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Notes on the English Draft Code
(1878-1883)

Introduction

On 12 April 1892, Sir John Thompson, the Attorney General for Canada, moving second reading of Bill 7, An Act respecting the Criminal Law (the Criminal Code of 1892¹) stated that the Bill was founded, inter alia, "on the draft Code prepared by the Royal Commission in 1880...."²

Sir John Thompson was mistaken in making such a statement as the Criminal Code Bill Commissioners had signed their Report³ on 12 June 1879⁴. However, their Report mistakenly indicates 12 June 1878 as the date of signature.⁵

Mewett and Manning,⁶ seem to have noted the mistake as they mention that Sir Thompson stated that the Bill was based, inter alia, on "the English Draft Code as presented in 1880". There was indeed such a draft Code presented in 1880 to the English Parliament and the wording of the provisions of the Criminal Code of 1892 based on the English Draft Code follows the wording of the 1880 version. However, Mewett and Manning state that in 1878, a comprehensive code of indictable offences "was formulated and proposed but, although twice presented in the form of a Bill before the English Parliament, was never enacted."⁷ In fact, as we will see, there were more than two Bills of such a code presented to the English Parliament.

Macleod and Martin state that the revised draft bill of a criminal code prepared by the Royal Commission in 1879 was "presented...too late in the year for it to be considered by Parliament."⁸ This is inaccurate. As we will see, on 3 April 1879, the government introduced in the House of Commons, Bill 117, a draft code prepared by the Criminal Code Bill Commissioners.

As noted, there appears to be a lack of clarity as to what exactly occurred in 1878 to 1880 regarding the English Draft Code. The purpose of this article is to give a short account of the events pertaining to the English Draft Code.

The Criminal Code (Indictable Offences) Bill, 1878

In the spring of 1877,⁹ Sir James Fitzjames Stephen's first edition of A Digest of the Criminal Law (Crimes and Punishments)¹⁰ was published. While preparing this book, Stephen had formed the opinion that his Digest could be transformed, "with a little alteration"¹¹ into a Draft Penal Code and he communicated that opinion to the Attorney General (Sir John Holker) and the Lord Chancellor (Cairns).¹² Leslie Stephen reports that "On August 2, 1877, he [James Fitzjames] writes that he has just received instructions from the Lord Chancellor to draw bills for a penal code, to which he was soon directed to add a code of criminal procedure."¹³ Stephen completed his work in early October 1877.¹⁴ Stephen's draft was sent by the Lord Chancellor Cairns to the Statute Law Committee for their views.¹⁵ The Committee recommended "the observations of Sir Francis Reilly",¹⁶ the parliamentary draftsman, which were not favourable to Stephen's project. Nevertheless, the draft code (including both substantive and procedural provisions) was ready for printing in the early part of January 1878.¹⁷

On 14 May 1878, the Attorney General, Sir John Holker, introduced Bill 178 [41 Vict.], A Bill to establish a Code of Indictable Offences, and the Procedure relating thereto¹⁸ which was read for the first time in the House of Commons on that day. The Bill, prepared by Sir James Fitzjames Stephen, is founded on Stephen's Digest. The Bill contained 425 clauses,¹⁹ including clauses on such "matter of excuse" as drunkenness, necessity, ignorance of fact and trifling offences. The Bill also included a schedule of repeals. Sir John Holker made an important and interesting speech upon first reading.²⁰ Manchester mentioned that "The Bill was received quite favourably".²¹

The Bill was read a second time on 17 June 1878 after a short debate. Stephen prepared some explanations on the Bill that were ordered by the House of Commons to be printed on 10 July 1878.²² The Parliamentary session lasted from 17 January to 16 August 1878 and the Bill did not become law. Sir John Holker explained the reasons why Bill 178 was not proceeded with during the session:

...soon after it was introduced, and as time went on, the interest [of Parliament] in it became somewhat thin. This was owing to the complication of foreign affairs, and other causes which I will not now dwell upon, and it was due to these that the remainder of the Session was occupied with affairs of perhaps greater importance.²³

The Criminal Code Bill Commission (1878-1879)

On 17 August 1878, the Criminal Code Bill Commission consisting of Lord Colin Baron Blackburn (chairman), Mr. Justice Charles Robert Barry (an Irish judge), Lord Justice Robert Lush and Sir James Fitzjames Stephen was created.

