

The Role of Law Reform in Constitutionalism, Rule of Law and Democratic Governance: Reflections by the Scottish Law Commission

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Introduction

This paper contributes to the theme of this conference by reflecting on three main areas – first, on the constitutional settlements within the UK and how these have affected law reform; second, the role of links between law reform bodies, for the purpose of assisting each other to promote law reform within our own constitutional contexts; and third, the fostering of active citizenship within law reform.

UK constitutional arrangements and law reform

The United Kingdom of course does not have a written constitution similar to those adopted in many countries around the world, including in many countries in Africa in the 1960s and in the 1990s. In the UK we therefore operate in a different context in that sense. However the UK Parliament at Westminster does – albeit on very rare occasions – enact legislation which is of such significance that the enactment can be regarded as having the status of a constitutional act. These include the enactments at the Westminster Parliament which provided for the historic constitutional settlements in 1999, namely for the transfer of legislative power from the UK Parliament to Scotland and Wales in 1999. The Scotland Act 1998, an Act of the UK Parliament, established the Scottish Parliament, and also the executive arm of Government in Scotland; the current administration now referring to itself as the Scottish Government. Another Act of the UK Parliament, the Government of Wales Act 1998, established the National Assembly of Wales. Powers to legislate and to administer were transferred in these enactments to the devolved institutions.

These new arrangements changed the constitutional landscape within which law reform in Scotland operates.

First, the constitutional landscape was immediately more complicated. It now comprises two separate and distinct layers of Government and legislature with which the Scottish Law Commission has to work. This is because the constitutional settlement was not one granting independence to Scotland. Legislative competence in many specified areas was reserved to the UK Parliament by the Scotland Act 1998. These areas are set out in Schedule 5 to the Act. That Schedule covers a wide variety of matters which were thought fit to remain with the UK Parliament and the UK Government in the interests of the UK as a whole – for example foreign policy; defence; the Crown; the regulation of the professions; insurance; regulation of business associations; and others. But many other important domestic areas were devolved to the Scottish Parliament – including in general the criminal law and civil law

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of Scotland; health; education; agriculture in Scotland; and others. Certain of the reservations to the UK are subject to exceptions. Some of the reservations are very specific, and some are in very general terms.

There has therefore been much debate over the years, between the UK Government and its advisers, and the Scottish Government and its advisers, as to where the boundaries lie between reserved and devolved matters in certain areas.

This division of power led at the time to a discussion as to what should be the role of the Scottish Law Commission as the law reform body for Scotland within this new constitutional framework. It is the case after all that the UK Parliament, in enacting legislation on reserved matters for Scotland, would of course continue to be making law for Scotland. The Scottish Parliament on the other hand would be enacting laws, for Scotland only, in relation to the devolved areas. Would the Scottish Law Commission be confined to acting as a law reform body for devolved areas of the law only, providing reports to the Scottish Government on devolved areas of Scots law to be implemented in the Scottish Parliament?

In the event, the Scottish Law Commission retained the role of reviewing all matters of Scots law, both those reserved to the UK and those devolved to Scotland under the constitutional settlement.

This meant that the Scottish Law Commission could carry out a law reform project on a reserved area of the law, making a report direct to UK Ministers, and any Bill implementing our recommendations would have to be passed through the UK Parliament. The Scottish Law Commission can receive a reference from a UK Minister, requesting the Commission to undertake a law reform project on a reserved area of the law.

With the advent of devolution, however, the majority of the work of the Scottish Law Commission relates to areas devolved to Scotland. Most of our Programmes of Law Reform, and many of our references from Government, come from the Scottish Government and are to be implemented by way of legislation through the Scottish Parliament.

As representatives of law reform bodies, you will be well aware of the challenges of working with the Government of your country, and working with your Parliament, to encourage and ensure the implementation of your law reform recommendations. You may therefore have a little sympathy for the position of the Scottish Law Commission, in having to deal over the past 10 years or so with not one but two separate Governments, and two separate Parliaments, to ensure implementation of our recommendations.

