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The case for a code of criminal procedure

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Crim. L.R. 519 **Summary:** *This article sets out the case for English criminal procedure to be codified. It discusses the codification of criminal procedure that has taken place in other jurisdictions, including Scotland, and makes practical suggestions as to how this might be done in England.*

Over the years there has been endless discussion of the need to codify substantive criminal law. But it seems to me that the case for codifying the rules of criminal procedure (including criminal evidence) is equally strong. Arguably, the case is even stronger. And there is at least some reason to think that a code of criminal procedure would be less problematic to achieve.

In many respects, the case for a code of criminal procedure is the same as the case for a code of criminal law. Criminal procedure and substantive criminal law are in reality two sides of the same coin. Together, they contain the rules under which the State can strip the citizen of his reputation, his property, his liberty and--until recently--his life. Substantive criminal law tells us what it can do it for, and criminal procedure and evidence tells us how it is allowed to go about it. In terms of what is actually at stake, no part of the law could possibly be more important. For this reason alone, you would expect these two areas of law to be clearly formulated and made publicly accessible in codes.

Not only are they inherently important. They are both in constant, widespread use. Each year, something in the region of two million cases go through the criminal courts. In terms of utility--making available in a convenient form those parts of the law that need to be known and practically applied by the greatest number of lawyers--the case for codifying both criminal law and criminal procedure is unanswerable.

But criminal procedure and substantive criminal law are not only interesting and important for lawyers. They are also a part of the law which is hugely interesting to those who never have to apply it, and who rarely if ever have it applied to them. Even in the serious newspapers, crimes, criminals and criminal proceedings are regularly front-page news--and so is criticism of the underlying law, and so are proposals to reform it. Criminal law and criminal procedure engage the more or less continuous ***Crim. L.R. 520*** attention of journalists, and of the general public who read and try to understand what they have to say about it.

Yet as things stand, the rules of criminal law and the rules of criminal procedure are both equally inaccessible, because the sources of both are in an equally chaotic state.

As between the two, the case for codifying criminal procedure is the stronger, because it is criminal procedure that consumes the larger share of the time of the courts, and the bigger slice of public attention. A quick look at any volume of the *Criminal Law Review* or of the *Criminal Appeal Reports* shows at once that far more appeals are brought on points of criminal procedure than are brought on points of substantive criminal law.[1] An equally cursory glance at the newspapers reveals that most of the *causes célèbres* that attract serious public attention turn on points of criminal procedure and evidence, not on substantive law.

I believe that a code of criminal procedure would be less problematical to achieve than a code of criminal law for two reasons, both of which are examined more fully later in this paper. One is that a precedent exists in that the Scots have managed to codify theirs, and the other is that a code of criminal procedure, unlike a code of criminal law, could be done at least in part by delegated legislation. The fact that a codification of criminal procedure might be easier to bring about than a codification of substantive criminal law does not, of course, make it more practically pressing or more theoretically important. But in a world where time and resources are necessarily limited, aims that have a chance of success are more profitably pursued than those which have little or none.

Reasons for codification of criminal procedure

So what is wrong with English criminal procedure in its present state of non-codification, and why is it important that it should be codified?

The first (and most pragmatic) reason is that the sources are at present in a shocking mess, as a result of which the law is not readily accessible to those who have reason to discover it. Many of the rules of English criminal procedure are to be found dispersed among perhaps some 150 different statutes. Some of these, like the Justices of the Peace Act 1361--are very ancient and written in language both archaic and obscure. Most are comparatively modern. But even the modern ones are mainly messy and unsystematic and hard for the user to find his way around: a succession of Criminal Justice Acts, each a disparate jumble of new rules, or of new amendments to the old ones. Some modern statutes were more user-friendly when originally enacted because they initially put between a single pair of covers some identifiable part of the law, like juries,[2] or the summoning of witnesses,[3] or bail[4] ; but over the years they have been amended and re-amended--and of course no official version is ever published of the final text. And some most important parts of our criminal procedure have no statutory basis at all: like most of the law of evidence, ***Crim. L.R. 521** and the whole of the law on double jeopardy, and nearly all the law on guilty pleas. Only the briefest look at the Scottish code[5] is needed to see how much easier it is to discover the Scottish rules of criminal procedure than it is the English ones--even if you are an English lawyer rather than a Scots one. Indeed, it is no exaggeration to say that an English layman who can read foreign languages would find it simpler to discover the French or German or Italian rules of criminal procedure and evidence than he would his own. As an experienced lay magistrate said to me the other day, “If only we could have the basic rules set out in one single, simple book. It would make our job so much easier--and we would probably do it better, too”.

