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FOUNDATIONS OF CRIMINAL LAW

Criminal law represents, articulates and enforces many of a community's dominant moral values and imposes consequences on those who breach those values

WHAT IS A CRIME?

LEGAL POSITIVISM APPROACH:

- 'A crime may be defined as an act (or omission or a state of affairs) which contravenes the law and which may be followed by prosecution in criminal proceedings with the attendant consequence, following conviction, of punishment'
 - Doesn't give us a reason why things are crimes (nothing to do with morality)
 - There's a strict set of rules or special proceedings in a criminal case – e.g. jury
 - Criminal law is different to civil law in this way
 - Limitations: not all crimes result in punishment, doesn't take the gravity of different crimes into account and gives too much power to law makers

PROCEDURALIST APPROACH:

- Conduct that can be made subject to the criminal process of charge, trial, verdict and punishment
- Involves a public prosecutor, conviction and sentence (criminal procedure)
- Punishment is different from unpleasant consequences (civil law)

SUBSTANTIVE APPROACH:

- Crimes are public wrongs (an attack on the community) or a concern to the public
- Defines crimes in terms of what they are 'in themselves', without reference to the legal process that is to be applied to them
- Why certain kinds of conduct are subject to criminal procedure? Because they are crimes
- Uses normative and evaluative concepts --> not congenial to strict legal positivism
- Conduct considered a *public wrong*
- Wrongs that are done to individuals but which are also of concern to the public and which matter to the members of the community

DISTINCTION BETWEEN CIVIL AND CRIMINAL CASES

- It is not the nature of the prohibited conduct that distinguishes prohibitions on that conduct from other legal prohibitions (such as torts, or civil wrongs). Rather, it is criminal procedure (e.g. its distinctive standard of proof) that is crucial to defining what a crime is
- Punishment is a means of distinguishing crimes from civil wrongs
 - Many laws prohibit conduct, but only criminal law has the power to impose punishment in the name of the state following a guilty verdict
- **ELEMENTS OF PUNISHMENT**
 - It must involve pain or other consequences normally considered unpleasant
 - It must be for an offence against legal rules

- It must be of an actual or supposed offender for his offence
- It must be intentionally administered by an authority constituted by a legal system against which the offence is committed
- Civil remedies are not criminal punishment as they do not flow from a determination of guilt following criminal proceedings

LIMITATIONS OF PROCEDURAL DEFINITION

- They focus on formal aspects of law rather than the substance of a law
- Tend to be descriptive rather than normative
 - They describe the (supposedly) value neutral facts about what the law is rather than make value-judgements about what the law ought to be or what a good or just law is

WHY SHOULD SOMETHING BE MADE A CRIME?

1. The prevention of harm
2. The vindication of moral values
3. The expression of legitimate public concern

PREVENTION OF HARM

- If the State prohibits some of the harm-causing kinds of conduct, and punishes those who, despite the prohibition, engage in them, the intention is that these harms will not be committed again, or at least reduced in frequency
- Criminal law should not be used to prohibit non-harmful behaviour, or even to prevent individuals from harming themselves
- A way of trying to balance the interests of the State and the community
- Harm principle acts as both a reason for criminalisation and as a limit on it: the prevention of harm to others is a basis for criminalisation but if there is no such harm then there should be no criminalisation

In ***R v Wilson*** the English Court of Appeal found that a wife's consent to her husband's branding his initials onto her buttocks with a hot knife was a defence to assault

- Why is this not a criminal matter, but consensual activity between homosexual men (sado-masochistic activities) would not be?
- In ***R v Brown*** it invites the conclusion that it was an implicit moral disapproval of homosexual conduct that made the activity harmful in the eyes of the law but in *Wilson* the approval of heterosexual marriage made the activity harmless so far as the law was concerned

DIFFICULTIES OF HARM PRINCIPLE

- Uncertainty about what constitutes 'harm to others'