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The English Law Commission: A New Philosophy of Law Reform¹

R. J. Sutton*

Mr. Sutton discusses the newly formed English Law Commission in an effort to present constructive suggestions for the establishment and maintenance of effective law revision programs for other jurisdictions. He examines the structure of the English commission and points out that the qualities of flexibility, independence, and opportunity for early compromise of its proposals with legislators are essential for a successful law revision commission. The author concludes that the major value to be gained from the English commission is its adoption of a new philosophy of law reform—give the commission sufficient latitude to enable it to stimulate advanced legislation.

Lawyers in the British Commonwealth are becoming increasingly concerned about the need for an official agency which can accomplish law reform.² The law has many shortcomings. They are debated in legal writings, at professional conventions and at local law society meetings where complaints are made by law practitioners. There is a gap, however, between agitation and reform. Probably nothing will come of the proposals for change unless somebody undertakes the task of investigating the complaints, refining the proposals to a point where they can properly be translated into law, and then submitting these proposals to the appropriate authority. Is there an agency that effectively performs that function? Should it go beyond the investigation of complaints, and initiate a comprehensive program of reform?

The English Law Commission was established in 1965 with the express duty of reforming English law.³ The initiative came from the

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1. Grateful acknowledgments are due to Dr. Gareth Jones of Trinity College, Cambridge, and Visiting Professor at the Harvard Law School, 1966-1967, who supplied basic materials which have been of the greatest assistance in the preparation of this article.

2. See, e.g., Goodhart, *Law Reform in England*, 33 *AUSTL. L.J.* 126 (1959); Megarry, *Law Reform*, 34 *CAN. B.R.* 691 (1956). See generally Cardozo, *A Ministry of Justice*, 35 *HARV. L. REV.* 113 (1921); Stone & Pettee, *Revision of Private Law*, 54 *HARV. L. REV.* 221 (1940).

3. Law Commissions Act 1965 c. 22 (establishing separate law commissions for England and Scotland). See Chorley & Dworkin, *The Law Commissions Act, 1965*, 28 *MOD. L. REV.* 675 (1965); cf. Heineman, *A Law Revision Commission for Illinois*, 42 *ILL. L. REV.* 697 (1948); MacDonald, *The New York Law Revision Commission*,

Lord Chancellor, Lord Gardiner, who, prior to his appointment, had sharply criticized the previous arrangements for achieving law reform.⁴ In his view, the pace of reform had been much too slow. A radical change was necessary if the law was not to fall far behind what was required of it under modern conditions. Noteworthy features of the Commission, which immediately distinguished it from its predecessors, were its formal constitution by legislation, its full-time members, its control of a full-time staff, and its responsibility for a planned program of law reform.⁵ But beneath these apparent differences lay something much more important—an entirely new philosophy of law reform. The task of shaping the common law, which had for so long been in the hands of the legal profession, was in a large measure to be taken away from them. New, contemporary values were to be infused into the traditions of the law. In the words of the chairman of the Commission, “in many respects law reform is too serious a matter to be left to the legal profession.”⁶ The purpose of this article is to examine some of the implications of this new philosophy in relation to the structure, functions and effectiveness of the Commission.

In making this examination, useful comparisons can be drawn with a law revision commission established in New Zealand shortly after the English Commission had been set up. The New Zealand Minister of Justice had also become unhappy about the way law reform had been carried out in his country.⁷ The solution he proposed, however, was conceived along much more traditional lines. It was based upon the notion of a partnership between the various bodies which would normally be involved in the making of law, that is, the legal profession, university lawyers, the legislature and the Department of Justice.⁸ Representatives of all these bodies were to play a part in the activities undertaken by the new Commission. The New Zealand Commission, therefore, involved not so much a shift in the responsibility for law reform, as a new and improved technique aimed at ensuring that existing responsibilities are fulfilled.

28 MOD. L. REV. 1 (1965); MacDonald & Rosenzweig, *The Law Revision Commission of the State of New York: Its Organization, Procedure, Program and Accomplishment*, 20 CORNELL L.Q. 415 (1935); Schientag, *A Ministry of Justice in Action*, 22 CORNELL L.Q. 183 (1937).

4. LAW REFORM NOW 1-14 (G. Gardiner & A. Martin eds. 1963) (hereinafter cited as Gardiner & Martin); *OF THE REFORM OF THE LAW* 9-21 (G. Williams ed. 1951) (hereinafter cited as Williams).

5. Law Commission Act 1965 c.22, §§ 1,3.

6. Scarman, *The Role of the Legal Profession in Law Reform*, 21 RECORD OF N.Y.C.B.A. 11, 12 (1966).

7. J. HANAN, *THE LAW IN A CHANGING SOCIETY—A POLICY AND PROGRAMME FOR LAW REFORM* (1965).

8. *Id.* at 20-25. For the establishment of the proposed Commission, see N.Z. DEP'T OF JUSTICE ANN. REP. 1965-1966 at 18 (1966).

It is by no means clear whether a commission of the English type is in fact the best way of bridging the gap between dissatisfaction with particular rules of law and their eventual reform. Indeed, it would be presumptuous to suggest that there is any one "best way" when law reform agencies exist in states and countries where the common law and professional attitudes towards it are in very different stages of development. However, there are certain questions which can usefully be asked. What reasons appear to have led the English Lord Chancellor to the view that a radical break with the past was necessary, while his New Zealand counterpart came to the opposite conclusion? What structure does the independent English Commission have, and how is its independence likely to affect its chances of achieving specific reforms? Finally, what impact is the new philosophy of law reform to have on the program of reform undertaken by the Commission? These are matters that deserve the most serious consideration before the English Commission can be held up as the model law reform commission of the future.

I. LAW REFORM BEFORE THE COMMISSION

What factors influenced the Lord Chancellor in adopting a new philosophy of law reform? It seems that much more was involved than his own personal predilections. An examination of the recent history of law reform in England suggests that two matters in particular would call for close scrutiny in any review of existing law reform arrangements. They were (1) the comparative lack of productivity of the only agency which had an overall responsibility for reform of the general law, and (2) the existence of certain entrenched attitudes within the profession which seemed, at least to more liberal critics, inimical to the development of a modern system of law. A comparison with the corresponding situation in New Zealand, where much less concern was expressed on these matters, tends to confirm the impression that they weighed heavily in the Lord Chancellor's calculations.

