Law Commission
Reforming the law

Sentencing Procedure
Issues Paper 1
Transition

1 July 2015

Law Commission

SENTENCING PROCEDURE

Issues Paper 1 - Transition

Any enquiries regarding this publication should be sent to us at The Law Commission, 1st Floor, Tower, Post Point 1.52, 52 Queen Anne's Gate, London, SW1H 9AG

THE LAW COMMISSION – HOW WE CONSULT

About the Law Commission: The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are: The Rt Hon Lord Justice Lloyd Jones, *Chairman,* Stephen Lewis, Professor David Ormerod QC and Nicholas Paines QC. The Chief Executive is Elaine Lorimer.

Topic of this consultation: Transition to the New Sentencing Code. This consultation paper addresses:

- The existing legal principles governing non-retroactivity,
- Whether we can take a clean sweep approach to transition to the New Sentencing Code,
- What exceptions and safeguards might need to be observed in implementing such a clean sweep, to ensure the fundamental rights of offenders in historic cases are respected.

Geographical scope: This consultation paper applies to the law of England and Wales.

Availability of materials: The issues paper is available on our website at http://www.lawcom.gov.uk/project/sentencing-procedure/

Duration of the consultation: We invite responses from 1 July to 26 August 2015.

Comments may be sent:

By email to sentencing@lawcommission.gsi.gov.uk

OR

By post to Paul Humpherson, 1st Floor, Tower, Post Point 1.54, 52 Queen Anne's Gate, London SW1H 9AG (access via 102 Petty France)

Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

After the consultation: In the light of the responses we receive, we will decide on our final recommendations and present them to Government.

Consultation Principles: The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency.

The Principles are available on the Cabinet Office website at: https://www.gov.uk/government/publications/consultation-principles-guidance.

Information provided to the Law Commission

We may publish or disclose information you provide us in response to this consultation, including personal information. For example, we may publish an extract of your response in Law Commission publications, or publish the response in its entirety. We may also be required to disclose the information, such as in accordance with the Freedom of Information Act 2000.

If you want information that you provide to be treated as confidential please contact us first, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic disclaimer generated by your IT system will not be regarded as binding on the Law Commission.

The Law Commission will process your personal data in accordance with the Data Protection Act 1998.

THE LAW COMMISSION

SENTENCING PROCEDURE: TRANSITION

CONTENTS

THE LAW COMMISSION
SENTENCING PROCEDURE
ISSUES PAPER 1: TRANSITION

PART 1
INTRODUCTION

1.1 This is the first of a number of publications seeking consultees' views on aspects of the Law Commission's project to codify sentencing procedure in a new sentencing procedure code ("the New Sentencing Code").

1.2 The first phase of this project involves consideration of the way the New Sentencing Code should be introduced, and the structure which it should follow.

1.3 The exercise of codifying sentencing procedure is a very significant undertaking, and will bring correspondingly large benefits in terms of simplicity and accessibility of the law. For this reason, we believe it is important to maximise the opportunities for input from interested individuals throughout the project. To this end, we plan a number of consultation documents, of which this is the first. We explain the structure of the project, and a little more about the content of future consultation documents below.[1]

1.4 This Issues Paper considers the important policy questions around transition from the current law to the New Sentencing Code. Our aim is to find a way to introduce the New Sentencing Code in the most effective way possible by:

(1) minimising the need for complex transitional provisions; while

(2) respecting the fundamental rights of those engaged in the criminal justice and sentencing process.

BACKGROUND TO THE SENTENCING PROCEDURE PROJECT

1.5 The sentencing procedure project is part of the Law Commission's 12th programme of law reform.[2] Our terms of reference are:

> To consider the codification of the law governing sentencing procedure, understood as the process applicable from verdict to the end of the sentence imposed and to design a sentencing procedure Code, embodied in one Act with a clear framework and accessible drafting. Such a new Code will provide the courts with a single point of reference, capable of accommodating amendment and adapting to changing needs without losing structural clarity.
>
> To keep in mind the principles of good law: that it should be necessary, clear, coherent, effective and accessible. In short, to make legislation which works well for the users of today and tomorrow.

[1] See para 1.15 below.

[2] Twelfth Programme of Law Reform (2014) Law Com No 354.

> To ensure that the new Code must not restrict Parliament and the Government's capacity to effect changes in sentencing policy. In particular, the penalties available to the court in relation to an offence are not within the scope of this project except insofar as some consideration of them is unavoidable to achieve the wider aim of a single, coherent Code. Similarly, the Code should not in general impinge upon sentencing guidelines, and its drafting will be consistent, and in cooperation, with the work done by the Sentencing Council.

1.6 In other words, the aim of the project is to introduce a single sentencing statute that will act as the first and only port of call[3] for sentencing tribunals regarding the procedure to be followed at the sentencing hearing. It will set out the relevant provisions in a clear, simple and logical way, and will allow for all updates to sentencing procedure to be made in a single place.

1.7 This will represent a sharp contrast to the current state of the law in this area. The current law is an impenetrable thicket, contained in hundreds of separate provisions scattered across dozens of statutes. The provisions are often overlapping, technical and complex. They have different commencement and transition dates.

1.8 The confused state of the current law has concrete negative effects in practice. It is extremely difficult even for an experienced judge to identify the correct sentencing procedure applicable to any case. The impact of this is that judges spend more time on the sentencing process than ought to be needed, which adds cost and delay to sentencing determinations and can have knock-on effects on the punctuality of other trials. Practitioners are also forced to spend more time assisting the judge on these issues.

1.9 This complexity leads to error. That causes additional cost and delay with additional court hearings under the "slip rule"[4] to remedy minor errors and more appeals to the Court of Appeal (Criminal Division) ("CACD"). These unnecessary appeals on sentence are expensive and time consuming, and delay other appeals. An analysis of 262 randomly selected cases in the CACD in 2012 showed that the complexity of the legislation is resulting in an extraordinary number of wrongfully-passed sentences: there were 95 *unlawful* sentences passed in the sample.[5] These were not sentences which the CACD thought required reducing on the basis they were manifestly excessive, but cases in which the type of sentence(s) imposed was wrong in law.[6] In addition, the

[3] At least, as far as primary legislation goes.

[4] Powers of Criminal Courts (Sentencing) Act 2000, s 155.

[5] R Banks, *Banks on Sentencing* (8th ed 2013), vol 1, p xii. Those 292 cases consisted of every criminal appeal numbered 1600 to 1999 in 2012, excluding "those not published, those relating to conviction, non-counsel cases and those that were interlocutory etc."

[6] Robert Banks' table of why each sentence was unlawful can be found on his website here: http://www.banksr.co.uk/images/Other%20Documents/Unlawful%20orders/2012%20(11)%20Sentencing%20illegalities%20Sorted%20by%20error.pdf (last visited 19 June 2015).

complexity of the law is undoubtedly resulting in many inappropriate sentences and is influential in producing unduly lenient sentences.[7]

1.10 The complexity also impedes the rational development of the law. According to policy officials, the landscape has become so confused that they cannot always be confident when advising on the likely effects of proposed sentencing initiatives. Unintended consequences of new statutory procedures cannot reliably be identified and guarded against. We have now reached the point at which it is difficult to see how the existing morass of legislation can effectively be amended.

1.11 This project, to remedy the current state of the law, was formally launched on 26 January 2015. As part of that launch, a number of leading figures in the criminal justice system endorsed our view that the current landscape of sentencing law and procedure is highly complex and expressed strong support for simplification and consolidation in this area.[8]

1.12 For example, the Lord Chief Justice stated that:

> …the Law Commission's project to codify sentencing law is a valuable and long-overdue stepping stone in the process of the rationalisation and clarification of the criminal law. The law on sentencing is highly complex and contained in a dizzying array of separate but overlapping sources. For that reason sentencing procedure represents an obvious candidate for consolidation and simplification.[9]

1.13 The Director of Public Prosecutions also highlighted the value of the New Sentencing Code for victims and witnesses:

> For a victim or witness the court process can seem very daunting and people can often be discouraged from being part of proceedings as they are either worried about the length of time it may take or because they do not understand the process they are about to go through.
>
> Whilst sentencing is only one stage of a trial, it is vital that the public are able to understand the process. This new Code takes the needs of all court users on board and will provide a clear framework for each part of the sentencing procedure, this will allow the public to gain a greater level of understanding of the sentencing process, and hopefully ease some of their concerns.

[7] Consultation with the Attorney General's Office suggests that errors due to the current complexity of the law can cause unduly lenient sentences, and also that in the course of reviewing sentences for undue leniency, many other legal errors in sentences are revealed.

[8] Including The Rt Hon the Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales; Alison Saunders CB, Director of Public Prosecutions; Lord Justice Treacy, Chairman, Sentencing Council; Alistair MacDonald QC, Chairman, Bar Council; and Andrew Caplen, President, The Law Society.

[9] See http://lawcommission.justice.gov.uk/areas/sentencing-procedure.htm.

> The introduction of this single sentencing code should go a long way to increase clarity and transparency, improving the service provided to the public and their confidence in the sentencing process.[10]

1.14 The project is limited to reform of the law in England and Wales, it has no application to Scotland or Northern Ireland.[11]

Structure of the project

1.15 This large and ambitious project will begin with three consultative phases.

(1) **Phase 1:** Transition to, and the structure of, the New Sentencing Code.

(2) **Phase 2:** Policy issues and the content of the New Sentencing Code.

(3) **Phase 3:** Embedding the New Sentencing Code / constitutional issues.

Phase 1

1.16 During Phase 1, of which this issues paper forms part, we will consider two main issues. The first is the way in which the New Sentencing Code will be introduced, and how much of the pre-existing law on sentencing procedure needs to be preserved. These questions form the subject-matter of this paper.

1.17 The second is the appropriate structure of the New Sentencing Code. For instance, should there be more than one Code: one governing adults and one governing those under 18 years old being one obvious possibility? Or perhaps separate documents for the different criminal court jurisdictions (Crown, magistrates' and youth courts). We expect that our consultation on these structural issues will take the form of testing different structural models on sentencing judges and court users, as well as roundtable discussion and public events to discuss these with interested stakeholders.

1.18 Both the question of transition and the question of structure have important implications for the drafting of the New Sentencing Code, and so we believe should be confronted in Phase 1 of the project.

1.19 In addition, during Phase 1 we will publish a document containing what we believe to be an exhaustive list of the current sentencing law in force (though not restructured, simplified and streamlined as is our intention under the New Sentencing Code) and we will seek consultees' input as to whether this list is indeed comprehensive. At this stage, we will also be seeking consultees' views on what the proper scope of a New Sentencing Code should be. The presence of a certain area of law in our list should not necessarily be taken as an indication that we believe it belongs in the New Sentencing Code; rather our intention will be to present a broad conception of the current law in force on sentencing, which may well be whittled down, as well as augmented if necessary, in light of consultation responses.

[10] See http://lawcommission.justice.gov.uk/areas/sentencing-procedure.htm.

Phase 2

1.20 During Phase 2 of the project we will consider questions of policy which might require resolution in the course of codifying the law in this area.

1.21 It is important to emphasise that this project is principally an exercise in consolidation of the existing law. It is not our aim, nor is it within our terms of reference,[12] to make major changes to sentencing policy. For instance, it is not the aim of the project to make any amendment to the maximum levels of sentences, nor indeed to change the substance of sentencing outcomes in any particular case. Rather, our aim is to ensure that every part of the sentencing process is set out in a single, clear and logical structure in plain accessible language. This accords with the general aims of the Law Commission: making the law fair, modern, simple and cost-effective.

1.22 The significance of the important work of the Sentencing Council in issuing definitive sentencing guidelines will not be reduced by the New Sentencing Code. Indeed, we believe the Sentencing Council's work should become easier, and more effectively implemented in practice, since by contrast to the structure of the current law of sentencing, the New Sentencing Code will be drafted explicitly with the existence and prominence of sentencing guidelines in mind.

1.23 However, we recognise that in the process of attempting to simplify and impose some coherence on the existing morass of law and procedure in this area, it may be necessary to make some policy choices. This may occur, for instance, where there is an inconsistency of approach in the current law, and any useful exercise in codification will require a decision as to which approach is preferable.

1.24 By the conclusion of Phase 2 we hope to have identified any policy decisions which will need to be made as part of the codification process, and to have gathered consultees' suggestions for how they should be resolved by Parliament.

1.25 Based on these consultation responses and our work gathering together the current law, we intend to publish a full formal consultation paper in 2016 which we hope will include drafts of provisions of the New Sentencing Code, with commentary inviting further comment and feedback.

1.26 Having received and digested the responses to our full consultation, our current target is to publish a finalised version of the draft New Sentencing Code in 2017.

Phase 3

1.27 Whilst we await and process responses to our full consultation on the draft New Sentencing Code, we will also explore ways to avoid the replication in future of the present confused state of the law. Previous attempts at consolidation of sentencing law and procedure have been frustrated by being rapidly overtaken by further legislation on the same topic.

[11] Although, see for example the transfer regime under the Crime (Sentences) Act 1997, Sch 1, para 6(1)(a) under which "restricted transfer" offenders who are transferred across borders remain governed by the sentencing law of the jurisdiction which imposed the sentence.

[12] See para 1.5 above.

1.28 In Phase 3 we hope to engage consultees in a discussion about how this might be avoided, by making efforts to encourage those engaged in legislating in this area in future to make changes to sentencing law and procedure *that take effect as amendments of the New Sentencing Code*, rather than in successive separate pieces of free-standing legislation.

STRUCTURE OF THIS ISSUES PAPER

1.29 This Issues Paper will explore the legal implications of transition to the New Sentencing Code in the following order:

(1) Part 2: options for transition to the New Sentencing Code;

(2) Part 3: non-retroactivity and the common law;

(3) Part 4: non-retroactivity and human rights law;

(4) Part 5: the implications of non-retroactivity for transition to the New Sentencing Code; and

(5) Part 6: other considerations for transition.

PART 2
OPTIONS FOR TRANSITION TO THE NEW SENTENCING CODE

THE PROBLEM

2.1 As stated above[1] there is consensus amongst those involved in the current system of criminal justice and sentencing that the law governing sentencing procedure is highly complex, which is causing serious difficulties in practice.

2.2 One cause of this complexity is the sheer volume of legislative provisions governing sentencing, and the fact that these are found across many different pieces of legislation. Clearly it is our aim in codifying and simplifying the law in this area to help remedy that situation.

2.3 However, another principal cause of the current complexity is the fact that very frequent changes are made in this area. Additionally, the fact that these changes are often brought into force some time after they first appear on the statute book, or are only brought into force for a certain class of case or purpose at a particular time. This leads to complicated transitional arrangements which often make it difficult to know, for any particular sentencing exercise, which set of provisions governing the same subject matter should be referred to.

2.4 A good illustration of the serious problems which can be caused by complex transitional arrangements is provided by the case of *R (Noone) v Governor of Drake Hall Prison & another.*[2] That case concerned the application of the law on release from custody of prisoners serving consecutive sentences of imprisonment, in particular the question of when they became eligible for early release on electronically monitored home curfew. Sitting in the High Court, Mr Justice Mitting commented:

> Section 174(1)(b)(i) of the Criminal Justice Act 2003 requires a court passing sentence to explain to an offender in ordinary language the effect of the sentence. This requirement has been in place since 1991. These proceedings show that, in relation to perfectly ordinary consecutive sentences imposed since the coming into force of much of the Criminal Justice Act 2003, that task is impossible. Indeed, so impossible is it that it has taken from 12 noon until 12 minutes to 5, with a slightly lengthier short adjournment than usual for reading purposes, to explain the relevant statutory provisions to me, a professional Judge.
>
> The position at which I have arrived and which I will explain in detail in a moment is one of which I despair. It is simply unacceptable in a society governed by the rule of law for it to be well nigh impossible to

[1] See paras 1.11 to 1.13 above.

[2] [2010] UKSC 30, [2010] 1 WLR 1743.

> discern from statutory provisions what a sentence means in practice. That is the effect here…[3]

2.5 When the same case reached the Supreme Court on appeal, the President, Lord Phillips, stated simply that:

> "Hell is a fair description of the problem of statutory interpretation caused by [these] transitional provisions."[4]

2.6 The then Lord Chief Justice, Lord Judge, went further, declaring that:

> [The problem] is not the mere number of statutes, but their increasing bulk. Many of them are "enormous". Indeed they are. And that is not the end of the difficulties. Ill considered commencement and transitional provisions, which have to negotiate their way around and through legislation which has been enacted but which for one reason or another has not or will not be brought into force, add to the burdens…
>
> …Elementary principles of justice have come, in this case, to be buried in the legislative morass…It is outrageous that so much intellectual effort, as well as public time and resources, have had to be expended in order to discover a route through the legislative morass to what should be, both for the prisoner herself, and for those responsible for her custody, the prison authorities, the simplest and most certain of questions – the prisoner's release date.[5]

2.7 The effect of such complex transitional arrangements is that sentencing judges and all other court users need to know (or have ready access to) various different sets of rules and procedures which apply to the same subject matter, depending on the precise date of the offence or the date of some other procedural milestones in the case.

2.8 In other words, sentencing judges and practitioners need to be familiar with various different historic formulations of the law on the same subject and have these readily available to them. This puts significant pressure on the limited time and resources available to the courts and to practitioners, and leads to error.[6]

2.9 Any sentencing exercise will involve the judge working through a number of procedural stages. Set out below is a list of steps that might be encountered in a typical case, though not all cases will involve all of them, and some might involve other stages as well. The sentencer may need to consider:

[3] [2008] EWHC 207 (Admin), [2008] ACD 43 at [1].

[4] [2010] UKSC 30, [2010] 1 WLR 1743 at [1].

[5] [2010] UKSC 30, [2010] 1 WLR 1743 at [78] and [86].

[6] See para 1.9 above.

(1) Whether and how[7] the defendant must be present at the sentencing hearing, whether or not they are to be accompanied by a pre-sentence report and the defendant's entitlement to representation.

