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 formidability 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 occuring either *imperio rationis* or *ratione imperii*.[4] More recently, there has been

---

1 Ernst J. Cohn, *Comparative Jurisprudence and Legal Reform* (Unpublished Ph.D. thesis, Univ.Coll. London, 1946), p.125.

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.

4 Arminjon, Nolde, Wolff, *Traité de Droit Comparé* (Libraire Générale de Droit et de Jurisprudence, Paris, 1950), t.I, p.136.

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.... [T]hey 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 sufficent 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.

---

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 acquiesence to the external model, there can be no reception, only ongoing struggle -- 'Persuasive Authority' (1987) 32 McGill LJ 261 at 265.

6 Norman S. Marsh, 'Comparative Law and Law Reform', *Proceedings of the Fourth European Conference of Law Faculties* (Council of Europe, Strasbourg, 1977), 71 at 76; reprinted in (1977) 41 RabelsZ. 649 at 654. See generally Max Rheinstein, 'Types of Reception' (1956) 6 Annales de la Faculté de Droit d'Istanbul 31; Albert Kocourek, 'Factors in the Reception of Law' in *Studi in Memoria di Aldo Albertini* (Cedam, Padua, 1938), 233.

7 See Konrad Zweigert and Hein Kotz, *An Introduction to Comparative Law* (trans. Tony Weir, 2nd ed., Oxf.U.P., 1987), pp.226-245 (The Spread of the Common Law Throughout the World), pp.246-263 (The Law of the U.S.A.). Also a series of BBC talks an 'The Migration of the Common Law' (1960) 76 LQR 39-77.

8 Zweigert and Kotz, ibid., p.228.

The French Civil Code of 1804 has been the inspiration of numerous foreign codes.[9] 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.

---

9 See Jean Limpens, 'Territorial Expansion of the Code' in Bernard Schwarz (ed.), *The Code Napoleon and the Common-Law World* (N.Y. Univ. Press, N.Y., 1956), 92 and Zweigert and Kotz, supra n.7, pp.100-122 (The Reception of the Code Civil).

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 commisson 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]

---

[10] *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury*, 1978, Cmnd. 7054.

[11] E.H. Hondius, 'The Contribution of Comparative Law to Teaching, Research and Law Reform in the Netherlands', National Report to the Fourth European Conference of Law Faculties (unpublished, 1976), p.14.

[12] Report of Advisory Committee on Law Reform -- Reform of Law on Occupiers' Liability in Ireland, incorporating a Study entitled 'Occupiers' Liability in Ireland -- Survey and Proposals for Reform' by Dr. Bryan McMahon (Prl.4403, 1974), pp.75-82.

[13] Report of the Company Law Reform Committee (Chairman: Arthur Cox)(Prl. 4523, 1958), para. 39.

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[14] 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.[15]

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"[16] 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.[17]

---

[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.

[15] See A. Ponsard, 'Commentaire de la loi du 13 Juillet 1965' [Law on Matrimonial Property] Dalloz 1966.Leg.117; B. Audit, 'Recent Revisions of the French Civil Code' (1978) 38 Louisiana LR 747; Tallon, 'Reforming the Codes in a Civil Law Country' (1980) 15 JSPTL (ns) 33.

[16] Jan M. van Dunné, 'The Use of Comparative Law by the Legislator in the Netherlands' in Hans Jessurun d'Oliveira (ed.), *Netherlands Reports to the Eleventh International Congress of Comparative Law/ Caracas 1982* (Kluwer, Netherlands, 1982), p.43 and p.49.

[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 Dunné'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?[18] 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.[19] 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[20] 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.[21]

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.[22] German government departments often commission research from the famous Max

---

[18] Van Dunné, 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,[23] a system which is envied by many non-Germans. In fact, many professors of law faculties figure amongst the highest functionnaries in the German Ministry of Justice.[24]

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.[25] 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.[26]

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,[27] the intial drafting is done in the ministry originating the law, by an officer in the section responsible for the topic.[28] That offi-

---

[23] Ulrich Drobnig and Peter Dopffel, 'The Use of Comparative Law by the German Legislator' (English summary) (1982) 46 RabelsZ. 299 at p.300, point 5; Wolfram Hahn, 'Rapport sur l'Apport du Droit Comparé à l'Enseignement, à la Recherche et à la Réforme du Droit en République Fédérale d'Allemagne', National Report to the Fourth European Conference of Law Faculties (unpublished, 1976), p.33.

[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, laïque, 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.

[31] See Bernard Ducamin, 'The Role of the Conseil d'État in Drafting Legislation' (1981) 30 ICLQ 882.

