SOME ELEMENTS OF A MODERN CODIFIED LAW OF PREPARATION AND FACILITATION OF SERIOUS CRIMINAL OFFENCES

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I want to thank the organisers of today's conference for the honour and privilege of inviting me to participate in the conference and for their invitation to address the conference on a topic of some difficulty but, nonetheless, one of considerable importance.

As a former holder of the office of Minister for Justice, Equality and Law Reform, in the Irish State and as a former Attorney General of Ireland, I have long held a close personal interest in the codification process. As Attorney General, I had personal responsibility for the Office of Parliamentary Counsel and, in that context, initiated statutory reform in relation to the law of interpretation and also initiated the process which led to a general law for restatement of enacted legislation.

The very serious logistical and resource issues involved in a general codification of the criminal law were apparent to me. Nonetheless, in 2002, the Programme for Government of the incoming government of which I was to be a part, provided for a general codification of the Irish criminal law.

Pursuant to that political mandate, a scoping exercise was carried out, provision for codification was made part of the Criminal Justice Act of 2006, and a codification project was established in conjunction with University College Dublin. The legislative s for the Codification project is attached as Appendix 1.

I want to take this opportunity to publicly thank all of those who were involved in the various stages of this project both within the Department of Justice Equality and Law Reform, within the offices of the Attorney General, within the legal professions, and within the academic community, most notably the law faculty of UCD.

Topics

Today, I want to consider two issues which may be of importance in relation to the preparation and facilitation of serious crime. They are:

(a) the citizen's duty to assist by disclosing personal knowledge of the commission of, or preparation for, serious crime, and

(b) the question of separately criminalising *"organised crime"*.

(1) The Demise of Misprision

When I was a law student in the late 1960's and early 1970's, there was a dearth of authoritative text books on criminal law relating to Ireland. In those days, bearing in mind that huge areas of the criminal law were common to both the United Kingdom and to Ireland, English text books were generally used by Irish students of criminal law. In the 1960s and 1970s we were taught criminal law on the basis that there were two separate offences (which were categorised by Kenny's Criminal Law as *"offences against the State"*. One of these was misprision of felony and the other was compounding a felony. Misprision was a common law misdemeanour and its ingredients were the subject of considerable development and judicial an academic debate. As late as 1948, the Court of Criminal Appeal in the U.K. had stated in relation to misprision:

> *"If in any future case it is thought necessary or desirable to include in an indictment account for misprision a felony, great care should be taken to see what – at any rate according to more modern authorities – are the constituents of the offence ... It may be that the court will have carefully to consider whether it is necessary to show a concealment for the benefit of the person charged."*

But in 1961 in the case of *Sykes v. The DPP*, the House of Lords laid down a much wider definition of misprision. Lord Denning listed the essential ingredients as follows:

(1) The accused must know that a felony has been committed by somebody else.

(2) He must have concealed or kept secret his knowledge: he need not have done anything active, but it is his duty by law to disclose to proper authority all material facts of which he has knowledge.

(3) If he fails or refuses to perform this duty where there is reasonable opportunity available to him to do so, he is guilty of misprision which is itself a misdemeanour with no other limit on the period of imprisonment than that the sentence *"must not be inordinately heavy"*.

(4) But a claim of right made in good faith would be a defence in the case of lawyer and client, doctor and patient, clergyman and parishioner each of whom *"might in good faith claim that he was under a duty to keep it confidential"*.

The judgment continued:

> *"There are other relationships which may give rise to a claim in good faith that it is in the public interest not to disclose it. For instance, if an employer discovers that his servant has been stealing from the till, he might well be justified in giving him another chance rather than reporting him to the police. Likewise with the*

master of a college and a student. But close family or personal ties will not suffice where the offence is of so serious a character that it ought to be reported."

