EDITORIAL

Parliamentary Scrutiny of Law Reform in Recently Established Constitutional Democracies and in the Commonwealth Sphere

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A The IALS Law Reform Project, Law Reform and Parliamentary Scrutiny of Law Reform

The articles published in this special issue on parliamentary scrutiny of law reform have been commissioned as part of a wider research project, namely the Law Reform Project.[1] This project, co-led by ourselves, has been carried out since 2015 within the Institute of Advanced Legal Studies (IALS), University of London, under the general supervision of Constantin Stefanou, Director of the Sir William Dale Centre for Legislative Studies.

Five annual workshops have been held at the IALS every year from 2015; two special issues of this journal (No. 4, 2017, on 'Codification'; No. 1, 2019, on 'Initiating Law Reform') and one special issue of the journal *The Theory and Practice of Legislation* (No. 2, 2018, on 'Law Reform') have been published within the project; other articles from some of the aforementioned annual workshops have been also published in this journal (No. 3, 2016; No. 4, 2019).

This special issue collects the articles from our fifth annual workshop, held at the IALS on 4 November 2019, concerning 'Parliamentary Scrutiny of Law Reform: Procedures, Bodies and Methods'. Within the scope of that workshop, we decided to analyse parliamentary scrutiny of law reform in five different jurisdictions: Albania, the Arab region, Australia, the Republic of Ireland and the UK.

Obviously, the concept of law reform (and thus the role of parliament in scrutinizing it) is not the same in these jurisdictions. It is worth saying a few preliminary words to explain this.

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1 *See* http://ials.sas.ac.uk/research/research-centres/sir-william-dale-centre-legislative-studies/ials-law-reform-project (last accessed 5 June 2020). The scope of the Law Reform Project is well described in J. Teasdale, 'Prologue: The IALS Law Reform Project', *European Journal of Law Reform,* Vol. 18, No. 3, 2016, pp. 253-264. Some preliminary hypotheses have been set up in E. Albanesi, 'Beyond the British Model. Law Reform in New Zealand, Australia, Canada, South Africa and Israel', *The Theory and Practice of Legislation,* Vol. 6, No. 2, 2018, pp. 153-166.

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With our project, we assume that, strictly speaking, the concept of law reform hardly fits with civil law jurisdictions.

In the Commonwealth legal culture and in those jurisdictions which have historically and culturally strong political and legal connections with the UK (e.g. because of its current or past membership of the Commonwealth), law reform is seen as 'an effect' ("the alteration of the law in some respect with a view to its improvement"), but it is also 'a process' ("the process by which law reform is carried out, including the selection and application of values and the development and implementation of proposals for specific law reforms").[2] Therefore, within the Commonwealth sphere the concept of law reform is often used broadly to include all the functions of the law reform agencies: law reform (in a narrow sense), consolidation, revision, repeal, codification. With regard to this, it should also be remembered that, strictly speaking, consolidation and revision concern the *form* of the law, whereas law reform, in its narrow meaning, means improving the *substance* of the law in significant ways.[3]

In civil law jurisdictions, only a concept of law reform which is intended to be seen in a very broad way and focus on the similar mechanisms which are *mutatis mutandis* used in the common law world can be embraced. In civil law jurisdictions, strictly speaking, a *process* of law reform, as that in the Commonwealth sphere, can hardly be found.[4] In particular, when it comes to those jurisdictions where democracy has only recently been established, the concept of law reform can assume a different trait. In this context, the concept pertains best to those radical transformations of legislation in the aftermath of changes in the political regime from a totalitarian or authoritarian regime to constitutional democracy, although still volatile. When democracy is stabilized in these countries, the concept of law reform addresses more narrowly those reforms arising from obligations necessary for the integration of these states within supranational organizations, such as the European Union.

Against this background, we decided to focus our analyses, first, on the role of parliaments in scrutinizing law reform in two jurisdictions where law reform is seen as a radical transformation of legislation or at least a way to comply with obligations required for the accession to the European Union. This is the case, respectively, of the Arab region (where the picture is manifold still, as some jurisdictions are a sort of hybrid with customary law elements) and Albania. On the other hand, we decided to analyse the role of parliaments in scrutinizing law reform in three jurisdictions where law reform is seen, as mentioned earlier, as 'an effect' and 'a process' aimed at improving legislation: this is the case of two

2 *See* W.H. Hurlburt, *Law Reform Commissions in the United Kingdom, Australia and Canada*, Edmonton, Juriliber, 1986, p. 8 *et seq.*

3 *See* R. Percival (Ed.), *Changing the Law. A Practical Guide to Law Reform*, London, Commonwealth Secretariat, 2017, pp. 11-14.