(2) The maximum available sentence by virtue of the particular offence; when it was committed; the court that the sentencer is sitting in; and the age of the defendant, both now and at the time the offence was committed.

(3) The factual basis on which the judge is sentencing the offender – from the basis of a guilty plea, the evidence before the jury that convicted, and/or from a specially-convened *Newton*[8] hearing to establish certain facts. The offender may also ask the judge when sentencing to take into account offences for which the offender has not been convicted.

(4) The effect of any indication of sentence length prior to a plea of guilty under the *Goodyear*[9] principles.

(5) Whether the judge is bound to issue a minimum sentence unless there are exceptional circumstances, as – for example – in some firearms cases or for recidivist domestic burglars.[10] (The mandatory life sentence for murder uniquely applies regardless of whether there are exceptional circumstances.)

(6) Which, if any, sentencing guidelines are applicable to the case, and to what extent the judge is bound to follow them. Sentencing guidelines tend to indicate a range of suggested sentences for each category of case, where the category is determined by the offender's culpability and the level of harm the offender caused.[11] Aggravating and mitigating factors then move the sentence up or down from that starting point.[12]

(7) What effect any previous convictions of the offender ought to have on the sentence imposed.

7 For example, is video-link presence sufficient?

8 (1983) 77 Cr App R 13, (1982) 4 Cr App R (S) 388. The decision in *Newton* sets out the method to resolve disputes as to the factual basis of a guilty plea or finding of guilt where it is material only to sentence.

9 [2005] EWCA Crim 888, [2005] 1 WLR 2532. Under the *Goodyear* principles, the court can give an indication as to likely sentence only if sought by the accused. The court can refuse but should they give an indication, this will be binding upon any judge sentencing in the case until the accused has had reasonable opportunity to consider his or her position and does not plead guilty or there is a change to sentencing guidelines. See also Criminal Procedure Rules 2014, r 3.23.

10 The statutory test for recidivist domestic burglars is actually "particular circumstances" under Powers of Criminal Courts (Sentencing) Act 2000, s 111.

11 For murder, a different regime of starting points for the minimum term attached to the mandatory life sentence operates – see Criminal Justice Act 2003, Sch 21.

12 For more information on how sentencing guidelines operate, see A Rafferty and J Roberts, "Sentencing guidelines in England and Wales: exploring the new format" (2011) *Criminal Law Review* 681.

(8) What reduction, if any, of sentence ought to be awarded for co-operation with the law enforcement authorities.

(9) What reduction, if any, of sentence ought to be awarded for a plea of guilty.

(10) Whether the offender is "dangerous"[13] and, if so, whether an extended sentence or a life sentence ought to be imposed as a result.

(11) Whether the sentence reflects the overall gravity of the offending, where more than one offence is being sentenced for (the "totality principle"), including the question of whether to impose consecutive or concurrent sentences, where relevant.

(12) Whether any seizure, compensation, or other ancillary orders such as the "victim surcharge"[14] and the newly introduced criminal courts charge[15] ought to (or must) be imposed.

(13) Whether confiscation proceedings ought to be initiated.[16]

(14) Whether anything needs to be said about taking into account time in prison on remand[17] or out of prison on an electronic tag-monitored curfew.

THE NEW SENTENCING CODE – REDUCING COMPLEXITY

2.10 At each of the stages outlined above, the judge is faced with a dual difficulty in identifying the relevant provisions which apply. First, because they may be set out across various different legislative sources. Secondly, because there may be two or more sets of provisions in force governing a single issue.

2.11 The answer to the first problem clearly lies, insofar as possible, in gathering together all of the provisions governing sentencing procedure in a single place. This will be one important function of the New Sentencing Code.

2.12 However, a mere consolidation would not necessarily resolve the second issue. If, even with a Code enacted, the judge were still required to refer back to previous versions of the law for particular classes of case, the law would remain

[13] Criminal Justice Act 2003, ss 224 to 236 and Schs 15 and 15B (as amended by the Legal Aid, Sentencing and Punishment of Offenders Act 2012), provide measures for sentencing "dangerous offenders". An offender falls within these provisions if he or she is convicted for particular offences as specified in the provisions.

[14] Criminal Justice Act 2003, ss 161A and 161B.

[15] Prosecution of Offences Act 1985, s 21A (inserted by Criminal Justice and Courts Act 2015, s 54).

[16] These are proceedings, primarily under the Proceeds of Crime Act 2002, which aim to deprive convicted offenders of any gain from their offences.

[17] Now calculated and taken into consideration automatically *except* where the offender has been recalled to prison at the time he or she is remanded into custody, where it normally does not count. Criminal Justice Act 2003 (as amended), ss 240ZA and 240A. Note that the position is different in the case of offenders given indeterminate sentences.

unsatisfactorily complex.[18] Regarding this second problem at least two possibilities may arise:

(1) The court needs to look not at the most recent statute on the subject but at some older legislation, because the most recent enactment in the area has yet to be brought into force at all. Examples include the extension of magistrates' courts' sentencing powers to 12 months,[19] and the change from detention in a young offenders' institution to imprisonment for 18 to 21-year-olds.[20]

(2) The court needs to look not at the most recent sentencing statute on the subject, but at some older legislation (notwithstanding that the most recent legislation on the subject has been brought into force) because some general principle of law or specific saving provision provides that the old law continues to apply to a particular class of case.

2.13 We provisionally believe that possibility (1) is avoidable by adopting a system for drafting and updating the New Sentencing Code which means that un-commenced provisions do not appear on its face. We will explore the details of this possibility at a more advanced stage of the project in consultation with representatives of the government and Houses of Parliament. We envisage a situation in which changes to sentencing procedure are commenced at relatively predictable intervals, and amending provisions introduced by subsequent legislation which are enacted but not yet commenced do not appear on the face of the New Sentencing Code. In this way, the New Sentencing Code will remain an accurate and comprehensive statement of the current law in force on sentencing procedure, and a reader of the New Sentencing Code will not be confused or distracted by reference to proposed amendments not yet brought into force.

2.14 Avoiding possibility (2) would appear to provide a greater policy challenge. The necessity to continue to apply the old law of sentencing even after the commencement of new law on the subject may arise for a number of reasons. We consider the issue below under the headings of "phased transition"[21] and "non-retroactivity".[22]

Phased transition

2.15 Reform of sentencing law is sometimes commenced in phases:

[18] And if the previous law in question was set out in various different legislative sources then this re-introduces the first problem, at least for this class of historic case.

[19] Criminal Justice Act 2003, s 154.

[20] Criminal Justice and Court Services Act 2000, s 61. Because it has never been brought into force, all later statutory changes that refer to "imprisonment" have to make oblique reference to it in case it is ever brought in.

[21] Para 2.15.

[22] Para 2.18.

(1) A new provision is commenced only in a particular region of England and Wales to begin with. This occurred with the phased introduction of sending hearings to replace committal proceedings.[23]

> **Example 1**. The New Sentencing Code is brought into force in 2018. In 2020 the government of the day introduces a new form of short custodial penalty. This penalty includes an extended licence period with stringent supervision requirements to assist with the offender's reintegration post-release. In order to test the efficacy of this policy, the government initially only brings the changes into force in Yorkshire. When the chapter of the new Code listing available custodial penalties is amended to include this new penalty, the Code would also, ideally, state that this penalty is only available in Yorkshire. Subsequently, if and when the changes are later brought into force nationwide, the reference to Yorkshire could be removed from the New Sentencing Code altogether, from the date of commencement.

(2) A new provision only applies to sentences for particular offences. This occurred in the Criminal Justice and Courts Act 2015 with the introduction of the "offenders of particular concern" regime.[24] Presently, this only applies to offenders who both commit one of a small range of grave crimes[25] and are not considered "dangerous" by the sentencing judge,[26] although the list of crimes it applies to could be amended in future.

> **Example 2**. The New Sentencing Code is brought into force in 2018. In 2019 the government of the day extend the power of the Attorney-General to challenge sentences on the basis that they are unduly lenient. The policy is to extend this power to all offences triable in the Crown Court. In the first instance, for budgetary reasons, the change is only brought into force for a scheduled list of violent and sexual offences. The chapter of the New Sentencing Code regarding appeals and challenges is amended to reflect the extended power of the Attorney-General. On the face of the New Sentencing Code, and within the same part of the New Sentencing Code,

[23] Which happened by the gradual implementation of Criminal Justice Act 2003, s 41 and Sch 3. Just one example of the complexity this created – when read with the 29th commencement order (SI 2012/2574) for the Criminal Justice Act 2003 – s 41 was commenced by art 2(3) for provisions specified in art 2(1)(c), subject to saving provisions specified in arts 3 and 4. This was the 7th s 41-related commencement order.

[24] See s 6 which inserts s 236A into the Criminal Justice Act 2003, and Criminal Justice and Courts Act 2015, Sch 1 which inserts Sch 18A into the Criminal Justice Act 2003.

[25] Including, for example, rape of a child under 13 contrary to Sexual Offences Act 2003, s 5; solicitation to murder with a terrorist connection contrary to Offences Against the Person Act 1861, s 4; or use etc of a nuclear weapon contrary to Anti-terrorism, Crime and Security Act 2001, s 47.

[26] For the purposes of the statutory test used to determine whether an extended sentence or a discretionary life sentence would be appropriate.

the class of case for which this power has been brought into force is made clear. If and when the policy is brought into force in full, then as from that date, this part of the New Sentencing Code will be amended so that it is clear on its face that the power extends to all indictable offences.

2.16 In both cases, the "new law" can be incorporated into the New Sentencing Code on commencement, along with text on the face of the provision which makes clear the limited class of case to which it applies. The "original law" which continues to apply to cases outside that class would also remain on the face of the same section of the New Sentencing Code. Again it would be clear on the face of the provision to which class it applies. If and when the "new law" is commenced for the whole of England and Wales, the New Sentencing Code would be amended accordingly, deleting the reference to the "original law", and the relevant caveats.

2.17 We would add that, whilst we recognise the value of pilot schemes for road-testing reforms, and acknowledge they can be necessary for financial reasons, it would be desirable if such limited or phased commencements were used sparingly. The effect of such an approach to changing the law, even if made more transparent and consolidated into one source as we envisage, is to make the law less clear and more difficult to ascertain. That is the opposite of the objective of this project. Furthermore, whilst it may on occasion be a necessary evil for the thorough pilot of a reform, regional variance in sentencing law is offensive to basic ideas of fairness and equality before the law.

Non-retroactivity

2.18 Outside these types of phased transition, which are not the norm, the broader question remains: is there a principled reason, when making changes to sentencing law, to provide that the changes do not apply to some cases which will fall to be sentenced after the general commencement of those changes? In other words, what is the relevance of the principle of non-retroactivity to the issue of changes to sentencing law and procedure?

Example 3. The New Sentencing Code is brought into force in 2018. In 2020 D is convicted by a jury of a number of sexual offences committed by him in 1958, which were not reported to the police by the victims until 2019. In 1958 the sentencing options available to a criminal court were very limited, consisting essentially only of sentences of imprisonment and fines. In 2020, under the New Sentencing Code, there are countless types of sentence available, including community penalties with various rehabilitative and restorative requirements. There are also various ancillary orders available under the New Sentencing Code, including orders designed to protect the public from the risk of future harm posed by an offender.

2.19 Can the judge sentencing in 2020 draw upon some of those sentencing options available under the New Sentencing Code which were not available in 1958? If

the answer is yes,[27] what safeguards or limitations are there on a judge sentencing a historic case of this kind to ensure that D is not treated unfairly?

OUR PREFERRED APPROACH: A CODE GOVERNING ALL SENTENCING DECISIONS TAKEN AFTER ITS INTRODUCTION

2.20 If it is possible, without infringing established legal principles or fundamental rights, to apply the New Sentencing Code to all cases falling to be sentenced after the date of the commencement of the New Sentencing Code, then the potential gains in terms of certainty and simplification would be enormous. In short, such a "clean sweep" would allow, at a stroke, for the consignment to history of layers of historic sentencing procedure stretching back for decades.[28]

2.21 Valuable though a "clean sweep" will be, we further hope that the New Sentencing Code will enable and encourage governments and legislators to be bolder in the way they introduce changes to sentencing procedure. In this paper we explain how making changes to sentencing procedure which can apply to all sentencing hearings after enactment is generally unobjectionable both in legal and principled terms. Making changes through the New Sentencing Code in this way, insofar as future Parliaments consider this appropriate, will keep sentencing law simple and accessible, and prevent the build up of a complex multi-layered landscape such as now exists in this area. We believe this would represent a significant improvement on the current practice, which often involves introducing sentencing changes only for certain classes of case, using complex transitional provisions which remain a crucial part of the legal landscape for years after the change is enacted.

2.22 Ensuring the law is relatively certain and accessible is fundamental to the rule of law, particularly in the context of penal legislation. However, gains in certainty must not be pursued without consideration for what appears to be both a fundamental right and an entrenched interpretative principle, namely the qualified presumption against retroactive law-making. It is to this principle which we must now turn.

[27] Which is our ultimate conclusion, see para 5.11.

[28] Subject to some minimal record of historic sentencing maxima, perhaps in tabular form, which would always need to be retained for a generation: see below para 5.3.

PART 3
NON-RETROACTIVITY – THE COMMON LAW

BACKGROUND TO THE PRINCIPLE

3.1 There is a strong and ancient common law suspicion of retroactive laws.[1] A retroactive law is understood as one which purports to apply to events which pre-date the commencement of the law as though it were the law at the time of those past events.[2]

3.2 Article 8 of the French Declaration of the Rights of Man and of the Citizen of 1789 provided that:

> No one may be punished except by virtue of a law passed and promulgated prior to the crime and applied in a lawful manner.[3]

3.3 This, in its now well-known Latin formulation, is represented by the dual maxims *nullum crimen sine lege* and *nulla poena sine lege* (no crime without law, no punishment without law)[4] which appear in common law and civilian law systems alike. Further, the European Court of Human Rights has consistently held these principles to be embodied in article 7 of the European Convention on Human Rights and Fundamental Freedoms ("ECHR").[5]

3.4 The thrust of the objection to retroactive law is based in part on the desirability of the law being reasonably certain. This does not mean that the precise legal answer to every question be guaranteed in advance, but it does mean that the law regarding a particular event should follow certain readily ascertainable principles. It also requires that it can be relied upon that these principles will not later be changed in a way which destroys the existing certainty about the application of those principles to events which have already occurred.

[1] For a full historical account of the development of the principle of non-retroactivity see B Juratowitch, *Retroactivity and the Common Law* (2008) ch 2. Suffice it to say here that the principle can be traced in some form from Roman Law, through Magna Carta to the writings of Blackstone.

[2] We gratefully adopt this definition of retroactivity from B Juratowitch, *Retroactivity and the Common Law* (2008). This definition entails a distinction from the broader term "retrospectivity". Although these terms are not always used consistently either in the cases or in the secondary literature, the distinction adopted here seems to us helpful, and has authoritative support, see eg *Wilson v First County Trust (No 2)* [2004] 1 AC 816, [2003] UKHL 40.

[3] "*Nul ne peut être puni qu'en vertu d'une loi établie et promulguée antérieurement au délit et légalement appliquée.*"

[4] For more detail on the historical development of the principle see Lord Rodger, "A Time for Everything under the Law: Some Reflections on Retrospectivity" (2005) 121 *Law Quarterly Review* 57, pp 65-6.

[5] See para 4.6 below.

3.5 One potential unfairness of a retroactive law is that it defeats the reasonable expectation of an individual who has relied upon an existing law. Thus in *EWP Ltd v Moore*[6] Lord Justice Staughton stated that:

> One requirement of justice is that those who have arranged their affairs … in reliance on a decision of these courts which has stood for many years, should not find that their plans have been retrospectively upset.

3.6 It is inherent in the common law that it develops organically over time as new cases are decided, though such changes should be gradual and reasonably predictable. By contrast, subject to interpretation, statute law is applied by the courts faithfully and without such development (until and unless it is replaced by further statute). Thus the objection to retroactive statute law may be even stronger than the objection to retroactive developments in the common law expressed by Lord Justice Staughton.

3.7 However, the problematic nature of retroactive law goes beyond the unfairness to those who have in fact relied upon the law, rather, as Lord Diplock has said:

> Acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should *be able* to know in advance what are the legal consequences that will flow from it.[7]

3.8 Further, and particularly in the context of criminal law, retroactive laws have the potential to offend against fundamental values of liberty, autonomy and human dignity. The latter, according to Professor Joseph Raz, requires:

> Treating humans as persons capable of planning and plotting their future. Thus, respecting people's dignity includes respecting their autonomy, their right to control their future.[8]

3.9 It can readily be seen that respecting an individual's right to control his or her future will not generally be compatible with retroactive changes to criminal legislation, with the effect that a penal sanction is applied to conduct which, at the time it was engaged in, would not have attracted such sanction.

> **Example 4(1)** In 2016 Y purchases a heavy cosh from a specialist martial arts shop and regularly carries it in public. In January 2017 new legislation is brought into force specifically prohibiting the unlicensed purchase, selling and carrying in public of such an item for any purpose, in the absence of a tightly defined "reasonable excuse" defence. Such a change would only be introduced prospectively, so that Y would not be at risk of prosecution for purchasing and carrying the

[6] [1992] 2 WLR 184, [1992] QB 460, p 474.

[7] *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] 2 WLR 513, [1975] AC 591, p 638 (emphasis added).

[8] J Raz, "The Rule of Law and its Virtue" (1977) 93 *Law Quarterly Review* 195, 204.

weapon, as long as Y desisted after the new law was brought into force.

THE PRINCIPLE OF STATUTORY CONSTRUCTION

3.10 In light of the pedigree of the legal principle of non-retroactivity, as briefly sketched out above, it is unsurprising that it has been frequently described as an important rule of statutory construction in the courts of England and Wales that statutes are presumed not to be intended to have retroactive effect.[9]

3.11 In *Yew Bon Tew v Kenderaan Bas Mara*, Lord Brightman stated:

> There is at common law a *prima facie* rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used.[10]

3.12 This was the Privy Council's approach to retro*spectivity* – understood as law which interferes with an existing vested right or obligation. This was in the context of civil rights and obligations (in that case the effect of a statute of limitations on a tort action for personal injury). We would suggest if anything an even stronger presumptive rule against retro*active* law would be expected (as the term has been used here[11]) especially in the context of criminal prohibitions backed by penal sanctions.

