## CONCLUSION

This thesis examined law reform, the comparative method and the combination of those two elements. The conclusions to be drawn will be summarised under those three headings.

### *Law Reform*

A definition of law reform which would emphasise its problem-solving function was adopted:

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 Law reform is the solution of a problem which arises because law, legal institutions or legal methods are outdated and obsolete.

The definition was broadly drafted, so as to include problem-solving by legislators, by law reform agencies, by judges and by academics. It was submitted that constant change in the law will always be necessary. The idea that law reform could somehow come to an end is untenable. This permanent need for constant change was represented by a Graph at page 12.

Different methods of law reform were studied, including problem-solving by legislation, by law reform agencies and by judges. The merits of each method were examined along the way.

In Chapter II (Legislation and the Comparative Method), it was stated that legislation must be prepared conscientiously as it is normally prospective not retrospective, as it can comprehensively change a whole area of the law and as it is very difficult to amend once it has been passed. In examining the pre-drafting stage and the drafting stage, the "iceberg effect" was a serious problem, i.e. the preparation of legislation in most countries is essentially a secretive process in the sense that what we know of it is only the tip of the iceberg. It was suggested that a Swedish-style policy of openness would be preferable. Civil law and common law drafting processes and drafting styles were contrasted. Parliamentary committee systems were found to vary widely in strength. It was found that academics were consulted more widely in the preparation of legislation on the continent of Europe. However, their influence was increasing in the U.S.A. through

the *Restatements*. The advantages of academics are their time, their libraries and their teaching experience. Their disadvantages are that they can be too theoretical and the dangers of the "rat-race" in the universities. Academics were urged not to write for themselves, to come down from their ivory towers and participate in law reform projects.

Law reform agencies are discussed in Chapters III, IV and V. The emphasis is on the *present* agencies of law reform, and useful data was provided by the questionnaire. The U.K. Law Commissions were inspired by the New York Law Revision Commission and by the European Ministries of Justice. In the early years, the English Law Commission undertook ambitious programmes and developed the device of the Working Paper. However, the enthusiasm of those early years has died down. The Scottish Law Commission was very much an afterthought. It has taken upon itself the task of preservation of Scots law from anglicisers. The Irish LRC has had its ups and downs since its establishment. In 1985, it published 11 reports but it was then placed "on ice" for 14 months. Its new working methods are welcomed, but its implementation rate is dangerously low.

It would be unduly repetitive to summarise the information provided on the agencies of Canada, Australia, New Zealand, the United States, Africa and Other Jurisdictions. However, certain trends may be pointed out. The majority of the Canadian agencies were established between 1964 and 1971. More than half of the agencies can initiate projects of law reform themselves, without external approval. The Federal LRC has the largest budget of any LRA in the world. The majority of the Australian agencies were established between 1966 and 1976. Most of them cannot initiate projects themselves. The Federal LRC has made constant use of public hearings in preparing its reports. The agencies have also experimented with Community Law Reform references and joint venture references. New Zealand's new Law Commission, established in 1985, can initiate projects itself, has a large budget and must submit programmes at least once a year.

In the United States, there is no federal LRA. The American Law Institute and the National Conference of Commissioners on Uniform State Laws are the most important LRA's in the country. The state agencies are very different from those in other countries. All members are part-time, they include elected officials and they are mainly concerned with technical law. The state agencies tend to have a power of initiative of projects and to have a very high implementation rate.

The majority of the African agencies were established from 1973 to 1983. They tend to be modelled on the U.K. Law Commissions and suffer from shortages of funds. The Zambian Law Development Commission is the only LRA in the world to have a statutory requirement of 50% non-legal membership. The majority of the agencies in the Other Jurisdictions were established from 1969 to 1982. The Indonesian Law Development Commission is a curious institution which had a huge budget and a huge staff when last studied in 1978.

All of the LRA's engage in detailed, painstaking research. Because of their independence from government, they have to fight to have their proposals adopted. The disadvantages of research are that it slows down and reduces the quantity of reports, the ministers hardly ever read the reports anyway, and the research may be far too academic. On the other hand, valuable sources of information in themselves are created.