[32] As regards Belgium, see G. Horsmans, 'L'Utilisation de Droit Comparé par le Législateur' in *Rapports Belges au XIe Congrès de l'Académie de Droit Comparé, Vol.2* (Kluwer, Anvers, 1985), pp.1-19. Note that the Roumanian Conseil d'État, in Article 44 of a Decree on *Méthodologie générale de technique législative* officially recognises the usefulness of comparative law by ordering research into law of Roumania, law of other Socialist states and law of other countries -- Victor Dan Zlătescu, 'L'Utilisation du Droit Comparé par le Législateur' (1982) 26 Rev. Roum. Sc. Sociales -- Sciences Juridiques 31 at 33.

[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 tend[37] 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

---

[35] Ibid., p.334.

[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 Frankin, Dean Swift and Ben Donne. See

world[38] and by civil lawyers.[39] 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.[40]

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.[41]

---

also Chapter 6 of the Renton Report, *The Preparation of Legislation* (Cmnd. 6053, 1975).

[39] Zweigert and Kotz, supra n.7, pp.270-272 (CHECK).

[40] Poem by A.P. Herbert quoted in Book Review by D.C. Pearce, (1978) 9 Federal Law Review 132; cited in Stan Ross, *Politics of Law Reform* (Penguin, Australia, 1982), chap.6.

[41] J.A. Clarence-Smith, '[Legislative Drafting:] Comparative Summing-Up' in J.A. Clarence-Smith (ed.), supra n.37, 155 at 159.

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 Committee[46] and the Law Commissions[47] 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.

[44] See note (1974) 48 Austl. LJ 3-4.

[45] Elmer Dreidger, *The Composition of Legislation* (Ottawa, 1957).

[46] Renton Report, supra n.38.

[47] *The Interpretation of Statutes* (Law Com. No.21; Scot. Law Com. No.11; H.C. 256, 1969). See Norman S. Marsh, *Interpretation in a National and International Context* (U.G.A., Belgium, 1974), Appendix, pp.91-98. The Report was rejected by the House of Lords -- see *Hansard*, House of Lords, vol.405, Feb. 13 1980, col.276.

[48] Francis Bennion, *Statute Law* (Oyez, London, 2nd ed., 1983) and Bennion, 'England' in Clarence-Smith (ed.), supra n.37, 115.

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'État, 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

---

[49] Dale, supra n.20, chap.14 (Conclusions - The Mischief and the Remedies). See also Dale, 'Statutory Reform: The Draftsman and the Judge' (1981) 30 ICLQ 141.

[50] See John D. Lees and Malcolm Shaw (eds.), *Committees in Legislatures: A Comparative Analysis* (Duke U.Press, USA, 1979) and Inter-parliamentary Union, *Parliaments of the World: A Reference Compendium* (Macmillan, London, 1976), Tables 37-40 and 51.

[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.[55] The French committee system was formerly (during the Fourth Republic) so strong that it may have been even stronger than the American system.[56] 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*.[57] In Sweden, the Riksdag has 16 permanent committees whose reports are published and considered by the House on the Bill's second tabling.[58] 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.[59]

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.[60] 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.[61] 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.[62]

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.[63] 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.[64] Organised interests are therefore not heard as often by these committees as by the continental and U.S. committees.[65] 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

---

[61] Ibid., p.56.

[62] U. Yadin, 'Use of Comparative Law by the Legislator' in Stephen Goldstein (ed.), *Israeli Reports to the XI International Congress of Comparative Law* (Harry Sacher Institute, Jerusalem, 1982), 10 at 14.

[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.

and U.S. system provides.[66] It is true that the British-style parliaments spend more time in plenary session than the U.S. and continental parliaments.[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.[68]

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:

> 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.[69]

Codification is not merely a civil-law concept, since Codes have been adopted in common-law countries.[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.

---

[66] Dale, supra n.20, p.340.

[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).

[68] Steffani, *Parliamentarismus Ohne Transparenz* (2nd ed., 1973), pp.81-83; cited in Arnold J. Heidenheimer and Donald P. Kommers, *The Governments of Germany* (4th ed., 1975), p.175.

[69] Roscoe Pound, 'Codification', chap.19 of his *Jurisprudence*, vol.III (West Publishing Co., St. Paul, U.S.A., 1959), 673 at 677-8. [Much of this chapter was originally published as 'Codification in Anglo-American Law' in Schwartz (ed.), supra n.9, p.267.]

[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.[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.[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.[73] Only two seem to have any chance of success.[74] Professor Hein Kotz has concluded that it was counterproductive to have put codification on the agenda of the Law Commissions.[75] There has also been a debate as to whether codification is an outmoded form of legislation.[76]

---

[71] Law Commissions Act 1965, s.3(1).

[72] See, for example, Leslie Scarman, *A Code of English Law?* (U. of Hull Lecture, 25 Feb. 1966) and John O'Connor, 'The Law Reform Commisson and the Codification of Irish Law' (1974) 9 Ir.Jur. (n.s.) 14.

[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, 'Law Reform in Changing Times' (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, 'Codification of Scots Law: A Way Ahead or a Blind Alley' (1987) Stat.LR 173].

