

CONFERENCE REPORT

DOES JERSEY NEED A CRIMINAL CODE?

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1 The 2015 Annual Conference of the Institute of Law took place on 2 November 2015. “Does Jersey need a Criminal Code? Current Issues in Criminal Law” included talks by high-profile international and local speakers on a wide range of legal issues and areas. Speakers included Law Commissioners, legal academics, and leading Jersey advocates, and there were opportunities for delegates to discuss legal problem areas and potential reform.

2 The study and application of criminal law in Jersey involves certain fundamental challenges. There is no written Code, while there are many relevant Laws they are patchy in their coverage, and the closest thing to a relevant textbook is an edition of *Archbold* which predates the English Theft Act 1968, used in combination with notes passed down through law firms by generations of advocates. The sum total of this raises an undeniable issue with the principle of legal certainty, as represented both in the common law and as represented in human rights guarantees. Writing down legal concepts serves three important practical functions: it helps to make the law clear and accessible to the public; it guides the law to be predictable and it facilitates the prosecution of offences by the public authorities.¹ The rule of law requires clear and certain offence definitions both in written and judge-made laws.² The principle of legality, often referred to by the Latin

¹ See Elliott and de Than, “The Case for a Rational Reconstruction of Consent in Criminal Law” (2007) 70 *Modern Law Review* 225–249 for detailed discussion of the arguments in favour of a coherent, internally-consistent and comprehensive approach to criminal offences and defences.

² HLA Hart has observed (*The Concept of Law* (1961) 38–39, quoted by J Horder in “Criminal Law and Legal Positivism” (2002) 8 *Legal Theory* 221 at 223)—

“[T]he characteristic technique of the criminal law is to designate by rules certain types of behaviour as standards for the guidance . . . of members of society [T]hey are expected without the aid or intervention of officials to understand the rules and to see that the rules apply to them and to conform to them”

maxim nulla poena sine lege, was recognised by Glanville Williams as an important tenet of criminal law.³ Human rights law has taken this further: Article 7 of the European Convention on Human Rights⁴ has been held to include the rule that criminal offences must be clearly defined (by the law, not by a jury), such that “the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him criminally liable”.⁵ In respect of many offences, there are grave doubts as to whether a citizen of Jersey could reasonably predict whether a particular action would involve the possibility of criminal liability. An inquiry into the criminal law of Jersey in 1847 recommended a codification process since so little of the relevant law is written down anywhere accessible.⁶

3 The movement for codification of the criminal law reflects the scholarly movement supporting consistency, clarity and simplification within a legal system. Thus, the Law Commission of England and Wales set out the aims of its draft Criminal Code, as being “accessibility, comprehensibility, consistency and certainty”.⁷ The arguments for and against codification, and the wide range of forms which the latter may take, were assessed by the conference speakers, and will appear in detail in the official conference volume in due course.

4 The conference was introduced by the Bailiff of Jersey, William Bailhache, who outlined the history of attempts to codify England’s criminal law, and the challenges faced by the judiciary in the present system. Without a Code, the increasing volume of legislation has led to problems for judges on a day-to-day basis, to a lack of certainty in legal principles, and to frustration as courts feel constrained by the shackles of legislation, particularly in relation to sentencing. Criminal law in particular would be aided by the existence of a clear, accessible and certain source such as the Codes which exist in many other jurisdictions. A Criminal Code for Jersey would require various significant differences from an English Code, but an English Code could serve as a partial basis for adaptation.

³ G Williams (1961) *Criminal Law: The General Part*, London: Stevens, at 575.

⁴ As incorporated into Jersey’s law by the Human Rights (Jersey) Law 2000.

⁵ *C and SW v UK* [1995] 21 EHRR 363, at 33.

⁶ See the discussion at http://www.jerseylaw.je/Publications/JerseyLawReview/feb10/JLR1002_Miscellany.aspx#_ftnref11

⁷ *A Criminal Code for England and Wales* (1989) Law Com No 177, Part 2.