In Scotland, the legal profession and other interests were of course most interested in the establishment of a legislature again in Scotland, in May 1999. We had again a Parliament, based in Edinburgh, ready to legislate on Scottish devolved affairs. There was an expectation that the Parliament would undertake a good deal of law reform work, bringing the statute law book for Scotland up-to-date, and introducing a modern legal framework for many of the areas of Scots law - thus from the point of view of a law reform body, steadily implementing outstanding and new law reform recommendations. Did the new constitutional arrangements have this effect?

The surprise following devolution is that this did not take place to any great extent.

In the early years after devolution, it must be said, the Scottish Parliament did indeed enact a number of important and substantial outstanding reports of the Scottish Law Commission – there were a number of enactments reforming the law of land tenure, abolishing the ancient feudal system which still existed in Scotland; and making changes in areas such as the law relating to adults with incapacity. In practice however the Parliament was largely fully occupied with the busy legislative programme put forward by the new Scottish administration, newly elected and keen to make progress with the political and other priorities set out in their manifestoes. This is of course understandable.

But as time went by, questions had to be asked about the priorities of the administration and of the Parliament with regard to the work of law reform. Some 10 years after devolution, the Parliament had enacted only one consolidating statute for Scotland; no statute law revision enactment relating to Scotland alone; and the implementation rate of Scottish Law Commission reports, on devolved areas due for implementation by the Scottish Parliament, had fallen to below 50%. This was an astonishingly low figure for a jurisdiction which had established its own legislature.

It has been the task of the Chairman of the Law Commission, Lord Drummond Young, Commissioners, and myself, as Chief Executive, to raise the profile of law reform with the current Scottish Ministers and the Government, with the Scottish Parliament, members and officials alike, and with the profession and interested bodies in Scotland generally. We are seeking to instil an awareness of the need for law reform, and to encourage the Parliament to embrace a sense of responsibility for the statute book for Scotland; and to introduce closer working with Government and better planning within Government, so as to ensure business planning for law reform implementation in addition to the priorities of the current administration. We are also seeking an improvement to the working remit of committees and of methods within the Scottish Parliament, to achieve an enhanced capacity in the Parliament to undertake law reform work.

Progress has been made on all these fronts. The rate of implementation of Scottish Commission reports is rising. The current legislative programme of the Scottish Government contains two substantial Bills which originated from the Scottish Law Commission, one on the law on long leases, and one on land registration. We also expect that one of our criminal law reports will be included within a Criminal Justice Bill towards the end of the year; and we hope that a consolidation exercise that we are working on, the law of bankruptcy, will also be introduced next year.

We are also working with the UK Government and the UK Parliament to seek the introduction of a Scottish Bill in the House of Lords, to implement one or two of our outstanding reports to the UK, and for the Bill to be introduced by way of the new procedure in the House of Lords for uncontroversial Law Commission Bills.

From all of this we can perhaps take it that new constitutional arrangements, even if intended to improve law-making and law reform, may not necessarily have this effect in relation to law reform. Accordingly, the law reformer requires to be vigilant; monitor the effects of change; and press the case for the role and profile of law reform. Within the law reform body, it is important to keep in place the capacity at a senior level to make the case for law reform within Government and Parliament.

Links between law reform bodies

I now turn to consider ways in which law reform bodies can support each other, by sharing knowledge, skills and experience; so that each law reform body can develop capacity for the work of promoting law reform within their own constitutional context, in order to entrench the rule of law and to encourage democratic governance.

On the matter of contact and links between law reform bodies, I can describe three recent strands in which the Scottish Law Commission has been involved. First, there is collaboration between law reform bodies within the UK, by way of working on a joint law reform project. Second, there are links between law reform bodies expressed by way of visits, or study tours, by one law reform body to another, in order to discover how another agency goes about particular types of work, or to establish best practice in particular areas of work. The third area concerns what can be done by way of a particular link between two specific law reform bodies. The Malawi Law Commission and the Scottish Law Commission forged such a link in July last year, 2010. This arrangement may be an unusual one, if not novel, and therefore an interesting case study for law reform bodies generally and for this conference in particular.