The second (and equally pragmatic) reason is that because our rules of criminal procedure are not codified, they are quite unnecessarily complex. Because there is no basic text to amend, we tend to build a completely new structure every time we want to make a minor change. The result is an excessive proliferation of rules.

A practical example is what has happened over the last 20 years or so to the rules on committal to trial. In 1980 there were two routes: committal by the justices, of which there were two variants, the “short form” and the “long form”, plus (exceptionally) the voluntary bill of indictment. To this fairly simple scheme, section 4 of the Criminal Justice Act 1987 added a new element: transfer for trial, bypassing the magistrates, in the case of serious frauds. Four years later section 53 of the Criminal Justice Act 1991 produced yet a further new system: transfer to trial, at the option of the prosecutor, in child abuse cases. Several years later, the Criminal Procedure and Investigations Act 1996 heavily amended the existing statutory provisions governing the two variants of committal for trial that operated in the magistrates' courts. And then in 1998, section 51 of the Crime and Disorder Act created a third and entirely new form of transfer for trial, applicable to offences that are indictable only. In practice, this means that in the place of three sets of procedure for sending cases to the Crown Court that existed in 1980 we now have no less than six, the rules of which are scattered across no less than six different Acts of Parliament. And of these different systems, three of them--the three forms of transfer for trial--are virtually identical to one another. Nor is this all, because in the course of the last 10 years, two further forms of transfer for trial have been solemnly created and then less solemnly abolished--both before they were brought into force.[6]

The third objection to our present uncodified system is related to the last one, but is less pragmatic and more principled. It is that our haphazard way of creating different sets of rules at different times results in all sorts of astonishing contradictions. At one point of time, principle X is thought to be important, and we solemnly incorporate this principle into one set of rules. Then at a different time it is a different principle, Y, that is in the forefront of our minds, and to deal with a new and related situation we create a different set of rules that are based upon principle Y--without noticing that it is incompatible with principle X. The ***Crim. L.R. 522** consequence is that two closely related parts of criminal procedure contradict each other.

Regrettably, examples of this are not difficult to find. A classic example is our treatment of what is sometimes called the “Philips principle”. In 1981 the Royal Commission on Criminal procedure[7] (Chairman Sir Cyril Philips) said that it was important for the functions of investigating and of prosecuting to be clearly separated. With this in mind, it said that the new Crown Prosecution Service it proposed should play no part whatever in the investigation of offences, and should have no power to control the police. In 1985 this principle was fully respected when the CPS was created, and the

role of the CPS was restrictively defined. But even as Parliament was honouring the “Philips principle” it was simultaneously disregarding it. The legislation[8] that created the CPS gave the new prosecutor no monopoly over public prosecutions, and left the Inland Revenue, the Customs and Excise and a whole set of other regulatory agencies with the right to prosecute the people whose misdeeds they had earlier investigated. And then two years later the “Philips principle” was forgotten altogether when the Criminal Justice Act 1987 created the Serious Fraud Office. The Director of the Serious Fraud Office is the original investigator-cum-prosecutor--and the offences he or she investigates are serious, by definition.

Perhaps the “Philips principle” is mistaken. There are advantages as well as disadvantages in a public prosecutor who is responsible for the investigation, and most other countries (including Scotland) have constructed their systems on the assumption that the advantages outweigh the drawbacks. But it cannot be at once both right and wrong--which is how English criminal procedure appears to view it.

Another striking example of inconsistency in principle is the use of coercive measures for the gathering of evidence. In general, English law takes the position that the agents of the state can be trusted to make their own decisions about the less invasive measures, but the more invasive ones require the prior authorisation of a magistrate or judge. But to this there are some striking exceptions. Under the Interception of Communications Act 1985 warrants to tap telephones are authorised not by the judiciary but by the executive, in the form of the Home Secretary. When the Customs and Excise investigate criminal offences they can use wide powers of search and seizure which are available to them without any external authorisation at all. Certain customs officers are equipped with documents called *writs of assistance.* These are documentary authorisations which entitle the holder to search (with force if necessary) any premises, at any time, if he suspects that goods are present which are liable to forfeiture under the Customs and Excise Acts[9] ; general warrants, in other words, of the sort that were condemned by the Court of King's Bench in *Entick v. Carrington* [10] and on the other side of the Atlantic helped ***Crim. L.R. 523*** to provoke the American War of Independence.[11] Even more surprisingly, the Home Office until recently took the official position that it was proper for the agents of the State to exceed the limits of their legal powers of search where evidence would be difficult to obtain if they respected them. Before Part III of the Police Act 1997 gave them extra powers, the police were breaking into houses and planting bugging devices without any legal authority at all, and on the basis of an official Circular from the Home Office inciting them to do so.[12]