Session one: issues in codification of criminal law

5 Edward Phillips of the University of Greenwich opened the first session with a paper on the Indian Penal Code (IPC) and its influence on the codification of criminal law. He argued that the IPC, a nineteenth century legal landmark, remains important now, since we ignore legal history. Thomas Babington Macaulay, the IPC's drafter, was a man of his time and influenced by contemporary political thought, notably by the utilitarian principles of Jeremy Bentham. In particular, he espoused the view that "the science of legislation" was preferable to the "caprice" of judicial law-making. His focus was on two aspirations for the authors of Codes: precision and comprehensibility. Although the overt aim of the IPC was the "transplantation" of the common law to India, in reality, it was the defects in English law which motivated the codification project, and the ironic result was that imperial rule was able to accomplish in India what the criminal law reformers of the nineteenth century were unable to accomplish at home in the codification attempts in England in 1843 and 1848.

6 Professor Pamela Ferguson of the University of Dundee gave the second paper, "Structuring Criminal Codes", using her experience as part of the committee responsible for Scotland's (unofficial) Draft Criminal Code (DCC) with Commentary, an attempt at turning Scotland's common law into statute. She argued that it is important to make the case strongly for codification if you want to persuade people to engage in the process. The DCC has been influential, for example in sex offences, but has not been enacted: the lesson from this is that a Code needs a high-profile champion, such as a politician. A further lesson from her experience is that it is important to have very clear and accurate offence labelling, with discrete offences so that everyone knows precisely what is involved in a conviction under a particular section. Her paper finished with a series of questions for any codification project in Jersey to consider. First, whether a Code should take the form of a restatement of existing principles, or should be a work of legal reform, since there are arguments in favour of each. Secondly, whether the end result should be one Code or two; Paul Robinson has suggested that there should be one Code aimed at officials in the criminal justice system, and a separate version addressed to citizens and their needs. Thirdly, issues of structure: should there be a general part and a special part? It would also need to be considered whether there are any offences in Jersey which would be difficult to categorise as offences against property, people, and so on. Fourthly, what should become of the existing common law or customary law principles? Should they continue to develop alongside the Code, with judges having the power for example to develop or create defences? Finally, what steps should be taken to ensure that a

Code, once enacted, does not stagnate? These and other issues are discussed in detail in Professor Ferguson's paper in the conference publication.

7 Professor Ian Dennis⁸ discussed his involvement in the creation of the English Draft Criminal Code 1989⁹ as an advisor to the Law Commission of England and Wales. The DCC generated a great deal of debate and academic literature, but fell by the wayside for some 20 years. Until 2008, there remained a possibility that the DCC project might be revived. Then it was abandoned officially by the Law Commission, but now seems to have the potential of resurgence due to the Law Commission's recent announcement of a sentencing codification initiative. Professor Dennis shared his views on why the English DCC failed initially, and its prospects over the coming years. For any jurisdiction considering a codification project, it is important to recognise that there are various possible forms of codification, ranging from a simple consolidation of statutory law without legal change at one extreme, to a full new Model Penal Code at the other. There is a middle position of a restatement of the existing common law and statutory principles into a coherent and slightly reformed whole. Even a restatement such as the DCC requires to some extent reform of the prior common law as well as a statement of it. The form of codification is informed by the distinct conception of criminal law which a jurisdiction has; the English DCC manifested the belief that substantive criminal offences should be interpreted within an overarching framework of general principles. It used the normative theory of orthodox subjectivism espoused by Duff, under which at least subjective recklessness, capacity and a fair opportunity to act otherwise, should all exist before D should be criminally liable. The English DCC has some clear, if modest claims for success, despite never being enacted. First, it showed that such a Code was in fact a feasible project. Secondly, the Draft was used by the Law Commission as the basis of a considerable amount of further work in the 1990s, such as the Reports on Offences Against the Person from 1993¹⁰ and Involuntary Manslaughter from 1996.¹¹

⁸ University College London.

⁹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235826/0299.pdf

¹⁰ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/271986/2370.pdf

¹¹ http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc237_Legislation_the_Criminal_Code_Involuntary_Manslaughter.pdf

8 For a Code to be successful, there are various requirements: significant political and professional support, and a supervisory body to watch over the Code and keep track of developments are among them. The English Law Commission rebutted in detail the suggestions that a Code would cause ossification of legal principles. Rather it would enhance what are now seen as core values of criminal law: accessibility, comprehensibility, certainty, consistency, efficiency.