Joint working by law reform bodies

The first area concerns joint working by law reform bodies on a particular law reform topic. This is with a view to issuing a jointly agreed consultation paper, seeking the views of consultees, and thereafter submitting to Government a joint report with recommendations agreed by Commissioners of both law reform bodies. This way of working together can only operate properly where the law reform bodies are making recommendations for reform to an executive and legislature which has the competence to effect the reforms across the territories of both the law reform bodies concerned.

An Act of the UK Parliament, the Law Commissions Act 1965, established two Law Commissions – the Law Commission for England and Wales, which is based in London, and the Scottish Law Commission for Scotland, which is based in Edinburgh. Each of these Law Commissions has the statutory objective of reviewing the laws of their own jurisdiction in order to make recommendations to simplify, update, and improve the law in that jurisdiction. After the establishment of the Commissions, and until devolution in 1999, reports from both law reform bodies were submitted to the UK Government, who had executive responsibility through the UK. Implementation of the recommendations of law reform bodies was the responsibility of the UK Parliament at Westminster given the competency of that Parliament to enact laws with regard to England, Wales and Scotland.

Despite the separate legal systems in England and Wales, and in Scotland, there are areas of the law in respect of which it is desirable to have reforms producing a common set of rules and provisions applying throughout the UK. For that reason, the two Law Commissions, that for England and Wales and the Scottish Law Commission, have regularly carried out joint law reform projects, examining the law on a particular topic from the point of view of both England and Wales and Scotland, and producing a set of recommendations which seek on the whole similar reforms. Current examples of such joint law reform projects include a substantial and long-running project on the law of insurance; on consumer redress for misleading and aggressive practices; and on level crossings. Joint law reform projects between two distinct law reform bodies called for the evolution of particular processes for

dealing with the project, which respect the working methods and the autonomy of two sets of Commissioners and each Commission. Despite that, and the practical difficulties, the joint law reform projects do usually run smoothly and result in joint reports to UK Ministers for implementation by the UK Parliament.

It is usually the case in a joint law reform project that the Law Commission for England and Wales project team shoulder the burden of preparing the research and other papers into the topic, and so take the lead in the project. This is because of the substantial resources that the London Commission has, in terms of human resources, including legally qualified staff, and financial resources. The Scottish Commission by contrast is a small and less resourced law reform body, reflecting the position of Scotland itself compared to our bigger neighbour in England. Nevertheless the Scottish Commission contributes fully to a joint project, not only by providing the Scottish material and analysis of the law in Scotland, but also by participating fully in consideration of the law reform options, and in agreeing to the final law reform recommendations submitted in a joint report.

This means in practice that the joint draft consultation papers, and the joint draft reports, are placed before sets of Commissioners, at consecutive meetings, one in London and then one in Edinburgh for consideration. The project teams in both London and Edinburgh consider the comments of all Commissioners, English and Welsh and Scottish, and seek to take these comments on board. The handling of the business of a joint project at a meeting of one Commission is usually assisted considerably by the presence of the lead Commissioner and sometimes team members of the other Commission; to help to explain comments from their Commissioners.

I have drawn attention already to the constitutional position within the UK, and that the process of law reform was rendered more complicated by the devolution of legislative power within the UK. Joint law reform projects address substantive areas of the law which are expressly reserved to the UK Parliament ie to legislate for all of England, Wales and Scotland; such areas of law not being devolved to the Welsh or Scottish legislatures on the basis that a common set of rules is required across the whole of the UK.

A further development of interest within the UK was the establishment of the Northern Ireland Law Commission in 2007. Links were quickly made between the established Law Commissions, in London and Edinburgh, and the new Law Commission in Belfast; as occurs in Africa and the Pacific also where new law reform bodies are being established, with advice and support often being provided by the established law reform bodies in the region. The links were established at different levels – between the Chairmen of the respective Law Commissions, between the Chief Executives, and also on legal topics of mutual interest, between lead Commissioners – for example on property law matters.

