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# LAW REFORM

## INTRODUCTION

"Heart-breaking delays and ruinous costs were the lot of suitors. Justice was dilatory, expensive, uncertain, and remote. To the rich it was a costly lottery: to the poor a denial of right or certain ruin. The class who profited most by its dark mysteries were the lawyers themselves."

Although this could be a fair comment on the legal system in the 1990s, these words were written by Sir Thomas Erskine May in 1861 (*Constitutional History of England*).

The social reformer Jeremy Bentham (1748-1832), argued for constant radical legislation to achieve the greatest happiness of the greatest number. From this time efforts were made to demystify law and to see it as a set of practical rules. From the Reform Act 1832 onwards, a series of reform measures were passed. The Judicature Acts 1873-75 were followed by a series of Acts codifying substantive branches of law, like the Sale of Goods Act 1839 and the Partnership act 1890. This continued with a series of reform Acts on land, eg, the law of property legislation of 1925. These various measures, however, were ad hoc responses to particular problems. There was no overall plan or consistency of effort and this was to remain the situation until the 1960s.

The need for continual reform arises for a number of reasons. Statutes remain in force until repealed and some statutes get overlooked, like the Innkeepers Act 1424. The vast amount of law and the increasing rate at which it is being made has become overwhelming; an example of this is that, according to the Home Office, the number of criminal offences is over 70,000. In a rapidly changing society new laws have to be made to meet new needs, eg, the Criminal Justice and Public Order Act 1994 makes it an offence to make, distribute, advertise or possess child pronography which is simulated by computer graphics. Responsibility for the law is somewhat diverse as the Home Secretary is responsible for the criminal law, while the Lord Chancellor is responsible for the courts and both civil and criminal procedure. There is no single body or person who can accept responsibility for reform.

## WHY NOT LEAVE LAW REFORM TO THE COURTS?

The courts, through their use of the doctrine of precedent, could bring about changes in the law. Some academics favour judge-made law, because it is based on real cases rather than legislation which is made in an artificial way. However, judges changing the law conflicts with their constitutional position, as it is up to Parliament to do this. Other arguments against judges reforming the law have been put forward by Norman Marsh, a former Law Commissioner:

(a) A judge cannot make assumptions about people's values, this is better left to Parliament;
(b) reform depends on a case coming before the courts;
(c) a reforming decision may be hard on the losing party;
(d) the system of precedent is slower than legislation;
(e) the courts are not well informed on the background to problems as they cannot consult experts or interested bodies.

## ESTABLISHMENT OF THE LAW REFORM AGENCIES

In 1921 an American lawyer, Benjamin Cardozo, in "A Ministry of Justice" Harvard Law Review, 1921, suggested a permanent body:

"The courts are not helped as they could and ought to be in the adaptation of law to justice. The main reason they are not helped is because there is no one whose business it is to give warning that help is needed…"

In 1934 the Lord Chancellor set up the Law Revision Committee which became the **Law Reform Committee** in 1952. It is a part time body of practitioners and academics whose task is to examine and report on any matters of civil law referred to it by the Lord Chancellor.

In 1959 the Home secretary set up the **Criminal Law Revision Committee**, a part time body, to carry out a similar role as regards criminal law, and it examines matters referred to it by the Home Secretary.

In 1965 a White Paper proposed setting up a full time body:

"One of the hallmarks of an advanced society is that its laws should not only be just but also that they be kept up to date and be readily accessible to all who are affected by them."
(Proposals for English and Scottish Law Commissions 1965 (Cmnd 2573.)

This was quickly followed by the **Law Commissions Act 1965**, which set up two Commissions, one for England and Wales (jointly) and one for Scotland. Section 3 of the Act provides:

"It shall be the duty of … the Commissions … to keep under review all the law … 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, the reduction of the number of separate enactments and generally the simplification and modernisation of the law …"

The section went on to provide that the Commissions should:

(a) consider proposals for reform made to them;
(b) prepare and give to the Minister programmes for the reform of different branches of the law;
(c) prepare draft bills for matters approved;
(d) prepare the consolidation of statutes on request by the Minister;
(e) give advice on reform to Government departments and others;
(f) obtain information about other legal systems which might help in the task of reform.

