

PATRIATION OF INHERITED IMPERIAL STATUTES

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1. The great preponderance of the jurisdictions within the Commonwealth share the inheritance of a basic system of law comprised of the common law of England and the doctrines of equity, coupled with a body of statute law, enacted by Parliament in the United Kingdom (or predecessor Parliaments², that has been given local effect. This common legal inheritance is one of the acknowledged links in shared institutions and values which maintain the strength of the Commonwealth. Although states, on independence, have acquired full autonomy with respect to the direction of legal change and development and the policy and content of legislation, there has been little inclination to replace the basic system to which they have succeeded. For that system usually provides the foundations and footings upon which subsequent legal structures have been built and with which they are intricately tied in. Replacement or substantial displacement would be a major task of legal engineering that would carry with it the dangers of insecurity and instability. In any case, there are distinct benefits in retaining such a basic law. For it makes available, most particularly through judicial precedents, the wealth and enormous variety of sophisticated legal experience which has developed over centuries in the United Kingdom and more recently in the Commonwealth.

2. Nevertheless, despite the shared ground in which the various legal systems are rooted, the nature and direction of the legal growth of each independent system necessarily must take its own form. Moreover, there is a growing belief that any appearance of dependence upon the founding legal system is inconsistent with the actuality of separate development. Accordingly, there is an expectation that, as far as possible, the original sources of the legal system will be formulated in terms that accentuate the distinctiveness of each legal system and emphasise the ability of the institutions of that system to develop those sources to meet the unique needs and objectives of the particular society.

3. Such patriation of the inherited law involves two processes. The first is designed to emphasise that the development of the received common law and the doctrines of equity³ to meet the circumstances of a particular society is the function of the courts of that society, unconstrained by any obligation to follow the dictates of the courts of another system. The second aims to identify those statutes of the United Kingdom which have been given local effect and which require local continuance and to integrate them fully into the local statute book, at the same time repealing all others that have been given such effect but no longer serve any current purpose. This paper is concerned with the second of these processes.⁴

PATRIATION OF STATUTE LAW

4. Most Commonwealth jurisdictions have inherited a body of statute law originally enacted by the Imperial Parliament. In almost all, the extent and nature of that inheritance is uncertain. There are few jurisdictions, perhaps none, for which it is possible at present to provide a definitive statement of the statutes which have been inherited and currently have local effect. Indeed, there are often serious difficulties in determining authoritatively, otherwise than through litigation, whether or to what extent a given Act of Parliament has local application.

5. Such a state of affairs has nothing to commend it. It is less than satisfactory that those who wish to follow a course of action may for this reason be unable to establish the full range of their statutory obligations and that their local statute book will usually not contain the complete texts of all the written rules which are applicable to a given subject matter. Legal systems usually operate through a general acceptance of a moral duty to comply with the law. There is also a normal expectation of security for transactions conducted in compliance with the law. If, however, there are legal rules which, if the matter comes before the court, are found to be applicable but about which there was to that time ignorance or uncertainty as to their existence or content, these important values might be thought to be at risk.⁵

6. It is partly for considerations of this kind and partly because there is rightly a wish to emphasise the autonomy of independent legal systems over all sources of local written law that the question of inherited statute law is increasingly seen as calling for particular attention. Major projects have been initiated in several of the Australian jurisdictions and in New Zealand and the subject is being carefully monitored in a number of the Canadian Provinces.⁶ A programme concerned with the matter of inherited Imperial statutes in small Commonwealth States has recently been instituted by the Legal Division of the Commonwealth Secretariat with funding from the Commonwealth Fund for Technical Cooperation.

7. In this context, satisfactory patriation of inherited statute law appears to involve the following steps:

- (i) the compilation of a definitive list of Imperial legislation that has been given effect as part of local law and the continuance of which is necessary in current circumstances;
- (ii) the repeal of any Imperial legislation that has been given local effect and still remains in force but the continuance of which is no longer needed;
- (iii) wherever appropriate, the replacement of continuing Imperial legislation by local enacted provisions which are consistent, both in form and content, with the existing body of local legislation and the current needs of the legal system;
- (iv) the integration into the local statute book, not only of the replacement provisions, but also of the complete corpus of continuing Imperial legislation, whether by reprinting or by re-enactment.

In principle, it seems unacceptable that it should be necessary to examine the statute book of one legal system in order to determine the nature and extent of current legal requirements in another.

TYPES OF INHERITED STATUTES

8. There are four principal ways in which statutes enacted in the United Kingdom have become part of the law of other Commonwealth jurisdictions. The first of these, since it is the result of the exercise of local legislative authority, may be said already to have comprised a form of patriation. It is the patriation of the other three types which is usually required.

(i) Verbatim repetition of United Kingdom legislation

9. The statute books of most Commonwealth jurisdictions contain examples of statutes which repeat, sometimes with changes of greater or lesser importance, the terms of statutes enacted in the United Kingdom usually for application to England and Wales. This practice was encouraged during the colonial era by the distribution by the Colonial Office of model legislation, notably in areas of law in which there appeared to be advantages in Imperial harmonisation. Those who prepared legislation in dependencies always paid close regard to English enactments, perhaps because of familiarity or availability, perhaps because of the benefits of having access to English case law and texts relating to the original. In many systems, basic areas of law are still governed by statutes which are modelled upon English precedents, notably criminal law, contract, company and commercial law, family law, law of torts, real property, conveyancing and succession law.

10. This practice may on occasion be open to criticism, not least where there has been an uncritical adoption and failure to make suitable adaptations⁷ or to learn from the experience in operating the original to effect improvements or to take account of relevant English amendments. Nonetheless, it has the merit of constituting local made legislation, locally available and eventually finding an appropriate place in the Revised Laws. Small jurisdictions in particular still find positive advantages in this practice, since they are unlikely to have the resources or the expertise to innovate with respect to every type of matter requiring legal regulation. Indeed, where the common law and the doctrines of equity have also been received as basic law, there are clear arguments in favour of making considered use of the legislative precedents from similarly based systems. Legislative Counsel are rightly encouraged to make discriminating and critical use of such models⁸ although today they are increasingly being sought in the statutes of those common law jurisdictions less given to convolution and dense drafting than the United Kingdom.

