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The Drafting of Criminal Legislation: Need it be so Impenetrable?

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In a recent case, Mitting J said this:

> [1] "Section 174(1)(b)(i) of the Criminal Justice Act 2003 requires a court passing sentence to explain to an offender in ordinary language the effect of the sentence. This requirement has been in place since 1991. These proceedings show that, in relation to perfectly ordinary consecutive sentences imposed since the coming into force of much of the Criminal Justice Act 2003, this task is impossible. Indeed, so impossible that it has taken from 12 noon until 12 minutes to five, with a slightly lengthier short adjournment than usual for reading purposes, to explain the relevant statutory provisions to me, a professional judge.
>
> [2] The position at which I have arrived and which I will explain in detail in a moment is one of which I despair. It is simply unacceptable in a society governed by the rule of law for it to be well night impossible to discern from statutory provisions what a sentence means in practice. That is the effect here..."[1]

He is not the first judge to make a comment of this sort. In recent lecture, Sir Igor Judge described a similar problem:

> "An example is the case of S. The simple question was whether a defendant was guilty of an offence of failing to register as a sex offender contrary to the 2003 Sexual Offences Act. Any intelligent observer would have been baffled to discover whether there could be any doubt about whether the defendant was or was not guilty of this criminal offence.
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> For the Court of Appeal to decide the issue, we heard detailed submissions about the legislative provisions in no less than five statutes...
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> The problem was so complicated that three judges had to reserve judgment because at the end of the hearing we could not work out whether or not the defendant was guilty. After reserving judgment we concluded that no offence had been committed. Yet this appellant had spent time in custody. This is not a unique example."[2]

In this lecture I propose to ask two questions:

> Why do we enact criminal justice legislation that is impenetrable?

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[1] R v HMP Drake Hall and Minister of State for Justice [2008] EWHC 207 (Admin) (31 January 2008).
[2] "Current Sentencing Issues", Lincoln's Inn, London, 29 October 2007.

What could be done to avoid this happening?

I
Why it happens

It is traditional to blame the Parliamentary draftsman for statutes that are impenetrably drafted. In Cutler v Wandsworth Stadium,[3] Lord du Parq made the point with gentle irony:

> "I trust, however, that it will not be thought impertinent, in any sense of that word, to suggest respectfully that those who are responsible for framing legislation might consider whether the traditional practice, which obscures, if it does not conceal, the intention which Parliament has, or must be presumed to have, might now safely be abandoned."

But in my view, if Parliamentary counsel are to blame at all, they are only partly so. The real roots of the problem lie elsewhere.

In my view, the first reason and main reason why we end up with impenetrable legislation in the area of criminal justice is that those who hold political power try to make much of it, too quickly.

"Binge law-making"

In his recent talk, which I have already quote, Sir Igor Judge said "The tidal wave of criminal justice legislation is relentless, and although it constantly comes in, unlike the tide it never seems to ebb."

At one time, Criminal Justice Acts were rare events. But speaking ironically, my Cambridge colleague Professor David Feldman QC was heard to say the other day that "It has become a constitutional convention that there should be a Criminal Justice Act every year."

For this lecture I tried to collect some statistics; but it was not easy, because there has been so much criminal justice legislation over the last ten years that accurate figures are now hard to give. However, by my reckoning we have had since 1997 no less than 55 Acts of Parliament altering the rules of criminal justice for England and Wales – and if you count those enacted for Northern Ireland, and for Scotland before devolution, the number of Acts of Parliament in the area of criminal justice is nearer 70.[4]

The problem is not only one of number, but of size. Many of these new Acts are enormous: the Criminal Justice Act 2003 contains 339 sections and 38 Schedules; the Serious Organised Crime and Police Act 2005, 179 sections and 17 Schedules; the Sexual Offences Act 2003, 143 sections and 7 Schedules; the Serious Crime Act 2007, 95 sections and 14 Schedules; and when I last looked at it, the Criminal Justice

[3] [1949] AC 398, 410.

[4] Andrew Keogh, "The justice merry-go-round" 157 New Law Journal 1037, says the Criminal Justice and Immigration Bill 2007 is the 68th piece of criminal justice legislation since 1997.

and Immigration Bill, currently before the House of Lords, contained 202 clauses and 38 Schedules – so big that it had to be printed in two volumes.

Over the last ten years so many new criminal offences have been created that nobody can count them. In a speech in the summer of 2006, Nick Clegg MP, then the Liberal Democrat's spokesman for home affairs, stated that no less than 3,000 had been created in the 10 years since Tony Blair had been in power: a claim which Channel Four News investigated, concluding that "Clegg seems to be on pretty solid ground". On 25 November 2005, Baroness Scotland, in answer to a Parliamentary question from Lord Tebbit, owned up to 404 new offences emanating from the Home Office alone. She could not speak for other Departments, she said. "More detailed information is not held and could be identified and listed only at disproportionate cost."