Yet another set of contradictions exists around the principle that a suspect may not be questioned once he has been formally charged. The basic rule--often said to be vital in order to protect the right to silence--is that the police and prosecuting authorities must cease their attempts to get information out of the suspect after he has been charged, and hence made the transition from suspect to defendant.[13] But when the Serious Fraud office was created, the Director was given powers to question suspects which do enable him or her to question people after charge.[14] If it is wrong in principle to question suspected murderers and rapists after charge, it is hard to see how it can be acceptable to question suspected fraudsters. And if it is acceptable to question suspected fraudsters once they have turned into defendants, why not suspected murderers and rapists too?

But perhaps the most remarkable set of contradictions is those surrounding rights of appeal. Common sense (and international standards)[15] suggest that someone who has been punished severely after being convicted of a grave offence should have an automatic right to have his case reviewed, whereas a person punished lightly for a minor offence should have a right of appeal subject to qualification. In English criminal procedure, however, the position is exactly the reverse: a person convicted after summary trial has an automatic right to an appeal that consists of a rehearing, whereas a person convicted on indictment needs leave to appeal, for which he must show grounds, and if he is allowed to appeal the proceedings do not take the form of a rehearing. Although this state of affairs is really a historical accident, it could (perhaps) be justified by pointing to the extra safeguards for defendants that supposedly attach to Crown Court trials. But surely no justification whatever can be made for the contradictory rules that govern appeal by the prosecution. Following summary proceedings, the disgruntled prosecutor has the right to get a higher court to overturn an acquittal where this was founded on an error of criminal law or ***Crim. L.R. 524*** criminal procedure, but he has no right to have a higher court increase an inadequate sentence. But where the outcome of proceedings on indictment dissatisfies him, his position is exactly the reverse: he can (within limits) get an inadequate sentence increased, but he has no way of getting an unjustified acquittal overturned--however gross the legal error that gave rise to it.[16] In this morass of contradictions there is said to be one clear rule, namely that the prosecutor can never appeal where a properly conducted trial has resulted in an acquittal on the merits--and this is a rule the justice of which all English lawyers

apparently agree with. But even this supposedly clear rule has at least one bizarre exception. By section 47(3) of the Customs and Excise Management Act 1979, the prosecutor has an unfettered right of appeal “against any decision of a court of summary jurisdiction under the Customs and Excise Acts”.[17]

The fourth objection to the current state of affairs is related to the third one. Because there is no place in which the rules of English criminal procedure are conveniently set out as a unified whole, we tend to go on adding to the list of anomalies. A striking example of this is what happened recently over admissibility at trial of written statements that potential witnesses have made to the police. These fall, of course, within the hearsay rule, which means that they are in principle inadmissible. In 1988 we enacted a complicated series of exceptions, under which they were made occasionally admissible, in sections 23 and 24 of the Criminal Justice Act of that year. Then in 1996, without really noticing what it was doing, Parliament suddenly enacted new provisions which--without reference to earlier provisions--seem to make such statements admissible in any case where the trial judge thinks it would be sensible to admit them.[18]

The fifth objection to the present uncodified state of English criminal procedure is a more principled one. It is that rules are made by authorities that are inappropriate to make them.

In a rational system, we would expect rules to be made at two different levels. Rules about really important matters would be laid down by Act of Parliament, and rules about less important and more practical matters would be made by some suitable rule-making body under delegated powers. To some extent, modern English criminal procedure does reflect this pattern. But to a large extent, regrettably, it does not. Parliament wastes its precious time in making over-detailed rules about low-level practical matters, such as the details of advance disclosure or committal for trial--and being ill-fitted for this kind of work, produces bad rules ***Crim. L.R. 525*** which are then difficult to change. And meanwhile, basic rules about matters of capital importance are made and unmade by a range of authorities, some rather unsuited to the task, by means of guidelines, codes of practice and delegated legislation.

