Prologue: The IALS Law Reform Project

Jonathan Teasdale[*]

Abstract

Law, particularly enacted law, needs to be as simple and as accessible as possible, clear and concise and – perhaps above all – fit for the purposes of modern society. Laws passed in one decade may prove to be less than adequate for the needs of later generations because of changes in the social fabric or social mores or because of technological advance or economic challenge. Societies needs mechanisms for keeping law under review, particularly when governments are focused on introducing more law – sometimes layered on top of existing law – to fulfil electoral promises. The position is compounded in common law systems where the senior judiciary add to the legal corpus.

Different jurisdictions have differing needs. The IALS Law Reform Project (at the Institute of Advanced Legal Studies, University of London) has set itself the task of identifying the range of law reform mechanisms employed across the common law and civil law worlds with a view to establishing which of the components are core, and identifying others which could be improved. The starting point, of course, is: what is law reform? Are reform and revision the same? Does reform need to be legislative? Why does codification work in civil law jurisdictions but is eschewed in parts of the common law world? This is about the processes of law reform; substantive reform is for another day.

Keywords: statute, common law, codification, consolidation, implementation.

A Introduction

Law is a socio-political tool, with practical purpose. Whether written or unwritten, whether employed in sophisticated or less structured societies, whether designed to regulate human behaviour between individuals or between individuals and their overarching nation or tribe, law (or the application of law) creates a means whereby peace, security and orderliness can be maintained within a societal setting. Law can be derived from religious or secular sources, and its expression can take a variety of forms. But for it to apply fairly and universally – as part of the rule of law – it must be accessible and comprehensible. So too with interna-

[*] LL.B, LL.M, Barrister (England and Wales), FRSA. Presently associate research fellow in the Sir William Dale Centre for Legislative Studies at the Institute of Advanced Legal Studies (University of London) specializing in law reform, and formerly a lawyer with the Law Commission for England and Wales.

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tional law in the public realm, governing the relationships between, and behaviour of, states both specifically and generally.

In much of the world two forms of secular-based legal systems operate: the civil law system and the common law tradition. Each has substantial roots and each is acted out against a backcloth of – and within a framework derived from – legislative activity by the nation state. Legislative and judicial powers are ordinarily kept separate as a matter of constitutionality. Frequently, though, the exercise of executive powers becomes entangled with the legislative; sometimes they try to impinge on the judicial.

The common law tradition in its Anglo-American guise has both strengths and weaknesses. Its strength lies in its flexibility: its ability to adapt to social or economic or cultural circumstances, to fill gaps left by the legislature (sometimes because the particular topic is too controversial politically, sometimes because the issue has never needed to be addressed), and to interpret and apply statute-based law.

But its weakness lies in its reliance on judge-made decisions: it is founded on application of the doctrine of precedent, *i.e.*, meaning that decisions on points of law by more senior courts have to be accepted by more junior courts. However, not every case is appealed which means that new points of law do not automatically require – or acquire – the approval of a senior court. So that law on a particular topic at date A may change when a similar issue is litigated at date B and then goes on appeal. The 'fundamental' nature of the precedent doctrine, as Lord Neuberger said recently in a UK Supreme Court decision, is that without it, in a common law system, "the law [would become] anarchic and [lose] coherence, clarity and predictability."[1]

The downside of common law decision-making is that it carries the risk that the law will be changed judicially as time goes by and, because the Supreme Court in the United Kingdom is capable of reviewing its earlier decisions, long-standing precedents may be overturned and the law changed in practice prospectively (and, in legal theory, retrospectively – that is to say, it is deemed always to have been the way it is treated today). On that basis, although it can be said that law is predictable at a given date, it may nonetheless change over the course of time because it has been found later to have been decided or interpreted wrongly – or, perhaps, not in the nuanced way in which it should have been the first time round. The law develops incrementally. Rigid application of fixed legal principles does not always deliver justice, or does not always take account of fluctuating circumstances. So certainty is an issue.