Some months ago, Private Eye satirised what has been happening with a spoof news item, which at this point it seems appropriate to reproduce.

What The Eye Says

THE SHAME OF BRITAIN'S BINGE LAW-MAKING

BRITAIN faces an epidemic of round-the-clock law-making which threatens to plunge the country into a new Dark Age.

Evidence is mounting to show that the government's policy of 24-hour law-making is producing nothing but confusion and chaos in the streets of all our major cities.

Citizens no longer have any idea of what is or is not legal, and many, it is clear, are so bemused that they no longer even know which country they are living in.

An only too typical scene of life in Britain today was witnessed by shocked observers recently in the heart of London's once-respectable Westminster, only a stone's throw from Buckingham Palace.

Groups of middle-aged men and women could be seen sprawling about on green, leather benches, in an all-night session of reckless law-making.

"I've never seen anything like it," said one horrified New Zealand tourist, Mary Maori, 26. "These people were totally out of control, just spewing out law after law. It was sickening."

We say this: *It is time this shameful madness was stamped out once and for all. There ought to be a law against it.*

When so much legislation is passed so quickly, Parliament does not have the time it needs to scrutinise the text. To get big Bills through quickly, the government makes use of muscular procedures created in the Nineteenth Century to cope with "filibustering" – the exploitation of debate by Irish nationalist MPs to hold up the legislative process as a protest. From time to time, courageous members of one or other House have protested at important criminal justice legislation being pushed through Parliament in this way without proper scrutiny or debate: most famously Anne Widdecombe MP, who staged a "sit-in" against this in March 2001. But yet it still happens. In truth, great tracts of the Criminal Justice Act 2003 were shovelled through Parliament with no proper examination of the detailed drafting in either House.

If "binge lawmaking" means insufficient scrutiny in Parliament, it also often means the legislation is badly drafted at the outset – and so, paradoxically, the Bill needs more of the scrutiny in Parliament which it will not get.

A government Bill is invariably drafted by Parliamentary counsel, whose job it is to turn the plans of the Minister and his civil servants into legislative prose. They do this on the basis of "instructions" which are drawn up for them by the "Bill team" – a small group of civil servants from the Department from which the legislative proposal emanates, aided by one of the Department's in-house lawyers. To draw instructions properly takes time. As the Cabinet Office's official Guide to Legislative Procedures says:

> "The translation of policy into instructions can often highlight points which may not have been considered in detail previously or identify an inconsistency in the policy. The instructions may need to go through several drafts before these points are addressed and they are ready to be sent to Counsel. It is essential that adequate time be allowed for this process. Poorly drafted, or inadequately thought-through instructions can cost time later in the drafting process."[5]

Once the instructions are received, an "iterative process" then supposedly takes place, in which Parliamentary counsel produce a draft version of Bill, and this is batted to and fro between the "Bill team" and Parliamentary counsel for as long as it takes for the "bugs" to be discovered and removed, and after which it is ready to be introduced. But if there is insufficient time this does not happen – and a "buggy" Bill is the result.

Did we really need all the torrent of criminal justice legislation that has flowed though Parliament in the last ten years?

In my view, the answer to this is "clearly no"**.** I believe that much of it was unnecessary; and none of it needed to be enacted with excessive haste.

Some of the last ten years' criminal justice legislation seems to me to be completely futile. To take just one example out of many, look at section 47 Anti-terrorism, Crime and Disorder Act 2001, which provides that:

> "(1) A person who
> (a) knowingly causes a nuclear weapon explosion… is guilty of an offence.
> …
> (5) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for life…"[6]

Other substantial parts of the recent wave of criminal justice legislation use the criminal law in situations where it is in my view inappropriate to use it. Large parts of the Sexual Offences Act 2003 display this fault: including all those which prohibit sexual acts between consenting adults, and those which make all sexual acts between

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[5] At page 30. The document as available online at http://www.cabinetoffice.gov.uk/upload/assets/www.cabinetoffice.gov.uk/secretariats/guide_legislative_procedure.pdf

[6] Subsection 9 provides that the new offence shall "cease to have effect on the coming into force of the Nuclear Explosions (Prohibitions and Inspections) Act 1998"; i.e. the Government had already caused Parliament to pass an Act making it an offence to cause a nuclear explosion three years earlier – but had then not bothered to bring it into force!

consenting children punishable: with sentences of up to 5 years, 14 years, or life, depending on who does what, and what it is they do.

And even more worryingly, significant parts of the criminal justice legislation passed in the course of the last ten years were introduced and pushed through Parliament with no serious attempt to think about the practical consequences.

