Time for a Code: Reform of Sentencing Law in England and Wales

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Abstract

The Law Commission of England and Wales is currently working to produce a New Sentencing Code that will seek to remedy problems with one of the most heavily used and unsatisfactory areas of statutory law. It responds to the problems of complexity and inaccessibility in the current sentencing legislation, and more fundamentally in the process by which sentencing legislation is created and implemented. The aim is to introduce the new Code as a consolidation Bill in 2018 with a view to it being in force from early 2019. This article provides an overview of the problems endemic to the current law and how the Commission envisages that the new Sentencing Code will provide not only a remedy, but a lasting one.

It is important to understand from the outset that the scope of the Commission's work on sentencing is to reform procedure. The project and the resulting legislation will not alter the length or level of sentence imposed in any case. The penalties available to the court in relation to an offence are not within the scope of the project and will not change. The change will be in the process by which each sentence is arrived at.

Keywords: Law Commission, codification, consolidation, consultation, criminal procedure.

A Introduction

I The Importance of Sentencing

A criminal trial is a fact-finding exercise that attempts to answer a very closed question, 'guilty' or 'not guilty', from the available evidence. Sentencing is, in many respects, a very different process. Once criminality has been established, at trial or otherwise, the court must decide on the appropriate reaction. The court must identify the range of available penalties, ascertain the precise facts that go beyond those necessary to establish liability and consider a multitude of statutory and non-statutory guidance. The court will then select the most appropriate disposal to meet the case, with the aim being to produce a fair and just penalty. It is in some respects a more open-textured decision.

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For many purposes the exercise of sentencing marks the public 'conclusion' of a criminal case and is one of the most significant processes in our criminal justice system.

Sentencing law and procedure in England and Wales touches upon millions of cases a year,[1] affecting a significant proportion of our population. As a matter of principle, it is vital that we have a system that provides for the fair and just determination of a criminal penalty on conviction and for the clear, confident declaration of that penalty by the sentencing court. While conviction in itself is clearly significant, it is sentencing that enables the court to respond to and communicate effectively the harm caused and culpability demonstrated by the offender in a way that pure declaration of conviction cannot. The declaration "conviction for theft" is silent as to offence seriousness, culpability of the offender, and gravity of harm caused in a way that "imprisonment for 3 years following a conviction for theft" is not.

Sentencing provides a clear and public declaration of the state's condemnation. It is that aspect of the process to which the press often turn their attention and headlines. It is those headlines in turn on which politicians rely to promote vote-winning policies to the electorate. It is this relationship which both explains the importance of sentencing, but also may begin to explain how the problematic state of the current law discussed in this article has evolved.

II *The Problem with the Current Way of Legislating for Sentencing*

The significance of sentencing in the mind of the general public, and the associated media attention provide two reasons to explain why sentencing has become such a highly politicized area of law. It is an area in which politicians have demonstrated a willingness to legislate regularly; we can expect primary legislation almost annually. However, very rarely indeed does the legislation do more than make some amendment or addition to the existing morass of statutory provisions. It may be a new sentencing policy; a new purpose for imprisonment; a new disposal for the courts; a new mandatory regime for extended licence supervision etc., but very rarely indeed does it involve a new framework. We see regular shifts of policy involved with changes of government and even within a parliament. It is inevitable that the perennial amendment of the law produces incoherence in the overall scheme of sentencing legislation. Changes to sentencing law are often short-term political fixes but the result is to risk creating longer term legal incoherence.

In short, political and parliamentary practice in the last two decades has led to the law becoming increasingly complex and incoherent with each variation made to the regime of penal policy.

Not only does the present process produce annual changes to the sentencing procedure, but the method of implementing those changes exacerbates the inco-

1 'Criminal Justice Statistics Quarterly, England and Wales, October 2015 to September 2016', Ministry of Justice (published February 2017, accessed February 2017), p. 6. Total offenders sentenced by all English and Welsh criminal courts in the year ending September 2016 was 1.21 million individuals, out of which 497,064 were sentenced for summary motoring offences.

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herence, complexity and lack of clarity in the law. Each new scheme has been accompanied by myriad commencement dates, transitional regimes, and repealing and saving provisions. This is a systemic failure in the process by which legislation is produced. The specific failure in the process is a combination of over-legislating, but also over-caution in actually bringing changes into effect.

III The Resulting Problems for Sentencing Procedure Law

The procedural law of sentencing is now widely acknowledged by those who use it to have reached an intolerable and needless state of complexity. We examine this in detail in Part C.

Judges, lawyers and academics frequently struggle to ascertain what the provisions of the law actually mean. This state of affairs has generated forceful comment from the most senior judiciary:

> ...It is outrageous that so much intellectual effort, as well as public time and resources, have had to be expended in order to discover a route through the legislative morass to what should be...the simplest and most certain of questions.[2]

For someone with such experience of the law, in such a forum, to use such language is a striking illustration of the judicial dissatisfaction with the system. The present position causes frequent errors and wastes resources, but moreover, the state of the current law is intolerable from a perspective of legal certainty. The law should be clearly promulgated, and ascertainable.

Given the difficulties faced even by experienced and expert legal professionals and the judiciary, members of the public have no real prospect of discovering the sentencing law to which they could be subjected. Furthermore, there is a risk that sentences handed down cannot be readily understood and the significance of any given sentence is not adequately signalled to the public at large. The criminal justice system therefore fails in some cases to provide the necessary public denunciation of criminal conduct that should be central to the sentencing process.

IV The Proposed Solution

The Law Commission of England and Wales proposes the enactment of a Sentencing Code, to draw the vast bulk of sentencing law together in a consolidated Act that will provide the courts and other users with a single point of reference. The Act should have a clear framework and strive for accessible drafting. Further, to anticipate the continued parliamentary and political desire for legislative change to sentencing *policy* after the Code, the statute must be capable of accommodating frequent amendment and changing needs without any loss of structural clarity. This will not make any changes to the sentencing guidelines, nor to any applicable statutory maximum sentences. The Code will provide the procedure for arriving at a sentence.