4 With specific reference to the Italian case, *see* E. Albanesi, 'The Mechanisms Used to Review Existing Legislation in the Civil Law System. Case Study – Italy', *European Journal of Law Reform,* Vol. 18, No. 3, 2016, pp. 275-295 and, more specifically, about codification, E. Albanesi, 'Codification in a Civil Law Jurisdiction: An Italian Perspective', *European Journal of Law Reform,* Vol. 19, No. 4, 2019, pp. 264-284.

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Commonwealth jurisdictions (such as Australia and the UK) and a country which has historically and culturally strong political and legal connections with the UK (the Republic of Ireland).

In these two different contexts, parliaments play different roles, which obviously are not comparable between one and the other. This is the reason why it is important to summarize separately the main results of the studies carried out by the articles hosted in this special issue: on the one hand, those concerning Albania and the Arab region; on the other hand, those concerning Australia, the Republic of Ireland and the UK.

B Parliamentary Scrutiny of Law Reform in Albania and in the Arab Region

The article by Oriola Sallavaci about Albania describes the bodies, the procedures and the methods used by the Albanian Parliament to scrutinize law reform.

As Sallavaci notes, parliamentarism in Albania has a history of about one century, but the period since the early nineties has been the most significant, due to the changes in the political regime to parliamentary, pluralist democracy. Although the current heightened political turmoil during the past few years has significantly affected the role of parliament, Albanian democracy is now consolidated. The most significant areas of law reform nowadays are those arising from Albania's obligations for European integration, as the country has been a candidate for membership of the European Union since 2014.

From this perspective, the Albanian Parliament plays an important role, as the scrutiny of law reform is carried out by standing committees and by the plenary, especially in ensuring that law reform adequately reflects the interests of the citizens and of all stakeholders, not simply the government's political agenda, and meets the required quality standards from a technical as well as legal content perspective.

Moreover, it is interesting to note that the Albanian Parliament has established a special advisory body, the Council on Legislation, which, at the request of the relevant committee, expresses its opinion on the bills: with regard to any constitutional or legal issues arising from it and its compatibility with the existing legislation and international obligations. The Council was introduced following the model of the Italian *Comitato per la legislazione* (which scrutinizes bills from the perspective of the quality of their drafting only),[5] but in 2019 its role was changed and the Council is nowadays tasked, as mentioned, with scrutinizing constitutional and legal issues arising in the text of the bill.

However, Albania's case shows that the establishment of bodies, procedures and methods to scrutinize law reform cannot suffice.

Sallavaci notes that Albanian legislation is still ineffective, partly due to deficiencies in its preparation and drafting. She also stresses the need to improve the transparency of the work of parliamentary committees and councils. With regard

5 *See* E. Albanesi, 'Parliamentary Scrutiny of the Quality of Legislation within Europe', *Statute Law Review*, 2020 (forthcoming).

to the recent change to the tasks of the Council on Legislation, she asks whether the quality of the legislation is adequately assessed by the new Council.

In Albania the main problem concerning the functioning of parliament is currently the lack of political dialogue between the governing coalition/party and the opposition and the extended boycotts of the opposition parties. At the end of the day, Sallavaci notes, the current political turmoil has obstructed the efforts to meet the political criteria and the timely implementation of key reforms required for Albania's European integration.

The article by Sara Razai on the Arab region, focuses not on the role of parliaments and law reform as such, but on that of external actors in law reform in the area: the reason for such an approach is that their activities are seen by the author as removing much of the core function of a legislative branch itself. This is obviously problematic, it is argued: while aiming (often in good faith) at reforming the law, particularly in relation to human rights and the rule of law, these initiatives interfere with the democratic national bodies and are in conflict with the sovereign right of the people themselves.

This issue is not new in our Law Reform Project: from a different perspective, we have already analysed the role played by international actors (and, more specifically, international drafters) in a different but close context, namely that of post-conflict settings, and have explored the various difficulties concerned.[6]

With regard to the Arab region, Razai's article shows how complex the picture concerning the evolution of law and legal system in the region is; analyses the causes of a rule of law deficit in these jurisdictions; and explains how the rule of law is central to Arab legal and political discourse but has been used in the area by the three distinct actors who have sought to use law as a means of promotion or consolidation of power: colonial, authoritarian and, more recently, international development actors.

It has already been mentioned here that civil law jurisdictions are not familiar with law reform (as a process) and that it is still impossible in the Arab region to speak about law reform as an effect in the narrow sense mentioned earlier, as Arab states are still consolidating the pillars of their democracies, and law reform concerns radical transformation of their legislation.