While no formal association of law reform bodies as such was established, there is now an annual conference of the law reform bodies of the United Kingdom, being England and Wales, Northern Ireland and Scotland; and Jersey, and the Republic of Ireland. These conferences are usually attended by the Chairs and Chief Executives of the law reform bodies. At these conferences, hosted by each of the law reform bodies in turn, issues of mutual concern to law reform bodies are discussed, and valuable contacts are made. Such issues discussed recently include the methods of preparation of programmes of law reform; the preparation of impact assessments to accompany law reform reports, to assist Government in considering the reports and to seek to smooth the path towards

implementation of law reform reports; and of course the main pre-occupation of law reform bodies everywhere, namely the rates of implementation of law reform reports by Government; also particular legal issues of mutual interest may be raised.

A new development this year has been the launch of the first three-way law reform project– a law reform project being conducted by the three law reform bodies, for England and Wales, Scotland, and Northern Ireland, conducted at the request of the UK Department of Health, which intends to bring forward legislation for the UK to implement the eventual recommendations for all of the jurisdictions concerned. The project is on the regulation of the health care professions. Managing a three-way law reform project will raise definite challenges, and demand a fair amount of time and effort. You may have thought it difficult enough to obtain a common view on law reform recommendations from a variety of Law Commissioners comprising the one Law Commission; imagine the challenge of seeking to reconcile the views of Commissioners from across three distinct bodies of Commissioners. I can say however that the project has been initiated and things are going smoothly.

Visits and study tours to law reform bodies

Second, there is the matter of links between law reform bodies, expressed by way of visits and study tours to one another. These visits can be short, for the purposes of meetings for an exchange of views and of experience on a particular process or legal topic. The visits can be longer, involving a placement, for the purpose of gaining a deeper understanding of the working methods and processes of another law reform body, and seeking to understand the context in which the host body works. Such visits can often be used to establish good practice in a particular area, or for comparative purposes, as part of a benchmarking visit. These visits and studies can be used to enhance the skills and knowledge of members of the visiting delegation, or they can be used to inform further consideration and development of the processes and working methods of the law reform body of the visiting delegation. Such visits are usually of interest to both the host body and the visitors, in gaining an insight into the issues and working methods, and live issues, of each body.

On the part of the Scottish Commission, one example is that our Chairman, Lord Drummond Young, when in Jersey earlier this year for the conference of the law reform bodies of the UK, Republic of Ireland and Jersey, undertook further meetings as part of a comparative study on the law of trusts. Jersey has an up to date statutory framework for trusts and advertises that as an incentive to draw business into the island. The knowledge and contacts gained are proving to be useful to the Scottish Commission in taking forward our own project reviewing the law of trusts in Scotland.

Further, earlier this year the Scottish Law Commission was pleased to receive a high level delegation from the Uganda Law Reform Commission. An interesting meeting was held, focussing on the different aspects of statute law revision. I am pleased to continue this relationship with the Uganda Law Reform Commission by attending this ALRAESA conference.

As to links between law reform bodies, I might add that there are also historic links between Scotland and at least some of the Southern African systems through the mixed nature of our legal systems– both of which I believe have been influenced, to greater or lesser extent, by both English and Roman-Dutch law. There is perhaps some shared experience there which

may make exchanges between Commissions on certain legal topics easier in some respects, since that will be based on an understanding of each other's legal context and language.

Links between Malawi Law Commission and Scottish Law Commission

While there may be study visits or exchanges between different law reform bodies to gain knowledge and experience, the Malawi Law Commission and the Scottish Law Commission have taken relations between law reform bodies a step further. The Malawi Law Commission and Scottish Law Commission forged a link in the summer of last year, 2010. This link exists to promote law reform, by providing for co-operation and assistance between the two Commissions. This is part of a wider programme between Scotland and Malawi, in particular now within the justice sector. This Programme is entitled Capacity Building for Justice.

