## Patterns of criminalisation in 1951/52, 1997/98 and 2010/11: a research note

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This research note builds on earlier work examining the creation of criminal offences in two selected twelve-month periods (1997-98 and 2010-11),[1] which analysed the first twelve months of criminalisation under governments elected in 1997 and 2010 respectively (referred to here as the "New Labour" and "Coalition" samples). It presents the preliminary results of an analysis of the creation of offences in a further twelve month period, that of 1951-52.

The analysis of 1951-52 is part of a broader project aiming to use snapshots of criminalisation at different points in the post-war period to illustrate both continuity and change in this practice. The period analysed here is the twelve months after the General Election of 25 October 1951. Current work is focused on the twelve months after the General Election of 18 June 1970.[2]

The first section of this research note sets out the results from 1951-52 and compares these results with the New Labour and Coalition samples. In the second section, some general observations on the drafting means and methods adopted during 1951-52 are made, allowing for comparisons between current and past practice.

**The key points stemming from the analysis are as follows:**

- Contrary to the widely accepted belief that formal criminalisation (the number of criminal offences created by legislation) has increased in recent years, analysis of the 1951-52 sample suggests that this is far from the case. In fact, more offences applying to England were created in 1951-52 than in 2010-11 (786 compared to 634).

- The majority of the offences created in 1951-52 (82%) were created by statutory instrument, something that was also true of the New Labour and Coalition samples, indicating that criminalisation via secondary legislation, without the scrutiny of Parliament, is not a new phenomenon.

- As in the New Labour and Coalition samples, the majority of offences created in 1951-52 by statutory instrument were highly punitive: 76% of offences created by secondary legislation in 1951-52 carried a maximum penalty of imprisonment (most commonly this was two years).

- The majority of the offences created in 1951-52 (81%) were not aimed at the general public but instead targeted those acting in some form of special capacity. While this is a significant number, it was even higher in the New Labour and Coalition samples (where the relevant figures were 98% and 89% respectively).

- One thing was notably different in the 1951-52 sample, which was the subject matter of the offences created. The three most common areas of criminalisation were the sale of goods (rationing and the protection of food supply in particular); taxes, customs and excise; and roads, railways and transport. By contrast the most common areas of criminalisation in the New Labour and Coalition samples were agriculture; health and safety; and terrorism.

[*] We are grateful to the Leverhulme Trust for their support of this work.
[1] J Chalmers and F Leverick, "Tracking the creation of criminal offences" [2013] Crim LR 543.
[2] The selection of the sample time periods has been undertaken in order to achieve a degree of consistency with the initial research.

**A brief note on methodology**

In determining whether a criminal offence was created during 1951-52, the following approach was taken. First, as with earlier research, the 'test of separability'[3] was applied to identify the number of offences created. Put briefly, whenever a primary or secondary legislative provision set out a clear and distinct act or omission, separable from other specified acts or omissions, that would result in a punitive sanction of some kind, it was recorded as a separate offence. Secondly, the infraction was recorded as a criminal offence – as opposed to a civil penalty – on the basis of the statutory language used. This was a particular problem in 1951-52, where legislation was frequently drafted so as to leave it unclear whether it was intended to create a criminal offence or a civil penalty. In many cases, all that could be said with absolute certainty is that the proper characterisation of the provision would have been for a court to decide had the point arisen before it. Against that background, we sought to err on the side of caution, so as not to overstate the number of offences created by legislation,[4] and recorded something as a criminal offence only where the statutory language appeared clearly to justify this.

**The key research findings**

1. How many offences were created?

The first analysis conducted was to identify the number of criminal offences created in 1951-52 and to establish whether these were created by primary or secondary legislation. As can be seen from table 1, the creation of offences by way of statutory instrument was, consistent with the New Labour and Coalition samples, far more common than through primary legislation.

