NECESSITY AND MISTAKE OF LAW IN THE DRAFT CRIMINAL CODE

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The Law Commission, responding to a proposal of the Criminal Law Sub-Committee of the S. P. T. L., appointed a Working Party of four members of the Society (Professor J.C. Smith, Professor E. Griew, Mr. I.H. Dennis and Mr. P. Glazebrook),¹ the core of its terms of reference being to formulate, in a manner appropriate to a Criminal Code, the general principles which should govern liability under such a code. The Working Party has now reported to The Law Commission, and its report, with an introduction by The Commission, has been published.² The document is of great significance to the development of criminal law. It may be that a piece of legislation based upon the Draft Criminal Code Bill³ will be enacted. Even if not enacted, it is sure to be cited frequently in court⁴ and elsewhere.

Now the Report, and the appended Draft Criminal Code, require to be evaluated on a number of levels. There must be consideration of each recommendation or group of recommendations, as to its substance, the clarity of its drafting, and whether the clause as drafted achieves the desired objective. There can also be much more speculative criticism, perhaps more from students of law reform,⁵ revision and codification than of criminal law, of the limited objectives

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¹ Mr. Glazebrook subsequently withdrew.
² Law Comm. No. 143, Criminal Law: Codification of the Criminal Law (1985), to which subsequent paragraph numbers (unless otherwise stated) refer.
³ Pages 167-246 of the report contain a draft Criminal Code Bill, to which subsequent clause numbers (unless otherwise stated) refer.
⁴ Note the way in which Law Commission reports have affected the development of the law. Thus, for example, R. v. Graham [1982] 1 All E.R. 801 relies upon Law Commission No.83, Criminal Law: Defences of General Application (1977) para. 2.28.
⁵ "Law Reform" widely understood to include revision and restatement. The Working Party distinguishes (para. 1.10) codification (a process of rational reconstruction of the existing law, with the addition of the recommendation of any recent Law Reform bodies not hitherto enacted) from Law Reform narrowly understood, which may involve working out answers de novo to the entire set of problems.
and theoretical assumptions of the Code. But there is a further means of assessing the Draft Code, which will be adopted in this essay. This is to test different areas of the report and Draft Code for internal consistency of approach, whilst being conscious that any recommendation is open to evaluation in the light of developed criminal law theory and that the inquiry may throw light upon the codification process generally. The two areas to be considered are mistake of law and necessity.

Two Defences Compared

As to mistake of law the Working Party notes that:

There is abundant authority that as a general rule the accused's ignorance of the offence he is alleged to have committed, or his mistake as to its application, will not relieve him of liability.

Whilst expressing some sympathy with arguments for a defence of mistake of law, at least in some areas, the Working Party takes the view that to draft an appropriate defence:

... would be to embark upon a major exercise of law reform. There is no English authority supporting a general defence of excuseable mistake of law and no recommendation from an official committee to which we could give effect. The topic has not in fact been considered by either The Law Commission or the Criminal Law Revision Committee. The introduction of a defence to cover even the two cases referred to above (reliance upon official or judicial statements) raises major questions of policy requiring detailed consideration and extensive consultation. We ourselves cannot do more than draw attention to the case for reform in the hope that the topic will be taken up elsewhere. The Code therefore restates the orthodox position in English law.

6 One such assumption, with which it is hoped to deal elsewhere, is that "rules" and "principles" are identical and that principles are usefully susceptible of statutory statement.
7 Para. 9.2.
11 Para. 9.6.