

HOW HAS THE COMMON LAW SURVIVED THE 20TH CENTURY? “Gouverner, C’est Choisir”

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This article concerns the survival of the common law in the United Kingdom over this past century, and its prospects for the next. Why has the “unwritten” common law survived for so long, and for how much longer will it do so? This survival is in many ways quite remarkable. The changes over that period, while perhaps tamer than in many other parts of the world, have nonetheless been huge. It is a puzzle, then, to find at the end of the 20th century a legal system expanded far beyond anything there was in earlier centuries, in many respects utterly changed — and yet with an “unwritten” core still there, still treated with respect. The torrent of legislation through which parliament continually makes and re-makes the legal system has left the core of the common law, if hardly untouched, at least intact and flourishing. Indeed, the common law is often treated as the defining characteristic of the legal system of which it forms part, the thing that most truly indicates its nature and identity — these systems are “common law systems”, even though most of their law is statutory! The area of pure case law is small when we look at each system as a whole, yet somehow this small area is treated as the core, as somehow fundamentally important.

THE PUZZLE

To see that the survival of the common law is indeed a puzzle, and in need of explanation from legal historians, consider the perspective of reform-minded lawyers at the middle of the 19th century. To them it was obvious not merely that the common law *should* be swept away but that it inevitably *would*. So someone like Vaughan Hawkins, a minor intellectual at the Chancery Bar at mid-century, could spice up his case for codification¹ with arguments that the case law system was already on the verge of collapse. Now it is interesting to review the arguments of people like Vaughan Hawkins, because they are so believable, so entirely plausible. He gave excellent reasons for supposing that the collapse of the common law, if not exactly imminent, was nonetheless a highly likely medium-run possibility; and (unlike many of those who argued for codification) he had some quite serious analysis of the system of doctrinal law in his time. Of course, we have an advantage that he did not — 130 years on, we know that it has not collapsed, and that it does not show any immediate signs of doing so. The question is, what is it about the common law that falsified Hawkins’ arguments? How has it kept going so long?

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¹ Vaughan Hawkins, “Digests and codes, with reference to Law Reform” (1871) 3 *Papers read before the Juridical Society* 110.

Vaughan Hawkins' argument started from the everyday application of case law in courts. It is rarely necessary in case law to lay down *wholly* new principles, he pointed out; nearly all of the time, the judges can simply apply settled principles to the circumstances in front of them. So in a developed society, he argued, case law is less and less concerned with broad principles, and more with matters of detail, and "accidental gaps in the fabric" of the law.² The increasing wealth and complexity of society accelerates this trend. As society becomes richer and more varied, the case law becomes more complex too, as the basic principles are applied in more and more situations, more and more variations on the basic theme are played through. Now, clearly, he argued, this will suggest to many people the need for reform. It will become obvious that the accumulating mass of case law is unwieldy. In some situations the old principles will yield acceptable results, but in many they will not.

So what will happen? In each area where there is an obvious problem, people will consider the alternatives for fulfilling the increasingly diverse needs of society. And when they do so, legislation will nearly always seem superior to common law. Legislation will be a more precise instrument than case law can ever be,³ and more practical too. Statute will triumph, therefore, as being much clearer than common law. So what was in Vaughan Hawkins' day apparent only to a few reform-minded characters — that the case-law system was chaotic, and should be replaced by clear statutes — would in time become clear to all, and the common law would be swept away. And eventually the final step would be taken. What a code can make clear in a single volume, takes an entire library of reports under the case law system.⁴ Eventually, the advantages of a code will become obvious. The chaotic common law will be replaced by a code, and everyone will breath a sigh of relief.

That was the argument. Now, the *premises* of the argument were correct. Indeed, cases and statutes have grown in bulk if anything rather more than Vaughan Hawkins expected, and the threat of incoherence brought about by this rise in bulk is still present. Yet with the benefit of 130 years' hindsight, we know that the conclusion is wrong. Society has changed in so many ways, and so many of the common law's cherished precepts have been turned on their heads. As predicted, the overwhelming bulk of the law is now statutory. *And yet* there is still a small but recognisable core of common law principle — not a backwater, but somehow the most important bit of the system. The legal system remains a "common law" system, even though for most practitioners "common law" is merely a dim memory from law school.

And what a core it is! Despite its relatively small practical importance, it is treated as an essential part of legal education. It is perfectly possible to complete a law degree without knowing what pleadings look like, but impossible to do so without knowing a substantial amount of common law.

THE SCOPE OF THE MODERN "UNWRITTEN" LAW

What is left of the common law? Much has changed, certainly. To the eyes of a mid-19th century lawyer, it might seem that the common law had split in two. Expecting to find a criminal law and a civil law, both heavily reliant on juries applying common law, rather they would see a criminal jury (largely applying statute), and civil law case development almost

² *Ibid*, 116.

³ *Ibid*, 117-118.

