17-26-02

N.B. This is a Working Paper of the Law Commission's Working Party on the Codification of the Criminal Law; it is being circulated for comment and criticism, and does not represent the concluded views of the Working Party or the Law Commission.

LAW COMMISSION

SECOND PROGRAMME, ITEM XVIII

Published Working Paper No. 17

Codification of the Criminal Law
General Principles

WORKING PARTY'S
PRELIMINARY WORKING PAPER

THE FIELD OF ENQUIRY

14th May, 1968

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THE LAW COMMISSION

PUBLISHED WORKING PAPER NO. 17

SECOND PROGRAMME, ITEM XVIII

CODIFICATION OF THE CRIMINAL LAW, GENERAL PRINCIPLES

PRELIMINARY WORKING PAPER - THE FIELD OF ENQUIRY

1. The Working Party[1] which is assisting the Commission in the examination of the general principles of the criminal law as a first stage to its codification, has considered the subjects which seem appropriate for inclusion in Part I - the General Part - of the proposed Criminal Code. This part, in the view of the Working Party, should state the general principles governing the substantive criminal law up to but not beyond the determination of guilt.[2] It is, however, contemplated that the codification will, in addition to the General Part, include other parts dealing with specific offences, with matters of jurisdiction and procedure, and with the disposal and treatment of offenders. The Working Party's preliminary examination of the content of the proposed Part I has been made against this background.

2. The point has now been reached when it seems desirable for the Working Party to publish the results of its preliminary deliberations. These take the form of provisional proposals as to the subjects which Part I should cover. They also indicate, in relation to each subject provisionally selected for inclusion, particular questions which arise for consideration. The object of the publication of this Paper[3] is, at this early and formative stage, to ensure the maximum opportunity for consultation with those, both lay and professional, who are interested in the subject.

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(1) For its membership see Appendix "A".

(2) Exceptionally, Part 1 may have to deal with the disposition of those acquitted on the ground of mental disorder (below p.41) or intoxication (below p.43)

(3) Appendix "B".

3. In order to facilitate this consultation, the Working Party has decided to adhere, for the present purpose, to the traditional divisions of the topic of General Principles. Indeed, these are followed by most commentators as well as by the compilers of such modern codes as the American Law Institute's Model Penal Code. The subjects for examination are thus provisionally grouped under the following main headings:-

(a) General principles of construction
(b) Application of the criminal law
(c) Elements of criminal liability
(d) Justification and excuse
(e) Criminal responsibility
(f) Inchoate crimes (Attempts, Incitement and Conspiracy)

The propositions which the Working Party will ultimately frame for Part I of the Code will not necessarily be arranged under the same headings.

4. A vital further question is how far the general principles to be formulated for Part I of the Code should affect the existing criminal law. It may well be found possible to apply some at least of those propositions to that law, in advance of its codification. This process may involve the inclusion of a vocabulary of expressions which are at present commonly used in criminal legislation.

Furthermore, it will be necessary to consider, in relation to future offences (whether or not they are ultimately included in the Code) whether the vocabulary should be declared to apply to such offences in the absence of clear legislative expression to the contrary.

5. Finally, in presenting this Paper the Law Commission desires to stress that its work, and that of the Working Party, in the field of Codification of the Criminal Law is intended to be carried out in the closest consultation with the Criminal Law Revision Committee and with Government Departments and other interested bodies, both inside and outside the legal profession. Further Papers will be published from time to time.

The Law Commission accordingly invites written comments on this Paper and is prepared to deal with any enquiries. These should be addressed to:-

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Appendix "A"

MEMBERSHIP OF THE WORKING PARTY

Joint Chairmen:	Mr. Neil Lawson, Q.C.
	Mr. Norman Marsh, Q.C.
Law Commission member:	The Hon. Mr. Justice Scarman, O.B.E.
Members, other than representatives of the Law Commission:	* The Rt. Hon. Lord Justice Edmund Davies
	* The Common Serjeant, Mr. J.M.L. Griffith-Jones, M.C.
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	Mr. A.E. Cox
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	Mr. A.J.E. Brennan (Home Office)
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	+ Mr. G.V. Hart (Home Office)
Secretary:	Mr. Lionel Alexander (Law Commission)
Assistant Secretary:	Mr. W.V.H. Rogers (Law Commission)

* Also members of the Criminal Law Revision Committee.

+ Secretary of the Criminal Law Revision Committee.

CODIFICATION OF CRIMINAL LAW

PART I - GENERAL PRINCIPLES

WORKING PARTY PAPER

DRAFT PROVISIONAL OUTLINE OF CONTENTS OF PART I OF THE CRIMINAL CODE

A. GENERAL

Subject 1 - Principles of Construction

Under this subject it is proposed to consider:-

(a) Whether any offences at common law should outlive the codification (4)

(b) Whether the provisions of Part I of the Code should apply to all offences created either by Part II of the Code ("Specific Offences") or by other enacted law, or, so far as they may be retained, at common law.

(c) Whether, and, if so, by what method Part I should allow or provide for exceptions to its general principles to be operative in respect of some offences.

It is generally considered that the purposes of the substantive criminal law include:-

(i) the proscription of conduct which unjustifiably and inexcusably causes or threatens substantial harm to individual or public interests;

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(4) A start has been made on the abolition of common law offences by s.13 (1) (a) of the Criminal Law Act 1967. It is proposed to carry this process further by Clause 31 (1) (a) of the Theft Bill. Finally, the Criminal Law Revision Committee is considering the question of common law misdemeanours as part of the reference made to it by the Home Secretary under Item XIV of the Law Commission's First Programme.

(ii) the giving of clear warning of the nature of the conduct so proscribed;

(iii) the safeguarding of conduct which is without blame from condemnation as criminal;

(iv) the differentiation on reasonable grounds between serious and minor offences

(d) As an aid to the application of the Code to particular cases, should Part I include a statement of "general purposes" and, if so, what should be included?

Penal statutes should, it is said, be construed strictly in favour of the subject.

(e) For the avoidance of undue rigidity in the construction of the Code, is it desirable to include in Part I any, and if so what, provisions enabling the courts to adopt a less restricted approach and in particular to take into account a statement of general purposes as suggested in (d) above ?

B. APPLICATION OF THE CRIMINAL LAW

Subject 2 - Time of Operation of Penal Legislation

The following questions will be considered:-

(a) Should Part I lay down as a matter of principle:-

(i) that penal legislation does not operate retrospectively;

(ii) that changes in the law relating to punishment should not expose an offender to heavier penalties than those which his offence would have attracted at the time it was commited ?

(b) Should Part I contain the principles to be applied in order to determine at what time an offence is committed ?

Subject 3 - Territorial Extent of the Criminal Law (5)

The Working Party will consider whether provisions should be included in Part I of the Code governing the territorial extent of the criminal law in respect of:-

(a) Offences committed on British ships or British aircraft (as to aircraft see the Tokyo Convention Act 1967).

(b) Offences committed in British territorial waters.

(c) Offences committed on the high seas or in unoccupied areas.

(d) Offences against English law committed abroad (i.e. within foreign criminal jurisdictions).

(e) Other offences with a "foreign element" (6)

Subject 4 - Classification of Offences

On this subject the Working Party will take a number of factors into consideration:-

(a) Most criminal codes classify offences primarily by reference to the degree of punishment which they attract. However, the role of the judiciary in relation to punishment under our law does not seem to make such a basis of classification meaningful for the purpose of general principles. The abolition by the Criminal Law Act 1967 of the centuries-old classification of "serious crimes" into felonies and misdemeanours leaves open the question whether a more modern basis of classification could and should be provided.

(b) The 1967 Act replaces the old felony and misdemeanour classification by a new classification of "arrestable" and other offences; but this is a classification primarily relevant to powers of arrest without warrant and to liability for giving assistance to criminals. (7)

(c) It seems likely that it will be necessary for the

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(5) The Law Commission is undertaking an initial examination of this subject under LAW COM.14 Item XVIII No.3 of its Second Programme.

