The Technique of Codification

By Francis Bennion

The Law Commission has been under a statutory duty to codify the law since it was set up 21 years ago.[1] In an attempt to carry out this duty, it embarked upon a number of codification projects in its early years, but apart from that concerning criminal law all have been abandoned without any outcome.[2]

The project to codify the criminal law was announced in 1968.[3] The Law Commission published a number of working papers on the topic between 1968 and 1974, the first of which discussed the matters to be included in the part of the code it referred to as 'Part I - the General Part'.[4]

The reception given to this working paper encouraged the Law Commission 'to prepare our work on the General Part of the Code in accordance with the broad lines foreshadowed in that Paper'.[5] However nothing more is heard of the General Part for some ten years. Then the Commission reports that its limited resources have prevented it from making any progress.[6]

So in 1980 the Law Commission asked for the aid of the Society of Public Teachers of Law, which agreed to its request.[7] A group of four leading academic lawyers headed by Professor J. C. Smith took on the task.[8] The Law Commission explained that this S.P.T.L. Committee would formulate 'the basis of a code of general principles and a common vocabulary in this field'. This would serve to lay the foundations for the ultimate objective of a criminal code.[9] The results are now before us in the shape of a 246-page report entitled *The Law Commission: Codification of the Criminal Law, a Report to the Law Commission*.[10] This is referred to as 'the 1985 Report' in the remainder of this article, which examines the codification technique used in the incomplete draft Bill embodied in the report.

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[1] Law Commissions Act 1965, s. 3(1).

[2] In 1965 the Commission announced its intention to begin by codifying the law of contract, the law of landlord and tenant, family law and the law of evidence (First Programme of the Law Commission (LAW COM No. 1, 1965), p 3). Nothing more has been heard about codification of the law of evidence. Abandonment of the other unsuccessful projects took place in the following years: family law 1970, contract law 1973, landlord and tenant law 1978.

[3] The Law Commission: Second Programme of Law Reform (LAW COM No. 14), p 6.

[4] *Codification of the Criminal Law: General Principles. The Field of Enquiry* (Working Paper No. 17, 1968), p 1. The paper did not debate whether or not there should *be* a general part, though with any code this is a matter for serious preliminary consideration. However it did raise the basic issues of how far the code should be comprehensive, and whether special interpretation provisions should apply to it.

[5] The Law Commission: Fourth Annual Report 1968-1969 (LAW COM No. 27), para. 41.

[6] The Law Commission: Fifteenth Annual Report 1979-1980 (LAW COM No. 107), para. 1.4.

[7] The Law Commission: Eighteenth Annual Report 1982-1983 (LAW COM No. 131), para 2.26. The Commission earlier indicated that the initiative had come from the S.P.T.L. (The Law Commission: Fifteenth Annual Report 1979-1980 (LAW COM No. 107), para. 1.4), and that version of events is maintained in the 1985 Report (The Law Commission: Codification of the Criminal Law (LAW COM. No. 143; H.C. 270) p. 5).

[8] The Law Commission: Sixteenth Annual Report 1980-1981 (LAW COM No 113), para 1.6. The other three were Edward Griew, Ian Dennis and Peter Glazebrook, the last of whom withdrew in 1984 (The Law Commission: Codification of the Criminal Law (LAW COM. No. 143; H.C. 270) page 5).

[9] The Law Commission: Fifteenth Annual Report 1979-1980 (LAW COM No. 107), para. 1.4.

[10] 1985, LAW COM. No. 143; H.C. 270.

The S.P.T.L. Bill

The draft Bill is divided into two parts, respectively dealing with general principles of criminal liability and the statement of specific offences.[11] It is contemplated that before enactment a part codifying criminal evidence and procedure, and one dealing with disposal of offenders, will be added. The 1985 Report assumes and does not argue the desirability of this arrangement, thus continuing the Law Commission's unquestioning assumption that it is necessary, or at least desirable, to start off a criminal code with a general part.[12]

Yet, as an examination of current European codes will show, there is no unanimity on the desirability of a general part. Some have it, some do not.[13] The long-enduring and much-praised Indian Penal Code does not.[14]

Even assuming that some general provisions are necessary, there is a crucial decision to be made concerning how far principles should be generalised and how far included (repetitively if need be) in the statement of individual offences. The price to be paid for over-generalisation is undue compression of language in the general part, and serious incompleteness in the statement of each offence. Conversely, failure to generalise sufficiently may lead to inconsistency of principle.

