



JUDICIARY OF
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President of the Queen's Bench Division
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1. Let me start by saying that, whatever the history of sentencing, its importance in the modern age is simply indisputable. Sentencing serves a valuable purpose in punishing those who have committed crime, protecting the public, and in preventing future crime. It is critical component of respect for the rule of law.
2. My first interest in sentencing was in 1969 as Professor Sir Rupert Cross, then the holder of the Vinerian Chair at Oxford introduced a course in Penology as part of the undergraduate law degree. I was sufficiently interested in the subject that I investigated undertaking post-graduate research in the subject, which Sir Rupert encouraged as it had been the subject of very little academic interest at the time. In the end, I decided against it and it is just as well because in 1970, the late David Thomas published his seminal work *Principles of Sentencing* in 1970 in which he provided the systemic analysis that I had been considering.
3. Judges were given a broad discretion in sentencing and as a result practice varied significantly across the country. While the impact of sentencing decisions for the offenders concerned was never disputed sentencing tended to be seen rather as an after-thought by practitioners and the judiciary and was an area of law that was relatively under-developed. With the exception of the sentencing of children, there were relatively few sentences available to a sentencing court. While a formal probation service had been created at the turn of the century,¹ probation and community based orders were still in their infancy until the latter part of the 1900s

¹ Probation of Offenders Act 1907.

and, when I was called to the bar, in reality, the sentences of the court were limited to discharge, fine, probation and prison. As for determinate sentences, all prisoners served two thirds of the nominated sentence the final third being remitted for good behaviour – although that could be lost for bad behaviour. It is noteworthy that it was only in 1967 that the Parole Board was created.²

4. Reasons did not have to be given and to such extent as there was any explanation, it was very brief. I vividly remember, after conviction, the judge simply saying “Stand up. Congratulations. You have reached double figures. 10 years. Take him down”. Further, it was well known who were harsh sentencers and who were less harsh – and defence counsel struggled to avoid the former and be listed before the latter. It was only during the following years that guideline judgments were available, first provided by Lawton LJ in *R v Turner*³ in relation to robbery and thereafter by the Lord Chief Justice in *R v Aramah*⁴ in relation to drugs. For *Aramah*, the court investigated some statistics of its own motion but it was only by the Crime and Disorder Act 1998 that the Sentencing Advisory Panel, chaired by an academic, was set up and, the Criminal Justice Act 2003, the Sentencing Guidelines Council now both incorporated into the Sentencing Council by the Coroners and Justice Act 2009, which I chaired for the first four years of its life.
5. Until these bodies were established, the appropriate tariff could only be ascertained by looking at another work of Dr David Thomas, that is to say his four volume Encyclopaedia of Current Sentencing Practice which listed hundreds if not thousands of decisions of the Court of Appeal Criminal Division so that counsel could try to align the facts of their case with one of those. I would like to think that the current approach to sentencing decisions is now much more consistent with guidelines ensuring that all decisions are approached in the same way, whatever the location of the court or the personal philosophy of the sentencing judge. Variation in local practice is, I hope, in the past.
6. Over the years, I have given many speeches about guidelines and this is not intended to be another one. Because save for a few common law offences (and even then, statute has sometimes interposed an approach for sentencing judges such as is visible in Schedule 21 of the Criminal Justice Act 2003 in relation to murder), the approach of the court is governed by statutory maxima and the variety of potential sentencing

² Criminal Justice Act 1967, s.59.

³ (1975) 61 Cr App Rep 67

⁴ (1982) 76 Cr App Rep 190

decisions or disposals now available. On top of that, although parole and release is not for the sentencing judge, it sometimes has to be considered by the Court of Appeal because of s. 11(3) of the Criminal Appeal Act 1968 which forbids the Court of Appeal from sentencing more severely than the Crown Court whether or not the sentence imposed in that court is lawful.

