

SOCIETAL DYSTOPIAS AND LEGAL UTOPIAS? REFLECTIONS ON VISIONS PAST AND THE ENDURING IDEAL OF CRIMINAL CODIFICATION

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INTRODUCTION

PERIODICALLY, CONCERNS ABOUT THE LAW and its operations, and its relevancy to contemporary society, induce a variety of commentators (including politicians and legal practitioners) to reflect on the desirability of reform. In England, from the nineteenth century on, such reflections have frequently focused on the desirability of establishing the codification of the criminal law. Over the last fifteen years, with codification once more starting to appear on the reformist agenda, there has been an interest in examining the previous serious attempts at codification, those of the sixty-odd years between 1830 and the late 1880s, in order to extract lessons from them.¹ The assigning of 'blame' for the failure of these attempts provides a sub-text indicating a current regret for 'lost opportunity'.² *Heroes*, notably Sir James Fitzjames Stephen and Lord Brougham, and *villains*, including Sir Alexander Cockburn and other (often unspecified) leading members of the judiciary, have loomed large in the essentially narrative examinations of nineteenth century codification. The responsibility for the historic failure of this essentially utopian project is assigned primarily to the machinations of the *villains*, principally Cockburn. Some recent comment has also sought to explain the disappearance of the proposed Code Victoria from the politico-legal landscape of the 1880s by pointing to a supposed lack of contemporary support for the project, especially within Parliament.³ Yet neither interpretation can be fully sustained as explaining the demise of codification attempts, especially when the codification project is placed in the wider societal context.

There was considerable support, both inside and outside Parliament for this grand project. This included the judiciary, who have been unfairly landed with the largest share of the responsibility for the failure of the codification project, especially during the 1870s and 1880s. Indeed, had the project been persisted with, it is highly likely that it would have passed into law. It is also misleading to focus too much on Stephen, and the condemnation of his code by Cockburn. For one thing, Cockburn died in November 1880, and more importantly, there were alternative versions of a draft criminal code available during that decade. Thus, the 'disappearance' of the codification project later in the 1880s cannot be solely ascribed to either the 'failure' of Stephen or the machinations of Cockburn or other members of a hostile judiciary. Instead, this article explores the interfaces between law, society and politics to explain the disappearance of codification from the legal reform agenda.

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¹ The orientation of this article derives from an on-going project, based at Nottingham Trent University, examining the Victorian and contemporary parallels for social panics and legal responses, exploring the significance of the past through interdisciplinary research.

² See for example, J. Hostettler, *Politics and the Law in the Life of Sir James Fitzjames Stephen* (Barry Rose, 1995); L. Radzinowicz, *Sir James Fitzjames Stephen and His Contribution to the Development of the Criminal Law* (Seldon Society Lectures, Spottiswoode, Ballantyne & Co., 1957); K. J. M. Smith, *James Fitzjames Stephen, Portrait of a Victorian Rationalist* (Cambridge University Press, 1988).

³ J. A. Colaiaco, *James Fitzjames Stephen and the Crisis of Victorian Thought* (Macmillan, 1983); Hostettler, *op.cit.*

It is frequently presumed that legal discourse needs to be assessed, in scholarly terms, independently of the chronological dimensions provided by consideration of the historical societal contexts.⁴ However, the original motivations for the codification project, and the factors leading to genuinely determined efforts to place codification on the statute books, only become substantial when examined against a broad range of socio-cultural and economic factors. Aspirant legal reformers, and interested politicians, as well as the opponents of codification, were very powerfully influenced by contemporary considerations. Too narrow a focus, especially on James Stephen's efforts and reactions to his initiatives, encourages neglect of the full range of considerations driving nineteenth century personalities interested in codification. This provides lessons for assessments of current interest in codification. Efforts at legal remedies for social ills can be said to come to prominence at times when widespread contemporary fears, whether based in reality or not, seem to argue for the imminence of social dystopias. This article will thus place the issue of legal reform at the heart of the search for the ideal society in Britain, providing a framework for a consideration of current projects in the light of desires for the ideal or *utopian* European community.

VISIONS OF A CODE VICTORIA

Concerns about the impact of increases in population size and urbanisation in the early nineteenth century created a cultural climate in which fears of a potentially dystopian future for Britain could flourish. The perceived threat to the social order of public disorder, criminal behaviour and immorality arguably precipitated a shift towards a more formal regulation of society through the universal application of national codified laws as the most practical remedy against chaos.⁵ Legal visionaries, such as Lord Brougham, believed that the fundamental framework of the law and its potential prescription for defining national standards of societal behaviour could deliver the concept of an idealised future or social utopia. They believed that the invocation, at increased levels, of legislation to prevent, curb and punish anti-social activities would provide an effective remedy to this perceived threat. Providing the substance for the realisation of their vision of an absolute and comprehensive codification of the existing body of criminal law required unwavering self-belief and determination beyond the human will of many of their contemporaries. The visionary masterplans of such thinkers provided the material for one of the most ambitious projects in legal and social engineering ever undertaken in England, though it can be argued there was precedent for such in Napoleonic France. As already emphasised, such visionary undertakings deserve to be interpreted not just as a reformulation of the law, but as an exercise in social forecasting in direct reaction to contemporary crises. The idea was that the law, properly enacted, has the capacity to provide a social utopia by attempting to create a better and more stable society, safeguarding it against lawlessness by means of an easily accessible and wide-ranging legislative code.

