A CRIMINAL CODE FOR ENGLAND?

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Introduction

England is one of the few countries in the world not to have a criminal code. A small number of other jurisdictions follow the common law tradition in this respect, but the great majority of the world's legal systems set out their principles of criminal liability in a single comprehensive text promulgated by the legislature. English criminal law, however, continues to be found in a variety of sources: statutes, delegated legislation, decided cases, judicial opinions, and the works of writers of authority. There is almost no system in the relative roles of these different sources. Thus most non-fatal offences against the person are defined in a statute of 1861, but the crime of assault, a crime whose existence is presupposed by the 1861 Act, is defined only at common law. Similarly the law of homocide is to be found partly in legislation and partly in the common law. The Homicide Act 1957 dealt with the penalty for murder and special defences to murder but did not define murder itself. It frequently astonishes foreign lawyers that murder, the most serious crime of all, has never been defined by an English Act of Parliament. The explanation for such anomalies is, as might be expected, historical. Criminal law was originally developed in England by judicial decision.[1] Parliament has intervened by legislation from the earliest times[2], but its interventions have tended to be reactive and unsystematic, influenced by considerations of political expediency and a preference for pragmatic as opposed to comprehensive law reform. There has been a general tendency since the middle of the nineteenth century to define specific offences by statute. However, as the examples of murder and assault show, the scope of such legislation is often incomplete. One further illustration of the haphazard relationship of common law and statute is provided by the law of inchoate offences. English criminal law theory generally regards these offences as part of the general principles of criminal liability. Such general principles are mostly to be found in the common law. The inchoate offence of incitement to commit an offence was devised by the judges of the seventeenth and eighteenth centuries.[3] It is still defined only by case law. The other inchoate offences of attempt to commit an offence and conspiracy came into existence in the same way.

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1. For a useful summary of the origins of criminal liability in England, see KAYE, 'The Making of English Criminal Law – The Beginning', 1977, *Criminal Law Review*.
2. See, e.g., the Treason Act 1351, A Criminal statute which is still in force.
3. Its existance was confirmed by the Court of King's Bench in the leading case of R. v. Higgins (1801) 2 East 5.

However, they are now defined mainly, but not, in the case of conspiracy, exclusively, by statute.[4]

It might be thought that if the process of legislative restatement of the criminal law were to continue eventually there would be a number of criminal statutes which might collectively approximate to a code. However, this would not be so. A code, as the English Law Commission has pointed out, is a «single, coherent, consistent, unified and comprehensive piece of legislation».[5] Even a consolidated collection of statutes would fail to meet these criteria. Because the statutes would have been drafted at different times by different persons, using different terminology and invoking different principles of criminal responsibility, they would inevitably lack consistency and coherence.[6]

There have been a number of attempts to codify English criminal law. It is the latest of these with which this paper is concerned. Two major efforts were made in the nineteenth century. The work of the Criminal Law Commissioners from 1833-1849[7] was a development which sprang from the efforts of penal reformers to curb the savage penal law which had resulted from earlier unchecked growth of the number of capital offences.[8] This work led eventually to the introduction of two codification Bills in the House of Lords in 1853. The Bills were circulated to the common law judges for their comments. The unanimously unfavourable reaction of the judges was sufficient to prevent the Bills gaining support in Parliament and they failed to make progress. Twenty-five years later, James Fitzjames Stephen, inspired by his experience as a draftsman of codes for India[9], produced a draft criminal code for England. This was subsequently amended by specially appointed Criminal Code Commissioners, then presented to Parliament in 1879.[10] A change of government followed in 1880 and the Criminal Code Bill was not passed. Stephen's code, although not enacted in England, did prove influential overseas. It formed (and still forms) the basis of the criminal codes of Canada, New Zealand and the Australian states of Queensland, Tasmania and Western Australia. Interest in codification in England lapsed after 1880 and revived only with the establishment of the Law Commission in 1965.