Of all the various matters that are determined by the rules of criminal procedure, none is so sensitive as the length of time that a person may be held in custody pending trial. It is therefore not surprising to learn that they were at one time laid down by a famous Act of Parliament--section 6 of the Habeas Corpus Act 1679. As this Act defined the maximum period of detention in relation to “terme sessions of oyer and terminer or generall goale delivery”, it lost its bite once “terms” were no longer the rhythm according to which criminal justice was administered--and in 1971 it was unceremoniously repealed and replaced with a toothless provision[19] which expressed the pious hope that persons would be tried within times to be fixed by Crown Court Rules, and left them with no redress if they were not. When some years later, rising public concern about pre-trial detention led to legislation, the legislation took the form of section 22 of the Prosecution of Offences Act 1985--which enables maximum periods of pre-trial detention to be fixed by the Home Secretary. Whilst there is nothing wrong as such with the custody time limits he eventually laid down,[20] there is surely everything wrong with the Home Office being the body that makes them. However enlightened, intelligent and humane its civil servants may be, however elevated its departmental mission statement[21] and however libertarian the Ministers responsible for it, the Home Office is still the national security department. Its responsibilities include the police, prisons and the control of immigration. Its brief in criminal justice is to see that suspects get caught, when caught do not escape, and when sentenced stay inside to serve the sentences the courts mete out to them. So in a society that respects separation of powers and the rule of law, it is the last agency that should be entrusted with the job of making the rules about how long citizens can be held in pre-trial detention.

Alas, this is far from being the only example of rules that are made by an authority that is of the wrong level, or otherwise inappropriate. There are the rules about when a suspect or defendant can be questioned. This, no less than pre-trial detention, raises important questions of civil liberty, on which it might be expected that Parliament would legislate. But yet at present, the rules that the suspects must be cautioned before questioning, and that after charging questioning must stop, are contained in a Code issued by the Home Secretary.[22] And so are the rules about the extent to which the Crown Prosecution Service can give orders to the police.[23] And even more surprisingly, the rules about the balance of power between the Crown Prosecution Service and the barristers whom they instruct were laid down by an ***Crim. L.R. 526*** informal committee which had no legal status whatsoever.[24] At the other end of the scale, it seems equally inappropriate that Parliament should expend its valuable time drawing up the detailed rules about the way in which cases are committed for trial. The result, as we have seen, has been a set of rules that are both overcomplicated and, once made, difficult to amend.

And the same is true, surely, of the detailed rules about the protection of vulnerable witnesses when giving evidence. Part II of the Youth Justice and Criminal Evidence Act 1999 contains no less than seventeen sections on the subject, containing nearly 5,500 words.[25] It would be much more sensible, surely, if Parliament dealt with such matters by passing a law that gave the outlines only, and left the detail to a Rules Committee.

The sixth and final objection to the present uncodified state of English criminal procedure is a more abstract one.

Because we never make the effort to set out all the rules of criminal procedure coherently between one set of covers, we never really see the system in the round. In consequence of this we never fully understand it, or appreciate what is happening to it--and the changes that we make are generally reactive ones, and sometimes ill thought out.

When lawyers think about English criminal procedure they tend to imagine that it is something static, that has existed broadly in its present form since Magna Carta. This makes them readily believe that any proposal to amend it has an element of sacrilege about it, rather like asking Norman Foster to remodel Canterbury cathedral. As legal historians have shown us, however, the story of English criminal procedure has been one of constant change, and since the middle of the eighteenth century the change it has undergone is truly fundamental.[26]

In 1750 almost every case was tried by jury, and both guilty pleas and summary trial were virtually unknown. But jury trial, of course, was very different then from what we have today. There were virtually no rules of evidence, and in the great majority of cases there were no lawyers (either for the prosecution or for the defence). In consequence a jury-trial was a truly summary affair, in which the dominant role was played by the judge. It was, in fact, rather similar to the sort of trial that used to take place until quite recently in the magistrates' courts, in the days when the police still prosecuted their own cases and legal aid for summary trials was virtually unknown--except that magistrates did not sentence convicted criminals to hang. But from the eighteenth century onwards, judges became rightly worried about miscarriages of justice. As the legal historian John Langbein explains,

“Into the early decades of the eighteenth century the judges seem to have remained confident that this system was working well, and they must have prided themselves on the immense caseloads that they were able to discharge in a few trial days per year. Beginning, we think, in the middle third of the eighteenth century, the judges became aware that there might be grievous flaws in the criminal process, although we cannot say with any precision when and ***Crim. L.R. 527*** why the doubts set in strongly. We have pointed to the crown-witness prosecution, where the potential for false witness was so distressing that it had led to the strict corroboration rule before 1751. The reward system, especially after the Macdaniel scandal of 1754,[27] was another major source of doubt about the reliability of prosecution evidence in major categories of serious crime”.