Of this, the most striking example are the sentencing provisions of the Criminal Justice Act 2003. Even the proverbial lemming could have foreseen that requiring judges to pass indeterminate sentences of imprisonment for public protection, and (in effect) requiring them to impose long fixed periods of imprisonment on those who are convicted of murder, were bound to inflate the prison population and so create a crisis of overcrowding unless we built a lot more gaols. And of course a crisis of prison overcrowding is exactly what this legislation brought about. The average prison population of England in 2003 was just over 73,000 – a record in itself. On 22 February 2008 the Ministry of Justice informed us that it had now reached 82,068 – 96 more than "operational capacity".

Some months ago, this grim situation was summed up by in a cartoon by the Banx in the Financial Times, which showed two glum policeman on patrol in an unlovely city centre, one of whom was saying to the other: "Typically British, isn't it? A police state without enough prisons."

It is easy to laugh at all this, but in fact it is extremely serious. For a government to push through an authoritarian reform of sentencing without providing the means for the sentences to be carried out is irresponsible in the extreme. As Beaumarchais said: *Je me presse de rire de tout, de peur d'être obligé d'en pleurer*.

Bungling, even when we are not legislating in a hurry

But even when we take our time, and enact criminal justice legislation without rushing it, we still quite often contrive to make a botch of it.

It seems to me that we do so, in particular, by passing criminal justice legislation that is:

(a) much too detailed and prescriptive;
(b) fails to take account of the basic rules of substantive criminal law, or criminal procedure, or both;
(c) is obtuse – and makes a meal of doing simple things, apparently for the sake of it.

Let me give you some examples.

The first comes from the Sexual Offences Act 2003. There are many reasons why I particularly dislike this piece of legislation –in particular because it is so

authoritarian.[7] But my criticisms now are technical ones related to the drafting, not libertarian objections to the policy that it is designed to implement.

A major criticism of the drafting of this Act is that creates an excessive number of criminal offences. The French and German Criminal Codes manage to cover all forms of sexual misbehaviour with around six offences each; but the Sexual Offences Act 2003 employs no less than 50. The result, of course, is a huge amount of overlap and repetition. Its purposes could have been achieved by legislation that was a great deal simpler, without any loss of ground.

Most of the physical acts this law proscribes are set out with a wealth of sordid detail: but despite their extraordinary length, some of the sections still fail to do the job that they were meant to do.

A prime example is the new offence of "voyeurism", created by sections 67 and 68. These two sections are as follows:

> "67. (1) A person commits an offence if-
> (a) for the purpose of obtaining sexual gratification, he observes another person doing a private act, and
> (b) he knows that the other person does not consent to being observed for his sexual gratification.
> (2) A person commits an offence if-
> (a) he operates equipment with the intention of enabling another person to observe, for the purpose of obtaining sexual gratification, a third person (B) doing a private act, and
> (b) he knows that B does not consent to his operating equipment with that intention.
> (3) A person commits an offence if-
> (a) he records another person (B) doing a private act,
> (b) he does so with the intention that he or a third person will, for the purpose of obtaining sexual gratification, look at an image of B doing the act, and
> (c) he knows that B does not consent to his recording the act with that intention.
> (4) A person commits an offence if he instals equipment, or constructs or adapts a structure or part of a structure, with the intention of enabling himself or another person to commit an offence under subsection (1).
> (5) A person guilty of an offence under this section is liable-
> (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
> (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years.
>
> 68. (1) For the purposes of section 67, a person is doing a private act if the person is in a place which, in the circumstances, would reasonably be expected to provide privacy, and-
> (a) the person's genitals, buttocks or breasts are exposed or covered only with underwear,
> (b) the person is using a lavatory, or
> (c) the person is doing a sexual act that is not of a kind ordinarily done in public.
> (2) In section 67, "structure" includes a tent, vehicle or vessel or other temporary or movable structure."

Between them, these two sections use 334 words to create three separate criminal offences – but yet in several obvious ways they still fail to deal with the essential problem.

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[7] Though despite this, or possibly because it, it was the piece of legislation of which the Home Secretary who introduced it claimed to be particularly proud. Stephen Pollard, David Blunkett (2005), quotes Mr Blunkett as saying, with his characteristic modesty, that the Sexual Offences Act "demonstrates that it sometimes takes a very robust and very tough Home Secretary to be able to do things that others have not done" (see p.307).

One needless difficulty is that a legal ingredient in all three offences is a forbidden purpose: to be criminal, the act must be done "for the purpose of sexual gratification". But why should this be so? Does it make it any better for the victim if he or she is "perved on" for some purpose other than to give someone else a sexual thrill? For example, if the aim of the exercise is to cause hurt or humiliation by publishing intimate pictures of the victim on a website?

