

## **50 Years of Law Reform in Scotland**

**The Hon. Lord Pentland**

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### **Introduction**

In this short talk I want to offer a few thoughts prompted by the 50th anniversary of the Scottish Law Commission in the hope that some of our experiences in this jurisdiction may be of wider interest.

### **Origins**

I will begin by looking back at our origins.

As every law reformer knows, Law Commissions for Scotland and for England and Wales were set up in 1965 under the Law Commissions Act passed in that year by the UK Parliament. These bodies provided the basic model for law reform agencies later established in many Commonwealth countries.

At this conference we are discussing law reform in a changing world. It is perhaps worth recalling that the Commissions were created at a time when life in the United Kingdom and elsewhere was changing rapidly. The new law commissions were products of that changing world. By the 1960s the grey and dreary post-war years of food rationing and conscription lay behind us. Most homes had a new television set and even a refrigerator or so Wikipedia tells me. But more importantly, there were seismic shifts in the ways people thought and behaved. Rebellion was in the air and deference to established authority was on the wane. It was the age of swinging London (Edinburgh and Cardiff had to wait a while longer), Carnaby Street, Twiggy and the Beatles. In 1964 a Labour Government had been narrowly elected under the technocratic leadership of Harold Wilson on a manifesto entitled,

“A modern Britain”; at 48 he was the youngest prime minister of this country for 70 years. Within a few years many of the old taboos would be dismantled. Restrictive laws on censorship, divorce, homosexuality, immigration, and abortion were relaxed and capital punishment was abolished.

As part of this tidal wave of social change the view gathered force amongst some lawyers in England, that the law had fallen badly behind the times and that the machinery for reforming it had become ossified. The new Lord Chancellor in the Labour government, Gerald Gardiner, believed that effective law reform demanded a standing body with general responsibility for keeping the whole of the law under review. The new agency would be independent of government. Its head (originally conceived as a Minister of State) would preside over a committee of at least five highly qualified lawyers to be known as law commissioners. That was the ambitious vision behind the 1965 Act. It was largely the brainchild of English lawyers and its mission was focussed on the reform of the law of England and Wales.

It is well known that Scots Law developed from its Roman law origins along a separate path from the common law of England and Wales. It is a mix of native law, Roman law and English law. Its continued independence is guaranteed by the Acts of Union of 1706 and 1707, the effect of which was that the Parliaments of Scotland and England united to form the Parliament of Great Britain based in the Palace of Westminster in London. Between then and 1999, Scotland continued to have (and jealously to guard) its own distinct legal system and a separate legal profession, but there was no Scottish legislature as such. Legislation to reform Scots law did not have a high political priority and sometimes struggled to find parliamentary time at Westminster.

Despite Scots Law being a legal system without a legislature, there was in the 1960s no real drive for new law reform machinery in Scotland. The legal establishment here appears to have been content with the existing *ad hoc* and part-time law reform committees.

Initially Lord Gardiner thought that it would be sufficient to have an English Law Commission, which if it proved to be successful, could be extended to Scotland. This was politically unacceptable to Scottish ministers in the Labour government. After some hesitation it was decided that if there was to be a Law Commission for England and Wales then the Scots had better be given one too.

### **The 1965 Act and the early days of the Scottish Law Commission**

Under the 1965 Act, which remains largely unamended so far as the powers and duties of the Scottish Law Commission are concerned, we are responsible for promoting reform of the whole of the law of Scotland. The Act goes on to say that this is to be done with a view to the systematic development and reform of the law (i.e. the whole of the law). And if that were not daunting enough, the Act added, for good measure, that this duty was to include, in particular, codification of the 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. Undoubtedly, a tall order.

All this was perhaps unrealistically ambitious. Writing about the Scottish Law Commission as Lord Advocate some 30 years after the passing of the 1965 Act, Alan Rodger (Lord Rodger of Earlsferry), an experienced politician and parliamentarian as well as distinguished judge and jurist, was struck by the naïveté of the debates in Parliament about what the new law reform bodies would achieve. In Scotland there was scepticism and even outright hostility in some quarters towards the establishment of the Scottish Law Commission, not least from Scotland's most senior judge, the Lord President of the Court of Session, the former Conservative Lord Advocate, Lord Clyde.