3.13 In the context of the interpretation of substantive criminal legislation, in the case of *Docherty*[12] the Court of Appeal summarised the position as follows:

> As our domestic law currently stands, it is clear that the subsequent legislative changes in the criminal law are presumed not to have any retrospective effect (s.16(1)(d) and (e) of the Interpretation Act 1978), and it is well established that legislation enacted after the conviction and sentence does not affect the correctness of anything done under the law as it stood and was properly applied at the time of trial: *Bentley* [2001] 1 Cr. App. R. 21 (p.307) at [24] by Lord Bingham C.J. Even a later interpretation of the common law that is favourable to a convicted person does not in itself confer a right to an extension of time for appealing to the Court of Appeal: see, for example, *Hawkins* [1997] 1 Cr. App. R. 234.

3.14 Section 16 of the Interpretation Act 1978 confirms the common law presumption, providing, so far as relevant for present purposes, that:

> Where an Act repeals an enactment, the repeal does not, unless the contrary intention appears:

[9] See eg F Bennion, *Statutory Interpretation* (6th ed 2013) s 97, p 291. Though as noted above, the terms retroactive and retrospective have by no means been used consistently or coherently in this context: see B Juratowitch, *Retroactivity and the Common Law* (2008), ch 1.

[10] [1983] 1 AC 553 (PC – Malaysia) at p 558.

[11] See paras 3.1 and following.

…

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against that enactment;

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed.

3.15 Set against this strong rule of construction is a line of authority which suggests that a distinction can be drawn between procedural and substantive law, and that the presumptive rule against retroactive law applies only to the latter category. This distinction, though contentious and at times difficult to draw in practice, is between those laws which create or affect rights or obligations, categorised as substantive law, and those which only alter the way in which such rights and obligations can be realised, enforced or protected, categorised as procedural law.

3.16 An obvious example of a substantive law would be an enactment which created a new crime, such as criminalising possession of an object or substance which was not previously regulated. Such a law clearly creates obligations and liabilities where none previously existed.

> **Example 4(2)** In 2017 the police see a video online of Y carrying his cosh in public back in July 2016. If they were then able to prosecute Y for this conduct under the new law (introduced since his actions), then Y would be subject to a punishment that he could not possibly have foreseen when Y was carrying the weapon in public in July 2016.

3.17 An example of a procedural law would be one which prescribed the forms which must be complied with before a right, such as the right to a tax rebate, could be enforced. Another example would be a time limit within which a claim to enforce a legal right can be brought. Changes to such procedural laws do not change the underlying rights or obligations themselves, only the way in which a person would go about seeking to enforce them.

> **Example 5** Z is shortly to stand trial for a sex offence alleged to have been committed 5 years ago. In the interim period, the deadline prescribed in the Criminal Procedure Rules for making an application to introduce hearsay evidence has changed from 14 to 28 days prior to commencement of trial. At the time the offence was committed, Z would have had to use a “Form 3” to make the application. Now, the application can only be made on “Form 3A”. These are examples of

[12] [2014] EWCA Crim 1197, [2014] Cr App R (S) 76.

purely procedural changes which, whilst they might affect Z's rights in practice if the changed formalities are not complied with, are not covered by the principle of non-retroactivity.

3.18 It certainly cannot be said that procedural laws are insignificant: a change to a time limit or the prescribed forms for enforcement of a right can have the effect of preventing a person from enforcing these rights at all, for instance because a new shorter time limit leaves some persons time-barred. However, it has often been suggested in general terms that a retroactive change to procedural law might be less troubling than such a change to substantive law.

3.19 Thus in *Re Athlumney* Mr Justice Wright expressed the view that:

> Perhaps no rule of construction is more firmly established than this—that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, *otherwise than as regards matter* [*sic*] *of procedure*, unless that effect cannot be avoided without doing violence to the language of the enactment.[13]

3.20 Commenting on *Re Athlumney* in a more modern decision, and after noting the general rule of construction, Lord Rodger summarised the position as follows:

> Changes in matters of pure procedure have been treated differently. Wilde B stated the position most starkly in *Wright v Hale* (1860) 6 H & N 227, 232:
>
> > Where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act.
>
> The justification for treating matters of pure procedure differently was stated by Mellish LJ in *Republic of Costa Rica v Erlanger* (1876) 3 Ch D 62, 69:
>
> > No suitor has any vested interest in the course of procedure, nor any right to complain, if during the litigation the procedure is changed, provided, of course, that no injustice is done.[14]

3.21 In *Re Barretto*[15] the question was whether changes to the confiscation regime[16] could be applied to a confiscation order made before those changes were commenced, in order to seek to confiscate a greater sum from the offender, on pain of imprisonment. In answering this question in the negative, Sir Thomas Bingham MR (as he then was) stated:

[13] [1898] 2 QB 547 at p 551-2 (emphasis added). See also F Bennion, *Statutory Interpretation* (6th ed 2013) s 98, p 296.

[14] *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816.

[15] [1994] QB 392 (CA), [1994] 2 WLR 149.

[16] The legal regime for the confiscation of the proceeds of crime from convicted offenders, at that time governed by the Drug Trafficking Offences Act 1986.

> To permit this obligation to be increased and the penalty strengthened by means of a law enacted subsequently would in my view contravene the presumption against retroactivity as this has, I think, been understood in English law.[17]

3.22 As to the argument that such a change was procedural in nature, and caused no injustice (relying upon the authorities quoted by Lord Rodger in *Wilson* above[18]), Sir Thomas responded:

> Many would think that on the present facts there would be nothing unfair in stripping Mr. Barretto of the fruits of his criminal activity which he did not disclose in January 1990 even if this means relying on a law enacted later. But the court is here concerned with fairness in a more particular sense. A defendant is not to be substantially prejudiced by laws construed as having retroactive effect unless Parliament's intention that they should have that effect is plain. The blackest malefactor is as much entitled to the benefit of that presumption as anyone else. Parliament has not displaced the presumption in this case and it would not be fair to treat it as having done so however strong one's disapproval of Mr Barretto's conduct.

3.23 In summary:

(1) Retroactivity in this context refers to law which purports to apply to events which pre-date the commencement of the law as though it were the law at the time of those past event(s).

(2) It is a principle of the common law that it should develop in such a way as to ensure that those who have arranged their affairs in reliance on a decision of the courts should not find that their plans have been retrospectively upset.

(3) A yet more powerful principle of interpretation applies when considering all statutory law, which requires the courts to presume that statutes are not intended to have retroactive effect unless the intention that it was to do so is expressed clearly and unambiguously. This principle is both a recognition of a general healthy attitude of suspicion towards retroactive law[19] and recognition that retroactive law will on occasion be necessary and desirable, as long as careful thought has been given to it by Parliament.

(4) On occasion, a distinction has been found by the courts between "substantive" and "procedural" law. One significance of this distinction is that the interpretative presumption against retroactivity is said to apply less powerfully to procedural changes, although still in a way which guards against injustice.

[17] [1994] QB 392 (CA), [1994] 2 WLR 149, 400.

[18] Quotation in para 3.20 above.

[19] See para 3.1 above. See further, B Juratowitch, *Retroactivity and the Common Law* (2008).

3.24 What implications does this have for the New Sentencing Code? Apart from provisions creating maximum penalties,[20] much of sentencing law might be thought to be procedural in nature insofar as it relates not to the existence of legal obligations, and the consequent liability to punishment for breaches of those obligations in the criminal context (this is the business of the substantive law) but to the manner of the law's enforcement. Further, the New Sentencing Code on its initial enactment is intended to deal principally with matters of sentencing procedure, and not the questions of the tariffs and levels of penalty.[21]

3.25 On the other hand, in order to fulfil its function as the single source of procedural guidance for sentencing tribunals, the New Sentencing Code will need to make reference to the types of penalties available (including reference to mandatory sentencing provisions – see below[22]).

3.26 Further, whilst it is not our purpose in introducing the New Sentencing Code to make any change to sentencing tariffs or the level of punishment imposed, it is our intention that such changes in sentencing policy can be made by future legislators by amendment of the New Sentencing Code. Changes to the type and level of punishment available for breach of a criminal law obligation may well look more "substantive" than "procedural" in nature.

3.27 Ultimately, whether or not a particular provision of sentencing law is conceived of as substantive or procedural, the above discussion shows that the courts are likely to strive to interpret that provision in a way which does not give it retroactive effect and will certainly do so where it is argued that retroactivity would cause injustice.

3.28 Whether any particular provision is considered to be procedural or substantive in nature, the safest course, if the New Sentencing Code is intended to be given retroactive effect, is to make it clear on the face of the Code that this is Parliament's intention, and respect will be accorded to such a clear legislative statement.

[20] For an argument that even a penalty increase does not offend against the principle of non-retroactivity see J Waldron, "Retroactive Law: How Dodgy was Duynhoven?" (2004) 10 *Otago Law Review* 631-654 – "there is no inherent objection to the retrospective increase of penalty, provided that the penalty is what the offence deserves" [and the offence was itself prohibited at the time of commission].

[21] See para 1.21 above.

[22] See para 5.58 below.

PART 4
NON-RETROACTIVITY – HUMAN RIGHTS

4.1 In addition to the strong domestic common law authorities considered above, the principle of non retroactivity is now embedded within the law of England and Wales as a result of the influence of article 7 of the ECHR through the mechanism of the Human Rights Act 1998 (the "HRA").[1]

4.2 Whatever the future for the HRA, it is has been suggested that many of the rights which it incorporates into English and Welsh law from the Convention receive independent protection from the common law. The following recent statement from Lord Mance JSC is representative of views which have been frequently expressed by the senior judiciary since the enactment of the HRA:

> Since the passing of the Human Rights Act 1998, there has too often been a tendency to see the law in areas touched on by the Convention solely in terms of the Convention rights. But the Convention rights represent a threshold protection; and, especially in view of the contribution which common lawyers made to the Convention's inception, they may be expected, at least generally even if not always, to reflect and to find their homologue in the common or domestic statute law. Not surprisingly, therefore, Lord Goff of Chieveley in *Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109*, 282–284 and the House in *Derbyshire County Council v Times Newspapers Ltd [1993] AC 534*, 551E both expressed the view that in the field of freedom of speech there was no difference in principle between English law and article 10. In some areas, the common law may go further than the Convention, and in some contexts it may also be inspired by the Convention rights and jurisprudence (the protection of privacy being a notable example). And in time, of course, a synthesis may emerge. But the natural starting point in any dispute is to start with domestic law, and it is certainly not to focus exclusively on the Convention rights.[2]

4.3 Such comments have also been made expressly in the context of the right to freedom from punishment without law, and in emphasising the need for sufficient certainty and predictability in the criminal law. In *Rimmington,*[3] in considering the compatibility of the common law offence of public nuisance with article 7, Lord Bingham quoted the following remarks of Lord Judge[4] with approval:

> …it is not to be supposed that prior to the implementation of the Human Rights Act 1998, either this court, or the House of Lords,

[1] For an introduction to the relevance of the Human Rights Act 1998 and the ECHR to English criminal law, see D Ormerod and K Laird, *Smith and Hogan*'s *Criminal Law* (14th ed 2015) pp 23-32. For more detailed treatment, see Emmerson, Ashworth and Macdonald *Human Rights and Criminal Justice* (3rd ed, 2012); J Cooper and M Colvin *Human Rights in the Investigation and Prosecution of Crime* (2009).

[2] *Kennedy v Charity Commission* [2014] UKSC 20, [2014] 2 WLR 808.

[3] [2005] UKHL 63, [2006] 1 AC 459.

[4] From *Misra* [2004] EWCA Crim 2375, [2005] 1 Cr App R 328.

> would have been indifferent to or unaware of the need for the criminal law in particular to be predictable and certain. Vague laws which purport to create criminal liability are undesirable, and in extreme cases, where it occurs, their very vagueness may make it impossible to identify the conduct which is prohibited by a criminal sanction.

4.4 And Lord Bingham went on:

> There are two guiding principles: no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done.

4.5 We note such observations here to emphasise that, even if article 7 itself ceased to form a part of the domestic law of England and Wales, it is quite likely that a corresponding right in similar terms would be held to exist as a matter of common law (especially in light of the strong constitutional history of the principle which underpins article 7[5]). References to article 7 in this section should be read in that light. It is of course not possible to predict the exact ambit of any such right, or the mechanism by which any such common law right might be enforced, given that these issues do not arise for direct consideration by the courts whilst the HRA remains in force. It is not our intention here to engage with the considerable controversy surrounding this subject,[6] over and above pointing out the authoritative support for the concept of common law rights distinct from the ECHR.

4.6 Article 7 provides that:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. *Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.*
>
> This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.[7]

4.7 The key element for present purposes is the prohibition on "a heavier penalty be[ing] imposed than the one that was applicable at the time the criminal offence was committed". This is important in the context of our proposed "clean sweep"[8]

5 See para 3.1 and following, above.

6 See *De Smith's Judicial Review* (7th ed 2013) at [5-042] which lists the right to freedom from punishment without law in the catalogue of common law rights. See also, the preface to R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009); E Bjorge "Fundamental rights at English (and European?) common law" (2015) 131 *Law Quarterly Review* 192-196.

7 Our emphasis.

8 See para 2.20 above.

approach to the introduction of the New Sentencing Code. This is because in the small minority of sentencing hearings involving historic offences, the "clean sweep" approach may involve the imposition of new types of penalties which might not have been available at the time the offence was committed.

4.8 At least two issues arise for consideration under article 7 and the decisions of the European Court of Human Rights which interpret and apply it:

(1) when will the law under examination involve the imposition of a "penalty" for these purposes? And, presuming it does,

(2) when will such a penalty be considered heavier than that which was available at the time of commission?

MEANING OF PENALTY

4.9 The relevant prohibition in article 7 only applies to a retroactive increase of a penalty. If the provision in question is not considered to involve the imposition of a penalty, article 7 has no application. In this sense the article 7 prohibition is narrower than the common-law presumption interpreting legislation so as to avoid giving it retroactive effect.[9] In the context of article 7, "penalty" has a particular meaning, as defined by the European Court of Human Rights. Therefore, the fact that domestic law classifies a measure as something other than a penalty will not necessarily mean that article 7 does not apply.[10]

4.10 The case of *Welch v United Kingdom*[11] related again to changes in the regime for confiscation of the proceeds of crime from convicted offenders. In concluding that a confiscation order was a penalty for the purposes of article 7, the Strasbourg court held that the following factors were all relevant:

(1) whether the measure is imposed following a criminal conviction (if not, it will not be a penalty);[12]

(2) the nature and purpose of the measure;

(3) whether the measure is classified under national law as a penalty or not;

(4) the procedures involved in the making and implementation of the measure; and

(5) the severity of the measure.

[9] See B Juratowitch, *Retroactivity and the Common Law* (2008) p 105.

[10] See *Welch v UK* (1995) 20 EHRR 247 (App No 17440/90) at [27]. This is true with respect to the UK's obligations under the Convention, and as a matter of domestic law the UK courts must take into account the Strasbourg Court's caselaw (HRA 1998, s 2).

[11] For critical discussion, see B Juratowitch, *Retroactivity and the Common Law* (2008) and Murphy, "The principle of legal certainty in criminal law" [2010] *European Human Rights Law Review* 192.

[12] *Welch v UK* (1995) 20 EHRR 247 (App No 17440/90) at [28] to [29].

(1) Whether the measure is imposed following a criminal conviction

4.11 Factor (1) was applied by the High Court in the case of *Gough and Another v Chief Constable of Derbyshire*.[13] That case concerned football banning orders made under the Football Spectators Act 1989, as amended: section 14A provided the power to make such an order after conviction, and section 14B without the need for a conviction, on a Chief Constable's application. The question was whether such orders were penalties for article 7 purposes. In concluding that they were not, Lord Justice Laws stated:

> The order is not made as part of the process of distributive criminal justice. Under section 14B there is no requirement of a criminal conviction, so that the starting point in *Welch v United Kingdom 20 EHRR 247* is not met. In section 14A, the existence of a relevant conviction is in my judgment no more than a gateway criterion for the making of the order.[14]

4.12 Factor (1) was also considered relevant in *Field and Young*[15] where the Court of Appeal was required to consider whether orders disqualifying convicted offenders from working with children constituted penalties for article 7 purposes. In that case, although such orders were generally made on conviction, the same order was also available in the event of a special verdict of not guilty by reason of insanity, or following a finding that the offender committed the act but was unfit to plead (rendering a criminal trial inappropriate). As the Court observed, such findings do not equate to "a conclusion that would merit the imposition of any penal provision even though restriction of the right of the individual may be demonstrated to be necessary in order to protect others". The fact of the availability of the order otherwise than on conviction, even if such cases were very much the exception rather than the rule, was a factor which the Court of Appeal considered militated against the conclusion that the orders in question were a penalty for article 7 purposes.[16]

(2) The nature and purpose of the measure

4.13 This second factor identified in *Welch* requires the court to engage in the notoriously difficult exercise of divining the purpose behind a legislative measure, with the key distinction being between measures which are protective or preventive, on the one hand, and those which are punitive or retributive on the other.[17] The former would be indicative of a non-penalty, and the latter of a penalty, for article 7 purposes.

[13] [2001] EWHC Admin 554, [2002] QB 459.

[14] [2001] EWHC Admin 554, [2002] QB 459 p 489. The case went to the Court of Appeal as [2002] EWCA Civ 351, [2002] QB 1213, but on a different point.

[15] [2002] EWCA Crim 2913, [2003] 1 WLR 882.