2 *R (Noone) v Governor of Drake Hall Prison* [2010] UKSC 30; per Lord Judge at [87].

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In a very innovative way, the Commission proposes to enact what is termed a "clean sweep" of the legislation currently in force. This will repeal the overlapping layers of historic sentencing procedure law, leaving the Code to be applied to every conviction after it comes into force. This will restore consistency and practicality to the law. We explain this in more detail below.

B Symptoms of Dysfunction within the Current Law

I Complexity and Volume

In a lecture delivered in 2008 on the subject of criminal justice legislation, Professor John Spencer QC complained that statistics for the lecture had been particularly hard to gather, in part by virtue of the fact that within a 10-year period, 55 new Acts of Parliament had altered the rules of criminal justice.[3] The detail of the problems facing Professor Spencer were subsequently dealt with by Lord Judge (CJ) in *R (on the application of Noone) v Governor of Drake Hall Prison*:

> The problem... is not the mere number of statutes, but their increasing bulk. Many of them are "enormous"... And that is not the end of the difficulties. Ill-considered commencement and transitional provisions, which have to negotiate their way around and through legislation which has been enacted but which for one reason or another has not or will not be brought into force, add to the burdens. And there are hidden traps, the most obvious of which is legislation which repeals the earlier repeal of yet earlier legislation."[4]

The volume of primary legislation dealing with sentencing procedure is incredibly large. It is spread across a great many different statutes and lacks any consistent framework. The Commission, in an early phase of the Code project, set out to provide a complete statement of the sentencing legislation currently in force. This document ran to over 1,300 pages.[5] It was the first time that someone had set out, in a thematic way, the existing sentencing procedure law.

Furthermore, the true legal landscape on sentencing procedure is not evident from primary legislation alone. There are substantial amounts of the law in secondary legislation, including important but frequently intricate arrangements for phased commencement, transitional and saving provisions. These all add to the overwhelming complexity:

> In turn, the result of this has been that highly complex adjustments have had to be made in the Commencement Order under which other provisions of the CJA 2003 were brought into force. The Criminal Justice Act 2003 (Commencement Number 8 and Transitional and Saving Provisions) Order 2005,

3 J.R. Spencer, 'The Drafting of Criminal Legislation: Need It Be So Impenetrable?', *The Cambridge Law Journal*, Vol. 37, No. 3, 2008, p. 585.

4 *R (on the application of Noone) v Governor of Drake Hall Prison* [2010] UKSC 30, per Lord Judge at [78].

5 Law Commission, *Sentencing Law in England and Wales – Legislation Currently in Force* (2015).

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> 2005 No 950 ("the 2005 Order"), Schedule 2, paragraph 14 provides as follows:
>
> "14. The coming into force of sections 244 to 264 and 266 to 268 of, and paragraph 30 of Schedule 32 to the 2003 Act, and the repeal of sections 33 to 51 of the 1991 Act, is of no effect in relation to any sentence of imprisonment of less than twelve months (whether or not such a sentence is imposed to run concurrently or consecutively with another such sentence)."
>
> It is perhaps unnecessary to say that the effect of that provision is not immediately apparent to the reader.[6]

The law itself is complex, but the way in which legislators bring changes to the law into force and repeal the old law adds an extra dimension of complexity. Current legislative practice is to provide that amendments made to sentencing procedure apply in relation to offences committed on or after the commencement date of that provision. At the same time, in what is a rather contradictory state of affairs, where new sentencing procedure legislation repeals old iterations of the law it usually includes saving provisions that preserve the old law for cases in which the offence was committed before the commencement date of that repealing provision.[7] The practical effect is that every historical iteration of the law is kept alive, to be applied by the court in a case involving an offence of that particular age. Therefore, every change made to the law in this manner produces yet another layer of complexity and the most modern version of the law is only applicable in real terms to those offenders who committed crimes since the most recent legislative change came into effect. For every other case, the court must identify the relevant regime that applied to the offender by looking to the myriad regimes that coexist to be applied in historic cases.

With dozens of sentencing statutes currently in force the result of this system of legislating is to create dozens of parallel sentencing processes any one of which may be applicable in a given case, and so all of which must be in the cognisance of the court. At present courts are having to apply one or more of numerous processes, some from the Acts in 1990, 1991, 1997, 2000, 2003 and so on. In certain cases, the need to apply historic law may extend back several decades, for example historic sexual abuse cases have frequently required the courts to apply sentence-setting legislation dating from the 1960s.

6 *R v Round* [2009] EWCA Crim 2667, per Hughes LJ at [5].

7 The applicable sentencing law in a given case is frequently stated to be the law applicable at the time that an offence was committed, as opposed to the law applicable on the day that an offender appears before the court. This effect is achieved by virtue of transitional provisions which limit the extent to which any changes to the law are effective for a given class of cases. For example, a newly introduced type of community order might be made applicable only to cases before the court in which the underlying offence was committed after that new type of order came into force. Similarly, the repeal of an old type of order itself would not be effective for cases in which the offence was committed before the commencement of the repeal: therefore the change is not yet available.

The final point to note about the system of implementation and transition is that the law is contained in statutory instruments, sometimes being laid many years after the date of the Act and which are labyrinthine in their structure.

This is the result of a systemic failure in the way new legislation is made and an over-cautiousness on the part of legislators to apply new procedures retroactively without regard to pragmatism.