Notwithstanding this shaky start, the first Scottish Law Commissioners, under the chairmanship of Lord Kilbrandon, were determined that the new body should not be strangled at birth or that it should operate as a mere branch of government. Lord Kilbrandon was a man of principle with a strong sense of public duty. He accepted chairmanship of the

new body despite the fact that the Lord President had threatened that any judge rash enough to do so would lose his seniority and that his prospects of promotion to an appellate level would be terminally damaged.

The new Commissioners made it clear from the beginning that they were not disposed to adopt an unduly narrow view of their functions. In their first annual report they said this:

“We are concerned with all the law of Scotland, and we do not consider that we are in any way confined to what is loosely referred to as “lawyers’ law”. All law has social implications, and it is impossible to draw any dividing line between “social law” and “lawyers’ law”. We interpret the terms of the Act as imposing on us a duty to see to the development and reform of *all* the law systematically. Our intention is that when any question of social policy arises in connection with any branch of law with which we are dealing, we shall draw attention to it and express our views upon it so far as it affects the legal point under consideration. The decision upon it will be a matter for others – ultimately for the Government of the day.”

In the final paragraph of the first annual report three key points were made. First, it was stated that the Commission's work had to be intelligible and acceptable to the general public, in whose interests, fundamentally, all the Commission's work was done. Secondly, the Commission stressed that it had to be accessible to the public (in its first year the Commission had received 49 proposals from members of the public out of a total of 193 proposals; a large majority of those from the public were said to have contained suggestions for reform that were well worth consideration). Thirdly, the Commission had to be independent; constitutionally this was thought to be the most important of its attributes.

Intelligibility, accessibility and independence. These have been guiding principles throughout the past half century.

The independent-minded stance that the Commission adopted was quickly tested. The Commission's first project considered whether the evidential rule requiring corroboration in civil proceedings should be retained.

Three pillars of the Scottish legal establishment strongly opposed the idea. Corroboration of evidence was a holy icon of Scots law and had to be preserved; otherwise the walls of the temple would come crashing down. At this point the Scots amongst you may be starting to feel that legal history really does repeat itself.

The Lord President of the Court of Session, the Faculty of Advocates (the Scottish Bar) and the Law Society of Scotland each urged that abolition of corroboration in civil actions would have dire consequences for Scots Law. The Commission did not agree. In its conclusion it said:

“The rule requiring corroboration is a survival from the early history of Scots law. It is no longer justified in the class of case in which we recommend its abolition. It is unknown or has long been abandoned in most other systems of jurisprudence. We are not convinced by any of the reasons which have been advanced for its retention. It is causing real hardship to individuals in Scotland today.”

It cannot have been easy for the newly appointed Scottish Law Commissioners to face down the *ancien regime* in this way. By doing so, they marked out the independence of the new body and they set the standard for their successors.

The recommendation was promptly implemented, but only in the case of personal injury actions. It took until 1990 for corroboration to be abolished in the case of all civil claims.

That report was quickly followed by others tackling issues with societal implications. The Commission's second report recommended that the law should be changed to permit the legitimisation of children by the subsequent marriage of their parents notwithstanding that

the parents had not been free to marry at the time of the child's conception or birth. Then there was a report proposing extension of the grounds for divorce to include separation for two years with consent. At the time these proposals would have been socially controversial.

So I think it can be said that the Scottish Law Commission understood from its earliest days that it had to operate as a truly independent advisory body beholden to no external interest. It understood also that its work would not always be limited to technical aspects of the law.

Independence from government has remained a key principle throughout our existence and it is one to which we remain strongly committed today. The principle has become so firmly entrenched that it would be unthinkable for the government to seek to influence the approach we resolve to take towards reform of any branch of the law; whether they accept our recommendations is, of course, another matter altogether.

### **The work of the Scottish Law Commission**

Over the past 50 years the Scottish Law Commission has been responsible for reforming the law of Scotland in a vast number of areas. Many of our projects have involved systemic reforms to fundamental principles of Scots Law - the sort of law reform that is particularly suited to a specialist law reform agency, which has built up substantial knowledge and expertise in comparative analysis, in conducting comprehensive public consultations, in policy development and in the preparation of legislation. For various reasons a government department may find it difficult to undertake this type of law reform work - lack of resources (especially in times of economic difficulty) and more pressing political priorities. It is not realistic to expect such reforms to emanate from decisions of the courts, especially in a small system like ours.