**Table 1: Number of criminal offences created**

| Mode of creation | 1951-52 | 1997-98 | 2010-11 |
|---|---|---|---|
| Statute | 159 (18%) | 18 (1%) | 247 (14%) |
| Statutory instrument | 704 (82%) | 1377 (99%) | 1513 (86%) |
| Total | 863 | 1395 | 1760 |

The total number of offences created during 1951-52 (863) was lower than in the New Labour sample (1395) and just less than half of the number of offences created in the Coalition sample (1760). However, this is misleading: the number of offences created in the Coalition sample is substantially inflated as a result of devolution, whereby offences – primarily ones designed to implement European legislation – are often created in duplicate form in different parts of the UK.[5] A more meaningful comparison can be made by analysing only those offences applicable to England, as table 2 shows.

The number of criminal offences created applicable to England was actually *higher* in 1951-52 than it was in 2010-11 (786 compared to 634), although the figure for 1997-98 was higher still, at 1235. This is a clear indication that, contrary to widely accepted belief, the phenomenon of 'over-criminalisation' is far from new. On the contrary, the rate at which offences were being created in the immediate post-war period is actually little different to that of recent times.

[3] Chalmers and Leverick (n 1) at 548-549.
[4] The "principle of parsimony": see Chalmers and Leverick (n 1) at 549.
[5] See the discussion in Chalmers and Leverick (n 1) at 550-551. This was also the case to a much lesser extent in the 1951-52 sample: see the Eggs (Great Britain) Control Order 1951/Eggs (Northern Ireland) Control Order 1951 and the Oats (Great Britain) Order 1952/Oats (Northern Ireland) Order 1951.

**Table 2: Offences applicable to England**

| Geographical extent | 1951-52 | 1997-98 | 2010-11 |
|---|---|---|---|
| England | 8 | None | 212 |
| England and Wales | 15 | None | 9 |
| Britain | 153 | 213 | 4 |
| UK | 610[6] | 1022 | 409 |
| Total | 786 | 1235 | 634 |

2. Causes of criminalisation: internal and external prompts

Notably, during the New Labour and Coalition periods, a significant number of offences were created due to an external obligation to criminalise, whether this was at the EU level (i.e. the implementation of an EU Directive) or the international level (i.e. the implementation of an internationally agreed treaty). Table 3 shows whether or not criminalisation was driven by such an external obligation for all three samples. As for all of the tables that follow, the percentage totals may be more or less than 100 due to rounding.

**Table 3: Did the criminal offence implement an international obligation?**

| | 1951-52 | 1997-98 | 2010-11 |
|---|---|---|---|
| No | 860 (99.7%) | 128 (9%) | 529 (30%) |
| Yes – European Directive | None | 947 (68%) | 1043 (59%) |
| Yes – international obligation | 3 (0.3%) | 320 (23%) | 84 (5%) |
| Yes – international obligation implemented at EU level | None | None | 104 (6%) |
| Total | 863 | 1395 | 1760 |

As table 3 indicates, the majority of criminal offences created in both the New Labour and Coalition samples (91% and 70% respectively) arose from an international or European obligation placed on the UK.[7] The picture was rather different in the 1951-52 sample. Here almost all of the offences created stemmed directly from the UK legislator. The lack of external influence can be easily explained. In 1951-52, the UK was not part of the EU's fledgling entity, the European Steel and Coal Community (which, in any event, did not have the same regulatory competence as today's EU). The only international obligation that led to criminalisation in 1951-52 came from the Japanese Treaty of Peace Order that sought, primarily, to criminalise unauthorised dealings with Japanese property and, more residually, conduct that frustrated or impeded the Order's operation.[8]

[6] Including three offences applying to "the UK, Isle of Man, Channel Islands and Territories".
[7] As noted in Chalmers and Leverick (n 1) the true figure may be even higher than this as the motivation of the legislator was not always ascertainable from the legislative text or notes: see the discussion at 554.
[8] Interestingly enough, this statutory instrument is the only piece of secondary legislation from the 1951-52 sample that, at the time of writing (June 2014), remains in force.

3. Areas of criminalisation

To help further understand the specific use of the criminal law, the offences created were classified according to the categories used in *Halsbury's Statutes*,[9] with a few additions to avoid gaps or inappropriate categorisation.[10] Table 4 displays the results of this exercise.

