

PART I GENERAL ASPECTS

CHAPTER 1

INTRODUCTION

The Toronto seminar on Legal Literature in Small Jurisdictions marked the culmination of a pilot project which was initiated by the International Legal Center (I.L.C.) as part of a series of follow-up activities to the I.L.C. Report Legal Education in a Changing World (1975). One of the main purposes of that report was to draw attention to neglected but problematic aspects of legal education. Among the topics highlighted in this way were the problems of law and legal education in multi-lingual societies, the dissemination of information about law to non-lawyers and to the public at large and the difficulty of developing an adequate corpus of literature dealing with local laws.

The primary focus of the pilot project was the problem of localizing all kinds of legal literature in small jurisdictions. It was recognized from the outset that this relatively narrowly focused study had to be set in the context of more general studies of legal information, of legal pluralism, of multi-lingual societies and of changing ideas about strategies for "development" and the role of law in such strategies.

The primary purpose of the project was to obtain a broad conspectus of the problem in a variety of jurisdictions as a preliminary either to a broad comparative study or to some programmes for action. It was clear that a thorough study which would involve both a theoretical analysis of the role of legal literature in the development of legal culture and practical plans for action would have to be based on detailed field-work embracing such topics as the information needs and habits of lawyers in private practice and public service, the problems of law students and academic lawyers, the local publishing industry, the operation of subsidy schemes and the communication of legal information to the community at large.

The limited aim of the pilot project has been to attempt to diagnose a practical problem and, in particular, to concentrate on collecting mainly factual data on the existing situation, by commissioning a number of largely descriptive papers on selected jurisdictions and on particular topics, and by compiling profiles by questionnaire on a wider range of jurisdictions. In the event the working papers and other exploratory studies not only provided a useful corpus of descriptive material, but also suggested perspectives and questions which went well beyond the original aims of the pilot project.

The basic strategy adopted was to invite a number of individuals with first-hand experience of the problems on the ground to prepare working papers on particular jurisdictions in the English-speaking world. The authors were asked to provide some basic information and to address themselves to certain specific issues, but beyond that they were given a free hand. The seven country papers in this volume testify to the differences of perspectives and of emphasis that can be brought to bear on a study of legal literature in a particular jurisdiction.

Contemporaneously with the preparation of the working papers several other lines of enquiry were initiated either in conjunction with or independently of the pilot project. With the aid of the Commonwealth Legal Education Association and the Commonwealth Secretariat a questionnaire was circulated to a number of jurisdictions in the Commonwealth with a view to building up a series of basic profiles of the existing situation in countries not covered by the working papers. In 1977 Professor William Twining visited Papua New Guinea and prepared a report for the Law Reform Commission on problems of documenting Papua New Guinea Law, especially customary law and the operation of the lower courts, in connection with their proposals respecting the underlying law. This was published by the P.N.G. Law Reform Commission and is referred to in Dr. Paliwala's paper. Between 1976 and 1977 Professor Twining and Mrs. Uglow participated in informal seminars and consultations in several different jurisdictions; these were useful not only in obtaining information, views and impressions, but also in revealing the high degree of concern felt by lawyers and others about the implications of an inadequate local literature for the functioning and development of the legal system and of legal education.

During this period several other activities were going on which were relevant to but independent of the pilot project. Three warrant specific mention. Firstly, in 1975, the Society of Public Teachers of Law in the United Kingdom established a working party to consider the problems of academic law publishing in the U.K. at a time of rapid inflation. A striking feature of this exercise was the spontaneous interest expressed by individuals working in the smaller jurisdictions of the British Isles. The work and reports of the S.P.T.L. Working Party are described in chapter 3. Secondly, as a direct result of this project, it was decided to initiate a special study of the problems of localization of legal literature in the smaller jurisdictions of the British Isles and, with the support of a small grant from the Nuffield Foundation, it is hoped to report on

this in 1980-81 in the form of a companion volume to the present work. Thirdly, recent studies of the legal profession in the Third World, in the British Isles and elsewhere have begun to focus on the information habits of lawyers, especially private practitioners. Sometimes this interest has been specifically stimulated by concern about the possible applications of computers to legal practise, in other instances it has been part of a more general study of lawyers and their work. During the pilot project we maintained liaison with some researchers into the legal profession in several countries, but there is room for a much closer integration of studies of legal information and of the legal profession than has so far been achieved.