9 Some further lessons from the English experience include, first, that soft law or secondary legislation can have significant achievements, for example Codes of Practice. Secondly, that there has been a rise in “mini-Codes” such as the English statutes reforming sexual offences, bribery and fraud, where a statute makes a new starting point. Courts are treating such statutes as making a completely fresh start and are resisting attempts to bring back old principles. The paper ended by noting that the expected path of English codification of criminal law may now run in reverse, starting with sentencing, then evidence and procedure, before moving into the more politically controversial specific offences and general part.

10 The final paper in this session, Preventing Miscarriages of Justice, by Dr. Stephanie Roberts,¹² concerned the history of reforms to criminal appeals in England and Wales, and potential lessons for Jersey from the repeated attempts at creating a fair and workable written law. She began by posing a series of questions. What is the point of codification? Does the law really matter? Is changing the law necessarily the answer to a problem? Is it attitudes that are the problem? If so, how do we change attitudes? In England and Wales, it took 60 years and 31 Bills to create a court of criminal appeal with jurisdiction over errors of fact. The resulting law, the Criminal Appeals Act 1907, is mirrored in Jersey law under the Court of Appeal (Jersey) Law 1961, art 26(1), and has caused problems for judges ever since. Under both laws, an appeal court may allow an appeal if they think that the verdict of the jury should be set aside on the grounds that it is unreasonable or cannot be supported having regard to the evidence; or that the judgment of the court by whom the appellant was convicted should be set aside on the ground of any wrong decision of any question of law or that on any ground there was a miscarriage of justice. There is also “the proviso”, under which the court may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred. These laws were designed to give courts very wide powers to overturn convictions. However, the English

¹² University of Westminster.

version as subjected to a great deal of criticism in practice,¹³ and repeated attempts at reform have also led to problems and further criticisms. One example, as noted by the Donovan Committee in 1965,¹⁴ is that where a factually innocent person has been wrongfully identified and in consequence wrongfully convicted, he has virtually no protection conferred by his right to appeal or to apply for leave to appeal against his conviction, provided that the evidence of identification was, on the face of it, credible (para 145). Views have differed as to the source of the problem: the Justice Committee¹⁵ at least partly blamed the attitudes of judges but the Donovan Committee believed that the issue lay with the wording of s 4. Each of the English criminal appeal statutes since 1907¹⁶ claimed to merely restate what had already been happening in judicial practice, but they all actually made substantial changes. The 1995 Criminal Appeals Bill made the same claim that it was confirming judicial practice, but it was really a liberalising measure. As noted by the end result in English law is not an admirable one:

“The Court’s jurisprudence in this area, including on ‘lurking doubt’ [about the safety of a conviction], is difficult to interpret and it is concerning that there is no clear or formal mechanism to consider quashing convictions arising from decisions which have a strong appearance of being incorrect.”¹⁷

11 Further change seems unlikely in England at least for the foreseeable future, since in 2015 Michael Gove rejected the House of Commons Justice Committee’s recommendation that the Law Commission should have another look at the grounds of appeal. However the same does not apply in Jersey, where there is an ongoing Jersey Law Commission project on criminal appeals. The latter will be taking up the challenge posed by the 2015 Justice Committee.

12 In conclusion, the paper suggested that creating the Court as one of review was unsuccessful; that law changes but judicial attitudes stay the same; that it may be time to change the court to one of rehearing in the civil sense of allowing judges to come to a different decision than

¹³ As will be discussed in the version of Dr Roberts’ paper which will appear in the conference publication.

¹⁴ Donovan Committee, Report of the Interdepartmental Committee on the Court of Criminal Appeal Cmnd 2755 (1965, HMSO, London).

¹⁵ Justice, Criminal Appeals (1964, Stevens and Sons, London).

¹⁶ Including the Criminal Appeals Acts 1966 and 1968.