**Table 4: Subject matter of the offences created**

| | 1951-52 | 1997-98 | 2010-11 |
|---|---|---|---|
| Sale of goods | 418 (48%) | 3 (0.2%) | 34 (2%) |
| Taxes, customs and excise | 151 (18%) | None | None |
| Roads, railways and transport | 96 (11%) | 13 (0.9%) | 21 (1%) |
| Animals (general welfare, veterinary medicine) | 45 (5%) | 134 (10%) | 32 (2%) |
| Agriculture (inc. farming and horticulture) | 36 (4%) | 420 (30%) | 569 (32%) |
| Health and safety at work (inc. on ships) | 36 (4%) | 348 (25%) | 45 (3%) |
| Companies, commerce and competition | 30 (4%) | None | 4 (0.2%) |
| Food production (exc. agriculture) | 15 (2%) | 88 (6%) | 148 (8%) |
| Registration concerning the individual | 12 (1%) | None | 5 (0.3%) |
| Health and care regulation | 9 (1%) | None | 131 (7%) |
| Environment (inc. energy conservation, pollution control) | 2 (0.2%) | 127 (9%) | 54 (3%) |
| Armed forces (inc. weapons) | 1 (0.1%) | 3 (0.2%) | 33 (2%) |
| Terrorism/international sanctions | None | 158 (11%) | 188 (11%) |
| Fishing | None | 52 (4%) | 41 (2%) |
| Shipping and navigation (inc. port management) | None | 19 (1%) | 8 (0.5%) |
| Criminal law (general) | None | 8 (0.6%) | 23 (1%) |
| Nature conservation (inc. forestry but exc. animals) | None | 3 (0.2%) | 20 (1%) |
| Land, tenants and housing | None | 1 (0.1%) | 22 (1%) |
| Water (supply of, exc. nature conservation issues) | None | None | 171 (10%) |
| Parliament/elections | None | None | 170 (10%) |
| Other | 12 (1%) | 18 (1%) | 41 (2%) |
| Total | 863 | 1395 | 1760 |

Looking at the subject matter of the offences created during 1951-52, just under half (418 or 48%) related to the sale of goods. A further analysis was undertaken, classifying the offences according to the public policy aim they were designed to pursue.[11] This showed that around half of these 418 offences were implemented for rationing and protection of food supply purposes; understandable given that post-WWII rationing practices did not end until June 1954. In fact 57 of these offences were created by a single piece of

[9] A commercially produced compendium of legislation in England and Wales, first published in 1929.
[10] The additions were fishing, food production (excluding agriculture), parliament / elections and terrorism / international sanctions.
[11] Public policy categories were taken from earlier work by JUSTICE, who attempted to calculate the number of criminal offences on the books in 1974: see JUSTICE *Breaking the Rules* (1980). Some categories were added to reflect different priorities in the time samples covered by our research, such as rationing (1951/52); the protection of the environment (1997/98); and the prevention of terrorism (2010-11). Offences could have multiple public policy aims.

legislation, the Food Rationing (General Provisions) Order 1952, which by itself accounted for seven per cent of the offences in the entire 1951-52 sample.[12]

Offences relating to taxes, customs and excise stood as the next sizeable chunk (151 or 18%), the majority of which, unsurprisingly, were created in pursuit of general revenue-raising aims (135 or 89% of all taxes, customs and excise offences).[13] Indeed, 1951-52 was a busy period for the legislator in terms of taxation, with the (sizeable) Customs and Excise Act 1952, the Income Tax Act 1952, the Finance Act 1952 and the Isle of Man (Customs) Act 1952 all receiving Royal Assent during this period.

Roads, railways and transport made up the third largest proportion of offences in terms of subject matter in the 1951-52 sample (96 or 11%), with just under half of these offences focusing on the protection of public safety (40 or 42% of all roads, railways and transport offences). The two main pieces of legislation responsible for the creation of these offences were the Motor Vehicles (Construction and Use) Regulations 1951 and the Public Vehicles (Licences and Certificates) Regulations 1952. The former attempted to regulate any modifications and/or uses of privately operated vehicles that were unsafe or disorderly, whereas the latter focused on applications and renewals of road service licences i.e. those required for buses and other commercial transport services on the roads.