As a reaction to this, as Langbein further explains,

“The courts admitted defence lawyers, initially for the sole purpose of helping the criminal accused probe the prosecution evidence. And the courts began to develop rules of evidence, such as the corroboration rule and the confession rule, designed to prevent the riskiest kinds of prosecutions from going forward.”[28]

In consequence of this, in the course of the nineteenth century the pace of jury trial slowed dramatically down and became, as Langbein puts it, “unworkable as a routine dispositive procedure”. To meet the resulting risk of criminal justice simply collapsing, two immensely important steps were taken. Parliament, on the one hand, passed a series of Acts that hugely increased the scope of summary trial. And the judges, for their part, reversed their long-standing attitude towards guilty pleas. Originally they positively discouraged them, being unwilling to sentence people against whom the evidence had not been heard.[29] But during the nineteenth century they gradually departed from their traditional practice and took to positively encouraging them--finally inventing the “sentencing discount” for those who were prepared to admit their offences and thereby relieve the court of the need to hear the evidence.[30]

The consequence of all this is that jury trial ceased to be the central route by which criminal cases are disposed of. Nowadays, in fact, only some two per cent of all cases are handled in this way, and the normal route for all except a narrow slice of the most serious cases is summary trial in the magistrates' courts, usually accompanied by a plea of guilty. Yet lawyers, as well as Parliament and the general public, do not seem to appreciate the enormous changes that have taken place. In legal

theory, trial on indictment is still in principle the normal method, and ***Crim. L.R. 528*** summary trial an exception to the rule. And, as Penny Darbyshire has eloquently pointed out in this *Review,* [31] public debate about almost every aspect of criminal procedure is still commonly conducted on the basis that jury trial is the way in which criminal justice is predominantly done, as it used to be in the eighteenth century. If we once sat down and codified the rules, we might begin to understand what our system really is and how it actually operates.

Models of codification

So what in practice would be involved in codification?

If we look at the codes of criminal procedure that exist elsewhere in Europe, we find two models: those that consolidate, and those that reconstruct.

Scotland provides the classic example of consolidation. A quarter of a century ago, Parliament enacted the Criminal Procedure (Scotland) Act 1975. This put between one pair of covers, and in an orderly and rational form, a mass of material that was previously scattered over some 60 pieces of legislation passed between 1587 and 1973. On any view of the matter this was a major task, the preparation of which must have involved a large amount of careful work. Yet it was completely uncontroversial. The Bill emanated from the Lord Advocate's Department, and sailed calmly through Parliament as a consolidating measure, provoking little debate and absolutely no dissent. So far as I can discover, no legal journal, whether Scottish or English, ever mentioned it. Indeed the Criminal Procedure (Scotland) Act 1975 seems to have been the least noticed event in the whole of Scottish legal history. But, subliminal as it was, the Act still produced a major change, because it made Scottish criminal procedure accessible where it previously was not. So successful was it that 20 years later the exercise was repeated. Five years ago, Parliament passed the Criminal Procedure (Scotland) Act 1995, which consolidated the 1975 Act and the additions and amendments that had been made to Scottish criminal procedure over the succeeding years. Despite the need to incorporate amendments, the 1995 Act contrives to be both shorter and crisper than its predecessor--with 309 sections instead of 464.

