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The origins and work of the Scottish Law Commission, and the problem of the codification of Scottish private law

Abstract: The subject covered in the paper is the origins, structure and workings of the Scottish Law Commission created, along with its English counterpart, under the Law Commissions Act of 1965.

The author of the article outlines the course of conceptual and legislative work to constitute the new commission, the extent of its relationship with and dependence on public authorities, as well as the key differences between the legal position of the two commissions, symbolically highlighted by the English commission's gaining a stronger mandate under the 2009 Law Commission Act.

The final part of the paper is devoted to an attempt to assess the achievements of the Commission to date, the reasons for the failure of the premise of the grand codification endeavour, and the successes that the Commission claim in terms of reforming specific institutions and branches of law.

Keywords: Scottish Law Commission, Law Commissions Act of 1965, law reform, codification, Scottish law.

Introduction

Referring to Scotland's legal legacy as a hybrid legal system, Andreas Rahmatian points out that attempts to codify and capture this hybridity in the form of a code may provide a model for future codification of civil law at the European level. At the same time he observes that this optimistic attitude is a characteristic of the older generation of lawyers, who saw in the harmonisation of legal systems one of the mechanisms for fostering European integration and create further ties

between states, which was intended to serve as a barrier against the outbreak of another war on the continent. However, younger generations of lawyers, less attached to the very idea of codification understood as the creation of a civil code from scratch, see the need for continuous reform and modernisation of the legal system.¹

Over the centuries attempts to reach the goal in question were made with various, mostly ad hoc measures. Although the subject of the present study is the origins and activities of the Scottish Law Commission, established in the second half of the twentieth century, the difficulty of the work undertaken by the Commission is emphasised the most by the history of earlier reform efforts.

Attempts to reform and codify Scottish law

The evident need to codify Scottish law is not a result of just recent reflection on its state.² The first ad hoc attempts at reform are traditionally dated to 1425, when, during the reign of King James I, a decision was made, at the third parliament convened during the reign of that ruler, to appoint a commission of six learned men who, representing each of the three estates, were to undertake a study of the existing law and then formulate a proposal for its amendment.³

Scottish law created on the basis of the royal decrees, regulating individual issues in a way that was far from systemic in nature, was characterised not only by numerous loopholes, but also by a growing level of uncertainty. The consequence of this was a systematic study of Scottish law in the form of legal treatises published from the late seventeenth century until the first half of the nineteenth century, some of which acquired the status of institutional works.⁴ The outstanding nature of the arguments found in these institutional works was appreciated by the Scottish judiciary, which granted them the status of a subsidiary source of law, and in view of the gaps in the Scottish legal system in the period preceding their publication, they became a vehicle for a unique, intellectual infiltration of the Scottish

¹ A. Rahmatian, “Codification of private law in Scotland: Observations by a civil lawyer”, *Edinburgh Law Review* 8, 2004, no. 1, p. 34.

² A draft code was presented by University of Edinburgh professor Eric Clive in 2002, and the work on this project, carried out in the 1990s, is presented in the author’s article, E. Clive, “Current codification projects in Scotland”, *Edinburgh Law Review* 4, 2000, no. 3, pp. 341–350.

³ “Sex wise men and discreete, of ilk ane of the three Estaites, quhilk knawis the Lawes best, sail be chosen [...] that sail see and examine the Buikes of Law [...] and mend the Lawes that neids Mendement.” Excerpt from a law reform bill from the reign of James I (c. 54/1426), text of the bill available at: <https://www.rps.ac.uk/trans/1426/13> (accessed: 21.05.2023).

