission in particular.

94 Mr. Justice Walsh returned to the Supreme Court and increased it to six members, a situation which was foreseen in 1975 and led to some debate as to whether the Chief Justice would be in a difficult position as to which judges to allocate to important cases -- supra n.70, pp.46-47.

95 Irish Times, Saturday 19 April 1986, Weekend p.6.


97 The other full-time member is Simon O'Leary, on secondment from the office of the D.P.P. The part-time members are John Buckley, solicitor, former vice-President of the Law Society, William Duncan, senior lecturer in law and registrar of Trinity College and Maureen Gaffney (supra n.91). Charles Lysaght is no longer a research counsellor, but William Binchy remains.

98 (1) Conveyancing (2) Sexual offences, including rape and child sexual abuse (3) Sheriffs/ tax and debt collection (4) Certain issues re compensation in personal injury cases (5) Various criminal law matters, including sentencing policy, indexation of fines, confiscating the proceeds of crime and updating a number of offences which are still governed by pre-1922 legislation, in particular dishonesty, malicious damage and offences against the person. (Ninth Annual Report 1986-87 (Pl. 5625), p.2.)

He strongly urged the implementation of the Commission’s previous reports, saying its work would become "futile" if its reports did not have the optimum prospects of success. He said that the Commission was changing its practice as regards Working Papers:

The experience of law reform agencies, including this Commission, of this procedure has been singularly disheartening: the gloomy experience has been -- and I stress again that this is not a problem unique to Ireland -- that the response tends to be minimal.

To tackle this problem, Discussion Papers would be circulated on a limited basis, working groups would be established of persons with an interest in topics, empirical research would be commissioned from other state or outside agencies, there would be co-operation with third level law faculties and young law graduates would be employed. (There would still, of course, be circumstances in which the topic being dealt with would raise policy questions of such a nature as to require a more widely circulated document.) These new practices were already in operation. The Commission would constantly monitor the progress of implementation of its reports. He was anxious to receive the views of the public "so as to ensure that the ever present danger of law reform being produced in a vacuum isolated from reality can be avoided so far as is humanly possible".

The new Commission has so far produced one Consultation Paper, one Annual Report and six Reform Reports. The reports are attractively presented and typeset, and the Consultation

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100 Ibid., p.133. Five days later, the Taoiseach came under pressure in the Dáil from Deputies Taylor and Enright to implement the Commission’s reports. The Taoiseach said he did not think that setting up a Dáil committee to consider these reports would help. See 372 Dáil Debs. 5-10 (28 April, 1987).


102 See Ninth Annual Report 1986-87 (Pl. 5625), pp.3-4 (New Procedure) and pp.4-7 (The Year’s Work).

103 Supra n.99, p.134.

Paper was accompanied by a short leaflet summarising its contents. This is in line with the practice in several jurisdictions, and is to be welcomed as increasing the readability and digestibility of the proposals. As Hurlburt has said:

The disadvantage of a summary is that it can give only a superficial statement of what a report is about. On the other hand, it gives some information to a reader who would not otherwise be informed at all; it is a guide to a casual reader; and it helps the media to decide whether there is anything in the report which is newsworthy. Perhaps most important of all, if it is well prepared it may well serve as the executive summary which goes to the minister.105

The Commission's handling of the controversial rape reference was a test of its new procedures. It decided that this was an area where a published Consultation Paper would be needed. The Paper's publication was front-page news.106 It recommended the abolition of the marital rape exemption and the creation of two new offences, sexual assault and aggravated sexual assault. It recommended that a judge might scrutinise the sexual history of the complainant with the defendant and that the complainant should not have separate legal representation. The Commission thought that the legal definition of rape, based on vaginal sexual intercourse, should remain unchanged. The unique feature of rape was the fact that pregnancy might result from the act. This latter recommendation was widely criticised. One writer said:

It would seem to me that by retaining the traditional definition of rape, an opportunity may be missed whereby polarisation on a male/female basis might have been removed.107

Anne O'Donnell, Manager of Dublin Rape Crisis Centre, said:

Pregnancy is the last thing on the minds of the victims we treat. It is AIDS they are scared of .... If a bottle is used on a woman, she is degraded. She doesn't sit

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105 Hurlburt, supra n.4, p.353.
She was "seriously concerned" about the composition of the Law Reform Commission on two counts -- four of the five members are men and all four male members are lawyers. In the media, Maureen Gaffney and Simon O'Leary emphasised that the Commission was anxious to receive "reasoned comments" on the Paper. The Commission then held a seminar, which was private and by invitation, on January 30th.

As a result of the seminar and the media discussions, the Commission decided in its final Report to change its views and extend the definition of rape. Its consultation with the public had obviously influenced it greatly, and its proposals for reform are now more in line with the wishes of interest groups and probably a large proportion of the population as well. The Commission has shown itself to be extremely open to the views of non-lawyers. Without compromising its independence, it obviously learnt much from the experience of people who deal with rape on a day-to-day basis. As Mr. Justice Keane had promised, the danger of law reform proposals being formulated in a vacuum was avoided.

At present, the Commission's budget is IR£310,000 (£267,800 sterling), a respectable amount which ranks eleventh on a table of 25 budgets available for comparison. It has two full-time and three part-time Commissioners, a part-time Research Counsellor, a full-time Secretary, three full-time Research Assistants (recent law graduates) and five administrative and secretarial staff. However, its implementation rate is poor. There has been governmental action on only 6 of the Commission's 24 Reform Reports. No report has been implemented in full. Allowing two

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108 Irish Times, Mon. 14 Dec. 1987, p.11. An editorial in the Irish Times of 2 Dec. seems to have supported this view.

109 Irish Times, Sat. 5 Dec. 1987, Letters Page. See Chapter IV below, Observations (b) Non-lawyer Members.


years for implementation, its implementation rate is 6 out of 20 reports (30%) implemented in part.\footnote{112}

The Commission recently held a seminar on "Priorities in Law Reform" at Trinity College, Dublin. There were sessions on "Child Sexual Abuse", "Defamation, Privacy and Contempt of Court" and other topics. Mr. Justice Keane said that a review of the existing programme undertaken by the Commission must be undertaken at some stage.\footnote{113} He discussed the distinction between "lawyers' law" and laws where there are no agreed social or political objectives. He said there was some force in Lord Scarman's view that all law reform raises either social, political or economic issues.\footnote{114} The reference on Child Sexual Abuse, the inclusion of Protection of Privacy in the Commission's first programme and the Commission's interest in defamation and contempt of court illustrated the social relevance of its work. He pointed out that the Commission was operating with greatly reduced resources and diminished staff levels and this made husbanding of its scarce resources more important than ever.\footnote{115} He felt it was his duty to again criticise the implementation rate,\footnote{116} quoting Kirby's observation that publicity is the antidote to indifference to injustice and indifference is the special enemy of law reform.\footnote{117} He urged greater use of the sys-

\footnote{112} A new version of the Rules of the Superior Courts enacted in 1986 gives effect to most of the recommendations in Working Paper 8 (Judicial Review of Administrative Action: The Problem of Remedies, 1979). However, it would be statistically inconsistent to include this as an implemented report as it was a working paper only.


\footnote{114} Ibid., p.4. See Scarman, supra n.51, p.28 and Chapter IV below, Observations (a) Lawyers' Law vs. Social-Policy Law.

\footnote{115} Ibid., p.5. This is also mentioned in the \textit{Ninth (Annual) Report} (1986-87, Pl.5625), pp.1-2, where it is added that its limited resources have obliged the Commission to effect economies in the purchase of books and periodicals and the organisation of seminars, etc.

\footnote{116} Ibid., p.10.
tern of Oireachtas committees as a means of implementing the Commission's reports.\textsuperscript{118}

In October 1988, Mr. Justice Keane warned that the law reform movement in Ireland could "run out of steam" unless the implementation rate improved. He said that all future Taoisigh should nominate the Attorney General as a member of the Seanad so that he could introduce legislation based on accepted LRC proposals. He again urged the introduction of a joint Oireachtas committee which would oversee the passage of non-contentious law which is in urgent need of updating.\textsuperscript{118a}

\textbf{CANADA}

\textit{(1) Federal}

The Law Reform Commission of Canada was established by the Law Reform Commission Act 1971.\textsuperscript{119} It is given functions similar to those of the U.K. and Irish Commissions, except for two important differences. Firstly, under s.11(b), its objects include

\begin{quote}
the reflection in and by the law of the distinctive concepts and institutions of the common law and civil law legal systems in Canada, and the reconciliation of differences and discrepancies in the expression and application of the law arising out of differences in those concepts and institutions.
\end{quote}

Secondly, under s.11(d), the objects include

\begin{quote}
the development of new approaches to and new concepts of the law in keeping with and responsive to the changing needs of modern Canadian society and of individual members of that society.
\end{quote}

When first established, its main emphasis was on criminal law. The LRC took its broad mandate very seriously and in its early years its main goal was not to change the law but to bring about the change in attitudes necessary for law reform.\textsuperscript{120} It wanted to "cut through the jargon and get to


\textsuperscript{118} Ibid., pp.13-14. See the Taoiseach's earlier reply to such a suggestion, supra n.100.

\textsuperscript{118a} \textit{Irish Times}, Mon. 3 Oct. 1988.

\textsuperscript{119} S.C., 1969-70, c.64; amended by 1974-75, c.40.
the social questions that are involved in all law reform". The LRC deliberately omitted draft legislation from five of its first six reports, which demonstrated its view that legislative reform was not its main goal. The Commission issued study papers even before it issued working papers and final reports. Its documents were written in a distinctively readable, interesting and intelligible style. It tried to involve the public more by establishing a local Ottawa study group to comment on its work and it thought of providing public libraries with books explaining law in simple terms.

Much of this experimentation of the early years was not successful. In 1978, when Mr. Justice Muldoon became President, the LRC began to take a more pragmatic approach. Hurlburt comments:

The change in the Canada LRC's approach to law reform is symbolized by changes in the format of its reports. Since 1978 these have been issued in standard covers, and there appear in the annual reports lists of judicial references and, later, lists of steps taken towards the implementation of the Commission's proposals.

The reports now contain draft legislation. The LRC now participates in a unique co-operation between an independent LRC and a government department, known as the "Criminal Law Review". Its work has never ceased to be imaginative and exciting. For example, it has dealt with the vexed questions of euthanasia and the criteria for the determination of death, and it is currently dealing with options for abortion policy reform and with environmental law under the Protection of Life project and with demystifying Government forms under the Plain Language

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120 Third Annual Report, pp.8-9.

121 Mr. Justice Antonio Lamer, 'In and Out of Court' (1976) 4 Canadian Daily Newspapers Association M.C.E.C. Newsletter; cited in Hurlburt, supra n.4, p.184.

122 Hurlburt, supra n.4, p.190.


The LRC currently has the largest budget of any law reform agency in the world. In 1986/87, its budget was $4,799,000 (£2,323,500 sterling). It has published 16 Annual Reports, 56 Working Papers, 73 Study Papers and 31 Reform Reports. Only 13 Reports have been implemented in whole or in part. Allowing two years for implementation, its implementation rate up to July 1987 is 12 reports in whole or in part out of 25 reports published up to July 1985, i.e. 48%. Hurlburt says that much has been achieved in changing attitudes and opinions, but the problem of non-implementation of its reports is a major drawback. He says there are six possible explanations:

1. The LRC did not issue a final report until its fifth year of existence and the receptiveness upon which the Commission might have counted had cooled by then.
2. The early reports were heavily philosophical and did not contain draft legislation.
3. Lack of parliamentary time.
4. The problems of the federal system.
5. The government's energetic response to the first report (Evidence) encountered stormy weather.
6. Ministers of Justice were otherwise preoccupied, e.g. with the new Constitution for Canada.

The literature on the LRC of Canada is wide-ranging and interesting.

(2) Alberta

The Alberta Institute of Law Research and Reform is quite different from the U.K. model. The Institute is governed by an agreement dated November 15th 1967 between the Attorney General of Alberta, the Governors of the University of Alberta and the Law Society of Alberta. The ILRR

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125 Information from *16th Annual Report 1986-87*, pp.27-28. It seems that most of these reports have only been implemented in part.

126 Hurlburt, supra n.4, p.199.

is located at the University of Alberta. It works in close liaison with the Attorney General's Department. It chooses its own law reform programme, though it has undertaken much of its work at the suggestion of the Attorney General and other government departments.

The ILRR did not complete the questionnaire, but it did send three sample reports and its 1986-87 Annual Report in reply to the survey. Unfortunately, the Report does not give its budget. But Hurlburt says that its resources have been substantial, coming second of the provincial Canadian law reform agencies, after Ontario.\(^{128}\) It now has a legal staff of six people. By February 1988, it had produced 16 Research Papers, 4 Reports for Discussion, 1 Issues Paper and 50 Reform Reports (including Report 37A). Allowing two years for implementation, 30 of the 44 reports (including 37A) issued up to March 1985 had been implemented in whole or in part by March 1987. That gives an implementation rate of 68%. However, the rate of enactment slowed from 1980. Hurlburt hoped that usage of an Assembly committee would solve this,\(^{129}\) but this does not appear to have been successful, judging from the 1986-87 Report.\(^{130}\)

(3) British Columbia

The British Columbia LRC was established by the Law Reform Commission Act 1969.\(^{131}\) Its Act is largely similar to the 1965 U.K. Act. It submits programmes to the Attorney General which are not subject to a veto, but it cannot formulate proposals for reform without the approval of the Attorney General. Its reply to question 10 ("Does the agency have power of initiation of projects?"; "Yes") must be read in this light. The Commission now has a full-time Chairman (Mr. Justice Arthur L. Close), four part-time Commissioners, 3 full-time legal research officers, a full-

\(^{128}\) Hurlburt, supra n.4, p.217. Funding from the Alberta Law Foundation has been of great assistance.

\(^{129}\) Ibid., p.223.


time Secretary and two administrative staff. Its budget is $550,000 (£267,000 sterling), about the same as the Irish LRC's. By December 1987, it had published 17 Annual Reports, 58 Working Papers and 78 Reform Reports (including 2 Minor Reports in Annual Reports for 1979 and 1980). 39 Reports had been implemented in whole or in part. Allowing two years for implementation, 39 of the 86 reports published by December 1985 had been implemented in whole or in part by December 1987. This gives an implementation rate of 45.3% in whole or in part.

Two points of interest are: Firstly, there is a Judges' Law Reform Committee which responds to the LRC's Working Papers and calls the LRC's attention to defects in the law. Secondly, its annual report contains its criteria for the choice of projects and expresses a preference for internal research rather than usage of outside experts.

(4) Manitoba

The Manitoba LRC was established by the Law Reform Commission Act 1970 “to inquire into and consider any matter relating to law in Manitoba with a view to making recommendations for the improvement, modernization and reform of law” (s.5(1)). While it must accept references from the Attorney General and give them the priority which the Attorney General prescribes, the statute does not restrict it to acting upon such references. From the beginning, the Chairman has been the only full-time member. At present, the Chair is vacant but there is a full-time Secretary and two full-time legal research officers. There have always been non-lawyer members. At one stage there were three, but now there is only one -- Ms. Lee Gibson, a teacher. It has also been the practice to appoint persons known to be adherents of the three major political parties. This has been a successful policy which in fact makes the LRC more credible to outsiders. (The members

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of the Commission have not divided along party lines). It has done work in the field of constitutional law, where the law reform agencies have rarely trod.\textsuperscript{135} It has also recommended that trans-sexual persons be entitled to revised birth certificates and issued a report on a Human Tissue Act.\textsuperscript{136}

By February 1988, the LRC had published 24 Working Papers and 101 Reform Reports (69 formal, 32 informal). Allowing two years for implementation and discounting the 7 reports which recommended no provincial action, its implementation rate is 83.3\% (67.9\% in full, 15.4\% in part).\textsuperscript{137} Unfortunately, according to lengthy comments attached to the survey, the LRC was informed in mid-December 1987 that it was the intention of the Government to phase out the Commission over the next fiscal year.\textsuperscript{138}

\textit{(5) New Brunswick}

New Brunswick does not have an independent law reform agency, but there is a Law Reform Division attached to the Attorney General's office and its address is listed in Appendix 1. Up to the end of 1982, it had issued 10 Working Papers and worked on 7 projects.\textsuperscript{139}

\textsuperscript{135} \textit{The Case for a Provincial Bill of Rights} (Report 25, 1976).

\textsuperscript{136} \textit{Revision of Birth Certificates of Trans-sexual Persons} (Report 26, 1976), \textit{The Human Tissue Act} (Report 66, 1986). The Human Tissue Act has now been enacted -- \textit{Law Reform} (LRC of Canada Newsletter), No.9, January 1988, p.4.

\textsuperscript{137} Information from Sixteenth Annual Report 1986/87 (April 1987). This is a calculation of implementation up to April 1987 of reports up to April 1985. There were 84 reports, 70 implemented (57 in full, 13 in part). This does not tally with the reply to Question 18 of the survey, which states that 74 reports were implemented. This difference presumably means that 4 reports were implemented between April 1987 and February 1988.

\textsuperscript{138} See Appendix 5 below, Manitoba.

\textsuperscript{139} Commonwealth Secretariat, supra n.6, pp.62-63.
(6) Newfoundland

Although the Newfoundland Law Reform Commission Act was passed in 1971, no members were appointed until April 1984. The Commission has an unfettered initiative of projects, except that it must consider any subject referred to it by the Minister of Justice. At present, it has 6 part-time members (including a non-lawyer, Ms. Carol Ann Benson), a part-time Secretary and a full-time executive director. Its budget is $100,000 (£48,500 sterling), which is very low by any standards. It has produced one report and two working papers.\(^{140}\) It used Australian-style public hearings in its work on Limitation of Actions and changed some of its views as a result.\(^ {140a}\) The Report has not yet been implemented.

(7) Northwest Territories

The Northwest Territories Committee on Law Reform is a non-statutory body established in 1986. By March 1988, it had only produced one document, a Working Paper on the topic of aborigines on juries in the province.\(^ {141}\)

(8) Nova Scotia

The Nova Scotia Law Reform Advisory Commission was established in 1969.\(^ {142}\) The LRAC could exercise its powers only with the Attorney General's approval. From the beginning, Nova Scotia's attitude to it was reserved and suspicious. Its offices were on the same floor as the Legislative Counsel. Commission reports were not published unless the Attorney General decided to

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\(^{140a}\) See WP1 Supp.


publish them. It has been one of the few law reform agencies to have a woman as Chair (Mrs. Lilias M. Toward). The LRAC's reports were largely unimplemented, and it has had no members since 1981, although it continues to exist in law.

(9) Ontario

The Ontario LRC was established in 1964, a fact which led the current Chairman to suggest that its establishment sparked the zeal for law reform in the Commonwealth in the 1960's. However, Hurlburt, even though he is a Canadian, points out that this is not true:

It was the inspiration of English lawyers which led to the establishment of the law reform commissions in the United Kingdom, Australia and Canada .... The Ontario LRC was established a year earlier than [the U.K. Law Commissions], but one of its principal inspirations was the law reform committee which already existed in Ontario and which was in turn based on [the] model of the English law reform committees.

Its statute is remarkably short (less than 200 words). It can conduct inquiries of its own initiative, but must conduct inquiries on any subject referred to it by the Attorney General. To an unusual degree, it has its research work done by outside teams of academic lawyers. Many of its reports are massive tomes. It has tackled the administration of Ontario courts (other LRC's have done little in the field of procedure and less in the field of administration), Sunday observance legislation and Human Artificial Reproduction.

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143 Currently, it appears that only three agencies have a woman as Chair, i.e. federal Australia, New South Wales and Washington (Law Revision Commission).


145 See Appendix 5 below, Ontario, covering letter.

146 Hurlburt, supra n.4, p.255, text and footnote 1.

147 Reports 43, 45 and 49.


The LRC has a full-time Chairman, 4 part-time members, a full-time Counsel, 5 full-time staff lawyers and 9 administrative staff. Its budget of $1,200,000 (£580,000 sterling) ranks 6th on the table of budgets. It does not publish working papers since its research teams cover much of the ground which other law reform agencies tend to cover by circulating discussion documents. It had published 65 Reform Reports by February 1988. Allowing two years for implementation, 49 of the 64 reports issued by the end of March 1985 had been implemented by the end of March 1987, 38 of them in full and 11 in part. This gives an implementation rate of 76.6% (59.4% in full, 17.2% in part).

(10) Prince Edward Island

The Prince Edward Island Law Reform Commission was established in 1970. However, it did not commence work until 1976, and was hampered by a lack of resources until its demise in 1983. Hurlburt believes that the LRC was established merely due to a desire to conform to fashion and there was no interest in its work. Only three of its recommendations had reached the statute book by the end of 1982.

(11) Quebec

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150 Information from Twenty-Second Annual Report 1986-87 (Report 87, 1987). It is often difficult to decide from the Annual Report whether a report has been implemented in whole or in part. In particular, no explanation is given as to why some entries in the column 'Original Legislation Concerning Commission Proposals' are phrased as "See" a certain statute, whilst others simply list a statute. The "See" entries have been interpreted as implementation in full, unless the words "partial implementation" appear.


152 In reply to the survey, a letter was received from Nancy K. Orr, Secretary-Treasurer of the Law Society of P.E.I., which stated that no steps had been taken to have the Commission re-established since 1983.

153 The letter, dated 7 December 1987, states that a completed questionnaire is enclosed, but no completed questionnaire was received.
In reply to the survey, a letter was received from Marie José Longtin, Director of the Direction générale des affaires législatives, saying that in Quebec there is no agency responsible for recommending legislative reforms to the Government. However, she stated that the Direction général des affaires législatives is responsible for developing legislative orientations in private law and in certain areas of public law (administrative and penal). The Office for the Revision of the Civil Code was established in 1955 and ceased all activities at the end of 1977, when the jurist tabled his report. In 1980, an act was adopted to establish a new Civil Code (1980, SQ, c.39) and to date, reforms in family law (1980, SQ, c.39) and in law of persons, successions and property (1987, SQ, c.18) have been adopted.

(12) Saskatchewan

The Law Reform Act 1971 (SS 1971, c.21) created the Saskatchewan LRC. The Commission must act either on the Attorney General’s request or with his/her approval. It has usually had three members. The Chairman has always been a professor in the College of Law of the University of Saskatchewan. The first two Chairmen served full-time. In 1986, the Chairman was serving part-time. The other two members have always served part-time. The Commission has always had a full-time legal staff of a Research Director and one or two lawyers. Its funding is increased by income from the Law Foundation of Saskatchewan. By the end of 1984, it had issued 16 Reform Reports. It has recently produced a Report on Proposals for a Human Artificial Insemination Act. Its implementation rate is not good.


154a See further Law Reform (LRC of Canada Newsletter), No.8, July 1987, p.4.


155a See Law Reform (LRC of Canada Newsletter), No.8, July 1987, p.2.
(13) Yukon Territory

There has never been a law reform agency in the Yukon Territory.

AUSTRALIA

(1) Federal

The Australian Law Reform Commission was established by the Law Reform Commission Act 1973, but its first members were not appointed until February 1975. Under Section 6 of the Act, the Commission can only act in pursuance of references from the Attorney General ("whether at the suggestion of the Commission or otherwise"). The Attorney General can also give directions as to the order in which the LRC is to deal with references. Under Section 7, the Commission is under a duty to ensure that laws and law reform proposals

(a) ... do not trespass unduly on personal rights and liberties and do not unduly make the rights and liberties of citizens dependent upon administrative rather than judicial decisions; and
(b) ... as far as practicable ... are consistent with the Articles of the International Covenant on Civil and Political Rights.

Membership of the Commission is open to non-lawyers (s.12(1)(f)), but there has only been one non-lawyer member -- Associate Professor G.J. Hawkins, a Criminologist.

The Commission's first Chairman was Justice Michael D. Kirby, Deputy President of the Australian Conciliation and Arbitration Commission. The Commission had modest beginnings, in two disused robing rooms tucked away behind the Industrial Court in Sydney. However, on 16 May 1975 it was plunged into hectic activity by two references which included the unusual instruction that the reports be delivered within three months. The LRC somehow met the deadline (with a short extension for the second report) and was immediately involved in controversy as regards the latter report on Criminal Investigation. In fact, many of its reports have been con-

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troversial, and Mr. Justice Kirby once expressed the view that it is precisely in areas of controversy that a law reform commission can be of the greatest value. Justice Kirby's personality was an important factor in the development of the LRC's standing in Australian life. He remained President for almost a decade (until September 1984). He was not only a workaholic but also particularly skilful in dealing with the media and in delivering public speeches. Mr. Justice Kirby became a "media star" and his name became a household word in Australia. Kirby's efforts at media publicity were extraordinarily successful:

It seems likely that his efforts in the field have made the Australian LRC more successful than it would otherwise have been; indeed, were it not for these efforts it might have been entirely overlooked. He realised that the media have inherent dangers (sensationalisation, personalisation and trivialisation of information), but felt that "a serious attempt to involve society in the process of law improvement must involve a utilization of the modern mass media of communication". This was what Prime Minister Fraser termed "participatory law reform".

Australia, 1982), pp.81-83.

159 Statement to the 1984 meeting of the law reform agencies of Canada, August 1984; cited in Hurlburt, supra n.4, p.453.

160 Supra n.157, p.131.

161 He delivered 38 speeches in 1978 (Ross, supra n. 158, p.76). Hurlburt states that he delivered 80 to 100 speeches each year (supra n.4, p.113).

162 Ross, supra n.158, p.55.

163 Hurlburt, supra n.4, p.110.

164 Ibid., p.114.


Kirby was also responsible for the widespread use of public hearings by the Australian LRC. The LRC systematically uses public hearings as a matter of course, and no other law reform agency has used them on as wide a scale. The hearings are held in capital cities and in some provincial centres. Kirby took the idea from Professor Geoffrey Sawer,\(^{167}\) who in turn cited the precedent of legislative committees in the United States. Kirby has said that time is only "occasionally" lost by irrelevant submissions.\(^{168}\) On the whole, he thought that the hearings were successful in bringing forward the lobby groups, identifying defects in the law through personal case histories and attracting media attention. He thought that they were also desirable in point of principle, allowing ordinary citizens to have their say.

One particular project of the Australian LRC deserves special mention as it was its largest and longest enquiry ever conducted. The reference was on Aboriginal customary laws, and it came five years after the establishment of the 'Aboriginal Embassy'\(^{169}\) and nine months after the celebrated case of Sydney Williams in the Supreme Court of South Australia (1976).\(^{170}\) On 9th February 1977, the reference from the Attorney General instructed the LRC to consider whether existing courts or Aboriginal communities should have power to apply customary laws and punishments, bearing in mind that no person should be subject to any cruel or inhumane treatment, conduct or punishment.\(^{171}\) The final report was tabled nine years later,\(^{172}\) after 15 Research


\(^{168}\) Kirby, supra n.165, p.59 (Reform the Law), p.210 (Legal Change).

\(^{169}\) The 'Aboriginal Embassy' was a small number of shabby tents first erected on the lawns of Parliament House in Canberra on 14 July 1972. See Ross, supra n.158, p.37.

\(^{170}\) Kirby, supra n.165, p.123. Sydney Williams was an Aboriginal convicted of manslaughter. He had killed his wife after they had been drinking together. He claimed that his wife mentioned secrets which under tribal law women were not supposed to know. By Aboriginal customary law, the wife's outburst warranted death. Mr. Justice Wells imposed a suspended sentence on condition that Williams submit to the tribal elders. The elders punished Williams in accordance with tribal custom, by spearing him in the leg with a spear without barbs.

\(^{171}\) For the terms of the reference, see Annual Report 1986 (ALRC 34), p.84.

\(^{172}\) The Recognition of Aboriginal Customary Laws (ALRC 31, 1986), 2 volumes. Tabled on 12
Papers, 4 Discussion Papers and extensive discussions with Aboriginal people and Aboriginal organisations. Hundreds of Aboriginals converged on the public hearings in remote outback centres, and special audio tapes explaining the LRC’s proposals were produced in Aboriginal languages. In the area of criminal law, the Report proposed, inter alia, that there should be a partial customary law defence similar to diminished responsibility, which would reduce a charge of murder to manslaughter where an accused acted in the well-founded belief that the customary laws of his/her Aboriginal community required the act which constituted the offence, that the Aboriginal customary laws be taken into account in the exercise of sentencing discretion, and that there should be special rules to protect Aboriginal suspects under police interrogation. Traditional Aboriginal marriages should be recognised for nine specified purposes but not for five others, there should be legislative endorsement of an Aboriginal child placement scheme and Aboriginal people should have access to non-Aboriginal land for the purposes of traditional hunting.

Two years later, and in the midst of the Australian Bicentenary, there has been no action to implement these proposals. Mr. Justice Kirby rightly realises that their implementation would merely scratch the surface in removing the major sources of injustice, but has urged their implementation as a step towards rectifying the damage done by the colonial denial of aboriginal Australia.173 The Australian LRC currently has a budget of $2.8 million (£1.3 million sterling), which ranks third on the table of budgets (Appendix 1). From 5th January 1988, its President has been Justice Elizabeth Evatt, Chief Judge of the Family Court, who worked at the English Law Commission in 1968 and was an editor of the International and Comparative Law Quarterly.174

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There are two other full-time Commissioners, 12 part-time Commissioners, 15 legal staff and 15 administrative and secretarial staff. The Commission's offices are in Sydney, and the distance from Canberra causes problems.\textsuperscript{175} By February 1988, it had issued 86 Research Papers and Working Papers, 43 Discussion Papers etc., 17 Annual Reports and 28 Reformation Reports. Allowing two years for implementation, and disregarding its interim report on Evidence (ALRC 26), its implementation rate is 70.6\% (47.1\% in full, 23.5\% in part).\textsuperscript{176}

In 1979, the Senate Standing Committee on Constitutional and Legal Affairs recommended various improvements in the machinery for processing LRC proposals.\textsuperscript{177} It recommended that there should be a system to guarantee regular debate of Private Members' Bills (along the lines of the Westminster ballot procedure) and that all LRC reports should be referred to a parliamentary committee. The Government's response was hostile and unco-operative.\textsuperscript{178} The Senate itself therefore referred to the Standing Committee the continuing oversight of the implementation of the LRC's reports.\textsuperscript{179} Kirby was optimistic about the chances for an improvement,\textsuperscript{180} but the Committee's powers did not prove sufficient to enable it to have much effect upon the process of implementation.\textsuperscript{181}

\textsuperscript{174} [1988] Reform 45. From 1985 to 1987, the President was the Hon. Xavier Connor.

\textsuperscript{175} Ross, supra n.158, p.80. The LRC had a small Canberra office at one stage, but it was closed on 5 December 1986 ([1987] Reform 99).

\textsuperscript{176} Implementation up to end 1987 of reports issued up to end 1985. 17 Reports calling for legislation, 12 implemented (8 in full, 4 in part). \textit{Annual Report 1987} (ALRC 41), Appendix D.


\textsuperscript{180} "This is an important new development. It represents an institutional advance on anything found elsewhere in non-parliamentary law reform bodies in the Commonwealth of Nations." (Supra n.165, p.16.)

\textsuperscript{181} Hurlburt, supra n.4, p.119.
(2) Australian Capital Territory

The Law Reform Commission for the Australian Capital Territory was established by the Law Reform Ordinance 1971. It remained in existence until the establishment of the Australian LRC in 1975. It had three part-time members and issued eight reports. The report on guardianship and custody of infants was partially implemented and the report on the civil procedure of the court of Petty Sessions was implemented in full. The implementation of the latter report was the most noticeable result of its work.

The Australian LRC now has responsibility for law reform proposals for the A.C.T. This responsibility has allowed the Australian LRC to consider a number of subjects which would otherwise be wholly or partially beyond the legislative jurisdiction of the federal Parliament to implement, e.g. the references on alcohol, drugs and driving, on human tissue transplants and on defamation and privacy. In 1984, the Australian LRC received a New South Wales-style Community Law Reform reference for the laws of the A.C.T. (This type of reference is explained below.) The LRC placed advertisements in the newspapers, on television and on milk cartons to solicit suggestions for reform. The A.C.T. Community Law Reform Programme operates with limited resources and has so far produced four Consultative Papers and two Reports. None of the proposals has been implemented. However, certain of the other Australian LRC reports have been implemented in the A.C.T.

182 See Hurlburt, supra n.4, pp.120-123.
183 Ibid., p.109.
184 See Annual Report 1986 (ALRC 34), pp.33-35. Since then, the fourth consultative paper and the second report have been produced.
185 See Annual Report 1987 (ALRC 41), pp.104-107 -- ACT legislation was enacted on ALRC reports 4, 7, 18 and 30; ACT legislation is mentioned in connection with ALRC 15.
(3) New South Wales

The N.S.W. Law Reform Commission was established soon after the 1965 U.K. Act. It was established first by administrative act on 1st January 1966 and then by the Law Reform Commission Act 1967. The statute is largely similar to the U.K. Act. The Commission may only act in accordance with references made to it by the Minister. The Act originally required the Chairman to be a judge and all the members to be lawyers, but was amended in 1981 to allow Professor Ronald Sackville become Chairman and to allow for the appointment of a sociologist and an economist.

The Commission has dealt with three unusual areas. Firstly, it devoted most of its resources for five years to a reference on the legal profession. This has been the single largest project of any LRC on an institution of the legal system. The reference precipitated the Commission into an area of passion and controversy and Hurlburt believes in retrospect that the reference should have been given to a separate agency established especially for the purpose. In 1987, many of the LRC's recommendations were enacted, except for the proposal that legal practitioners be admitted to practice under a common title.

Secondly, the Commission began its "Community Law Reform Program" in 1982. The idea is that the LRC places advertisements requesting the public and the legal professions to submit suggestions for relatively minor alterations in the law. The LRC evaluates the suggestions, does

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187 Hurlburt, supra n.4, p.478.

188 Ibid., p.131 and p.478.

189 Annual Report 1987, pp.46-48. At the time of preparation of that Report (July 1987), the Legal Profession Bill 1987 was awaiting Royal Assent. The new legislation was expected to come into operation on 1 January 1988.
preliminary work upon them and, in appropriate cases, asks the Attorney General to make a reference to enable it to prepare a report and recommendations. The programme has been extremely successful in opening "a direct institutional path between the legal profession and members of the community and the legislative process".\textsuperscript{190} Since 1982, 350 proposals for reform have been received. Thirteen reports have been completed, on subjects from service of civil process on Sunday (LRC 37) to conscientious objection to jury service (LRC 42). The points are not always small; the Commission is completing references under the programme on employees' liability to indemnify employers (Ref.54) and contributory negligence (Ref.57).

Thirdly, the Commission is dealing with the controversial area of artificial conception. Reference 50 (received on 5th October 1983) requires it to report on human artificial insemination, in vitro fertilisation, "surrogate mothering", etc. The Commissioner in charge of the reference, Mr. Russell Scott is a member of the Medical Research Ethics Committee. A gynaecologist, Dr. Susan Fleming, is also a member of the Commission. Public hearings on artificial insemination (16 April, 1985) and in vitro fertilisation (15 April 1988, [1988] Reform 84) have been held. There have been four documents issued under the reference.\textsuperscript{191}

The Commission has recently received an unusual reference in the following terms:

\begin{quote}
THE WORK OF LAW REFORM AGENCIES THROUGHOUT AUSTRALIA:
(a) to inquire into and report on the publication of Reports and Discussion Papers by other agencies and as to whether such Reports or Papers are of sufficient importance and relevance to warrant their formal examination by the Commission either alone or in conjunction with another Commission;
(b) the suitability for New South Wales of reforms proposed in those Reports specified by the Attorney General; and
(c) any related matter.\textsuperscript{191a}
\end{quote}

\textsuperscript{190} Ronald Sackville, 'The Role of Law Reform Agencies in Australia' (1985) 59 Austl. LJ 151 at 162.

\textsuperscript{191} Human Artificial Insemination (DP11, Nov.84), Human A.I. (Report 49, Jul.86), Surrogate Motherhood: Australian Public Opinion (Research Report 2, May 1987), In Vitro Fertilisation (DP 15, Jul.87). A discussion paper on surrogacy was completed in April 1988 ([1988] Reform 113).

\textsuperscript{191a} [1988] Reform 54.
This reference resembles one recently given to the Victorian LRC (see below).

Since 18 May 1987, the Commission's Chairman has been Ms. Helen Gamble. It currently has two other full-time members, 13 part-time members, nine full-time professionals (Research Director, Secretary, 6 legal staff, Librarian), five temporary or seconded legal staff and nine administrative and secretarial staff. Its budget is $1.1 million (£510,000), which ranks seventh on the table of budgets (Appendix 1). It has produced 22 Working Papers, 36 Discussion Papers, etc. and 53 Reform Reports. Allowing two years for implementation, its implementation rate is 81%.

(4) Northern Territory

The Northern Territory established its Law Reform Committee in 1976, after the territory had attained self-government. The Committee is governed by a Constitution which was updated in 1987. It cannot submit proposals for reform unless it has been given a reference from the Attorney General. All of its members are part-time. It has one legal staff member, occupied 50% on its work, and one administrative/secretarial person, occupied 30% on its work. Its budget for 1986-87 was $74,000 (£34,300 sterling). It has produced 12 reports. Allowing two years for implementation, its implementation rate is 60% in full. The Committee's reply to Question 12 of the survey ("With whom does the agency normally consult in the preparation of its reports? (interest groups, etc.?)") was the most negative received. It reads:

192 Information from Annual Report 1987, Appendix D. Implementation up to June 1987 of reports issued up to June 1985. 44 reports, 42 calling for legislation (disregarding No.15 - no action recommended; No.41 - interim report), 34 implemented in full or in part (vast majority in full). This does not tally with the answer to Question 18 (d) of the survey. 40 reports are classified as implemented there. 5 of the 6 difference are as a result of the Legal Profession Act (4 reports) plus the enactment of Report 46. The one remaining may be an Act passed between July 1987 and May 1988. It may also be that the count includes Report 41, the interim report disregarded above.

193 See Hurlburt, supra n.4, pp.104-105.

Not done in the normal course of events. However has been done on projects concerning (a) De Facto Relationships -- all members of the public and specialist organisations invited to comment on Discussion Paper ..., (b) Administrative Appeals -- public service.

But the second sentence shows that in fact the Committee has consulted widely, and it has consulted more than some agencies which gave positively-phrased answers.\textsuperscript{195}

\section{5\,(5)} \textit{Queensland}

The Queensland Law Reform Commission was established by the Law Reform Commission Act, 1968.\textsuperscript{196} The LRC may work on programmes approved by the Minister of Justice, but may also work on its own initiative. Under s.10(4) (formerly, s.10(3)), only those recommendations of the Commission which are approved by the Governor in Council must be laid before Parliament. As a result, some reports have never been tabled, and some have been tabled long after the LRC has delivered them to the Minister. The LRC has one full-time member, some part-time members, a Secretary and two Senior Legal Officers. Its budget for 1986-87 was $250,000 (£115,800 sterling). It had issued 32 Reform Reports by the end of 1982. It had issued 30 Working Papers by April 1987.\textsuperscript{197} No reply to the survey was received from Queensland, and so no up-to-date figures are available. By the end of 1982, 19 of the 30 reports delivered by the end of 1980 had been implemented. The Commission has issued several massive reports on large areas of private law, e.g. real property, trusts, evidence, succession. Its enacted reports have had a substantial effect on Queensland’s private law.

\textsuperscript{195} For example, the Washington Statute Law Committee said that it merely "consults amongst its own legal staff and reports to the Statute Law Committee; the South Dakota Code Commission merely consults "the State Bar Association".


\textsuperscript{197} [1987] Reform 97.
(6) South Australia

The Law Reform Committee of South Australia was established by proclamation in 1968. It must accept references from the Attorney General. In 1986, Hurlburt said that the Committee could act of its own motion as well. However, in his reply to Question 10 of the survey, the Chairman stated that the Committee does not have a power of initiative. Reports are not published unless the Attorney General consents. The Hon. Dr. Howard Zelling has been its Chairman from its inception to the present day. He serves part-time, as do the eight other members. By the end of 1982, the Committee had issued 68 Reform Reports. By February 1988, this had risen to 108. The reports are very short, but can deal with large subjects, e.g. privacy, illegitimacy, libel and slander. The Committee does not publish annual reports, but the Hon. Dr. Zelling stated in his reply to the survey that about 40% of the reports have been implemented in full and about 10% have been implemented in part. He also stated in his covering letter that as a cost-cutting measure Cabinet had put the Committee on hold until the next budget review in August 1988 and the Committee was merely completing partly done references until then.

(7) Tasmania

The Tasmanian Law Reform Commission was established by the Law Reform Commission Act 1974. The Commission could only act on references from the Attorney General. When it


199 Hurlburt, supra n.4, p.144.

200 This information has not been included in Appendix 2 as it does not allow two years for implementation, and as it is too imprecise.


202 In reply to Question 10 of the survey, the Research Director said that the Commission had a power of initiative. Presumably he meant that the Commission may suggest references to the Attorney General (s.7(1)(b)) and may place before him/her suggestions and suggested pro-
reported back to him/her, he/she was not obliged to publish the reports. (In practice, all reports have been published.) The LRC was obliged, on request, to advise the Attorney General on a confidential basis on any legal matter which involved relations between Tasmania and the federal or other State governments. The Commission had a Chairman and four other members. The Chairman served part-time, the Research Director member served full-time and the three other part-time members represented the Bar Association, the Law Society and the University of Tasmania Law Faculty respectively. The 1974 Act originally required the LRC to have two non-lawyer members. Two teachers held these positions for a period. In 1982, the incumbents were the Administrator of the Family Planning Association and a member who held supervisory positions in child care services. All eight of the "lay representatives" who were appointed over the years were women.203 The subject of tranquilizer guns (Report 30, 1982) was undertaken upon the initiative of one of these non-lawyer representatives.204 They played an important role at the National Conference on Rape held in Hobart in May 1980 and made an important contribution to the work of the LRC generally.205 However, Stan Ross says that at the sixth Australian Law Reform Agencies Conference held in Hobart in 1981, the Chairman of the Tasmanian LRC announced that the two women members would be serving tea and coffee during the breaks!206 The provision for non-lawyer representatives was deleted in 1984.

The Commission's budget for 1986-87 was $93,000 (£43,000 sterling). It was assisted by grants from the Law Foundation of Tasmania. By the end of 1987, it had issued 13 Annual Reports, 17 Working Papers and 53 Reports. Allowing two years for implementation, its imple-

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204 Hurlburt, supra n.4, p.168.
205 Ross, supra n.158, p.168.
206 Ibid., loc. cit.
III-Law Reform Agencies: Group One

mentation rate is 51.1% (42.2% in full, 8.9% in part).\textsuperscript{207}

In February 1988, the Law Reform Commission of Tasmania was due to be abolished and replaced by a single Law Reform Commissioner.\textsuperscript{208} In its annual report, the Commission defended itself as "probably the cheapest law reform agency in the world".\textsuperscript{209} The Chairman, Mr. J.B. Piggott, objected to the abolition of the Commission on the basis that a collegiate Commission was better able to serve the needs of law reform in the State and that the government would only save $6,000 a year by its action.\textsuperscript{210} He objected to the appointment of a judge as a single Law Reform Commissioner as his/her investigations would cause embarrassment in a small community like Tasmania, his/her appointment would reduce the efficiency of the Courts by depriving them of adequate numbers of judges, and he/she could not go in person to government departments etc. in order to obtain submissions.

(8) Victoria

The Chief Justice's Law Reform Committee of Victoria was established in 1944.\textsuperscript{211} By November 1982, it had issued 214 reports (40% implemented). It has a very high proportion of judicial members, and its reports have largely been in areas of technical law.

\textsuperscript{207} Information from \textit{Thirteenth Annual Report 1987}, typescript, Appendix A. Implementation up to end December 1987 of reports issued up to end December 1985. 45 reports, 23 implemented (19 in full, 4 in part). The figure of 22 non-implemented includes reports 12 ("No action proposed") and 29 ("No action contemplated"), despite the ambiguous wording of these entries. The reason is that the wording is similar to the clearer wording of the entry for Report 32 ("No action is to be taken on this report").

\textsuperscript{208} See Appendix 5 below, Tasmania, covering letter; [1988] Reform 3; \textit{Thirteenth Annual Report 1987}.

\textsuperscript{209} \textit{Thirteenth Annual Report 1987}, transcript, p.12. The statement is not completely true. Appendix 1 below places five agencies as being cheaper than the Tasmanian LRC (Sri Lanka, Michigan, Northern Territory, South Dakota, Gambia).