Against this background it can be seen that the Toronto seminar, and this report of its proceedings, represent only a stage in what is a continuing exploration of a complex subject with many ramifications. The pilot project was merely exploratory: in our view, this somewhat cautious approach has been vindicated. For, while these preliminary investigations have confirmed that there is indeed a widespread concern about improving and localising the provision of legal information in small jurisdictions it has also revealed that there is not one problem, but rather a complex variety of phenomena, problems and perspectives which need to be differentiated and which are not susceptible to treatment in a single project or programme. This complexity can be illustrated in a simple way by our experience of the different concerns of our different sponsors and informants during these early stages.

Different Perspectives on the Pilot Project

During the course of the pilot project it gradually became clear that the notion of a study of legal literature in small jurisdictions triggered a rather varied set of associations and expectations. We found that we were dealing with several constituencies with different, but overlapping concerns. For the sake of clarity it may be useful to differentiate between three sets of concerns and expectations about the possible scope and significance of such a study; these in turn suggest at least three different approaches to the subject.

The first approach which we encountered was concerned with solving a practical problem: how to develop a body of local legal literature that meets the main day-to-day needs of functionaries professionally associated with the legal system: in particular private practitioners, government lawyers, the judiciary, law students and to a lesser extent police officers, civil servants, businessmen, etc. From this point of view, systematic study is relevant only in so far as it helps to diagnose the nature and extent of the problem and points to practical ways and means of solving or at least mitigating it. Practicable recommendations and action were expected to flow directly from this preliminary study. By and large those who assumed that this was what the project was about tended also to assume what might be called an orthodox conception of legal literature - that is, its only, or at least its primary, function is to provide information about the law as it is for professional users and law students.

On this view legal literature consists mainly of five types of work: (a) the statute book (including subordinate legislation); (b) law reports confined to decisions having value as precedents within the jurisdiction; (c) secondary research tools such as indexes, digests and citators; (d) treatises and textbooks expounding the law as it is in a systematic way and (e) law journals, which might serve a variety of functions.

Holders of this view commonly made certain other assumptions, for example:

- (i) that the primary users of legal literature are practitioners (often equated with private practitioners) and law students;
- (ii) that the main, perhaps the only problem, is how to produce works in category (d) - viz, expository works on local law;
- (iii) that the two main obstacles to solving the problem are (a) finance (b) recruiting suitable authors;
- (iv) that the main responsibility lies with academics and commercial publishers, and
- (v) that the only kind of information needed by professional users is information about current rules of law (legal doctrine in a broad sense).

It is not surprising that we encountered a certain amount of scepticism about the exercise from this quarter, although it is fair to say that a very large proportion of our informants agreed that there is a problem. Two kinds of scepticism are worth mentioning explicitly, as they openly challenge the validity of the project. In extreme form they might be stated as follows:

(vi) the problem is easily stated and understood, therefore there is nothing to study; and

(vii) the problem is insoluble, at least in very small jurisdictions.

During the pilot project we have deliberately concentrated (a) on trying to diagnose the problem largely in terms of the orthodox model, which is set out at the end of William Twining's paper on "The Concept of a National Legal Literature" and (b) on identifying possible strategies and devices for trying to solve practical problems. However, even within this limited approach we are inclined to question each of the assumptions listed above. In addition it is evident that the orthodox model of legal literature underlying this view, and used as a basis for our own aspirational statement, makes rather vague assumptions about the uses to which legal literature is in fact put. For example it assumes it is "important" that law reports should come out quickly and that the statute book should be easy to use. Within certain narrow limits it is feasible to operate on the basis of such "common sense" assumptions. But there are a number of empirical questions centred around the global question "who uses what products in what circumstances, in what ways, for what purposes, at what cost in time and money, and with what effects?"