Then there are other issues. The common law can sometimes be hard to decipher and inaccessible to citizens who do not have legal training. Part of the problem is that in appellate courts there may be multiple judgements – some concurring with the majority, some dissenting. Even in those where judges concur on the outcome, it may be difficult for the reader to work out exactly which legal principle or principles has or have held sway. As Lord Bingham sagely indicated,

1 *See* Willers *v*. Joyce (No 2) [2016] UKSC 44, [2016] The Times 6 September (Sup Ct).

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the only way through this mire is to ensure that two conditions are observed. Firstly,

> It is only the principle of law laid down which binds any other court or governs and other case, and if the court does not make that principle clear it is simply failing to perform its duty in accordance with the principle [of delivering clarity].

Secondly, where cases are brought before judges raising novel questions,

> [t]heir answers will often make law, whatever answer they give, one way or the other. So the judges do have a role in developing the law, and the common law has grown up as a result of their doing just this. But, … there are limits.
>
> …It is one thing to move the law a little further along a line on which it is already moving, or to adapt it to accord with modern views and practices; it is quite another to seek to recast the law in a radically innovative or adventurous way, because that is to make it uncertain and unpredictable, features which are the antithesis of the rule of law.[2]

Although this advice is being applied more cogently in decision-making, today the common law of yesteryear more than occasionally fails on both counts.

Professor Michael Zander of LSE has written,

> There is no doubt that the doctrine [of precedent or *stare decisis*] does lead to the perpetuation, sometimes for long periods, of bad decisions. Not infrequently they are even widely recognized to be bad decisions, and yet the courts somehow lack the energy to change them.[3]

Some others might also say that equally they lack the imagination to grasp the issue in a timely manner, given that the common law is of their making and impacts on the lives of all citizens both today and tomorrow.

The balance in the common law between flexibility and stability is not a feature of the common law system itself: it comes about, as Zander says, by the way the judges apply the doctrine of precedent. And that application does not preclude a court from seeking to finesse a laid-down principle or indicating, *obiter*, that the law in a particular area needs urgent reform. There is an art in distinguishing and bypassing unhelpful precedents.

All this means that the common law – in England and Wales at any rate – does not necessarily deliver law which is immediately accessible or certain. Nor does it carry the warranty that when it ventures into areas of public policy it is

2 *See* T. Bingham, *The Rule of Law*, London, Penguin Books 2011, Chap. 3 at pp. 45-46.

3 M. Zander, *The Law-Making Process*, 6th edition, Cambridge, Cambridge University Press 2004, Chap. 5 at p. 304 (and *see* generally).

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underpinned by informed and scrupulous analytical technique. Judges and lawyers are not masters of public policy formulation and option-weighing: that is the territory of Whitehall mandarins and Westminster politicos.

Is parliamentary legislation any better? The answer is: probably not. It carries the imprimatur of representative democracy in action, it is formulated by policy analysts (certainly when it is government inspired) and translated into workable legal text by immensely skilled drafters, and it is subject to the cut and thrust of political debate (and amendment) in an open forum. And yet for all that, it is far from perfect. The bulk of legislation in the UK parliament (and now the devolved assemblies) is based on the government's agenda. The executive initiates the legislative programme – its content and its reach – and controls the manner in which bills are fed through the parliamentary process. Through its whips it ensures that timetabling is kept on a rigid path, that errant party politicians are kept in check, that bill scrutiny is as adequate or inadequate as it thinks desirable (using guillotine motions and the like) and that the range of matters within a parliamentary session delivers on its political mandate.

This means that various matters that should demand parliamentary attention never come before the House (usually the Commons) unless they fulfil certain unwritten criteria. They either need to be about winning votes in the country, or at least ensuring that voters see that what they voted for is coming to pass; they need to satisfy all the political factions within the governing party to ensure that majority votes are secured in the chamber; they need to deliver concrete visible results, whether that is in terms of social infrastructure or behavioural regulation; and they need to avoid the over-technical or the downright divisive. So they avoid addressing subjects like end-of-life issues, or the divvying-up of property of unmarried cohabitees when relationships breakdown, or anything that looks as if it might hint at remotely undermining the moral fabric and institutions of society. Those matters are left to private members to raise, often in another place (as the House of Lords is quaintly termed), where government does not have to take a view or afford precious debating time.