The LRA's are compared with European Ministries of Justice, as the U.K. Act was inspired by these Ministries. It is noted that the Ministries cannot be classed as LRA's, because they are large, they are composed of both civil servants/administrators and lawyers, they are part of the ordinary machinery of government and they are under government control. This lack of independence was the price to pay in political terms for the advantages of the Ministries. Information on the Ministries is scarce, but it would seem that they tend to have one or more legal divisions which watch out for obsolesence in the law and which perform a central planning function as regards law from other ministries. Commissions and committees tend to fill in details only. Policy issues are decided before the commission or committee begins its work.

At the end of Chapter IV, some observations were made on five aspects of law reform agencies. Everyone has their own ideas as to what the LRA's should be doing. The diversity in the machinery of law reform created in different jurisdictions reflects the diversity of opinion as to the role of LRA's. It is true that, as Lord Scarman says, all law embodies social policy, but it is still useful to make a distinction between technical law (which society leaves to lawyers and is comparatively "rule-bound") and social-policy law (which society reserves for development by Parliament and the ordinary machinery of government and is comparatively free in its attempted achievement of social purpose). It is too narrow to confine LRA's to technical law only, but they should avoid questions of partisan politics (such as abortion). Non-lawyer members have been extremely helpful when they have been appointed to LRA's, and it is suggested that LRA's should be composed of 50% non-lawyers as in Zambia. The trend away from the old Working Paper procedure is welcomed, and it is suggested that Australian-style public hearings should be tested in other jurisdictions.

On the question of implementation rates, it is stressed that they are not the sole criterion of success of a LRA. The LRA can have an important influence on the legal system without actually getting many of its reports implemented, the reports which are implemented may be the most important ones, and the LRA's suggestions may be way ahead of its time. Some implementation rates are set out in Appendix 2. Hurlburt suggests five methods of improving implementation rates - delegated legislative power, committees of legislatures, omnibus bills, a time limit for response from the government and private members' Bills.

LRA's might be able to increase their finances by funding from Law Foundations and/or by adopting the precedent of the Arkansas Code Revision Fund (where there is a 25 cent levy on all legal costs).

Chapter VI deals with judicial law reform. There is a conflict of authority amongst the cases as to whether judges reform the law. In fact, statements from judges to the effect that they do not reform the law "camouflage" actual reform. The old Blackstonian idea is a fiction and it should not remain. There is a consensus amongst the commentators that judges reform the law. More concrete proof is summarised under five headings: The definition of law reform adopted in the Introduction includes judicial law reform, judicial decisions are a source of law, the very act of interpretation is a form of lawmaking, judges must fill in gaps, and strict adherence to precedent is now a thing of the past. It is often said that judicial law reform is undemocratic, but the question should be asked whether it is undemocratic *in comparison* with other methods of law reform. The judiciary is not without democratic features. The issue of whether judicial law reform or legislative law reform is more useful is largely a matter of opinion and depends on the area of law involved. The disadvantages of judicial law reform are that the judiciary cannot research the needs and opinions of society, judicial law reform depends on the accidental union of the determined party, the right set of facts, the persuasive lawyer and the perceptive court, and it can be slow and unsystematic. Its advantages are that judges can deal with a "flesh and blood" problem, they can often deal with problems much more quickly than the legislature, and piecemeal improvements are better than none at all.

The suggestive role of judges in law reform is also examined. Many examples are given of suggestions for reform made by judges. Some formalised system is needed to ensure that useful suggestions for reform are not forgotten or ignored. There should be no obligation on judges to use the apparatus. It would only ever be a facility of which judges could choose to avail or not to avail as they pleased.

This thesis does not address the broad constitutional issue as to how law should be reformed in an ideal world. This is a question which can be tackled at some future time. Instead, each method of law reform is taken as it exists in different jurisdictions, a comparison is made between the

various jurisdictions, advantages and disadvantages are pointed out and improvements are suggested. Openness is a common factor in most of the improvements suggested. Law reform must be more openly conducted as it is so important. If it were more openly conducted, it is also likely that its quality would improve.

### *The Comparative Method*

It was suggested that the term "Comparative Law" is slightly inaccurate. A distinction was drawn between "the comparative method" (comparison of laws as a practical method) and the autonomous discipline of comparison of laws. A distinction was also drawn between descriptive comparative law (of an encyclopaedic style) and applied comparative law (of a *critical* style).