[16] For a critique of this reasoning, see S Atrill, "Nulla poena sine lege in comparative perspective: retrospectivity under the ECHR and US Constitution" (2005) *Public Law* 107 at 114. See also A Ashworth and M Strange, "Criminal Law and Human Rights" (2004) *European Human Rights Law Review* 121, pp 126 to 127.

[17] See *Welch* (1995) 20 EHRR 247 (App No 17440/90) at [30] and *Field and Young* [2002] EWCA Crim 2913, [2003] 1 WLR 882 at [58].

4.14 Of course a particular measure may well have more than one purpose, and hence the Strasbourg Court has made clear that the fact a measure has a preventive aim is not a bar to it being classified as punitive.[18]

4.15 The courts of England and Wales have interpreted this criterion as inviting an enquiry as to whether the *predominant* purpose of a measure is punitive or preventive.[19] This approach is consistent with the result reached by the European Commission of Human Rights in *Ibbotson v UK*[20] that the requirement for registration of sex offenders was not a penalty, due to its primarily preventive and protective purpose, notwithstanding the impact on the offender.

4.16 In *Gough* the High Court held, and this decision was upheld by the Court of Appeal,[21] that:

> The more closely an order is related...to the commission of a particular offence the more likely it is that the order should fall to be treated as a penalty.[22]

4.17 As Atrill argues[23] there is a potential conflict between this principle, and the principle that a protective measure should be strictly limited to that which is proportionate and necessary to avoid the particular harm which it is sought to guard against. One clear way of limiting a protective measure to ensure proportionality is to restrict its deployment to those who have demonstrated a particular form of harmful behaviour through their conviction for a particular class of criminal offence.

> **Example 6** The New Sentencing Code is brought into force in 2018. In 2021 the government of the day introduces a new protective measure to protect the public from identity theft, by restricting the access of certain individuals to the internet. To ensure its proportionality, the availability of the order is restricted to cases where the offender has been convicted of certain types of fraud offence.

4.18 Whilst such a limitation on the availability of a protective order is likely to make it more targeted and proportionate to the harm it guards against, where such a gateway criterion for a particular protective measure is established, this tends towards its classification as a penalty under the reasoning in *Gough*.[24]

[18] *Welch* (1995) 20 EHRR 247 (App No 17440/90) at [30].

[19] *Gough* [2001] EWHC Admin 554, [2002] QB 459.

[20] App No 40146/98 (Commission decision).

[21] [2002] EWCA Civ 351, [2002] QB 1213.

[22] [2001] EWHC Admin 554, [2002] QB 459 at [38].

[23] S Atrill, "Nulla poena sine lege in comparative perspective: retrospectivity under the ECHR and US Constitution" [2005] *Public Law* 107, pp 116 to 117.

[24] [2002] EWCA Civ 351, [2002] QB 1213.

(3) The measure's classification under national law

4.19 Although the classification of the measure as a matter of domestic law is expressly listed as a relevant factor in *Welch*, the Strasbourg Court has also repeatedly emphasised that the notion of a penalty is an autonomous concept under the Convention.[25] It follows that the domestic classification of a legislative provision (for instance as creating a punitive penalty, a protective measure or an administrative sanction) will only ever be suggestive, rather than determinative of the question of whether it is a "penalty" so as to engage article 7.

4.20 For that reason the domestic classification of the measure is of comparably little importance by contrast to some of the other factors identified in *Welch.*[26] There might be good reasons for this. Preventing signatory states from having the final say on whether a measure is a "penalty" in an article 7 sense can protect against the evasion of rights protection through domestic classification. Further, the purpose of a particular domestic classification of a measure may be very different from the purpose of the label "penalty" in the Convention sense.[27]

(4) The procedures involved in the making and implementation of the measure

4.21 Some orders or sanctions may have additional procedural protections in place and discretion available to the decision maker. Such additional measures are considered to indicate that the measure in question is a penalty for article 7 purposes.

4.22 For this reason, in *Ibbotson v UK*[28] the automatic nature of the obligation of those convicted of certain sex offences to register their names (following directly and inevitably on conviction, without judicial discretion or involvement) bolstered the European Commission of Human Rights in its conclusion that the measure was not a penalty but a protective measure.

4.23 By contrast, the degree of judicial discretion in the confiscation regime (both as to whether to make an order, and to the terms of any order being tailored to the individual case) and the relative procedural complexity involved, were factors tending towards the conclusion reached in *Welch* that a confiscation order was a penalty.

(5) The severity of the measure

4.24 As might be anticipated, the severity of a measure has been held by the Strasbourg Court to be an important factor in determining whether or not it falls within the article 7 definition of "penalty". Intuitively, the guidance derived from this factor is essentially that the more severe a measure is in its effects, the more

[25] *Welch v UK* (1995) 20 EHRR 247 (App No 17440/90). See para 4.9 above.

[26] *Welch v UK* (1995) 20 EHRR 247 (App No 17440/90). See para 4.10 above.

[27] Namely to catch all legislative measures necessary to protect individuals from the potentially oppressive effects of retroactive penal legislation, described above at paras 3.1 to 3.9 and in more detail B Juratowitch, *Retroactivity and the Common Law* (2008) and S Atrill, "Nulla poena sine lege in comparative perspective: retrospectivity under the ECHR and US Constitution" [2005] *Public Law* 107, pp 109 to 110.

[28] App No 40146/98 (Commission decision).

likely it is to be considered a penalty. Thus, in *Welch*[29] the Court considered that there were potentially very serious consequences for an offender subject to a confiscation order, including being liable to pay very large sums and to serve a sentence of imprisonment in default of payment. These consequences could in some cases have a greater punitive effect than the sentence for the offence itself, which pointed in favour of its classification as a penalty.

4.25 Severity is an inherently subjective factor because, for example, the pains of imprisonment will be felt more acutely by some individuals than others and financial sanctions will be felt more keenly by those of limited means. Lord Justice Laws remarked in *Gough*[30] that this subjectivity means that severity alone is unlikely to determine whether a measure is a "penalty" or not. In considering the classification of football banning orders, his Lordship said:

> As for the orders' severity, I would accept that the restrictions they impose are more than trivial; and under the 1989 Act they are potentially more burdensome than previously. How harshly they might bear on any individual must, I would have thought, be largely subjective. However that may be, it is clear from the Strasbourg jurisprudence, not least *Welch v United Kingdom 20 EHRR 247* itself, that severity alone cannot be decisive; and in my judgment the burdens or detriments involved cannot conceivably confer the status of penalty on banning orders if otherwise they do not possess it, which in my judgment plainly they do not.[31]

4.26 Further, there is the question of whether the severity factor should extend to consideration of more indirect effects of the conviction and sentence on the offender. In *Ibbotson* the European Commission of Human Rights dismissed arguments that the hostile public reaction to a conviction for a child sex offence, including the increased risk of violent assault, was a relevant factor when considering the severity of notification requirements which were imposed on conviction.[32] The Commission stated:

> These difficulties (not referred to by the applicant) cannot be relevant to the Commission's determination of whether the Act imposes a ''penalty'' as they stem from the public's reaction to particular types of offence, rather than from the registration requirements.[33]

4.27 As Atrill points out,[34] one uncontroversial starting point may be that a sanction including the use of imprisonment, which has been treated by the US Supreme Court as the classic example of a punitive sanction[35] will always be sufficiently

[29] *Welch v UK* (1995) 20 EHRR 247 (App No 17440/90).

[30] [2001] EWHC Admin 554, [2002] QB 459.

[31] [2001] EWHC Admin 554, [2002] QB 459 at [42].

[32] App No 40146/98 (Commission decision).

[33] App No 40146/98 (Commission decision), 334.

[34] S Atrill, "Nulla poena sine lege in comparative perspective: retrospectivity under the ECHR and US Constitution" [2005] *Public Law* 107, pp 112 and 120.

[35] Actually described in *Smith v Doe* (2003) 538 US 84, p 97 as the ''paradigmatic affirmative disability or restraint".

severe to constitute a penalty. However, this apparently clear line is subject to the nuanced approach which has been taken by the Strasbourg Court to changes to release and parole provisions, which we consider in the next section.

4.28 Further, the fact that a sanction including an element of imprisonment will be so severe as inevitably to constitute a penalty for article 7 purposes does not greatly assist with the approach to relative changes to prison sentence regimes, such as an increase in the use of solitary confinement. It would seem that such a change would not be considered as a change to the available penalty, and so would not fall within article 7, but rather would be seen as a change to the manner of the enforcement and administration of the penalty which existed before (that of imprisonment), by analogy to the approach to parole.[36] We return to the general question of the introduction of novel types of sanction later.[37]

WHEN WILL A PENALTY BE CONSIDERED HEAVIER THAN THAT WHICH WAS AVAILABLE AT THE TIME OF COMMISSION OF THE OFFENCE?

4.29 The article 7 prohibition on the retroactive application of a penalty to an individual's detriment – that is to say, where the penalty imposed is more severe than the penalty available at the time of commission of the offence – applies if a measure is classified as a penalty applying the *Welch* criteria discussed above.[38]

4.30 But even where the prohibition applies, it is necessary to answer the questions "what was the penalty applicable at the time of the commission of the offence?" and "is the penalty now being imposed heavier?".

4.31 Generally there will not be a single answer to the first question, as it is rare that the commission of a criminal offence gives rise automatically to any particular penal response. Rather, there will generally be a wide range of lawful sentencing disposals open to a tribunal when sanctioning an offender (indeed, as noted above,[39] the existence of this kind of discretion is a factor which tends towards a measure's classification as a penalty for article 7 purposes). For example, the sentences handed down by the criminal courts for offences of theft might vary from a small fine, for a first shoplifting offence, to lengthy sentences of immediate imprisonment, for a repeat offender committing a high value theft in breach of trust. The existence of such discretion, as opposed to some automatic administrative penalty which might be attracted by some regulatory infractions would be one of the reasons why sentences handed down for theft at either end of the spectrum would inevitably be considered to constitute penalties. For example, see the case of *Ozturk v Germany*[40] where the European Commission of Human Rights set out the autonomous exercise of deciding whether there is a "criminal charge" for article 6 purposes.

4.32 It is clear that article 7 sets its face against the application of a heavier sentence than *the maximum sentence* applicable at the time of commission. In *Coeme v*

[36] See para 4.40 and following.

[37] See para 5.16 and following.

[38] See para 4.10 above.

[39] See para 4.23 above.

[40] (1984) 6 EHRR 409 (App No 8544/79) (Commission decision).

Belgium[41] the Strasbourg Court therefore described its function in policing article 7 in the following terms:

> The Court must … verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed *did not exceed the limits fixed by that provision*.[42]

4.33 However, where the punishment received by an offender falls within the limits of the court's jurisdiction available at the time of the commission of the offence, both the domestic and Strasbourg courts have been highly resistant to arguments that the punishment imposed was impermissibly heavier in article 7 terms.

4.34 In the case of *Uttley* both the House of Lords[43] and the European Court of Human Rights[44] (declaring the applicant's complaint inadmissible) concluded that there was no infringement of article 7 where a change in the parole regime resulted in a prisoner being subject to more onerous licence conditions than would have applied under the parole regime as it stood when he committed the offence.

4.35 Uttley was sentenced to 12 years' imprisonment for a number of sexual offences including three rapes. The maximum sentence for rape, at all material times, was life imprisonment. The effect of his sentence, combined with the rules governing release on licence which applied by the time of his sentence, was that he would serve 8 years in custody, and then be released. During the first year after his release he would be subject to a licence regime, including supervision and a liability to be recalled to prison.

4.36 It was argued that this position compared unfavourably to the position that applied at the time Uttley committed the offences for which he was sentenced (some 12 years had passed before he was prosecuted for the offences). At the time the offences were committed, the effect of a 12 year sentence was that the offender was released after 8 years without licence conditions or being subject to any liability for recall.

4.37 In rejecting the suggestion that the sentence imposed infringed article 7, Lord Phillips stated:

> The maximum sentence which could be imposed for rape at the time that the respondent committed the rapes for which he was convicted was life imprisonment. That was the "applicable" penalty for the purposes of article 7(1). The sentence of 12 years' imprisonment imposed on the respondent would seem, manifestly, a less heavy penalty than life imprisonment…The release of a prisoner on licence, albeit subject to onerous conditions, mitigates rather than augments the severity of the sentence of imprisonment which would otherwise

[41] (22 June 2000) App Nos 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96.

[42] Our emphasis.

[43] [2004] UKHL 38, [2004] 1 WLR 2278.

[44] App No 36946/03.

> be served. A sentence of 12 years' imprisonment, with release on licence after serving two-thirds, is a less heavy penalty than a sentence of 12 years' imprisonment, all of which has to be served. The sentence of 12 years' imprisonment, with release on licence after serving eight years, imposed on the respondent under the new regime, was a less heavy penalty than a sentence of 15 years, with unconditional release after ten years, which could have been imposed on him under the old regime, and manifestly less severe than the sentence of life imprisonment which could have been imposed on him under that regime. For these reasons I conclude that there has been no infringement of article 7(1).

4.38 In declaring the article 7 complaint inadmissible, the Strasbourg Court appeared to go even further, in apparently rejecting the suggestion that any change to the release regime could infringe article 7:

> The "measure" in the present case, the application of the rules on early release, was not a "measure" in the sense understood by the Court in the case of *Welch*, and was not "imposed" at all, but was part of the general regime applicable to prisoners. The nature and purpose of the "measure", far from being punitive, were to permit early release, and they cannot be considered as inherently "severe" in any ordinary meaning of the word.
>
> Although, as the Court of Appeal found in the present case, the licence conditions imposed on the applicant on his release after eight years can be considered as "onerous" in the sense that they inevitably limited his freedom of action, they did not form part of the "penalty" within the meaning of article 7, but were part of the regime by which prisoners could be released before serving the full term of the sentence imposed.
>
> Accordingly, the application to the applicant of the post-1991 Act regime for early release was not part of the "penalty" imposed on him, with the result that no comparison is necessary between the early release regime before 1983 and that after 1991. As the sole penalties applied were those imposed by the sentencing judge, no "heavier" penalty was applied than the one applicable when the offences were committed.

4.39 A similar approach was taken by the European Commission of Human Rights in rejecting the admissibility of the application in the case of *Hogben v UK*.[45] That case also related to a change in the approach to release from custody, but in the context of release of those sentenced to life imprisonment.

4.40 In that case, a policy shift had led to a significant change in the approach to the release of certain offenders convicted of murder and sentenced to life imprisonment, which led in substance to longer periods spent in custody before

[45] App No 11653/85 (Commission decision).

consideration for release, and more restrictive criteria to applications for release.[46]

4.41 The changes applied to all those sentenced (and already serving sentences) at the time of its implementation, so included those who committed the relevant offences before the changes were made. The Commission gave short shrift to an article 7 challenge on these grounds:

> … in the opinion of the Commission, the "penalty" for purposes of article 7, para. 1 (article 7-1), must be considered to be that of life imprisonment. Nevertheless it is true that as a result of the change in parole policy the applicant will not become eligible for release on parole until he has served 20 years' imprisonment. Although this may give rise to the result that his imprisonment is effectively harsher than if he had been eligible for release on parole at an earlier stage, such matters relate to the execution of the sentence as opposed to the "penalty" which remains that of life imprisonment. Accordingly, it cannot be said that the "penalty" imposed is a heavier one than that imposed by the trial judge.

4.42 The approach in the *Uttley* line of cases has been criticised as overly restrictive,[47] and we will return to consider below how the transition to the New Sentencing Code could be justified (both in legal and purely principled terms) even if a more nuanced approach were taken by the courts in future.

4.43 For present purposes, however, in attempting simply to set out the current legal position under both domestic law and in light of the decisions of the Strasbourg Court, the following principles emerge:

(1) a measure which appears to apply retroactively, to an individual's detriment, will not violate article 7 if it does not fall within the autonomous definition of a "penalty" considered above[48] though the broader common law principles of interpretation will continue to apply;

(2) even where there is clearly a penalty involved, a distinction can be drawn between the penalty imposed, and changes in the way in which such penalties are administered or enforced (such as release from custody) and retroactive changes of this kind are also outside article 7;

[46] It is notable that *Hogben* was decided when the tariff for life sentences was not set by the court – the court simply imposed a life sentence and the tariff was set by the Home Secretary. Whereas now the tariff is set by the court, and is part of the penalty imposed by the court, see *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837.

[47] See S Atrill, "Nulla poena sine lege in comparative perspective: retrospectivity under the ECHR and US Constitution" [2005] *Public Law* 107, p 116 and following.

[48] See para 4.9 onwards.

(3) where the measure is a penalty, and the change relates to the penalty itself and not the manner of its enforcement, the meaning of "penalty applicable at the time" is the maximum penalty which could have been imposed at the time of commission. Changes to the law which do not involve creating the possibility of imposing a sentence above the historic maximum sentence available at the time of commission are therefore compliant with article 7 on their face.

4.44 In the context of simply comparing two prison sentences of differing length, the question of whether a penalty is heavier than that which was the historically available maximum is very easy to answer. The question may become more difficult where the comparison is between sentences which also involve a community element, or some ancillary order, which may be less simple to compare in terms of their severity. We return to this issue below[49] though in principle the approach should be the same.

[49] See para 5.14 below.

PART 5
IMPLICATIONS OF NON-RETROACTIVITY FOR THE NEW SENTENCING CODE

THE BASIC LIMITATION PROVIDED BY ARTICLE 7

5.1 We set out above[1] the great value in certainty terms of taking a "clean sweep" approach to sentencing procedure, by enacting a new consolidating code which collects together all of sentencing procedure in one place,[2] and applies in its entirety to all sentencing exercises from the date of its enactment. After our examination of the way in which article 7 has been interpreted by the courts, we are in a position to answer the question we posed earlier, namely, to what extent does the human rights based prohibition on "a heavier penalty be[ing] imposed than the one that was applicable at the time the criminal offence was committed" conflict with the "clean sweep" approach?

5.2 We have set out the various limitations to the application of article 7. Nonetheless it is clearly impermissible in article 7 terms to impose a sentence upon an individual in excess of the maximum penalty which could have been imposed upon them for the act in question at the time of its commission.

