THE PROCESS OF CRIMINAL LAW REFORM IN ENGLAND AND WALES

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1. Introduction

Over the past decade, many criminal justice systems in Europe have engaged in the intellectual exercise of rethinking parts of their criminal justice system. Already in 1988 the new Italian Code of Criminal Procedure was passed.[1] In the same year, the *Commissie Herijking Wetboek van Strafvordering* was established in the Netherlands. In France the *Commission Justice Pénale et Droits de l'Homme* was set up in 1989 and delivered its final report in 1990. The Belgian *Commissie Strafprocesrecht-Commission pour le droit de la procédure pénale* was created in the autumn of 1991 and is expected to report in the course of 1994.

This perceived need for reform reflects a gap between criminal law systems and the society they function in. In many countries criminal justice systems have not been able to cope with the increase in crime and especially with new types of criminality unknown at the time when the criminal laws of these criminal justice systems were devised. In some countries this has resulted in the enactment of new legislation whereas in other countries law makers have dismally failed to update the criminal law.

In a legal system such as England and Wales's where there exists no criminal code, many aspects of the common law are developed by decisions of the courts of law and a good deal of updating of the law can take place in this way. There is, however, a limit to this judicial law-making; judges should not create new principles but restrict themselves to applying old principles to new circumstances. This is certainly true in criminal law which is concerned with punishing individuals and where the powers of the judge are rightly limited. It follows from the mentioned limitation on judicial law-making, that, like in Belgium, the main law reforms in England and Wales have to be achieved by means of statutory legislation. Nevertheless English judges play a far greater role in developing (and thus reformulating) the (criminal) law than their Belgian counterparts.

The aim of this article is to examine the way criminal reform has taken place in England and Wales over the past decades and, in doing so, to point out some differences with the Belgian way of criminal law reform. The purpose is thus not so much to examine the *content* of this law reform as the *process* through which it was carried out. Although the focus will therefore be primarily on procedural aspects of criminal law reform such as the establishment and the composition of the reform bodies and the ways by which they proceed, attention will also be paid to the outcome of these reforms as the two issues are obviously intertwined.

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1. See ZANDER, M., 'From inquisitorial to adversarial – the Italian experiment', *New Law Journal*, 1991, 678-679; CORSO, P., 'Italy', in *Criminal Procedure Systems in the European Community*, VAN DEN WYNGAERT, C. (ed.), London, Butterworths, 1993, 226 *et seq.*

This article surveys the work of the four bodies that, over the years, have played an important role in the reform of the criminal law. Two of them are permanent bodies, the Law Commission and the Criminal Law Revision Committee, while two are ad hoc bodies, the Royal Commission on Criminal Procedure and the Royal Commission on Criminal Justice. The latter has only recently completed its *Report*[2], and there are significant controversies surrounding that report. For these reasons, special attention will be paid to its methods and conclusions. In a final chapter an attempt will be made to draw some comparisons between the way criminal law reform is undertaken in England, Wales and Belgium.

2. The Law Commission

The Law Commission was established by the Law Commissions Act 1965. It was the brainchild of Lord GARDINER, who was Lord Chancellor in the Labour Government at that time. In the book he had edited in 1963, Lord GARDINER advocated the establishment of a permanent body charged with the revision and reform of the law.[3] Its task is 'to take and keep under review all the law with which [it is] concerned with view to its systematic development and review [...]'.

The Commission consists of five commissioners appointed by the Lord Chancellor. The chairman and the other four members must be 'suitably qualified by the holding of judicial office or by experience as a barrister or a solicitor or as a teacher of law at a university'.[4] Their term of appointment cannot exceed five years but they are eligible for re-appointment. This changing composition of the Commission does not seem to present a real danger to the continuity of its policy; on the contrary, it is said to be a stimulus for progress (as opposed to ossification).[5]

The way in which the commissioners execute their task is two-fold: either by specific reference from the Government or by proposing a programme of law reform.[6] In the latter case the Commission selects certain areas of law which seem in need of reform. If the Lord Chancellor approves the programme it becomes a matter for the Commission how to reform the topics concerned and what proposals to make. This is certainly the most ambitious and the most difficult way of working and in its twenty-five years of working the Commission has had 'only' four programmes of law reform and none of them have been completed.[7] The vast majority of the Commission papers derive from references from the Government, i.e. when the Government asks to consider certain topics of law, such as e.g. computer misuse, extradition, attempt, etc. One of the main aims for setting up the Law Commission was to create an independent body which could formulate its own proposals without external interference. It is a disputed issue however if this independence has been achieved.[8]

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2. Royal Commission on Criminal Justice, *Report* (Cm. 2263, 1993, London, HMSO).
3. GARDINER, G. and MARTIN, A., *Law Reform Now*, London, Victor Golancz Ltd., 1963, 302 p.
4. Section 1 (2) of the Law Commissions Act 1965.
5. ZELLICK, G., *The Law Commission and the Law Reform*, London, Sweet & Maxwell, 1988, 13.
6. ZELLICK, G., *o.c.*, 3-7.
7. ZELLICK, G., *o.c.*, 3-20.
8. CERTON, R.T., *A Lament for the Law Commission*, Chicester, Countrywise Press, 1987, 103-109.