7. So this speech is not about how judges go about choosing a particular sentence from the legislative choices available. It is about the myriad of legislative choices and the incredible complexity of sentencing legislation, in which available options and even maxima for offences change with bewildering rapidity. The upshot is that sentencing takes up an increasing amount of court time, and appeals against sentence now constitute the vast majority of the work of the Criminal Division of the Court of Appeal. From October 2016 to September 2017 the court heard 215 appeals against conviction and 1,183 appeals against sentence.⁵ Far more applications had to be dealt with by a single judge on the papers, never progressing to the full court.⁶
8. So what is the problem? Unfortunately, as anyone with experience in the criminal courts will tell you, the law of sentencing is unnecessarily complex and technical. It is the result of frequent piecemeal legislative amendment, and is contained in over 50 different pieces of primary legislation. It has no coherent structure, and the result is that it is incredibly difficult to navigate and understand. This leads to significant errors in the sentencing of offenders, such as those which required me to convene a special court of the Court of Appeal in the conjoined appeals of *Thompson; Cummings; Fitzgerald; Ford*.⁷ Cummings, for example, had been convicted of causing grievous bodily harm with intent, having broken the jaw of a young woman who bought drugs from him and who had owed him money. The judge had expressly found that Cummings posed a serious danger to the public, but fell into the mistaken belief that because Cummings was under 18 at the time of his conviction he did not have the power to impose an extended sentence. The result of section 11(3) of the Criminal Appeal Act 1968 was that we could not on appeal correct this error and impose upon him the extended sentence that the judge ought to at trial.
9. As I commented at [82] of that appeal:

⁵ *Court of Appeal (Criminal Division) Annual Report 2016-17* (21 August 2018) Annex D and E (accessible at <https://www.judiciary.uk/publications/court-of-appeal-criminal-division-annual-report-2016-17/>).

⁶ *Court of Appeal (Criminal Division) Annual Report 2016-17* (21 August 2018) Annex F (accessible at <https://www.judiciary.uk/publications/court-of-appeal-criminal-division-annual-report-2016-17/>).

⁷ [2018] EWCA Crim 639; [2018] 1 W.L.R. 4429.

The complexity of sentencing legislation is such that errors such as those that have been made in these cases are inevitably becoming more frequent as judges and advocates struggle with (and take time to resolve) the multiplicity of disposals and the statutory requirements for each.⁸

10. The error in the case of *Cummings* was a rather serious one, but the Court of Appeal's time is also plagued by the correction of a number of more technical errors. Take the case of *Squires*⁹ from November of last year which required a court to be convened to issue a three paragraph judgment correcting the unlawful imposition of a surcharge order, or the case of *Komolafe*¹⁰ from December where three judges of the Court of Appeal gave a four paragraph judgment correcting the imposition of a sentence of detention in a young offender institution which should have simply been a sentence of detention of the same length because of the offenders age. Many of these errors are not even spotted by the counsel in the case preparing the appeal but are instead noticed by the eagle-eyed lawyers in the Criminal Appeal Office. Because the sentences have been imposed more than 56 days previously these errors cannot be corrected by the Crown Court under what is known as the slip rule.¹¹
11. When dealing with the approach to criminal justice by the various agencies, but equally apposite to the question of sentence, in my *Review of Efficiency in Criminal Proceedings*, I made it clear that the priority must be "getting it right the first time".¹² I am sorry to say that the current state of sentencing law means that frequently the right result is not reached until even the third time. An analysis conducted by Robert Banks, the author of *Banks on Sentence*, in 2012 of 262 randomly selected appeals against sentence in the Court of Appeal Criminal Division found that 95 of them involved an unlawful sentence.¹³ That is to say that 36% of those cases involved a sentence which the judge simply had no power at law to pass. This is clearly an unacceptable position.

⁸ [2018] EWCA Crim 639; [2018] 1 W.L.R. 4429 at [82].

⁹ [2017] EWCA Crim 2070.

¹⁰ [2017] EWCA Crim 2351.

¹¹ Powers of Criminal Courts (Sentencing) Act 2000, s.155.

¹² *Review of Efficiency in Criminal Proceedings by The Rt Hon Sir Brian Leveson* (January 2015) para 25 (accessible at <https://www.judiciary.uk/publications/review-of-efficiency-in-criminal-proceedings-final-report/>).

¹³ R Banks, *Banks on Sentence* (8th ed 2013), vol 1, p xii. Those 262 cases consisted of every criminal appeal numbered 1600 to 1999 in 2012, excluding "those not published, those relating [solely] to conviction, non-counsel cases and those that were interlocutory etc."