11. There is one respect in which these statutes may be important to the question of patriation or received Acts of Parliament. The Law Reform Commission of the Australian Capital Territory has drawn attention to the principle of implied repeal elaborated by the High Court of Australia in 1934:

"The repetition of [a section of a United Kingdom Act] by the colonial legislation operated as an implied repeal of the British enactment so far as it applied to New South Wales."⁹

The limits of this principle, as the Commission point out¹⁰ are uncertain, though there are suggestions that it may not be confined to cases of absolutely identical wording and that repetition of part may impliedly repeal the whole.¹¹ Moreover, this introduces the unusual form of implied repeal by later consistent, rather than inconsistent, legislation. This doctrine may present difficulties in reaching a conclusive decision whether a received Act has been repealed.

(ii) Referential legislation

12. Referential legislation is a further legislative device which has been practised in the Commonwealth. By this device, local enactments expressly adopt or apply United Kingdom statutes, not by repeating their content, but merely by referring to the statutes, in whole or in part, by some appropriate citation. The text of the original must, therefore, be used, usually with the assistance of provisions in the local interpretation Act, whereby formal adaptations, not affecting the substance, may be made as are necessary to render it applicable in the context to which it has been applied.

13. As a general rule, the device of referential legislation has value if it is employed to incorporate into a new setting earlier provisions enacted by the same Legislature. For it

avoids needless repetition of the same words already contained in the same statute book, it saves the time of the legislature in covering the same ground and it reduces the possibility of different legislative expressions being used in respect of matters on which uniformity is desirable.¹² But the use of this technique with respect to the enactments of another Legislature rarely confers these benefits. Rather the reverse. For the statute must be sought in the statute book of another country where it may no longer be in force in the form it enjoyed when it was incorporated. It may be difficult to construe and apply in the legal and social context to which it has been applied, as its substantive terms are usually not to be modified to suit it to local circumstances. There are also problems as to the status in the local courts of decisions interpreting the original statute rendered by the courts of the country of origin.¹³

14. Moreover, the statutory methods used in Commonwealth legislation for incorporation by reference bring their own difficulties on construction and application. The extent of the incorporation will depend upon the statutory device by which it is effected, whether it is by reference to the citation of a named statute or a more generalised reference to English statutes on a particular subject, whether it is ambulatory in effect or relates to statutes as they stood at a particular point of time.¹⁴ What Imperial statutes may be caught by these devices is not always easily determined. The technique of referential legislation may have been unavoidable in the past in order to introduce a complete or residual body of tried law into an under-developed legal system. At present, however, it often leads to reliance upon out-dated or unsuitable statutes which are frequently not readily to hand.

(iii) Statutes of paramount force

15. Certain statutes enacted by the Parliament of the United Kingdom (and its predecessors) have become part of the law of dependent territories and of independent countries of the Commonwealth whilst dependencies of the United Kingdom as a result of extension by virtue of provisions in the Acts themselves. These Acts are variously referred to as "Imperial statutes" or "United Kingdom statutes in force proprio vigore" or "of paramount force". The terminology is designed to emphasise that these statutes have become the law of a dependent territory in consequence of the exercise of the imperial authority of the Parliament in the United Kingdom at a time when it enjoyed legislative jurisdiction over that territory.¹⁵

16. These statutes must be distinguished from those that alter the law of the United Kingdom in its dealings with its colonial territories, but which are not intended to operate as part of the law of those territories. Such statutes, although they "apply" to dependencies, do not "extend" to them so as to operate as legal rules enforceable or effective in the colonial legal system. This legislation may relate to the institutions which have authority over dependencies but it takes effect only as part of the law of the United Kingdom, albeit in discharge of its colonial responsibilities. The mere fact of a reference in a United Kingdom statute to a dependency does not constitute an extension of its provisions as part of the law of that dependency. In addition to statutes of the Imperial Parliament, most former dependencies were subject to the exercise of the Crown's legislative power¹⁶ either by virtue of the prerogative¹⁷ or under the authority conferred by Imperial statute to make instruments, such as Orders in Council, to have effect as part of the law of dependencies.

17. The principal constitutional characteristic of this type of legislation is that it cannot be altered by the legislature of a dependency, since to do so would fall foul of the Colonial Laws Validity Act 1865.¹⁸ Unlike received statutes, considered below, these statutes become part of the law of a dependency by virtue of their own terms and may so extend, even though they never had application in England or any other part of the United Kingdom.¹⁹ They may be altered by the local legislation only after the constraints imposed

by the Colonial Laws Validity Act 1865 have been removed, usually by the particular independence legislation.

18. This type of legislation was extended in some cases to all the then dependencies, in others for groups of dependencies or for individual territories. Since the legislation took effect as part of the law of the jurisdictions concerned, it remains in force unless and until repealed subsequently by a legislative authority competent to pass such legislation.

19. Much of the extended Imperial legislation is obsolete, being applicable to colonial circumstances or to conditions no longer found. In many instances, however, the type of legislation has not been the subject of express repeal, either by the Imperial Parliament, when it had the authority or, subsequent to independence, by the local legislature and, thus technically it remains part of the law of the jurisdictions to which it was extended. In some cases, legislation continues as law in dependent jurisdictions to which it was extended, although it has been repealed by the Parliament of the United Kingdom for the purposes of United Kingdom law.²⁰ In yet other cases, the enactment of local legislation on a particular subject matter may raise difficult questions of implied repeal of extended statutes dealing with related matters.²¹

20. At the same time, there appears to be a substantial body of statutes of paramount force which may have important implications for independent Commonwealth States to which they were extended. So, for example, it has been common practice to give effect in dependent territories to treaty obligations undertaken by the United Kingdom, by Order in Council extending the implementing Acts of Parliament (usually with appropriate modifications). These Acts will normally continue in force after independence, even though the question of succession to the treaty by the newly independent state has not been finally resolved (as for example the Extradition Acts 1870-1935 and the Copyright Act of 1911 or 1956). Other important areas of law, as for example those relating to air navigation, merchant shipping and admiralty jurisdiction, and official secrets, continue to be governed by statutes of paramount force.

