

CHAPTER 4

SOME PROVOCATIVE PROPOSITIONS

These very tentative generalized conclusions, impressions and hypotheses were drawn up from our reading of the papers and other material collected during the course of the pilot project and of the S.P.T.L. Working Party on Academic Law Publishing. They were prepared as a working paper for the seminar with the intention of provoking discussion and criticism and they are presented here, with only minor textual amendments, with the same end in view.

The propositions represent an initial attempt to collect in a single place some of the more common themes that have been expressed, and their very generality, particularly in a relatively unsystematic form arouses some questioning. Points made at the seminar ranged from the doubt as to the appropriateness of the aspirational model to pluralistic, multi-lingual countries where precedent is less central to the development and application of law, to the effect of the educational system as a whole on the performance of legal academics, and to particular issues of economics and planning. We do not personally agree with all the propositions, still less do we feel that they are universally applicable to all the jurisdictions with which we are concerned. Rather they are presented as a convenient and, we hope, suggestive starting-point for considering a number of the general issues in relation to any particular jurisdiction.

A. In Relation to the Aspirational Model

1. (a) In all small jurisdictions existing legal literature, in terms of products, falls far short of the orthodox aspirational model (as stated in chapter 2).
- (b) This may have adverse, or in some instances positive, effects on the efficiency of legal services and legal education, but a direct relationship is difficult to document.
- (c) The aspirational criteria may need adjusting for different types of jurisdiction and for different models of legal development.

B. In Relation to Producers and Resources

2. (a) In most small jurisdictions there is a vacuum with regard to distribution of responsibility for the production of most classes of legal literature.
- (b) This is the biggest single factor in producing the ad hoc growth of legal literature as publications are produced in response to market demand or individual interest and not in response to perceived 'needs'.
- (c) Planning for local legal literature confronts an immediate problem due to the conflict of priorities and interests as perceived by different groups: government, private practitioners, academics, unions, advisory groups, foreign business enterprises etc.
- (d) In some cases, and for various reasons, institutions and groups may actually resist the publication of information about decisions, or about the area of law in which they operate.
3. (a) It is a common complaint that governments do not give a sufficiently high priority (especially in respect of resources) to the development of local legal literature.
- (b) Despite this general feeling very rarely, if ever, has the case for such a claim been stated in a sustained and systematic way.
4. (a) Where there is no local law school there is an almost total absence of expository and critical works.
- (b) Whether there is a law school or not the tradition of legal writing by officials, judges and practitioners in the 19 or early 20c has faded; reasons given include greater pressure of work and lack of incentive, but these do not constitute an adequate explanation.
5. (a) Where a law school exists it is assumed (by government, professionals etc.) that they will make a substantial contribution to the development of local literature.

- (b) In many jurisdictions it is assumed that this contribution will include documentation, law reporting, producing journals and books to meet practitioners' needs as well as academic and student interests and research.
- (c) Most local law schools appear to have made a contribution on both a smaller and less systematic scale than was potentially within their capacity.
- (d) The reasons for this vary from place to place and are related to such factors as the level and continuity of staffing; the lack of incentive to undertake work that is time consuming, not within the individual academic's real sphere of interest, lacks academic prestige and may demand specialized skills which an academic does not necessarily possess.
- (e) The potential contribution of postgraduate research students to the localization of legal literature has been almost entirely overlooked in most jurisdictions.
- (f) A centralized research scheme, particularly in countries with no commercial publishers, may help to ensure the availability of funds and also keep research in line with agreed national priorities.

C. In Relation to the Economics of Publishing

- 6. (a) The domination of much small jurisdiction publishing by multi-national publishing companies, often with bases far removed from the jurisdiction, has resulted not only in high prices for published works, but has also been a brake on local writing.
- (b) For career and prestige reasons local outlets are often by-passed in favour of publishing in international journals or with foreign publishing houses.
- (c) The desire for international recognition may lead writers to concentrate on topics which are not at all, or not exclusively, of local importance.
- 7. (a) But local outlets can generate legal literature as much as they service it.
- (b) If a journal is started, articles even if of variable quality will appear, and the same is true of books if a local publisher shows interest in publishing legal works.
- 8. (a) In most small jurisdictions little attention has been paid to the most economic and efficient means of publishing legal literature.
- (b) This may be due to the retention of set ideas as to what constitutes 'publication'.
- (c) In a very small jurisdiction xeroxing or duplicating essential material may be the sensible way of disseminating information about law as few copies will be required.
- (d) In a slightly larger market subsidy schemes for printed works may serve the purpose better, but economical production methods can still be used.
- 9. A carefully administered subsidy scheme can have considerable effect,
 - (a) in facilitating publication by cutting the publisher's risk,
 - (b) as a catalyst and stimulus to research.
- 10. (a) In the absence of formal, or systematic informal, pressures, such as compulsory subscription to law reports, it is likely that a high percentage of the potential professional customers for local legal literature will not in fact purchase it.
- (b) This seems to vary from place to place and empirical research is required before explanations can be advanced.
- (c) In most small jurisdictions the potential international market for local legal literature is not adequately exploited; a national, regional or international distribution agency for legal publications might go a long way to remedy this.
- 11. Little attention has been paid, either by individual jurisdictions or by international aid agencies, to creating schemes whereby jurisdictions with similar conditions and problems can exchange information and assistance.

