

Constructing a Criminal Code

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Introduction

As Ireland embarks on codification, this seems an opportune time to reflect on some of the issues which potential criminal law codifiers may have to determine.¹ The paper considers the extent to which the process of codification ought largely to restate the current law, or attempt to reform the law at the same time; and the relationship between a criminal code and the common law. It assesses different ways of structuring codes, and stresses the importance of accurate offence labelling. The paper draws lessons from codification projects in a range of jurisdictions which have traditionally been based on the common law, and in particular on the author's experience as a member of the team which drafted a criminal code for Scotland.²

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¹ The Irish Criminal Law Codification Advisory Committee was established under Part 14 of the Criminal Justice Act 2006.

² *Draft Criminal Code for Scotland with Commentary* (2003), available at:

<http://www.scotlawcom.gov.uk>. The other members of the Scottish code team were Professors Eric Clive (University of Edinburgh), Chris Gane (University of Aberdeen) and Sandy McCall Smith (University of Edinburgh). The code's construction was an unofficial exercise and it has not been enacted by the Scottish

Initial decisions

Those embarking on codification may have to consider some preliminary issues, such as:

- Ought the code to restate the current law, regardless of the merits of that law, or should the codification process attempt to reform the law at the same time? If the latter approach is adopted, how much reform can be undertaken without jeopardising the codification effort?
- What is the criminal law's purpose(s)? Can codification provide an opportunity for a society to reflect on the kind of values it wants its criminal law to uphold?
- Ought the code to have a 'General Part'? If so, where should this be positioned in relation to the rest of the code? What should it contain?
- Should offences be grouped together in a 'Special Part'? How should offences be drafted?
- What should become of the common law? Should it continue to develop alongside the code? Should the courts retain the power to develop, or indeed create, new defences?

Reform or restate?

Most codifiers accept that a measure of reform is inevitable; there is an understandable reluctance to perpetuate statutory provisions which have proved to be unworkable, or to entrench in legislation common law principles which are perceived to have out-lived their usefulness. The American Model Penal Code was intended as

Parliament. For an over-view, see E. Clive, 'Submission of a draft criminal code for Scotland to the Minister for Justice' (2003) *Edinburgh L.R.* 7:395.

a reforming measure; its principal drafter believed that ‘the... need was less for a description and reaffirmation of existing law than for a guide to long delayed reform.’³ Given the unsatisfactory nature of aspects of its criminal law, the Scottish code group decided that its draft would in large part restate the law, but ought also to reform areas which had been subject to sustained criticism.⁴ Since the Scottish group was an unofficial body, it was free to suggest a number of substantial amendments to the law.⁵ The Irish Criminal Law Codification Advisory Committee intends to reform as well as restate.⁶ It is, however, generally accepted that codification is not primarily designed to bring about major reform. Even if felt to be desirable, pragmatism dictates that radical reforms are unlikely to have an easy passage through

³ H. Weschler, ‘The Model Penal Code and the codification of American criminal law’ in Hood (ed.) *Crime, Criminology and Public Policy: Essays in Honour of Sir Leon Radzinowicz* (1974) at 421. A history of the MPC is given in P.H. Robinson and M. D. Dubber, ‘American Model Penal Code: A brief overview’ (2007) 10 *Crim. L. Rev.* 319.

⁴ The law relating to rape is a good example of an area of Scots law which was ripe for reform, in the view of the code team. The position has since been improved by the development of the common law (see the case of *Lord Advocate’s Reference (No. 1 of 2001)* 2002 SLT 466; 2002 SCCR 435), and further reforms have now been suggested by the Scottish Law Commission: *Report on Rape and Other Sexual Offences* (Scot. Law Com. No. 209, 2007).

⁵ Some problematic areas of current Scots criminal law are highlighted in P.R. Ferguson, ‘Codifying criminal law (1): A critique of Scots common law’ [2004] *Crim. Law Rev.* 49.

