

## 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.<sup>1</sup> It has been said that it made comparative law respectable in the U.K. by an Act of Parliament.<sup>2</sup> 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.<sup>3</sup> 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.

---

<sup>1</sup> 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.

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

<sup>3</sup> Gerald Gardiner, 'Comparative Law Reform' (1966) 52 ABAJ 1021 at 1023-4.

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.<sup>4</sup>

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.<sup>5</sup>

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

---

<sup>4</sup> 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).

<sup>5</sup> 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).

1969.

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.<sup>6</sup> 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",<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup>

---

<sup>6</sup> 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.

<sup>7</sup> Michigan Compiled Laws, §4.1403(b) and (f).

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

<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> South Australia answered "No, but we do in practice do so."

Finally, South Dakota and Gambia answered "yes"<sup>12</sup> to Question 13 but quoted sections of their statutes which have no real link with comparative research at all.<sup>13</sup>

There were twelve straight "no" answers to question 13.<sup>14</sup>

---

<sup>10</sup> Ibid., section 204(7).

<sup>11</sup> 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."

<sup>12</sup> South Dakota added a question mark: "Yes?"

<sup>13</sup> 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.

<sup>14</sup> 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.<sup>15</sup> 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

---

<sup>15</sup> L. Neville Brown, 'Comparison, Reform and the Family' (U. of Birmingham lecture, 27 April 1967), p.3. Brown also adds that Professor L.C.B. Gower had extensive knowledge of foreign commercial and company law (fn.10).

British Institute and to serve on its advisory board. The appointments to the Scottish Law Commission also gave due weight to comparative law.<sup>16</sup> 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.<sup>17</sup>

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.<sup>18</sup>

---

<sup>16</sup> Ibid., loc.cit.

<sup>17</sup> Lord Kilbrandon, *Other People's Law* (1966).

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.<sup>19</sup>

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.<sup>20</sup>

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 reports<sup>21</sup> but instead rely on the "executive summaries" of them prepared by their officials in making their decisions<sup>22</sup> 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".<sup>23</sup>

---

<sup>18</sup> Stephen Woolman, 'The Scottish Law Commission' [1982] Stat.LR 164 at 164.

<sup>19</sup> Hurlburt, *supra* n.2, p.317.

<sup>20</sup> *Ibid.*, p.318.

<sup>21</sup> "With only rare exceptions, ministers and legislators do not and will not read law reform commission reports" -- Hurlburt, *supra* n.2, p.352.

<sup>22</sup> *Ibid.*, p.352 and p.364.

<sup>23</sup> J.N. Lyon, 'Law Reform Needs Reform' (1974) 12 Osgoode Hall LJ 421 at 428.

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.<sup>24</sup> 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.<sup>25</sup>

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.<sup>26</sup> These conferences appear to foster personal contacts amongst the agencies which attend.

---

<sup>24</sup> Commonwealth Secretariat, *Law Reform in the Commonwealth: Law Reform Proposals and their Implementation, Issue 2* (London, 1983). Listing in this publication does not necessarily mean that a document is stocked in the Secretariat's library. In 1986, Mr. Jeremy Pope, Director of the Legal Division of the Commonwealth Secretariat, apologised for the lack of information on law reform due to the lack of resources -- Commonwealth Secretariat, *Codification as a Tool of Law Reform* (Meeting of Commonwealth LRA's, Ocho Rios, Jamaica, 10 Sept. 1986, London, 1987), p.28.

<sup>25</sup> Brian Davenport, 'Collaboration and Mutual Assistance' in Stuart M.I. Stoker (ed.), *Forum on Law Reform Within the Commonwealth* (Meeting of Cwth LRA's, Hong Kong, 21 Sept. 1983)(London, 1984), 15 at 16.

<sup>26</sup> 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"<sup>27</sup> of law in those countries. The Uniform Law Conference of Canada has tried to discourage this trend, but is fighting an uphill battle.<sup>28</sup> 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.<sup>29</sup> Surprisingly, the Attorneys General rejected this proposal.<sup>30</sup> 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".<sup>31</sup> The Committee urged the

---

<sup>27</sup> Hurlburt, *supra* n.2, p.420; David Kelly, 12th Australian LRA Conference as reported [1987] Reform 200.

<sup>28</sup> Hurlburt, *supra* n.2, pp.420-422.

<sup>29</sup> The full text of the resolution is in Anon., 'Promotion of Uniform Law Reform' (1975) 49 Austl.LJ 213/4.

<sup>30</sup> Foreword by Kirby in Australian LRC, *First Annual Report* (ALRC 1, 1975).

<sup>31</sup> *Reforming the Law* (Parl.Paper No.90, Austl. Govt. Publ. Service, 1979), 85-86.