The Law Commission is a statutory body one of whose purposes is «to take and keep under review all the law of England and Wales with a view to its systematic development and reform, including in particular the codification of such

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4. For attempt see the Criminal Attempts Act 1981. For conspiracy see the Criminal Law Act 1977 Part I. The kinds of pressures which result in unsystematic legislation are well illustrated in Sir Derek Hodgson's account of the reform of the law of conspiracy: «Law Com. No. 76 – A Case Study in Criminal Law Reform» in *Reshaping the Criminal Law* (ed. P.R. Glazebrook, 1978) London, Stevens & Sons 240.
5. Law Com. No. 143 *Codification of the Criminal Law, A Report to the Law Commission* (1985) London, H.M.S.O. para. 16.
6. An example is given later in this article of the different rules governing the use of force contained in the Criminal Law Act 1967 s. 3(1) and the Criminal Damage Act 1971 s. 5(2) (b).
7. For an account of this work see the essay by Cross in *Reshaping the Criminal Law, op. cit.* 5.
8. See Stephen, *History of the Criminal Law of England* (1883) London, Macmillan Vol. I 470-475.
9. He was responsible for the Code of Criminal Procedure and the Indian Evidence Act.
10. Report of the Royal Commission on the Draft Code, Parl. Pap. (1878-79) XX. Stephen discussed his code in Ch. XXXIV of his *History of the Criminal Law of England, op. cit.* Vol. III.

law...»[11] In its Second Programme of Law Reform, published in 1968[12], the Law Commission set out as one of its objectives the codification of the criminal law. This followed a commitment to codification made by the government of the day[13] which has never been formally withdrawn or modified.

Progress towards codification has, however, been slow. Owing to limited resources and a wide range of other responsibilities the Law Commission was not able to devote itself to the work full-time. In addition the drafting task was delayed for some time by the need to consider whether certain areas of the criminal law should be substantially reformed before being codified. Eventually, in 1980, following an initiative by the Society of Public Teachers of Law, the Law Commission engaged the services of a small team of academic criminal lawyers to assist in the production of a draft criminal code.[14] This team first produced a report to the Law Commission in 1984 setting out the case for a code and describing its possible content and form. A specimen draft Bill was included in the Report. It contained 90 clauses comprising a reasonably complete statement of general principles and some representative specific offences illustrating the operation of the general part. The Commission published the Report a few months later in March 1985[15], having added an Introduction. This explained the history of the codification project and invited views on whether it would be worthwhile to continue work on it along the lines indicated by the Report. The objective was to stimulate as full a response to the Report's proposals as possible, particularly from judges and the legal profession who would be the main users of a code. A substantial number of individuals and organisations responded to the Law Commission's invitation to express their views.

The results of the consultation were sufficiently favourable to encourage the Commission to proceed with the preparation of a revised and expanded draft code. The academic team continued at the Commission's request to provide assistance with the work. The assistance included advice on policy issues and the drafting of clauses for the code Bill. This further collaboration between the Commission and the academic team bore fruit in April 1989 with the publication of a two-volume Report by the Law Commission.[16] Volume One reviews the history of the project and the case for a code. It describes the draft code which has been produced and sets out the text of the draft Criminal Code Bill. Volume Two consists of a detailed commentary on the provisions of the Bill.

The Report was laid before Parliament by the Lord Chancellor in accordance with the statutory procedure.[17] It is therefore now in the public domain. However, the Criminal Code Bill had not been introduced into Parliament and the

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11. Law Commissions Act 1965 s. 3 (1).
12. Law Com. No. 14, Item XVIII (1968) London, H.M.S.O.
13. The commitment was made by the then Home Secretary, Mr. ROY JENKINS M.P., in a speech delivered on 1 July 1967. The relevant part of the speech is set out in Law Com. No. 143, *op. cit.* para. 7.
14. The team originally consisted of Professor J.C. SMITH (University of Nottingham) the team's Chairman, Mr. (later Professor) I.H. DENNIS (University College London), Mr. P.R. GLAZEBROOK (Jesus College Cambridge) and Professor E.J. GRIEW (University of Leicester). Mr. GLAZEBROOK withdrew from the team in January 1984.
15. Law Com. No. 143, *op. cit.*
16. Law Com. No. 177 (1989) London, H.M.S.O.
17. Law Commissions Act 1965 s. 3 (2).

present government has given no indication that it will be introduced. It remains therefore as a legislative proposal which has yet to appear on the political agenda. I will say something about the prospects of implementation at the conclusion of this paper. First, however, it is necessary to consider the reasons why codification of the criminal law is thought to be desirable in England. Some comment will also be made on the principal features of the present draft.