The three most significant subject areas of criminalisation during the New Labour and Coalition sample years – agriculture, terrorism and health and safety at work – did not receive similar levels of attention during 1951-52. Likewise, the three most common areas of criminalisation during 1951-52 discussed above were not as prominent in the more recent time samples. The 'snapshot' nature of the review must be emphasised here, as the results from a specific year of legislative action are not necessarily indicative of the broader intentions of Parliament during the decade in which the sample falls. If a different twelve month period in the 1950s had been selected for analysis, for example, the prominence of offences in the area of taxes, customs and excise would most likely have been far lower. Likewise, the prominence of offences relating to elections/parliament in the Coalition sample would most likely have been much reduced if the time period in question had not encompassed two referendums: the Alternative Vote referendum and the referendum on increased law making powers for the Welsh National Assembly. It also has to be said that some subject areas are over-represented in the Coalition sample because devolution resulted in identical subject matter being criminalised separately in different parts of the United Kingdom: this was particularly apparent in the areas of agriculture and food production.[14] All of these caveats aside, the table does nonetheless paint an interesting general picture of societal priorities in the three decades in question.

4. Seriousness of offences

A further analysis was undertaken in order to gain a picture of the respective seriousness of the offences created across the three time samples. As such, table 5 indicates the form of the maximum penalty available on conviction. It should be said at the outset that the maximum penalty attached to an offence does not necessary correlate with the 'moral' seriousness of the regulated conduct. Indeed, as we discuss later in this note, due to a particular drafting technique used during this period,[15] the 1951-52 sample in particular contained some relatively trivial offences (in terms of moral wrongfulness) that attracted very lengthy periods of imprisonment.

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[12] The other legislative instruments that created a sizeable number of offences in the area of sale of goods were the Hire-Purchase and Credit Sale Agreements (Control) Order 1952; the Utility Furniture (Marking and Supply) Order 1951; the Barley Order 1952; the Iron and Steel Distribution Order 1951 and the Iron and Steel Scrap Order 1952.

[13] Those that were not created for revenue raising purposes tended to have either the avoidance of non-meritorious economic or non-economic benefit as their primary aim.

[14] See text attached to n 5 above and the discussion in Chalmers and Leverick (n 1) at 551.

[15] See the discussion of the Defence (General) Regulations 1939 below.

**Table 5: Maximum penalty available on conviction**

| | 1951-52 | 1997-98 | 2010-11 |
|---|---|---|---|
| Imprisonment | 578 (67%) | 906 (65%) | 993 (56%) |
| Fine (nominate value) | 249 (29%) | 17 (1%) | 3 (0.2%) |
| Fine (standard scale)[16] | None | 270 (19%) | 641 (36%) |
| Fine (unlimited) | 36 (4%) | 202 (15%) | 123 (7%) |
| Total | 863 | 1395 | 1760 |

As table 5 shows, over half of the offences created during 1951-52 were punishable by imprisonment (578 or 67%), a figure that is roughly comparable to the New Labour sample (where it was 65%) but slightly higher than the Coalition sample (where it was 56%).

What is of perhaps more interest is that, as was the case in the New Labour and Coalition samples,[17] the majority of imprisonable offences in the 1951-52 sample were created by secondary legislation. This is demonstrated by table 6 below, which shows both the total number of imprisonable offences created by statutory instrument and the length of the maximum penalty concerned.

**Table 6: Maximum penalty for imprisonable offences created by statutory instrument**

| | 1951-52 | 1997-98 | 2010-11 |
|---|---|---|---|
| 1 month | 49 (9%) | None | None |
| 3 months | None | 6 (1%) | 334 (39%) |
| 6 months | None | 202 (23%) | 4 (0.5%) |
| 51 weeks | None | None | 33 (4%) |
| 1 year | None | 2 (0.2%) | 8 (1%) |
| 2 years | 483 (91%) | 664 (74%) | 355 (41%) |
| 5 years | None | 1 (0.1%) | 130 (15%) |
| 7 years | None | 21 (2%) | 1 (0.1%) |
| 10 years | None | None | 2 (0.2%) |
| Total imprisonable offences created by SI | 532 | 896 | 867 |

