

INTRODUCING THE CRIMINAL JUSTICE SYSTEM

2.4 HARM, RISK AND MORALITY

2.4.1 PUBLIC/PRIVATE

Many legal commentators have substantially neglected the historical origins and cultural relativity debates

Their purpose is to distinguish torts from crimes

- Some actions count as both torts and crimes (e.g. assault and theft)
- Others are crimes but not torts (e.g. illegal drug use, public order offences)
- Others are torts but not crimes (e.g. inducing breach of contract)

Most interests can be expressed either as public or private

- Blackstone (W Blackstone, *Commentaries on the Laws of England*) might say that only certain sorts of breaches, which threaten the viability of society should be crimes, and breach of contract is not one of these.
- Public/private distinction has some appeal - it does NOT go far in helping us to understand the phenomenon of crime, nor does it go far enough to explain the complex public responses to breaches of certain interests

Some behaviour is lawful in private but criminal if done in public (e.g. sexual behaviour between consenting adults)

2.4.2 PRIVACY: THE HUMAN RIGHTS (SEXUAL CONDUCT) ACT 1994

Human Rights (Sexual Conduct Act) 1994 (Cth)

- United Nations Human Rights Committee found a that ss 122(a), (c) and 123 of the *Criminal Code* (Tas) which criminalised a range of sexual activity to be in violation of Australia's obligations under Art 17 of the *International Covenant on Civil and Political Rights* (ICCPR)
 - o Interference was arbitrary

2.4.3 HARM

- Opinion: Characteristic shared by all forms of criminal actions is that they are harmful → *Only* harmful acts should be criminal
- Harm has an immediate plausibility as a justification for criminalising a given form of behaviour
 - o Term has connotations of objectivity, simplicity and concreteness which belie its complexity

2.4.4 RISK AND THE RISE OF PREVENTIVE JUSTICE

Risk and prevention have become major preoccupations: of individual citizens, of the media, of governments and of the state

- The proliferation of notions and mentalities of risk and the ubiquity of risk instruments and of risk management in many facets of life have contributed to the emergence of a (new) form of “preventative justice” → sharply at variance with traditional legal approaches and notions like the rule of law and the presumption of innocence

2.4.5 MORALITY: THE HART/DEVLIN DEBATE

One of the most famous debates on the role of the criminal law centres on immoral conduct:
Should the criminal law prohibit certain forms of conduct simply because they are immoral?

1. Immortality or sinfulness of the conduct supplies a sufficient reason for criminalization → Although immortality might be considered a major element in many existing crimes, it does not by itself explain criminalization
2. Immortality is a necessary condition for criminalization
3. Certain forms of immoral conduct undermine the shared beliefs essential to social cohesion → Indirect form of the argument based on harm: the harm is to the social order rather than any individual

Private immorality: Immorality, which is not offensive or injurious to the public

- Criminal law is based on moral principle
→ P Devlin, *The enforcement of morals*
- 1. Has society the right to pass judgment on all matters of morals? Ought there, in other words be a public morality, or are morals always a matter for private judgment?
 - The structure of every society is made up both of politics and morals
 - A society means a “community of ideas” → without shared ideas on ethics, morals and politics, no society can exist
 - Everyone has ideas about good v evil; they cannot be kept private from the society in which we live
- 2. If society has the right to pass judgement, has it also the right to use the weapon of the law to enforce it?
 - If society has no right to make judgements on morals, the law must find some special justification for entering the field of morality: if homosexuality and prostitution are not in themselves wrong, then the onus is very clearly on the lawgiver who wants to frame a law against certain aspects of them to justify the exceptional treatment
 - BUT, if society has a right to make a judgement and has it on the basis that a recognised morality is as necessary to society as, say, a recognised government, then society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence
 - THEREFORE, if the first proposition is securely established with all its implications, society has a *prima facie* right to legislate against immorality as such

2.4.6 OFFENSIVENESS

Debates on offensiveness as a ground for criminal prohibition often proceed in close association with debates about immorality

- Offensive behaviour in law involves an element of publicness, although as we will see the definition of public place is very broad