II Error

The volume and complexity, coupled with the frequently changing nature of the law induce error, and that is exacerbated by the inaccessibility of transitional and commencement provisions. Time and again, the Criminal Division of the Court of Appeal produces judgments with an exasperated tone:

> I cannot, however, leave the case without expressing my sympathy both for the "despair" which the judge felt when considering the statutory provisions in the case.[8]
>
> We observe that the sentencing judge was faced with a very difficult and complex sentencing exercise, generated in part by the shifting sands of sentencing legislation.[9]
>
> We sympathise with the judge. The problem he faced is the unintended result of heavily complex sentencing legislation.[10]
>
> Such is the complexity of modern sentencing legislation that courts make mistakes as to their powers quite frequently. Such errors are corrected by the appellate process when detected.[11]
>
> We repeat what this court has said often before. It is intolerable that a judge taking one of the most difficult and important decisions that has to be taken, that is to say determining the proper sentence for those convicted of serious crime, can only reach his or her destination by travelling a path of such labyrinthine complexity.[12]

In essence, the Court of Appeal finds itself respectfully correcting the sentencing judge's application of the law, but sympathetically describes the severe difficulty of the task which that judge faced in applying the law. The court is frequently emphasizing that the judge is not to be criticized for the error, and that the error was an unavoidable consequence of the unnecessarily complex 'legislative morass'.

These concerns cannot be dismissed as mere anecdote or statements by judges desperate to defend errors by judicial colleagues. A 2012 study by Robert

8 *Governor of HMP Drake Hall v R (Noone)* [2008] EWCA Civ 1097, per Wall LJ at [60].
9 *R v Casbolt* [2016] EWCA Crim 1377, The Recorder of Liverpool at [40].
10 *R v Costello* [2010] EWCA Crim 371, per Hughes LJ at [34].
11 *GJD v Governor of HMP Wakefield* [2016] EWHC 345 (Admin), per Edis J at [14].
12 *R v Grimes* [2007] EWCA Crim 1782, per Pitchers J at [6].

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Banks provides a startling empirical perspective. The study found that, in a random sample of 400 cases before the Court of Appeal (Criminal Division), 262 cases involved an appeal against sentence. From those appeals, 95 sentences had been found by the Court to have been unlawfully imposed by the sentencing court below.[13] That is to say, these were not merely cases of manifestly excessive sentences where the Court opted to interfere with the exercise of discretion, but that these were sentences that were wholly or partly unlawful. The power had simply not been available in law to the sentencing judge at first instance. On that basis, it is inferred that over a third of appeals against sentence involve some element of unlawfulness.

Even this figure, however, disguises the true extent of the prevalence of error. It does not include those cases in which the illegality of the sentence had not yet been noticed, or was noticed but not appealed. The figure also disguises those errors addressed using the slip-rule, if unlawful sentences are spotted early enough, they can be revised by the sentencing judge.[14] Although the slip-rule provides a mechanism for rectification, it is a costly one requiring attendance of the original judge, legal representatives and the defendant to change what is often tantamount to an administrative error caused by enormous complexity in the present system.

Banks, reflecting on the results of the 2012 study, said:

> Figures show that we can no longer say the sentencing system is working properly. Cases since then have indicated that these figures are not unrepresentative.[15]

III Cost

In an era when even the most principled of law reform must be supported by some statement demonstrating its short-term positive impact in monetary terms, the Law Commission is keen to demonstrate the obvious cost implications of such an unnecessarily complex and inefficient system.

The present complexity and accompanying risk of error means that judges spend longer preparing for, considering and delivering any given sentence in a particular case. In addition, there is equally an enhanced burden on practitioners. It is widely recognized that the complexity of the law means that they are forced to spend more time assisting the court and in preparation.

> It is a matter of regret that neither counsel pointed out the judge's error. The error was not noticed by anyone in the case until it was pointed out by the Registrar, to whom we are grateful. The regrettable complexity of current sentencing legislation does not require further comment but it underlines the

13 *Banks on Sentence*, 8th edn., 2013, Vol. 1, p. xii.

14 Powers of Criminal Courts (Sentencing) Act 2000, s 155.

15 *Banks on Sentence, supra* note 13.

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> necessity for the legal representatives of both Crown and defence to be prepared to and to provide, appropriate assistance to a judge in this regard.[16]
>
> Whilst of course judges carry the primary responsibility for their sentences, there is a duty upon practitioners who appear before the courts, particularly prosecutors, to ensure that they give assistance to busy judges who will often have a list of cases beset with legislative traps arising from a torrent of sentencing legislation often couched in opaque terms.[17]

The plight of those undertaking publicly funded work on already strained resources needs no further elucidation or comment. Ultimately, there is a cumulative impact on the overall efficiency of the court system as precious court and professionals' time is wasted working out how unnecessarily complex legislation applies to particular cases.

It should also be noted that appeals are expensive and time consuming. There is an increased cost both to the court service and the legal aid fund as a disproportionate number of criminal appeals are based on the ground that the sentence is unlawful. The sentencing appeals also add to the staggering workload of the Court of Appeal. Fewer sentencing appeals generated by technical slips would leave more time for conviction appeals and other matters.

During 2015, a total of 6,267 applications for leave to appeal were received. Of these 1,517 (24%) were against conviction in the Crown Court and 4,444 (71%) against the sentence imposed.[18] To describe the caseload as staggering would not be an exaggeration.

IV Rule of Law Certainty

The pressure for reform derives not solely from the frustration of overworked professionals being impeded in their quest to discover and apply these important laws. Nor is it a question of the volume of error and wasted resources. The most significant pressure for reform derives from a more general constitutional aspect of the dysfunctional state of the law. In Lord Bingham's magisterial treatment of the Rule of Law, his first principle was expressed as:

> The law must be accessible and, so far as possible, intelligible, clear and predictable.

The present sentencing regime clearly challenges that principle when even experienced and highly trained judges cannot discover the law and are forced to express 'despair':

16 *R v Sparks* [2010] EWCA Crim 2194, per Gross LJ at [1].

17 *R v LF* [2016] EWCA Crim 561, per Treacy LJ at [26].

18 'Civil Justice Statistics Quarterly January to March 2016', Ministry of Justice (published June 2016, accessed February 2017), p. 23.