21. There is no comprehensive and up-to-date list of statutes of paramount force. Its compilation, whether in general terms or for individual jurisdictions, has never been fully undertaken.²² Identification of those statutes which expressly extend is only part of the task. For it has long been recognised that an Act may extend "by necessary intendment", if -

"a consideration of the scope and object....leads to the conclusion the [Parliament] intended to affect a colony and the words used are calculated to have that effect."²³

Unhappily, that test is far from easy to apply, especially in relation to statutes enacted before England acquired overseas possessions or in the early period of the Empire when the relevant legal rules and related legislative practices were in the process of evolution.²⁴ It is at least arguable that statutes relating to institutions which came to have authority within colonial legal systems when they were subsequently created should be treated as having paramount force. So, for example, legislation relating to the Crown and its prerogatives and possibly that governing treason ought in principle to have automatic operation in dependencies, and not be dependent upon the operation of any reception of law rules.

22. Even with respect to the period after the authority of the Imperial Parliament over dependencies was well established, it is by no means always certain whether Parliament intended to bring colonial dependencies within the ambit of particular statutes. As Piggott wrote:

"The draftsmen have not always borne the existence of the Colonies in mind but have dealt with them as the humour seized them, in some cases whimsically."²⁵

Whether a statute is extended by necessary intendment is, in the end, a matter for the courts. They have increasingly relied upon a presumption against extension, requiring the presence in the statute of "clear language, given its proper, usual and reasonable effect"²⁶, from which the intention to extend can be inferred. But in the absence of inference as to the intention from the language used, it is possible, in the view of the High Court of Australia, to infer the intention from a consideration of the relative convenience and complexities that result from holding in favour or against extension.²⁷

(iv) Received statutes of general application

23. Jurisdictions which became British possessions as a result of settlement are considered to have acquired English law as their basic law, because the settlers are deemed to have carried it with them. Those acquired by conquest or cession usually acquired it, in whole or part, by Crown grant in substitution for the non-English system which had hitherto been in force. Usually from the date of settlement or from the date of the grant, the United Kingdom statutes of general application in force in England at the time, with rules of common law and equity, had effect so far as suited local circumstances. This position is still derived from the common law in many of the early settlements, in which the date of reception is now very distant (Bermuda, 1622; Barbados, 1627; Montserrat, 1632). Most jurisdictions in the Commonwealth, however, are governed by statutory rules based upon the common law. In some, notably in the South Pacific, the reception date is much more recent (Fiji, 1875; Kiribati, Solomon Islands, Tuvalu, Vanuatu, 1961).

24. In several respects, the reception rules are easier to describe than to apply. For they contain qualifications, the application of which can only be determined by judicial ruling. Although there has been considerable case law over the years in the Commonwealth as a whole, both on the rules themselves and on their application to individual statutes, it is not easily accessible, especially to small states with law libraries made up principally of English law reports. There are relatively few cases which have come before the courts in England. In any case, decisions from another system must be used with care. For the reception of a statute must be decided upon under the rules as they apply to the circumstances of the jurisdiction in question. As this must be a matter for the courts there, it follows that any list of received statutes drawn up administratively cannot be treated as either definitive or comprehensive. Whilst it is open to the legislature to provide exact guidance, this has been attempted only rarely.

25. The legal difficulties in implementing the reception rules indicate the uncertainties surrounding predictions as to the applicability of particular statutes, and indeed in determining exactly which statutes are likely candidates for reception:

(a) the statute must be an Act of the United Kingdom Parliament

26. Implicitly at common law, usually explicitly in the statutory provisions, the enactment must be an Act of the Parliament of the United Kingdom. The term is usually taken to include enactments of the Parliaments which existed prior to the Unions with Scotland and with Ireland. It will presumably include any subordinate instruments, made by virtue of an Act of Parliament, which satisfy the other requirements set out below.²⁸ It does not extend to Church Assembly Measures or General Synod Measures, albeit that, on ecclesiastical matters relating to the Church of England, these generally have the force and effect of an Act of Parliament.²⁹ They are not technically statutes. Accordingly any changes to an Act of Parliament by such Measures will not be caught under these rules.³⁰ There are reported decisions in which parts of statutes have been held to have been received,³¹ although other sections clearly are incapable of application. This will usually be possible only where the removal of the latter does not damage the legislative scheme. In other cases, individual

provisions from an Act comprising a series of unconnected sections have been applied, when others have not.³² Generally, however, courts have been reluctant to apply individual sections from a statute most of which is not applicable.³³

(b) the statute must be one of "general application"

27. Common law and statutory reception provisions usually agree that the Act must be of general application in England. The exact coverage of the term, however, is not a matter of certainty. There is no question that statutes declaratory of, or modifying, the common law fall within the term. It is generally accepted that statutes designated as "private", "local" or "personal" do not.³⁴ At the same time, it is clear that not all those classified as "public and general" are intended. For many examples can be found of Acts of this kind which have but limited application to particular places in the United Kingdom or to identifiable persons. Unhappily, there is no clear agreement about the test for distinguishing those public and general Acts which, being essentially suited or designed for the English context, are only of limited application, from those which are suitable for export. There are suggestions in Blackstone³⁵ that penal and policing statutes³⁶ are not of general application nor are those relating to revenue³⁷ or to particular classes of persons.³⁸ It may be doubted whether any such broad conclusions can be justified in the absence of any unifying principle.

28. The purpose of this requirement, it may be suggested, is to exclude statutes the aim of which was to deal with circumstances which are exclusively found in the United Kingdom to to implement a policy which is essentially concerned with conditions which are peculiarly domestic. Accordingly, it should be asked, in relation to each statute, whether its objects and purpose were to bring about a change in the regulation of activities in England which arise out of political or social factors particularly associated with England at the time of enactment.³⁹ In this respect, Commonwealth decisions on individual statutes may be especially helpful, since all the courts will have been engaged upon the same task of seeking to establish whether those Acts were capable of being exported anywhere. Unfortunately, the same conclusions have not always been reached on the same statute in different parts of the Commonwealth.

(c) the statute must be in force in England on the reception date

29. The law which was exported was English law. It follows that the received statutes must be part of English law. An Act of Parliament which applies only to Scotland or to Northern Ireland will not be caught. On the other hand, one which applies to the whole of the United Kingdom obviously has force in England.