Another problem is that, although these offences cover spying on a person's private acts, they fail to cover spying on their private parts: for example, by the man who uses a video camera hidden in shopping basket to look up women shoppers' skirts. And so when a man was recently caught doing this, it was impossible to prosecute him under these provisions of the Sexual Offences Act, and Crown had to resort to the common law offence of outraging public decency – an offence which the Court of Appeal then had to construe extensively, because this sort of behaviour was some way removed from anything that had been held to fall within the scope of it before.[8]

The other day, my Cambridge colleagues and I tried our hands at drafting a statutory provision about voyeurism which would have done the job that sections 67 and 68 set out to do, but properly; and with relatively little effort we came up with this:

> "(1) It is an offence to spy, without consent, or lawful authority, on another person's private bodily parts or private bodily functions.
> (2) To do so is punishable with two years' imprisonment on indictment, or six months' imprisonment and a fine not exceeding the statutory maximum on summary trial."

- a provision that consists of 49 words, instead of the 334 that are used in sections 67 and 68!

Another problem with the Sexual Offences Act 2003 is that, despite the excessive detail, it still contrives to leave various legally essential points unclear. For example, sections 5 to 8, which impose very heavy penalties on sexual acts with children under 13, fail to say whether it is an ingredient in these offences that the defendant should be aware that the other person involved is under age: an obvious omission which has led to an appeal which is currently before the House of Lords.[9]

Of criminal justice legislation that is over-complicated many other examples could be given. A very recent one is to be found in Part II of the Serious Crime Act 2007. This abolishes the common law offence of incitement, and replaces it with a new and wider form of criminal liability for giving either encouragement, or help. To do so, it creates no less than three separate new offences, spread out over 24 sections, involving 3,458 words – or 5,130 if you count the Schedule that comes as part of the pack as well: the size of an article in a legal journal. And some of the provisions are quite astonishingly obscure. For those who enjoy linguistic puzzles, I commend section 47 in general, and section 47(8)(c) in particular, which says:

> (8) Reference in this section to the doing of an act includes reference to—
>
> (a) a failure to act;
>
> (b) the continuation of an act that has already begun;

[8] R v Hamilton [2007] EWCA Crim 2026; [2008] 1 WLR 107; [2008] 1 CrAppR 171.
[9] R v G; for the Court of Appeal proceedings, see [2006] EWCA Crim 821, [2006] 1 WLR 2052.

> *(c) an attempt to do an act (except an act amounting to the commission of the offence of attempting to commit another offence).* (My italics)

In a Continental criminal code, I believe that the task that these provisions carry out at enormous legislative length would have been done by a single, relatively brief section. And that such economy of language is possible in principle, even on this side of the Channel, is suggested by clause 47 of the Law Commission's now (alas!) long-forgotten Draft Criminal Code, which framed a workable offence of incitement with no more than 264 words.

For a good example of legislative obtuseness, we should look at Part I of the Extradition Act 2003.

This was designed to give legal effect to the Brussels Framework Decision creating the European Arrest Warrant. Like the Sexual Offences Act 2003, its provisions are exceptionally long-winded: much longer, I believe, than the implementing statutes passed in any other Member State.[10] And yet, despite all the effort that has gone into their construction, it has caused all sorts of problems – of which no less than four have so far engaged the attention of the House of Lords.

In the most recent of these cases, Lord Bingham pointed out that many of these problems stem from the fact that, when implementing the Framework Decision, we did not copy the wording, but paraphrased it:

> "Once again, as in Office of the King's Prosecutor, Brussels v Cando Armas [2006] 2 AC 1, paras 26-27 and Dabas v High Court of Justice in Madrid, Spain [2007] UKHL 6, [2007] 2 AC 31, para 25, it has to be said that the fact that the language of Part 1 of the 2003 Act does not match the requirements of the Framework Decision has given rise to difficulty."[11]

The Framework Decision was written in language that is clear and relatively simple, and Part I of the Extradition Act 2003 was meant to give effect to it, not to frustrate it. So why on earth, when drawing up the implementing legislation, did we not adopt the wording of the instrument to which we were attempting to give effect?

So why do blunders of this sort happen?

I believe that there are several explanations these technical defects.

- attempted micro-management

The main reason for excessive complexity in criminal justice legislation is, I believe, a desire to micro-manage the criminal justice system from Whitehall: a state of mind which seems to affect some civil servants (and possibly their Ministers as well).

A striking example of this attitude is Part II of the Youth Justice and Criminal Evidence Act 1999, which regulates a number of "special measures" by which a

[10] They consist of 68 long sections – as against, for example, 40 considerably shorter ones in France.
[11] Pilecki v Circuit Court of Legnica, Poland [2008] UKHL 7, at [22].

criminal court may help a vulnerable witness to give evidence. On the drafting of these provisions, Sir Robin Auld said this:

> First... they are extraordinarily complicated and prescriptive. I can only assume that those drafting them have no idea of what judges and criminal practitioners have to cope with in their daily work of preparing for and conducting a criminal trial or of what they need as practical working tools for the job.[12]

To the complexities inherent in these provisions, a further twist is added by section 18(2), which provides that

> "Where... a special measure would... be available in relation to a witness in any proceedings, it shall not be taken by a court to be available in relation to the witness unless
>
> (a) the court has been notified by the Secretary of State that the relevant arrangements have been made available in the area in which it appears to the court that the proceedings will take place, and
>
> (b) the notice has not been withdrawn."