(6) E.g. R. v. Harden [1963] 1 Q.B.8; Board of Trade v. Owen [1957] A.C. 602

(7) See s.2 (7) of the Criminal Law Act 1967

purposes of applying the general principles of Part I of the Code to make some provision for classification of offences (e.g. in respect of time limits for prosecutions (Subject 5)). One possible basis exists in the procedural classification of "indictable" and "summary" offences.

(d) But the adoption of this classification would not resolve the practical difficulties which arise from the present trend towards "hybridization" in this field. Apart from grave offences, triable only on indictment, and minor offences triable only summarily, there now exist the following main categories of offences which can be said to be "hybrid"(8):-

(i) Indictable offences triable summarily under special statutory provisions (e.g. Criminal Justice Administration Act 1914, s.14, as amended by the Malicious Damage Act 1964).

(ii) Indictable offences triable summarily with the approval of the court and the consent of the defendant (Magistrates' Courts Act 1952, Schedule I, as amended).

(iii) Statutory offences triable summarily or on indictment, which the magistrates' court decides to deal with summarily on the application of the prosecution (in which case the sentencing powers of the court are limited).

(iv) Statutory offences triable summarily or on indictment which the magistrates' court decides to deal with summarily otherwise than on the application of the prosecution, where the maximum penalty on summary trial does not exeed three months' imprisonment.

(v) Similar offences to those dealt with in (iv) above where the maximum penalty on summary trial exceeds three months and the defendant has elected summary trial.

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(8) Excluding special provisions (a) as to charges against children and young persons, (b) under which an accused may refuse summary trial of a summary offence, and (c) as to summary offences triable on indictment after one or more previous convictions.

(vi) Summary offences carrying a maximum sentence in excess of three months' imprisonment where the defendant has elected summary trial.(9)

Bearing in mind that magistrates'courts, quite apart from trying summary offences, finally dispose of over 90% of indictable offences charged, there appears to be a strong case for simplification of the above categories. But it would seem more appropriate to deal comprehensively with the problem in the procedure code.

(e) The Working Party provisionally takes the view that much of the general part of the criminal law is primarily concerned with those crimes in which mens rea is an essential ingredient.(10) Upon this approach there is a basis of distinction between mens rea offences, on the one hand, and, on the other hand, statutory offences involving strict liability where mens rea is irrelevant (see further Subject 11). It may be that one of the consequences of a classification based upon this distinction would be the acceptance of the principle that no person convicted of an offence of strict liability should suffer deprivation of liberty.

(f) But the adoption of such a principle as last suggested would raise questions as to the treatment of certain types of cases, such as those where a strict liability offence is in fact committed intentionally or negligently. Strict liability offences will be further referred to under Subject 11 below.

(g) A further problem of classification is presented by offences of negligence (i.e.those in which a different element from

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(9) The defendant's right to claim jury trial in these cases is excluded where the charge is assault or an offence under ss 30 to 32 of the Sexual Offences Act, 1956.

(10) "mens rea" is here used to include intention or recklessness, but not negligence. Offences of "negligence" are referred to in (g) below.

intention or recklessness attracts culpability). This will be discussed under Subject 8 below.

Subject 5 - Time Limits for Prosecution

The Working Party proposes, in relation to this subject, to consider two main matters:-

(a) Whether in principle time limits should be laid down for the prosecution of all crimes, if so, should such limits be inflexible and should any crimes, e.g. homicide, be excepted from their operation.

(b) Whether it is desirable and practicable to lay down uniform rules as to the time limits for prosecution for summary offences.

Subject 6 - Autrefois Acquit; Autrefois Convict

It is the Working Party's present view that nemo debet bis vexari is a well-established basic principle apt for inclusion in Part I of the Code. In this context it is proposed, therefore, to consider how far the detailed working out of the principle should be provided for in Part I, or whether it is practicable to state the principle in Part I and leave its practical application to the code of procedure.

Subject 7 - Onus of Proof

Although recognising that the rules as to onus of proof are closely related to the law of evidence, the Working Party is nethertheless disposed to the view that there are two basic principles which require to be stated in Part I of the Code. These are:-

(a) The prosecution must always prove the charge against the accused beyond reasonable doubt.

(b) The proposition, which is now enacted in s.8 of the Criminal Justice Act 1967, implementing the first part of the proposals of the Law Commission's Report dated 12th December, 1966 on "Imputed Criminal Intent".

The Working Party will also consider in Part I how far, if at all, the basic principles stated above may have to be modified in relation to particular ingredients of an offence or in relation to certain types of defence, taking into account such recommendations on this question as may be made by the Criminal Law Revision Committee in their expected Report on the law of evidence in criminal proceedings.

C. PRINCIPLES OF CRIMINAL LIABILITY

Introduction

This division of Part I of the Code, comprising Subjects 8 to 14 inclusive, proceeds on the assumption that criminal liability basically depends upon voluntary conduct[11] on the part of a person, together with the necessary state of mind (or, in some cases, negligence) to render his conduct criminal. To this general proposition exceptions may have to be made in the fields of strict and vicarious liability and in relation to the criminal liability of corporations (Subjects 11, 13, and 14 below).

Subject 8 - Culpability

In order to formulate propositions relating to the mental element required to attract criminal liability, the Working Party will assume that the definitions of specific offences (whether contained in Part II of the Code or some other enactment) will set out all the external elements (apart from general defences and conditions of liability) which are required to constitute the offence. These elements will include the consequences of conduct as well as the relevant surrounding circumstances. Thus, limiting propositions under this head to the mental element in crime, the following are the main questions to be considered:-

(a) How far is it desirable and practicable to eliminate such

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(11) The problems posed by the voluntary character of conduct, particularly in offences of "being found" or "being in possession", as well as cases involving hypnosis or automatism will be considered by the Working Party.

expressions as "wilfully," "maliciously" and "unlawfully" from the definitions of specific offences?

(b) How far can a general test of the mental element in criminal liability be formulated by reference to intention and to recklessness in relation to foreseen consequences of conduct? and in the case of recklessness should any distinction be drawn between foreseen consequences according to their certainty, their degree of probability or their mere possibility? (12)

(c) If a test of foresight, as indicated in (b) above, be adopted, has negligence any and if so what place in criminal offences? If offences of negligence are retained, should they be distinguished from cases involving a higher degree of blame and, if so, should they be distinguished in respect of the sanctions available?

(d) Should the test of foresight be applied to every prescribed ingredient in offences or should it be applied only to the consequences of conduct? If the latter, what test of the mental element should be applied to the other ingredients of offences? How far in this context would a test of negligence be appropriate?

(e) The definitions of specific offences will often hereafter, as at present, involve factors of knowledge or belief in relation to some of their ingredients. Should any general provision be made to deal with cases in which such factors are absent on account of ignorance or mistake? If such provisions, general or special, should be made, to what extent should they be related to negligence?

(f) Assuming that it is found necessary to retain specific

(12) See R. v. Mowatt [1967] 3 W.L.R. 1192.

offences not requiring culpability for some of their ingredients, can such cases be contained within general propositions under this subject or should they be left for treatment in the definition of such offences?

(g) Where an offence is one of strict liability, either in general or in respect of some of its ingredients, should protection be provided for persons who offend but who nevertheless are regarded as morally without blame? If so, should this protection be by way of making available limited defences of due diligence or by way of limiting the penalties available?

(h) Would it be desirable to include in propositions under this subject a vocabulary of expressions of the kind used or appropriate for use in relation to specific offences, particularly when these involve questions of ulterior or secondary intent, such as "dishonestly","fraudulently" and "knowingly"?

Subject 9 - Causal Relationship of Conduct to Result

(a) Whilst at first sight it seems obvious that the external circumstances which attract criminal liability must have resulted from the accused's voluntary conduct, there are clearly cases in which those circumstances can be seen to be in whole or part the product of intervening factors outside the control of the accused. How in such cases is the accused's culpability to be decided? The question of unsuccessful medical treatment of victims of offences against the person, for example, raises problems which fall to be considered in this context. (13)

(13) See R. v. Jordan (1956) 40 Cr. App. Rep. 152 and cf. R. v. Smith [1959] 2 Q.B. 35.

