

Topic 1: Criminalisation and Penalty

Introduction

- Criminalisation integrates principles, motivations and forces behind the idea to criminalise.
- Penalty refers to a broad field of institutions, practices, discourses and social relations which surround the ideas and practices of punishment.
- Dynamic, legal and social constructions of crime interact with criminal justice and criminology (N Lacy, Legal constructions of crime, The Oxford Handbook of Criminology (3rd ed, 2002)).
- As time progresses different things become criminalised and decriminalised, criminalisation complex set of strategies and relationships, process of identifying an act deemed dangerous to social order and punishing it, reaction to social problems (S Cohen, Against Criminology (1988)).
- If we deem more acts as criminal then there are more crimes to offend, if we raise awareness of them then there will be more reporting's (D Husak, Overcriminalisation: The limits of the criminal law (2008)).

Substance of criminal law and its processes

- Originates from history, customs, culture, morality, legislation, common law.
- Enforced by police, judges, prison officials, society.
- Criminal procedure – how the law is carried out.
- Comes from sources such as legislation, common law, practice.
- Initial detection, detention, police powers in situations, discretion to prosecute, bail, hearings, trial, sentencing.

History and cultural perspectives

- Different actions are considered criminal at different points in time.
- When we look at where we've come from and how far we've changed we can see how society and our culture influence what we deem as behaviour deserving punishment or criminal behaviour, it changes all the time with values morality and judgement, we need to reflect on other countries and cultures as well as our own past to make sense of our own criminal history.

What is a crime?

- Traditional view; crime is what the statute books say a crime is, legal wrong followed by criminal proceedings which may result in punishment, prohibited acts, legal wrong followed by criminal proceedings, society deem acts as harmful, (G Williams, Textbook of criminal law (1983)).
- Commonsense; change all the time, though we know a crime when we see one (taken for granted view), views and assumptions assumed the status of givens within debates about crime, the starting point of research and analysis, media influential role, crime problems are criminal justice problems which criminal justice agencies control and punish those deserving, elements of law and order commonsense; soaring crime rates, worse than ever, criminal justice system is soft on crime and doesn't protect society, solution is more police with more powers, tougher penalties and victims should be able to take revenge through courts, most logical and tactical response deemed by society (R Hogg and D Brown, Rethinking law and order (1998)).

Criminalisation

- Result of political choice out of many options.
- Criminal offences come in multiple forms and are enforced by a diverse range of agencies using different methods and transgressions producing broad range of sanctions.
- Criminalisation encompasses enforcement agencies, criminal procedures and police powers.
- Crime is not normal nor necessary, rather it's constructed.

Construct of crime

- Social - produced in and through knowledge and power relations.
- E.g. rape, homosexuality, alcohol, domestic violence.
- Gather knowledge – agencies and institutions; media, research institutions, education, police departments, law societies, courts, parliament.

→ Knowledge provides material and commonsense for theories of criminal justice, power works with an alongside knowledge (e.g. politicians produce fear in order to strengthen the legal system) (R Hogg, Perspectives on the criminal justice system, Issues in Criminal Justice Administration (1983)).

Normative theories of criminalisation

Normative theory of criminal law

- A theory or criteria determining limits of criminal law, decoding what should be criminalised
- When and how criminal law should be used (A Ashworth. Is the criminal law a lost cause? (2000)).
 - ∞ Only for substantial wrongdoing.
 - ∞ Enforced with equal treatment and proportionality.
 - ∞ Provided with appropriate protections.
 - ∞ Maximum and effective sentencing proportionate to crime.
 - ∞ Serious offences should require MR.
 - ∞ No other means are appropriate.
- To criminalise conduct is to declare it as a public wrong, worth punishing.
- Ensure defendant respected by being answerable for their conduct
- When deciding whether behaviour should be seen as criminal factors must be considered; is it serious enough to warrant criminal law intervention, could it be dealt with by other means or remedies, is it practically enforceable, is the penalty level with seriousness of offence (Lord Williams).

Overcriminalisation

- Poor resource allocation, funding and time.
- Expenditure: illicit drugs 09-10; \$1.7bn; 66% law enforcement, 21.3% treatment, 9.2% prevention, 2.1% harm reduction (more on research and enforcement less on prevention and reduction).
- Conviction and imprisonment: 1000 crimes committed, 400 reporting's to police, 320 recorded as offences, 64 cleared up, 43 convictions, and 1 imprisonment.
- Will it lead to positive behaviour changes? Create crime problems in other areas? Police corruption? Health issues? Unequal effect of the criminal law?
- What conduct is worth state punishment? Leads to limitations on sanctions when decided whether persons are eligible or ineligible for punishment, we must identify a state interest determine its legitimacy and decide whether it is substantial enough to warrant criminal enforcement, identify risk what can be done to prevent it what can be done to reduce harm and what can be done to hold offenders accountable (D Husak, Overcriminalisation: The limits of the criminal law (2008)).
- Normative theory looks into rationality, logic, coherence, justice where criminology approach reflects political, legal and cultural conditions (D Brown, Criminalisation and Normative Theory (2013)).

Harm, risk and morality

How and why is an act categorised as a crime?