This particular arrangement, between two established and respected law reform bodies, may be an unusual one. It certainly is a novel arrangement for the Scottish Law Commission. It may be that this link is an interesting case study for this conference. I shall explain more about the background to this link.

There are long standing ties between Malawi and Scotland. These date back to missionary times, including of course David Livingstone, with missionary activity extending to the provision of hospitals and schools. With the constitutional settlement in the UK in 1999, foreign policy and external affairs remained with the United Kingdom. The new Scottish Government wished to have links beyond Scotland and the UK, to play a part in world affairs. Scotland looked to establish a presence and a voice in the European Union, although the Member State of the European Union remains the United Kingdom; and to develop links with other European regions that had devolved powers. Beyond that the Scottish Government wished to develop links with trading partners, in the United States and China. The Government also wished to play a role in international development, albeit the Scottish Government would only have, compared to the UK and the EU, a small capacity and a small budget for that purpose.

In that context it made sense to build on existing and historic links between Scotland and countries such as Malawi; in order to focus energy on co-operation and assistance within these established relationships. This resulted in an inter-government agreement between Scotland and Malawi, signed in 2005, which provided for co-operation and assistance between the two countries in a number of areas. At first the work continued in the areas of education, and health, and in the development of enterprise. In 2009 the Scottish and Malawi Governments agreed to launch a further programme, in the area of governance, with the Programme on Capacity Building in the Justice Sector in Malawi. Scottish Ministers appointed an Edinburgh-based development charity, Challenges Worldwide, to prepare the Programme and deliver it. Scottish Ministers provided funding for the Programme. The Programme is not however intended to be one providing finance as such to local projects. There is not sufficient money available for that. The Programme contemplates the building of local capacity where appropriate, in terms of an exchange primarily of skills and experience. So the funding allows for visits to Malawi from partner bodies in Scotland for that to take place. The Programme therefore is based on the value of interaction between people, in the context of a continuing link between partner bodies.

To that end Challenges Worldwide, advised by a former Edinburgh-based British High Commissioner to Malawi, George Finlayson, undertook a number of visits to various justice

institutions in Malawi, to establish with these institutions what needs they had that could be met under such a Programme; with visits to representatives of donors to ensure that any such work in Malawi was complementary to and co-ordinated with any other programmes.

Following scoping visits of this nature, Challenges Worldwide reported to Ministers. In due course, Ministers approved the Programme and an approach was made to bodies in Scotland to take the initial assessments forward by meeting with their counterparts in Malawi and seeing what assistance and co-ordination could be agreed.

A number of projects are underway, some are still in gestation; some have been more successful than others so far. Forging links and finding spare capacity may not be easy for many public bodies in a country like Scotland where, given the financial crisis, budgets for public bodies are being cut substantially.

The link between the Malawi and Scottish Law Commissions is part of this wider picture in the justice sector. As part of the link, a number of activities have taken place since July 2010 - the placement of one of the Scottish Commissions legal assistants, Garry MacLean, to the Malawi Commission, as part of the project team working on a review of intellectual property law and now also acting part-time as the local co-ordinator of the Capacity Building for Justice Programme; the offer of the time and expertise of a Scottish Commissioner, Professor MacQueen, an expert in intellectual property law, to assist where requested by way of mentoring from a distance eg in commenting by e-mail on draft papers on IP issues; the donation of some surplus library stock; a visit by 2 lawyers from the Scottish Commission to deliver a programme of training requested, namely on project management, with particular reference to law reform projects, and on legal research techniques. Our Chairman, Lord Drummond Young, visited Malawi in March this year, to hold discussions with the Malawi Commission, to meet other leading figures in the justice sector; and to deliver a keynote address on law reform and another on judicial training and judicial ethics. That visit was kindly hosted by Mrs Hiwa, the Law Commissioner, and by Chief Justice Munlo.