12. Let me give you some examples. First, historic cases. The complexity of the law is even greater in those cases involving historic offences. It is rather trite to state that sentencing law is frequently amended. Over the last 30 years there have been major amendments to the law of sentencing on an almost bi-annual basis. The issue is not simply the pace of legislative change, but the unfortunate way in which these legislative changes have been brought into force. When new amendments to sentencing law are brought into force they are frequently brought into force prospectively only: applying only to offences committed, convicted or charged on or after their commencement. Frequently these restrictions on the effect of the legislative change are not found in the primary legislation itself but hidden in complex transitional provisions in the commencing statutory instrument. The result is that it is often difficult and time-consuming to find out whether a particular provision applies to a particular case. It is often too easy to miss the fact that an amendment to the law has been commenced prospectively only.
13. This makes the sentencing of historic offences, already a difficult topic which has required the close attention of the Court of Appeal in cases such as *Forbes*¹⁴ and *H*,¹⁵ even more difficult. Take the recent case of *JM*¹⁶ where the judge at trial had purported to impose a suspended sentence under the Criminal Justice Act 2003, but because the offence had been committed before 4 April 2005,¹⁷ the suspended sentence could in fact only be imposed under the Powers of Criminal Courts (Sentencing) Act 2000. This meant that there was a different test for the availability of a suspended sentence, and that no community requirements could be imposed as part of it. Valuable court time was spent debating and deciphering these transitional provisions.
14. In some cases, real injustice can arise from a failure to identify these transitional provisions. In the case of *GJD*¹⁸ the offender received a sentence of imprisonment for public protection under section 225 of the Criminal Justice Act 2003 with a minimum term of six years following a conviction for an offence committed between August 2004 and January 2005. Such a sentence was not available for him as section 225 of the Criminal Justice Act 2003 had been commenced so that it applied only to

¹⁴ [2016] EWCA Crim 1388; [2017] 1 W.L.R. 53.

¹⁵ [2011] EWCA Crim 2753; [2012] 1 W.L.R. 1416.

¹⁶ [2017] EWCA Crim 2458.

¹⁷ SI 2005/950, art.2, Sch.1 para.8 and Sch.2 para.5.

¹⁸ [2015] EWCA Crim 599, [2015] EWHC 3501 (Admin).

offences committed on or after 4 April 2005 (like with suspended sentences under that Act). This error was only corrected 9 years later, over three years after the expiry of the minimum term. As the former Lord Chief Justice, Lord Thomas, had cause to remark: “It is astonishing that the fact that the judge had no power to pass that sentence was not recognised for a considerable period of time.”¹⁹

15. The offender’s case had in fact been reviewed by the Parole Board on over four occasions before the error was spotted, and it was spotted not as part of an appeal against the conviction but in the preparation of an application to challenge the opportunities he had been given to undertake rehabilitative work.
16. That brings me to the concept of a Sentencing Code. Given the unsatisfactory state of the current law, I hope that it is not surprising that, in my *Review of Efficiency in Criminal Proceedings*, I commended the decision of the Law Commission to give proper consideration to a comprehensive consolidation of sentencing practice and procedure.²⁰ I am glad to say that not only did the Government include sentencing in the list of topics for the Law Commission to cover but, in addition, the Commission have taken up the task with real enthusiasm and, after proper consideration, on 22 November, they published their final Sentencing Code.²¹
17. If enacted, the Law Commission’s Sentencing Code will bring the primary law of sentencing procedure into a single statute, providing the law with a much needed clear and logical structure. This will do a great deal to make the law more accessible for judges, practitioners and members of the public. It is to be hoped that this clear structure and contents will help avoid many of the cases I have mentioned. The Sentencing Code, for example, clearly separates out all the custodial sentences available for an offender convicted when under age 18 from those available for older offenders.
18. This structure has been heavily informed by consultation with members of the judiciary and criminal practitioners over the last three-and-a-half years. The draft Sentencing Code itself was the subject of a 6-month consultation last year during which the Law Commission spoke to over 1400 people and hosted public consultation events in every Circuit.

¹⁹ [2015] EWCA Crim 599, [2015] EWHC 3501 (Admin) at [5].

²⁰ *Review of Efficiency in Criminal Proceedings by The Rt Hon Sir Brian Leveson* (January 2015) paras 369 to 372 (accessible at <https://www.judiciary.uk/publications/review-of-efficiency-in-criminal-proceedings-final-report/>).

²¹ The Sentencing Code (2018) Law Com No 382 (accessible at <https://www.lawcom.gov.uk/project/sentencing-code/>).