The Law Revision Committee, appointed early in 1934, was the first official agency in England specifically devoted to the general reform of the law. When it went into recess at the outset of World War II, it had produced eight reports, on seven of which the legislature subsequently acted. In 1952, the Law Reform Committee was established, with the same functions. That Committee produced fourteen reports, seven of which have so far resulted in legislation.⁹

9. Wade, *The Machinery of Law Reform*, 24 *Mod. L. Rev.* 3 (1961). The appendix to Professor Wade's article contains a list of the Committees' reports and consequential legislation. For subsequent work, see *LAW REFORM COMMITTEE, NINTH REPORT, CMD. NO. 1268 (1960)* (liability in tort between husband and wife); *LAW REFORM COMMITTEE, TENTH REPORT, CMD. NO. 1782 (1962)* (remedies for innocent misrepre-

This does not, however, give a fair idea of law reform activities in England during the period. Two "permanent" committees had been set up to deal with reform of criminal law and private international law respectively, on a continuing basis. A fair number of committees concerned specifically with one reform had also reported.¹⁰ Moreover, it would be unwise to judge the committee solely on the number of reforms effected, without regard to their legal and social importance and the general state of obsolescence of the law with which they dealt. In fact, many of the committees' reports dealt with matters of great legal difficulty, and they are to be credited with some important reforms.¹¹

Nevertheless, the critics of the status quo had a great deal of ammunition at their disposal. Many anomalous features of English law still remained.¹² Large areas of law had been allowed to grow, without overall direction, and were ripe for re-examination, yet nothing was being done. Furthermore, the committees were "representative" in the sense that their members were purposely drawn from the various branches of the profession—from the judges, the barristers, the solicitors and the academic lawyers.¹³ This gave ground for doubts whether such a committee could carry out this large task.¹⁴ Would its part-time members be able to devote sufficient time to it? Might not a body in which barristers and judges were so predominant be unduly hampered by established professional attitudes? And, above all, how could one hope for a comprehensive and consistent system of law when so many different bodies were responsible for its reform?

In New Zealand, on the other hand, the last twenty years of law reform were considerably more successful, at least in the view of

sentation); LAW REFORM COMMITTEE, ELEVENTH REPORT, CMD. No. 2017 (1963) (damages for loss of services of servant, wife or child); LAW REFORM COMMITTEE, TWELFTH REPORT, CMD. No. 2958 (1966) (transfer of title to chattels); LAW REFORM COMMITTEE, THIRTEENTH REPORT, CMD. No. 2964 (1966) (hearsay evidence in civil proceedings); LAW REFORM COMMITTEE, FOURTEENTH REPORT, CMD. No. 3100 (1966) (acquisition of easements and profits by prescription).

10. For details of the work of the ad hoc committees, see Wade, *supra* note 9, app. pt. 2. The reasons for the successes and failures of some of them are analysed by Goodhart, *supra* note 2.

11. Notable examples are the principles of contribution between joint tortfeasors and contributory negligence. These must surely now have daily application in the courts. See Law Reform (Married Women and Tortfeasors) Act 1935, 25 & 26 Geo. 5, c. 30; Law Reform (Contributory Negligence) Act 1945, 8, 9 & 10 Geo. 6, c. 28; LAW REVISION COMMITTEE, THIRD REPORT, CMD. No. 4637 (1934); LAW REVISION COMMITTEE, EIGHTH REPORT, CMD. No. 6032 (1939).

12. See LAW COMMISSION, FIRST PROGRAMME 13-14 (1966).

13. See Wade, *supra* note 9, app. pt. 1. The committees were heavily weighted on the side of court lawyers. For example, in 1960, the Law Reform Committee comprised five Supreme Court judges and law lords, five practising barristers, two solicitors and three academic lawyers.

14. See 258 PARL. DEB., H.L. (5th ser.) 1087 (1964); Gardiner & Martin 2-7; Chorley & Dworkin, *supra* note 3, at 681.

those associated with reform in that country.¹⁵ The reasons for this sense of achievement are of some importance to the present enquiry. There seem to be four significant factors. First, although a law revision committee was set up in 1936 along the same lines as the English Law Revision Committee, its practice was very different. It preferred to consider a large number of lesser matters, rather than to concentrate on a few major ones.¹⁶ The major studies it did undertake were delegated to very small subcommittees.¹⁷ Thus, while each reform effected was probably of smaller compass than those undertaken by the English committees, the overall result was perhaps more impressive. Second, at the same time the Law Revision Committee was formed, a section of the Justice Department which would be specifically responsible for law reform was set up. Capable lawyers within the department not only assisted the Committee in its research, but also initiated reforms through the department itself. Third, the Minister of Justice or his deputy sat as a member of the Committee. Presumably he steered the Committee away from areas of reform which for political reasons would prove fruitless, and he also provided the Committee with an influential friend in the legislature. Thus, there was less danger that the Committee's work would go for nothing because of political opposition. Finally, to the body of "home-grown" reform¹⁸ were added a number of English reforms which New Zealand adopted.¹⁹ Although the introduction of English

15. J. HANAN, *supra* note 7, at 1-19; Cameron, *Law Reform in New Zealand*, 32 N.Z.L.J. 72, 88, 106-08 (1956). On the formation of the New Zealand Law Revision Committee, see Sim, *Law Reform in New Zealand*, 12 N.Z.L.J. 86 (1936); *Law Revision Committee—The Attorney-General's Inaugural Address*, 13 N.Z.L.J. 224 (1937); *The Law Revision Committee's Work in 1937*, 13 N.Z.L.J. 337 (1937). Its recommendations were not published, but its activities were reported briefly and sporadically in the *New Zealand Law Journal*.

16. The Committee considered about 250 suggestions, of which some 160 were the subject of recommendations. The "great majority" of recommendations resulted in legislation. J. HANAN, *supra* note 7, at 7.

17. *E.g.*, *New Zealand Law Revision Committee—Tenth Meeting*, 16 N.Z.L.J. 120 (1940) (procedural code for courts of limited civil jurisdiction); *The Law Revision Committee's Work*, 23 N.Z.L.J. 328 (1947) (property legislation; magistrates' courts); *The Work of the Law Revision Committee*, 14 N.Z.L.J. 357 (1938) (imperial statutes).