(b) In those cases where criminal liability is attracted by reference to a state of affairs (e.g. offences of "being found" in a place or "being in possession" of certain things) in which the accused is involved, it is desirable to clarify how far such liability arises when the state of affairs has come about without blame on his part(14)

(c) It not infrequently happens that the result of an accused's conduct was not intended by him or, in cases where recklessness or negligence provides the mental element for attracting liability, was not foreseen nor reasonably foreseeable. It may be necessary in this context to distinguish between cases where the resulting harm or injury is the same in kind (albeit lesser in degree or to a different person or thing) as that intended, foreseen or foreseeable and cases where that harm or injury is a result of a wholly different nature.(15) The principles governing culpability in such cases, described as the doctrine of "transferred malice", will be considered by the Working Party. They are, of course, closely related to the question of the mental element, which will be considered under Subject 8.

Subject 10 - Ignorance of law: Ignorance of Fact

While it is expected that much of the subject matter usually dealt with under the headings of ignorance and mistake will be covered by the Working Party's examination of the law and their formulation of propositions under Subject 8 (Culpability), the following specific questions will be examined under this head:-

(14) Cf. R. v. Larsonneur (1933) Cr. App Rep.74 with Lim Chin Aik v. The Queen [1963] A.C.160. See Also Note 11 at p.11.
(15) Cf. R. v. Pembilton(1874) L.R. 2 C.C.R. 119 and R. v. Latimer (1886) 17 Q.B.D. 359; and see R. v. Cunningham [1957] 2 Q.B.396.

ADDENDUM

See subparagraph (b) and footnote (14), page 14.

Whilst this Paper was being prepared for distribution, the House of Lords delivered judgment in the case of Warner, which relates to "possession" of dangerous drugs.

No full report has been published at the time of issuing this Paper, but the case appears to contain matter relevant to the whole field of strict liability, and the Working Party will of course be giving it very close attention.

Ignorance of Law

(a) Should ignorance of the criminal law in any circumstances constitute an excuse from criminal liability? (16)

(b) Should an accused who commits an offence but who has acted bona fide be allowed a defence if he did so on legal advice (17) or on the basis of an "official ruling"? (18)

(c) Should an accused who is charged with complicity in a statutory offence primarily designed for the regulation of a trade or business which he does not undertake have a defence if he acted innocently? (19)

(d) Should a distinction be drawn as a matter of general principle between ignorance of the criminal law and ignorance of the civil law which (when and because it impinges on factual situations affecting possible offences) may lead to exculpation on the ground of mistake of fact? (20)

Ignorance of Fact: Mistake of Fact

(e) Assuming that mistake of fact in relation to an ingredient in a composite offence operates to exculpate an accused of that offence, his conduct may nevertheless remain such that he should be found guilty of some lesser offence. For example, on a charge of assault upon a police officer in the execution of his duty, it may appear that the accused mistakenly thought he was assaulting a private person. Should provision be made for such cases to ensure conviction of the offence which was intentionally committed or is s.6 of the Criminal Law Act 1967 (which does not apply to summary cases) adequate for this purpose?

(f) Honest mistake has a particular application to some offences against property (e.g. dishonesty offences under the Larceny

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(16) Cf. Statutory Instruments Act 1946, s.3.

(17) See Johnson v. Youden [1950] 1 K.B. 544.

(18) Cp. American Law Institute's Model Penal Code Art. 2.04 (3)

(19) See Lord Devlin in the Times newspaper 19th April, 1957.

(20) Cf. R. v. Wheat [1921] 2 K.B. 119 (over-ruled by R. v. Gould [1968] 2 W.L.R. 643); R. v. King [1964] 1 Q.B. 285

Act 1916, or malicious damage offences under the Malicious Damage Act, 1861). It is generally held that the mistake need not be reasonable, but some authorities, in cases under the 1861 Act, are to the contrary. It is sometimes held that the reasonableness of the grounds of mistake is relevant only to its honesty. This problem will be examined under Subjects 8 and 18.

(g) The question how far ignorance of fact and mistake of fact can negative culpability will (otherwise than on the points mentioned in (f) above) be considered under Subject 8.

Subject 11 - Strict Liability

(a) Whilst Parliament has from time to time prohibited certain courses of conduct under criminal penalty without specifying any requisite mental state of the actor, it is not always recognized that the courts have added to an important extent to the corpus of strict liability offences, by interpreting many statutes in such a way as to dispense with mens rea, even where such expressions as "wilfully", "knowingly", "causing", "permitting" and the like are to be found in the relevant statutory provisions. At the same time, the courts have interpreted other statutory provisions creating offences in such a way as to require a mental element for culpability, even where no such requirement is expressly contained in the relevant legislation. For these reasons it is not always possible by referring to the language of a statutory provision to determine whether or not it creates an offence of strict liability. A similar difficulty also affects much of the area to which the principle of vicarious liability (Subject 13) has been applied by the courts.

(b) Since it is to be assumed that Parliament will, in the

future as in the past, enact absolute prohibitions and provide for vicarious responsibility ~~principles~~ in certain areas of conduct, the Working Party is concerned, in these areas, with three main problems. These are, first, the place of these concepts in the criminal law; secondly, the formulation of tests, which will show clearly whether or not a statutory offence is truly one of strict or vicarious liability; and thirdly, the formulation of "defences" which will enable some defendants without blame to escape conviction of such an offence, unless Parliament expressly excludes this means of protection.

(c) The questions arising under Subject 8 above assume blameworthiness as the mental element attracting culpabilit in many types of statutory offences. There may be cases where statutory control is required notwithstanding the absence of fault. Should there be a place in the criminal law for such strict liability offences? Could the purposes for which such offences are enacted be achieved by other means than through the machinery of the criminal law?

(d) If such offences are to remain within the ambit of the criminal law, should they be placed in a lower and less serious category than "crimes"?;[21] or should the penalties available in such cases stop short of imprisonment? Should the courts in any case be given additional powers to deal with strict liability offences in new ways, e.g. by making orders prohibiting future conduct of specified kinds[22] or orders of a declaratory

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(21) The American Law Institute's Model Penal Code classifies strict liability offences as "violations".

(22) See, for example, the powers to prohibit use of premises &c under the Factories Act 1961, ss.54 and 55.

nature or requiring payment to the State of profits made from a prohibited transaction?

(e) Is it possible to design tests to be applied to existing statutory offences to determine whether or not they import true strict or vicarious liability?

(f) Should "escape clauses" be applicable to all or only to some, and if so to which, types of strict liability offences? The Working Party will consider the practicability of standardising such clauses, either generally or for groups of offences.

(g) To the extent that "escape clauses" are incorporated into strict liability offences, the further question arises as to whether the burden of proof in this respect should be imposed upon the defence, either as a general rule or as a rule applicable to some, and if so to what, types of cases?

Subject 12 - Complicity

The changes affected by the Criminal Law Act 1967 necessitate a re-appraisal of the principles governing complicity in offences. This subject is linked with the later topics of "Incitement" and "Conspiracy" and the Working Party will take this relationship and the recommendations of the Criminal Law Revision Committee(23) into account in formulating general principles. So far as "complicity" itself is concerned, despite the unifying procedural provisions to be found in s.8 of the Accessories and Abettors Act 1861, and s.35 of the Magistrates' Courts Act 1952(re-enacting s.5 of the Summary Jurisdiction Act 1848) and the general "assimilation" effected by s.1 of the 1967 Act, it will be necessary to formulate clear rules by reference to which the culpability of the perpetrator of crimes, on the one hand, and of those who assist them to accomplish their offences, on the other, may be determined. With this object in mind, the Working Party will consider the following questions:-

(23) Currently considering conspiracy and common law misdemeanours.

(a) Would it be appropriate to classify persons involved in complicity in offences according to whether they are perpetrators or persons merely assisting, and upon what basis should such classifications be founded? How far, in this context, is "common design" a governing factor[24] and at what point in relation to the relevant conduct should the line be drawn between the two classes?[25]

(b) With regard to the class of "persons assisting", would it be necessary if such classification is appropriate, to draw any, and if so what, distinctions between "aiders and abettors", on the one hand, and those whose role is limited to encouragement or procurement of offences, on the other?[26]

(c) In relation to "encouragement" of perpetrators, should any distinction be drawn between those who actively assist in the preparations for crime, on the one hand, and those who merely lend encouragement by their presence at the time when a crime is being committed, on the other?

