CRIMINAL LAW AND JUSTICE

ESSAYS FROM THE W. G. HART WORKSHOP, 1986

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INTRODUCTION

The essays in this volume are based on the papers delivered at the 1986 W. G. Hart Legal Workshop in London. This annual series of workshops, organised by the Institute of Advanced Legal Studies, is devoted to a different subject each year, and in 1986 offered a four-day programme on "Criminal Law and Justice." The programme was designed around the general theme of codification. Interest in this topic has been re-awakened by the publication of a Report to the Law Commission by a sub-committee of the Society of Public Teachers of Law on codification of the criminal law.[1] The Draft Criminal Code Bill appended to the Report has shown the public and the legal profession, for the first time since Stephen's day, what a new criminal code for England and Wales might look like. The Report has led to widespread debate about the desirability of codification in principle, a debate fuelled by increasing anxiety over the performance of the House of Lords in recent years as the final arbiter of the criminal law. The seriousness with which codification is now being discussed as the way forward is demonstrated by the extensive and elaborate consultation on the Report undertaken by the Law Commission. A network of Scrutiny Groups has been established round the country composed of practitioners from all branches of the profession with a brief to provide a detailed practical response to the Report's proposals. In addition a large number of individuals and organisations have responded directly to the Commission's invitation to comment with, it may be revealed, much support for and little outright opposition to the principle of codification.

It seemed appropriate therefore to invite speakers at the workshop to consider some of the problems entailed in codification and some of its wider implications for the criminal justice process. One of my particular concerns as Academic Director of the workshop was that discussion should not be limited to the substantive criminal law which determines liability to conviction. Although the Draft Bill is currently confined to substantive law, the Report envisages a Code which will eventually cover much of the pre-trial and post-conviction stages as well.[2] The administration of these parts of the criminal process is currently characterised by the exercise of extensive official discretion. One central theme which runs through all discussions of codification is the place of discretion in a

codified system of law and procedure; what role it should have, how it should be structured, to what extent and by what methods its exercise should be regulated, and so on. Several of the essays address this theme explicitly and bring a variety of approaches to bear upon it. I will say more of these presently.

A further reason for expanding the workshop to include the criminal justice process as a whole was the belief that for too long criminal law and criminal justice specialists have tended to lead separate lives, sometimes in ignorance of each other's work. The Law Reform Commission of Canada has commented recently that "Legislation, especially in respect of criminal matters, must reflect sociological reality."[3] "Traditional" criminal lawyers who offer prescriptive analyses of the penal law must, if they are to be taken seriously, come to terms with criminological findings relevant to their concerns. This is particularly important where these may have the effect of undermining or qualifying the theoretical base of what is proposed. The research conducted for the Royal Commission on Criminal Procedure[4] is a good example of material which added significantly to the weight and persuasiveness of large-scale reforms recommended by an official body, the membership of which had limited first-hand experience of the issues under discussion. Equally, it is undeniable that the terms of the substantive law can and do influence the behaviour of officials within the criminal justice process. McBarnet has recently called the attention of criminal justice theorists and researchers to the importance of understanding the substantive law in constructing their research and analysis.[5]

Thus the workshop had a subsidiary aim of providing a forum in which persons with a wide range of interests in criminal justice could debate matters of general concern. This aim is reflected particularly in two of the essays in this volume. David Nelken explores the nature of criminal law and criminal justice scholarship and the reasons for the apparent disharmony between them. Andrew Sanders provides further material from his wide-ranging study of prosecutions to offer a valuable insight into the processes by which the police construct cases. His essay points up particularly an important consideration for the legislator and the judge; the price to be paid for increasing subjectivity in the substantive law is increasing reliance by the police on confession evidence as a means of proof of the required states of mind. This may result in more pressure on suspects to incriminate themselves and more challenges to police versions of interviews, although the advent of widespread tape-recording of interviews may reduce the size of this problem. Sanders' essay also contains a lesson for all

researchers into criminal justice policy; they cannot afford to allow the matter to be investigated to be defined unproblematically by other agencies. At the very least the assumptions underlying such definitions must be scrutinised critically.