\textsuperscript{210} \textit{Thirteenth Annual Report 1987}, transcript, pp.39-44.

\textsuperscript{211} Hurlburt, supra n.4, p.103; F.C. O'Brien, 'The Victorian Chief Justice's Law Reform Committee' (1972) 8 Melb.ULR 440.
From 1973 to 1984, there was a Law Reform Commissioner in Victoria. Twelve reports by successive Commissioners had been issued by the end of 1982. Six of the ten reports issued by 1980 had been implemented by that time. In 1984, the office of Law Reform Commissioner was replaced by a Law Reform Commission by the Law Reform Commission Act 1984. The Commission can work on any matter raising "relatively minor legal issues" on its own initiative, provided the examination of the matter will not require a significant deployment of resources. Otherwise, it must work on references from the Attorney General. Much of the Commission's funding comes from the Victorian Law Foundation. In 1986-87, its budget was $1,600,000 (£740,800 sterling), the highest of any state agency in Australia, and $500,000 more than the nearest Australian state agency (the New South Wales LRC).

The Commission has received a reference in the controversial area of medicine, science and the law, studying such topics as gene modification and informed consent. It has also studied the area of "plain English" in drafting of legislation, legal agreements and government forms. Finally, it has received a standing reference from the Attorney General to improve co-ordination between its work and the work of other Australian agencies. There are two aspects to the reference. Firstly, the Attorney General can specify a particular report of another law reform agency which the Victorian LRC must examine and report upon its possible implementation in Victoria. Secondly, the Victorian LRC can enter 'joint-ventures' with other agencies. For example, it received a companion reference on product liability when the Australian LRC received such a reference on 11 September 1987. It has also undertaken a "joint venture" with the New South Wales LRC on informed consent to medical procedures. A joint discussion paper on the topic was issued

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212 Hurlburt, supra n.4, pp.159-161.
213 S Vict 1984 No.10131; Hurlburt, supra n.4, pp.162-164.
214a The text of the reference is at [1987] Reform 201. It resembles the recent reference given to the New South Wales LRC (see above).
in November 1987.\textsuperscript{215}

\textbf{(9) Western Australia}

A Law Reform Committee was established in Western Australia in 1968. It was converted to a Law Reform Commission by the Law Reform Commission Act 1972.\textsuperscript{216} Originally, it had three part-time members. In 1979, two full-time members were added. It is confined to acting on references from the Attorney General. By the middle of 1982, it had issued 62 final law reform reports. Action had ensued on 29 of the 57 reports which recommended legislative action. Its budget for 1986-87 was $700,000 (£324,000 sterling). It has worked in conjunction with the Australian LRC on the topics of privacy and defamation.

\textbf{NEW ZEALAND}

Until 1985, there was no full-time law reform commission in New Zealand. Instead, there was a system of part-time committees, which were quite effective.\textsuperscript{217} In 1985, a full-time Commission was established.\textsuperscript{218} It is known as the "Law Commission" in an attempt to emphasise "the wider objective of keeping under systematic review the country's developing law considered as a whole".\textsuperscript{219}

There are two points of interest in the Act. Firstly, the Commission has an unfettered initiative if it wishes to consider any topic (s.6). It must, however, report on a topic referred to it by the Minister of Justice and give topics priority if he/she so requests (s.7). The Act contains the unusual requirement that the Commission must submit programmes to the Minister "at least once

\textsuperscript{215} \textit{Informed Consent to Medical Treatment} (VLRC DP 7, 1987).

\textsuperscript{216} S WA 1972, No.59. See Hurlburt, supra n.4, pp.137-144.

\textsuperscript{217} See Farrar, supra n.3, pp.80-89.


\textsuperscript{219} Woodhouse, ibid., p.108.
a year" (s.7(1)). Secondly, Section 5(2)(a) states:

In making its recommendations, the Commission -- (a) shall take into account the Maori (the Maori dimension) and shall also give consideration to the multicultural character of New Zealand society.

This was described as a "timely and important directive" by the Minister of Justice at the time. However, John H. Farrar, who now lectures in New Zealand, is far more sceptical. He says that Maoris constitute less than a tenth of the population but more than half of the prison inmates. Their life expectancy is shorter than that of the pakeha. He is doubtful about the prospects for improvement, given the proposal to make the Treaty of Waitangi part of the supreme law of the land, and given what he calls "market oriented policies ... which even Mrs. Thatcher might envy." He goes on to criticise the new Law Commission in more general terms:

The full-time Law Commission has been set up with wide-ranging responsibilities but a modest budget and no economic input. At the end of the day, however, a full-time Law Commission with the odd sociologist and economist begs the question. It is, after all, simply a committee with a grandiose name. Its creation does nothing per se to solve the problems generated by social and economic change. So far it has been slow off the mark. It will be interesting to see how it copes.

Farrar may believe that the Law Commission has a "modest budget", but it ranks fourth in Appendix 1 and NZ$2,800,000 (£1,120,000 sterling) is a large amount for a country with New Zealand's population. Furthermore, all five Commissioners are full-time. The President is Sir Owen Woodhouse, author of the famous "Woodhouse Report". The Principal Research Officer (Prue Oxley) is an anthropologist/social researcher. There are five more full-time legal staff listed in reply to Question 5 of the survey, three in reply to Question 6, and eleven administrative and secretarial staff. On 21 July 1987, it had twelve projects on its work programme, six of them.

220 Palmer, supra n.218, p.106.


222 Ibid., pp.153-4.

referred to it by the Minister and six chosen on its own initiative.\textsuperscript{224} The six topics referred to it by the Minister cover wide areas -- The Courts, Maori Fisheries, Legislation and its Interpretation, Companies, The Limitation Act 1950 and Accident Compensation. By April 1988, it had published five preliminary papers and two Reform Reports. A Bill had been introduced to implement the first report, and it was at committee stage.

CHAPTER IV - LAW REFORM AGENCIES: GROUP TWO

This Chapter is subdivided into three parts. In the first part, the law reform agencies of Group Two (United States, Africa, Other Jurisdictions) are discussed. Secondly, there is a comparison with European Ministries of Justice. In the third part, some observations are made on particular topics which arise from the discussion of law reform agencies.

UNITED STATES

(1) American Law Institute

The American Law Institute was established in 1923 by members of the Association of American Law Schools, and its constitution declares its objects are "to promote the clarification and simplification of the law and its better adaptation to social needs, and to encourage and carry on scholarly and scientific legal work." It began to produce "restatements" of areas of the law, which could be viewed as authoritative sources, making it unnecessary for each individual researcher to induce a rule from the increasingly unwieldy mass of case material.

The restatements are more precise than civil law codes. The drafting committees come up with an agreed formulation of the principles and rules applicable to a particular area. The rules are mainly deduced from case-law, but can also be innovative and strike out in new directions. Examples of such reforming provisions are Sections 90 and 45 of the Restatement of Contracts. Once a Restatement is eventually agreed, it is not adopted as a statute by any legislature, but can often be highly authoritative in court and is a useful research tool.

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2 Gray, ibid., p.120.
The Restatements have been criticised on various grounds. Farrar complains of their "excessive caution and their predominantly legalistic outlook". Vanderbilt says that the choice of subjects for the Restatements "reflects the preoccupation of the profession with private substantive law". Professor Lawrence Friedman is the most critical of all: He says that the drafters of the Restatements took fields of living law, scalded their flesh, drained off their blood, and reduced them to bones .... The Restatements were almost virgin of any notion that rules had social or economic consequences.... [The drafters] expended their enormous talents on an enterprise which, today, seems singularly fruitless. Incredibly, the work of restating (and rerestating) is still going on. 

Whitmore Gray believes that Friedman is "too severe", citing the example of the reforms brought about by the Restatement of Contracts as significant contributions to American law.

(2) National Conference of Commissioners on Uniform State Laws

This Conference was formed in 1892 as a result of an initiative by the Alabama Bar Association and the American Bar Association. Its membership consists of several appointees from each state, and representatives from state legislative drafting bureaus are associate members. The major portion of its financial support comes from state appropriations. Commissioners receive no salary. The Conference meets annually for a convention of six days at which it considers legislation drafted by subcommittees. Legislation falls into two categories -- Uniform and Model Acts.

3 Farrar, supra n.1, p.94.
7 Ibid., pp.120-121.
Uniform Acts are promulgated in areas of law where the Conference feels that uniformity among the jurisdictions is desirable. Model Acts are drafted for areas of law where although there is no pressing need for uniformity, there seems to be a demand for legislation in a substantial number of states. Uniform acts are recommended for all jurisdictions to adopt. Model Acts are prepared merely for the convenience of such legislative bodies as may be interested.

The Conference has drafted over two hundred laws on a wide range of subjects. Many of its laws are projects of law reform rather than simple unification or harmonization. Its most significant undertaking has been the Uniform Commercial Code (UCC), a joint project with the American Law Institute. The Code was first drafted by Professor Karl Llewellyn, who left his mark on its structure, scope and methods. It has been adopted in all states, except only in part in Louisiana. Thus essentially the same rules apply today in all of the United States to sale, transactions involving negotiable instruments, cheques, warehouse receipts, bills of lading, certificates of deposit, etc.

Lawrence Friedman describes the UCC as "curiously old-fashioned", attacking strictly "legal" problems, with no real explorations of business needs or the interests of labour and the consumer. However, he concedes that later Model Acts (eg the Model Penal Code) were more sophisticated, the drafters being aware of the wider implications of their work. Gray believes that present efforts by the Commissioners are achieving a great deal of significant reform. For example, the vigorous opposition which the Model Probate Code encountered indicates that the

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9 See the detailed chart of laws and their enactment given in National Conference of Commissioners on Uniform State Laws, 1985-86 Reference Book (1985); reproduced in Gray, supra n.1, pp.160-165.


11 Friedman, supra n.5, pp.581-582.

12 Ibid., p.583.
Commissioners have been willing to undertake reform in a sensitive area.\(^{13}\)

**(3) State Agencies**

In its comments for the survey, the Arkansas Code Revision Commission began by saying "Law reform in the United States is different from law reform in other countries ..." The ten United States replies to the survey illustrate this graphically. One difficulty is that the state agencies can differ so much from each other in powers, structure, size and effectiveness. Another is that it is uncertain which (if any) state bodies can be classed as law reform agencies. All members of the state agencies of the USA are part-time. Unlike agencies outside the USA, they tend to include elected officials from the legislature as part of their membership. Hurlburt explains that while this greatly assists the implementation of their proposals, such a membership structure is only suitable for agencies which deal with technical and non-controversial law; broader social questions are likely to prove divisive if elected officials are present.\(^{14}\) The state agencies are mainly concerned with technical law. Most of them limit their work to codification, compilation, recodification and recompilation of the statute law of their state.

Little has been written on the state agencies in the United States. There is no comparative study available. One interesting item discovered through correspondence with the Connecticut Law Revision Commission is an unpublished summary of Law Revision Commissions by Susan E. Goranson (hereinafter referred to as "the Goranson Report").\(^{15}\) Goranson and others examined state statutes and spoke with the National Conference of Commissioners on Uniform State Laws, etc., to determine which states have law revision commissions similar to Connecticut's.

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\(^{13}\) Gray, supra n.1, p.157.


\(^{15}\) The six-page report is dated July 30, 1987. The heading reads: Connecticut General Assembly: Joint Committee of Legislative Research; reference number 87-R-0550; To: Honourable John Larson; From: Office of Legislative Research -- Susan E. Goranson, Research Analyst; Re: Law Revision Commissions.
She came up with a total of 16 bodies. Goranson's criteria for inclusion of agencies in her list are unclear. There are reasons to believe that her list is not entirely satisfactory, including some agencies which should not have been included and excluding others which should have been included. However, her report serves as a useful structure for the examination of the state agencies. What is more, she had the advantage of examining the state statutes and talking to personnel from the agencies. Reservations as to her list will be expressed below in describing what is known of the agencies.

The Goranson Report conveniently groups fifteen of the agencies into four groups. Those four groups will now be examined in detail.

**Group A - New York and others**

For Group A, Goranson gives a brief description of the New York Law Revision Commission and adds that the agencies in California, New Jersey, Oregon and Washington are similar to New York's.

Even though the New York Law Revision Commission did not reply to the survey, information on its activities is not scarce as it is the oldest and best-known of the state agencies of the USA. It was established in 1934 as a result of Cardozo's call for a "Ministry of Justice... to watch the law in action, observe the manner of its functioning, and report the changes needed

16 Unfortunately, the statutes of the individual states of the U.S.A. are not available on LEXIS. The unavailability of these texts in Ireland has hampered investigation of the state agencies. For example, even basic facts such as the names of the agencies are uncertain. Goranson lists the statutes governing the agencies, but not their names. She provides a printed list of addresses of agencies responsible for statute and code revision, but it was not specifically prepared for her report and is of little assistance for many states, except as a means of making contact with the legislative agencies, hoping that mail will be conscientiously redirected.

when function is deranged."\(^{18}\) The Commission was created a few months after the establishment of the Law Revision Committee in England, but is not limited to topics referred to it. It can recommend any change to bring the law into harmony with modern conditions, but it deliberately stays away from matters of policy. It also confines itself to matters of substantive private law only. It prides itself on a high standard of independent research. For instance, it spent three years from 1954 to 1956, exclusively examining the Uniform Commercial Code and proposing modifications before it would be enacted in New York. Many of its modifications were later embodied in the 1957 Official Edition of the UCC.\(^{19}\) The LRC normally has about twenty to twenty-five projects being studied at one time, and submits about fifteen Bills a year. Members of the public are apparently entitled to attend public hearings on its proposals.\(^{20}\) Like all the state agencies, its implementation rate is high. Of the 327 Bills recommended between 1935 and 1962, 243 were enacted into law.\(^{21}\)

The statute governing the LRC\(^{22}\) establishes a Commission of five members appointed by the Governor and four ex officio members. The four ex officio members are the Chairmen of the Judiciary and Code Committees of the House and the Senate. At least two of the five appointed by the Governor must be members of New York law faculties and at least four of them must be attorneys admitted to practice in the New York courts. Thus, one non-lawyer may be appointed. However, by 1963, only one member had been appointed who had not been admitted to practice, and he was not a non-lawyer since he had a Columbia law degree.\(^{23}\) The Commission has always

\(^{18}\) Cardozo, 'A Ministry of Justice' (1921) 35 Harv. LR 113 at 114. Cardozo did not mean a Ministry of Justice of the continental European sort.

\(^{19}\) MacDonald (1963), supra n.17, p.452.

\(^{20}\) MacDonald (1965), supra n.17, pp.14-15; (1963), supra n.17, p.437.

\(^{21}\) MacDonald (1965), supra n.17, p.10.


\(^{23}\) MacDonald (1963), supra n.17, p.414, n.40. The member was Mr. Bruce Smith, member from
had its headquarters at Cornell Law School. Its members are paid $17,000 to $18,000 compensation for their part-time work. They are appointed for five-year terms, and there is a remarkable continuity of membership.\textsuperscript{24} In 1987, the Executive Director told Goranson that the LRC was staffed by five lawyers and three clerical staff. Two of the lawyers, the director and the associate attorney are full-time, while the other three lawyers are in a one or two year clerkship arrangement. There also is a position (vacant at the time) for a lawyer to do administrative and legislative liaison work. The Commission has several student interns who are not paid, but earn school credit. The budget of the LRC is not given. In 1963, it was $139,250.

The California Law Revision Commission is quite similar to the New York LRC. The Goranson Report points out that the major difference is that it must have its topics of study approved in advance by the legislature. Its statute\textsuperscript{25} establishes a Commission of ten members, seven appointed by the Governor with the advice and consent of the Senate, one Senate member, one Assembly member and the Legislative Counsel. Its budget is $525,000 (\£308,800 sterling), which ranks tenth in Appendix 1. By December 1987, it had produced 212 reports and 92\% of them had been implemented in whole or in substantial part. At that time it had a calendar of 24 topics, ranging from Family Law to Evidence to Probate. However, it is currently concentrating exclusively on Probate.\textsuperscript{26}

In New Jersey, the Commission on Statutes was created in 1939 and replaced by the Law Revision and Bill Drafting Commission in 1944. This had two further changes of name, first becoming the Law Revision and Legislative Services Commission, and then the Legislative Ser-

\textsuperscript{24} In 1963, the average length of service of the members appointed by the Governor was ten years -- MacDonald (1963), supra n.17, p.443; From 1934 to 1984, the Commission had only seven different chairpersons -- Gentile, supra n.17, pp.105-106.


vices Commission. In 1986, the law reform functions of the Legislative Services Commission were transferred to the New Jersey Law Revision Commission.\textsuperscript{27} The LRC has an unfettered initiative of projects. It was not funded or staffed until summer 1987 and its first report was due in February 1988. It has a part-time Chairman and eight part-time members. In December 1987, its budget was $400,000 (£235,000 sterling), but it was not yet fully staffed.

As regards Washington, a detailed reply to the survey was received from the Statute Law Committee, which is the body charged with technical changes for the sake of clarification and uniformity in publication. However, this is not a law reform agency by any definition, and the agency of interest is the Law Revision Commission established in 1982.\textsuperscript{28} The legislature has not appropriated funding for the LRC. As a result, only one proposal (recommending changes in the notary public statute) has been submitted since its creation. The Washington LRC exists primarily in name alone. As such, it hardly merits inclusion in the list of law reform agencies. However, for the sake of completeness, the address of the current Chairman is given in Appendix 3 below.\textsuperscript{29}

No reply to the survey was received from Oregon. In 1982, Zaphirou referred to the Oregon Law Improvement Committee as an institution similar to the New York LRC.\textsuperscript{30} A survey was therefore sent to the "Oregon Law Improvement Committee" at the State Capitol. The agency is governed by Section 173.315 of Oregon Revised Statutes Annotated.

\textsuperscript{27} New Jersey Stat. Ann. Section 1: 12A-1 et seq. In reply to Question 20 of the survey, the Executive Director of the LRC indicated that he was enclosing a copy of the statute. However, the statute was not in fact received.

\textsuperscript{28} Revised Code of Washington, Chapter 1.30

\textsuperscript{29} The address of the Statute Law Committee is also given, as it is a more permanent means of contacting future Chairmen of the LRC.

\textsuperscript{30} George A. Zaphirou, 'Use of Comparative Law by the Legislator' (1982) 30 AJCL (Supp.) 71 at 85.
Group B - Vermont and others

This group includes Vermont, Georgia, Idaho, Indiana, South Dakota and Virginia. The Goranson Report only provides information about the Vermont Statutory Revision Commission. The Commission is governed by Vermont Statutes Annotated Title 1, Chapter 1. It consists of five members -- the Chief Justice of the Supreme Court or designee, the administrative judge or designee, the court administrator, and two persons appointed by the Governor. The Commission publishes the Vermont Statutes, including technical revisions. It also recommends revision of redundant or obsolete statutes. The only staff of the Commission is the Deputy Clerk of the Supreme Court. It is submitted that this Commission has less powers than are necessary to deserve to be classified as a law reform agency on any reasonable construction. Its address is included in Appendix 3 as a source of reference only.

The Goranson Report states that the other agencies in this group generally have broader technical revision authority. Replies to the survey were only received from Georgia and South Dakota, but it would seem that their powers are still not broad enough to allow them to be classed as law reform agencies.

No direct reply was received from the Georgia Code Revision Commission. As with Washington, a detailed reply was received from the Legislative Services Committee but certain facts are given for the Code Revision Commission. The CRC is governed by Title 28, Chapter 9 of Georgia Code Annotated (1986). It was established in 1977 and has 15 members. Its budget is $34,000 (£20,000 sterling). It is empowered, inter alia, to codify and recodify the laws of Georgia, and to effectuate Code Revision. In practice, its broadest function seems to be to "correct errors in the laws".31

31 See Appendix 5 below, Georgia, covering letter.
The South Dakota Code Commission was established in 1966 and is currently governed by Chapter 2-16 of South Dakota Codified Laws 1985. It has powers of technical revision only, apart from a power to undertake substantive revisions which is not used.32

Presumably, the agencies of Idaho, Indiana and Virginia have similarly restricted powers. The Virginia Code Commission is governed by Section 9-77.4 of the Virginia Code. The titles of the agencies in Idaho and Indiana are uncertain, but they can probably be contacted at the addresses given in Appendix 3. They are governed by Section 73-201 of the Idaho Code and Section 2-5-1.1-10 of the Indiana Code Annotated respectively.

**Group C - Michigan only**

The Michigan Law Revision Commission was established in 1966, and is governed by Sections 4.1401-4.1403 of Michigan Compiled Laws. The Commission consists of four members appointed by the Legislative Council, four legislative members and an ex officio member of the Legislative Service Bureau. It initiates its own projects. Its functions are similar to those of the New York LRC, but it operates on a much smaller scale. It is located at the University of Michigan Law School, Ann Arbor.32a Its sole staff is an Executive Secretary (a Professor of Law) who conducts research one day a week. Its budget is $60,000 to $70,000 (£35,000 to £41,000 sterling). It has produced roughly 100 reports and roughly 75 of them have been enacted. The topics range from Revision of Grounds for Divorce (1970) to the Rule against Perpetuities (1986).

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32 The power to make substantive revisions is included in Section 2-16-10.1(2). In reply to Question 22 of the survey, the Code Commission said that it did not have the staff or the budget to make recommendations for revisions of law.

32a The University of Michigan also publishes the University of Michigan Journal of Law Reform. (This periodical was originally known as "Prospectus", until 1970).
**Group D - Alabama and others**

This group consists of the Alabama Law Institute, the Louisiana State Law Institute and the North Carolina General Statutes Commission.

The Louisiana State Law Institute was set up in 1938, four years after the New York LRC.\footnote{Louisiana Acts 1938, No.166, now Louisiana Revised Statutes, Title 24, chapters 4 and 5. See Fred Zengel, 'Civil Code Revision in Louisiana' (1980) 54 Tul.LR 942; J. Denson Smith, 'Role of the State Law Institute in Law Improvement and Reform' (1956) 16 La.LR 689; Ferdinand F. Stone, 'The Louisiana State Law Institute' (1955) 4 AJCL 85.} It is located at the Louisiana State University, expressly "organized under authority of the Board of Supervisors" of that University and described as "an official advisory law revision commission, law reform agency and legal research agency of the State of Louisiana" (S.201). Its Council consists of 17 categories of ex officio members plus 31 elected members. In addition, it has a large general membership. Council members are not compensated for their work, but receive expenses for attendance at meetings. It has six full-time staff attorneys, including the Coordinator of Research, and its 1987-88 budget was $650,138 (£380,000 sterling).

The Institute can initiate its own projects, but the legislature, by concurrent resolution, may direct a report or special projects (as has been done for products liability and the Code of Evidence). Its functions (set out in S.204) are similar to those of the New York LRC. Louisiana is a "mixed" jurisdiction, whose laws have civil law and common law elements (see Chapter II above). The Institute must make available translations of civil law materials and provide materials for the better understanding of the civil law of Louisiana and the philosophy upon which it is based (S.204(7)). In reply to Question 14 of the survey, the Institute stated that it reviewed the law in other civil law jurisdictions throughout the world in making its proposals.

The Institute does not publish reports, but all its documents are public documents available upon request. (In addition, all its meetings are open to the public and representatives of special interest groups may participate in them, apart from any votes taken.) Its recommendations are...
currently submitted as a draft Bill (Joint Rule 10, Rules of Order), and the reporter who coordi-
nated the project will explain and defend it to the legislative committee which considers it. Occas-
sionally, a special printed pamphlet is produced. The Institute’s Biennial Reports list its Bills
(and legislative action on them) for the legislative sessions under review. 80% to 90% of Bills are
enacted. The Institute’s major revisions have been the Louisiana Revised Statutes 1950, the Crim-
inal Code 1942, the Code of Criminal Procedure 1966, the Code of Civil Procedure 1960, the

Information on the Alabama Law Institute is supplied by the Goranson Report and by publi-
cations received in reply to the survey. It was created in 1967 (Act No.249) and commenced
operations in 1969. It is now governed by Sections 28-9-1 to 29-8-5 of the Alabama Code. It basi-
cally adopted the same organisation and objectives as the Louisiana State Law Institute. It
receives its projects from members of the Legislature, state government, from the Bar or may ini-
tiate the study itself. The Council of the Institute is composed of 19 categories of ex officio mem-
bers and three categories of elected members (two elected from the faculty of the University of
Alabama School of Law, two elected from the faculty of the Cumberland Law School of Samford
University and 42 practising attorneys, six from each district in the state). The Institute also has a
large general membership. It is staffed by two lawyers (the director and assistant director) and
two clerical staff, and also uses law students as clerks. Its interim committees have sometimes
included non-lawyers (e.g. in its studies of medicaid and child abuse). From 1975 to 1984, it

34 For example, Proposed Louisiana Code of Evidence (On the Recommendation of the Louisiana

35 The Institute’s Director, Mr. Bob McCurley, did not complete the questionnaire but instead for-
warded the Handbook 1984 and the Report to the Alabama Legislature and Institute Mem-
bership 1986-87. See also R.L. McCurley Jr., ‘Alabama Law Institute’ (1975) 36 Alabama Law-
yer 398-402; L. Vastine Stabler, ‘The Alabama Law Institute -- A Legal Adviser to the
Legislature’ (1969) 30 Alabama Lawyer 134.

36 Annual Report 1986-87, p.8. See Alabama Project on Medicaid (1977), Child Abuse and Neg-
lect (1978). Its study of medicaid became a national model, and was received by over forty
states as well as the U.S. Department of Health and Human Services.
was responsible for twelve major revisions.\textsuperscript{37} In 1987, it presented five Bills to the legislature and had eight projects in progress. Detailed implementation rates are not available but the Director has said that the Legislature passed "every major completed project presented to it by the Institute".\textsuperscript{38}

As regards North Carolina, the North Carolina Commission for Improvement of Laws was created in 1931 (N.C. Laws 1931, ch.98) and abolished in 1943 (1943, ch.746). It was succeeded by the General Statutes Commission in 1945 (c.157), which was assigned the task of substantive law revision in 1951 (c.761).\textsuperscript{39} The Commission consists of 12 part-time members, appointed by deans of law schools (5), the Governor (2), the Speaker of the House of Representatives, the President of the Senate, the President of the State Bar, the President of the Bar Association and one by the Commission itself. The Commission has a staff of 2 and a half attorneys and one administrative/secretarial staff member. In reply to Question 18 of the survey, the Commission stated it had submitted 315 proposals to the legislature by December 1987. Approximately 254 of these had been implemented (127 in whole, 127 in part). The Biennial Report for 1985-87 lists 15 Bills enacted by the 1985 General Assembly as a result of Commission recommendations. At that time, the Commission's major projects in progress were Trusts, Condominium Statutes, the Non-profit Corporation Act and the Business Corporation Act.\textsuperscript{40}


\textsuperscript{38} Annual Report 1986-87, p.6.

\textsuperscript{39} See now North Carolina General Statutes, Sections 164-12 to 164-19. Also article on General Statutes Commission at (1968) 46 N.C.L.Rev. 469.

\textsuperscript{40} General Statutes Commission, Biennial Report to the General Assembly of North Carolina 1985-1987 (March 31, 1987), pp.4-5.
Arkansas

The Goranson Report lists the Arkansas Code Revision Commission as an agency similar to the Connecticut LRC, but does not place it in any group and does not describe its activities. A completed questionnaire was received in May 1988, along with a lengthy page of comments. The Code Revision Commission was originally established as the Statutory Revision Commission in 1945 (Acts 1945, No.50) to revise and prepare the General Statutes of Arkansas. In 1955 (Act 246), it was empowered to recommend modifications or deletions of antiquated, inequitable or inconsistent rules. Various other amendments followed, and in 1987 (Act 334) its name became the Code Revision Commission. The Commission is currently governed by Sections 1-2-301 to 1-2-306 of the Arkansas Code of 1987 Annotated. It has six voting members (2 Deans of Law Schools, a representative of the Attorney General, 3 members of the Bar) and two non-voting observer members from the House and the Senate. It has a full-time Executive Director, four legal staff and three administrative/secretarial staff. In reply to Question 22, the Commission said that it has not yet done any "real revision" work as it has only just completed the first complete codification of the statute law in Arkansas. In reply to Question 18, it said that it had produced three reports/recommendations, all of which had been enacted. No explanation was given as to why this figure is so small. Perhaps the Commission only counted Bills it had introduced since 1987, when it received its new name.

One very interesting feature of the Commission's statute is that part of its funding comes from the Arkansas Code Revision Fund (set up by Act 651, 1983), which comes from a 25 cent levy on the costs of all civil cases and on criminal cases with a conviction or a plea of guilty (Section 1-2-306). The Commission's budget is $271,356 (£160,000 sterling).

41 See 'Statute Revision Commission' (1956) 9 Ark.LR 414.
Connecticut

As the Goranson Report was prepared in Connecticut, it does not place the Connecticut Law Revision Commission in any group. This Commission was established in 1974 (P.A. 74-132) and is currently governed by Chapter 22 of the Connecticut General Statutes. The Commission can have up to 17 part-time members. It has four full-time staff (an Executive Director, two staff attorneys and an administrative assistant) and a budget of $148,904 (£87,600 sterling) for salaries. By the end of 1986, it had submitted 59 proposals (12 technical revisions, 37 substantive revisions and 10 proposals concerning unconstitutional statutes.) By January 1988, this figure had risen to 69 proposals, of which approximately 36 had been enacted (reply to Question 18). This implementation rate is extremely low for a state agency of the U.S.A., and the Commission complains of the lack of responsiveness of the legislature in its reply to Question 22.

Other States

It has already been submitted that the Goranson Report lists some agencies which should not be classed as law reform agencies. For example, the powers of the Vermont Statutory Revision Commission are too narrow, and the Washington Law Revision Commission has not been funded. There is also some evidence that the Report omits some states which have agencies which could be classed as law reform agencies. That evidence is briefly set out below.

Firstly, it seems that Tennessee may have a "Law Revision Commission" of some sort. There are three references to such a Commission in law journals, and the mailing list of the Australian LRC includes "Law Reform Commission, Tennessee". This address is given in Appendix 3. A survey was sent there, but no reply was received.

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42 Reply to Question 4 of the survey. This contradicts Section 2-86 of the version of the statute received (which provides for eleven members), but presumably that version was slightly out-of-date.

43 Val Sanford, 'Work of the Law Revision Commission' (1964) 32 Tenn. LR 11 (The author was at that time Chairman of the Tennessee LRC, and stated that the LRC had "made no decisions as yet" -- p.13); D.J. Gifford, 'Report on Administrative Law to the Tennessee LRC' (1967) 20 Vanderbilt LR 777; Zaphirou, supra n.30, p.85.
Secondly, there is evidence that the District of Columbia may have a Law Revision Commission. One reference to such a body\textsuperscript{44} states that it was established on 21 August 1974 by P.L. 93-379 and is a Presidential Advisory Committee. A letter to the D.C. Office of General Counsel enquiring about this agency was not acknowledged. Another reference is found in Carolyn Gentile's 1984 speech on the occasion of the 50th anniversary of the New York LRC. She says that the New York LRC presented testimony before Congress which led to the creation of a reform commission in the District of Columbia.\textsuperscript{45} Further evidence of a Commission's existence, including a specific address, was found in an annual index to U.S.A. Government publications.\textsuperscript{46} A survey was sent to this address (see Appendix 3 below) but no reply was received.

Thirdly, the Texas Legislative Council appears to be engaged in a complete overhaul of the Texas laws, including substantive reforms preceded by hearings.\textsuperscript{47} Although the Legislative Council is said to be "supervised and directed by the Texas Legislature", more would need to be known about its structure before the possibility that it can be classed as a law reform agency could be discounted.

\textbf{AFRICA}

Only two African agencies (LRC of the Gambia and LRC of Tanzania) replied to the survey. It is difficult to find information about the African agencies, but eleven addresses are given in Appendix 3 and a brief summary is provided below of what is known of those eleven agencies, taking them in chronological order of their dates of establishment.

\textsuperscript{44} Linda E. Sullivan et al (eds.), \textit{Encyclopaedia of Governmental Advisory Organisations} (Gale Research Company, Detroit, Michigan, 1975), No.2080 (p.420).

\textsuperscript{45} Gentile, supra n.17, p.114.


\textsuperscript{47} Appendix 5 below, Arkansas, Q.22 (Comments), para.3.
The Law Reform Commission of Ghana was established in 1968,\textsuperscript{48} issued its first Working Paper in 1969 and had issued 17 Reports to 1978.\textsuperscript{49} The Commission is obviously still active, as its Chairman addressed a Commonwealth conference in 1986.\textsuperscript{50} He reported that the Ghana LRC always consulted widely in the preparation of its reports, by placing advertisements, organising seminars and participating in radio discussions. The Commission was responsible for a new code of Evidence adopted in 1975 (Evidence Decree 1975, NRCD 323). In preparing the code, the LRC consulted the American Law Institute Model Code of Evidence, the Californian Code of Evidence, the Nigerian Evidence Ordinance and the Israel Evidence Act.

The South African Law Commission was established circa 1973/74,\textsuperscript{51} and has issued at least 19 Working Papers and dealt with at least 57 Projects.\textsuperscript{52}

The Zambian Law Development Commission was established by the Law Development Commission and Institute of Legislative Drafting Act 1974. An unusual feature of the Act is that it provides for the appointment of ten Commissioners, five legally qualified and five lay members.\textsuperscript{53} It issued its first Working Paper in 1976 and had issued two Discussion Papers, some


\textsuperscript{52} WP 19 is listed at [1988] Reform 112. Project 57 is listed at [1986] Reform 214.

\textsuperscript{53} 'Memorandum by the Zambian Law Development Commission on its Functions and Current Programme' in Commonwealth Secretariat, Law Reform in the Commonwealth: 1977 Meeting
Draft Bills and four Reports by the end of 1982.\textsuperscript{54} It was reported in 1983 that the Commission was seriously understaffed.\textsuperscript{55}

The Law Reform Commission of Uganda issued its first Working Paper in 1976 and by the end of 1982 had issued 10 Working Papers, 7 Draft Bills and 5 Reports.\textsuperscript{56}

As regards Zimbabwe, the Advisory Committee on Law Reform issued its first Working Paper in 1981 and had issued three Working Papers and one Report by the end of 1982.\textsuperscript{57} In 1987, a Bill was introduced to create a new Law Development Commission.\textsuperscript{58}

Kenya's Law Reform Commission Act was passed and its first members were appointed in 1982.\textsuperscript{59} The Act provides for a Chairman and four other Commissioners (s.2(1)). That number may be increased by the appointment, on the recommendation of the Chairman, of additional Commissioners for specific projects (s.2(3)). Non-lawyers may not be appointed. The Attorney General can veto items in the LRC's programme (s.3). The Commission was still extant circa 1986/87.\textsuperscript{60}

\textsuperscript{54} Commonwealth Secretariat, supra n.49, pp.118-9.


\textsuperscript{56} Commonwealth Secretariat, supra n.49, pp.99-100.

\textsuperscript{57} Ibid., p.120.

\textsuperscript{58} 'Law Development Commission Bill 1987' (1987) 13 Cwth. L. Bull. 1382-3. In Appendix 3, the address of the Advisory Committee on Law Reform is given, as the address of the new Law Development Commission is not yet known.


\textsuperscript{60} Its Third Annual Report 1984-85 is listed at [1987] Reform 49.
The Law Reform Commission of the Gambia was established by the Law Reform Commission Act 1983 (No.3 of 1983). The Act is similar to the U.K. Act. The Commission has a full-time Chairman and four part-time members, two of whom need not be lawyers. At present, there is a sociologist member, Mrs. Safieyatou Singhateh. It has three research staff and seven other staff. The Commission prepares programmes for law reform and it may not prepare draft Bills on a topic unless the Attorney General and Minister of Justice (these offices are performed by one person) approves the topic. The Commission's answer to Question 10 of the survey must be read in this light.\(^61\)

The Commission's budget of 221,800 Dalasis (£18,500 sterling) is extremely low, and it is supplemented by donations of equipment, etc. from the U.S. Embassy, the U.K. High Commission and the Ford Foundation. In answer to Question 18 of the survey, the Commission stated that it had produced 24 Reports. It is impossible to calculate an implementation rate due to the inadequacy of information in the Annual Reports.\(^62\) On 2 June 1987, the Commission inaugurated a project on the codification of customary law, with the assistance of an annual grant of $17,500 from the Ford Foundation.\(^63\)

Although the Law Reform Commission of Tanzania Act was passed in 1980 (No.11), the first members of the LRC were not appointed until October 1983.\(^64\) The Commission is given a clear power to initiate projects itself (s.9). It may also prepare programmes (s.4(c)). Otherwise,

\(^{61}\) The Attorney General and Minister of Justice's control over the LRC's programme can be seen by the fact that he could walk in and make a surprise visit to the members of the Commission on 11 June 1987, and "direct [them] on some future projects." During the meeting, he referred at least six new topics to them (Third "Annual" Report 1985-87 (1987), pp.15-16).

\(^{62}\) The first annual report was not received. The second annual report states that four bills and memoranda were submitted on 10 July 1985. In the third "annual" report, there is a confusing chart which for some reason includes two of the 1985 projects but excludes two others. It also adds that a report on the law of treason was noted in the 2nd annual report, but this is not so.


\(^{64}\) Salter and Ojwang, supra n.59.
the Attorney General may refer a specific question to it. Section 13 lists the matters the Commission must take into account in the performance of its functions, e.g. "the need for having in Tanzania laws which are in accord with, and which facilitate the policy of Ujamaa and Self-reliance", and "to promote and secure the decolonisation of the law of Tanzania by the refinement and adaptation of the customs, traditional values and beliefs of the people of Tanzania which are suitable for application in conjunction with modern progressive ideas."

The Commission currently has a full-time Chairman, one full-time Commissioner and five part-time Commissioners. Non-lawyers may be appointed (s.5(1)(e)). There is a legal staff of five, and fifteen other staff. The Commission had a budget of 5.2 million Tanzanian Shillings for 1987-88, i.e. £48,400 sterling. By April 1988, the Commission had issued three Working Papers and four Reports, two of which had been implemented in part. This is an extremely low output. The subjects of those documents are not known, except that one of them was a Discussion Paper on "Delays in the Disposal of Civil Suits". The Commission attributes its lack of activity to budgetary constraints and apathy amongst the legal profession and the public. In April 1988, it stated that it was "about to publish" the first issue of a Law Reform Bulletin.


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65 In reply to the survey, Mr. Pius Msweka was given Code "5" i.e. Sociologist. However, in the Third Annual Report 1985-86, p.3, he is referred to as "Principal Secretary, Prime Minister's Office".

66 This figure is obtained using an exchange rate of 112 T.Sh. to the pound, referred to as the "Middle Rate, 15 Sept. 1987" in Whitaker's Almanack 1988, p.81.

67 Reply to Q.22 of the survey (Appendix 5 below).

68 The evidence of its existence in 1983 is the listing of its address in Commonwealth Secretariat, supra n.49, p.92.

entitled *Review of Pre-1900 Statutes in Force in Nigeria: Applicable Laws* and twenty Working Papers on specific Acts.\(^{70}\)

The Law Reform Commission of Sierra Leone existed in 1983\(^{71}\) and on 15 September 1984, its Chairman, Mr. Justice S.J. Foster, visited the LRC of the Gambia.\(^{72}\) Little else is known of this agency.

The address of the Zanzibar Law Reform Commission was received from the Law Commission for England & Wales in reply to Question 21 of the survey. However, it is likely that the correct title of the agency is the Zanzibar Law Review Commission.\(^{73}\) Little else is known of this agency.

**OTHER JURISDICTIONS**

Fourteen addresses of law reform agencies in other jurisdictions are given in Appendix 3. Only two jurisdictions under this heading (Hong Kong and Sri Lanka) returned completed questionnaires. Replies by letter were received from the Bahamas and from Antigua & Barbuda.\(^{72a}\) Nothing is known of the agencies in five of the jurisdictions, apart from their addresses.\(^{74}\) There fol-


\(^{71}\) Commonwealth Secretariat, supra n.49, p.94.


\(^{73}\) In LRC of Tanzania, *Third Annual Report 1985-86*, p.10, it is reported that Mr. A. Borafia, Chairman of the Zanzibar Law Review Commission, visited the LRC of Tanzania on 21st April 1986.

\(^{72a}\) The reply from Antigua & Barbuda was that its Law Reform Advisory Committee "is at present non-functional", so the address is not given in Appendix 3. The letter, dated 27 July 1988, was from: Permanent Secretary, Ministry of Legal Affairs, Office of the Attorney General, St. John's, Antigua, W.I.

\(^{74}\) The jurisdictions are: Cyprus, Malaysia, Nepal, Pakistan and Tonga. (However, it is known that the Law Reform Committee of Tonga existed in 1983, except that no references had yet been made -- Commonwealth Secretariat, supra n.49, p.95.) The Bermuda Law Reform Committee is not listed as its reports are not published but are submitted direct to the Government (supra n.49, pp.41-42.)
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allows a summary of what is known of the other nine agencies, taken in chronological order of their dates of establishment. Some information is then given about the Indonesian Law Development Centre (established 1974).

The first Law Commission of India was appointed in August 1955. It is not governed by any statute, but instead is reconstituted every few years by a cabinet decision. In the beginning, it had a mixture of full-time and part-time members, but it appears that the practice of having part-time members was discontinued in 1968. The Commissions have been mainly composed of retired justices of the Supreme Court and the High Courts. Academic lawyers have rarely been appointed. The average age of the Law Commissioners would be above 60 years. The only element of continuity to the L.C.I. is provided by the institution of the Member-Secretary. He/she and his/her five law officers prepare the draft reports. Its reports have dealt mainly with technical law. Successive commissioners have taken the view that law reform must be confined to lawyers' law.

Upendra Baxi is extremely critical of the Law Commission on several counts. He says that political considerations in its composition are clearly noticeable. He found that there was no systematic approach to data collection -- the reports give only the information that the Commission wishes to give and not all the information that it collects, whatever be its quality. The Commission's reports avoid any reference to scholarly literature by Indian jurists, the Commission feeling that it does not have much to learn from the academics, but that the latter may well be enlightened by the former's reports. He says that the Law Commission "assumes almost an oracular mission", some of its recommendations being of the "Do it because we say so" type. The Commission appears to support its proposals in a casual way. While some of its reports are of high quality,


76 Baxi, ibid., pp.266-7.

Baxi says others are based on half-hearted research and presentation in a clumsy manner.

The present members of the Law Commission were appointed on 1st September 1985 and the Commission has issued at least 115 reports. In 1982, Baxi found that 41% of reports had been legislatively implemented. The establishment of the Indian Law Institute in December 1956 has made available high-quality research on Indian law. This research is of assistance to the government in reforming the law, and presumably is useful to the Law Commission as well.

The Law Reform Committee of Jamaica was established before 1969, and had issued 55 reports by 1977. Interestingly, one of its reports (Report 19), studied the question of establishment of a Law Reform Commission in Jamaica, but no such Commission has been established (either the report decided against a Commission, or the government did not implement its recommendation to establish one).

The Law Commission of Sri Lanka (originally known as the Ceylon Law Commission) was established in 1969. It was reconstituted in 1978 and worked on 17 projects from 1979 to 1982. It must obtain Cabinet approval before it can work on a project. There is a specific section in its statute charging it to review the system of legal education in Sri Lanka in consultation


78a Baxi, sura n.75, loc.cit. He lists the 77 Reports to the end of 1978, discards 18 for various reasons (which reasons are difficult to follow) and finds that of the 59 remaining, 25 had been implemented in whole or in part, 23 were not implemented and 11 still awaited publication. This statistic has not been included in Appendix 2 below, as it is out of date and as it does not allow two years for implementation.

79 Rajeev Dhavan, 'Legal Research in India: The Role of the Indian Law Institute' (1986) 34 AJCL 527. The Institute publishes the Journal of the Indian Law Institute, the Annual Survey of Indian Law, and an Index to Legal Periodicals.

80 Commonwealth Secretariat, supra n.49, pp.74-78. See also S.I. Miller, 'Development of Law Reform in Jamaica and Current Work of the Legal Reform Commission (sic)' in Commonwealth Secretariat, supra n.53, pp.211-235.


82 Commonwealth Secretariat, supra n.49, pp.94-95.
with the Council of Legal Education. It has a full-time Chairman, fourteen part-time Commissioners, three legal staff and fifteen other staff. Its budget is 1.6 million Sri Lankan Rupees (£36,300 sterling).\(^{83}\) In reply to the survey, the Commission stated that it had produced 15 Working Papers and 20 Reports. It stated that five Reports had been implemented (3 in full, 2 in part). (No implementation rate has been calculated due to the inadequacy of information available). The Commission now also publishes a Law Bulletin. In reply to Question 22 of the survey, it complained of a shortage of funds, shortage of staff and lack of professional training for research.