It also means that little time or enthusiasm can be found for addressing the more mechanical issues of the law: reviewing law that may have passed its sell-by date, law that has caused difficulties in the courts (either because of its construction or amendment or because of its omission or inadequacy); law that is needed to address technical deficiencies that arise in the more abstruse areas such as trusts and settlements or contractual relationships. And by leaving these gaps in an uncodified system, the courts are obliged to use the common law as a tool for bridging them – sometimes very effectively, sometimes less so. There is always in the mind of the judiciary the concern to balance their role as interpreters of the law against the need to be makers of the law. Judicial creativity is frowned on by senior politicians in government, particularly if it means applying Strasbourg jurisprudence too rigidly or inventing new means whereby the executive is held more closely to account.

Where does this leave us in the liberal democratic common law world? Probably in a not dissimilar place to our cousins across the Channel in the civil law world. Individual laws can go out of fashion, become worn and threadbare so that

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patches have to be sewn in or holes darned, or simply fall apart at the seams and have to be discarded (or possibly recycled for better use).

B The Need for Regular Review

Law reform in its many guises bridges the divide between the practical and the academic.[4] In both common law and civil law jurisdictions, there is a continuing need to review existing law – both statute and case law – to ensure it remains fit for purpose and relevant to the current needs of government and society. The means employed to achieve these aims, and to deliver revision where that is called for, will vary from jurisdiction to jurisdiction, and will take various forms.

For those jurisdictions with a mature statute book, there comes a time when the legislation within it needs to be assessed with a view to removing material that has, for one reason or another (not least the passing of decades), become obsolete or superseded or of no practical use. That needs to be weeded out. Other legislation will have been subject to amendment down the years and some mechanism needs to be found either to consolidate the adjustments into a single text or to restyle it, taking into account court decisions arising from interpretation or application, through a codification or a rewrite exercise. Law revision involves a combination of all these techniques, reordering the whole or parts of the statute book in a more logical manner so that its format and content become more accessible in hard or electronic copy.

And then there is the need from time to time to stand back from the subject matter of particular areas of law and to decide whether, if the law no longer functions in a wholly satisfactory manner, it should be reformed – in other words, unpicked and reassembled in a more coherent or comprehensive or simplified manner, underpinned by a legislative process.

Law reform is carried out through different organizations. In some jurisdictions, this is the task of the attorney general's office; in others, specific law reform agencies are formally established with a brief to review and make recommendations to government or to the legislature; and in others, the job of law reform is given to academic bodies to undertake. Alongside that, professional bodies in the less formal realm often develop law reform proposals and lobby for change. But what is not really clear is how law reform is delivered within different types of jurisdiction; how effective that delivery is, in terms of governmental acceptance and implementation; how a programme of law reform is developed; and how good practice across the different agencies may be identified, disseminated and shared.

4 The text in this section is drawn from the website entry for the IALS Law Reform Project: *see infra* note 9.

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C The Practicalities

What then is law reform about? The Law Commission for England and Wales[5] takes as its brief the facilitating of better law – through independent recommendation to government and the legislature – with the aim of delivering law that is

- more accessible,
- fairer,
- simpler and more intelligible (including in terms of legislative language), and
- able to accord with modern needs.[6]

That strategic aim is supported by several specific objectives including

- to propose and carry out programmes for development and reform of the law,
- to carry out individual projects of law reform in addition to those in the ministerially approved programmes,
- to consult widely on work of law reform so as to ensure the work is directed towards areas considered to cause difficulty through complexity, age or inaccessibility, and
- to promote implementation of recommendations in an appropriate manner.

All this, of course, can only be delivered with adequate resourcing, both financial and personnel, and with legal staff who can bring research skills and practical as well as academic knowledge to the table.

Law reform within this brief involves undertaking projects that seek to review and revise areas of law that, for one reason or another, have become unfit for purpose (or certainly in need of improvement), undertaking work to consolidate existing statutory material (with or without some adjustment or rewrite), and undertaking work that involves reviewing parts of the statute book and recommending repeal of material that no longer has practical utility.