As Kenny commented, the judgment did not explain whether or not the lawyer, doctor and clergyman are under a duty (or privilege?) *"to keep it confidential"*, nor how the *"public interest"* is or could be thought to be served by the concealment of felonies of stealing by an employee or a collegians, but not, apparently, by a member of the family. But further limitations were envisaged by references to the Judge's ability *"further to define the just limitations to misprision"*.

Thus, the ancient offence of misprision of felony was briefly reinvigorated by the decision in *Sykes v. The DPP* but was left very much in the status of a work in progress, the exact configuration of, limitations of, and exceptions to which were consciously acknowledged to be a matter for further judicial development.

In Ireland, however, the distinction between felonies and misdemeanours was abolished by Section 3 of the Criminal Law Act of 1997. That section provides as follows:

"3- (1) All distinctions between felony and misdemeanour are hereby abolished.

(2) Subject to the provisions of this Act, on all matters on which a distinction has previously been made between felony and misdemeanour, including mode of trial, the law and practice in relation to all offences (including piracy) shall be the law and practice applicable at the commencement of this Act in relation to misdemeanour."

Section 8 of that Act introduced a statutory offence described in the marginal note as *"penalty for concealing offence"*. It reads as follows:

"8-(1) Where a person has committed an arrestable offence, any other person who, knowing or believing that the offence or some other arrestable offence has been committed and that he or she has information which might be of material assistance in securing the prosecution or conviction of an offender for it, accepts or agrees to accept for not disclosing that information any consideration other than the making good of loss or injury caused by the offence, or the making of a reasonable compensation for that loss or injury, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for a term not exceeding three years."

The section goes on, at subsection (3), to provide that:

"The compounding of an offence shall not be an offence otherwise than under this section."

The combination of these provisions has been generally understood to spell the end, in Irish law, of the offence of misprision. (See for example **Criminal Law** by Charleton McDermott and Bolger at paragraphs 3.102 to 3.118.) If that is a correct interpretation of the foregoing provisions, it raises the question as to whether Irish citizens who were at one point at risk of prosecution for failing to report to persons in authority their knowledge of the commission of grave offences are now **wholly excused** from any criminal liability save with the exception of a limited number of circumstances considered below.

On one hand, it might be argued that misprision, as loosely defined by Lord Denning, was a vague offence committed by simple omission to disclose matters known to persons in authority. It might be thought that with a growing consciousness of the liberty of the individual, intellectually and physically, the existence of a vague offence committed by a person who has knowledge of something but keeps it to himself or herself is the existence of a form of *"thought crime"* coupled with mere omission.

Adherents of the absolute right of the citizen to be left alone would not, presumably, lament the demise of misprision.

On the other hand, it might be thought that in a *"rights conscious"* world, the duty of citizenship (which in Ireland is explicitly stated by our Constitution to include as a primary duty the notion of *"loyalty to the State"*) is to assist in the prevention of very grave crimes or in the vindication of the victim's rights by assisting the authorities with their detection and prosecution.

Should we be content to rely on criminalisation of *"accessories after the fact"* insofar as that term is generally understood. Although the U.K. draft criminal code, the Canadian criminal code and the Australian criminal code contain cognate provisions relating to the meaning of *"accessory after the fact"*, it is clear from all of them that *"some positive action is required by the accused person to render them guilty of the offence."* In Ireland, the offence of assisting offenders, i.e. being an accessory before or after an offence, is codified in Section 7 of our Criminal Law Act of 1997.

I have to suggest that the concept of misprision i.e. the conscious omission to report to authority knowledge of a planned or completed grave criminal offence cannot simply be regarded as an irrational hangover of some distant age.

It seems to me that there is a strong argument that social solidarity and vindication of the individual's rights places on citizens in any state based on the concept of law and order and the rule of law *some* obligation (other than a mere counsel of moral perfection) to report to competent authorities knowledge of the intended commission of very grave offences by other persons or knowledge that such offences have been committed with a view to their prevention or detection and prosecution.