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> It is simply unacceptable in a society governed by the rule of law for it to be well nigh impossible to discern from statutory provisions what a sentence means in practice. That is the effect here.[19]

As a general proposition, it should be possible for members of the public to discover the laws to which they are subject and to arrange their affairs in accordance with the legitimate expectations that those laws create.

The same is true of sentencing law. It should be possible for any member of the public to access the legislation that relates to criminal justice, navigate to the provisions relating to sentencing and, from there, discover those provisions which govern the mechanics of the court in providing sentence. Those provisions should be expressed in clear language, and so far as possible, be collected in a single Act under one heading.

It is widely acknowledged that the freely and publicly available National Archive database, legislation.gov.uk, is incomplete. Its moderators do not have the financial or human resources necessary to update and maintain a database of all legislation in force in the UK. In the sentencing context, they are unable to make available accurate versions of the law that should apply in every iteration of historic offence, nor can they keep pace with the legislators.

> About half of all items of legislation are also up-to-date to the present. For the remainder there are still effects outstanding for at least one of the years 2003 to the current year.[20]

The lay user will struggle to find an accurate statement of the sentencing procedure law in force in England and Wales. The commercial databases, Westlaw, Lawtel, Lexis etc., may allow a trained lawyer, at considerable expense, to understand the true legislative position. Even with commercial subscriptions, ascertaining the correct answer on a legal position, is by no means guaranteed. Take the following example regarding the current status of attendance centre rules.

The Attendance Centre Rules 1995[21] were made under regulation-making powers conferred by the Criminal Justice Act 1982, Section 16(3). This section was consolidated and became Powers of Criminal Courts (Sentencing) Act 2000, Section 62(3), which was in turn repealed by Criminal Justice Act 2003.

The repeal in question was brought into force by Criminal Justice Act 2003 (Commencement No. 8 and Transitional and Saving Provisions) Order 2005 on 4 April 2005.[22] The practical question for the user of this legislation should be a simple one: are the Attendance Centre Rules 1995 in force, despite the power to make them now having been apparently repealed? Westlaw UK records the answer as no:

19 *R (Noone) v Governor of HMP Drake Hall* [2008] EWHC 207 (Admin), per Mitting J at [2].

20 Available at: <www.legislation.gov.uk/help#aboutRevDate> (accessed 23 March 2017).

21 Attendance Centre Rules 1995, SI 1995/ 3281.

22 Criminal Justice Act 2003 (Commencement No. 8 and Transitional and Saving Provisions) Order 2005, SI 2005/950, Sch 1 para 44(4)(r), with saving provisions expressed by Sch 2 para 5(2)(c)(xii).

> Status: Repealed... Lapsed on the repeal of the consolidated enabling provision contained in 2000 c.6 s.62(3) by Criminal Justice Act 2003 c. 44 Sch. 37(7) para.1 (February 27, 2004: April 4, 2005)

Lexis Library on the other hand provides no such indication. Despite also showing the enabling provision in Section 62 PCC(S)A 2000 as repealed elsewhere, Lexis' note under the Attendance Centre Rules 1995 reads:

> Following the repeal of the Criminal Justice Act 1982, s 16(3), these Rules have effect as if made under the Powers of Criminal Courts (Sentencing) Act 2000, s 62(3), by virtue of s 165(3), Sch 11, Pt I, para 1(2) thereto.

The law is manifestly unclear even with the aid of expensive subscription services and expert legal knowledge. In any event, the complexity serves only to further drive up the cost of adequate legal representation in an already strained system.

The inaccessibility of the law manifests itself in another significant way. The court has a general duty to explain the effect of a sentence it has passed:

> Section 174(1)(b)(i) CJA 2003, which requires the court, in passing sentence, to "explain to the offender in ordinary language...the effect of the sentence". True it is that the complexities of sentencing... make this obligation one which is capable of discharge only in the most general possible terms[23]

The court is required to explain the effect of a sentence, but there is a significant risk it cannot properly do so in all cases because of the level of obscurity in the law. For a system dealing with matters as fundamental as the loss of liberty through imprisonment, it is clearly unacceptable that a member of the public has limited prospects of being able to access or to understand the law.

V *Lack of Public Confidence*

A vital function of sentencing is the public denunciation of the offender's behaviour; the public must be readily able to understand the penalty imposed in order to understand the level of harm done and culpability demonstrated. Sentences are often expected to act as deterrence[24] and as a general proclamation of the level of wrong that has been committed. Society needs to see that justice is done. If the law is as obscure and inaccessible as described, that fundamental objective of the sentencing process is inhibited.

The negative consequences highlighted above also serve to fuel a perception that the criminal justice system is expensive, inefficient and serves the interests of lawyers, rather than victims and the wider public.

23 *R v Round* [2009] EWCA Crim 2667, per Hughes LJ at [42].

24 Criminal Justice Act 2003, s 142(1)(b) "Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing; ...the reduction of crime (including its reduction by deterrence)."

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The sentencing phase of a trial should be a step in the justice process that does quite the opposite: it should serve to reassure the public that justice has been delivered and that fair and just punishment is imposed.

VI Fettered Development

Finally, in terms of the catalogue of problems created, complexity impedes the rational development of the law. The landscape has become so confused that the officials in the Ministry of Justice cannot always be confident when advising government as to the likely effects of proposed sentencing initiatives. The unintended consequences of new statutory procedures are not readily identifiable. This is an area of law which government is often keen to change and yet precisely because of that volatility it becomes harder for government to do so confidently.