The draft Bill follows the usual preference of academic lawyers, and aims at maximum generalisation. Thus Part I includes a group of sections headed 'Preliminary offences'.[15] These deal respectively with incitement, conspiracy, and attempt. In most places the treatment is brief. In the attempt clause for example the Committee tell us they 'have needed to do little more than incorporate the relevant provisions of the [Criminal Attempts Act 1981]'.[16] There is no mention of the argument, advanced by the present writer for one, that the 1981 Act scarcely amounts to codification.[17] On this question of the degree of detail, Friedland's argument concerning the Canadian Criminal Code is of general application-

> . . . simplicity, clarification, and accessibility of the law do not necessarily mean fewer legislative provisions. Indeed, if anything, they require much greater detail than we presently have. You do not simplify by oversimplifying.[18]

If there is more detail, will not the Code be too long? This objection can be met by confining it, as the

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[11] The draft Bill is confined to England and Wales: clause 1(3). This is notwithstanding the Law Commission's early decision that their codes should, so far as possible, extend throughout Great Britain: The Law Commission: First Annual Report 1965-1966 (LAW COM No 4), para 32.

[12] Surprisingly, the Law Commission has never embarked on a detailed examination of the technique it should employ in carrying out its statutory duty to codify the law. This may be one reason for its lack of success.

[13] For an exhaustive discussion of the point see Konrad Zweigert and Hartmut Dietrich, 'System and Language of the German Civil Code 1900', reprinted in S.J. Stoljar (ed.) *Problems of Codification* (Australian National University, Canberra, 1977) pp. 34-62.

[14] Sir James Stephen, who drafted the Indian Criminal Procedure Code, said that the Indian Penal Code was 'triumphantly successful' (cited Acharyya, *Codification in British India* (1912 Tagore lectures) 214). The current editors of Nelson's edition enthusiastically say: 'The Indian Penal Code is the consummation of drafting excellence, towering above all Codes in the world. It is the magnum opus of Macaulay celebrated for his literary craftmanship. Inscribed on the statute book in 1860, the Code is now more than a century old but time can write no wrinkles on its brow' (Nelson, *The Indian Penal Code* (6th edn. 1970) Vol. 1 p. iii). It does not appear that the S.P.T.L. Committee have sought guidance from the techniques or history of this Code.

[15] The novel term 'preliminary offence' is used in preference to the more familiar 'inchoate offence'.

[16] 1985 Report, para. 14.28.

[17] See Bennion, *Statute Law* (2nd edn., 1983) p. 84: 'The gist of the offence is stated in a mere eight lines . . . While the Law Commission report, which runs to more than a hundred pages, deals fully and clearly with the many points that have caused difficulty in this field, the codified provisions in what is now the Act fail to mention most of them'.

[18] M.L. Friedland, 'The Process of Criminal Law Reform' 12 *The Criminal Law Quarterly* (1969-70) 148, 150. The Canadian Criminal code was enacted as long ago as 1892: see 1892 (Can.), c. 29.

Indian Penal Code is confined, to matters of substantive law.[19]

Inclusion of reforms

Lately the Law Commission has largely abandoned its earlier, somewhat naive, belief that the law should be reformed before it is codified. Nowadays the task 'is seen primarily as the restating of the *present* law in a coherent and consistent manner coupled with the suggestion of *limited* reforms where the law is seen to be defective'.[20] Wisely, the 1985 Report follows this line and for the most part eschews embodying reforms in the code. Those with practical experience of the workings of our legislative processes know full well that, if there is to be any hope at all of enacting a code, it must be possible to prevent MPs putting down amendments of substance. Under parliamentary procedure, they can be excluded only if no such amendments are contained in the Bill as introduced.

The Law Commission have been taught this lesson by bitter experience, as a recent lament of theirs indicates-

> . . . the implementation of nearly all recommendations for law reform involves legislation, and ... this takes up both parliamentary time and the time of officials in the Government Departments affected. It is not always appreciated that the number of days available each session in the House of Commons for the consideration of 'optional' Bills . . . is not large, and governments naturally give priority to Bills forming part of their own programme. In the result the departments concerned must give priority to programme Bills, and a full programme inevitably leads to great difficulty in finding parliamentary time for the implementation of law reform Bills. The cumulative effect in practice is that even the consideration of our recommendations by the Departments concerned is put on one side.[21]

The S.P.T.L. Committee do however adopt the policy of including in the draft Bill previously-formulated law reform proposals which have not yet been enacted. Thus they incorporate the proposals made in the report of the Committee on Mentally Abnormal Offenders ('the Butler Report').[22] Even this limited course has its dangers. The Butler Report has waited more than a decade for enactment, and cannot be said to be uncontroversial. The S.P.T.L. Committee themselves feel the need to modify its proposals in certain ways.[23] For a codifying Bill to be presented to Parliament with such provisions included would almost certainly be fatal to its prospects of getting through. Codification does not halt reforms of substance. But it amounts to reform of a different kind, and should not be put forward as a hybrid.