This provision has produced a shower of fussy notices, issued in different terms at different times to different courts, first by the Home Office and now by the Ministry of Justice, in relation to section 27 of the Act – the provision which in principle allows the evidence in-chief of a vulnerable witness to be given in the form of a video-interview conducted ahead of trial. And these notices specify not only whether a given court is allowed to admit video-recorded evidence at all, but also presume to tell each court the types of offences at trials for which the procedure may be used; and in some cases even add a further layer of complication in relation to the date of the offence.

The latest in the series, entitled "Ministry of Justice Circular 25/06/07: Complainants in sexual offences tried in the Crown Court: implementation of Section 27 of the Youth Justice and Criminal Evidence Act 1999" is a document consisting of six A4 pages, issued under the name of a civil servant who grandly describes himself as the "Head of the Better Trials Unit, Office for Criminal Justice Reform". And the last page of this imposing document is an Appendix, constructed in the style of a football pool, with columns running across and up and down, to enable the judicial user to discover what special measures, by grace of this important functionary, he is permitted to use, in which court, and when trying what offence.

This Circular was issued, I believe, without any consultation beforehand, and without any attempt to see that those who knew about it were informed about it afterwards. This I learnt from the Resident Judge of one of our busier Crown Courts, who recently sent a copy of it to me with a letter saying:

> "Yesterday – for the first time – my attention was drawn to the enclosed by Counsel... My Court Manager and I (and others) were never sent this, or notified of its existence, neither had any of my judges spotted it. It applies,

[12] Review of the Criminal Courts (2001), chapter 11, §126.

> as you can see – only to "investigations" after 1/9/07 - not a sensible way to implement such a change as the date an investigation starts is not always apparent (particularly in 'historic' cases)."

- ignorance of legal principles

When blunders take the form of overlooking basic rules, the explanation can only be that those who prepare the legislation (or more probably, the instructions to Parliamentary counsel) lack a basic knowledge of the underlying law; and do not trouble to consult with those who have the knowledge they do not.

The reason that sections 5 to 8 of the Sexual Offences Act 2003 are silent as to the mens rea requirement can only be that those who drew these sections up were unfamiliar with the important rule, as laid down by the House of Lords many years ago in Sweet v Parsley,[13] that where a statute is silent as to the mental element a requirement of mens rea is presumed. There seems little doubt that, when preparing this legislation, the Home Office meant these offences to carry strict liability in this respect;[14] and the reasoning seems to have been that if no mental element was mentioned, an offence of strict liability would automatically result. But because those concerned had forgotten about Sweet v Parsley, the provisions were drafted in way that left this important point uncertain.

And the plethora of offences relating to sexual acts with children appears to stem from the fact that those who drafted it were equally unfamiliar with the rules of criminal procedure. The original Bill contained one group of offences designed to protect children under 13, and another group, less severely punishable, to protect those aged between 13 and 16; and in an attempt to ensure that those who interfered with children under 13 were invariably prosecuted for the more serious offence, the Bill contained a clause forbidding the courts to convict a defendant of any of the under 16-offences "if what is proved against him" is one of the under-13 offences. This, of course, would have enabled a defendant prosecuted for one of the less serious child sex offences to avoid conviction by proving that he was actually guilty of one of the graver ones: a trap which should have been obvious to anyone who understood the rules of criminal law and criminal procedure. But it was only when the Bill had reached in its final stages in the House of Lords that this problem was pointed out: at which point the under-16 offences were hurriedly redrafted so that they overlap with the under-13 offences – so making the reader wonder why it was necessary to have the first group at all.

- a preference for complicated language

As to why those who draw up criminal justice legislation sometimes obtusely use complicated forms of words when simpler ones would do the job, and do it better, I can only speculate.

My guess is that it is partly a question of the "house style" used by Parliamentary counsel. Like other groups of specialist lawyers, they have their own way of doing

[13] [1970] AC 132.

[14] One of the notions underlying the reform was that no person under 13 is ever mature enough to give valid consent to any form of sex: see the White Paper Protecting the Public (Cm. 5668), §36.

things, with which they feel comfortable, and which, quite understandably, they prefer to use. And this style, I suspect, is influenced by the particular mental skills which as a group they have, the first of which is an astonishing ability to see their way through linguistic mazes in which normal mortals are likely to get lost. And like other very clever people with a quirky skill – mathematicians, miocro-engineers, or linguists – they tend to assume that anyone else could do the same as them, if only they would make the necessary effort.

And I also suspect that the use of convoluted language is, at least occasionally, deliberate.