The Law Reform and Revision Commission of the Bahamas is governed by the Law Reform and Revision Act 1975.\(^{83a}\) The Commission consists of lawyers only (s.3(2)) and has law reform functions almost identical to those of the U.K. Law Commissions (s.4). However, it is also under a duty to prepare revised editions of the statute law from time to time, a function which is similar to that of many of the U.S.A. agencies. The Act specifies in precise detail the Commission's role in this regard (sections 6 to 20). According to the Commonwealth Secretariat, the Commission worked on thirteen projects up to 1979.\(^{84}\)

The Law Reform Commission of Papua New Guinea produced its first Report in 1975. By the end of 1982, it had produced 16 "Occasional Papers", 17 Working Papers and 11 Reports.\(^{85}\) This Commission enjoys a special status, being mentioned in the Papua New Guinea constitution\(^{85a}\) and having particular responsibility for adapting the inherited common law of England to

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\(^{83}\) This figure is obtained using an exchange rate of 41.70 Rs. to the pound, referred to as the "Middle Rate, 15 Sept. 1986" in *Whitaker's Almanack* 1987, p.81. (The Sri Lankan Rupee exchange rate is not given in the 1988 edition.)

\(^{83a}\) Act No.20 of 1975. Copy received from Myrtle Brandt, Legal Draftsman, Office of the Attorney General. The Act came into force on 2nd October 1975.

\(^{84}\) Commonwealth Secretariat, supra n.49, p.41.


\(^{85a}\) Papua New Guinea Constitution (1975), Sch. 2.13 and Sch. 2.14.
the common law and customary needs of the country.  

The Law Commission of Trinidad and Tobago also issued its first report in 1975. By the end of 1982, its work included 25 listings of various kinds, including unpublished Working Papers.

The Law Reform Commission of Hong Kong was established in 1980 by an order of the Governor in Council. It has three ex officio members (the Attorney General, the Chief Justice and the Law Draftsman) and five lawyer members appointed by the Governor. The Governor also appoints two unofficial members of the Legislative or Executive Councils and two or more other members. The last two categories allow for the inclusion of non-lawyers as members. At present, there are five non-lawyers -- a sociologist, a paediatrician, a businessman and a commodity broker. All the members serve part-time. Research is carried out by the Secretariat of seven full-time staff (Secretary and six Assistants). There are five other staff.

References are received either from the Attorney General or from the Chief Justice. (Originally, references came from them jointly, but now each can make separate references). Topics for reference are normally suggested by the Secretary. The subjects range from contempt of court to insurance to laws governing homosexual conduct. The Commissioners meet only once a month for about one and a half hours. Subcommittees are appointed to deal with each reference, and a substantial proportion of non-lawyer members are appointed to these. These subcommittees consult as widely as resources will permit. The Commission has produced 23 Working Papers, 12 Working Paper/ Interim Reports and 13 Reports. Five reports have been implemented in full. It is not possible to calculate an implementation rate due to the inadequacy of information received.

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87 Commonwealth Secretariat, supra n.49, pp.95-6.

88 These are a Judge of the High Court or a Justice of Appeal, a member of the Hong Kong Bar Association, a member of the Hong Kong Law Society and two members of the Faculty of Law of Hong Kong University.
The Law Reform Commission of Fiji existed in 1982 and had already produced two discussion papers and two informal papers by the end of that year.\textsuperscript{90} Since then, it has produced at least nine reports.\textsuperscript{91} It is not known what effect the coup of September 1987 has had on the Commission.

The Law Revision Commission of Dominica was established in 1987 and its first Chairman is Mr. Francis Otho Coleridge Harris, QC. The Commission is to prepare, publish and maintain a revised edition of the written laws of Dominica in looseleaf form as well as reforming the laws found to be in need of reform.\textsuperscript{92}

Mention should also be made of the National Law Development Centre of Indonesia. In an article published in 1978, June S. Katz and Ronald S. Katz described this Centre in detail.\textsuperscript{93} It had a staff of 165 and a budget of $4.8 million per year. As part of its functions, it systematically prepared drafts of proposed laws for discussion and future implementation. It was established in 1974 with the same rank as a Directorate General within the Department of Justice. It is not known if this Centre still exists.

\textsuperscript{89} It is impossible to tell from the list of references given in \textit{Introduction to the LRC of Hong Kong} (August 1987) when the Reports on references 1 and 6 were published. Therefore, an implementation rate allowing two years for implementation cannot be calculated.

\textsuperscript{90} Commonwealth Secretariat, supra n.49, p.72.

\textsuperscript{91} Reports 5 and 6 are listed at [1984] Reform 163; Reports 8 and 9 are listed at [1987] Reform 214.


COMPARISON WITH EUROPEAN MINISTRIES OF JUSTICE

In Chapter II, the preparation of legislation in civil law countries was examined and contrasted with the common law process. It is unnecessary to repeat here the descriptions given there of parliamentary committees, special commissions/committees, scrutiny by bodies such as the Conseil d'Etat, and drafting procedures in civil law countries. The present chapter and Chapter III concern law reform agencies, and it is submitted that the institution in civil law countries which is relevant for comparison is the ministry of justice. As was mentioned before, the ministries of justice in civil law countries were examined by Professor Andrew Martin when he was involved in the preparation of the U.K. Law Commissions Act.94 The 1965 Act, (and subsequent legislation in other common law jurisdictions), was inspired by the ministries of justice, not by other institutions of law reform in civil law countries. Hence, it is fitting in examining common law law reform agencies to offer some comparative observations on the civil law ministries of justice by which they were inspired.95

The European ministries of justice cannot be classed as law reform agencies. Hurlburt has identified four distinctive characteristics of law reform commissions:

1. They are separate from the ordinary machinery of government
2. They are to some extent independent of government control
3. They and their expert staffs are mostly or entirely composed of lawyers
4. They are small in size, whether considered as legal institutions or in comparison with government institutions.96

The ministries of justice do not satisfy these criteria. They are quite large and are composed of civil servants/administrators and lawyers. They are also part of the ordinary machinery of government and under government control. The lack of independence has been referred to by Pro-


95 Farrar takes a different approach, barely mentioning the ministries of justice and focusing on the codification projects in France and Germany (Farrar, supra n.1, pp.97-102).

96 Hurlburt, supra n.14, p.454.
Professor Martin as the "price to pay in political terms" for the advantages of the ministries:

The judgement of officials can be overruled by the political head of the department concerned; in the last resort, it is for him to decide, on his own, or in consultation with ministerial colleagues, on what subjects, and when and how, the law is to be reformed... [I]nitiatves are politically controlled by ministers.97

For this reason, the Law Commissions were established outside the Civil Service. Professor Martin saw this as a step beyond the continental system. He mentioned it to senior officials of the five ministries of justice which he visited in 1964 and their reaction was uniformly positive.98

Information on the operation of the European ministries of Justice is scarce. A letter to the French ministry of justice was not acknowledged.99 A guide published by that ministry is of little assistance.100 Professor Martin's summary of his visits to five of the ministries, although written in 1964, is the most useful item available.

Professor Martin emphasised three points about the situation in the ministries:

(1) There was a movement towards making law reform the concern of a specialised body bearing no responsibility for 'servicing' the courts and the other organs of the administration of justice
(2) Permanent and ad hoc committees had ceased to be the principal agencies of law reform
(3) The ministries of justice were responsible for making sure that legislation initiated in other departments would not run counter to the overall direction in which the legal system was intended to develop.101

In France, he found that there were five Main Divisions ("Directions") in the Ministry of Justice, of which only two (Civil Law and Criminal Law) were concerned with the general law (including commercial law).102 The other three departments were purely administrative depart-

98 Martin (1964), supra n.94, p.iv.
99 The letter, in French, was sent on 27 June 1988.
100 Ministère de la Justice, Guide Pratique de la Justice (Editions Gallimard, 1984).
101 Martin (1964), supra n.94, pp.iii-iv.
ments. Decisions on law reform fell to be taken at one of three different levels:

(a) by the Minister and members of his "cabinet"
(b) by the Council of Ministers
(c) by a committee of the Council of Ministers, composed of the heads of the interested government departments.

Commissions and committees are appointed for major projects, but to research the details of reform only. Generally speaking, the decision as to whether and on what lines the law requires to be reformed will have been taken before any commission or committee is appointed. The personnel of the Department ("Administration Centrale") numbered 400, of whom 150 were members of the judiciary (including its prosecuting branch). Of the rest, the majority were non-professional executive and clerical officers, and only 10 or 20 were civil servants of the professional class. The principal safeguard against defects in the law was the expertise of the professional staff at the Ministry. However, the Ministry of Justice only kept "a watchful and expert eye" on civil and criminal law, the public law concerned with the administration of justice (including the legal profession) and questions of nationality. In the remaining vast fields of public and administrative law, the system relied on the expertises and watchfulness of officials in the immediately interested administrative departments. There was no Law Reform Card Index System as in Germany (see below), but it was possible that one would be installed in the near future.

Prof. Martin found that there were, in the Directorate of Civil Law, three distinct units designed to assist in the task of keeping the law constantly under review: The "Service du Fichier Central de Jurisprudence" kept an up-to-date record of case-law; the "Service de Législation Étrangère" collected and classified foreign material of general interest and the "Se Bureaux: Ques-

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102 The Guide (supra n.100) now lists six "Directions" at p.14.


104 See Chapter V below.
tions Juridiques Européennes” concentrated on comparative material from Common Market countries.

In West Germany, he found that the total staff of the Federal Ministry of Justice numbered 120 highly qualified lawyers and 280 executive and clerical officers. Approximately 30/40 lawyers and a corresponding number of executive and clerical officers were engaged exclusively on law reform projects. The Ministry was divided into five Main Divisions. The Administration Division was the least directly concerned with changes in the law, but it did collect the whole body of federal law for “Materielle Rechtsbereinigung” (ironing out of inconsistencies and weeding out of obsolete material). The Heads of the five Main Divisions were always available to act under the chairmanship of the Minister or the Permanent Under-Secretary. If ad hoc bodies were appointed, they merely worked out the details of a project. The decision as to the necessity of law reform would already have been taken. The merits would have been decided by the Government in advance. He said that the Germans started from the proposition that it is the government’s business to discover defects and obsolescence in the law long before these had led to the piling up of unsatisfactory judicial or administrative decisions. The experts (“Referents”) were expected to be familiar with particular segments of the law and all literature on the subject in law journals and in newspapers (press cuttings were supplied by the Press Section). The Ministry was starting to establish an automatic “early warning system”. There was already in existence a Law Reform Card Index System (“Reform-Kartei”) in the area of criminal law. Proposals for change in the law, and comments on Bills from all sources, were card-indexed.

105 These were: Administration; Civil Law and Procedure; Criminal Law and Procedure; Mercantile and Economic Law; and Public Law.

106 He contrasted this with the prevailing view in England, which was that only when dissatisfaction with the state of the law had led to a forceful demand for reform made by a large number of people and organisations was it proper for the government and Parliament to act (p.4).
In Sweden, he found that the Ministry of Justice was relatively small. It had two main divisions (Administration Division and Legal Division). The Legal Division had five sections. All government departments had a legal division of their own, with a highly qualified legal staff. The Swedish system of law reform relied to a very large extent on the work of committees. In April 1964 about 50 committees were actively at work. Major Bills went to the Law Council (see Chapter II) and certain Bills were referred to the Chancellor of Justice (one of Sweden's three Ombudsmen). The judiciary were consulted on many projects. There was also a Standing Committee on law revision ("Lagberedningen"). It consisted of a retired judge of the Supreme Court and two judges of Courts of Appeal. They served on a full-time basis and worked on one project at a time. Since 1960, the Committee had been engaged in preparing a complete overhaul of land law. There was no Law Reform Card Index System in operation, but it was considered unnecessary in such a small country. Review of the law was assisted by three Standing Joint Committees of both Houses of Parliament, which scrutinised the whole legal system every year.

Professor Martin also visited the Netherlands and Denmark. In the Netherlands, there was a permanent "Legislation Division" specially concerned with law reform attached to the Ministry of Justice. It was subdivided into a Private Law section and a Public Law section. The Division was headed by the Secretary-General himself and its principal officials had direct access to the Minister, a privilege not shared with any other Division. The staff all had high academic qualifications in law. There was an Advisory Committee on Civil Law which commented on Bills having an impact on general civil law. Each government department also had a legislative section of its own. There was no Law Reform Card Index System in operation, but it was not considered necessary. In Denmark, the Ministry of Justice had a special Legislation Division. The Division was

107 A more up-to-date summary of the work of the "drafting commissions" will be found in Dale, supra n.103, pp.98-99.

108 Every Minister had to present an annual report to Parliament and each such report had to pass through the appropriate standing committees. Thus, the whole legal system came under review every year (p.21).
very small, consisting of 6 senior legal officers and a secretarial pool. The planners of law reform were the three Chiefs of Section of the Legislation Division. Priorities were, to some extent, determined by the international planning done in the Nordic Council. The Legislation Division was also responsible for drafting. (90% of the 150 Government Bills introduced in 1962-63 had passed through the Division). Defects in the law came to light very quickly in a small country like the Netherlands. The Ombudsman and the Nordic Council were frequent sources of reform proposals.

OBSERVATIONS
Law reform agencies have always given rise to heated debates and discussions and will continue to do so in the future. Everyone has their own ideas as to what the law reform agencies should be doing. The diversity in the machinery of law reform created in different jurisdictions reflects the diversity of opinion as to the role of law reform agencies. It is appropriate to conclude the rather lengthy discussion of the world's law reform agencies which has been given in this chapter and the previous chapter by making some general observations on some of the most interesting topics.

Five specific topics have been selected:
(a) Lawyers' Law vs. Social-Policy Law
(b) Non-lawyer Members
(c) The Consultation Process
(d) Implementation Rates
(e) Finance

These topics will be briefly discussed below.

(a) Lawyers' Law vs. Social-Policy Law

Law Reform is often subdivided into two categories -- "lawyers' law" (alternatively, technical law, adjectival law, law with minimal policy considerations) and "social-policy law" (alternatively, political law, administrators' law, social-economic law). The existence of such a subdivision has been disputed by Lord Scarman in his forceful remark:

I challenge anyone to identify an issue of law reform so technical that it raises no
While Scarman’s statement that all law embodies social policy is true, this does not mean that a lawyers’ law/social-policy law distinction cannot be made. It simply means that the distinction must be made on some other basis. It is submitted that the subdivision can be made along the lines proposed by Hurlburt. He uses the term ‘technical law’ (i.e. lawyers’ law) to denote law which society at any given moment leaves to lawyers and which is comparatively ‘rule-bound’ or which is ‘encapsulated in propositions’ in a system within which the law proceeds by propositional logic in its attempted achievement of social purpose. He uses the term ‘social-policy law’ to denote law which society at any given moment reserves for development by Parliament and by the ordinary machinery of government and which is comparatively free in its attempted achievement of social purpose.

He recognises that the distinction is artificial, misleading and subjective. However, some such distinction is necessary for an intelligible discussion of the law reform process.

The importance of this distinction is that there is much debate as to whether and to what extent law reform agencies may go beyond the boundaries of lawyers’ law and examine questions of social-policy law. Certain writers believe that the agencies should confine themselves to technical legal issues and that they are not qualified to address areas of social-policy law. It is submitted that this is too narrow an approach. As Lord Wedderburn has said, the Law Commissioners will operate best if they are allowed to take as panoramic a view as possible of the law, civil and criminal.

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110 As Hurlburt says, even the rule against perpetuities embodies a profound social policy (supra n.14, p.11).

111 Hurlburt, supra n.14, p.13.

112 Ibid., loco cit.

Reference has already been made to Kirby's view that it is precisely in areas of social controversy that a law reform commission can be of the greatest help to its government and to its public. Hurlburt emphasises that the law reform agencies are not decision-makers but are investigators, analysts and advisers. They are qualified to contribute to the resolution of social issues since they have resources of time and money, they are interested in ensuring that current law suits current conditions and they come from a profession which is used to trying to be objective. Provided they call attention to the value assumptions they have made and consult experts in other disciplines, they are entitled to investigate social-policy questions. However, they should avoid questions of partisan politics, chiefly because they would alienate large sections of the community and cause unnecessary hostility towards their work in general. For instance, the study of abortion laws would be dangerous as an agency would lose credibility with pro-life or pro-choice people.

(b) Non-lawyer Members

As can be seen from the information above, only a minority of agencies have consistently had non-lawyer members. There has been a fair deal of scepticism in certain quarters as to the advisability of appointing such members. In 1971, Lord Scarman and Norman S. Marsh believed that the case for appointing laymen or members of other allied disciplines to a law reform agency is not yet made out. They said that the day-to-day work of a law reform agency is largely a research and drafting routine. The non-lawyers have to "play a waiting game" until the initial research is completed. After that, they have a "vital part to play" in the consultation process. Furthermore, they stated that the only constant factor in law reform was its legal character. Different non-lawyers would be need-

114 Above, Chapter III, Australia (1) Federal.
115 Hurlburt, supra n.14, p.466. See generally ibid., pp.461-469.
115a It would seem, therefore, that the Canadian LRC is treading on dangerous ground in its current study of options for abortion policy reform.
ed to assist on different branches of the law.

Seventeen years later, these arguments have been disproved time and time again. In all the jurisdictions where non-lawyer members are regularly appointed, they have been extremely helpful at all stages of the law reform process. As Mr. Justice W.F. Ryan said:

There is a vital difference between taking an opinion from a consultant and continuously being reminded by a colleague who is not a lawyer of the forces other than law that affect legal change. What is significant is that a colleague, as colleague, is bringing to bear the insights of another discipline; or, to put it another way, issues are being placed in a broader frame of reference by a person who is not a lawyer but is to share responsibility for the decision to be taken. For this there is no substitute.117

With respect, Scarman and Marsh missed the point of having a permanent non-legal presence on an agency. The non-lawyer members have caused their legal colleagues to question their own premises and attitudes more critically to see if they are justified. The lawyer members have had to use plainer language in explaining their conclusions.118 As Hurlburt says,

There is force in the argument that lawyers live so close to the law that they miss obvious problems which the more detached view of a non-lawyer of good intelligence can perceive, and in the argument that it is precisely in the throes of decision making that that more detached view can make itself more effectively felt.119

As regards Scarman and Marsh's second argument (that different non-lawyers are needed to assist on different branches of the law), this has not been a problem in those agencies on which non-lawyers have served. Often, a non-lawyer will be appointed because his/her area of expertise is relevant to the current programme of the agency. However, his/her input remains of great assistance on all projects of the agency for the reasons given above.


118 Hurlburt, supra n.14, p.313.

119 Ibid., p.314.
There is a lot to be said for Hurlburt's view that two non-lawyer members should be the minimum in any law reform agency, if they are not to be overawed by the legal majority. He also argues that non-lawyers should remain in the minority in the agencies. However, it is submitted that it is dangerous for a lawyer to defend his own profession so strongly. There is no evidence that any harm would result from allowing agencies to consist of an equal proportion of lawyers and non-lawyers (as is required in the case of the Zambian Law Development Commission). Indeed, if this were to happen, law reform proposals could stand a better chance of being implemented and might also benefit from such a high input from the non-lawyers. The common assertion that "law reform is too important to be left to lawyers" is a warning which should not be ignored.

(c) The Consultation Process

Mention has already been made in Chapter III of disillusionment in Britain with the consultation process, particularly with lengthy working papers. It is submitted that the trend away from lengthy working papers is to be welcomed. It is usually more useful to produce a discussion paper of limited circulation and to involve as many interested persons as possible in subcommittees and seminars of various sorts. It is strange that the U.K. Law Commission has adhered to the working paper procedure. However, perhaps it is justified in so doing given its relatively vast resources and the large population for which it caters.

It is difficult to decide whether Australian-style public hearings should be used in other jurisdictions. Kirby certainly paints a glowing picture of their usefulness and their value. On the other hand, critics have found them to be largely a waste of time and energy, yielding few arguments of interest. Since the hearings appear to be working in Australia, what is needed is for delegates from outside Australia to observe at first hand how those hearings are organised and how they function. Then, an attempt should be made to stage similar hearings in those other jurisdictions.

So far, other countries have only dabbled in the area of public hearings. It would be interesting to see a conscious effort on their part to reach the individual members of the public who will be most affected by their decisions.

(d) Implementation Rates

In discussing implementation rates, it is well to remember that the implementation rate is not the sole criterion of success of a law reform agency. Firstly, an agency can have an important influence on the legal system without actually getting many of its reports implemented. Secondly, its reports which are implemented may be far more important than the unimplemented ones. Thirdly, a low implementation rate may be due to the fact that the agency's suggestions are way ahead of its time.

A problem which often arises is whether law reform agencies should formulate proposals bearing in mind their prospects of implementation. On the one hand, some believe that an agency should suggest what it considers to be the most suitable solution to a problem of law reform, regardless of whether it would ever be implemented by any government or legislature. On the other hand, there are those who say that it is better to offer three quarters of a loaf which can be eaten than to offer a whole loaf and in fact starve. One solution to this problem is for the agency to propose an ideal solution and also offer alternative solutions in case the ideal solution is not adopted.

Appendix 2 is a comparative table of implementation rates of 11 law reform agencies. The U.S.A. agencies have not been included, and it was not possible to calculate rates for many of the other agencies. The implementation rates vary enormously, from 94% in the case of Scotland to 30% in the case of Ireland.

There has been concern in all jurisdictions (even those with high implementation rates) as to why certain reports remain unimplemented. That concern is aggravated when agencies find that their reports do not receive any response, good or bad, from the government. As Hurlburt says:

The greatest problem of machinery is the lack of linkage to the machinery of governments and legislatures, the lack of gearing mechanisms.\(^{122}\)

Hurlburt suggests five possible improvements to facilitate implementation of law reform agency reports.\(^{123}\) Firstly, the agencies could be given some form of delegated legislative power. Secondly, law reform proposals could be processed by standing committees of legislatures. Thirdly, several law reform proposals could be included in one omnibus Bill. Fourthly, perhaps a government should be required to respond to a law reform commission's proposal within a prescribed period of time. Fifthly, the device of the private members' Bill could be used. Hurlburt concludes that the second option is the most promising. It is interesting in the Irish context that Mr. Justice Keane has come to a similar conclusion but the Taoiseach is against such a measure.

\section*{(e) Finances}

Appendix 1 is a comparative table of the annual budgets of 25 of the world's law reform agencies. The budgets range from CAN$4,799,000 (£2,323,500 sterling) in the case of the LRC of Canada to 221,800 Dalasis (£18,500 sterling) in the case of the LRC of the Gambia. Kirby has referred to the lack of resources as the second of the "seven deadly constraints" on law reform.\(^{124}\) By way of contrast, Hurlburt believes that there is no need for a substantial augmentation of resources of law reform agencies as there are limitations implicit in the law reform process which would restrict at least the larger commissions from increasing their size indefinitely.\(^{125}\)

\begin{footnotesize}
\begin{enumerate}
\item[\(^{122}\)] Hurlburt, supra n.14, p.488.
\item[\(^{123}\)] Ibid., pp.389ff.
\item[\(^{124}\)] Kirby, supra n.86, p.13.
\item[\(^{125}\)] Hurlburt, supra n.14, p.459.
\end{enumerate}
\end{footnotesize}
Some agencies in Canada and Australia and Australia have increased their resources by funding from Law Foundations, which are themselves funded by the interest paid on lawyers' mixed trust accounts. 126 It is suggested that such a practice might usefully be followed in other jurisdictions too. Another idea worth considering is Arkansas's Code Revision Fund, whereby 25 cents is levied on all legal costs.

CHAPTER V - LAW REFORM AGENCIES AND THE COMPARATIVE METHOD

Most reports of law reform agencies contain a description of some sort of the solutions adopted abroad to the problem which has arisen. A casual glance at the tables of contents of law reform agency reports confirms this. This chapter concerns the use and the usefulness of the comparative method to the law reform agencies. The replies received to questions 13, 14 and 15 of the survey will be particularly important.

**Statutory Provision for Comparative Law**

In 1965, the passing of the U.K. Law Commissions Act marked a significant formal recognition of the value of comparative legal research. In section 3(1) of the Act, it was provided that

> It shall be the duty of each of the Commissions to take and keep under review all the law..., and for that purpose -- (f) to obtain such information as to the legal systems of other countries as appears to the Commissioners likely to facilitate the performance of any of their functions.

This is the only legislative text in the U.K. to give an express role to comparative law.\(^1\) It has been said that it made comparative law respectable in the U.K. by an Act of Parliament.\(^2\) Lord Gardiner was proud of section 3(1)(f) and believed that the U.K. could learn much from the laws of the United States, Commonwealth countries, Ireland, Scotland and Council of Europe countries.\(^3\) He looked forward to "real strides towards unification of law" and felt that the United Kingdom as a whole could be a bridge between the legal systems of the Commonwealth and the legal systems of Europe.

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1. Norman S. Marsh, 'Quelques Réflexions Pratiques sur l'Usage de la Technique Comparative dans la Réforme du Droit National' (1970) 47 Rev.Dr.Int. et Dr.Comp. 81 at 82.

2. William H. Hurlbutt, *Law Reform Commissions in the United Kingdom, Australia and Canada* (Juriliber, Edmonton, Canada, 1986), p.170. Hurlbutt attributes this statement to other writers ("It has been said..."), expressing no opinion himself as to its validity.

Section 3(1)(f) is drafted in such a way that the Commissioners are under a "duty" to obtain information as to foreign legal systems, but only if that information appears to them likely to facilitate the performance of any of their functions. The quantity of comparative research undertaken can therefore vary from a wideranging survey to almost zero, depending on the opinion of the Commissioners as regards each project. This explains the reply received from the English Law Commission to Question 13 (c) of the survey. In its reply, the Commission pointed out that "the provision is mandatory, but the Commissioners have a complete discretion, as in Ireland." Thus, if extremely parochial and xenophobic members were to be appointed to the Law Commission, they would technically be within their rights not to conduct comparative research at all. The wide discretion given to the Commissioners in this matter must always be borne in mind. The Act does not compel them to use the comparative method. Indeed, if it did, this would be an unfair restraint on their work.

Some of the jurisdictions which established agencies resembling the UK Law Commissions after 1965 included a section similar to section 3(1)(f) in the statute of establishment. Many others decided that such a section was unnecessary, that the power and duty to conduct comparative research were implied in the other provisions of the statute. Jurisdictions which followed the U.K. example include Ireland, federal Canada, Manitoba, Tanzania, the Bahamas and Sri Lanka. The Irish Act states:

4(3) Where in the performance of its functions it considers it appropriate so to do, the Commission may... (b) examine and conduct such research in relation to the legal systems of countries other than the State as appears to the Commission likely to facilitate the performance of its functions.

This differs slightly from the drafting in s.3(1)(f) of the U.K. Act. The Irish Commission is technically freer not to use the comparative method. In the Dáil, the Attorney General explained the Irish section as follows:

It has been considered desirable to express in subparagraph (b) of this subsection the view that the commission need not feel constrained in any way by the legal system which pertains in this State and this subparagraph suggests that if it considers it appropriate so to do the commission should examine the legal systems of
other countries. There are many aspects of the Scottish legal system and of the legal systems of our EEC partners which would repay careful examination for the purpose of formulating suitable reforms in the laws of this country.4

Mr. Costello referred to civil law in the Seanad:

I know that many members of this House will share the view that although our system of law is derived from the Common Law the commission could consider the laws in civil law jurisdictions when suggesting reforms and improvements in the laws of this country.5

The Canadian Act states:

12(1) In carrying out its objects, the Commission... (b) may initiate and carry out... such studies and research of a legal nature as it deems necessary for the proper discharge of its functions, including studies and research relating to the laws and legal systems and institutions of other jurisdictions in Canada or elsewhere.

This is another slight variation on the U.K. model, giving the Commission absolute discretion and including comparative research as a subdivision of legal research in general. The Manitoba section is almost identical (see Appendix 5).

The Tanzanian Act includes comparative research as a subdivision of co-operation with foreign persons or bodies engaged in law reform:

4(3) The Commission may, for the purposes of the more effective performance of its functions, establish and maintain a system of collaboration, consultation and cooperation with any person or body of persons within or outside the United Republic engaged in law reform and may, for that purpose (a) establish a system for obtaining any information relating to the legal systems of other countries which appears to the Commission likely to facilitate the performance of any of its functions.

Section 4(e) of the Bahamas Act (Law Reform and Revision Act 1975) is identical to the U.K. Section 3(1)(f). The text of the Sri Lankan statute was not received in reply to the survey, but it was stated by the Commission that the relevant section was s.4(e) of the Law Commission Act

4 277 Dáil Debs. 1586. Brendan Toal later said he would like the Commission "to look across the water to the EEC and try to get the laws not just in uniformity but in conformity with the broad concept of law throughout the Community" (Ibid., 1611).

5 80 Seanad Debs. 209. Mary Robinson referred to reforms in other jurisdictions as a "very useful reference point" and said "It is of enormous assistance to be able to look at precedents in other countries and see how the reforms worked in practice" (Ibid., 234).
The majority of the statutes do not include such a section. Nevertheless, many of the agencies replying to the survey answered "yes" to Question 13 ("Is there a similar provision to s.4(3)(b) of the Irish Act in your agency's statute?") on other grounds. Canada and Manitoba quoted the sections in their statutes which empower them to carry out joint projects with other law reform agencies in Canada or elsewhere.6 The Law Reform Commission of Tasmania quoted the following section in its statute:

7(1) The functions of the Commission are (c) subject to the approval of the Attorney-General, to consider proposals relating to (iv) uniformity between laws of other States and the Commonwealth [of Australia].

The Michigan Law Revision Commission cited its powers to consider reports of "other learned bodies" and "co-operate with law revision commissions of other States and Canadian provinces",7 while the Arkansas Code Revision Commission referred to its duty to make studies of the methods, means and systems used in the various states for the compilation, codification, revision, and publication of the codes or statutes of those states. These studies are to be used by the Commission in determining means of improving the compilation of the Statutes of Arkansas and to prepare recommendations to the General Assembly in regard thereto.8

Two duties of the Louisiana State Law Institute were cited as relevant. The first duty resembles those of the Michigan Law Revision Commission as already quoted:

It shall be the duty of the Louisiana State Law Institute (3) To cooperate with the American Law Institute, the Commissioners for the Promotion of Uniformity of Legislation in the United States, bar associations and other learned societies and bodies by receiving, considering and making reports on proposed changes in the law recommended by any such body.9

6 S.13 Law Reform Commission Act 1971 (Canada); S.6(1)(c) Law Reform Commission Act 1970 (Manitoba). Canada and Manitoba did not refer in their replies to the sections in their statutes which actually most resembled s.4(3)(b) of the Irish Act, i.e. s.12(1)(b) of the Canadian statute (quoted above) and s.6(1)(a) of the Manitoban statute.

7 Michigan Compiled Laws, §4.1403(b) and (f).

8 §1-2-303(c)(3), Ark. Code of 1987 Ann. The reference to "the various states" means the states of the U.S.A.

9 Louisiana Revised Statutes, Title 24, Section 204(3).
The second duty is unique among law reform agency statutes:

To make available translations of civil law materials and commentaries and to provide by studies and other doctrinal writings, materials for the better understanding of the civil law of Louisiana and the philosophy upon which it is based.  

Some agencies answered "no" or "not directly" to Question 13, but added that the power to conduct comparative research was implied in the statute. Ontario answered "Not directly" and then referred to section 2(2) of its statute:

The Commission may institute and direct legal research for the purpose of carrying out its functions.

New Zealand answered "No" but stated that such a section was not necessary:

No. It is not necessary. The statute gives the authority without specifying it.

Australia answered "no" but stated that section 8 of its statute has the same effect. South Australia answered "No, but we do in practice do so."

Finally, South Dakota and Gambia answered "yes" to Question 13 but quoted sections of their statutes which have no real link with comparative research at all.

There were twelve straight "no" answers to question 13.

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10 Ibid., section 204(7).

11 Section 8 provides as follows: "Subject to this Act, the Commission has power to do all things necessary or convenient to be done for or in connexion with the performance of its functions."

12 South Dakota added a question mark: "Yes?"

13 South Dakota quoted S.2-16-10.1(3) of its statute, which empowers the Code Commission to make recommendations to the Legislature and direct the code counsel to prepare bills. Gambia quoted s.4(b) of the Law Reform Commission Act 1983, which states that proposals for reform should reflect customs and values of Gambian society as well as concepts consistent with the U.N. Charter of Human Rights and the Charter of Human and People's Rights of the Organisation of African Unity.

14 British Columbia, Newfoundland, Northwest Territories, New South Wales, Northern Territory, Hong Kong and six U.S. agencies (Cal., Conn., Geo., N.J., N.Car., Wash.)
Given that on the one hand the majority of law reform agency reports include sections describing comparative research, but on the other hand, the majority of statutes governing law reform agencies do not include a section similar to s.3(1)(f) of the U.K. Act, it follows that there is no correlation between statutory provision for comparative research and the actual carrying out of comparative research. However, it does not follow that statutory provision for comparative research is meaningless and unimportant. While the comparative method is frequently used in many agencies whose statutes do not include specific provision for comparative law, the reverse is not the case: There is no agency whose statute provides for comparative research but which rarely engages in such research.

In statutory drafting terms, s.3(1)(f) was unnecessary in order that the U.K. Law Commissions would have the power to conduct comparative research. This is why such a section was not included in the statutes governing the majority of the agencies which were modelled on the U.K. Commissions. However, this does not reduce the importance of the section for the U.K. Commissions and for the agencies which were modelled on them. Even in the many jurisdictions where such a section was not included in the statute, the fact that s.3(1)(f) had been included in the 1965 Act remained influential.

**Personnel and Research Methods**

The very composition of the first U.K. Law Commissions also contributed to their extensive use of the comparative method. Three of the first appointees to the English Law Commission had a comparative law background. As mentioned in Chapter I, Norman S. Marsh had been Director of the British Institute of International and Comparative Law until his appointment. Professor Andrew Martin had since 1963 been Professor of International and Comparative Law at the University of Southampton. Lord Scarman continued to take an active part in the management of the

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British Institute and to serve on its advisory board. The appointments to the Scottish Law Commission also gave due weight to comparative law. Professor A.E. Anton had written extensively on French law and Professor T.B. Smith's particular interest had been the comparison of Scots and English law. The S.L.C.'s Chairman, Lord Kilbrandon, took a comparative theme for the Hamlyn lectures which he delivered in 1966.

The later agencies which modelled themselves on the U.K. Commissions cannot but have noted this strong comparative law aspect to the appointments. Those appointments were a concrete reinforcement from the U.K. government (and particularly Lord Gardiner) of the importance attached to the aspiration expressed in s.3(1)(f). Comparative research became an important aspect of the Law Commission's work, and also of the work of the other agencies.

The very fact that the membership of every law reform agency (apart from the Zambian Law Development Commission) is either composed entirely of lawyers or composed of a majority of lawyers combined with a minority of non-lawyers also contributes to the widespread use of comparative research by the agencies. Lawyers are more likely to have the expertise necessary to discover the state of the law in other jurisdictions and to use that knowledge to best advantage in solving a problem in their own jurisdiction. Furthermore, the likelihood of comparative research is increased by the presence in most law reform agencies of a legal staff of some kind.

Linked to the factor of the personnel of the agencies is the factor of their research methods. Most law reform agencies feel that their recommendations must be based on detailed, painstaking research which is as exhaustive as possible. As Stephen Woolman has said,

Law reform in the modern world is a complex and time consuming process. The authors of the Napoleonic Codes and even Tribonian himself might have quailed at the prospect of the painstaking examination and analysis of the law which modern law reform bodies engage in.

16 Ibid., loc.cit.

Since most of them are independent of government machinery, they have to fight to have their proposals accepted by the government. Hence, they will ground their reports on detailed research so that it is more difficult for the government to reject them:

Research is the foundation of the law reform commissions' law reform process. There are two reasons for this. One is that the commissions think that information is the essential foundation for good law reform. The second is that, unlike the legislator, the law reformer cannot simply appeal to intuition or to a parliamentary majority for the implementation of his proposals; he must persuade and justify, and to do that he must demonstrate that his proposals are solidly based upon adequate information.19

Many of the law reform agencies use empirical research, public hearings and consultation as means of research. All of them use legal research. Legal research is fundamental to any law reform project, and it often involves comparative study of the law in other jurisdictions.20

There are disadvantages in this detailed legal research. For instance, the insistence on quality of research slows down the law reform process and reduces the quantity of recommendations from the agencies. In addition, the fact that ministers and legislators rarely read law reform agency reports21 but instead rely on the "executive summaries" of them prepared by their officials in making their decisions22 would seem to reduce the justification for such painstakingly detailed research. Finally, there are those who say that this detailed legal research is far too academic and ignores the real problems, that the agencies "bring forth mice after monumental efforts".23

19 Hurlburt, supra n.2, p.317.
20 Ibid., p.318.
21 "With only rare exceptions, ministers and legislators do not and will not read law reform commission reports" -- Hurlburt, supra n.2, p.352.
22 Ibid., p.352 and p.364.
On the other hand, the agencies' dedication to quality and detail in their research must be admired. Even when their proposals are not adopted, their reports are valuable sources of authoritative information in themselves.

**Cooperation between Law Reform Agencies**

It is useful for law reform agencies to keep track of developments in their counterpart agencies in other jurisdictions. Firstly, a report in one jurisdiction on a particular area may stimulate other such reports on the same area in other jurisdictions. Secondly, the research carried out in one jurisdiction may be useful to another jurisdiction in examining the same problem. Thus, unnecessary duplication of efforts will be avoided. Thirdly, the later agency can seek information as to whether the proposals were implemented by the legislature and if so, whether their implementation led to a substantial improvement in the area.

Given the obvious merits of pooling of information on law reform, the least one would expect would be that all the law reform agencies would receive copies of each others' reports. However, it would appear that even this basic minimum is not achieved. Leaving aside the agencies of the United States since they deal primarily with matters of technical revision, the replies to Question 15 (b) of the survey ("Which agencies' reports are stocked in your library?") revealed that few agencies obtain all reports of all the other agencies. The most common answer was that "most" of the reports of the U.K., Canada and Australia were received, followed by a list of a few other agencies whose reports were stocked. Ontario confidently answered "all" to Question 15 (b) but frankly, it is difficult to believe that this answer is to be taken literally. Even federal Australia was cautious as regards the reports of all Australian agencies. It answered: "most Australian, English and some European and U.S." England and Wales replied "hopefully all Commonwealth plus New York, California, South Africa." The Legal Division of the Commonwealth Secretariat probably stocks the most comprehensive library of Commonwealth law reform agency reports in the world. However, its limited resources have meant that the most recent catalogue
was published in 1983, and that was only a listing of titles. The Commonwealth Law Bulletin, published since 1975, is an extremely valuable source of information. However, it only summarises certain reports and it is perhaps too detailed for keeping abreast with developments:

By the very nature of its detail and completeness..., it is a work of reference rather than a tool to increase current awareness. It is not designed for rapid assimilation by over-burdened lawyers but for detailed study.

There are other valuable sources of information available, as mentioned in Chapter III. However, these are confined to particular countries and may not have a wide circulation outside those countries.

It is submitted that some centralised information base for law reform agencies is needed. Ideally, this would consist of computerised abstracts of all law reform agency reports from 1964 to the present day. A law reform agency considering a particular topic should be able to quickly consult this database to determine what reports have previously been written or are in the pipeline. There is also a need for a printed worldwide digest of these reports which would be available to all legislators and academics.

The Australian agencies hold an annual conference, and so do the Canadian agencies. There have been three conferences of Commonwealth law reform agencies -- in 1977, 1983 and 1986. These conferences appear to foster personal contacts amongst the agencies which attend.


26 See Commonwealth Secretariat, Law Reform in the Commonwealth (Meeting of Cwth LRA's, London 1977)(1978); Cwth Sec., supra n.25; Cwth. Sec., supra n.24 (Codification as a Tool of Law Reform). The next meeting is scheduled for 1990 in New Zealand.
It is quite common for delegates of law reform agencies to visit each other's offices and discuss mutual activities and work methods. Personnel are sometimes swapped for defined periods. This helps to ensure that the agencies keep in touch with each other's work.

It is important that appropriate use be made of the reports of other law reform agencies when a local agency is examining a particular area of the law. On occasion, the local agency uses the research by an earlier agency or agencies as an excuse to unjustifiably reduce its own research in the area. Furthermore, excessive examination of conclusions of common law law reform agencies may leave less time to examine solutions adopted in civil law jurisdictions and in common law jurisdictions whose agencies have not made reports on the area.

A difficulty which has arisen in Canada and Australia has been the problem of different conclusions being reached by different agencies to the same problem. Instead of contributing to uniformity of law, the agencies have contributed to a "balkanization" of law in those countries. The Uniform Law Conference of Canada has tried to discourage this trend, but is fighting an uphill battle. There is no Uniform Law Conference in Australia. In 1975, the Australian Law Reform Agencies Conference passed three resolutions recommending that the Standing Committee of Attorneys General (SCAG) assume a central role in the processing of uniform law proposals in Australia. Surprisingly, the Attorneys General rejected this proposal. In 1979, the Senate Standing Committee on Constitutional and Legal Affairs referred to this rejection as "one of the most depressingly obscurantist chapters in Australian legal history". The Committee urged the


28 Hurlburt, supra n.2, pp.420-422.

29 The full text of the resolution is in Anon., 'Promotion of Uniform Law Reform' (1975) 49 Austl.LJ 213/4.

30 Foreword by Kirby in Australian LRC, First Annual Report (ALRC 1, 1975).

Attorneys General to adopt the proposal, but this has not been done. In 1983, Senator Gareth Evans, the Australian Attorney General, proposed a National Law Reform Advisory Council for Australia. The idea was accepted by the Australian Law Reform Agencies Conference but again "foudered on the sharp rock of the Standing Committee of Attorneys-General".

Apart from the many joint reports produced by the English and Scottish Law Commissions, law reform agencies have rarely co-operated in producing their reports. The sharing of resources in joint projects would appear to have been successful in recent Australian references. The most interesting experiments are the new standing references given to the New South Wales LRC and the Victorian LRC.

**The Comparative Method in the Various Agencies**

The comparative method is constantly used by a majority of the agencies. As was said at the beginning of this chapter, this is proven by skimming the tables of contents of typical law reform agency reports. Naturally, there are variations in the amount and type of comparative research from country to country and from agency to agency. These variations are outlined below.

The English Law Commission usually conducts some form of comparative research for all its projects. In 1966, Norman S. Marsh spoke in Germany on the use of the comparative method by the Law Commission. He said the Commission was firmly convinced of the great worth of the comparative method. The practical proof of this conviction was in its almost daily use of comparative research. The Commission kept in touch with legal developments abroad through

32 See [1987] Reform 201 ("The SCAG viewpoint").


34 See above, Chapter III.


36 Ibid., p.18.
Commonwealth channels, through the British Institute of International and Comparative Law, and through requests for information to judges, academics and practitioners. Professor Andrew Martin had visited European Ministries of Justice and was an expert on legal developments in the Commonwealth. Marsh spoke of the Commission's research of civil law as being especially significant:


One early project which involved extensive consultation of civil law solutions was the project on interpretation of statutes. The 1967 Working Paper on this topic contained summaries of the law in various European countries prepared by various national experts. The final report omitted these summaries but was obviously heavily influenced by the civil law approach to statutory interpretation. The report encountered fierce opposition precisely because its implementation would mean that differences between the common law and civil law methods would be reduced. It was the first report of the Law Commission not to be implemented in any form.

In 1970, Marsh again spoke of the comparative method and law reform, this time focusing on the practical difficulties of the national reformer's task in consulting foreign solutions. It was at this time that he stated that the national reformer should choose the "eclectic reformer approach" rather than the "highest common factor approach". (See further Chapter I above).

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37 Ibid., pp.16-17.
38 Ibid., p.19. Translation: "Mr. Permanent Secretary Bulow said in Berlin last May that the Law Commissions are building a bridge between common lawyers and civil lawyers. Comparative law is our important tool in this bridge-building."
40 Interpretation of Statutes: Report by the two Commissions (Law Com. No.21, Scot.Law Com. No.11, H.C. 256, 1969).
41 Marsh, supra n.1.
1976, he spoke at the fourth European Conference of Law Faculties, disagreeing with some of Kahn-Freund's academic restraints on the comparatist/reformer. Interestingly, he pointed out that sometimes research into foreign law will be carried out but will not be published in the Commission's documents for various reasons, including the restraints of time on the Commissioners. As an example, he said that the Law Commission had not published its research into foreign law in connection with its proposals for reform of the landlord and tenant relationship.