As early as 1623, Sir Francis Bacon had proposed that obsolete laws be repealed to avoid stifling the living laws "in the embraces of the dead".⁶ Hale also advocated a *Corpus Juris Communis*, though failed, formally, to develop his ideas. The nineteenth

⁴ Professor Richard Evans, "Does Social History Have a Future?", unpublished paper, Social History Society Conference, Cambridge, January 2000.

⁵ See, for example, D. Eastwood, *Governing Rural England: Tradition and Transformation in Local Government 1780-1840* (Clarendon Press, 1994).

⁶ De Augm. Scient., Bk. viii. Aph.57 as cited in "Codification of English Law: A Retrospect and a Prospect" (1884) *Edinburgh Review* at p. 478.

century English equivalents of visionaries like Bacon and Hale were fascinated by the 1811 French *Code d'Instruction Criminelle* and *Code Penal* which incorporated, and defined, universally accepted societal norms, envisioning the future health and security of the French nation. In the context of an on-going debate over levels of criminality and the effectiveness of the legal system, the need for a re-organisation of the existing substantive criminal law was widely agreed: "The rough general rules (which left much scope to individual judges and juries) and a maze of statutory detail (which sought to delimit the range of the death penalty) was coming to seem seriously inadequate to the reform-minded".⁷ Apart from anything else, there was a practical incentive to reform provided by the increasing difficulties experienced by non-summary courts in achieving convictions, even in apparently clear-cut cases. Juries were notoriously reluctant to convict, especially because of the huge range of offences which carried the death penalty. This is the context in which, in 1824, the ambitious enterprise of codifying and consolidating the whole of the criminal law was first mooted: it undermined the so-called "economy of deterrence" which governed thinking on crime and punishment in the interests of social stability.⁸

At this period, a mixture of religio-moral (Evangelical) and philosophical (Utilitarian) idealisms shaped the thinking of many influential figures in British society, creating a climate in which a reform agenda became central to political strategies, regardless of governmental party complexion. It is, here, worth pointing out that (unlike many current reforms) the major nineteenth century legal reforms were, with the possible exception of the franchise campaigns, never central to *party* politics. Support for, or opposition to, such reforms operated largely independently of party loyalties. This was important, for it ensured the continuation of debates, in Select Committees and Royal Commissions, through changes of government.

For those interested in legal reform, Bentham's *Principles of Penal Law*, seeking rationale and clarity in the law through the application of scientific principles, was a central text. Benthamites (including figures like Lord Brougham) believed law should be enacted in the interests of the greater good, where definable harm could be shown to result from a particular practice or conduct.⁹ In 1824, the then Home Secretary, Sir Robert Peel, responded to the widespread consciousness of a compelling need for action, setting up a Select Committee which reported in 1825. The recommendation was for the consolidation and simplification of the criminal law, and on that basis, Peel introduced legislation in March 1826. The primary objective was beginning the not insignificant task of harmonising and consolidating the immense array of existing legal rules and common law doctrines into formal legislation. It was estimated that there were 20,000 existing Acts of Parliament contained in some 36 volumes, which necessitated identification, cataloguing and condensation. Parliamentary support for the reforms mirrored wider support amongst respectable society. Peel and the succeeding Whig ministry successfully piloted through the first Criminal Law Amendment Acts 1826-32, comprising eleven consolidated statutes. For example, in 1828, law relating to offences against the person was targeted. The Act repealed some 60 existing statutory provisions (dating back to the reign of Henry III), and consolidated 38 new sections.¹⁰ Many of these formed the basis of the subsequent all-encompassing Offences Against the Person Act 1861. Manchester comments that in securing the co-operation

⁷ W. R. Cornish and G. de N. Clark, *Law and Society in England 1750-1950* (Sweet and Maxwell, 1989) at p. 598.

⁸ Eastwood, *op.cit.*

⁹ See, "Bentham's Papers on Codification" (1817) *Edinburgh Review*; A. Manchester, *A Modern Legal History of England and Wales 1750-1950* (Butterworths, 1980) at pp. 39-40.

¹⁰ An Act for consolidating and amending the Statutes in England relative to the Offences against the Person 9 Geo.IV, c.31.

of the judges Peel surpassed the efforts of all other subsequent reformers during the nineteenth century.¹¹ However, his success must be assessed against the background of lawlessness then current. It must also be added that it was a very limited first step in consolidation, and that its real significance, certainly in the broader social context, lay elsewhere.

As historians emphasise, the major contemporary resonance was that Peel was successful through his reforms in reducing the list of offences carrying a mandatory death penalty.¹² In promoting a renewed effectiveness in the legal system, he initially was held simply to have reinvigorated the economy of deterrence. However, he undoubtedly promoted impulses for further legal reform as a remedy for societal ills. In the climate of continuing unrest (including the development of the Chartist movement) after passage of the Great Reform Act in 1832, the example of the successful management by the French authorities of the 1830 'revolution' encouraged the supporters of what constituted a hugely ambitious enterprise - the codification of the entire criminal law. In July 1833 Brougham, the Lord Chancellor, appointed a Royal Commission to digest the enacted, and unenacted, criminal law into two new statutes entitled Crimes and Punishments, and Criminal Procedure. Brougham regarded the inquisitorial system used by French justice as more effective in controlling the unruly urban masses, having little time for the flexibilities of the English common law or for powers of judicial interpretation.¹³ In this, he was in line with utilitarian thought. The Criminal Law Commission, acknowledged as Benthamite in its membership, comprised some formidable names, including the highly respected Professors of Law, John Austin, Thomas Starkie, and Andrew Amos as well as the lawyer Henry Bellenden Ker; something which underlines the potential for support for the project within the legal profession.