An interesting and highly praised feature of the law Commission's working methods is the circulation of working papers. These working papers normally consist of an outline of the present law, an account of the criticisms and defects in the law and proposals for change. These documents are published and widely circulated to seek the advice of interested parties. After this consultation, a final report is produced, which normally includes a draft bill. The consultation also fulfills an important psychological function; it can strengthen the value of the recommendations in the subsequent report. It should be noted, however, that the response to these working papers is often very low. Apart from a few institutions who are under some kind of a duty to respond to these reports, very few people actually take this 'democratic exercise'. Finally it is – as it should be in a democratic society – the responsibility of Government and Parliament to implement the proposals.

The Law Commission's activities cover almost every area of law, but in the field of criminal law, its attention has been devoted to topics as diverse as conspiracy to defraud, the power of the court of appeal to order retrial, corrobation of evidence in criminal proceedings, marital rape, etc. Many of its reports have contributed to the implementation of new legislation, such as the Criminal Justice Act 1967, the Criminal Damage Act 1971, the Forgery and Counterfeiting Act 1971, the Forgery and Counterfeiting Act 1981 and the Extradition Act 1989.

The Law Commission's most ambitious project is undoubtedly the draft of a criminal code. In the history of English criminal law, several attempts have been made at a criminal code, the first of such attempts dating from 1843 when Royal Commissioners appointed ten years earlier produced drafts which were to form the basis of a consolidation of statutory criminal law and common law crimes in one document. No action was taken on these reports, although in 1853 the Lord Chancellor of the day, Lord CRANWORTH, undertook to produce a new Criminal Law Bill which he hoped would result in a Criminal Code. No such codifying measure was ever brought forward. A further attempt to introduce a Criminal Code for England and Wales was made by Sir James Fitzjames STEPHEN, whose Code of Criminal Law was introduced into Parliament in 1878 but afterwards withdrawn. Almost a century later, the then Labour Home Secretary, Mr. Roy JENKINS, gave a new political impetus to the issue. In a speech he argued the case for a criminal code by reasons of clarifying the obscure provisions of the criminal law in the interest of the liberty of the individual. Subsequently, in 1968, the Law Commission published its Second Programme which included a comprehensive examination of the criminal law with a view to its codification. The Law Commission proceeded very thoroughly, first examining the specific offences (a job partially shared with the Criminal Law Revision Committee). Many reports originated from this work. In addition to this, the general principles that would form part of such a code were also being considered. A Working Party was created for this purpose. In 1981, resulting from a proposal of the Society of Public Teachers of Law (a professional association reflecting the views and interests of University law teachers), a Criminal Code Team was set up (partially intended to cope with the Law Commission's limited resources).[9] It consisted of four well known academics under the chair-

9. ZELLICK, G., *o.c.*, 62.

manship of Professor J.C. Smith. Its terms of reference included not only the drafting of a criminal code but also the examination of the advantages of such a code and the possible problems that could arise out of its application. After more than three years of travail, the Team was able to submit its report to the Law Commission in November 1984.

The great efforts of the Law Commission and the Criminal Code Team have however not been appreciated by the political world. Although the Draft Bill and the report have been laid before Parliament by the Lord Chancellor pursuant to section 3 (2) of the Law Commissions Act 1965, little attention has been paid to the project and the chance that the criminal code will pass through Parliament is very low. Realising this, the Law Commission in 1992 published a consultation paper *Legislating the Criminal Code: Offences Against the Person and General Principles.*[10] The Law Commission proposes to proceed step by step and instead of enacting the Criminal Code as a whole, to start by codifying a first part of the criminal law, namely non-fatal offences against the person. At the same time some general fault principles and some defences of general application would be codified.[11]

It has sometimes been said that a criminal code would ossify the law and is therefore inimical to the common law process. Although this argument can be countered by saying that a code can meld with the system of precedent and thereby strengthen it[12], it is probably true that there subsists an underlying distrust of the very idea of a criminal code. This legal conservatism, together with the fact that there is little electoral incentive for lawmakers to pass a criminal code, are the main reasons for the failure to introduce a criminal code in the law of England and Wales.