18. *See, e.g.*, Legitimation Act 1939, 7 N.Z. Reprint 847 (legitimation *per subsequens matrimonium*); Law Reform (Testamentary Promises) Act 1949, 7 N.Z. Reprint 823 (provision for enforcement of promises to make testamentary benefaction in appropriate cases); Joint Family Homes Act 1950, 6 N.Z. Reprint 673 (optional protection for family homes against sale for non-payment of debts and alienation by owner spouse); Wills Amendment Act 1958, N.Z. Stat. 1958 at 158 (statutory substitution of grandchildren where child of testator predeceases him); Simultaneous Deaths Act 1958, N.Z. Stat. 1958 at 405 (passing of estate where time of death uncertain); Judicature Amendment Act 1958, N.Z. Stat. 1958 at 417 (new provisions in respect of money paid under mistake). Some of these reforms were based on Commonwealth or United States legislation.

19. *E.g.*, Law Reform Act 1936, 7 N.Z. Reprint 817 (contribution between joint tortfeasors; capacities and liabilities of married women); Frustrated Contracts Act 1944,

legislation required some study in order to ensure that it was appropriate under New Zealand circumstances, the fact that it had already been accepted in England made the way much smoother.

The foregoing comparisons go a long way toward explaining why the two countries chose different forms of law revision commissions. In England, the Lord Chancellor, anxious to promote a comprehensive scheme of law reform, could find little foundation in the existing institutions on which to build. In New Zealand, on the other hand, a foundation had already been laid, with the Law Revision Committee acting as a pivot in the relationship between the profession, the academic lawyers and the Justice Department.

No doubt improvements could have been effected in the English machinery of law reform. But even so, would it have met the new demands being made upon it? Or had the time come for a reappraisal of the legal profession's role in law reform? The Lord Chancellor evidently made such a reappraisal, and concluded that the initiative for reform could no longer rest with the profession alone.

This does not mean that the English profession had failed in its basic responsibilities. A promoter of law reform is a specialist, just as a judge or an advocate, and the law cannot hold back the age of specialization forever. But certain professional attitudes may have contributed to the decision. English writers have cited well meaning conservative opposition from within the profession as a major factor in past delays in legislative reform.²⁰ Perhaps for the same reason, the tempo of judicial reform has been curiously uneven.²¹ Connected with this conservatism is the tremendous deference judges occasionally pay to ancient decisions, at the possible expense of a consistent structure of modern principle. A striking illustration is *Ministry of Health v. Simpson*,²² in which the following very modern

5 N.Z. Reprint 495; Limitation Act 1950, 8 N.Z. Reprint 393; Judicature Amendment Act 1952, 6 N.Z. Reprint 741 (interest on unpaid money claims); Defamation Act 1954, 3 N.Z. Reprint 861; Contracts Enforcement Act 1956, 2 N.Z. Reprint 751; Occupiers Liability Act 1962; Innkeepers Act 1962; Perpetuities Act 1964. In some cases, English reforms were anticipated in New Zealand. See, e.g., *Law Reform Act 1936*, 7 N.Z. Reprint 810 (abolition of common employment rule); *Trustee Act 1956*, 16 N.Z. Reprint 150 (variation of trusts).

20. Chorley & Dworkin, *supra* note 3, at 677 n.10; Williams 12.

21. Compare, e.g., *Hedley Byrne & Co. v. Heller & Partners*, [1964] A.C. 465, where the House of Lords, overruling a previous Court of Appeal decision, made a far-reaching extension of liability for careless misrepresentation, with *Myers v. D.P.P.*, [1965] A.C. 1001, where the same court declined to re-examine the "patchwork quilt" of the hearsay rule, Lords Pearce and Donovan dissenting. The first decision caused a much greater adjustment of social interests than a different decision would have in the second.

22. [1951] A.C. 251, *aff'g* *Diplock v. Wintle*, [1948] 1 Ch. 465 (C.A.), *rev'g* [1947] 1 Ch. 716. Lord Simonds, at 268, attributed the error of the court at first instance to counsel's failure to draw its attention to seventeenth and eighteenth century decisions.

problem arose: A trustee paid trust money to someone not entitled to it, under a mistake of law, and was subsequently relieved of responsibility to the beneficiaries under a trustee relief statute. Can the beneficiaries recover the money from the payee? The court solved the problem largely by reference to seventeenth century decisions on waste. Most serious of all, English courts have been criticized for paying too little attention to decisions of courts in the Commonwealth and the United States.²³

Can the lawyer shake off these habits of thought when he begins to deliberate law reform? There are indications that this was too much to expect even of the eminent members of the reform committees.²⁴ However, for obvious reasons, these attitudes cannot be permitted to intrude into a large scale program for law reform. This consideration may have led the Lord Chancellor to the view that a law commission should infuse new values into law reform, leading professional thought rather than following it. Certainly, the following examination of the structure of the Commission can leave little doubt that this is to be its role.

II. THE STRUCTURE AND PROCEDURES OF THE COMMISSION

The predominant feature of the English Law Commission, which sets it apart from the more traditional law reform agencies, is its almost complete insulation from any kind of external control. Its independence of the government, the legislature, and even, to some extent, the Lord Chancellor is secured by a constitution laid down by Act of Parliament.²⁵ Its freedom to transcend ordinary professional

23. Wade, *supra* note 9, at 9; see *Informed Opinions*, 37 AUSTL. L.J. 137 (1963). But cf. *Informed Opinions*, 38 AUSTL. L.J. 186 (1964). On the other hand, the New Zealand profession has been taken to task for its undue reliance on overseas precedent, especially English, without adapting it to local circumstances. Cameron, *supra* note 15, at 73-74.

24. On the small degree to which overseas material was used in law reform, see Wade, *supra* note 9, at 8-9. He cites as an extreme instance the Porter Committee on Defamation, which "dismissed the voluminous study of the law of libel throughout the Commonwealth and the United States which was prepared for them by Dr. Glanville Williams and the late Sir Percy Winfield respectively with a bare sentence." COMMITTEE ON THE LAW OF DEFAMATION, REPORT, CMD. No. 7536 (1948), especially ¶ 3. Charges of conservatism and preoccupation with historical matters would be more difficult to support. It is true, however, that the Law Reform Committee in some of its earlier reports tended to prefer to stay with old conceptions when perhaps a more radical approach was called for. See LAW REFORM COMMITTEE, SECOND REPORT, CMD. No. 9161 (1954) (innkeepers' liability); LAW REFORM COMMITTEE, FOURTH REPORT, CMD. No. 18 (1956) (rule against perpetuities). There is also extensive discussion of history in many of the reports of both the Law Reform Committee and the Law Revision Committee. Furthermore, the committees seemed to have a cautious policy in selecting topics, preferring matters that have already aroused much professional dissatisfaction. Professor Goodhart defends such a policy. See Goodhart, *supra* note 2, at 13.