⁶ Expert Group on the Codification of the Criminal Law: *Codifying the Criminal Law* (Dublin, 2004) para 2.69.

the legislative process. The English criminal code team took the view that its draft code was more likely to be enacted if it largely restated the existing law and limited reforms to remedying deficiencies.⁷ As Bennion has noted:

Those with practical experience of the workings of the [Westminster Parliament's] 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.⁸

Mindful of this, the Irish Criminal Law Codification Advisory Committee has proposed innovative parliamentary mechanisms to expedite the passing of code legislation.⁹ Political expediency may dictate that codification be mainly an exercise in restatement, since there are numerous examples of draft codes which have become de-railed due to the controversial nature of some of their provisions. For example, the draft Federal Criminal Code for the USA, completed in the early 1970s,

⁷ See Law Commission: *Eighteenth Annual Report 1982-1983* (LAW COM. No. 131), para. 2.26, and *Codification of the Criminal Law: A Report to the Law Commission* (LAW COM. No. 143 (1985)) at paras 1.10-1.15. For the argument that the English code project is in fact a reforming one, see C. Wells, 'Codification of the criminal law- Part 4: Restatement or reform' [1986] *Crim. Law Rev.* 314. Both codes are considered in P.R. Ferguson, 'Codifying criminal law (2): The Scots and English draft codes compared' [2004] *Crim. Law Rev.* 105.

⁸ F. Bennion, 'Codification of the criminal law- Part 2: The technique of codification' [1986] *Crim. Law Rev.* 295 at 298

⁹ *Op.cit.* (note 6) at para 3.72 on.

recommended a ban on handguns and the outlawing of private armies for the first time in federal law.¹⁰ The code would also have decriminalised consensual sodomy.¹¹ The New Zealand Crimes Bill 1989 failed to distinguish the crime of murder from that of manslaughter, and this is said to have contributed to the demise of the entire Bill.¹² It is unsurprising that these draft codes were not enacted.

If the codification process is seen as doing nothing more than making life easier for those who work in the criminal justice system, it is unlikely to prove popular in political terms. As an Australian commentator has noted, in relation to the failed attempt to codify the law in Victoria:

The system we have rewards politicians for winning votes. It does not reward them for getting through codifications, but for enacting

¹⁰ *National Commission on Reform of Federal Criminal Laws, Final Report*, S.Doc. No. 1042, 92d Cong., 1st Sess. 129-514 (1971), discussed in J.L. McClellan, 'Codification, reform and revision: The challenge of a modern federal criminal code' (1971) *Duke Law Journal* 663 at 706-7. Criminal law is reserved primarily to individual states by the U.S. Constitution. Federal criminal law is generally restricted to crimes which cross more than one state, or which is difficult to police in individual states (such as narcotic offences).

¹¹ As McClellan noted, this proposal could 'be counted on to provoke sharp controversy.' (*Ibid*, at 707).

¹² S. France, 'Reforming Criminal Law- New Zealand's 1989 Code' [1990] *Crim. Law Rev.* 827 at 829-830.

popular measures that interest the general public and make a difference to everyday life outside the courts.¹³

The same author suggests that the failure of the Victorian codification project was ‘not only... a failure of strategy and tactics but also a failure of salesmanship.’¹⁴ This also seems to have contributed to the lack of success of the New Zealand Crimes Bill 1989.¹⁵ Political pressure for codification can be increased by generating public debate via the media, such as newspaper articles on what is wrong with the current law, and how codification will improve the situation. What seems to be required, then, is for codifiers to walk a tight-rope between presenting codification as a mundane, tidying-up exercise (which will be unlikely to excite the support of the public or politicians) while at the same time avoiding radical proposals which may result in hostility, not merely to the provision at issue, but to the whole code, and to the very idea of criminal law codification.

The innate conservatism of the legal profession is also a factor which needs to be taken into account. It may be that those who opt to study law are naturally conservative; certainly my own experience of teaching law students suggests that they are often searching for the ‘right’ answer and expect the law to be clear cut. They accept the status quo as a given. Once legally qualified, such people tend to dislike

¹³ G. Taylor, ‘The Victorian Criminal Code’ (2004) *University of Queensland Law Journal* 202, at 203. In similar vein, Paul Robinson has noted that the value of reforms resulting from codification ‘cannot be reduced to a sound bite that will generate votes at the next election.’ (P.H. Robinson, ‘Reforming the Federal Criminal Code: A Top ten List’ (1997) *Buffalo Crim. L. Rev.* 225, at 226.)