It is, also, a mark of the widespread cross-party political support for this exercise in legal reform that, despite changes in government, a Criminal Law Commission remained active into the 1850s, though with various modifications to the membership and the precise shape of its remit for reform. The members laboured assiduously, producing 13 reports in as many years. The Fourth Report, for example, was critical of the unsystematic and contradictory accumulation of laws, lacking any firm rationale or principle, especially in relation to offences against the person and property. Brougham consistently ensured that their comments were brought before Parliament. In May 1844, he tabled a Draft Act of Crimes and Punishments, asking "How much longer will Parliament be content to let the Criminal Law lie scattered over so many books - locked up in so many statutes - floating, as it were, in the air of Westminster Hall".¹⁴ Ignorance of the law is, of course, no defence - but as Brougham pointed out, how could the people possibly know what constituted the law if it was so vague and uncertain?

Brougham also deprecated the creative role of the judiciary in developing and augmenting the criminal law through judicial dictat rather than Parliamentary debate: "I want . . . to leave as little as possible to the judge's discretion. . . I would have the law speak through the judge who delivers it, and not the judge make the law he delivers".¹⁵ The judicial stranglehold on the control of the law prompted Brougham to

¹¹ *Op.cit.*, at p. 41.

¹² Vic Gatrell, *The Hanging Tree: Execution and the English People 1770-1868* (Oxford University Press, 1994).

¹³ E. Foss, *A Biographical Dictionary of the Judges of England 1066-1870* (John Murray, 1870) at p. 130.

¹⁴ Henry P. Brougham, *Speech of Lord Brougham upon the Criminal Code in the House of Lords* (James Ridgeway, 1844) at p. 4.

¹⁵ *Ibid.* at pp. 14-15.

comment that this was “a great and incurable defect”, only to be mitigated through the promulgation of a more prescriptive Code. Adopting the French model of the *Code Civile* would, he advocated, “rescue the judges from the chaos of the Ancient law”, giving them a “code purged of such shameful impurities”.¹⁶ In 1849, the Commissioners issued their last report on criminal procedure, but apart from a handful of short Acts (covering specific subjects such as burglary, robbery, and arson) little, immediately, seemed to have resulted from these endeavours. It was, according to Cross, the “largest and most abortive enterprise yet seen in this country”.¹⁷ Yet this is an unjust criticism. It undoubtedly advanced the project of codification by helping to provide the framework for the subsidiary project of consolidation. This in turn was seen as a vital preliminary to the passage of the further parliamentary reform which, during the 1850s, was identified as a necessary societal development.

Thomas has argued that tidying up the criminal law and making it more accessible was possibly of less importance to the Commissioners, and presumably to would-be reformers in Parliament, than the opportunity “to reduce the scope for arbitrary decision-making by prosecutors, judge and juries alike”.¹⁸ However, this is to ignore the pressures placed on the legal system and politicians by societal developments. Particularly after 1848, and despite increasing individual and national prosperity, there were growing fears over the threats to communal and national security posed by the ‘dangerous’ classes, those identified as most likely to need the attentions of the courts.¹⁹ If Chartism was seen as a spent force, the masses to whom it had appealed were still believed to be a constant menace in the social climate of the 1850s.²⁰ The same commentators, such as Brougham, Viscount Ingestre, or John Parker, who promoted codification were also vocal on these issues in a wide range of periodicals and newspapers throughout the 1850s.²¹ They recognised that a further extension of the franchise was inevitable, and sought to promote prior legislative reform to ensure that this expansion of democracy did not destabilise the nation. This is underlined by Brougham’s comments to the Lords in March 1855. He argued that codification “would not only separate the disreputable classes from the bettermost folks, and thus restrain the former, but it would render riotous proceedings and other like outrages impossible”.²² A highly refined and well-elaborated criminal law, with an effective means of execution, was crucial if society was to move forward from the legal relics and barbarism of the previous unenlightened age to a more enterprising, bright and democratic future.

The filibustering and protracted debate that surrounded codification proposals underlines the gap between vision and reality: the Commission had identified its desirability, but not put forward any schedule for its establishment that Parliament could consider acceptable. In 1852 Lord St. Leonards ensured the enactment of a digest of criminal offences. Charles Sprengel Greaves, (editor of *Russell on Crimes*), and James John Lonsdale were directed to reconsider and amend the Bills produced by the

¹⁶ *Ibid.* at p. 31.

¹⁷ R. Cross, “The Reports of the Criminal Law Commissioners (1833-1849) and the Abortive Bills of 1853” in P. R. Glazebrook (ed.) *Reshaping the Criminal Law: Essays in Honour of Glanville Williams* (Stevens, 1978) at p. 5.

¹⁸ D. A. Thomas, “Form and Function in Criminal Law” in Glazebrook, *op.cit.*, at p. 22.

¹⁹ See, for example, *Report of the Rural Constabulary Commissioners* (1839) Parliamentary Papers xix, at p. 169.

²⁰ Gertrude Himmelfarb, *The Idea of Poverty. England in the Early Industrial Age* (Faber & Faber, 1984), at pp. 371-400.

²¹ Viscount Ingestre (ed.), *Meliora or Better Times to Come. Being the Contribution of Many Men Touching the Present State and Prospects of Society* (J. W. Parker & Son, 1853); Lord Brougham, *Addresses on Popular Literature and the State of Society* (Edward Law, 1858).

²² *Lord Brougham’s Speech on Criminal Law Procedure* (James Ridgeway, 1855) at pp. 9-10.