19. In reality, the Sentencing Code is a consolidation of the existing law on sentencing procedure. While it will make a number of streamlining changes to the law in the interests of clarity and certainty it will not affect the severity of the sentence that is imposed for any offence. It will not interfere with the maximum sentences available for an offence, or increase the scope of minimum sentencing provisions. Similarly, it will not interfere with existing judicial discretion in sentencing
20. Furthermore and of real significance, the Sentencing Code was the first ever draft Bill to be hosted by the National Archives on legislation.gov.uk. With the move to an increasingly digital practice in the Crown Court with the advent of the Crown Court Digital Case System, it is increasingly important that legislation is usable online. The Law Commission considered this problem in depth. At times interpretative provisions have been reproduced in each relevant section, rather than at the end of the Act, as the extra length does not have the same repercussions if it is in the digital environment. Where this is not practicable the Sentencing Code uses cross-references to the section number where definitions can be found, enabling effective hyperlinking. These changes appear minor, but are the sort of thing that in practice really contribute to the usability of and ease of access to a piece of legislation.
21. Similarly, the Sentencing Code has been drafted with the work of the Sentencing Council in mind and will complement the sentencing guidelines. It will allow judges to focus on the key issue – the correct sentence to be imposed in each case – and allow them to not have to be distracted by the exercise of having to navigate the morass that is the current law of sentencing.
22. Critically, however, the Sentencing Code will go beyond consolidation in one notable way: by removing the need to make reference to historic versions of sentencing legislation. Through the implementation of what the Law Commission is calling the “clean sweep”, the Sentencing Code will apply the current law of sentencing to all offenders whose convictions occur after the Sentencing Code has come into force, with a few limited exceptions necessary to protect offender’s human rights. These exceptions exist where applying the current law would either result in an offender receiving a greater penalty than that they could have received at the time of the offence; or, alternatively, would make an offender subject to a minimum sentence that did not apply at the time of their offence. These exceptions guarantee that the Sentencing Code complies with Article 7 of the European Convention on Human Rights which provides protections against retrospective punishment.

23. Judges will only need to have reference to the Sentencing Code itself when sentencing offenders convicted on or after its commencement. Even where an exception has been made to the clean sweep, the court will find the relevant law in the Sentencing Code. Further, it will be clear from the first subsection of the relevant provision to which cases that provision applies. Take, for example, the mandatory minimum sentence for repeat knives offences: the first subsection will make clear that the section applies only to offences committed on or after 17 July 2015. No longer will courts have to have reference to easily missed transitional provisions in separate statutory instruments.
24. The Law Commission estimate that the Sentencing Code will allow for significant savings in court-time and appeals by reducing the length of time necessary to identify the relevant law and by reducing the rate of error. The projected savings from the implementation of the Sentencing Code are valued at £256 million over the next ten years.
25. The impact of the wasted court time that results from the complexity of sentencing law is not just felt in sentencing. When judges in the Crown Court are spending an unnecessary amount of time interpreting sentencing law they cannot preside over trials, thereby contributing to the increasing delay between charge and trial and adding to the burden of the work of the court. Similarly, when the Court of Appeal is required to spend time correcting minor technical errors in sentencing, let alone identifying such errors that have been overlooked by advocates and the court when passing sentence, that is time that could be used considering the real merits of appeals against conviction or sentence. In short, the Sentencing Code will allow courts to get it right the first time.
26. It will save time and money in the magistrates' courts, the Crown Court and the Court of Appeal. It will make the process of sentencing simpler and clearer for all involved. It will bring clarity, transparency and efficiency to a critical part of the criminal law. It will ensure that the sentences handed down by the courts are accurate and lawful. It will allow us to do more with the limited resources available.
27. The need for a clear, logically structured statute governing sentencing procedure is long overdue. It has been the work of three and a half years but the Sentencing Code is here and is ready to be introduced. It is a reform that is critically necessary, has the strong support of all strands of the legal profession, and is completely achievable.
28. I turn to enactment of the Code. Because it has been drafted as a consolidation Bill, it can proceed through the special parliamentary procedure for such Bills. This

special procedure takes up minimal time in the debating chambers of the Houses of Parliament, with parliamentary scrutiny instead provided by a Joint Committee of the two Houses.²² It also ensures that the Bill cannot be “hijacked” and used to effect other more controversial legal reforms. The Sentencing Code is comprised of 412 clauses and 28 Schedules. Although it is an admirable reduction on the size and complexity of the current law it remains a large Bill. This consolidation procedure allows it to be enacted without taking up valuable Parliamentary time.