However, it is interesting to note that the word 'process' is used by Razai in her article too. Noting that in the Arab region legislative reform and democratization ought to emerge through practice, and not normative ideals imposed from above or outside, Razai speaks of an 'indigenous process' that can emerge only through *a home-grown process characterized by trial and error*.

6 *See* N. Berkowitz, 'Legislative Reform in Post-Conflict Setting. A Practitioner's View', *European Journal of Law Reform,* Vol. 21, No. 1, 2019, pp. 58-81.

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C Parliamentary Scrutiny of Law Reform in Australia, the Republic of Ireland and the UK

As my co-editor Enrico Albanesi indicates earlier in this editorial (Jonathan Teasdale writes), law reform within common law jurisdictions – in terms of process and outcomes – stands in sharp contrast to those arrangements that operate in civil law countries. The majority of Commonwealth nations embrace a common law tradition and for the purposes of this special issue (and the 2019 workshop on which it is based) we sought to analyse the systems in two countries – one relatively small (Ireland, albeit not a Commonwealth member) and one large (Australia) – and to gain an understanding of the characteristics they share with the UK models, especially that driven by the Law Commission for England and Wales. We also wanted to understand how the products of law reform efforts were – and are – translated into legislation via parliamentary processes – or, in some cases, were simply left to wither on the vine.

Law reform in common law jurisdictions has, as its backcloth, two distinct corpuses of law: that made by parliament, be it through primary or secondary legislation, and that which has accumulated through the higher courts, principally through the doctrine of precedent. It is this doctrine which distinguishes common and civil law jurisdictions. Much law reform across Commonwealth countries, especially those that have dedicated law reform agencies, shares the desire both to modernize and to simplify the law which applies to the everyday lives of citizens, businesses and visitors.

The rule of law is fundamental to the smooth operation of liberal democratic polities, and access to justice is made possible only through a combination of functioning arbitral processes and a body of relevant and meaningful jurisprudence (both legislative and juridical). Some form of mechanism which keeps laws and lawmaking under review is desirable – some would say essential – so that they remain in step with the contemporaneous requirements of society.

However, where law reform is promulgated from outside government – as opposed to from within – the extent to which government is then committed to taking forward proposals for reform becomes a live issue, not just in terms of the proper use of public resources but also in terms of whether the body of law as a whole remains fit for purpose. In the UK the government, including that within the devolved administrations, is the gatekeeper to the parliamentary process. So it is useful to examine how closely government is involved in, or allied to, the mechanics of law reform and the factors which it takes into account when deciding whether or not to pursue reform proposals.

These factors can be traced from the inception of projects for reform, including inclusion right back at the beginning when formulating periodic programmes for work, up to the implementation of political steps required to translate recommendations into statute. And, interestingly, that also throws a spotlight onto the sometimes spurious reasons why government simply fails or refuses to act. As readers will see from the articles in this edition, they can range from the suggestion that timing is not apposite (perhaps because of political sensitiv-

ity) to the assertion that parliamentary time is just not available in sufficient measure.

So the linkage between the law reform agency and the executive, its closeness versus its independence and the former's ability to control its own work programme, have a bearing on the degree to which projects move off the law reform drawing board and into the maelstrom of the legislative process. To what extent must the agency operate at arm's length to ensure that it can balance out intellectual independence as against the likelihood or risk of non- or reduced implementation?

Jacinta Dharmananda provides an illuminating insight into the Australian system, where law reform not only falls within the domain of the federal government but also resonates through the legislatures of the individual states and self-governing territories. None of the law reform agencies, which are generalist rather than specialist in their remit, have a bilateral relationship with their legislatures. Each of the statutory bodies is subordinate to the executive in that project selection by ministers is 'highly influential if not determinative'. In the case of the federal Australian Law Reform Commission (ALRC) the relationships are tripartite in that the Commission is responsible to parliament through the executive's Attorney-General. But although ministers have a statutory obligation to table the Commission reports in parliament within a specified time frame they have no obligation to respond to reports or to refer them to a parliamentary committee for examination. This mirrors in part the practice in England and Wales (although formal response is a requirement). Those reports which are selected by a minister for legislative action are more likely to be given a 'head start' if a draft bill accompanies the recommendations (subject, of course, to achieving a place in the government's overall legislative programme). However, bills are attached to ALRC reports only 'where appropriate', and that practice does not extend to the state commissions and legislatures.