The stages involved in delivering law reform proposals that are capable of practical realization are manifold, spanning inception of a government-approved work programme through to parliamentary implementation of specific projects. In the United Kingdom, this involves constructing a rolling programme of law reform that is updated every 3 to 4 years, reporting annually on programme delivery and government reaction to projects, and ensuring that funding and timetabling match the requirements of bilateral protocols. Today, this arrangement operates against a backcloth of a devolved legislative and executive settlement

5 Established (along with the Scottish Law Commission) by the Law Commissions Act 1965. This was one of the first legislative initiatives undertaken by the Wilson Labour Government (1964-1970) and came about through the advocacy of Gerald Gardiner, QC (subsequently Lord Chancellor Gardiner) and Professor Andrew Martin in their co-edited book *Law Reform Now* (published in 1963). That work led to a government White Paper *Proposals for English and Scottish Law Commissions* (Cmnd. 2573, 1965) which described UK laws as in "such an unsatisfactory state" that they failed the fundamental requirements of accessibility and modernity.

6 *See* Law Commission's Seventh Programme of Law Reform 1999 (Law Com No. 259), section A.4.

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embracing the different nations that comprise the United Kingdom of Great Britain and Northern Ireland.[7]

The stages can be tabulated approximately as follows:[8]

Phase 1 – Programme formulation	
Stage 1	Consultation on programme of forthcoming law reform
Stage 2	Evaluating suggestions for reform and preparing programme
Stage 3	Seeking governmental approval of programme
Phase 2 – Project initiation	
Stage 4	Preliminary consultation with interested parties on specific reform topic
Stage 5	Preparing a scoping paper defining project
Stage 6	Commissioners sign off on project initiation
Stage 7	Public consultation on provisional proposals through a Consultation Paper
Stage 8	Analysis of consultation responses
Stage 9	Publish summary of responses on website
Stage 10	Commissioners agree final recommendations
Stage 11	Where applicable Instructions for draft Bill prepared (and Bill drafted by parliamentary counsel)
Stage 12	Final Report prepared and published
Phase 3 – Project implementation	
Stage 13	Submit Report and draft Bill to government and provide 'aftercare' service
Stage 14	Government to decide whether or not proposals to be implemented and, if so, possible timeframe
Stage 15	Introduction of Bill by government to Parliament (following choice of appropriate legislative route)

D Researching the Mechanisms for Reform

The IALS Law Reform Project,[9] working in conjunction with other bodies in the field, has been established to address some of the issues described previously. The canvas is necessarily wide, but as co-leaders we hope it will appeal to a range of

7 The Law Commissions for England & Wales, Scotland and Northern Ireland also liaise in their work with the Crown dependencies of Jersey, Guernsey, Alderney and the Isle of Man, and with their opposite numbers in Ireland (based in Dublin). Wales does not have its own law reform commission for the present, but since Cardiff acquired a primary legislation-making capacity its review and reform needs within the joint jurisdiction of England and Wales are focussed on separately by the Law Commission.

8 The following list draws upon the table set out in the Law Commission's Annual Report 2014-2015 (Law Com No. 359), at point 4, p. 57.

9 The Law Reform Project (at the Institute of Advanced Legal Studies in London) is co-led by Dr. Enrico Albanesi (University of Genoa lecturer in constitutional law) and Jonathan Teasdale (Sir William Dale associate research fellow at IALS), under the general supervision of Dr. Constantin Stefanou (Director of the Sir William Dale Centre for Legislative Studies at IALS): for further details, *see* website available at: <http://ials.sas.ac.uk/research/lawreform/lawreform.htm>.

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practitioners (in reform and in legal services generally), of academics (specializing in law and other related disciplines) and of those who are engaged in the arenas of policy-making, legislative drafting and political decision-making.