¹⁷ Justice Committee 12th Report of Session 2014–15 on the Criminal Cases Review Commission, HC 850, para 27.

the initial arbiter of fact; and that the current law England and Wales may not be the best model for reform.

Session two: current problems in criminal law: part I

13 This session took the form of presentations and discussions with a Panel of leading Channel Islands Advocates on a range of topics of current concern for Jersey. Advocate William Redgrave of Baker and Partners spoke about the law of fraud and related offences in Jersey, which is a combination of customary law (*crimes/delits*), common law and statute. There was a lack of recorded decisions until the nineteenth century, and court records show the variety of terms used in reference to financial crime: *fraude*, *escroquerie* (cheat), *faux* (forgery), *vol* (theft), *concussion*, *malversation* (embezzlement), *filouterie* (knavery). More recently, the Court of Appeal in *Att Gen v Foster*¹⁸ reviewed the history of fraud prosecutions and decided there was a single customary law offence of fraud/“*fraude*”, the elements of which are deliberately making a false representation; intending to cause prejudice to someone, and benefit to D or another; thereby causing actual prejudice and actual benefit. There is no maximum sentence. However, from the mid-nineteenth century, the lack of local precedent led Jersey lawyers to seek inspiration from English law to prosecute customary law fraud offences. Charges were drafted as per the English Larceny Acts 1861 and 1916. The result was that larceny, fraudulent conversion, obtaining by false pretences, housebreaking, receiving and embezzlement were all declared to be Jersey customary law offences. Yet the general customary law “Foster” fraud survived this development. Various relevant Jersey fraud statutes have also been passed: the Investors (Prevention of Fraud) (Jersey) Law 1967, art 2; the Banking Business (Jersey) Law 1991, art 23; the Collective Investment Funds (Jersey) Law 1988, art 10(1) and 10(2); the Financial Services (Jersey) Law 1998, art 39G and 39L; the Going Equipped (Jersey) Law 2003, art 1; and the Proceeds of Crime (Jersey) Law. The lack of a textbook source to add clarity, the plurality of offences, the confusing presence of obsolete English statutory terms in customary law, the inconsistency in maximum sentences, and the overlap between offences are clear pointers that reform might be necessary.

14 The second speaker, Advocate Simon Thomas of Baker and Partners, examined the past ten years of the law of sexual offences in Jersey, and the extent to which the relevant law has been influenced by other jurisdictions. He examined issues which local practitioners face

¹⁸ 1992 JLR 6.

in prosecuting and defending sexual offences and the practicalities of introducing a codified form, such as the English Sexual Offences Act 2003. Key recent developments which are modernising the approach to sexual offences in Jersey include the abolition of the anachronistic corroboration requirement;¹⁹ an increasing awareness of special measures to assist complainants in court; the use of intermediaries in some trials; judicial directions intended to dispel “rape myths”; and improvements to witness care by the police and other services, both at investigation and prosecution stages. In relation to the cross-examination of complainants as to their sexual history, recent Royal Court guidance²⁰ has taken inspiration from other jurisdictions in the absence of authority in Jersey; evidence of sexual relations with other men is rarely relevant where the issue is consent to sex with the accused, and leave is required for cross-examination of the complainant as to their previous sexual history. But if Jersey is to continue to look to England for inspiration and reform, statutory codification of sexual offences would be a natural next step. Jersey has no overarching statutory scheme such as the English Sexual Offences Act 2003, which aimed to improve conviction rates by providing a clear framework for finders of fact as they decided each case. The 2003 Act has been criticised for *inter alia* overlapping offences, complexity, and the criminalisation of consensual activity between teenagers, and has faced problems of interpretation relating to intoxicated “consent”,²¹ but its strengths include a codified definition of consent under s 74, at least some of the evidential presumptions under ss 75 and 76, and the reform of the *mens rea* for sexual offences to an objective test of absence of reasonable belief in consent. Although some of the scope of the 2003 Act was encompassed within the Sexual Offences (Jersey) Law 2007, such as sexual offences against children, planned amendments would bring Jersey’s law much more closely into line with the 2003 Act. These issues will be explored in greater detail in Advocate Thomas’s paper in the conference publication.