Elsewhere in Europe, codes of criminal procedure are usually of the second type: the fruits of a conscious desire to change the existing system, frequently in the wake of some major political upheaval. The classic example was the Napoleonic *Code d'instruction criminelle* of 1808, which refashioned French criminal procedure, amalgamating elements from the old pre-Revolutionary inquisitorial procedure, and elements recently borrowed from English criminal procedure by the Revolutionaries. This code was widely exported, and the modern codes of many other Continental countries are directly or indirectly based upon it (including the current French *Code de procédure pénale,* which--significantly--dates from 1958). The German *Strafprozeßordnung* --which mixes French ideas with yet more notions drawn from the common law tradition--dates from the 1870s, and the unification of Germany. The Italian *Codice di procedura penale* of 1988, which goes still further in the same direction of borrowing common law ideas, resulted partly from a widespread feeling that the existing law worked badly, and partly from a democratic wish to demolish the existing code because it was a legislative monument to Mussolini.

Crim. L.R. 529 In my opinion, the criminal procedure of England and Wales really needs first the consolidation treatment, and then the reform-cum-reconstruction one.

A consolidation on the Scottish model would be an excellent first step to take. The Scottish experience shows that this is something that could be done both easily and quickly. To have our existing statutory rules rationally ordered and physically accessible would be an enormous practical advantage; one so great, surely, that the effort would be fully justified, even if a more radical codification-cum-reconstruction never followed.

Ideally, the more important common law rules would also be put into written form as part of the same process of consolidation. But codifying the common law parts of criminal procedure is obviously a stiffer task than consolidating existing statute. In the first place, it would involve extra work in the form of drafting new text, which is more intellectually strenuous and time-consuming than applying scissors and paste to text that Parliament has already enacted. And secondly, there is the problem that as soon as one lawyer reduces a common law rule to writing, a second lawyer complains because the written formula does not properly express the rule and a third one complains because it does and an opportunity to reform a bad rule has been thrown away.[32] Thus if any attempt were to be made to

codify the unwritten rules of criminal procedure at this stage, it should be limited to the ones that are most clear and least controversial.

If the basic rules were available between one set of covers, this would enable us to understand our existing system better. Armed with this knowledge we might then be able to undertake with some prospect of success the very much more ambitious task of drafting a code that attempts to rationalise and reform it.

The task of reform and rationalisation should be done, I believe, with an eye to three distinct elements. The first is the existing system, as rendered more accessible by consolidation. The second element is the European Convention on Human Rights, and its attendant case-law. This is a subject which--astonishingly--the Runciman Commission completely failed to mention in its report in 1993.[33] If the Convention was important then, it is doubly important now in the light of the Human Rights Act. It is partly the embarrassment of being condemned by the Strasbourg Court in cases like *Malone* [34] and *Saunders* [35] that led to the Human Rights Act being enacted in 1998. Whilst most of English criminal procedure undoubtedly meets Convention standards, the risk that any part may fail to do so is a matter of serious concern. Indeed, this issue is receiving official attention already--as witness the Law Commission's recent Consultation Paper on bail.[36] And the third element, more controversially, is criminal procedure in continental Europe.

Just as the continental systems have always looked at the common law tradition in the course of their reforms, so it would seem sensible for us to look at theirs. Over the years, English criminal procedure has already borrowed important elements ***Crim. L.R. 530** from the continental tradition, including public prosecutors[37] and professional police.[38] The continental countries face the same practical problems as we do--and any serious attempt to reform our criminal procedure should involve a thorough look at them. They deserve a better examination than the cursory glance that the Runciman Commission gave them.[39]

Daunting as the task may sound, I believe that a reform-cum-codification of criminal procedure would be easier to achieve than a reform-cum-codification of substantive criminal law.

This is because much of it could be done, I believe, by delegating the job to a Rules Committee. This is a technique that could hardly be applied to the substantive criminal law, but for much of criminal procedure and evidence it seems a realistic option. In fact large parts of criminal procedure are made in this way already. Not only do we have the Crown Court Rules and the Magistrates' Courts Rules, replete with housekeeping points about deadlines for submitting documents and the details that they must contain. As we have already seen, delegated legislation (or something like it) is also used to make rules about matters of high principle and capital importance--like how long a person can be held in prison pending trial,[40] how many offences a person can be tried for in the same proceedings,[41] whether a suspect can be questioned after he has been formally charged,[42] and the relationship between the CPS and the police.[43] It is not difficult, surely, to envisage delegated legislation being used to make the rules about such matters as the details of committal for trial, or advance disclosure. Rules so made could hardly be more impenetrable than the jungle of hastily-drafted sections and schedules of Acts of Parliament which governs these topics at present, and they would certainly be much easier to polish and reform.