30. The statute must be shown to have been in force at the particular reception date.⁴⁰ Any Act or any provision thereof passed before that date but brought into force after it is not included.⁴¹ Any amendments or repeals after that date obviously are also excluded. It is essential, therefore, to determine exactly both the reception date and the date when the Act or its provisions (if different dates are used) have been brought into effect. The former task is not easy for many of the early settlements, although usually the date has been settled by the courts. Fortunately precise statutory dates are normally to be found. Whether the Act was in force may require careful research since dates of commencement, especially in recent practice, have been postponed or staggered.

(d) the statute must be capable of application to local circumstances

31. Although the statute may be found to be suitable for export, it must still be shown to be appropriate for import into the particular legal system, that is, to be capable of application in the circumstances of that jurisdiction.⁴² If the conditions of that jurisdiction are such that the legislation could not be put into effect, it will not be received, as, for example, if there are no institutional arrangements which are essential to the implementation of the statute. It appears that the courts may consider cultural and social circumstances and the state of development in the jurisdiction at the relevant time.

32. Unhappily, there is controversy as to what is the relevant time. Arguments have been made in favour of the reception date, of the date of the statute, if any, setting the reception date, the time at which the events leading to proceedings arose and the date of the proceedings.⁴³ If any date other than that of reception is used, a high degree of unpredictability arises. For all the other dates allow the possibility that statutes, incapable of application at the reception date, are attracted by subsequent changes in local conditions. There is, however, some authority both in case law⁴⁴ and amongst commentators⁴⁵, that the date is that when the subject matter of the litigation, in which the question is to be decided, arose. There can be little doubt that it is easier for a court to assess the local circumstances as they currently obtain than to enter into an examination of the past. Yet this approach hardly seems satisfactory. For, illogically, it makes it possible for a statute, held in the past not to have been received on this ground, at some later time to be ruled to be applicable. Yet a statute which has been held to have been received cannot subsequently be held to be no longer applicable because of changed circumstance.⁴⁶ If this is the case, it means that, in principle, no reliance can be placed upon a decision that a statute had not been received as unsuited to the circumstances prevailing at that time. A better view, surely, is that this line of argument should be confined to the reception of common law rules which may, as it were, lie dormant until the circumstances to which they apply emerge.⁴⁷ For statutes, it seems more appropriate to treat the reception date as the time for assessing applicability.

33. There are other difficulties with this qualification. Although a statute as a whole must be examined for its applicability, it may be held to be reasonably applicable to local circumstances, despite the fact that parts of it clearly are not. A court may, therefore, treat sections of a statute otherwise applicable as inappropriate and not to be applied. Again the degree to which this may be done is not always predictable. Whether this permits a court to alter the substance of particular provisions to make them apply when they would otherwise not must be doubted. It is common to find courts authorised by the Interpretation Act to make formal adaptations; it would require very clear words to permit the courts to exercise a legislative power over rules of substantive law.⁴⁸ In principle, it seems probable that the courts will limit themselves to the making of formal modifications or to the rejection of those sections of a statute, otherwise capable of having effect, which do not suit local circumstances.

(e) the statute must not be repugnant to local legislation

34. Express repeal of a received statute by a local enactment, though rare, will, of course, expunge it from the local statute book. Where the local legislature has dealt explicitly with the same matters as are covered by a statute of general application, the local legislation prevails to the extent of any inconsistency. But, as the South Australia Law Reform Committee has pointed out⁴⁹, the question of implied repeal in this context is a thorny one. For such a repeal requires a contradiction between the later and the earlier statutes. Merely because they deal with the same subject matter is not enough. For two sets of provisions can often be construed in such a way as to give effect to both.⁵⁰ The later local Act will not repeal the received statute except by express terms or to the extent to

which the former cannot be given effect because of the requirements of the latter. Again this can only be finally determined by the courts in the accidents of litigation. Local legislation may, by the apparent premises on which it is drafted, indicate that an English Act is, or is not, being relied upon as having local force.⁵¹

PATRIATION SCHEMES

35. A number of Commonwealth jurisdictions have undertaken schemes for the patriation of Imperial statutes. Most have been partial in their coverage and necessarily cautious in their approach. To date the only schemes which have set out to patriate the three types of statutes, that is, referentially applied, received and extended statutes, are: the one currently in hand in New Zealand and the Commonwealth Secretariat project. The following paragraphs describe in outline the major projects (details of the sources referred to are listed in the Appendix).

Bahamas

36. One of the earliest patriation arrangements is to be found in the Declaratory Act 1799 of the Bahamas. In addition to declaring that the common law of England is in force in the Bahamas, this statute in its original form declared some 207 statutes and Acts of Parliament to be in force there. Subsequent Bahamian legislation has reduced this number to less than 20. The text of each is inserted into the appropriate title and numbered as a Chapter in the Revised Laws. In addition, it has long been the practice to list in the various reprints of this Act those Acts of Parliament which, subsequent to 1799, have been declared by Acts of the Assembly of the Bahamas to be law in the Bahamas and which, at the time of the re-print, were still in force. The full text of these again is reproduced in the Revised Laws. These are almost all nineteenth century Acts of Parliament and now total less than 30.

37. The enumeration of the statutes in force is, however, not comprehensive. For there is a general provision in the Act that statutes relating to "the prerogatives of the crown and the allegiance of the people" and those which "declare the rights, liberties and privileges of the subject" are in full force in the Bahamas.⁵² There is no identification of these. Further, Acts of paramount force, with the exception of the Copyright Act 1956, are not included in the Revised Laws, though reference is made to some in the Table of Statutes printed for use with those Laws. The original listings of particular pre-1799 statutes are a useful indication of statutes which can be considered capable of export to the colonies.

Western Region of Nigeria

38. The Law of England (Application) Law of 1959 of the Western Region of Nigeria adopted a radical approach to patriation. Whilst the common law of England and the doctrines of equity observed by the High Court of England are stated to be in force, no Imperial statute "hitherto in force" within the Region is, after the Act, to have any force and effect there.⁵³ Such Acts as were needed were specifically continued in the form of locally enacted statutes. Whether or not any Act had been received as an Act of general application under earlier rules was no longer to have relevance with respect to future circumstances. Unless re-enacted, all such Acts ceased to have application by virtue of this repealing provision.