⁴ The very names of the individual works, which draw on the legal treatises of Gaius and Justinian, indicate a similar role to be played by them — for they were to be textbooks as well as an attempt to develop a comprehensive system of law based on the complex and heterogeneous structure of the sources of law.

legal order by the sophisticated reception on Roman law in the form of the output of the Dutch jurisprudence.⁵

An interesting remark in the context of the “codifying” nature of institutional works has been made by David Walker. Referring to the views of Lord Cooper, he notes that if it had not been for the legal consequences of the 1707 union, the natural outcome of the development of Scottish law in the nineteenth century would have been a great process of codification based on the works of institutional writers.⁶ Walker points out that the same process took place in France on the basis on works by Domat and Pothier, and in Germany on the basis of the writings of Pandectist school representatives.⁷

The eighteenth and nineteenth centuries, a period immediately following the union, brought further attempts at codification, but they were systemically rejected by the Scots. On the one hand, in view of the functioning of Scottish law as an uncodified system of law with a strong element of Romanticism, there was doubt as to whether the consequence of the codification effort might be at least a partial loss of the previous achievements of the legal system. On the other hand, doubts were also expressed about the direction of the codification efforts. This is because there were fears that the process would not lead to the creation — as in the case of the fruits of the codification processes taking place on the continent at the time — of a civil code, but only further anglicisation of Scottish law.⁸

The origins, establishment and structure of the Law Commission

Moving on to a discussion of the institution that is the subject of the present study, it is worth noting a certain subtlety of social change that makes it possible to look at the role of legal codification in the twentieth century in a completely different light.

⁵ N. Brothie, “The Scottish Law Commission: Promoting law reform in Scotland”, *Legal Information Management* 9, 2009, no. 1, p. 30.

⁶ In the case of civil law the codification process was to be based primarily on works of Erskine and Bell, and the criminal code — on David Hume’s *Commentaries*.

⁷ In addition, Lord Cooper also pointed to the doctrine of individually binding precedent, which, while not part of the Scottish legal tradition, became an element — rather unexpectedly and contrary to the will of the Scottish jurisprudence — of the Scottish legal system owing to the role the House of Lords played at the time as the highest appellate authority against decisions of Scottish courts in civil cases. D.M. Walker, “The Scottish Law Commission under review”, *Statute Law Review* 8, 1987, no. 2, p. 116.

⁸ Most of the demands for changes in law during this period concerned far-reaching harmonisation of Scottish law with the existing English enactments, making the emerging system of British law vulnerable to the hegemony of enactments characteristic of the English common law.

The immediate predecessors of the two Legal Commissions were informal *ad hoc* committees calling for law reforms, and operating on a part-time basis in the 1950s and the first half of the 1960s in England and Scotland. It should be noted, however, that the activities of these bodies did not meet the increasingly urgent need to modernise the legal system of the two states in the union.⁹

The Scottish Law Commission was established by the 1965 Law Commissions Act,¹⁰ but the very origin of the introduction of the statutory solution is interesting in that it demonstrates that the law reform process was designed primarily for the purpose of modernising English law.

The man commonly regarded as the father of the Commission is Gerald Gardiner¹¹ — one of the members of the committees discussing the need for law reform, Lord Chancellor and co-editor of the 1964 book *Law Reform Now*, in which the authors outlined the plan, role and tasks for law reform, and advocated the creation of a special commission for the purpose, which indeed happened as a result of this inspiration the following year. The initial suggestion was that a body should be set up to focus exclusively on the reform of English law,¹² with its remit being extended with time to include the problems relating to Scottish law, or that a separate body should be established to deal with the problem of Scotland, on the basis of the experiences of the commission to be created for English law.

Restricting the reform activities only to the territory of England and Wales was strongly opposed by the Scottish legal community. A significant role in persuading the House of Lords to accept solutions that would include work on Scot-

⁹ Shona Stark observes that the activities of these bodies were not particularly successful, citing the position of Gerald Gardiner, who was a member of one such body between 1952 and 1963. Gardiner pointed out “that it is impossible for a body consisting of even the most prominent people to update the law if they meet once a quarter, for seven quarters of an hour after a full day’s work.” S.W. Stark, “The longer you can look back, the further you can look forward: The origins of the Scottish Law Commission”, *Edinburgh Law Review* 18, 2014, no. 1, pp. 61–62.

¹⁰ Law Commissions Act of 1965, c. 22 — text of the act available at: <https://www.legislation.gov.uk/ukpga/1965/22> (accessed: 21.05.2023).