In Italy, the new (1988) code of criminal procedure was brought about by Parliament passing a statute that laid down a list of basic principles, and then handed the task of drawing up a detailed code to others; the job was then done by a committee of lawyers, acting under the scrutiny of a Parliamentary committee. This new Code, unfortunately, seems to have been almost as controversial as the old ***Crim. L.R. 531** one.[44] But moving nearer to home, the method that was used in Italy is not so very different from the mechanism that was recently employed in England to reform civil procedure in a truly radical fashion. The recent reforms of civil procedure seem to be widely welcomed, and there is great optimism that they will succeed. Is it too much to hope that in criminal procedure, similar methods of working could produce similar results?

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1. For example, Part 2 of the *Criminal Appeal Reports* for 1999 contains 28 cases involving points of criminal procedure, as against twelve that turned on points of substantive criminal law. The *Criminal Law Review* for November 1999 gives

us seven new reported cases on various aspects of criminal procedure, two on sentencing, and one on substantive criminal law.

2. Juries Act 1974.

3. Criminal Procedure (Attendance of Witnesses) Act 1965.

4. Bail Act 1976.

5. Criminal Procedure (Scotland) Act 1995; see further below.

6. The War Crimes Act 1991 originally had its own transfer for trial procedure, which was prospectively abolished by the Criminal Justice and Public Order Act 1994, then solemnly revived and re-abolished (except for Northern Ireland) by the Criminal Procedure and Investigations Act 1996. Schedule 4 of the Criminal Justice and Public Order Act 1994 created a transfer for trial procedure that was designed to replace committal proceedings altogether--but the provisions were found to be defective and were also repealed by the CPIA 1996.

7. Cmnd 8092 (1981).

8. Prosecution of Offences Act 1985.

9. Customs and Excise Management Act 1979, s.161; see David Feldman, *The Law Relating to Entry Search and Seizure* (1986, Butterworths). I am grateful to Christopher Burke for providing me with further information about them.

10. (1768) 19 St. Tr. 1030.

11. See *Boyd v. United States,* 116 US 616 at 625; “The practice had obtained in the colonies of issuing writs of assistance to revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced ‘the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that was ever found in an English law book’ …”

12. See *Khan* [1997] A.C. 558. The most recent of these Circulars, entitled “Covert Listening Devices and Visual Surveillance (Private Place)” was issued in 1984. As Lord Nolan explained in *Khan,* “The Home Office circular was placed in the library of the House of Commons, but knowledge of its terms was not available to the general public”. Large excerpts are set out in the Court of Appeal's judgment in this case: see [1995] Q.B. 27.

13. PACE 1984, Code C:16.5.

14. *R. v. Director of Serious Fraud Office, ex p. Smith* [1993] A.C. 1.

15. Article 2 of Protocol 7 to the European Convention on Human Rights provides that “(1) Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law. (2) This right may be subject to exceptions in regard to offences of a minor character, as provided by law …”. But this Protocol has not yet been ratified by the United Kingdom.

16. This anomaly was recently criticised by the Attorney-General when he gave the tenth Tom Sargant Memorial Lecture: see (1999) 149 N.L.J. 1815. Prosecution appeals have now been referred to the Law Commission, which was already investigating the related problem of double jeopardy: see its Consultation Paper No. 156, *Double Jeopardy,* 1999. In this Consultation Paper the Law Commission takes the view that wider rights of appeal for the prosecution would be compatible with the European Convention on Human Rights.

17. Nor is this all. The Commissioners of Customs and Excise also have the power at any time to order the release of any prisoner who is serving a sentence for an offence under the Customs and Excise Act(!): Customs and Excise Management Act 1979, s.152(d). The fact that the Customs and Excise have managed to retain all these extraordinary powers suggests that they have the intelligence not to over-use them.

18. Section 68 and Schedule II; see Roderick Munday, “The Drafting Smokescreen” (1997) 147 N.L.J. 792 at 860; and see *Archbold* 2000, para. 10-41: “It remains to be seen how much the courts are prepared to read into an Act which plainly does not say what it was intended to say”.

19. Courts Act 1971, s.6, now contained in the Supreme Court Act 1981, s.77(2)(b).

20. Prosecution of Offences (Custody Time Limits) Regulations 1987. If the current rules are satisfactory, the same can hardly be said of the initial version--which laid down different maximum periods for different parts of the country!