To get possibly contentious legislation through Parliament, wily would-be legislators have a range of relatively well-known techniques. One is "decking the Christmas tree": hanging controversial clauses on an already laden Bill, where they are masked by the dazzle from other other items that are brighter. Another is "red ragging": the inclusion of a particularly controversial clause which the government is prepared to drop, to deflect the charge the Parliamentary bulls would otherwise direct at clauses which the government is not. And a third, I suspect, is "wrapping up": putting controversial proposals into complex language in the hope that Members of Parliament will not notice them, and the further hope that, when they reach the courts, the judges, who are used to this sort of convoluted language, will be able to make sense of it; codification, in other words – but as the term was understood in Bletchley Park, rather than by the Emperor Napoleon.

II
What could be done?

To ease the problem I have five suggestions – ranging from the utopian, to the severely practical.

(i) a change of attitude by politicians

First, of course, we need a change of attitude by our politicians.

Since the mid-1990s, successive governments have got into the habit of passing legislation in the area of criminal justice that is based on "spin" instead of on research.

Legislation is widely thought to be the sign of Ministerial virility, and so Ministers who aspire to power feel that they must promote a lot of it. So things are done, not because they need to be done, but because Ministers feel the need to do them. And in recent years, much of the criminal justice legislation the government has promoted has been designed to please what was believed to be public opinion, by reacting to "scandals" blown up the popular press.

This trend began with the Crime (Sentences) Act of 1997, which introduced mandatory minimum sentences; a piece of legislation, passed in the teeth of opposition from everyone who knew anything about sentencing, which was based on the false premise that the judges had gone "soft on crime". And it was a similar spirit

which inspired the government's recent attempt, now happily abandoned, to amend the Criminal Appeal Act so that the Court of Appeal could no longer quash convictions on what the Home Secretary who promoted the Bill described as "purely procedural grounds". This proposal was based on two mistaken, but widely held views about the process of appeal: first, that Court of Appeal quashes the convictions of the visibly guilty on account of procedural errors that are trivial, when it does not; and secondly, that when a conviction is quashed on account of procedural irregularity, the defendant then "walks free" – when if the case is serious, he is almost certain to be retried, and if guilty, once again convicted.

Legislating about criminal justice in the hope of pleasing public opinion as reflected in the popular press is a dangerous and foolish game to play, because on criminal justice matters, public opinion – as misled by the popular press – is seriously misinformed: a point which the Lord Chief Justice, and the President of the Queen's Bench Division, have made repeatedly, with reference to public misperceptions about the levels of sentences.

The point was made in telling language by Lord Phillips CJ in a speech he made to the Commonwealth Law Conference in Nairobi in September 2007, and in what follows I shall quote him.

The editor of the Daily Mail, Lord Phillips said, had told the House of Lords Select Committee on the Constitution that

> The public saw 'an increasingly lenient judiciary handing down lesser and lesser sentences'. [The Editor] had commissioned a poll of 1,000 members of the public and only 18% had faith that the sentences they wanted passed against criminals would be reflected by the courts whereas 75% felt that sentences were too lenient.

But, Lord Phillips pointed out,

> This perception is totally at odds with reality, for sentences imposed by judges have been becoming steadily heavier.

And yet the Editor, Lord Phillips said,

> accepted no responsibility for the public's misconception, notwithstanding editorial comment such as this in an edition of his own newspaper:
>
> > *'Britain's unaccountable and unelected judges are openly, and with increasing arrogance and perversity usurping the role of Parliament, setting the wishes of the people at nought and pursuing a liberal, politically correct agenda of their own, in their zeal to interpret European legislation.*'

In my view, it marks a grave deterioration in the standards of behaviour in public life that certain of our politicians (of both major parties) have been prepared to play the demagogue and legislate in criminal justice matters in response to this sort of misunderstanding, when they should be using their position to correct it.

In a democracy we count on our politicians not to tell us lies. And it equally important, I believe, that they should avoid using to their political advantage the misinformation spread by others: in particular, by irresponsible sections of the popular press.

(ii) an end to micro-management by legislative text

Secondly, I believe we need a change of approach by our civil servants, and their political masters, as to the level at which detailed legal rules in the criminal justice system are made.

In broad terms, I believe it needs to be accepted that:

> - primary legislation is appropriate for making rules at a high level of generality;
> - secondary legislation (e.g. Criminal Procedure Rules) is appropriate for making rules at a lower level of generality;
> - matters of detail usually can and should be left to the judges to sort out, by case-law, or in some cases, by issuing Practice Directions.

It is not acceptable, nor is it practically workable, for the government (in whatever sense) to try to micro-manage the criminal justice system by means of over-detailed and prescriptive legislation.

(iii) those who prepare legislation should be prepared to listen to the experts

Thirdly, I believe that those who draw up plans for criminal justice legislation need to be more willing than they have usually been in the recent past to talk to other people in the criminal justice system before they produce proposals to change it. In particular, they should be prepared to talk to the judges, who run the system and will have to implement the changes, and to academics working in the area, who spend their lives thinking and writing about it.