Mr. Justice GIBSON, the present chairman of the commission, has complained that since its establishment twenty five years ago, the rate of implementation of the Commission's reports has slowed down.[13] Since the end of 1984 only eleven out of thirty three reports have been implemented: one third. The reasons for this are complex. Sometimes a report is too controversial to be politically realizable; sometimes wide consultation is required. But the main reason is said to be that draft bills are simply not allocated enough (if any) parliamentary time. The vast majority of the reports are concerned with dull codification of parts of the law or revision of fairly technical lawyer's law. As there is little interest from the public opinion for his kind of topics, there is consequently little or no interest from politicians either.[14]

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10. Paper No. 122, 1992.
11. See: WELLS, C., 'Moral boundaries and criminal codes', *New Law Journal*, 1992, 1133.
12. SMITH, J.C., 'Codification of the Criminal Law. The Case for a Code', *Criminal Law Review*, 1986, 291.
13. X, 'Making love to an Elephant', *Solicitor's Journal*, 1991, 367.
14. ZANDER, M., *The Law-making Process*, London, Weidenfield, 1989, 124-133 and 140-142.

3. The Criminal Law Reform Committee

In 1952 the Law Reform Committee had been set up but its sphere of work was restricted to civil law.[15] The calls for a counterpart to this Law Reform Committee which had been initiated by Professor Glanville WILLIAMS, were answered in 1959 by the establishment of the Criminal Law Revision Committee.[16] It is aimed to be 'a standing committee to examine such aspects of the criminal law of England and Wales as the Home Secretary may from time to time refer to the committee, to consider whether the law requires revision and to make recommendations'.[17] In contrast with the Law Reform Committee, the Criminal Law Revision Committee is not responsible to the Lord Chancellor but to the Home Secretary. This may, reflect, perhaps, the greater level of political interest in the Committee's work.

The Criminal Law Revision Committee consists of between fifteen and seventeen members which include judges, the Director of Public Prosecutions, a practising barrister, solicitors and academics. It seems to have been the intention to provide a mixture of legal knowledge and partly to give a look-in to all the influential groups. There was nevertheless no clear representation from either the police nor of the defence nor, indeed, from lay persons. The Committee was assisted in its deliberations in relation to the reform of sexual offences with a 'Policy Advisory Committee' which included members from disciplines other than law, such as social work, social psychology and sociology.

Within the committee deliberations take place and members try to achieve an agreement concerning the final text of the report. If this is not possible however, members have the possibility to dissent. The framework of their reports resembles that of the working papers of the Law Commission; first there is a statement about the existing law, then the mischiefs are indicated and subsequently possible remedies are proposed. One of the most notable and valuable features of the Criminal Law Revision Committee's reports is that most of them, especially the early ones, contain a draft bill. Thus providing its recommendations in statutory form, the Criminal Law Revision Committee made it easy to give effect to its proposals. Compared to the Law Commission, the Criminal Law Revision Committee's recommendations have known a very and rapid implementation.[18] The form of presentation of the proposals is however not the only explanation for the high implementation rate of the Criminal Law Revision Committee's recommendations. This high implementation rate is also due to the fact that the Criminal Law Revision Committee only examined specific subjects (in contrast with the larger areas of law revised by the Law Commission). The most important explanation is probably provided by the fact that different ministers are politically responsible for the respective bodies. The Home Secretary seems to be much more active in the field of (and better equipped for) law reform than the Lord Chancellor.

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15. BAILEY, S.H. and GUNN, M.J., *Smith and Bailey on the Modern English Legal System*, London, Sweet & Maxwell, 1991, 24.
16. SMITH, J.C., 'An academic lawyer and law reform', *Legal Studies*, 1981-82, 125.
17. Warrant of the Home Secretary of 2 February 1959.
18. SELLERS, 'The First Ten Years of the Criminal Law Revision Committee', *Criminal Law Review*, 1969, 306.