A second kind of approach assumes that a study of legal literature necessarily involves empirical research. Existing research, such as the studies in the United Kingdom by Campbell, Campbell and Kidd and Boyd have tended to concentrate on the habits and needs of private practitioners for information about existing law. While these path-breaking studies are undoubtedly illuminating, the systematic empirical study of legal literature and information is, as we shall see, potentially very much wider than that. During the course of the pilot project we did not undertake any detailed empirical research ourselves. We collected a miscellany of data, views and impressions but we stopped short of carefully structured fieldwork. There were two main reasons for this. First, we felt that it would be premature to launch into any detailed and systematic study before we had gained a broad overview of the various dimensions of the subject and its possible ramifications. Secondly, there is an inevitable tension between satisfying the exacting standard of systematic research and taking prompt action to deal with pressing practical problems. At least in respect of certain kinds of basic orthodox provision, it seemed to us that it did not need expensive and time-consuming research to establish that if copies of legislation in force are unobtainable or there are no educational materials on local law, there is a problem for specialist users. Research and reflection may lead us to modify our perceptions of problems and to readjust judgments of needs and priorities, but it was, and remains, our judgment that there are some matters that can and should be tackled with a sense of urgency.

A third approach which was suggested to us came from people who are interested in broader aspects of the general field of "law and development" and, in particular, questions about the role of law, lawyers and legal processes in promoting and hindering development goals. This approach, which has been articulated most clearly by Professor Paul, and is evident in his paper on Ethiopia, would concentrate on examining the strategies used to determine needs and to develop programmes relating to legal literature and legal information, in terms of the assumptions and models of legal development employed. It would explore the kinds of strategy required by divergent goals, for example, "What are the elements of a strategy if the goal is to strengthen and reform the existing legal system, legal profession, legal education and model of legal development or if the goal is to develop a model of legal development geared to alternative development strategies (eg. human needs, participation, etc.)?"

Among areas of study related to the pilot project which the holders of this approach feel deserve greater attention are the development of an historical perspective analysing the impact of legal literature and information systems on the character of legal and professional development and vice-versa, and of a comparative perspective examining models of legal literature in non common-law jurisdictions. In addition they draw attention to the contextual factors which affect the character of legal literature, such as markets for legal services and access to, and use of, the legal system by various groups. Related in a sense to the empirical approach discussed above are questions about who defines needs by what criteria, and the important issue of providing legal resources for various purposes outside the structure of existing legal services. Our position has been that such questions, though interesting and relevant, go far beyond the immediate objectives of the pilot project. However, some of these issues are explored in a preliminary way in some of the papers, especially in the paper on Ethiopia and the final chapter.

A Possible Aspirational Statement for the Orthodox Model

We feel that the problems, and especially the priorities for planning any changes or developments in the pattern of legal literature within a jurisdiction, can best be

identified by those who have to live and work with the materials within the legal system or legal education structure for which they are designed. We have, however, tried for our own purposes to develop a model against which to set such information. The skeleton of this can be found in William Twining's paper, "The Concept of a National Legal Literature". It is a model of orthodox provision and is intended only as a starting point. Furthermore, as is suggested in the paper, it is important to distinguish between long term aspirational goals and minimum standards for a healthy system.

During the course of the Toronto seminar we concentrated on three sets of questions in connection with it. Firstly, is this adequate as a general aspirational statement for orthodox provision (and a bit beyond), bearing in mind that assessment of needs and priorities in a particular jurisdiction will depend on local circumstances and on the concerns of those in a position to set priorities for action? Secondly, to what extent does each jurisdiction under consideration fall short of this statement (or a revised version of it)? Thirdly, with regard to each category of literature, what is the range of possible strategies and devices available for taking practical steps to improve local provision?