⁴ *Ibid*, 119.

entirely *without* a jury. The main categories of law would still be very familiar to a Victorian lawyer, despite the strangeness of the detail. In public law, much of constitutional law and administrative law is still unwritten. Nearly the whole of the criminal law is now to be found in statutes; but it is the most serious crimes that either are not, or are contained in statutes so ancient that the case-law “interpreting” them has all but swallowed them up. In private law, there is still a recognisable “common law” side consisting of tort, contract and restitution (a new name for the old “quasi-contract”), and an “equity” side; the rationale for treating the “equity” side as distinct has long gone, but the process of unifying it with the common law side has gone very slowly, if indeed it has not stalled completely.

A surprise to the 19th-century lawyer would, however, be the rise of very general theories of liability. The 18th-century lawyer would have expected the civil law to be structured, if at all, around the procedural requirements of the forms of action, and, on being told that those forms had been abolished, might not have known quite what to expect. The common law has always had room for truisms such as *pacta sunt servanda* and *sic utere tuo ut alienum non laedas*, but in the 20th century these truisms have become the basis of rather precise theories. So the courts do not merely proclaim that people should not harm one another, but have rather precise ideas about what constitutes harm, when it can lead to legal action, and what remedies are available in consequence. These theories could hardly have taken hold before the decline of civil juries, before which the questions now debated in law schools would largely have been jury questions. “Contract”, with its “offer and acceptance” and other attempts to define what an 18th-century lawyer would not have felt was in need of definition, appeared in the 1870s. “Tort” took slightly longer, and the dominant concept came to be a sub-category, “negligence”, which now threatens to swallow all the others. “Administrative Law” emerged as an important and coherent entity in the 1960s; and at about the same time there was “Restitution”, as yet of uncertain impact. So it is now these high-level theories that dominate, and would to lawyers of early centuries be a very striking feature of the system.

In other common law areas, there has been a relative lack of theory, but the lack of a theory has not led to stagnation. The “inherent” jurisdiction of the courts in procedural matters has occasionally produced monsters, such as the *Mareva* (“freezing”) injunction.⁵ The common law of crimes, small though it is, is certainly a far-from-stagnant area: the courts’ response to the problems of marital rape⁶ and stalking,⁷ slow though they were, were certainly faster than Parliament’s. And property rights of unmarried cohabitants have increasingly been recognised in property law, despite the difficulty of finding any clear doctrinal basis for so doing.

The idea that common law is entirely distinct from statute still seems to be in rude health. There is no question of common law being absorbed into statute; it stubbornly maintains independence. There are occasional developments which look like a growing-together of statute and common law; but most of these anomalies have existed for many decades, with no sign that they are getting any broader. So there are occasionally statutes

⁵ See generally Dockray, “The inherent jurisdiction to regulate civil proceedings” (1997) 113 *LQR* 120.

⁶ *R v R* [1991] 4 All ER 481.

⁷ See *R v Ireland*, *R v Burstow* [1997] 4 All ER 225; the courts also took tentative steps towards a tort of harassment, see *Khorasandjian v Bush* [1993] 3 All ER 669. Both developments were superseded by later legislation: see Protection from Harassment Act 1997, (and N.I. Order).

which are treated much as if they were part of the common law, either because they are very ancient,⁸ or because they were drafted with that intent.⁹ More recently, there have been developments which might upset this division. For example, the status of the public law *ultra vires* doctrine has been called in question — is the rule under which administrative action may be held invalid “really” part of the statute authorising the action, or is it “really” part of the common law?¹⁰ Or again, the liability of public bodies in negligence now seems to be governed by a hybrid form of liability, deriving ultimately from common law concepts, but moulded and guided by the relevant legislation and its underlying policies — begging the question whether it is part of the statute or part of the common law.¹¹ But these puzzles, while in theory they call the distinctness of the common law into question, are very unimportant in the scheme of things. Calls for the courts to develop a common law fit for an age of statutes, perhaps by extending statutes by analogy to cover new situations,¹² have been largely ignored. The common law is treated as a conceptually distinct entity, which does not accommodate itself to statute but merely ignores it.

This paper, then, is concerned with the mechanisms by which the common law has been preserved from the statutory onslaught, and the mark that that resistance has made on the common law itself.

THE TWENTIETH CENTURY: HOW THE COMMON LAW HAS SURVIVED

The common law has always been chaotic. Yet the bulk of the material involved has grown considerably over the past centuries. The huge increase in litigation is an obvious factor. The scope of the common law has broadened, but more important has been its *deepening*, as more and more cases crowd into the old space. It is all as Vaughan Hawkins said it would be: More and more fact situations, each new one not being startling different from the others, but each nonetheless unique. Outright overruling of old cases is relatively rare: new cases are accommodated by distinguishing the old, which remain good law in a reduced sphere. The disappearance of civil juries aids this process: cases which in earlier days would have seemed identical, their precise equities being resolved by juries, are now minutely dissected for factual differences.¹³ This deepening may be seen in the rapid growth of any textbook which survives in new editions for a few decades. The slim volume of theory which is the

⁸. For example the Fires Prevention (Metropolis) Act 1774, s 86, the “meaning” of which has long escaped from the constraints of its text, and is a matter of common law.