The initial aims of the project are

- to identify the range, and to categorize the types, of law reform agencies operating across common law jurisdictions, and to start to scope their functions, methods of operation and arrangements for intellectual independence and funding;
- to identify, in similar fashion, the mechanisms employed in jurisdictions operating within a civil law context, or a mixed common and civil law environment, to review and revise their municipal law;
- to identify the breadth of law reform projects handled within agencies, and to ascertain the vehicles through which law reform is delivered (*e.g.*, by codification or consolidation or simplification);
- to identify the methodologies adopted by agencies to choose topics for law reform, to undertake and commission research, to obtain public and stakeholder feedback, and to publicize their findings;
- to identify how reform recommendations are implemented and the degree to which implementation is secured (by legislative, executive or judicial means); and
- to identify the range of professional skills required to deliver effective law reform, and the manner by which such skills are either acquired or enhanced.

Given the magnitude of the task, the project started with an inaugural workshop in London to ascertain whether the project was viable, whether it was thought to be worthwhile and whether a network of people and organizations could be established with whom we could collaborate as things progressed.

The first workshop at the Institute (within the University of London) in November 2015 sought to set out – in a fairly broad brush way – the areas felt worthy of academic exploration but which may well have practical uses for other audiences. For example, governments abroad who may need advice on setting up law reform agencies may value pointers to the different models in place, how they perform, and the people or organizations to contact for more detail.

Two articles from the November event are included in this issue of the Journal: those by William Robinson (formerly of the European Commission Legal Service) and Dr Enrico Albanesi (lecturer in constitutional law at the University of Genoa), accompanied by a third article by Dr Fabio Pacini (research fellow in constitutional law at Scuola Superiore Sant'Anna, Pisa). The themes addressed by the workshop speakers covered five areas of law reform endeavour:

1. *Law reform the world over: a global perspective* by Michael Sayers, general secretary of the Commonwealth Association of Law Reform Agencies who spoke about
   - what constitutes law reform, and who undertakes it;
   - why law reform is necessary, particularly in the common law arena;
   - what law reform techniques are employed in the United Kingdom and across Commonwealth jurisdictions;

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- whether the law reform process needs to be independent, and how it delivers credibility; and
- how law reform proposals make the transition from drawing board to enactment.

2 *The legislative drafter's perspective* by Ronan Cormacain, consultant legislative drafter (formerly with the Northern Ireland Executive) who engaged with the issues
- working with a law commission: in what way is that different from working with government administrators?;
- receiving Bill instructions and testing proposals: how the iterative process operates;
- converting principles, policies and recommendations into draft legislation: the practical challenges;
- whether law reform demands different legislative drafting techniques; and
- advising on legislative procedures and possible pitfalls (and reading the political mind-set).

3 *A Law Commission perspective* by Elaine Lorimer, then chief executive of the Law Commission for England and Wales, who spoke about
- independence: the need to balance political pragmatism with intellectual integrity;
- sources of law reform work: the formal programme, ministerial referral, and select committee recommendation;
- relations with the judiciary;
- overview and scrutiny of the Commission's functions and output;
- the challenges of implementation of proposals for reform: from securing executive commitment to facilitating parliamentary passage; and
- the standing of Commission recommendations with parliament and the courts.

4 *European law: the legislative quagmire* by William Robinson, IALS associate research fellow (formerly with the European Commission Legal Service) who addressed
- an overview of the European law-making process, including the effect of decisions of the Court of Justice of the EU;
- the role of the European Commission in legislation-initiation and post-enactment implementation;
- the need for simplification and revision of EU legislation (the *acquis*);
- how to make EU law more accessible; and
- whether some form of independent entity is needed to review the growing body of enacted and case law and to make recommendations to the EU institutions for law revision, consolidation and repeal.

5 *Law revision, legal restatement and legislative scrutiny: a civil law perspective* by Dr Enrico Albanesi, lecturer in constitutional law at University of Genoa, IALS visiting fellow (formerly legal adviser to the President of the *Comitato per la legislazione* of the Italian *Camera dei deputati*) who explained
- the law-making process in Italy;

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- the mechanisms for Italian law revision: the experience of the so-called *taglia-leggi*;
- the mechanisms for legal restatement: the role of the *Consiglio di Stato*; and
- how legislative scrutiny is conducted through the *Comitato per la legislazione* and the *Commissione per la semplificazione*.