The autonomous discipline of comparison of laws was used in examining the subjects of this thesis (law reform, the comparative method and the combination of those two elements) but it was not merely used in a descriptive manner. It was pointed out that one would be forgiven for believing that the only valid form of comparison is that between the common law and the civil law. However, comparison within the common law family is extremely important as well. This thesis contained much comparison amongst common law jurisdictions as well as comparison between common law and civil law jurisdictions. It was concerned with external comparison only, however (as opposed to inventive, internal and historical comparison).

Having made use of the autonomous discipline throughout the thesis, some conclusions have been drawn as regards it. The primary importance of access to materials was underlined time and again in preparing each and every chapter. The comparatist must search longer and harder than most jurists for obscure articles and reports. Some familiarity with foreign languages is essential. Letters of enquiry to foreign institutions or persons produce mixed results, but are always well worth a try. Personal contacts will be built up over time. The questionnaire device (as used in Chapters III to V) can be invaluable, but extreme care must be taken in compiling the actual questionnaire, preferably through a pilot study at the outset.

This thesis focusssed on the combination of the comparative method and law reform, but it was pointed out that the comparative method is also used by legal historians, by legal philosophers, by those who seek to unify or harmonise divergent laws, etc. It is incomplete and one-sided for any theorist to confine the functions of the comparative method to one particular object alone. It must not be forgotten that its role in law reform is only one function of many. Many of the conclusions summarised under the next heading (the combination of the comparative method and law reform) are relevant to the comparative method in general. In this thesis, there is a very large overlap between this topic (the comparative method) and the next (the combination of the two elements).

### *The Combination of the Two Elements*

Chapter I deals with the theory of the combination of the two elements (i.e. the comparative method and law reform). It is a natural reaction when faced with any problem to try and ascertain how others have solved the same problem. It is also natural in reforming the law to look abroad for ideas to use at home (Home Thoughts from Abroad). There is an increasing standardisation of life in the world. This means that the same legal problems arise in many countries. There are four options open to someone faced with a problem of law reform - invention of a solution, internal comparison, historical comparison and/or to try and ascertain how the same problem has been solved abroad. This thesis focusses on the fourth option, but the other three functions remain significant. The comparative method is a supplement to, not a substitute for, the other methods.

As stated above, the comparative method's role in law reform is only one function of many. It is not even its chief function. However, this practical function makes the comparative method more easily acceptable to lawyers generally and to practitioners in particular. The comparative method has become the "handmaid" of law reform. Reformers are constantly using the "eclectic reformer" approach.

The transplantation or reception of a foreign legal idea can occur for at least five reasons: (1) On an involuntary basis, due to chance or colonisation. (2) On a voluntary basis, due to great respect on the part of the donee for the donor's laws (the Transplant Bias). (3) Unification/ Harmonisation. (4) To solve a problem of law reform which was shared by the donor and the donee and which has been solved more successfully by the donor. The reformer can only be sure that the proposed reform is the best solution possible if he/she looks to possible advances which have been made abroad. Reception is a question of expediency, a question of need. Comparative studies reduce the amount of creative ability required. It means the full utilisation of all legal talent. It may even be a "moral duty". (5) Because a foreign solution is seen to have functioned effectively in practice. This is comparable to a doctor's or a scientist's reliance on experimentation.

There must be no naive enthusiasm for the combination and five of its limitations and dangers are discussed. Firstly, there is the danger of getting the foreign law wrong. Natives may lie waiting with spears, as Rabel says. Difficulties of language have been overemphasised. Personal relationships across frontiers are very useful.

Secondly, the combination may be misused because it is fashionable. This fashionability may mean that a foreign solution is unjustifiably adopted (the native genius not being allowed to find a better solution) or that no practical use is made of comparative research undertaken (tokenism).

Thirdly, there may be excessive respect for a certain jurisdiction. Transplant Bias (great respect on the part of the donee for the donor's laws) usually manifests itself as *excessive* respect for a jurisdiction, as with Ireland's respect for British law.