Reasons for codification

Arguments in favour of codifying English criminal law exist at two levels. At the most fundamental level are what the Law Commission described as constitutional arguments of principle.[18] The principle of legality – *nulla poena sine lege* – requires that the law should be known in advance to those accused of violating it and that criminal liability should not be imposed retrospectively. Where judicial decisions constitute a source of law there is an inherent danger that the operation of case law will contravene the principle. An illustration of the danger occurred in the notorious case of *Shaw* v. *Director of Public Prosecutions*.[19] This arose out of the publication by the accused of a directory in which prostitutes advertised their services. He was charged with, inter alia, conspiracy to corrupt public morals. On appeal against conviction the House of Lords held that such an offence was known to English law. No precedent for this form of conspiracy could be found, but because conspiracy was a common law offence the judges were able to 'declare' that it extended to cover the accused's conduct. Thus he was convicted of an offence the definition of which he could not have known before he acted. Such a conviction would not be possible under a code in which all offences were carefully defined.

A related principle is that of legitimacy. The criminal law may be regarded as a set of notices by a state to its citizens. These notices set out the conditions under which citizens who do or fail to do certain acts may be punished by the state. In a state with a democratically elected legislature such notices should be deliberated upon and passed by that body, certainly whenever they involve an extension of liability. It is not acceptable that criminal liability should be created by unelected officials who may not have access to all the relevant policy considerations. Moreover law which has been created by the judges in the past ought to be put before the legislature for its approval. In an increasingly plural society there is a danger that the 'common law' of the judges will reflect only the values of one rather narrow and privileged group. It therefore becomes increasingly important that such law should be scrutinised and, where necessary, amended by Parliament.

These aspirations of legality and legitimacy argue for the replacement of common law as a source of criminal law by a modern statute. At a less fundamental level codification offers important instrumental benefits. These were identified in the Law Commission Report as accessibility, comprehensibility, consistency and certainty.[20] A few words will be said about each. Where the law is contained in a

18. Law Com. No. 177, *op. cit.*, para. 2.1.
19. [1962] A.C. 220.
20. See n. 18.

variety of sources a problem for all inquirers is access to the law. Even lawyers may find it difficult to discover what the law is in some cases. For interested non-lawyers such as journalists the difficulty may be acute. Common law is a particular problem in that even where relevant precedents are located it may be difficult to state the law with confidence. This is partly because the language of judgments is not generally regarded as authoritative in the same way as the text of a statute. Consequently the principles expressed are open to reformulation in later cases. The other difficulty is that English judges are often careful not to express principles in terms wider than necessary for decision in the instant case. This may make generalisation from the case problematic. It also raises the possibility of decisions on very different sets of facts coming into conflict at the level of abstract generalisation. More will be said later about this problem of consistency. For the moment it may be noted that a code would have the advantage of providing an agreed authoritative text which would serve as a starting-point for all inquirers. For the legal profession in particular the advantage would be considerable. As the academic team noted in their report 'the source of the general principles of liability would be found in little more than 50 sections of an Act of Parliament instead of many statutes, thousands of cases and the extensive commentaries on them to be found in the textbooks».[21] Similarly ancient statutes would conveniently be replaced by one modern Act.

The report also noted that accessibility is not of much value if what is found is incomprehensible or, worse still, misleading.[22] A major aim of codification should be to ensure that the law is as intelligible as possible. It ought to be capable of being readily understood not only by lawyers but also by the ordinary intelligent citizen. This is important at the theoretical level if the 'due notice' principle is to be meaningful. It is also extremely important in practice given the large numbers of lay persons involved in the administration of criminal justice in England. Jurors, lay magistrates, police officers and social workers need to be able to understand and apply the criminal law confidently and regularly.