The volume begins with two essays concerned with the future of the current codification project. Mr. Justice Beldam, Chairman of the Law Commission, reviews the history of the project, discusses some of the difficulties in the way of completion and enactment of the Code and suggests that the chances of success will be maximised by the production of a Code with a greatly expanded list of offences in Part II; Government and the profession will be best persuaded of the utility of a Code, in his view, by being presented with one which would apply to over 95 per cent. of all proceedings in Crown Courts and Magistrates' Courts for indictable offences. In this he is strongly supported by Professor Leigh who calls for a much fuller Code than is contained in the Bill appended to the Report to the Law Commission. Leigh would also wish the Code to be more innovative. A wide-ranging review of other codification exercises leads him to conclude that more resources need to be devoted to the current project to obtain the best instrument possible, particularly since comprehensive reform of an enacted Code may be a difficult and lengthy process.

One innovation recommended by the Code team responsible for the Report and Draft Bill was a set of detailed provisions for interpretation of the Code.[6] These include, *inter alia,* the giving of a power to refer to the (anticipated) Report of the Law Commission on Codification for guidance as to the intended meaning of provisions thought to be ambiguous. Professor Tony Smith examines the proposal in the context of a detailed analysis of current judicial attitudes to and use of law reform proposals. The inconsistencies he exposes—highlighted by the very different approaches of the House of Lords to Law Commission Reports in *Caldwell*[7] and *Shivpuri*[8]—argue strongly for the adoption of a new clear rule on this aspect of the construction of statutes. Smith's own suggestion, that there should be a duty on the courts to consult such Reports in cases of doubt, should attract much support.

Interpretation of the rules of liability is a perennial problem in the administration of criminal justice. A further problem is the application of those rules by tribunals charged with making decisions about liability, and, in particular, the division of responsibility between judge and jury. Since juries do not give reasons for their decisions and their decisions are not generally reviewable, the area of "discretion" allocated to them is of vital concern. In England the allocation is commonly indicated by the distinction

between questions of law and questions of fact, although it has never been entirely clear whether this distinction is the consequence of or the antecedent to classification of matters as judge or jury issues. Stephen Guest adopts a rigorous philosophical technique to explore the law/fact distinction. He argues that such distinctions as may be drawn will not support the existing judge/jury allocation. In particular he shares the widespread unease about the justification for leaving the meaning of ordinary words such as "insulting" or "dishonest" at large to the jury. Since such words do not usually have a clear lexical meaning in relation to the subject-matter of the dispute, it is an illusion to believe that characterising their application as questions of "fact" will produce uncontroversial conclusions. Guest identifies the problem in such cases as being the states of affairs envisaged by the relevant law as within its scope. This, he argues, is a question of interpretation of the law to be decided by the judge. Handing over that decision to the jury amounts to an abdication of constitutional responsibility.

The next five essays deal with fundamental issues in the construction of criminal culpability under the Draft Code Bill. Kenneth Campbell begins the series by asking whether there is a conceptual difference between definitional elements of an offence and defences to criminal liability. Such a difference, if it exists, could be of considerable help in the drafting and analysis of conditions of liability; it could also provide support for the allocation of such matters as burdens of proof and reasonableness of mistakes to one side rather than the other. Campbell argues for a theory of offence definitions as delimiting that against which the law (always) takes there to be prima facie reason, whereas defences set out conditions under which the defendant is to be exonerated even though the prima facie reason against his conduct subsists. Accordingly, the analyst of the crime of assault would ask himself in the first instance whether the law is aimed prima facie at all touchings, or all touchings without consent, or all touchings with hostile or indecent intent, or some other combination of circumstances. An answer to this question will need to take account presumably both of the terms in which the law is expressed, and the various values (moral, political, social, economic) underlying the law. The theory fits well with intuitions about the way in which culpability is constructed under the law, although some problem cases may exist. Should questions of jurisdiction, for example, be regarded as matters of definition or defence?