39. This statute, however, was silent on the question of referential legislation. Presumably, any United Kingdom statutes made part of the law of Western Nigeria by virtue of a locally enacted Law would have the effect stated by that Law. Further, this statute had no effect upon the continued operation of an Imperial Act dealing with a subject matter outside the legislative competence of the Western Nigerian Legislature.⁵⁴ Lastly, statutes of

paramount force are expressly stated to be unaffected by these requirements.⁵⁵ It is apparent, therefore, that the patriation process was only partially effective.

Gibraltar

40. By the Application of English Law Ordinance 1962, Gibraltar has undertaken patriation using a process similar in some respects to that followed much earlier by the Bahamas. Having declared that the common law and the rules of equity "from time to time in force in England" are in force in Gibraltar, subject to the usual qualifications⁵⁶, the Ordinance gives effect to a series of enactments specified in its Schedule. Originally these comprised 113 Acts enacted between 1267 and 1883. Four Acts passed between 1957 and 1972 have also been given effect by this mechanism. None of these has been reproduced in the Laws of Gibraltar. By a series of subsequent Ordinances, 26 of these have been deleted, usually following the enactment of substantive Ordinances on the subject matter in question.

41. The Ordinance also states in general terms that the Imperial statutes are in force if they have been -

- (a) "applied to Gibraltar" by Order in Council or express provision or necessary implication in the United Kingdom legislation;
- (b) applied to Gibraltar referentially by local Ordinance.⁵⁷

Appendices contain listings of "English Acts" in force by their own terms or as a result of being applied thereto by Order in Council and of Orders in Council applying to Gibraltar. These lists have no legislative force and are not claimed to be comprehensive. Indeed, they contain some Acts which "apply" to Gibraltar but which may not have been "extended" as part of the law of Gibraltar. There is no listing of referentially applied Acts nor are any of these statutes and orders reproduced in the Laws of Gibraltar.

Victoria

42. One of the most thorough enquiries into received statute law has been conducted, in two stages, in Victoria. The first, leading to the enactment of the Imperial Acts Application Act 1922, was carried out by Sir Leo Cussen of the Supreme Court of Victoria over a period of seven years. Its purpose was, by including received statutes with the Consolidated Laws of Victoria, "to make readily accessible all the enacted law over which the Parliament of Victoria has control and for the continued operation of which it therefore is responsible". This involved a detailed examination of over 7000 statutes enacted by Parliament in Britain between 1235 and 25 July 1828, the reception date established by local statutes. The resulting Act identified those enactments which were believed, free from any reasonable doubt, to have been received and to remain in force. The terms of many of these were set out in a consolidated form as directly established by the Parliament of Victoria. The latter were generally those of greatest practical importance. A large number of others which did not lend themselves to consolidation or, usually being of less importance or which appeared likely, but not certainly, to have been received, were either transcribed or merely listed by citation in the Act, leaving the question of their continuance for judicial decision. All other Imperial statutes were repealed, as far as they might be in force in Victoria within the competence of the Victoria Parliament. It was recognised that the inclusion in any of the listings was not the final word, it being open for judicial decision to hold that such statutes had, or had not, been received under the reception rules.⁵⁸

43. The legislation did not deal with Imperial statutes in force by paramount force or those operating as a result of referential adoption.⁵⁹ Perhaps not surprisingly for such an

innovatory study, it was a rather cautious approach. Although it made accessible the text of many Imperial Acts that were clearly in force, it did not set out to provide an authoritative or definitive statement of all received statute law.

44. Provisions and listings in the 1922 Act were repealed on a number of subsequent occasions as the Parliament of Victoria introduced legislation of its own on various subject matters. By 1973, it had become clear that many of the statutes included in the Act had little or no utility in current circumstances. Accordingly, a further enquiry was undertaken by Mrs Gretchen Kewley for the Victoria Law Foundation with a view to retaining only those English Acts "which are undoubtedly in operation in Victoria, or with which the Victorian law is so inextricably bound, that to repeal them would be impossible". Mrs Kewley was able to recommend complete repeal, or replacement in modern terms, of a substantial number of the Acts. It was re-emphasised that Acts of paramount force fall outside the competence of the Victoria Parliament.

45. Two Acts of the Victoria Parliament followed. The first, the Imperial Law Re-enactment Act 1980, had as its principal purpose the re-enactment of certain Imperial Acts hitherto listed in the 1922 Act, in a form allowing consolidation with existing Victoria statutes. The second, the Imperial Acts Application Act 1980, listed 13 Acts that were known to have been received and which were to continue, usually by reason of their historical or constitutional importance. The terms of these were transcribed. All other received statutes were repealed. As with the 1922 Act, the Governor in Council was empowered to add by proclamation any statutes which should have been included.⁶⁰ Subject to this, the Act is now definitive and authoritative on the question of received statutes. Its importance has been greatly reduced by the gradual replacement of received statutes by locally enacted legislation.

New South Wales

46. The Law Reform Commission of New South Wales reported in 1967 upon the application of Imperial Acts in that State. It set out to provide a comprehensive account of the Imperial Acts received up to 25 July 1828 and still in force in New South Wales. It did not tackle those Acts referentially acquired, those of paramount force, although some of the latter were mentioned, or any other received laws that were outside the legislative competence of the New South Wales Parliament. This report was followed by the enactment of the Imperial Acts Application Act 1969.

47. The 1969 Act took a rather different approach from the first Victoria statute. It identified a series of statutes in force in England on 25 July 1828 which appeared to have been received in New South Wales, to have continued in force and to be required still. These were declared to have been in force in New South Wales from 1828 by virtue of the reception requirements, thereby putting their status beyond doubt.⁶¹ Most of these, however, were repealed as law of New South Wales, but equivalent provisions, set out in the Act, were substituted for them. The remainder were continued in force by reference, without reproduction of their text. Most of this latter group were constitutional enactments of little day-to-day importance, whilst others, concerned with treason and piracy, were likely to receive early modernisation: their transcription was thought to be unnecessary. All other statutes (except those of paramount force) were repealed as far as they were part of the law of New South Wales, subject to the power of the Governor by proclamation to revive an Act in an appropriate case.⁶²

Australian Capital Territory

48. The Law Reform Commission of the Australian Capital Territory produced its proposals relating to Imperial Acts in 1973. Legislation in implementation of its proposals is at present under consideration. As with earlier State schemes, the Commission favoured repeal of all applicable Imperial Acts except those which retained continuing value. Those which could be so repealed were identified in the Report and will be dealt with by general repeal provisions. The Commission identified two sets of Imperial Acts, those received up to 25 July 1828 and still in force and applicable to the Australian Capital Territory and those of paramount force that are applicable to that Territory and were passed before 3 September 1939 when the Statute of Westminster 1931 came into force with regard to Australian law. Of the Acts to be continued, some, those of major constitutional and historical significance but rarely cited, should not, the Commission thought, be restated in modern terms, especially where those provisions were in force in the other States and Territories, and need not be transcribed. Others, however, were recommended for repeal and replacement by provisions in modern terms set out in the patriation statute. In principle the exercise, as those in the States, did not involve itself with possible reforms which touched upon policy.