This is not an easy claim to achieve. Some aspects of criminal law are highly complex. They involve sophisticated concepts and difficult distinctions. The English law on the effect of intoxication on criminal liability is a good example. The rules differ according to the nature of the crime involved and both the cause and the effect of the intoxication.[23] A code can only go so far in simplifying this kind of law which for policy reasons is conceptually complex. Nevertheless there are certain things which can be done. Rules can be stated in a few lines instead of having to be synthesised from numerous cases. They can be expressed in uniform language used as consistently as possible throughout the code. Archaic and technical terms can be avoided as far as possible. One example of an easy and desirable change which could be made would be to replace the old mens rea word 'maliciously' in the Offences Against the Person Act 1861. This no longer bears in law its ordinary meaning whereby it refers to a person's attitude of spite or ill will. Instead it has been given a cognitive interpretation. A person acts maliciously with

21. Law Com. No. 143, *op. cit.*, para. 1.4.
22. *Ibid.*, para. 1.5.
23. A good account of the law is given by Smith and Hogan, *Criminal Law* (6th ed. 1988) London, Butterworths 209-222.

regard to a particular harmful result if he intends to produce that result or is reckless whether he does so.[24] Recklessness denotes the unjustified taking of a foreseen risk.[25] 'Maliciously' therefore now presents a trap for the unwary. An inexperienced trial judge who directed a jury to apply this term according to its natural meaning would be guilty of a misdirection. It would plainly be preferable to legislate directly in terms of intention and recklessness.

A major criticism of current English criminal law is that it is inconsistent both in terminology and substance. This inconsistency is directly attributable to the piecemeal and unsystematic way in which the law has developed through its various sources. One of the most important benefits of codification would be the elimination of the anomalies and confusions caused by such inconsistency. Two examples may be given of the problem.

As I have just indicated two central concepts of mens rea in modern law are intention and recklessness. Many serious crimes require at least recklessness as an element of liability, others go further in requiring nothing less than intention. However, neither term is used consistently. Intention sometimes has a narrow meaning of purpose or aim[26] and sometimes it refers to 'specific intent'.[27] This is a cloudy notion which the courts say is not restricted to purpose or aim[28] but what else it covers the courts mysteriously refuse to clarify. The jury may be told that a specific intention to cause a harmful consequence may readily be inferred from the accused's foresight that such a consequence was virtually certain to result from his act.[29] However, the inference is one of fact, and in deciding wether to draw it the jury is directed to take into account any explanation given by the accused of his real 'intention'.[30] Not surprisingly this has left many commentators exceedingly puzzled because it seems to reintroduce the idea of the accused's purpose or aim from which intention has been distinguished. The authors of the leading English textbook on criminal law conclude that faced with such a direction 'the jury can do no more than decide to call the defendant's awareness of virtual certainty 'intention' if they think that, in all the circumstances of the case, he ought to be convicted of the offence charged; and not to call it intention if they think he ought to be acquitted'.[31]

Recklessness is even more confusing. This term now has three different meanings depending on the offence in question. In non-fatal offences against the person, when it is used either by itself or to explain the concept of malice, it means deliberate and unjustified risk-taking.[32] The accused must have foreseen the risk of a particular harm resulting from his act and must have taken that risk without justification. In offences of criminal damage and manslaughter recklessness has a wider meaning.[33] It signifies both the kind of subjective recklessness just descri-