> **Example 7** The New Sentencing Code is brought into force in 2018. In 2020 D is convicted of a number of offences of indecent assault on a woman over 13 committed in 1975. The maximum sentence for that indecent assault in 1975 was 2 years' imprisonment. The judge sentencing D in 2020 would conduct the sentencing hearing under the New Sentencing Code, and could have recourse to all of the sentencing options in it, including types of penalty introduced after 1975. However, the judge would have to ensure that the total penalty imposed was not heavier than 2 years' imprisonment in respect of each offence.

5.3 We do not generally envisage the New Sentencing Code containing reference to the particular sentencing tariffs or sentencing ranges for different offences (these will continue to appear in the offence-creating provisions themselves, and in sentencing guidelines, as they do under current law). However, there will be exceptions, such as mandatory sentences which do appear in the sentencing legislation, and we also envisage the New Sentencing Code setting out an exhaustive list of the available types of sentencing disposal, and providing a framework for their imposition. For the avoidance of doubt then, one implication of article 7 and the principle of non-retroactivity more generally will be the necessity for judges to continue to refer to the maximum sentences available for offences at the time they were committed. This will obviously only be relevant in

[1] See paras 2.20 to 2.22 above.

[2] See para 1.19 above.

the small minority of sentencing exercises in respect of offences committed some time earlier, under an earlier legal regime ("historic sentencing exercises").[3]

5.4 The obligation of Government ministers to ensure that legislation introduced by Parliament is ECHR compliant[4] would clearly make it likely that any legislative change with the effect of simply increasing a maximum penalty would be enacted only with prospective effect. Further, the obligation on the courts as public authorities to respect ECHR rights[5] provides an independent legal safeguard against the possibility of a sentence being imposed which offended against this principle, to the extent that the New Sentencing Code allowed for the possibility of a heavier sentence than that available historically.[6]

5.5 Although these obligations and safeguards already exist, we have considered whether it would be desirable to provide, on the face of the New Sentencing Code, that all sentences passed under it should be such that no heavier penalty is imposed than the maximum available at the time the offence was committed.

5.6 One argument against such a provision in primary legislation would be that it is unnecessary, given that it would simply re-state obligations which already exist under other primary legislation. Further, to do so might be thought to create uncertainty, or to open up the possibility of argument that the newly stated principle has some different meaning or effect from that of the pre-existing obligations. It is of greatest concern that such a provision on the face of the New Sentencing Code might be thought to suggest that a sentencing court using the New Sentencing Code still needs to have recourse to all of the previous sentencing law in historic cases, to ensure it is respecting the article 7 principle, whereas we intend that this will not be the case.[7]

5.7 However, we do believe it would be valuable to make some express provision in the New Sentencing Code for protection of the right currently enshrined in article 7, and we now turn to how this could be best achieved.

[3] In this age of electronic legal databases, this should (and indeed does at present) provide no insurmountable obstacle in those relatively rare instances of historic sentencing exercises. We would provisionally propose the drafting of an authoritative tabular presentation of the most common offences with their historic sentencing maxima over the last generation (whether as a schedule to the Code or elsewhere).

[4] Human Rights Act 1998, s 9 (and probably any successor legislation designed to protect fundamental rights).

[5] Human Rights Act 1998, s 6.

[6] One example, as discussed in more detail below at para 5.21 and following, would be where the code introduced a new type of penalty to be retroactively available which, though not in itself incompatible with article 7, could be combined with some other penalties also available to the court to create a total sentence which is arguably heavier than the historically available maximum combination.

[7] See 4.43 above.

THE WAY IN WHICH THE NEW SENTENCING CODE WILL PROVIDE FOR PROTECTION OF THE RIGHT NOT TO BE SUBJECT TO RETROACTIVE HEAVIER PENALTIES

5.8 As stated above[8] where the question "is the sentence being considered a heavier one than the historically available maximum?" involves simply the comparison between two sentences of imprisonment, the solution is readily available, and the answer is legally clear. If the offence at the time of commission was punishable by imprisonment, then any form of non-custodial penalty[9] will be lawful, as would any sentence of imprisonment up to the historic maximum.[10]

5.9 A community sentence is not available unless the offence under consideration is one punishable by imprisonment[11] and this would continue to be so under the New Sentencing Code, which will consolidate the current position. Although this has not always been the case (prior to 2008 a community order was theoretically available for offences punishable by way of fine and not imprisonment) this historic position, which will be a decade old by the time the New Sentencing Code could be brought into force, is likely to have no practical relevance.[12] It follows that in any case that is likely in practice to be sentenced under the New Sentencing Code where a community penalty would have been historically available, a custodial sentence would also have been historically available. No complaint can be made then, in article 7 terms, based solely in changes to the nature of community orders from time to time.

5.10 Consider the example of an offender ("D") who commits a criminal offence in 2002, though D is not apprehended and convicted until 2020. D's offence is punishable by way of a community penalty, and also by way of imprisonment,

[8] See para 4.32 above.

[9] Certainly any currently known to the law: community orders are only available where a sentence of imprisonment is available (Criminal Justice Act 2003, s 150A), and where the offence is serious enough to warrant it (s 148). Imprisonment itself is only available where the offence is so serious that neither a fine nor a community order alone can be justified (s 152). This implies that imprisonment is always to be considered as more severe than community orders currently available.

[10] As to more principled authority for the assertion that imprisonment is qualitatively different and more severe form of punishment, see A Ashworth, *Sentencing and Criminal Justice* (5th ed 2010), pp 291 to 292 – "Prison is...a severe restriction on ordinary human liberties, far above those imposed by most non-custodial sentences, and its negative effects on the prisoner's capacity for autonomy and responsible citizenship should be recognized. Moreover, the restriction of liberties impinges not just on the offender but also on the offender's family and dependants. These considerations suggest that custody should not be used without some special reasons, and should be reserved for the most serious cases of lawbreaking. In particular, they suggest that custody should not simply be seen as the top rung of a ladder which starts with discharges and runs upwards through fines and community penalties. The imposition of a custodial sentence restricts liberty to a far greater degree than any other sentence, and for that reason should require special justification."

[11] This is the effect of the Criminal Justice Act 2003, s 150A, because s 151 of the same Act is not in force.

[12] The only class of case for which this historic position would have relevance would be those punishable by way of fine and not imprisonment, which almost without exception would make them summary-only offences with a six month time bar for prosecution. There is therefore no practical likelihood of an offender appearing before the courts after 2018 charged with a fineable only offence dating back prior to 2008. It is only for this class of offender, which we provisionally believe will be an empty class, where the historically available penalty range could have included a community order but not imprisonment.

under the law in 2002. At the time D commits the offence, the community penalties which D would be liable to receive are made up of community punishment and rehabilitation orders,[13] with some combination of the requirements available under such orders at that time. The New Sentencing Code is brought into force in 2018 before D is sentenced.

Example 8 First, take the case where the New Sentencing Code consolidates the law in force at the time of commencement in 2018, which in the case of community penalties is largely governed by the Criminal Justice Act 2003 creating "new style" community orders and suspended sentence orders. The New Sentencing Code on commencement would streamline the law, by making the law on non-custodial orders in force at that time applicable to all historic cases. The effect of this consolidation and simplification for D, when D is sentenced under the New Sentencing Code in 2020, is that D is liable to the imposition of the most up to date form of community penalties (as introduced by the 2003 Act, consolidated by the New Sentencing Code) rather than those types of order available in 2002. D cannot complain that receiving a "new style" community order, is a retroactive change to the law in human rights terms. In 2002, as remains the case in 2020, the maximum sentence was a custodial sentence, which we have argued is necessarily more serious. The effect of the streamlining of the law has not been to change the maximum penalty, but rather to make Parliament's preferred approach for the delivery and range of non-custodial penalties available for all offenders whenever their offence.

Example 9 Second, take the case where a new form of non-custodial penalty is introduced by amendment to the New Sentencing Code in 2019, for instance a new type of electronic monitoring at work. It is only available for offences where the maximum penalty is a sentence of imprisonment. As with the position on the initial commencement of the New Sentencing Code, when this change is introduced in 2019 it can be brought into force for all future sentencing hearings, keeping the law simple and accessible, and any pre-existing inconsistent provisions regarding community orders can be retrospectively repealed for anyone sentenced after the change. The effect of this amendment is that, when sentenced under the New Sentencing Code in 2020, D is liable to the imposition of the most up to date form of community penalties including the 2019 amendment to the New Sentencing Code, rather than those types of order available in 2002. D cannot complain that receiving an order

[13] Under the Power of Criminal Courts (Sentencing) Act 2000 (as amended).

containing the element newly introduced in 2019 is an objectionable retroactive change to the law in human rights terms. In 2002, as remains the case in 2020, the maximum sentence was a more serious custodial sentence. The effect of the amendment of the law has not been to change the maximum penalty, but rather to make Parliament's preferred approach for the delivery and range of non-custodial penalties available for all offenders whenever their offence.

5.11 In summary, a prison sentence must be available before the imposition of a non-custodial sentence other than a fine. In any case involving a change to the community sentence regime the historic maximum would have been a custodial penalty,[14] and therefore both legally and as a matter of principle a heavier one than any contemporary community-based sentence.[15]

5.12 Where the historic maximum sentence took the form of a financial penalty, then the New Sentencing Code will provide that only a financial penalty can be imposed. This can be any of the new forms of financial penalty available under the New Sentencing Code, up to the value of the historic maximum fine.[16]

5.13 A sentencing judge who is considering imposing only one form of penal element to the sentence (whether custodial, community-based or financial) need therefore only be armed with the New Sentencing Code and a statement of the historic maximum penalty to be confident that the sentence passed is lawful.

5.14 Where the issue becomes more complex is where the sentencing judge is considering imposing a combination of different penal elements in a single sentence.

5.15 We have emphasised[17] that it is our intention that the New Sentencing Code contain the sole and authoritative list of all available *types* of sentencing disposal as a matter of English and Welsh law (though not tariffs or guidelines on the degree of punishment, such as levels of fine, periods of imprisonment and so on unless these are fixed by law, as with mandatory minimum sentences).

5.16 Were an entirely new type of sentencing disposal introduced, by amendment of the New Sentencing Code, it might be suggested that the application of such a sentence type in response to an offence which predated its inception was in itself objectionable. In his judgment in the House of Lords in *Uttley* Lord Rodger made

[14] Save for historic fineable-only cases prior to 2008, on which see discussion above in fn 12.

[15] See paras 5.8 and fn 10 above, and para 5.25 below.

[16] Note that, for offences committed after 12 March 2015, no fine limit now applies in magistrates' courts for offences with a maximum penalty expressed as "level 5" or "£5,000", with certain exceptions. See Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPOA), s 85, and SIs 2015/504 and 664. In general, changes to magistrates' powers to fine (including this) operate prospectively only – see eg LASPOA s 87(7). This does not pose difficulties in practice because of the strict time limits for bringing proceedings in the magistrates' courts – six months in the majority of cases (Magistrates' Courts Act 1980, s 127). We are not currently aware of any limited fines in the Crown Court, so we think no issues of retrospectivity in uprating can arise – Criminal Law Act 1977, s 32.

[17] See para 3.25 above.

the following remark, in the course of rejecting the suggestion that the change to the release conditions in that case constituted heavier punishment:

> …if legislation passed after the offences were to say, for instance, that a sentence of imprisonment was to become a sentence of imprisonment with hard labour, then issues would arise as to whether [article 7] was engaged, even where the maximum sentence had been life imprisonment at the time of the offences. But in this case there is no suggestion that the actual conditions of the respondent's imprisonment changed.[18]

5.17 This example is a particularly vivid one, and clearly involves the introduction of a new sentence type which is potentially more onerous for the offender than anything available at the time the offence was committed (not least because it would be imposed in addition to an existing available type of punishment).

5.18 Of course, one option would be for any new types of sentencing disposal which are inserted into the New Sentencing Code by subsequent legislation to make clear on their face in the Code that they are being prospective only in their application, with the commencement date being clearly expressed in the Code itself. However, though a significant improvement on the current law, this would still to some extent undermine the clarity of the approach we are advocating in this paper. Our intended level of clarity would be best achieved by having a single sentencing code which is applicable to all sentencing hearings conducted after its commencement, subject to amendment from time to time.

5.19 In article 7 terms, the objection to the application of a new sentence *type* would only apply if the effect of its application, in combination with any other sentencing disposals applied, was to create a heavier penalty than the maximum available at the time of the commission of the offence. It can readily be seen that this would by no means necessarily be the effect of the retroactive application of a new type of sentencing disposal. For instance, the application of a new type of community sentence involving an electronic monitoring element, perhaps requiring the offender to remain within different particular geographical areas at particular times of day for a year's duration (for example, between home and work) would not on any sensible view appear to offend against article 7 if applied retrospectively in respect of an offence for which there was a maximum sentence of 5 years' imprisonment available at the time of commission.

5.20 Although the common law interpretative principle of non-retroactivity would apply, it could be readily rebutted by unambiguous statutory language, and the courts would not be likely to strive for a strained contrary interpretation where the effect of the retroactive measure did not appear to be detrimental to the offender.

5.21 The more difficult question arises where the sentence imposed involves the combination of multiple penal elements, such as a type of sentencing disposal which *was* available at the time of commission, and within the historic sentencing range, in combination with a new type of penalty, which is being retroactively applied.

[18] [2004] UKHL 38, [2004] 1 WLR 2278 at [43].

Example 10 D commits a high value sophisticated theft in 2016, for which the maximum sentence at that time is 7 years' imprisonment. D initially escapes the notice of the police. In 2018 the government of the day introduces a new regime permitting the confiscation and sale of a convicted defendant's property to raise money for large compensation payments to victims' organisations. In 2019 D is intercepted by the police, and in 2020 is convicted by a jury and sentenced to 5 years' imprisonment and the seizure and sale of much of his property, to the value of £700,000, is ordered under the new regime introduced in 2018.

5.22 In deciding whether the imposition of this sentence is article 7 compliant it is necessary to decide whether a 5 year sentence of imprisonment combined with the £700,000 order is a heavier penalty than the historically available maximum of 7 years' imprisonment, combined with any other historically available sanctions which could have been imposed in combination at the time of commission (for instance a fine would historically have been available in combination with imprisonment).[19]

5.23 Ultimately, difficult or borderline cases may arise in this very small minority of cases requiring historic sentencing exercises where the judge feels that a combination of penalties is necessary. In such rare cases, a 'safety valve' test may be necessary, ensuring that the general policy of enacting clean, swift and straightforward changes to the New Sentencing Code does not create a risk of infringing the article 7 rights of convicted defendants in historic cases.

5.24 As to the wording of such a "safety valve" test, inspiration might be provided by a provision which already exists in English and Welsh sentencing law in the form of section 11(3) of the Criminal Appeals Act 1968. This section governs the Court of Appeal's powers to substitute a different sentence on appeal, and provides that:

> The Court shall so exercise their powers under this subsection that, taking the case as a whole, the appellant is not more severely dealt with on appeal than he was dealt with by the court below.

5.25 This provision was interpreted in *Waters and Young*[20] as requiring the court to act such that "no ordinary person would consider that the appellants are [on appeal] being dealt with more severely". In that case, the imposition by the Court of Appeal of an immediate prison sentence which was entirely subsumed by time served on remand (and hence did not require the appellants to spend any further time in custody) rather than the suspended sentence with requirements imposed by the judge, was held to be consistent with that safeguard.

[19] This power is less likely to be exercised since confiscation regimes were introduced. An example from before confiscation regimes is *Fox* (1987) 9 Cr App R (S) 116, where Lord Lane CJ in the Court of Appeal upheld a sentence of 5 years and a fine of £16,000 in a drugs matter even where that fine was in excess of D's estimated £9,000 gain from the Class A drug smuggling.

[20] [2008] EWCA Crim 2538. See also *Grahn* [2012] EWCA Crim 2629, and *Price* [2013] EWCA Crim 1283, [2014] 1 Cr App R (S) 36.

5.26 We consider that a similar "safety valve" test could be applied when considering whether the default position, which will be the retroactive application of the New Sentencing Code, including the full list of available penalties, offends against article 7 and corresponding common law rights. The sentencing court (and appellate courts on appeal) should ask whether the total penalty which it is considering imposing for the offence(s) before it, taken in the round, would be considered by an ordinary observer as a heavier one than the maximum which could have been imposed for the offence(s) at the time of commission. In structuring this inquiry, we suggest the following steps could assist:

(1) Is this a case where the justice of the case demands a sentence, in respect of any single offence, with more than one penal element (for example, a sentence of imprisonment *and* a financial sanction, or an ancillary order which is penal in nature[21])?

If no, then impose a single penal element to the sentence in respect of each offence, and check against the historic maximum penalty. If the historic maximum is a period of imprisonment, then any non-custodial sentence, or any custodial sentence up to the historic maximum, will be lawful. If the historic maximum is a fine, then only a financial penalty up to this level should be imposed. That would complete the sentence and the judge need go no further.

If yes, then go to (2).

(2) Impose that combination of the sentencing options available under the New Sentencing Code which meets the justice of the case and proceed to (3).

(3) Before finalising the sentence, check the historic maximum penalty and ask the "safety valve" question:

> Is the total penalty which the court is considering imposing for the offence, taken together, such as would be considered by an ordinary observer to be a heavier one than the maximum which could have been imposed for the offence at the time of commission?

5.27 In only a small minority of historic sentencing exercises will the court be required to go to stages (2) and (3). For all other cases, the court can be satisfied that the sentence it imposes from the full menu under the New Sentencing Code will be human rights compliant, simply by reference to any historic maximum sentence.

5.28 In that small minority of cases where the court does get as far as stages (2) and (3), if the answer to question (3) is no, then the article 7 principle will not be infringed, and the clear statutory language of the New Sentencing Code which provides for the retroactive application of the full list of penalties which it contains to cases can be safely followed. The common law interpretative presumption, though engaged, would be rebutted by the clear language, and there are

[21] As to when an ancillary order will be penal in nature, see discussion of the meaning of "penalty" above at para 4.9 above. We anticipate similar considerations would be taken into account by a court adjudicating on the situation under common law rights.

excellent reasons of principle (in the huge gains of certainty and consequent benefits in rule of law terms which this entails) for legislating in this way in this area.