⁹. For example Occupiers’ Liability Act 1957; Sale of Goods Act 1979 (see *The Hansa Nord* [1976] QB 44).

¹⁰. See Wade and Forsyth, *Administrative Law* (7th ed, 1994) 41-49, 445-447.

¹¹. See for example *X (minors) v Bedfordshire CC* [1995] 3 WLR 152. To what extent the “tort of breach of statutory duty” may be regarded as a hybrid of statute and common law is an interesting question, though this doctrine seems moribund outside the context of employers’ liability, where the courts have time and time again refused to amalgamate it with strictly common law liabilities — see for example *Chipchase v British Titan Products* [1956] 1 QB 545.

¹². Calabresi, *A common law for the age of statutes* (1982); Atiyah, “Common Law and Statute Law” (1985) 48 MLR 1.

¹³. Milsom, “The past and present of judge-made law”, in *Studies in the history of the common law* (1986).

1st edition is an overweight monstrosity by the 5th, and by the 10th it is practically a reference work — Treitel on *Contract* and Wade on *Administrative Law* are ready examples. The deepening can also be seen in the increasingly “sophisticated” treatment of issues as time progresses. The most startling example is perhaps the law on assessment of personal injury damages,¹⁴ which in the early years of this century was barely a legal subject at all, but which through the steady growth of case law has now become a very precise science indeed, with millions of pounds of insurance company money turning on each minor point of the law.¹⁵ What is standard practice in one decade seems hopelessly jejune, not to say slapdash, to the next. The pressure to complexify is all around.

As the system increases in scale and intricacy, so the individuals who run it seem to shrink in stature.¹⁶ Reference books in common law areas are written by committees, not single authors. There are no great *generalist* judges any more — Lord Denning was the last. Fame and status attaches to work done in specialist fields. There are great Family lawyers, great Criminal lawyers, great Commercial lawyers, but no great generalists. The system is simply too large for any one individual to make much impact on the whole. Individual judges rarely have the time or the opportunity to make fundamental changes. When contrasted with their predecessors of a century ago, the modern bench is bookish, narrow and cautious, forever on guard against possible objections by the many who sit in judgement over them. *Most* lawyers are ignorant on *most* legal topics: the legal system is too big, and legal specialisms too deep, for them to be anything else. If judges usually give the impression of omniscience, it is because they are not usually asked questions outside their specialist area.

With the scale of the system so vast, it is hopeless to look to the judges to structure the common law. Yet the need for structure is rather desperate. And *this* is what gives academics in the law schools their influence today. If we go back a century and a half, only a few legal thinkers seemed to have much regard for any overall structure. And the claims of academics to clarify and interpret the words of the judges seem to have been rather resented by many on the bench. It seemed to raise important problems of status for judges, who perhaps saw academics as trying to usurp the judges’ claims to respect. So academics who seemed to be getting above themselves were targets of judicial scorn, as was the idea that being a knowledgeable academic might give any claim to be an authority in any particular area.

All this has now changed. Academic researchers have done much to force regularity and system on the common law. But they have also played a major part in fostering the taste for it: they have raised expectations as to the regularity and “rule-ness” of the common law, expectations which the judges themselves cannot possibly satisfy. So it is a regular event for academics in law journals to criticise judges for not relating their rulings to the overall corpus of the law, or for failing to spell out the full implications of their judgments. Occasionally, judges and academics

¹⁴ See generally Dias (ed), *Clerk and Lindsell on Torts* (16th ed, 1989) §5-09. The key development was the decision in *Jefford v Gee* [1970] 2 QB 130, which required precise itemisation of awards, and hence allowed for a developed jurisprudence of damages. Demand for more “rigorous” treatment of damages is now also promoted by practitioner groups, as each extra dose of “rigour” favours one side or other.

¹⁵ See especially Lewis, “Lobbying and the Damages Act 1996: ‘Whispering in appropriate ears’” (1997) 60 MLR 230.

¹⁶ Simpson, “The survival of the common law” in *Then and Now 1799-1974: Commemorating 175 years of Law Bookselling and Publishing* (1974), 55-57

openly come to blows over this, the academics saying that the judges asked themselves the wrong question, and the judges replying that their job is only to answer the questions put to them by the parties, not to tell the parties to ask different ones. This is like a battle between an elephant and a whale. Appeal courts are set up to hear appeals, and it rarely makes managerial sense to tell both sides to re-cast their dispute in some different, doctrinally more correct way. Yet most of the important questions concerning structure are about checking that a clear and coherent set of questions is asked, and very little to do with how they are answered. So what is often regarded as a source of friction between academics and judiciary is simply a division of labour: the judges want there to be system in the common law, but have to rely on the academics to supply it. As the need for structure becomes more and more pressing, the old judicial objection to academic views fades away.