Without creating a police state in which everyone is turned into an unwilling chooser between committing a crime or informing on criminals, we have to ask whether

vindication of the rights of crime victims does not require the imposition of an enforceable duty on the ordinary citizen to inform the authorities of any intended or executed crime of a very grave kind where the citizen actually knows (as distinct from suspects) of the intended or completed crime.

Withholding Information after Omagh

It is of interest that in the aftermath of the sectarian atrocity in Omagh, County Tyrone, in the Summer of 1998, the Irish parliament enacted temporary emergency legislation (all of which is still in operation) in relation to withholding of information.

Section 9 of the **Offences Against the State (Amendment) Act 1998**, provides as follows:

> *"9-(1) A person shall be guilty of an offence if he or she has information which he or she knows or believes might be of a material assistance in – (a) preventing the commission by any person of a serious offence, or (b) securing the apprehension, prosecution or conviction of any other person for a serious offence,*
>
> *and fails without reasonable excuse to disclose that information as soon as it is practicable to a member of the Garda Síochána.*
>
> *(2) The person guilty of an offence under this section shall be liable on conviction or indictment to a fine or imprisonment for a term not exceeding five years or both."*

The section defines *"serious offence"* as meaning an offence which satisfies both of the following conditions:

(a) It is an offence for which a person of full age and capacity and not previously convicted may, under or by virtue of any enactment, be punished by imprisonment for a term of five years or by a more severe penalty, and

(b) It is an offence that involves loss of human life, serious personal injury (other that injury that constitutes an offence of a sexual nature), false imprisonment or serious loss of or damage to property or a serious risk of any such loss, injury, imprisonment or damage, and includes an act or omission done or made outside the State that would be a serious offence if done or made in the State.

Commenting on that section of his Bill, the then Minister informed the Irish parliament that *"the offence of withholding information has a wider potential application, but the message it is intended to underscore is that it is the duty of persons, who have knowledge of planned offences involving death, serious injury or destruction or information which*

would lead to the conviction of those responsible for such offences, to make that information available to the garda."

It is noteworthy that this offence of withholding information was expressly stated to be temporary, but that it has been renewed by successive parliaments for ten years.

Admitting that there could be an argument that the term of imprisonment of five years contained in the definition of a serious offence may be too low a threshold and that the concept of *"serious loss of or damage to property"* is very vague, the issue that I am raising today is as to whether some analogous offence restricted to very grave offences should not be part of the ordinary law of the State.

If the 1998 Act is, in the future, allowed to lapse due to the improvement of the rule of law in the context of *"terrorist type"* offences, the question that has to be addressed is as to whether we are to relapse into a situation which existed between 1997 and 1998 (i.e. the passing of the Criminal Law Act of 1997 and the enactment of the emergency provision of the Offences Against the State (Amendment) Act of 1998), in which, for a brief period, citizens were totally and absolutely absolved of any positive duty backed by a criminal sanction to report knowledge on their part of the intended commission of grave offences or the actual commission of such offences with a view to their prevention, detection or prosecution.

It should be noted that the 1998 Act also allowed, as a defence, the existence of *"a reasonable excuse"*. That very vague defence could cover a multitude of situations. But it would not totally absolve a person who had clear knowledge of the commission of a very grave crime of any obligation in any circumstance to report it to a person in authority with a view to its prevention, detection or prosecution.

Personally, I believe that a *"withholding of information"* type offence could and should be created under Irish law where the law provides that the offence in respect of which the information is withheld is an offence carrying a maximum sentence of life imprisonment and where it is an offence that involves loss of human life, serious personal injury, kidnapping, or the risk of same.

Obviously, in the context of codification, a much better attempt at stating the defences available to a person accused of such a withholding of information offence would be required than the poor attempt made by the House of Lords in *Sykes v. The DPP*.