¹⁴ G. Taylor, *ibid.*

¹⁵ France, *op. cit.* (note 12).

change. Predicting the arguments of those likely to oppose a new federal code in the US, one commentator stated:

We can firmly expect to hear it argued... that the shortcomings of existing jurisprudence are known and may be dealt with by proper advance preparation. It will also, of course, be suggested that a new code will cause great confusion and uncertainty and deprive the practicing bar of its accumulated wisdom under the existing law.¹⁶

Those who have built up an expertise in the intricacies of a legal system will be reluctant to forgo that knowledge. Nevertheless, despite their instinctive conservatism, the process of codification ought ideally to stimulate debate amongst the profession (and ideally also among the citizenry) as to the appropriate boundaries of the criminal sanction. This leads us to our next consideration.

Re-assessment of the criminal law's purpose(s)

What values do we want our criminal law to uphold? What concerns are worthy of protection using the criminal law? In a society in which there is little homogeneity, it is easy for politicians to resort to the criminal law to attempt to cure perceived social ills, whether these involve anti-social behaviour or plain bad manners. This has led to what William Stuntz refers to as the 'pathological politics of criminal law', leading to the

¹⁶ J.L. McClellan, *op. cit.* (note 10) at 686. In relation to the failed New Zealand code of 1989, Simon France has suggested that lack of support within the legal profession made the task of enacting codification much more difficult- *op. cit.* (note 12) at 838.

criminalisation of an increasingly wide range of conduct.¹⁷ Western democracies are increasingly pluralistic, largely secular societies, where there is growing reluctance to upbraid people for behaviour which is not proscribed by the criminal law, even where that behaviour may be regarded as dishonest, dishonourable, or otherwise immoral. Condemnation of others' undesirable conduct may be seen as ineffectual, perhaps even inappropriate. Historically, children's bad behaviour was regarded merely as naughty, whether it was taking apples from a neighbour's tree without asking, ringing doorbells and running away, or even smashing windows. Such infractions were dealt with unofficially, by the victims having a quiet word with the child's parents, or the local policeman reprimanding the child. Now it is not always felt to be possible to do this, or the victim may believe that remonstrating with parents or child is unlikely to produce the desired result. Societies are less cohesive. People live in larger cities. Even in small villages, one is less likely to know one's neighbours. Such childish behaviour is more likely today to be labelled as 'stealing' or 'vandalism', or (in Britain at least) to be used as grounds for an Anti-Social Behaviour Order (ASBO).¹⁸ In an era in which a community had shared religious and moral codes and these were enforced strictly by the church and/or society, the role of the criminal law may have been to act as a backup, to provide an additional reason for compliance and to mete out punishment for serious infringements. Now that there is less homogeneity, it may be that the criminal

¹⁷ W. Stuntz 'The pathological politics of criminal law' (2001) 100 *Mich. L. Rev.* 505, 576-79.

¹⁸ Despite being initially intended to apply only to adults, it seems that more than 40% of ASBOs issued in England and Wales involve those aged from 10 to 17- see S. Macdonald and M. Telford, 'The use of ASBOs against young people in England and Wales: Lessons from Scotland' (2007) 27 *Legal Studies* 604.

law offers the only normative standards, common to all, or almost all, segments of society. As has been remarked, in relation to Britain:

...successive Home Secretaries... have been manoeuvred into a position where, not only must they be seen to be 'doing something', but where they are forced to insist that what they are doing is making society a safer and better place, even though the evidence suggests that there is no cause and effect at work in this area. Politicians plainly believe otherwise and the criminal law is treated as though it offers some sort of social panacea...¹⁹

Thus we need to reflect on the appropriate role of the criminal law in society. Ought a criminal code to spell out its own rationale?²⁰ The American Model Penal Code, published in 1962, does so explicitly. Its purposes are:

¹⁹ A.T.H. Smith, 'Criminal law: The future' [2004] *Criminal Law Review* 971 at 972, (footnote omitted). See also Ashworth: 'Politicians, pressure groups, journalists and others often express themselves as if the creation of a new criminal offence is the natural, or the only appropriate, response to a particular event or series of events giving rise to social concern. ...There is little sense that the decision to introduce a new offence should only be made after certain conditions have been satisfied, little sense that making conduct criminal is a step of considerable social significance.' (A Ashworth, 'Is the criminal law a lost cause?' (2000) 116 *Law Q. Rev.* 225.)