We have published about 240 reports recommending reforms. Most we have produced ourselves, although there has been important joint work with the Law Commission

for England and Wales, with whom we have always enjoyed an extremely strong and positive relationship. More recently, we have worked also with the Northern Ireland Law Commission, which was established in April 2007; it is a matter of regret that the Northern Ireland government has recently decided to cease funding that body. In addition to reports recommending reform of the law, we have issued around 160 consultation documents.

To mention a few major themes.

From the early 1980s the Commission embarked on a series of studies of family law, beginning with a report on financial provision. Then we looked at outdated rules in the law of husband and wife; illegitimacy; occupancy rights in the marital home; matrimonial property; the recognition of foreign nullity decrees; jurisdiction and enforcement in child custody cases; and child abduction. Much of this work resulted in modernising legislation.

The Commission's work on reform of property law is also worth highlighting. For centuries almost all land in Scotland had been held on feudal tenure, under which multiple rights of ownership co-existed in the same piece of land. The Commission's ambitious aim was to abolish that system, erected on the foundation of the ancient feudal relationship of superior and vassal, and to replace it with a modern system based on the principle of absolute ownership of land.

As a result of the Commission's work, the feudal system was swept away. There were related reforms to title conditions, long leases, tenements and land registration.

The Commission has examined many other areas of private law too numerous to list in full; they include: the law relating to companies and partnerships; the law of succession; the law affecting adults with incapacity; many aspects of the law relating to contracts; and the law of negligence.

The final area I want to touch on is criminal law. Here the Commission has been very active over the years. I would mention, in particular, the work done on sexual offences,

resulting in a comprehensive new statute passed by the Scottish Parliament in 2009. We have recently considered other sensitive and topical aspects of the criminal law, including the rules on double jeopardy and on similar fact evidence.

Bringing us right up to date, our Ninth Programme of Law Reform (on which we embarked this year) includes projects on the law of defamation and the law of prescription (the extinction of rights by the passage of time). We are continuing with projects on compulsory purchase, on moveable transactions and on the law of contract in the light of the European Draft Common Frame of Reference.

We have five commissioners drawn from the judiciary, private legal practice and the universities. They are supported by a small experienced team of solicitors seconded from the Scottish government and a small number of legal assistants, who are normally recent law graduates.

### **The changing constitutional framework**

No survey of the past 50 years touching on legal and political life in Scotland would be complete without reference to devolution and the growth of Scottish nationalism. The New Labour government elected in 1997 under the leadership of Tony Blair was in favour of devolving some powers from the Westminster Parliament to a Scottish Parliament to be established in Edinburgh. Following a referendum vote in Scotland in favour of devolution, the Westminster Parliament passed the Scotland Act 1998. This created a Scottish Parliament (now based in Holyrood, Edinburgh) and a Scottish government. The Act does not spell out which areas are devolved to the Scottish Parliament; rather it specifies those matters that are reserved to the United Kingdom Parliament. Subjects not reserved by the Scotland Act are devolved to the Scottish Parliament. The Scottish Parliament has primary legislative competence, i.e. the power to enact statutes on devolved issues.



Reserved matters include the constitution, foreign affairs, defence, international development and financial and economic issues.

Consequently devolved matters extend to areas such as health and social work, education and training, local government and housing, justice and policing, the environment and economic development and internal transport.

Until these constitutional changes took effect in 1999, the Scottish Law Commission reported with recommendations for reform of Scots law to the Government of the United Kingdom, which was, as I have explained, responsible for the whole of Scots law; implementation of law reform recommendations was a matter for the UK Government and the UK Parliament at Westminster.