By way of footnote, in the aftermath of very serious evidence of widespread sexual abuse of children in Ireland, the Criminal Justice Act of 2006 enacted, in Section 176, an offence of endangerment. It provided, *inter alia*, that a person who had authority or control over a child or an abuser and who intentionally or recklessly endangered a child by failing to take reasonable steps to protect the child from a risk of serious harm or sexual abuse while knowing that a child was in a situation of substantial risk of its occurrence, should be guilty of an offence. That offence, in some respects, includes a

limited form of *"misprision".* Admittedly it is confined in its scope to the omissions of persons having authority or control over a child or an abuser.

But it raises the question as to whether we should legislate for a system of law, which briefly existed in Ireland between 1997 and 1998, which relieves of all criminal liability a person who knows that another person it going to be killed or maimed and who does nothing about it or who knows that another person has committed that type of offence on a fellow citizen and does nothing about it, while at the same time taking steps to criminalise equivalent omissions in respect of children who are vulnerable to serious harm or sexual abuse.

And it also raises the cognate question as to whether it is fair to confine the scope of criminal liability for reckless endangerment of children under Section 176 to *"persons in authority"* and to totally exonerate any person who may not be in authority but who may have clear knowledge of the intended commission of such an offence or the fact that such an offence has been committed.

In the end the demise of misprision and the scattered (and in some cases temporary) criminalisation of withholding of information type offences is a very complex legal issue which may be incapable of resolution by simple broad-brush options such as the re-introduction of a general offence creating a modern version of misprision.

But, that said, it can hardly be the hallmark of a civilised society based on the rule of law that the duty of citizenship does not include some basic positive duties on those with clear knowledge to prevent the gravest of crimes against fellow citizens or, alternatively, to assist in their detection and prosecution as a means of vindication of the rights of the victim.

(2) Organised crime

There is, across the world, a general desire to establish a system of criminal law which is apt to deal with the threat of organised crime.

The problem with organised crime is that it is often based on a quite sophisticated network of intimidation and terror.

Participants are in fear of their lives and left with little or no means of exiting from their participation. Non participants are intimated by the scale of the criminal organisation and its willingness to kill and maim from giving information in relation to its activities or giving evidence against persons accused of carrying out those activities.

There have been several attempts to define and criminalise participation in organised crime. The 2007 Criminal Justice Act contains provisions to that end. The difficulty with such provisions is that it is difficult to accumulate evidence which inculpates a person and which is distinct from evidence of the commission of existing substantive offences under the criminal law.

The intention behind such measures is to create an offence which could be proved against the *"godfathers"* of organised crime.

The problem with criminal godfathers is one of evidence and proof. The forces of law and order can quite easily detect activity which, by any rule of commonsense, appears to be involvement in organised crime. But if the godfather is careful to disguise and encrypt the language he uses, then even wire tap evidence of a sustained pattern of communication may not yield tangible proof of involvement in any particular offence.

The Irish measures contained in the Criminal Justice Act of 2006 were modelled on Canadian precedents. They are open to the criticism that they amount to offences which look impressive on paper but are very difficult to prosecute in fact. By the same token, however rarely they are used to secure convictions, they may offer the State authorities some value in terms of deterrents, for persons on the periphery of organised crime to refrain from assisting persons engaged in organised crime.

Speaking bluntly, the huge problem with detecting and prosecuting organised crime is the curtain of secrecy and intimidation that always surrounds it. Penetration of that curtain by surveillance, informer evidence (with or without witness protection programmes) is very difficult.

It is very unlikely, in my view, that any significant prosecution under Part VII of the Criminal Justice Act 2006 will take place other than on the basis of *"informer evidence"*. However, in the context of available informer evidence, the existence of a criminal organisation as defined in that Act could be well established in future cases, and persons, including godfathers and *"enablers"* could be prosecuted under Section 72 of the Act.

I have appended, for the purpose of completeness, the text of Part 7 of the Criminal Justice Act 2006, to this paper as Appendix 2.

Summary

While there are many strands in inchoate offences, there is, perhaps, a common element to the two themes which I have considered in this paper.

That common element is the mobilisation of citizens, as citizens in resisting organised crime within a society based on the rule of law.

Ends