Our civil service has traditionally operated on the assumption that, in order to reach level of high responsibility in any government department, no specialist knowledge of the area in question is required; a tradition satirised in the celebrated line from "Yes Minister": "Of course I have no formal training in economics. I wouldn't be head of the Economic Division if I did!" Whilst this tradition of intelligent generalists has its merits, it breaks down unless the non-specialists who run the show are prepared to treat the specialists in their area of authority with respect, and listen to what they have to say.

To make this point, here is the story of a legislative provision which is a success. Section 53 of the Youth Justice and Criminal Evidence Act is as follows:

> **"Competence of witnesses to give evidence.**
> (1) At every stage in criminal proceedings all persons are (whatever their age) competent to give evidence.

...
(3) A person is not competent to give evidence in criminal proceedings if it appears to the court that he is not a person who is able to—
(a) understand questions put to him as a witness, and
(b) give answers to them which can be understood."

The germ of this provision was contained in the report of a Home Office working group, entitled "Speaking up for Justice",[15] which said we needed to change the rules on competency of witnesses, and suggested how this might be done. An academic with experience in this area wrote an piece in the New Law Journal[16] pointing out, politely, that the Home Office had already caused Parliament to pass two laws in this area that were incomprehensible and had failed to achieve their intended purpose, and suggesting the form of words which – to the surprise and pleasure of the writer – were then adopted in the Bill. And when the resulting provision came before the Court of Appeal in the case of Macpherson two years ago, it was praised as written in "commendably clear in its language"![17]

(iv) employing draftsmen who are specialists

Fourthly, I think that it would help to produce intelligible criminal justice legislation if, when legislative text is produced, the job could be done by Parliamentary counsel who have some specialised knowledge of the area.

At present, the office of Parliamentary counsel works on the basis that all its members are specialists in drafting legislation, but none of them have any specialist knowledge of any particular area of the law. And broadly speaking, the job of drafting Bills is distributed among them on the "cab rank principle"; each project, as it arrives, is given to the person who happens to be free. To this usual practice there is a quasi-exception in the case Finance Bills, one of which is almost always in the pipe-line, and which are thought to require a particular level of knowledge and experience to get them right. It would be helpful, I believe, if the same thing could be done for legislation in the area of criminal justice.

(v) codification

But fifthly, and most importantly, I believe that what is really needed in the area of criminal justice is a programme of codification.

The case for this has been argued many times, usually in terms of the need to make the law accessible to those who have to use it.

If anyone is still unconvinced about the advantages in terms of accessibility of having Codes, I suggest they take a legal holiday in France. There – as is usual in continental Europe – the basic rules of criminal law and criminal procedure are set out in two Codes: the Code pénal and the Code de procédure pénale. Every year, each of these two Codes are republished in their current and updated form, with annotations, by the

[15] Home Office, June 1998.
[16] "Competency: children and witnesses with learning disabilities" (1998) 148 New Law Journal 1472, 1526; the form of words were inspired by article 196 of the Italian Code of Criminal Procedure.
[17] [2006] 1 CrAppR 459, 466.

legal publisher Dalloz, at a modest price. You can buy both of them for a combined price of around 100 euros, which in sterling is about £75: a bargain compared with the equivalent in England, which is the annual subscription to Archbold, which currently costs £360.

And even more helpfully, in France the texts of both Codes are also available in their latest version online, free of charge, from the French government's official legal website, Légifrance; where for good measure, they also publish them *in an English translation too*! (If readers are inclined to disbelieve me, here is a link to the website, and they can see for themselves: http://www.legifrance.gouv.fr/)

Just compare that with the position in this country! In December 2006, the government launched the Statute Law Database, a well-constructed system which in theory does the same. But because it is under-resourced it is not kept up to date, and if you try looking for a statute in the area of criminal justice, it will pop up on your screen together with a "health warning" helpfully informing you that the text you see is not the current version. So back you have to go, at great expense, to LexisNexis or to Westlaw.

It is really no exaggeration to say that, even for someone physically located in this country, it is both easier and cheaper to find the text of a French law than an English one. To me, this situation seems a national disgrace.

But I believe that codification is needed not only to make the law accessible. It is needed just as much to ensure that, when new laws are made, they are made properly, to enable us to avoid the muddles and confusions which were described earlier in this lecture.

This point was made as long ago as 1835 in the First Report of the Statute Law Commissioners:

> "The imperfections in the statute law arising from mere generality, laxity or ambiguity of expression, are too numerous and well known to require particular specification. They are the natural result of negligent, desultory and inartificial legislation; *the statutes have been framed extemporaneously, not as parts of a system, but to answer particular exigencies as they occurred*." [18] (My italics)

If the basis of the law is set out in a Code, this means you have (i) a framework, and (ii) a template. For example, if England had a Criminal Code it would undoubtedly contain a provision in the "General Part" about mens rea – and so when drafting new offences the sort of mistake that caused the case of R v G to take up the time of the courts would be avoided. And if there were a Code, this would also help to ensure a consistent style: including, perhaps, a convention as to the level of detail that it is appropriate for primary legislation to contain.