¹¹ Gerald Gardiner (1900–1990), British lawyer and Labour politician. From 1964 to 1970 he served as Lord Chancellor of Great Britain, that is the official at the head of the British judiciary, responsible for its proper functioning and independence. Gardiner’s term in office was marked by far-reaching reforms of the legal system, and his particular achievement was forcing through the establishment of the two Law Commissions in 1965. The reforms of the legal system in the second half of the 1960s became the backdrop for a failed bomb attack on Gardiner in June 1981. More: N. Marsh, “Gardiner, Gerald Austin, Baron Gardiner (1900–1990)”, [entry in:] *Oxford Dictionary of National Biographies*, Oxford 2004.

¹² During the second reading of the bill in the House of Lords Gardiner admitted that the idea of limiting reform efforts to England stemmed from the fact that English law required such an intervention more urgently. In the case of Scottish law, due to the influence of the heritage of civil law, in particular, thanks to the work of institutional writers, by the mid-nineteenth century significant changes were carried out and some of the existing enactments were modernised. More on the legislative process that led to the adoption of the Act: S.W. Stark, “The longer you can look back, the further you can look forward”, pp. 62–65.

tish law was played by two individuals in particular — William Ross¹³ and Professor Thomas Broun Smith.¹⁴ Ross, then Secretary of State for Scotland, felt that it was necessary to simultaneously establish two separate bodies the task of which would be to prepare parallel drafts of reforms for both legal orders, as well as to cooperate as far as possible to not only harmonise enactments, but also to respect and protect the distinctiveness of the two legal systems. In the case of T.B. Smith, who was sometimes referred to as a “legal nationalist,” the reason behind his position was the fear of simultaneous reform of English law and lack of reform of Scottish law, which would contribute even further to the evident and continuing anglicisation of Scottish law. The role of the Scottish body in this context was to not only take care of the modernisation of Scottish law, but also to uphold its native character.¹⁵

The fact that a compromise was reached and the decision to establish the two bodies made the legislative process generally smooth. At the same time, already in the course of the work and discussion, there became apparent a difference in the understanding of the idea of law reform, a difference that was quite significant and determined the effectiveness of the Commission’s any possible further work. While no one opposed the idea itself, at the same time there were signals that the problem of not taking earlier action did not lie in a lack of a full-time law reform body, but stemmed from the nature of the English legislative process, which was already diagnosed at this stage of reform efforts as a “bottleneck” that hindered actions focused on amending the legal system. The role of the Commission was seen in this context as cleaning the old law of “cobwebs,” rather than truly modernising the legal system, a task that was apparently solely in the hands of political bodies.¹⁶

The legislative efforts resulted in the establishment of two separate bodies in 1965 — the Scottish Law Commission, responsible for reforming Scottish law, and the Law Commission, responsible for modernising English and Welsh law.¹⁷

¹³ William Ross (1911–1988) was a Labour politician and the longest serving Secretary of State for Scotland (in 1964–1970 and then again from 1974 until 1976). More: W. Hughes, “Ross, William, Baron Ross of Marnock (1911–1988)”, [entry in:] *Oxford Dictionary of National Biographies*.

¹⁴ Thomas Broun Smith (1915–1988), professor of civil law at the University of Edinburgh and one of the most eminent Scottish lawyers of the twentieth century. Smith was not only one of the members of the first Scottish Law Commission, but from 1954 to 1970 was also a member of its predecessor, the Scottish Law Reform Committee. For more on Smith’s life and work, see Lord Hunter, “Thomas Broun Smith 1915–1988”, *Proceedings of the British Academy* 82, 1993, pp. 455–473.

¹⁵ On T.B. Smith’s role in the development of the concept of the Scottish Law Commission: S.W. Stark, “The longer you can look back, the further you can look forward”, pp. 66–68.

¹⁶ D.M. Walker, “The Scottish Law Commission under review”, p. 119.