5.29 By contrast, if the answer to the "safety valve" question (3) is yes then the sentencing court should avoid deploying that particular combination of sentencing disposals, in recognition of its obligations under human rights law.

5.30 **Do consultees agree that a safety valve of this kind is necessary, and if so with the step-based decision making framework set out at paragraph 5.26 above?**

PROCEDURE FOR CHALLENGING A SENTENCE WHICH FALLS FOUL OF THE PRINCIPLE AGAINST HEAVIER RETROACTIVE PUNISHMENT

5.31 We have argued above that the "clean sweep" approach will allow for the application of the New Sentencing Code in its entirety to all cases sentenced after it is brought into force, and the consignment to history of all previous sentencing procedure. The only limitation to this position will be the necessity to retain a record of the historically available maximum penalties for all offences, which usually appear on the face of the offence-creating provision in any event.

5.32 We have further argued that in most cases the exercise of comparing the severity of the proposed sentencing disposal under the New Sentencing Code with the maximum sentence historically available will be a simple one. This will generally place no undue burden on the court or advocates at a sentencing hearing, so long as they are armed with the provisions of the New Sentencing Code and any historic maximum sentence insofar as this differs from the current maximum penalty.

5.33 However, we have further noted that the position may be more complex in a small minority of cases where the sentencing court considers it necessary to impose a combination of penal elements under the New Sentencing Code for a single offence. We foresee that in such a case the exercise of comparing the severity of the proposed sentence under the New Sentencing Code with the most severe sentence (including possible combinations of penalty) which were available at the time of commission might be more contentious, and require lengthier argument and research.

5.34 We provisionally propose that a new procedure could be introduced into the New Sentencing Code giving offenders a right to challenge their sentences on the ground that it infringes the principle against retroactive heavier punishment.

5.35 We believe, for all the reasons of increased clarity which we have set out above,[22] that such an error would be substantially less common under the New Sentencing Code.[23] However, to the extent that such errors are committed, it may, after some research, be easy to demonstrate that such an error has been made, but appeal to the Criminal Division of the Court of Appeal would seem to

[22] See Part 2 above.

[23] There are a number of recent appeals on this basis – for example in *H* [2011] EWCA Crim 2753, [2012] 1 WLR 1416.

be an inefficient solution in such cases. This appeal route is costly to the public purse, and generally brings with it substantial delay of at least a matter of months.

5.36 We therefore propose that an offender should be permitted to return to the sentencing tribunal which dealt with the original sentence to request the sentence be altered to respect the rule against retroactive heavier punishment. Such an application would be akin to that under the "slip rule"[24] used to correct errors without the necessity for a slow and costly full appeal to the Court of Appeal (or the Crown Court as the case might be). In many such cases, where the historically available maximum had not been brought to the sentencing tribunal's attention, or the tribunal had proceeded on the basis of an error, this could be rectified quickly, and without contention.

5.37 In pursuing an application under this expedited procedure the defendant's rights to pursue a substantive appeal against sentence to the Court of Appeal would be unaffected.

5.38 **Do consultees agree that an expedited procedure, akin to the slip rule, would be desirable to allow an offender, or another party who noticed a possible oversight, to amend the sentence on the basis that it infringed the principle against retroactive heavier punishment?**

FURTHER LIMITATIONS TO THE CLEAN SWEEP APPROACH?

5.39 With the exception of the necessity to keep the sentence imposed within the historically available sentencing range, the principles set out above, as interpreted by the courts, would appear to provide no bar to the wholesale adoption of a fresh sentencing procedure code for all cases (our proposed "clean sweep"). Are there any further nuances to this position?

5.40 Specific issues that need to be considered are –

(1) indeterminate sentences of imprisonment;

(2) application of contemporary sentencing guidelines to historic cases; and

(3) recidivist premiums and mandatory sentences.

5.41 We will now consider each of these in turn. We consider these issues both with respect to the initial enactment of the New Sentencing Code, consolidating the current law in force, and with respect to future amendments to the New Sentencing Code.

(1) Indeterminate sentences of imprisonment

5.42 One notable implication is that any new indeterminate sentence could apply only in respect of offences committed after the coming into force of the relevant statutory provisions.[25] An indeterminate sentence for these purposes means one where no latest end-date can be identified at the time of imposition of sentence.

[24] Powers of Criminal Courts (Sentencing) Act 2000, s 155.

[25] Unless a life sentence was available for the offence at the time of commission.

Those sentence types where a latest release date does exist, albeit that there is discretion and uncertainty as to the exact date of release as between some earlier date and the latest release date, are not indeterminate.

5.43 An example of this latter type of sentence is the extended sentence of imprisonment. Similar sentences have existed in various forms in English and Welsh law over the past few decades.[26] Currently, an extended sentence involves a minimum period of incarceration, followed by an extended period (either in custody and/or under licence conditions in the community as the case may be) the exact length of which might be determined by a discretionary body taking a view as to the danger posed by the offender at a set stage during the sentence.[27]

> **Example 11** A is convicted of a sustained assault with a knife causing serious and permanent life-changing injury to the victim. The judge concludes that A is dangerous, within the statutory definition of this term, and A is sentenced under the law currently in force to an extended sentence of imprisonment of 12 years' duration, with a custodial term of 9 years and an extended licence period of 3 years. At the time A committed his offence, the extended sentence of imprisonment was not available. If A had been sentenced to a standard determinate sentence of 9 years' imprisonment, the effect under normal circumstances would have been release from prison at the half-way point: after 4.5 years, followed by 4.5 years on licence in the community. However, because A has received an extended sentence, A will serve at least 6 years at which stage A's suitability for release will be considered by the Parole Board and A will not be entitled to automatic release until 9 years have expired.[28]

5.44 Such a sentence is not indeterminate in the way in which a sentence of life imprisonment is, or the old sentence of imprisonment for public protection ("IPP") was, as with the extended sentence it is possible at the date of sentence to identify a last possible date on which the offender will be released. It is our provisional view that the retroactive application of such a sentence for an offence committed before it was introduced is consistent with article 7. This reflects the current law on the applicability of the extended sentence.[29]

[26] See the history of extended sentences in R Banks, *Banks on Sentence* (10th ed 2015) Vol 1, p 535.

[27] See, for example, extended sentences under Criminal Justice Act 2003, s 226A. Such sentences are made up of an "appropriate custodial term", from which the offender can be released on licence at the discretion of the parole board from two-thirds of the way through, plus an "extension period" of additional supervision.

[28] Following the changes introduced by the Criminal Justice and Courts Act 2015, s 4, prior to which A's release at the two-thirds point would have been automatic.

[29] Criminal Justice Act 2003, s 226A(1)(a) provides that an extended determinate sentence is available for an offence whenever committed; and s 226A(9) provides that the term of an extended determinate sentence (ie the custodial term and the extended licence period) imposed in respect of an offence must not exceed the term that, at the time the offence was committed, was the maximum term permitted for the offence.

5.45 In addition to representing the current position in statute, support for this approach is derived from the reasoning of both the Strasbourg Court[30] and the domestic courts in *Uttley*:[31] namely that the penalty which is to be compared with the historic maximum for these purposes is the total sentence handed down by the court, without consideration of rules on release. Clearly if an extended sentence or an indeterminate sentence were available at the time of commission of the offence then there can be no rights-based objection to the imposition of a modern sentence of like effect. However, on the reasoning in the *Uttley* line of caselaw, an individual sentenced to a 9 year extended sentence under the New Sentencing Code has no cause for complaint even if the historic maximum penalty for the offence was a *determinate* 9 year term (or more), despite the fact that historically the release provisions for determinate sentences might have given him a shorter period to serve in prison.

5.46 It is possible to envisage a more defensive approach in which, before passing an extended sentence in respect of a historic offence the court could seek to satisfy itself that the latest possible release date under the extended sentence would result in a sentence equal to, or below, the period which would have been served under the historically available offence maxima.

5.47 However, we provisionally believe that a lawful and proportionate approach would be for the New Sentencing Code to make extended sentences, of up to the same length[32] as the historically available maximum term of imprisonment, retroactively available for all offences. This would represent simply a consolidation of the current law,[33] and is consistent with the general approach of both the domestic and Strasbourg courts to changes to the law on release provisions. Further this approach ensures that extended sentences, with their greater element of Parole Board supervision of dangerous offenders, are available in appropriate cases for public protection.

5.48 Were the position otherwise, in any historic sentencing exercise a sentencing court would have to have regard to both the contemporary and historic law on release from custody, which has changed frequently (and is likely to continue to do so) and would have to attempt to compare the effect of various different release regimes in deciding whether a sentence constituted a heavier penalty. The courts have consistently held that, quite in contrast to such a duty, the question of release from custody is not a matter to which a sentencing court is intended to have regard.[34]

[30] App No 36946/03.

[31] [2004] UKHL 38, [2004] 1 WLR 2278.

[32] Where the length of the extended sentence is understood as the combination of the custodial term and the extended licence period, see Criminal Justice Act 2003, s 226A(9).

[33] As referred to in para 5.44 above.

[34] In *Bright* [2008] EWCA Crim 462, [2008] 2 Cr App R (S) 102, the sentencing judge incorrectly explained that the offender would serve only 3.5 years as a result of the 7 year sentence handed down. However, the Court of Appeal (Sir Igor Judge P) said this was irrelevant – the sentence was and remained 7 years, whichever release provisions applied, and it was 7 years that the judge intended to pass. See also *Giga* [2008] EWCA Crim 703, [2008] Crim App R (S) 112.

Example 12(1) A is sentenced in 2016 to a 4 year determinate prison sentence. As at the time of his sentencing hearing, the law is that the effect of such a sentence will be that A is released at the half way mark (so for A after 2 years) and will then spend a further year on electronically monitored home curfew, and then serve the final year on parole under a licence in the community without curfew requirements. In 2017, the law on release from custody changes, meaning that the effect of his sentence is now that A remains on curfew for the full second half of the sentence. The law is clear[35] that A has no arguable complaint in human rights terms. There has been no retroactive change to the law which set out A's liability to punishment, nor to the sentence, which is one of 4 years' imprisonment, but rather to the way in which this sentence is administered.

Example 12(2) B is sentenced in 2017 for an offence committed in 2016 and also receives a 4 year determinate prison sentence. The effect of this sentence in 2017, when it is handed down, is that B must serve 2 years in prison, and 2 years on curfew. At the time the offence was committed, the same sentence would have resulted in 2 years in prison, 1 year on curfew and 1 year on licence. However, under the same authorities, the law is clear that B, like A, has no arguable human rights complaint. This is for the same reason, namely that there has been no retroactive change to the law which set out B's liability to punishment, but rather to the way in which this sentence is administered.

Example 12(3) In 2018 the New Sentencing Code is brought into force. This restates the present law on extended sentences, originally brought into force in 2009 and amended in 2015. Extended sentences result in an offender serving two thirds of the custodial term before being considered for release by the Parole Board. Offenders sentenced to standard determinate sentences are currently automatically released at the halfway point. The New Sentencing Code replicates the present position[36] so that extended sentences are available regardless of when the offence is committed, subject to human rights law and the usual "safety valve" test.

[35] *Uttley* App No 36946/03 (Commission decision)*; Hogben* App No 11653/85 (Commission decision).

[36] Criminal Justice Act 2003, s 226A(1)(a).

C is sentenced in 2019 for a serious sexual offence against a child, committed in 1965, but not reported or prosecuted until 2018. The maximum sentence at the time of C's offence was 10 years imprisonment. An extended sentence of 10 years was imposed by the judge, comprising a 9 year "appropriate custodial term"[37] and a 1 year extension period. The effect of this is that C will not be eligible for release until 6 years into the sentence, and then will either be in prison or under supervision for the entire 10 year period. Regardless of what the release schedule for C would have been like if convicted in 1965, C can have no complaint now, on the basis of the principles discussed earlier in this chapter: this is because C's sentence will inevitably be within the historically available[38] sentence range.

5.49 By contrast to all of the examples considered above, with an indeterminate sentence it is of course impossible to give a last possible release date, and hence impossible for a sentencing tribunal to be confident that the retroactive application of such a sentence would not infringe the offender's article 7 rights (presuming a determinate maximum sentence was in force at the time of commission). It is for this reason that we propose any new form of indeterminate sentence introduced by amendment to the New Sentencing Code should have only prospective application.[39]

5.50 In conclusion, there are no indeterminate sentences under the law of sentencing currently force in England and Wales save for the life sentence, and therefore the initial enactment of the New Sentencing Code could simply consolidate all currently available sentences, including extended sentences. Were a sentencing court considering imposing an extended sentence under the New Sentencing Code for an historic offence, this would be unproblematic under the reasoning in *Uttley*[40] as long as the full term of the extended sentence did not exceed the historically available maximum term. Were a government to consider introducing a new form of indeterminate sentence, or extending the availability of the life sentence, we believe that this should be done by amendment to the New Sentencing Code which makes clear that such sentences are available only in respect of offences committed after the commencement of that amendment (which date should be clear on the face of the amended Code).

(2) Application of contemporary sentencing guidelines to historic cases

5.51 The courts of England and Wales have had various opportunities, including in recent high-profile cases of historic sexual abuse, to consider the proper approach to historic sentencing exercises. One question which arises in such cases is the extent to which it is appropriate to apply modern sentencing practices, such as contemporary sentencing guidelines (within the limits of the

[37] This is defined as being the term which the judge would otherwise have given in accordance with Criminal Justice Act 2003, s 152.

[38] Criminal Justice Act 2003, s 226A(9) makes this a requirement of extended sentences.

[39] Save for offences which already carried an indeterminate sentence (which under the law currently in force means a life sentence) at the time of commission.

historic maximum sentence) when dealing with offences committed many years earlier, when different sentencing practices, and indeed societal attitudes, may have held sway.

5.52 This question was the main focus of the appeal in *Bao*[41] which concerned the sentence received by a defendant for offences of managing a brothel and possessing criminal property (the proceeds of the brothel). In sentencing the defendant to a total of 18 months' imprisonment the judge took into account the Sentencing Council's definitive guideline on sexual offences, which stated on its face that it applied to sentencing exercises after 14 May 2007. The offences in question were committed by the defendant some time before that date, and the defendant challenged the application of this guideline to his case, complaining of a breach of his article 7 rights. Giving the judgment of the Court of Appeal, Mr Justice Aikens answered this challenge as follows:

> Was the judge wrong in law to consider the guidelines? We have concluded that he was clearly entitled, indeed obliged, to consider them. Section 172 of the CJA 2003 instructs judges to consider guidelines which are relevant to the offender and the offence. He is bound to do so, even if he disagrees with them; so must this Court… These guidelines were, in our view, clearly relevant to the present case.
>
> In considering the guidelines the judge was not acting in a way which was contrary to the ECHR Art.7.1 rights of the appellant. The penalty for the offence at the time when this appellant committed the offence in 2005 had already been set at a maximum of seven years' imprisonment. That maximum penalty had not been changed at any relevant time. The provisions of Art.7 are directed at "… the mischief of retroactive or retrospective changes to the law": see *Bowker [2007] EWCA Crim 1608* at [27], per Sir David Latham V.P. In the present case there has been no change in the law. The sentencing guideline report foreword specifically states it will apply to sentencing after May 14, 2007. That is the key expression. The guidelines published by the Sentencing Guidelines Council are reflections of current sentencing policy and practice. They are not rules of law. In that respect they are no different from the status of guideline cases of this court, which were used to provide assistance on sentences in different types of case. The "tariff" might change from time to time but so long as the sentencing regime or maximum sentence had not changed, a judge would be obliged to follow the most recent guideline case if handed down before sentencing. This would be so, even when the new guideline on the tariff had been promulgated after the offence or conviction or guilty plea, as here.
>
> In our view there is no difference in principle since the establishment of the current regime where the Sentencing Guideline Council publishes its definitive guidelines. If the contrary position were to hold,

[40] [2004] UKHL 38, [2004] 1 WLR 2278.

[41] [2007] EWCA Crim 2781, [2008] 2 Cr App R (S) 10.

> it would lead to manifest inconsistencies in sentencing. It would add yet further complications to an already complicated sentencing regime. Therefore we reject the submission that the judge was wrong to follow the Sentencing Guidelines Council's report.[42]

5.53 We respectfully agree with the Court's approach. Whilst there may in some cases be powerful reasons, in the courts' discretion, to differentiate between a historic offender and one convicted of a more recent offence when approaching the sentencing exercise, the starting point in every case is the application of current sentencing practice and procedure within the limits of the historically available sentencing range. The suggestion that this approach is unlawful is misconceived. We draw support for the approach advocated in this paper by the authoritative endorsement of this position by the appellate courts, and gratefully adopt the observation that to do otherwise would be to "add yet further complications to an already complicated sentencing regime". Of course, our objective in this project is quite the opposite.

5.54 The same issue received authoritative consideration in the case of *H*[43] which concerned a total of eight conjoined sentencing appeals relating to historic cases of sexual offending dating back between 25 and 40 years. The Lord Chief Justice reviewed the authorities, and gave the following guidance, which merits replication in full:

> (a) Sentence will be imposed at the date of the sentencing hearing, on the basis of the legislative provisions then current, and by measured reference to any definitive sentencing guidelines relevant to the situation revealed by the established facts.
>
> (b) Although sentence must be limited to the maximum sentence at the date when the offence was committed, it is wholly unrealistic to attempt an assessment of sentence by seeking to identify in 2011 what the sentence for the individual offence was likely to have been if the offence had come to light at or shortly after the date when it was committed. Similarly, if maximum sentences have been reduced, as in some instances, for example theft, they have, the more severe attitude to the offence in earlier years, even if it could be established, should not apply.
>
> (c) As always, the particular circumstances in which the offence was committed and its seriousness must be the main focus. Due allowance for the passage of time may be appropriate. The date may have a considerable bearing on the offender's culpability. If, for example, the offender was very young and immature at the time when the case was committed, that remains a continuing feature of the sentencing decision. Similarly if the allegations had come to light many years earlier, and when confronted with them the defendant had admitted them, but, for whatever reason, the complaint had not been drawn to the attention of, or investigated by, the police, or had

[42] [2007] EWCA Crim 2781, [2008] 2 Cr App R (S) 10 at [16] to [18].