## WHO CONTRIBUTES TO REFORM OF THE LAW?

### THE JUDGES

As we have seen above the judges play a part in reform of the law by adapting old decisions to new situations. The example is often given from the law of tort how the principle *in Donoghue v Stevenson*, ie, that you must not injure your neighbour, has been used to impose liability in a wide range of situations.

### THE LAW REFORM COMMITTEE

This committee has produced a range of reports which have been followed by legislation. The Occupiers' Liability Act 1957 and the Latent Damage Act 1986 are examples of this.

### THE CRIMINAL LAW REVISION COMMITTEE

This committee also produces reports from time to time, and the Theft Act 1968 was the product of one report. However, its report on criminal procedure entitled "Evidence General" which was made in 1972 after eight years of investigation, was never implemented. This was partly because of the

recommendations which it made, which included the abolition of the right of silence when a suspect is arrested.

*Note*: The problems faced by the above two committees are that they are part time, have limited resources, cannot initiate reports but have to wait for the Minister to tell them what to examine, and often take a long time to produce a report. The consequence is that their reforms have been piecemeal.

The Law Commissions are dealt with separately below.

PARLIAMENT

Parliament has numerous committees which investigate various aspects of law reform from time to time. In July 1988, eg, a Select Committee of the House of Lords was appointed to review the law and procedure relating to murder and life imprisonment. It recommended that the sentence for murder be changed from a fixed sentence of life imprisonment to a maximum of life imprisonment, ie the court would have power to give a lesser term. In December 1995, the House of Commons Home Affairs Committee produced a report on the mandatory life sentence and recommended that the sentence should stay.

GOVERNMENT DEPARTMENTS

These constantly keep under review the law within their particular ambit. They may appoint a committee from within the department to review a topic or may help in directing the work of an independent advisory committee.

One example of a committee within a Government department comes from the Office of Fair Trading. Following numerous complaints about timeshare selling, a departmental report was made calling for legislation. The Timeshare Act 1992 now gives a consumer a right to cancel within 14 days, if a timeshare agreement is made with a business.

Government ministers may also refer matters to the Law Commission. In 1994, the Home Secretary referred the hearsay evidence rule to the Commission. This rule prevented a witness in court giving evidence about something which someone else had told him or her, and it was widely believed that this operated to exclude important evidence. The Law Commission recommendations were implemented by the Civil Evidence Act 1995, which abolishes the hearsay rule in civil proceedings.

ROYAL COMMISSIONS

These bodies also produce ideas for reform, eg, the Royal Commission on Civil Liability and Compensation for Personal Injury reported in 1978 (Pearson Report). One of its recommendations was a "no fault" compensation scheme for the victims of road accidents, funded by a tax on petrol, but this was not implemented. It has been said that such commissions are merely a way of postponing dealing with a problem for at least two years. This criticism cannot be made about the report of the Royal Commission on Criminal Justice in July 1993, swiftly followed by the Criminal Justice and Public Order Act 1994, which implemented many of its recommendations.

UNIVERSITIES AND COLLEGES

Some academics in certain universities and colleges are constantly carrying out research in various areas of law. One example of such an institution is the Centre for Socio-Legal Studies at Oxford University.

PRESSURE GROUPS

Pressure groups with widely differing aims also contribute to law reform; eg, the National Consumer Council which promotes consumers' interests; the Howard League for Penal Reform which campaigns for prisoners; the Justice organisation which upholds the principles of justice and the right to a fair trial and the Legal Action Group which campaigns to improve legal services for disadvantaged members of society.

MEDIA PRESSURE

The influence of the media must not be forgotten, especially with such pioneering programmes as "Rough Justice".

## THE LAW COMMISSION

Although reference will be made to the Law Commission, it must be remembered that there is also a Commission for Scotland. The two Commissions co-operate on matters which affect both Scotland and also England and Wales.

There are five members, namely the chairman and four others who must be barristers, solicitors or university teachers. They are appointed initially for five years but may be asked to stay for longer. They work part time for the Commission. There is currently a staff of 20 lawyers including four draftsmen from the Office of Parliamentary Counsel. There are also 15 research assistants, normally appointed for one year, an administrative staff and consultants who are used on an ad hoc basis. The Commission is financed by the Lord Chancellor's Department and in 1997 the cost was £4 million. There is a separate "Conveyancing Standing Committee" which deals with matters concerning land.