Interpretation of the Code

Its terms of reference required the S.P.T.L. Committee to formulate rules to govern the interpretation of the Code. It is perhaps surprising that the Law Commission should have made this request in view of the sad fate of its own 1969 report on statutory interpretation.[24] The Committee have dutifully put in a clause, but have wisely limited it to a mere three subsections.[25] The first subsection says the Act embodying the Code

> . . . shall be interpreted and applied according to the ordinary meaning of the words used read in the

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[19] The distinction is already recognised in our legislative practice: an Act amending the substance is called a Criminal Law Act, while one concerned with procedure is called a Criminal Justice Act or Criminal Procedure Act.

[20] The Law Commission: Eighteenth Annual Report 1982-1983 (LAW COM No. 131), para. 2.26: emphasis added).

[21] The Law Commission: Fifteenth Annual Report 1979-1980 (LAW COM No. 107), para. 1.6).

[22] 1975, Cmnd. 6244.

[23] 1985 Report, para. 12.3.

[24] The Law Commissions: Report on the Interpretation of Statutes (1969, LAW COM. No. 21). For the fate of this abortive report see Bennion, 'Another Reverse for the Law Commissions' Interpretation Bill' 131 N.L.J. (1981) 840. The article is reproduced in Zander, *The Law-Making Process* (2nd edn. 1985) pp. 133-139.

[25] 1985 Report, page 172.

context of the Act, except insofar as a definition or explanation of any word or phrase for the purposes of the Act or any provision of it requires a different meaning.

This represents an understandable, if probably futile, attempt to restrain courts from perverse constructions of the kind experienced in ***R. v. Ayres***.[26]

The second subsection says that the 'context' of the Act, for the purposes of the first subsection, includes two elements. The first is Schedule 1 to the draft Bill, consisting of examples or illustrations. This is an excellent innovation.[27] Elsewhere is a provision, clause 4, which states that the illustrations are not exhaustive, and that if they conflict with any other provision of the Act that other provision is to prevail.[28]

The other element is less welcome. It states that the 'context' of the Act includes the long title, cross-headings and sidenotes. These however are not part of the 'context' of an Act.[29] They are components of the Act, and are taken into account where necessary in the ordinary processes of statutory interpretation.[30] The third subsection states that where a provision, read in the context of the Act, is reasonably capable of more than one meaning, regard may be had to the 1985 Report and to the previous law. This is an attempt to reduce to very brief compass some fairly complicated principles of statutory interpretation.[31]

Giving another very useful aid to interpretation, the draft Bill includes as clause 5(1) a fully comprehensive set of definitions.[32] Clause 5(2) shortens the Code by enabling certain formal expressions to be dispensed with.[33]

While the innovatory devices described above are to be applauded, it is highly doubtful whether any good can come of laying down special principles of interpretation. The Code is to be passed into law as an Act of Parliament. Courts cannot be expected to apply special rules to its interpretation, just as they do not apply special rules to the interpretation of delegated legislation.[34] Moreover such statutory rules are inherently unsatisfactory, which is why the Law Commissions' 1969 proposals to that end have never been enacted.

Interpretation of other criminal statutes

The draft Bill displays confusion over the question of the interpretation of penal enactments generally. The Interpretation Act 1978, which is designed to shorten the language needed in Acts and statutory instruments, contains a number of provisions applicable to criminal statutes.[35] It is arguable that these should instead be embodied in the Criminal Code, but that possibility is not explored. On the other hand the draft Bill does include (purely for the purposes of the code) certain definitions that are unnecessary because already contained in the Interpretation Act 1978.

Comprehensiveness of the Code

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[26] [1984] Crim. L.R. 353. See para. 3.3 of the 1985 Report.

[27] The 1985 Report para. 3.6 justifies Schedule 1 as follows: 'There is a persuasive precedent for this course in the Consumer Credit Act 1974. Schedule 2 of that Act provides "Examples of use of new terminology". As Parliament found this method acceptable, we hope that the not entirely dissimilar "illustrations" which Schedule 1 provides will meet with favour.'

[28] Clause 4 'is modelled closely on section 188 of the Consumer Credit Act 1974': 1985 Report para. 3.6.

[29] For the true context see Bennion, ***Statutory Interpretation*** (1984) s. 259.

[30] They are among the thirteen components known as 'descriptive' components. For their use as aids to construction see Bennion, Statutory Interpretation s. 124 and Part XII.

[31] For these see Bennion, ***Statutory Interpretation*** s. 119 and Part XI.

[32] Stated to be modelled on the Consumer Credit Act 1974 s. 189(1): see 1985 Report para. 2.25.

[33] Modelled on the Consumer Credit Act 1974 s. 189(7): see 1985 Report para. 2.27.

[34] The Law Commissions: Report on the Interpretation of Statutes (1969, LAW COM. No. 21 para. 77.