25. Law Commissions Act 1965, c. 22.

values is attained by the abandonment of the principle that a law reform body should be representative of the various branches of the legal profession.²⁶ Thus, the Commission is designed as a small, closely knit striking force whose object will be to inject new life into English law reform.

A closer examination of the constitution and procedures of the Commission shows how tightly the control of law reform is held by the Commission, to the exclusion of any political influence. It is actively involved in every stage of preparation of the reforms which will eventually be presented to Parliament for passage as legislation. As a body, it decides on a general program of law reform, and then, subject to the approval of the Lord Chancellor, begins work on specific projects within that program. One of its members then heads a group of research assistants who make the initial investigation of the project. If working parties are formed to make more comprehensive enquiries, a member of the Commission will be its chairman, though the legal profession and interested government departments will be represented on the working parties. A report will then be made back to the Commission, whose final report on the proposed reform will be presented to the Lord Chancellor.²⁷ The staff employed by the Commission includes not only research assistants, but also statutory draftsmen responsible for the preparation of reform bills.²⁸ Thus, the entire process of bringing reform to the door of the legislature is in the hands of the Commission, subject only to initial reference to the Lord Chancellor, whose many other duties will no doubt prevent his making any active surveillance of the Commission's activities.²⁹

A corollary of this policy of freeing the Commission of political or governmental dependence, was the decision not to include any cabinet representative on the Commission. In his initial, unofficial proposals before his appointment as Lord Chancellor, Lord Gardiner had proposed that the president of the Commission should be chosen from the House of Commons, be styled "Vice-Chancellor" and have the rank of Minister of State, with his entire responsibility being that of law reform.³⁰ But in the Law Commissions Act, this part of the design was not included, presumably because of its inconsistency with the Commission's independent status. This decision is a some-

26. See text accompanying notes 34-37 *infra*.

27. Law Commissions Act 1965, c. 22, § 3; LAW COMM'N FIRST ANN. REP. 1965-1966, §§ 7-13, 28-30, app. I (1966).

28. LAW COMM'N FIRST ANN. REP. 1965-1966, §§ 10-11 (1966). The Commission then had a staff of 35, comprising the Secretary, four draftsmen, nine other lawyers and twenty-one non-legal members.

29. Gardiner & Martin 8; Williams 13-14.

30. Gardiner & Martin 8.

what debatable feature of the structure of the Commission, because the experience of law reform agencies in which political figures have played a part in their deliberations seems to indicate that their presence is valuable.³¹ If reforms are to be effected through legislation, it is very important that some member of the legislature, preferably an influential one, be prepared to identify himself with the reform and to speak on its behalf. Moreover, some reforms, however desirable, are just not politically feasible; if the reform agency wants to avoid undertaking work which will not produce results, it will find the advice of someone with political experience extremely helpful. On the other hand, the English profession has always tended to resist political involvement in law reform for fear that it might lead to political interference with the general administration of law.³² This fear, however, appears exaggerated, and certainly the experience in New York and New Zealand,³³ where such political involvement exists, gives it no basis whatsoever. Perhaps a more real apprehension is that a representative of the government or the legislature might tend to steer the Commission away from any area of reform where the political consequences would be uncertain, with the result that very unsatisfactory parts of the law would not be dealt with at all. But this seems to be a matter in which one would have to rely on the good sense of the Commission as a whole, as is so often the case.

Turning now to the question of the relationship of the Commission to the legal profession, this question centered around the selection of the members of the Commission themselves. How many should there be, and on what principles should they be appointed? It was decided that the Commission should be small, expert and non-representative. There are five commissioners, including the chairman. No restrictions are placed on how the Commission should be made up, except that each member must be "suitably qualified by the holding of judicial office or by experience as a barrister or solicitor or as a teacher of law in a university."³⁴ The appointments actually made re-emphasised the advent of a new philosophy of reform. Of the appointees, one (the chairman) was a judge, one a retired barrister, and no less than three were what could properly be described as "academic lawyers" although two of them had professional experience.³⁵ An interesting

31. J. HANAN, *supra* note 7, at 16; Heineman, *supra* note 3, at 718. For a recent plea for more governmental involvement in law reform, see Winters, *A Ministry of Justice: The Time to Act is Now*, 48 J. AM. JUDIC. SOC'Y 206 (1965).

32. Chorley & Dworkin, *supra* note 3, at 679 n.22; Williams 12.

33. N.Z. DEP'T OF JUSTICE ANN. REP. 1960-61 at 6 (1961); MacDonald, *supra* note 3, at 10, n.44.

34. Law Commissions Act 1965, c. 22, §§ 1, 3.

35. Chorley & Dworkin, *supra* note 3, at 686. The members of the Commission are there described as follows: Mr. Justice Scarman, a High Court Judge assigned to the Probate, Divorce and Admiralty Division; Mr. Neil Lawson, Q.C., a retired bar-

feature of the appointments, in view of the suggestion made in the previous part that English practitioners do not refer to decisions of courts outside their own jurisdiction, was the fact that two of the new commissioners were experts in comparative law. Inevitably, the appointments aroused controversy, the details of which are recounted elsewhere.³⁶ But the crucial fact was that the old Law Reform Committee, which had been solidly representative of the legal profession, was now replaced by a small group of men whose views were likely to be well in advance of those generally held in the profession.³⁷

This development brought with it a major problem. By what means could the profession be persuaded to support the Commission's proposal for law reform, since they would be based on more liberal values than those of the majority of practitioners? Any substantial opposition from that quarter would mean that a particular reform opposed would almost certainly be stalled, and possibly doomed. Techniques had to be devised whereby objections to the reform could be met at an early stage, and the reform modified if necessary. Moreover, the profession still had a role to play in reform. The difficulty was how to give it as large a part in the process as possible, without compromising the fundamental objective of speeding up the rate of achievement.