So where have we got to on codification?

[18] Quoted by C.K.Allen, Law in the Making, (7th ed 1964), 484.

As regards the substantive criminal law, the Law Commission produced a Draft Code back in 1989, which was generally well received. For some years afterwards, the Law Commission made attempts by get it legislated in "penny numbers"; for a time, the Reports that it vainly presented to the Lord Chancellor on different areas of the criminal law were hopefully entitled "Legislating the Criminal Code". But in recent years it seems to have given up, and has been producing Draft Bills that in style and content are completely incompatible with its own earlier Draft Code. The Law Commission Bill that became the Fraud Act 2006 was a model of simplicity and clarity; but by contrast, the Law Commission's Draft Bill on encouraging and assisting crime, on which Part II of the Serious Crime Act 2007 Part II was then based, was exceptionally dense and complicated.

In his Review of the Criminal Courts in 2001, Sir Robin Auld renewed the call for codification. In Chapter 1 of his Review he said that we need a Criminal Offences Code, a Code of Procedure, a Code of Criminal Evidence and a Sentencing Code.

Responding to this, the government, in its White Paper "Justice for All" (2001), accepted the need for codification. In this it deplored the fact that "in Britain, you still need a whole library to understand the law's rules and procedures". And shortly afterwards it took a practical step in the right direction when, in the Courts Act 2003, it included provisions creating a single unified Criminal Procedure Rule Committee: a statutory body charged with the task of rewriting in intelligible form the tangled mass of secondary legislation by which many detailed aspects of criminal procedure were regulated. Under the leadership of Lord Woolf CJ, and ably supported by a civil service team under the direction of Mr Jonathan Solly, this group gave us a "mini-code" of criminal procedure in the form of the Criminal Procedure Rules in 2005.

In the hope of tackling the bigger issue of the uncodified primary legislation, the Criminal Procedure Rule Committee then set up a Codification Group. Of this Sir Robin Auld was chairman, and several academics, including myself, had the privilege of being members too.

With the support of Lord Falconer, as well as of the Lord Chief Justice and the President of the Queen's Bench Division, this Group supervised the collection in one place of all the primary legislation, and the creation of a computer programme to navigate around it: all with a view to rationalising and organising the material, so that it could eventually be turned into an English equivalent of the current Scottish code of criminal procedure, the Criminal Procedure (Scotland) Act 1995. This work was done by civil servants in the Department of Constitutional Affairs during 2005 and 2006, with substantial help from the Law Faculty at Cambridge.

Then towards the end of 2006 the project ran out of money: the Department of Constitutional Affairs had a spending cut imposed on it, and could no longer afford the time of the small team of civil servants working on the project. At this point, Sir Robin Auld wrote to Lord Falconer, who was then the Lord Chancellor, to ask for some more funding.

This request that was met with a rebuff. In refusing to find further funding for the project, Lord Falconer said that he no longer supported it. For this change of mind, he gave the following explanation:

> "... it is by no means certain that in the long term it would amount to a consolidation and nothing more, or that it really would be cost effective and uncontroversial. And I have significant doubts about whether time could be found for it in any legislative programme presently foreseeable."

In 2007, when the Department of Constitutional Affairs turned into the Ministry of Justice, and shortly afterwards Lord Falconer was replaced as Lord Chancellor and Minister of Justice by Jack Straw, Sir Robin Auld wrote to Mr Straw in an attempt to revive the project once again.

The letter that he wrote to Mr Straw received, at first, a rebuff in terms that were identical to the one delivered earlier by Lord Falconer; and written for the Minister, we suspected, by the same official who had penned the first.

But later, when Sir Robin and I met Mr Straw and were able to speak to him directly, he told us – and others too – that he is in favour of the project. And so we are now hoping that he will be able to put the "codification show" upon the road again.

Conclusion

To whom are our laws directed? Or to ask the question in another way, to whom is Parliament speaking when it passes a law?

In principle, the answer, surely, is that our laws in general (and our criminal laws in particular) are directed to our citizens: to set out rules for their behaviour, and to tell them what is likely to happen if they break them.

But what chance has the ordinary citizen of understanding them if, as Mr Justice Mitting and Sir Igor Judge discovered recently, they are written in such obscure language that even professional judges have difficulty in understanding them?

Though the audience here today is mainly judges, it is with a message for the government that I shall close.

In the area of justice, you have to your credit two major reforms that are likely to endure: a Supreme Court, and a Ministry of Justice.

Before you go, please give us just one more: a code of criminal procedure, and code of criminal law?