Attorneys General to adopt the proposal, but this has not been done.<sup>32</sup> 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 "foundered on the sharp rock of the Standing Committee of Attorneys-General".<sup>33</sup>

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.<sup>34</sup>

### ***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.<sup>35</sup> 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.<sup>36</sup> The Commission kept in touch with legal developments abroad through

---

<sup>32</sup> See [1987] Reform 201 ('The SCAG viewpoint').

<sup>33</sup> Kirby [1985] Reform 5. See Hurlburt, *supra* n.2, pp.424-5.

<sup>34</sup> See above, Chapter III.

<sup>35</sup> Norman S. Marsh, 'Rechtsreform in England und Rechtsvergleichung', Juristische Studiengesellschaft Karlsruhe, Schriftenreihe, Heft 75 (C.F. Muller, Karlsruhe, 1967).

<sup>36</sup> *Ibid.*, p.18.

Commonwealth channels, through the British Institute of International and Comparative Law, and through requests for information to judges, academics and practitioners.<sup>37</sup> 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:-

Herr Staatssekretär Bülow sagte im letzten Mai in Berlin, daß die Law Commissions eine Brücke bauten Zwischen Common Law-Juristen und Zivilisten. Die Rechtsvergleichung ist unser wichtigstes Wekzeng bei diesem Brückenbau.<sup>38</sup>

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.<sup>39</sup> The final report omitted these summaries but was obviously heavily influenced by the civil law approach to statutory interpretation.<sup>40</sup> 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 focussing on the practical difficulties of the national reformer's task in consulting foreign solutions.<sup>41</sup> 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). In

<sup>37</sup> *Ibid.*, pp.16-17.

<sup>38</sup> *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."

<sup>39</sup> Interpretation of Statutes (Law Com. WP No.14, Scot.Law Com. Memorandum No.6, 1967), pp.55-100. The Working Paper is summarised in Marsh, 'The Interpretation of Statutes' (1967) 9 JSPTL 416.

<sup>40</sup> Interpretation of Statutes: Report by the two Commissions (Law Com. No.21, Scot.Law Com. No.11, H.C. 256, 1969).

<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup>

As mentioned in Chapter III, the Scottish Law Commission has taken upon itself the task of preserving Scots law from anglicisers.<sup>44</sup> The aim is "to restore the coherence of the Scottish legal system as a cosmopolitan legal system".<sup>45</sup> The Commission cannot avoid consulting English law on its topics,<sup>46</sup> 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.<sup>47</sup>

---

<sup>42</sup> Norman S. Marsh, 'Comparative Law and Law Reform' in Proceedings of the Fourth European Conference of Law Faculties (Council of Europe, Strasbourg, 1977), 71; reprinted in (1977) 41 *RabelsZ.* 649.

<sup>43</sup> *Ibid.*, pp.84-85 (Proceedings), pp.655-6 (*RabelsZ.*).

<sup>44</sup> Hurlburt, *supra* n.2, pp.92-97.

<sup>45</sup> Sir Thomas B. Smith, 'Reflections of a Would-Be Law Reformer' (unpublished, 1982), p.2; cited in Hurlburt, *supra* n.2, p.96.

<sup>46</sup> In reply to Question 14 of the survey, the Commission stated: "Naturally the most commonly consulted jurisdiction is England and Wales."

<sup>47</sup> Alan Watson, *Legal Transplants* (Scottish Academic Press, Edinburgh, 1974), p.92.

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".<sup>48</sup>

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.<sup>49</sup> Unfortunately, for political reasons, the continental idea was not adopted.<sup>50</sup> 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".<sup>51</sup> 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.<sup>52</sup> The Commission appears to have built up a large network of contacts

---

<sup>48</sup> Smith, *supra* n.45, p.12; cited in Hurlburt, *supra* n.2, p.98. The project to produce an Evidence Code was later abandoned.

<sup>49</sup> 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* (Pr.8855), p.19.

<sup>50</sup> 'Comment' (1985) 79 *Gaz. ILSI* 327 and 356; Domicile and Recognition of Foreign Divorces Act 1986.

<sup>51</sup> 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.

<sup>52</sup> Para. 193. The report was partially implemented by the Status of Children Act 1987. See *Ninth*

with legal experts in other countries.<sup>53</sup>

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.<sup>54</sup> 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.<sup>55</sup>

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.<sup>55a</sup> The Tasmanian LRC indicated that it has recently considered solutions adopted in Scandinavia and Germany.<sup>56</sup>

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.<sup>57</sup>

---

(*Annual Report 1986-87* (Pl.5625, 1988), pp.7-8.

<sup>53</sup> See *Report on Receiving Stolen Property* (LRC 23, 1987), pp.124-127.

<sup>54</sup> See the replies from the Canadian agencies to Question 14 of the survey (Appendix 5 below).

<sup>55</sup> *Report on Sunday Observance Legislation* (Rep.31, 1971), p.270.

<sup>55a</sup> NSW LRC Consultant Paper 4 (Studies in Comparative Civil and Criminal Procedure vol.1: N.R. Carson, *Court Procedure in the United Kingdom, United States, South Africa and New Zealand*, 1978) and Consultant Paper 5 (Studies... vol.2: J.Bishop, *Innovations in Civil and Criminal Procedure*, 1978).