The techniques adopted by the Commission deserve close attention, as they are both novel and skillfully conceived. In the first place, while the Commission draws up its own program of reform, it does so on the basis of the many proposals it invites and receives from the profession, from law teachers, from government departments and from the lay public.³⁸ Second, it undertakes a great deal of consultation

ristler; Professor L.C.B. Gower, a solicitor who "has spent the previous seventeen years mainly in academic work, the last three in Nigeria;" Mr. N. S. Marsh, the Director of the British Institute of International and Comparative Law, and previously an Oxford don; and Professor Andrew Martin, Q.C., Professor of International and Comparative Law at the University of Southampton and a practising barrister. The last named was a co-editor of *LAW REFORM NOW*, *supra* note 4.

36. Chorley & Dworkin, *supra* note 3, at 684-87.

37. *Cf. supra* note 13. It should be noted that a further danger with a representative law reform agency is that it may tend to avoid controversial issues, because it feels it cannot resolve conflicting points of view. Occasional examples of declining to meet issues are to be found in the record of the New Zealand Law Revision Committee. See its handling of liability for livestock wandering on the roads, *Law Revision Committee Tenth Meeting*, 16 N.Z.L.J. 120, 121 (1940), and *Law Revision Committee Twelfth Meeting*, 21 N.Z.L.J. 233 (1945); admissibility of records in criminal cases, *Law Revision Committee Forty-Fifth Meeting*, [1962] N.Z.L.J. 350 (*But see* the Evidence Amendment Act 1966); and absolute liability for motor accidents, *Law Revision Committee Forty-Fifth Meeting*, [1962] N.Z.L.J. 350; *Law Revision Committee Fiftieth Meeting*, [1965] N.Z.L.J. 63, and the totally inconclusive *REPORT OF THE COMMITTEE ON ABSOLUTE LIABILITY* (1963). Such a tendency, however, has not been cited as a serious problem in New Zealand's program of law reform.

38. *LAW COMM'N FIRST ANN. REP. 1965-1966* ¶¶ 127-30 (1966). At that stage, 632 law reform proposals had been received. The sources were: legal profession (including

with members of the profession. It has a Special Consultant who is a solicitor, and whose function is to present the views of that branch of the profession to the Commission. He spends a great amount of time with the commissioners, and gives them valuable assistance.³⁹ Arrangements have been made through the various professional societies for informal consultations whenever the Commission feels the need for them.⁴⁰ Finally, where a matter is large and controversial, working parties have been set up, consisting of members of the Commission, practicing lawyers and members of interested organisations.⁴¹ The function of these groups is to investigate possible opposition to the proposed reform, either informally or by way of public hearing. Of course, the question still remains, will these devices be sufficient? As yet, it is much too early to assess their efficacy.

One technique for assuring professional acceptance for reform seems to have been overlooked. It is the promotion of certain reforms, not through legislation, but through judicial decision. By addressing reports to the judiciary, the Commission could give the courts the first opportunity to put a misconceived rule of law aright. The report would bring much more relevant information to the court's attention than would normally be possible in an adversary hearing, and in a more impartial manner. If the court were to accept the Commission's reasoning, and apply it in its decisions, then conservative opposition would lose much of its force.

This suggested technique would have other advantages as well. Some legal doctrines are best developed step by step, rather than delineated once and for all in a statute. One example, considered by the New York Law Revision Commission, was the rule that an infant had no right to claim damages for injuries suffered while *en ventre sa mere*, as a consequence of negligent conduct towards the mother.⁴² The Commission refused to recommend legislation, feeling that the matter was best left to judicial correction, which in fact

professional associations, law teachers and lawyers in government departments), 58%; individual members of the public, 24%; non-legal organizations, 8%; found in the legal and lay press, 10%. Of these proposals, 38% were made part of the immediate program of reform, 40% deferred for later consideration, 17% referred to Government departments. On the remaining 5%, the Commission found no action could appropriately be taken. Compare the lack of public response to the activities of the Law Reform Committee discussed by Wade, *supra* note 9, at 4-5.

39. LAW COMM'N FIRST ANN. REP. 1965-1966 ¶ 8. See Chlorley & Dworkin, *supra* note 3, at 686-87.

40. LAW COMM'N FIRST ANN. REP. 1965-1966 ¶¶ 22-23. Cf. Hollands, *The Work of the Committee to Co-operate with the Law Revision Commission*, 37 N.Y.S.B.J. 58 (1965) (account of situation in New York).

41. LAW COMM'N FIRST ANN. REP. 1965-1966 ¶¶ 36-38, 67, 73, 90, app. I. Working parties have been formed to deal with exemption clauses in contracts, codification of the law of landlord and tenant, restrictive covenants in transfers of land and recognition of foreign decrees of divorce and legal separation.

42. *Drobner v. Peters*, 232 N.Y. 220, 133 N.E. 567, 191 N.Y.S. 220 (1921).

happened.⁴³ This approach nearly had spectacular consequences recently, when the New York Court of Claims allowed a plaintiff to claim damages in respect of the defendant's negligently allowing intercourse between the plaintiff's mother and a third person, resulting in the plaintiff's conception and birth without proper family status. A statute would have been most unlikely to cover such a contingency, but would probably have prevented the court from extending the common law to meet the situation. On appeal, however, the Court of Claims' decision was reversed.⁴⁴

Of course, not every reform can be promoted through the courts. Some require a precision of statement, or a refined regulatory technique, which only a statute can give them. But where this method is available, it is a useful alternative, especially in view of the many difficulties involved in legislative reform. The pressure on parliamentary time, resulting in a bottleneck at which reform bills seem the most likely to suffer, was much discussed when the English Commission was established, but nothing was done about it.⁴⁵ The fact that a new principle of law must, when embodied in a statute, be expressed in precise terminology, may distort the philosophy behind the new rules, and subject the reform to the additional and complicated process of statutory interpretation.⁴⁶ All these considerations suggest that reform through judicial decision should not too hastily be dismissed as impracticable.

What conclusions are to be drawn from an examination of the structure and procedures of the Law Commission? It seems that the sponsors of the Commission were successful in their objective, to create a law reform agency capable of marching ahead of professional opinion. But this success may have its price, because of the Commission's basic lack of liaison with the profession and the

43. *Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691 (1951); N.Y. LAW REVISION COMM'N, COMMUNICATION TO THE LEGISLATURE RELATING TO PRE-NATAL INJURIES, N.Y. LEG. DOC. NO. 60H (1935); Fuld, *The Commission and the Courts*, 40 CORNELL L.Q. 646, 657-58 (1955).