So despite the disdain with which the bench have treated academics for most of this century, nonetheless the entire century's work by academics has laid the ground-work for their eventual acceptance, with the judges now welcoming academic writings despite themselves. Every judge is a former law student, and their world-view is to a certain extent a reflection on the state of legal education 30 or 40 years ago. The true message of English legal education, that Law consists of rules and that no-one can call themselves a lawyer without knowledge of those rules, has at last been so fully internalised by their students, and retained by those students even when they have become judges. The despised academic lawyers of the past, snubbed by the judges in their lifetimes, were the unacknowledged legislators for later generations. The sheer scale of the modern system forces the importance of academia on the judges.

So a century ago, the status of the judges was such that academic theorists were seen as mere impertinent upstarts. The bench bitterly resented the claims of academics to be authorities in the law.¹⁷ Today, judges and academics feed off one another's respectability: the academics prove their status from the fact that the judges listen to them, the judges appeal to the academics for that clarity and rationality on which the judges' own prestige is based. And it is the judges who seem to be neglecting *structural* considerations that get the most furious academic criticism.

So the job of structuring the common law, without which it would surely have collapsed by now in a welter of uncontrolled detail, is done by the academics. Yet when we speak of academics, we do not mean a single band of thinkers, all pulling together. We mean individual teachers and researchers, with differing views, limited mental powers, and operating under constraints of various sorts. Researchers specialise, and if they are teachers as well (and the bulk of them are), their research specialisms are likely to be related to their teaching specialisms. Academics tend to know a huge amount about very small areas. Trainee lawyers are made to study a variety of subjects, overwhelmingly biased towards the common law, yet few of their teachers have much general knowledge. This ought to be seen as deeply paradoxical — but it is not. No paradox is seen in the point that students are forced to study the detail of a wide range of subjects if they are to hold themselves out as legally trained, yet any one qualified lawyer or academic would be intensely ignorant about much of what the students are being made to ingest. Students are told that it is vital to study a wide range of subjects if they are to be competent lawyers, and they are also

¹⁷ For accounts of the transition to the modern position, see: Rodger, *Savigny in the Strand* (John Maurice Kelly Memorial Lecture, Dublin, 1995); Zander, *The Law-making process* (2nded, 1985) 335-340; Birks, "Adjudication and interpretation in the common law: a century of change" (1994) 14 LS 156.

given to understand that their lecturers are competent lawyers. Yet they also find out quickly enough that few of the lecturers know much outside their own specialism. If they have a point of equity they wish to know about, it will do them no good to ask their administrative law lecturer about it. The “admin” lecturer will just say, “Equity? I haven’t touched *that* since I left law school”. Lawyers specialise intensely. Most of the topics they study at university and law school are topics they will never consider again. The detail of what they learn will not long survive their examinations; the main lasting thing they get from those courses is the overall structure. Once you have taken a tort course, you know in general terms what problems tort addresses, and the sorts of rules it uses to address them. It is therefore the law schools that inculcate structure.

So someone looking for a broad knowledge of the legal system in the modern law school should best look to students for the higher degrees, or to recent graduates: after that point of their education, academic career paths lurch inevitably towards specialism. Academics each pick “their” subjects — partly through their own interests, partly as a result of plans that lecture list committees have for them, and partly through luck. Having acquired “their” subjects, academics tend to stick to them. And so those who teach “contract” may know little, and may admit to knowing little, about land law — or indeed about any particular type of contract, for in the academic world the law of particular types of contracts (employment contracts, contracts for the sale of goods) is distinct from the general law of contract. As Collins has argued, the result is a system of “operational closure” under which each sub-field of law is kept distinct from the others and ignores what the others are up to, even at the cost of repeated paradox.¹⁸

So the pressures of the academic system, the need to give a tolerably clear explanation of the law in class-sized and exam-sized chunks, is a powerful force, and indeed over the length of a century has proved capable of conserving the basic structure of legal thought as we know it. Taught law is tough law. And the structure of university courses, which assume not only the distinctiveness of the common law subjects but also their primacy over others, builds these assumptions into the legal education of young lawyers well before they are in a position to evaluate them.

Why it is that law degrees concentrate so heavily on the common law, this small lagoon in a vast ocean of statute, would be a long study. Certainly a case can be made that in its origins, at the start of modern legal education in the 1870s, this was an ideologically motivated choice by the law teachers, a deliberate statement that what the courts say and do is of more importance than what Parliament says or does. A case could further be made that their successors had for several decades little choice but to continue in the same vein, the resources devoted to legal education being so scanty.

With the massive expansion of law faculties since the 1960s, different considerations apply. More and more law teachers have been saying they want freedom, and it is a puzzle of a different order to say why they do not receive it. Certainly the immediate constraint on legal academia was, and still is, the legal professions. The universities cannot hope to attract law students in large numbers unless the university qualification is a step on the way to professional recognition, and this recognition is refused to courses which do not include the (overwhelmingly common law) “core subjects”. So university learning has overtaken dining and other initiation

¹⁸ Collins, “Legal classifications as the production of knowledge systems”, in Birks (ed), *The classification of obligations* (1997).

rites, as the badge of entry into the legal professions. Lawyers are those who know of The Snail in the Bottle, the Carbolic Smoke Ball, and other mysteries opaque to laypeople. And indeed the need for education in common law as the basis of legal training seems to be firmly held by legal professionals. No-one can be a qualified lawyer unless they know of *Rylands v Fletcher*,¹⁹ whether or not they intend to practice in areas where bursting mine reservoirs are a day-to-day concern. The common law is not important to legal practice, but the legal professions are insistent that it be taught as if it were. It is not important in lawyers' work: but it seems to be a vital part of the lawyerly self-image.