²⁰ For a criticism of the Canadian government's proposal to include a General Part in that country's criminal code, with a view to 'articulating and enshrining [the criminal law's] underlying social values', see C. Nowlin, 'Against a general part of the Canadian criminal code' (1993) *U Brit. Colum. L. Rev.* 291.

- (a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests;
 - (b) to subject to public control persons whose conduct indicates that they are disposed to commit crimes;
 - (c) to safeguard conduct that is without fault from condemnation as criminal;
 - (d) to give fair warning of the nature of the conduct declared to constitute an offense;
 - (e) to differentiate on reasonable grounds between serious and minor offenses.²¹
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Two codes?

Robinson has suggested that codifiers ought to draft two separate codes, one of which would contain the 'rules of conduct', and the other 'principles of adjudication'.²² The former would be addressed to citizens, and would contain a list of clearly drafted and simply stated prohibitions of the 'you must not kill other people' variety.²³ The latter

²¹ American Model Penal Code, s. 1.02(3).

²² *Op. cit.* (note 13) at 268-270. See also by the same author, 'Making criminal codes functional: A code of conduct and a code of adjudication' (1996) 86 *J. Crim. L. & Criminology* 304; 'Rules of conduct and principles of adjudication' (1990) 57 *U. Chi. L. Rev.* 729.

²³ *Op. cit.* (note 13) at 247. For the suggestion that the Scottish code should be drafted in a similar manner, see T.H. Jones, 'Towards a Good and Complete Criminal Code for Scotland' (2005) 68 *Modern Law Review* 448.

would be addressed to officials in the criminal justice system, and would contain the ‘General Part’ of the code, namely the rules required for prosecuting infractions of the conduct rules, including principles of liability, defences and *mens rea* requirements. I have reservations about the practicality of such a scheme,²⁴ but Robinson’s proposals do serve to remind us of the importance of clear drafting in legislation, particularly in respect of criminal law provisions.²⁵ Care must be taken to ensure that a criminal code avoids unnecessarily convoluted language or excessive use of technical terms. If ignorance of the law is not to be a defence to a breach of the criminal law’s provisions, as is the case in many jurisdictions, then the law’s requirements ought to be clearly expressed such that they make sense even to the non-lawyer.²⁶

The Canadian Criminal Code contains rules of evidence and criminal procedure alongside substantive provisions. Hence amidst the chapter defining assaults, one finds a provision on corroboration,²⁷ rules on the inadmissibility of complainants’

²⁴ See P.R. Ferguson, ‘Codifying Scots Criminal Law’ available at the website of the *International Society for Reform of Criminal Law*: <http://www.isrcl.org/>.

²⁵ The Scottish code team were in the fortunate position of having Professor Eric Clive, a highly experienced draftsman, as one of its members.

²⁶ For a criticism of the English Draft Criminal Law Bill (*Legislating the Criminal Code: Offences Against the Person and General Principles*, Law Com. No. 218 (1993)) see F. Bennion (1994) 15 *Stat. L.R.* 108. Bennion described the draft as ‘over-technical, poor on exposition and a sore puzzle from beginning to end’ (*ibid.*) For a rebuttal in robust terms see J.C. Smith (1995) 16 *Sta. L.R.* 105. Several of Bennion’s criticisms are more properly of the then current English criminal law, than of the code per se.

²⁷ S.274.

sexual history in sexual assaults,²⁸ and how the court should deal with applications to have the jury and public excluded from such cases.²⁹ While it may be desirable for a jurisdiction to codify its criminal procedure, as well as its substantive law, in my view the two should be in separate chapters, or perhaps even in separate codes, rather than one code with an admixture.

Whatever the shape of the final draft, codifiers must ensure that it conforms to the principle of legality; its provisions should not be retrospective in application and should be drafted with sufficient clarity and precision to enable citizens to know in advance whether their conduct is subject to sanction.³⁰ Justice and equality are often regarded as being of more relevance to criminal procedure than to the substantive criminal law, but it is axiomatic that crimes should be defined in general terms, in the sense of not targeting particular groups for what they are, as opposed to for what they have done. Code drafters must check that no provision discriminates on specious grounds relating to factors out-with an individual's control, such as race, colour, gender, sexual orientation or disability.