As table 6 indicates, of the 578 offences in the 1951-52 sample with a maximum penalty of imprisonment, an astonishing 532 (92%) were created by secondary legislation. Or, putting it another way, of the 704 offences created by statutory instrument, 532 (76%) carried a maximum penalty of imprisonment. Of these 532 offences, almost all carried a maximum sentence of two years imprisonment.[18]

While it might be assumed that the creation of offences carrying potentially lengthy terms of imprisonment would properly be a matter for Parliament, this was not true back in the 1950s. Nor was it true in 1997-98

[16] The “standard scale” is fixed by primary legislation (see Interpretation Act 1978 Sch.1 for the relevant references) and at the time of writing (June 2014) had five levels ranging from £200 to £5000 (in England and Wales and Northern Ireland) and £10,000 (in Scotland).

[17] See the discussion in Chalmers and Leverick (n 1) at 556.

[18] This was due to the fact that the vast majority were created under the auspices of the same enabling legislation, the Defence (General) Regulations 1939, a point discussed in more detail below.

and 2010-11. Both the New Labour and Coalition samples also included a high number of imprisonable offences created by secondary legislation (99% and 87% of all imprisonable offences respectively). Beyond this, it is difficult to draw any conclusions about trends in the 'punitiveness' of offences created by secondary legislation as this depends on how the figures are presented. If one looks at the proportion of offences created by statutory instrument attracting a maximum penalty of two years imprisonment or more, this was 91%, 76% and 56% for the 1951-52, New Labour and Coalition samples respectively. This might seem to suggest the punitiveness of offences created by secondary legislation has decreased over time. However, *none* of the offences created by statutory instrument in the 1951-52 sample attracted a maximum penalty *greater* than two years, whereas in the New Labour and Coalition samples 2% and 15% respectively of offences created by statutory instrument attracted a maximum penalty of five years imprisonment or above. Regardless of how these figures are presented, the most important point is that the phenomenon whereby offences with potentially very lengthy periods of imprisonment attached are created by secondary legislation, without the scrutiny of Parliament, is not by any means a new one.

5. Who are the offences addressed to?

A key finding of the analysis of the New Labour and Coalition samples was that the bulk of the offences created were addressed not to the public at large, but to those acting in some form of 'special capacity'.[19] The same analysis was undertaken for the 1951-52 sample and table 7 displays the results.

**Table 7: Special capacity required for each criminal offence created**

| | 1951-52 | 1997-98 | 2010-11 |
|---|---|---|---|
| None | 164 (19%) | 33 (2%) | 200 (11%) |
| Role (by virtue of engaging in an activity) | 307 (36%) | 728 (52%) | 652 (37%) |
| Role (by virtue of being awarded a licence or by registration) | 68 (8%) | 87 (6%) | 158 (9%) |
| Role (status, e.g. "a debtor") | 2 (0.2%) | None | 18 (1%) |
| Implied (ordinary people highly unlikely to undertake activity) | 143 (17%) | 47 (3%) | 117 (7%) |
| Implied (ordinary people never undertake activity) | 49 (6%) | 256 (18%) | 345 (20%) |
| Imposed (prior requirement/direction imposed on accused) | 96 (11%) | 203 (15%) | 187 (11%) |
| Prior circumstances (e.g. receiving information or a donation) | 20 (2%) | 20 (1%) | 39 (2%) |
| Specific body (e.g. "the harbour trust") | 12 (1%) | 12 (1%) | 6 (0.3%) |
| Corporate offence | 1 (0.1%) | 9 (1%) | 35 (2%) |
| Familial | 1 (0.1%) | None | 3 (0.2%) |
| Total | 863 | 1395 | 1760 |

Before discussing the findings, some explanation of the categories is required. Some of the legislative provisions explicitly stated that a form of special capacity was required. This was either by virtue of engaging in a particular activity (see, for example, article 19A(1) of the Food Rationing (General Provisions) Order 1952, which required "any retailer of rationed food" to give notice if he intended to cease trading[20]) or by virtue of being awarded a licence (see, for example, regulation 10(1) of the Public Vehicles (Licences and Certificates) Regulations 1952, which required the holder of a public vehicle licence to notify the licensing authority if his licence was lost or destroyed). Other offences did not explicitly provide for special capacity, but nonetheless carried this implication, and we included these in the table in two categories: those where

