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Book Review: Law Reform and the Law Commission, by J. H. Farrar

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Book Reviews

LAW REFORM AND THE LAW COMMISSION By J.H. FARRAR, LONDON: Sweet and Maxwell, 1974. Pp. 151.

"Questioning", said Dr. Johnson, "is not the mode of conversation among gentlemen." Clearly, then, the English Law Commission consists of gentlemen. No questioning, no doubts, beset or trouble their deliberations. They know quite clearly where they want to go and how, and then in sure and steady fashion they proceed to get there. This is the classical approach to law reform.

This classical approach is based on a now fairly classical paradigm of law itself. This paradigm views law in basically Austinian terms as rules coming down to the citizen from up above — from Parliament or from the judges. These rules are written down in cases and, increasingly, in statutes. As time goes on, then the law becomes increasingly voluminous, complex, confused and, often obsolete. In short it has to be reformed.

Reforming the law — still sticking to this paradigm — means bringing order and chaos into this confusion. Obsolete laws are repealed. Anomalies are done away with. Muddles and confusions are sorted out, complexities are simplified, and the very volume of the laws is reduced. The paradigm of this kind of reform is seen in the work of consolidating the statute book. On this view law reform means altering and improving what is written down in law books.

This is the approach, then, of the English Law Commission. In following this approach it stays quite firmly within the tradition which began with James I and Bacon and continued through Bentham, Brougham, the numerous commissions of the nineteenth century and the various law reform and law revision committees of the twentieth, culminating in the establishment of the Law Commission itself in 1965 as a permanent law reform body. And like its predecessors, the various committees and commissions, it too has had considerable success and must be credited with singular achievement.

All this and more is well described in Mr. Farrar's excellent short monograph *Law Reform and the Law Commission.* He tells the tale of how law reform evolved in England and with it institutions of law reform. He sets the scene and shows the climate of ideas prior to 1965 leading to the setting up of the Commission. He recounts the story of the establishment of the two Commissions, the English and the Scottish. He scrutinises their *modus operandi,* examines the role of public opinion, and inquires into the underlying problem of values. Interestingly, he draws comparisons with experience in New Zealand, in the United States, in France and Germany, and also in the international field. Finally, and usefully, he catalogues in the fifth of his Ap-

pendices the Commission's successes, viz. the Reports which have been implemented in legislation. All this he manages to do in less than a hundred and fifty pages — in itself no mean achievement.

One thing he doesn't do unfortunately is draw a comparison with Canada. I say unfortunately because our experience has been so different that a glance at Canada could have provided useful contrast. How different our experience has been I will try to indicate.

Writing some time back in this Review, Noel Lyon[1] suggested that law reform itself needs reform. With that suggestion the Law Reform Commission of Canada would heartily agree. Indeed our approach differs from that of the English Commission in three respects: in aim, in methodology, and in our paradigm of law.

First, then our paradigm of law. Unlike the English Commission we attach relatively little importance to what is written in the law books. Our view of law is less an Austinian one than a Realist one, though here perhaps we owe less to the American realists than to writers like Ehrlich. To us law is neither what the sovereign commands nor what the courts may do, but rather what is done by all who shape or run or enforce or participate in the system. So criminal law is not so much the Criminal Code and the cases, as what police do, what crown attorneys do, and what corrections officers and criminals may do. This, not the written rules, is the prime matter that concerns us.

This view of law affects our aim and methodology. What we are out to do is change the real law, to alter the behaviour of those who run the system. You don't necessarily do this by altering written laws. For instance take the Bail Reform Act. The object was to keep fewer people in prison awaiting trial, and so the written law was altered. Did it achieve its object? Preliminary evidence suggests that more people were in prison awaiting trial after the Act than before: the Don Jail, for example, was fuller than ever. It isn't what the doctor orders, but what the patient actually does, that really counts.

Conversely, you can alter what is done without necessarily altering written laws. Two illustrations must suffice. First, we came to the conclusion that many criminal offences should, if possible, be disposed of by pretrial settlement by what we termed a diversionary option procedure. The reasons for this view are set out in our Working Paper on Diversion. To test out our hypothesis we ran a pilot project in East York to see just what would happen "on the street" — and observe the reaction of the people actually involved as well as the "community" at large. Not that special legislation may not eventually be needed to form the diversionary option. Meanwhile, however, the point is that as a result of lessons learned there have been changes brought about in the way that things are being done; and these changes have been brought about administratively.

Administrative change too was the basis for our second illustration, which concerns discovery. On this our view was that full disclosure by the

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[1] J. N. Lyon, *Law Reform Needs Reform* (1974), 12 O.H.L.J. 421.

prosecution to the defence in criminal cases would be both fairer and more efficient. Again there was a pilot project, this time in Montreal and pioneered by local judges albeit with the encouragement and cooperation of the Commission. Encouraging results have justified further efforts in this regard. So here once again a real change is being brought about without the need for legislation.

In short, then, we have concentrated, not on what is written, but on what happens. What we have tried to do is, by talking to people, writing, making suggestions, partaking in conferences and courses with diverse bodies across Canada, to get them to replace bad practices by better practice. But what is *better* practice?

Here again our *modus operandi* contrasts with that of our English counterpart. For both bodies there is a basic question: whose values should we try to further? Should a Commission operate on the basis of its own values or on those expressed by public opinion. As Farrar says and as we have said in our annual reports, commissions cannot rest content with simply reporting back to the public the public's own values; they owe us, as Burke said M.Ps. owe us, their judgement. But this has meant a different approach for each of the two bodies. The English Commission has exercised its judgment and articulated preferences where necessary. All the same, at least one Commissioner,[2] speaking in Toronto, confessed that looking back he found their underlying philosophy "pretty thin" — a general but unarticulated utilitarianism. We took a different route. We started by trying, in criminal law and family law particularly, to enunciate broad values which are generally accepted. We then attempted to give reasons supporting those values and showing why they should be accepted. Next we tried to spell out from those values the more detailed implications for our law. And finally we tried to mount discussion and dialogue with the public on these values and their implications.

Was this a better way? If so, has it been successful? These are questions not for me to answer. All I would say by way of conclusion is that we see law reform as a much less clear and certain affair than does the English Commission. Where they see answers, we see questions. Perhaps we are just not gentleman. If so, I take comfort from the words of Francis Bacon, who said:

> "If a man will begin in certainties, he shall end in doubts; but if he will be content to begin with doubts, he shall end in certainties".

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[2] L.C.B. Gower, *Reflections on Law Reform* (1973), 23 U. of T. L. J. 257.