[43] [2011] EWCA Crim 2753, [2012] 1 WLR 1416.

been investigated and not then pursued to trial, these too would be relevant features.

(d) In some cases it may be safe to assume that the fact that, notwithstanding the passage of years, the victim has chosen spontaneously to report what happened to him or her in his or her childhood or younger years would be an indication of continuing inner turmoil. However the circumstances in which the facts come to light varies, and careful judgment of the harm done to the victim is always a critical feature of the sentencing decision. Simultaneously, equal care needs to be taken to assess the true extent of the defendant's criminality by reference to what he actually did and the circumstances in which he did it.

(e) The passing of the years may demonstrate aggravating features if, for example, the defendant has continued to commit sexual crime or he represents a continuing risk to the public. On the other hand, mitigation may be found in an unblemished life over the years since the offences were committed, particularly if accompanied by evidence of positive good character.

(f) Early admissions and a guilty plea are of particular importance in historic cases. Just because they relate to facts which are long past, the defendant will inevitably be tempted to lie his way out of the allegations. It is greatly to his credit if he makes early admissions. Even more powerful mitigation is available to the offender who out of a sense of guilt and remorse reports himself to the authorities. Considerations like these provide the victim with vindication, often a feature of great importance to them.[44]

5.55 This approach was followed again in *Clifford*,[45] concerning the conviction of Max Clifford of eight separate offences of indecent assault against 4 different victims under the Sexual Offences Act 1956 regime, which carried a maximum sentence of 2 years at the time of his offences. The sentencing judge took into account contemporary guidelines and attitudes regarding sexual offences against young people (the victims of the offences were aged between 15 and 19) in coming to the conclusion that consecutive sentences amounting to 8 years' imprisonment in total were appropriate. The Court of Appeal rejected the suggestion that either the letter or the spirit of article 7 was breached by the approach of the sentencing judge. Lord Justice Treacy stated:

> There is no question of a breach of art.7 in this case by the imposition of a heavier penalty than what was applicable at the time the offence was committed, because the judge in no case exceeded the maximum sentence available…We do not accept in the circumstances there is a breach of art.7 or anything approaching it. The court is entitled to reflect modern attitudes to historic offences, and to look to modern sentencing guidelines. Where the court looks to a modern offence containing equivalent elements to the historic

[44] [2011] EWCA Crim 2753, [2012] 1 WLR 1416 at [47].

[45] [2014] EWCA Crim 2245, [2015] 1 Cr App R (S) 32.

> offence and where the maximum under the 2003 Act is significantly higher, then the task of the judge will be to make due allowance for that. That is why the phrase "have regard to" is used in para.3 of Annex B to the guideline and why in *R. v H* the court spoke of "measured reference" to guidelines.[46]

5.56 In conclusion, for cases under the New Sentencing Code as initially brought into force, and as amended from time to time, the courts will continue to have regard to contemporary sentencing guidelines even when considering historic cases. We respectfully endorse this approach of the Court of Appeal, and draw support from the parallels between this and the "clean sweep" approach we advocate for sentencing procedure, both in terms of the initial commencement of the New Sentencing Code, and its amendment in future.

5.57 There are authoritative sentencing guidelines in place for different offence types which apply to all sentencing exercises and are amended by replacement, at which point the previous versions of the guideline are consigned to history. We advocate the same approach for the New Sentencing Code.

(3) Recidivist premiums and mandatory sentences

5.58 The current law on the relevance of an offender's previous convictions to sentencing for a new offence is contained primarily in section 143(2) of the Criminal Justice Act 2003, which provides:

> In considering the seriousness of an offence ("the current offence") committed by an offender who has one or more previous convictions, the court must treat each previous conviction as an aggravating factor if (in the case of that conviction) the court considers that it can reasonably be so treated having regard, in particular, to—
>
> (a) the nature of the offence to which the conviction relates and its relevance to the current offence, and
>
> (b) the time that has elapsed since the conviction.

5.59 Mandatory sentencing provisions (situations in which the court is under an obligation to pass a particular type of sentence, or no less than a minimum threshold) remain a relatively rare feature of English law. Significant examples include the mandatory minimum 3 year prison sentence for a third domestic burglary[47] and the mandatory minimum 5 year prison sentence for certain firearms offences.[48] A more accurate term for such sentences would be "prescribed" sentences, since they are specified in statute but are subject to "exceptional circumstances" provisions.

5.60 The question of the law's approach to previous convictions as a potential aggravating factor in sentencing (the extent to which to apply a so-called

[46] [2014] EWCA Crim 2245, [2015] 1 Cr App R (S) 32 at [38]. See also para 5.54 above.

[47] Powers of Criminal Courts (Sentencing) Act 2000, s 111.

[48] Firearms Act 1968, s 51A(2).

"recidivist premium" to a repeat offender[49]) was considered by the Grand Chamber of the European Court of Human Rights in the case of *Achour v France*.[50] In that case a man was convicted of a drug offence in France in 1984 leading to a two year prison sentence. At the time of his receiving that first sentence the law in France dictated that if a person was convicted of a second offence within five years of the expiry of his sentence for his first he would receive an uplift in sentence (in Achour's case, this period of liability for enhanced punishment would have expired in 1991). In 1994, the law was changed to increase the period for which the sentencing uplift remained available after a first offence to ten years, rather than five. In 1995, within ten years of his release from prison for his first offence, Achour committed a second drug offence (for which he was convicted in 1997). He was sentenced using the enhanced punishment regime for recidivists.

5.61 The Grand Chamber[51] found, by a majority of 16 to 1, that there was no contravention of article 7: the recidivist premium is an additional penalty *for the second offence* ("the index offence"), and so its application to the offender who commits the second offence (after the coming into force of the new law relating to that premium) involves no retroactive application of law. That offender could have discovered, had he or she made enquiries, before the moment when the index offence was committed, what the effect of a previous criminal record would be on sentencing liability for a further offence.

5.62 We respectfully agree with this approach, which was also the position taken by the Court of Appeal in the earlier domestic case of *Offen and Ors*[52] regarding the prescriptive life sentence for a second "serious offence" regime under the Crime (Sentences) Act 1997 (no longer in force).

5.63 An objection could be raised against a change in the law in respect of offenders who committed their index offences before the change, but who are sentenced after it. To this extent, and this extent only, there may be reasons of principle to make changes to the law on the relevance of previous convictions, which have the potential to apply to an offender's detriment, prospective only in their effect. Set against this it could be said following the approach of the House of Lords in *Uttley*[53] that, as long as the effect of the retroactively applied recidivist premium was not to aggravate the sentence beyond the maximum available for that offence at the time it was committed, no complaint in article 7 terms should be sustained.

[49] See generally – A Ashworth, *Sentencing and Criminal Justice* (5th ed 2010).

[50] (2007) 45 EHRR 2 (App No 67335/01).

[51] In common with the French Court of Cassation.

[52] [2001] 1 WLR 253, [2001] 1 Cr App R 24.

[53] [2004] UKHL 38, [2004] 1 WLR 2278.

Example 13 Both A and B have a single previous conviction for robbery dating back to 2010, for which they each received short prison sentences. Both in 2010 and in 2016 the maximum sentence for robbery is life imprisonment. On the 1 January 2016 A commits a second robbery offence. On the 1 March 2016 a new law is brought into force prescribing a 5 year prison sentence for a second robbery offence. On the 1 May 2016 B also commits a second robbery offence. Both A and B are arrested by the police in June 2016, and both are tried and convicted of their offences in December 2016. Both fall to be sentenced in January 2017. It could be argued that imposing the prescribed "two strike" 5 year prison sentence in the case of either A or B is permissible in article 7 terms, as it falls well within the maximum offence range at the time each of them committed their offences in 2016. However, even if such a sentence is within the letter of article 7 as currently interpreted by the courts, there are rule of law objections to the imposition of the prescribed sentence in the case of A. At the time A committed the second offence the new law was not in force, and A would have had no warning of the prescriptive 5 year sentence which would follow (and which would have the effect of eliminating the possibility of any sentence below that of 5 years, which would otherwise have been within the available range of punishments at the time A committed his offence.) By contrast in B's case, when the prescriptive sentencing law had been brought into force before the commission of B's second offence, no such objection exists.

5.64 It is not only with respect to those prescribed sentencing regimes which involve repeat offending that we believe particular caution is required. We have argued above, in line with the stance of the Court of Appeal, that historic exercises which deploy contemporary sentencing practice and procedure but result in sentences within the historically available sentencing range are unobjectionable in article 7 terms. Along the same lines, it could be argued that the introduction of a retroactively applicable prescribed sentence of one year's immediate[54] imprisonment for a first offence of carrying a bladed article might be article 7 compliant, so long as the sentence of one year fell within the historically available sentencing range.[55]

5.65 However, we have also argued[56] that, whilst application of the contemporary sentencing procedures and practices should be the starting point, there may be good reason, in particular cases, for sentencing tribunals to take into account the

[54] It is notable that prescribed sentences can also be suspended: the power of the court to suspend sentences under the Criminal Justice Act 2003, s 189 is not disapplied by any of the minimum sentence provisions (as opposed to eg the ability to impose a community order, which is disapplied, see Criminal Justice Act 2003, s 150).

[55] The contrary argument would be that such a prescribed sentence constitutes a new form of penalty which excludes anything below the set minimum (unless exceptional circumstances are present) and so is a harsher penalty.

[56] See para 5.54 above and following.

historic nature of an offence when exercising their discretion at sentence. In other words, whilst it is right to accept the application of contemporary sentencing guidelines to an historic offence for which sentence is now being imposed, there may well be powerful mitigating arguments arising in cases where the conduct giving rise to the conviction was viewed very differently by society at the time, even if the maximum penalty provides a great deal of head room.

5.66 Prescribed sentencing regimes, by their nature, exclude the court's sentencing discretion, and so eliminate the possibility of the court adjusting its approach when applying the New Sentencing Code to take into account features of a case which flow from the historic nature of the offending.[57] For this reason, as with changes to the law's approach to the recidivist premium, we provisionally consider that changes to the law introducing new prescribed minimum penalties may also fall into a special category, which should only be given prospective effect. To provide otherwise, whilst it might be consistent with article 7 as currently interpreted by the courts, would be to risk sentences in a small minority of cases which do real damage to the underlying values served by the principle of non-retroactivity[58] without the availability of a safeguard in the form of the sentencing tribunal's discretion.

5.67 In conclusion, in terms of the implications of this discussion for the New Sentencing Code, we provisionally consider that they are as follows. The New Sentencing Code as originally enacted could contain a single set of provisions governing the effect of previous convictions on sentence (including those offences which carry prescribed sentences for repeat offending of the same type) and a single set of provisions governing other forms of mandatory sentence. These provisions could be applied to all offenders sentenced after the enactment of the New Sentencing Code, as long as *the index offence* (the one for which the recidivist premium or prescribed sentence was being imposed) was committed after the commencement of the Code, or further amendment to it.

[57] An obvious example is the possibility of a long period of blameless or creditworthy behaviour between the offence and the sentence.

[58] See para 3.1 and following above.

Example 14 D's criminal record is as follows:

(1) D burgles a house on 15 September 1998, for which D is convicted on 15 November 1999.

(2) D burgles a house on 15 December 1999, for which D is convicted on 15 December 2000.

(3) D relapses into crime by burgling again on 15 July 2019, for which D is due to be sentenced on 15 July 2020.

Must the judge impose the prescribed minimum? Under the current law, the answer is no. All three domestic burglaries must take place after 30 November 1999 before the mandatory sentence applies.[59] However, if the prescribed sentencing regime were consolidated in the New Sentencing Code which came into force on 1 January 2018, then under our proposed streamlined approach the prescribed minimum would apply, since the index offence post dates the coming into force of the New Sentencing Code.

5.68 Section 28 of the Criminal Justice and Courts Act 2015, which has not yet been brought into force, imposes prescribed minimum sentences for second convictions for certain knife crimes. It is already drafted in the manner we propose for the New Sentencing Code: that is to say, the only requirement is that the offence for which the offender is being sentenced is committed after the date that the section is commenced. Their previous qualifying knife crime could have been at any time in their lives. The same is true of section 224A of the Criminal Justice Act 2003 which creates life sentences for a second listed serious offence.

5.69 By changing the position so that our Code only requires the offence for which D is being sentenced – in our example, the burglary committed on 15 July 2018 – to be after the commencement of the New Sentencing Code, we will bring these older provisions into line with more modern prescribed minimum sentences. Given the time elapsed since such old-style provisions came into force, this change will only adversely affect a very small number of people, and not in a way which violates article 7 ECHR or common law protections against retroactivity.[60]

5.70 We provisionally believe that a similar approach would be desirable if a government wished to enact changes to the approach towards previous convictions, or to introduce new prescribed sentencing regimes, through the New Sentencing Code. Such changes could be made through the Code, and could be applied to all cases sentenced under the Code after their commencement, but it may be agreed in future that the better approach would be to make such changes applicable only to those cases where the index offence is committed after the commencement of the change.

[59] *Hoare* [2004] EWCA Crim 191, [2004] 2 Cr App R (S) 50.

[60] See paras 5.61 and 5.62 above.

Example 15 The New Sentencing Code is brought into force in 2018. In 2020, the government of the day decides to introduce a new law mandating an uplift of 20% on custodial sentences for a third violent offence. The New Sentencing Code is amended on 1 June 2020 to show this change, and the date of its introduction on the face of the Code. We provisionally believe that such a change could be brought into force for all sentencing hearings where the index offence post dated that change, even if the previous offences taken into consideration pre-dated the change. For cases where the index offence pre-dates the change, a government may choose to retain the old law, which could also continue to appear in a schedule to the Code, with a note in the main body of the Code making clear that class of offences to which the old law still applies (those where the index offence pre-dates 1 June 2020).

5.71 It would be compliant with article 7 and common law rights to apply new laws on prescribed minimum sentencing and recidivist premiums to all cases where the index offence post-dates the change in the law.

CONCLUSIONS ON HUMAN RIGHTS AND TRANSITION TO THE NEW SENTENCING CODE

5.72 In summary, we do not believe that an immediate transition to the New Sentencing Code for all subsequent sentencing exercises will violate article 7 or common law rights if the following steps are followed by a sentencing court which is required to consider an historic offence:

(1) Is this a case where the justice of the case demands a sentence, in respect of any single offence, with more than one penal element (for example, a sentence of imprisonment *and* a financial sanction, or ancillary order which is penal in nature[61])?

If no, then impose a single penal sentence in respect of each offence, and check against the historic maximum penalty. If the historic maximum is a period of imprisonment, then any non-custodial sentence, or any custodial sentence up to the historic maximum, will be lawful. If the historic maximum is a fine, then only a financial penalty up to this level should be imposed. That would complete the sentence and the judge need go no further.

If yes, then go to (2).

(2) Impose that combination of the sentencing options available under the New Sentencing Code which meets the justice of the case. Before finalising the sentence, check the historic maximum penalty and ask the "safety valve" question:

[61] As to when an ancillary order will be penal in nature, see discussion of the meaning of "penalty" above at para 4.9. We anticipate similar considerations would be taken into account by a court adjudicating on the situation under common law rights.

(3) Is the total penalty which the court is considering imposing for the offence, taken in the round, such as would be considered by an ordinary observer to be a heavier one than the maximum which could have been imposed for the offence at the time of commission?

5.73 Furthermore, we believe extended sentences of the type currently in force, where a "last release date" is identifiable, could be retroactively imposed under the "clean sweep" approach, as long as their total term did not exceed the historic maximum sentence, which simply reflects the current legal position.[62] By contrast, any new indeterminate sentences introduced by amendment to the New Sentencing Code, or any extension to the availability of the life sentence, should be prospective only in their application (and this should be clear on the face of the Code).

5.74 Regarding the law's approach to the recidivist premium and prescribed minimum sentences, we believe that the law in this area can be consolidated on the commencement of the New Sentencing Code, and future amendment could be made to the Code, on the basis that:

(1) provisions on this topic can be consolidated in a way which requires a court to take into account previous convictions which pre-date the change; but

(2) such provisions should only be applied to sentencing exercises where the *index offence* post dates the original commencement of the provision which is being consolidated or introduced.

[62] See para 5.47, above.

PART 6
OTHER CONSIDERATIONS FOR TRANSITION

6.1 This Issues Paper has set out the advantages of a "clean sweep" approach to the introduction of a New Sentencing Code which can be applied to all sentencing exercises after its introduction. We have also examined the common law and ECHR jurisprudence on the principle of non-retroactivity, and the extent to which this body of law provides limitations of principle within which transition to the New Sentencing Code should take place.

6.2 In this final substantive part we explore a few outstanding considerations which we consider are relevant to the objective of facilitating a smooth and rapid transition to the New Sentencing Code.

CHANGES TO SENTENCING LAW WHICH BENEFIT THE OFFENDER

6.3 In *Scoppola v Italy*[1] the Grand Chamber of the European Court of Human Rights found that:

> A consensus ha[d] gradually emerged in Europe and internationally around the view that application of a criminal law providing for a more lenient penalty, even one enacted after the commission of the offence, has become a fundamental principle of criminal law.

6.4 Accordingly, the Strasbourg court has held that article 7 of the ECHR implicitly incorporates the principle of *lex mitior*. That principle provides, somewhat more fully, that where there is a change to the sentencing law which would benefit the convicted defendant which post-dates the commission of his offence and remains in force for those committing new offences as at the time the offender falls to be sentenced, the offender is entitled to the benefit of that change (rather than being subjected to the harsher regime which applied at the date of commission).