South Australia

49. The Law Reform Committee of South Australia is at present completing its series of studies concerning inherited Imperial statute law. Its enquiries have not extended to statutes of paramount force, as they are outside the competence of the South Australia Legislature or to these referentially adopted by South Australian Legislation. The Committee concentrated upon those statutes in force in England on 28 December 1836 that have been received into the law of South Australia. Rather than proceed "by general considerations repealing all, or all except a few, statutes", as in other jurisdictions, the Committee set out to consider every statute enacted for England before the reception date and to make recommendations, whether for repeal or for preservation, or for repeal with amendment of local legislation. In consequence, their reports, which, in some cases, look at the statutes that relate to particular topics and, in others, chronologically, contain comments upon each individual Act of Parliament enacted between 1225 and 28 December 1836. They represent a useful beginning for any enquiry seeking to establish which Acts in force in England appear capable of export to the colonies. The South Australian approach is a salutary reminder that decisions taken about reception, continuance and repeal in one jurisdiction may not be appropriate for others which have different reception dates and legislative histories, and the dangers of repealing, perhaps by oversight, statutes which, though rarely invoked in specific terms, relate directly to foundation doctrines in the particular systems of law.

New Zealand

50. A project relating to Imperial Laws application has been under way in New Zealand for several years.⁶³ Towards the end of the 1981 session of the New Zealand Parliament, a draft Imperial Laws Application Bill was introduced to give notice that legislation dealing with this subject was in contemplation. Further work on the drafting of the legislation is currently being undertaken. It is already evident that this project will be the most far-reaching yet undertaken. For it will extend to:

- (i) Acts in force in England on 14 January 1840, so far as applicable to the circumstances of New Zealand and in so far as they have not been repealed;
- (ii) Imperial Acts of Parliament of paramount force which continue to have effect as part of the laws of New Zealand;

(iii) Acts of Parliament declared to be in force in New Zealand by express words or necessary intendment of some New Zealand Act and continue to be in force;

(iv) Unrepealed Imperial subordinate legislation extending to New Zealand.

51. It is expected that the legislation will provide for the repeal, in relation to New Zealand, of all Imperial legislation that no longer serves a necessary or useful purpose, the enactment of a definitive list of Imperial Acts which are to continue to have effect as the law of New Zealand and the enactment, in appropriate cases, of substituted provisions for certain of these Acts. It is possible that in some cases the latter may be more conveniently undertaken by separate Bills concurrently enacted. The ultimate aim is to absorb, as soon as possible, the continued legislation into the New Zealand statute book by re-enactment or reprinting. This is a much more ambitious programme than any carried out elsewhere to date. It is, indeed, a complete patriation project.

Tuvalu

52. The project recently instituted for Tuvalu by the Commonwealth Secretariat has objectives similar to those adopted in New Zealand. They are:

- (a) to establish as definitively as possible which United Kingdom statutes have been inherited;
- (b) to determine which are still required and should be continued as Tuvalu law; and
- (c) to develop and implement arrangements whereby these statutes can be fully incorporated into the corpus of Tuvalu law. This will clear the way for the publication of a statute book for Tuvalu that will be complete.

53. The emphasis of the project will, however, differ from the Australian schemes in a number of respects. Thus the cut-off date for statute reception is 1 January 1961, thereby requiring examination of statutes enacted for England over a much more extensive period, during which a substantial proportion of the statutes currently in force in England were passed. There are significant difficulties in determining how much of current English statute law, designed for an advanced industrial and commercial society, is suited to the circumstances of a state comprising nine islands of 23.96 square kilometres and some 9,000 people. Further, the local statute book comprises some 108 Ordinances, suggesting that many more areas of law are likely to be governed by received statutes than is the case in previous projects. Tuvalu has also inherited paramount United Kingdom statutes enacted up to late 1978, a period of 40 years longer than New Zealand. Lastly the Tuvalu Ordinances contain a number of referential clauses incorporating English law and practice in broad and rather imprecise terms. It is apparent that the results of previous projects, which, in the main, have been concerned with rather different legal conditions, must be taken with caution. It is, however, probable that the results of this project will be of particular benefit to other jurisdictions with legal circumstances analogous to those of Tuvalu.

54. The Tuvalu project will concentrate upon those subject areas in respect of which English law will have been inherited and continues to be needed (certain subject matters, notably those relating to lands, are not significantly affected by received law). To implement this approach the following steps will be necessary:

- (i) examination of United Kingdom legislation between 1225 and 1960 to determine those which may constitute "statutes of general application in force in England on 1 January 1961";

- (ii) a listing of such of these statutes as seem capable of having been received into Tuvalu as compatible with the circumstances of Tuvalu and to have continued in force to date consistently with Tuvalu statutes;
- (iii) determination of Imperial Acts enacted for Tuvalu by the United Kingdom Parliament prior to the independence of Tuvalu in 1978 and which of these still continue in force;
- (iv) ascertainment of those United Kingdom Acts that have been introduced referentially by the terms of Tuvalu legislation;
- (v) determination of which of the inherited statutes are still required, in whole or part, in present Tuvalu circumstances and which, though necessary, appear in need of substantial reform;
- (vi) preparation of legislation to bring to an end dependence on imported statutes, to repeal inherited statutes no longer required, to replace required legislation by equivalent Tuvalu statutes, as far as is practicable, to continue them by reprinting them as part of the Tuvalu statute book.