15 Advocate Rebecca Morley-Kirk of Parslows spoke about the potential impact of codification on Jersey’s homicide offences, and assessed the arguments against codification in Jersey. The absence of a clear electoral mandate for a criminal code would be the first hurdle, and it would require careful consideration both of Jersey’s constitutional position and of the extent to which codification might lead to an influx of principles from English common law. A well-

¹⁹ Criminal Justice (Miscellaneous Provisions) (No 3) (Jersey) Law 2012.

²⁰ *Att Gen v Correia* [2015] JRC061A; 2015 (1) JLR N [22].

²¹ *R v Bree* [2007] 2 Cr App R 13.

drafted criminal code, setting out the core principles in one accessible document, would be advantageous but might not be achievable. Criminal law receives a great deal of publicity, so it is important that its authority should not be undermined by perceptions of incoherency and inconsistency. The relationship between common law and statute is a major factor in the existing complexity for all involved in application of criminal law in Jersey, and a clear example is that of *Att Gen v Holley*.²² D argued that his personality traits made him more likely to react violently to the provocation from his partner, who he then killed (avoidant, depressive, codependent, anxious, and had a severe alcohol dependency). Under an application of the parallel English law, all involved in the case felt that the characteristics could be taken into account in determining whether he could use the provocation defence, but the case was very complicated due to the competing principles relating to provocation, intoxication and alcoholism. The resulting two misdirections indicate how complex the law governing homicide is, but a Code may not have been the answer. A Code would need to be comprehensive if it is to provide clarity, and might remove the flexibility which common law provides. Judges in cases such as *Holley*²³ have been able to change the law more rapidly than a written law can do so, and the Privy Council decision in *Holley* changed the law in both Jersey and England and Wales very quickly. A vast body of common law has gone into creating the definitions of murder and each form of manslaughter, and would be difficult to convert into a concise written form. The defence of diminished responsibility, as applied recently in *Att Gen v Rzeszowski*²⁴ is an example under both English and Jersey law (Homicide (Jersey) Law 1986); the English version under the Coroners and Justice Act 2009 has been reformed substantially to remove archaic language and add specificity. The 2009 Act has also replaced the provocation defence for England and Wales with a new loss of control defence, which is more narrowly drafted and excludes some of the core situations, such as sexual infidelity, which had previously satisfied the provocation defence. Codifiers would have difficult choices to make as to which version of these defences, if either, to adopt. But issues such as the lack of a power in Jersey for a court to impose a hospital order, and indeed of the necessary facilities, can cause major problems. She concluded that some codification would be useful, but that there is a difficult balance to maintain between comprehensiveness and accessible simplicity of principles.

²² 2003 JLR 22.

²³ [2005] 3 WLR 29, Privy Council.

²⁴ [2012] JRC 198.

16 Advocate Matthew Maletroit of the Law Officers' Department considered recent developments in relation to social media and cyberbullying, as well as revenge pornography. The revolution in communication brought by social media has led to new forms of crime, and new applications of ancient forms of crime. Over 90% of Jersey's population has access to the internet from home, more than half use tablet computers and around two-thirds use smartphones to access immediate communication wherever they are. Twitter, Facebook and webchat apps have become the preferred means of social interaction online. But the escalation in the use of social media and the internet brings with it new legal challenges because these media are also being used to cause harm through cyberbullying, revenge pornography, and online impersonation of others. The scale of the potential audiences of, for example, cyberbullying combine with the ease with which it can be conducted anonymously and the potentially serious harms which may result for the victim to create a highly significant legal problem. Jersey has no legislation specifically dealing with cyberbullying, but existing criminal law can be adapted to the new challenge. The sending of abusive communications, for example, may fall foul of art 51 of the Telecommunications Law, or of art 3, Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008, and Jersey's courts may take inspiration from the manner in which English cases have applied similar provisions. The cases of *Collins*²⁵ and *Chambers*²⁶ are examples of this. However existing Laws do have their limitations and it is unclear how the definitions used could apply to some common forms of behavior online, such as Facebook groups. Key concepts such as harassment are not defined clearly in the existing law, and so the Royal Court has had to work hard to adapt them, as can be seen in the case of *Chapman v Att Gen*.²⁷ Restraining orders are only available under the harassment law, so prosecutors will usually charge that offence if possible, rather than multiple counts of the telecommunications offence. Finally, revenge pornography has become a specific offence in England and Wales, as in many other jurisdictions, to criminalise a growing and devastating form of online harm caused by the sharing of private sexual images of another person without their consent. Jersey has begun to see such cases and should consider whether a new law is required, since the consequences may be particularly devastating in a small community, and such behaviour is far removed from that which existing laws were designed to tackle.