The committee has paid attention to matters both of substantive criminal law and criminal procedure. It has revised the criminal law concerning suicide, penalty for murder and such aspects of criminal procedure as insanity, juror's perjury and attendance of witnesses. Among the most important legislation that resulted from its reports were the Theft Acts 1968 and 1978.[19]

The best known report of the Criminal Law Revision Committee is undoubtedly its notorious Eleventh Report on Evidence (1972).[20] This report expressed the opinion that the criminal justice system had got badly out of balance by becoming too favourable to the accused. It stated that 'the law should now be less tender to criminals in general' (thereby seemingly treating defendants as criminals prior to their conviction). One of the many recommendations that were made to assist the prosecution proved to be highly controversial, namely the proposal to abolish the right of silence at the police station. Up till then, and still now as a matter of fact, the suspect had to be cautioned in the next formula: 'You do not have to say anything unless you want to do so, but anything you say will be taken down and may be used in evidence'. The Criminal Law Revision Committee proposed that the suspect be warned that, if he refused to speak at that stage, negative conclusions might be drawn from this silence at the trial. The state of the law was and still is that the judge was not allowed to induce the jury to draw adverse interferences from the silence of the suspect at the police station. In the proposal of the Criminal Law Revision Committee, both the persecution and the judge would be allowed to invite the jury to draw such interferences. This proposal aroused a storm of protest, not only from MP's (both Labour and Tory) but also from professional groups and public opinion in general. This flood of protest made it impossible for any subsequent Government to implement any of the recommendations of this so widely criticised report.[21] The committee has not been convened since 1985.[22]

4. The Royal Commission on Criminal Procedure

In contrast to the two previous institutions which are permanent bodies, the Royal Commission on Criminal Procedure is an ad hoc committee established in 1978 by the Callaghan Labour Government. The aim was to review the whole criminal process systematically, instead of the piecemeal approach that had governed till then. Two motives in particular led to the decision. On one side there was a feeling in the public opinion that the restraints imposed on the police by the rules of criminal procedure hindered their job; but on the other hand there was often grave criticism of the use of investigate powers by the police.[23]

Being an ad hoc committee, the remit of the Royal Commission on Criminal Procedure was of course closely defined. The terms of reference of the Com-

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19. SMITH, J.C., 'An academic lawyer and law reform', *l.c.*, 129-130.
20. ZANDER, M., *A Matter of Justice*, Oxford, Oxford University Press, 1989, 173.
21. See also the way in which the two Royal Commissions handled this delicate issue; neither of the two commissions proposed to abolish the right of silence.
22. BAILEY, S.H. and GUNN, M.J., *o.c.*, 24.
23. The Royal Commission on Criminal Procedure, *Report on Criminal Procedure*, Cmnd. 9092, 1981, 1.

mission were: 'to examine, having both regard to the interests of the community to bringing offenders to trial and to the rights and liberties of persons suspected or accused of crime and taking into account also the need for the efficient and economical use of resources, whether changes are needed in England and Wales in: (1) the powers and duties of the police in respect of the investigation of criminal offences and rights and duties of suspect and accused persons, including means by which these are secured; (2) the process of and the responsibility for the prosecution of criminal offences; (3) such other features of criminal procedure and evidence as relate to the above'.[24]

These terms of reference reflected the two public concerns about the role of the police in investigating crime. The main theme indeed of the Royal Commission on Criminal Procedure was to strike a fair balance between the rights of the citizen and the suspect (rights and liberties of the individual) on the one hand and the police and the state on the other hand (interest of the whole community).

This purpose was also reflected in the composition of the Royal Commission. Whereas the Criminal Law Revision Committee consisted entirely of establishment judges and lawyers with no one representing the accused, the police or lay interests, the Royal Commission on Criminal Procedure had not only a lay chairman, Sir Cyril PHILLIPS, and a majority of lay members but also two senior police officers and a lawyer with considerable experience in representing the defence.[25]

As already pointed out, the terms of reference of the Royal Commission indicated the difficult and delicate task of elaborating a balance between the rights and liberties of the individual and the interest of society in an effective combat of crime. It is essential for the criminal law of England and Wales that the historical development of this balance resulted in the establishment of the criminal trial as accusatorial in evidence. This kind of criminal trial is in effect a contest between two sides, designed to prove an answer to a specific accusation and a question: 'Is it established beyond reasonable doubt that the suspect has committed the offence with which he or she is accused?'[26] It is exactly the nature of this kind of adversarial trial which largely determines pre-trial procedure. The Royal Commission on Criminal Procedure did not think it suitable however to consider a radical change to a completely inquisitorial system. This would have a too fundamental effect on centuries-old institutions. The introduction of some features of the inquisitorial pre-trial procedure might be considered however.[27]

One of the basic concepts of this adversarial trial (and the nature of the pre-trial stage that follows from it) is the right of silence. Warned by the political stalemate and the public row that arose out of the Eleventh Report of the Criminal Law Revision Committee, the Royal Commission on Criminal Procedure ordered an empirical study into the right of silence at the police station. The study showed that the right of silence at the police station was so relatively rarely used at the police station that is presented little harm to the efficiency of the police investigation. The commission decided that it did not want to abolish the right of silence, which was

24. Royal Warrant of February, 3, 1978.
25. ZANDER, M., *A Matter of Justice*, 176.
26. *Report on Criminal Procedure*, 2.
27. *Report on Criminal Procedure*, 2.

in fact strengthened by the Government.[28] It may of course also have been that the majority of the PHILLIPS commission was in principle convinced of the necessity of preserving the right of silence at the police station. In preserving the right of silence, the commission in fact acknowledged that the accusatorial system of trial must fully dictate the nature of the pre-trial procedure.[29] The Royal Commission's dedication to preserving the right of silence also reflects the libertarian view that in a democracy a person should be treated as a free individual, irrespective of the goal of achieving a verdict.