What the legal academics would do if freed from these constraints, and allowed to teach what they wanted, is an interesting, if rather hypothetical, question. Law schools have not, in the past, made great use of the freedom they have had. Perhaps it is arguable that law faculties are now very various, and would not be greyly uniform, if given the opportunity to do otherwise.²⁰ And even within the constraints of the current system, a considerable amount of innovation has taken place. Yet the idea of the common law as a distinct and self-sufficient entity has in the past proved very deep-rooted, and weeding it out would be a long process.

So the conservatism of the legal academy in matters of doctrinal structure is a fact, even though there is room for doubt whether it is forced on law schools or welcomed by them. This section of the paper concludes with a review of specific teaching practices which tend to maintain the separate status of the common law, and the integrity of the subject-divisions within it. At no point, in most legal degrees at least, is the distinct status of the common law seriously called into question, and while the arbitrariness of the divisions between subjects is rather more remarked on, little comes of this. Three specific teaching practices come to mind.

First, the splitting of subjects between courses, the type of split being largely taken for granted, and which tends to persist over time. To take an example, the divide between common law and equity. This is hardly discussed in the modern academic literature at all.²¹ Yet most students coming out of a first degree course will have these areas of law in different compartments in their minds. The common law subjects will have been taught as coherent wholes, the equity course as a coherent whole.

Now in theory it is easy to spot points of contact between the two, to point out (for example) how close the similarity is between a fiduciary duty, on the one hand, and a *Hedley Byrne* duty of care on the other.²² But who would have pointed out the connections in the course of a degree? The Tort lecturers may feel rather uncomfortable dealing with Equity, and the Equity lawyers with Tort. There are plenty of reasons not to mention the matter in the Tort course — how much use is it, the lecturers will ask themselves, to draw parallels with a subject your students haven't yet studied? And there are plenty of reasons not to mention it in Equity either — how much use is it, the lecturers will say to themselves, to remind your

¹⁹ (1868) LR 3 HL 330.

²⁰ See especially "The quest for a core" in Twining, *Blackstone's Tower — The English Law School* (1994).

²¹ When views are expressed at all, sharp divergences of approach are seen. See for example Martin, "Fusion, fallacy and confusion: A comparative study" [1994] Conv 13; Birks, "Equity in the modern law: An exercise in taxonomy" (1996) 26 Western Australia Law Review 1.

²² See for example *Henderson v Merrett Syndicates* [1994] 3 All ER 506, and compare the opinions of (the common lawyer) Lord Goff and (the equity lawyer) Lord Browne-Wilkinson.

students of last year's work, when they are struggling to keep up with this year's? And so the two teams of lecturers will between them give the impression that the two subjects are distinct, even though they have never really turned their own minds to the question whether they are distinct. The division between Tort and Equity will have been pushed into the students' heads without presenting any alternative, or any reasoned case for the division. And for those of the students who eventually reached the bench, what was pushed in three decades before comes pouring out again. Academics are only expected to teach a small range of subjects, but are expected to teach those few well. The overall impression resulting from that is bound to be a certain conservatism of structure, that the lines along which the law has been split for teaching purposes represent something rather more than a mere teaching convenience.

Secondly, the structure of common law doctrines is preserved by delegating the really awkward, divisive issues to others. At key points, common law doctrine holds that the answer to certain problems depends on what is reasonable, or on what a certain person's intention is to be taken to have been, or on some "factual" point on which there is nothing of a "legal" nature to be said. The legal doctrine is preserved intact by pushing the more divisive issues elsewhere.

This stratagem is particularly obvious in criminal cases involving a jury. The chapters in the average textbook on murder, rape and grievous bodily harm read at first as if they were explaining the *law* on the topic, but on a careful reading they are actually doing something quite different. They are setting out the forms of words that will be employed when leaving the real issues to a jury. What the jury actually does with those instructions is something the legal system is not only not very interested in, but goes to great lengths to *conceal*. Indeed, where the jury tried to resolve a murder case by contacting the spirit of the victim with a ouija board, even there it was a close-run thing whether the Court of Appeal were prepared to interfere.²³ To say that it is wrong to use ouija boards is a step in a direction the courts would rather not go, namely towards laying down exactly how one *does* determine who is a murderer and who is not. As a society, we have no clear shared vision as to what counts as murder, or rape, or unlawful wounding. People routinely disagree on questions of that sort, often quite heatedly. A common law that gave unequivocal answers to these questions would be engulfed in controversy — some lobby powerful enough to demand legislation would undoubtedly be offended by whatever the common law said. So the stability of the common law is maintained by a system of delegation. The questions which would tear the common law apart, if discussed openly, are quietly handed over to bodies which need not justify their decisions in detail, if at all.