²⁵ [2006] UKHL 40.

²⁶ [2012] EWHC 2157 (Admin).

²⁷ 2014 (1) JLR 84.

Session three: current issues in criminal law: part II—issues for Jersey to ponder

17 The speakers in this session examined theoretical issues which would usually be covered by the General Part of a Criminal Code, and how those issues may affect Jersey's law. In various of the situations discussed in this session, Jersey's criminal law is unclear and lacks elucidation in reported cases.

18 John Child's²⁸ paper, "Legislating for Prior Fault", concerned situations where, before committing at least some of the elements of an offence, D acted in a manner to which the law attributes fault. For example, getting drunk in order to have the courage to kill an enemy, or provoking a violent response from him in order to kill in "self defence", or becoming voluntarily intoxicated and then making a mistake which D would not have made if sober. His overarching argument was in favour of a reforming Code of criminal law, not just a Code which simply chooses from existing competing principles. The current law on prior fault is inconsistent, incoherent, and has been created in separate "silos" of legislation or common law principles. The paper explored different models of prior fault which have been recommended in an effort to bring coherence to this area of law, and proposed that where D was subjectively reckless at the time of prior fault *both* as to the later harm *and* as to causing the circumstances of his defence, then D should be blocked from arguing any defence to the later harm caused. Under this model, D would be able to argue a defence where he made an intoxicated mistake as a result of voluntary intoxication, but had not foreseen the risk of doing so. That is not the case under current English law²⁹. The paper concluded by arguing that the potential for codification in Jersey presents a unique opportunity to clarify the principles of prior fault in a comprehensive and consistent manner, within the General Part of a Code. These issues are explored in greater detail in Dr Child's contribution to the conference publication.

19 My paper, de Than, "Capacity and Consent", made the case for a rational reconstruction of consent and capacity in criminal law in all legal systems, including Jersey's. Written rules, whether statutory or codified, have great advantages of clarity and legal certainty compared with the piecemeal nature of case law, particularly where criminal law is concerned, since a citizen should be able to predict whether his

²⁸ Sussex Law School.

²⁹ *Hatton* [2005] EWCA Crim 2951; Criminal Justice and Immigration Act 2008 s 76(5).

planned actions will break the law.³⁰ It is tempting to approach reform issue by issue, because to do otherwise seems a massive task which requires large numbers of experts and resources. However, there are many risks involved in a step-by-step, situational approach to law reform rather than a comprehensive Code. As an example, four such risks were examined in relation to the linked issues of consent and capacity in criminal law, although these risks would also apply in many other elements of criminal liability. The first risk is in reforming only part of the law of capacity and consent. I have published elsewhere the arguments in favour of a rational reform of the law of consent in order to create a coherent and human rights-compliant defence;³¹ parallel arguments apply equally in Jersey, although the relevant law is largely judge-made rather than statutory. The current criminal law of consent is chaotic, with different definitions and tests applying in relation to sexual offences, nonfatal offences, and property offences. As a point of principle, and indeed a human right, informed consent by a person with capacity should always be respected, but current criminal law does not do so. There are also discriminatory provisions in English law which prohibit consent where V has capacity to make decisions about sex, but has a “mental disorder”, and the reform brought by the Sexual Offences Act 2003 did not encompass a definition of capacity, leading to contradictory case law. The second risk is reforming capacity but not consent. The two concepts sometimes coincide, but the results can be different in different contexts. In my view, to have a codified definition of capacity but leave consent to be defined at common law is highly dangerous, as has been demonstrated by the English experience.³² Criminal and civil law in England apply different tests for capacity, and there have been contradictory decisions which are examined in the full version of this paper. Sometimes judges have conflated capacity and consent, because of the lack of full definitions of both.³³ The Mental Capacity Act 2005 was intended to be a human rights-compliant statute, but its history proves otherwise, as may be seen in the debates on the Northern Ireland Capacity Bill in June 2015, the report of the House of Lords

³⁰ For the reasons with which I began this paper, *supra*, notes 1–7.