21. “To build a safe, just and tolerant society in which the rights and responsibilities of individuals, families and communities are balanced and the protection of society and the public are maintained”. (Prominently painted on the wall of the entrance lobby of the Home Office building in Queen Anne's Gate.)

22. PACE 1984, Code C:16.5.

23. Code of Practice under Part II of the Criminal Procedure and Investigations Act 1996, s.23(1).

24. The Farquharson Committee; see *Archbold* 2000, paras 4-94--4-96.

25. But under section 18(5) of the Act, the Home Secretary has wide powers to amend the provisions.

26. On this subject, see, *inter alia,* the extensive writings of J. H. Langbein, and in particular his articles “The criminal trial before the lawyers” (1978) 45 U. Chig. L.R. 263; “Shaping the eighteenth-century criminal trial: a view from the Ryder sources” (1983) 50 U. Chig. L.R. 1; “The prosecutorial origins of defence counsel in the eighteenth century” [1999] C.L.J. 314.

27. Macdaniel and his associates made a living by falsely accusing innocent persons of highway robbery and pocketing the official rewards payable to those whose evidence secured the conviction of highwaymen. As a result of their activities a number of innocent persons were sentenced to death and executed. When they were eventually detected there was an unsuccessful attempt to prosecute them for murder, followed by successful proceedings for perjury. Their sentences included standing in the pillory, where the mob set upon them and stoned one of them to death. The story is told by Sir Leon Radzinowicz in Volume 2 of his *History of English Criminal Law* (1956), pp. 326-332. One of the court rulings in the case is still cited as an authority: *Macdaniel* (1756) 1 Leach 44, discussed in Smith and Hogan, *Criminal Law* (9th ed., 1999), p.347.

28. “Shaping the eighteenth-century criminal trial”, note 26 above, p.133.

29. Langbein, “The criminal trial before the lawyers”, note 26 above, pp.278-279.

30. The precise point when the change of judicial attitude took place in England appears to be unknown. However, observers writing about English criminal procedure at the beginning of the nineteenth century still said guilty pleas were rare, whereas in 1903 the Select Committee on the Poor Person's Defence Bill reported that 40 per cent of prisoners plead guilty. Much information about the history of guilty pleas is contained in Albert W. Alschuler, “Plea bargaining and its history” (1979) 79 Col. L.R. 1. In England the old practice of discouraging guilty pleas lingered on in capital cases until the end of capital punishment.

31. “An essay on the importance and neglect of the magistracy” [1997] Crim.L.R. 627.

32. This is one of the many problems that has beset attempts to codify substantive criminal law. On this see Ian Dennis, “The critical condition of criminal law” [1997] C.L.P. 213 at 244.

33. Report of the Royal Commission on Criminal Justice, Cm 2263, 1993.

34. *Malone v. United Kingdom* (1984) 7 E.H.R.R. 14.

35. *Saunders v. United Kingdom* (1996) 23 E.H.R.R. 313.

36. *Bail and the Human Rights Act 1998,* Law Commission Consultation Paper No. 157 (1999).

37. The main inspiration was, of course, the procurator fiscal in Scotland; but this figure was originally borrowed by the Scots from France. See W. Reid, “The origins of the procurator fiscal in Scotland” (1965) *Juridical Review* 154.

38. The very word “police” is French; see Sir Leon Radzinowicz, *A History of English Criminal Law,* vol. 3, pp.1, *et seq.* If the idea of a professional police force is a continental European one, it is of course also true that the heavily decentralised British version is a reaction to habits of autocratic continental governments, which used their police forces to enforce their political will.

39. The Royal Commission did cause two studies to be made: L. H. Leigh and L. Zedner, *Report on the administration of criminal justice in the pre-trial phase in France and Germany,* RCCJ Research Study no. 1, and N. Osmer, A. Quinn and G. Crown, *Criminal justice in other jurisdictions* (which is a brief account of the criminal justice systems in 21 jurisdictions). But the only use the Royal Commission made of the information so collected is a few dismissive lines in the introduction, the gist of which is “we have … no evidence to suggest that there is somewhere a jurisdiction in which the rights and interests of the various parties are so uniquely well balanced as to give the system the best of all worlds”.

40. See above, note 20.

41. Indictments Rules 1971.

42. See above, note 22.

43. See above, note 23.

44. See the chapter on Italy in Delmas-Marty (ed.), *Procédures pénales d'Europe* (Presses Universitaires de France, Paris 1995).


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