Commissioners, incorporating both statute and common law. They were advised to start with the one area widely acknowledged to be the most important, and problematic, that concerning offences against the person.

CONSOLIDATING THE POSITION

Consolidation was not, as examination of the parliamentary debates indicates, without its controversies. It was not until 1861 that the resultant act passed onto the statute books. But its lengthy and stormy passage emphasises the point that, where there are wider societal factors driving on reform, opposition related to legal detail succumbs to the wider imperatives. In 1853, Lord Cranworth, succeeding St. Leonards, solicited the views of the judiciary and asked for their comments on the draft bills relating to offences against the person and larceny, but received a none too favourable response. His judicial colleagues were opposed to the idea of codification; fearing (rightly) that politicians and visionaries such as Brougham would see consolidation as a first step along the path to codification.²³ Vociferous criticisms were made to the effect that the Bill was totally wrong in principle with considerable inaccuracies, blunders and mistakes.²⁴ But despite this, the will to achieve consolidation as a measure of social as well as legal reform continued throughout the 1850s, punctuated by reminders from Brougham of the ultimate dream of criminal codification. The consolidation brief was to simplify “the statute laws of the realm, . . . [or parts thereof] combining with that process, if they should think it advisable, the incorporation of any parts of the common law or unwritten law”, in the interests of a more orderly society.²⁵

The Statute Law Commission appointed in 1854 initially resolved to consolidate the whole of the statutory criminal law and employed an army of barristers to assist them. It was a huge task. Over 14,000 statutes needed to be reduced to approximately 300 new enactments.²⁶ But some of those involved, notably Greaves, were concerned about the long-term impact of restricting the reforms to consolidation. Even if all the obstacles could be surmounted and “all the statutes consolidated, without alteration or amendment, what would be effected by it?”²⁷ As the law would not be changed or altered in any substantive manner the end result would simply be a *collection* of statutory provisions including those that ought to be repealed. Greaves made his reservations known to Cranworth. The consequence was the preparation of nine consolidating Bills which were later reduced to the seven Consolidating Acts of 1861. The Commission also threw up a number of problems associated with consolidation: problems which undoubtedly in the longer term highlighted the need to consider the greater possibilities contained in codification, with its opportunities for amendments to existing legislation.²⁸ In the Commons, for example, Mr Bowyer criticised the whole consolidation process on the grounds there was much “repetition and unnecessary matter” which might have been reduced “had there been proper scientific definitions of what constituted certain offences”.²⁹

²³ “The Judges on Codification, Observations on the Answers of the Judges” (1854) *Edinburgh Review* vol. xcix, pp. 573-581 at p. 575.

²⁴ *Ibid.* at p. 577.

²⁵ C. S. Greaves, *The Criminal Law Consolidation and Amendment Acts of the 24 & 25 Vict. with Notes and Observations* (Stevens & Sons, 1861) at p. xvi.

²⁶ HC 1856 1R [140] 719 *et seq.*

²⁷ *Op.cit.*, at p. xxiii.

²⁸ *Op.cit.*, at p. 43; and see Lord Campbell’s comments in *The Times* 24 February 1860 3d.

²⁹ HL 2R 1857 [146] at p. 1354.

Subsequent perspectives have downplayed the 1861 Offences Against the Person Act, arguing that it was spectacularly flawed, lacking cohesion and rationale. Yet its importance was enormous: it was arguably the most significant piece of positivist legislation to be enacted during the nineteenth century. Its effects have been lingering. Even today it is responsible for some 80,000 offences a year (though its repeal is now impending). Yet despite defects in its draftsmanship, the Act was fundamental in fusing both existing statutory provisions and some common law rulings to prescribe a national centralised standard of behaviour. It certainly made the dream of codification more substantial, even if contemporaries did not immediately comprehend this. Greaves, for example, concluded that “I have shown that codification is out of the question and that mere consolidation is impracticable” and advised that reform should be approached by taking a specific subject, collecting all the clauses on that subject and confining all amendments to those that are absolutely and practically necessary.³⁰

As early as 1863, discussion of codification reappeared, as part of the wider dialogue focusing on further (and better) attempts at consolidation. Westbury raised the issue in the Lords, and *The Times* gave it a considerable airing, showing a growing degree of public endorsement. Another Royal Commission was appointed in 1866, but its efforts became lost in the debates surrounding the Reform Act of 1867. It was hoped that this further extension of the franchise would provide an alternative remedy against the threats to individual and national happiness provided by the dangerous classes. It did not. In the eyes of contemporaries, fears over the level and type of offending continued.³¹ The focus returned to legal reform, but this time with added urgency. The increased levels of democracy resulting from the 1867 Reform Act, and the relative failure of the 1861 Act to control the excesses of the dangerous classes, made concerns over the threats posed by an enfranchised but unenlightened mass electorate more acute. During the 1870s even the trades union movement saw its cause, that of the skilled worker, as being advanced by better control over a range of societal menaces from individuals and groups alienated from respectable society by economic and social, as well as political, factors. With consolidation making codification seem more viable, discussion of the project reached its peak.