[74] (1) The project for codification of the criminal law has finally resulted in a draft Criminal Code being prepared by four law teachers. [*Codification of the Criminal Law: A Report to the Law Commission* (Law Com. No.143, 1985)] See 2 articles by J.C. Smith: 'Codifying the Criminal Law' (1984) Stat.LR 17 and 'Codification of the Criminal Law' (1987) Denning LJ 137. The present aim is to complete a report and draft Code Bill by about the end of 1988 -- Law Com. 22nd Annual Report 1986/87 (H.C. 319), para. 2.13. (2) The Law Commission's work on family law has produced what might be described as an embryonic code -- William H. Hurlburt, *Law Reform Commissions in the United Kingdom, Australia and Canada* (Juriliber, Edmonton, Canada, 1986), pp.71-72.

[75] Hein Kotz, 'Taking Civil Codes Less Seriously' (1987) 50 MLR 1 at 14. Note, however, that the Canadian Law Reform Commission has produced volume 1 of a draft Criminal Code (Report 30, 1986) and is working on a Code of Criminal Procedure. See also *Codification as a Tool of Law Reform: Report of a Meeting of Commonwealth Law Reform Agencies/ Jamaica 1986* (Commonwealth Secretariat, London, 1987).

[76] This topic was item I.B.1 at the Eleventh International Congress of Comparative Law. See Edgar Bodenheimer, 'Is Codification an Outmoded Form of Legislation?' (1982) 30 AJCL (Supp.) 15; U. Yadin, 'Is Codification an Outmoded Form of Legislation' in Goldstein (ed.), supra n.62, p.1; P.Delnoy, 'La Codification, Forme Dépassée de Législation?' in Centre Interuniversitaire de Droit Comparé, *Rapports Belges au XIe 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] Kotz[81] 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

---

Anvers; Bruylant, Brussels: 1982), p.119.

[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."

[78] Pound, supra n.69, pp.724-5 (Jurisprudence), p.282 (Code Nap. and C.L.World).

[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 -- Pound, supra n.69, pp.704-5 (Jurisprudence), p.278 (Code Nap. and C.L.World).

[84] *Max Weber on Law in Economy and Society*, the 20th Century Legal Philosophy Series, vol.VI (editor: Max Rheinstein), (Harvard U.P., Mass., 1954), pp.256ff.

[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.

[86] See T.W. Bennett and T. Vermeulen, 'Codification of Customary Law' (1980) 24 J.Afr.L. 206; Commonwealth Secretariat, supra n.75.

> 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

---

[87] Karl Llewellyn, 'The Bar's Troubles, and Poultices -- 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.[93] If they wish, they can in their writings openly campaign for law reform.[94] Their writings can be a source of the international unification of law.[95] 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.[96] 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

---

[93] Hence, van Dunné's interviews at the Dutch Ministry of Justice revealed that the drafters relied on the lack of comparative study in local literature as a detterent to comparative study in the Ministry -- Supra n.16, p.60.

[94] See for example the English trilogy of books which consists of Glanville Williams (ed.), *The Reform of the Law* (Gollancz, London, 1951), Gerald Gardiner and Andrew Martin (eds.), *Law Reform NOW* (Gollancz, London, 1963) and Peter Archer and Andrew Martin (eds.), *More Law Reform Now* (Barry Rose, Chichester, 1983).

[95] 'Doctrine as a Source of the International Unification of Law' was a topic for the XIIth International Congress of Comparative Law held in Sydney and Melbourne in 1986. See C.Mouly, 'La Doctrine, Source d'Unification Internationale du Droit' (1986) 38 Rev.Int.D.Comp. 351; Glenn, supra n.5; E. Bodenheimer, 'Doctrine as a Source of the International Unification of Law' (1986) 34 AJCL (Supp.) 67-79.

[96] See, for example, Denning, 'The Universities and Law Reform' (1949) 1 JSPTL 258; William Twining, *Academic Law and Legal Development* (Faculty of Law, Univ. of Lagos, 1976); L.A. Sheridan, 'Law Teachers and Law Reform' (1976) 10 Law Teacher 89; Michael Zander, 'Promoting Change in the Legal System' (1979) 42 MLR 489; J.C. Smith, 'Academic Lawyer and Law Reform' (1981) 1 Legal Studies 119-130.

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 brethern.... However, before academics educate and reform society

---

[97] Alexander Turner, 'Changing the Law' (1969) 3 NZULR 404 at 408.

[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.[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.[102]

---

[101] John H. Farrar, *Law Reform and the Law Commisison* (Sweet & Maxwell, London, 1974), p.x. Similarly, Prof. Yuri Grbich calls for a "much needed academic renaissance" through greater involvement in law reform -- *Institutional Renewal in the Australian Tax System* (Monash Univ., 1984), Preface. See also Prof. Thomas W. Mapp: "Unless we marshall 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.

[102] Farrar, ibid., loc.cit. Emphasis added. Sheridan also emphasises the link with comparative law -- Supra n.96.