¹⁷ The difference in the naming of the two entities was accurately commented on by the first chairman of the Scottish body, who put this difference down to a peculiarly English insensitivity, for although the two entities were equal, and had the same powers and tasks within the two legal orders, at the same time such a distinction in naming could create an unwarranted impression of

The Commissions were to be composed of no more than five commissioners¹⁸ appointed for five-year terms; the entire membership or individual members could be re-appointed.¹⁹ The appointees were eminent representatives of the judiciary, barristers, solicitors, and law professors.²⁰ The first chairman of the Scottish Commission was one of the judges of the Court of Session,²¹ Lord Kilbrandon, who was relieved of his judicial duties for the duration of his term in office as commissioner.²² The other four Commissioners were the University of Edinburgh professor Thomas Broun Smith, University of Glasgow professor J.M. Holiday, G.D. Fairbairn, and A.G. Brand,²³ who became the Commission's secretary.

When it came to administrative services²⁴ and office conditions, they changed as the Commission's offices moved to new locations.²⁵ At the beginning the Commission also used the library of the University of Edinburgh Law School, but when its offices were moved to permanent premises, a separate law library was established for its needs, managed by a full-time curator who organises, catalogues and seeks out new items to be added to one of the richest collections of Scottish legal literature.

An important issue relating to the effectiveness of the Commission's work was the question of the full-time nature of the Commissioners' appointments. Unlike the English Commissioners, who devoted themselves entirely to working for the Commission, in the case of Scotland the only full-time Commissioner was the chair, who was a Court of Session judge delegated to work in the Commission and preside over this body. In this context the Commission undoubtedly faced difficul-

the superior or leading role of the English Commission. Lord Kilbrandon, "The Scottish Law Commission", *Georgia Law Review* 2, 1968, p. 194.

¹⁸ This requirement derives, in the case of the English Commission, from Article 1.1, and in the case of the Scottish Commission, from Article 2.1 of the 1965 Law Commissions Act.

¹⁹ Article 2.3 of the Act.

²⁰ Article 2.1 of the Act.

²¹ As George Gretton observes, the practice was to appoint to this role one of the judges of the lower chamber of the Court of Session (Outer House), who, upon being promoted to adjudicate in the higher chamber (Inner House), resigned from the chairmanship of the Law Commission. G. Gretton, "Of law commissioning", *Edinburg Law Review* 17, 2013, no. 2, p. 136.

²² Article 2.4 of the Law Commissions Act stipulates that the chairperson be relieved of his judicial duties for the duration of his term in office, while noting that a different solution is also possible, but must be explicit in the wording of the terms of appointment of the Commissioner.

²³ Lord Hope of Craighead, "Do we still need a Scottish Law Commission?", *Edinburgh Law Review* 10, 2006, no. 1, p. 10.

²⁴ The Commission has a total of fifteen full-time staff — five administrative support positions (which also include the librarian), five legal assistants (a position entrusted to young lawyers) and five legal service staff (reserved for experienced lawyers who are expected to provide substantive support for the Commissioners). More: N. Brotchie, "The Scottish Law Commission", p. 33.

²⁵ The premises used by the Commission were initially located in Edinburgh at 1 Grosvenor Crescent, but already during its first term the Commission was provided with facilities at the University of Edinburgh's Law School located on the picturesque campus of the Old College. In 1976 the Commission moved to its own headquarters at 140 Causewayside in central Edinburgh, a short distance from the Scottish Parliament.

ties, in terms of both its organisation, and the time and energy the Commissioners could devote to the reform of the legal system.²⁶ The problem of tenure was mentioned by the first chair of the Commission, Lord Kilbrandon, who with his usual glibness said that in Scotland the inequality in the way Commissioners were employed was understandable, for it was an admission, as it were, that English law needed more reform than Scottish law.²⁷

The scope of the activity of the Commission

The tasks of the two Commissions and the manner of their operation were regulated in Article 3 of the Commissions Act in an essentially uniform manner, taking into account the difference between the lawmaking bodies with which each Commission cooperated.