The General Part

Criminal law codes commonly contain a 'General Part' and a 'Special Part'. The latter contains the offence provisions, while the former, as its name suggests, includes provisions of general application, such as inchoate and group liability, defences, definitions of common terms, such as those relating to *mens rea*, and the like. If key terms such as 'intention', 'recklessness' and 'negligence' are defined in the General

²⁸ S.276.

²⁹ S.276.1.

³⁰ See also Art. 7 of the European Convention on Human Rights.

Part, this simplifies the drafting of specific offences by avoiding needless repetition.³¹ Likewise, the General Part may specify a default provision, such as that all offences in the code are to be defined as requiring intentional behaviour on the part of the accused, unless a particular provision provides otherwise.³²

Ought the General Part to come before the Special Part? There is some logic in having the Special Part first. This would follow the order in which cases are dealt with by the courts, in that the prosecution must first establish that there has been an infraction of one or more code provisions (Special Part), and thereafter the accused has an opportunity to establish a defence (General Part). On the other hand, the General Part will often contain provisions (such as *mens rea* definitions, general principles of liability, etc.) which need to be assimilated before the Special Part makes sense. This suggests that the General Part should precede the Special Part. Of course, it must be remembered that ‘General Part’ and ‘Special Part’ are merely labels, which may be modified or even discarded if found wanting. It may be preferable to start with a comprehensive definitions section. Next could come those general provisions which need to be understood in order to make sense of the offences (such as principles of liability, including group and inchoate liability, and so forth). Thereafter, the Special Part would describe the offence provisions, followed by a description of defences, in its own part (perhaps entitled ‘Exculpation and Mitigation’?). Promulgation of the code on a website would allow for regular updating and assist in cross referencing. Key terms

³¹ The Australian Capital Territory’s Criminal Code 2002 uses the *mens rea* terms ‘intention’, ‘knowledge’, ‘recklessness’ and ‘negligence’ (s.17). The American Model Penal Code employs ‘purposely’, ‘knowingly’, ‘recklessly’ and ‘negligently’ (s.2.02).

³² This is the position under the Scottish draft criminal code (s.8), discussed further, below.

could appear in a different font, or in different colour from the rest of the text, and contain hotlinks to the relevant defining section.

The Special Part

A code will be easier to use if offences are grouped into cognate categories, such as ‘offences against the person’, ‘offences of dishonesty’, ‘offences against the administration of justice’. These could be listed in order of severity. For example, the category of ‘offences against the person’ could start with murder, through lesser forms of homicide, down to serious assault, simple assault, and offences of personal endangerment. Alternatively, offences could be listed in order of the least serious first. It may be that ‘offences against the person’ should be sub-divided into those which are fatal, and those which are not. The point is that there should be a gradation of offence within each category. As I understand it, the American Federal Criminal Code arranges offences alphabetically, such that ‘assault’ is sandwiched between provisions on ‘arson’ and ‘bankruptcy’. An alphabetical listing should be provided in an index, but the grouping of offences in the main body of the text ought to be into offence categories. This also serves to articulate what it is about the behaviour that is reprehensible. For instance, is ‘robbery’ primarily an offence of dishonesty, against property? Or is it better categorised as an offence of violence, against the person? If we put robbery in the former camp, what does this say about the value the criminal law puts on protection of persons, as opposed to property?³³ Are ‘prostitution’ and ‘soliciting’ types of nuisance crimes? Or are they offences against morality (and is it appropriate in the 21st century, to have the latter category of offences in the criminal law calendar?)

³³ For a critique of the value placed by criminal law on property, see Nowlin, *op. cit.*

(note 20) at 291.

Grading of offences is also very important in relation to sentencing. Currently in Scots criminal law, which is in large part based on the common law, the maximum penalty for murder, theft, assault, robbery, rape, and breach of the peace is the same: namely, 'life imprisonment'. In practice, this is the mandatory penalty for murder, but is largely theoretical in relation to most of the other crimes listed. Nevertheless, it remains the case that the only limiting factor for each of these crimes is the sentencing power of the court which hears the case. The High Court of Justiciary, the most senior domestic criminal court in Scotland, can (in theory) sentence someone convicted of any common law crime to life imprisonment. This is not satisfactory. The draft Criminal Code for Scotland suggests statutory maxima for each offence provision, but contains only five offence grades. Paul Robinson has criticised the American Model Penal Code for having a similar number of grades,³⁴ and in retrospect it might have been preferable to have had a more refined sentence structure.