- Nothing natural or necessary as to why certain acts are or are not crimes at particular points in time.
- Intentions, what the law says, context, culture, where how and when acts occur.
- Public and private distinction – conduct occurs in public, harming public interest, disturbing public order and peace, when done in private it doesn't hold the same effect or social stigma.
- Harm – state may interfere with liberty of individuals where actions could, would harm others, protect community, social stigma, concerns for welfare of community members.
- Risk – preventative justice, education reducing risk of offending and harm, deter, impose sanctions to show seriousness of offence in the hope that society will see the high levels of risk associated with the offence.
- Morality – immorality, shared values, causing moral panic, social order, accepted behaviours, ideas adopted by community, values/ethics/morals/ideas/beliefs/actions society and communities hold in high regard about what is a criminal act and what isn't (and how it should be punished).
- Offensiveness – how society see conduct, relative to harm risk and morality aspects, unaccepted behaviour, rudeness, social stigma.

- Religion – culture, what laws developed out of, though we have differed and gone down a different road in modern society.
- Social reaction – social stigma attached to offences, reactions, shared values/beliefs, what media convey to society influence how conduct is perceived, decide how conduct will be regulated.
- Though none of these explanations explain why we criminalise acts as they all have limitations and problems, though they are useful for understanding the ways or how crime is constructed.

Justification for punishment

Aims of punishment

- Crimes (Sentencing Procedure) Act 1999 (NSW) s 31A; offender adequately punished, prevent crime by deterring offender and other persons, protect community from offender, promote offender rehabilitation, make offender accountable for actions, denounce conduct, recognise harm to victim and community.
- Objectives and purpose of sentencing; retribution, general deterrence, specific deterrence, rehabilitation, incapacitation, denunciation, restoration, changing offenders attitudes and perceptions, promote sense of responsibility, recognising victims (ALRC, Sentencing of federal offences (2005)).

Topic 2: Components of Criminal Offences I

Introduction

General components and principles

- Conduct element of criminal offences (AR – to perform a forbidden act); act, omission, causation.
- Mental element of criminal offences (MR – guilty mind); intent, recklessness, negligence, strict and absolute liability.
- Golden thread; innocent until proven guilty, burden of proof on prosecution to prove guilt beyond a reasonable doubt (Woolmington v DPP [1935])).
- Burdens of proof – persuasive burden; legal burden, prosecution prove beyond reasonable doubt or defendant (where legislation allows or for defences) prove on balance of probabilities, evidentiary burden; rules of evidence party must satisfy for issue to be legally raised, sufficient foundation of evidence, prosecution prove beyond reasonable doubt guilt given evidence against defendant, defendant has burden of introducing evidence that raises the issue (involuntariness, insanity, HRMF).

Constructing individual guilt and innocence

- Many involved in criminal activities claim that they should not be held criminally responsible, although something ‘seriously wrong’ happened. Initially society demand justice, however upon insight into cases questions are raised as to the personal responsibility of the accused. It may therefore be unacceptable to convict and punish someone who did not meet the conditions for responsibility applied in everyday life.
- A critical issue is the extent which courts should conduct inquiries into accused’s state of mind and who should be responsible for proving it. The law often insists on proof that the accused thought about the event and that they realised what was happening. Changes though require the events to be seen from the reasonable person and what they would have thought. This has caused debates to extend to what that the accused ought to have been aware as the reasonable person would have been aware.
- A person who engaged in criminal conduct should not be convicted unless there were at fault (realised actions and appreciated risk of consequences). The actus reus and mens rea must then coincide.
- General deterrence is more important than individual deterrence. The law should inquire into accused’s mental state. We cannot excuse conditions. This would alter our beliefs about cruelty of punishments and merits. The law intends to prevent socially damaging actions and therefore carelessness, accidents and negligence need to be considered (HLA Hart, Punishment and Responsibility (2nd ed, 2008)).
- Intent, recklessness (foresee) and negligent describe peoples actions and mental states.

Constituting legal personhood

- Actions and states of mind are predicted on assumption is subject to the criminal law. Not everyone is seen as capable of bearing criminal responsibility.
- Insanity: exempt from criminal responsibility.

→ Doli Incapax: children under 10 are treated as incapable of committing criminal offences (Children (Criminal Proceedings) Act 1987 s 5), children 10-14 presumed to be incapable of wrongdoing and must be rebutted by prosecution proving beyond a reasonable doubt that the child knew their actions were seriously wrong and not just naughty or mischievous (C (A Minor) v DPP [1995] 2 WLR 383), subjective test; what the child knew and evidence presented about state of mind (RH v DPP [2014] NSWCCA 305).

→ If an adult or older person contributed to offence or convinced child to commit offence, they are also guilty (Children (Protection and Parental Responsibility) Act 1997 s 11).

Actus Reus and Mens Rea

- Two components of criminal offences; prohibited conduct (AR) and mental state (MR).
- AR – prohibited conduct defined in offence; act/omission, circumstance, consequence.

Coincidence

→ For an offence to be committed the prohibited act and fault element must coincide (Meyers v R (1997) 147 ALR 440).