The first and most important task of the Commissioners is to carry out a constant and ongoing review of the entire legal system. A consequence of this review, as we can read further in the provision, should be a systematic reform of the law, including its codification. In the last part of the article in question the legislator indicates the purpose of these activities: elimination of legal anomalies, repeal of obsolete and unnecessary enactments, synthesis of the existing enactments, and general simplification and modernisation of the legal system.²⁸

Analysing the tasks set for the Commission, we should acknowledge that they were undoubtedly defined both broadly and vaguely, which, on the one hand, could give the body in question broad powers to review the legal system and submit proposals of changes to it, and, on the other, for the same reason, could give rise to doubts as to whether in its activities the Commission might not go beyond its mandate. Part of the Commission's tasks of consolidating and repealing obsolete enactments, that is tasks that could collectively be described as improving the law, did not arouse any special controversy, which could not be said about the activities aimed at reforming the functioning enactments.²⁹

The sphere that turned out to be the most controversial, both because of the nature of the Scottish legal system and the understanding of the semantic scope

²⁶ Lord Hope of Craighead, "Do we still need a Scottish Law Commission?", p. 12.

²⁷ Lord Kilbrandon, "The Scottish Law Commission", p. 194.

²⁸ Article 3.1 of the Act: "It shall be the duty of each of the Commissions to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law."

²⁹ In the course of legislative work the matter of marriage law was recognised as an example of a legal issue that was too controversial to be the subject of the Commissions' work. Yet already in their early years the Commissions were asked to analyse the legal arrangements for divorce in both legal systems.

of the concept, was the codification of law. It has been pointed out that G. Gardiner himself, when formulating the premises of law reform based on the substantive work of the Commission, put little emphasis on the codification of the law in the strict sense, focusing more on the problem of consolidation of the law, the norms of which were scattered considerably between the existing legislation and normative judicial decisions.³⁰ The premises of codification and, to some extent, uniformisation of the law were in any case included in the first programmes of both reforms,³¹ which, for reasons indicated further in this paper, failed, the consequence being that the ambitious problems were broken down into smaller tasks and the idea of “codification for codification’s sake” was abandoned.

The statutory regulation of the Commission’s mandate further indicates the forms of its activities and mechanisms for cooperation with state institutions. The Commission is the addressee of proposals for law amendments, which can be referred to it by an undefined group of entities³² — thus the solution does not limit the possibility of demands being formulated only by a specific group of public entities, since suggestions for necessary statutory changes can also be submitted by non-governmental organisations, local governments and even individuals. In addition, the Commission prepares reform programmes in which it identifies legal issues or institutions that will become the subject of the Commission’s work and analysis in the near future.³³ Recommendations in this respect may also be addressed to the Commission by the Scottish or British governments — they may also take the form of a request to draft a relevant bill³⁴ or even a programme of laws that will consolidate enactments within the entire branch of law.³⁵ The Commission also has obligations relating to information and research — under the Act it has to provide assistance and information to the relevant public bodies that request its assistance in the course of their legislative work with regard to recommending solutions to be adopted,³⁶ as well as to obtain information about enactments functioning in other countries, enactments that can help solve problems on which the Commission will work.³⁷

The reform programmes formulated by the Commissions should be submitted to the relevant ministers, and after approval by the government, they should be put

³⁰ S. Woolman, “The Scottish Law Commission”, *Statute Law Review* 3, 1982, no. 3, p. 166.

³¹ It should be noted at this point that the Commissions Act itself is also credited with an important political role relating to the United Kingdom’s attempted accession to the European Communities, vetoed in 1963 by France. This is because there were hopes that the harmonisation of British law through codification would facilitate the accession process, which was not successfully completed until 1969, after the French president Charles de Gaulle had left office.

³² Article 3.1a of the Act.

³³ Article 3.1b of the Act.

³⁴ Article 3.1c of the Act.

³⁵ Article 3.1d of the Act.

³⁶ Article 3.1e of the Act.