The Attorney General, Sir John Holker, explained in the House of Commons, the reasons for the creation of the Commission:

...because it [Bill 178] contained not only a codification or consolidation of a considerable portion of the Criminal Law of the country, but also enacted several radical alterations therein, it was thought advisable to utilize the interval between the end of the last Session [16 August 1878] and the beginning of the present [5 December 1878] by submitting the Bill to a most thorough and exhaustive examination and review. It was also thought advisable that the opportunity should be seized of extending its provisions to Ireland, and thus assimilating and bringing into harmony and concord, to a great extent, the Criminal Law of the two countries. Now, for the purpose of accomplishing these ends, the Government resolved upon appointing a Commission.²⁴

The Times had questioned the validity of having Stephen as commissioner: "The author of a measure is not its best critic: and the critical rather than the constructive faculty is what the task of this Royal Commission principally needs."²⁵

The Report²⁶ of the Commission included the terms of reference of the Commission which stated, *inter alia*, that the Commission "should forthwith issue to inquire into and consider the provisions of a Draft Code relating to Indictable Offences [i.e. The Criminal Code Indictable Offences Bill, 1878] prepared for the purpose of being submitted to Parliament during the ensuing Session and to report thereon...." Under the terms of reference, the Commission could also report their proceedings from time to time. Stephen has explained the work of the Commission as follows:

The Commissioners were not required to codify the criminal law. They were required to inquire into, consider, and report upon the draft Code of 1878, upon which in the language of the [Commissioners'] Report,

the Bill of 1879 'was founded throughout'....The Bill of 1879...represents not the labours of a Commission of four members which sat for five months, but the judgment formed by such a Commission on a work adopted by the Attorney General after most careful study, and on which I had expended a considerable part of the work of twenty-five years.²⁷

Stephen reported that the Commissioners considered the Bill of 1878 "for about five months, namely from November, 1878, to May, 1879...."²⁸ The Commissioners "sat daily during nearly the whole of that time...."²⁹ Stephen explained that "Every section, every sentence, every word was weighed again and again. Every authority for each proposition was carefully examined."³⁰ Cross has stated that "There does not appear to be any extant record of their proceedings."³¹ Leslie Stephen states that "The discussions, I gather, were not so harmonious as those in the Indian Council, and his [James Fitzjames Stephen] letters show they sometimes tried his temper."³² The Commission's report, dated 12 June 1879, was written by Stephen.³³ The report included as an appendix "The Draft Code" consisting of 552 clauses. Clause 1 of this "Draft Code" states that the short title of the (proposed) Act is the "Criminal Code (Indictable Offences), 1879."

The Criminal Code (Indictable Offences) Bill, 1879

In the Parliamentary session of 5 December 1878 to 15 August 1879, the government introduced on 3 April 1879, Bill 117 [42 Vict.], A Bill to establish a Code of Indictable Offences, and the Procedure thereto³⁴ which was read for the first time on that date. The Bill was prepared by the Criminal Code Bill Commission³⁵ and, according to Cross,³⁶ is identical to the draft Bill that is found in the Commission's report of 12 June 1879. Bill 117 had 552 clauses. Cross explains the augmentation of the number of clauses in Bill 117 over the Bill of 1878 as follows: "A major cause of the increase in the number of clauses was the inclusion of detailed provisions concerning the use of force in self-defence, defence of property and the prevention of crime."³⁷

On 7 April 1879, the House of Commons ordered that a "Copy of Memorandum showing the principal Changes proposed to be made in the existing law by the Criminal Code (Indictable Offences) Bill, as settled by the Criminal Code Commissioners" be published.³⁸ The Bill was read a second time on 5 May 1879. Speeches were made at the first³⁹ and second reading.⁴⁰ After the second reading, the Bill was "committed" for 12 May 1879.

On 12 May 1879, the Committee submitted its report. The Committee's report is Bill 170 [42 Vict.], A Bill [As Amended in Committee] to establish a Code of Indictable Offences, and the Procedure thereto⁴¹ and was ordered by the House of Commons, to be printed, on 12 May 1879. Bill 117 remained with 552 clauses.