The team responsible for the Report and the Draft Bill found that it was essential to employ equivalent expressions for *actus reus* and *mens rea* in drafting many provisions in Part I. Clause 19 of the

Draft Bill sets out an extended meaning of the word "act" for this purpose. Richard Buxton subjects this clause to the kind of critical searching analysis that it may expect to receive at the hands of the keen practitioner. He argues that the Code team were over-ambitious in seeking to compress all forms of *actus reus* into a single descriptive term for use as drafsman's shorthand. This results in an ordinary word being given a highly artificial meaning in some respects, which in turn produces difficulties of construction in other provisions. There is much force in this criticism, but the drafting problem should not be underestimated. A degree of artificiality may be the price which has to be paid if complexity and tedious repetition in referring constantly to omissions and situational offences are to be avoided in Part I.

The code team saw itself as engaged essentially in an exercise of restatement rather than reform of the present law.[9] To that extent it may be open to a charge of having perpetuated false or dubious assumptions underlying existing law. Such a charge forms part of Antony Duff's critique of the codification of fault terms. Duff argues that the definition of such terms as "purposely" and "intentionally" in the Draft Code fail both on their own terms (the notion of "wanting" a result is ambiguous and unhelpful), and because they are based on philosophical and moral assumptions which are debatable or untenable. He suggests that it may be preferable for the definitions to abandon the search for precise descriptive criteria of the states of mind which constitute "fault"; instead they should aim to indicate the kinds of moral judgment which have to be made if fault is to be ascribed to the agent whose acts are in question. Duff is conscious that this would leave a large task of interpretation to courts and juries. His own solution for easing that burden by providing a much fuller and more detailed set of authoritative illustrations is not, however, without its own difficulties. As the very least, questions would arise about the juridical status of statutory examples purporting to indicate "proper" results in certain cases, and about the decision of other cases falling outside the illustrations.

A central problem for any theory of fault and criminal culpability is the mentally disordered offender. This is one topic above all in which issues of liability are inseparable from questions of disposal. The codifier in England is faced with a stark choice: he must go either for the M'Naghten Rules with their outdated medical theory and terminology and inflexible disposal consequence, or the scheme propounded by the Butler Committee[10] which does not command universal assent and whose resource implications are unclear. As yet there is no plausible third possibility on offer;

the code team took the view that the Butler scheme was the only sensible way forward, while recognising that certain aspects of it might need modification.[11] Ronnie Mackay, who has worked extensively in this area, discusses the Code's proposals on insanity and automatism in the light of the considerable changes which have been taking place in American jurisdictions since the Hinckley case.[12] He points out that under the part of the Butler scheme which has caused most misgivings—the availability of the special verdict where the accused is suffering from severe mental illness not (necessarily) causally connected with the offence—Peter Sutcliffe (the "Yorkshire Ripper") would very probably have been acquitted of murder. Whether a special verdict in such a case is publicly acceptable must be very doubtful. Mackay identifies a further difficulty with the treatment of diabetic cases under the principles in the Draft Code. Some cases at least will qualify for the mental disorder verdict (as they would under the M'Naghten Rules), and the problem of inappropriate labelling must then be faced. The objection is the same as that to the decision in *Sullivan*,[13] although the force of it may be lessened by the flexibility of the disposal powers under the new verdict.

Finally in this section of the volume Heather Keating reviews the treatment of fatal and non-fatal offences against the person in the Code. The case for reform of this obscure, incoherent and archaic branch of the law is unanswerable, but there are many problems to be overcome. The precise specification of the mental element for murder is now an acute difficulty after *Moloney*[14] and its successors. The Criminal Law Revision Committee based its proposals for murder[15] on a wider definition of "intention" than appears in the recent cases, while at the same time narrowing the common law by rejecting the intention to do grievous bodily harm *simpliciter* as sufficient for murder. Careful thought will now be needed both about the policy on this point and the statutory language to give effect to it. Keating makes a strong plea for the inclusion of the major driving offences as part of the law on crimes against the person. It would be very odd to find an important homicide offence (causing death by reckless driving) not in the Code, and reckless and careless driving may fairly be viewed as offences whose essential character is that of conduct endangering the lives and safety of persons. Inclusion in the Code might help to meet criticisms that these offences have been "marginalised" in the criminal justice process, and deserve to be treated with greater seriousness.[16]

The remaining essays in the volume focus on some of the wider isues of codification and criminal justice I referred to earlier.