So while it is jury cases that give the clearest example, in fact this sort of thing is going on all the time throughout the civil and the criminal law.²⁴ So long as judges in negligence cases repeat that liability depends on what the defendant should have foreseen, and on what it was reasonable for the

²³ *R. v Young (Stephen)* [1995] 2 WLR 430, noted by Spencer [1995] CLJ 519. The court's solution to the case — that as the ouija board was used during the jurors' overnight break, not during a formal hearing, questioning its use did not infringe the secrecy of jury deliberations — has an air of sophistry about it. As Spencer says, this suggests that use of the board during a formal hearing would have been unobjectionable.

²⁴ See especially Lord Hoffmann, "Anthropomorphic Justice: the reasonable man and his friends" (1995) 29 *Law Teacher* 127; Williams, "The meaning of indecency" (1992) 12 LS 20.

defendant to do, then stability is maintained, even if the various cases yield starkly differing interpretations of what is reasonable and what is foreseeable. Lecturers and text writers can simply re-iterate the general rule, and awkward cases can always be dismissed with the classic law lecturer's put-down, that the case was "decided on its own particular facts". This phrase is, in a strictly logical sense, nonsense, because it suggests, absurdly, that there are two sorts of cases, insignificant ones which have their own particular facts, and significant ones which do not. The real point of the phrase is of course the lecturer's power to say which cases are the important ones, and which the unimportant ones where factual considerations predominated. *Every* case is decided on its own particular facts, but lecturers rarely say so except when it suits their purposes to do so. The structure of the common law is maintained by the ability to downplay cases which do not fit into it.²⁵

Thirdly and finally, there is the rather subtle way in which the common law is distanced from notions of public policy. In earlier centuries, some of the more ebullient judges maintained that the common law is the epitome of reason — with the implication that to question the common law is to go against reason itself. That claim is not made so often today, and what has replaced it is more self-effacing. This is the claim that we have no business judging the common law by ordinary standards, that common law decisions are not to be seen as implementing specific *policies* at all, but rather some ethereal and timeless *principles* that are above mere politics. Statutes are the products of politics, but the common law is above that sort of thing. Law students pick up on this quite quickly, in my experience, and soon learn that if one particular case does not seem to fit with the others, they should ask themselves "whether it was a *policy* decision" — as distinct from the ordinary sort of decision, which does not involve policies but only involves law. Law students are quickly trained out of any idea that the common law has to be justified by rational arguments. *Statutes* have policies behind them, and the discussion of those reasons is the stuff of politics. But the common law just *is*.

So the overall structure of the common law is maintained by a variety of teaching practices, and all quite apart from any question of what the individual teachers believe. Law lecturers pass on the structure of common law thought to their students, perhaps without asking themselves whether the structure is good, or perhaps even while actively thinking it is bad. There was no collective decision by law teachers to maintain the common law structure, and many, given the choice, would not have done so. Academic debate on the merits of particular doctrinal structures rages continually. But the conservatives always defeat the radicals, in the result at least. The most persuasive demonstrations that "contract" is an arbitrary category, or that the categorisation smuggles in ideologies with which lawyers should have nothing to do, has no hope of challenging the subject itself, but at most leads to the addition of an extra lecture or chapter entitled "Critics of Contract".

²⁵ The area where the retreat into general formulations is most evident at the moment is negligence. See especially Barker, "Unreliable assumptions in the modern law of negligence" (1993) 109 LQR 461; Steele, "Scepticism and the law of negligence" [1993] CLJ 437. But there is also a succession of dull rumbles about the concept of "intention" in the criminal law: see for example Lacey, "A clear concept of intention: Elusive or Illusory?" (1993) 56 MLR 621; Order, "Intention in the criminal law — A rejoinder" (1995) 58 MLR 678.

PROSPECTS FOR CHANGE

So much for the present. If we turn our minds to the question of how much longer this can go on, inevitably we can only make some rather feeble guesses based on our understanding of the present. It appears that, left to their own devices, the courts and law schools will continue to develop the common law indefinitely. Is there any external body that is likely to stop them?

The Law Commission, in theory, poses a threat to the common law, though, as I hope to show, it is not a quarter from which very much can be expected. In theory, abolition of the common law and replacement by a code has always been on the Commission's agenda. Introduction of a code of contract law was high up the list of its 1st programme of law reform, announced soon after it was established in 1965. In practice, matters have not worked out that way. The various proposed codes have died, one by one.²⁶ The Commission has proceeded with less challenging projects, which update parts of the common law that have been seen as antiquated. If you care to look for it, there is an evolving jurisprudence, both in the Law Commission itself and in the (judicial) House of Lords, over which law reform issues are for the courts and which for the Commission.²⁷ Plainly, this discourse assumes the continued existence of the common law, statute always being seen as so inflexible once in place that it can only be used to make the most minor of changes. In this discourse, flexibility is good, and the common law is flexible — which entails that the common law is good.