As mentioned in Chapter III, the Scottish Law Commission has taken upon itself the task of preserving Scots law from anglicisers. The aim is "to restore the coherence of the Scottish legal system as a cosmopolitan legal system". The Commission cannot avoid consulting English law on its topics, but it tries to consult other systems as much as it can. In 1974, Alan Watson referred to the practical limits encountered by the S.L.C. in using the comparative method:

Little attention has been directed towards Dutch Law primarily because none of the Commissioners reads Dutch.... In general little use is made of the possibility of comparison with Soviet Law or the law of the United States. The former is based on different social premises. The lack of influence of the latter is more interesting and has, I think, two main causes. First the very multiplicity of American solutions may well daunt the Commissioners. Secondly, the same multiplicity demands, if American law is to be used seriously, the existence of a large and extensive collection of the relevant books as just do not exist in Scotland.

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43 Ibid., pp.84-85 (Proceedings), pp.655-6 (RabelsZ).

44 Hurlburt, supra n.2, pp.92-97.


46 In reply to Question 14 of the survey, the Commission stated: "Naturally the most commonly consulted jurisdiction is England and Wales."

However these practical limits were overcome, at least in the case of Evidence reform, when the Commission prepared "sample chapters of an Evidence Code largely based on a Californian model".\footnote{Smith, supra n.45, p.12; cited in Hurlburt, supra n.2, p.98. The project to produce an Evidence Code was later abandoned.}

Ireland's Law Reform Commission has followed the example of most other law reform agencies by routinely surveying foreign law on each topic it studies. The foreign law is not just included "for the sake of completeness" but is often used as a model for recommended change. The Commission does not confine itself to studying British solutions, but seriously considers solutions adopted in other common law countries and in civil law jurisdictions. For example, in its examination of domicile and habitual residence in private international law, it recommended adoption of the continental "habitual residence" concept.\footnote{Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (WP 10, 1981; LRC 7, 1983). The Commission also produced an unpublished Background Paper on "The Domicile of Married Women in Common Law Jurisdictions: A Comparative Study" (2 volumes) -- See Second (Annual) Report 1978-79 (Pr1.8855), p.19.} Unfortunately, for political reasons, the continental idea was not adopted.\footnote{'Comment' (1985) 79 Gaz. ILSI 327 and 356; Domicile and Recognition of Foreign Divorces Act 1986.} In its Working Paper on 'Judicial Review of Administrative Action: The Problem of Remedies' (W.P.8, 1979), it noted that unification of the remedies had taken place simply and speedily in Australia, England, New Zealand, Northern Ireland and Ontario, and went on to use the New Zealand and Ontario models for reform, except that it doubted the advisability of confining the reform to "a statutory power".\footnote{W.P. 8 1979, ch.6, paras. 2-5. The Working Paper was largely implemented by Order 84, rr.18-27 of the Rules of the Superior Courts, 1986.} In its "Report on Illegitimacy" (LRC 4, 1982), it spent the whole of Chapter 2 (pp.59-84) referring to the foreign law, and eventually concluded that the concept of illegitimacy should be abolished in Ireland as it had been in the countries discussed.\footnote{Para. 193. The report was partially implemented by the Status of Children Act 1987. See Ninth...}
with legal experts in other countries.\textsuperscript{53}

Comparative research is also automatically used by all the Canadian agencies. Quite a large part of their time is devoted to considering the different solutions adopted in the different Canadian states to the problem. It is likely that the need to deal with these reduces the time available to consider solutions from outside Canada. When the agencies do look outside Canada, it would appear that English, Australian and Commonwealth solutions are more seriously considered than solutions adopted in the United States.\textsuperscript{54} It is interesting to note that the Ontario LRC looked at an edict of the Praesidium of the Supreme Soviet of the U.S.S.R. in considering Sunday observance legislation.\textsuperscript{55}

The situation in the Australian agencies is much the same. The solutions adopted in other Australian jurisdictions are always examined. Commonwealth solutions seem to be consulted before United States solutions. The New South Wales LRC has produced two Consultants' Papers which are specifically comparative law studies.\textsuperscript{55a} The Tasmanian LRC indicated that it has recently considered solutions adopted in Scandanavia and Germany.\textsuperscript{56}

New Zealand's Law Commission stated that comparative research was a "significant aspect of law reform study". It stated that common law jurisdictions (U.K., Australia and Canada in particular) tended to be referred to more often.\textsuperscript{57}


\textsuperscript{54} See the replies from the Canadian agencies to Question 14 of the survey (Appendix 5 below).


\textsuperscript{56} Appendix 5 below -- Tasmania, Q.14.
As regards the United States, foreign law is regularly consulted by the National Conference of Commissioners for Uniform State Laws and the American Law Institute. However, most of the state agencies confine themselves to interstate comparison within the United States. The replies to Question 14 of the survey were brutally honest: "We have done no research on foreign law" (Georgia Legislative Services Committee), "There is no research of statutes out of the U.S.A." (South Dakota Code Commission), "[Comparative law is] never consulted" (Washington Statute Law Committee), "Almost never examine law of foreign countries" (California Law Revision Commission), "Comparison is generally restricted to other states within the United States" (Connecticut Law Revision Commission), "Surrounding states are most often reviewed" (North Carolina). However, there are exceptions to the general rule. Firstly, the Michigan Law Revision Commission often consults Canadian solutions, and its executive secretary annually reviews reports of other law reform agencies (including reports of Ireland's LRC). In fact, the Michigan Law Revision Commission was one of only two U.S. agencies replying to the survey that receive reports of law reform agencies outside the U.S.A. Secondly, the Louisiana State Law Institute usually examines solutions adopted in civil law jurisdictions throughout the world. The Institute stated that a project currently under study contained provisions from the Civil Codes of France, Italy, Switzerland, Germany, Ethiopia, the Philippines, Greece and Argentina. Further evidence of the Institute's interest in comparative law was provided by documents supplied with the reply to the survey. The Conflicts Law Committee of the Institute was furnished with photocopied extracts of the laws applicable in Austria, Benelux countries, England, France, Germany (East and West), Greece, Hungary, Italy, Quebec, Spain and Switzerland. Thirdly, the New York

57 Appendix 5 below -- New Zealand, Q.14.
58 Appendix 5 below -- Arkansas, Q.22 (Comments), para.5.
59 Appendix 5 below -- Michigan, Q.14.
60 The other agency was the North Carolina General Statutes Commission. See Appendix 5 below -- United States agencies, replies to Q.15(a).
61 Symeon C. Symeonides, Conflicts Law -- Law Governing Status -- American and Foreign Law
Law Revision Commission sometimes examines foreign law. In 1963, its Chairman said that research studies were "the heart of the research process" and continued:

Any study must include an analysis of the New York law, a comparison of it with the law in other jurisdictions, sometimes even including foreign law, and a consideration of the policy questions involved.62

In 1984, the Chairperson stated that the Commission exchanged materials on an ongoing basis with those who are concerned with law reform in other countries, and particularly the Canadian agencies. She said that the Commission was a "recognised part of the international movement for law reform which spans the globe".63

The African agencies are hampered by severe shortages of funds, but their comparative research is assisted by material supplied by the Commonwealth Secretariat. The LRC of Gambia stated that it most often consulted solutions adopted by Australian states, New Zealand, Canadian Provinces, Hong Kong, Zambia, Nigeria, Ghana, Jamaica, and Barbados.64 The Evidence Code produced by the Ghana LRC relied on the American Law Institute Model Code of Evidence, the California Code of Evidence, Nigeria's Evidence Ordinance and Israel's Evidence Act.65 A.J.G.M. Sanders has written on the subject of comparative law and law reform in Africa, particularly South Africa.66


64 Appendix 5 below -- Gambia, Q.14.


As regards other jurisdictions, information is only available concerning Hong Kong, Sri Lanka and India. The LRC of Hong Kong's reply to Question 14 states that comparative law was important because Hong Kong is a regional and international centre for finance and commerce. The Commission was particularly interested in developments in common law countries. Jurisdictions most often consulted were the U.K., other Commonwealth countries and countries of the region. The Sri Lankan Law Commission stated that it consulted laws of England, America, India, Australia and most of the developing countries and some states in Africa where Roman-Dutch law still exists. Upendra Baxi has analysed the use of comparative law by the Indian Law Commission in some detail. He says that, given the unimpressive library facilities around New Delhi, one must applaud the immense amount of comparative law familiarity displayed by the Law Commission's reports from time to time. However, the references to foreign law are "flimsy and shoddy". The countries chosen for comparison were inappropriate, there being no references to the law of developing countries, whose contexts are far more related to India's problems than those of the "old" Commonwealth countries and the U.S.A. In discussing the sanction of adverse publicity under the Indian Penal Code, Baxi believes that the Commission simply apes foreign law in a manner which is "devoid of serious thought." Baxi found that there was an overreliance on English and American law (and on Soviet law when the political climate was hospitable to the reference). The Law Commission was shy to propose fundamental change and so it emphasised that since ideas had been accepted elsewhere, surely those ideas could not be considered "radical". The result, in Baxi's opinion, was often the adoption of a neo-colonial model of

Appendix 5 below -- Hong Kong, Q.14.

Ibid., Sri Lanka, Q.14.


law reform, naturally not fully related to Indian reality and problems.\footnote{Baxi, supra n.69, p.275.}

In civil law jurisdictions, the ministries have various different methods of obtaining information on foreign law. In France, Professor Andrew Martin found in 1964 that the Service de Législation Étrangère had begun collecting and classifying foreign material of general interest; the 5e bureau (Questions juridiques européennes) was concentrating on comparative material from the Common Market countries.\footnote{Andrew Martin, 'Law Commissions Bill: Some Comparative Notes' (Unpublished, Oct. 1964, Copy in U.K. Law Commission Library), p.10.} Since 1951, the Service has been part of the Centre de Droit Comparé.\footnote{See Decree of 2 April 1951; reproduced in Anon., 'Centre Français de Droit Comparé (1951) 3 Rev.Int.Dr.Comparé 301.} In 1968, the Service de Coordination de la Recherche was formed within the Ministry of Justice. This Service organises contracts for comparative research by outside bodies.\footnote{Denis Tallon, 'Rapport sur l’Apport du Droit Comparé à l’Enseignement, à la Recherche et à la Réforme du Droit en France', National Report to the Fourth European Conference of Law Faculties (Unpublished, 15 Nov. 1975), pp.15-16.}

In West Germany, Professor Martin found that the library of the Ministry of Justice was reasonably well stocked with materials on the existing state of the law in other highly developed countries. However, this equipment did not necessarily enable the Referent to ascertain what, if any, projects for the reform of the relevant foreign law were in hand or had been mooted. In the case of major projects, comparative research was entrusted to the Max Planck Institute at Hamburg or to a German University known to be well equipped for comparative research in a given field -- e.g. the University of Freiburg i/B. in the field of criminal law.\footnote{Martin, supra n.72, p.7.} In 1967, Professor L. Neville Brown found that the staff of the Max Planck Institute in Hamburg included twenty full-time and ten part-time research assistants, as well as five qualified librarians. Its library had a collection of 125,000 volumes and received some 700 foreign legal periodicals.\footnote{Dr. Hahn has...}
pointed out that comparative research is assisted by the fact that many of the Ministry of Justice's officials are professors of law faculties. He has said that the close collaboration between the administration and the researchers is proven by the fact that the Federal Ministry of Justice and the Ministries of Justice of the Länder are members of the Association for Comparative Law.77

In the Netherlands, Prof. Martin found that the ascertainment of foreign law was not entrusted to the universities. If the Ministry's senior staff could not obtain sufficient comparative material through personal contacts abroad, the Ministry would not normally enlist the co-operation of the Foreign Office. This, in its turn, would request the appropriate Netherlands Embassies to supply reports on the state of the law in the countries concerned.78 In Denmark, he found that the attitude was the same as in the Netherlands. Much reliance was placed on the personal contacts of senior officials. The reports of international organisations (which contained comparative material) were regularly read and noted up. When outside help was still required, the appropriate Danish Embassy would be asked to report. Universities as such were not normally asked to carry out comparative research, but individual professors were from time to time commissioned.79

In Switzerland, M. Frossard found that recourse to comparative law was de rigueur. The laws of neighbouring countries (particularly Germany and France) were primarily examined.80 In specialised areas, the government's own officials were often well informed of foreign developments.

76 Brown, supra n.15, p.5. See also Anon., 'The Need for a Major Australian Law Research Institution' (1975) 49 Austl. LJ 209 at 210 (The Max Planck building "occupies a substantial building of several floors").


78 Martin, supra n.72, p.15.

79 Ibid., p.25.

Experts were often commissioned, but it was rare to ask an Institute to conduct comparative research. Library facilities were good.
CHAPTER VI - JUDICIAL LAW REFORM

A. JUDGES AS LAW REFORMERS

Most members of the judiciary hastily deny any implication that they reform the law. According to Lord Simonds, "heterodoxy, or as some might say, heresy is not the more attractive because it is dignified by the name of reform" and law reform "is the task not of the courts of law but of Parliament". Similarly, O'Higgins, C.J. says in the Norris case that

Judges may, and do, share with other citizens a concern and interest in desirable changes and reform in our laws; but, under the Constitution, they have no function in achieving such by judicial decision...[T]he sole and exclusive power of altering the law of Ireland is, by the Constitution [Article 15.2.1], vested in the Oireachtas. The courts declare what the law is -- it is for the Oireachtas to make changes if it so thinks proper.2

Similar views are expressed by Viscount Dilhorne in Cassell & Co. Ltd. v Broome,3 by Lord

1 Scrutons Ltd. v. Midland Silicones Ltd. [1962] AC 446 at 467/8
3 [1972] AC 1027 at 1107: "As I understand the judicial functions of this House, although they involve applying well established principles to new situations, they do not involve adjusting the common law to what are thought to be the social norms of the time. They do not include bowing to the wind of change. We have to declare what the law is, not what it ought to be."
4 [1976] 1 QB 345 at 371: "The task of law reform, which calls for wide-ranging techniques of consultation and discussion that cannot be compressed into the forensic medium, is for others."
5 In Michael Zander (ed.), What's Wrong with the Law? (BBC, London, 1970) at pp.92-3: "I do not believe that the judge is equipped, or ought to be equipped, to make law.... The court is not the proper place to manufacture new law." Similarly, "Great as has been the contribution of judicial decision to the development of our law it can no longer carry the load.... It is really a perversion of the judge's function in society that he should be requested to do so; his task is to decide particular cases, not to make but to apply the law" - Scarman, 'Codification and Judge-Made Law: A Problem of Co-existence' (Univ. of Birmingham, 1966), p.18; reprinted (1967) 42 Indiana L.J. 355 at 366.
Scarman in *Farrell v Alexander* and elsewhere, by Lord Reid in *Myers v D.P.P.* and *Shaw v D.P.P.* and by Stephen J. in the Australian case of *White v Barron.* And those views have been supported by Blackstone and Bacon:

The judges in the several courts of justice ... are the depositaries of the laws; the living oracles .... [The judge is] not delegated to pronounce a new law but to maintain and expound the old one ... Precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose that they acted wholly without consideration.  

Judges ought to remember that their office is *jus dicere,* and not *jus dare,* to interpret law, and not to make law, or give law.

Montesquieu believed that

les juges de la nation ne sont ... que la bouche qui prononce les paroles de la loi; des êtres inanimés qui n’en peuvent modérer ni la force ni la rigueur.

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6 [1965] AC 1001 at 1021-2: "If we are to extend the law it must be by the development and application of fundamental principles. We cannot introduce arbitrary conditions or limitations: that must be left to legislation.... A policy of make do and mend is no longer adequate. The most powerful argument of those who support the doctrine of strict precedent is that if it is relaxed judges will be tempted to encroach on the field of the legislature, and this case to my mind offers a strong temptation to do that which ought to be resisted."

7 [1962] AC 220 at 275: "Where Parliament fears to tread it is not for the Courts to rush in." (Dissenting opinion).

8 (1980) 54 Austl. J.L.Rep. 333 at 336: "In this area ... there is, perhaps, less scope than usual for judicial innovation by appellate courts. There is also little room for the formulation of general rules to guide the future exercise of curial discretion. If judicial discretion is to be subject-ed to such rules, this should be rather as a result of legislative intervention after full consideration by law reform agencies."


10 Sir Francis Bacon, *Of Judicature.* Cappelletti has added that from *jus dicere* came the word *jurisdiction* to indicate the judicial function, whereas *legislation* came from *jus dare* (or *legem ferre*) - "The Law Making Power of the Judge and its Limits: A Comparative Analysis" (1981) 8 Monash U.L.R. 15 at p.66, fn.214.

11 *De L'Esprit des Lois,* Livre I, chap.6. Translation: "The national judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour."
It is often stated that French judges do not reform the law. Juillot de la Morandière states that "without doubt ... the judges do not make law, but only apply it." Article 12 of the Decree on the Organisation of the Judiciary (16th and 24th August 1790) provided that the judges "shall not make regulations, but they shall have recourse to the legislative body, whenever they think necessary, either to interpret a law or to make a new one." 

While one frequently finds statements to the effect that judges do not reform the law, the contrary view is often to be found as well. Lord Radcliffe is adamant that judges do reform the law:

There was never a more sterile controversy than that upon the question whether a judge makes law. Of course he does. How can he help it? The legislature and the judicial process respectively are two complementary sources of law-making, and in a well ordered state each has to understand its respective functions and limitations.

It is interesting to note that Lord Radcliffe made these observations within a few months of his retirement from the House of Lords. It is as if he became able to voice his true opinion only after he ceased to be a judge. Three years later, he repeated his views in the following terms:

Would anyone now deny that judicial decisions are a creative, not merely an expository, contribution to the law? There are no means by which they can be otherwise, so rare is the occasion upon which a decision does not involve choice between two admissible alternatives .... I do not believe that it was ever an important discovery that judges are in some sense lawmakers. It is much more important to analyse the relative truth of an idea so far reaching.

An Australian example of this view comes from Mr. Justice Mason:

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12 Morandière, Droit Civil (3rd ed., 1963), p.86


15 'The Lawyer and his Times' (Opening Address at 150th Anniversary of Harvard Law School, 1967), reprinted in Not in Feather Beds 265 at 271
The myth that judges do not make law has been dispelled. The entire body of our non-statutory law has been created by the courts, as indeed has so much of our statutory law as flows from judicial interpretation.\(^\text{16}\)

Similarly, but more narrowly, Mr. Justice McCarthy of our Supreme Court has attacked the Blackstonian idea:

At times, judges proclaim that they are not making law but declaring what the law is. Rubbish! Every invocation of the Constitution means judge-made law.\(^\text{17}\)

Judges seem to feel freer to admit to their lawmaking function outside the courtroom, in public addresses as quoted above. However, there are times when they admit to this function in the course of their judgements. For instance, in *Southern Pacific Co. v Jensen* (1917), Holmes J., dissenting, admitted that courts can legislate:

I recognise without hesitation that judges must and do legislate, but they do so only interstitially; they are confined from molar to molecular motions.\(^\text{18}\)

Lord Denning put it in typical Denning fashion in the *Siskina* case:

To the timorous souls I would say in the words of William Cowper:

Ye fearful saints, fresh courage take,
The clouds ye so much dread
Are big with mercy and shall break
In blessings on your head.
Instead of "saints" read "judges". Instead of "mercy" read "justice". And you will find a good way to law reform.\(^\text{19}\)

One more frequently comes across a narrower acknowledgement of a law reform function in statements to the effect that "the law on this topic is judge made and can therefore be altered by the judges." Thus in *Miliangos v George Frank Textiles*, Lord Wilberforce says

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\(^{16}\) Mr. Justice Anthony Mason in Alice E-S Tay and Eugene Kamenka (eds.), *Law Making in Australia* (Edward Arnold, Australia, 1980), p.11

\(^{17}\) Niall McCarthy, 'To Do a Great Right, Do a Little Wrong' (1987) J.Ir.Soc.Lab.L. 1 at 1

\(^{18}\) 244 U.S. 205 (1916) at 221; 61 Law Ed. 1086 at 1100.

\(^{19}\) *Siskina v Distos Compania Naviera S.A.* [1977] 3 WLR 532 (C.A.) at 554. Bridge, LJ said in his dissent that "The clouds in Lord Denning MR's adaptation of William Cowper may be big with justice but we are neither midwives nor rainmakers" (p.561). The House of Lords was similarly dismissive - [1977] 3 WLR 818 at 831 (Lord Hailsham).
The law on this topic is judge-made -- it is entirely within the House's duty in the course of administering the law to give the law a new direction in a particular case where on principle and on reasoning it is right to do so. I cannot accept the suggestion that because a rule is long established only legislation can change it.  

In *R. v I.R.C., ex parte Federation of Self-Employed*, Lord Diplock stated that:

> The rules as to "standing" for the purpose of applying for prerogative orders, like most of English public law, are not to be found in any statute. They were made by judges, by judges they can be changed; and so they have been over the years.

In *Haley v London Electricity Board*, Lord Evershed took a similar approach:

> The ancient rules of the English common law have - and have as one of their notable virtues - the characteristic that in general they can never be said to be finally limited by definition but rather have the capacity of adaptation in accordance with the changing circumstances of succeeding ages.

Finally, mention should be made of the wording of the famous 1966 Practice Statement of the House of Lords on judicial precedent:

> Their lordships .... propose ... to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

This is yet another statement acknowledging that if judges have made laws then they can alter them.

As regards the civil law countries, the duty on judges to reform the law in certain instances has actually been inserted into the Codes. (Ironically, most common lawyers believe that the Codes do not allow judicial law reform but the provisions of the Codes themselves contradict this surface view). Article 4 of the French Code Civil (1804) is the most famous example:

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21 [1982] AC 617 at 639. See also *State (Lynch) v Cooney* [1982] IR 337 at 369: Walsh J says that the rules regarding "sufficient interest" for certiorari etc. are "judge-made rules and, as such, can be changed and altered by judges."

22 [1965] AC 778 at 800-801

23 Practice Statement (Judicial Precedent) [1966] 3 All E.R. 77

24 "In the common law, perhaps for too long, we were of the opinion that the real difference between our system and that of the civil law was its emphasis upon the judge as a maker of
Le juge qui refusera de juger sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice.25

There is a similar provision in Article 11 of the Quebec Civil Code (1866):

A judge cannot refuse to adjudicate under pretext of the silence, obscurity or insufficiency of the law.26

Article 1, paragraphs 2 and 3, of the Swiss Civil Code (ZGB, 1907) is even more explicit than the French model:

À défaut d'une disposition légale applicable, le juge prononce selon le droit coutumier et, à défaut d'une coutume, selon les règles qu'il établirait s'il avait à faire acte de législateur.
Il s'inspire des solutions consacrées par la doctrine et la jurisprudence.27

Gény has praised this remarkable provision as "probably the first time that a modern legislator has given official recognition in a general formula to the fact that the judge is his indispensable auxiliary."28 There are similar provisions in Article 1 of the Turkish Civil Code,29 in the Italian Civil Code of 194230 and in the Brazilian Code of Civil Procedure.31

law. It isn't one of the things that a comparative lawyer very quickly learns ... is that the judge, whatever the system, is the repository - is the secret - of the life of the law" - Scarman, 'Law Reform by Legislative Techniques' (1967) 32 Sask.L.R 217 at 217-8

25 Translation: "The judge who shall refuse to judge under the pretence of the silence, obscurity or insufficiency of the statute shall be liable to prosecution for denial of justice." See J. Vanderlinden, 'Some Reflections on the Law-Making Powers of the French Judiciary' (1968) 13 Juridical Review 1


27 Translation: "Where no relevant legal provision can be found, the judge shall decide according to the existing customary law, and, in its absence, according to the rules which he would lay down if he had himself to act as legislator. In so doing he must be guided by accepted legal doctrine and case-law." See Ivy Williams, Swiss Civil Code: Sources of Law (1923), pp.54-60 and Konrad Zweigert and Hein Kotz, An Introduction to Comparative Law, vol.1 (trans. Tony Weir, 2nd ed., Oxford U.Press, 1987), pp.182-3.

28 François Gény, Méthode d'Interprétation et Sources en Droit Privé Positif II (2nd ed., 1954), p.328


From the evidence quoted so far, it is seen that there is a conflict of authority as to whether judges reform the law. Even before attempting to resolve the problem, it is submitted that the very existence of this conflict of authority is an argument against any categoric statement that judges do not reform the law. In other words, a categoric statement by a judge or commentator that judges do not reform the law, without any discussion of the opposite view, is to be treated with great suspicion since it is incomplete.

It is submitted that judges do indeed reform the law, despite their many statements to the contrary. In fact, those statements are frequently used to "camouflage" actual reform. A judge often says one thing ("we cannot reform the law") and proceeds to do exactly the opposite in the same case. The truth of the matter is that the Blackstonian idea is a fiction behind the cloak of which judges have been reforming the law for centuries. Weber has remarked as follows:

*Gerade auch den, objektiv betrachtet, am meisten 'schöpferischen' Richtern eigen gewesen, daß sie subjektiv sich nur als Mundstück schonsei es eventuell latent - geltender Norman, als deren Interpreten und Anwender, nicht aber als deren Schöpfer fühlen.*

It is submitted that this fiction should no longer be relied upon by judges, for the sake of clarity and honesty. We have had enough of these fictitious sweeping statements that judges merely declare the law, that they are its mouthpieces only. There is nothing inherently wrong with a


33 Austin refers to the "childish fiction employed by our judges that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity and merely declared from time to time by the judges" - *Jurisprudence*, II, p.634. Diplock refers to the "legal fiction that the courts merely expound the law as it has always been" - "The Courts as Legislators" (U. Of Birmingham, 26th Mar. 1965), reprinted in Brian W. Harvey (ed.), *The Lawyer and Justice* (Sweet & Maxwell, London, 1978), 265 at 281

34 Translation: "The very judges who, objectively speaking, are the most 'creative' have felt themselves to be just the mouthpiece of legal rules, as merely interpreting and applying them, rather than as creating them" - *Wirtschaft und Gesellschaft* II (4th ed., 1956), p.512; cited in Ziegert and Kotz, supra n.27, p.130.
judge holding that he/she cannot reform the law in a particular case (e.g. because he/she feels that it would be better for the legislature to undertake a comprehensive reform project) provided he/she admits that in general judges can reform the law in the right circumstances.

The vast majority of commentators who have seriously considered the question nowadays conclude that judges reform the law in some form or another. Thus, Mauro Cappelletti has said that the idea of judges deciding the law, "writing the script" in addition to being the mouths of the law, is "news to no-one" today. Friedmann lists the jurists who have reached this conclusion:

The Blackstonian doctrine ... has long been little more than a ghost. From Holmes and Gény to Pound and Cardozo, contemporary jurists have increasingly recognised and articulated the lawmaking functions of the Courts.

Dias also concludes that judges make law. So much for the common law theorists. What of the civil law? Reference is sometimes made to Article 5 of the Code Civil as proof that French judges do not make law. That Article provides:

Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises.

But, for various reasons, the commentators have concluded that civil law judges do in fact reform the law:

In substance,... it is really undeniable that in Civil Law countries judges are playing a large and constantly growing part in the development of the law.

35 Lord Reid in Myers v D.P.P. [1965] AC 1001 at 1022: "The only satisfactory solution is by legislation following on a wide survey of the whole field, and I think that such a survey is overdue. A policy of make do and mend is no longer adequate."

36 Mauro Cappelletti, Giudici Legislatori? (Giuffré, Milan, 1984), p.130


39 Translation: "The judges are forbidden to pronounce, by way of general and legislative determination, on the causes submitted to them."

40 Zweigert and Kotz, supra n.27, p.278.
Similarly, Friedmann has noted that there is "in all Continental countries, an amazing amount of judge-made law". René David's view is that French law is not a creation of law professors. Like the common law, it is a judge-made law in its origins. The only difference is that judicial decisions have not been viewed as authoritative in themselves. Their authority arises only after they have received scholarly study, evaluation, and systemization. Legal science has viewed them as an essential, but not the exclusive, source of insights in to the kind of rules required to achieve justice. The difference between French law and the common law in their treatment of the sources of law is much more a matter of technique than of substance.

Finally, Von Mehren concludes that any court aware of the true, nonmechanical nature of the judicial process recognises that at times it must make new law.

Apart from this consensus amongst many commentators, it is submitted that more concrete proof of the fact that judges reform the law can be summarised under the following five headings:

a) The broad definition formulated above in the Introduction includes judicial law reform
b) Judicial decisions are widely recognised as a "source" of law
c) The very act of interpretation is a form of law-making
d) Judges must "fill in gaps"
e) Strict adherence to precedent is now a thing of the past.

a) The definition includes judicial law reform

In the Introduction, it was suggested that law reform could be defined as follows:

Law reform is the solution of a problem which arises because law, legal institutions or legal methods are outdated and obsolete.

If such a broad definition of law reform is adopted, then there is no reason why judicial law-making should not be included in it. If a judge makes new law, or interprets a statute/code creatively, then he/she is solving a problem which arises because the law is outdated and obsolete.

Hurlburt addresses the question as follows:

41 Friedmann, supra n.30, p.534


43 Von Mehren and Gordley, supra n.13, p.1143.
What is law? Certainly, for the purposes of "law reform" it includes statute law and judge-made law, including equity ... There is no reason to exclude from the term "law" anything which professional or common usage would include in it.44

Some believe that while judges make law, they do not reform the law. Lord Scarman, while he recognises that "the judge, whatever the system, is the repository - is the secret - of the life of the law" and refers to the judge's vital role as a law maker and modifier, submits that "this function ... is not to be confused with law reform".45 However, he offers no coherent explanation as to what is the difference between law making and law reform. In fact, on another occasion, he criticises Bentham for not paying sufficient regard to "the function of the judge as a maker of law",46 refers to "the courts ... as legislators"47 and by stating that the courts are no longer sufficient instruments for "the reform or modernisation of the law",48 implies that judges are instruments for reform.

Whatever about the inconsistencies of Scarman's statements, his views show that if one adopts a narrow definition of law reform then it is likely that one will not permit judicial law making to be considered as law reform. However, since it has been submitted that law reform should be broadly defined, there is no necessity to try and unravel such pedantic distinctions as made by Scarman. Furthermore, it is unnecessary to investigate in any detail the pedantic argument that while judges make law, they cannot be considered as legislating.49


45 Scarman, supra n.24, p.218.


47 Ibid., p.10

48 "There are clear indications that under the strain of our times the Courts, notwithstanding the quality of their work, can no longer be accepted as sufficient instruments for the reform or modernisation of the law" - Ibid., p.10.

49 Lord Diplock said that "Courts by the very nature of their functions are compelled to act as legislators" and referred to the courts' exercise of a "legislative power" (Supra n.33, p.266 and
b) Judicial decisions are a source of law

There are some areas of the law which can be described solely by reference to statutes/codes and regulations. But most areas are governed by a mixture of statutory law and case-law, and indeed some areas are entirely the creation of the judges. The very fact that a description of the law is usually incomplete without a description of case-law is evidence that judicial decisions make/reform law. Who would think of describing constitutional law in the United States without referring to Brown v. Board of Education? Is it not true to say that the "neighbour principle" in Donoghue v. Stevenson has been a source of development of countless principles of tort law? Areas such as the law of evidence, the law of procedure, and the rules of equity are almost entirely created by judicial decisions.

In civil law countries, judicial decisions are now widely recognised as a source of law (or, by some writers, as authorities but not sources.) Hence, Mazeaud has said that "la jurisprudence est pour la loi la fontaine de la jouvence" and that "la jurisprudence est devenue en France une source de droit d'une importance considérable". Juillot de la Morandièr refers to "son rôle cap-

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51 [1932] AC 562 at 580 (Lord Atkin). "No lawyer really supposes that such decisions as Rylands v. Fletcher [(1868) LR 3 HL 330] in the last century or Donoghue v. Stevenson in this did not change the law just as much as the Law Reform (Contributory Negligence) Act, 1945" - Diplock, supra n.33, p.266

52 Many jurists still believe that only legislation and custom can be considered as sources of law. e.g. Carbonnier, Droit Civil (Paris, 1957), vol. I, p.105 at seq. David insists that while judges make law their decisions are not a source of law, strictly speaking (Supra n.42, p.181). See generally Vanderlinden, supra n.25, p.17.


54 Ibid., p.129. Translation: "In France, case law has become a source of law of considerable importance."
Judicial decisions created the vast majority of what is known as "droit administratif", and also created the "general principles of law", which Brown and Garner have summarised as follows:

a) Prerogatives of the administration e.g. the necessity to preserve public order, the doctrine of separation of powers
b) Liberties of the individual e.g. right to strike, freedom of thought and opinion, freedom of movement, right to a normal family life
c) Economic and social rights e.g. local authorities' right to establish services where local need is proved, right to strike, right to join or not to join a union, right to a minimum wage for public sector employees
d) Protection of the environment
e) Equality before the law
f) Impartiality
g) Audi Alteram Partem
h) Non-Retroactivity
i) The right to judicial review

c) The very act of interpretation is a form of lawmaking

In the past, orthodox statements of the theory of judicial decision contained elements of a mechanical theory of the judicial process. As regards interpretation of statutes/codes, this would mean that a judge looks at the provision in question and decides what its ordinary or plain meaning is. It was said that resort could be had to other canons of construction only if there was ambiguity in the wording of the provision. This view can still be found in judicial decisions. However, there is now a growing tendency to recognise that interpretation is not a mechanical process. It is an art, rather than a science. Questions of interpretation arise every day of the week in the courts. For example, in the U.K., the Law Commissions found that more than half of

55 Morandière, supra n.12, loc.cit.
57 Von Mehren and Gordley, supra n.13, p.1133.
58 For example, see Inspector of Taxes v. Kiernan [1981] IR 117 at 122.
the cases in the courts of first instance and in the Court of Appeal involved a point of statutory interpretation and three quarters of the reported cases before the House of Lords raised an issue of this kind. If statutory interpretation were as mechanical as it is sometimes made out to be, then there would be no need for this amount of litigation on such points.

Marsh has pointed out that

The inherent ambiguity of words is a fundamental truth to be grasped in any approach to the problems of interpretation .... The meaning to be given to any particular words depends on factors extraneous to those words themselves and the meaning of the words will always be to a greater or lesser extent ambiguous because it is impossible to provide the interpreter with a cut-and-dried and consistent list of all the factors which he is to take into account in giving a meaning to the word.

Hence, he believes that it is inaccurate for so many of the "canons" of construction to begin with "if the words of a provision are clear and unambiguous". There is no such thing as unambiguous wording. It is submitted that Marsh's argument is a fundamental support for the proposition that the very act of interpretation is a form of lawmaking. When a statute is promulgated, many questions immediately arise in the minds of the reader as to what are the limits of its application. Those questions are only satisfactorily answered once there has been litigation to clarify the meaning of the statute's provisions.

In the realm of constitutional law, lawyers have always recognised that interpretation is a form of law-making. Because the wording of Constitutions is so broad, their meaning only becomes clear when the judges say what they mean. "The Constitution is what the judges say it is." Just as interpretation of Constitutions is a form of judicial lawmaking, so too interpretation

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61 "The fact of litigation... is surely compelling evidence that absolute certainty and omniscience in the law are unachieved, and arguably unachievable, ideals" -- James C. Brady, 'Legal Certainty: The Durable Myth' (1973) 8 Ir.Jur. (ns) 18 at 20, fn.10.

of statutes/codes is judicial law-making.

In civil law countries, the situation is much the same as with the common law jurisdictions. The orthodox theory is that the interpretation of the codes is a mechanical process, but the practice is very different -- the codes are creatively interpreted to meet new situations. The difference from the common law method is that in civil law jurisdictions, the code must always be the starting-point for the judicial decision. 64

It is submitted that judges should be more explicit in describing how they have come to interpret a provision one way rather than another. They should explicitly recognise their lawmaking function in interpreting words which are, after all, inherently ambiguous. Their reluctance to do this is understandable:

To begin with, judges find such activity difficult and psychologically disturbing. In addition, the thinking of the Western World generally favours the logical development of accepted premises. This attitude is due both to the importance of rationalized procedures in regulating and facilitating human life and to an instinctive human urge to find security through simplifying and categorizing reality .... Finally, in societies where the exercise of political power is legitimated through the democratic process, a court is understandably reluctant to formulate the policies regulating social behavior. 65

But, while the reluctance is understandable, it is not excusable. What is more, the fear that public faith in the courts would decrease if the judges were explicit about their lawmaking function is unfounded. In fact, it is likely that public faith in justice would actually increase if they were explicit about it. Witness the words of Justice Hall of the Supreme Court of Canada:

I find it hard to believe that the public will cease to believe in the fairness and probity of the courts if the courts lay down new laws from time to time. Indeed, if anything, faith in the courts will increase.66


64 See Zweigen and Kotz, supra n. 27, pp.260-274 (Law-Finding in Common Law and Civil Law).

65 Von Mehren and Gordley, supra n.13, pp.1142-3.

66 Hall, 'Law Reform and the Judiciary's Role' (1972) 20 Chitty's L.J. 77 at 82; reprinted (1972)
d) Judges must fill in gaps

Aristotle once remarked that "no piece of legislation can deal with every possible problem".67 Similarly, Portalis et al explained that they approached the drafting of the French Civil Code bearing in mind that "to foresee everything is a goal impossible of attainment":

We have ... avoided the dangerous ambition to desire to regulate and foresee everything .... The needs of society are so varied, the intercourse among humans so active, their interests so multiple, and their relationships so extensive that it is impossible for the legislator to foresee everything .... One cannot do without either case law or laws. We leave to the case law the rare and extraordinary cases that do not enter into the plan of a rational legislation, the very variable and very disputed details that should not occupy the legislator at all, and all the things that it would be futile to try and foresee or that a premature foresight could not provide for without danger. It is for experience to fill in gradually the gaps we leave.68

The French judge is specifically forced to fill in gaps in the law by the provisions of Article 4 of the Code Civil (see page 185 above). We have also seen how Article 1 of the Swiss Civil Code forces the judge to act as a legislator if there is no applicable legal provision. German jurists have invented the term "Rechtsfinden" to signify filling in gaps in the law by analogy69 and the German Supreme Court once expressed the view that "when the written law fails, the judge takes the place of the legislator for the individual case".70 Zweigert and Kotz maintain that ever since the decline of conceptualist positivism everyone has recognised that a legal order will still have gaps, even after all the possibilities of reasonable interpretation and analogy have been exhausted, and that they have to be filled by creative judicial activity.71

67 Scarman, supra n.46, p.14. No source is given for the remark.


69 Marsh, supra n59, p.68.


71 Zweigert and Kotz, supra n.27, p.182.
Gaps arise which judges must fill in a variety of situations. One American judge has pointed to legislative errors, ambiguous statutes and clearly wrong statutes as occasions on which judges must fill in the gaps.\(^{72}\)

In *McGonagle v. McGonagle*, the Supreme Court rectified an error which the legislature had made by referring, in the Criminal Justice (Evidence) Act 1924, to 'The Prevention of Cruelty to Children Act 1904 - the whole Act':

> The words ... would seem to indicate that, per incuriam, the Legislature overlooked the fact that a great deal of the Act of 1904 had been repealed and re-enacted in the [Children] Act of 1908.\(^{73}\)

Exactly the opposite approach was taken in *Commissioners of Inland Revenue v. Ayrshire Mutual Insurance* - Lord Macmillan recognised that "the legislature has plainly missed fire"\(^ {74}\) (speaking of s.31(1) of the Finance Act 1933), but the mistake was not to be rectified by the courts.\(^ {75}\) It is submitted that the *McGonagle* approach is preferable. As Lord Diplock says of the *Ayrshire Insurance* case,

> If, as in this case, the Courts can identify the target of Parliamentary legislation, their proper function is to see that it is hit: not merely to record that it has been missed. Here is judicial legislation at its worst.\(^ {76}\)

In *Bailly v. Ministère Public*.\(^ {77}\) an enactment which forbade passengers to get on or off the trains "when the train has completely stopped" was held to forbid such *before* the train stopped. In other words, the court corrected the error. The statute was clear, but it was clearly wrong.


\(^{73}\) [1951] IR 123 at 128 (O'Byrne J.)

\(^{74}\) [1946] 1 All ER 637 at 641.

\(^{75}\) See also Lord Esher MR in *R. v. Judge of the City of London Court* [1892] 1 QB 273 at 290 - "If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity."

\(^{76}\) Diplock, supra n.33, p.274.

\(^{77}\) Cassation criminelle. 8-III-1930, DP, 1930, I, 104. See Vanderlinden, supra n.25, p.6.
e) Strict adherence to precedent is now a thing of the past

In civil law countries, there has never been any doctrine of binding precedent, strictly speaking. However, the reality has always been that previous decisions will be highly persuasive:

The existence of official and private case reports where decisions are reported makes it easy to cite them. Advocates have never failed to do so .... Although such arguments may not be legally binding, they cannot help but affect a court. There is a natural tendency for courts to follow precedents.78

In common law countries, precedents are theoretically binding if a higher court has rendered a decision on the question, or if there is a previous decision of the same court. However, recently many common law courts have recognised that precedent should not be strictly adhered to if it will cause injustice. The most famous example is the 1966 Practice Statement of the House of Lords.79

Even without decisions such as that Practice Statement, the common law doctrine of precedent is to a certain extent only a myth. Justice Hall believes that precedent "has been a protective screen behind which judges legislated in silence and in secrecy".80 If a judge did not want to follow a particular precedent, he could always distinguish it on technical ground from his present decision. However, now with the new openness in common law countries as regards precedent, cases can be expressly overruled and the matter is much more clearly resolved. In R. v. Shivpuri,81 the House of Lords expressly overruled Anderton v. Ryan,82 which had been decided only a year or so earlier. Lord Bridge remarked that

78 David, supra n.42, p.182.

79 [1966] 3 All ER 77. For reference to similar developments in other common law countries see J.H. Hiller, 'The Law-Creative Role of Appellate Courts in the Commonwealth" (1978) 27 ICLQ 85 at 96.

80 Hall, supra n.66, p.78, quoting from Dr. Mark MacGuigan, a Canadian M.P.


The 1966 Practice Statement is an effective abandonment of our pretention to infallibility.\(^{83}\)

Even before 1966, courts were often willing to correct precedents which they found to have been erroneously decided. In Australia, Sir Isaac Isaacs reasoned as follows:

> Our sworn loyalty is to the law itself, and to the organic law of the Constitution first of all. If, then, we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation. It is not, in my opinion, better that the Court should be persistently wrong than that it should be ultimately right.\(^{84}\)

In *R. v. Button*,\(^{85}\) it was held that the common law offence of affray could occur in a private place. There was no reason to perpetuate erroneous precedents which held that it could only occur in a public place. In *Bourne v. Keane*,\(^{86}\) the House of Lords overruled *West v. Shuttleworth*\(^{87}\) and Lord Birkenhead said

> I cannot conceive that it is my function as a judge of the Supreme Appellate Court of this country to make error perpetual in a matter of this kind.\(^{88}\)

Having concluded that judges do reform the law, two questions often arise:

i) Is judicial law reform an undemocratic usurpation of the legislative power?

ii) Which is the more useful - reform by legislative or judicial means?

As regards the first question, it has been emphasised by Cappelletti that we should ask whether judicial law reform is undemocratic *in comparison* to that of other governmental decision-makers.\(^{89}\) He points out that the judiciary is not without democratic features. For example, judg-

\(^{83}\) [1986] 2 All ER 334 at 345.

\(^{84}\) (1913) 17 CLR 261 at 278.


\(^{86}\) [1919] AC 815.

\(^{87}\) (1835) 2 My. and K. 684.

\(^{88}\) [1919] AC 815 at 860.
es are appointed by the elected government, they give written decisions justifying their opinions and they are perhaps more easily accessible (the key to the courtroom is only a complaint). On the other hand, the legislatures are not as democratic as they seem. They do not perfectly reflect majority sentiments. Also, the majority will can be unjust, so the courts rightly "check" it.