(d) What, if any, special provision should be made for a mental element of culpability in the case of persons assisting the perpetrators of crime? Should knowledge be an essential element in their liability[27] and, if so, to what factors should knowledge be related?[28]

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(24) See R. v. Smith[1963] 1 W.L.R. 1200; R. v. Anderson and Morris [1966] 2 Q.B. 110.

(25) See Tambiah v. The Queen [1966] A.C. 37.

(26) The old offences of accessory after the fact and misprision of felony have now been replaced by the new offences created by ss.4 and 5 of the Criminal Law Act 1967.

(27) As to knowledge, see e.g. Ferguson v. Weaving[1951] 1 K.B.814; R. v. McCarthy [1964] 1 W.L.R. 196.

(28) See R. v. Bullock[1955] 1 W.L.R. 1; R. v. Beetles(1966) Crim.L.R. 503

(e) What principles should govern the culpability of persons assisting the perpetrators of crimes when the crime actually committed is other than that which was contemplated by the assister? Is the test of the "scope of the concerted (or assisted) activity" satisfactory for this purpose?(29)

(f) Is the concept of abetting applied too widely in circumstances where the offence relates to one side of a bilateral transaction and the abettor provides the other side - as in some offences of "selling"? (30) How should such cases be treated? Should the liability of such an abettor be dependent upon the presence of a mental element on his part or should he be permitted to set up a defence of lack of knowledge?

(g) What rule should govern the responsibility of victims of crimes to which they are technically accomplices? Are there special factors to be taken into account in sexual offences?

(h) What provisions should be made to deal with the withdrawal from complicity of a person assisting a perpetrator before his offence is completed? How should the effectiveness of such withdrawal be tested? Should this depend upon the actual communication of the withdrawal to the perpetrator or upon some, and if so, what other action?

Subject 13 - Vicarious Liability

(a) In what circumstances is it justifiable to apply the principles of an employer's vicarious liability for the offences of servants or agents?

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(29) See R. v. Baldessare(1930) 22 Cr. App. Rep. 70: Davies v. D.P.P. [1954] A.C. 378.

(30) See e.g.Sayce v. Coupe[1953] 1 Q.B. 1.

(b) Should the principles be applied to any and, if so, to which "common law offences";[31] should they be applied to attempts or other inchoate crimes or to "aiding and abetting"?

(c) In the application of the vicarious liability principles to statutory offences, should any, and if so, what distinction be drawn between different types of offences, such as:-

(i) offences of strict liability generally (see Subject 11);

(ii) offences against the laws generally regulating trading where the servant's act according to the principles of civil law is that of the employer (e.g. Merchandise Marks Act 1887, as amended; Food and Drugs Act 1955; Weights and Measures Act 1963);

(iii) offences against the laws regulating the conduct of licensed activities of specialised kinds (e.g. Pharmacy and Poisons Act 1933; Road Traffic Act 1960-67; Licensing Act 1964; Betting, Gaming, and Lotteries Act 1963)?

(d) In the case of offences falling within (ii) and (iii) above, does a test of "delegation" serve a useful purpose? If so, in view of the current uncertainty,[32] how and with regard to what factors should such a test be formulated? Should the test be the same where a statute or other rule of law expressly requires knowledge on the part of the employer?[33]

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(31) i.e. offences other than those arising under "regulating" legislation; they are at present said (for different reasons) to apply to criminal libel, public nuisance and contempt of court.

(32) i.e. the doubts created, inter alia, by the different opinions expressed in Vane v. Yiannopoullos[1965] A.C.486 and see Ross v. Moss [1965] 2 Q.B. 396.

(33) See John Henshall (Quarries) Ltd. v. Harvey[1965] 2 Q.B.233 and cases cited therein: R. v. Winson [1968] 2 W.L.R. 113.

(e) Should the benefit of "escape clauses", and of what kind or kinds, be made available to employers prima facie open to be subjected to vicarious liability? Should such clauses be standardised and made of general application? Are there any and, if so, what offences in respect of which the provision of "escape clauses" of any kind is inappropriate?

(f) In relation to such "escape clauses" as may be provided in cases of vicarious liability, how should the burden of proof be dealt with?

[NOTE: It is considered that the liability imposed by s.55 of the Children and Young Persons Act 1933 (as now extended) upon parents in certain circumstances to pay fines or compensation monies primarily ordered against juvenile offenders is not appropriate for treatment as an instance of vicarious liability.]

Subject 14 - Liability of Corporations

(a) Should corporations in any, and if so, in what, circumstances be held criminally liable for the conduct of their officers, servants, agents or others in respect of offences? Should there be any distinction in such cases between strict liability and other offences?

(b) Should there be any distinction in this context between, say, "one-man" or family companies and other kinds of company, or between statutory corporations or public utility undertakers and "private"concerns?"

(c) If corporations should be under such liability, should this depend upon the presence of the following two factors:-

(i) the relevant conduct of the officer &c. having occurred in the course of his undertaking the corporation's business, and

(ii) his being a person concerned in the control and direction of the corporation's activities? (34)

(d) At what level of responsibility for activity should the line be drawn for the purposes of factor(ii) of paragraph (c) above? (35)

(e) Should the doctrine of ultra vires have any place in determining the criminal liability of corporations?

(f) Should this criminal liability be incurred when the relevant conduct of the officer &c. is in fraud of the corporation or otherwise directed against its interests? (36)

(g) Should there be any and if so what kind of "escape clauses" to protect against corporate criminal liability (e.g. where those who control or direct its affairs have used due diligence to prevent the relevant offence)?

(h) Should provision be made to ensure that the officer &c. whose conduct constituted the offence can be dealt with as the principal offender? If so, should the corporation in that case be immune from criminal liability?

(i) Should there be standard provisions designed to impose criminal liability on those officers &c. of a corporation who cause, connive at or approve of or, by failure in diligence, permit the commission of offences by other officers &c.?

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(34) D.P.P. v. Kent and Sussex Contractors Ltd. [1944] K.B. 146 and R. v. I.C.R. Haulage Co. [1944] K.B. 551

(35) See Magna Plant Ltd. v. Mitchell (1966) Crim L.R. 394 and John Henshall (Quarries) Ltd. v. Harvey [1965] 2.Q.B. 233.

(36) Cf. Moore v. I. Bresler Ltd. [1944] 2 All E.R. 515.

(j) In the case of such standard provisions, where should the onus of proof lie?

D. JUSTIFICATION AND EXCUSE

Introduction

(a) This division of Part I is designed to cover such "defences" to charges of crime as may be found to be generally available when the conditions of criminal liability appear to have been satisfied. Sometimes defences of this character have the effect of negativing the criminal character of the act (as with "consent" in the case of some assaults and rape or in some cases of offences against property). But other such defences are more concerned with defining situations in which an accused's conduct should be excused from punishment (as with acts done in defence of persons or property or pursuant to honest claims of right). The selection of subjects for inclusion in this division is not free from difficulty. If one excludes the proposed Subjects 21, 22, and 23 (Duress and Coercion, Necessity and Entrapment), the other matters provisionally listed appear to relate only to offences against the person and against property. If, therefore, the qualification for the inclusion of a subject heading in this division of Part I is that it should be a "generally available defence", subject heads 15 to 20 would appear to be excludable. On the other hand, many of the factors requiring to be taken into consideration in any detailed analysis of these particular subjects are common, whether the relevant matter of defence relates to offences against the person or against property. To that extent it may seem that these subjects can appropriately be treated within the framework of Part I

of the Codification rather than dealt with as exculpatory matters in the law relating to specific offences. It is also to be recalled that the subject of ignorance and mistake is frequently interlinked with many of the subjects provisionally listed in this division.