So even though there is a range of views expressed at any one time, some Commissioners favouring codification and some not, the chances of any major changes from this quarter are rather marginal. And even if the Law Commission were determined to introduce a code, so as to do away with the common law, they would have difficulty in doing so because, politically speaking, they are tremendously weak.²⁸ They are far from universally popular with the legal professions, many regarding their reports with suspicion. Such a major project as a code would involve the co-operation of many other lawyers, not all of whom might be very co-operative. So, for example, parliamentary counsel assigned to them have been very resistant to the idea that drafting a code requires a very different style from most legislation; and parliamentary counsel, like the classic independent contractor, are very willing to do their jobs but highly resistant to being told how to do them.

But beyond the difficulties of getting all the lawyers behind some codification project, there is the broader problem that co-operation by *non-lawyers* would be necessary. The Law Commission is largely left alone by the wider political process: it deals in “lawyer’s law”, which is quite

²⁶ On the failure of the contract code project see Reynolds, “Contract: Codification, Legislation and judicial development” (1995) 9 *Jour Contract Law* 11, 12ff. More generally see Dame Mary Arden, “Time for an English Commercial code?” [1997] *CLJ* 516.

²⁷ See for example Beatson, “Should there be legislative development of the law of restitution?” in Burrows (ed), *Essays on the law of restitution* (1991); and see the differing opinions expressed in *Kleinwort Benson v Lincoln City Council* [1998] 3 *WLR* 1095.

²⁸ For fairly downbeat assessments of the problems the Law Commission encounters see Zelic (ed), *The Law Commission and Law Reform* (1988); Cretney, “The Law Commission: True dawns and False dawns” (1996) 59 *MLR* 631.

different, apparently, from more ordinary sorts of law, and which deserves a little parliamentary time in each session, but not much. If the Commission departs in any way from these expectations, it finds the full force of political venom directed against it, which it is very poorly equipped to withstand. It is a very minor offshoot of the Lord Chancellor's Department;²⁹ the LCD is itself the tiniest and most powerless of departments. And as the Law Commission discovered a few years ago, one of the worst things that can happen to them is for the tabloid press to notice what they are up to, and to consider the merits of their reports from the tabloids' perspective rather than on technical legal grounds. No doubt it was a shock for the Commissioners to find their reports vilified, and themselves referred to as "legal commissars subverting family values". But the shock was not, of course, that the *Daily Mail* would see it that way, as that the *Mail's* attention should be directed to such matters at all.³⁰ The Law Commission are used to hiding from the public under a dense undergrowth of legal technicalities. They know very well that if they call attention to themselves in some way, this camouflage will not be enough, and that in the resulting fracas they will come off worst.

This is what Birks calls the "democratic bargain" between the legal professions and the politicians — that the lawyers will manage lawyer's law and the politicians the rest.³¹ Birks' phrase is misleading, because there is nothing very obviously democratic in this particular bargain, or in its assumption that there is such a thing as "lawyer's law" which needs no input from outside the legal professions.³² But while the bargain restricts the ability of non-lawyers to influence the detail of the law, it hampers the lawyers too. If lawyers' law is dry, technical, and remote from the concerns of ordinary people, then the average political manager will doubt whether it deserves much time, when set against whatever exciting programme the government has to persuade voters to re-elect them. Part of the price the lawyers pay, for being able to manage "lawyer's law" outside the ordinary political process, is that very little parliamentary time will be made available for this purpose. It follows that a code to replace a significant part of the common law would take far more time to enact than the Law Commission is likely to be granted.³³

This is a problem that would-be codifiers have had for over a century. Codification does not interest modern political managers, and so it is in practice almost impossible to force it onto the parliamentary agenda.

²⁹ Oerton, *A lament for the Law Commission* (1987), 11.

³⁰ On this incident see Cretney, "The Law Commission: True dawns and False dawns" (1996) 59 MLR 631, 633; Berlins, "Commission Impossible" *The Guardian* 23 April 1996.

³¹ Birks, "Equity in the modern law: An exercise in taxonomy" (1996) 26 *Western Australia Law Review* 1, 97-98.

³² See generally North, "Is law reform too important to be left to lawyers?" (1985) 2 LS 119.

³³ The Law Commission are currently seeking enactment of their Criminal Code Bill (published in *Law Commission 143, Codification of the Criminal Law*, March 1985), and have attracted some eminent supporters amongst the judiciary - see for example *H.L. Debs*, 25 November 1998, col 88 (Lord Wilberforce). No clear public undertaking by the Government has been given on the matter, despite being generally more positive towards Law Commission projects than the previous administration: see for example *Common (Written Answers)*, "Law Commission" 19 March 1998, col 710. It is hard to find any very public opposition to the code in any quarter; indeed, so far as law reviews are concerned one must look abroad to find doubts being raised (for example Robinson, "Are criminal codes irrelevant?" (1994) 68 *So Cal Law Rev* 159).