The second question is largely a matter of opinion, and depends to a large extent on the area of law in question. Judicial law reform has its advantages and disadvantages, and so does legislative law reform. The main disadvantages of judicial law reform are:

1) The judiciary cannot conduct research or investigations into the needs and opinions of society.\(^{90}\)
2) Judicial law reform depends on the "adventitious concatenation of the determined party, the right set of facts, the persuasive lawyer and the perceptive court".\(^{91}\)
3) The law develops slowly and unsystematically if it is reformed by the judges. Judicial law reform can take centuries.\(^{92}\)

On the other hand, the courts have the advantage of dealing with a "flesh and blood" problem which arises. They can often deal with problems much more quickly than the legislature. Nowadays, with the increasing demands on legislatures' time, it can often be quicker to reform the law through a court action. Piecemeal improvements are better than none at all.\(^{93}\)

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\(^{89}\) Cappelletti, supra n.36, p.132.

\(^{90}\) Scarmen, supra n.24, p.219.

\(^{91}\) Friendly, supra n.72, p.791.


B. THE COMPARATIVE METHOD AND JUDICIAL LAW REFORM

If a judge is solving a problem which arises because the law is outdated, external comparison can serve as a useful tool in this problem-solving function.\(^\text{94}\) Let us now turn to the combination of the comparative method and judicial law reform and ascertain its use and its usefulness.

Kamba has confined the usefulness of the comparative method to three areas:

i) Cases of first impression
ii) Elucidation in national law of concepts and principles which have a foreign origin
iii) In the application of foreign law in national courts under the Conflict of Laws\(^\text{95}\)

But it is submitted that this is too restrictive an explanation. In particular, Kamba's first heading (cases of first impression) means that he cannot see any role for the comparative method if there is national law on the topic, but in fact the method can perform a useful function in such cases.

Marsh says that the knowledge of a foreign system of law brings about a "widening of the intellectual horizons", thus enabling a judge to realise that a step in judicial development of the law which may seem very bold is after all not so revolutionary, and its adoption in a similar country has taken place without apparent ill-effects.\(^\text{96}\) This "widening of the intellectual horizons" need not be confined to cases where there is no preexistent national law. Marc Ancel has urged the judge to make a habit of casting an eye on the world,\(^\text{97}\) since the comparative method furnishes

\[
\text{une règle d'interprétation singulièrement efficace pour démêler les difficultés d'un texte nouveau ou les complexités d'une espèce judiciaire.}\(^\text{98}\)
\]


\(^{96}\) Marsh, supra n.29, p.80 (Proceedings), p.660 (RabelsZ.)

\(^{97}\) Marc Ancel, 'La Fonction Judiciaire et le Droit Comparé' (1949) Rev.Int.Dr.Comp. 57 at 60.

\(^{98}\) Translation: "a rule of interpretation singularly effective for unravelling the difficulties of a new text or complexities of a judicial kind" - Ibid., p.61.
The comparative method helps the judge in three ways:

i) trouver plus facilement une solution exacte
ii) mieux se renseigner sur la portée d'une loi nouvelle
iii) suggérer plus aisément, pour un cas imprévu, une interprétation renouvelée d'une règle ancienne.\textsuperscript{99}

Again, Ancel does not confine these areas to cases of first impression. Finally, it may be noted that courts refer to persuasive authorities\textsuperscript{100} even when there is national law on the topic.

Before trying to come to conclusions as to the use and the usefulness of the combination of the comparative method and judicial law reform, a brief country-by-country survey would be helpful.\textsuperscript{100a} Material on this subject is difficult to trace, and Dutoit's comment should be borne in mind:

\begin{quote}
Cet aspect de l'impact du droit comparé dans la vie juridique resta parfois dans l'ombre, malgré son intérêt.\textsuperscript{101}
\end{quote}

\textbf{ENGLAND}

The various historical influences on English law are often overlooked. Edward Stanley Roscoe started his book on 'The Growth of English Law' with the following words:

\begin{quote}
Before the time of Edward I, English law did not exist: Anglo-Saxon, Danish, Norman and Roman influences were each at work.\textsuperscript{102}
\end{quote}

\textsuperscript{99} Translation: "(i) to more easily find an exact solution (ii) to better inquire about the scope of a new law (iii) to more easily suggest, for an unforeseen case, a renewed interpretation of an old rule" - Ibid., p.62.

\textsuperscript{100} See Glenn, 'Persuasive Authority' (1987) 32 McGill L.J. 261; Cohn, supra n.31, pp.100-118.

\textsuperscript{100a} No account is given of the comparative method in decisions of the European Court of Justice. This topic has been dealt with recently in G.Benos, 'The Practical Debt of Community Law to Comparative Law' (1984) 37 Rev.Hellenique Dr.Int. 241-254 and M.Hilf, 'The Role of Comparative Law in the Jurisprudence of the Court of Justice of the European Communities' in A. de Mestral et al (eds.), The Limitation of Human Rights in Comparative Constitutional Law (Ed. Y.Blais, Cowansville, 1986), 549-574.

\textsuperscript{101} Bernard Dutoit, 'Quelques Considérations sur les Objectifs d'une Revue de Droit Comparé' (1975) 27 Rev.Int.Dr.Compl. 113 at 117. Translation: "This aspect of the impact of comparative law in legal life at times stays in the shade, in spite of its interest."

The French influence was particularly strong:

The Common Law itself is derived from the Norman laws and customs which were carried from France to England at the time of the conquest by William the Conqueror. We should remember that until the sixteenth century French was the judicial language of England.\textsuperscript{103}

It has been argued that French thought and culture have not disappeared from English law, but have rather been absorbed into it.\textsuperscript{104} References to French law are in fact quite rare in British decisions. In the nineteenth century, it was common to refer to the writings of Pothier, especially on the Sale of Goods. In Cox v. Troy (1822), Best J. stated

The authority of Pothier is expressly in point. That is as high as can be had next to the decision of a court of justice in this country. It is extremely well known that he is a writer of acknowledged character; his writings have been constantly referred to by the court and he is spoken of with great praise by Sir William Jones in his Law of Bailments, and his writings are considered by that author equal in point of luminous method, apposite examples, and a clear manly style, to the works of Littleton on the laws of this country. We cannot, therefore, have a better guide than Pothier on this subject.\textsuperscript{105}

Lord Blackburn said in McLean v. Clydesdale (1883) that

we constantly in the English courts, upon the question what is the general law, cite Pothier.\textsuperscript{106}

Pothier was also relied upon in Hodgson v. Beauchesne (1858),\textsuperscript{107} in Young v. Grote\textsuperscript{108} and in Taylor v. Caldwell (1863).\textsuperscript{109} Cohn has remarked that

Only tradition can justify the preference granted to Pothier as against the large treatises of Planiol, Aubry at Rau and Baudry-Lacantinerie.\textsuperscript{110}

\textsuperscript{103} Mr. Wickersham, former Attorney General of the United States, cited in Rinfert, 'Reciprocal Influences of the French and English Laws' (1926) 4 Can.B.Rev. 69 at 70.

\textsuperscript{104} William D. Guthrie in Rinfert, Ibid. p.71.

\textsuperscript{105} (1822) 5 B. & Ald. 474 at 480.

\textsuperscript{106} (1883) 9 AC 95 at 105.

\textsuperscript{107} (1858) 12 Moore P.C. 285.

\textsuperscript{108} 4 Bing. 253. Pothier's view was confirmed as authoritative in London Joint Stock Bank v. McMillan [1918] AC 777.

\textsuperscript{109} (1863) 3 B.S. 826.
Sources other than Pothier were also relied upon. In Wing v. Angrave,\(^{111}\) Lord Campbell refers to the Code Napoleon. In Hadley v. Baxendale (1854),\(^{112}\) the rule of the Code Napoleon on the question in issue was considered. Hickman v. Peacey & Others (1945)\(^{113}\) involved extensive references to the Code Civil (articles 720-722).

In Bulmer v. Bollinger, Lord Denning, M.R., referred to Conseil d'Etat and Cour de Cassation cases\(^ {114}\) and said that European law "is like an incoming tide ... [which] cannot be held back".\(^ {115}\) Lord Denning has justified the granting of a mareva injunction on the basis of "the practice in the Continent of Europe" (Nippon Yusen Kaisha v. Kasageorgis (1975))\(^ {116}\) and more particularly, the French concept of "saise conservatoire" which "is applied universally on the continent" (Rasu v. Perushaan (1978)).\(^ {117}\) He also came very close to relying on a French interpretation on Company Law in Phonogram Ltd. v. Lane (1982),\(^ {118}\) even quoting from a French textbook on the subject, but he eventually rejected the idea that the French text was decisive. Lord Wilberforce, in Hoffman-La Roche (1978),\(^ {119}\) referred to "more developed legal systems" (meaning France) to point out the inadequacy of English law on claims for loss arising from illegal acts or omissions of the administration.

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\(^{110}\) Cohn, supra n.31, pp.116-117.

\(^{111}\) 8 H.L.C. 183 at 197-8.

\(^{112}\) (1854) 9 Ex. 341; 156 E.R. 145.

\(^{113}\) [1945] AC 304 at 332-3 (Lord Porter), at 342-3 (Lord Simonds).

\(^{114}\) [1974] 2 All ER 1226 at 1235.

\(^{115}\) Ibid., p.1231.

\(^{116}\) [1975] 1 WLR 1093 at 1094.

\(^{117}\) [1978] QB 644 at 658.


Roman law was consulted more often than French law. Gutteridge comments that "there can be little doubt that much Roman law has found its way into our common law system either directly or through the canon law". In *Acton v. Blundell* (1843), Tindall C.J. said:

> The Roman law forms no rule, binding in itself, upon the subjects of these realms; but, in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law the fruit of the researches of the most learned men, the collective wisdom of ages, and the ground work of the municipal law of most of the countries of Europe.

In 1863, Blackburn J., in the course of his judgment in *Taylor v. Caldwell*, held that

> although the Civil Law is not of itself authority in an English Court, it affords great assistance in investigating the principles on which the law is grounded.

Willes J. justified his conclusion in *Becharvaise v. Lewis* (1872) on the authority of the civil law, and quoted from the Digest. References to Roman law continued into the twentieth century. Roman law was invoked in 1901 in *Keighley Maxted & Co. v. Durant*, in 1924 in *Cantiare San Rocco*, and in 1939 in *Kearry v. Pattinson*. The 1942 case of *Hope Brown Deceased*...

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122 (1843) 12 M.& W. 324 at 353; 152 E.R. 1223 at 1234.

123 (1863) 3 B. & S. 826 at 835; 122 E.R. 309 at 313. He repeated this view in *Appleby v. Myers* (1867) LR 2 CP 651 at 653: "The opinions of the great lawyers collected in the Digest afford us very great assistance in tracing out any question of doubtful principle, but they do not bind us."

124 (1872) LR 7 CP 372 at 373.

125 [1901] AC 240.

126 [1924] AC 226.

127 [1939] 1 KB 471. Cohn regrets that the attention of the court was not drawn to the fact that the Roman sources had been considered by continental interpreters all of whom had adopted the opposite view from that which the court in *Kearry* preferred - Cohn, supra n.31, Notes on Chapter I, fn.190. See Cohn, 'Bees and the Law' (1939) 55 LQR 289.

constitutes a legal curiosity since the quote from Ulpian relied upon in it was buried under three cross-referring authorities. Cohn argues that the quote should have been relied upon as it stood, without the complications which Langton J. unnecessarily brought about by referring to the other three authorities.¹²⁹

American cases have often been cited in English courts. In *Hadley v. Baxendale* (1854),¹³⁰ counsel urged that the court "ought to pay all due homage in this country to the decisions of the American courts upon this very important subject, to which they appear to have given much careful consideration", and both counsel and the judges referred to an American treatise, Sedwick on Damages. But in 1889, Fry LJ interrupted counsel's comparative arguments to say:

> I have been struck by the waste of time occasioned by the growing practice of citing American authorities.¹³¹

In 1921, in *Re Macartney*, Astbury J. quoted extensively from an American case and adopted and followed it.¹³² Lord Atkin's judgment in *Donoghue v. Stevenson* (1932)¹³³ relied extensively on "the illuminating judgment" of Cardozo J. in *McPherson v. Buick*,¹³⁴ adding that

> It is always a satisfaction to an English lawyer to be able to test his application of fundamental principles of the common law by the development of the same doctrine by the Courts of the United States.¹³⁵

¹²⁹ Cohn, supra n.31, fn.189.

¹³⁰ (1854) 9 Ex. 341; 156 E.R. 145 at 149.

¹³¹ *In Re Missouri Steamship Co.* (1889) 42 LR Ch.D. 321 at 330. Cotton LJ said "I have often protested against the citation of American authorities" (p.331).

¹³² [1921] 1 Ch. 522 at 528-530. Cohn describes this as one of the few unfortunate cases where a foreign precedent has been adopted just as it stands without further investigation - supra n.31, p.103.

¹³³ [1932] AC 562 at 598.

¹³⁴ 217 N.Y. 382 (1916).

¹³⁵ [1932] AC 562 at 598.
However, in the same case, Lord Buckmaster, referring to the citation of an American case, was of an entirely different view:

[It is clear] that such cases have no close application and no authority for though the source of the law in the two countries may be the same, its current may well flow in different channels.\(^\text{136}\)

In 1934, Greer LJ alluded to the scarcity of authority in England on the effect of assumption of risk in relation to the principle of violenti non fit injuria, and went on to study the American approach:

There is, however, a wealth of authority in the United States .... The effect of the American cases is, I think, accurately stated in Professor Goodhart's article to which we have been referred .... In my judgment that passage represents not only the law of the United States, but I think it also accurately represents the law of this country.\(^\text{137}\)

Lord Wright had this to say of American authorities in *Beresford v. Royal Insurance Co.* (1937):

Authorities were cited from the Supreme Court of the United States. Decisions of that court are always considered with great respect in the courts of this country, and it has often been said that it is desirable to have uniformity in the law of contracts as far as possible in our two countries.\(^\text{138}\)

In *Lorentzen v. Lydden & Co.* (1942),\(^\text{139}\) American cases assisted Atkinson J. to solve a novel question as to a Norwegian order in Council. American Restatements of Law may also be relied on in English cases: They are spoken of "with the highest respect as a statement of the trend of decisions in American law".\(^\text{140}\) Finally, in *Corocraft v. Pan American Airways* (1969), Lord Denning referred to American cases so that the Warsaw Convention on air transport could be "given the same meaning throughout all the countries who were parties to it".\(^\text{141}\)

\(^{136}\) Ibid., pp.576-7.


\(^{138}\) [1937] 2 KB 197 at 216.

\(^{139}\) [1942] 2 KB 202.

\(^{140}\) *Read v. J.Lyons & Co. Ltd.* [1945] KB 216 at 225 (Scott LJ).

\(^{141}\) [1969] 1 QB 616 at 653.
Scottish and Irish cases are cited quite frequently in English courts. In 1974, Lord Scarman commended the attention of English lawyers to *McGee v. A.G.*\(^\text{142}\) saying that the Irish Supreme Court was showing a profundity of thought and independence of approach seldom seen in English judgments, and that it was developing a very exciting jurisprudence.\(^\text{143}\) In *Re Brightlife* (1986),\(^\text{144}\) Hoffman J. consulted the Irish decision of *Re Keenan Bros.* (1985)\(^\text{145}\) in relation to fixed charges on the book debts of a company.

Commonwealth jurisdictions are another source of persuasive authorities in English cases. These references are so frequent that examples are unnecessary. Sir C.K.A. Allen, speaking of decisions of English-speaking courts, has noted a growing disposition on the part of English courts to recognize [them] as somewhat more than merely persuasive, and to regard the line between 'persuasive' and 'binding' as thin and shadowy, or at least as technical and artificial.\(^\text{146}\)

It has been urged that more use should be made of Commonwealth cases:

> Legal issues should be decided in the light of, rather than in ignorance of, decisions already taken in other common law jurisdictions.\(^\text{147}\)

Lord Denning has at least twice referred to German cases in support of his judgments. In *Trendtex Trading Corporation v. Central Bank of Nigeria* (1977),\(^\text{148}\) many civil law authorities

\(^{142}\) [1974] IR 284

\(^{143}\) Scarman, foreword to Marsh, supra n.59.

\(^{144}\) [1986] 3 All ER 673.

\(^{145}\) [1985] IR 401.

\(^{146}\) Allen, *Law in the Making* (7th ed., 1964), p.284. He speaks of "foreign judgments", but makes it clear that these are only cases from "English-speaking courts in countries beyond this realm" (p.281).


were cited in the arguments of counsel\textsuperscript{149} and Denning relied particularly on a decision of the Commercial Court of Frankfurt - \textit{Youssef M. Nada v. Central Bank of Nigeria} (1976)\textsuperscript{150} - saying that the decision

affords strong support for the view I have expressed, seeing that the German court decided in just the same way for just the same reasons.\textsuperscript{151}

In \textit{Siskina v. Distos Compania Naviera} (1977),\textsuperscript{152} Denning relied on the decision of a Hamburg court concerning "saisie conservatoire".\textsuperscript{153}

In the area of Private International Law, seventeenth century English judges frequently resorted to foreign sources when laying down the rules.\textsuperscript{154} For example, in \textit{Potinger v. Wightman} (1817), Grant MR observed:

On the subject of domicil, there is so little to be found in our own law that we are obliged to resort to the writings of foreign jurists for the decision of most of the questions that arise.\textsuperscript{155}

However, foreign jurists are no longer referred to as frequently as before, a state of affairs which Gutteridge regrets since it involves a failure to recognise the importance of ensuring that similar problems in the conflict of laws should not receive different solutions in different jurisdictions and that problems of conflict often assume the same form in all systems of law.\textsuperscript{156}

\textsuperscript{149} Counsel's arguments are only summarised in the Queen's Bench report. The cases cited were from the Courts of Appeal of Brussels, Amsterdam, Paris and the Hague, from the French Cour de Cassation and from the Commercial Court of Frankfurt.

\textsuperscript{150} L.G. Frankfurt a.M., August 25, 1976, No. 3/8 014/76.

\textsuperscript{151} [1977] QB at 558-9.

\textsuperscript{152} [1977] 3 WLR 532 (C.A.)


\textsuperscript{154} Gutteridge, supra n.121, p.44.

\textsuperscript{155} (1817) 3 Mer. 67 at 79; 36 ER 26 at 30.

\textsuperscript{156} Gutteridge, supra n.121, p.45.
Also as regards Conflict of Laws, the comparative method is utilised by English judges when they determine questions of foreign law. Foreign law is a question of fact, but a question of fact of a peculiar kind. Section 102 of the Supreme Court of Judicature (Consolidation) Act 1925 provides that the issue is decided by the judge and cannot be left to the jury. The judge must be furnished with evidence as to the foreign law, and in assessing that evidence, he/she employs the comparative method.

Statistical surveys of cases cited are of some assistance, but their usefulness must not be overestimated. Professor Diamond conducted a survey of the 434 cases reported in the three volumes of the All England Reports for 1965. The 3,685 cases cited included 65 Scottish, 37 Australian, 12 Irish, 12 Canadian, 10 American, 4 New Zealand, 3 Northern Irish, 2 South African decisions and 1 Indian decision. Two points may be made about this survey. Firstly, there may well have been references to foreign law which was not case-law. Roman law is never cited by cases, but instead by references to the Digests. Continental law may be referred to simply by quoting provisions of Codes or opinions of jurists. Secondly, the survey does not show how much weight was placed on the foreign decisions by the English judges. Jane Giddings has conducted a survey which deals with citations of cases in argument and judgment of cases reported in the Appeal Cases from 1973 to October 1975. The information is broken down year by year, but it is perhaps more helpful for present purposes to obtain totals and represent them in a Table as below:


158 See generally Gutteridge, supra n.121, chap.IV (Comparative Law & The Conflict of Laws) and Kamba, supra n.95, pp.500-501.


There are several limits on the usefulness of this survey. It does not show how much weight is placed on the foreign cases. There may have been references to foreign law which was not case-law. (Giddings states that the information is obtained from the lists of cases cited given in the headnote to each reported case.) With respect, on this basis, Giddings is mistaken to conclude from this survey that

Perhaps quite naturally, there seems to be no place in decisions of cases for comparison with e.g. Civil Law solutions .... Judicial cognisance is taken of legal decisions in other jurisdictions, but this is limited exclusively to cases from other common law jurisdictions.¹⁶¹

Examples have already been given above of modern references to Roman and civil law authorities in English cases. Unfortunately, these can only be discovered from reading of cases, since the fact of reference to those authorities is often not included in the headnote. Another limit to the usefulness of Giddings's survey is the fact that she has not broken the foreign cases down country by country.

One interesting point in her survey is that foreign cases are cited more frequently in the Privy Council (167) than in the House of Lords (80), since the former Board sits as the Supreme Court of appeal from British Colonies and Protectorates and from the higher courts of some independent Commonwealth countries. Giddings found that the Privy Council used for the main part cases local to the dispute (e.g. from Australia, Bahamas, Jamaica, Trinidad and Tobago, Hong Kong, Malta, Malaysia, Fiji). She refers to Vaudin v. Hamson (1974) as an exception to the general predilection for the exclusive use of comparative cases from common law jurisdictions. The case involved the law of prescription of land on the channel island of Sark, and Lord Wilberforce, delivering the judgment of the Privy Council, made short references to French and Roman law.

UNITED STATES

Cases in the United States can involve two forms of comparative law - international (consideration of solutions adopted in jurisdictions outside the U.S.A.) and interstate (consideration of solutions adopted in other U.S. states). It has rightly been said that "interstate law comparison and international law comparison are methodologically very similar".

When the settlers arrived, they did not adopt English law exactly as it was in England. In the post-revolutionary period (1776-1861), civilian sources were frequently referred to by Chancellor

162 Ibid., p.13.
164 Ibid., p.582. Also p.584 (Terrien) and p.586 (Terrien and Pothier). He cites another Privy Council case, La Cloche v. La Cloche (1870) LR 3 PC 125 as authority for the proposition that it is proper to look at related systems of law, and commentators on them, in order to elucidate the meaning of terms. But he limits this proposition to cases where it can be shown "that the system of law to which appeal is made in general, and moreover the particular relevant portion of it, is similar to that which is being interpreted in a manner which should call for a similar interpretation in the latter" (pp.581-2).
165 George A. Zaphirou, 'Use of Comparative Law by the Legislator' (1982) 30 AJCL (Supp.) 71 at 95.
Kent of New York and Justice Story of Massachusetts and the U.S. Supreme Court.\textsuperscript{166} As Whitmore Gray has said,

In the early years of every state, looking at decisions beyond its borders was an obvious necessity.\textsuperscript{167}

Some state legislatures attempted to prevent post-1776 English cases being cited in the state courts, but these statutes were short-lived and often ignored by the courts.\textsuperscript{168}

However, international comparison declined after the Civil War (1861-1865). But civil law elements have remained, particularly in Louisiana, Texas, California and Puerto Rico. For example, in \textit{Li v. Yellow Cab Co. of California} (1975),\textsuperscript{169} a landmark California case on comparative negligence, there were references to the Code Napoleon and French laws in general. In 1953, the Supreme Court of New Jersey, in the case of \textit{Greenspan v. Slate},\textsuperscript{170} cited at length Article 203 of the French Civil Code, Articles 147 and 148 of the Italian Civil Code and Articles 271 and 272 of the Swiss Civil Code. Maritime law cases are more likely than most to contain references to civil law authorities.\textsuperscript{171}

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{166}] Ibid., p.81.
\item[\textsuperscript{168}] See further John Chipman Gray, \textit{The Nature and Sources of the Law} (Macmillan, N.Y., 2nd ed., 1931), p.245, fn.1. Such statutes were passed in Kentucky, Pennsylvania and New Jersey. The Kentucky statute was passed in 1808 and was actually applied twice. It was revised in 1852.
\item[\textsuperscript{169}] 13 Cal. 3d. 804, 532 P. 2d. 1226, 119 Cal. Rptr. 858 (1975); discussed in Zaphirou, supra n.165, pp.89-90. See also 'Li v. Yellow Cab Company -- Judicial Activism Illustrated' (1977) 30 Arkansas LR 557-70.
\item[\textsuperscript{170}] 12 N.J. 426, 97 A. 2d. 390 (1953); cited in Zaphirou, supra n. 165, p.88.
\item[\textsuperscript{171}] See Zaphirou, supra n. 165, pp.78-80, referring to \textit{Thompson v. The Catherina} 23 F. Cas. 1028 (D.Pa. 1795)(No.13, 949) and \textit{United States v. Reliable Transfer} 421 U.S. 397 (1975).
\end{enumerate}
\end{footnotesize}
Interstate comparison is now so complicated a matter that American courts are less likely than before to resort to international comparison. Furthermore, international comparison is also rendered less likely since American judges resort more freely than English judges to textbooks, academic articles and the Restatements of Law. \(^{172}\) Professor Wise has summarised the situation today as follows:

Foreign law is consulted, at best, only sporadically. To survey (as is often done) the law within the United States, with its multitudinous specific variations in over fifty independent jurisdictions, is already a laborious undertaking. Such glances as are cast abroad are likely to be towards other English-speaking countries, towards England usually more so than the rest of the Commonwealth for reasons of habit, familiarity, and perhaps accessibility. \(^{173}\) English cases continue to be read, although more in academic circles than elsewhere and largely, I fear, because to American sensibilities they seem to have many of the delightful qualities of a quaint fairy tale. \(^{174}\)

**IRELAND**

Since Ireland only became independent of English law in 1922, there has always been a marked English influence on Irish law. \(^{175}\) Article 73 of the Constitution of the Irish Free State (1922) provided that subject to that Constitution and to the extent to which they were not inconsistent therewith the laws in force in Saorstát Éireann at the date of the coming into operation of that Constitution should continue to be of full force and effect until either repealed or amended by the Oireachtas. This meant that pre-1922 common law and statutes would still apply. Article 50 of the 1937 Constitution carried forward the laws of Saorstát Éireann courts under similar conditions. The courts were quite free to develop new common law rules if they wished. In 1945, in

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\(^{172}\) Zaphirou, supra n.165, pp.87-88.


\(^{174}\) Ibid., p.11.

\(^{175}\) For a historical survey, see James C. Brady, 'English Law in the Republic of Ireland' (1978) 6 U. Tas. L.R. 60. A pamphlet governing the Republican courts established from 1919-1922 stated that "citations may be made ... from the Code Napoleon and other Codes, the Corpus Juris Civilis and works embodying or commenting upon Roman law, but such citations shall not be of binding authority". However, "there was a very limited acceptance of the invitation" - J. P. Casey, 'Republican Courts in Ireland, 1919-1922' (1970) 5 Ir.Jur. (n.s.) 321 at 329.
Cook v. Carroll, Gavan Duffy J. said:

When, as a measure of necessary convenience, we allowed the common law generally to continue in force, we meant to include all the common law in harmony with the national spirit, we never contemplated the maintenance of any construction of the common law affected by the sectarian background. 176

He believed that English law "surviving to us from an alien polity" need not be applied, and instead cited the laws of sacerdotal privilege from U.S. states, Newfoundland and Quebec as representing the correct rule.

In 1964, in State (Quinn) v Ryan, Walsh J. stated his preference for U.S. decisions:

In this State one would have expected that if the approach of any Court of final appeal of another State was to have been held up as an example for this Court to follow it would more appropriately have been the Supreme Court of the United States rather than the House of Lords. 177

1964 was also the year when the Supreme Court departed from the strict doctrine of stare decisis, and in so doing preferred the American, European, Canadian, South African and Australian rules to that of the House of Lords. 178 This writer has conducted a survey of the cases cited in the 1965 volume of the Irish Reports, and found that of the 439 cases cited in the 39 cases reported, 229 are English (including at least 7 from the Privy Council), 152 are Irish, 29 are American, 21 are Scottish, 4 are from Northern Ireland, 2 from Canada, and 2 from Australia. While this survey is subject to the same limitations as those of Diamond and Giddings discussed above, it does show that at that time references to English cases were extremely frequent.

It is no longer as necessary as before to rely on English authorities. While there is still wholesale copying of English statutes (Black J. has called this the "scissors and paste penchant" of the Oireachtas), 179 our law has diverged from English law on a wide variety of issues. Further-

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176 (1945) IR 515 at 519.

177 (1965) IR 70 at 126.


179 Cited by McWilliam J. in Breathnach v. McCann [1984] IR 344 at 346. No source is given for
more, within the last ten or fifteen years, many fine textbooks on areas of Irish law have been produced which reflect this divergence from English law and assist students, lawyers and judges in finding relevant Irish authorities.

The judiciary have continued to criticise excessive reliance on English cases. Mr. Justice McCarthy of the Supreme Court has condemned such reliance, saying that English cases must be examined and questioned in the light of a jurisprudence whose fundamental law is radically different in its denial of a supremacy of parliament and its upholding of three co-equal organs of government. He stresses that we have a written Constitution, in contrast with the situation in England, and that our courts would, in my view, find more appropriate guidance in the decisions of courts in other countries based upon a similar constitutional framework than in what at times appears to be an uncritical adherence to English precedent, which itself, appears difficult to reconcile from time to time.

Similarly, D'Arcy J. has criticised reliance on English authorities, particularly in the area of Landlord and Tenant.

United States law has had quite an impact on the interpretation of the 1937 Constitution, as P.D. Sutherland has found.

the quote.


181 Ibid., loc.cit. McCarthy J. has recently re-iterated this view but added "a plea against the unthinking citation of precedent as being a substitute for argument on principle, a practice all the more offensive when it involves a form of forensic forelock touching to judgments in foreign courts" - Supra n.17, p.2

182 C.I.F. First Holdings Ltd. v. Barclays Bank (Irl) Ltd. (H.C., 25 July 1986). No written judgment was delivered, but D'Arcy J's comments are cited in De Blacam, 'Disregarding Rent Reviews when Fixing a New Rent' (1988) 6 ILT (n.s.) 7 at 7.

183 P.D. Sutherland, 'The Influence of U.S. Constitutional Law on the Interpretation of the Irish
Civil law is at times referred to in Irish cases. A striking example is *Byrne v. Ireland* (1972),\(^{184}\) in which Walsh J. describes the French and German law on state liability, referring to the *Blanco* case,\(^{185}\) Article 839 of the German Civil Code and Article 34 of the German Basic Law. In *Bourke v. Attorney General* (1972),\(^{186}\) concerning the principle of non-extradition for political offences, there were references to French, Belgian and German law.\(^{187}\) In *Wavin Pipes v. Hepworth Iron* (1982),\(^{188}\) Costello J. decided that in certain circumstances the Irish courts might look at legislative history in interpreting statutes, and in so holding commented that the English rule did not apply in civil law jurisdictions, in the U.S.A. or in the European Court of Human Rights. In *Murphy v. Attorney General* (1982),\(^{189}\) German and Italian law on tax assessment of married couples was quoted in some detail by the High Court and the Supreme Court.\(^{190}\)

As regards the law on *locus standi*, there have been references to "the law in other countries" (without the particular countries being named, but presumably including civil law countries) in *East Donegal Co-Operative v. A.G.* (1970)\(^{191}\) and *Cahill v. Sutton* (1980),\(^{192}\) while a more particular reference to the law of the member states of the European Communities was made by Walsh

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\(^{184}\) [1972] IR 241 at 267-8. Walsh J. also refers to the situation in the U.S.A., Australia, Canada, New Zealand, South Africa and India.

\(^{185}\) Tribunal des Conflits, 8 Feb. 1873, *Recueil Dalloz* 1873.III.17.

\(^{186}\) [1972] IR 36.

\(^{187}\) Art. 227 of the Belgian Code d'Instruction Criminelle was quoted in French and references were made to the French law of 10 March 1927, the Belgian law of 1833, Beltzen's Encyclopédie and the German Supreme Court case of *Re Fabijan* 1933 [1933-34] Ann. Dig. 360 (No.156); 6 Digest of Int. Law 834-6.


\(^{189}\) [1982] IR 241.

\(^{190}\) Ibid., pp.272-3 (Hamilton J., H.C.) and pp.284-5 (Kenny J., S.C.)


J. in *State (Lynch) v. Cooney* (1982).\(^{193}\)

In the field of Private International Law, the same rules apply as in England,\(^{194}\) which means that Irish judges and counsel use the comparative method in assessing expert evidence on foreign law. Thus, Barrington J. assessed evidence on French divorce law in *L.B. v. H.B.* (1980),\(^{195}\) and German law was assessed in *Re Interview Ltd.* (1975)\(^{196}\) and *Krupstahl Equipment v. Quitmann Products* (1982).\(^{197}\)

**FRANCE**

In 1876, the *Service de Législation Étrangère*, attached to the Ministry of Justice, was established\(^{198}\) and part of its function was to inform French judges about foreign law. In 1951, this *Service* became part of the *Centre Français de Droit Comparé*.\(^{199}\)

It is extremely difficult to evaluate how much use is made by French judges of comparative law in deciding cases. In 1948, Marc Ancel spoke of the comparative method's usefulness to the French judge at considerable length, but unfortunately did not cite any cases to back up his description.\(^{200}\) Tallon's report to the 1976 Council of Europe conference is of no assistance.

\(^{193}\) [1982] IR 337 at 368.

\(^{194}\) See William Binchy, *Irish Conflicts of Law* (Butterworths Irl. Ltd., 1988), chap. 7 (pp.104-120).


\(^{196}\) [1975] IR 382 at 392.

\(^{197}\) [1982] ILRM 551.


\(^{199}\) Established by decree of 2 April 1951, reproduced in Anon., 'Centre Français de Droit Comparé' (1951) 3 Rev. Int.Dr. Comp. 301.

\(^{200}\) Ancel, supra n.97.
either. The problem is aggravated by the length of French judicial decisions. The French believe that "a judicial decision must assert itself in rigorous brevity".\(^{201}\) As René David has said, "the higher the court the shorter the decision in France, where a brief decision is regarded as a sign of experience and wisdom."\(^{202}\) This concise style has been criticised by Touffait and Tunc in a 1974 article.\(^{203}\) Since the French decisions are so short, we have no means of ascertaining just how much foreign law is consulted by the French judges. Zweigert and Kotz have recently stated that the Cour de Cassation seems utterly unreceptive to comparative law arguments, due to the peculiar style of its judgments, which pay no heed to the factual background of the law.\(^{203a}\)

**GERMANY**

Ulrich Drobnig has surveyed the use of comparative law by the German courts from 1950 to 1980,\(^{204}\) and concluded that the likelihood of resort to foreign cases depends on the type of case involved. There are three classes of cases. In the first class, comparison is unavoidable. Comparison is necessary in order to determine general principles of international law, or for the classification of foreign institutions so that the appropriate German conflicts rule may be correctly applied. In the second and third classes, comparison is on a voluntary basis. The second class consists of cases where comparison is encouraged by a more or less pronounced international

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\(^{202}\) David, supra n.42, p.187.


\(^{203a}\) Zweigert and Kotz, supra n.27, p.19.

\(^{204}\) Ulrich Drobnig, 'The Use of Comparative Law by German Courts' (English summary) (1986) 50 RabelsZ. 629-630. See also A. Weber, 'The Role of Comparative Law in the Civil Liberties Jurisprudence of the German Courts' in A. de Mestral et al (eds.), supra n.100a, 525-548. Dr.Hahn's national report to the 4th European Conference of Law Faculties is of no assistance in this respect.
connection of a relevant rule of German law -- the rule may be based on a convention for uniform law, it may have been derived from a foreign legal system, or the relevant branch of the law may address trans-border situations. In the third class, recourse to foreign law is completely voluntary and therefore quite rare, especially in criminal and public law. Comparative law is sometimes used in order to fill a gap in domestic law.

One example of such rare voluntary references to foreign law is a Constitutional Court (Bundesverfassungsgericht) decision of 1953\textsuperscript{205} in which the court referred to Article 1 of the Swiss Civil Code in justifying its opinion that the courts had a duty to adapt the law to new governing principles where the legislator was under a temporary disability to effect the change.

On at least two occasions, the Bundesgerichtshof (Federal Supreme Court) has used comparative law to support the principle that the victim of an invasion of the "general right of personality" may claim damages at large. In one case, it said:

\begin{quote}
In almost all legal systems which, like ours, put a prime value on the individual, damages for pain and suffering are regarded as the proper private law sanction for invasions of the personality. The availability of such damages does not adversely affect the freedom of the press, which those systems also treat as of fundamental importance, so the objection that the award of such damages in cases of invasions of personality improperly invades or unduly imperils the constitutionally guaranteed freedom of the press is clearly without substance.\textsuperscript{205a}
\end{quote}

In another case, the Bundesgerichtshof held that the claim for such damages was limited to cases where the invasion of the right of personality had been particularly serious, observing that such a limitation "is also to be found in Swiss law, which is more concerned with legal protection of the personality than the BGB (see art.49 I OR)."\textsuperscript{205b}

\textsuperscript{205} Civil Decisions (BGZ) Vol.II.Appendix P.35 (1953), cited in W. Friedmann, supra n.30, p.535.

\textsuperscript{205a} BGHZ 39, 124, 132 (BGHZ = Decisions of the Bundesgerichtshof in civil matters); cited in Zweigert and Kotz, supra n.27, p.19.

\textsuperscript{205b} BGHZ 35, 363, 369; cited in Zweigert and Kotz, loc. cit. (BGB = West German Civil Code; OR = Swiss Code of Obligations). Zweigert and Kotz state that many further examples from German courts are analysed by Aubin, 'Die Rechtsvergleichende Interpretation autonom-intern Rechts in der deutschen Rechtsprechung' (1970) 34 RabelsZ. 458.
In Conflicts of Law cases, the German courts are in a different position to the English and Irish courts. Under S.293 of the Code of Civil Procedure (ZivilProzessOrdnung), foreign law is not a question of fact, and the court may use any source of information in order to ascertain it.\textsuperscript{206} The result is that "the German judge cannot fold his hands and leave the question to be dealt with by the parties; he must take it up himself and pursue the matter on his own account."\textsuperscript{206a} In 1967, Cohn found that the German judges hardly ever relied on English case reports, since they only rarely had access to them. Instead recourse was had to textbooks, sometimes in out-of-date editions.\textsuperscript{207}

\textbf{SWITZERLAND}

The unification of the cantonal laws of Switzerland was a long process which did not end until 1907 when the Code Civil was adopted. That Code was influenced by German and French law, and comparative law continues to be referred to in the majority of Swiss doctrinal writings.\textsuperscript{208}

In 1959, Professor Klein surveyed 20 years of cases of the Tribunal Fédéral and cited approximately 50 cases in which that court had referred to German, French, Austrian, Italian, Belgian, Chilean, Argentinian and English law. He found that comparative law was extremely useful to a judge in interpreting Swiss law or when he/she was forced to act as a legislator by the provisions of Article 1 of the Swiss Civil Code (cited at page 185 above). On the other hand, sometimes comparative law could permit the judge to establish if there was, in fact, a gap in Swiss law.\textsuperscript{209} He notes that often the court is not contented to compare the Swiss rule with a "parent"


\textsuperscript{206a} Gutteridge, supra n.121, p.48.

\textsuperscript{207} Cohn, supra n.206.

foreign rule, but spreads the comparison to other systems proceeding on different principles.\textsuperscript{210}

As regards the court's method of comparison,

Un simple renvoi à tel auteur allemand, français ou italien suffit parfois pour corroborer un raisonnement. De nombreux arrêts, toutefois, consacrent de long développements à l'analyse comparative. Et s'il est vrai que cette méthode est essentiellement appliquée en matière de droit privé, il n'en reste pas moins que certains arrêts de droit public ont su la mettre pareillement à profit.\textsuperscript{211}

Klein refers to only one public law decision in which the comparative method was applied - \textit{Lüt­hold c. König} (1956).\textsuperscript{212}

Some 16 years later, M. Gabriel Frossard of the University of Geneva\textsuperscript{213} came to a very different conclusion:

Forcé est de constater que, pour l'application du droit national, le recours au droit comparé est très peu pratiqué dans la jurisprudence rendue en matière de droit privé. En revanche, l'étude de droits étrangers est fréquente lors de la préparation des décisions prononcées en matière de droit public (droit constitutionnel et droit administratif), ainsi que, tout particulièrement depuis 1973, en matière de droit pénal également.\textsuperscript{214}

Perhaps the reason M. Frossard reaches such a different conclusion to Professor Klein is that the former is referring to the preparatory stage of the judicial process, whilst the latter relied entirely on the published reports of the court's decisions. M. Frossard explains that the Tribunal Fédéral

\textsuperscript{209} Ibid., p.332.

\textsuperscript{210} Loc.cit.

\textsuperscript{211} Translation: "A simple reference to some German, French or Italian author sometimes suffices to corroborate a point. However, many decisions contain long expansions of comparative analysis. And if it is true that this method is essentially applied in private law matters, it is no less true that certain public law decisions have equally applied it profitably" - Ibid., p.323.

\textsuperscript{212} 5 December 1956, Arrets du Tribunal Federal Suisse 82 - I - 234.


\textsuperscript{214} Ibid., p.34. Translation: "It must be noted that, for the application of national law, comparative law is resorted to very little in private law cases. On the other hand, study of foreign laws is frequent at the time of preparation of decisions pronounced in matters of public law (constitutional and administrative law) and also, particularly since 1973, in criminal law."
uses comparative law mainly in the phase which precedes the judgment: such studies are contained in the report of the juge rapporteur and form the subject of the court's deliberations. The published decisions only rarely mention comparative analysis or references to foreign law.  

M. Frossard adds that French law is never referred to, for two reasons. Firstly, Swiss public law, procedural law and criminal law are much more similar to the corresponding legislation in force in Germany, Austria and Italy than that adopted by France. Secondly, German, Austrian and Italian decisions are elaborated and presented according to rules and conceptions which correspond to those practised by the Tribunal Fédéral: the difference from the French Cour de Cassation, for example, is considerable. What he is saying, in effect, is that the brevity of French decisions reduces the likelihood of their being used as a source of comparative material by the Swiss Courts.

M. Frossard also makes a point which is probably true not just of Switzerland, but of most countries:

Le recours au droit comparé, dans l'application du droit national, est unanimement souhaité et reconnu comme de la plus haute utilité. Cependant, compte tenu de la surcharge des tribunaux, l'analyse comparative apparaît un peu comme un luxe, étant donné le temps considérable qu'elle nécessite.

In 1984, Zweigert and Kotz stated that the Swiss Federal Court readily accept arguments from comparative law. They referred to BGE 98 II 73 and 273 as leading examples.

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215 Ibid., p.35.
216 Ibid., p.34.
217 See also Marsh, supra n.29, p.79 (Proceedings), p.658 (RabelsZ.)
218 Frossard, supra n.213, p.35. Translation: "Resort to comparative law in the application of national law is unanimously wished for and recognised as of the greatest usefulness. However, having regard to the overburdening of the courts, comparative analysis appears somewhat as a luxury, given the considerable time which it requires."
218a Zweigert and Kotz, supra n.27, p.19. Although the English translation of Zweigert and Kotz was published in 1987, the German version of the second edition was published three years earlier in 1984 (p.vi). BGE = Decisions of the Swiss Federal Court (Bundesgericht). As a
Finally, it should be noted that the Swiss Institute of Comparative Law, created by a federal statute of 6 October 1978, provides information to courts as part of its functions.219

**OTHER EUROPEAN COUNTRIES**

In Greece, judicial decisions are "not indifferent to"220 foreign law, as M. Mettalinos has illustrated by referring to a decision of the Court of Appeal of Athens. In that unnamed case, a question of arbitration law was decided by reference to Austrian and, in particular, German law, since the Greek Code of Civil Procedure was modelled on their systems of law.

In Turkey, judicial decisions benefit from comparative researches and this is especially true when the judge must act as a legislator under Article 1 of the Turkish Civil Code (modelled on Article 1 of the Swiss Civil Code).221

In the Netherlands, Dutch court practice has been said to be coloured by a *horror alieni juris*.222 Mr. E.H. Hondius says that it is very rare to find references to foreign law strictly for comparative reasons in Dutch court decisions. A 1943 *Hoge Raad* decision, *Van Kreuningen v. Bessem*,223 which was based on case-law and legislation of neighbouring countries concerning

source of further details and references, they cite Uyterhoven, *Richterliche Rechtsfindung und Rechtsvergleichung* (1959).


tortious compensation for nonfinancial loss, has proven to be a *rara avis*. Ever since, references to foreign law usually are not made, even if it is quite clear that inspiration was drawn from foreign law. Thus, a 1973 decision of the Hoge Raad concerning the demand of a transsexual for change of the mention of his sex in his birth certificate\(^\text{224}\) may well have been inspired by a similar decision of the German Bundesgerichtshof\(^\text{225}\) (which Hondius says seems to have the highest impact on Dutch legal science). Hondius adds that the motivation of Hoge Raad decisions is far less elaborate than that of German and English decisions, but not as staccato as that of Belgian, French and Russian decisions in cassation.\(^\text{226}\)

Comparative law seems to play a considerable role in Luxembourg, probably because it is such a small jurisdiction. M. Arendt describes the situation as follows:

> Il ne se conçoit pas une bibliothèque de praticien (juge ou avocat) où ne figurent les grands traités et un grand nombre de périodiques édités en France, en Belgique ou en Allemagne. Les arrêts de la Cour de Cassation reflètent très souvent ceux de la Cour de Cassation de France, plus rarement ceux de la Cour de Cassation de Belgique (notamment en matière de responsabilité délictuelle ou quasi-délictuelle). Un revirement de jurisprudence en France ou en Belgique sera tôt ou tard suivi au Luxembourg.\(^\text{227}\)

M. Arendt therefore describes the Luxembourg situation as eclectic in character.\(^\text{228}\)

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\(^{226}\) Hondius, supra n.222, p.14.

