

Criminal Law – Seminar Notes

Class 1: Crime, Law and Morality

Main questions:

1. Sources of Criminal Law

- NSW is a 'common law' state
- Unlike in Code states, there is no statute that comprehensively states the criminal law
- Criminal law is mostly contained in legislation – **Crimes Act 1900 (NSW)** – which defines crimes
- **Crimes Act** is ambiguous, and common law resolves this ambiguity
 - E.g., the courts have given meaning to the phrase “act [or omission]...causing...death” in **s18(1)(a) Crimes Act** (an act or omission causing death is the actus reus of the offences of murder and manslaughter)
- Some defences are created by common law – e.g., duress and necessity are judge-made defences, and not defined in the **Crimes Act**
- Judges also defined two categories of involuntary manslaughter that exist (unlawful and dangerous act manslaughter and criminal negligence manslaughter)

2. How are the limits of criminal liability determined?

- **Findlay, Odgers and Yeo** discuss two competing principles that underlie the criminal law: (a) the individual autonomy principle and (b) the community welfare principle.
- Individual autonomy principle is reflected in the criminal law's insistence that only persons who have **voluntarily** performed the actus reus of an offence may be held criminally liable.
 - This principle also reflected in:
 - a) the general principle that criminal liability is not established simply by proving that the accused performed an offence's actus reus
 - b) the rebuttable presumption that a subjective mens rea must be proved for statutory offences that are silent as to mens rea (see **He Kaw Teh**)
 - c) the temporal coincidence rule
 - d) It underlies many of the defences for which the criminal law provides: e.g., self-defence, duress, necessity, and mental illness.
- Community welfare principle is reflected in the substantive criminal law.
 1. First, objective mental elements – which apply, for example, to offences such as sexual assault and involuntary manslaughter – are perhaps more consistent with this principle than they are with the individual autonomy principle.
 2. Secondly, the CW principle underlies the law's insistence that some of those who have committed criminal conduct involuntarily may nevertheless be institutionalised indefinitely: see **Bratty v AG for Northern Ireland [1963] AC 386**.
 3. Thirdly, community protection concerns seem partly to explain judges' failure always strictly to apply the temporal coincidence rule: see **Thabo Meli v R [1954] 1 WLR 228**.
 4. Finally, the current content of the 'defence' of self-induced intoxication is also heavily influenced by the CW principle: see **Pt 11A Crimes Act**.
- An example of an area of the criminal law that has been influenced by both liberalism and community protection concerns is the law in NSW concerning the 'defence' of self-induced intoxication: see **Pt 11A Crimes Act** (especially **ss 428C, 428D**)

Theory

• Social context and the criminal law

- Competing principles = moral culpability vs community protection
- Law can protect people in a paternalistic way

• What is criminal law?

- Defines activities for which the legislature and judiciary have decided we should be criminally liable
- Public law → prosecuted by the State
- Behaviours that have been criminalised are behaviours that have breached society's moral standards → criminal law is normative (value based)

- Symbolic function of criminal law – deterrence and denunciation of behaviour
- **Key factors that criminal liability depend on**
- Did A have the capacity to make a free and rational choice to commit the crime?
- Have the elements of an offence been established? (Prosecution to prove BRD)
- Did A have an excuse or justification?
- **Alan Norrie: “criminal law is, at heart, a practical application of liberal political philosophy”**
- Ideas of individual autonomy have influenced the content of the criminal law
- Judicial concern to protect the community and to ensure that the existing social order is not radically undermined
- Competing concerns
- Competing influences of autonomy and community protection seem to explain the criminal law’s ambivalent approach to subjective mental states
- **Euthanasia**
- How desirable is the general rule that an accused person’s motive is relevant only to sentence?
- Is this rule an instance of the criminal law exaggerating the extent to which certain accused persons have acted freely? If so, why might it do this?