44. *Williams v. State*, 46 Misc. 2d 824, 260 N.Y.S.2d 953 (Ct. Cl. 1965), *rev'd*, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966). On the general problem of analogising from legislation, see Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4 (1936).

45. Chorley & Dworkin, *supra* note 3, at 682; Devlin, *The Process of Law Reform*, 63 LAW SOC. GAZ. 453 (1956). See generally Hutton, *Mechanics of Law Reform*, 24 MOD. L. REV. 18 (1961); MacDonald, *Legal Research Translated into Legislative Action*, 48 CORNELL L.Q. 401 (1963).

46. The English techniques of statutory interpretation are under consideration by the Law Commission. LAW COMM'N FIRST ANN. REP. 1965-1966 ¶¶ 107-12 (1966). No doubt the use of the legislative history in interpreting a statute will be closely considered, see Gardiner & Martin 13. New techniques of drafting may also help. The Law Reform Committee tried a statutory "statement of principle" in the Occupiers' Liability Act, 5 & 6 Eliz. 2, c. 31, §§ 1, 2 (1957). LAW REFORM COMMITTEE, THIRD REPORT, CMD. NO. 9305 (1954).

government. If the price is paid in terms of a mounting collection of recommendations for reform which can command neither judicial nor legislative acceptance, then the Commission's independence will be costly indeed. If, on the other hand, it can solve these problems, by means of a judiciously chosen program of reform and the use of such techniques as have been described to overcome the friction caused by its activities, then its prospects of achievement are extremely bright.

It is instructive to return briefly to the position in New Zealand, where presumably the risks entailed in a commission of the English style were thought to be too great when compared with the advantages to be gained.⁴⁷ As a consequence, all the points which have so far been considered concerning the structure of the English Commission were decided differently in New Zealand. The Law Revision Commission was given only one part of the process of law reform; its function is to "map out territory, to decide priorities; to allocate particular items to standing committees, special committees or other bodies, and to review progress annually."⁴⁸ The tasks of investigation and research were given to standing and special committees, who report directly to the Minister of Justice.⁴⁹ The Minister of Justice himself continues to occupy a key position in the machinery of law reform. He is a member of the Commission, and his staff in the Justice Department provides the only lawyers available to work full-time on projects set in motion by the Commission.⁵⁰ The Commission, like its predecessor, is representative, drawing its members from the profession, the university law schools, the Department of Justice and the legislature.⁵¹ It has no formal constitution, because the Minister of Justice felt that

47. See J. HANAN, *supra* note 7, at 18-19. The defects in New Zealand's previous program of reform with which he was concerned were: (1) the lack of an adequately qualified full-time staff, coupled with the fact that the members of the Law Revision Committee had insufficient time available; (2) the tendency to wait until a particular reform was accepted in England before promoting similar legislation; (3) the tendency to deal only with known anomalies in the law, and not to look for injustices before they happened. *Id.* at 20-21.

48. *Id.* at 23.

49. *Id.* at 22-24.

50. *Id.* at 22.

51. *Id.* at 23. In 1965, the Law Revision Committee had sixteen members. They were the Minister of Justice (chairman), four representatives of the New Zealand Law Society, one representative from each of the four university law schools, the Chairman of the Statutes Revision Committee in Parliament, one nominee of the Parliamentary Opposition, the Solicitor-General, the Law Draftsman, the Secretary for Justice and two members appointed in their personal capacity. *Id.* at 10. The judiciary had expressed early interest, but their representative was not able to sit with the Committee, and membership was not continued. Cameron, *supra* note 15, at 106 n.39. Surprisingly enough, this large committee began with only seven members. Mason, *Law Revision Committee*, 13 N.Z.L.J. 224 (1937); *The Law Revision Committee's Work in 1937*, 13 N.Z.L.J. 337 (1937).

it was "better to be free to modify and alter in the light of experience or as the circumstances at any particular time dictate."⁵²

This comparison shows how two very different conceptions of a law reform agency can share the name "Law Commission." It also illustrates the great extent to which the English Commission has departed from traditional thinking in its structure. It is still much too early to assess the impact which the new philosophy will have on law reform. But some effects can already be seen in the program of reform the Commission has drawn up.

III. THE PROGRAM OF REFORM

The role the Law Commission has assumed, and made explicit in its first program of reform, is the clearest evidence of all of the break which has occurred with the past. The program is more ambitious than anything hitherto undertaken by a law reform agency, either in the Commonwealth or the United States. No longer will reform proceed on a piecemeal basis. Instead, whole areas of law will be reconstructed, and put into a form in which it will be readily accessible to both the lawyer and the layman. Ultimately, all the work of the Commission in renovation of the private law will be brought together to make up a Code of Obligations.⁵³

It would be inappropriate, when discussing so large a conception, to concern oneself unduly with the specific projects the Commission has undertaken. Each country has its own problem areas of law which will receive priority when a program of reform is drawn up. Instead, this part of the article will be concerned with three major policy questions which must be confronted by a law reform agency in drawing up such a program: (1) Should it consciously avoid matters which are likely to be controversial because of their social or political implications? (2) Should it undertake overall studies of broad areas of law, or should it confine its work to the reform of specific unsatis-

⁵² J. HANAN, *supra* note 7, at 25.

⁵³ LAW COMM'N FIRST ANN. REP. 1965-1966, pt. II (1966). For published recommendations, see LAW COMMISSION, LANDLORD AND TENANT: INTERIM REPORT ON DISTRESS FOR RENT (1966); LAW COMMISSION, REFORM OF THE GROUNDS OF DIVORCE: THE FIELD OF CHOICE, CMD. No. 3123 (1966); LAW COMMISSION, PROPOSALS FOR REFORM OF THE LAW RELATING TO MAINTENANCE AND CHAMPERTY (1966); LAW COMMISSION, PROPOSALS TO ABOLISH CERTAIN ANCIENT CRIMINAL OFFENCES (1966); LAW COMMISSION, REPORT ON THE POWERS OF APPEAL COURTS, CMD. No. 3145 (1966); LAW COMMISSION, IMPUTED CRIMINAL INTENT (1967); LAW COMMISSION, TRANSFER OF LAND: INTERIM REPORT ON ROOT OF TITLE TO LAND (1967). There is insufficient published material on the New Zealand Law Revision Commission's proposals to make any detailed comparison at this point. The Commission has approved "the commencement of work on what is undoubtedly the broadest and most far-reaching programme of law reform in [New Zealand's] history." N.Z. DEP'T OF JUSTICE ANN. REP. 1965-66 at 18 (1966). See J. HANAN, *supra* note 7, at 26-28, for an indication of its possible scope.

factory rules of law? (3) Should it have as its ultimate aim the restatement or codification of the whole of private law, or is it better merely to try to achieve improvements in the existing amalgam of common law and statute? In the answers given by the English Commission to these questions, the Commission has shown that it takes the very broadest view of its functions.