29. What needs to be done before the Sentencing Code can be introduced? Five clauses have to be enacted as part of an ordinary Public Bill to give effect to the “clean sweep” of the law, and allow the Law Commission to make a number of minor amendments to the law necessary to produce the consolidation. The Law Commission has drafted these clauses as a stand-alone Bill but they could be incorporated into any other Public Bill for which sentencing is in scope. Speaking for myself, I hope that given the non-political nature of this reform and the level of support it enjoys among the legal profession, it could be introduced through the special procedure for Law Commission Bills, which would also allow it to take up less time on the floor of the house.
30. I recognise, of course, that Parliament is particularly busy at the moment with Brexit and the determination of our withdrawal from, and future relationship with, the European Union. However, the time necessary to enact these five clauses is minor yet the passage of these five clauses would bring with it the vast benefits of the Sentencing Code and now is the perfect time to consolidate the law of sentencing – it is, for once, largely static. The risk of delay, is that the draft Sentencing Code becomes out of date. I venture to suggest that it would be a travesty if the Code was allowed to grow dusty on a bookshelf like the Criminal Code produced in the 1980s and in which so much effort was invested.
31. What of the future? Once the Sentencing Code is enacted Parliament must ensure it remains the single source of sentencing law, and that amendments are made to it in ways which are consistent with the “clean sweep” approach. As the Law Commission acknowledges we do not, in this jurisdiction have a formal legislative concept of a “Code”. Parliament’s autonomy and sovereignty cannot be restricted and it will remain open to them to make any change to sentencing law they wish, and to do so in any way they wish, even if that involves creating a separate sentencing statute.

²² The Sentencing Code (2018) Law Com No 382, paras 11.13 to 11.17 (accessible at <https://www.lawcom.gov.uk/project/sentencing-code/>).

32. However, I remain hopeful, as I am sure the Law Commission does, that a culture can be created where amendments are made only to the Sentencing Code itself – and that these amendments are made clearly, applying to all new convictions. The Law Commission devotes a full chapter of their Report to how they will ensure that such a cultural change is created, including by providing a large number of example amendments.²³ It will suffice for my purposes tonight to say that I echo their view that the creation of such a culture is critical.
33. It is not sufficient simply to enact a Sentencing Code. We must preserve it and cannot allow the law to return to its current state. There are no benefits of our current approach.
34. Let me conclude by observing that consolidation of the law has rather fallen out of fashion. From 1965 to 2006 there were more than 200 consolidation Bills, averaging 5 a year. In the 12 years since 2006, there have been only two.²⁴ The benefits of consolidating law should not be underestimated and they should not continue to be seen as politically unattractive. Where the consistent and proper application of the law is prevented by the sheer complexity of the legislative regime, the rule of law itself is under threat. It is often forgotten that most legal problems are resolved by sensible advice and litigation follows in relation to the law when the advice cannot be certain because the law is not certain. The greater the certainty, the less pressure there is in relation to legal disputes. Only consolidation, such as the Sentencing Code, offers real benefits in relation to the clarity and accessibility of the law, as well as important cost and efficiency savings. They should not be seen as half-steps or irrelevances. Once they are enacted they should be preserved and respected.
35. The Law Commission has provided us with an opportunity greatly to simplify and clarify the law of sentencing. The proposed code will save money and time and create greater certainty in relation to the options available to sentencers in this ever increasingly complex world. The current rates of error and delay consequent on that complexity in this crucial area simply cannot be allowed to continue. In that regard, I know that, in his evidence to the Justice Select Committee, the Lord Chief Justice entirely supported this reform. Speaking with the experience of 50 years of the law and practice of sentencing, as one who was interested in it as an academic study when

²³ The Sentencing Code (2018) Law Com No 382, chapter 12 (accessible at <https://www.lawcom.gov.uk/project/sentencing-code/>).

²⁴ The Charities Act 2011 and the Co-operative and Community Benefit Societies Act 2014.

I was an undergraduate, and now near to retirement, I respectfully suggest that this consolidation must go forward and Parliamentary time must be made for it.

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