C The Solution

I Treat the Cause, Not the Symptoms

The failings outlined above are so substantial, so systemic and have become so deeply entrenched that simply making further amendment cannot solve these problems. Even if it were possible to identify each and every issue, then to offer solutions in a single statute, such an approach would not correct the deeper-rooted problems. One could take the existing law, renumber the provisions and re-enact it in its entirety. Such an approach would be palliative at best. Judges would still struggle to navigate it, provisions would not appear in the most coherent order, different transitional provisions would apply to different penalties and future amendments would continue to overlay strata of complexity. The *system* of legislating about sentencing is failing; the only curative response is a complete overhaul of form and process as well as content.

II Time for a 'Code'

Codification is more typically associated with civil legal systems, though many common-law jurisdictions also have codified systems of criminal law and procedure. England and Wales does not and there is no strong precedent for codifying the criminal law in this jurisdiction.

Despite this, efforts to codify English criminal law persisted throughout the 19th century. A serious effort was made by the Criminal Law Commissioners between 1833 and 1849. Their attempt ultimately failed, as did those of jurist Sir James Fitzjames Stephen. It is fair to say that wholesale codification of the criminal law proved an elusive goal in the 19th century.[25]

In the late 20th century, in its report to the Law Commission on Criminal Law Codification, the Code Team, as it became known, listed the following as the overarching aims of codification. Although drafted with substantive criminal law in mind they serve, we submit, as sound bases for any code:

25 'Codification of the Criminal Law: Introduction by the Law Commission', LC143 (1985) pp. 1-3.

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1. *Accessibility*: ensuring the law is not scattered throughout the statute book and is drafted with a minimum of ambiguity. The aspiration is that an inquirer would not have to search the statute book and law reports to find the criminal law.[26]
2. *Comprehensibility*: ensuring the law is as intelligible as possible and can be understood by ordinary citizens. Words should have their ordinary language meanings.
3. *Consistency*: the haphazard accretion of the law in a multitude of statutes leads to inconsistency of terminology and substance. Codification seeks to remove inconsistencies.
4. *Certainty*: ensuring that the law's prohibitions are clear so that the citizen has a real opportunity to understand the law.[27]

These are equally sound goals for the creation of the Sentencing Code.[28]

The Commission's aim with the Sentencing Code is to repeal the existing law of sentencing procedure, re-enacting it in a consolidated form as a 'single source' of the law. In doing so it will remove inconsistency of style and language. It will relegate repealed law and law not yet brought into force into designated schedules, thus uncluttering the main body of the Act and rendering it easier to navigate. It will provide its users with functional legislation. Above all, it will give the lay-reader a reasonable prospect of being able to understand the laws to which they are subject. Moreover, in introducing a clean sweep, it will provide all users with a simple approach to transition and commencement. If conviction occurs after the date on which the Code has come into force, the law as described by the Code will apply irrespective of the date of the commission of the offence, barring very occasional exceptions.[29]

III How Would a Code Solve the Problems?

1 Reduction in Complexity: The 'Clean Sweep'

Complexity and technicality will be radically reduced under the Code in many ways. One is by taking the opportunity afforded by consolidation to bring the law into a consistent, streamlined format. Perhaps the most innovative method to achieve a reduction in complexity, however, is by the Commission's proposal for a 'clean sweep': the removal of the transitional issue.

As described above, when a new sentencing provision is enacted, the common practice is to specify in transitional and savings provisions that the new law will apply only in relation to offences *committed* after a given date of implementation.

26 I. Dennis, 'The Law Commission and the Criminal Law', *in* M. Dyson, J. Lee, & S. Wilson Stark (Eds.), *Fifty Years of the Law Commissions*, Oxford, Hart Publishing, 2016, p. 116.

27 'Codification of the Criminal Law', LC143 (1985), p. 17.

28 For further discussion, *see* Dennis, 2016, pp. 108-122.

29 For examples of the exceptions, *see* 'A New Sentencing Code for England and Wales Transition – Final Report and Recommendations', 2016, LC365, paras. 5.12 to 5.37, available at: <www.lawcom.gov.uk/wp-content/uploads/2016/05/lc365_Sentencing_Law_in_England_and_Wales.pdf?#page=49> (accessed 23 April 2017).

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It is these transitional arrangements which cause many of the problems outlined above. They provide for newly made provisions to apply in only a limited class of cases while unhelpfully giving the new primary legislation the appearance of being in force for all cases on its face. They also keep old versions of the law alive for cases involving offences before a provision was repealed or replaced, each new regime re-doubling the potential body of law to which the court must have regard. Such is the state of the law that Lord Phillips, then President of the Supreme Court, felt it necessary to say:

> Hell is a fair description of the problem of statutory interpretation caused by these transitional provisions.[30]

Ultimately the Commission proposes that, in almost every case,[31] these complex transitional provisions will become unnecessary. The bold headline for the proposed Sentencing Code is that the law in force on the date of conviction, and not the law applicable at the time the offence was committed, should apply. Transitional provisions will be swept out of the law. The Code will apply in relation to every case in which the conviction was obtained after it was implemented. So, assuming the Code is enacted in 2018, and implemented on 1/1/2019, an offender convicted on that date even for offences in the 1960s will be dealt with under the new Code. That is to say that the process by which his sentence is determined will be under the Code; the maximum penalty for the relevant offence will remain that which was applicable at the date of the commission of the offence (as set out in the offence-making, as opposed to sentencing procedure, legislative provisions).

Some may be concerned that this will involve a degree of retrospective criminalization and that it would therefore be incompatible with ECHR Article 7, which prohibits the imposition of a heavier penalty than the one that was applicable at the time the criminal offence was committed.[32] That is not the case and the Commission examined this closely and conducted an open consultation on the matter.[33] Consultees including Professor Andrew Ashworth QC, the Bar Council and Government legal officers were strongly supportive of the proposals. Moreover, the proposal will be consistent with the interpretation in the leading cases. In *Uttley*,[34] the House of Lords considered the application of a new release arrangement provision, which had entered into force after the original offence

30 *R (Noone) v Governor of HMP Drake Hall* [2010] UKSC 30, per Lord Phillips at [1].