PROFESSIONAL RIVALRIES AND POLITICAL AGENDAS

The abortive 1866 Commission did achieve one consequence of note in interesting a number of legal commentators in the concept of codification of the criminal law. Amongst them was the figure most concentrated on by subsequent scholarship (partly because of his well-established skills of self-publicity): the eminent jurist and commentator, Sir James Fitzjames Stephen. Already a self-proclaimed Benthamite and an admirer of Macauley the framer of the 1835 Indian Penal Code, Stephen readily embraced the arguments for codification. He has proved to be its most enduringly high-profile advocate, though not necessarily amongst the best qualified of the legal reformers of the period. However, one of the reasons why he does form an important resource for scholars interested in assessing Victorian efforts at codification is that Stephen was a prolific journalist as well as an active lawyer. As part of his support for codification, Stephen discussed not just the details of his proposed draft and criticisms thereof, but also put his legal proposals firmly in the context of the social imperatives requiring such change, though this aspect has been less focused on. Deeply interested

³⁰ *Notes and Observations op.cit.*, at pp. li-ii.

³¹ F.M.L. Thompson, *The Rise of Respectable Society* (Penguin, 1988).

in the criminal law and the ethical problems it posed, Stephen had previously compared the differences between the adversarial approach of the English legal system and the inquisitorial one of the French, in terms of their social impact far more than their discrete, legal coherence.³² In his articles and books, Stephen had anticipated his coming role in his suggestion that the 1861 Consolidating Acts be re-enacted in a simpler and less technical form because of the social need therefor. He had also previously proposed the creation of a Ministry of Justice “to direct the administration of the law and superintend criminal legislation” for similarly societal reasons.³³ Yet in the late 1860s, Stephen was unconvinced of either the practicality or the desirability of codification of the criminal law in the purely legal dimension. Other figures took the lead in working on potential schemes, including Serjeant Woolrych, who produced a draft code in 1869.

However, in that year Stephen began to qualify himself as the leading public advocate for codification, thanks to his appointment as the legal member of the Governor-General’s Council in India. There, codification of the criminal law was already well-advanced as a result of the identified need to safeguard against any future uprisings or major unrest by promoting ‘civilisation’ in India. A practical criminal code, which was also accessible to Victoria’s Indian subjects, was seen as an essential in this civilising exercise. Stephen praised Macauley’s 1835 efforts at an Indian Penal Code thus, “[it] Seems to me to be the most remarkable . . . [it has] triumphantly stood the ordeal of 21 years experience . . . and has been more successful than any other statute of comparable dimensions”.³⁴ In a remarkable effort, Stephen formulated what became known as the Indian Criminal Code by expurgating all extraneous sections of English criminal law, simplifying the remainder, and amalgamating that with Macauley’s work.³⁵ Flushed with self-confidence as a result, Stephen became convinced that codification of the English criminal law was both desirable and practical as a tool in the campaign to civilise the English counterparts of the Indian dangerous classes, though he still doubted the willingness of Parliament to enact such a measure.

Finding, on return from India in 1872, that codification was once more under discussion by both legal and social reformers, Stephen took the opportunity to develop a central role in the debates. The narrative of his involvement during this period is rehearsed at length in a number of recent volumes, and it is not proposed to repeat this here.³⁶ However, it is important to comment on the reasons why Stephen, rather than any of the other would-be codifiers, achieved contemporary prominence, particularly in the political arena. Stephen’s journalism undoubtedly ensured that his intervention would attract a high public profile, but would not necessarily convince hard-headed politicians that he was a good choice to spearhead a serious attempt to enact a criminal code. First and foremost, Stephen was the one extant English legal figure who had developed a code and seen it put into practice, with contemporary Indian comment praising its accessibility.³⁷ Moreover, though it attracted criticism, there was, as Sir John Holker stressed, also substantial praise. It was seen as a successful enterprise.³⁸

³² See J. F. Stephen, “The Criminal Law and the Detection of Crime” (1860) *The Cornhill Magazine* vol. ii, pp. 697-708; “English Jurisprudence” (1861) *Edinburgh Review* vol. cxiv, pp. 456-486; *A General View of the Criminal Law of England* (Macmillan & Co., 1863).

³³ L. Stephen, *The Life of Sir James Fitzjames Stephen* (Smith, Elder & Co., 1895) at p. 210.

³⁴ *Ibid.* at p. 247 and see Stephen’s commentary in “Codification in India and England” (1872) *Fortnightly Review* vol. xii, pp. 644-672.

³⁵ See Radzinowicz *op.cit.*, at p. 14.

³⁶ See Colaiaco, *op.cit.*, at pp. 200-206; Hostettler, *op.cit.*, at pp. 170-198.

³⁷ Letter of the High Court of Bengal on the Indian Criminal Procedure Bill (Smith, Elder & Co., 1883).

³⁸ HC 1878 [239] 1936. Interestingly enough, Sir Courtenay Ilbert at the time thought more highly of the code produced by another figure, R.S. Wright, for the Colonial Office, though he was later to accord great praise to Stephen’s work as

Stephen also emphasised the debt he owed to English criminal law in drawing up his Code (produced in a remarkably short period of time), making his claims for successful codification seem credible.