\(^{227}\) Translation: "A library of a practitioner (judge or advocate), without the main treatises and a large number of periodicals published in France, Belgium or Germany, is inconceivable. The decisions of the Luxembourg Cour de Cassation very often reflect those of the French Cour de Cassation, more rarely those of the Belgian Cour de Cassation (notably in delictual or quasi-delictual matters). A change of case-law in France or Belgium will sooner or later be followed in Luxembourg" - E. Arendt, National Report to the Fourth European Conference of Law Faculties (unpublished, 20 February 1976), pp.17-18.

\(^{228}\) Ibid., p.18.
CONCLUSIONS

Consultation of foreign solutions is probably more frequent in judicial law reform than has hitherto been realised. Judges often seem slow to admit to such consultation - "judges are seldom explicit about their reliance on comparative law".229 Again, it is submitted that a policy of openness in judicial decision-making should be pursued, which would mean that judges should refer to foreign law researches in their judgments if they have conducted such researches.

The country-by-country account above demonstrates that comparative law is not only useful for cases of first impression, for conflict of law cases and for cases involving international conventions. Judges have consulted foreign solutions on a much wider basis.

The judiciary normally consult jurisdictions within the same legal family as their own jurisdiction. Thus, common law judges normally consult civil law jurisdictions and vice versa. However, statistical surveys of cases cited in published reports have been shown to be defective and to present an incomplete picture of crossreferences from common law to civil law. Consultation of foreign solutions would appear to be more frequent in small jurisdictions or jurisdictions whose legal history involves a mixture of influences.

Hondius points out that comparative research is something of a luxury when courts are overburdened, given the considerable amount of time it requires. However, it is submitted that while this may excuse judges for their lack of such research, the situation for practitioners is very different. Hence, Gutteridge has stated:

'It would be too much to expect of our judges that they should all be comparative lawyers. The burdens imposed on them are already sufficiently heavy without the addition of a further requirement that they should engage in a profound study of foreign law. This is a plea, however, which should not be available to those who practise in the courts. If they themselves have not the qualifications to enable them to place before the court an accurate synopsis of solutions which have been arrived at or proposed in other jurisdictions it is their duty to consult others who are in a position to supply the information which is needed.'

229 Marsh, supra n.29, p. 77, fn.17 (Proceedings), p.654, fn.18 (RabelsZ.)
Finally, it must not be forgotten that there are dangers in the misuse of the comparative method in judicial law reform, as in all areas of law reform. These dangers have been summarised in Chapter I. For example, Cohn has noted that there are a few unfortunate cases where a foreign precedent has been adopted just as it stands without any further investigation. However, as he says, such cases are rare.

C. THE SUGGESTIVE ROLE OF JUDGES IN LAW REFORM

Often when a judge is deciding a case, he/she will point out a defect in the law which he/she feels should be remedied by the legislature. He/she may even summarise the solution which should be adopted. This is known as the "suggestive" role of judges in law reform -- judges suggest to the legislature the remedial action which should be taken. Strictly speaking, this is not judicial law reform at all. In fact, it is an aspect of the mechanism for reform by legislation. However, to the extent that in performing this suggestive function judges are catalysts or initiators of law reform, this topic may be dealt with here.

An early example of judges' suggestive role in law reform is *Hall's Case* (1845). The heavy ironic humour which Mr. Justice Maule employed in sentencing a bigamist at Warwick Assizes in this case is said to be the 'fons et origo' of the move to transfer matrimonial jurisdiction from the ecclesiastical to the secular courts. The Matrimonial Courts Act, 1857, was enacted partly as a result of this judgment. There are many other English cases containing such suggestions. One notable example is *Cartledge v. Jopling* (1963) which caused an amendment of the law

230 Gutteridge, supra n.121, p.45.
231 Cohn, supra n.31, p.103.
233 [1963] AC 758
within 6 months. In *Mangin v. I.R.C.* (1971), Lord Donovan suggested amendments to s.108 of the Land and Income Tax Act 1954. In *Dennis v. Charnwood Borough Council* (1981), Lawton LJ suggested a compulsory insurance scheme for builders of houses. In the 1960's, the Council of Law Reporting added a new category to its indexing and digesting of cases reported, viz., "Law Reform - Whether Necessary", and there have been more than 50 cases classified under that heading to date.

In New York, judges have sometimes sent copies of their judgments to the Law Revision Commission to ensure that a suggestion will not be ignored. In *Germain v. Germain* (1959), Judge Moule stated:

> The court believes that consideration should be given to amending the New York State law to provide for the appointment by the court of a conservator of the property of one who disappears voluntarily or involuntarily and cannot be proved dead, seen or heard of.... This court, by sending copies of this opinion to the New York State Law Revision Commission, New York State Bar Association and Erie County Bar Association, is suggesting that remedial legislation be enacted.

Sometimes, the New York courts will send a letter to the LRC to call its attention to a suggested reform, as happened in *Karminski v. Karminski* (1947).

The Irish courts have often suggested reforms to the Oireachtas. As Tony Kerr says,

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235 [1971] 1 All ER 179.


The Supreme Court has never been shy of indicating to the legislature any deficiencies there might be in legislation they are called on to interpret.\textsuperscript{238} In 1945, Gavan Duffy J. suggested that the Oireachtas adopt the Quebec statute on sacerdotal privilege.\textsuperscript{239} In 1977, Kenny J. and O'Higgins CJ urged immediate reform of the Trade Disputes Act 1906.\textsuperscript{240} In 1980, in \textit{Cahill v. Sutton},\textsuperscript{241} the Supreme Court urged changes in s.11 of the Statute of Limitations 1957.\textsuperscript{242} In \textit{Siney v. Dublin Corporation (1980)},\textsuperscript{243} Henchy J. suggested that statutory effect in relation to tenancies be given to the legislative proposals set out in the Law Reform Commission's Working Paper No.1. The same judge pointed out a problem with the ground rents legislation on 14 November 1980\textsuperscript{244} but it was not solved until 1984, with the enactment of the Landlord and Tenant (Amendment) Act 1984. Reforms in the planning laws were enacted a mere five months after the decision in \textit{State (Pine Valley Developments) v. Dublin County Council},\textsuperscript{245} Finlay P. (as he then was) urged removal of an anomaly in s.22 of the Courts Act 1981 in his decision in \textit{Mellowhide Products v. Barry Agencies (1983)},\textsuperscript{246} pointing out that the equivalent U.K. statute did not have such an anomaly. Murphy J. suggested an amendment to s.180 of the Building Societies Act 1976 in \textit{Rafferty v. Crowley (1983)}\textsuperscript{247} and took the highly

\textsuperscript{238} Tony Kerr, 'Is There Anybody Out There Listening' (1983) 1 ILT (n.s.) 100-102 at 100.

\textsuperscript{239} \textit{Cook v. Carroll} [1945] IR 515 at 518-9.

\textsuperscript{240} \textit{Goulding Chemicals Ltd. v. Bolger} [1977] IR 211 at 241 (Kenny J) and at 233 (O'Higgins CJ).

\textsuperscript{241} [1980] IR 269 at 288.

\textsuperscript{242} In \textit{O'Domhnaill v. Merrick} [1984] IR 151, McCarthy J. noted that the Oireachtas was stalling incredibly on reforming the problem. The problem was the subject of a Dáil question on 13 May 1987 (372 Dáil Debs. 1788). The Law Reform Commission has now proposed reforms -- Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries (LRC 21, Oct. 1987).

\textsuperscript{243} [1980] IR 400 at 420-421.

\textsuperscript{244} \textit{Gilsenan v. Foundary House Investments} [1980] ILRM 273.

\textsuperscript{245} [1982] ILRM 169.

\textsuperscript{246} [1983] ILRM 152.

\textsuperscript{247} [1984] ILRM 350.
unusual step (as in the New York cases) of directing the Registrar of the Courts to forward a copy of his judgment to the Minister for the Environment and to the Registrar of Building Societies to ensure they were aware of his suggestion. As a result, the second reading of the Building Societies Bill 1983 was moved nine working days after his judgment. In State (Clarke) v. Roche,248 decided on 12 December 1986, Finlay CJ suggested that the Oireachtas replace the Petty Sessions Act 1851 with statutory provisions more suitable to the modern District Court. Within 17 days, the Oireachtas passed the Courts (No.3) Act 1986, which legalised computer summoning (but did not repeal the 1851 Act). In the Derrynaflan Hoard case,249 the Supreme Court suggested reform of the law of treasure trove by provision of a system of rewards as existed in other countries.

Judges and observers have often expressed dissatisfaction at the slow response (or often, absence of response) of legislatures to such suggestions. In France, a limited mechanism already exists which strengthens the communication between the judges and the legislators. Since reforms in 1963 (i.e. the creation of the Commission du Rapport et des Etudes), the Conseil D'État submits an annual report to the President of the Republic which deals, inter alia, with what legal or administrative reforms it considers desirable.250 Some have called for a system whereby there would be no danger that the legislature would not be aware of a judgment and the suggestions for reform contained in it.


In 1934, Prof. Yntema proposed links of "mediation" between the courts and the legislature as one means of achieving a scientific process of law reform.\textsuperscript{251} In 1948, the editor of the \textit{Law Quarterly Review} complained that

There have been a considerable number of cases in recent years in which the judges have called attention to desirable changes in the law, but as things are at present there can be little hope that their authoritative recommendations will be put into effect.\textsuperscript{252}

In 1974, Mr. Justice Fox, senior Justice of the Supreme Court of the Australian Capital Territory, proposed that there should be machinery at an appropriate official level to process the suggestions for law reform made by judges from time to time, and to ensure due consideration being given to any legislative changes recommended by them.\textsuperscript{253} In 1976, the Second Annual Report of the Australian Law Reform Commission regretted the wastefulness caused because law reform suggestions "remained hidden in the lawbooks".\textsuperscript{254} In 1979, a Committee of the Australian Senate recommended that the Australian L.R.C. act as a clearing house for law reform suggestions, and that its annual reports should list suggestions by judges or received from other sources.\textsuperscript{255} In 1980, Sir Garfield Barwick, Chief Justice of Australia called for a "formalised apparatus" for suggested reforms to be communicated from judges to the legislature and the executive.\textsuperscript{256} The Australian government agreed to the Chief Justice's suggestion and Annual Reports of the Australian

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\textsuperscript{251} Yntema, 'Legal Science and Law Reform' (1934) 34 Col.LR 207 at 224-5.
\textsuperscript{252} Note (1948) 64 LQR 171.
\end{flushright}
L.R.C. now contain a schedule of law reform suggestions, including those emanating from the judiciary. In 1983, Tony Kerr said that the Irish judiciary was justified in wondering whether the "hot-line" between the Courts and the legislature was "out of order" and concluded as follows:

Law reform should not depend on the chance of whether sufficient pressure can be brought to bear on Ministers nor on whether sufficient political advantage can be derived from it. A constructive move would be an amendment to the Law Reform Commission Act 1975 empowering the Commission to respond immediately to decisions such as Mellowhide Products and to produce draft Law Reform (Miscellaneous Provisions) Bills without having to be specifically directed to do so by the Attorney General.

It is submitted that some formalised apparatus is indeed needed to ensure that useful suggestions for reform are not forgotten or ignored. Some judges may be opposed to such an arrangement on the grounds that it would be an inappropriate reduction of judicial independence, but the system would only ever be a facility of which judges could choose to avail or not to avail as they pleased. Murphy J's move in Rafferty v. Crowley, when he forwarded a copy of his judgment to the Minister and to the Registrar, would appear to indicate that at least some Irish judges would welcome a formalised apparatus. There would be no obligation on judges to use the apparatus. This would eliminate the main defect of three other procedures which involved compulsory reference to the legislature by a judge for an interpretation if he/she found a gap in the law, namely the French référe législatif (1790-1837), Article 50 of the Preußisches Allgemeines Landrecht

257 See, for example, Annual Report 1986 (ALRC 34), Appendix C, pp.73-78. In March 1988, Mr. Justice Kirby complained that no parliamentary mechanism had been established to consider the suggestions - 'Revitalising Parliament' [1988] Reform 101 at 102.

258 Kerr, supra n.238, p.100.

259 Ibid., p.102.


261 Otherwise known as the "r\'ef\'er\'e obligatoire". This only applied if there was a "résistance des juridictions du fond" -- see Art.21, decree of 27 Nov.-1st Dec. 1790. Further details in Gérard Comu and Jean Foyer, Procédure Civile (Presses Universitaires de France, Paris, 1958), p.195 and p.199.
(Prussian General Land Law) (1794)\textsuperscript{262} and Bentham's 'View of a Complete Code of Law'.\textsuperscript{263}

\textsuperscript{262} This required a judge, if he did perforce fill a gap in the Code, immediately to report it to the Ministry of Justice. See Marsh, supra n.59, p.11.

CONCLUSION

This thesis examined law reform, the comparative method and the combination of those two elements. The conclusions to be drawn will be summarised under those three headings.

**Law Reform**

A definition of law reform which would emphasise its problem-solving function was adopted:

Law reform is the solution of a problem which arises because law, legal institutions or legal methods are outdated and obsolete.

The definition was broadly drafted, so as to include problem-solving by legislators, by law reform agencies, by judges and by academics. It was submitted that constant change in the law will always be necessary. The idea that law reform could somehow come to an end is untenable. This permanent need for constant change was represented by a Graph at page 12.

Different methods of law reform were studied, including problem-solving by legislation, by law reform agencies and by judges. The merits of each method were examined along the way.

In Chapter II (Legislation and the Comparative Method), it was stated that legislation must be prepared conscientiously as it is normally prospective not retrospective, as it can comprehensively change a whole area of the law and as it is very difficult to amend once it has been passed. In examining the pre-drafting stage and the drafting stage, the "iceberg effect" was a serious problem, i.e. the preparation of legislation in most countries is essentially a secretive process in the sense that what we know of it is only the tip of the iceberg. It was suggested that a Swedish-style policy of openness would be preferable. Civil law and common law drafting processes and drafting styles were contrasted. Parliamentary committee systems were found to vary widely in strength. It was found that academics were consulted more widely in the preparation of legislation on the continent of Europe. However, their influence was increasing in the U.S.A. through
the Restatements. The advantages of academics are their time, their libraries and their teaching experience. Their disadvantages are that they can be too theoretical and the dangers of the "rat-race" in the universities. Academics were urged not to write for themselves, to come down from their ivory towers and participate in law reform projects.

Law reform agencies are discussed in Chapters III, IV and V. The emphasis is on the present agencies of law reform, and useful data was provided by the questionnaire. The U.K. Law Commissions were inspired by the New York Law Revision Commission and by the European Ministries of Justice. In the early years, the English Law Commission undertook ambitious programmes and developed the device of the Working Paper. However, the enthusiasm of those early years has died down. The Scottish Law Commission was very much an afterthought. It has taken upon itself the task of preservation of Scots law from anglicisers. The Irish LRC has had its ups and downs since its establishment. In 1985, it published 11 reports but it was then placed "on ice" for 14 months. Its new working methods are welcomed, but its implementation rate is dangerously low.

It would be unduly repetitive to summarise the information provided on the agencies of Canada, Australia, New Zealand, the United States, Africa and Other Jurisdictions. However, certain trends may be pointed out. The majority of the Canadian agencies were established between 1964 and 1971. More than half of the agencies can initiate projects of law reform themselves, without external approval. The Federal LRC has the largest budget of any LRA in the world. The majority of the Australian agencies were established between 1966 and 1976. Most of them cannot initiate projects themselves. The Federal LRC has made constant use of public hearings in preparing its reports. The agencies have also experimented with Community Law Reform references and joint venture references. New Zealand's new Law Commission, established in 1985, can initiate projects itself, has a large budget and must submit programmes at least once a year.
In the United States, there is no federal LRA. The American Law Institute and the National Conference of Commissioners on Uniform State Laws are the most important LRA's in the country. The state agencies are very different from those in other countries. All members are part-time, they include elected officials and they are mainly concerned with technical law. The state agencies tend to have a power of initiative of projects and to have a very high implementation rate.

The majority of the African agencies were established from 1973 to 1983. They tend to be modelled on the U.K. Law Commissions and suffer from shortages of funds. The Zambian Law Development Commission is the only LRA in the world to have a statutory requirement of 50% non-legal membership. The majority of the agencies in the Other Jurisdictions were established from 1969 to 1982. The Indonesian Law Development Commission is a curious institution which had a huge budget and a huge staff when last studied in 1978.

All of the LRA's engage in detailed, painstaking research. Because of their independence from government, they have to fight to have their proposals adopted. The disadvantages of research are that it slows down and reduces the quantity of reports, the ministers hardly ever read the reports anyway, and the research may be far too academic. On the other hand, valuable sources of information in themselves are created.

The LRA's are compared with European Ministries of Justice, as the U.K. Act was inspired by these Ministries. It is noted that the Ministries cannot be classed as LRA's, because they are large, they are composed of both civil servants/administrators and lawyers, they are part of the ordinary machinery of government and they are under government control. This lack of independence was the price to pay in political terms for the advantages of the Ministries. Information on the Ministries is scarce, but it would seem that they tend to have one or more legal divisions which watch out for obsolescence in the law and which perform a central planning function as regards law from other ministries. Commissions and committees tend to fill in details only. Policy issues are decided before the commission or committee begins its work.
At the end of Chapter IV, some observations were made on five aspects of law reform agencies. Everyone has their own ideas as to what the LRA's should be doing. The diversity in the machinery of law reform created in different jurisdictions reflects the diversity of opinion as to the role of LRA's. It is true that, as Lord Scarman says, all law embodies social policy, but it is still useful to make a distinction between technical law (which society leaves to lawyers and is comparatively "rule-bound") and social-policy law (which society reserves for development by Parliament and the ordinary machinery of government and is comparatively free in its attempted achievement of social purpose). It is too narrow to confine LRA's to technical law only, but they should avoid questions of partisan politics (such as abortion). Non-lawyer members have been extremely helpful when they have been appointed to LRA's, and it is suggested that LRA's should be composed of 50% non-lawyers as in Zambia. The trend away from the old Working Paper procedure is welcomed, and it is suggested that Australian-style public hearings should be tested in other jurisdictions.

On the question of implementation rates, it is stressed that they are not the sole criterion of success of a LRA. The LRA can have an important influence on the legal system without actually getting many of its reports implemented, the reports which are implemented may be the most important ones, and the LRA's suggestions may be way ahead of its time. Some implementation rates are set out in Appendix 2. Hurlburt suggests five methods of improving implementation rates - delegated legislative power, committees of legislatures, omnibus bills, a time limit for response from the government and private members' Bills.

LRA's might be able to increase their finances by funding from Law Foundations and/or by adopting the precedent of the Arkansas Code Revision Fund (where there is a 25 cent levy on all legal costs).
Conclusion 236

Chapter VI deals with judicial law reform. There is a conflict of authority amongst the cases as to whether judges reform the law. In fact, statements from judges to the effect that they do not reform the law "camouflage" actual reform. The old Blackstonian idea is a fiction and it should not remain. There is a consensus amongst the commentators that judges reform the law. More concrete proof is summarised under five headings: The definition of law reform adopted in the Introduction includes judicial law reform, judicial decisions are a source of law, the very act of interpretation is a form of lawmaking, judges must fill in gaps, and strict adherence to precedent is now a thing of the past. It is often said that judicial law reform is undemocratic, but the question should be asked whether it is undemocratic in comparison with other methods of law reform. The judiciary is not without democratic features. The issue of whether judicial law reform or legislative law reform is more useful is largely a matter of opinion and depends on the area of law involved. The disadvantages of judicial law reform are that the judiciary cannot research the needs and opinions of society, judicial law reform depends on the accidental union of the determined party, the right set of facts, the persuasive lawyer and the perceptive court, and it can be slow and unsystematic. Its advantages are that judges can deal with a "flesh and blood" problem, they can often deal with problems much more quickly than the legislature, and piecemeal improvements are better than none at all.

The suggestive role of judges in law reform is also examined. Many examples are given of suggestions for reform made by judges. Some formalised system is needed to ensure that useful suggestions for reform are not forgotten or ignored. There should be no obligation on judges to use the apparatus. It would only ever be a facility of which judges could choose to avail or not to avail as they pleased.

This thesis does not address the broad constitutional issue as to how law should be reformed in an ideal world. This is a question which can be tackled at some future time. Instead, each method of law reform is taken as it exists in different jurisdictions, a comparison is made between the
various jurisdictions, advantages and disadvantages are pointed out and improvements are suggested. Openness is a common factor in most of the improvements suggested. Law reform must be more openly conducted as it is so important. If it were more openly conducted, it is also likely that its quality would improve.

**The Comparative Method**

It was suggested that the term "Comparative Law" is slightly inaccurate. A distinction was drawn between "the comparative method" (comparison of laws as a practical method) and the autonomous discipline of comparison of laws. A distinction was also drawn between descriptive comparative law (of an encyclopaedic style) and applied comparative law (of a critical style).

The autonomous discipline of comparison of laws was used in examining the subjects of this thesis (law reform, the comparative method and the combination of those two elements) but it was not merely used in a descriptive manner. It was pointed out that one would be forgiven for believing that the only valid form of comparison is that between the common law and the civil law. However, comparison within the common law family is extremely important as well. This thesis contained much comparison amongst common law jurisdictions as well as comparison between common law and civil law jurisdictions. It was concerned with external comparison only, however (as opposed to inventive, internal and historical comparison).

Having made use of the autonomous discipline throughout the thesis, some conclusions have been drawn as regards it. The primary importance of access to materials was underlined time and again in preparing each and every chapter. The comparatist must search longer and harder than most jurists for obscure articles and reports. Some familiarity with foreign languages is essential. Letters of enquiry to foreign institutions or persons produce mixed results, but are always well worth a try. Personal contacts will be built up over time. The questionnaire device (as used in Chapters III to V) can be invaluable, but extreme care must be taken in compiling the actual questionnaire, preferably through a pilot study at the outset.
This thesis focussed on the combination of the comparative method and law reform, but it was pointed out that the comparative method is also used by legal historians, by legal philosophers, by those who seek to unify or harmonise divergent laws, etc. It is incomplete and one-sided for any theorist to confine the functions of the comparative method to one particular object alone. It must not be forgotten that its role in law reform is only one function of many. Many of the conclusions summarised under the next heading (the combination of the comparative method and law reform) are relevant to the comparative method in general. In this thesis, there is a very large overlap between this topic (the comparative method) and the next (the combination of the two elements).

**The Combination of the Two Elements**

Chapter I deals with the theory of the combination of the two elements (i.e. the comparative method and law reform). It is a natural reaction when faced with any problem to try and ascertain how others have solved the same problem. It is also natural in reforming the law to look abroad for ideas to use at home (Home Thoughts from Abroad). There is an increasing standardisation of life in the world. This means that the same legal problems arise in many countries. There are four options open to someone faced with a problem of law reform - invention of a solution, internal comparison, historical comparison and/or to try and ascertain how the same problem has been solved abroad. This thesis focusses on the fourth option, but the other three functions remain significant. The comparative method is a supplement to, not a substitute for, the other methods.

As stated above, the comparative method's role in law reform is only one function of many. It is not even its chief function. However, this practical function makes the comparative method more easily acceptable to lawyers generally and to practitioners in particular. The comparative method has become the "handmaid" of law reform. Reformers are constantly using the "eclectic reformer" approach.
The transplantation or reception of a foreign legal idea can occur for at least five reasons: (1) On an involuntary basis, due to chance or colonisation. (2) On a voluntary basis, due to great respect on the part of the donee for the donor’s laws (the Transplant Bias). (3) Unification/Harmonisation. (4) To solve a problem of law reform which was shared by the donor and the donee and which has been solved more successfully by the donor. The reformer can only be sure that the proposed reform is the best solution possible if he/she looks to possible advances which have been made abroad. Reception is a question of expediency, a question of need. Comparative studies reduce the amount of creative ability required. It means the full utilisation of all legal talent. It may even be a "moral duty". (5) Because a foreign solution is seen to have functioned effectively in practice. This is comparable to a doctor’s or a scientist’s reliance on experimentation.

There must be no naive enthusiasm for the combination and five of its limitations and dangers are discussed. Firstly, there is the danger of getting the foreign law wrong. Natives may lie waiting with spears, as Rabel says. Difficulties of language have been overemphasised. Personal relationships across frontiers are very useful.

Secondly, the combination may be misused because it is fashionable. This fashionability may mean that a foreign solution is unjustifiably adopted (the native genius not being allowed to find a better solution) or that no practical use is made of comparative research undertaken (tokenism).

Thirdly, there may be excessive respect for a certain jurisdiction. Transplant Bias (great respect on the part of the donee for the donor’s laws) usually manifests itself as excessive respect for a jurisdiction, as with Ireland’s respect for British law.

Fourthly, there is the danger of legal isolationism and xenophobia. This stems from inertia, which limits law reform. It is unjustified given the increasing standardisation of life, it lags
behind the opinions of the general public and it leads to the danger that non-lawyers will lose all respect for law.

Fifthly, the foreign solution may need to be adapted to suit the donee's present system. Two separate factors are identified - factor (a) (the context of the proposed rule within the donee's system) and factor (b) (the context of the existing rule within the donor's system). These are represented as two circles in Diagram 1 (page 35). The debate on this topic is traced from Montesquieu and Kahn-Freund to Watson and Marsh. Montesquieu believed that laws should be adapted in such a manner to the people for whom they are framed that it should be a great coincidence (un grand hasard) if those of one nation suit another. He said laws were closely linked to their habitat due to geographical, climatic, political, sociological, cultural, religious and economic factors. Kahn-Freund agrees with him, but says the political factors have gained in importance. Watson disagrees, saying that the law reformer is after an idea. As regards the political context, it is enough to look at factor (a) and factor (b) is irrelevant. Generally speaking, factor (a) is easier to discover than factor (b). Law possesses a life and vitality of its own and there is no extremely close relationship with its habitat. Marsh says transplantation can take place even if political and cultural backgrounds are fundamentally different and criticises Kahn-Freund's highly academic approach. It is concluded that the theories of Montesquieu and Kahn-Freund are unsatisfactory as they are counterproductive. The primary danger for a reformer is factor (a), not factor (b). Also, the legal context is the primary concern within factor (a). The reformer is looking for an idea, for inspiration. Diagram 2 (page 35) is a more elaborate version of Diagram 1. As a bare minimum, the reformer need only consider the two dots and subcircle 1 of Circle A (the legal context of the new rule within the donee's system). Thereafter, his/her priorities should be subcircle 1 of Circle B, followed by subcircles 2 to 7 of Circle A, followed finally by subcircles 2 to 7 of Circle B.

Chapter II then turns to legislation and the comparative method. Mention is made of Reception/major transplants and some basic historical facts are recalled. A detailed examination
is not made as this would primarily involve socio-political analysis of historical events. Reports of special commissions/committees often contain comparative research. This is an advantage of those commissions/committees over most other legislative proposals. At the pre-drafting stage, the "iceberg effect" makes it difficult to determine the extent of comparative research. It seems that comparative research is more likely in a department/ministry of justice than in other departments. If a jurist is called in, comparative research is also more likely. The existence of an international convention may actually be an excuse for a lack of comparative research.

Civil law and common law drafting processes and drafting styles are contrasted. It is tempting to conclude that there are more opportunities for comparative research in the civil law process since more stages and more people are involved, but it is too early to so conclude without hard evidence. The differences in drafting style are a hindrance to comparative research, as researchers find it difficult to move from studying legislation/codes drafted in their own style to studying those of the other style. The two systems should learn from each other and some form of middle ground should be reached to aid comparability of common law and civil law legislation/codes.

Parliamentary committee systems are compared. It is noted that members of the U.S. Congress have access to a Congressional research service. Lobbyists often refer to comparative research to support their arguments and the comparative method has been used by at least two subcommittees. The comparative method is constantly used by the Dutch Standing Committee on Justice and has been used by the Judicial Committee of the Israeli Knesset. In countries with weaker committee systems, comparative research is bound to be rarer and of an inferior quality.

To the non-lawyer, codification seems a natural way of stating the law. There was initial excitement at the prospect of codification in common law jurisdictions when it was included as one of the functions of many LRA's. However, three British Law Commissions plans for codification have failed and only two seem to have any chance of success. Codification has different
meanings, but it is concluded that codification of some form is still the ideal solution. A realistic interim target would be the improvement of drafting style in common law countries.

Comparative research is more likely if academics are consulted. Academics should not only participate in law reform projects but should increase their comparative law expertise so as to contribute more usefully to such projects.

Chapter V examines law reform agencies and the comparative method. Most LRA reports contain comparative material. Section 3(1)(f) of the 1965 U.K. Act is significant and has been influential. Similar provisions are found in Ireland, Federal Canada, Tanzania, the Bahamas and Sri Lanka. Statutes elsewhere are less specific about comparative research, but none prohibits it. There is no correlation between statutory provision for comparative research and the actual carrying out of such research, but this does not reduce the significance and influence of s.3(1)(f).

The personnel appointed to the first U.K. Law Commissions had backgrounds linked with comparative research. This demonstrated the perceived importance of such research and was noticed by countries which were inspired by the U.K. precedent. There is a majority of lawyers on all LRA's (except in Zambia) and this increases the likelihood of comparative research. The presence of legal staffs at many LRA's has a similar effect. Research is the foundation of the work of all LRA's. All of them use legal research, and this often involves comparative research.

Cooperation between LRA's takes place through conferences, through exchanges of personnel and through joint venture reports. It is useful for a LRA to keep track of the work of other LRA's - a report elsewhere may stimulate a report at home, research abroad may be useful at home, and the LRA can see whether the report was implemented and if so whether the implementation solved the problem. The least one would expect would be that all the LRA's would receive copies of each other's reports, but this is not the case. A centralised information base and a printed digest of LRA reports are needed. Of course, appropriate use should be made of other LRA
reports. They should not be used as an excuse to unjustifiably reduce local research. Also, excessive examination of conclusions of common law LRA's may leave less time for examination of civil law solutions and solutions in common law jurisdictions whose agencies have not made reports on the area. There have been problems of "balkanization" in Canada and Australia where different conclusions are being reached by different LRA's to the same problems.

There are variations in the amount and type of comparative research in the various agencies. Marsh has discussed the use of the comparative method by the English Law Commission on a number of occasions. Its project on interpretation of statutes involved extensive consultation of civil law solutions. Apart from examples already given in Chapter V, reference may also be made to the use of the comparative method in the Commission's projects on proof of paternity in civil proceedings\(^1\) and on interest in contract cases.\(^2\) The Scottish Law Commission tries to preserve Scots law from anglicisers. It embarked on a Code of Evidence project largely based on the Californian model. One of its reasons for proposing the abolition of the status of illegitimacy was that it would be in line with foreign trends\(^3\). The Irish LRC's studies have not been confined to English law. It has recommended adoption of the continental "habitual residence" concept. Its projects on illegitimacy and judicial review of administrative action drew on foreign solutions.

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2. See Law Com. W.P. 66, *Interest* (1976), pp.36-40 ('The Law and Practice in Other Countries' - references to France, Italy, Belgium, Ireland, etc. The Commission's proposals would be broadly consistent with the western world's laws), pp.46-47 (references to Germany, Denmark, France, Sweden) and Law Com. No. 88, *Law of Contract: Report on Interest* (Cmdn. 7229, 1978), implemented in part by s.15 of the Administration of Justice Act 1982 (c.53) and Rules of the Superior Courts (Amendment No.2) 1980. See also *President of India v. La Pin­


and have been implemented by the Status of Children Act 1987 and the Rules of the Superior Courts 1986. It has built up a large network of contacts abroad.

In Canada, Australia and New Zealand, common law solutions are most often consulted. One notable exception is the 1969 proposal by the New South Wales LRC to adopt the civil law concept of "civil act" (acte juridique or Rechtsgeschäft) in the law of minors, which was implemented by the Minors (Property and Contracts) Act 1970.4

In the U.S.A., the National Conference of Commissioners on Uniform State Laws and the American Law Institute regularly consult foreign law. The Uniform Commercial Code was influenced by continental law because of Karl Llewellyn's familiarity with the subject (see above, page 27) and Section 220.2 of the Model Penal Code (Causing or Risking a Catastrophe) was modelled on the penal codes of several civil law countries.5 Most of the state agencies do not consult foreign law, but the exceptions are Louisiana, Michigan and perhaps New York.

The African agencies are hampered by a shortage of funds, but the Ghana LRC relied on U.S., Nigerian and Israeli models in formulating an Evidence Code. As regards the Other Jurisdictions, the LRC of Hong Kong consults many common law solutions because Hong Kong is a regional and international centre for finance and commerce, the Sri Lankan Law Commission consults Roman-Dutch solutions as well as the common law solutions, and the Indian Law Commission from time to time displays an immense amount of comparative law familiarity. However, Baxi has characterised the latter's references to foreign law as flimsy, shoddy and inappropriate.


5 See American Law Institute, Model Penal Code and Commentaries, vol.2, p.36, fn.1; cited in LRC, Ireland, Malicious Damage (LRC 26, 1988), chapter 9, pp.29-31. This provision has been adopted in at least 8 states.
In the European Ministries of Justice, comparative research is widespread. Different methods are used by the different Ministries. The systems in France (use of the Centre de Droit Comparé), West Germany (use of the Max Planck Institute) and Switzerland (experts often commissioned) are to be contrasted with the system in the Netherlands and Denmark (use of personal contacts abroad and reports from their embassies abroad).

Section B of Chapter VI contains a country-by-country survey of the comparative method and judicial law reform. The conclusions drawn are summarised at pages 224-5. Consultation of foreign solutions is probably more frequent in judicial law reform than has been generally realised. Judges are often slow to admit to such consultation and again a policy of openness would be preferable. Comparative research is not only useful for cases of first impression, for conflict of laws cases and for cases involving international conventions. Judges have consulted foreign solutions on a much wider basis. The judiciary normally consult jurisdictions within the same legal family as their own jurisdiction. Statistical surveys of cases cited in published reports are shown to be defective and to present an incomplete picture of crossreferences from common law to civil law. Consultation of foreign solutions is more frequent in small jurisdictions or jurisdictions whose legal history involves a mixture of influences. Comparative research is something of a luxury when courts are overburdened, given the considerable amount of time it requires. However, while this may excuse judges for their lack of such research, the situation for practitioners is very different. There are a few cases where a foreign precedent has been adopted just as it stands without any further investigation, which illustrates that there are dangers in the misuse of the comparative method in judicial law reform, as in all areas of law reform.

What has emerged from this study of the impact of the comparative method on law reform is that there is plenty of comparative research going on, but that some cautionary notes must be sounded. Firstly, there is still not enough comparative research taking place. Reformers often fail in their "moral duty" to consult foreign solutions. This is true even of the law reform agencies,
where quite a number of reports are being produced which contain no comparative material. Secondly, comparative research is strongly biased towards legal systems of the same "family" as the local law. Crossreferences from civil law to common law are too few and far between. Even if crossreferences are made in LRA reports, the proposals resulting from those crossreferences are the ones which are least likely to be implemented by the legislatures. Thirdly, inappropriate use is often made of comparative research. Time and again, reformers simply set out comparative material with no real purpose except to show that such research was conducted. On the other hand, such comparative material may be used as a model for reform without questioning its merits.

There has undoubtedly been a change in attitude to comparative research since it was "made respectable" by s.3(1)(f) of the U.K. Law Commissions Act 1965. However, the momentum of this change of attitude must be kept up and the best way to do this is by education. If comparative law courses were more widespread and more popular, the quantity and quality of comparative research in law reform would inevitably improve.
APPENDIX 1 - TABLE OF LAW REFORM AGENCY BUDGETS

All budgets have been converted to sterling.
Unless otherwise stated in the text, the exchange rate used is the rate applicable in August 1988, to the nearest £100 sterling.
Most budgets were taken from the replies to question 8 of the questionnaire. The budgets of Victoria, Western Australia and Queensland were taken from LRC of Tasmania, Thirteenth Annual Report, transcript, p. 11.
The letter 'x' in the "Period" column indicates that the period to which the budget applies is not known.

<table>
<thead>
<tr>
<th>AGENCY</th>
<th>PERIOD</th>
<th>AMOUNT</th>
<th>£ STERLING</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Canada - Federal</td>
<td>1986-87</td>
<td>CAN$4,799,000</td>
<td>2,323,500</td>
</tr>
<tr>
<td>2. England and Wales</td>
<td>1986-87</td>
<td>£2,062,300</td>
<td>2,062,300</td>
</tr>
<tr>
<td>3. Australia - Federal</td>
<td>x</td>
<td>AUS$2,800,000</td>
<td>1,300,000</td>
</tr>
<tr>
<td>4. New Zealand</td>
<td>1988-89</td>
<td>NZ$2,800,000</td>
<td>1,120,000</td>
</tr>
<tr>
<td>5. Victoria (L. Reform Commission)</td>
<td>1986-87</td>
<td>AUS$1,600,000</td>
<td>740,800</td>
</tr>
<tr>
<td>6. Ontario</td>
<td>x</td>
<td>CAN$1,200,000</td>
<td>580,000</td>
</tr>
<tr>
<td>7. New South Wales</td>
<td>x</td>
<td>AUS$1,100,000</td>
<td>510,000</td>
</tr>
<tr>
<td>8. Louisiana</td>
<td>1987-88</td>
<td>US$550,138</td>
<td>380,000</td>
</tr>
<tr>
<td>9. Western Australia</td>
<td>1986-87</td>
<td>AUS$700,000</td>
<td>324,000</td>
</tr>
<tr>
<td>10. California</td>
<td>x</td>
<td>US$525,000</td>
<td>308,800</td>
</tr>
<tr>
<td>11. Ireland</td>
<td>1988</td>
<td>IRE310,000</td>
<td>267,800</td>
</tr>
<tr>
<td>12. British Columbia</td>
<td>x</td>
<td>CAN$550,000</td>
<td>267,000</td>
</tr>
<tr>
<td>13. New Jersey</td>
<td>x</td>
<td>US$400,000</td>
<td>235,000</td>
</tr>
<tr>
<td>14. Manitoba</td>
<td>x</td>
<td>CAN$366,000</td>
<td>17,800</td>
</tr>
<tr>
<td>15. Arkansas</td>
<td>x</td>
<td>US$271,356</td>
<td>160,000</td>
</tr>
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</table>

(Appendix 1 is continued on the next page)
<table>
<thead>
<tr>
<th>Region</th>
<th>Year 1986-87</th>
<th>Salary 1986-87</th>
<th>Year 1987-88</th>
<th>Salary 1987-88</th>
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<tbody>
<tr>
<td>Queensland</td>
<td>1986-87</td>
<td>AUS$250,000</td>
<td>115,800</td>
<td></td>
</tr>
<tr>
<td>Connecticut (salaries only)</td>
<td>x</td>
<td>US$148,904</td>
<td>87,600</td>
<td></td>
</tr>
<tr>
<td>Newfoundland</td>
<td>x</td>
<td>CAN$100,000</td>
<td>48,500</td>
<td></td>
</tr>
<tr>
<td>Tanzania</td>
<td>1987-88</td>
<td>T.Sh.5,200,000</td>
<td>46,400</td>
<td></td>
</tr>
<tr>
<td>Tasmania</td>
<td>1986-87</td>
<td>AUS$93,000</td>
<td>43,000</td>
<td></td>
</tr>
<tr>
<td>Sri Lanka</td>
<td>x</td>
<td>Rs.1,600,000</td>
<td>36,300</td>
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<tr>
<td>Michigan</td>
<td>x</td>
<td>US$60,000</td>
<td>35,000</td>
<td></td>
</tr>
<tr>
<td>Northern Territory</td>
<td>1986-87</td>
<td>AUS$74,000</td>
<td>34,300</td>
<td></td>
</tr>
<tr>
<td>South Dakota</td>
<td>x</td>
<td>US$34,000</td>
<td>20,000</td>
<td></td>
</tr>
<tr>
<td>Gambia</td>
<td>x</td>
<td>D.221,800</td>
<td>18,500</td>
<td></td>
</tr>
</tbody>
</table>
Allowing two years for implementation, this Table gives implementation up to the end of Date B of reports calling for legislation issued by the end of Date A. If up-to-date figures were not available, the agency is not listed. United States agencies are not included. The letter 'x' indicates that a figure could not be calculated from information received. The statistics from which the percentages were calculated will be found in Chapters III and IV.