31 It will be necessary to not apply the clean sweep in a very limited class of cases where the statutory maximum has been increased, or new prescriptive sentencing regimes introduced, so as to ensure that this approach is compliant with the offender's Article 7 right against the imposition of a heavier penalty than the one which was available in law at the time of the commission of the offence. These cases are described in more detail in the Commission's transition report at note 29 above.

32 ECHR Article 7(1).

33 Law Commission, 'Sentencing Procedure: Issues Paper 1- Transition', 2015, generally parts 3 and 4, available at: <www.lawcom.gov.uk/wp-content/uploads/2015/06/Sentencing-Procedure-Issues-Paper-Transition-online.pdf> (accessed 21 April 2017).

34 *R (Uttley) v Secretary of State for the Home Department* [2004] UKHL 38.

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was committed. It was claimed that the retroactive application of a new provision violated the right provided by Article 7. In rejecting this submission, Lord Phillips declared that the "penalty applicable at the time" for the purposes of Article 7(1) was not the full image of the law frozen at that time, the "probable" penalty that would have been received, but instead merely the maximum sentence that could have been imposed at that time.[35] The House of Lords' interpretation is wholly consistent with the Strasbourg jurisprudence.[36]

This understanding facilitates the Commission's proposals regarding transition. There will be no change to offence-specific maxima; there will be no change to prescribed outcome. The only change will be that the Code will provide a new procedural path to those same, historically available conclusions.

This approach will render the vast majority of the present law redundant after a very short time. There are four potential types of case:

1. Cases in which an offender is convicted after the Code has come into force will be sentenced under the Code.
2. Rare exceptions to cases dealt with under (1), where an offender is convicted under the Code but where the court must have regard to the historically applicable maximum sentence or nonexistence of a recidivist premium at the time the offence was committed, so as to ensure Article 7 compliance.[37]
3. Cases in which the offender is convicted before the Code comes into force, but will be sentenced after that date, will be dealt with under the pre-Code law. These cases will pass through the courts within months in almost every case (residual cases will exist where there has been post-conviction absconding, delay or continuing trial of a co-defendant).
4. Cases in which the offender is convicted and sentenced before the Code comes into force, but fall to be dealt with again in respect of that original sentence for some reason after the Code has come into force, will be dealt with under the pre-Code law. For example, this may be the case following breach of community requirements where a power to amend or revoke the original community order arises. The overwhelming majority of these cases will pass through the courts within 3 years.

Therefore, a very substantial majority of offenders who fall to be sentenced after the Code has been brought into force will be dealt with according to the procedural law provided by the Code within only a few months.

This is one of the most important things the Code will do, clearing away the present law's decades of parallel systems as cleanly and swiftly as possible so as to provide the best opportunity for the new sentencing process to reach maximum efficiency.

35 *R (Uttley) v Secretary of State for the Home Department* [2004] UKHL 38, per Lady Hale at [45].

36 *Uttley v United Kingdom (Admissibility)* ECHR (36946/03).

37 Recidivist premiums, such as the third-strike minimum sentence for domestic burglaries, are explained in detail in the Commission's transition report (*supra* note 29), at 5.16-5.17.

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The Commission has concluded that the approach violates no fundamental principles. This conclusion has been universally approved on consultation.[38]

2 *An Act Restructured with Users' Needs in Mind*

Having swept the law clean of all but its most contemporary version, now applicable to every new conviction, the Commission takes the opportunity to present a Code that is structured according to the needs of its principal users.

a) Courts and Practitioners

The driving force for the drafting has been the courts' practical needs. Practitioners, judges and those working in sentencing-related agencies need to be provided with a clear accessible structure within which to make sentencing decisions and to ensure they are carried into effect.

The Code must have a robust workable structure that accurately reflects the way judges actually work through a sentencing exercise. The Commission has sought to achieve this by working with sentencing judges with regular engagement to ensure the Code's structure best reflects their practical requirements.

The Commission published the draft Sentencing Code Bill in July 2017. It is open for public consultation for 6 months. The Commission hopes that during this period judges and practitioners will compare the process under the present law and that under the Code in relation to cases with which they are dealing. This extensive pre-legislative scrutiny will provide another opportunity to tailor the Code to the needs of its users.

b) Sentencing Council and Criminal Procedure Rules Committee

The new Code must provide a structure that allows the Sentencing Council and the Criminal Procedure Rules Committee to continue their excellent work. The Code will assist by promoting the simplicity of the Guidelines and ensuring that the court understands when the duty to follow those Guidelines applies. Unlike much of the present law, the Code will be drafted with the Sentencing Council in mind, being the first major restatement of sentencing law since the creation of the Council in 2009. It will therefore provide a more solid foundation on which the Council's guidelines can operate. One potential innovation can be for common commencement days, on which new procedure rules, practice directions, definitive sentencing guidelines and legislative updates to the Sentencing Code, will come into force.

Lord Justice Treacy, Chairman of the Sentencing Council, wrote in support of the project:

> A sentencing code, containing a single comprehensive statement of the procedure to be followed after an offender's conviction, would greatly increase the accessibility and clarity of the law in this area. This would reduce the potential for confusion which may create real problems in practice. This in

38 'A New Sentencing Code for England and Wales Transition – Final Report and Recommendations', LC365, 2016.

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turn would help promote fairness and consistency in sentencing. It could also increase the impact of the Sentencing Council's work by allowing judges to focus on the key issue: the correct sentence to be imposed in each case based on the Council's definitive guidelines. Judges would no longer be distracted by the exercise of navigating the current myriad and overlapping sources of sentencing provisions.[39]

c) Future Amenders

By creating a high-level framework in one Act, the Code will be able to accommodate any future changes with less risk to coherence. The structure and integrity of the Code will be critical to its long-term success. This is discussed in more detail under the heading 'Changing the Culture of Legislating on Sentencing' below.