This all amounted to substantial credentials in the eyes of administrators like Holker whose support depended on its realisation within a measurable period of time, and on its presentation in a form which would make it an asset to government. Stephen stressed that his proposals took account of these factors.³⁹ He reviewed the 1861 Acts as a preliminary, asserting that while “They have been of great practical convenience in the administration of justice. . . Their arrangement is so obscure, their language so lengthy and cumbrous . . . [that] they present a strange assemblage of incongruities”.⁴⁰ Stephen estimated his codification of these Acts could reduce them to less than a quarter of their existing length. He was also willing to tackle the problem that had defeated the Commission in 1857, that of defining the crime of murder. Sections 11-15 of the Offences Against the Person Act 1861 which provided eight different methods of attempting to commit murder could, he insisted, be condensed into the single line “Whosoever attempts to commit murder shall . . .”. Stephen compared the parts of the 1861 Acts which required reform “to stakes in the bed of a stream which have become the centres of masses of weed and obstructions of every description. If the stakes were pulled out the water would run clear”.⁴¹

Offering to undertake this labour in 1877, Stephen promised that a draft could be completed by the end of the year.⁴² It was, and in a form which made it clear he remained fully conscious of the societal pressures driving governmental interest in the project:

I do not believe that any offence known to the common law is unintentionally omitted from the Code. If any such offence exists, it must be one which, after the most careful search and inquiry, was unknown to every member of the Criminal Code Commission, and . . . if it exists, can scarcely be of any real danger to society.⁴³

Though not the first attempt at such a draft, it was the first to be taken seriously, being referred to the Statute Law Consideration Committee for their confidential observations.⁴⁴ These were not uncritical, but (particularly in the climate of the time) were sufficiently encouraging to convince the government to consider them further.

Much has been made by recent scholarship of the resistance that Stephen’s code encountered, from the judiciary and above all, from the Lord Chief Justice, Sir Alexander Cockburn.⁴⁵ It is explained as the reason why the project failed to come to fruition in 1879-80, and (along with other “pressing” business including Irish troubles) why there was no sustained attempt to represent codification to Parliament. This is misleading. That there was significant opposition is undoubted, and some of it was based on genuine concerns relating to the legal dimensions of the draft code. But much opprobrium, such as that emanating from R.S. Wright, related to professional rivalry. Wright was another who had drafted a colonial criminal code (for Jamaica), which was

it had operated in practice. See M.L. Friedland, “R.S. Wright’s Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law” (1981) *Oxford Journal of Legal Studies* vol. 1, at p. 308; Courtenay Ilbert, *Methods of Legislation* (University of London Press, 1912).

³⁹ J.F. Stephen, *A History of the Criminal Law of England* (Macmillan, 1882) at p. 366.

⁴⁰ PRO/LCO1/42.

⁴¹ *Ibid.*

⁴² *Ibid.* Letter dated 1 June 1877.

⁴³ *A History of the Criminal Law, op.cit.*, at p. 360.

⁴⁴ PRO/LCO1/42 Letter dated 2 January 1878.

⁴⁵ For example, see S.White, “Lord Chief Justice Cockburn’s Letters on the Criminal Code Bill of 1879” [1990] *Criminal Law Review* pp. 315-17.

actually intended to provide the model for other colonial codes.⁴⁶ However, by the time he produced his code in 1878, Wright must have suspected that the greater publicity accorded to Stephen's Indian Code would incline colonial administrations to look to the India Office model and not his own.

It could not, of course, be denied that Cockburn's hostility was profoundly damaging, but only in the short term. Cockburn, who had a far higher opinion of himself and his abilities than was shared by most of his contemporaries, had expected to be asked to chair the Royal Commission considering the draft code. Vexation at his 'exclusion' reached such a level that, as Home Office records show, Lord Cairns was forced to take a hand in the ensuing bitter clash of personalities to try to soothe Cockburn's injured feelings.⁴⁷ The Commission presented their completed report on 12 June 1879, the same day that Cockburn sent a long letter to the Attorney General outlining his dissatisfaction with the Bill. Cockburn claimed he strongly opposed the Bill's passage into law because of its defects. While this may be true to some extent, the timing and the record of his earlier resentments suggests very strongly the addition of a more personal motivation. Though in terms of daily practical politics, Cockburn's opposition was damning, leading Holker to withdraw the code (despite his own rejection of Cockburn's criticisms) it was not, at the time, seen as the end of the project. Indeed, it reappeared in early 1880, but again failed to pass onto the statute books.

The usual conclusion is that the change of administration in April 1880, and the consequent shifting positions of key personnel interested in codification, such as Holker, ensured that there would be no further immediate attempt at introducing legislation to Parliament.⁴⁸ This seems a reasonable conclusion. However, it is less reasonable to argue that, despite some further efforts by Stephen, the codification dream evaporated because of lack of popular support and parliamentary interest.⁴⁹ Such emphasis over-inflates Stephen's importance. After all, when the codification project was taken up again in February 1880, a different draft code produced by Edward Dillon Lewis was invoked.⁵⁰ Too elegiac a tone over Stephen's lost dream and elevation to the Bench ignores the continuing public interest in legal reform. The Trades Union Congress had a sustained interest in the codification project. In 1877, Stephen and Wright, along with other prominent figures such as Lord Coleridge, had addressed its members.⁵¹ The TUC Parliamentary Committee subsequently sent a petition to the Lord Chancellor expressing support and requesting involvement in the refining of the code, because the magnitude of such law reform involved not only questions of law and procedure but also "subjects of vital interest to the social and political freedom of the people".⁵² This perspective did not change, as the powerful resolution passed in favour of codification in 1881 underlines. It indicates the extent to which this increasingly powerful national institution saw the need to link respectable skilled working class interests to this type of legal reform, albeit in a more radical direction than the Royal Commission proposal. Almost certainly, an amalgamation of Stephen's code with Wright's code would have suited them best, since the latter was far more radical in certain areas, such as free speech.⁵³

⁴⁶ Friedland, *op.cit.*, at pp. 307-8.

⁴⁷ PRO 30/51/22 Letter dated 15 July 1878.

⁴⁸ Colaiaco, *op.cit.*, at pp. 204-5; Hostettler, *op.cit.*, at pp. 193-5.