Legal Literature and Legal Information

The subject of both the pilot project and the Toronto seminar was designated by the label "Legal Literature in Small Jurisdictions". From the outset it was recognized that it would be artificial to define any of these terms too precisely. As is indicated in the first paper it is useful to interpret "legal" and "literature" fairly broadly. "Literature" can encompass almost anything which is written from conventionally published books and journals to unpublished court records and archival material. Similarly, "legal" in this context has not been confined to information about principles and rules of law, but is broad enough to include information about customs, processes, personnel and institutions. Nevertheless, it is fair to say that the project as originally conceived was focused primarily on unpublished literature about different aspects of the official legal system. The orthodox model is concerned mainly, but not exclusively with works which provide information about existing legal doctrine; since much of our original concern was with the economics of publishing, it was natural that the primary focus of attention should have been on conventional publications and on possible alternatives to them. However, during the course of the project, it became clear that this way of looking at things might help to sustain two questionable assumptions which seem to be quite widespread in discussions of legal information. First, it is wrong to assume in any jurisdiction, especially a small one, that writing is the main medium of communication about law. The telephone, formal lectures, informal lunches and even social occasions all feature frequently in most jurisdictions as channels for oral communication about law and, it seems, many professionals rely as much on oral as written sources for obtaining and updating the information they need. Second, our own impressions, confirmed specifically by the recent research of David Kidd into Scottish solicitors, suggests that it is wrong to assume that information about legal doctrine is the most important kind of information that certain classes of professional lawyers think that they need. Many Scottish solicitors, for example, spend only a very small proportion of their time looking up points of law, but they have a wide variety of information needs in order to perform the tasks they undertake. How far the concept of "legal information" should be expanded to accommodate all kinds of information that legal specialists seek to have access to is a debatable question that will not be pursued here. Suffice to say that while the primary focus of what follows is on published information about legal rules, it is important to bear in mind that the systematic study of legal literature in any jurisdiction needs to be set in the broader context of a realistic picture of all forms and channels of legal information and of the different types of information used or needed by a variety of types of users. Ultimately a systematic study of legal information in a given jurisdiction should attempt to give a comprehensive answer to questions of the kind: "Who seeks and who provides what information for what purposes in what forms at what cost?"

Different Perspectives on the 'Small Jurisdiction'

It should by now have become clear, in terms of the pilot project, what we mean by "legal literature" and if we continue to elucidate terms perhaps we should consider the "small jurisdiction". The first qualification that must be made is that there is no such thing as a standard "small jurisdiction", a point which becomes abundantly clear on reading the various country papers. The only common factor, and this was indeed the starting-point of the project, is one related to the economics of publishing; that in no case is there sufficient market for specialised legal works relating to the jurisdiction to support a commercial law publishing industry. A second linking factor is that all the countries covered by the papers and questionnaire have a varying degree of common

law inheritance and in most cases the language of legal literature, at least until recently, has been English.

If we survey the actual jurisdictions which have been examined so far they vary in a number of aspects, all of which are significant for the development of legal literature. If one takes different schematisations it becomes clear that there are no simple sets of contrasting "models", for the conditions described combine in different permutations in separate jurisdictions. First, to take straightforward physical size, most of the countries are by no means "small". At one extreme one has the tiny jurisdictions such as the Isle of Man, or Niue in the Pacific, and in these cases it appears that in a geographically small jurisdiction some of the main functions of legal literature can be performed by informal networks of oral communication, or by the use of a single centralized library which is physically accessible to nearly all professional users, but certain problems, such as the publication of case law or the provision of educational materials, become more severe. At the other end of the spectrum are countries like the Sudan, with far greater numbers of lawyers, but where the provincial courts may be up to 700 miles from the capital, communications are unreliable, and as foreign law books for the use of the judiciary are kept in the central Judiciary Library they may be described as "not readily available". In another case we have been asked whether we really consider New South Wales "small" and yet it does have a limited market for "local" legal works.

Grouping these two examples together highlights another level of variation, that between developing and developed countries. While the developed country may have similar market problems it usually has access to greater resources to alleviate these, in terms of finance, publishing outlets and expertise, long established law schools and libraries, better access to new technologies (such as computer retrieval systems) and so forth; yet some would argue that the high expectations these engender only complicate the publishing problem. Yet again there is obviously considerable variation between less developed countries in terms of their relative prosperity and the human and economic resources available.