(b) Without prejudging the question of whether a statement of the principles governing each of these heads of "justification and excuse" should be included in Part I of the Codification, the Working Party takes the view that they can be usefully considered in the context of General Principles". The following matter is, therefore, designed to indicate the main questions which seem to emerge from a consideration of each listed subject in the belief that this treatment will assist in determining the aptness of including the whole or any part of each such subject in this division of Part I of the Code and the extent to which subjects at present listed separately can in the end be treated together.

Subject 15 - Consent

(a) In relation to this "defence", offences can be classified in two groups: (a) cases where the existence of consent negatives the essential element of the crime(e.g. rape, common and indecent assault, theft), and (b) cases where its existence does not preclude the evil or harm which the law establishing the specific offence is designed to prevent or punish(e.g. serious offences against the person or bigamy). Would it be practicable to formulate a test governing the vitiation of consent on the grounds of public policy?

(b) In those cases where consent involves justification or excuse, questions arise as to the effect of the

consensual acts relied on. Sometimes, as in the case of serious injury suffered in the course of lawful sports or under medical treatment, these questions are not difficult to answer,[37] since recourse may be had to the element of criminal intent. But in other cases (e.g. the role of consent in crimes of dishonesty,[38] or where the victim of hurt has taken part in a dangerous activity or performance) their solution is more difficult.

(c) Even where its existence negatives guilt, consent must be real, co-extensive with the conduct concerned, and given by a person of sufficient competence[39] and capacity with knowledge of the relevant surrounding circumstances and not induced by duress or deception. The formulation of propositions directed to these matters will probably present drafting rather than policy problems.

(d) Where a number of persons are involved in an offence, the effectiveness of consent may involve consideration of the relationship between each of those persons and the consenting party and the function of each of those persons in relation to the offence.

Subject 16 - Execution of Public Duty: Force in Crime Prevention and Law Enforcement

(a) Execution of Public Duty

There are a number of identifiable cases where conduct which would otherwise attract criminal liability occurs in the execution of public duty and thus may be justifiable,

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(37) Subject to Lord Denning's(dissenting) views expressed obiter in Bravery v. Bravery[1954] 3 All E.R. 59 at pp. 67 and 68

(38) See R. v. Hensler(1870) 11 Cox C.C. 570; and more recently Martin v. Puttick[1967] 2 W.L.R. 1131 on dishonesty offences.

(39) For this purpose"protected classes" of victims, particularly girls under age, are regarded as incompetent to consent. See also,as to capacity to consent, R. v. Howard [1966] 1 W.L.R. 13.

These cases are: first, when such conduct is required or authorised by laws defining the duties or functions of public officers or those who are entitled or obliged to assist them in the performance of their duties; secondly, where conduct occurs under cover of the law governing the execution of legal process; and thirdly where the law relating to the armed forces or the lawful conduct of war is involved, although the boundaries in this category are somewhat uncertain.

(b) Force in Crime Prevention and Law Enforcement

Similarly, there are a number of identifiable situations in which the use of force against the person or property of others takes place in the processes of crime prevention or law enforcement and is thus justifiable. Illustrations of these situations are the use of force to effect an arrest, to prevent an escape from custody and to prevent crime. These cases are closely related to those, of a more general character, mentioned in (a) above. They may, however, at the moment be appropriate for separate treatment, first since they are covered by the general provisions of s.3 of the Criminal Law Act 1967 and, secondly, because the use of justifiable force in these cases is essentially dependent upon the content of the existing or future law governing the lawful use of force in the particular context of crimes contemplated or committed.

(c) General Problems under (a) and (b) above

Both the above subdivisions of this subject involve the use of force against the persons or property of others and both of them seem to raise the following questions:-

(i) Is it necessary or desirable to specify the situations in which force may be used and the

subjects to which it may be applied?

(ii) Should prior warning be requisite to the use of force in any and, if so, in what cases falling within this subject heading?

(iii) Is it necessary to distinguish in any and, if so, in what respects between the use of force by public officers and by others and as to the latter between those called upon to assist public officers and those who act on their own initiative?

(iv) Is it desirable to attempt to define the character or extent of permissible force by reference to specified situations, or to its use by different categories of persons or to permissible methods or in any other way?

(v) Should the permissibility of force be related to what is reasonably necessary to attain the lawful object of its employment or be restricted to what is reasonable in the circumstances?

(vi) In what, if any, situations should the use of lethal force be permitted?

(vii) It may not infrequently occur in these cases that the person using or assisting in the use of force mistakenly believes that the situation is one in which his conduct would be protected against criminal liability on the grounds of justification and this mistaken belief may or may not be based upon reasonable grounds. How, in these situations, are the principles of justification and excuse to be applied to public officers and to other persons; or to other persons according to the capacity in which they have acted?

Subject 17 - Force in the Execution of Authority

There are a number of situations in which the use of force is accepted as justifiable under this heading. These situations present certain common features; first, that the user of force must be in a position of authority over the victim, although the source of this authority may widely vary(e.g. a parent, guardian, teacher, police or prison officer[40] or carrier of persons by land, sea or air;[41] secondly, that the force used must be intended to further a beneficial object, the nature of which, however, varies according to the relationship between the user and the victim(cf. teacher and pupil with master or pilot and passenger); thirdly, in most of these cases limits are set to the degree of force permissible and, where such limitations apply, the test of reasonable necessity or appropriateness to achieve the object does not seem relevant; fourthly, as under Subject 16 above, the question arises as to when, if at all, the use of lethal force is permissible. The Working Party will consider all these questions.

Subject 18 - Justification in Property Offences

Legal Rights of Interference with Property

(a) It is important to avoid confusing the problems arising in this subject with the wholly different question of "ouster of jurisdiction" of magistrates in cases of claims of title to real property.

(b) The cases in which this subject is relevant may be grouped under two heads; first, where the actor has a legal right to interfere with the property of others,e.g. in the self-help remedies of distress, abatement of nuisance and recaption of goods;[42] secondly where interference with

(40) e.g. forcible feeding of prisoners(Leigh v. Gladstone (1909) 26 T.L.R. 139).

(41) The masters of vessels have certain common law as well as statutory powers; the powers of commanders of aircraft are now set out in s.3 of the Tokyo Convention Act 1967.

(42) Recaption is now under consideration by the Law Reform Committee.

property of others takes place under an honest claim of right to possession or destruction. The situations in the first group can be dealt with in part by reference to the defences available in civil proceedings. Those in the second group could in most cases be dealt with appropriately under the heading of specific offences (cf. Clauses 2(1), 10(3), 11(6) and 20 of the Theft Bill). It may be that general provisions as to claims of right should, however, be included in the General Part.(43)

(c) The first subsidiary question which arises on this subject is how far honest mistake should affect the criminal liability of actors in situations covered in these two groups of cases. Whilst it appears in some cases to be accepted that the actor has sufficient justification for his conduct if he honestly believed in his claim and the reasonableness of his belief is irrelevant,(44) in the area, e.g., of malicious damage to property there is some confusion on this point.(45)

(d) The second subsidiary question concerns the manner and extent of the relevant interference. It is doubtful whether the limit of what is "reasonable in the circumstances" applies to these cases. Even threats of force, for example, do not invalidate an honest claim of right (See R. v. Skivington [1967] 2 W.L.R. 665).

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(43) Claims of right may be involved in offences against the person, e.g. when force is used in purported recaption.

(44) See R. v. Bernhard [1938] 2 K.B. 264 and Clause 20 of the Theft Bill.

(45) See Gott v. Measures [1948] 1 K.B. 234; Wells v. Hardy [1964] 2 Q.B. 447.

Subject 19 - Self-Defence - Person and Property

(a) From the victim's viewpoint this "defence" operates in two areas of offences, mainly those against the person but occasionally those against property. In the former area its characteristic feature is the self-protection of the actor(his person or property) against the actual or imminent use of unlawful force by the victim.(46) In the latter area its characteristic feature appears to be self-protection of the actor(person or property) against actual or imminent danger arising from the state or situation of the victim's property on the relevant occasion(e.g. his burning house or his straying dog),(47) and there is no question of unlawful force on the part of the victim. Cases in both these areas thus present similar features to those encountered in the subject of "necessity"(see Subject 22 below). From the actor's viewpoint the availability of the "defence" appears to depend in all cases upon the presence or imminence of a peril to him and also, where the defence is set up against a charge involving personal injury to the victim, the use or threat of force unauthorised by law by the victim. If this analysis be correct it is considered unnecessary to embark upon a detailed specification of the situations in which the "defence" may be available. It may also be thought unnecessary to specify in any detail the matters upon which reliance may be placed in support of self-defence. Do the factors of actual or

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(46) "Unlawful force" may depend upon the mental condition of him who employs force as in the case of a person of unsound mind or one whose conduct is affected by mistake.