³⁷ Article 3.1f of the Act.

forward for further processing within the framework of parliamentary proceedings.³⁸ At the end of each year the Commissions prepare a report on their work, which is submitted to the government, and then — together with the government's position — laid before the parliament.³⁹

The forms of activity outlined above, combined with the Commissions' independence from government bodies on the one hand, and the non-binding nature of the Commissions' recommendations on the other, as well as the need to obtain adequate political support for the solutions suggested by them, caused a certain impasse in the early twentieth century, which was the highest-ever decrease in the percentage of solutions proposed by the Commissions and implemented by the Scottish Parliament and the British Parliament, respectively.

The solution to the problem took different forms in the case the two bodies. A custom informally developed in Scotland whereby a proposal from the Scottish Law Commission should receive a response from the relevant minister within three months. In the case of the English Commission, a 2009 amendment to the Law Commissions Act⁴⁰ introduced Article 3A into the analysed law. Under this new provision, the Lord Chancellor must prepare an annual report indicating which of the Commission's proposals have been implemented and to what extent they have been implemented; if they have not been implemented, information must be provided about the plans to work on the Commission's proposal or, in the event of a refusal to proceed with a Commission proposal, the reasons for the decision.⁴¹

Assessment of the work of the Scottish Law Commission

Evaluating the work of the Law Commission is a complex task, especially given that it is not easy to precisely define the ultimate purpose of this work. If we consider that the purpose was to create a civil code, then obviously the Commission's actions failed.⁴²

³⁸ Article 3.2 of the Act.

³⁹ Article 3.3 of the Act.

⁴⁰ Law Commissions Act of 2009, c. 14 — text of the act available at: <https://www.legislation.gov.uk/ukpga/2009/14/enacted> (accessed: 21.05.2023).

⁴¹ Article 3a.1 of the Law Commissions Act of 1965 (Introduced by the Law Commissions Act of 2009 indicated above).

⁴² The foundation for such work was the Commissions' joint work on a code of contractual obligations in its first few years. Later attempts at codification, narrower in scope, which in the case of Scotland concerned the law of evidence and, in the case of England, property lease, did not end with the adoption of the solutions proposed either. More on attempts of the two Commissions to cooperate can be found in a paper by one of the Scottish commissioners: C.G.B. Nicholson, "Codification of Scots law: A way ahead, or a blind alley", *Statue Law Review* 8, 1987, no. 3, p. 174.

Another, similarly difficult task was the harmonisation of legal solutions, which stemmed indirectly from the division of work between the two entities, differently oriented geographically and legally. The failure of the attempts to develop uniform solutions, stemming from different legal traditions⁴³ and different priorities, consequently prompted the two Commissions to focus on reforms of their own legal systems. Although the Scottish Commission did not cease to follow both the directions and outcomes of the work of its English counterpart, it approached them in the context of experience that could be used rather than ready-to-implement solutions. This does not mean, however, that the Commissions have had no successes when it comes to harmonisation — Peter North⁴⁴ points out that the sphere in which harmonisation was quite successful was the sale of goods, which had previously been regulated by one of the great acts of parliament codifying English commercial law,⁴⁵ and which eventually came to be regulated by a 1979 act of parliament that was applied almost uniformly in both parts of Great Britain.⁴⁶

By far the greatest achievements can be attributed to the Commission with regard to the reform of individual enactments, in terms of both eliminating archaic and systemically contradictory enactments, and introducing unified regulations.

The Commission has worked on the basis of programmes outlining the scope of problems to be addressed in the next period. To date the Commission has adopted ten programmes, and its actions have inspired significant reforms in various areas of Scottish law.

The first decade of the Commission's activity was marked by two programmes: the First Programme, from 1965,⁴⁷ which dealt with the unsuccessful projects of harmonisation of Scottish and English laws of contracts and of unification of enactments in the field of law of evidence, as well as the Second Programme, from 1968,⁴⁸ which covered a wider range of issues in both civil and criminal law.⁴⁹

⁴³ The above difficulties are well illustrated by L.C.B. Gower, one of the first members of the English Commission, who explains the problem in question, using the example of the binding effect of a unilateral promise — although both systems affirm the effectiveness of such a promise, in the case of English law this stems from a broader definition of the term “contract,” while in the case of Scotland, given its civil law tradition, the effectiveness of unilateral legal acts has not been questioned in any way. L.C.B. Gower, “Reflection on law reform”, *University Toronto Law Journal* 23, 1973, no. 3, p. 264.