Fourthly, there is the danger of legal isolationism and xenophobia. This stems from inertia, which limits law reform. It is unjustified given the increasing standardisation of life, it lags

behind the opinions of the general public and it leads to the danger that non-lawyers will lose all respect for law.

Fifthly, the foreign solution may need to be adapted to suit the donee's present system. Two separate factors are identified - factor (a) (the context of the *proposed* rule within the *donee's* system) and factor (b) (the context of the *existing* rule within the *donor's* system). These are represented as two circles in Diagram 1 (page 35). The debate on this topic is traced from Montesquieu and Kahn-Freund to Watson and Marsh. Montesquieu believed that laws should be adapted in such a manner to the people for whom they are framed that it should be a great coincidence (*un grand hasard*) if those of one nation suit another. He said laws were closely linked to their habitat due to geographical, climatic, political, sociological, cultural, religious and economic factors. Kahn-Freund agrees with him, but says the political factors have gained in importance. Watson disagrees, saying that the law reformer is after an *idea*. As regards the political context, it is enough to look at factor (a) and factor (b) is irrelevant. Generally speaking, factor (a) is easier to discover than factor (b). Law possesses a life and vitality of its own and there is no extremely close relationship with its habitat. Marsh says transplantation can take place even if political and cultural backgrounds are fundamentally different and criticises Kahn-Freund's highly academic approach. It is concluded that the theories of Montesquieu and Kahn-Freund are unsatisfactory as they are counterproductive. The primary danger for a reformer is factor (a), not factor (b). Also, the *legal* context is the primary concern within factor (a). The reformer is looking for an *idea*, for inspiration. Diagram 2 (page 35) is a more elaborate version of Diagram 1. As a bare minimum, the reformer need only consider the two dots and subcircle 1 of Circle A (the legal context of the new rule within the donee's system). Thereafter, his/her priorities should be subcircle 1 of Circle B, followed by subcircles 2 to 7 of Circle A, followed finally by subcircles 2 to 7 of Circle B.

Chapter II then turns to legislation and the comparative method. Mention is made of Reception/major transplants and some basic historical facts are recalled. A detailed examination

is not made as this would primarily involve socio-political analysis of historical events. Reports of special commissions/committees often contain comparative research. This is an advantage of those commissions/committees over most other legislative proposals. At the pre-drafting stage, the "iceberg effect" makes it difficult to determine the extent of comparative research. It seems that comparative research is more likely in a department/ministry of justice than in other departments. If a jurist is called in, comparative research is also more likely. The existence of an international convention may actually be an excuse for a lack of comparative research.

Civil law and common law drafting processes and drafting styles are contrasted. It is tempting to conclude that there are more opportunities for comparative research in the civil law process since more stages and more people are involved, but it is too early to so conclude without hard evidence. The differences in drafting style are a hindrance to comparative research, as researchers find it difficult to move from studying legislation/codes drafted in their own style to studying those of the other style. The two systems should learn from each other and some form of middle ground should be reached to aid comparability of common law and civil law legislation/codes.

Parliamentary committee systems are compared. It is noted that members of the U.S. Congress have access to a Congressional research service. Lobbyists often refer to comparative research to support their arguments and the comparative method has been used by at least two subcommittees. The comparative method is constantly used by the Dutch Standing Committee on Justice and has been used by the Judicial Committee of the Israeli Knesset. In countries with weaker committee systems, comparative research is bound to be rarer and of an inferior quality.

To the non-lawyer, codification seems a natural way of stating the law. There was initial excitement at the prospect of codification in common law jurisdictions when it was included as one of the functions of many LRA's. However, three British Law Commissions plans for codification have failed and only two seem to have any chance of success. Codification has different

meanings, but it is concluded that codification of some form is still the ideal solution. A realistic interim target would be the improvement of drafting style in common law countries.

Comparative research is more likely if academics are consulted. Academics should not only participate in law reform projects but should increase their comparative law expertise so as to contribute more usefully to such projects.

Chapter V examines law reform agencies and the comparative method. Most LRA reports contain comparative material. Section 3(1)(f) of the 1965 U.K. Act is significant and has been influential. Similar provisions are found in Ireland, Federal Canada, Tanzania, the Bahamas and Sri Lanka. Statutes elsewhere are less specific about comparative research, but none prohibits it. There is no correlation between statutory provision for comparative research and the actual carrying out of such research, but this does not reduce the significance and influence of s.3(1)(f).