(47) As to straying dogs, see Cresswell v. Sirl[1948] 1 K.B. 241.

imminent peril and unlawful force used or threatened by the victim against the actor provide a satisfactory basis for the operation of the principle?

(b) Should a common standard of permissible force be applied to all cases where its use is the subject of justification or excuse on the grounds of execution of authority, law enforcement and protection of persons or property?

(c) The effects of mistake and honest belief on the part of the actor as to all or some of the relevant ingredients of the situation have to be considered. If Gott v. Measures [1948] 1 K.B. 234 is correctly decided, the existence of these states of mind does not enable self-defence to be invoked unless they are reasonably founded. Gott v. Measures may, however, be out of line with the general trend of authority. Further, in Kenlin v. Gardiner[1968] 2 W.L.R. 129 at p.136, Winn L.J. expressed the view that such states of mind are relevant only to the degree of force used by the actor.

(d) Would it be useful to attempt a definition of the degree of force which may lawfully be used in self-defence? It is generally accepted that deadly force may be used against a person who is attempting unlawfully to evict the actor from his home(see R. v. Hussey[1924] 18 Cr.App. Rep. 160). Whether this is in accordance with present day social standards may be doubtful.

(e) The Working Party will consider whether any propositions covering this subject should deal with the question of provocation.(49) The recent case of Lane v. Holloway[1967] 3 W.L.R. 1003 is of interest here.

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(48) Cp. s.3 Criminal Law Act 1967.

(49) For example, should "provocation" be given a more extended application in the criminal law than is at present available?

(f) If the test of actual or imminent danger to the actor's person or property be the correct one to apply in determining the availability of the "defence", then the need to deal with the use of a whole range of devices such as mantraps, electrified fences &c. for protection against trespassers would have to be considered.

Subject 20 - Protection of Others -Persons and Property

Consideration of this subject involves many of the same problems as arise under Subject 19 (Self-Defence). Indeed s.3 of the Criminal Law Act 1967 makes no distinction as to the use of reasonable force, between cases where it is used in self-protection or defence, and cases where it is used to help others:-

(a) Although recent authority[50] suggests that the existence of a "special relationship" between the user of force and the person on whose behalf he intervened is irrelevant as a matter of law, should special statutory treatment be accorded to particular relationships (e.g.parent and child; teacher and pupil)?

(b) Where an actor has been called upon to assist in protecting another it may be right to regard him as identified with the person assisted so far as the limits of self-defence are concerned; but if in such cases mistake or honest belief becomes relevant and the states of mind of the two parties differ, what, if any, provision should be made to protect those who intervene under a misapprehension of the circumstances?

Subject 21 - Duress and Coercion[51]

Duress

Duress as a defence is founded on the assumption that the actor has to

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(50) R. v. Duffy[1967] 1 Q.B. 63 but cf. R. v. Wheeler[1967] 1 W.L.R. 1531.

(51) Coercion is used here to denote the special husband and wife situation.

choose between evils. It is, therefore, closely related to the use of force in protection of oneself or others (Subjects 19 and 20) and the defence of necessity (Subject 22). The Working Party will consider formulating general principles within which these special "defences" may operate.

Duress is generally thought to operate in two different ways. On the one hand its presence is said to bear upon criminal intent;(52) on the other hand, it may provide a justification or excuse for intentional conduct.(53) It is the latter to which the Working Party will devote its examination of this subject. The questions which will be considered specifically include:-

(a) Should the availability of duress as an answer to a charge be limited to criminal conduct induced by the use or threat of serious personal violence (including imprisonment) to the actor and his immediate family?(53) If it should be so limited, what persons should qualify as members of the family for this purpose?

(b) Should a subjective test be applied to duress? Alternatively, should it be available in all cases where a threat is of such a character that no person of reasonable firmness, in the actor's situation, would have been able to resist its impact?(54) But would it be right to apply an objective test to the actor's state of mind? If this approach were adopted, should the "defence" be available when the actor was at fault in placing himself in, or in failing to escape from, the situation in which his relevant conduct occurred?

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(52) As in R. v. Steane[1947] K.B. 997

(53) See e.g. R. v. Gill[1963] 1 W.L.R. 841

(54) The test of duress is formulated in this way in the American Law Institute's Draft Penal Code (Art. 2.09).

Coercion

This term is used to deal with the special "duress" position which may arise in the context of the marriage relationship. The present law is contained in s.47 of the Criminal Justice Act 1925 (15 and 16 Geo. 5 c.86) replacing the old presumption of coercion of wives by the defence (not available in treason or murder) that the offence charged was committed in the presence and under the coercion of the husband.(55) Authority is lacking as to whether this enactment places wives in a less favourable position than other persons and as to whether coercion in this context necessarily involves force or the threat of force to the wife's person or whether it may be of wider application.(56) The main questions arising are however:-

(a) Should the defence of coercion be merged with duress?

(b) If it is retained as a separate defence, should it be available in the case of all offences? and should the extent of its availability be defined?

Subject 22 - Necessity

Although it is sometimes said that the English law does not at present allow "necessity" as an answer to a criminal charge,(57) in the spheres of self-defence and defence of others (Subjects 19 and 20) and of duress (Subject 21) it accepts situations in which it was necessary for the actor to engage in the relevant conduct as a matter of choice between evils.(58) The American Law Institute's Draft Model Penal Code(59) proposes that the test of necessity should be whether the evil sought to

(55) See R. v. Holley[1953] 1 W.L.R. 199 showing that there must be evidence of actual coercion.

(56) R. v. Bourne[1952] 36 Cr. App. Rep. 125 suggests that the general principles of duress, in the wide sense, also apply to wives.

(57) See R. v. Dudley and Stephens (1884) 14 Q.B.D. 273. But cf. s.2(2) of the Antarctic Treaty Act 1967.

(58) In Stone v. Bastick[1967] 1 Q.B. 76 the facts did not admit of "necessity" being considered.

(59) Art. 3.02.

be avoided by the actor's conduct is greater than that designed to be prevented by the law creating the offence. The main questions which will, therefore, be considered are:-

(a) whether and in which situations,"necessity" should be a justification or excuse? If so,

(b) can general principles be laid down covering "necessity" which will also contain the presently accepted cases where it is a material factor? and

(c) how should "necessity" be tested?

Subject 23 - Official Instigation: Entrapment

It seems that English law does not recognise these matters as affording justification or excuse for crime,(60) Their presence, may however, negative an element in the offence(e.g. the absence of consent in some cases). The American Law Institute's Draft Model Penal Code provides that, in cases other than those involving actual or threatened bodily injury, an accused who proves "by a preponderance of evidence" that his conduct was in response to official entrapment is entitled to an acquittal. For this purpose entrapment occurs when an official or his accomplice induces or encourages the commission of crime by:-

(i) fraudulently inducing a belief that the conduct is not criminal;(61) or

(ii) using methods which create a risk that offences will be committed by persons other than those who are ready to commit them.(62)

Such situations, particularly the latter, are of particular

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(60) The body of English case law on the subject of "instigation" is mainly concerned with the liability of officials as principal offenders or accomplices and with the corroboration of their evidence. See Brannon v. Peek [1948] 1 K.B. 68; and Snedden v. Stevenson[1967] 1 W.L.R. 1051 and cases therein cited.

(61) Cf.Question (b) under Subject 10 at p.15 ante.

(62) Art. 2.13.

significance in strict liability offences.[63]

The questions for consideration are:-

(a) Should, in any and if so what cases, official instigation or entrapment be available as a matter of justification or excuse? and, on this assumption,

(b) what, if any, provision should be made to define the situations or limit the circumstances in which the excuse should be available?