⁴⁴ P. North, “Problems of codification in a common law system”, *Rebels Zeitschrift für ausländisches und internationales Privatrecht* 46, 1982, no. 3, p. 493.

⁴⁵ Sale of Goods Act 1893, c. 71.

⁴⁶ Sale of Goods Act 1979, c. 54.

⁴⁷ First Programme of Law Reform of 1965 — Scottish Law Commission no. 1, available at: <https://www.scotlawcom.gov.uk/files/6212/7989/7300/rep1.pdf> (accessed: 21.05.2023).

⁴⁸ Second Programme of Law Reform 1968 — Scottish Law Commission no. 8, available at: <https://www.scotlawcom.gov.uk/files/5012/7989/7473/rep8.pdf> (accessed: 21.05.2023).

⁴⁹ The commission studied and prepared enactments in the areas of bankruptcy, succession, liability for damages, presumption of death, legal capacity of minors and criminal procedure.

A cursory analysis of the activities of the Law Commission in the 1970s and 1980s solely with regard to the programmes may lead to the erroneous conclusion that the Commission's reform activity declined during this period, for over these two decades only one work programme was presented, that is the Third Programme of 1973,⁵⁰ which, in addition, covered only one issue.⁵¹ At the same time during this period a number of laws were adopted following proposals formulated by the Commission and submitted for further legislative work.⁵²

The last decade of the twentieth century brought two programmes — the Fourth in 1990⁵³ and the Fifth in 1997.⁵⁴ Both covered issues of reform of property law, unjustified enrichment, issues specific to civil procedure (the problems of security, powers of attorney, and guardianship), and the latter also addressed the adaptation of contract regulations to the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980.⁵⁵

The 2000s and 2010s were marked by a definite acceleration in the Commission's work in quantitative terms — the period accounts for half of the Commission's work programmes. At the same time more and more specific problems were noticeably addressed, and on the other hand work was moved to or continued in subsequent programmes, if it was not completed. A characteristic feature of the Sixth Programme of 2000⁵⁶ is that, in addition to private law issues (such as leasehold reform), it addresses a number of problems from the sphere of public law,⁵⁷ which

⁵⁰ Third Programme of Law Reform 1973 — Scottish Law Commission no. 29, available at: <https://www.scotlawcom.gov.uk/files/8712/7989/6586/rep29.pdf> (accessed: 21.05.2023).

⁵¹ Although an exceptionally important issue — private international law, relevant particularly in view of the United Kingdom's accession to the European Communities in 1972, the influx of foreigners and the need to develop appropriate conflict of laws rules concerning applicable law.

⁵² The most important acts of parliament from the period in question, which had their origin in the Commission's earlier work, include the Criminal Procedure (Scotland) Act of 1975, c. 21, text of the act available at: <https://www.legislation.gov.uk/ukpga/1975/21>; Rent (Scotland) Act of 1971, c. 28, text of the act available at: <https://www.legislation.gov.uk/ukpga/1971/28>, Sexual Offences (Scotland) Act of 1976, c. 67, text of the act available at: <https://www.legislation.gov.uk/ukpga/1976/67/>; Adoption (Scotland) Act of 1978, c 28, text of the act available at: <https://www.legislation.gov.uk/ukpga/1978/28>.

⁵³ Fourth Programme of Law Reform 1990 — Scottish Law Commission no. 126, available at: <https://www.scotlawcom.gov.uk/files/9312/7989/6587/rep126.pdf> (accessed: 21.05.2023).

⁵⁴ Fifth Programme of Law Reform 1997 — Scottish Law Commission no. 159, available at: <https://www.scotlawcom.gov.uk/files/7712/7989/7430/rep159.pdf> (accessed: 21.05.2023).

⁵⁵ The Convention (referred to after its English-language abbreviation as CISG) was ratified by Poland on 25 October 1996, with the effective date of ratification on 1 June 1996.

