

Laws1021:

Crime and the Criminal Process

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CRIMINALISATION (1): DEFINING CRIME; MORAL PANICS

46-61; 111-118

Concept of Criminalisation

- Issue of criminalisation interrogates the principle, motivations and forces behind decisions to characterise behaviours as 'criminal'.
- Is there overuse of criminalisation?
- One characteristic of criminal law is that it entails punishment and the debate surrounding justification for punishment
- The field of penalty: encompasses but is considerably broader than 'punishment'
- Social response is a fundamental aspect
- Contextualising criminal law

- Criminalisation can be seen as the process of identifying an act deemed dangerous to the dominant social order and designating it as criminally punishable' (S Cohen 256).
 - Interesting when he talks about how this perspective is shaped by a formed dichotomy. A good act and a bad act. It dismisses the possibility of a 'grey space' where an act could be a crime but not a crime- there is no in-between, which can be dangerous because it threatens the idea of smaller, or larger degrees of criminal behaviour.

N Lacey – 'Legal Constructions of Crime' (47)

- Criminalisation = Social practices which form criminal law + criminal justice & criminological studies. Interlocking practices in which the moments of defining and responding to crime can rarely be completely distinguished and in which legal and social constructions of crime constantly interact.
- Social actors and institutions: citizens, police, media, prosecution, courts, judges, lawyers, social workers, probation officers, employees of the penal and mental health systems, legislators and the executive.
 - "Criminalisation captures the dynamic nature of the field...in which the moments of 'defining' and 'responding' to the crime can rarely be completely distinguished and in which the legal and social constructions of crime constantly interact' (N Lacey Legal constructions of crime p.282).

S Cohen – 'Against Criminology' p.48

Problems of the current model of criminal law:

- Takes for granted the very category that is the problem. Situations and conflicts are now being judged in a different way.
- Criminalisation relates to the overall exercise of power in modern society, which is assumed to be centrally focussed (relating back to the State), a property (something that one has while another does not) and always operates in the negative.

Criminalisation must rather be seen in terms of a complex set of strategies, maneuvers, and relationships in which the power to ban is not its only effect.

- Criminal law draws a simple line of demarcation, i.e. an act is either a crime or not a crime. There cannot be degrees of criminality.

The criminal law model thus applies the same yardstick in unique and different situations, which is a **weakness of crime as a form of social control**.

- The solution criminal law aims to obtain is elusive, and becomes more elusive the more we try to stretch the category.

Over- criminalisation (49)

(D Husak)

- The fundamental idea is that over-criminalisation leads to excessive punishment.
- “A substantial amount of contemporary punishments are unjust because they are inflicted for conduct that should not have been criminalised at all” (Husak)
- An interesting idea but doesn’t that completely conflict with the idea of law itself. Shouldn’t law/criminal law be there to dictate acts which are inherently perceived as dangerous to society, and thus if you are punished for an act that shouldn’t be criminalised- how can that be operating under the law? Of course this doesn’t apply in hindsight- for example the criminalisation of gay people.
- Over-criminalisation may be backfiring in terms of leading people to mistrust the legal system. They may fear it, but will also mistrust it.
- Ignorance and lack of education seems to be a reason for over-criminalisation. Those who are offending do not know whether or not their acts are punishable by law. I agree- if lawyers themselves can spend hours looking through laws, how can people, and even uneducated people be expected to know every single law.
- The law is there to shape behaviour of a society- but the majority of people should agree on what is right and wrong despite this being quite a complex task. If the majority of people disagree on smaller actions that constitute as a crime, faith in the justice system will be compromised.
- “Injustice is most glaring when defendants are sentenced for conduct that should not have given rise to criminal liability at all.... When punishments are imposed for conduct that fails to satisfy our best theory of criminalisation” (Husak)
- Over criminalization produces too much punishment, most of which is unjust for two main reasons: they are excessive, and that they are inflicted for conduct that should not have been criminalized at all.
- Due to the number and complexity of criminal statutes, potential lawbreakers may not receive adequate notice of their legal obligations, and thus are not given a fair opportunity to refrain from whatever conduct will incur penal liability. This undermines the objective that the law exists to guide behaviour.
- Massive opportunity costs – resources spent in law enforcement (police, prosecutors, courts) could be spent on more urgent needs, such as improving schools and hospitals.
- Stigma is depleted and deterrence most likely is eroded if the criminal law expands to conduct that few condemn and most everyone performs.
- Provides police with increased powers to arrest. Arrests are embarrassing, costly and inconvenient.

- Destructive of the rule of law itself. The behaviour that is proscribed cannot be ascertained without straying beyond the boundaries of criminal statutes and examining noncriminal laws.