The purpose of the Commission is to keep the whole of the law of England and Wales under review and promote the reform of the law. Its aims include the following:

(a) to simplify the law;
(b) to codify the law;
(c) to eliminate anomalies;
(d) to reduce the number of separate Acts on a particular matter;
(e) to repeal obsolete Acts.

HOW DOES THE LAW COMMISSION CARRY OUT ITS WORK?

The Commission publishes a *consultation paper* (formerly called a working paper) on a particular matter, explaining the problems and making provisional recommendations. These are circulated to lawyers, academics, Government departments and other interested bodies, asking for comments. After a suitable period to allow for comments to be collated and discussed, a draft report is prepared, usually with a draft bill attached and this report is presented to the Lord Chancellor. The Commission has so far produced approximately 150 consultation papers and 250 reports and publishes an annual report. The main interests of the Commission are family law, criminal law, the law of property, common law and statute law revision.

EXAMPLES OF THE COMMISSION'S WORK

***Programmes for reform***

One of the tasks of the Commission under the Law Commissions Act 1965 was to prepare programmes for reform and to submit these to the Minister. The following programmes have been produced:

(a) the first programme (1965) contained 17 items, including the codification of the entire law of contract;
(b) the second programme (1968) included the codification of criminal and family law;
(c) the third programme (1973) dealt with private international law;
(d) the fourth programme (1989) covered nine items on such diverse matters as the modernisation of conveyancing, and the law relating to mentally incapacitated adults;
(e) the fifth programme (1991) dealt with two items, ie, judicial review and the use of damages in personal injury litigation.
(f) the sixth programme (1995) covered 11 items, ie the law of contract, damages, limitation periods, illegal transactions, landlord and tenant, transfer of land, trusts, family law, company law, third party rights against insurers, and criminal law (including involuntary manslaughter and offences against the person).

***Reports***

Listed below is a very small selection from the reports.

(a) Family Law: Review of Child Law Guardianship and Custody (Law Commission No. 172): the Children Act 1989 was partly based on this.

(b) Statute Law Revision: 13th Report (Law Commission No. 179). This included a draft bill which was presented to Parliament in May 1989 and passed as the Statute Law (Repeals) Act 1989 in November 1989. It repealed a number of disused statutes, including the Innkeepers Act 1424. More recently, the Statute Law Repeals Act 1993 contains 64 pages of statutes and parts of statutes which have been repealed, from the Ordinances of Corporations Act 1503 to the present time.

(c) Criminal Law: Computer Misuse (Law Commission No. 186) was presented to Parliament in October 1989 and became the Computer Misuse Act 1990 in June 1990.

(d) Family Law: The Ground for Divorce (Law Commission No. 192). This was produced in October 1990 and included a draft bill. It suggests that the aim of divorce laws should be to dissolve the marriage with the minimum of distress, to encourage the amicable resolution of practical issues about the home, money and children, and to minimise the harm to children.

(e) Distress for Rent (Law Commission No. 194) was issued in April 1991. It examines the existing system, under which a landlord who is owed rent can enter the property and take the tenant's goods, to sell them in order to pay the rent owed. It describes the right as being wrong in principle.

***Consultation Papers***

Approximately 150 consultation papers have been issued. For example, in 1995, the Commission published 'Liability for Psychiatric Illness' (Paper No 137). This paper examined, in particular, the situation where someone suffers psychiatric illness following the death or injury of a third party caused by the defendant's negligence. The Commission believes that the requirements for liability laid down in *Alcock v CC of South Yorkshire Police* (1991) are too strict and that it is sufficient if the plaintiff can establish a close tie of love and affection with the victim.

***Codification***

The Commission's work on the codification of contract law was eventually abandoned, one reason being the difficulty of what to do when faced with conflicting case law. The Commission currently hopes to codify the criminal law. Report No 218 Criminal Law: Legislating the Criminal Code: Offences Against the Person and General Principles (November 1993). The

Commission points out that this area of non-fatal offences against the person is in urgent need of reform and cites the archaic language of the Offences Against the Person Act 1861.