It is not uncommon for statutory provisions to describe the *actus reus* of an offence and (if we are lucky) the requisite *mens rea*, but then simply to conclude that a person who fulfils these requirements 'commits an offence'. An example from Scottish legislation is s.16 of the Building (Scotland) Act 2003. This provision is headed: 'Applications and Grants: Offences', and states:

(1) Any person who— (a) makes an application under section 9 for a building warrant or an amendment to a warrant containing a statement which that person knows to be false or misleading in a material particular, or (b) recklessly makes such an application containing a statement which is false or misleading in a material particular, is guilty of an offence.

³⁴ *Op. cit.* (note 13) at 247.

But what the offence is called we are not told, and so must resort to saying that a conviction under this section is ‘for a breach of s16 of the Building (Scotland) Act 2003’. For a recent example from English law, s.44 of the Serious Crime Act 2007 provides:

A person commits an offence if— (a) he does an act capable of encouraging or assisting the commission of an offence; and (b) he intends to encourage or assist its commission.

At least there is a heading at the top of the section of ‘Intentionally encouraging or assisting an offence’, so we know what to call this inchoate offence. In contrast, the Scottish Draft Criminal Code specifies the name of each offence at the end of each section. For instance, s.41(1):

A person who attacks another person, presents a weapon at another person in a menacing manner or uses force against another person, without that person’s consent, is guilty *of the offence of assault*³⁵

and s.42:

A person who intentionally or recklessly causes injury to another person without that person’s consent, is guilty *of the offence of causing unlawful injury*.

Another point to note in respect of these two sections relates to *mens rea*. Although the *mens rea* required for a breach of s.42 is specified (‘intentionally or recklessly’), s.41 says nothing about the mental element. This is due to the fact that s.8 of the draft Code provides ‘general rules on state of mind required’, the first of which is that ‘a person is criminally liable for an act, only if the person intended to perform that act.’ Having a default *mens rea* in a code greatly simplifies the drafting. The Code of the Australian

³⁵ Emphases added.

Capital Territory has a default of ‘intention’ in respect of physical elements that consists only of conduct, and of ‘recklessness’, where the physical element consists of a circumstance or result.³⁶ The American Model Penal Code’s default position is that the accused must have acted ‘purposely, knowingly or recklessly’.³⁷

If we look again at s.44 of the (English law) Serious Crime Act 2007:

A person commits an offence if—

(a) *he* does an act capable of encouraging or assisting the commission of an offence; and

(b) *he* intends to encourage or assist its commission...³⁸

This is typical of legislation enacted by the Westminster Parliament. Similarly, while many offences in the Canadian Criminal Code are phrased in gender neutral language, others use the male pronoun only.³⁹ The Model Penal Code uses ‘he’⁴⁰ and the New

³⁶ S. 22.

³⁷ S. 2.02(3).

³⁸ Emphases added.

³⁹ Thus s. 222(1) provides: ‘A person commits homicide when, directly or indirectly, by any means, *he* causes the death of a human being’ and s. 265(1)(a) states that: ‘A person commits an assault when ... without the consent of another person, *he* applies force intentionally to that other person,...’ (emphases added).

⁴⁰ This reflects the date of publishing of the Model Penal Code (1962).

Selected sections are available at:

<http://www.fordham.edu/law/faculty/denno/fall2007/model%20penal%20code%20selected%20sections%20toc.pdf>.

York Penal Code uses ‘he’ in some provisions,⁴¹ and ‘he or she’ in others.⁴² In contrast to this, the Scottish code has been drafted in a gender neutral manner, and this has been achieved without resort to referring to ‘he/she’ or the ungrammatical ‘if a person...they ...’. As we have seen, most provisions in the Scottish draft code begin: ‘A person who...’, specify the *actus reus* (and the *mens rea* if the default of intent alone is not being employed) and conclude ‘commits the offence of [*name of offence*]’. Similarly, the Code of the Australian Capital Territory provides:

A person commits an offence (*theft*) if the person dishonestly appropriates property belonging to someone else with the intention of permanently depriving the other person of the property
and

A person commits an offence (*robbery*) if - (a) the person commits theft; and (b) when committing the theft, or immediately before or immediately after committing the theft, the person— (i) uses force on someone else; or (ii) threatens to use force then and there on someone else...⁴³.