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24. *R.* v. *Cunningham* (1957) 2 Q.B. 396.
25. *W (A Minor)* v. *Dolbey* (1983) 88 Cr. App. Rep. 1; *R.* v. *Morrison* (1989) 89 Cr. App. Rep. 17.
26. *R.* v. *Ahlers* [1915] 1 K.B. 616; *R.* v. *Steane* [1947] K.B. 997.
27. *R.* v. *Moloney* [1985] A.C. 905; *R.* v. *Hancock* [1986] A.C. 455.
28. *R.* v. *Moloney* [1985] A.C. 905.
29. *R.* v. *Nedrick* [1986] 1 W.L.R. 1025.
30. *R.* v. *Moloney* [1985] A.C. 905, citing *R.* v. *Steane* [1947] K.B. 997.
31. Smith and Hogan, *op. cit.*, 57.
32. See n. 25.
33. *R.* v. *Caldwell* [1982] A.C. 341; *R.* v. *Seymour* [1983] 2 A.C. 493.

bed and the taking of a risk which would be obvious to a reasonable person in circumstances where the accused has given no thought to whether there is a risk. In the case of *R.* v. *Seymour* Lord Roskill stated that this meaning applied whenever recklessness was used in the criminal law unless Parliament had otherwise ordained.[34] But this dictum is demonstrably inaccurate. It is contradicted by the law on non-fatal offences against the person and by the law of rape where the Court of Appeal has rejected so-called objective recklessness in favour of a third meaning based on the accused's absence of belief in consent.[35]

This inconsistent use of terminology in different offences is a product of the tradition of mixing common law with piecemeal statutory revision without providing authoritative general definitions. It is unfortunate, looking at the matter with hindsight, that the Law Commission did not include a definition of recklessness in the Criminal Damage Act 1971. A definition in subjective terms, which is what the Commission intended[36], would have precluded the objective interpretation set out in *R.* v. *Caldwell.*[37] A great deal of time, expense and difficulty would thereby have been saved.

Inconsistency in terminology may have other unfortunate consequences. It is confusing for jurors and magistrates to be told that recklessness means one thing in one offence, and something different in another offence. The confusion is made worse when both offences are charged against the same accused. There is then a danger that the law begins to look seriously defective in the eyes of the lay person. Any intelligent juror or magistrate might well ask why it is that the mental element for criminal damage is wider (and therefore the offence is easier to prove) than it is for malicious wounding which carries a lower maximum penalty. If no explanation can be given, other than historical accident, then respect for the law may well be diminished.

This line of argument shows that inconsistency in terminology may well lead to a problem of inconsistency in substance. English law now appears to protect property more than persons. This is so for two reasons. The first is the point just noted – that the mental element for criminal damage to property includes an objective element which is easier to prove than the subjective recklessness required for an offence against the person. Accordingly, if the accused fires what he wrongly believes to be an unloaded gun at the victim and shoots the victim in the face, it is easier to convict him of damaging the victim's spectacles than of causing injury to his fase. Secondly the law on defences is different. A man may legitimately do more to defend his property than he may to defend his person. In relation to his person the law allows him to use (objectively) reasonable force to prevent crime or in self-defence against an unlawful attack.[38] But, in relation to this property, the law allows a lawful excuse for damaging another's property if he believes that

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34. [1983] 2 A.C. at p. 506.
35. *R.* v. *Satnam S. and Kewal S.* (1984) 78 Cr. App. Rep. 149; *R.* v. *Breckenridge* (1984) 79 Cr. App. Rep. 264; *R.* v. *Taylor* (1984) 80 Cr. App. Rep. 327.
36. Law Com. No. 29, *Criminal Law: Report on Offences of Damage to Property* (1970) London, H.M.S.O. para. 45 and Law Com. Working Paper No. 31, *The Mental Element in Crime* (1970) London, H.M.S.O. 30-31.
37. [1982] A.C. 341.
38. Criminal Law Act 1967 s. 3(1); Smith and Hogan, *op. cit.*, 240-245.

his own property is in immediate need of protection (not necessarily against unlawful attack) and if he believes that the means of protection are reasonable (not necessarily objectively reasonable). Consequently, where the accused is attacked by his neighbour's dog, it is debatable whether he may kill the dog to protect his legs (was this in fact necessary and reasonable?), but he may certainly kill the dog to protect his trousers if *he* believes that this is a reasonable thing to do in the circumstances.[39]

This analysis raises a major problem of the law's values. It is surely the case that interests in property deserve no greater protection than interests in personal security. Arguably they deserve less. It follows that one or other area of the law needs amendment in substance. The law is in this state because of the tradition of piecemeal development, and because in 1971 Parliament did not consider the relationship of the defense of lawful excuse under the Criminal Damage Act to the law on use of force in prevention of crime or private defence. The policy issues involved plainly ought to be debated in Parliament, but it is only the introduction of a draft criminal code Bill which can provide the appropriate context.