Readings

Brown et al (2020)

- **Individual choice & Irrelevance of motive (pp. 151-3, 190-91)**
- Introduction to Criminal Law
 - **Actus reus** (conduct element of criminal offences) → prohibited event per the definition of an offence (the act or omission, the context/circumstances it takes place in, any consequences that must be caused)
 - **Mens rea** (mental element of criminal offences) → accompanying fault elements (negligence, strict and absolute liability)
 - General principles: *actus non facit reum, nisi mens sit rea* → doing a forbidden act (*actus reus*) does not itself make a person guilty; it must also be shown they had a guilty mind (*mens rea*)
 - *Mens rea* enables us to construct individualised justice based on individual guilt/innocence
- Irrelevance of motive [Motive vs Intention]
 - Criminal law does not allow a person’s good/bad motives to be taken into account in determining guilt → factors considered in determining fault in criminal law is much narrower than those taken into account in making moral judgements
 - However, as motive is an emotion and force that prompts individual actions, motive is a vital part of a person’s state of mind and is a crucial factor in moral evaluations of a person’s behaviour. It is improper to evaluate culpability based on intention alone (as motive and intention shape people’s actions)
 - Law-makers are reluctant to consider motives, and only consider intention, because abstract mental states of ‘intention’/‘recklessness’ are “apparently neutral”, de-politicised categories, representing an abstract individualism. People form intentions to act regardless of who they are, where they come from, what they experience.
 - But motives are subject to social and political environments (e.g., a poor person may use *need* as a motive, or claim they acted on *right*)
 - Motives and social-economic background arguably allow individual responsibility/justice and proper deterrence. Defences (necessity, duress) are motives that justify criminal conduct.
 - Motives should also be considered in euthanasia (assisted suicide).
- **Subjective / objective mental states (mens rea standards) (pp. 176-77, 170-72)**
- Subjectivism is too narrow, and objectivism is too broad
- *Mens rea* is considered subjective as they turn on the defendant’s awareness
- ‘Absolute liability’ → *actus reus* is sufficient, no need to examine *mens rea*
- Middle grounds between ‘absolute liability’ and a subjective standard → requires the defendant’s claim they lacked awareness to be “reasonable” → this is an objective standard

- **DPP v Morgan [1976] AC 182.**

- 3 men charged with rape of a woman who did not consent
- The men argued they genuinely believed the women consented
- House of Lords held that the *mens rea* standard is a subjective, not objective one → the men would be acquitted (innocent) if they were genuinely mistaken as to her consent, even if that mistake was unreasonable
- House of Lords upheld the finding of guilty, as no reasonable jury would have a reasonable doubt their mistake was not genuine

ACTUS REUS	Voluntary Act	Circumstance	Consequence
MENS REA	INTENT	KNOWLEDGE OR RECKLESSNESS (awareness of risk: probable or possible?) OR STRICT LIABILITY (absence of an honest and reasonable mistake of fact) OR ABSOLUTE LIABILITY	INTENT (purpose or object) OR RECKLESSNESS (awareness of risk: probable or possible) OR NEGLIGENCE (reasonable person would have realised the risk) OR ABSOLUTE LIABILITY