Taking the first question, it has never been altogether clear what is meant when law reform agencies are warned against making recommendations on "controversial," "political" or "social" issues. If these terms are intended to connote proposed reforms which would affect established interests, then the warning has little force, because few reforms simply smooth out a situation, leaving no one worse off than he was before. Of course, in some cases those adversely affected are in a much better position to voice opposition to the reform, and to bring pressure to bear to prevent its becoming law. But to put the distinction on that basis would seem to imply a judgment, not about a principle, but about political tactics.⁵⁴ The same is true of other issues that might be thought to come within the warning, such as the censure of a government department for failure to observe the rule of law,⁵⁵ or the discussion of matters concerned with morals and close family relationships. Whatever substance the warning may have, it has clearly been disregarded by the Commission, whose early reports include a recommendation to abolish distress for rent without leave of the court despite vigorous opposition from landlords,⁵⁶ and a commentary on proposals for new grounds of divorce.⁵⁷

It is plain that an independent Commission, basing itself on reason, research and an ordinary sense of decency, has much to contribute to the discussion of a "controversial" issue. It can outline the basic criteria that must be met before a proposed rule of law will operate satisfactorily, and recommend the rejection or re-examination of those proposals which do not meet them. It can clarify the arguments put forward by the disputing sides, and verify the factual assertions that have been advanced in support of them. It can supply an impartial account of the history of the existing legal position, which a long and heated debate may have obscured. In theory

54. See MacDonald, *supra* note 3, at 15; MacDonald, *Foreword to Symposium on the New York Law Revision Commission*, 40 CORNELL L.Q. 641, 644 (1955); Scarman, *supra* note 6, at 18-19.

55. See J. HANAN, *supra* note 7, at 24. He thought a law commission should include departmental activities within its purview.

56. LAW COMMISSION, LANDLORD AND TENANT: INTERIM REPORT ON DISTRESS FOR RENT (1966).

57. LAW COMMISSION, REFORM OF THE GROUNDS OF DIVORCE: THE FIELD OF CHOICE, CMD. No. 3123 (1966).

at least, it can do all these things without trespassing on the final judgment of the substantial issues involved.⁵⁸

There is, however, a cost to be paid for the Law Commission's participation in such discussions. It must inevitably find itself tending to reject certain proposals and to support others. For example, anyone reading the Law Commission's report on the grounds of divorce could be left in little doubt that it favored only one solution, namely, the introduction of divorce based on two years separation of the parties to the marriage.⁵⁹ Despite protestations that the Commission acts in such matters on purely technical or lawyerly grounds, to all outward appearances it becomes an aligned party. If the Commission consistently takes such positions, might not its image as an impartial law reform agency be affected? The fact that its reports are to be found at the center of a stormy public debate, could encourage others to attack its other recommendations on matters in which it is fighting to overcome conservative opposition. The Commission's boldness could thus lead to a general weakening of its authority.

This is a matter, therefore, in which the Commission will have to exercise great circumspection. It will be virtually forced to enter some controversies, because they intimately affect its own plan of reform. The report on the grounds of divorce was an example; the reform of family law is one of its first projects. But there will be other issues in which, although the Commission may feel it has much to contribute, it is better not to intervene. This judgment will always be a difficult one, and much will depend on how well it is made.

The second major policy issue is whether a law reform agency should proceed by way of broad studies of particular areas of law, or by introducing small reforms to take care of specific rules which are not working satisfactorily. The Law Commission has chosen the former alternative.⁶⁰ Thus it seeks to deal with one of the most pervasive problems of law reform—how to avoid a confused patchwork

58. Cf. Scarman, *supra* note 6, at 19.

59. *Supra* note 57, at ¶ 120. See Kahn-Freund, *The Law Commission: Reform on the Grounds of Divorce*, 30 MOD. L. REV. 180 (1967). At ¶¶ 56-70, the Commission rejected as impractical certain proposals put forward by a group appointed by the Archbishop of Canterbury. Those proposals would have required a court to investigate whether a marriage had in fact broken down, before decreeing a divorce. COMM. OF ARCHBISHOP OF CANTERBURY, PUTTING ASUNDER: A DIVORCE LAW FOR CONTEMPORARY SOCIETY (1966), noted in Irvine, *Report of the Mortimer Group on Divorce Law*, 30 MOD. L. REV. 72 n.1 (1967).

60. LAW COMM'N FIRST ANN. REP. 1965-1966, pt. II (1966). Topics for investigation include such broad items as "Consideration, Third Party Rights in Contract and Contracts Under Seal" (¶¶ 40-42), "Civil Liability for Dangerous Things and Activities" (¶¶ 43-45), "Personal Injury Litigation" (¶¶ 50-57) and "Transfer of Land" (¶¶ 68-76).

of amendment, without guiding principles or overall direction.⁶¹ There are also practical advantages in the course taken. It is easier to see the real problem that a rule was meant to solve, when it is taken in a wider context. A solution can be devised which will not create anomalies of its own.⁶² By comparison, the amendment or removal of a single rule of law may be only a palliative action, which fails to deal with the basic difficulty, and indeed may hinder the eventual adoption of the appropriate measures.⁶³

While there is much to be said for undertaking broad studies, however, drawbacks do exist. Much more work is required before such a study is presented, and this may mean that urgently needed reforms may be delayed. For example, in its interim report on Distress for Rent, the Commission considered that distress before judgment is seldom used and is "unattractive to contemporary society."⁶⁴ It declined to make any definite recommendation, though, because it saw the problem as part of a much larger issue, the general question of how the courts ought to enforce the payment of debts. This latter question will no doubt require prolonged enquiries. Moreover, when a large study does come, it may be much more difficult to get its recommendations accepted. The very fact that it deals with more fundamental alterations in the law will provoke opposition, because not everyone will agree that radical change is necessary. What is more, one controversial recommendation in the study may bring the whole reform to a halt, even though the other proposals taken by themselves are generally acceptable. Here too the Commission will have to exercise great skill and discretion if it is to succeed in its objectives.