Another frame which could be used is that of the constitutional or other relationship to other jurisdictions, which can affect the closeness of local law to that of an allied jurisdiction and consequently the level of reliance on foreign literature. Most of the jurisdictions in the papers are independent, yet independence has been achieved at different dates and official policy since has had different impacts on the development of the legal system, education and literature. Others, such as Hong Kong and the Isle of Man are dependencies with a considerable degree of autonomy, and others like the Australian states and Canadian provinces have legislatures within a federal system.

A further frame of reference is the legal system itself, which ranges from the single common law base of the United Kingdom (except Scotland), to systems which have a strong element of civil law tradition and pluralist systems where legal literature must take account of the operations of different kinds of law. Language provides another set of variations. Only the United Kingdom and Australia can claim that the language of the legislation, courts and legal texts is that of all the people (and even here a layman or Welsh nationalist might take exception). At the opposite end of the scale is a country like Papua New Guinea with 300 local languages; in between are jurisdictions where, to varying extents, even where a switch from English as the official language has been effected or is being attempted, the official legal language is not comprehensible to many of the people to whom the law actually applies. Some of the problems of multi-lingual societies in relation to legal literature are illustrated in Mark Cooray's paper on Sri Lanka. Legal education could offer yet more differences relating to the role of the law school in developing local legal works and doubtless there are other categories which could be used.

In a sense these rather crude perspectives are only of use in illustrating the complexity of the real situation in contrast to the abstract level of the aspirational statement. In this context, one final distinction may be made. This is the level of consciousness that there is in fact a problem. In most cases concern with the provision of legal literature is articulated from time to time by disparate groups - professionals, academics and so forth - but is not presented in a coherent way at the level of national concern; the result is that the system continues much as before, with small ad hoc attempts to improve different aspects, such as government intervention in law reporting, or a subsidy scheme for text-books. It is a common complaint that governments do not give a sufficiently high priority (especially in respect of resources and the schedules of government printers) to the development of local legal literature and yet rarely, if ever, has the case for such a claim been stated in a sustained and systematic way. In a few jurisdictions the government has been made aware of the general problem but this is usually as a consequence of action in a related field, such as the work of the Law Reform Commission in Papua New Guinea, the official language switch-over in Sri Lanka, an internationally funded aid project as in the Sudan or a specific government policy to "modernize" the state as in Ethiopia.

The papers which follow pick up these various themes in a variety of ways. William Twining's "The Concept of a National Legal Literature" was originally delivered as a public lecture in Lagos in the early days of the project. It attempts to explore some of the main dimensions of the subject from a broad perspective; it also contains some sceptical reflections on the suitability for export of some of the assumptions underlying two particular forms of English legal literature, viz. law reports and text-books. Similarly Jenny Uglow in describing and reflecting on the the lessons of the S.P.T.L. study of academic law publishing in the United Kingdom raises some general questions about the relationship between academic attitudes, traditions of scholarship and legal publication in a way which transcends national boundaries. The next seven papers deal with particular countries or jurisdictions. The papers on Hong Kong and Sudan, by Peter Wesley-Smith and Akolda Tier respectively, follow fairly closely and in detail the original questionnaire which was primarily directed to orthodox provision of published works. Michael Gaiger's account of the problems facing the widely dispersed Sudan judiciary in gaining access to basic materials graphically illustrates some of the realities which can easily be masked by high-minded aspirations. The account of the situation in the provinces of Canada, by Balfour Halevy and Paul Murphy, underlines inter alia the point that money alone cannot solve many of the problems of providing even basic research tools. Mark Cooray's account of the language changeover in Sri Lanka is part of a pioneering study of the problems of law in multi-lingual societies. Abdul Paliwala in his study of Papua New Guinea raises some broad issues about the relationship between colonialism, neo-colonialism and information about law. Similarly Rob Martin, in looking at the development of legal publications in the East African jurisdictions from a Marxist perspective, makes some points which deserve consideration in a broader context. James Paul in his study of Ethiopia also raises some fundamental general questions about the relationship of the provision of legal information to recent thinking about development, while at the same time giving a detailed account of what can be achieved by a few dedicated individuals attacking the problems in an energetic and determined way. In the final chapter the editors have attempted to draw together some of the main points that emerged during discussion at the seminar and to make some suggestions for further study and action.