Commonsense (50)

- Commonsense responds to the question of 'what is crime' by saying that everyone knows what a crime is when they see one.
- Commonsense is 'what we all know already'
- It argues that we should be learning about the rules about homicide, assault etc., rather than going into depth about a 'silly' question such as what is crime?
- This is very deceptive because in even a major crime (murder) there are so many smaller categories- accidental killing, manslaughter etc. Therefore, can manslaughter be considered a 'crime'- it is murder and thus a crime, but is it the same as intentional killing.
- The 'hierarchy of credibility' (Howard Becker coined term) shows how in any hierarchal society the right to define reality/what is crime etc. falls to a select few authoritative sources, whose views then circulate to the wider public
- Interesting concept because this theory of 'Commonsense' seems to place an assumption on the basic understanding of the 'obvious'. But really- the 'obvious' may not always be 'obvious'.
- Commonsense especially in the general public makes contradictions to 'what we know or what we believe to be right or wrong' harder to accept. Laws harder to change.
- Hierarchy of credibility really applies and links in with Commonsense theory

Law and order "common-sense": Hogg & Brown: "Rethinking Law and Order (51)

- "Hierarchy of credibility" – dominant agent/group in a situation commands greater authority... This notion operates in favour of the views of a select few authoritative sources whose views circulate widely in the public arena, and over time become incorporated into popular common-sense.
- Elements of law and order common-sense:
 - Soaring crime rates
 - The idea that "it is worse than ever" o The future is NY or LA (downward spiral into unrestrained crime).
 - These (above) are the types of issues we continually see in the media. e.g. "the youthful of today can't be controlled". This represents the enduring idea about crime that things are always going downhill, however crime rates are stable and society still remains intact today.
 - The criminal justice system is soft on crime and does not protect citizens o The solution is more police with more powers o We need tougher penalties
 - These types of statements are also frequently seen in the media. - This assumes that changing that the criminal justice system will lower crime. However, to lower crime, we need to address the underlying causes of offending behaviour, such as substance abuse, despair, poverty, socioeconomic status, etc. More police -> more likely to be caught committing offences -> more crime. - Moreover, the operation of police is targeted/profiled – police are likely to be more interested/attentive to some people over others. E.g. youth vs. middle aged woman driving the same car in the same area. "suspect population".
 - Gender: male over female Race: black over white Socio-economic status: poor over rich
- Victims should be able to get revenge through the courts.

Pratt, Penal Populism (53)

- Penal populism is when major political parties compete for tougher action on crime (at times supported by misinformed public)
- Perceptions of rising crime can lead to this momentum of wanting change or toughness on crime.
- Public give support to populist organisations or politicians who seem to be speaking for them and offering simple understandable solutions
- The problem with this is that the public is misinformed and may perceive things that are not happening in reality.
- Instilled fear can create momentum

Historical relativity and change

- Refers to how the legal landscape constantly changes and progresses
- For example, drugs such as heroin were legally available, now they are illegal.
- Decriminalisation of homosexual acts
- Across history, ideas about criminality change over time, and so what may be considered criminal in one era may not be considered criminal in another.

- Some conduct has been included in the criminal law, such as drug use, while others have been excluded, such as homosexual intercourse.

- The common-sense view that everyone knows a crime when they see one is inadequate. The content of criminal laws and the forms of criminal agency are constantly changing. The wide variety of behaviour treated as criminal by the law at any given time suggests that attempts to distil any common essence of criminal conduct will prove extremely difficult.

Cross-cultural perspectives (55)

- Cultural relativity serves as a test of the common-sense view that everyone knows what a crime is.

- The things that we think are given and beyond question are often actually part of our own cultural understanding/framework, including our ideas about what conduct is criminalized

The production of knowledge *R Hogg – “Perspectives on the Criminal Justice System” (57)*

- Knowledge is only possible through certain material practices which are invested with power relations, i.e. power and knowledge are interdependent.
- **Criminal statistics**

- Criminal stats are a key source of knowledge about criminal justice.

- They are social constructions, based on discovery methods, classification rules, validity checks and many more, and so are not reflections of “real” levels of crime.

- Police stats (reported and recorded crimes), court stats (persons charged and outcomes), prison stats (persons imprisoned), self-report studies, and victimization surveys.

Unreported crime

- 1000 crimes committed -> 320 recorded by police as offences -> 1 person

imprisoned. Research such as this shows the over-reliance placed on the criminal justice system as a protection against crime.

- Agencies of criminal justice (police, courts, penal systems) respond to crime, however **never affect the incidence of crime, as crime is largely a function of social, economic and cultural factors.**
- Changes in reporting and recording rates are the result of **attitudinal shifts in public** (e.g. increased reporting of domestic violence due to public education campaigns), police practices and technological changes.
- Stats are ground in and derive from community attitudes and professional practices, and are also destined to serve a variety of social and political functions

Definition of Crime

- “A crime is a legal wrong that can be followed by criminal proceedings which may result in punishment” (G Williams 27-9)
- There is a complex relationship shared between crime and punishment. There are many questions about what can be classified as criminal and what are the effects of criminalisation- will it really assist society/regulation?
- There is no workable definition of crime. It is so complex.