The Royal Commission's report consists of two parts. The first one deals with the condition of the criminal procedures and police powers as they were then. The second part is concerned with the proposed remedies for the mischiefs that are indicated. The commission proceeded very systematically and scientifically. This scientific approach was a novelty in the working methods of Royal Commissions. It provided an objective ground for reform proposals (in contrast with previous Royal Commissions who sometimes tended to work on anecdote-based views). Moreover, the commission not only proceeded on a scientific base, it also published its research papers[30], which made it possible to judge the way in which the commissioners had reached their conclusions. Before examining the different aspects of its remit, the commission first set out the need for a revision and gave a scientific view of the role of the police in investigating crime and indicated the standards that should be applied to the different parts of the criminal investigation.

The report itself of the Royal Commission on Criminal Procedure deals with most aspects of criminal investigate powers such as entry and search or premises, detention upon arrest, search on arrest, etc. Each time attention is paid to the rights of the individual citizen. The questioning and the rights of the suspect were examined in detail.

The *Phillips Report* was produced in the beginning of 1981. It was well received both by the police and the legal profession. The political Left (including the Labour Opposition) thought of it as too prosecution minded. The Home Office was clearly determined to implement the proposals of the report and already in November 1982, the Home Secretary introduced the first version of the *Police and Criminal Evidence Bill* into Parliament. This first bill failed to pass because Mrs. THATCHER called a General Election in 1983. In October 1983, the new Home Secretary, Mr. Leon BRITTAN, presented a new version of the Bill which was widely and passionately discussed in both Houses but eventually emerged in October 1984 in pretty much the same form as it had been introduced a year before despite the numerous amendments that were made.[31] On several important points the *Police and Criminal Evidence Act 1984* however significantly differs from the proposals of the *Phillips Report*; the Government picked the recommendations it wanted and left out others. In doing so, the Government of course distributed the well balanced package of proposals made by the Royal Commission on Criminal

28. ZANDER, M., *Cases and Materials on the English Legal System*, London, Weidenfield, 1988, 146.
29. *Report on Criminal Procedure*, 9-10.
30. Twelve research studies were commissioned, dealing with such matters as police interrogation, confessions, the role of the police in uncovering crime and prosecutions by private individuals and non-police agencies.
31. ZANDER, M., *The Police and Criminal Evidence Act 1984*, London, Sweet & Maxwell, 1990, xii.

Procedure. It cannot be denied however that the process of coming into being of the *Police and Criminal Evidence Act* was an example of the functioning of a democratic society. The commission was set up by a Labour Government; its proposals were cast into two versions of a statute by a Tory Government, which in turn were massively amended, in some cases under strong pressure of public opinion or interested groupes.[32] Police powers for investigating crime, e.g. the powers of arrest, were significantly increased. At the same time the new powers were accompanied by a set of restrictions and qualifications in order to protect the rights of citizens. An interesting and essential part of the *Police and Criminal Evidence Act* regime is the system of the accompanying Codes of Practice (on stop and search, search of premises, questioning of suspects in the police station, identification and tape recording). They are not law and a breach of them cannot lead to a criminal or a civil case against the police officer who committed the breach. A breach of the Codes is however a disciplinary offence for a police officer and may entail the exclusion of evidence obtained by breaching the Codes (although the judge still has the power to allow the evidence: a strongly criticised point). Whereas the police were initially delighted about the Commission's proposals they viewed the actual implementation of the proposals by the Government with considerably less enthusiasm. The Codes of Practice are in particular being criticised for involving too much bureaucratic work.[33]

5. The Royal Commission on Criminal Justice

The Royal Commission was set up in June 1991 as an immediate response to the release of the 'Birmingham Six' following the quashing of their convictions by the Court of Appeal. The fact that it was established at all by an administration which had been unsympathetic to their use (this was the first Royal Commission to be established in the United Kingdom since 1979) is evidence of the very real crisis of confidence affecting the system of criminal justice in England and Wales. The establishment of the Commission can be seen, therefore, as prompted at least in part by the need to re-establish confidence in a system which appeared to be prone to abuse by law enforcement agencies such as the police, and, moreover, not particularly efficient in convicting criminals.