⁴⁹ Colaiaco, *op.cit.*, at p. 25; Radzinowicz, *op.cit.*, at pp. 20-21.

⁵⁰ HC, 1880 1R [244] col. 433.

⁵¹ Stephen, "A Penal Code" (1877) *Fortnightly Review* vol. xxi, pp. 362-376.

⁵² PRO/LCO1/42 Letter dated 9 July 1878.

⁵³ See, for example, Hostettler, *op.cit.*, at pp. 191-2.

Codification was also widely discussed in the printed media, not just in specialist publications such as the *Law Times* but also in national organs. In widely-respected and read periodicals including the *Edinburgh Review*, *Nineteenth Century*, and *Fortnightly Review*, articles on legal reform continued to stress the issue of codification, either as a main or a subsidiary focus. Even *Punch* expressed an interest in the topic.⁵⁴ In particular, *The Times* demonstrated an enduring commitment to the project in a number of leading articles into the 1880s, demonstrating the extent to which codification remained on the political agenda.⁵⁵ To argue it was not a major issue because it was not flagged in electioneering as a central policy plank for either main party, or to point to Irish hostility, is to misunderstand Victorian perceptions of the politics of legal reform.

The general desirability of such measures was not then identified as a party-specific issue. The intimate details of proposals were debated not along party lines, but across them, as the passages of the 1861 Act and the 1885 Criminal Law Amendment Act illustrate.⁵⁶ There was, as a result of the efforts of the 1878-9 Royal Commission and Stephen's own work, to say nothing of the input of figures like Wright, a broad political consensus that codification was necessary. The distinctly shaky Disraeli government would not otherwise have dreamed of introducing the measure with a general election looming. As commentators like Hostettler and Colaiaco point out, it was expected that the 1879 Bill would have little difficulty in passing through Parliament. Its reintroduction in 1880 indicates that the furore over Cockburn's intervention had already died down, and that Stephen's response thereto had been widely accepted. True, some criticisms had surfaced, such as those identified by Hostettler in the *Law Times*, but it would have been surprising indeed had reservations not been voiced, and overall, the political mood in 1880 was still positive.⁵⁷ The issue of legal reform was far from dead.

It was not to be expected that an incoming administration would see codification as a matter of immediate urgency, but it did reappear on the government agenda in the 1881-2 Queen's Speech, as a result of the efforts of Liberal supporters, including Henry Broadhurst. A Grand Committee on Law, a clear descendant of earlier bodies examining codification was created in 1882, though it was not, in the end, to issue a report of any substance. The intervention of crises in Ireland and the Transvaal do help to explain the temporary eclipse of codification in the parliamentary debates, but not entirely. More significant was the further exercise in ameliorating the dangerous tendencies of the masses by invoking the civilising effects of an extension of the franchise, as had been tried in 1867. This time, as a result of Acts in 1884 and 1885 the majority of male heads of households were enfranchised, and the boundaries of parliamentary constituencies amended, better to reflect actual demographic concentrations. There was also an attempt to improve the operation of the legal system and remedy the defects of the 1861 Offences Against the Person Act by further efforts at consolidation. Consequently, the debates on legal reform in the first half of this decade were dominated by arguments over the precise details of what emerged as the Criminal Law Amendment Act 1885.

Disappointments over the soothing effects of such measures, and in particular over the practical problems remaining unresolved by the 1885 Act, resulted in a willingness

⁵⁴ "The Essence of Parliament" (20 July 1878) *Punch* vol. 15.

⁵⁵ *The Times*, 12 June 1880, 25 March 1886.

⁵⁶ See, for example, HL 1883 3R [280] pp. 397-407.

⁵⁷ Hostettler, *op.cit.*, at pp. 193-4; Colaiaco, *op.cit.*, at pp. 204-5; Stephen, "The Criminal Code" (1880) *Nineteenth Century* vol. vii, at pp. 140-143.

to revisit codification in 1886.⁵⁸ Time was set aside in the parliamentary session by the new Conservative administration, with a fair expectation of support for such a measure from the Liberal opposition. Stephen himself certainly expected such a development would involve a revival of his draft code. However, it must be remembered that there were now a variety of alternatives, including Wright's draft code, and any committee considering a codification Bill could very probably have sought to amalgamate these alternatives. But in fact, despite promises in 1886 that a "short well-considered Bill amending the criminal law" would be introduced in the next session, which could be expected to "be passed without any great difficulty, notwithstanding the opposition of the Irish members", the codification project was allowed to remain dormant.⁵⁹

The responsibility for this state of suspension, at a time when moves to codify aspects of civil law were proceeding smoothly and successfully towards fruition from the late 1880s into the 1890s, lies not with the Lord Chancellor, recalcitrant Irish members, or a hostile judiciary, but with a now little known legal figure who rejoiced in the soubriquet of 'the real Sleuth Hound of the Treasury'. Henry Bodkin Poland, Senior Counsel to the Treasury at the Central Criminal Court was the man entrusted by Lord Herschell with preparing a codification Bill in 1886, for introduction in 1887. Though he made positive noises to Herschell in Home Office papers, he was, as his subsequent biography based on extended conversations illustrates, profoundly opposed to criminal codification: "Something may be said for codification in general, but nothing for the codification of the Criminal Law. . . It is impossible to codify the Criminal Law of this country. . . the practical difficulties. . . are insuperable".⁶⁰ He did, however, find a number of positive things to say about Stephen's code, including the issue of the locking up of juries. The basis for his opposition to codification was far broader than a simple hostility to some of the aspects of Stephen's code. It was not so much legal, or strictly societal, though he did say to his biographer Bowen-Rowlands that "You cannot stabilise an essentially fluctuating thing like our Criminal Law", because "Any Code would *pro tanto* hamper the Judges in interpreting the Criminal Law in accordance with the requirements of the age".⁶¹ Rather, it was the economic dimension that occupied Poland. As he informed Lord Herschell, he had advised the Chancellor of the Exchequer that he feared such a code, particularly one that would promote the efficiency of the legal system and encourage more cases to be brought before the higher courts, would be too expensive.⁶²