3 *Presentation*

The introduction of the new Code will be further accompanied by an opportunity to present information in the most efficient and accessible format.

First, the Commission aims to simplify the language used. Transparency must be secured by drafting in clear simple terms. The Commission has consulted widely on the language of the Code. The draft Bill will be subjected to open consultation for six months. The future users of the legislation will have an opportunity to scrutinize whether the draft Code Bill actually delivers the anticipated improvements.

Second, the Commission is working with National Archives to develop presentational tools to accompany the presentation of the Code on legislation.gov.uk once enacted. These will include flow charts and tables. The sentencing exercise in a criminal trial is concerned with procedural steps that lend themselves to the use of such tools. A good example of such would be a table that will demonstrate which combinations of penalties can and cannot be imposed together. Innovations such as this have great potential to save time, effort and money and to prevent the imposition of unlawful sentences.

There is clearly a demand for these clear and simple presentational tools: they are provided in practitioners' texts such as Banks on Sentence and Thomas' Sentencing Referencer. The Commission will also consult with Westlaw, Lexis, Lawtel and other database providers to discuss how best the Code may be displayed for its users. Unlike drafting over previous decades, the way in which the law will be displayed and used digitally will be borne in mind from the outset with respect to the statute and the extra-legislative material.

Finally, some challenges to drafting convention may be involved. For example, there is a convention in parliamentary drafting that a clause should only be included in a Bill if it contains operative law. That is, a provision must make or repeal law but ought not simply to refer to the existence of law elsewhere. There is an argument that this should not be taken as an absolute rule. Sometimes a statutory provision might prove useful to a reader simply by referring the reader to other legislative provisions.

39 Available at: <www.lawcom.gov.uk/project/sentencing-code/> (accessed 23 March 2017).

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To take a concrete example, the draft Bill will clearly have to include all of the behavioural or ancillary orders imposable on conviction. There is a growing list of such orders and they derive from many diverse statutes. One is the power to disqualify a company director. The provision empowering the sentencing court to do so is found in the Company Directors Disqualification Act 1986. Taking that provision and including it in the Code would produce a more coherent Sentencing Code, but would leave an unnatural gap elsewhere in the law. This is particularly the case where, as here, the disqualification power is not limited to cases that would involve the imposition of a sentence after a criminal trial, but also in a variety of civil contexts and on application.

One solution would be to leave the provision in the Company Directors Disqualification Act 1986, but to assist the reader by including a 'signpost' in the Sentencing Code. There is no convincing policy reason why a statutory provision cannot say "the power available to a judge to make a disqualification order is in the Company Directors Disqualification Act 1986..." It does not provide new law, but would certainly help the reader and retain the coherence of the current host statute.

Another feature of this style of presentation is that the drafting guarantees that the body of the Code which is in most frequent use remains uncluttered. Schedules to the Code can deal with any manner of other important information to assist the judge in sentencing, which may, for example, include:

1. A schedule listing the maximum sentences for commonly prosecuted offences and their transitional dates over the last 50 years will ensure that the clean sweep of the Code cannot run into any Article 7 problems.
2. A schedule of all the provisions that have been enacted but never commenced.[40] This will allow the Code to reflect the fact that these provisions are law, without running any risk of their non-availability being missed by keeping them off the face of the operative law.
3. Similarly, a schedule to deal with those provisions that are in force but need only be relied on during the short transitional window.[41]

All of this should mean that judges can apply the law easily and confidently. Sentences are more likely to be lawful and understood by the public. Their declaratory and deterrent function is maintained. Further valuable information, for example, directing the user to regulations made under powers in the primary legislation, can appear alongside the Act (although not itself part of the Act), as it will be displayed on legislation.gov.uk, so that time is not wasted looking to separate parts unnecessarily.

40 The working title in the team is the "maternity schedule".

41 Referred to in the team as the "hospice schedule".

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D Changing the Culture of Legislating on Sentencing

As described above, there is an understandable political desire to make refinement to sentencing law on a regular basis. The former Lord Chief Justice, Lord Judge, said in *R (Noone) v Governor of Drake Hall Prison*:

> For too many years now the administration of criminal justice has been engulfed by a relentless tidal wave of legislation. The tide is always in flow: it has never ebbed.

This practice will continue and the Code must be able to accommodate change if it is to survive. This is a major challenge the new Code must meet. It must:
1. Respect parliamentary preferences and be capable of accommodating change, indeed allowing for change more readily and transparently than through the present system.
2. Respect parliament's autonomy and sovereignty to enact any sentencing procedure desired.
3. Assist policy officials who need to identify the impact of change and advise government with confidence.

The success of the new Sentencing Code depends on the extent to which a drafting culture change can be encouraged. The position where the Code no longer contains all of the relevant sentencing legislation – because for the full picture one must turn to subsequent Acts – must be avoided. The Powers of Criminal Courts (Sentencing) Act 2000 failed in this respect. Subsequent legislation very soon made changes to sentencing powers but did so without amending that 2000 Act. To take one example, the provisions relating to extended sentences for dangerous offenders expressed by Section 85 PCC(S)A 2000 were not merely amended in 2003, but instead were repealed (for new cases) and replaced by parallel provisions expressed by Section 227 Criminal Justice Act 2003.[42] The coherence and purity of a single source of law was almost immediately lost.

That coherence and purity is achievable. Parliament can always, of course, enact any provision on sentencing procedure that it desires. But what must be encouraged, is that when parliament enacts new sentencing law after the enactment of the Code, it does so by amending the Code. "Do what you like to sentencing law, but do it through amendment to the Code!"

The aim is that the Code will remain the single point of primary legislation for any person concerned with sentencing. There will be no restriction on the substance of what can be enacted in future sentencing legislation, but the new provisions should all be made to fit within the framework of the Code. Parliamentarians will be encouraged to apply the clean sweep policy to changes when procedural changes and types of sentence are introduced after the Code has been enacted. So, for example, if a new disposal becomes available, it should be made availa-

42 Which has itself now been repealed and replaced by the confusingly numbered Section 226A CJA 2003, per changes made by Legal Aid, Sentencing and Punishment of Offenders Act 2012.