On the 16 June 1879, the House of Commons ordered that "A Copy of Letter from the Chief Justice of England, dated 12 June 1879, containing Comments and Suggestions in relation to the Criminal Code (Indictable Offences) Bill"⁴² be published. The letter is from Mr. Justice A.E. Cockburn, the Lord Chief Justice of England, and is not favourable to the bill of 1879. Stephen replied to the Lord Chief Justice in a published article.⁴³ Mr. Justice Cockburn had been deceived in not being appointed a Commissioner of the Criminal Code Bill Commission.⁴⁴ Sir John Holker explained the reason why Mr. Justice Cockburn had not been named to the Commission:

...unfortunately, the necessities of the case demanded that when the Commission was formed its sittings should be continuous. The Commissioners were not to be interrupted in their labours, and the arrangement and understanding was that the Commission should sit de die in diem. It was therefore, seen to be impossible that the work of the Courts of Justice at Westminster could have been properly proceeded with if the head of those Courts were to be withdrawn altogether during several months from the multifarious and important duties which devolve upon him in connection therewith. For this reason, the Lord Chief Justice was not placed upon the Commission, and for this reason only.⁴⁵

The Parliamentary session ended on 15 August 1879 without Bill 170 being enacted.

The Criminal Code Bill, 1880

In the next Parliamentary session, the government introduced on 6 February 1880, Bill 2 [43 Vict.], A Bill to Establish a Code of Offences for England and Ireland and to prescribe the Procedure by Indictment for the Punishment of offenders⁴⁶ which was read for the first time on that date without debate. On 23 February 1880, a number of speeches⁴⁷ were made before Bill 2 was read a second time. After second reading it was referred to a Select Committee. There was a change of ministry in April 1880 and Bill 2 never became law. Bill 2 had 499 clauses, "the Bill

being presented in a somewhat neater garb than before"⁴⁹. Sir John Holker, the Attorney General, "had submitted to the Commissioners...the drafts which were prepared, and he had obtained from them their approval of the great bulk of the alterations that had been made".⁴⁷ Hansards also reports that Sir Holker had authorized to "state explicitly that the Bill was still in substance their measure, and that they thought that it might be introduced into the House as such".⁵⁰

It should be noted that during the same session as of Bill 2, Mr. Wheelhouse, Mr. Sergeant Spinks, and Captain Pim introduced Bill 47 [43 Vict.], A Bill to Establish Criminal Code.⁵¹ This was not a government's bill. It also never became law. This Bill seemed to have been introduced to embarrass the government.⁵²

The Bills on Procedure (1882-1883)

Cross mentions that "A private's member Criminal Law Amendment Bill containing many of the procedural clauses of the 1880 Bill was read in the Commons in 1882".⁵³ This Bill, is Bill 43 [45 Vict.], A Bill to Prescribe the Procedure by Indictment for the Punishment of Offences against the Criminal Law.⁵⁴ It was introduced in the House of Commons by Mr. Gorst and Mr. Arthur Balfour and received first reading on 10 February 1882. It never became law.

On 16 February 1883, the Attorney General, Sir Henry James, introduced in the House of Commons, Bill 8 [46 Vict.], A Bill to Regulate Procedure in Criminal Cases⁵⁵ which contained the procedural clauses found in the 1880 Bill. It was read a second time on 12 April 1883 and was subsequently referred to the Standing Committee on Law, and Courts of Justice, and Legal Procedures. Colaiaco mentions that the Bill "suffered strong opposition and foundered in committee".⁵⁶

Conclusion

It is hoped that these research notes will lead to further research and help in understanding what is meant by the English Draft Code.

1. 55 & 56 Vict., c. 29 (the Code came into effect on 1 July 1893).
2. Debates - House of Commons Dominion of Canada, Session 1892, vol. 1 at col. 1379. Sir Thompson added that the other sources were "Stephens' Digest [sic] of the Criminal Law, the edition of 1887, Burbidge's Digest of the Canadian Criminal Law of 1889, and the Canadian Statutory Law."
3. Report of the Royal Commission Appointed to Consider The Law Relating to Indictable Offences: With An Appendix Containing A Draft Code embodying the Suggestions of the Commissioners, British Parliamentary Papers, 1878-79 [C.2345] XX. 169 (mf 85.148-150); in the reference, "1878-79" means the session, "[C.2345]" the command paper number, "XX" the volume number, "169" the page number and "mf 85.148-150", the microfiche filing numbers of the Chadwyck-Healey Ltd. Collection. A readily available copy of this report is found in the Irish University Press Series of British Parliamentary Papers on criminal law, vol. 6, Legal Administration - Criminal Law, Shannon: Irish University Press, 1971 at p. 369.
4. J.F. STEPHEN, A History of the Criminal Law, vol. I, London: Macmillan, 1883 at p. vi, note 1.
5. Supra, note 3 at p. 41 of the Command publication.
6. A.W. MEWETT and M. MANNING, Criminal Law, 2nd ed., Toronto: Butterworths, 1985 at p. 5.
7. Ibid.
8. A.J. MACLEOD and J.C. MARTIN, "The Revision of the Criminal Code" (1955) Can. Bar. Rev. 3 at p. 4. These authors seem to have wrongly interpreted STEPHEN, supra, note 4 at p. vii who said: "Our report was presented too late for the Code to be passed in 1879".
9. Leslie STEPHEN, The Life of Sir James Fitzjames Stephen, London: Smith, Elder, 1895 at p. 377 (Leslie Stephen was Stephen's brother).
10. London: Macmillan, 1877. Stephen wrote four other editions of this book: 2nd (1879), 3rd (1883), 4th (1887) and 5th (1894). J. FORTIN and L. Viau, Traité de droit pénal général, Montreal: Thémis, 1982 at p. 15 mistakenly report that Stephen's first edition was in 1869.
11. STEPHEN, supra, note 4 at p. vi. R. CROSS, "The Making of English Criminal Law - (6) Sir James Fitzjames Stephen", [1978] Crim.L.R. 652 at pp. 656-657 writes:

On January 20, 1877, Stephen wrote to the Attorney General (Sir John Holker) suggesting a number of

changes in the criminal law and saying that he thought his Digest, to be published before Easter, would form a useful basis of a criminal code.¹⁷

Cross's note 17 reads: "See the Lord Chancellor's Office file 142, now in the Public Record Office".

12. STEPHEN, ibid.

13. Leslie STEPHEN, supra, note 9 at p. 380. On this point CROSS, id. at p. 657, writes:

As a result of the ensuing communications between Holker, the Lord Chancellor and himself, Stephen was directed to prepare a code of the substantive and adjective criminal law incorporating the changes he considered appropriate. The original idea had been to have three Bills, the first to contain the amendments and be brought before Parliament in advance of the others. The decision to proceed by means of a single Bill may have been the undoing of the entire project.

For a more detailed account of the events, see D.H. BROWN, The Genesis of the Canadian Criminal Code of 1892, Toronto: The Osgoode Society (distributed by the University of Toronto Press), 1989 at pp. 27-29 and p. 31. BROWN explains at p. 29 that:

In accordance with past practice, and with the actual organization of the draft code of 1878, the third bill [besides the bill on a Penal Code and a bill on a Code of Criminal Procedure], the third bill was undoubtedly to be a statute law revision act to repeal the enactments made redundant by the Code.

14. BROWN, id. at p. 29.

15. Id. at p. 31.

16. Id. See also M.L. FRIEDLAND, "R.S. Wright's Model Penal Code: A Forgotten Chapter In The History Of The Criminal Law" (1981) 1 Oxford Journal of Legal Studies 307 at pp. 319-321 and K.J.M. SMITH, James Fitzjames Stephen - Portrait of A Victorian Rationalist, Cambridge: Cambridge University Press, 1988 at p. 81.

17. BROWN, supra, note 13 at p. 31.

18. British Parliamentary Papers, 1878 (178) II.5 (mf 84.8-10). The short title of the (proposed) Act as stated in clause 1 of the Bill is "the Criminal Code (Indictable Offences), 1878".

19. For an analysis of the contents of Bill 178, see B.L. MOSLEY, "The New Criminal Code", (1878-79) 4 The Law Magazine and Review, 4th ser. at pp. 31-58 and the articles published in the The Law

Time: The Journal and Record of the Law and The Lawyers (London): (May-October 1878), vol. 65, at pp. 80, 116, 136, 155, 189, 209, 228 and 348. Credit must be given to L. RADZINDWICZ and R. HOOD, A History of English Criminal Law and its Administration from 1750, vol. 5, The Emergence of Penal Policy, London: Stevens, 1986, p. 738, note 48 and p. 739, note 51 for the mention of these articles. However, the authors are mistaken in mentioning that the The Law Times published 16 articles under the title "The New Criminal Code". Only seven such articles were published.

20. Hansard's Parliamentary Debates, 3rd ser., 41 Vict., 1878, vol. 239, cols. 1936-1959, 14 May 1878.

21. A.H. MANCHESTER, "Simplifying the Sources of the Law: An Essay in Law Reform", (1973) 2 Anglo-American Law Review 527 at p. 532. Sir John Holker in Hansard's Parliamentary Debates, 3rd ser., 41 Vict., 1879, vol. 245, cols. 310-311, 3 April 1879 reported that:

...both hon. Members in this House and numbers of other persons living in the country who were conversant with the subject, and thoroughly able to form a just opinion upon it, appreciated the efforts that had been made by the framers of the Bill, and, in fact, received the measure with high approval; and not only was it received with approval by the House and country generally, but the Press took up the subject, and I believe I am stating accurately what occurred when I say that it was unanimous in approving the determination which the Government had exhibited, of codifying, an of codifying effectually, an important branch of the law.