***Consolidation***

The Commission is constantly looking at areas which would benefit from consolidation measures. Examples resulting from the work of the Commission include the Merchant Shipping Act 1995, the Employment Rights Act 1996, the Industrial Tribunals Act 1996 and the Justices of the Peace Act 1997.

***Local legislation***

The Commission has been working for some time on a programme of rationalisation of local legislation. The Statute Law (Reform) Act 1989, for example, included the rationalisation of approximately 2,900 local and private acts for South Yorkshire which had been passed between 1850 and 1864. The Law Commission published a chronological table of local legislation in 1996 covering over 37,000 Acts of Parliament. This table covers both public local Acts and private local Acts and gives details of those still in force.

CODIFICATION

The Law Commissions Act 1965 sets out codification as one of the duties of the Commission. The idea of a code is quite simple as the rules from one branch of law would be put together in to one book or "code". This has its attractions, eg, the opportunity could be taken to simplify the law, to use clearer language and all the law on a particular matter could be found in one place. The Commission is continuing its work on codifying the criminal law by degrees. It has emphasised the need for the criminal law to be 'more accessible and comprehensible to ordinary people'. The Commission is currently working on the sentencing powers of courts. However, there are difficulties associated with codification apart from the practical implications of codifying vast areas of the common law. For example: all earlier cases would not be good law; the code itself would need to be interpreted and until this was done, the law would be uncertain; if the code did not cover a particular matter, the courts would have to create a precedent; the code would eventually become outdated and have to be replaced.

There are also problems concerned with the type of code to be chosen. Would it, eg, be a very detailed one like the German Civil Code with 2,385 sections, or like the French "Code Civil" which sets out basic principles, leaving the courts to fill in the details? A detailed code is more certain but less flexible. The idea of a code is alien to the common law system, although in parts it has been codified, eg, the Sale of Goods Act.

## A MINISTER OF JUSTICE

The Haldane Committee in 1918 suggested a Minister of Justice in charge of the legal system. The present system divides responsibility between the Home Secretary and the Lord Chancellor and other Government departments, eg, the Department of Trade is in control of consumer protection. It is said that such a Ministry would have better control over law reform.

## EVALUATION OF PRESENT POSITION ON LAW REFORM

The Law Commission has made progress in some areas, eg, it has achieved the repeal of outdated laws and it has made innovations like the preparation of draft bills containing reform measures, to save Parliament time. The success of Law Commission recommendations for reform has varied over the years of

its existence, but the overall success rate for implementation of the Commission's reports is 70 per cent. Since 1984, 45 reports have been implemented, and at the end of 1997 22 reports were outstanding. Recent successes have included the Family Law Act 1996, the Trusts of Land and Appointment of Trustees Act 1996 and the Land Registration Act 1997. A recent report published in 1978, Report on Interest, recommended that a creditor should have an automatic right to interest on unpaid debts, and the Late Payment of Commercial Debts (Interests) Bill is before Parliament.

This success rate may in part be due to gaining support for law reform measures from all political parties. New parliamentary procedures have also helped. Under one procedure, after the second reading in the House of Lords a Bill can go to a Special Public Bill Committee, which can hear written and oral evidence. This allows technical Bills, such as those produced by the Commission, to be given expert scrutiny without taking up time on the floor. These committees are known as 'Jellicoe Committees'. A second change in procedure allows a public Bill to be automatically referred to a Second Reading Committee if the Bill is to give effect to a Law Commission report.

The system of programmes for reform has not been consistent, with a 16-year gap between the third and fourth programmes. Problems have arisen with the schemes for the codification of certain areas of law.

In spite of the difficulties the Commission has faced, in its Sixth Programme of Law Reform (No 234), published in June 1995, it set out the advantages of having a Commission as having independence of the Government, a single purpose of law reform and expertise developed over 30 years.

The general public now demand that the law should be clear, accessible to all and cheap to use. In the face of these demands the work of the Commission should be given a higher priority and more resources should be allocated to it. In spite of recent successes, it must be remembered that implementation of its reforms is still very much in the hands of the Government. Although the Law Commission is developing initiatives for working closer with the Government and has set targets for achieving quicker responses from the Government to its reports, this is at a time when funding has been cut and the Commission has had to reduce the number of free consultation papers it distributes.

Notes adapted from: T. Blakemore & B. Greene, *Law for Legal Executives*, Second Edition, 1998.