E RESPONSIBILITY

Introduction

Subject 8 - Culpability - raises various problems in relation to the defendant's state of mind. The tests of culpability are primarily designed to deal with persons who are sane and sober - i.e. in full possession of their faculties. In this section, the questions raised concern two groups of persons: (i) those who, according to the tests considered under subject 8, may or may not be culpable but who by reason of mental disorder[64] or intoxication,[65] should be wholly or partially exempt from responsibility and (ii) those who are culpable but who, because of mental disorder or intoxication, present a disposal problem.

The age of responsibility is considered under subject 25.

Part I of the Code is in the main concerned with the determination of the guilt of offenders. Thus, the questions posed are generally relevant to the processes of the law up to the moment of conviction. It is nevertheless impossible fully to consider questions of responsibility without looking to the possible consequences (whether punishment, treatment, discharge or otherwise) of the extent to which any

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(63) See Browning v. J.W.K. Watson (Rochester) Ltd. [1953] 1 W.L.R. 1172 and French v. Hoggett [1968] 1 W.L.R. 94

(64) The words "mental disorder" are taken from the Mental Health Act 1959, and have the same meaning as in the Act.

(65) "Intoxication" includes such mental disturbances as may be attributable to the effect of drink or drugs.

defendant is treated as less than fully responsible.(66)

In this field, questions necessarily arise which are broader than those which lawyers are usually considered qualified to determine. For this reason, the Working Party in its examination of this subject will consult widely with non-legal interests.

Subject 24 - Mental Disorder: Intoxication

General

Mental disorder, including intoxication, is relevant both to the substantive law and to the disposal of offenders.

In the former case, the question is whether the state of mind of the accused, at the time of committing the offence, was such as to make it certain, probable or possible that he lacked the mental element or capacity to attract culpability.(67)

In the latter case, the question is whether, at the time of disposal of the charge,(68) the accused is subject to mental disorder (however caused) to such an extent as to affect the desirable method of dealing with him.

The above distinction is important in dealing, for example, with cases of intoxication. The occasional drunkard is as likely to commit offences under the influence of drink as is the chronic alcoholic. While the latter may be in need of institutional care, the former is not likely to be so.

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(66) For the disposal powers of the courts in relation to mental disorder, see s. 4 of the Criminal Justice Act, 1948; Ss. 60 to 65 of the Mental Health Act 1959; s. 5 of the Criminal Procedure (Insanity) Act 1964.
As to alchoholics, see Inebriates Acts 1879 and 1899; s. 6 of the Licensing Act 1902. Little use is made of these provisions. In 1965 only 2 and in 1966 only 17 orders were made "black-listing" habitual drunkards under the 1902 Act.

(67) The partial defence of "diminished responsibility" in homicide raises similar questions. S.2 of the Homicide Act 1957.

(68) Under s.60(2) of the Mental Health Act 1959, a Magistrates' Court can make a hospital or guardianship order without actually convicting the accused. See also s.26 of the Magistrates' Courts Act 1952.
The superior courts must, however, in general convict the accused before making such an order. S.60(1) of the 1959 Act. But see Criminal Procedure (Insanity) Act 1964.

Mental Disorder[69]

This expression may conveniently be employed to cover three different legal concepts the first is insanity in accordance with the McNaghten Rules; the second is "diminished responsibility" under s 2 of the Homicide Act 1957; the third is mental disorder within the meaning of s.4 of the Criminal Justice Act 1948 (as amended) and s.4(1), as attracted to s.60(1) of the Mental Health Act 1959. In the first two cases, the substantive law is affected; in the third, the disposal of offenders is involved. In the former cases the time to which regard has to be paid is the time of the offence. In the latter case, the relevant time is the time of disposal. Mental disorder which is relevant to disposal will frequently have existed at the time when the "offence" was committed. The special treatment in the substantive criminal law of persons of unsound mind may be said to be based upon two premises:-

(i) that such persons should be wholly or partly excused from punishment, in contrast with those who can be held fully responsible for their actions, but

(ii) that they have done something which the law forbids, and in some cases may be likely to commit further offences. It is therefore necessary to regulate their disposal in such a way as to protect society against the possible recurrence of their conduct, and it may be prudent to subject them to restraint with or without remedial treatment.

Assuming that this broad approach is justifiable, the substantive criminal law must be so designed as to identify those individuals who ought not to be held "fully responsible," whilst the provisions for the disposal of offenders should aim at the protection of society. The main questions which the Working Party will consider in relation to

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(69) The Working Party provisionally takes the view that "Unfitness to Plead" belongs to the Procedural Part of the Codification.

the substantive law will, therefore, be:-

1. How should the law take account of mental disorder?

   For example:

   (a) Should the law include an express provision exempting from criminal responsibility persons subject to mental disorder (see paragraph 2, below) or

   (b) would it be preferable simply to treat evidence of mental disorder as a matter to be taken into account in determining whether an accused person possessed the necessary mens rea?(70)

2. If the answer to 1(a) above is affirmative, should the express provision be:

   (a) The McNaghten Rules(71)

   (b) some alternative formula to the McNaghten Rules, but still of a relatively narrow kind, taking account of the effect of mental disorder on the power of control as well as on the reason(72)

   (c) a wider formula in general terms analogous with that contained in s.2 of the Homicide Act, 1957, or the formula recommended by the Royal Commission on Capital Punishment?(73)

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(70) See Durham v. United States 214 F. 2D 862 (1954)

(71) The Royal Commission on Capital Punishment(1953) Cmnd. 8932 agreed, with one dissentient, that "the test of responsibility laid down by the McNaghten Rules is so defective, that the law on this subject ought to be changed".

(72) The Atkin Committee on Insanity and Crime (1924) Cmnd.2005 recommended that "it should be made clear that the law does recognize irresponsibility on the ground of insanity when the act was committed under an impulse which the prisoner was by mental disease in substance deprived of the power to resist". See also R. v. King [1965] 1 Q.B. 443.

(73) "....whether at the time of the act the accused was suffering from disease of the mind or mental deficiency to such a degree that he ought not to be held responsible?" (See Cmnd. 8932, recommendation 19)

3. If the answer to 1(b) above is in the affirmative:

(a) Would this be consistent with the proposed principles governing culpability (see Subject 8, above)?

(b) Would any difficulty arise in relation to offences in which the necessary mens rea is recklessness or negligence?

(c) Should the tribunal of fact, if satisfied that the accused, owing to mental disorder, did not have the necessary mens rea,

(i) make a finding of fact to that effect, or

(ii) return a simple verdict of acquittal?

4. (a) What powers if any should the court have to make an appropriate order for the disposal of the accused with a view to the protection of the public,

(i) if provision is made for a special verdict?

(ii) if the verdict provided for is a simple aquittal?

Should the court in any case have residual powers to adjourn a case for enquiries into the accused's mental health?(74)

(b) Should all offences be treated alike, or should there be different methods of disposal for different types of offences?

5. (a) Should English law, like some foreign codes, provide for partial exemption from responsibility (diminished responsibility) as well as for complete exemption?

(b) Is there any scope, outside the field of homicide for diminished responsibility?

(c) If the answers to (a) and (b) are in the affirmative, should a relatively narrow test be prescribed, or should the question whether the accused is suffering from diminished responsibility be left in general terms for the tribunal of fact?

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(74) See s.4 of the Criminal Justice Act 1948; ss. 60 to 65 of the Mental Health Act 1959.

6. Should it be open to the prosecution as well as to the defence to raise the issue of mental disorder and to both to lead evidence directed to it?(75)

Intoxication

Because of the basic subject-matter of Part I, which, as has already been mentioned, is concerned with the determination of guilt, it is not considered necessary here to go into questions of modernising the law in the area of specific offences where drunkenness is part of the actus reus(76) nor to deal with the effect of intoxication upon provocation in murder (which latter will doubtless be considered by the Criminal Law Revision Committee in its examination of the law of offences against the person).(77)

The questions for consideration upon the substantive law relating to intoxication will be:-

(a) Should there be any distinction between voluntary and involuntary intoxication?