Finally there is the aim of certainty. One objective of the draft criminal code is to increase the certainty of the law by filling gaps left by the accidents of litigation and piecemeal legislation. For example, in relation to the criminal liability of corporations the code clarifies a number of points, including possible defences, left unclear by the present law.[40] In other areas such as complicity in crime the code attempts to resolve uncertainties created by the complexity and obscurity of some of the existing law.[41] The code may also promote certainty indirectly by preventing retrospective amendment of the law by judicial decision. This is always a potential problem with the common law tradition. The Law Commission's Report summarises the point in this way. (Footnotes have been omitted).

'The common law method of resolving uncertainty by "retrospective" declaration of the law is objectionable in principle. It may lead to the conviction of a defendant on the basis of criminal liability not known to exist in that form before he acted. Much criticism was directed at the decision of the House of Lords in *D.P.P.* v. *Shaw* where this was generally perceived to have happened. On the other hand, the effect of an appeal may be to narrow the law retrospectively, either by acknowledging the existence of a defence to criminal liability which was not previously recognised or by altering the definition of a criminal offence. In the recent cases of *Maloney* and *Hancock* the House of Lords restated the meaning of 'intention' as the mental element for murder. In doing so, the House disapproved the terms of a direction to a jury given ten years earlier in the leading case of *Hyam*. Such a change may give rise to a suggestion not only that the conviction in the earlier case was unsafe but also cast doubt on the validity of the convictions in other cases during the intervening ten year periode which had been based on the

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39. See the Criminal Damage Act 1971 s. 5(2) (b) and Smith, 'Codifying the Criminal Law' [1984] *Statute Law Review* 17 where this vivid example is given.

40. Law Com. No. 177, *op. cit.* Criminal Code Bill (hereafter referred to as CCB) cl. 30.

41. CCB cl. 27. A particular difficulty at the present time concerns the mental element required for liability as a secondary party. The cases of *Director of Public Prosecutions for Northern Ireland* v. *Lynch* [1975] A.C. 653 and *Gillick* v. *West Norfolk and Wisbech Area Health Authority* [1986] 1 A.C. 112, decided on very different facts, conflict at the level of principle.

terms of the direction approved in the earlier case. Such suggestions, which are inherent in the development of the law on a case by case basis, must undermine confidence in this important branch of the law. Statutory changes, on the other hand, do not have retrospective effect. They come into force only after full Parliamentary debate with the commencement of the provisions of the statute. Earlier cases are unaffected.'[42]

Form and content of the draft code

The draft criminal code Bill contains a total of 220 clauses. It is divided into two Parts. Part I (clauses 1-51) covers general principles of criminal liability and Part II (clauses 53-220) contains specific offences. The latter are grouped in five Chapters dealing with offences against the person, sexual offences, theft, fraud and related offences, other offences relating to property and offences against public peace and safety. These groups include the indictable offences most frequently met with in practice. Collectively they comprise 90-95% of the work of the English criminal courts in relation to such offences.