22. "Memorandum showing the Alterations proposed to be made in the existing Law by the Criminal Code (Indictable Offences) Bill, if Amended, as proposed by the Attorney General", British Parliamentary Papers, 1878 (276) LXIII.159 (mf 84.493).

23. Hansard's Parliamentary Debates, supra, note 21, col. 311.

24. Id. at cols. 311-312. See also BROWN, supra, note 13 at p. 33 who gives a very good account of the events that lead to the creation of the Commission.

25. The Times, Wednesday, July 10, 1878, p. 9, col. E.

26. Supra, note 3.

27. J.F. STEPHEN, "The Criminal Code (1879)", The Nineteenth Century - A Monthly Review, vol. VII, January-June 1880 (London: Kegan Paul) 136 at pp. 137-138.

28. STEPHEN, supra, note 4 at p. vi.

29. Ibid.
30. STEPHEN, supra, note 27 at p. 138.
31. CROSS, supra, note 11 at p. 657.
32. Leslie STEPHEN, supra, note 9 at p. 380.
33. Ibid.
34. British Parliamentary Papers, 1878-79 (117) II.175 (mf. 85.10-13). The short title of the (proposed) Act as stated in clause 1 of the Bill is "the Criminal Code (Indictable Offences), 1879".
35. Hansard's Parliamentary Debates, supra, note 21 at cols. 313-314. See also CROSS, supra, note 11 at p. 657.
36. CROSS, supra, note 17¹ at p. 657. This is not entirely correct, see the example discussed at p. 660 of his article.
37. Id. at p. 659. These detailed provisions seem to have been drafted by Lord Blackburn, see H.E. TASCHEREAU in The Criminal Code of the Dominion of Canada As Amended in 1893 With Commentaries, Annotations, Precedents of Indictments, & &, (Toronto: Carswell, 1893) at p. v.
38. British Parliamentary Papers, 1878-79 (140) LIX. 225 (mf.85.455).
39. Hansard's Parliamentary Debates, supra, note 21, cols. 310-347. For a summary of the debates, see BROWN, supra, note 13 at pp. 34-35.
40. Hansard's Parliamentary Debates, 41 Vict., 1879, vol. 245, cols. 1750-1773 (5 May 1879). For a summary of the debates, see BROWN, supra, note 13 at p. 35.
41. British Parliamentary Papers, 1878-79 (170) II. 427 (mf 85.13-15). The short title of the (proposed) Act as stated in clause 1 of the Bill is "the Criminal Code (Indictable Offences), 1879".
42. British Parliament Papers, 1878-79 (232) LIX. 233 (mf 85.455).
43. STEPHEN, supra, note 27, pp. 136-160.
44. See SMITH, supra, note at p. 79 and p. 268, note 45.
45. Hansard, supra, note 21, col. 313.
46. British Parliamentary Papers, 1880 (2) II.1 (mf 86.7-9). The short title of the (proposed) Act as stated in clause 1 of the

Bill is "the Criminal Code, 1880".

47. Hansard's Parliamentary Debates, 3rd ser., 43 Vict., 1880, Vol. 250, cols. 1236-1247. See BROWN, supra, note 13 at p. 36 for an outline of the debates.

48. Hansard, id., col. 1241 (Sir John Holker, the Attorney General). CROSS, supra, note 11 at p. 657 refers to "verbal amendments".

49. Hansard, ibid.

50. Ibid.

51. British Parliamentary Papers, 1880 (47) II. 223 (mf 86.9-12). The short title of the (proposed) Act as stated in section 1 of the Bill is "the Code of Criminal Law and Procedure".

52. BROWN, supra, note 13 at pp. 120-121.

53. CROSS, supra, note 12 at p. 657.

54. British Parliamentary Papers, 1882 (43) II.81 (mf 88.8-9). The short title of the (proposed) Act as found in clause 1 is "the Criminal Procedure, Act."

55. British Parliamentary Papers, 1883 (8) II.249 (mf 89.11-12). The short title of the (proposed) Act as found in clause 1 is "the Criminal Code (Procedure Act, 1883)".

56. J.A. COLAIACO, James Fitzjames Stephen and the Crisis of Victorian Thought, Hong Kong: Macmillan, 1983 at p. 205.

Further Bibliographical References

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