• **Euthanasia (Assisted suicide) (pp. 860-66)**

- We pick intention over motive.
- **Section 31A Crimes Act:** suicide not a crime anymore
- **Section 31C(1) Crimes Act:** a person who aids or abets the suicide or attempted suicide of another person shall be liable to imprisonment for 10 years
- The fact that the person acted out of compassionate motives is irrelevant. The consent of the deceased is no defence, and necessity is also not a defence (**R v A Primary Care Trust (2013)**). In limited circumstances, a defence of substantial impairment may be available (**Mathers (2011)**)
- **Mathers [2011] NSWSC 339** – 78-year-old was charged with the murder of his partner who suffered severe pain even though she had expressed her wish to commit suicide in a note. The accused was given a suspended sentence of 2 years' imprisonment.
- **Section 31C(2) Crimes Act:** providing advice on suicide – liable for 5 years imprisonment – if the person actually attempts suicide as a consequence (**Attorney-General v Able**)
- Distinguish between Homicide and Assisting suicide → can it be said to have caused the deceased's death → which depends on whether the deceased had the mental capacity to suicide (**Justins**)
 - **Justins [2008] NSWSC 1194** → Court of Criminal Appeal held that:
 - The issue of whether the deceased had the mental capacity to suicide is a question of fact for the jury to decide on the whole of the evidence.
 - If he did not have capacity to commit suicide due to his mental illness, then the accused *caused* his death by making the drug available to him.
 - If he did have capacity to commit suicide, then she is not guilty of murder or manslaughter, but is guilty of aiding/abetting suicide (as she had not completed the *actus reus* of homicide in that she had not caused his death)
 - The issue of capacity is concerned with whether the deceased was able to make a reasoned, but not necessarily informed or rational, decision to take his own life (citing **Hunter and New England Health Service v A** (at [365]))
 - By reason of mental illness, the deceased did not have the mental capacity to suicide
 - Court ordered a new trial on the manslaughter charge → on whether she had the *mens rea* for manslaughter by criminal negligence (prosecution must prove that a reasonable person in her position would have been aware of the deceased's lack of capacity)

- Discretion to prosecute assisted suicide
 - Factors favouring prosecution
 - Suspect was not wholly motivated by compassion
 - Suspect unknown to the victim and encouraged or assisted the victim to suicide by providing specific information via, for example, a website or publication
 - Suspect was an employee or volunteer for a group, which provided a physical environment in which to allow another to suicide
 - Factors against prosecution
 - Victim had reached a voluntary, clear, settled and informed decision to suicide
 - Suspect was wholly motivated by compassion
 - Actions of the suspect were of only minor encouragement or assistance
 - Suspect had sought to dissuade the victim
 - Actions of the suspect may be characterised as reluctant encouragement or assistance in the face of a determined wish to suicide
 - Suspect reported the victim's suicide to the police and fully assisted them in their inquiries
- Passive medical euthanasia
 - E.g., discontinuation of medical treatment (removing artificial feeding tube, turning off a ventilator) → is not homicide, and is to be distinguished from active euthanasia (**Airedale NHS Trust v Bland**)
- Legalising Active Voluntary Medical Euthanasia in Australia
 - **Syme v Medical Board of Australia [2016]** → Victorian Tribunal allowed Dr Syme to give Nembutal to terminally-ill patients.
 - Northern Territory = 1st State to allow medical practitioners to assist terminally ill person over 18 to voluntarily terminate their lives (**Rights of the Terminally Ill Act 1995, ss 7(1)(a), 16, 20**)
 - Commonwealth government limited legislative powers of Territory Parliaments to enact euthanasia legislation (so overturned NT's law), but it cannot interfere with State powers → Victoria enacted **Voluntary Assisted Dying Act 2017**.
 - NSW also passed many Bills to legalise voluntary active euthanasia (but never passed).

Findlay, Odgers and Yeo (2014)

- **Aims / Functions of Criminal Law**
 - Overall aim is to prevent certain kinds of behaviour that society regards as harmful or potentially harmful, protecting interests and values such as bodily integrity of people, security of property, protection of the environment and moral values
- Moral Wrongness approach
 - Lord Devlin argued that morality underpins the social fabric of society and immoral behaviour destabilises society
 - Lord Devlin defined 'moral wrongness' by considering the strength of feelings of ordinary people, in response to certain conduct. If conduct arouses strong feelings of indignation or revulsion, then it is a good indication that the conduct infringes common morality, and should be criminalised
 - Criticism: his definition of moral wrongness is too imprecise (as it is only based on mere feelings of disgust). Such feelings could also stem from irrational prejudices, instead of reasoned moral indignation.
- Individual Autonomy Approach "harm to others/individualistic liberalism"
 - Individuals are accorded as much freedom as possible, subject to minimum restrictions to provide other individuals in the community who share those same freedoms
 - Promotes 'individualistic liberalism', and takes the 'harm to others' approach when determining criminalisation
 - Therefore, the criminal law should only be used against behaviour that injures the rights and interests of these other people

- As long as you had the reckless guilty mind at some point during the act, you have coincidence