It will be appreciated immediately that the draft Bill is in fact only a partial codification. Some serious offences are not presently included because they arise infrequently in practice and it has not been considered worthwhile to work on them at this stage when it is not clear whether the code will be legislated at all. Once the principle of codification has been accepted and the draft Bill passed by Parliament such offences can be added to the code in a rolling programme of legislation. The Law Commission's Report envisages that offences to be added later would include offences against the international community, offences against the State, offences relating to the administration of justice and offences agains public morals and decency.[43]

This would still leave a very large number of offences outside the code. The great majority of them would be regulatory offences concerned with such matters as road traffic, licensing, food and drugs, health and safety, and so on. These offences, which cary considerably in their gravity – some are indictable and carry substantial maximum terms of imprisonment – are currently contained in specialist legislation. Frequently they cannot be understood without reference to other technical or regulatory provisions of the legislation. It is thought that it would be more convenient to the users of such legislation (the legal profession, enforcement officers, businessmen and so on) to leave the offences in place. This kind of legislation does not generally present the kind of practical problems discussed above. It is usually modern, regularly updated and discussed in trade journals and official circulars. Abstracting even the more serious offences from their context for inclusion in the code might entail the removal or duplication of a good many other explanatory provisions. There seems little point in burdening the code with these.

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42. Law Com. No. 177, *op. cit.*, para. 2.11.
43. *Ibid.*, Appendix C.

Other matters excluded from the code in its present form are evidence and procedure and disposal of offenders. It is envisaged that they would be dealt with in Parts III and IV of a comprehensive criminal code.[44] No work has yet been undertaken on these Parts.

The provisions of the code mostly restate existing law. This reflects the belief of the Law Commission and the academic team that codification is a different process form law reform.

'Codification... is essentially a task of restating a given branch of the law in a single, coherent, consistent, unified and comprehensive piece of legislation. Codification does not necessitate reconsideration of the relevant law with a view to reform: it may entail no more than a restatement of existing principles.'[45]

In setting out to codify the existing law the Law Commission accepted the academic team's view that the fundamental principles of the present law are well settled.[46] It was agreed that it would be neither politically feasible nor desirable to depart from them. Accordingly the code adopts such familiar principles as that in general fault is a necessary condition of criminal responsibility.[47] Strict liability will continue to be regarded as exceptional. A subjective theory of fault in cognitive terms is proposed.[48] Subjective recklessness will be the minimum fault element for offences in the code unless otherwise stated. Secondary parties will continue to be liable to the same extent and to the same penalties as principal offenders.[49] The age of criminal responsibility remains at ten.[50] A person who acts under a mistake of fact will generally be treated according to the facts as he believed them to be.[51] In the law of defences no formal distinction is made between justifications and excuses.

However, the draft code also contains a substantial amount of law reform. Some of this has been necessitated by the aims of codification itself. Where inconsistencies exist policy and terminological choices have had to be made. For example, the Law Commission has recommended a change in existing law so that the subjective theory of fault will apply to offences of damage to property as well as offences of injury to persons.[52] This does not of course preclude Parliament choosing to maintain the existing policy of objective liability for criminal damage. But the choice will have to be made expressly and will have to be signalled by the use of a fault term other than recklessness. The latter, as indicated above, is defined for use in the code in subjective terms. The code also abolishes or amends a few rules of existing law which have no coherent justification and which are explicable only on historical grounds. An example is the rule that the offence of conspiracy does not extend to agreements between spouses. The exemption is anomalous, particularly given that one spouse can be liable as a secondary party to an

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44. *Ibid.*, Appendix C.
45. *Ibid.*, para. 3.28.
46. *Ibid.*, para. 3.30.
47. CCB cl. 20.
48. CCB cl. 18.
49. CCB cl. 25.
50. CCB cl. 32.
51. CCB cl. 41.
52. Law Com. No. 177, *op cit.*, paras. 3.31 and 17.6.

offence committed by the other. The effect of the code is to remove the exemption.[53]

In a number of areas the draft code incorporates recommendations for the reform of the law made in recent years by official bodies such as the Criminal Law Revision Committee[54] and the Law Commission itself. The justification for this is as follows:

'Where the law has been scrutinised, found to be defective and reforms recommended, it would be wrong to recommend the perpetuation of the existing law.[55]

In this way significant reforms would be introduced into the law of offences against the person[56], sexual offences[57] and the law relating to the effect of mental disorder on criminal liability.[58] In summary therefore, although the draft code is based on a guiding principle of restatement of existing law, it also acts as the vehicle for a considerable quantity of law reform. Some of this is controversial and may have implications for the implementation of the code.