PROBLEMS FOR SMALLER COMMONWEALTH COUNTRIES IN PATRIATING IMPERIAL STATUTES

55. There are many technical problems in ascertaining which Imperial Acts are candidates for continuation which will arise wherever a patriation exercise is undertaken.⁶⁴ However, there are special, perhaps peculiar, difficulties facing the small jurisdictions of the Commonwealth wishing to patriate imperial legislation.

56. Many of these jurisdictions have been subject to the authority of the United Kingdom for a very long period of time and usually until quite recently: some still are so subject. Independence and legislative autonomy have come rather earlier for larger communities. Accordingly, the latter have had longer, post-independence, (and often substantially greater resources) to provide a body of locally enacted law which, in practical terms, has displaced many of the inherited statutes. Therefore, one finds in force in smaller states a substantially greater number of the more recent Imperial Acts which were originally applied to them as dependencies. Again, for several small states, especially in the South Pacific, the date of reception of United Kingdom statutes of general application is very recent. In consequence, a far larger number of such statutes has been received than in most larger (and admittedly many medium sized) systems where the reception date is in the nineteenth century or even earlier. Moreover, since their legislatures tend not to be in constant session, the statute books of smaller jurisdictions are, by and large, of moderate size, thereby giving latitude to the argument that there are areas of activity untouched by local statutes which may be governed by inherited statutes. Several of the South Pacific jurisdictions again are in this position.

57. It is in these systems too that little assistance will be found from local litigation and from the law reports which are available, on the extent of the inheritance. Not only are very few cases dealing with particular statutes reported locally, but such cases seem rarely to have been argued. This may be the consequence of tiny and rather unsophisticated legal professions and a lack of adequate source materials, characteristic marks of many small jurisdictions.

58. The special position of small states is most evident in relation to their capacity to deal with the problems to which inherited statutes give rise. Those larger jurisdictions which have tackled them have usually done so through active law reform agencies and with considerable input from public service lawyers, especially Legislative Counsel. They have

invariably had access to well-developed research amenities. Few small states have the resources or the available personnel to undertake a project which calls not only for a determination of the exact nature of the inheritance but for restating it in terms which fit with locally enacted legislation, and thus for careful and lengthy legislative drafting. If this work is to be done in these states, it will necessitate a deliberate decision to allocate sparse resources, to seek technical assistance or to share the effort with others whose legal circumstances are analogous. Unfortunately, it is an exercise which, in cases where there are inadequate local collections of necessary materials, will often have to be undertaken outside the jurisdiction. Indeed the determination of what is involved in any project may be beyond local resources of time and expertise. Further, in many countries, there is only a limited possibility that these demanding enquiries can be undertaken within the country's programme of legislative preparation of law reform. Few have personnel available to provide the concentrated commitment called for. For these reasons, it seems inevitable that, as in the case of Tuvalu, the work will have to be commissioned from an outside expert.

CONCLUSION

59. In countries where a substantial inheritance is involved, it seems improbable that the process of integration of that inheritance into the local statute book can be completed as a single exercise. For it will often be found that the content of the continuing legislation, when compared either with local statutes or those currently in force in the United Kingdom, calls for re-consideration. Indeed the very process of establishing what has been inherited will point up areas in which legal changes may be needed. Former benefits from the availability of judicial decisions and texts relating to inherited statutes are gradually being reduced as the original statutes cease to be in force elsewhere. The replacement of out-of-date provisions, which may involve in some instances a deliberate decision to follow the terms of the current legislation of another jurisdiction, is a distinct exercise which should follow upon patriation.

60. Little has been said about the steps which might be taken to ensure that the proposals for the continuance of particular inherited statutes satisfy local expectations of what is required. In countries with established law reform systems, it is usual to enter into a formal consultation process, involving the issue and circulation of reports and recommendations. In many small states where there is likely to be a substantial body of received law, there may not be a well-tried system of public participation in law reform. Nonetheless, it remains desirable that opportunities be provided for at least the legal profession, the judiciary and the concerned Ministries to comment upon the proposals before legislation is put before the Legislature. In many respects, patriation is a matter of technical law, but its implications for the proper operation of the legal system clearly have a public dimension.

NOTES

1. Some sections of this paper use material from K W Patchett, "Inherited Imperial Statutes in Small Jurisdiction", Report of the Meeting of Law Officers of Small Commonwealth Jurisdictions, Vanuatu, 1985 forthcoming.
2. Ie, the Parliament of England prior to the Union with Scotland in 1707, and that of Great Britain prior to the Union with Ireland in 1801.
3. For details of reception provisions in individual jurisdictions in the Commonwealth, see K Roberts-Wray, *Commonwealth and Colonial Law*, passim. A selection of commentaries on the matter is set out in Appendix, below, section C.
4. For a recent discussion of the judicial treatment of Constitutional provisions patriating the common law in Papua New Guinea, see D K Srivastava & D Roebuck, (1985) 34 ICLQ, 850-857.
5. Lon L Fuller, *The Morality of Law*, 2nd ed, (1973), at 39, suggests that a man can have a moral obligation to obey a legal rule that is.....kept secret from him".
6. Sources for these and other projects are set out in Appendix, below, sections A & B.
7. For an example of uncritical copying, see *Barclays Bank DCO v Vermot* (1965) 8 WIR 250, where an English provision on estate duty was copied in Jamaica, although different rules relating to the devolution of real property applied.
8. G C Thornton, *Legislative Drafting*, 2nd ed, (1979), at 118-120.
9. *Hazelwood v Webber* (1934) 52 CLR 268, at 275.
10. (1973) Cwlt Aust PP Vol 7.4, at 3.
11. J E Cote, (1977) Alberta L Rev, 29, at 82.
12. Thornton, *op cit*, at 123; E A Driedger, *The Composition of Legislation* 2nd ed, (1976) at 125.
13. Whilst decisions on the original statute prior to its incorporation may be binding (Roberts-Wray, *op cit*, at 568), at the best, decisions rendered thereafter are to be treated as persuasive. Where the provisions of a statute have been repeated in a local statute, there is authority that the decisions of the House of Lords and the English Court of Appeal are binding in the construction of words in *pari materia*: *Robbins v National Trust Co Ltd*, above; *Trimble v Hill* (1879) 5 App Cas 342 (PC), affirmed in *Nadarajan Chettiar v Walauwa Mahatmoe* [1950] AC 482 (PC). But the recent trend is to treat these too as persuasive only: *Bitumen and Oil Refineries (Australia) Ltd v Commission for Government Transport* (1954-1955) 92 CLR 200, at 211 (HCA); *National & Grindlays Bank v Dharamshi Vallabhji* [1967] 1 AG 207 (PC).
14. For a fuller account of these arrangements, see K W Patchett, (1973) Jamaica LJ, at 55-60.
15. This jurisdiction has usually been terminated, on the achievement of independence, by United Kingdom legislation. The position of Canada, Australia and New Zealand is different, as the result of the Statute of Westminster 1931. See now, Canada Act 1982 and Australia Act 1986 (UK).