Finally, there is the question of the Code of Obligations. The Law Commission has dedicated itself to this ultimate achievement.⁶⁵

61. Cameron, *supra* note 15, at 106-08; Gardiner & Martin 6.

62. See, e.g., New Zealand's Judicature Amendment Act 1958, N.Z. Stat. 1958 at 417, § 94A; Sutton, *Mistake of Law—Lifting the Lid of Pandora's Box*, in A. G. DAVIS, *ESSAYS IN LAW* 218 (J. Northey ed. 1965). The section removed the old rule that money paid under mistake of law could not be recovered, but left untouched such allied questions as what happens when services are rendered under mistake of law, or a contract is entered into under a similar mistake.

63. See Cameron, *supra* note 15, at 107. He suggested that, in some cases, smaller measures, by removing the agitation for reform without dealing with its cause, had delayed the introduction of the necessary larger legislation.

64. LAW COMMISSION, *LANDLORD AND TENANT: INTERIM REPORT ON DISTRESS FOR RENT* ¶¶ 23-26 (1966). Compare the New York Law Revision Commission, whose sole venture into large-scale reform meant three years devoted to little else. See Braucher, *The Commission and the Law of Contracts*, 40 *CORNELL L.Q.* 696, 714-17 (1955); MacDonald, *supra* note 3, at 12, 16.

65. LAW COMM'N FIRST ANN. REP. 1965-1966 at ¶¶ 31-34, 67, 78-85. See Walker, *Reform, Restatement and the Law Commissions*, [1965] *JURID. REV.* 245. Work has already started on codes of the general law of contract, landlord and tenant and, in a more preparatory way, family law.

Should a law reform agency include as part of its program, the rewriting of the common law, with a view to its formal enactment as the fundamental law? The work would involve serious problems. Suitable words must be found to embody the philosophy as well as the letter of the common law rules. Room must be left for the Code to expand in many directions under judicial hand. Appropriate techniques for interpretation of the Code must be devised and made acceptable to the courts. Whether the end product of all this work would in fact operate more satisfactorily than the existing amalgam of decisional and statutory law is at least debatable. It would therefore seem more rational for a law reform agency to concentrate on improving the law, rather than diverting its efforts in rewriting law which already works well.⁶⁶

Nevertheless, special considerations may have influenced the English Law Commission in its decision to codify the law. The enunciation of a code could play a major part in attaining the Commission's objectives of infusing new values in law reform, and leading professional opinion to a point where it accepts radical change. It would provoke a great deal of discussion among the lay public, particularly those affected by the rules, and this is the opinion which the Commission is anxious to hear.⁶⁷ While no one believes that the detailed rules of law can be readily understood by the layman, the basic principles on which they are founded ought to be made available to him, because they belong to him and not exclusively to the lawyers.⁶⁸ Codification would also imply a rejection of historical details and ancient decisions as a proper source of law, a rejection from which lawyers and laymen would benefit, at least in the view of the sponsors of the Law Commission.⁶⁹ Thus the Code of Obligations may be seen as one of the direct implications of the new philosophy of law reform.

The Law Commission's policy on these three issues has added new dimensions to the functions of a law reform agency. Of course, there has always been a need for impartial advice on controversial issues, for probing enquiries into the fundamental bases of large areas of law, and for restatements of law which will make it more

66. Limited codes on special relationships, contracts or types of property, such as partnership, sales of goods or copyright, are, of course, an established part of Anglo-American law. The creation of such codes, however, has usually been undertaken by special ad hoc bodies, rather than the regular law reform agencies. See Wade, *supra* note 9, app. pt. 2, *cf.*, MacDonald, *supra* note 3, at 16.

67. LAW COMMISSION, FIRST PROGRAMME ¶ 3 (1966); LAW COMM'N FIRST ANN. REP. 1965-1966 at ¶¶ 137-38 (1966). For an interesting study of the fundamental values laymen have brought to law reform, see Dowrick, *Laymen's Values for Law Reform*, 82 L.Q.R. 497 (1966).

68. Scarman, *supra* note 6, at 12-13.

69. Gardiner & Martin, 10-12; *cf.* Williams, 15-21.

easily available both to the lawyer and, to a more limited extent, to the layman. But hitherto these needs have been met by the appointment of ad hoc commissions, or simply left to the enterprise of text-writers and contributors to legal periodicals. The relationship of this work with the processes of law reform has now been recognised, and the law reform agency's functions have been correspondingly enlarged.

IV. CONCLUSION

What conclusions are to be drawn from this enquiry into the structure and functions of the English Law Commission? In particular, what relevance does it have for those interested in law reform in other countries? The implications of its new philosophy of law reform, and the import of this article, may be summarised in the form of two questions.

First, has a conscious effort been made to adapt the machinery of law reform to the peculiar needs of each state and country? The outstanding success of the New York Law Revision Commission, in particular, may have obscured the fact that there are a variety of structures of law reform agency from which sponsors of law reform may choose. What is suitable in one state may be inappropriate in another. An assessment must be made of the general state of its law, the previous pace of law reform, and professional attitudes towards it. Moreover, these matters must be constantly reassessed to keep pace with growing demands and aspirations in law reform.

Second, have we been too conservative in what we think a law commission can achieve? Have we been too ready to circumscribe its activities with arbitrary boundaries? Many observers will no doubt have misgivings about the possible costs entailed in an adventurous policy of reform, particularly if payment is to be made at the point where the price is highest, namely when proposed reforms are being translated into law and may fail because of sectional opposition. But a conservative policy also has its costs. Large areas of law may remain untouched, and such reforms as are proposed may be insufficient to solve the real problems with which they should deal.

The English Law Commission is a new attempt to come to grips with these questions. Its progress will be closely followed in other common law countries and no doubt will be widely emulated if it is successful. But even if it is less successful than its proponents hope, it nevertheless represents a stimulating new idea in law reform. As long as there is the courage to put such ideas into practice, law reform will not stagnate.