With responsibility for Scots Law split under the devolution scheme between Holyrood and Westminster, sensitive questions arose about the future of the Scottish Law Commission. Would we continue to be responsible for all of Scots law, as was previously the case; or would the constitutional changes mean that the Scottish Commission would deal only with the devolved areas? There were siren voices urging that we should just cover devolved issues. In my view, that would have emasculated the role of the Scottish Commission. It would have left a gaping hole insofar as reserved aspects of Scots Law were concerned; it would have worsened the position for law reform in Scotland. Fortunately, good sense prevailed and it was decided that the Scottish Law Commission would continue to be responsible for the whole breadth of Scots law, extending to reserved and devolved matters.

What this has meant in practice is that the Scottish Law Commission now has to negotiate the corridors of power both in Edinburgh and in London. We have strong and positive relationships with the UK Government and the UK Parliament on reserved areas of Scots law. So far as projects within devolved areas go (and they account for most of our work), we have also had to develop strong relationships with the Scottish Government and

the new Scottish Parliament. It is the Scottish Government which is solely responsible for sponsoring the Commission, and for providing funding for us.

In the early years following devolution the Scottish Law Commission seized the opportunities presented for law reform by the creation of the Scottish Parliament. It persuaded the new Scottish Government and the Scottish Parliament to pick up a number of our pre-devolution reports and to implement important legislative reforms based on them. There were, for example, sweeping reforms to land and property law, as I have already mentioned, and to areas such as incapacity law.

After the first few years, however, the pace of change slowed. Somewhat ironically the implementation rate for Law Commission measures at Holyrood started to decline, despite the advent of the new legislature.

In order to drive Scottish law reform back up the Scottish political agenda the Commission has made major efforts in recent times to reach out to the new Scottish political institutions to ensure that the need for systematic law reform is fully appreciated.

The outcome has been the introduction of a new Scottish parliamentary procedure for Commission Bills complying with criteria set by the Scottish Parliament's Presiding Officer – the main one being a wide consensus on the need for reform and on the approach recommended. There is a similar procedure for law reform measures in the Westminster Parliament; this has worked well in regard to some recent reforms in reserved areas.

By this decision in 2013 the Scottish Parliament expressly acknowledged the importance of the contribution of the Scottish Commission to the promotion and delivery of effective law reform; and the need to improve the rate of implementation of law reform Bills.

The first Commission Bill to go through the new process has successfully passed its Parliamentary stages. There are plans to introduce a second Bill soon. And the Commission is working to provide further Bills for the process.

Still on the constitutional front, last year the UK and Scotland faced the possibility of a further shift in tectonic plates. A referendum on independence was held in Scotland. The majority voted against independence - 55 per cent to 45 per cent. Had the vote gone the other way, new horizons for law reform and the Commission were envisaged. There was discussion about a written constitution for Scotland. We noted with interest the Constitution for Malawi – with provision in the Constitution about the Malawi Law Commission and its role. A precedent for a Scottish constitution perhaps?

### **The future**

In recent times there have been important law reform projects carried out by *ad hoc* committees, including those chaired by the Lord Justice Clerk. At the Scottish Law Commission we are not at all complacent about our place in the legal fabric of the country. We fully understand that we must continue to justify our value to Scots Law and to Scottish society. Particularly in times of pressure on public spending, we need to be agile and forward thinking in our outlook and approach. We must ensure that we communicate effectively with government, the two legislatures, the legal profession and with all other relevant interests in the community we serve. We must work hard to explain who we are, what we do and how we go about our work. Amongst other things, we must take full advantage of modern technologies to reach the widest possible audience. Consultation exercises must be carried out in a way that allows maximum engagement with civil society. We need to continue to be accessible and to produce work that is intelligible, as was noted in our first annual report.

At the same time we must ensure that we do not compromise on the high quality of our work. As all here know, worthwhile law reform, particularly when it involves major structural changes, takes time. It has to be thought through rigorously and developed carefully, in consultation with stakeholders. In this regard the input of our project advisory groups has been crucial, as naturally our knowledge of day to day experience in particular areas is sometimes limited. However, we also have to accept that if we are perceived to take

too long with major projects then this can affect our reputation, particularly among stakeholders who seek change at the earliest opportunity.

But these are not, in fact, new challenges for the Scottish Law Commission. Similar challenges were confronted in the first half century of our work. I am confident that we will continue to do so successfully for the next 50 years and beyond.

**Paul Cullen**