The personnel appointed to the first U.K. Law Commissions had backgrounds linked with comparative research. This demonstrated the perceived importance of such research and was noticed by countries which were inspired by the U.K. precedent. There is a majority of lawyers on all LRA's (except in Zambia) and this increases the likelihood of comparative research. The presence of legal staffs at many LRA's has a similar effect. Research is the foundation of the work of all LRA's. All of them use legal research, and this often involves comparative research.

Cooperation between LRA's takes place through conferences, through exchanges of personnel and through joint venture reports. It is useful for a LRA to keep track of the work of other LRA's - a report elsewhere may stimulate a report at home, research abroad may be useful at home, and the LRA can see whether the report was implemented and if so whether the implementation solved the problem. The least one would expect would be that all the LRA's would receive copies of each other's reports, but this is not the case. A centralised information base and a printed digest of LRA reports are needed. Of course, appropriate use should be made of other LRA

reports. They should not be used as an excuse to unjustifiably reduce local research. Also, excessive examination of conclusions of common law LRA's may leave less time for examination of civil law solutions and solutions in commmon law jurisdictions whose agencies have not made reports on the area. There have been problems of "balkanization" in Canada and Australia where different conclusions are being reached by different LRA's to the same problems.

There are variations in the amount and type of comparative research in the various agencies. Marsh has discussed the use of the comparative method by the English Law Commission on a number of occasions. Its project on interpretation of statutes involved extensive consultation of civil law solutions. Apart from examples already given in Chapter V, reference may also be made to the use of the comparative method in the Commission's projects on proof of paternity in civil proceedings[1] and on interest in contract cases.[2] The Scottish Law Commission tries to preserve Scots law from anglicisers. It embarked on a Code of Evidence project largely based on the Californian model. One of its reasons for proposing the abolition of the status of illegitimacy was that it would be in line with foreign trends.[3] The Irish LRC's studies have not been confined to English law. It has recommended adoption of the continental "habitual residence" concept. Its projects on illegitimacy and judicial review of administrative action drew on foreign solutions

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1 See Law Com. W.P. 12, *Proof of Paternity in Civil Proceedings* (1967), Appendix D, pp.60-64 ('The Use of Blood Tests in Other Countries' - references to Denmark, Germany, France, Switzerland and U.S.A., showing that blood tests are useful) and Law Com. No. 16, *Blood Tests and the Proof of Paternity in Civil Proceedings* (H.C. 2, 1968), implemented by the Family Law Reform Act 1969 (c.46).

2 See Law Com. W.P. 66, *Interest* (1976), pp.36-40 ('The Law and Practice in Other Countries' - references to France, Italy, Belgium, Ireland, etc. The Commission's proposals would be broadly consistent with the western world's laws), pp.46-47 (references to Germany, Denmark, France, Sweden) and Law Com. No. 88, *Law of Contract: Report on Interest* (Cmnd. 7229, 1978), implemented in part by s.15 of the Administration of Justice Act 1982 (c.53) and Rules of the Superior Courts (Amendment No.2) 1980. See also *President of India v. La Pintada Compania Navigacion S.A.* [1985] AC 104; Atiyah, 'Common Law and Statute Law' (1985) 48 MLR 1 at 27.

3 See Scot. Law Com. No.82, *Family Law - Report on Illegitimacy* (1984), pp.5-7 ('The International Context' - references to U.S.A., Scandanavia, Switzerland, New Zealand, Australia, West Germany and France), implemented by Law Reform (Parent and Child) (Scotland) Act 1986 (c.9).

and have been implemented by the Status of Children Act 1987 and the Rules of the Superior Courts 1986. It has built up a large network of contacts abroad.