<table>
<thead>
<tr>
<th>Agency</th>
<th>Date A</th>
<th>Date B</th>
<th>Implemented in whole</th>
<th>Implemented in part</th>
<th>Total implemented</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scotland</td>
<td>Aug.85</td>
<td>Aug.87</td>
<td>89.5%</td>
<td>4.5%</td>
<td>94%</td>
</tr>
<tr>
<td>Manitoba</td>
<td>Apr.85</td>
<td>Apr.87</td>
<td>67.9%</td>
<td>15.4%</td>
<td>83.3%</td>
</tr>
<tr>
<td>England and Wales</td>
<td>Dec.85</td>
<td>Dec.87</td>
<td>77.9%</td>
<td>4.9%</td>
<td>82.8%</td>
</tr>
<tr>
<td>New South Wales</td>
<td>Jun.85</td>
<td>Jun.87</td>
<td>x</td>
<td>x</td>
<td>81%</td>
</tr>
<tr>
<td>Ontario</td>
<td>Mar.85</td>
<td>Mar.87</td>
<td>59.4%</td>
<td>17.2%</td>
<td>76.6%</td>
</tr>
<tr>
<td>Australia - Federal</td>
<td>Dec.85</td>
<td>Dec.87</td>
<td>47.1%</td>
<td>23.5%</td>
<td>70.6%</td>
</tr>
<tr>
<td>Alberta</td>
<td>Mar.85</td>
<td>Mar.87</td>
<td>x</td>
<td>x</td>
<td>68%</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>Jul.85</td>
<td>Jul.87</td>
<td>60%</td>
<td>0%</td>
<td>60%</td>
</tr>
<tr>
<td>Tasmania</td>
<td>Dec.85</td>
<td>Dec.87</td>
<td>42.2%</td>
<td>8.9%</td>
<td>51.1%</td>
</tr>
<tr>
<td>Canada - Federal</td>
<td>Jul.85</td>
<td>Jul.87</td>
<td>x</td>
<td>x</td>
<td>48%</td>
</tr>
<tr>
<td>British Columbia</td>
<td>Dec.85</td>
<td>Dec.87</td>
<td>x</td>
<td>x</td>
<td>45.3%</td>
</tr>
<tr>
<td>Ireland</td>
<td>Aug.86</td>
<td>Aug.88</td>
<td>0%</td>
<td>30%</td>
<td>30%</td>
</tr>
</tbody>
</table>
APPENDIX 3 - ADDRESSES

UNITED KINGDOM

England & Wales
Law Commission, Conquest House, 37-38 John Street,
Theobalds Road, London WC1N 2BQ

Scotland
Scottish Law Commission, 140 Causewayside, Edinburgh
EH9 1PR

IRELAND

Ireland
Law Reform Commission, Ardilaun Centre, 111 St. Stephen's
Green, Dublin 2

CANADA

(Federal)
Law Reform Commission, Varette Building, 130 Alberta Street
(7th Floor), Ottawa, Ontario K1A OL6

Alberta
Alberta Institute of Law Research and Reform, 402 Law
Centre, Univ. of Alberta, Edmonton, Alberta T6G 2H5

British Columbia
B.C. Law Reform Commission, Suite 601, Chancery Place, 865
Hornby Street, Vancouver, B.C. V6Z 2H4

Manitoba
Manitoba Law Reform Commission, 5th Floor, Woodsworth
Bldg., 521/405 Broadway Ave., Winnipeg, Manitoba R3C 3L6

New Brunswick
Law Reform Division, Office of the A.G., P.O. Box 6000,
Fredericton, N.B. E3B 5H1

Newfoundland
Nfld. Law Reform Commission, 2nd Floor, 21 Church Hill,
St.John's, Newfoundland A1C 3Z8

N.W.Territories
N.W.T. Committee on Law Reform, P.O. Box 1320, Courthouse,
Yellowknife, N.W.T., X1A 2L9

Ontario
Ontario Law Reform Commission, 18 King St. East, 15th Floor,
Toronto, Ontario M5C 1C5

Quebec
Direction de la Refonte des Lois et des Règlements, 1200
Route de l'Eglise, Ste-Foy, Province of Quebec G1V 4M1

Saskatchewan
Law Reform Commission of Saskatchewan, Sturdy-Stone Centre,
122 3rd Ave. North, Saskatoon, Saskatchewan S7K 2H6

AUSTRALIA

(Federal)
Australian Law Reform Commission, 99 Elizabeth St.(7th Floor),
GPO Box 3708, Sydney, New South Wales 2000

New South Wales
N.S.W. Law Reform Commission, Level 12, ADC Building, 189
Kent Street, Sydney, NSW 2000 (GPO Box 5199, Sydney, NSW
2001)

Northern Territory
N.T. Law Reform Committee, GPO Box 1535, Darwin,
Northern Territory 5794

Queensland
Queensland Law Reform Commission, 179 North Quay, P.O.Box
312, Brisbane, Queensland 4000
<table>
<thead>
<tr>
<th>Country</th>
<th>Address</th>
</tr>
</thead>
<tbody>
<tr>
<td>South Australia</td>
<td>South Australia Law Reform Committee, Supreme Court of S.A., Victoria Square, Adelaide, S.A. 5000</td>
</tr>
<tr>
<td>Tasmania</td>
<td>Tasmania Law Reform Commission, 7th Level, Executive Building, 15 Murray Street, Tasmania 7000</td>
</tr>
<tr>
<td>Victoria</td>
<td>Vic.Law Reform Commission, 7th Floor, 160 Queen Street, Melbourne, Victoria 3000 Chief Justice's Law Reform Committee, Faculty of Law, Univ. of Melbourne, Parkville, Victoria 3000</td>
</tr>
<tr>
<td>Western Australia</td>
<td>W.A. Law Reform Commission, St. Martin's Tower, 16th Floor, 44 St. George's Terrace, Perth, W.A. 6000</td>
</tr>
<tr>
<td>New Zealand</td>
<td>Law Commission, PO Box 2590, Wellington</td>
</tr>
<tr>
<td>United States of America</td>
<td></td>
</tr>
<tr>
<td>American Law Institute</td>
<td>American Law Institute, 4025 Chestnut Street, Philadelphia, Pennsylvania 19104</td>
</tr>
<tr>
<td>Alabama</td>
<td>Alabama Law Institute, P.O. Box 1425, Room 326 Law Center, University, AL 35486</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Statute Revision Commission, 1400 West Capitol Avenue, Little Rock, Arkansas 72201</td>
</tr>
<tr>
<td>California</td>
<td>California Law Revision Commission, 4000 Middlefield Road, Suite D-2, Palo Alto, CA 94303-4739</td>
</tr>
<tr>
<td>Connecticut</td>
<td>Connecticut Law Revision Commission, Legislative Office Building, 18-20 Trinity Street, Hartford, CT 06106</td>
</tr>
<tr>
<td>Georgia</td>
<td>Code Revision Commission, c/o Office of Legislative Counsel, Room 316, State Capitol, Atlanta, Georgia 30334</td>
</tr>
<tr>
<td>Idaho</td>
<td>Legislative Council, State Capitol, Boise, Idaho 83720</td>
</tr>
<tr>
<td>Indiana</td>
<td>Office of Code Revision, Legislative Services Agency, Room 302, State House, Indianapolis, Indiana 46204</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Louisiana State Law Institute, Paul M. Herbert Law Center, Room 382, University Station, Baton Rouge, Louisiana 70803</td>
</tr>
<tr>
<td>Michigan</td>
<td>Michigan Law Revision Commission, Univ. of Michigan Law School, Ann Arbor, Michigan 48109-1215</td>
</tr>
<tr>
<td>New Jersey</td>
<td>N.J. Law Revision Commission, c/o Rutgers Law School, 15 Washington St., Room 1302, Newark, NJ 07102</td>
</tr>
<tr>
<td>North Carolina</td>
<td>N.C. General Statutes Commission, P.O. Box 629, Raleigh, North Carolina 27602</td>
</tr>
<tr>
<td>Oregon</td>
<td>Oregon Law Improvement Committee, 410 State Capitol, Salem, Oregon 97310</td>
</tr>
<tr>
<td>South Dakota</td>
<td>Code Commission, 500 E. Capitol Ave., Pierre, SD 57501-5059</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Law Reform Commission, c/o Attorney General of Tennessee, 450 James Robertson Parkway, Nashville, Tennessee 37219</td>
</tr>
</tbody>
</table>
Vermont
Virginia
Washington

Statutory Revision Commission, Superior Court Building,
Montpelier, Vermont 05602
Virginia Code Commission, P.O. Box 3-AG, Richmond,
Virginia 23208
Statute Law Committee, Code Revisor's Office, Legislative
Building, MS/AS-15, Olympia, Washington 98504

Law Revision Commission, c/o Ms. Lynn B. Squires (Chair),
Law Offices of Bogle & Gates, 2100 Bank of California Center, Seattle, Washington 98164

AFRICA

Gambia
Ghana
Kenya
Nigeria
Sierra Leone
South Africa
Tanzania
Uganda

Law Reform Commission of The Gambia, 14 Picton Street,
Banjul, The Gambia, West Africa
Ghana Law Reform Commission, P.O. Box M63, Accra
Kenya Law Reform Commission, Co-operative Bank Building,
9th Floor, Haile Selassie Ave., P.O. Box 34999, Nairobi
Nigerian Law Reform Commission, New Secretariat Complex II,
P.O. Box 60008, Ikoyi, Lagos, Nigeria
Law Reform Commission, 25 Garrison St., Freetown
Law Commission, Private BAG X668, Pretoria 0001
Law Reform Commission, P.O. Box 3580, Dar es Salaam
Law Reform Commission, Parliamentary Buildings, P.O.Box 7183, Kampala

Zambia
Law Development Commission, 11th Floor, Profound House,
Cairo Road Northend, P.O.Box 34670, Lusaka
Zanzibar
Law Reform Commission, P.O. Box 259, Zanzibar
Zimbabwe
Advisory Committee on Law Reform, P.O. Box 8159, Causeway,
Zimbabwe. [Now Law Development Commission].

OTHER JURISDICTIONS

Bahamas
Cyprus
Dominica
Fiji
Hong Kong
India
Jamaica
Malaysia
Nepal
Pakistan
Papua New Guinea

Law Reform and Revision Commission, P.O.Box N-3746, Nassau
(or: c/o Office of Att.-Gen., P.O. Box N-3007, Nassau)
Law Commissioner, Revision and Consolidation of
Cyprus Legislation, Nicosia
Law Revision Commission, c/o Office of Attorney-General and
Minister of Legal Affairs, Government Headquarters, Roseau, Dominica, West Indies
Law Reform Commission, PO Box 2415, Government
Buildings, Suva
Law Reform Commission, 1st Floor, Queensway Government
Offices (High Block), 66 Queensway, Hong Kong
Law Commission, A Wing, 7th Floor, Shastrat
Bhawan, Dr.Rajendra Prasad Rd., New Delhi, 110001
Law Reform Committee, P.O. Box 456, Kingston
The Commissioner of Law Revision, A.G.'s Chambers,
Bank Rakyat Building, Jalan Tangsi, Kuala Lumpur
Law Reform Commission, GPO Box 4066, Kathmandu
Pakistan Law Commission, Rawalpindi
P.N.G. Law Reform Commission, Four Mile Government
Sri Lanka
Tonga
Trinidad & Tobago

Offices, PO Box 3439, Boroko
Law Commission, C 56, Keppetipola Mawatha, Colombo 5
Law Reform Committee, P.O. Box 22, c/o Crown Law Office, Nuku'alofa
T. & T. Law Commission, Park Plaza, 3rd Floor, 137
St. Vincent Street, Port-of-Spain, Trinidad, West Indies
Re: Law Reform Agency Survey 1987
Room D421
Tel. (01) 693244, ext. 8352

Dear Sir/Madam,

We write in connection with a questionnaire which we are circulating to all the world’s law reform agencies. It is now 22 years since the establishment of the British Law Commissions sparked off a fresh zeal for law reform which led to the creation of numerous new law reform agencies throughout the world. Darius Whelan has chosen as the topic for his LL.M. thesis here at U.C.D. “The Comparative Method and Law Reform”. As up-to-date information on law reform agencies is rather difficult to come by, we have decided to conduct a direct survey of the agencies for some basic information.

It would be greatly appreciated if you could reply to as many questions in the attached questionnaire as possible. We are particularly interested in questions 13 to 15. We would also like to receive any leaflets/roundouts/lists of publications, etc., you might have. Please enclose an original or a photocopy of both your most recent annual report and the Statute(s) which govern(s) your agency.

Any extra comments you might like to add with respect to Comparative Law and Law reform would be more than welcome.

Thank you very much for your time and attention.

Yours faithfully,

Arnaud Cras, Darius Whelan, B.C.L.
Lecturer.
LAW REFORM AGENCIES SURVEY 1987
Faculty of Law,
University College, Dublin, Ireland

QUESTIONNAIRE

We would be grateful if you could answer as many of the following questions as possible. All replies will be fully acknowledged.

For some questions, we may have inserted what information we do have about your agency. Please replace any incorrect information with the up-to-date data.

1. Full Title of Law Reform Agency
   Full Address
   Phone Number

2. Date of Appointment of First Members

3. Statute(s) governing the Conduct of its Work (with date(s))

4. Minimum Number of Members Required by Statute
5. Members of the Agency

Please go through the members and officials of the agency one by one, and complete the chart on the next page. There are five columns to be completed for each member. For Columns A and B, please fill in the answers in the spaces provided. For Columns C, D and E, there is a coding system as explained below.

Column A: Position

Please write the person's position within the agency.
Examples: Chairman, President, Vice-Chairman, Vice-President, Member, Commissioner, Secretary, Executive Director, Counsel, Staff Attorney, etc.

Column B: Name

Please supply the person's name in full (including qualifications).
Examples: The Hon. Mr. Justice Trellis
Brenda E. Wall, Ph.D., Q.C.

Column C: Sex

Please insert a number in the Column provided.
Write "1" for male.
Write "2" for female.

Column D: Tenure

Here, we want to know whether the person works full-time or part-time for the agency.
Write "1" for full-time.
Write "2" for part-time.

Column E: Principal Profession(s)

Here we want to know whether the person is or was a Judge, a Law Teacher, a Sociologist, etc. Please reply using the codes below.
If the person has more than one principal profession, write a code for each of them. (E.g. Law Teacher and Advocate = 2 + 3).

1 - Judge
2 - Law Teacher (e.g. lecturer, academic, tutor)
3 - Advocate (e.g. barrister, attorney)
4 - Solicitor
5 - Sociologist
9 - Other

If the person's profession does not fall within categories 1 to 5, please write "9" in the Column and write their profession somewhere near their name.
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6. **Legal Staff**

If there is a legal staff, please indicate approximate numbers (divided by area of activity if applicable)

7. **Number of Administrative and Secretarial Staff**

8. **Annual Budget of the Agency**

9. **Electronic Mail**

Can the agency be contacted by electronic mail?
(Please mark appropriate box)

If yes, state Network, Nodename and I.D.:

Network:

Nodename:

I.D.:

Note: We can contact you via electronic mail if you are linked to any of the following networks: EARN (European Academic Research Network), JANET, BITNET, NETNORTH, ARPANET, CSNET, or USENET.
You can contact us at EARN - Nodename IRLEARN - i.d. DWHELF88 or ACRAS
10. **Initiation of Projects**
Does the agency have power of initiation of projects?

Who else can initiate projects?

11. **To whom does the agency report?**

12. **Normal Consultation Procedure**
With whom does the agency normally consult in the preparation of its reports? (interest groups, etc.?)
13. Foreign Law and Comparative Law

Section 4(3) of Ireland's Law Reform Commission Act, 1975 states that:

Where in the performance of its functions it considers it appropriate so to do, the Commission may (b) examine and conduct such research in relation to the legal systems of countries other than the State as appears to the Commission likely to facilitate the performance of its functions.

a. Is there any similar provision in your agency's statute(s)?

   YES  NO

b. If yes, state section, subsection:

c. Is the provision mandatory ("shall") or discretionary ("may", as above)?

   MANDATORY  DISCRETIONARY

d. If you are not enclosing a copy of your Statute(s) with your replies, please write the subsection here:-

14. Foreign Law and Comparative Law, continued

Please give a brief summary of the importance attached by your agency to comparative law and research into foreign law. (Indicate which jurisdictions are consulted most often).
15. Co-operation Between Law Reform Agencies

a. Does your library stock the reports of other law reform agencies?

YES NO

b. If yes, which agencies?

c. Have delegates from your agency attended national or international conferences of law reform agencies?

YES NO

d. If yes, which conferences?

e. Are you aware of any published proceedings of such conferences; or of any published compilations of law reform agency information?

16. Annual Reports

a. Does your agency publish an annual report?

YES NO

b. If yes, give date of most recent report:

c. How many annual reports have been published to date?

d. Is there a list of publications included in the annual report?

YES NO

(If no, please include a list on separate sheets if possible)

17. Working Papers

a. Does your agency publish working papers?

YES NO

b. If yes, how many Working Papers have been published to date?

c. Please list here any Working Papers which are not listed in any list with which you are supplying us (e.g. those published since your most recent annual report):
18. Reports/Recommendations

Note: For subquestions c,d,e, approximations will suffice if exact numbers are not available.

a. How many Reports/Recommendations has your agency published to date?

b. Are the Reports submitted automatically to the Legislature or is this left to the discretion of the Executive?

| AUTOMATIC SUBMISSION | DISCRETION |


c. In how many of these was a draft Bill included?

d. How many of these have been implemented in whole by the Legislature?

e. How many of these have been implemented in part by the Legislature?

f. Please list here any Reports/Recommendations published which are not listed in any list with which you are supplying us (e.g. those published since most recent annual report).

19. Other Publications

Please list or summarise other publications (e.g. Programmes of Law Reform, etc.), unless listed elsewhere.
20. Information Enclosed

Please indicate here any publications which you are enclosing with your replies:-

Recent List of Publications

Statute(s) governing the Agency

Most Recent Annual Report

Sample Reports/Working Papers

Other Publications

21. The World's Law Reform Agencies

The Appendix is a list of the world's law reform agencies of which we are aware. Please add titles of others plus addresses if absent or changed.

22. Comments

(E.G. On the difficulties encountered by law reform agencies? Cooperation of the Legislature with your proposals? Attitudes to law reform in your jurisdiction?)

Please send replies to:

Law Reform Agency Survey 1987,
Room D421,
Faculty of Law,
University College,
Belfield, Dublin 4,
Ireland.
APPENDIX 5 - QUESTIONNAIRE REPLIES

There follows a printout of the 29 questionnaire replies received.

Information in square brackets has been added from other sources.
If a question was not answered, it is omitted from the list.

Periodic reminders of the questions appear at the bottom of the pages.
For the exact phraseology of a question, refer to Appendix 4.

As mentioned in the text, six replies by letter were also received, from Alberta, Quebec, Prince Edward Island, Alabama, Bahamas and Antigua & Barbuda.

Reminder of Questions
UNITED KINGDOM:

ENGLAND AND WALES


1. Law Commission, Conquest House, 37-38 John Street, Theobalds Road, London WC1N 2BQ, England. Tel.(01) 242 0861

2.16 June 1965

3. Law Commissions Act 1965 (1965, c.22)

4. Five (Chairman and 4 others) except during any temporary vacancy -- see s.64 of Administration of Justice Act 1982, c.53.

5. Chairman-The Hon. Mr. Justice Beldam: 1-1-1

Commissioner-Trevor M. Aldridge: 1-1-4

Commissioner-Brian J. Davenport, QC: 1-1-3+1 (part-time Social Security Commissioner)

Commissioner-Prof. Julian T. Farrand: 1-1-2

Commissioner-Prof. Brenda M. Hoggett: 2-1-2+1 (part-time Asst. Recorder)

Secretary-Michael H. Collon: 1-1-3

6. Four parliamentary counsel; 13 other civil servants + 14 research assistants + 4 consultants (of whom 6 on family law, 7 on property law, 4 on criminal law, 4 on statute law revision, remainder on other work)

7.21

8. About £2 million [1986/87: stg 2,062,300]

9. No; but a Fax is shortly to be installed.

10. Yes, under s.3(1)(b), within the ambit of any agreed law reform programme; Lord Chancellor and any other Minister (s.3(1)(e)) or any other body (s.3(1)(a)) - but in practice usually the Lord Chancellor

11. Proposals for reform: to Lord Chancellor (laid before Parliament); Annual Reports: to Lord Chancellor (laid before Parliament with such comments, if any, as Lord Chancellor sees fit; there have never been any such comments)

12. Judiciary, legal profession, government departments, academic lawyers, all known or thought to have an interest in the project.

13. a. Yes; b. S.3(1)(f); c. Mandatory. The provision is mandatory, but the Commissioners have a complete discretion ("as appears to the Commissioners"), as in Ireland

14. The law of other countries, especially common law jurisdictions, is invariably examined during the preparation of policy papers


e. Law Reform in the Commonwealth, Report of the Meeting of Commonwealth Law Reform Agencies/London 1977 (Cwth Secretariat 1978);

Law Reform in the Commonwealth, Law Reform Proposals and their Implementation. Issue 2. (Cwth Secretariat 1983);

Forum on Law Reform in the Commonwealth. Report of the Meeting of Cwth LRA's/Hong Kong 1983 (Cwth Sec. 1984);

Codification as a Tool of Law Reform. Report of a Meeting of Cwth LRA's/ Jamaica 1986 (Cwth Sec. 1987);

Law Commission Colloquium 1986. Law Reform: Can We Do Better? (1986);

The Future of Law Reform Seminar/Ottawa 1986 (LRC of Canada, Ottawa, 1986);

Conference of Australian LRA's. 1st. Record of Proceedings (1974?)

List of Official Committees, Commissions and other Bodies concerned with the Reform of the Law. No.9. (Inst. of Advanced Legal Studies, London, 1979);

17.a. Yes; c. WP 102 (Landlord and Tenant-Compensation for Tenants' Improvements), WP 103 (Criminal Law-Binding Over), WP 104 (Conspiracy to Defraud)(imminent), WP 105 (Title on Death)(imminent).
18.[a. Up to end of 1987, 144 reform reports published, including reports 11A and 18A];

(22nd Ann. Rep. - 96 implemented in full, 6 in part, 29 no implementation, 13 do not call for legislation. Implementation rate to end 1987 of reports to end 1985: 122 reports calling for legislation, 95 (77.9%) implemented in full, 6 (4.9%) in part, 21 (17.2%) no implementation.)
19. See covering letter.
Conveyancing Standing Committee - 'House Selling the Scottish Way for England and Wales' and 'Local Authority Enquiries. How Can We Eliminate Delays?';
Sept. 1987 - Paper on Treasure Trove (not a WP or Report)
'Law under Review' (Quarterly)
May 1986 - Condominium Schemes (Cm. 179) (not a LC Report)
22. See Part I of 21st Annual Report

Reminder of Questions
Appendix 5:

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 Scotia
 1. Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR, Scotland. Tel. 031-668-2131
 2. 1965 [June 16]
 4. Not more than five (Chairman plus not more than four others)
 5. Chairman-The Hon. Lord Maxwell: 1-1-1
 Commissioner-Dr. E.M. Clive: 1-1-2
 Commissioner-C.G.B. Nicholson, QC: 1-1-1
 Commissioner-Prof. P.N. Love: 1-2-4
 Commissioner-J. Murray, QC: 1-2-3
 Secretary-Kenneth F. Barclay: 1-1-4
 6. Nine; One draftsman and two part-time draftsmen
 7. Thirteen
 8. No
 9. No. But the Commission can receive and consider proposals for reform of the law which may be made or referred to them; Lord Advocate.
 10. Proposals for reform-to Lord Advocate (laid before Parli.), Annual Reports-to Lord Advocate (laid before Parli. with such comments, if any, as Lord Advocate thinks fit)
 11. Wide consultation depending on topic
 12. a. Yes; b. Section 3(1)(f); c. Mandatory
 13. Considerable importance to comparative law and research into foreign law. Naturally the most commonly consulted jurisdiction is England and Wales.
 15. a. Yes; b. Report for the year ended 15th June 1987 (publ. 19th Nov., 1987); c. 22; d. Yes
 16. Changes in the number of Reports. Figure includes annual reports and "Minors and Pupils" report (see f. below). It excludes our unnumbered published papers (Section 3, p. 24 of 22nd Annual Report). Although our Reports currently end at 110 we produced a Report numbered 6A in 1967.
 17. a. Yes. Known as Consultative Memorandum; b. 74
 18. a. 11 Reports. Figure includes annual reports and "Minors and Pupils" report (see f. below). It excludes our unnumbered published papers (Section 3, p. 24 of 22nd Annual Report). Although our Reports currently end at 110 we produced a Report numbered 6A in 1967.
 19. Items 3, 4 and 5 on pages 24-25 of 22nd Annual Report to be included?
IRELAND:

From Frank Ryan, Secretary. Dated 4 August 1988.
1.Law Reform Commission, Ardilaun Centre, 111 St.Stephen's Green, Dublin 2. Tel.(01)715699.
2.20 October 1975
3.Law Reform Comission Act, 1975
4.Five (President plus four Commissioners)
5.President-The Hon. Mr. Justice Ronan Keane: 1-1-1
Commissioner-John F. Buckley, BA,LLB,Solr.: 1-2-4
Commissioner-William Duncan, MA,FTCD,BL: 1-2-2+3
Commissioner-Maureen Gaffney, BA,MA: 2-2-9 [Psychologist]
Commissioner-Simon O'Leary, BA,BL: 1-1-3
Research Counselor-William Binchy, BA,BCL,LLM,BL: 1-2-3
Secretary-Frank Ryan, BA,FAAI,FIIA,AIMA,BL: 1-1-3
6.At 4th August 1988, the lawyers on the staff consist of the Secretary and one Research Counselor
7.Five
8.Varies. In 1988 it is IR£310,000 (£267,800 sterling]
10.Yes - Formulation of programmes in consultation with A.G. subject to veto by Government; Attorney General
11.Proposals for Reform: to A.G. or to Taoiseach; Annual Reports: to A.G. (A.G. sends copies to Taoiseach, Taoiseach submits to Government, Copies laid before Oireachtas)
12.There is no "normal" procedure. But lawyers and interest groups have been consulted, where considered appropriate.
14.The Commission always examines current legislation in other countries before making recommendations for change, or for the retention of the status quo, in Ireland.
15.a.Yes; b.Most of those in Canada, Australia, U.K. and English-speaking countries; c.No; e.No
16.a.Yes; b.1986/7; c.Nine; d.Yes
17.a.Yes; b.Eleven; c.Working Papers have now ceased. Replaced by Consultation Papers.
18.a.Twenty-Four; b.Discretion; d.None; e.Six
22.Enclosed is address of President of the Commission at a Seminar held by the Commission in Trinity College, Dublin.

Reminder of Questions
Appendix 5:
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CANADA:

CANADA - Federal

1. Law Reform Commission of Canada, 130 Albert Street, Ottawa, Ontario, Canada K1A 0L6. Phone (613) 996-7844.
2. April 1, 1971
4. President; Vice-President; Three other members.
5. President-The Hon. Mr. Justice Allen M. Linden: 1-1-1
Vice-President-M. Gilles Létourneau: 1-1-3
Commissioner-Mr. Joseph Maingot, QC: 1-1-3+9 (Former Parliamentary Counsel and Law Clerk of the House of Commons)
Commissioner-Mr. John Frecker: 1-1-3+4
Commissioner-Mme. la juge Michèle Rivet: 2-1-1
Secretary-M. François Handfield: 1-1-2+3
6. List Attached: Substantive Criminal Law-three legal staff
Criminal Procedure-ten legal staff
Administrative Law-five legal staff
Protection of Life-five legal staff
Other Legal Staff-four.
7. See Organizational Chart [11 Secretaries; 29 Others]
8. See Annual Report [1985/6: $5,049,000 = £2,450,000 sterling]
9. Yes; Facsimile: Ottawa, Ontario (613) 996-8599;
Montreal, Quebec (Montreal Regional Office) (514) 496-2572
10. See LRC Act Section 12(2); Minister of Justice and Attorney General of Canada
11. Minister of Justice and Attorney General of Canada
12. See Annual Report starting at page 22
13. a. Yes; b. Section 13. We also do comparative law in the conduct of our research; c. Discretionary; d. Enclosed.
[Section 13 (Joint Projects): "The Commission may in its discretion and with the concurrence of the Minister undertake any particular study, having as its intended result either directly or indirectly the improvement, modernization and reform of any law of Canada, as a joint project of the Commission and any one or more other law reform commissions, agencies or bodies in Canada or elsewhere, and may enter into such contractual arrangements as it deems necessary for the carrying out of such joint project, including arrangements for the provision of personnel or other resources of the Commission to any such commission, agency or body." ]
[Note also S.12(1): "In carrying out its objects, the Commission (b) may initiate and carry out ... such studies and research of a legal nature as it deems necessary for the proper discharge of its functions, including studies and research relating to the laws and legal systems and institutions of other jurisdictions in Canada or elsewhere." ]
14. In every aspect of our research, the LRC looks at, and analyzes, the legal system of foreign countries, both in the Commonwealth system and in the continent (France, Spain, etc.)
15. a. Yes; b. See list of Law Reform Agencies (the ones highlighted): all Canadian agencies, all Australian agencies, England & Wales, Scotland, California, Hong Kong, India, New Zealand, Fiji, Papua New Guinea; c. Yes; d. See Annual Report - Also, in the summer of 1987, the LRC participated in the 1st meeting of the Conf. for the Reform of Criminal Law, London England; e. No proceedings have been published at this time but we anticipate there will be.
Appendix 5

16. Yes; b. 1985-86 15th Annual Report; 1986-87 16th Annual Report (to be published in May-June 1988); c. 16 (including 1986-87); d. Yes
17. Yes; b. 56 [also 73 Study Papers etc.]; c. Nil
18. a. 31 (as of May 19, 1988); b. Automatic Submission; c. In all our reports there are recommended draft sections; d. +e. See page 28 of Annual Report [27 Reports; 13 enacted in whole or in part]; f. Nil
20. All five categories.

Reminder of Questions
1. Law Reform Commission of British Columbia, 601-865 Hornby Street, Vancouver, British Columbia V6Z 2H4 Canada. Phone (604)660-2366
2. August 1, 1969
4. Three
5. Chairman-Arthur L. Close: 1-1-3
Vice-Chairman-Hon. R.I. Cheffins, Q.C.: 1-2-1
Commissioner-Mary V. Newbury: 2-2-4
Commissioner-Peter T. Burns, Q.C.: 1-2-2
Counsel-Thomas G. Anderson: 1-1-4
Legal Research Officer-Deborah M. Cumerford: 2-1-4
Legal Research Officer-J. Bruce McKinnon: 1-1-4
Legal Research Officer-Monika Gehlen: 2-1-4
Secretary-Sharon St. Michael: 2-1-9
6. Four
7. Two
8. $550,000 (Can.) per annum (£267,000 sterling p.a.)
9. No
10. Yes; Attorney General
11. Attorney General
12. Appropriate special interest sections of the Canadian Bar Association. Such other persons and groups as the particular topic may require
13. a. No
14. Comparative research is regarded as important. Jurisdictions researched (in decreasing order of importance) are: other Canadian provinces, United Kingdom, Australia and New Zealand, United States
15. a. Yes; b. Almost all commonwealth agencies listed plus California and New York; c. Yes; d. Law Reform Conference of Canada
16. a. Yes; b. April 1987; c. Seventeen; d. Yes
17. a. Yes; b. 58
18. a. 90+ [78 excluding Annual Reports]; b. Discretion; c. 25%; d. See Annual Report [39 Reports implemented; 39 Reports unimplemented]
19. Study Paper on the Office of the Sheriff; Study Paper on Family Property
20. All five categories enclosed
MANITOBA

1. The Manitoba Law Reform Commission, 521 Woodsworth Building, 405 Broadway, Winnipeg, Manitoba, Canada R3C 3L6. Tel. (204) 945-2896
2. One Chairman - Oct. 1, 1970; Six Commissioners - Feb. 12, 1971
4. No minimum - maximum 7
5. Chairman - (vacant)
   Commissioners - Lee Gibson: 2-2-9 (teacher); John C. Irvine: 1-2-2; Gerald O. Jewers: 1-2-1;
6. Director of Legal Research (Counsel) - Jeffrey A. Schnoor: 1-1-3-4
   Legal Research Officers - Iris C. Allen: 2-2-3+4; Nancy E. Harwood: 2-1-3-4; Daniel Mathieu:
   1-1-3+4; Sherri Walsh: 2-2-3+4.
7. Admin. Secretary - (vacant)
8. Three full time, two part time
9. One Administrative Officer/Secretary, one Admin. Sec. (vacant)
10. 8.366,000 (£17,800 sterling)
11. No
12. Yes; Attorney-General
13. Attorney General
14. Judiciary, members of the Bar, law professors, interest groups and other law reform agencies
15. a. Yes; b. Section 6(1); c. Discretionary; d. Enclosed
[Section 6(1): "In the performance of its duties, the commission may (a) institute and direct
research of a legal nature, as it deems necessary, including studies and research relating to the
laws and legal systems and institutions of other jurisdictions in Canada or elsewhere, (c) in its
discretion and with the concurrence of the minister [i.e. Attorney General] undertake any study
pursuant to its duties as a joint project of the commission and any one or more other law reform
commissions, agencies or bodies in Canada or elsewhere ...."]
16. All Canadian agencies, New York, California, Hong Kong, Australian Commonwealth and States, New Zealand, Ghana, South Africa, Ireland, England & Wales and Scotland;
17. a. Yes; b. March 31, 1987; c. 16; d. Yes (attached)
18. a. 69 formal, 32 informal (unpublished) - including informal report on the Wages Recovery Act, submitted September 9, 1987;
   a. 40 (+ 3 which recommended no provincial action);
   b. 19 (+4 which recommended no provincial action)
   c. 10 (formal), 5 (informal)
20. Enclose list of publications, statute, annual report
22. See attached note:

Over the years, the Commission's recommendations have been very well received by the Legislature, as will be evidenced by the 75%+ implementation rate. Although this has fallen in the past
two to three years, an omnibus family law Bill will be introduced at the next session of the Legislature, beginning in mid-February 1988, and hopefully this will result in the implementation of several recommendations contained in our reports on The Dower Act, The Testators Family Maintenance Act, Intestate Succession, and The Married Women's Property Act.

We have, however, encountered difficulty with respect to funding. As you will note from the above information, the Commission has a very small staff (1 Director, 2 full time and 2 part-time researchers, and one Administrator/Secretary). Also, over the past few years, the number of Commissioners has been reduced from 7 to 5 and, in fact, we presently have only 4 Commissioners (who are not remunerated as of mid-December 1987) and the Chairman's position has not been filled since his resignation December 31, 1986. We were informed in mid-December 1987 that it was the intention of the Government to phase out the Commission over the next fiscal year and re-deploy the permanent staff (2) to a "policy division" of the Department; the term of the contracts for the remainder of the legal research staff would be honoured but would not be renewed.

We should also point out that in 1986 the Manitoba Law Foundation was established and, as a result of an agreement reached between the Foundation and the Government, an annual grant of $100,000 for three years was made to the Commission. This, too, will terminate at the end of the fiscal year 1988-89. The grant was not in addition to the existing budget of the Commission, but rather resulted in a reduction of the Government's funding.

Reminder of Questions
NEWFOUNDLAND

1. Newfoundland Law Reform Commission, 2nd Floor, 21 Church Hill, St. John's, NF A1C 3Z8, Canada. Tel. (709) 739-9686/739-6617
2. April 13, 1984
4. One
5. Chairman: J. Derek Green, Q.C.: 1-2-3+4
Commissioner-The Hon. Madame Justice M.A. Cameron: 2-2-1
Commissioner-Carl R. Thompson: 1-2-3+4
Commissioner-John F. Roil: 1-2-3+4
Commissioner-Carol Ann Benson: 2-2-9 (lay person)
Secretary-Linda Hunt Black: 2-2-3+4
Executive Director-Christopher P. Curran: 1-1-3+4
6. One
7. One
8. $100,000 (£48,500 sterling)
9. No
10. Yes; Minister of Justice
11. Minister of Justice
12. Individuals, groups and organisations, to whom the particular subject under consideration might be of interest
13. a. No
14. The Commission regards comparative research as an invaluable component of every project. In order of priority, the jurisdictions most often consulted are:
Other common law Canadian provinces, Quebec, Commonwealth jurisdictions outside Canada, the United States, other.
15. a. Yes; b. See attached sheet [7 Canadian, 8 Australian, 3 African, California, New York, New Zealand, England & Wales, Scotland, Ireland, Hong Kong, Jamica, Fiji, Papua New Guinea]. c. Yes; d. Law Reform Conference of Canada; e. Yes (see attached minutes)
16. a. No
17. a. Yes; b. Two [Limitation of Actions (WP1, WP1 Supp.), Powers of Attorney (WP2)]
18. a. Two [Limitation of Actions Final Report - R1; 2nd Report not known]; b. Discretion; c. None as yet
20. All categories enclosed, except annual report.
NORTHWEST TERRITORIES


1. Northwest Territories Committee on Law Reform, P.O. Box 1320, Yellowknife, Northwest Territories, Canada X1A 2L9. Tel. (403) 920-6487
2. 1986
3. Non-statutory body
4. N/A
   Member-Geoffrey Bickert: 1-2-3+4
   Member-Katherine Peterson: 2-2-3+4
   Member-Carol Roberts: 2-2-3+4
   Member-Richard Hardy: 1-2-3+4
   Member-Gordon Gamble: 1-2-9 (Surveyor)
6. One
7. None full-time. Secretarial support provided by Dept. of Justice and private contractor
8. Part of the Law Reform budget, NWT Dept. of Justice
9. No
10. Yes; Minister of Justice
11. Minister of Justice
12. Territorial Bar, appropriate interest groups for particular project
13. a. No
14. Very important. We most other look at the law of other Canadian jurisdictions, followed by England and the United States
15. a. Yes; b. All Canadian and Australian agencies, England, Scotland, Kenya, Fiji, Papua New Guinea; c. Yes; d. Law Reform Conference of Canada; e. Yes
16. a. No
17. a. Yes; b. One; c. An Act to Amend the Jury Act
18. a. None; b. No policy as of yet
19. Sample enclosed

Reminder of Questions

ONTARIO

1. Ontario Law Reform Commission, 15th Floor, 18 King Street East, Toronto, Ontario, Canada M5C 1C5. Tel. (416) 965-4761
2. 1964 (first Chairman appointed July 1, 1964; one member appointed July 9, 1964; three members appointed November 12, 1964).
3. The Commission was established by The Ontario Law Reform Commission Act, S.O. 1964, c.78, now R.S.O. 1980, c.343.
4. Three
5. Chairman-James R. Breithaupt, CJ, CD, QC, MA, LLB: 1-1-3+4
   Vice Chairman-H. Allan Leal, QC, QC, LLM, LLB, DCL: 1-2-2+3+4
   Commissioner-Earl A. Cherinak, QC: 1-2-3+4
   Commissioner-J. Robert S. Pritchard, MBA, LLM: 1-2-2+3+4
   Commissioner-Margaret A. Ross, BA (Hon), LLB: 2-2-3+4
   Counsel-M. Patricia Richardson, MA, LLB: 2-1-3+4
   11 other persons then listed (all Full Time): 3 Legal Research Officers (+one vacancy). Secretary and Administrative Officer, Senior Legal Research Officer, Administrative Assistant, Secretary to Chairman, Librarian, Secretary to Counsel, Secretary to Administrative Officer, 2 Secretaries to Legal Research Officers, Receptionist.
6. Counsel and five staff lawyers divide the activity of the Commission as directed by the Chairman
7. Nine
8. $1,200,000 (Can.) (£580,000 sterling)
9. Yes; FAX machine, (416) 363-2814
10. Yes; The Attorney General for Ontario can refer a topic to the Commission, but he alone has that right
11. The Attorney General for Ontario
12. The usual Project is under the responsibility of a Project Director, who is a leading academic law teacher in the field being studied. Research papers are begun and they are considered by an Advisory Board which covers the various interest groups
13. a. Not directly; b. Refer to Section 2 (2); c. Discretionary
   [Section 2(2): “The Commission may institute and direct legal research for the purpose of carrying out its functions.”]
14. In each of our Projects a review of comparative law as reported in local statutes or considered by reports of other law reform commissions is routinely done. The other Canadian provinces, the Australian states and the English and Scottish Commissions’ reports would be most frequently consulted.
15. a. Yes; b. All; c. Yes; d. Commonwealth Law Conferences and Annual Meetings of the Law Reform Conference of Canada; e. Yes- Commonwealth Law Conferences
16. a. Yes; b. 1986-87; c. 22; d. Yes
17. a. No
18. a. 65 plus 22 Annual Reports; b. Automatic Submission. By practice over the years, the Attorney General routinely tables our reports; c. Two-thirds; d. 60%; e. 20%
20. Enclosed statute, annual report, list of publications

[Covering Letter- "I would modestly suggest that it is now 24 years since the zeal to which you refer was first sparked in the Commonwealth of Nations by the creation of the Ontario LRC in 1964. The English and Scottish Commissions followed the next year and the rest, as they say, is history." ]
AUSTRALIA:

AUSTRALIA - Federal

1. Australian Law Reform Commission, 99 Elizabeth Street (7th Level), Sydney, N.S.W. 2000. Tel. (02)231-1733
2. Feb. 1975
3. The Law Reform Commission Act 1973
4. A President plus four or more other members
5. President-The Hon. Justice Elizabeth Evatt, AO: 2-1-1
   Deputy President-Mr. G. Greenwell: 1-1-4
   Member-Mr. George Zdenkowski: 1-2-2
   Member-Prof. J. Goldring: 1-1-2
   Member-Prof. M. Chesterman: 1-2-2
   Member-Mr. R. Fisher: 1-2-4
   Member-Prof. A. Hambly: 1-2-2
   Member-Hon. G. Maxwell: 2-2-1
   Member-Hon. D. Ryan: 1-2-1
   Member-Mr. N. Seddon: 1-2-2
   Member-Prof. James Crawford: 1-2-2
   Member-Mr. Ron Harmer: 1-2-4
   Member-Hon. Justice M. Wilcox: 1-2-1
   Member-Prof. Richard Harding: 1-2-2
   Member-Dr. Robert Hayes: 1-2-2
6. Secretary and Director of Research; 2 Principal Law Reform Officers, 6 Senior Law Reform Officers, 5 Law Reform Officers (3 of whom are part-time), 1 Asst. Legislative Counsel (PLRO).
7. Fourteen plus the President’s Associate who undertakes research for the President.
8. $2,500,000 appropriated from Parliament; approx. $300,000 from other sources. [$2.8m. = £1.3m. sterling]
9. No
10. The Commission may suggest a reference to the Attorney General who may then refer it to the Commission; The Attorney General.
11. To the Attorney General, and through the A.G. to federal Parliament
12. All interest groups in the private and public sectors. All interested citizens through public hearings held in capital cities throughout Australia.
13. a. No; b. Section 8 has same effect
14. Depending on subject area, great importance or less. For example, Admiralty Report (ALRC 33) paid particular regard to international law and recent US, UK, South African and other Commonwealth countries’ reforms of Admiralty. So also Foreign State Immunity report (ALRC 24). But Domestic Violence (ALRC 30) less so. Common law countries and the U.S. are the most often consulted. EEC Sometimes.
16. a. Yes; b. 1987; c. 12; d. Yes
17. a. Yes; b. 86 Research Papers and Working Papers [Also 33 Discussion Papers, 6 Issue Papers, 4 Australian Capital Territory Community Law Reform Papers]
18. a. 40 (includes Ann. Reps.) [28, excluding Annual Reports]; b. Automatic Submission;
   c. All-except Ann.Reps.; d. +e. See attached Table. [8 implemented + 4 implemented in part] Since then, the Government has indicated it will implement ALRC 33 (Admiralty)
Reminder of Questions
Appendix 5

NEW SOUTH WALES


1. New South Wales Law Reform Commission, Level 12, ADC Building, Sydney, NSW 2000 (or Box 5199, GPO, Sydney, NSW 2001). Tel. (02) 228 7213 [FAX (02) 271054]
2. 1966
3. Law Reform Commission Act 1967 (NSW)
4. Three
5. Chairman-Ms. Helen Gamble: 2-1-2+4
       Deputy Chairman-Mr. Russell Scott: 1-1-4
       Research Director—William J. Tearle: 1-1-2+3
       Secretary—John McMillan: 1-1-9 (Administrator)
       Librarian—Beverley Caska: 2-1-9 (Librarian)
       Also Research Staff.
6. Six Permanent, Full Time; Five Temporary or Seconded Staff. Supervised by Research Director
7. Nine
8. AUSS 1.1 million (£0.51 million sterling)
9. No
10. No (Except to a limited extent on Community Law Reform Programme); Attorney General
11. Attorney General (for tabling in Parliament)
12. All special interest groups appropriate to the issue, plus public, legal profession, and interested individuals.
13. a. No
14. Very important. Regularly consider all other Australian jurisdictions, UK, New Zealand, Canada, USA, others if appropriate to project.
15. a. Yes; b. All Australian agencies, NZ, Canada and most listed at end of this survey; c. Yes; d. Australian Law Reform Agencies Conference, Commonwealth Law Conferences; e. Yes. We keep A.L.R.A.C. proceedings.
16. a. Yes; b. 1987; c. Every year 1968 to date; d. Yes
17. a. Yes; b. See list attached [22 Working Papers, 17 Discussion Papers, 5 Background Papers, 4 Issues Papers, 2 Research Papers, 2 Research Reports, 5 Consultants' Papers, 1 Discussion Paper in conjunction with Australian LRC and Victorian LRC]
18. a. 53; b. Automatic Submission. To Attorney General "for tabling in Parliament"; c. Most; d. 36; e. 4
20. Enclosed all categories except other publications
NORTHERN TERRITORY

1. Northern Territory Law Reform Committee, GPO Box 1535, Darwin, NT 5794, Australia.
   Tel.89 7466
2.1978
3. Constitution is attached - see Annual Report
4. See Constitution
5. Chairman-Justice W.J. Keamey: 1-2-1
   Member-Gordon Bemer LLB: 1-2-3+4
   Member-Clyde Croft, Ph.D.: 1-2-9 (Sec., Dept. of Law)
   Member-Jim Darling LLB: 1-2-9 (Parliamentary Counsel)
   Member-Max Horton: 1-2-3+4
   Member-Ian Maugham: 1-2-9 (Lawyer, Dept. of Education)
   Member-Suzanne Phillip: 2-2-2
   Member-Trevor Riley: 1-2-3
   Member-Ted Rowe: 1-2-4
   Member-Sally Thomas: 2-2-1
   Executive Officer-Stephen Herne, LLM: 1-2-9 (Lawyer, Dept. of Law)
6. One - occupied 50% on NTLRC work
7. One - occupied 30% on NTLRC work
8. 1986-87: $74,000 (£34,260 sterling) (salaries $64,000, admin. expenses $10,000)
9. No
10. No; Attorney-General
11. Attorney-General
12. Not done in the normal course of events. However has been done on projects concerning (a) De
    Facto Relationships - all members of the public and specialist organisations invited to comment
    on Discussion Paper (available on request), (b) Administrative Appeals - public service.
13. a. No
15. a. Yes; b. Australia (national and state agencies), UK Law Commission, Scottish Law Commis-
    sion, New Zealand, Canada (national and provinces with law reform bodies - see attached list);
    c. Yes; d. Canadian Law Reform Conference (1987 only)
16. a. Yes; b. 1987; c. Unknown; d. Yes (some)
17. a. No
18. a. 12; b. Discretion; c. None; d. + e. See Annual Report [6 Reports enacted]; f. Report on Statutory
    Interpretation (No. 12)
19. Nil
20. Enclosed constitution, annual report, mailing list.
21. See our attached mailing list
SOUTH AUSTRALIA

1. The Law Reform Committee of South Australia, Supreme Court, Victoria Square, Adelaide 5000. Tel. 218-6657
2. September 1968
3. The Committee was set up by proclamation under the executive power of the Governor in Council
4. Not applicable
5. Chairman-The Hon. Dr. Howard Zelling, AO, CBE: 1-2-1
   Deputy Chairman-The Hon. Justice White: 1-2-1
   Deputy Chairman-The Hon. Justice Legoe: 1-2-1
   Member-Mr. J.J. Doyle, QC: 1-2-9 (Solicitor-General)
   Member-Mr. J.W. Perry, QC: 1-2-3
   Member-Mr. D.F. Wicks: 1-2-9 (representing the Law Society)
   Member-Mr. G. Hiskey: 1-2-9 (Special Magistrate)
   Member-Mr. A.L.C. Ligertwood: 1-2-9 (representing the Faculty of Law)
   Member-Mrs. B. Curzons: 2-2-9 (Secretary)
6. Not presently applicable - see letter
7. One
8. It does not have a separate budget
9. No
10. No; projects are initiated by the Attorney General
11. The Attorney-General
12. Such interest groups as it thinks relevant
13. a. No, but we do in practice do so
14. Most consultation is with other Australian law reform agencies and with New Zealand
15. a. Yes; b. Some 40 of them; c. Yes; d. All law reform agencies conferences, Commonwealth and Australian; e. Yes
16. a. No
17. a. No
18. a. 108; b. The Attorney General decides; c. About half; d. About 40%; e. About 10%; f. Not applicable
19. Nil
20. No enclosures
21. No comment
22. Like all law reform agencies we have difficulty in getting legislative time for bills because of the commonly held view by politicians that there are no votes in law reform

[Covering letter - As a cost-cutting measure Cabinet have put the Committee on hold until the next budget review in August and we are merely completing partly done references at present.]
TASMANIA

1. Law Reform Commission of Tasmania, 7th Level, Executive Building, 15 Murray Street, Hobart, Tasmania, Australia 7000. GPO Box 825H, Hobart 7001. Tel.002-306494
2. June 1975
Note 1987 Bill - copy enclosed
4. Three represent a quorum; There is provision for five members
5. Please note covering letter. Info. given below relates to immediate past members.
Chairman-Mr. J.B. Piggott, LLB, CBE: 1-2-3 (retired)
Research Director/Member-Mr. G.W. Briscoe, LLB (Hons.), MA: 1-1-4
Member (representing the Bar Assoc.) - Mr. H.J. Kable, LLB: 1-2-3
Member (representing the Law Society) - Mr. D.J. Gunson, LLB: 1-2-3
Member (rep. Fac. of Law, U. of Tas.) - Mrs. C.A. Warner, LLM: 2-1-2
6. Research Director
7. One Secretarial Asst. in addition to the Research Director
8. Approx. AUS$ 93,000 (£43,000 sterling)
9. No
10. Yes; the Attorney General of Tasmania
11. The Attorney General, who in turn is obliged to table our reports in each House of the Tasmanian Parliament within 10 sitting days of the House after the report is received by him.
12. As wide a community as possible bearing in mind the nature of the project; interest groups, lobby groups, lawyers' bodies, university faculties, etc. as well as the general public via public hearings, media advertisements, etc.
13. a. Yes; b. Section 7(1)(c)(iv); c. Discretionary
[Section 7(1)(c)(iv): "The functions of the Commission are (c) subject to the approval of the Attorney-General, to consider proposals relating to (iv) uniformity between laws of other States and the Commonwealth (of Australia)"
14. We have traditionally placed great emphasis on comparative law - particularly from other Commonwealth countries - more recently from non-Commonwealth countries such as USA, Scandanavia, Germany. Depending on the subject-matter of a particular project - other jurisdictions may be able to provide valuable ideas and other information to assist us in discovering the most appropriate response to the legal problem.
15. a. Yes; b. All that we are aware of except India; c. Yes; d. All Australasian Law Reform Agencies Conference, Commonwealth Law Reform Agencies Conference Hong Kong 1983 + Jamaica 1986;
e. Yes. Refer to Commonwealth Secretariat, London re CLRA Conf. and to Australian LRC re ALRAC
16. a. Yes; b. 1987 (to be tabled: not a public document); c. 13; d. Yes
17. a. Yes; c. Interest on pre- and post-judgment debts, Occupiers' liability, Variation of private trusts, Suretyship and guarantee, Compensation for victims of motor vehicle accidents, Private rights of access to neighbouring land, Fines, Minors' contracts, Lower courts, Succession rights on intestacy, Powers of attorney, Computer misuse, Burden of proof, Boundary fences, Exclusion clauses, Wills, Child witnesses.
18. a. 53; b. Automatic Submission; c. 3 or 4; d. Approx. 50%; e. Approx. 10% 20. Enclosed list of publications, statute, annual report

[Covering letter- The Tasmanian LRC is soon to be abolished and replaced with a single Law Reform Commissioner. The reasons given for this include a potential saving of money. The terms of office of the Chairman and other members of the Commission, apart from the Research Director, expired on 31 December 1987. No new appointments have been made. Until the LR Commr. Bill 1987 is enacted, the Research Director will be the only member of the LRC.]
NEW ZEALAND:

From Prue Oxley, Principal Research Officer ("for Sir Owen Woodhouse"). Postmarked 12th April 1988.