6.5 In *Docherty*[2] the Court of Appeal doubted the existence of such a principle in English law, noting the general presumption against retroactivity, especially in the criminal law,[3] though the court did not finally decide the question. That case involved the imposition of a sentence of imprisonment for public protection ("IPP") imposed on a defendant whose conviction pre-dated the repeal of this type of sentencing disposal, though his sentencing hearing post-dated that change. In holding that the sentence was lawful, the Court of Appeal ultimately relied upon the fact that, even disregarding the availability of IPP, a discretionary life sentence would have been available to the sentencing judge, and would have been a "real possibility" on the facts (which involved a sustained and extremely serious assault on two unarmed victims using a knife).

1 (2010) 51 EHRR 12 (App No 10249/03).

2 [2014] EWCA Crim 1197, [2014] 2 Cr App R (S) 76.

3 See Part 3 above.

6.6 The Court of Appeal later certified a point of law of general public importance[4] and leave to appeal to the Supreme Court in *Docherty* has now been granted.[5] We note this ongoing development in the law at this stage for interest, as it is clearly related to the issues under consideration in this paper.

6.7 However, it is apparent that, even if the *lex mitior* principle were to be held to form a part of domestic law as a further exception to the general presumption against retroactivity, this would create no particular difficulty for the introduction of the New Sentencing Code. The objection to retroactivity which we have been examining in this paper centres around the "no heavier penalty" principle enshrined in article 7 ECHR. The *lex mitior* principle is the reverse side of the coin to the "no heavier penalty" principle, holding as it does that a later *lighter* penalty *should* be applied retroactively.

6.8 This causes no difficulty for the streamlined transitional system which we are advocating for the New Sentencing Code. Under that system, the default position, subject to the "no heavier penalty" general principle, and possibly certain other qualifications[6] will be the application of the Code in full as amended to all sentencing exercises carried out after the Code (or its later amendments) are brought into force. Naturally this will include those changes the introduction of which is demonstrably beneficial to the convicted defendant when compared with the position at the time of the commission of the offence. Accordingly, no conflict with *lex mitior* arises.

THE STAGE FROM WHICH TO INTRODUCE THE NEW SENTENCING CODE

6.9 In advocating a "clean sweep" approach to the introduction of the New Sentencing Code this paper has so far assumed that the mode for achieving this transition is to apply the New Sentencing Code to all sentencing hearings which take place after its introduction. This approach has the advantage of catching the largest possible pool of cases, and hence ensuring the swiftest possible transition to the New Sentencing Code (with all the advantages we believe this will bring[7]).

6.10 However, it is worth briefly considering a couple of other possible options for commencement at this stage, to compare them with our preferred approach. We also need to consider what it means to apply the Code to all cases where the sentencing hearing begins after the Code is brought into force, in other words, to ask "when does a sentencing hearing begin?"

6.11 Transition to the New Sentencing Code will have to occur by reference to a relatively clear stage in the criminal process from which cases would fall to be

[4] [2014] EWCA Crim 1582 at [2] – "Is it consistent with Article 7 of the ECHR and the Human Rights Act 1998 for a court after 3 December 2012, when the sentence of imprisonment for public protection ('IPP') was repealed, pursuant to LASPO and Article 6 of the relevant commencement order, in respect of any conviction after that date, to impose on an offender, who was convicted before 3 December 2012, a sentence of IPP, where there was a real possibility that the court would otherwise have imposed a sentence of life imprisonment?"

[5] Permission granted on 24 February 2015; case not listed for hearing at the time of publication.

[6] See questions for consultees at para 7.2 below.

[7] See Part 1 above.

dealt with under the New Sentencing Code. Clearly the latest possible stage in that process we could choose (and hence the one that would draw the largest number of cases within its remit) would be the start of the sentencing hearing itself. Cases that had already been sentenced by the time of the commencement of the New Sentencing Code obviously would not fall to be dealt with under it.

6.12 At the other end of the spectrum, the earliest stage of the criminal process which can be indentified with anything like the required precision[8] might be arrest. This is the stage from which the common law strict liability rule on contempt of court considers criminal proceedings to become "active" for instance (and in this context it is in the law's interests to fix the point at the earliest identifiable point in time).

6.13 Between these possible extremes one could choose any one of a number of procedural milestones in the process. For the sake of argument we will give brief consideration to arrest and charge as two significant points within the criminal process.

6.14 From informal consultation we understand that there are significant concerns regarding use of either arrest or charge for the purposes of fixing a definite point in time for transitional purposes. This is because it is common practice for the police to arrest and re-arrest suspects at different stages of an investigation for different offences. There is a lack of consistency in approach about when and whether a person is arrested, or re-arrested, for an offence, since this will quite properly vary depending upon the circumstances of the case. A person might well be convicted and sentenced for an offence for which they were never arrested, either because they were arrested for another offence, or never arrested at all (having attended court on a written summons, for instance).

6.15 Similarly with charge, a person may be charged at various stages of proceedings, and some charges might be dropped and other proceeded with or added by the prosecution, even at a very late stage (up to and including the trial process itself).

6.16 For these reasons, neither arrest nor charge represent suitable candidates for a certain and relatively consistent stage of the proceedings to use as the trigger for transition to the New Sentencing Code.

6.17 The same objection does not apply to conviction, as this occurs on a readily identifiable date (the date the guilty plea is entered or guilty verdict returned). We considered whether there was a disadvantage to using the date of conviction for transitional purposes as compared with the date of the commencement of the sentencing hearing, on the basis that to do so creates a slightly longer transitional window. This is because a class of case would be excluded from the application of the New Sentencing Code on this approach, namely those where conviction had occurred but the sentencing process had not yet begun, which would have to continue to be dealt with under the old law. This in turn would require continuing availability of and familiarity with the old law for as long as it took for this class of case to pass through the system.

[8] Other than the date of commission of the offence: but of course the very long period which can pass between this and the sentencing hearing, and the significant problems to which this can give rise, have been the subject of much of this paper.

6.18 This would not be a large problem, as there is not generally a long delay between conviction and sentence (the majority of delays in the criminal process occur earlier). Sentence is often passed on the day of conviction, or a matter of only weeks thereafter to allow for a short adjournment to gather more information from a pre-sentence report.

6.19 More importantly, on informal consultation with experts, we found it difficult to identify a reliable and consistent milestone from which it could be said that a sentencing hearing had commenced (and which would hold true in all cases) other than the date of conviction itself.

6.20 Whilst it is our policy to seek to apply the New Sentencing Code insofar as possible to all sentencing hearings which take place after its commencement, we therefore provisionally consider that the only reliable way to achieve this is to use the date of conviction as the trigger for the application of the New Sentencing Code.

6.21 **Do consultees agree that the New Sentencing Code should apply to all cases in which conviction take place after its commencement?**

PART 7
CONCLUSIONS

7.1 We are now in a position to draw together the (to some extent competing) principles which have been considered in this paper. Earlier we summarised the effect of the common law principle of interpretation when it comes to statutes which might be read as having retroactive effect.[1] We also summarised the effect of the human rights based prohibition on the imposition of a heavier penalty for an offence than that which was applicable at the time of commission.[2] For ease of reference, we reiterate those summaries here, and add a summary of the further discussion on the other potential limitations to the "clean sweep" approach considered above:[3]

(1) A common law principle of interpretation applies when considering all statutory law (in particular law imposing penal sanctions, though to a lesser extent also to "procedural" law) which is capable of being read as having retroactive effect in the sense in which that term is understood here.[4] That principle requires the courts to presume that the statute was not intended to have retroactive effect unless the contrary intent is expressed clearly and unambiguously. This principle is both evidence of a general healthy attitude of suspicion towards retroactive law (for the reasons set out above[5]) and a recognition that retroactive law will on occasion be necessary and desirable, as long as careful thought has been given to it by Parliament.

(2) Article 7 of the ECHR contains a prohibition on "a heavier penalty be[ing] imposed than the one that was applicable at the time the criminal offence was committed."

(3) A measure which appears to apply retroactively, to an individual's detriment, will avoid scrutiny under this principle if it falls outside the autonomous definition of a "penalty" considered above[6] though the broader common law principles of interpretation will continue to apply. So an unambiguously retroactive protective ancillary order, enacted through the New Sentencing Code, would not be objectionable in human rights terms, to the extent that it fell without the autonomous concept of a penalty.

(4) Even where there is clearly a penalty involved, a distinction can be drawn between the penalty imposed, and changes in the way in which such penalties are administered or enforced (for example, release from custody) and retroactive changes of this kind are also outside article 7.

1 Part 3.

2 Part 4.

3 Part 5.

4 See summary at para 3.23(1).

5 See para 3.1 above and in more detail B Juratowitch, *Retroactivity and the Common Law* (2008).

6 See para 4.9 and following above.

(5) Where the measure is a penalty, and the change relates to the penalty itself and not the manner of its enforcement, the meaning of "penalty applicable at the time" is the maximum penalty which could have been imposed at the time of commission. Changes in sentencing law which do not involve creating the possibility of a sentence above the historic maxima at the time of commission are therefore on their face article 7 compliant.

(6) The retroactive imposition of indeterminate sentences will always offend against article 7 unless an indeterminate sentence was available at the time of commission. To the extent that new indeterminate sentences are ever introduced through the New Sentencing Code,[7] or the availability of life sentences increased, they should therefore generally be imposed only in respect of offences which post-date their implementation (a provision to this effect should appear on the face of the New Sentencing Code).

(7) The retroactive imposition of other novel types of sentencing disposal introduced through the New Sentencing Code will only offend against article 7 to the extent that their imposition results in a heavier penalty than the maximum available at the time of commission. When dealing with historic sentencing cases, the courts should therefore ask whether the total sentence,[8] taken in the round, would be viewed by an ordinary observer as a heavier penalty than the maximum available for the offence historically. In practice this will usually require simply a direct comparison between the sentences available under the New Sentencing Code and the historic maximum. Only in those cases where more than one penal element is imposed in respect of a given offence might the court need to consider the issue in more detail.

(8) The New Sentencing Code will set out the law's approach to considering a convicted defendant's previous convictions at the sentencing hearing. If the law on this subject changes, the better view is that there is no objection in retroactivity terms to applying the new law to the sentencing hearings for any offences which are committed after that change, even if some of the previous convictions which may fall to be considered pre-date the change.

(9) There is clear and consistent domestic authority to the effect that the application of contemporary sentencing guidelines to offences committed before their creation, subject to the historic maximum sentence, is lawful and appropriate. Indeed, this is explicitly the way in which definitive guidelines from the Sentencing Council are drafted.

7.2 We invite comment on the accuracy of our assessment of the current legal position, and the compatibility of that position with our proposed "clean sweep"

[7] We do not suggest that they should be, but simply describe how the New Sentencing Code could accommodate any future policy decision made by Parliament in a way which would keep the law as simple and accessible as possible.

[8] Which, subject to this principle, may be made up of all those types of sentencing disposals available under the Code at the date of sentence.

approach to transition to the New Sentencing Code. In particular, we have reached these specific provisional conclusions:

(1) The following three-step decision-making process accurately represents the steps that any judge must undertake *in respect of a historic case* to ensure that passing sentence under the New Sentencing Code is human rights compliant:

(i) Is this a case where the justice of the case demands a sentence, in respect of any single offence, with more than one penal element (such as a sentence of imprisonment *and* a financial sanction, or an ancillary order which is penal in nature[9])?

If no, then impose a single penal sentence in respect of each offence, and check against the historic maximum penalty. If the historic maximum is a period of imprisonment, then any non-custodial sentence, or any custodial sentence up to the historic maximum, will be lawful. If the historic maximum is a fine, then only a financial penalty up to this level should be imposed. Then stop here. If yes, then go to (ii)

(ii) Impose that combination of the sentencing options available under the New Sentencing Code which meets the justice of the case.

(iii) Before finalising the sentence, check the historic maximum penalty and ask the "safety valve" question (iii):

> Is the total penalty which the court is considering imposing for the offence, taken in the round, such as would be considered by an ordinary observer to be a heavier one than the maximum which could have been imposed for the offence at the time of commission?[10]

(2) An expedited procedure, akin to the slip rule, would be desirable to allow an offender, or another party who noticed a possible oversight, to amend the sentence on the basis that it infringed the rule against retroactive heavier punishment.

(3) It would be compliant with article 7 and common law rights to apply new laws on prescribed minimum sentencing and recidivist premiums to all cases where the index offence post-dates the change in the law.[11]

[9] As to when an ancillary order will be penal in nature, see discussion of the meaning of 'penalty' above at para 4.9 onwards. We anticipate similar considerations would be taken into account by a court adjudicating on the situation under common law rights.

[10] Para 5.26.

[11] Para 5.71.

(4) The New Sentencing Code should apply to all cases in which conviction takes place after its commencement.[12]

7.3 **Do consultees agree?**

[12] Para 6.21.

APPENDIX A
INTERNATIONAL COMPARISONS

CANADA[1]

A.1 Sentencing procedure law in Canada is almost exclusively[2] contained in the Criminal Code, largely in parts 23 to 27. Some limited retroactive effect can be achieved through the Canadian Code, but amendments to it are largely considered to be prospective only. There are two constitutional controls to any retroactive effect that Parliament wishes to achieve:

(1) a sentence is determined by the law in force at the time of the offence (this includes parole eligibility); and

(2) a person gets the benefit of a lightening of the available sentence that is introduced between conviction and sentence.

A.2 As discussed elsewhere in this paper, constitutional control (1) is clearly a considerably stronger bar to retroactivity than either human rights law or common law is here. Control (2) is effectively an expression of the *lex mitior* principle, which as has been explained,[3] is of doubtful effect in England and Wales at the moment, but whose applicability may be determined soon by the Supreme Court.

A.3 Formally, and therefore in officially published versions of the new Canadian sentencing code, only commenced provisions appear. However, this is not always the case with commercially published editions, and this is in any case subject to one exception: provisions ruled unconstitutional remain in place but not in force.

SOUTH AUSTRALIA[4]

A.4 The majority of sentencing legislation is contained in a single enactment, the Criminal Law (Sentencing) Act 1988 ("CL(S)A 1988").[5] As in Canada, there is a general presumption that amendments to this only take effect for offences committed after the date that the amendments are commenced. This can, however, be changed by the amending statute.

A.5 We understand from academic consultees in that jurisdiction that this can cause problems in practice. Whilst in Australia authoritative consolidated legislation is generally freely available and up-to-date, this can be of limited assistance if many of the provisions of that consolidated legislation are not in force in relation to the defendant whose case is being considered.

1 With thanks to Professor Allan S Manson of Queen's University (Ontario).

2 We are informed that the major exceptions are that rules on parole eligibility are contained in separate statutes, and that not all sentencing options in the Code are available in all provinces.

3 See para 3.13.

4 With thanks to Matthew Goode of the South Australian Attorney-General's office.

5 Many parole provisions are elsewhere, and more of the relevant law than in this jurisdiction remains at common law.

A.6 Further, amending legislation is sometimes specified to be of retroactive effect, but that effect will *not* be stated in the consolidated legislation: it will only be visible in the amending enactment.[6]

A.7 Recent amendments to the CL(S)A 1988 have taken a range of approaches. Some, such as the Controlled Substances (Serious Drug Offences) Amendment Act 2005, which amended the definition of "serious drug offence" in the CL(S)A 1988,[7] are prospective only,[8] in the sense that they only apply to offences committed after commencement.

A.8 Others are more complex. The Statutes Amendment (Sentencing of Sex Offenders) Act 2005 ("SA(SSO)A 2005") amends section 23 of the CL(S)A 1988 on detention of sexual offenders incapable of controlling (or unwilling to control) their sexual instincts so as to provide that, amongst other things:

(1) Sentencing courts for certain offences *must* (instead of may) refer the sentencing decision to the Supreme Court, which can impose indeterminate detention with an aim of protecting the public.[9]

(2) The Attorney-General has a new power to refer the cases of offenders currently in prison for these offences to the Supreme Court for consideration of whether to impose indeterminate detention.[10]

A.9 As with all changes made by Part 2 of the SA(SSO)A 2005, the transitional provision in section 9 states that it takes effect from the date of commencement, irrespective of when the offence was committed.

A.10 Both changes are undoubtedly retroactive. Were change (1) to be enacted in the UK, it probably would not offend any of the principles discussed elsewhere in this paper. It does not change the theoretical maximum penalty an offender might receive, so it would not offend article 7,[11] and it is arguably simply a procedural change. Instead of both the sentencing court and the Supreme Court having a discretion in relation to whether the section 23(5) power will be exercised, now only the Supreme Court does. But ultimately, judicial discretion is still exercised over who will be subject to this regime.

6 In South Australia in particular, this problem is ameliorated by the Attorney-General's website's version including all of the transitional provisions of the amending legislation in an appendix to the consolidated Act: http://www.legislation.sa.gov.au/LZ/C/A/CRIMINAL%20LAW%20%28SENTENCING%29%20ACT%201988.aspx (last visited 6 May 2015).

7 CL(S)A 1988, s 20A.

8 Sch 1 para 6.

9 New CL(S)A 1988 s 23(2) inserted by s 7(2) of the amending Act.

10 New s 23(2a) from s 7(2) of the amending Act. Court's powers are in a new s 23(5).

11 See Part 5 above.

SOUTH AFRICA[12]

A.11 In 2000, the South African Law Commission published a report on the creation of a new sentencing framework.[13] This unimplemented law reform proposal was for a new sentencing procedure Act that replaced the entire law with just 59 new streamlined sections. However, there is no consideration given in either the report or the draft Bill to the question of to what extent it could be applied retroactively or retrospectively. Clause 59 of the draft Bill simply states that it "takes effect on a date fixed by the President by notice in the *Gazette*", and subsection (2) of that clause is in a standard form allowing the President to fix different dates for different purposes.

[12] With thanks to Professor Dirk van Zyl Smit.

[13] South African Law Commission, Project No 82, *Sentencing (A New Sentencing Framework)*, (November 2000).