D. In Relation to the General Context of Legal Information and Legal Development

12. (a) Most legal literature is produced on the 'orthodox model' which treats professional lawyers and law students as the primary users to the almost total exclusion of almost all other classes with an interest in local law and in the operation of the legal system.
- (b) Professional lawyers and students tend to operate regularly in only part of the total legal system and the degree of access to and penetration of the legal system within society as a whole varies very much from jurisdiction to jurisdiction.
- (c) The publication of law for the people is usually given a lower priority by the authorities unless there is a deliberate policy to the contrary.
13. (a) The better documented legal system always dominates over the less well documented (Paliwala).
- (b) A lack of local legal literature, particularly reports and expository works leads to reliance on foreign sources plus inhibiting the development of a local legal culture.
14. (a) The problem of developing a local legal literature is more acute and/or more complicated in a multilingual society.
- (b) This is especially so where the language of legal education, and therefore of academic writing is different from that of practice in the courts or from that of the general population.
- (c) An official language switch-over in the courts and in education can lead to literature related problems e.g., translation of sources of law, translation of legal terminology.
- (d) Among the wider implications is the threat of greater isolation of professional lawyers and law students from international legal developments.
15. (a) There may be dangers attendant on the unthinking adoption of the orthodox model.
- (b) For example in some instances there are strong arguments for avoiding a rigid literary formulation of existing customary law principles and procedures.
- (c) The creation of a technical legal literature designed solely for professional users may make understanding of, and access to the legal system more problematic for the general public.
16. (a) Some of the main functions performed by legal literature in large jurisdictions are replaced in small ones by;
 - i) informal networks of oral communication
 - ii) use of a single centralized library or centre which is physically accessible to nearly all professional users.
- (b) These factors operate less satisfactorily when there is geographical dispersal of users and/or increasing numbers of users.
- (c) In other words the absence of literature may be less problematic in a physically small jurisdiction than in a medium sized one (in market terms).
- (d) Informal networks of communication about law exist in all jurisdictions, but their nature, extent and functions vary considerably from jurisdiction to jurisdiction. This is almost a totally neglected topic in studies of the legal profession.
17. (a) In the colonial situation within the common law world the development of legal literature seems to follow a roughly similar pattern.
 - i) pre-literate (in terms of professional literature) - customary or religious law.
 - ii) official colonial phase - published legislation
 - iii) (ii) plus non-academic literature - ad hoc production of reports, digests, lower court handbooks, treatises by officials and lawyers.

- iv) (ii), (iii) plus academic phase - ad hoc production as above plus more critical literature.
- (b) Other currents, which may be separate or inter-related, may affect the development of legal literature and may lead to a 'planning phase'. Such factors may include:
 - i) changes in official ideology
 - ii) nationalist feeling (following independence) articulated in official policy with regard to law
 - iii) the development of a law school
 - iv) a programme of law reform
 - v) an official language switch-over
 - vi) an injection of aid for a planned programme
 - vii) a policy aimed at developing a sense of nationality in a plural society.
- 18. In very small jurisdictions, at this stage in their development, computers have no role to play in meeting the legal information needs of professional users.
- 19. In respect of secondary writings, even in small jurisdictions it is not uncommon to find:
 - (a) concentration on areas of no great social significance;
 - (b) neglect of areas of special social significance;
 - (c) duplication of effort;
 - (d) waste of talent on relatively trivial tasks;
 - (e) inefficient or otherwise unsatisfactory systems of publishing primary sources;
 - (f) inappropriate choices of forms of communication unsuited to their purposes;
 - (g) the predominance of one ideology or of a single approach to law;
 - (h) over-concentration on one legal standpoint, for instance that of appellate court judges, to the neglect of other important legal standpoints - and so on.
- 20. The influence of economic factors on expository literature can be very great. Cost may be the single most important influence on length. Often students provide a more attractive market than practitioners to a commercial publisher, but where a work can be sold as serving several markets simultaneously, there will be pressure to force works into that mould to the detriment of one function or another. One reason for the continued domination of the textbook in legal education is because, by virtue of its reference function and its claim to cover whole fields, it is typically more attractive commercially to law publishers than most other types of educational work.
- 21. In large jurisdictions and, *a fortiori* in small ones economic factors tend to lead to bunching of expository literature, concentrating on those fields for which there is a reasonably assured educational market. Certain standard areas, such as contract and tort and land law, may suffer from over-concentration, other areas, such as industrial property, welfare law or consumer law may be neglected because the market for such works is restricted. Similarly innovation may be inhibited because publishers will wait for courses to develop and courses will wait for books. Content analysis of the spread of expository literature in a particular jurisdiction, even in terms of standard expository categories, might reveal some striking and unwholesome imbalances.
- 22. Even more striking imbalances may be found in the kinds of subjects covered or not covered by a system of orthodox law reports - for example, only cases involving serious or exotic crimes are reported.