It is perhaps worth concluding this section of the paper with a brief word about the drafting style of the draft code. English statutes have frequently been criticised for their opaque or convoluted language and for excessive detail. In drafting the code the Law Commission and the academic team have adopted a policy of using as lucid and economical a mode of statement as the subject-matter permits.[59] The needs of users of the code have been borne constantly in mind. Thus the draft tries to express propositions simply and shortly, using numbered and lettered paragraphs wherever possible to break up more complex statements. Many marginal notes are included to increase comprehension. Cross-references usually include an indication in parentheses of the subject-matter of the provision referred to. Clumsy and confusing references to other provisions which qualify the one under discussion are generally avoided. This style is the one recommended by the academic team in their Report to the Law Commission.[60] It attracted very favourable comment on consultation.[61]

Prospects for implementation

At the time of writing it is exactly two years since the draft code was published. The Bill has not been introduced into Parliament. The principle of codification has not even been debated. It is hard not to feel a sense of disappointment, even

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53. CCB cl. 48.
54. This is a standing committee of experts in the criminal law which reports to the Home Secretary on matters referred to it by him from time to time.
55. Law Com. No. 177, *op. cit.*, para. 3.34.
56. Following the recommendations of the Criminal Law Revision Committee: *Forteenth Report, Offences Against the Person* (1980) Cmnd. 7844, London, H.M.S.O.
57. Following the recommendations of the Criminal Law Revision Committee: *Fifteenth Report, Sexual Offences* (1984) Cmnd. 9213, London, H.M.S.O.
58. Following the recommendations of the *Report of the Committee on Mentally Abnormal Offenders* (the Butler Report) (1975) Cmnd. 6244, London, H.M.S.O.
59. Law Com. No. 177, *op. cit.*, para. 3.39.
60. Law Com. No. 143, *op. cit.*, paras. 2.14-2.20.
61. See n. 59.

anger, that the fruits of so many years' work have been received with such apparent indifference. The Home Office, as the governement department most concerned with issues of criminal law, has studiously refrained from committing itself one way or the other on codification. It is clear that the subject has not yet made its way on the political agenda.

A number of reasons may be guessed at for the failure of the code to make political progress. Firstly, the size and importance of the Bill mean that it would take up a great deal of legislative time. With the government already committed to a heavy legislative programme over the last two Parliamentary sessions such time has not been available. Since codification will not attract many votes, it is unlikely to become a legislative priority in the future. Secondly, even if time had been or were to become available it is doubtful whether the Bill would be introduced in its present form. As indicated above, much of the law reform in the code is controversial. This is particularly true of the chapter on sexual offences where some of the proposals, such as decriminalisation of incest between adult siblings, are certain to provoke strong feelings among MPs of all parties. Therefore it is likely that this part, and possible other parts, of the draft Bill would be dropped in the interests of the Bill making progress at all. Thirdly, codification as a cause lacks a powerful constituency or pressure group. It is warmly supported by the Law Commission and by most academic lawyers but they do not speak for the legal profession as a whole. Judges and practitioners have become accustomed to the present system. Although many of them might admit its defects and welcome the principle of codification, as they dit in the consultation on the academic team's Report, it remains true that there is no great movement for change within the profession. In addition some senior judges are known to fear an upsurge in the number of appeals as practitioners sought to test the provisions of a new code.

All this adds up to a somewhat gloomy prognosis. It is certainly my belief that the draft code is most unlikely to be enacted in its published form. However, this is not to say that none of it will ever be implemented. There is, for example, an overwhelming case for reviewing and modernising the law of homicide and offences against the person. If this is done, as the Law Commission hope it will be[62], the draft code is likely to be the starting-point for any new legislation. It is not implausible that most of the code would eventually be implemented in this rather indirect piecemeal way. Meanwhile the code continues to stand as a model for what English criminal law might look like in a more rational world.

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62. Law Com. No. 195, *Twenty-Fifth Annual Report 1990* (1991) London, H.M.S.O. paras. 2.15 and 2.16.