E Exploring the Underlying Principles

The project also provides an opportunity to explore some of the principles behind law reform and to achieve an understanding of what is perceived as 'law reform' in different jurisdictions. Thus, it would be useful to explore questions such as these:

- Is law reform about reviewing and reforming existing law, both statute based and judge made, and to what purpose? How does reform differ from the promotion of governmental priorities or policies through legislative means?
- Is reform about filling the gaps, and eradicating overlaps, in the legislative and judicial canvas on particular subjects, or is it about ensuring that the law and legal machinery keep pace with social and technological change?
- Should law reform projects, or their outcomes, be non-contentious morally and politically, or is law reform an appropriate vehicle for tackling subjects with which politicians are unwilling – or unable – to come to grips?
- Is law reform about rationalizing and simplifying existing law, by codification or restatement or rewrite, so as to make it more accessible to the citizens it serves?
- Do the techniques of law reform have a basis in legal theory, and to what extent should theoretical principles determine the direction of endeavour? What distinguishes law reform from pure academic study?
- In reviewing areas of law where the underlying purposes may differ, such as regulatory as opposed to conciliatory (*e.g.*, as in criminal law vs. family law), is it necessary to harness approaches and analytical techniques that differ according to the subject matter?
- Does successful implementation of particular law reform rely on the provision of an assessment of potential social or economic impact of the proposals?
- Is it right to measure success of a law reform body solely in terms of enactment statutorily of its reform or revision proposals, or should other criteria come into play?
- Is it about some or all of these things, and to what extent do law reform agencies need to establish their practical boundaries and their working relationship with others (such as government, the media, the judiciary)? How do such bodies secure the attention and respect of government and legislatures?

So far as practicable, the study needs also to focus on whether law revision and legal restatement within civil law jurisdictions deliver, or are designed to deliver,

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the same or similar outcomes to law reform across the common law world (and the manner in which mixed jurisdictions – such as South Africa, Sri Lanka, Botswana – work in this context).

F The Next Steps

The work programme has moved forward with two further initiatives: a second workshop in late October 2016 on the subject of codification, and the commencement of an organized literature review. The workshop aims to compare the approach to codification in civil law jurisdictions in Europe (Belgium and Italy) with that in common law jurisdictions (East Africa and the United Kingdom).[10] Whereas codification has long been a central ingredient in the civil law tradition in common law jurisdictions – where arguably it has much to offer to make law clearer and more accessible – progress has been much more sporadic for a number of reasons. In various ways the former colonial territories of the United Kingdom were used as testing grounds for this model of legislation before the metropolis was prepared to consider its application within its home shores – and the fruits of that experiment (for that is what it was) were not to prove so alluring as to find it a permanent home in the hearts of British civil servants and politicians. The question today is whether that has been a missed opportunity and whether it should, or can, be revisited.

Alongside this work, the project is starting to examine the published literature on the processes of law reform across the world, from the Americas to Oceania, from northern Europe to Africa and central Asia. Again this examination will tend to divide between the civil law countries of Europe and beyond on the one hand and the raft of common law countries who form an integral part of the Commonwealth of Nations.

In these opening stages, the project is designed simply to focus on the mechanics of law reform rather than its substance, although that certainly does not rule out later on seeking to undertake research work on areas of law reform that are unlikely to be looked at by other organizations in the field (usually through lack of monetary resource or competing pressures) and then linking that work with the Sir William Dale Centre's established Legislative Drafting Clinic. Our hope, with the involvement of academics and law reform practitioners, is to build up a picture of how law is reviewed and reformed, what techniques are employed in a range of jurisdictions, and whether there are significant similarities or differences in the way in which reform is actually implemented.

10 The workshop speakers are: Professor Patricia Popelier (Antwerp University), Dr. Enrico Albanesi (Genoa University), Professor David Ormerod, QC (UCL and Criminal Law Commissioner at the Law Commission for England & Wales), and Professor Agasha Mugasha (Essex University and past Chairman of the Uganda Law Reform Commission).

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