16. For example, the constituent power (to provide for the constitution) came to be exercisable by Order in Council.
17. For example, pursuant to the Foreign Jurisdiction Act 1890 or under the British Settlements Act 1887-1945. Other statutes, such as the Copyright Acts of 1911 and 1956, authorised the making of Orders in Council to bring dependencies within the scheme established by the Imperial Act.
18. S.2 provides that a colonial statute repugnant to any prior Act of Parliament extending to the colony or to any Order or regulation made under the authority of such an Act or having force and effect of such an Act "shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative".
19. For example, where the statute extends only to dependencies, either in general or as are specifically designated.
20. This is particularly the case following the enactment, on the recommendation of the Law Commissions, of a series of Statute Law (Repeals) Acts in 1969, 1971, 1973, 1974, 1976, 1977, 1978 and 1981.
21. See below, para 34.
22. For some compilations, see Appendix, below, section C. These usually contain disclaimers concerning their comprehensiveness and authority.
23. *Callender, Sykes & Co v Colonial Secretary, Lagos* [1891] AC 460 (PC), at 467.
24. J E Cote, (1977) *Alberta L Rev*, 29, at 33-34.
25. *Imperial Statutes Applicable to the Colonies*, introduction. See similarly, Blackstone, Kerr B1, 4th ed, 1876, vol 1, at 75.
26. *Federal Bank of Australia Ltd v White* (1895) 21 VLR 451, at 466, per Madden CJ.
27. *Bisticic v Rokov* (1976) 135 CLR 552 (HCA).
28. Cote, loc cit above, at 60-61, cites *Reynolds v Vaughan* (1872) 1 BCR (pt 1) 3, where a statutory reception provision was held not to apply to subordinate legislation.
29. Church of England Assembly (Powers) Act 1919, s 4; Synodical Government Measure 1969, s 2(2).
30. Eg, Ecclesiastical Jurisdiction Measure 1963 (No. 1). The extent to which ecclesiastical law and statutes relating to the Church of England have been inherited is in some cases unclear: Cote, loc cit above, at 59-61.
31. Cote, loc cit above, at 79.
32. Eg, Fires Prevention (Metropolis) Act 1774, s 86: *Hunter v Walker* (1888) 6 NZLR 690.
33. Cote, loc cit above, at 79
34. In recent times, these have been enacted by a special Parliamentary procedure.
35. *Commentaries*, Bk 1, 107.

36. The terms probably mean no more than statutory regulation of social conditions: *Quan Yick v Hinds* (1905) 2 CLR 345 (HCA). Cote, loc cit above, at 78.
37. Eg, *R v Mann* (1884) Legge's Rep 182. Cote, loc cit above, at 77.
38. Eg, *Shaik Sahied v Sockalingam Chettiar* [1933] AC 342 (PC) (moneylenders).
39. *Attorney-General v Steward* (1816) 2 Mer 143, at 160; *Delohery v Permanent Trustee Co of NSW* (1904) 1 CLR 283, at 310; *Quan Yick v Hinds*, above; *Leong v Lim Beng Chye* [1955] AC 648 (PC).
40. Cases can be found requiring merely that the Act should have been passed before the cut-off date. A few reception provisions do not contain this qualification at all.
41. See Supreme Court Act, Laws of Fiji, c 13, s 22(2), making an exception to this principle to cover the Judicature legislation, enacted in England before, but coming into force after, Fiji's reception date of 2 January 1875.
42. *Jex v McKinney* (1889) 14 App Cas 77 (PC).
43. *Roberts-Wray*, op cit at 546-7; *Allot*, op cit, at 92; Cote, op cit above, at 63-67; *R S O'Regan*, (1971) 20 ICLQ, 342-347.
44. *Cooper v Stuart* (1889) 14 App Cas 286, at 292.
45. See note 43, above; *State Government Insurance Commission (SA) v Trigwell* (1979) 53 ALJR 656 (HCA), at 658, per Gibbs J.
46. *Ibid*, 657, per Barwick CJ.
47. *Dugan v Mirror Newspapers* (1978) 53 AJLR 166 (HCA), at 168, per Gibbs J. See also on this view, *O'Regan*, loc cit above, at 344-345.
48. This may be authorised in some cases by the inclusion in the reception provisions of such words as "subject to such qualifications as local circumstances render necessary": *Nyali v Attorney-General* [1956] 1 QB 1 (CA). But it must be doubted that this permits alterations to render a statute, not otherwise suitable, fit for local use.
49. 54th Report (1980), at 5-6, referring in particular to *Hazelwood v Webber* (1934) 52 CLR 268, at 275-6.
50. It is only exceptionally that Statute Law (Repeals) Acts of the United Kingdom are extended to dependencies. Eg, the Act of 1973 was extended by SI 1976/54.
51. Cote, loc cit above, at 75.
52. Declaratory Act, c 2, s 4.
53. Law of England (Application) Law, c 60, s 4.
54. *Ibid*, s 7.
55. *Ibid*, s 6.
56. Application of English Law Ordinance, c 5, s 2.

57. *Ibid*, s 3(1).
58. The enactments "shall continue to have in Victoria....such force and effect, if any, as they had at the commencement of this Act": Imperial Acts Application Act 1922, No 3270, s 4.
59. *Ibid*, s 5.
60. Imperial Acts Application Act 1980, No 9426, s 6; (cp 1922 Act, No 3270, s 8.
61. Imperial Acts Application Act 1969, No 30, s 5.
62. *Ibid*, s 11.

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