Professor Denis Galligan examines the regulation of discretion in pre-trial decisions using ideas developed in the context of public law. He suggests that regulatory techniques involving the application of fair procedures for decision-making ("due process" values) and ideas of democratic accountability for decisions offer the best hope of achieving the goals of regulation. These goals he identifies in broad terms as preventing the abuse of power, ensuring some notion of fair government and protecting rights and other important values. On this approach the complex system of controls on the investigation of offences by the police, which have been established by the Police and Criminal Evidence Act 1984, offer a model for that part of the Code which will eventually deal with evidence and procedure. It is interesting to compare Galligan's discussion of pre-trial discretion with Nicola Lacey's treatment of discretion at the post-conviction stage. She argues that concentration on a "doctrinal critique" of criminal law and discretion, with an emphasis on formal values such as due process, misses the real problem of reconciling the tensions of principle and competing goals and priorities which are endemic in the criminal justice system. In her view it is essential to achieve a broad consensus on the proper function and underlying values of the criminal law before sensible reforms of any part of the system can be undertaken. Few would wish to disagree on the desirability of achieving such a consensus; whether and how it may be achieved is problematic, to say the least.

The concluding essay is by Martin Wasik, who undertakes a detailed inquiry into codification of the principles of sentencing. He makes a plea for serious consideration of the use of prescriptive guidelines for sentencers, arguing that they will result in increased accessibility and certainty of the relevant principles. They would also help to eliminate problems of disparity in the disposal of offenders, and might reduce the volume of appeals against sentence. Wasik's essay demonstrates clearly how the perceived objectives of codification can be given effect in an area of large judicial discretion. Adopting American-style guidelines is not of course the only technique for regulating such discretion; codifying current appellate guidelines might fit better with a general aim in the Code of restatement rather than reform, although whether these would promote values of consistency and coherence is debatable.

Finally, at the risk of emphasising the obvious, these essays do not provide, and are not intended to provide, either a prospectus for codification or a systematic review of current problems in criminal law and justice. They should be seen rather as a set of

explorations of some issues and implications of codification which reflect the varied backgrounds and interests of those whose professional lives are vitally affected by this topic. The essays in my view also demonstrate the breadth and richness of current scholarship in penal affairs. I hope they will be seen as an important contribution to debates on contemporary issues in criminal law and justice; if so, they will have served their purpose.

November 1986 I. H. Dennis

NOTES

[1] Law Com. 143 (1985).
[2] Para. 2.1.
[3] Paper presented to the Meeting of Commonwealth Law Reform Agencies, (Jamaica,1986) p.3.
[4] Cmnd. 8092 (1981).
[5] *Conviction* (1981).
[6] Report, Chap. 3; Draft Code Bill cll. 3 and 4. The team's terms of reference expressly asked them to formulate "the rules which should govern [the] interpretation" of the Code.
[7] [1982] A.C. 341.
[8] [1986] 2 W.L.R. 29.
[9] Report, para. 1.10.
[10] Report of the Committee on Mentally Abnormal Offenders (1975), Cmnd. 6244.
[11] Report, paras. 12.3, 12.6.
[12] (1982) 672 F. 2d. 115.
[13] [1984] A.C. 156.
[14] [1985] A.C. 905.
[15] Fourteenth Report, Offences Against the Person (1980), paras. 17–31.
[16] See Spencer, "Motor Vehicles as Weapons of Offence" [1985] Crim. L.R. 29; Wells,"Restatement or Reform" [1986] Crim. L.R. 314.

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