In Canada, Australia and New Zealand, common law solutions are most often consulted. One notable exception is the 1969 proposal by the New South Wales LRC to adopt the civil law concept of "civil act" (*acte juridique* or *Rechtsgeschaft*) in the law of minors, which was implemented by the Minors (Property and Contracts) Act 1970.[4]

In the U.S.A., the National Conference of Commissioners on Uniform State Laws and the American Law Institute regularly consult foreign law. The Uniform Commercial Code was influenced by continental law because of Karl Llewellyn's familiarity with the subject (see above, page 27) and Section 220.2 of the Model Penal Code (Causing or Risking a Catastrophe) was modelled on the penal codes of several civil law countries.[5] Most of the state agencies do not consult foreign law, but the exceptions are Louisiana, Michigan and perhaps New York.

The African agencies are hampered by a shortage of funds, but the Ghana LRC relied on U.S., Nigerian and Israeli models in formulating an Evidence Code. As regards the Other Jurisdictions, the LRC of Hong Kong consults many common law solutions because Hong Kong is a regional and international centre for finance and commerce, the Sri Lankan Law Commission consults Roman-Dutch solutions as well as the common law solutions, and the Indian Law Commission from time to time displays an immense amount of comparative law familiarity. However, Baxi has characterised the latter's references to foreign law as flimsy, shoddy and inappropriate.

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[4] See LRC of NSW, *Report on Infancy in Relation to Contracts and Property* (LRC 9, 1969), David J. Harland, *The Law of Minors in Relation to Contracts and Property: An Analysis of the Minors (Property and Contracts) Act 1970 (NSW)* (Butterworths, Australia, 1974, p.28 and Law Reform Commission, Ireland, *Report on Minors' Contracts* (LRC 15, 1985), p.60.

[5] See American Law Institute, *Model Penal Code and Commentaries*, vol.2, p.36, fn.1; cited in LRC, Ireland, *Malicious Damage* (LRC 26, 1988), chapter 9, pp.29-31. This provision has been adopted in at least 8 states.

In the European Ministries of Justice, comparative research is widespread. Different methods are used by the different Ministries. The systems in France (use of the Centre de Droit Comparé), West Germany (use of the Max Planck Institute) and Switzerland (experts often commissioned) are to be contrasted with the system in the Netherlands and Denmark (use of personal contacts abroad and reports from their embassies abroad).

Section B of Chapter VI contains a country-by-country survey of the comparative method and judicial law reform. The conclusions drawn are summarised at pages 224-5. Consultation of foreign solutions is probably more frequent in judicial law reform than has been generally realised. Judges are often slow to admit to such consultation and again a policy of openness would be preferable. Comparative research is not only useful for cases of first impression, for conflict of laws cases and for cases involving international conventions. Judges have consulted foreign solutions on a much wider basis. The judiciary normally consult jurisdictions within the same legal family as their own jurisdiction. Statistical surveys of cases cited in published reports are shown to be defective and to present an incomplete picture of crossreferences from common law to civil law. Consultation of foreign solutions is more frequent in small jurisdictions or jurisdictions whose legal history involves a mixture of influences. Comparative research is something of a luxury when courts are overburdened, given the considerable amount of time it requires. However, while this may excuse judges for their lack of such research, the situation for practitioners is very different. There are a few cases where a foreign precedent has been adopted just as it stands without any further investigation, which illustrates that there are dangers in the misuse of the comparative method in judicial law reform, as in all areas of law reform.

What has emerged from this study of the impact of the comparative method on law reform is that there is plenty of comparative research going on, but that some cautionary notes must be sounded. Firstly, there is still not enough comparative research taking place. Reformers often fail in their "moral duty" to consult foreign solutions. This is true even of the law reform agencies,

where quite a number of reports are being produced which contain no comparative material. Secondly, comparative research is strongly biased towards legal systems of the same "family" as the local law. Crossreferences from civil law to common law are too few and far between. Even if crossreferences are made in LRA reports, the proposals resulting from those crossreferences are the ones which are least likely to be implemented by the legislatures. Thirdly, inappropriate use is often made of comparative research. Time and again, reformers simply set out comparative material with no real purpose except to show that such research was conducted. On the other hand, such comparative material may be used as a model for reform without questioning its merits.

There has undoubtedly been a change in attitude to comparative research since it was "made respectable" by s.3(1)(f) of the U.K. Law Commissions Act 1965. However, the momentum of this change of attitude must be kept up and the best way to do this is by education. If comparative law courses were more widespread and more popular, the quantity and quality of comparative research in law reform would inevitably improve.