Moral discussion – Purposes of Punishment:

- Should David be convicted of any homicide offence – given that he was requested by his Mum to help her die?
- Act of euthanasia was not in his mind or motivation at all – but he had intention (intention to harm, but not intention to kill)
- David's culpability is not reduced by the fact that the mother begged him to kill her
- Did David commit the *actus reus* of homicide → yes, as the act causing death can be a series of acts
- Did David have the required *mens rea* of homicide → he had intent to harm, but not kill → can prosecute for GBH

Class 2: Scope and Principles of Criminal Law

Theory

- **Why do we Criminalise?**
 - Serious implications for those who are criminalised
 - Punishment
 - Imprisonment/any punishment can be the starting point of a long-term criminal career
 - General deterrence
 - Social stigma/negative labels
 - Long term impacts (unemployment, family disruption (BOCSAR 2017: Graffam et al 2017)
 - 41% of adults reoffend within 12 months
 - 66% of juveniles
 - 2/3 of reoffenders are unemployed
 - 2/3 of offenders in NSW have not completed HSC
 - For the state to intervene against the individual, it must have good and clear licence to do so because the implications are so serious (*Norrie 2014*)
 - Criminalisation requires *justification* – according to democratic principles (*Ashworth & Horder*)
 - There is a “right not to be punished” → burden of proof of crime should be on the Crown, whom is seeking to criminalise the behaviour (*Ashworth & Horder (2013)*, citing *Doug Husak (2008)*)
 - Criminalisation of behaviour needs to be justified
- **What is the purpose of criminal law?**
 - Maintain social order
 - Deterrence – specific and general
 - Community protection, denunciation
 - Standards of morality e.g., homosexuality before 1980s, abortion
 - Immediate
 - Remote harm → indirectly imposed on the community – not overly restrictive but should protect community if community interest would be disproportionately affected
 - Retribution: Just desserts
 - Punishment should be proportionate to the harm inflicted
 - Rehabilitation
- **Principles of Criminalisation**
 - Political opportunism and power shape criminalisation (*Ashworth and Horder*)
 - Sentences become harsher because of political parties attempting to be ‘tough on crime’
 - Power dynamics shape criminal law
 - Values that shape criminal law and help achieve goals – in conflict with each other
 - Individual autonomy
 - welfare
- 1. Principle of Individual Autonomy
 - An accused person should be liable for all conduct that they have freely chosen

- Assumption of liberalism – everyone has the capacity to make a free and individualised choice in life – because we have this capacity, we should be liable for the outcomes of these freely made decisions
 - A's act must be voluntary: (Ryan (1967) → Subjective test of A's state of mind (subjectively intended means awareness of what they were doing, and conscious decision)
 - Need actus reus and mens rea.
- Critiques
 - Too limited → requires State intervention to create social conditions necessary for the exercise of full autonomy by individuals
 - Not concerned with social structural factors which may partly determine whether, or not, someone committed a crime or not

2. Principle of Welfare

- States have the obligation to create social conditions that allow us to exercise autonomy and fulfil basic interests (*Finlay*) e.g., safeguards against unreasonable criminalisation
- Gives weight to collective and policy goals of the community e.g., protection from harm
- Objective test: uphold the individual person to the values of the larger community
 - Protects members and collective community from harm even if those protections infringe upon individual autonomy
 - Needs of 'community' weighted against individual rights or privilege
 - E.g., feminist calls for greater protection of women from harm of sexual assault has led to the emergence of objective tests for mens rea in sexual assault
 - Whether or not the lack of awareness of the victims' consent was reasonable → protection of community at large
- Critiques
 - Once they are considered in law reform, the two ideas are contradictory
 - Strict liability offences: largely used for minor/regulatory offences à example of how principle of welfare is infringing the mens rea principle and the principle of individual autonomy

• **A minimalist approach to criminalisation**

- Ashworth & Horder advocate a minimalist approach to criminalisation
 1. Respect human rights
 2. Right not to be punished
 3. Criminalisation as a last resort
 4. Criminalisation should have beneficial consequences

