

Society of Legal Scholars Conference – 8 September 2016

Speech by The Rt Hon Sir David Bean, Chairman, Law Commission of England and Wales

This is my first SLS conference and I am a little daunted at the prospect of addressing this formidably intellectual audience. I have never considered myself a legal scholar. I did get a decent degree in law, at any rate in my last year, was awarded what might be called a posthumous scholarship by my college, and for a short time afterwards taught the law of tort to supervision groups at Cambridge. But after that, for the 40 years before I took up the chairmanship of the Law Commission, I had to deal with the law as I found it. It is an attraction of the Law Commission that for almost the first time since I was called to the Bar I can devote time to thinking about what the law ought to be.

On the other hand I must tell you of the occasion when in my first term as a law student I was introduced to the second senior Law Lord, Lord Morris of Borth-y-Gest. He asked me a question of law. I said that I didn't know the answer, but I had only been a law student for a few weeks. The great man said that it was 60 years since he had started as an undergraduate, but he still considered himself a student of the law. So do I.

No-one could accuse the founders of the Law Commission of lack of ambition. Section 3(1) of the Law Commissions Act 1965 says that "it shall be the duty of each of the Commissions (that is, of England & Wales and of Scotland) 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..."

Note the very wide wording: the systematic development and reform of all the law. Lady Hale recently described this as "mission impossible". Section 3(1)(b) of that Act instructed the Commissions to prepare and submit from time to time "programmes for the examination of different branches of the law with a view to reform". Again, the pioneers, led by Sir Leslie Scarman, were extraordinarily ambitious. The First Programme, published in July 1965, contained 17 items. Number 1 of 17 was "Codification of the Law of Contract". The Second Programme of Law Reform appeared in November 1967. This added a mere three items to the 17 in the First Programme; but one of these was Family Law, and another was Codification of the Criminal Law.

Codification of contract law would have been a colossal task even if you consider it a desirable outcome, which is questionable in my view. It does not seem ever to have had a reasonable prospect of success. As for codification of criminal law, in 1981 the criminal law subcommittee of this Society, then the SPTL, established a team led by the great Professor Sir John Smith to work on the code. In the mid 1980s the Law Commission took the project in-house, and in 1989 a two volume Criminal Code looking like an old fashioned White Paper was published, covering both the general part of the criminal law and a selection of the most common offences. It was supported in debate in the House of Lords in 1989 but little has been heard of it since then.

Very recently the present Lord Chief Justice has expressed support for codification of criminal law. We are looking to codify one part of it, which is the law of sentencing procedure. I don't mean whether the correct answer is 5 years or 7 years, but all the procedural statutes which at present run

to 1300 pages and which David Ormerod and his team are seeking to codify. But I think a single Criminal Code covering everything is beyond the scope of what we could be doing, at least at present.

Once the halcyon days of Gardiner and Scarman were over the implementation rate of Law Commission reports was at times disappointing. There were some striking successes, notably the Children Act 1989, but all too often Law Commission reports led to no practical outcome. Under the chairmanship of Sir Terence Etherton (between 2006 and 2009) negotiations took place which led to the Law Commission Act 2009 and a Protocol agreed under that Act.

The Protocol says that before approving the inclusion of a project in a Law Commission programme the Lord Chancellor will expect the Minister with relevant policy responsibility to indicate that there is a serious intention to take forward law reform in the area of the proposed report.

The 2009 Act and the Protocol might be criticised by purists - and I appreciate there may be some purists in this audience - as restricting our independence and our right to take up any area of the law and consider whether it should be reformed. But I am not on the side of the purists. My view is that our limited resources should not be devoted to writing essays or textbooks if there is no prospect of achieving reform.

I accept, of course, that sometimes our reports persuade the courts, in particular the Supreme Court, to take action themselves. Lady Hale in her address yesterday referred you to two notable recent examples. One was *Mirza v Patel*, a blockbuster decision of the Supreme Court adopting proposals by the Law Commission on illegality. The other, less well known, is *Knauer v Ministry of Justice* on fatal accidents damages a story in which your President [Professor Burrows] and I each played a part at various stages.

In 1999, when Andrew Burrows was the common law Commissioner, the Law Commission published a report on the assessment of damages in fatal accidents cases. It pointed out that the reasoning in two previous decisions of the House of Lords was illogical. Successive governments did nothing about it. In 2014, in one of my last cases as a trial judge, I heard the *Knauer* case, in which the claimant challenged the method of assessment established by the House of Lords. I was bound by the previous decisions but granted a leapfrog certificate enabling the case to be appealed directly to the Supreme Court. They agreed to take the case, departed from the decisions of the House of Lords and instead adopted the proposals of the Law Commission. So, 17 years after Andrew and his colleagues wrote their report, it bore fruit. Law reformers have to be patient people.

Implementation of Law Commission reports by court decisions is relatively unusual. Usually we have to work by persuading Parliament to enact primary legislation. That involves competing for Parliamentary time, which always has been a scarce commodity and always will be. An important part of the 2009 package of reforms, therefore, was the revival of a special procedure in the House of Lords for Law Commission Bills.

The most recent bill to be enacted under this procedure was the Insurance Act 2015. The statistics about the time taken are interesting: 12 hours in the Special Public Bill Committee, half an hour on the floor of the House of Lords and half an hour for all stages in the House of Commons. That is a textbook example of successful law reform. But even for a special procedure bill, the Parliamentary business managers must be satisfied that there is a real problem which needs solving and that there are real benefits to be obtained from legislating. Something which appears a problem to a member of this audience may not pass this test.

The threshold tests for an idea to get be included in our Programme are these. Firstly, is the problem an issue on which the view of a commission of five lawyers is more valuable than the views of politicians or their constituents? (For example, there is an interesting discussion to be had on whether the minimum age for voting should be reduced from 18 to 16, but it is not an issue on which the advice of lawyers is necessary. The answer is either yes or no, the drafting is easy and lawyers have no particular part to play). Secondly, would a bill to enact the proposal be likely to result in a division on party lines in the House of Commons? If so, we should have nothing to do with it. Thirdly, would the relevant Department agree that there is a need for some reform in this area? If not, it fails the Protocol test. Fourthly, do we have the resources to take it on?

We have published what I call the kite-flying document setting out some ideas of possible projects for the next programme. We shall be very glad to hear any comments from any of you by the end of October, either on those proposals or making suggestions of your own. But please don't ask us to write textbooks or essays. That's your job.