³¹ *Supra*, note 1.

³² See the discussion in C de Than and J Elvin, “The Relationship Between Capacity and Consent” in Reed and Bohlander (eds) *Consent* (forthcoming).

³³ *R v C* [2009] UKHL 42.

Select Committee on the Mental Capacity Act³⁴ and the Law Commission proposals to rework the latter Act³⁵.

20 The third risk is in taking an outdated view of disability rights. Article 12 of United Nations Convention on the Rights of Persons with Disabilities represents a “paradigm shift” in the legal response to disability. Persons with disabilities must be allowed to enjoy legal capacity on an equal basis with others, and placing a focus on mental capacity leads to denial of legal capacity *i.e.* the right to make decisions. Criminal law must treat persons with and without disability equally.³⁶ But why does that matter for Jersey, which has not yet ratified the UNCRPD? Because the European Court of Human Rights has started to apply the UNCRPD including art 12.³⁷ To put the issue positively, Jersey has the chance to be one of the first jurisdictions to create a fully disability rights-compliant capacity law instead of merely a version of the English MCA 2005. The final risk is missing consent altogether when reforming relevant offences, such as non-fatal offences. The Law Commission of England and Wales Scoping Paper on Offences against the Person 2014 proposed to omit consent almost completely from its reform remit; the final version of their proposals³⁸ concedes the point at least partially. As a result of these four risks, the full version of this paper proposes three specific reforms to the law of consent for Jersey.

21 The penultimate paper, “What Role could the Distinction between Justification and Excuse Play in the Creation of a Criminal Code for Jersey?”, was presented by Paul Eden.³⁹ He considered the relationship between justifications and excuses within the criminal law defences,

³⁴ <http://www.parliament.uk/business/committees/committees-a-z/lords-select/mental-capacity-act-2005/>

³⁵ http://www.lawcom.gov.uk/wp-content/uploads/2015/07/cp222_mental_capacity.pdf

³⁶ The consequences of which are elaborated in C de Than and J Elvin, “How should Criminal Law Deal with People who have ‘Partial Capacity’?”, in A Reed, N Wake, and B Livings (eds), *Mental Condition Defences and the Criminal Justice System: Perspectives from Law and Medicine*, Cambridge: Cambridge Scholars (2015).

³⁷ *Shukurov v Russia* ECtHR 27/3/2008, *Stanev v Bulgaria* ECtHR 17/1/2012, *RP v UK* ECtHR 9/10/2012, *Ivinovic v Croatia* ECtHR 18/9/2014, *Glor v Switzerland* ECtHR 30/4/2009.

³⁸ http://www.lawcom.gov.uk/wp-content/uploads/2015/11/51950-LC-HC555_Web.pdf at 4.159

³⁹ Sussex Law School.

agreeing with Paul Robinson's assertion⁴⁰ that defences have so far lacked comprehensive conceptual analysis; rather, the nature and scope of most defences have remained more or less the same for centuries without detailed analysis. There are some practical implications of the distinction, such as that excusable conduct may not be lawfully assisted by another but justifiable conduct may be. However criminal law in England and Jersey has not given the distinction the attention which it arguably deserves. Fletcher⁴¹ was one of the greatest advocates for the justification/excuse distinction, but recent developments have revived academic interest. Joshua Dressler⁴² offers four reasons why the justification/excuse debate should concern the legal community. They are the need to send clear moral messages; the ability of the distinction to provide theoretical consistency in the criminal law; the opportunity the distinction offers to allocate the burden of proof fairly; and the clarity the distinction offers to the problem of accomplice liability. Given the complexity of defences in criminal law, with their notions of fairness and morality balancing against utility and efficiency, it is essential that a criminal law system has a rational and workable conceptual structure. As Michael Moore⁴³ has written, criminal law requires structure if its codification is to be possible and if the adjudication under such Codes is to be non-arbitrary. The paper argued that the distinction between justification and excuse offers the best basis for the systematic analysis of exculpatory defences, and is of fundamental theoretical and practical value in framing a rational Criminal Code.