<sup>56</sup> 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.<sup>58</sup> 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).<sup>59</sup> 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.<sup>60</sup> 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.<sup>61</sup> Thirdly, the New York

---

<sup>57</sup> Appendix 5 below -- New Zealand, Q.14.

<sup>58</sup> Appendix 5 below -- Arkansas, Q.22 (Comments), para.5.

<sup>59</sup> Appendix 5 below -- Michigan, Q.14.

<sup>60</sup> The other agency was the North Carolina General Statutes Commission. See Appendix 5 below -- United States agencies, replies to Q.15(a).

<sup>61</sup> 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.<sup>62</sup>

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".<sup>63</sup>

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.<sup>64</sup> 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.<sup>65</sup> A.J.G.M. Sanders has written on the subject of comparative law and law reform in Africa, particularly South Africa.<sup>66</sup>

---

(prepared for meeting of advisory committee, 26 Feb. 1988), pp.37-70.

<sup>62</sup> John W. MacDonald, 'Legal Research Translated into Legislative Action: The New York Law Revision Commission 1934-1963' (1963) 48 *Corn. LQ* 401 at 424.

<sup>63</sup> Carolyn Gentile, 'Speech Given at Fordham on the Occasion of the Law Revision Commission's 50th Anniversary Dec. 14th 1984' (1985-86) 14 *Ford. Urb. LJ* 103 at 114.

<sup>64</sup> Appendix 5 below -- Gambia, Q.14.

<sup>65</sup> P.E.N.K. Archer, 'Codification of the Law: Ghana's Experience' (1987) 13 *Cwth.L.Bull.* 1044.

<sup>66</sup> A.J.G.M. Sanders, 'Comparative Law, Law Reform and the Recording of African Customary Law' (1984) *De Jure* 321-329. (An inter-library request for this item failed to trace it, even in Africa. The reference comes from Vanderlinden's *African Law Bibliography*). Apparently, there is another article by Sanders available: 'Comparative Law and Law Reform in Africa' in P.N. Takirambudde (ed.), *The Individual under African Law* (Univ. of Swaziland, Kwaluseni, 1982), 148.

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.<sup>67</sup> 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.<sup>68</sup> Upendra Baxi has analysed the use of comparative law by the Indian Law Commission in some detail.<sup>69</sup> 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.<sup>70</sup> 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

---

<sup>67</sup> Appendix 5 below -- Hong Kong, Q.14.

<sup>68</sup> *Ibid.*, Sri Lanka, Q.14.

<sup>69</sup> Upendra Baxi, *The Crisis of the Indian Legal System* (Vikas, New Delhi, 1982), pp.269ff.

<sup>70</sup> As examples he cites Reports 35 (Capital Punishment, 1967), 42 (Indian Penal Code, 1971), 54 (Code of Civil Procedure, 1973), 58 (Structure and Jurisdiction of the Higher Judiciary, 1974), 61 (Power of States to Levy Tax under Central Sales Tax Act, 1974), 62 (Workmen's Compensation Act, 1974), 64 (Suppression of Immoral Traffic in Women and Girls Act, 1975).

law reform, naturally not fully related to Indian reality and problems.<sup>71</sup>

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 Etrangère 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.<sup>72</sup> Since 1951, the Service has been part of the Centre de Droit Comparé.<sup>73</sup> 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.<sup>74</sup>

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.<sup>75</sup> 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.<sup>76</sup> Dr. Hahn has

---

<sup>71</sup> Baxi, *supra* n.69, p.275.

<sup>72</sup> Andrew Martin, 'Law Commissions Bill: Some Comparative Notes' (Unpublished, Oct. 1964, Copy in U.K. Law Commission Library), p.10.

<sup>73</sup> See Decree of 2 April 1951; reproduced in Anon., 'Centre Français de Droit Comparé (1951) 3 Rev.Int.Dr.Comp. 301.

<sup>74</sup> 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.

<sup>75</sup> Martin, *supra* n.72, p.7.

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.<sup>77</sup>

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.<sup>78</sup> 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.<sup>79</sup>

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.<sup>80</sup> In specialised areas, the government's own officials were often well informed of foreign developments.

---

<sup>76</sup> 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").

<sup>77</sup> Wolfram W. 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.34.

<sup>78</sup> Martin, *supra* n.72, p.15.

<sup>79</sup> *Ibid.*, p.25.

<sup>80</sup> Gabriel Frossard, 'La Place du Droit Comparé dans l'Enseignement, la Recherche, La Réforme du Droit et la Jurisprudence: La Situation en Suisse', National Report to the Fourth European Conference of Law Faculties (Unpublished, 1976), p.28.

Experts were often commissioned, but it was rare to ask an Institute to conduct comparative research. Library facilities were good.