In its origins, composition and working methods the Royal Commission on Criminal Justice shares many features with the Royal Commission on Criminal Procedure. The establishment of both Commissions was closely linked to grave breaches of criminal justice. Like the *Phillips Commission*, the *Runciman Commission*, named after its president Lord RUNCIMAN OF DOXFORD, is characterised by a large lay input: six of the eleven members do not have a background in the criminal justice system (including the president). Both Commissions were also able to draw on a significant element of specially commissioned research.[34]

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32. ZANDER, M., *The Police and Criminal Evidence Act 1984*, 181.
33. ZANDER, M., *A Matter of Justice*, 181.
34. The Royal Commission on Criminal Justice commissioned 22 special research reports, dealing with topics ranging from reports on the systems of criminal justice in other jurisdictions (including France, German and Scotland), the conduct of police interviews, the right to silence in police interrogation, the appeal process and ethnic minorities and the criminal justice system.

One question that immediately arises is the extent to which the Commission was able to draw on a broad range of opinion in reaching its conclusions. This is a matter of particular importance given the high level of public concern generated by such matters as the affairs of 'the Birmingham Six' and 'the Guildford Four'. Like its earlier counterpart, the Royal Commission on Criminal Justice received evidence from a large number of organisations (over 200) and individuals (over 400). These organisations reflected interests as diverse as the Association of Chief Police Officers, the Children's Legal Centre, the Salvation Army and several local councils; those who gave evidence were predominantly those with professional interests in the law. This 'legal' input is particularly marked when one considers those who were invited to give oral evidence to the Commission. With very few exceptions (such as Victim Support, the Society of Black Lawyers and the Commission for Racial Equality), those who gave oral evidence to the Commission were almost exlusively those who had a close involvement in the administration and enforcement of the criminal law. In other words, although the consultation process was an open one, and the membership of the Commission was structured so as to broaden its approach to the questions with which it was concerned, it is likely that its views will have been strongly influenced by the 'professional' perceptions of those from whom it received evidence.

The terms of reference of the Commission were lengthy and detailed and embraced most aspects of the criminal justice system before, during and after the trial (although they were not concerned with sentencing and other forms of disposal). Those terms of reference were, however, coloured by the general object of the Commission, which was 'to examine the effectiveness of the criminal justice system in England and Wales in securing the conviction of those guilty of criminal offences and the acquittal of those who are innocent, having regard to the efficient use of resources'.[35]

The Commission reported in June 1993. The Report is lengthy – it extends to over 250 pages, and detailed – more than 350 specific recommendations. Among the most significant recommendations of the Commission are:

– the retention of the current rules regarding the 'right to silence' enjoyed by suspects during police questioning (recommendations 82, *et seq.*);

– uncorroborated confessions should continue to be admissible as evidence, but the jury should be warned that great care is needed before convicting on the evidence of an unsupported confession (recommendations 89 *et seq.*);

– the position of the victim in proceedings should be enhanced, by keeping him or her better informed of the course of proceedings, and of decisions taken in respect of these proceedings (recommendations 101 *et seq.*);

– the current right of the accused to select jury trial in the case of offences which may be tried 'either way'[36] should be abolished (recommendation 144 *et seq.*);

– the obligation of the accused to disclose his defence in advance of the trial should be enhanced (recommendation 132 *et seq.*);

– the system of 'sentence discounts' for early pleas of guilty should become more formalised (recommendations 156 *et seq.*);

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35. Royal Warrant, Cm2263, p.i.
36. See below.

– the rules regarding the admissibility of evidence of the accused's previous convictions and hearsay evidence should be relaxed (but only following further consideration by the Law Commission, recommendations 189 and 191, *et seq.*);
– a new independent body should be established to consider allegations of miscarriage of justice (recommendations 331 *et seq.*)

It would be fair to say that the reaction to the Commission's Report has been at best lukewarm, and in many quarters quite hostile. It has been vigorously attacked as lacking sufficient basis in principle for making too many concessions to economic efficiency and for exceeding its terms of reference.[37] There is even a suggestion that the Commission had made fundamental (and elementary) errors in interpreting the statistics on which it has based some of its recommendations.[38]