1. Law Commission, P.O. Box 2590, Wellington, New Zealand. Tel. (04)733.453
2. 1986
3. Law Commission Act 1985
4. Three
5. President-Rt.Hon. Sir Owen Woodhouse: 1-1-1
Commissioner-Ms. S. Elias: 2-1-3
Commissioner-Prof. Ken Keith: 1-1-2
Commissioner-Mr. B.J. Cameron: 1-1-9 (retired public servant)
Commissioner-Ms. M. Wilson: 2-1-2
Director-Alison Quentin-Baxter: 2-1-3
Princ. Research Off.-Prue Oxley: 2-1-9 (anthropologist/social researcher)
Law Drafting Officer-David Elliot: 1-1-4
Senior Legal Research Officer-Mandy McDonald: 2-1-3
Legal Research Officer-Megan Richardson: 2-1-3
Legal Research Officer-Janet Aikman: 2-1-4
6. Three
7. Eleven
8. 1988/89 $2.8 million [£1.12 million sterling]
9. Yes; Fax (04) 710.959
10. Yes; Minister of Justice
11. Minister of Justice
12. The public, government agencies, interest groups (e.g. business federations, unions, community groups, professional societies), universities
13. a. Yes. It is not necessary. The statute gives the authority without specifying it.
14. It is a significant aspect of law reform study. Even though the New Zealand context is our prime motivation (see for example s.5(2)(a) of Law Commission Act), comparative law enables us to (i) learn of alternative ways of proceeding, (ii) evaluate the problems and effectiveness of alternatives. Many jurisdictions are consulted but common law ones (UK, Australia and Canada in particular) tend to be referred to more often.
16. a. Yes: b. Year ended 31 March 1987 [NZLC R2]; c. Two; d. No (There will be in future)
17. a. Yes b. Five; c. See list
18. a. Two [Imperial Legislation in Force in New Zealand (R1), The Accident Compensation Scheme- Aspects of Funding (R3)]; b. Automatic Submission; c. One; d. Still under consideration. A bill has been introduced and is at select committee stage.
19. See list
20. Enclosed list of publications, statute, annual report
Appendix 5:

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UNITED STATES OF AMERICA:

ARKANSAS


1. Arkansas Code Revision Commission, 1400 West Capitol, Little Rock, Arkansas 72201, USA.
   Tel. 501-371-2128

2. 1945

   1987, No.334; reen. 1987, No.1009.

4. Eight

   Commissioner-Douglas O. Smith, LLB: 1-2-3
   Commissioner-Dean Lawrence H. Averill, Jr., LLB: 1-2-2
   Commissioner-Dean J.W. Looney, J.D.: 1-2-2
   Commissioner-R.B. Friedlander, J.D.:2-2-3
   Commissioner-Hon. Mike Beebe, J.D.: 1-2-3+9 (State Senator)
   Commissioner-Hon. J.L. "Jim" Shaver, Jr., J.D.: 1-2-3+9 (State Repve.)
   Executive Director-Vincent C. Henderson II,JD: 1-1-3+9 (Agency Dir.)

8 other persons listed: 7 Full Time (3 staff attorneys, 2 proofreaders, 1 Secretary, 1 Executive
Sec.), 1 Part Time proofreader

6. Four

7. Three

8. U.S.$271,356 (£160,000 sterling)

9. No

10. Yes; Arkansas General Assembly and Legislative Council

11. Arkansas Legislative Council and Arkansas General Assembly

12. Every recognizable entity even remotely connected with the work

13. a. Yes; b.A.C.A. §1-2-303(c)(2) and (3); c.Mandatory

   [Section 1-2-303(c): "The Arkansas Code Revision Commission shall cause the executive direc-
   tor and other staff members of the commission (1) to make continual studies ... of the ... law ... of
   the state in order to identify ... [Defects/Deficiencies, etc.] (2) to provide for other and similar
   studies designed to lead to the preparation of drafts of corrective legislation for presentation, after
   review and approval by the Commission to each session of the General Assembly for enactment;
   and (3) to make studies of the methods, means and systems used in the various states for the com-
   pilation, codification, revision, and publication of the codes or statutes of those states. These stud-
   ies are to be used by the commission in determining means of improving the compilation of the
   statutes of Arkansas and to prepare recommendations to the General Assembly in regard thereto."]

14. See item 22 (Comments)

15. a. Yes; b.American Law Institute, 4025 Chestnut St., Philadelphia, PA 19104, U.S.A.; Ameri-
    can Judicature Society, 35 E. Washington, Ste. 1600, Chicago, IL 6062, U.S.A.; National Con-
    ference of Commissioners on Uniform State Laws, Ste. 510, 645 N.Michigan, Chicago, IL 60611,
    U.S.A.; c. Yes; d.National Conference of Commissioners on Uniform State Laws; e.Yes

16. a. No

17. a. No

18. a. Three; b.Automatic Submission; c.Three; d.Three; e.None

20. Statute enclosed

22. Comments
Law reform in the United States is different from law reform in other countries. Most law reform agencies in the United States limit their work to providing for the continuing codification, compilation, recodification and recompilation of the statute law of their particular jurisdiction. For example, we have recently finished the first complete codification of all statute law in Arkansas of a general and permanent nature. The Michie Company published the codification last November as the Arkansas Code of 1987 Annotated, effective January 1, 1988. Rarely will law reform agencies become involved in what we call “real revision”, that is recommending changes in the statute law for the purpose of improving the policy supporting the law and the application and enforcement of the law. There are political reasons.

State legislators zealously and jealously guard their prerogative of initiating legislation for the improvement of public policy. Their attitude is based upon the position that they are the only competent persons to determine what is in the best interest of the people. Therefore, any attempt to improve public policy should start with them, not some state agency or special interest group which may have some “axe to grind”, some narrow interest to press.

That is not to say that no law reform is successful. For example, the Texas Legislative Council has been working on the codification of Texas’ statute law since 1961. Sometime after the turn of the century the work should be completed. This effort goes beyond merely codifying the existing statute law. Committees are appointed and hearings held to consider the proposed codifications and to make recommendations to the Texas Legislature. In fact reforms in the statute law are being adopted by the Texas Legislature by this process. It is one reason why the process will take nearly half a century. Keep in mind, however, the Texas Legislative Council is part of the legislative branch and is supervised and directed by the Texas Legislature.

Otherwise, most law reform efforts that do not come from the legislatures usually come from the state bar associations, special interest groups, or local public interest organizations.

Important sources of law reform information, recommendations, and examples come from the National Conference of Commissioners on Uniform State Laws, the American Law Institute, the Judicature Society, the Council of State Governments, and the National Association of State Legislatures. It is from and through these sources that comparative law and research into foreign and out-of-state law become important.

The preparation and adoption of the Code has been a monumental piece of law reform for Arkansas. In the preparation of the first codification of statute law since statehood 150 years ago, we now know what our statute law is and is not. We still have some things to finish up on the Arkansas Code of 1987 Annotated. When that work is completed, the Commission will begin doing “real revision” work and will decide what law revisions will be studied, considered, and proposed. During the codification process, we have found obsolete, antiquated, and outdated laws still on the books. We have found inconsistencies which must be resolved. The resolution of these problems will be the beginning of true law reform in Arkansas.

[The Goranson Report does not place the Arkansas Code Revision Commission in any group.]
CALIFORNIA

1. California Law Revision Commission, 4000 Middlefield Road, Palo Alto, California 94303-4739. Tel. (415)494-1335
2. 1954
4. Ten
5. Chairperson-Ann E. Stodden: 2-2-1
Vice Chairperson-Forrest A. Plant: 1-2-3
Commissioner-Roger Ambergh: 1-2-3
Commissioner-Tim Paine: 1-2-3
Commissioner-Vaughan R. Walker: 1-2-3
Legislative Counsel-Bion M. Gregory: 1-2-9
Assembly Member-Elihu M. Harris: 1-2-9
Senate Member-Bill Lockyer: 1-2-9
Executive Secretary-John H. De Moully: 1-1-3
Asst. Ex. Sec.-Nathaniel Sterling: 1-1-3
Staff Counsel-Stan Ulrich: 1-1-3
Staff Counsel-Robert Murphy: 1-2-3
6. Four lawyers
7. One Admin. Asst., 2 Secretarial
8. $525,000 (£308,800 sterling)
9. No
10. No; State Legislature
11. Governor and Legislature
12. State Bar Association, State Agencies, Lawyers and Judges, Special Interest Groups, Law Professors
13. a. No
14. Almost never examine law of foreign countries
15. a. No; c. No
16. a. Yes; b. December 1987; c. 32; d. Yes
17. a. No [Background studies are prepared. Sometimes published in law reviews].
18. a. 212; b. Automatic Submission; c. All; d. + e. 92%
20. Enclosed statute, annual report
22. Please send us a copy of any report, list, etc., issued as a result of this survey.

[The Goranson Report places the California LRC in Group A, i.e. similar to New York LRC. However, Goranson notes that the California LRC must have its topics of study approved in advance by the legislature under §8293.]
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CONNECTICUT

Postmarked 5th January 1988. Earlier information received from David D. Bilken, Executive Director.


2. 5th May 1974


4. Statute provides for appointment of seventeen members.

5. Note: all members are uncompensated, part-time.

Chairman-Bourke G. Spellacy: 1-2-3

Vice Chairman-Martin B. Burke: 1-2-3


Secretary-Donald W. Downes: 1-2-3

6. One Executive Director, two Staff Attorneys

7. One

8. $148,904 (£87,600 sterling) allocated for staff salaries. Office and support services are provided by the Legislative Management Committee from a general fund.

9. No

10. Yes; Various (Commission considers changes recommended by American Law Institute, National Conference of Commissioners on Uniform State Laws, bar associations, lawyers, public officials, or other learned bodies or qualified individuals).


Annual Report: To General Assembly.

12. Professional associations, legal practitioners, state agencies, law professors, and interested parties

13. a. No

14. Comparison with other jurisdictions is one of the tools used in evaluating the need for revision. Comparison is generally restricted to other states within the United States. We also review proposals for uniform laws, some of which have been previously adopted by other states. Reviewing the laws of other jurisdictions helps to put proposals into perspective and may provide a model for revision. It is not a substitute for analysis, however, and the mere observation that a proposal has been adopted elsewhere seems to carry little weight with the legislature.

15. a. No; c. No; e. No

16. a. Yes; b. 1986 (March 1987); c. 12; d. Yes

17. a. No


b. Automatic Submission, when LRC considers it appropriate; c. Draft bills are routinely included; d. + e. Approximately half of the proposals are implemented. 36 out of 69 is a rough approximation.


22. The adage in our legislature, especially where there is no clear constituency for a proposal, is "if it ain't broke, don't fix it." Political realities often require that we reach out to interested parties and develop a consensus proposal to effect change. The mere presentation of an analysis that something is wrong -- references are obsolete, provisions are inconsistent -- is often insufficient, in itself, to provide momentum for passage of a proposal. We feel the legislature should be more responsive than it has been to addressing these somewhat academic problems before they create problems in the real world.
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[The Goranson Report was prepared in Connecticut. The Connecticut LRC is not grouped.]
Appendix 5:

GEORGIA

1. Legislative Services Committee, Office of Legislative Counsel, Room 316 State Capitol, Atlanta, Georgia 30334. Tel (404)656-5000.
2. 1960
3. Title 28, Chapter 4 of the Official Code of Georgia Annotated
4. Fourteen
5. Chairman (Speaker of House)-Thomas B. Murphy: 1-2-3
   Secretary (Sec. of Senate)-Hamilton McWhorter, Jr.: 1-1-3
   Member (Lt. Governor)-Zell Miller: 1-1-9 (Lt. Gov.)
   Member (Clerk of the House)-Glenn W. Ellard: 1-2-3
Ten other Members are listed. All are Male and Part-time. Their principal professions are: Four Attorneys, Two Real Estate and Insurance; One Accountant, One Business Management, One Jeweler, One Hardware Store Owner.
6. Office of Legislative Counsel: 9 Attorneys, 2 Legislative Assistants, 1 Research Director, 8 Secretaries, 2 Proofreaders, 2 Receptionists, 2 Porters.
7. Office of Legislative Counsel-see above.
   Legislative Fiscal Office-10 Administrative; 12 Others (Janitors).
   Legislative Budget Analyst-12.
8. Total General Assembly Budget for Fiscal Year 1988-$20,439,128
   Office of Legislative Counsel- $1,988,618
   Legislative Fiscal Office- $1,513,742
   Legislative Budget Analyst- $841,686
   The budget of the committee itself is not separated and is included in the overall budget of the General Assembly
9. No
10. Yes; Any member of the General Assembly
11. General Assembly
12. Government officials and employees; interest groups; citizens.
13. a. No
14. We have done no research on foreign law
15. a. Yes; b. Legislative service agencies of other states within the U.S.A.; c. Yes; d. National Conference of State Legislatures, Southern Legislative Conference
16. a. No; d. No
17. a. No
20. Enclosed statute

[The Goranson Report names the Georgia Code Revision Commission as the relevant agency. Hence, this questionnaire reply is of little assistance, since it refers to the Legislative Services Committee. However, the covering letter says of the Code Revision Commission: It was established in 1977 to examine the laws of the state and provide for a recodification and publication of the laws in the official Code. It is essentially a legislative agency. It is composed of 5 members of the House of Representatives, the Lieutenant Governor and 4 members of the Senate and five nonmembers appointed by the President of the State Bar of Georgia, one of whom is a superior court judge and one of whom is a district attorney. The Office of Legislative Counsel serves as staff of the Code Revision Commission. The CRC examines the laws enacted at each session of the General Assembly, sponsors revise's bills each year to correct errors in the laws, and publishes the Code. The statute governing the CRC (Georgia Code Ann. Section 28-9-1, 1986) is also supplied. Goranson places the CRC in Group B, i.e. similar to Vermont Statutory Revision Commission.]
Appendix 5

LOUISIANA


1. Louisiana State Law Institute, Paul M. Herbert Law Center, Room 382, University Station, Baton Rouge, LA 70803-1016. Tel. (504) 342-6360; (504) 342-6930

2. January 28, 1939

3. Acts 1938, No. 166 now R.S. 24:201 et seq. (Chapters 4 & 5 of Title 24, Revised Statutes of 1950)

4. Seventeen categories of ex officio members plus thirty-one elected members. (See R.S. 24:202)

5. See attachments (2).

   President-Jack C. Caldwell: 1-2-3

   Chairman-J.J. Davidson, Jr.: 1-2-3

   Director-William E. Crawford: 1-2-2

   Treasurer-J. Huntington Odom: 1-2-3

   Secretary-William D. Hawkland: 1-2-2

6. Other Council Members listed (All Part-Time):

   1. Other Officers, 18 Senior Officers, 19 Practicing Attorneys, 16 Law School Representatives, 6 Members of House of Delegates of American Bar Association, 6 Representatives of Louisiana State Bar Association, 8 from Legislature Committees, etc., 5 Representatives of Courts, 1 Rep. of Attorney General, 12 Others.

7. Coordinator of Research and five staff attorneys who are assigned to various committees or projects.

8. Four plus three part-time student workers.


10. No.

11. The Louisiana state legislature.

12. All meetings are open to the public and all documents are public documents and available upon requests. Representatives of special interest groups may participate in Institute meetings, but are not allowed to vote.

13. a. Yes; b. R.S. 24:204(3) & (7); c. Mandatory; d. Enclosed

   R.S. 24:204- "It shall be the duty of the Louisiana State Law Institute (3) To cooperate with the American Law Institute, the Commissioners for the Promotion of Uniformity of Legislation in the United States, bar associations and other learned societies and bodies by receiving, considering and making reports on proposed changes in the law recommended by any such body, (7) To make available translations of civil law materials and commentaries and to provide by studies and other doctrinal writings, materials for the better understanding of the civil law of Louisiana and the philosophy upon which it is based."

14. Statutory Revision usually includes a review of other civil law jurisdictions throughout the world. For example, a project currently under study contains provisions from the Civil Codes of France, Italy, Switzerland, Germany, Ethiopia, the Philippines, Greece and Argentina.

15. a. No; c. No; e. No

16. a. Yes (The report is biennial); b. April, 1986. In preparation for April, 1988; d. Yes

17. a. Yes; b. See attached

   18. a. See attached for major revisions; b. Discretion. The Council votes on whether or not a project is ready to be submitted; c. The Reports are currently submitted as a draft bill - see Joint Rule 10 - attached; d. += No statistics kept. The listing in the Biennial Reports is a representative sample (20th - 25th) [80-90% of Bills are passed]; f. 1985 & 1986 bill charts attached. Will be incorporated into 1987 Biennial Report.


20. First four categories enclosed.
[The Goranson Report places the Louisiana State Law Institute in Group D, i.e. similar to Alabama Law Institute.]

Reminder of Questions
MICHIGAN

From Jerold Israel, Executive Secretary. Postmarked 3rd March 1988.

1. Michigan Law Revision Commission, c/o Jerold Israel, Executive Secretary, University of Michigan Law School, Ann Arbor, Michigan 48109-1215, U.S.A. Tel. 313-764-9353

2. 1966


4. Nine including one ex-officio

   Vice Chairman (public appointee)-Anthony Derezinski: 1-2-3
   Public appointee-David Lebenbom: 1-2-3
   Public appointee-Richard van Dusen: 1-2-3
   Legislative member-Rudy Nichols: 1-2-Senator (minority party)
   Legislative member-John Kelly: 1-2-Senator (majority)
   Legislative member-Perry Bullard: 1-2-Representative (majority)
   Legislative member-David Honigman: 1-2-Representative (minority)
   Executive Secretary (Professor of Law, responsible for research) - part-time, one day a week.
   Legislative Service Bureau also lends some legal assistance. Also use consultants.

6. Part-time secretarial assistance furnished by University of Michigan; Part-time accounting assistance furnished by Legislative Service Bureau.

7. $60,000 to 70,000 [£35,000 to £41,000 sterling]

8. Yes; Only agency can initiate, but various persons recommend projects

9. The Legislative Council of the Michigan Legislature

10. Varies with subject matter, but we often use members of law faculties

11. §4.1403 (b) -- Consider reports of "other learned bodies"; §4.1403 (f) -- "Co-operate with law revision commissions of other states and Canadian provinces"; Discretionary;

12. Enclosed

13. a. Yes; b. §4.1403 (b) -- Consider reports of "other learned bodies"; §4.1403 (f) -- "Co-operate with law revision commissions of other states and Canadian provinces"; c. Discretionary;

14. Primarily Canadian, but the executive secretary annually reviews reports of other commissions (e.g. Australia, United Kingdom, Ireland)

15. a. Yes; b. Almost all reports on your listing except for Asia and Africa; c. No; e. Australian (federal) compilations

16. a. Yes; b. 1987 (1987 forthcoming); c. 21st; d. Yes

17. a. No

18. a. Roughly 100; b. Almost all; c. Almost all; d. Roughly 75; f. Report enclosed

19. Enclosed list of publications, statute, annual report.

[The Goranson Report places the Michigan LRC in Group C - Michigan only]
NEW JERSEY

From John M. Cannel, Executive Director. Dated 16th December 1987.
1. New Jersey Law Revision Commission, c/o Rutgers Law School, 15 Washington Street, Room 1302, Newark, New Jersey 07102. Tel. (201) 648-4575
2. 1987
3. N.J.S. 1:12a-1 et seq.
4. Nine
5. Chairman-Albert Burstein: 1-2-4
Commission member-Bernard Chazen: 1-2-4
Commission member-Elizabeth Defeis: 2-2-2
Commission member-Walter M.D. Kern: 1-2-4
Commission member-Edward T. O'Connor: 1-2-4
Commission member-Hugo M. Pfaltz: 1-2-4
Commission member-Howard T. Rosen: 1-2-4
Commission member-Peter Simmons: 1-2-2
Commission member-Richard Singer: 1-2-2
Executive Director-John M. Cannel: 1-1-4
Counsel-Maureen E. Garde: 2-1-2+4
6. Two
7. One
8. $400,000 (£235,000 sterling) (The agency is not yet fully staffed)
9. No
10. Yes; No one
11. New Jersey Legislature
12. Persons interested in the area of law affected, professional organizations, academic experts
13. a. No
14. It is too soon to answer this question
15. a. Not yet; c. No; e. No
16. a. Yes; b. Not published yet
17. a. No
18. a. One; b. Automatic Submission; c. One; d. This recommendation was just approved by the Commission.
20. Enclosed statute [Statute was not received]

[Covering letter - The New Jersey LRC is new; it was established in 1986 and not funded or staffed until this past summer. Its first report is due this February. The answers to the questionnaire should be considered in that light.]

[The Goranson Report places the New Jersey LRC in Group A, i.e. similar to New York LRC.]
NORTH CAROLINA

1. State of North Carolina General Statutes Commission, P.O. Box 629, Raleigh, North Carolina 27602. Tel. (919) 733-5960
2. 1945
3. North Carolina General Statutes, Section 164-12
4. Twelve
   Vice Chairman-Robert G. Byrd: 1-2-2
   Member-Doris R. Bray: 2-2-3
   Member-Don R. Castelman: 1-2-2
   Member-Thomas M. Ringer, Jr.: 1-2-2
   Member-James E. Ezzell, Jr.: 1-2-3+9 (Senator, state leg'ure)
   Member-Garry M. Frank: 1-2-3
   Member-Charles Lewis: 1-2-2
   Member-Emil F. Kratt: 1-2-3
   Member-Alexander M. Hall: 1-2-3+9 (Rep., state leg'ure)
   Member-Melvtn G. Shimm: 1-2-2
   Member-John L. Sarratt: 1-2-3
Ex Officio Secretary-Floyd M. Lewis: 1-1-3 (Employed in this position by the Attorney General's office).
6. 1/2 Attorneys
7. One
8. Our budget is included in the Attorney General's Budget. There is no separate amount.
9. No
10. Yes; Bar association members, private attorneys, government officials, private citizens
11. General Assembly
13. a. No
14. Surrounding states are most often reviewed
16. a. Yes; b. March 31, 1987 (Enclosed); c. 20; d. No
17. a. No
18. a. 315; b. Automatic Submission; c. All; d. approx. 127; e. approx. 127
19. None
20. Enclosed statute, biennial report.

[The Goranson Report places the North Carolina General Statutes Commission in Group D, i.e. similar to Alabama Law Institute]
SOUTH DAKOTA

1. South Dakota Code Commission, 500 East Capitol Avenue, Pierre, SD 57501-5059, U.S.A. Tel. 605-773-3251
2. July 1, 1966
3. See attached [South Dakota Codified Laws, 1985, Section 2-16-3 and Chapter 2-16 generally]
4. Five
   Vice Chairman-John F. Murphy: 1-2-3
   Member-Judge Ronald K. Miller: 1-2-1
   Member-Michael G. Diedrich (State Senator): 1-2-3
   Member-Jim Hood (State Repve): 1-2-3
6. The Chairman is also the legal staff
7. One part-time
8. $34,000 (£20,000 sterling]
9. No
10. Yes; The State Legislature
11. The State Legislature
12. The State Bar Association
13. Yes?; b.2-16-10.1(3); c. Discretionary; d. Please see attached
   [Section 2-16-10.1(3): "In addition to those set forth in this chapter, the code commission shall
   have the following powers and duties: (3) To make such recommendations to the Legislature as
   to the laws of this state as it shall determine to be necessary and desirable for the general
   improvement of this state's laws and to direct the code counsel to prepare such bills as are appro-
   priate to implement such recommendations."]
14. Other state statutes are used as the basis for new South Dakota law. There is no research of
   statutes out of the U.S.A.
15. a. No; c. No; e. No
16. a. No
17. a. No
18. a. None
20. Enclosed statute
22. The Code Commission's primary duty is to arrange for publication of the State's Code. Although it has the power to make recommendations for revisions of law, it does not have the staff or budget to do so.

[The Goranson Report places the South Dakota Code Commission in Group B, i.e. similar to Vermont Statute Revision Commission]
WASHINGTON


2. March 15, 1951

3. Chapter 1.08 RCW; 34.08.020; 43.01.050; 43.03.240; 44.04.120; 47.04.015; 47.60.015. Copies attached

4. Twelve

5. Chairman-Raymond W. Haman: 1-2-3
Vice Chairman-Dennis A. Dellwo: 1-2-3
Bar Governors' Appointee-Keith Campbell: 1-2-3
Bar Governors' Appointee-Anne M. Redman: 2-2-3
Bar Governors' Appointee-Richard Hemstad: 1-2-3
Chief Justice's Appointee-Justice Fred H. Dore: 1-2-1
Senate Member-Phil Talmadge (Democrat): 1-2-3
Senate Member-Irving Newhouse (Republican): 1-2-3
House Member-Seth Armstrong (Democrat): 1-2-3
House Member-Mike Padden (Republican): 1-2-3
Chief Executive Officer-Dennis W. Cooper: 1-1-3
(List of members of Law Revision Commission also attached)

6. Nine full time attorneys; Four temporary attorneys during legislative sessions.

7. Twenty-seven permanent staff; Five additional staff hired during legislative session.

8. Approximately $5,400,000 every biennium [$2.7m. p.a. = £1.6m. sterling p.a.]

9. No

10. Yes; The Law Revision Commission.

11. The Statute Law Committee and Washington State Legislature

12. The agency consults amongst its own legal staff and reports to the Statute Law Committee.

13. a. No

14. Never consulted

15. a. Yes; b. The library maintains all of the 50 states' statutes at large and the process of codifying each state's law are contained therein; c. Yes; d. National Conference of State Legislators and the National Conference of Commissioners on Uniform State Laws; e. Yes. 21st Annual Report Michigan Law Revision Commission.

Please contact the American Bar Association [address...]. The American Law Institute publishes Model Laws and Restatements of various areas of the law. [Address...] The National Conference of Commissioners on Uniform State Laws publishes the Uniform Commercial Code, and other areas of the law. [Address...] These associations are more likely to research foreign laws while working on law reform on a national scale.

16. a. Yes; b. Not published, but reported. June 11, 1987; d. No

17. a. No

18. a. At least 18 reports for the last 18 years have gone before the Statute Law Committee; b. After the Code Reviser submits report to Statute Law Committee, the Committee then makes its recommendations to the Legislature. This is not automatic, per se.; c. Bill drafts are written after the Statute Law Committee has reviewed and consulted with the Code Reviser on the staffs' recommendations; d. The majority of them; e. A few; f. The Annual Reports resemble the one enclosed. These reports are not published, however.


[Annual Report not received]

21. The Law Revision Commission is a more recent commission. It has powers to submit bills with substantive changes to the legislature. Its funding, however, has not been continued beyond an appropriation in 1982.

22. The Statute Law Committee is a nonpolitical committee. Its powers and duties are limited by statute. It submits technical changes only, and not substantive changes. Therefore, there is no conflict with the legislature. The legislature approves the majority of bills submitted because they are for clarification and uniformity in publication.

The Law Revision Commission's mandate is to provide facilities and procedures to undertake the scholarly investigation of the law and their recommendations are anticipated to be of a more substantive nature. However, there has been only one proposal submitted by the Law Revision Commission to the legislature since their creation in 1982. The commission recommended changes in the notary public statute, chapter 42.44 RCW in 1985.

[The Goranson Report names the Washington Law Revision Commission as the relevant agency. Goranson places the LRC in Group A, i.e. similar to New York LRC. Hence, this questionnaire reply is of assistance only to the extent that it contains information on the Law Revision Commission (Q.5 list attached, Q.10, Q.21, Q.22 2nd paragraph). The covering letter says of the LRC: The LRC is responsible for law reform and was created in 1982. Although there might be some areas where the Statute Law Committee and the LRC overlap, their main functions remain very different in nature. The legislature has not appropriated funding for the LRC. The LRC does not have a staff. Their duties are set forth in Chapter 1.30 RCW, a copy of which is enclosed. Their mandate is to provide facilities and procedures to undertake the scholarly investigation of the law and their recommendations are anticipated to be of a more substantive nature. The address of the LRC is: c/o Ms. Lynn B. Squires, Chair, Bogle & Gates, 2100 Bank of California Center, Seattle, WA 98164.]

Reminder of Questions
AFRICA:

GAMBIA

2. 1st September, 1983.
5. Chairman - The Hon. Mr. Justice Patrick Dankwa Anin: 1-1-1
Vice Chairman - Alhaji Abdouille M. Drameh: 1-2-3
Imam Ratib of Banjul - Alhaji Abdouille M. Jobe: 1-2-9
Member - Sourahata B. Semega-Janneh: 1-2-3
Member - Mrs. Safieyatou Singateh: 2-2-5
Secretary - Emmanuel C. Sewe (Jnr.): 1-1-9
6. Three - Research
7. Seven
8. D. 221,800 (12 Dalasis = £1 Sterling) (£18,483 sterling)
9. No
10. Yes (Section 5 of Act 3 of 1983); Nobody
11. The Attorney General and Minister of Justice -- ss.5(1)(b); 6; 15; 16 of Act 3 of 1983.
12. Interest and pressure groups e.g. Bench, Bar, Women's Association, Muslim Associates, Chiefs and Subordinate Tribunals, Ad Hoc sub-committees.
13. a. Yes; b. Section 4(b); c. Mandatory
[Section 4(b): "The functions of the Commission are to study and keep under constant review the statutes and other laws comprising the laws of The Gambia with a view to making recommendations for their improvement, modernisation, and reform including in particular--... (b) the reflection in the laws of customs and values of the Gambian society as well as concepts consistent with the United Nations Charter of Human Rights and the Charter of Human and People's Rights of the Organisation of African Unity".]
14. We are in receipt through the Commonwealth Secretariat (Legal Division) of current publications of most Commonwealth Law Reform Agencies; and we find them very useful and informative, especially where they have covered topics being researched by us. The following jurisdictions are consulted most often:-
Australian States, New Zealand, Canadian Provinces, Hong Kong, Zambia, Nigeria, Ghana, Jamaica, Barbados.
Furthermore, we find the quarterly Commonwealth Law Bulletins most useful topical guides to current developments.
15. a. Yes; b. Almost all of them; c. Yes; d. Ocho Rios Commonwealth Law Reform Agencies Meeting on "Codification as a Tool of Law Reform" held on 10/9/86 - Report by Commonwealth Secretariat has just been published.
17. a. Yes; b. Numerous
18. a. 24; b. Discretion; c. In all cases; d. + e. Check from Table in Third Annual Report.
19. Copies of three Annual Reports submitted to you herein. [First Annual Report not received.]
20. Enclosed Statute + Samples
22. Need for more finance to undertake Law Reform projects; engage Consultants and Experts; and build up a good modern library.
I hope you can assist us!
TANZANIA

Covering letter from Mr. N. Issa, Secretary. Dated 29th April 1988.
1. Law Reform Commission of Tanzania, P.O. Box 3580, Dar-es-Salaam, Tanzania. Phone 26934 or 32598.
2. 21st October 1983
3. The Law Reform Commission of Tanzania Act (No. 11) 1980
4. Five members
5. Chairman: Hon. Mr. Justice Hamisi Amiri Msumi, LL.B. (Hons.): 1-1-1
   Full-time Commissioner: Mr. George Bakari Liundi, LL.B.: 1-1-3
   Commissioner: Mr. Joseph Kanywanyi LLB, LLM, PhD: 1-2-2+3
   Commissioner: Mr. Pius Msekwa, BA, MA: 1-2-5
   Commissioner: Mr. Mohammed Ismail, LLB: 1-2-3
   Commissioner: Justice Eusabia Nicholas Munuo, LLB (Hons): 2-2-1
   Commissioner: Mr. Henry Mnyasi Limihagati, LLB: 1-2-3
6. Five members including one executive secretary to the Commission
7. Fifteen
8. T Sh. [Tanzanian Shilling] 5.2 million (£46,400 sterling) per 1987/88 financial year
9. No
10. Yes; The Attorney-General [See S. 8 and S. 9]
11. To the Minister for Justice
12. Members of the public, particularly those directly affected by the law in question; some legal experts including practitioners and academicians; and experts from other disciplines of learning.
13. a. Yes; b. Section 4(3)(a); c. Discretionary; d. Copy of statute enclosed.
   [Section 4(3)(a): "The Commission may, for the purposes of the more effective performance of its functions, establish and maintain a system of collaboration, consultation and cooperation with any person or body of persons within or outside the United Republic engaged in law reform and may, for that purpose (a) establish a system for obtaining any information relating to the legal systems of other countries which appears to the Commission likely to facilitate the performance of any of its functions."]
14. We have a programme of visiting a number of foreign law reform agencies particularly those within common law system. Similarly we are in the mailing lists of almost all law reform agencies in the world.
15. a. Yes; b. See pages 9 and 10 of our Third Annual Report, a copy of which is enclosed [31 bodies listed]; c. Yes; d. Commonwealth Law Reform Agencies Meeting in Ocho Rios, Jamaica in September 1986; e. Yes
16. a. Yes; b. 1985/86; c. Three; d. No
17. a. Yes; b. Three; c. None
18. a. Four; b. Discretion [Reports are automatically tabled in the National Assembly - s. 15]; c. None; d. None; e. Two; f. None
19. The Commission is currently working on the following projects:-
   (1) Company Law, (2) Law of Marriage Act, 1971, (3) Child Law, (4) Congestion in Prisons,
   (5) Labour Law, (6) Law of Succession
   We are also about to publish the first issue of "Law Reform Bulletin".
22. So far the legislature has been taking our reports seriously. However, there is a marked apathy among the members of the legal profession and the public in general on the activities of the Commission. There are also budgetary constraints and hence the Commission is not doing as much as expected.
OTHER JURISDICTIONS:

HONG KONG

1. Law Reform Commission of Hong Kong, 1st Floor, Queensway Government Offices (High Block), 66 Queensway, Hong Kong. Tel. 5-8622005
2. February 1980
4. Twelve
5. Commission Members Ex Officio:-
   Attorney General (Chairman) - The Hon. Michael Thomas, CMG, QC: 1-2-3
   Chief Justice - Sir Denys Roberts, KBE: 1-2-1
   Law Draftsman - Mr. James O'Grady, JP: 1-2-3
Commission Members appointed by the Governor:- Eleven Members listed -- 8 Male, 3 Female;
   all Part Time; 2 Law Teachers, 1 Judge, 1 Advocate, 1 Advocate and Law Teacher, 2 Solicitors, 1
   Sociologist, 1 Businessman, 1 Commodity Broker, 1 Paediatrician.
Secretary - Mr. B.E.D. de Speville: 1-1-3
Six Assistant Secretaries listed -- 4 Male, 2 Female; all Full Time; 3 Solicitors, 2 Advocates, 1
   Advocate and Solicitor.
6. None other than Secretariat staff listed at 5 above.
7. Five
8. No separate budget. Salaries, capital equipment, stationery and running expenses are included
   in overall budget of Attorney General's Chambers.
9. FAX no. 852-5-8652720; Telex 81710 HKAGC HX
10. No; Attorney General or Chief Justice
11. Attorney General and Chief Justice
12. Hong Kong Bar Association, Law Society of Hong Kong, Law Society of University of Hong
   Kong, Chambers of Commerce, Urban Council and District Boards, Particular interest groups,
   Public opinion surveys.
13. a. No
14. Given Hong Kong's position as a regional and international centre for finance and commerce,
   the Commission attaches importance to keeping Hong Kong's law abreast of and generally in line
   with developments in the laws of developed countries, particularly Common Law jurisdictions.
   The comparative law part of most projects is therefore given some prominence. Jurisdictions most
   often consulted are the United Kingdom, other Commonwealth countries and countries of the
   region.
15. a. Yes; b. All Common Law jurisdictions; c. Yes; d. Commonwealth Law Conference - Hong
16. a. No, but the Commission publishes periodically a short leaflet "Introduction to the Law
   Reform Commission of Hong Kong" which includes a list of references and a summary of the
   progress of work.
17. a. Usually working papers or interim reports are published and sent only to interest groups for
   comment. They are not made generally available; b. 23 background papers, 12 Working Papers/
   Interim Reports; c. See attached sheet
18. a. Thirteen; b. Automatic submission for information; c. Four; d. Five; f. Report on the Adoption
   of the UNCITRAL Model Law of Arbitration
19. "Introduction to the Law Reform Commission of Hong Kong" -- August 1987 in English and
   Chinese.
20. Enclosed list of publications, statute, introduction leaflet.
22. The capacity of the Commission is limited by the fact that its Commissioners are all part time and meet only once a month for about 1 1/2 hours. The system of part time subcommittees, normally chaired by a Commissioner, works reasonably well and enables the Commission to make good use of experts on any given reference. The inclusion of non-lawyers in the Commission and its subcommittees is a valuable feature. Implementation is greatly assisted by the inclusion of the Attorney General and certain members of the Executive and Legislative Councils on the Commission.

We wish you every success with your survey and hope that in due course it will be published and made available to us.
SRI LANKA

Envelope marked "From Mrs. P. Wijesekera, Secretary,..." Postmarked 21st April 1988.
1. The Law Commission, C 56, Keppetipola Mawatha, Colombo 5, Sri Lanka. Tel. 586723/581703
2. 20th November, 1969
4. Chairman and ten Commissioners
5. Chairman-Mr. C.L.T.Moonemalle: 1-1-1+3
Commissioner-Mr. Eric Amerasinghe, P.C.: 1-2-3
Commissioner-Mr. John Wilson: 1-2-3
Commissioner-Mr. M.M. Hussein: 1-2-3
Commissioner-Mr. G.F. Sethukavalar, P.C.: 1-2-3
Commissioner-Dr. H.W. Jayawardene, Q.C.: 1-2-3
Commissioner-Mr. Eardley Perera, P.C.: 1-2-3
Commissioner-Mr. I.O.N.de Jacoby Seneviratne: 1-2-3
Commissioner-Mr. R.K.W. Goonesekara: 1-2-3
Commissioner-Professor G.L. Peiris: 1-2-2
Commissioner-Mr. H.L. de Silva: 1-2-3
Commissioner-Mr. Mahesh Kanagasundaram: 1-2-3
Commissioner-Mr. Elmo Perera: 1-2-3
6. One Secretary (Head of Administrative Staff and Director of Research); Two Assistant Secretaries-Administrative and Research Officers.
7. Fifteen
8. Approx. Rs. 1.6 million [Sri Lankan Rupees. £36,300 sterling]
9. No
10. Yes (but Cabinet approval has to be obtained beforehand); Minister of Justice and other Ministries through the Ministry of Justice
11. To the Minister of Justice
13. b. Section 4(e); c. Mandatory; d. See Section 4(e).
14. It is important indeed for us to make comparative study of all the available laws of any jurisdiction to get a proper understanding of whatever the topic of law we are dealing with. However, we consult laws of England, America, India, Australia and most of the developing countries and some states in Africa where the Roman-Dutch law is still in existence.
15. a. Yes; b. Almost all the Law Reform Agencies of the Commonwealth; c. Yes; d. Jamaica-Sept. 1986; e. Yes. The proceedings of the Conference were published by the Legal Division of the Commonwealth Secretariat.
16. a. Yes; b. 1986-87; c. Five; d. No
17. a. Yes; b. Fifteen
18. a. Twenty; b. Discretion; c. Five; d. Two; e. Three
22. (1) Shortage of Funds, (2) Shortage of Staff, (3) Lack of professional training for research.
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