Once law reform bills – including those introduced to achieve codification measures – do find a slot in the parliamentary process, they run alongside ordinary bills: they are afforded no preferential treatment either in terms of timing or navigation through the standard parliamentary stages. Dharmananda highlights the weaknesses which the arrangements at the federal level entail, from delivery of reform proposals to eventual enactment. The absence of any obligation on the part of government to respond to, let alone implement, recommendations is its own source of frustration, as is the absence of adequate parliamentary scrutiny, even for those proposals which seem politically non-controversial. Citing Professor Elizabeth Cooke, she writes that law reform and politics make for 'uneasy neighbours', in Canberra as in Westminster. The solution involves parliament itself. Because it created the ALRC by statute it could – and arguably should – give greater attention to law reform reports and bills through existing scrutiny procedures. That would provide more of an incentive to government to respond to recommendations and to avoid obfuscation, while acknowledging the practical constraints surrounding the availability of drafting resources and parliamentary debating time. Law reform deserves a more rigorous and non-partisan approach within the democratic structure.

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In Ireland, a much smaller jurisdiction, law reform, and the Irish Law Reform Commission (LRC), occupy what Ciarán Burke neatly describes as 'an unusual role' within the 'legislative architecture'. As with Australia and the UK commissions, there is no legal requirement for reform proposals to be legislated upon, but in practice much is followed up. The purpose of law reform in a jurisdiction which inherited a significant body of law from its former colonial master, and which continues to make law in the common law tradition, is both to develop the law and to simplify and modernize it through codification. Much of that law is substantive rather than procedural, which is left to other bodies to transact. The LRC acts independently of government and the legislature (although a creature of statute) and initiates its own law reform projects. But those projects ordinarily feature in a work programme which is developed in consultation with the Attorney-General, and the government has the power to approve or modify the programmes. So care has to be taken to find the right balance between maintaining intellectual and operational independence as against selecting appropriate and acceptable projects. Moreover, the LRC is obliged to act on separate referrals from the Attorney to examine a particular legal issue (although in practice such referrals are relatively few).

The Oireachtas (the Irish parliament) maintains an arm's length relationship with the LRC. It automatically receives the work programmes (there have been five since 1975) and annual reports – the latter feature an analysis of project implementation (although in Ireland implementation *per se* is not treated as a measure of performance or overall success). The in-house procedures and steps which the LRC adopts to achieve its reform outcomes lie within its 'complete discretion': they are designed to embrace rigorous analysis and wide consultation in its effort to deliver on its statutory mission.

In order to achieve what Burke describes as a 'speedy legislative follow-up' many – but not all – LRC reports are accompanied by a draft bill. Unlike in England and Wales, the Commission does not have dedicated legislative drafters embedded within its structure. Instead, drafting (seen as a 'useful discipline') is undertaken in-house by the Director of Research and the Chief Commissioner, curiously – as the author remarks – without the benefit of parliamentary counsel's closely guarded drafting manual (although that has not proved a hindrance in practice). Not all reports recommend a change in the law and those reports which do, but are not accompanied by bills, may lack that facility through 'political expediency'. Once bills are introduced into the Oireachtas (via either House in the bicameral system) they follow the same route as government policy bills. Government under the Irish 1937 Constitution has principal control of parliamentary business, which includes whether or not to introduce LRC-inspired bills. But in a small jurisdiction other pressures may be brought to bear on whether or not legislative action is followed through. Parliamentary deputies – including those on the opposition benches – may well invoke LRC reports in legislative debates or ask ministers when responses to reports are due. But the other source of external pressure is from the public and the media. Publication of LRC reports often generates press interest and media coverage. This has contributed to a healthy implementation rate of around 70% of all reports (slightly exceeding the Australian

and the English and Welsh rates), sometimes in full or via a 'piecemeal approach', given that it is not always practicable to act upon all recommendations at a given moment. On the whole the LRC's output is accorded considerable respect by legislators and, notwithstanding the 2008 financial crisis, the Commission has proved 'remarkably resilient', operating within its straitened resources.

Parliamentary processes and insufficiency of parliamentary time are often cited by governments as reasons why law reform has to take a low priority on their legislative agendas. But at Westminster – the parliament for both the United Kingdom and England (Wales has its own devolved legislature) – this myth is exploded by our authors Andrew Makower and Liam Laurence Smyth, Clerks of Legislation in the Houses of Lords and Commons, respectively. They are responsible for the accuracy and integrity of primary legislative text, right from introduction up to enactment. In their article they focus on the special procedures available for consolidation bills and bills which contain non-controversial law reform proposals, and they address the manner in which government prioritizes (or perhaps does not prioritize) the implementation of Law Commission recommendations.