[19] See the discussion in Chalmers and Leverick (n 1) at 557-558.
[20] As this was an offence created under the auspices of the Defence (General) Regulations 1939, failure to do so potentially attracted a maximum penalty of two years imprisonment: see the discussion below.

special capacity was implied because the offence required the accused to have engaged in an activity which 'ordinary people' would *never* undertake or would be *highly unlikely* to undertake. An example of the former was article 11 of the Feeding Stuff (Manufacture) Order 1952, which criminalised the sale of certain types of compound or livestock mixtures, the composition of which had been altered. An example of the latter was article 6(1) of the Barley Order 1952, which criminalised the sale of barley at a price exceeding a specified maximum price.[21] The attribution of an offence to one or other of these categories was not always easy,[22] but the main point is that in neither case were the provisions likely to be of any real relevance to the public at large.

As table 7 indicates, then, the majority of the offences created during 1951-52 were addressed to persons acting in some form of special capacity: only 164 offences (19%) had no 'special capacity' requirement (either express or implied). The proportion of general offences created during 1951-52 is higher compared to the New Labour and Coalition samples, where it was 2% and 11% respectively. However, for all three samples, the vast majority of offences are what might be termed 'regulatory' in nature, in the sense that they seek to control the behaviour of persons involved in specific activities.[23] It may be said, then, that the criminal law's use as a regulatory tool and the creation of 'regulatory offences' are not contemporary legal phenomena.

For those offences that were explicitly targeted at someone acting in a specific role or engaging in a specific activity, a further analysis was undertaken, which was to record the nature of that activity as set out in the legislative provision in question. Table 8 displays the results of this exercise.

**Table 8: Stated target of role related offences**

| | 1951-52 | 1997-98 | 2010-11 |
|---|---|---|---|
| Person acting in the course of a business (or similar) | 136 (44%) | 202 (28%) | 240 (37%) |
| Driver/owner of a vehicle | 51 (17%) | 2 (0.3%) | 1 (0.2%) |
| Person applying for a licence/registration/authorisation | 29 (9%) | 17 (2%) | 14 (2%) |
| Owner/occupier of premises or building/landlord | 27 (9%) | 21 (3%) | 12 (2%) |
| Master or owner of ship/commander of an aircraft | 20 (7%) | 378 (52%) | 18 (3%) |
| Keeper/owner of animals | 10 (3%) | 38 (5%) | 134 (21%) |
| Person objecting to licence/registration/authorisation | 9 (3%) | 0 | 0 |
| Employee/worker | 6 (2%) | 8 (1%) | 2 (0.3%) |
| Holder of a specified public office | 6 (2%) | 0 | 36 (6%) |
| Person engaging in certain type of work e.g. construction | 3 (1%) | 6 (0.8%) | 116 (18%) |
| Employer | 3 (1%) | 26 (4%) | 45 (7%) |
| Person responsible for X (e.g. safety officer, supervisor) | 0 | 17 (2%) | 29 (4%) |
| Veterinary surgeon | 0 | 8 (1%) | 2 (0.3%) |
| Other | 7 (2%) | 5 (0.7%) | 3 (0.5%) |
| Total | 307 | 728 | 652 |

[21] This was another provision that attracted a maximum penalty of two years imprisonment by virtue of its creation under the auspices of the Defence (General) Regulations 1939: see the discussion below.
[22] For further discussion see Chalmers and Leverick (n 1) at 557-558.
[23] Exactly what is meant by a 'regulatory' offence is contested: for discussion see G Smith, T Seddon and H Quirk, 'Regulation and Criminal Justice: Exploring the Connections and Disconnections', in H Quirk, T Seddon and G Smith (eds), *Regulation and Criminal Justice: Innovations in Policy and Research* (Cambridge: Cambridge University Press, 2010), 2-4.