22 The final conference paper was entitled "Causation and Responsibility: 'Take Your Victim as You Find Him'?" and was presented by Dr Jesse Elvin of City University, London. His focus was upon whether the maxim "you take your victim as you find him"⁴⁴ is appropriate in criminal law and, if so, what its limits should be. In which circumstances should D be able to argue that unforeseeable conduct by V broke the chain of causation? English criminal law has two apparently contradictory authorities: in *R v Roberts*, the English Court of Appeal suggested that reactions to the defendant's conduct should break the chain of causation in criminal law where they are so

⁴⁰ PH Robinson "Criminal Law Defenses: A Systematic Analysis" (1982) 82 *Columbia LR* 200.

⁴¹ GP Fletcher *Rethinking Criminal Law*, Boston: Little, Brown (1978) 759.

⁴² "'Justifications and Excuses': A Brief Review of the Concepts and the Literature" (1987) 33 *Wayne LR* 1155.

⁴³ *Act and Crime* [1993] Chapter 1.

⁴⁴ Otherwise known as the "thin skull" rule.

“daft” as to be unforeseeable.⁴⁵ However, in *R v Blaue*, the same court implied that it was irrelevant in criminal law whether V’s reaction was reasonably foreseeable, and held that “it does not lie in the mouth of the assailant to say that his victim’s religious beliefs which inhibited him from accepting certain kinds of treatment were unreasonable”.⁴⁶ The English law is at least arguably unclear, and Jersey’s law is rather mysterious on issues of causation, with a distinct lack of reported cases. The paper started with an overview of the approach that English criminal law currently takes to the “thin skull” rule, then considered whether English criminal law and similar legal jurisdictions should contain any such rule. Thirdly, on the basis that there might be convincing justifications for having such a “thin skull” rule, it considered the potentially appropriate parameters of this rule as it relates to moral convictions. It concluded by arguing that any “thin skull” rule should respect the victim’s moral convictions by declaring that they are beyond question in the application of the law on “legal” causation, except perhaps where such moral convictions are contrary to such fundamental values as are found in anti-discrimination law. However, it also argued that this does not mean that any conduct based upon them that does not infringe the rights of others must also fall within the scope of the “thin skull” rule.

Session four: roundtable on the future of Jersey’s criminal law

23 The speakers responded to questions on diverse topics related to Jersey’s current law, future law and the potential for codification. A transcript of the questions and answers will appear in the conference publication. However, it is worth noting at this point that the response to the final question, “does Jersey need a criminal code?”, was an overwhelming yes from both the speakers and the audience. Powerful arguments had been made in favour of the proposition, and it was viewed as important that a Code could take many different forms, some of which would enable Jersey to maintain the unique features of its law while allowing for further development. As a first stage or at the very least, there should be a textbook.

⁴⁵ (1972) 56 Cr App R 95.

⁴⁶ [1975] 1 WLR 1411.

Concluding remarks

24 An additional paper, by Professor Peter Edge,⁴⁷ will appear in the conference publication and will discuss potential lessons from the Isle of Man's experience of codification.

25 I wish to pose two questions and a challenge for Jersey's legal profession. First, do we have sufficient common agreement as to the principles of Jersey's criminal law as a basis on which to proceed towards a Restatement or Codification? Secondly, which aspects of Jersey's law might be unfortunately frozen in time if codified? Thirdly, a challenge: I am seeking volunteers to assist me with two projects. The first, with a longer timescale, is to contribute towards a Draft Criminal Code for Jersey. The second is to join a team co-authoring a textbook on Jersey's criminal law, in order to provide the accessibility which is needed to comply with human rights guarantees.

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⁴⁷ Small Jurisdictions Service, Oxford Brookes University.