(b) Should the General Part of the Code adopt the general principle that evidence of intoxication, together with all the other evidence, should be taken into consideration in determining whether an accused possessed the necessary mental element to render his conduct criminal (the Broadhurst line); or should evidence of intoxication only be relevant where the ingredients of an offence involve an "ulterior" intent, as going to negative such intent(78) (the Gallagher line)? Which of these views

(75) Cf. Criminal Procedure (Insanity) Act 1964, s.6 Report of the Royal Commission on Capital Punishment, Cmd. 8932, paras 442-445.

(76) See Criminal Justice Act 1967, s.91

(77) See Law Com. 14 Second Programme Item XVIII. Paragraph 2(b)

(78) The former view is that which emerges from Broadhurst v. R. [1964] A.C. 441 at 463; the latter is the view taken by Lord Denning in Att. Gen. Northern Ireland v. Gallagher [1956] A.C. 349 at pp.379-383. These views are inconsistent.

conforms more closely to the proposed principles governing culpability (see Subject 8 above)? Do the "defences" of justification and mistake pose any special problems affecting or depending on the selection between these alternatives?

(c) Is any special provision required to deal with cases where the accused forms an intent and then deliberately becomes intoxicated so that, it is alleged, he is not fully aware of his conduct at the time of committing the offence?(79)

(d) Where the necessary mental element in culpability is recklessness (i.e. foresight and disregard of consequences) should intoxication be treated differently from its effect in "intent" cases?

(e) What should be the effect of intoxication in cases where negligence is the relevant mental element?

(f) Is there a need to make general provision for acts or omissions caused by intoxication and resulting in danger?(80)

(g) If the first view set out in (b) above be accepted, voluntary intoxication inducing such a state of mind as to negative mens rea may result in an acquittal. This might be regarded in many cases as undesirable particularly where the consequences of conduct are grave or where the state of intoxication in the surrounding circumstances might be regarded as blameworthy. The possible solutions would be:-

(i) to create a new offence of being voluntarily "intoxicated and dangerous;" or

(ii) generally or in relation to selected offences (e.g. offences against the person and malicious damage) to make it an offence to commit the actus reus whilst voluntarily intoxicated, or

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(79) As in Gallagher's case, above.

(80) As to "danger" see R. v. Pearce [1957] 1 Q.B. 150. For statutory provisions to this effect see s.17 of the Railway Regulation Act 1842 (c.55) and s.220 of the Merchant Shipping Act 1894 (c.60).

(iii) generally or in relation to specific offences, to attract punishment to voluntary intoxication where that condition has negatived the mental element;[81] or

(iv) to make provision on an acquittal, where the necessary mental element has been negatived by evidence of intoxication, for an order to be made on the lines of s.4 of the Criminal Justice Act 1948 or s.60 of the Mental Health Act 1959 in appropriate cases.[82] This might possibly be combined with a power in the Court to remand the accused for medical &c. reports with a view to considering treatment or supervision or both.[83]

Subject 25 - Age of criminal responsibility

The questions which arise in this part of the Code affecting children concern their capacity to commit crime.

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(81) The present German Penal Code Art. 330a:-
"330a. Total Intoxication

1. Anybody who by indulgence in intoxicating liquors or other intoxicants intentionally or negligently places himself in a state of irresponsibility, shall be punished by imprisonment or a fine, if in this state he commits a punishable act.

2. This punishment, however, may not exceed in kind and degree the punishment imposable for the intentional commission of the punishable act."

The draft German Penal Code 1962 Art. 351 broadly follows Art. 330a in a more detailed manner.

(82) It has been proposed, in the White Paper of August, 1965 "The Child, the Family and the Young Offender" (Cmnd.2742), that the age of criminal responsibility should be raised to 16.

(83) i.e. where the intoxication is an indication of mental disorder (q.v.) such as chronic alcoholism.

The present immunity of males under 14 from conviction of certain sexual offences will require separate consideration.(84) The questions of substantive law are:

(a) What should be the age of criminal responsibility?

(b) should the rebuttable presumption of innocence in children between 10 and 13 (as at present) be retained? If so between what ages?

F. INCHOATE CRIMES

General

A general question affecting all three subjects in this division of Part II is whether the principles relating to inchoate crimes should relate to summary offences.(85)

Subject 26 - Attempts

The main questions which the Working Party will consider under this head are:-

(a) What is the necessary mental element for attempt particularly in crimes of negligence or strict liability?(86) Does recklessness in relation to some of the elements of the offence, coupled with intent as to the consequences of conduct, suffice?

(b) Should a distinction continue to be drawn between mere preparatory acts, on the one hand, and acts which are sufficiently proximate to the substantive offence contemplated to constitute an attempt, on the other? If so, how should it be formulated?(87)

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(84) The Law Commission, in its Second Programme, recommended that the Criminal Law Revision Committee should review sexual offences.

(85) Cf. R. v. Curr [1967] 2 W.L.R. 595 as to incitement to summary offences.

(86) See Gardner v. Akeroyd [1952] 2 Q.B. 743 on the analogy of vicarious liability.

(87) Davey v. Lee [1967] 3 W.L.R. 105 (accepting Paragraph 4104 of Archbold 36th Ed.) lays down the test applicable by English authority; but the American Law Institute's Model Penal Code (Art. 5.01) provides a different approach to the problem. R. v. Gurmit Singh [1966] 2 Q.B. 53 is an example of a common law offence - procuring a rubber stamp with intent to forge - where the facts did not amount to an attempt.

(c) How far should it be a criminal offence to attempt the impossible? Should the law be different where the object, if attained, would not (despite the actor's intentions) have been criminal?(88)

(d) Should the abolition of the old doctrine of "merger" (effected by s.12 of the Criminal Procedure Act 1851 (14 and 15 Vict. c.100) and by s.6 of the Criminal Law Act 1967 (c.58) in relation to felonies and misdemeanours respectively) be extended to summary offences?(89)

(e) Should special provision be made to deal with:-

(i) accomplices who aid attempts by others, which fail; or

(ii) the position of people who abandon an attempt?(90)

Subject 27 - Incitement

This subject is related both to complicity(Subject 12) and to conspiracy(Subject 28) but is distinguishable owing to the requirement of the element of "persuasion" on the part of the incitor.(91) The specific questions to be considered under this head will (subject to any recommendations of the Criminal Law Revision Committee on common law misdemeanours) include the following:-

(a) Should uncommunicated incitement attract criminal liability?

(b) Have recklessness or negligence any relevance to the establishment of the mental element in incitement?(92)

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(88) See R. v. Ring & others (1892) 61 L.J. M.C. 116 and cf. dicta in R. v. Percy Dalton Ltd. (1949) 33 Cr. App. Rep. 102. Consider too, the situations in R. v. Deller [1952] 36 Cr. App. Rep. 184 and D.P.P. v. Head [1959] A.C. 83.

(89) See Rogers v. Arnott [1960] 2 Q.B. 244

(90) The American Law Institute's draft Code contains such provisions.

(91) R. v. Allen [1965] 1 Q.B. 130 indicates a rather shadowy line between "persuasions" and encouragement and R. v. Creamer [1966] 1 Q.B. 72 shows the difficulty of distinguishing between incitors and aiders and abettors.

(92) See R. v. Curr [1967] 2 W.L.R. 593 on "intent" in incitement.

(c) Should liability be affected by the non-commission, the impossibility of committing or a variation by the principal offender in committing an incited offence?

(d) Should provision be made to cover a withdrawal from incitement and in what, if any, circumstances should withdrawal be exculpatory?

(e) Should the crime of incitement be limited to the incitement of specific persons to commit specific offences?(93) Can incitement of a general character be appropriately dealt with under the head of specific offences (e.g. sedition, at common law; or incitement to racial hatred under s.6 of the Race Relations Act 1965)?

Subject 28 - Conspiracy

This subject is being considered by the Criminal Law Revision Committee. The Working Party is therefore deferring discussion of it for the time being.

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(93) See R. v. Most (1881) 7 Q.B.D. 244