→ If the acts forms the same, unbroken sequence of events, even if there is an appreciable interval of time between the AR and MR, coincidence will be seen (Thabo Meli [1954] 1 All ER 373, Le Brun [1992] 1 QB 61).

→ Coincidence can be seen through continuing acts (Fagan v Commissioner of Metropolitan Police [1969] 1 QB 439).

Actus Reus (GUILTY ACT)

- An act involves physical, external, observable elements and aspects.
- Conduct – series of acts or omissions or a combination, or a state of affairs.
- Circumstance – context conduct done or omission made.
- Consequence – result of conduct.

Consequence and causation

→ We cannot say that a factor is a cause of a consequence unless that consequence wouldn't have occurred at the time but for the presence of that factor.

→ This 'but for' causation is distinguished from legal causation in the courts; courts aren't concerned to discover the causes of a particular consequence but only whether the accused's act or omission was a cause (the question is whether it was a legal cause).

→ If consequence is a component/element, the offence isn't committed if consequence doesn't eventuate.

Acts and omissions

- Act – positive; doing something that breaks the law.
- Omission – failure to act where the law imposes a duty to act.
- Many statutory offences impose duties to act on people carrying out certain activities.
- Look at definition of offence to discover if it can be committed by omission rather than positive act.

Status offences

→ Prosecution doesn't have to prove any action of the accused; criminal liability results from the fact the person was found in a particular situation.

Voluntariness (needed for every offence)

- Presumption of voluntariness.
- Prosecution must prove conduct (acts) were voluntary and cause the consequence.
- Ryan (1967) 121 CLR 205 (Barwick CJ, Windeyer J)
 - ∞ Entered service station with intent to rob, with rifle he started to detain the attendant while demanding money, killed the man in the process; claims accident, reflex movement, tried to fight voluntariness on a constructive murder charge.
 - ∞ He loaded the rifle, cocked it, presented it and pressed the trigger (causing death)
 - ∞ Act of the accused must be voluntary, prosecution must prove beyond a reasonable doubt the voluntary act, presumption that conscious persons act voluntarily, combination of acts with earlier voluntary acts in the chain of events leading to consequence, accused has an evidentiary burden of proving voluntariness.

- Murray [2002] HCA 26; 211 CLR 193 (Gummow, Hayne JJ): the relevant act that is considered to be voluntary must be seen in context; it can then be seen as a sequence of events.
- Juminez (1992) 173 CLR 572 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron JJ): asleep is evidence of unconsciousness or involuntariness, every conduct requires consciousness and voluntariness, if the driver wakes up and tries to correct his actions he cannot be held responsible, if driver is aware of risk of falling asleep but continues to drive and falls asleep the prior driving is dangerous and voluntary and sufficient for conviction.
- Defence – automatism; without consciousness.
- Minimal degree of mental control required for every offence; not MR state.

Mens Rea (GUILTY MIND)

- States of mind; intent, knowledge, recklessness, negligence (subjective and objective).
- Presumption of MR unless displaced by strict or absolute liability.
- Must look at individual offences and work out what if any state of mind is relevant.
- Find state of mind for each relevant AR element (some easy, some not so easy to decide).

Objective and subjective MR standards

- Objective: reasonable person though tin accused's situation, what accused should have foreseen or aware of, precautions that should have been taken (negligence)
- Subjective: accused's actual state of mind at time of offence (intent, knowledge, recklessness),

Conduct (act)

- Interpret legislation, strong presumption for intent (He Kaw Teh (1985)).
- Voluntariness and intent to act (knowledge, decision to bring about a situation or result).

Circumstance

- Interpret legislation.
- Knowledge – knew present circumstance, subjective test requiring examination of accused's actual state of awareness, what did they know?
- Recklessness – subjective test requiring proof accused was aware of risk that circumstance was present but proceeded anyway (advertent), or for some offences accused gave no thought to circumstance; assessed objectively according to reasonable person (inadvertent)
- Negligence – objective test whether reasonable person in accused position would have been aware of circumstance at time of conduct, ought to have realised/known, with honest and reasonable mistake of fact defence available which prosecution must negate, great falling short of standard of care which reasonable person would have exercised involving high risk that conduct would follow (Nydam v R (1977)).

Consequence

- Intent – subjective test; desire, purpose, knowledge consequence will probably occur (HKT), most blameworthy, distinct from motive.
- Recklessness – accused perceives risk that consequence may occur but takes the risk, foresight of probability (murder)/possibility (every other offence) of relevant consequences, advertent or inadvertent.
- Negligence – reasonable person in their position would have foreseen risk of consequence and taken reasonable steps to avoid it.
- Transferred malice; defendant attacks someone or something with MR for particular offence, fails but accidentally brings AR for same offence for a different person or thing, AR and MR are added together and defendant can be convicted of the offence.

Wilful blindness (relevant to only some offences; limited)

- Crabbe (1985); person deliberately refrains from making inquiries because they don't want to have the result, for some purposes treated as having knowledge which was deliberately abstained from inquiry.

Burden of proof

- Prosecution must prove beyond reasonable doubt mental state (MR) of accused.
- Accused has the burden of disproving.