⁵⁶ Sixth Programme of Law Reform 2000 — Scottish Law Commission no. 176, available at: <https://www.scotlawcom.gov.uk/files/7912/7989/6662/rep176.pdf> (accessed: 21.05.2023).

⁵⁷ During this period the Commission's activities focused on land registries, as well as reforms of the court system, the police and the health service. The previous lack of action in the sphere of public law can be explained by the fact that the sphere in question was primarily a field of harmonisation of enactments under British law. For it was entirely reasonable to introduce identical enact-

is a result of the process of devolution of some powers of the British Parliament to the Edinburgh-based Scottish Parliament, reinstated in 1999.⁵⁸

The other two programmes from the 2000s⁵⁹ were also private-public in nature. The long-standing continuation of work on trusts and succession was complemented by work in the field of criminal law, which concerned the reform of enactments dealing with defence of necessity, homicide and criminal liability of persons acting as bodies of legal persons. An interesting problem that became the subject of the Commission's work under the Eighth Programme was the adaptation of Scottish law of contract to the solutions stemming from the Draft Common Frame of Reference.⁶⁰

The Commission's most recent programmes — from 2015⁶¹ and 2018⁶² — are a continuation of previous work, with new issues of interest to the Commission being, in the field of civil law, regulation of prescription, cohabitation and personal injury, while in the field of criminal law — defamation and homicide.

Conclusions

Walter Scott once noted that Scottish law resembled an ancient castle: “partly entire, partly ruinous, partly dilapidated, patched and altered during the succession of ages, by a thousand additions and circumstance.”⁶³ In this context, with regard to the work of the Scottish Law Commission and the initial premises for the codification of the law, it should be acknowledged that the original goal of be-

ments in all parts of the British state, while the development of Scotland's autonomy enabled the Commission to work in this area as well.

⁵⁸ The devolution was a consequence of the British Parliament's Scotland Act of 1998 (c. 46), which resulted in the restoration of the Scottish Parliament and the formation of the Scottish Executive. Both bodies were given broad powers, limited only by the powers of the British government, whereas in the case of Parliament, a list of British laws was promulgated, featuring laws that could not be amended or repealed by the Scottish Parliament.

⁵⁹ Seventh Programme of Law Reform 2005 — Scottish Law Commission no. 198, available at: <https://www.scotlawcom.gov.uk/files/4412/7989/6557/rep198.pdf> (accessed: 21.05.2023); Eighth Programme of Law Reform 2010 — Scottish Law Commission no. 220, available at: <https://www.scotlawcom.gov.uk/files/9412/7989/6877/rep220.pdf> (accessed: 21.05.2023).

⁶⁰ The Draft Common Frame of Reference is an instrument created in 2008 by a team of European scholars, the objective and premise of which was to develop references between key concepts in contract law functioning in different languages, traditions and legal systems.

⁶¹ Ninth Programme of Law Reform 2015 — Scottish Law Commission no. 242, available at: https://www.scotlawcom.gov.uk/files/6414/2321/6887/Ninth_Programme_of_Law_Reform_Scot_Law_Com_No_242.pdf (accessed: 21.05.2023).

⁶² Tenth Programme of Law Reform 2018 — Scottish Law Commission no. 250, available at: https://www.scotlawcom.gov.uk/files/5615/1922/5058/Tenth_Programme_of_Law_Reform_Scot_Law_Com_No_250.PDF (accessed: 21.05.2023).

⁶³ D. Daiches, “Sir Walter Scott and history”, *Etudes anglaises* 24, 1971, no. 4, p. 459.

coming the “architect” of the law were too difficult, too ambitious, and perhaps even impossible to achieve in the political and legal environment of the day. At the same time, we cannot deny the Commission’s role as an outstanding engineer who, through a series of improvements, has brought about a significant reconstruction of those parts of the Scottish legal system that required — like the castle mentioned above — the most urgent or far-reaching repairs, and as a source of inspiration for law reforms also outside Scotland.⁶⁴

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