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ble in the Code for *all convictions after the date of commencement, not all offences* occurring after the date on which the change came into force.

The creation of a new Code cannot force parliament to act in any specific way. But, with the new Code and the clean sweep on transition, the Commission will encourage a change in culture. The major challenge will be to get parliament to recognize the need to make new Acts amend the Code rather than be free-standing sentencing provisions.

Various techniques can be encouraged to promote the lasting health and sanctity of the Code:

1. When new provisions are enacted in subsequent Acts of Parliament they should, by the time they are in force and inserted into the Code, state on their face their commencement date. When a new type of sentence is introduced in 2020, it should be inserted into the Code. The enacting provision in the relevant Bill in 2020 should also include a provision stating that upon its implementation and insertion into the Code the provision should then include explicit reference to the date from which it applies. "This provision applies to all convictions on or after 1 April 2021."
2. The Code can be 'republished' every time new provisions are commenced. It will remain a single point of primary legislation for all sentencing procedure. Such models of sentencing Acts have worked successfully for decades in other jurisdictions,[43] though it is recognized that legislation having 'editions' in the manner of a practitioners text amounts to a significant culture change.
3. Amending legislation should be drafted with the Code in mind. Once sentencing provisions have been enacted, it is usually the case that their implementation date can be planned well in advance. In an ideal world not only would new sentencing provisions be inserted in the Code, but they would be scheduled to take effect at the same time as updates to the Criminal Procedure Rules. These dates would be anticipated and planned for with schemes of education, training, publication etc. Coincide.

The dynamism of the Code, and what distinguishes it crucially from a mere consolidation, is that future sentencing procedure legislation will be accommodated within it. This will allow it to remain the single, comprehensive source of the legislation governing sentencing procedure.

E Enacting the Code

The Law Commissions Act 1965 assigned to the Law Commission for England and Wales (and for Scotland), the duty to review the law with a view to its systematic development and reform, including in *particular the codification* of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernization of the law. The Law Commission has the statutory duty, the

43 *See*, for example, the Sentencing Guidelines adopted in Minnesota, available at: <http://mn.gov/sentencing-guidelines/guidelines/>.

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experience and the expertise required to take on a challenge as enormous as codifying the law of sentencing.

English law, however, does not recognize Codes as a distinct species of legislative enactment. It can be used here as a convenient short hand for 'consolidation "plus"', that is to say consolidation of the existing law with the inclusion of policy refinement where necessary to maximize simplicity and make drafting innovations. The Commission, in their report on the Form and Accessibility of the Law Applicable in Wales, dealt with the differing meanings of codification and consolidation.[44] The Sentencing Code will not be a code in either the continental sense, nor in the sense of bringing provisions of common law on to a statutory footing. Instead, the Sentencing Code will be a code in the sense that it will remain the single source of primary legislation on that subject. Its comprehensive nature should be preserved and subsequent amendments incorporated.[45]

The Law Commission propose to use the consolidation procedure to bring about the enactment of the new Code. This has two major advantages:

1. It allows for a bill to avoid taking time on the floor of the Houses as a Joint Parliamentary Committee, will scrutinize the provisions. Their scrutiny and the expertise of the Office of the Parliamentary Counsel will ensure that the new law is a faithful reproduction of the effect of the law it replaces. Crucially for the sentencing Code, this will also avoid other parliamentary amendment to sentencing policy at that stage: no amendments will be tabled and the Code will not trigger contentious debate.
2. The consolidation route allows principled law reform to take place with little or no cost to the now Brexit-focused legislative timetable. The passage of the Code will not be adversely affected by the premium on parliamentary time.

With the above in mind, however, the Code Bill will need to go beyond pure consolidation or else it will simply be a renumbered (and vast) replication of the current law. The 'clean sweep' approach to the Code's transition into law and to various other consistency and streamlining changes that are suggested, mean that a marginally more involved process is required.

Precursor, or paving, clauses, contained within a separate legislative vehicle from the Code itself, will enable the government to make certain 'pre-consolidation amendment' changes to the current law, as well as provide for the transitional and saving provisions to be swept out of the law. These powers will be applied to the current law the instant before the consolidation takes place; thereby enabling a faithful consolidation of the 'current law'. The success of this approach is dependent upon continuing political support for the Code project and ultimately upon the inclusion of the paving clauses within another Bill passing into force through parliament in the usual manner.

The Commission published a final consultation paper alongside the draft Sentencing Code Bill in summer 2017.

44 'Form and Accessibility of the Law Applicable in Wales', 2016, LC366, ch 2.

45 *Ibid.*, paras 2.12-2.14.

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F Conclusions

In the first 50 years since its inception, the Law Commission has established itself as the authoritative voice on law reform in England and Wales. It has secured an international reputation for not only the quality of the reform recommendations it makes but also for the rigour of the law reform processes it adopts. In this latter respect the Commission has an unrivalled expertise.

By remaining faithful to its statutory obligation "to take and keep under review all the law" the Commission plays a valuable advisory role in government by producing an effective programme for legislative reform and therefore in helping to maintain a healthy statute book. The sentencing code will certainly be consistent with these functions.

Writing in the *Law Quarterly Review* in 1971, Lord Gardiner said:

> I still hope to see my ideal statute. It will be a codification of the statute law in one field (which will already have been consolidated) and the existing case law. It will be written in ordinary simple words and will be accompanied by a commentary explaining what are the things which it is intended to achieve ... It will of course by then be axiomatic that you never have another Act on the subject at the same time. You simply amend the code.[46]

46 'The Role of the Lord Chancellor in the Field of Law Reform', *Law Quarterly Review*, Vol. 87, 1971, p. 326.

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