• **How should the limits of liability be determined?**

- Ashworth and Horder claim that the principles and interests should be prioritised
- Ashworth and Horder (2013): When determining how to prioritise competing principles of individual autonomy and welfare, we need minimum criteria for determining the limits of liability → they suggest that 3 basic conditions must be satisfied for a voluntary conduct to be criminalised:
 1. Harmful
 - Violations of legitimate interests
 - Criminalisation of conduct that harms others – but what about offenders with bad intent but does not harm anyone
 - Subjective definition of harm – remote harm? Emotional harm?
 2. Wrongful (morally loaded)
 - Wrongful = culpably assailing a person's interests, or abusing them by using them as a means to another's satisfaction
 - Feinberg → inhibits or setbacks to another's interests
 - Guiding principle between what is wrong is based on morals
 - Margin of tolerance vs Gross lack of Respect
 - To criminalise morally wrongful behaviour: must be grounded in reasons consistent with other standards. Must be reasoned.

- Issues:
 - Morally wrong should be a pre-requisite, as opposed to being a guiding principle
 - Countervailing considerations – e.g., wrongful conduct that does not harm anyone
 - Who determines what is morally wrong?
- 3. Of public concern (public element in the wrong)
 - Community must be victim
 - General obligation of all citizens
 - “Public concern” is not interpreted as a wrong that injures the public, but one that properly concerns the public → e.g., public values, public peace
 - The question is whether the community is appropriately responsible for punishing these wrongs. Is the community the forum which this conduct should be sanctioned, or is it a conduct that should be resolved privately?
 - Issue of public interest = what is the “public interest”?

Readings

Ashworth and Horder (2013), pp. 22-43 → **Principles of Criminalisation:**

- The authors pose a **normative** argument about the ‘principles and values that ... ought (or should) to be considered when deciding whether or not to make conduct criminal.’
 - On the other hand, Findlay, Odgers and Yeo discuss the principles that do influence the criminal law’s content.
 - To what extent should the criminal law uphold the liberal idea that a person should be held criminally liable, and punished, only where he or she has *chosen* to cause harm?
 - The authors advocate a ‘minimalist approach to criminalisation’. Is it persuasive?

1. Principle of Individual Autonomy

- Each individual should be responsible for their own behaviour
 - Like Findlay, Odgers and Yeo, Ashworth and Horder discuss the individual autonomy principle. HCA’s decision in *He Kaw Teh* and NSWCCA’s decision in *Justins v R* exemplify the influence of the individual autonomy principle on the content of the criminal law.
 - The authors note that liberalism assumes people have ‘sufficient free will to make meaningful choices’ → but the law sometimes exaggerate the extent to which people are free to choose → see *Southwark London Borough Council v Williams and Anderson*
- Has factual and normative elements:
 - Factual element is that individuals have the capacity and sufficient free will to make meaningful choices. The concept of “free will” challenged by the notion of “determinism” – behaviour is determined by causes that ultimately each individual cannot control – displacing presumption of “free will” (e.g., poverty, duress, mistake)
 - Barbara Hudson cautions that the assumption of “free will” is a privileged perspective, and those who are poor and powerless have less opportunity for “free will”
 - Normative element is that individuals should be respected and treated as agents capable of choosing their acts and omissions. This prevents the creation of offences by the State on paternalistic grounds.
 - Ronald Dworkin’s principle that each individual is entitled to equal concern and respect
 - Principle assigns liberty and individual rights – protecting individuals from undue State power (an essential element to a “defensive approach” to criminalisation – Nils Jareborg)
 - A person should not be criminally liable unless he had the capacity and fair opportunity to do otherwise (H.A.L. Hart)
- Features of the autonomy-based doctrine of freedom
 1. Promotion and protection of positive freedom – capacity for autonomy (availability of an adequate range of options, and mental abilities necessary for an autonomous life)
 2. State has the duty to prevent the denial of freedom, as well as promote freedom (by creating conditions of autonomy)
 3. An individual must not infringe other people’s autonomy unless the action is justified (minimalist approach)