Of course, we can generally work out what an offence will be about from the title of the Act. So an offence under the Building (Scotland) Act 2003 is likely to have something to do with a breach of building regulations. Things are not so simple under a criminal

⁴¹ For example, s.135.25 (kidnapping); s.140.30 (burglary); s.145.12 (criminal mischief). The code is available at:

<http://wings.buffalo.edu/law/bclc/web/nycriminallaw.htm>.

⁴²For example, s.125.26 (aggravated murder); s.158.25 (welfare fraud); s.130.65 (sexual abuse).

⁴³ Ss. 308 and 309, respectively, emphases in original.

code, and indeed, many other criminal law statutes have titles which are less than helpful. Prior to becoming an academic, the author worked as a Procurator Fiscal depute (a Crown prosecutor). On one occasion, included in the list of previous convictions for a particular accused person was a reference to breach of a provision of the Civic Government (Scotland) Act 1982. This Act covers a miscellany of offences, hence the conviction could have been for operating a taxi without a licence;⁴⁴ giving a false name and address when selling something to a second-hand dealer;⁴⁵ being a prostitute and loitering, soliciting or importuning in a public place;⁴⁶ urinating or defecating in circumstances likely to cause annoyance;⁴⁷ or being drunk and incapable of taking care of oneself in a public place.⁴⁸ Since the offence for which the accused was appearing in court was a breach of the peace of a (minor) sexual nature, the court was concerned to know whether the earlier conviction was for ‘the taking, making, distributing, showing or having in one’s possession any indecent photograph of a child’ (proscribed by s.52 of the 1982 Act). In the event, the breach was for the more innocuous s.48 (for allowing one’s dog to deposit its excrement upon a footpath!) It is, then, important that offences are referred to by a specific *nomen iuris*, rather than merely as ‘a breach of s.42 of the Criminal Code’, and the easiest way of ensuring this is to have the name of the offences included in the wording of the sections

⁴⁴ S. 21 of the Civic Government (Scotland) Act 1982.

⁴⁵ *Ibid*, s. 26.

⁴⁶ *Ibid*, s. 46.

⁴⁷ *Ibid*, s.47.

⁴⁸ *Ibid*, s.50.

themselves.⁴⁹ Judges must be able to assess a convicted person's criminal record, and (in Britain, at least) the name of the offence is often the only information provided on the list of previous convictions.⁵⁰

As well as accurate labelling, each offence ought to describe a particular form of wrongdoing, so that the public, the offender and those involved in the criminal justice system know the sort of behaviour of which the accused is guilty. As already noted, the failure to label intentional killing as 'murder' contributed to the failure of the New Zealand Crime Bill 1989. In Scotland, the common law crime of 'breach of the peace' has been much criticised over the years for being ill defined, and for encompassing too diverse a range of behaviours.⁵¹ The High Court of Justiciary has narrowed the ambit of this crime in recent years, so that behaviour will only now be regarded as a breach of the peace if it is 'severe enough to cause alarm to ordinary people and threaten serious disturbance to the community.'⁵² Its application has also required to be limited by the provisions in the European Convention on Human Rights

⁴⁹ As Eric Clive, one of the drafters of the Scottish criminal code, has explained, naming each of the code's offences was designed to be 'an aid in transparency, record-keeping and reporting at all stages of the criminal process.' See E. Clive, 'Drafting the law on sexual offences: A comparison of the draft criminal code for Scotland and the Sexual Offences Act 2003' (2006) *Juridical Review* 55, at 61.

⁵⁰ See J Chalmers and F Leverick, 'Fair labelling in criminal law' (2008) 71 *Modern Law Review*, 217-246, at 231.