One specific criticism relates to the terms of reference: the reference to 'efficient use of resources' is said to have led the Commission to consideration of matters that were not strictly within their remit. It is certainly true that concerns with cost significantly influenced the Commission in their consideration of the right to jury trial. At present, some offences (summary offences) may only be tried in the lower courts (magistrates' courts) in which there is no jury. Some (very serious) offences can only be tried in the Crown Court before a judge and jury. But there is a large list of offences which may be tried 'either way', at the option of the accused. It is this option which the Commission has suggested should be removed. The Commission proposes that the mode of trial should, in the first instance be determined by the prosecutor. If the accused does not agree to this, then the mode of trial is to be determined by the magistrates' court. If implemented, this would mark a fundamental change in the English criminal justice system, and is widely opposed. (The present Lord Chief Justice has voiced his opposition to his proposal in particular.) It is interesting to note, however, that the mode of trial is not expressly referred to in the Commission's terms of reference, and it is only by reference to the question of 'efficient use of resources' that the Commission is able to justify its conclusions. The Commission's view is that their proposals would result in fewer cases being sent to the Crown Court for trial and this would allow resources to be directed towards improving arrangements for those cases that are sent for trial in the Crown Court. As the Commission expressly points out: 'A trial in a magistrates' court is many times cheaper than a trial at the Crown Court'.[39] While the Commission rightly points out that this would result in savings that could be directed towards speeding up Crown Court trials, it is nevertheless a less than satisfactory justification for proposing such a radical change in the criminal justice system.

The *Phillips Commission* and the *Runciman Commission* share another feature, which is not apparent from their terms of reference of their Reports, and that is the political context in which they operated. Both Commissions were concerned with

37. See in particular, the debate between Michael McConville and Chester Mirksy on the one hand (critics of the Report) and Michael Zander (a member of the Commission) in the *New Law Journal*, 1993, 1338, 1964, 1446, 1507 and 1597.
38. BRIDGES, L., 'The right to jury trial – how the Royal Commission got it wrong', *New Law Journal*, 1993, 1542.
39. *Report*, 88.

an area of the law which is particularly susceptible to the influence of political arguments and considerations. This is especially marked today, where crime and the commitment to reducing crime are central to the Government's political programme. What this means, however, is that however scientifically researched and however carefully reasoned, the Commission's conclusions may simply be ignored if they are considered to be out of keeping with the policy of the Government.

This is particularly clear in relation to the question of the 'right to silence'. The issue here is not whether persons should be 'compelled' to answer questions put to them by the police, but whether, at the trial stage, the judge and the prosecutor should be permitted to invite the jury to draw an adverse inference from the fact of silence. Both Royal Commissions considered the issue at length, and reached the conclusion that it would not be in the public interest to influence the decision of persons whether or not to respond to police questioning in this way. The Royal Commission on Criminal Justice also concluded that while maintaining the right to silence in its present form might have the effect that a small number of experienced criminals would evade conviction, this must be set against the dangers to 'vulnerable suspects': 'It is the less experienced and more vulnerable suspects against whom the threat of adverse comment would be likely to be more damaging. There are too many cases of improper pressures being brought to bear on suspects in police custody, even when the safeguards of PACE and the codes of practice have been supposedly in force, for the majority to regard this with equanimity'.[40]

Despite these concerns, the Government has made it clear[41] that it intends to modify the right to silence in the manner rejected by both Royal Commissions. This reveals a tension in this process of criminal law reform, which it is not easy to resolve. On the one hand there is a process of considered reflection and review, which, through the consultation process, enjoys a measure of democratic legitimacy. On the other hand, there is no means whereby a democratically elected government can be compelled to accept the conclusions of such a review. At the same time, where the Government finds the Commission's views to its liking, it will rely on the 'authority' of the Commission when giving effect to its views. It is perhaps inevitable that decisions concerning the criminal justice system will be driven by political preoccupations, but is perhaps unfortunate that what was seen as an opportunity to re-build public confidence may have been lost on this occasion.

6. Comparisons and conclusions

A question which can be asked with regard to criminal law reform in general is in how far the rethinking of parts of the criminal law should be governed by or rather depart from a general, underlying philosophy about the basic functions and goals of a criminal justice system. One of the recurrent criticisms, which has been aimed

40. Report, para. 23. *Cfr.* Report of the Royal Commission on Criminal Procedure, paras. 4.45 and 4.46.

41. See report of the Queen's Speech to Parliament, *The Times*, Friday 19 November 1993.

at the *Runciman Report* is that the proposals it contains, lack a theoretical basis.[42] Professor Michael ZANDER responds to this line of criticism by arguing that the choice of a theoretical criminal justice system does nothing but reformulate the problem. If e.g. the Royal Commission on Criminal Justice, as the *Phillips Commission* did, had chosen the balance between the rights of society on the one hand and the rights on the accused on the other hand as its basic theoretical concept, it still leaves open the question what is the right balance in regard to each topic.[43] Moreover it can be doubted whether, in the heterogeneous society in which we find ourselves at the end of the twentieth century, consensus can still be achieved on what should be regarded as the fundamental theoretical basis of the criminal justice system. To put it in other words, law reformers probably do not have a choice but to proceed on a pragmatic basis.