Following the coming into force in January 2010 of the Law Commission Act 2009 (underpinned by the March 2010 Protocol (Law Com No 321) between the Ministry of Justice and the Law Commission for England and Wales), government is now required to produce annual reports on its response to Law Commission reports, indicating those which have been implemented and those which are still pending (or have been rejected). These reports have to set forth the reasoning for delays or rejection. Makower and Laurence Smyth make the point that, notwithstanding the 2010 changes, there may be more transparency but no obvious increase in implementation rates, including on consolidation measures (for which a special fast-track parliamentary process exists to facilitate statute book simplification). Government indicates in its annual reports that insufficiency of parliamentary time is one cause of the delay in bringing forward Law Commission bills, thus deflecting opprobrium. But the authors demonstrate that parliamentary time is actually 'abundant', and that the logjam occurs at a much earlier stage in the proceedings. Government has control over the bulk of the legislative agenda (determined by a specialist cabinet committee). In reality, law reform bills simply struggle to find a place in the political prioritization process unless the proposals slot neatly into a 'flagship' bill which has already set sail and has a fair wind behind it.

Can parliament itself do anything about any of this, given that members of both Houses over the course of time have recognized – rather as in Ireland – the depth of research and learning which make Law Commission proposals a valuable adjunct to lawmaking? The answer is several fold. Although the rules for consolidation bills – bringing together layers of existing legislation – are necessarily restrictive, limiting the degree to which amendments can be tabled, there is still a parliamentary avenue whereby non-controversial amendments could be made. The mechanism could be employed to facilitate the process of amendment, consolidation and enhanced statute codification (and subsequent protection of the codified structure). The approach would complement the existing procedures

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(introduced in 2008) for progressing non-controversial pure law reform bills, which have worked well in practice, and would utilize the vehicle of special public bill committees.[7]

Running alongside this approach, three other more substantive mechanisms could be brought into play. First, neither pre- nor post-legislative scrutiny has been applied to Law Commission bills as a systematic or routine measure utilizing select committees in either House (although the House of Lords' review of the Bribery Act 2010 in 2019 was an exception). Second, the Commons Justice Select Committee could take a much more proactive stance in reviewing the MoJ annual reports on law reform implementation, particularly where progress seems insufficient. And, third, parliament itself might take greater ownership of the law reform programme, as to both its construction and its delivery. The existing Joint Committee [of both Houses] on Consolidation Bills could be proactive rather than purely reactive in initiating – or, at least, recommending – consolidation work in areas of law which have become demonstrably over-amended and over-complicated. These are all lines of thought which would bear careful exploration by UK parliamentarians.

D Conclusions

There are limited comparisons you can usefully draw between the civil law and the common law jurisdictions we chose to review for the workshop in November 2019 and this special issue of the *ELJR*, partly because the two articles on Albania and the Arab states analyse jurisdictions which are going through lengthy periods of reconstruction and transition, where their polities are still in a state of development, and the three articles on jurisdictions with well-rooted democratic traditions, which have accrued – whether by indigenous processes or from colonial inheritance or both – substantial bodies of legislative law. On the face of it, this is like comparing (to use a British expression) chalk and cheese.

But what makes some form of comparison valid is that each jurisdiction espouses democratic principles and an acknowledgment that social and political stability is achieved through the rule of law. As a consequence, the legislative processes are geared towards ensuring that legislation meets the needs of the community it serves, that it meets standards of drafting and principle which accord with international norms, and that it is subjected to careful scrutiny and testing before it is enacted. Reform in Albania and the Arab region is focused on creating a body of law which will pull together the threads of the past and weave them into a pattern which enables the nation or nations to operate on a global stage embodying economic, cultural and security challenges. Those same challenges confront the common law nations that need to ensure that their law reform endeavours keep abreast of law which has developed down the years – and keeps

7 On the issue of attempts to improve implementation rates (and oversight) through changes to parliamentary procedures, *see also* S. Wilson Stark, *The Work of the British Law Commissions: Law Reform … Now?*, Oxford, Hart Publishing, 2017, chap 4 at pp. 128-132 (for England and Wales) and pp. 146-148 (for Scotland) for a helpful analysis.

developing – through a combination of statute and judicial pronouncement. Australia, Ireland and the United Kingdom are cases in point. Both models call for robust parliamentary mechanisms to scrutinize the work of government as well as to enact legislation which takes account of the needs and obligations of their citizenry.

Societies the world over are in a continual state of flux and development. Law reform, in whatever guise, keeps that law fit for contemporaneous purpose, a purpose which needs vigilant oversight. Each nation will adopt the model which sits most comfortably with its own values and traditions. The following pages are designed to give some insight into the strengths and weaknesses of a few of them. The IALS Law Reform Project will keep on working – with the help of our many colleagues – to extend and share our knowledge of law reform processes across the globe.

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