For the Scottish Commission, this link with the Malawi Law Commission gives substance to one of our stated aims as a law reform body, namely being an active member of the international law reform community, encouraging the exchange of information and ideas. Through the link, the Scottish Commission have gained insight into law reform and processes different from our own, which cause us to reflect on our own practices. Indeed following the delivery of training on project management, and the discussions at the Malawi Commission, we are prompted to review and seek to improve our own process of project management. Through the link the Scottish Commission play a part in helping to achieve the Scottish Government's international objectives. The link is also a visible sign of the commitment of the two Commissions to our values. These values are reflected in the themes of this conference, namely to seek to promote law reform based on processes that encourage active citizenship, and assist in embedding the rule of law.

Law reform and active citizenship

I turn now to the theme of law reform and active citizenship, encouraging an active role for the citizen within the constitutional culture.

This same issue was raised in the opening address to the 20th anniversary seminar of one of our sister law reform bodies, the New Zealand Law Commission. The New Zealand Law

Commission celebrated its 20th anniversary in 2006. The Governor General of New Zealand, the Honourable Anand Satyanand closed the opening address thus –

“I end with a modest challenge, that the next step for the Commission, after having achieved a place for law reform on the legal landscape, is to ensure the same occurs on the citizens’ landscape. My challenge is that the ordinary person’s ability to participate in discussion about changes to the law needs fostering.”

Experience suggests that even well-established law reform bodies have to continue to work at getting and keeping a place for law reform on the legal landscape. This is a constant task. At the same time, once we have some measure of success in that respect, we all have to bear in mind the challenge highlighted, and work on fostering the involvement of the citizen too.

At the Scottish Law Commission, as with other law reform agencies, consultation is a vital part of our process in each law reform project. Following the initial research on the law applicable to the project, an analysis of the defects in the law, and a comparative study of what other legal systems provide on the matter, we prepare a discussion paper with questions as to possible reforms, or with proposals for reform. The discussion paper is published for consideration – views are invited. A period of 3 months is allowed for comment to us. After the close of the consultation period, we prepare for a meeting of Commissioners a paper setting out all comments received in relation to each question or proposal; and a policy paper analysing the responses and giving the policy proposed, in the light of the views of consultees, by the lead Commissioner and his or her project team.

We do aim to adopt methods to encourage active citizenship in the law reform process, ie the participation of the public and their representatives. These are as follows.

In preparing our 5 year programme of work, we consult widely on what areas of the law require reform. We consult professional bodies, interest groups; and also the public, by way of a leaflet circulated to libraries and citizens advice offices, and to members of Parliament; our consultation was advertised by a press release and by notice on our website, with a website page open for suggestions and comments by individuals.

In the course of each project, at the preparation stage, we consider what processes and consultations might assist – we usually set up one or more advisory groups of experts to assist a project – the group can include specialists in the area, not just lawyers; for example in the contract law project we have advisory groups consisting of people in business and involved in government contracting. We might also use the services of a consultant with special expertise. We consider whether the topic is one that requires statistical research; or - if there is a direct widespread impact on many citizens - an opinion survey is needed to inform the process; and we consider whether seminars or public meetings may be useful.

On individual law reform projects, we also issue a press release when publishing a discussion paper or a report; the press release is pitched at the media and the public, describing the proposals and their effect broadly so that the press can simply publish the notice as it is. This means the press do not need to work hard at summarising what can be a complicated legal paper; and avoids misunderstandings of what we are proposing; so it helps to ensure an accurate media report. We publish our discussion papers and reports and send these out in hard copy to a core list of contacts, bodies and representatives interested in our work and in the particular topic; and we publish the papers and news release on our website, so that anyone can access them that way.

We do get comments regularly from representative bodies; for example, from the Law Society of Scotland, the Faculty of Advocates, the judges, other legal groups; consumer bodies; organisations representing business interests; and other bodies. We do sometimes get comments from members of the public too.

The processes adopted in preparing law reform proposals can therefore aim to be inclusive, as far as possible within one's own context, so as to be accessible to the individual citizen and to representative bodies of citizens; and so as to consider the views expressed by citizens. That however leaves us still seeking more or better ways in which to foster discussion with members of the public as to changes in the law. That is not an easy challenge and we are interested in learning of the experiences of others in that respect.