[35] See ss. 16(1)(d) and (e) (effect of repeals) and 18 (duplicated offences), and the definitions in Sch. 1 of the following expressions: 'central funds', 'committed for trial', 'Crown Court', 'magistrates' court', 'indictable offence', 'summary offence', and 'triable either way'.

Can a criminal code hope to include *all* criminal offences? It is tempting to think so, until we remember the prevalence of modern Acts of a regulatory nature. Normally these reinforce their requirements by laying down offences. Are such Acts to be dismembered, and their offence provisions shunted into a criminal code? The S.P.T.L. Committee consider this question and wisely answer it in the negative-

> There are several thousand of offences and a code that contained all of them would be impossibly bulky . . . We are convinced that the governing principle should be that of the convenience of the users of the legislation - that an offence should be incorporated in Part II only if the balance of convenience so dictates.[36]

It is likely to be most convenient to put into the Code offence provisions that stand by themselves, while leaving where Parliament originally enacted them provisions whose purpose can be understood only within the context of specific regulatory statutes. The distinction, in other words, is broadly between *mala in se* and *mala prohibita*.

The S.P.T.L. Committee depart from this sensible principle when it comes to Part I of their Bill, the general part. They seek to apply many, though not all, provisions of this to *all* offences. For this purpose they divide offences into 'Code offences' and 'Pre-Code offences'. The former are defined, surely misleadingly, as including offences the elements of which are 'prescribed' in *any* post-Code Act.[37] It seems undesirable to complicate the code in this way. As codes normally do, it should apply its prescriptions only to its own provisions. In other words it should be self-contained. Later Acts may amend the Code, but how they do so will be a matter for their own draftsmen.[38]

Drafting technique

The draft Bill contains some novel features of drafting technique. While improvement is always to be welcomed, it is a basic preliminary question (not discussed in the 1985 report) whether a code should depart from techniques used in ordinary legislation, thus creating two categories of statute law. It may be better that improvements should be adopted universally, though the codifier is perhaps entitled to assert that he ought to be allowed to lead the way.

In a wholly praiseworthy attempt to bring uniformity to key concepts, the draft Bill contains a number of defining clauses. In the area of fault delineation for example, no less than seven clauses are taken up in the effort to introduce much-needed clarity and consistency. Immense care has clearly been taken over this, though whether the juror or lay magistrate will prove capable of following a number of these fine distinctions must be a matter for anxious speculation. Thus a defendant's act or omission may be done 'purposely', 'intentionally', 'knowingly', 'recklessly', 'heedlessly', 'negligently', or 'carelessly'. The components of this hierarchy are carefully explained, and it is made clear that it *is* a hierarchy. So clause 23(2) tells us that a requirement of carelessness is satisfied by intention, knowledge, recklessness, heedlessness, or negligence.

A minor drafting innovation is the use of individual sidenotes for subsections. The snag about this is that a sidenote for the first subsection in a section tends to get in the way of the sidenote for the section as a whole. Perhaps this could be cured by adopting the method used by ***Halsbury's Statutes*** and putting the sidenote to the section in bold type as the start to its first line.

Conclusion

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[36] 1985 Report para. 2.10.

[37] Draft Bill, clause 2(2)(a). The authors here reveal unfamiliarity with the practice of Parliamentary Counsel, who confine the term 'prescribe' to the making of delegated legislation.

[38] It would be well to formulate in advance an agreed technique for doing this.

The profession owes a deep debt of gratitude to the S.P.T.L. Committee. It is clearly right that the guiding spirits in the preparation of a code should be the most eminent exponents of the legal principles stated by it, and on that score we are in this instance most fortunate.

There remain some grounds for disquiet. Is it right that a body like the Law Commission, entrusted by Parliament with an important statutory duty, should as it were palm it off on a small body of unpaid academic lawyers, however eminent and devoted? Should not a thorough preliminary enquiry be conducted as to the nature of the various codification techniques used by other countries, and the degree of success or failure they have encountered? Is there not a need, in the light of that examination, for a careful working out of the desirable ambit of our own code? This would determine, for example, whether it should confine itself, as might well be wise, merely to the statement of the various offences. It would enquire what degree of detail is desirable, and what methods should be used for keeping the new code updated.

A further point is to be mentioned with diffidence by one whose legal career has mainly been spent as a legislative draftsman. Is there not a contribution to be made by those whose expertise lies in the legislative sphere, as well as by those who are learned in the substance of the criminal law?

That must not be the final note of this brief review of the techniques employed in the draft Bill. That a criminal code of the right kind is much needed there can be no doubt. That the S.P.T.L. Committee have got the project off to a good start is equally certain. To carry to fruition what has been so well begun will require determination. It is for the profession to supply this, for it is to the profession (in all its aspects) that the public look for much-needed improvements in the form in which the criminal law is expressed.

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