- It is possible for society to view behaviour as legally permissible though immoral when carried out in private, but legally impermissible, because offensive, if carried out in public
 - o Publicness rather than immorality is the heart of the concern
 - o More readily assimilable to the case of “harm” → Adversely affects third parties
- Behaviour can be classified as morally neutral but offensive – say on aesthetic grounds – and therefore to be prohibited (e.g. public drunkenness)

2.5 SOCIAL REACTION

2.5.1 DEFINING THE BOUNDARIES

Emile Durkheim (1858-1917) → thought that the key universal feature of crime was the reaction of the social audience

- Advised against making lists of all the forms of behaviour treated as criminal in order to isolate their common properties or essence
- He focused on the reaction of the social audience rather than the qualities of the act itself or the characteristics of the actor
- Crime was seen as a ‘normal and healthy part of any society’

2.5.2 OF MUGGINGS, MEDIA AND MORAL PANICS

Apart from the pre-disposition of the population towards “moral panics” at particular moments in history, we should not neglect the role of the media and public leaders who help define and amplify the phenomenon in question

- In large scale societies the social audience is largely dependent on the media to transmit information and constitute “the news”
- Shift of attention from the *deviant act* (i.e. mugging), treated in isolation to the *relation between the deviant act and the reaction of the public and the control agencies to the act*

2.5.3 ANTI-TERRORISM LEGISLATION AND THE PROCESSES OF CRIMINALISATION

Anti-terrorism legislation enacted by both Commonwealth and State governments presents a fertile field for analysis of the processes of criminalisation

2.5.4 LANGUAGE AND METAPHOR

The language used to discuss the phenomenon of crime is a study in itself

G Pearson → “The terms and limits within which the problems of lawlessness are understood and acted upon are established within a form of public discourse which has been with us for generations, each succeeding generation remembering the illusive harmony of the past while foreseeing imminent social ruin in the future”

2.5.5 COSTS OF CRIMINALISATION: “OVERREACH” AND “CRIME TARIFF”

People often think of crime in terms of absolute prohibitions:

- Forbidden, or
- Not forbidden

Choice is rarely between regulation by the criminal law or non-regulation, but between different forms of regulation

- Strong moral arguments which are felt by some override pragmatic cost considerations
 - o E.g. Some people think of drug taking as such an evil that arguments about the costs of policing drug use appear to be irrelevant → Funds for policing are not unlimited
 - Combined federal and state expenditure on illicit drugs was estimated as \$1.7 billion in 2009-10, with 66% of that being spent on law enforcement, 21.3% on treatment, 9.2% on prevention and 2.1% on harm reduction
 - o Costs include: Police salaries, equipment, court time and prisons

The criminal law constitutes only one regulatory option and it may not be the best way of achieving a given social objective

- Criminal law has “no place in the bedroom” or that too much in the way of police resources are used up regulating people's private lives must be treated with caution
 - o Public/private distinction is fluid

2.5.6 VARIOUS FORMS OF REGULATION

Morality offensiveness: Drunkenness, narcotics and drug abuse, gambling, disorderly conduct and vagrancy, abortion, sexual behaviour, juvenile delinquency

- The decriminalization of these forms of behaviour will not necessarily mean they escape regulation

Crime Tariff → makes the supply of goods and services (e.g. narcotics, gambling, prostitution) profitable for the criminal by driving up prices and at the same time discouraging competition by those who might enter the market were it legal

- The law of tort might be used with provision for civil enforcement proceedings and civil penalties
- Policy makers may rely on a mix of governmental and professional regulation
- Another common method of regulation on the borders of the criminal law is the welfare system

2.5.7 REGULATION AND GOVERNMENTALITY

The blurring of welfare and crime and the realization that policy choices are not adequately understood in terms of criminal prohibition versus non-regulation draw us into the realm of what has come to be called “governmentality” → term which describes a certain “mentality” of rule based around the regulation of “populations”

- Holds the prospect of thinking about the issues we have been considering such as harm, morality, offensiveness and the desirability of criminalisation as a strategy of regulation, in difference and more imaginative terms than those of prohibition or toleration, public or private, intervention or non-intervention, liberty or control