In the 1951-52 sample, 307 offences were explicitly addressed to those acting in a specific role or activity. Most commonly, and as was also the case for the 1997-98 and 2010-11 samples, this was to those acting in the course of a particular type of business (44%). The second most common targets of regulation were drivers or owners of vehicles (17%), an activity that was not as commonly regulated in the other two samples. It does have to be said, though, that the snapshot nature of this exercise may have been at play here: the vast majority of the 51 offences explicitly targeted at drivers and owners of vehicles came from two weighty statutory instruments, the Motor Vehicles (Construction and Use) Regulations 1951 and the Public Vehicles (Licences and Certificates) Regulations 1952, that both received Royal Assent during the sample period. Selecting a different year from the same decade may have produced a different result.

The third most common explicit targets of regulation were those applying for licences (9%), to which might also be added the 3% of provisions addressed to those objecting to licences (and not forgetting the 68 offences targeted at those who had already been awarded a licence noted earlier, in table 7). This activity was not as highly represented in the New Labour or Coalition samples. Once again this may simply be a reflection of the snapshot nature of the exercise, as two pieces of legislation in the 1951-52 sample created multiple offences applicable to those applying for licences: the Public Vehicles (Licences and Certificates) Regulations 1952 (twelve offences) and the Goods Vehicles (Licences and Prohibitions) Regulations 1952 (nine offences). However, the figure is also a reflection of a particular need to regulate food supply that arose in the immediate post-war period, as those offences that were not created by the Public Vehicles or Goods Vehicles Regulations mostly related to the licensing of food suppliers under either the Food Rationing (General Provisions) Order 1952 or the Flour Order 1952.

**General observations**

Some aspects of the approach to legislative drafting in the 1951-52 sample are worthy of note. In relation to the New Labour and Coalition samples, it was concluded that "offences are frequently drafted so inaccessibly as to breach basic principles of fair notice".[24] This is just as true of the 1951-52 sample, if not more so.

Around 59% of offences created during 1951-52 (508 out of 864 offences) were a product of secondary legislation emanating from the Defence (General) Regulations 1939 ('the 1939 Regulations'), an instrument that gave various executive bodies the ability to create regulatory regimes through other statutory instruments depending on the exigencies of war (and its aftermath).[25] Notably, the 1939 Regulations contained a provision that classified the contravention of or non-compliance with any regulation created using this power as an offence, liable to a maximum punishment of two years imprisonment if convicted on indictment.[26] Some statutory instruments established under the 1939 Regulations, such as the Meat (Prices) (Great Britain) Order 1952, gave express notice that any infringement of its provisions would amount to an offence against the 1939 Regulations.[27] However some instruments, such as the Hire-Purchase and Credit Sale Agreements (Control) Order 1952, stated nothing of the sort. Notwithstanding, given the terms of the 1939 Regulations,[28] an infringement of the Order's provisions still amounted to an offence regardless of whether notice of this was given in the Order. The criminal implications of a person's failure to comply with a requirement of the Hire-Purchase Order were therefore not readily ascertainable; indeed, a level of deduction of Sherlock Holmes proportions was required. Only if the preamble to the Order was read would its grounding in the 1939 Regulations have been apparent, but even here there was no reference to the

[24] Chalmers and Leverick (n 1) at 559.
[25] See, for example, regulation 55 of the Defence (General) Regulations 1939.
[26] Regulation 92 of the Defence (General) Regulations 1939.
[27] Article 12 of the Meat (Prices) (Great Britain) Order 1952.
[28] See the preamble to the Hire-Purchase and Credit Sale Agreements (Control) Order 1952.

offence creating provision itself – further reading of the 1939 Regulations would have been necessary to discover this.[29]

Sometimes, the only criminal offences created by a particular statutory instrument were created under the auspices of the 1939 Regulations. Some instruments, however, contained offences created under the 1939 Regulations alongside a separate, more detailed offence section in the instrument itself. An example of this was the Food Rationing (General Provisions) Order 1952. As well as containing express reference to the 1939 Regulations, the Order also contained a specific provision headed 'Offences'. Broadly speaking, this provision encompassed what might be termed *mala in se* conduct such as making a false representation to obtain rationed goods[30] and forging ration documents,[31] as opposed to the infringements criminalised through (implied reference to) the 1939 Regulation scheme, which were of a more *mala prohibita* nature (such as a failure to return a previously lost ration document[32] or being registered with more than one retailer in respect of each rationed food[33]).