⁵¹ See M. Christie, *Breach of the Peace*, (1990); C. Gane, C. Stoddart and J Chalmers, *A Casebook on Scottish Criminal Law* (2001); P.R. Ferguson 'Breach of the peace and the European Convention on Human Rights' (2001) *Edinburgh Law Review* 5: 1;

⁵² *Smith v Donnelly* 2001 SCCR 800, at 807 per Lord Coulsfield.

relating to freedom of expression, and of assembly and association.⁵³ While these attempts to narrow the focus of the crime are to be welcomed, it remains the case that breach of the peace covers a broad range of anti-social behaviour.⁵⁴ Enactment of the Scottish draft code would restrict its ambit still further, such that the accused must have caused a disturbance by acting in a way which a reasonable observer would regard as 'violent, aggressive, or disorderly.'⁵⁵ Other forms of conduct which would currently be regarded as a breach of the peace are separated by the draft code into distinct offences, such as that of 'violent and alarming behaviour' (where the accused has caused fear, alarm or significant distress to another person)⁵⁶ and 'intrusive and alarming behaviour' (to include stalking, following, watching and spying upon a person).⁵⁷ These innovations were justified by the code team on the basis that the principle of fair labelling requires that precise notice be given of the behaviour being proscribed by the criminal law.⁵⁸

Relationship with the common law

⁵³ Articles 10 and 11, respectively. For the impact of the Convention on the crime of breach of the peace, see *Jones v Carnegie; Tallents v Gallacher* 2004 SCR 361 and *Quinan v Carnegie* 2005 SCCR 267.

⁵⁴ For a recent example, see *H.M. Advocate v Murray* 2007 SCCR 271.

⁵⁵ S.92 of the Draft Criminal Code for Scotland.

⁵⁶ *Ibid*, s.49.

⁵⁷ *Ibid*, s.50.

⁵⁸ *Ibid*, commentary to s.49. See also the commentary to s.50.

Following amendment to the Canadian Criminal Code in 1955, almost all common law offences were abolished in that jurisdiction.⁵⁹ Likewise, the Scottish and Tasmanian codes, and the code of the Australian Capital Territory, provide that no crime can be prosecuted unless it appears within the code, or other statute.⁶⁰ However, both the Canadian and Tasmanian Criminal codes provide that rules and principles of the common law relating to justifications or excuses remain in force, unless altered by the codes.⁶¹ In contrast, the Scottish draft code provides that all common law principles (including defences) would be repealed by its enactment. The Irish codification team may adopt a provision similar to that used in the Tasmanian code; its preliminary report states:

...there is no compelling reason why the rules and principles amplifying the code provisions on the exculpatory defences should not be allowed to develop at common law, or why the jurisprudence on such matters should not continue to enjoy precedential force.⁶²

Allowing the courts to continue to develop existing defences, or even create novel ones, would not offend against the principle of legality in the way that judicial development or creation of crimes would do. It may be that a code ought to allow scope for judicial evolution and invention of defences to fit unforeseen situations. If a person behaves in

⁵⁹ The Canadian Criminal Code of 1892 was amended in 1955 by the addition of s.9, which abolished common law offences, with the exception of 'contempt of court'.

⁶⁰ Australian Capital Territory's Criminal Code 2002, s. 5; Tasmanian Criminal Code Act 1924, s. 6; Scottish draft code, s.1.

⁶¹ Canadian Criminal Code 1985, s. 8(3); Tasmanian Criminal Code Act 1924, s. 8.

⁶² *Codifying the Criminal Law, op. cit.* (note 6) at para 2.163.

a way which most people feel ought to be criminal, but which is not covered by a provision in the criminal code, this can be rectified by the legislature amending the code to include a new offence. Little injustice is caused by allowing one offender to escape punishment in such circumstances. But convicting someone of a crime, despite most people believing that the person ought to have had a defence in the circumstances, is a major injustice. As Robinson and Darley have argued, the moral credibility of the criminal law depends on its ability to punish those who are guilty and, perhaps even more importantly, to exculpate those who lack blame.⁶³

Conclusion

This paper has highlighted some of the preliminary issues which need to be addressed by would-be codifiers of the criminal law, and has offered some suggestions on the construction of a code. While codifiers can emulate the clarity of form and expression employed in some codes, much can also be learned from infelicities in the drafting style and structure of others. Consideration of the failure of codification efforts in other jurisdictions may also help to avoid some of the pitfalls which may be encountered.

⁶³ P.H. Robinson and J.M. Darley, 'The utility of desert' (1997) 91 *Nw. U. L. Rev* 453.