

Spring 1967

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Recommended Citation

Dickerson, Reed (1967) "A Note On England's Law Commission and Its Chairman," *Indiana Law Journal*: Vol. 42 : Iss. 3 , Article 4.

Available at: <https://www.repository.law.indiana.edu/ilj/vol42/iss3/4>

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A NOTE ON ENGLAND'S LAW COMMISSION AND ITS CHAIRMAN

The appearance in the *Indiana Law Journal* of the Honorable Mr. Justice Scarman's article, "Codification and Judge-Made Law: A Problem of Coexistence," makes it appropriate to say a few words to an American audience about the distinguished English author and the important governmental body that he heads.

The Law Commissions Act 1965 established an important new body called the "Law Commission," consisting of a chairman and four other commissioners, "for the purpose of promoting the reform of the law." It also established a similar body called the Scottish Law Commission. Section 3(1) further provides that the two Commissions shall "take and keep under review all the law . . . with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments, and generally the simplification and modernisation of the law. . . ."

This is a momentous undertaking. It includes not only substantive legislative reform but comprehensive programs of statutory consolidation, the kind of combining of statutes into a single coherent enactment that legislative lawyers in the United States normally call the "codification" of statutory law.

To man the Law Commission, the Lord Chancellor appointed the following persons:

The Honorable Mr. Justice Scarman, O.B.E., *Chairman*
Mr. L. C. B. Gower, M.B.E.
Mr. Neil Lawson, Q.C.
Mr. N. S. Marsh, Q.C.
Mr. Andrew Martin, Q.C.

On July 7, 1965, he requested the Law Commission to prepare a comprehensive program of consolidation and statutory revision. In 1966, it laid before Parliament its *First Programme on Consolidation and Statute Law Revision*. This listed the following major topics for first consideration: (1) income tax; (2) estate duty; (3) stamp duties; (4) rent acts; (5) road traffic acts; (6) public health acts; and (7) local government acts. As for substantive revision, the Commission announced its intention "to embark immediately on a review of all statutes in chronological order with a view to recommending the repeal of

all that cannot positively be shown to continue to perform a useful function.”

None of these projects, of course, relates to the codification of common law. For this, we turn to *The First Programme of the Law Commission*, issued July 19, 1965. In the prefatory note, the Commissioners said:

We have included in the present programme three subjects which we suggest should be examined with a view to codification: the law of contract, the law of landlord and tenant, and family law.

The law of evidence was passed over in view of the current work of the Law Reform Committee and the Criminal Law Revision Committee.

The following excerpts from the *First Programme* give the gist of the Commissioners' philosophy:

English law, in its history and substance, exhibits a great respect for both the concept and the application of the rule of law. If our law is to survive as one of the great legal systems of the world, it is necessary that a proper balance be struck between that concept and the administrative techniques of a highly developed industrial society . . . [Besides eliminating anachronisms] we recommend examination of certain subjects vitally important to commerce, industry, and the public at large such as, in the field of tort, the scope of strict liability and, in contract, the permissibility of exclusion clauses and the doctrine of fundamental breach. . . . It is eminently desirable that the legal system should be capable of making a rapid remedial response to defects exposed, by judicial comment or otherwise, in the course of the day-to-day operation of the law. . . . It is equally important that the law should promptly respond to informed criticism of certain developments of principle, made on the ground that such developments are jurisprudentially unjustifiable or socially questionable.

Guided by these assumptions, the Law Commission announced in the same document that it would take appropriate action under the following general headings:

- (1) Codification of the law of contract.
- (2) Exemption by contract from common law liabilities.
- (3) Consideration, third party rights in contracts, and contracts under seal.

- (4) Civil liability for dangerous things and activities.
- (5) Civil liability for animals.
- (6) Personal injury litigation.
- (7) Civil liability of vendors and lessors for defective premises.
- (8) Codification of the law of landlord and tenant.
- (9) Transfer of land.
- (10) Family law.
- (11) Recognition of foreign divorces, nullity decrees, and adoptions.
- (12) Imputed criminal intent (D.P.P. v. Smith).
- (13) Miscellaneous matters involving anomalies, obsolescent principles, or archaic procedures.
- (14) Interpretation of statutes.

The Law Commission also recommended that the financial limits on magistrates' orders in domestic and affiliation proceedings be studied by an interdepartmental committee; that common law misdemeanors and the crime of conspiracy be studied by the Criminal Law Revision Committee; and that the Judicature Act (Northern Ireland) be studied by an *ad hoc* committee.

The Law Commission is still too young to have produced more than fragmentary results. Even so, its *First Annual Report 1965-1966*, addressed to the Lord Chancellor, and its special reports on the grounds of divorce and imputed criminal intent show an impressive beginning. Examination suggests that American lawyers and jurists will do well to become acquainted with the work of the Law Commission. Both the Law Commission and its miscellaneous American counterparts have much to gain from a fruitful exchange of views.

This assertion was more than amply supported for the writer during the spring of 1966, when he was privileged to spend part of his sabbatical leave in the offices of the Commission, working on problems of statutory interpretation. This important field is being specially scrutinized by a small task group headed by Norman S. Marsh. As the *First Annual Report* states, "Our primary material has been the experience of courts in the United Kingdom, but we have found it necessary to study also the experience of the Commonwealth and other countries. . . . A study has also been made of the interpretation of statutes in a number of non-Commonwealth countries, with particular reference to the extensive use of legislative history and other extraneous materials in the United States and to the role of *travaux préparatoires* in continental Europe. . . ." The report continues:

Considerable assistance was obtained from a seminar held at All Souls College, Oxford, on 20th and 21st May, 1966, the second occasion upon which the Commission benefited in this way from the hospitality of the Warden and Fellows of the College. In addition to representatives of the Commission the seminar was attended by a Lord of Appeal and a High Court Judge, a former President of the Paris Court of Appeal, two American professors of law (one of whom had extensive practical experience of drafting statutes in the United States), a university lecturer in politics, the Second Parliamentary Counsel, and a number of practising and academic lawyers. . . .

Besides participating in the seminar, the writer enjoyed the honor of being consulted by the distinguished Chairman on the subject of statutory consolidation.

Sir Leslie Scarman, in addition to being a gentleman of great charm, brings to his current assignment many years of experience in the Probate, Divorce, and Admiralty Division of the High Court of Justice, from which he is now on leave. It seems highly likely that under his capable leadership the Law Commission will produce beneficial results that will be felt throughout the legal system generally shared by English speaking peoples. American lawyers will watch these developments with great interest.

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