Because of the fundamental differences, which divide a common law and a continental country, it is difficult to draw some conclusions which can be valid for both countries. These differences are not restricted to the legal sphere but should be set against a broader political, social and even philosophical background. Having said this, it is nevertheless remarkable that in a country with a pragmatic, case to case legal tradition, the reform of the criminal law is undertaken in an apparently more systematic way than in a contintental country such as Belgium.

As Belgium does not know any permanent institution that is charged with the review of (some aspects of) the criminal law, law reform can only take place through the activities of ad hoc bodies. The establishment in the autumn of 1991 of the *Commission Franchimont*, named after its president Professor Michel FRANCHIMONT, was preceded by the activities of other ad hoc bodies charged with reforming the criminal law.

In 1962 Professor H. BEKAERT was nominated *Koninklijk Commissaris voor de herziening van het Wetboek van Strafvordering – Commissaire Royal pour la réforme du Code d'Instruction Criminelle*. The report he submitted in 1974, was not followed by any legislative action however. In 1976 the *Commissie voor de herziening van het Strafwetboek – Commission pour la réforme du Code Pénal* was called into being, which reported in 1979. Professor R. LEGROS who was nominated *Koninklijk Commissaris voor de herziening van het Strafwetboek – Commissaire Royal pour la réforme du Code Pénal* in 1983 submitted his project for a new criminal code in 1985. Neither of both proposals have been put into legislation however.

On the contrary, the proposals of English law reform bodies have overall known a relatively high implementation rate. This is probably due to different factors, but one important explanation may be that criminal law reform in England and Wales is carried out in a more democratic way than in Belgium.

It was shown that the establishment of both the *Phillips Commission* and the *Runciman Commission* was closely linked to well-publicised and grave breaches of criminal justice and the same goes for their Belgian counterpart, the *Com-*

42. See e.g. MCCONVILLE, M. and MIRSKY, C., 'The disordering of criminal justice', *New Law Journal*, 1993, 1446-1447.
43. ZANDER, M., 'Where the critics got it wrong', *New Law Journal*, 1993, 1361.

mission Franchimont.[44] As the establishment of these criminal law reform bodies is thus motivated by a public concern about the functioning of the criminal justice system, it may be seen as only logic that the public is involved in or at least informed of the activities of these bodies. This need for democratic involvement is increased by the absence of a general consensus on the basis functions and goals of the criminal justice system. In this respect it may be pointed out that the two Royal Commissions have not only been provided with an important lay input, but that the way in which English law reform bodies go about their task seems to open more possibilities for input from third parties. See in this respect e.g. the circulation of working papers by the Law Commission and the huge extent to which individuals and organisations submitted evidence to the *Runciman Commission.*[45] The inclusion of large lay elements by which both Royal Commissions distinguish themselves, not only from continental law reform committees but also from the earlier established Law Commissions and the Criminal Law Reform Committee, can be seen as a reflection of the increasingly held view that a system dominated by lawyers and the legal establishment could not command public confidence. The selection of members of law reform committees should be governed by the preoccupation to reflect different perspectives on the subjects. The choice of these different perspectives can be confined to persons from within the criminal justice system or, as has happened in England and Wales, can be broadened to other parts of society. An obvious disadvantage of the latter option is the fact that some of the more technical aspects of the law will not get the attention they deserve.[46]

It may of course also be that the Belgian criminal law reform projects up till now were too ambitious in that they aimed to review the whole code (of criminal law and criminal procedure) and that only smaller projects stand a chance of succeeding.[47] Whatever the explanation, English criminal law reform clearly not only distinctly differs in its process but also in the results it is able to bring about. *L'influence du contenant sur le contenu* is not to be underestimated in matters of criminal law reform.

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44. The *Commission Franchimont* was established after the inquiry by the Belgian Parliament into the way the investigation of the so-called *Bende van Nijvel* was conducted.
45. In contrast, it can be noted that the survy carried out on behalf of the Belgian *Commission Franchimont* was explicitely restricted to magistrates and advocates.
46. This explains e.g. why the Royal Commission on Criminal Justice referred a revision of the rules of evidence to the Law Commission: ZANDER, M., 'Where the critics got it wrong', *New Law Journal*, 1993, 1339-1341.
47. See in this respect also the discussion of the high implementation rate of the reports of the Criminal Law Reform Committee.