It was still possible that the legal merits of codification could have seen its revival by subsequent governments. The matter remained before Parliament as colonies from Canada to Mauritius adopted criminal codification based on Stephen's Indian Code during the 1880s and 1890s. It remained a matter of interest to the print media too, as states such as Japan toyed with versions of British-style criminal codification. Stephen certainly turned his efforts to advocating the spread of *civilisation* (by which he effectively meant the spread of British values) via the export of criminal codification to nations as diverse as Russia and the USA. But with Bodkin Poland remaining as the economic Cassandra for the project into the early twentieth century, placing codification back on the parliamentary agenda would always have faced considerable obstacles from the Treasury. Also of subsequent significance in explaining the suspension of the codification project was the redirection of the focus of efforts at

⁵⁸ PRO30/51/22 Note, Lord Herschell, 6 October 1886.

⁵⁹ PRO/LCO/1/42 Lord Chancellor's papers 1886.

⁶⁰ Ernest Bowen-Rowlands, *Seventy-Two Years at the Bar. A Memoir* (Macmillan & Co, 1924) at p. 305.

⁶¹ *Ibid* at pp. 305-6.

⁶² PRO/LCO/1/42, Letter, Henry Bodkin Poland to Lord Herschell, 6 October 1886.

societally-driven legal reform from the mid-1890s. Neither women's issues nor Irish issues in their *fin de siecle* or Edwardian manifestations were susceptible to solutions via criminal codification. Thus, a Code Victoria was not to be.

FUTURE VISIONS

Such visionary desires to regulate the social order might be interpreted as simply providing the concept of an achievable *legal utopia* for those engaged in the practical operation of the law. However, as we enter the third millennium, many would argue that the visions of legal reform examined by our nineteenth century forebears warrant renewed consideration for much the same set of essentially societal reasons. The major difference is that now, legal reform is very much a matter of party politics. Carnwath J., recently appointed Chair of the Law Commission, has emphasised that he and his predecessors have been searching for the "Holy Grail" of codification for the last twenty years. The Commission has produced some twenty detailed reports awaiting implementation but these have been hampered by the lack of any systematic procedure or concerted political will to streamline the criminal law. Carnwath advocates that immediate action is necessary unless the Government is content "to leave the courts fighting twenty-first century crime with nineteenth century weapons".⁶³ Further impetus is provided by the recent enactment of the Human Rights Act 1998 which, as the previous chair of the Law Commission, Arden J. argues, has created an even more urgent and pressing need for reform as "many aspects of the criminal law may undergo change" once the Act comes into force.⁶⁴ If the modernisation of the criminal law is, to use Carnwath J.'s words, to be more than "simply a pipe dream" then the Government must take a more forward thinking and proactive approach. As Carnwath hopes, "A political commitment to codification of the criminal law with a programme to achieve it over this and the next Parliament, would be the ultimate prize of my term of office".⁶⁵

To figures such as Brougham, Stephen, and Holker, the codification of the criminal law was much more than a pipe-dream. It is so now, being identified as the key to achievement of a more stable and civilised society. Clearly it is a utopian ideal, but such are generally necessary for the achievement of any socially-driven legislative reforms. Now, however, there is an extra dimension, carrying with it overtones of *patriotism*. Present reformers must accept that unless Britain seizes the initiative, its sovereign power to determine both the substance and procedural aspects of the criminal law will be severely curtailed. Some elements of the executive of the European Union are already pressing for a common pan-European criminal justice system or *corpus juris*. The Eurojust Project demands not only a pan-European prosecutor but also a uniform, *i.e.* codified, body of criminal law, applicable in all member states. Currently Jack Straw, the Home Secretary, has rejected the notion of a uniform legal system on the grounds that legal systems are embedded in national and political cultures - an interesting reaffirmation of the socio-cultural dimensions to such legislation. He asserts that despite the fact that the Scottish legal system has much in common with the Continental system this does not prevent co-operation with the criminal justice systems

⁶³ *The Times* 15 June 1999. Also see H. Brooke, "The Law Commission and Criminal Law Reform" [1995] *Criminal Law Review* pp. 911-19.

⁶⁴ Mrs J. Arden DBE, "Criminal Law and the Crossroads: the Impact of Human Rights from the The Law Commission's Perspective and The Need for a Code" [1999] *Criminal Law Review* pp. 439-459 at p. 453.

⁶⁵ *Op.cit.*

of the rest of the United Kingdom.⁶⁶ Ben Hall, research director for the Centre for European Reform has said that “A single legal code for Europe is fantasy”.⁶⁷ However, the reality is that the nineteenth century vision of a Code Victoria, which attempted, but failed to bring the English criminal law more in line with the continental approach, has never been closer. The difference is that the nature of the ideal society encapsulated in such legal visions for the future may no longer be under English/British control.

⁶⁶ D. Rudnick, Is Eurocop our real legal future? *The Times* 26 October 1999.

⁶⁷ *Ibid.*