James Fitzjames Stephen, returning from a busy posting in British India to post-Reform-Act England, was struck by the huge difference in political culture. Coming from British India, a system that made no pretence of being democratic, to a system that was taking at least a few steps in that direction, Stephen was aghast at how difficult, by comparison, it was to argue for codification in England. Worst of all was the need for “.. endless discussion, continual explanation, and continual statement and re-statement to Parliament of every matter”, a process which he thought “hamper[s] to the last degree the process of governing”. Democracy, Stephen sourly concluded, dragged political debate down to the level of the stupidest: “Nothing can be done at all till the importance of doing it has been made obvious to [those of] the very lowest capacity; and what can be made obvious to such capacities is sure in the course of time to be done, although it may be obvious to people taking a wider view that it ought not to be done”.³⁴

Stephen’s haughty disdain for the new breed of politicians that voting reforms brought into Parliament is, perhaps, a little out of date. But the implications for would-be codifiers are still perfectly good. A code could never win sufficient Parliamentary time without support from some very unlawylerly quarters indeed. Is it ever likely to get it?

When we consider, then, whether other organs of United Kingdom government are ever likely to generate a sufficient head of steam to abolish significant parts of the common law, we are really involved in crystal ball-gazing, so I will be very brief. It is rather difficult to think of circumstances where some fundamental aspect of the common law would so interfere with the plans of government that some attempt to abolish it would be mounted. While friction between the common law and government is unavoidable, measures by government to resolve the conflict would probably avoid damage to central common law institutions. Whatever may be the intentions of the politicians who direct some swipe at the common law, the lawyers who handle the precise placing of the blow will aim away from what is important to them.

A spectacular demonstration of this at the other end of the 20th century was over trade union law, where the assorted Liberals and Socialists who achieved a landslide victory in 1906 opposed some dramatic innovations in tort law by Conservative judges. Yet the Trade Disputes Act 1906 which resulted did not make any attempt to control judicial creativity in torts. It simply excluded “trade disputes”, as defined in the Act, from the operation of whatever torts the courts saw fit to recognise. The basic structure of torts was left untouched, and indeed later administrations that wished to go back on the reform of 1906 had merely to repeal the Act, reviving the torts much as they were before.

More recently, possible conflicts between central government policy and central common law institutions seem always either to be diverted, or to come to nothing. Despite Whitehall’s lack of enthusiasm for the rise of administrative law,³⁵ no plan to restrict the availability of judicial review generally seems to have proceeded very far. Or again, every so often the Treasury remembers how much jury trial costs, and makes another attempt to abolish it; but although over about 70 years of Treasury pressure, it has been much reduced in scope, further reduction is very unpopular with most MPs.³⁶ Or again, the general growth of negligence liability has

³⁴. Stephen, *Liberty Equality Fraternity* (1873; Posner (ed), 1991) 215.

³⁵. See Barker, “The impact of judicial review: perspectives from Whitehall and the courts” [1996] PL 612.

³⁶. See more generally Findlay and Duff (eds), *The Jury Under Attack* (1988).

attracted much adverse comment in political circles, but unlike America, where the pressure for change can come from large corporate defendants who lose out when liability is extended, the main motivating concern here seems to have been to stop the law of negligence costing the *Treasury* money. So the reforms which have resulted have left tort liability largely untouched, but have instead focussed on cheapening procedures, and reducing the drain on the legal aid budget. The concern has been with the government's pocket, not the defendants'. So while to say that there is no threat to the common law from central government would be a claim to predict the future, nonetheless there is no particular reason to fear attack from that quarter.

That leaves, finally, the European Union, which seems to be the other quarter from which the common law is threatened. And certainly the proposed European Civil Code, if it ever become part of the law, would see off the common law, replacing it with a single code of liability.

I do not doubt that there will be significant support for it. There will be lawyers who are all for uniformity, economists who will swear that Europe cannot be a truly free market until the law is the same everywhere, politicians who will maintain that a pan-European code is an inevitable product of the closer union of the peoples of Europe. But on the basis of the historical evidence, such a grandiose project requires an incredible head of steam behind it if it is to generate the momentum necessary to succeed. The inevitable questions and objections it raises, in relation to each legal system it affects, seem likely to run it into the ground. And it is hard to see how it can be anything other than a very dry, technical project, of very little interest to the general public. To what problem is it the solution? In what respect would it improve the lives of significant numbers of EU citizens? There are no very obvious answers to these questions; accordingly, support for it will probably be very limited. Relatively few people would mourn if it never emerged, and it is hard to see how enough pressure can be generated to force the project through. To make speeches about how a common law of Europe would be a good thing, is so very much easier than to write one. My guess is therefore that the plan for a European Civil Code will fall into the same oblivion as most attempts to reform the common law out of existence has done.³⁷

My conclusion is therefore that the common law system seems secure for the foreseeable future.

³⁷. For debate for and against the proposed code, see: Hondius, "Consumer Guarantees: Towards a European Sale of Goods Act" <<http://www.cnr.it/CRDCS/Hondius.htm>>; Legrand, "Against a European Civil Code" (1997) 60 MLR 44.