'Hidden offences' could also be found in legislation that did not stem from the 1939 Regulations. Take the Goods Vehicles (Licences and Prohibitions) Regulations 1952; there is no reference in the instrument itself that a breach of its requirements amounts to a criminal offence. It is only when the 'parent Act' is consulted, reference to which is again found hiding in the preamble, that the provision creating prospective criminal liability for any contravention or failure to comply "with any regulation made under this Part of this Act" is revealed.[34]

A further result of the 1939 Regulations (and similar blanket criminalisation provisions) is that any person, natural or legal, covered by the resulting regulations would be guilty of a criminal offence if it deviated from the rules. For example, the primary aim of the Live Poultry (Restrictions) Order 1952 was to regulate the conduct of poultry traders. However, it also contained a couple of incidental duties for health inspectors, such as ensuring copies of trading licences were sent to the local authorities to which goods were being transferred. As such, a failure to do so on the part of a health inspector was a criminal offence subject to a maximum penalty of two years imprisonment, not just a breach of administrative duties. Whether or not the Board of Agriculture intended to cast the criminal net this wide must be open to question.

**Old habits die hard?**

The analysis of the New Labour and Coalition samples resulted in a number of observations being made about modern criminalisation practices.[35] The over-riding conclusion that can be drawn following the analysis of the 1951-52 sample is that none of these issues are new.

Our first cause for concern was the rate at which criminal offences were being created and the ease with which this could be achieved. This was, if anything, an even greater concern in relation to the 1951-52 sample, where the prolific creation of statutory instruments via the powers contained in the 1939 Regulations instantaneously brought whole swathes of regulatory provisions within the scope of the criminal law. Whether or not criminal sanctions were required to address every single provision within the

[29] Unless, for example, the criminal implications of an infringement of the Hire-Purchase and Credit Sale Agreements (Control) Order 1952 were made known at the time the contract was agreed.
[30] Article 27(c) of the Food Rationing (General Provisions) Order 1952.
[31] Article 27(e) of the Food Rationing (General Provisions) Order 1952.
[32] Article 17 of the Food Rationing (General Provisions) Order 1952.
[33] Article 5(3) of the Food Rationing (General Provisions) Order 1952.
[34] Regulation 35(3) of the Goods Vehicles (Licences and Prohibitions) Regulations 1952.
[35] Chalmers and Leverick (n 1) at 558-560.

instruments concerned is questionable, as some of the criminalised conduct appeared, on the face of it, to be extremely trivial in nature.[36]

A further cause for concern stemming from the analysis of the New Labour and Coalition samples was the highly punitive nature of some of the offences created through subordinate legislation, a significant proportion of which carried a lengthy maximum penalty of imprisonment. This concern applied equally to the 1951-52 sample. A total of 92% of the imprisonable offences in the 1951-52 sample were created by secondary legislation, the vast majority of which carried a maximum two-year sentence following a conviction on indictment.[37] This is little different to the corresponding figures for the New Labour and Coalition samples, which were 99% and 87% respectively.

Finally, contemporary criminalisation practices were criticised on fair notice grounds for their cryptic drafting styles and consequent inaccessibility to those to whom they are addressed. A substantial number of the offences created during 1951-52 required similar powers of deduction in order to ascertain that a breach of the provisions was a criminal offence and what the maximum penalty on conviction would be.

The concluding question posed in relation to the New Labour and Coalition samples was whether the criminal law should play *any* part in the regulation of relatively minor conduct.[38] This is a question that we still plan to address and work is ongoing in this area. What the 1951-52 sample does show, however, is that claims of 'over-criminalisation' neglect the fact that the creation of criminal offences in large numbers is not the peculiarly modern phenomenon which it is frequently assumed to be.

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[36] Take, for example, the provisions criminalising health inspectors contained in the Live Poultry (Restrictions) Order 1952 that were referred to above. Or article 4 of the Meat (Prices) (Great Britain) Order 1952, which provided that "[w]here, at the request of the buyer, any meat is minced by [a seller of meat], no additional charge shall be made by the seller for mincing".

[37] Due to the fact that most of them were created under the 1939 Regulations.

[38] See Chalmers and Leverick (n 1) at 560.