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INTRODUCTION

1 Introduction – Crime, Law and Morality

1.1 (Contested) purposes of criminal law

- Symbolic description of social expectations (declaring criminal wrongs)
- Prevention of crime/harm through deterrence
- Protection of morality
- Punishment for breach

1.2 Constructing individual guilt and innocence

- People often claim that, although they had been involved in what was a criminal activity, they should not be held criminally responsible
- In this case it may be unacceptable to convict and punish someone who did not meet the conditions for responsibility applied in everyday life
- Critical issue is whether courts should look into a person’s actual state of mind
- Law has generally insisted that the accused brought about the event (actus reus) AND that they actually realised what was going on (mens rea)
- Often decided from the perspective of a reasonable or ordinary person
- Motive is very important in determining a person's state of mind and a crucial factor in moral evaluations of their behaviour
- Norrie suggests that motives are generated by social conditions
  - Some occasions where determining criminal responsibility takes into account broader social context e.g. self-defence, necessity, provocation

1.2.1 HLA Hart – justifying why the law should inquire into mental states/motives

- By attaching excusing conditions to criminal responsibility, individuals are given more benefits than they would if the law operated on strict liability:
  1. Maximise the individual’s power at any time to predict the likelihood that the sanctions of the criminal law will be applied to him
  2. This enables the person to choose to determine whether to do the act or not
  3. If the sanctions of the criminal law are applied, the pains of punishment will for each individual represent the price of some satisfaction obtained from breach of law
- Overall, these excuses give the individual maximum protection from criminal law and thus seek to maintain a just approach
- Strict liability would meant that even accidentally striking someone would result in punishment – if you did not intend to do this, is a sentence just?
- Would also mean that we would suffer sanctions without having obtained any satisfaction
1.2.2 Barbara Wootton – *mens rea* has gone too far

- *Mens rea* would be okay if the law was concerned only with wickedness, but this is not necessarily the case → concerned about prevention of crime
- Just because someone didn’t mean or intend to do something, doesn’t mean damage was not caused
- Is absurd to turn a blind eye to negligence or carelessness
- Question of motivation here is irrelevant
- But at the later stage, the presence or absence of a guilty intention is very important when you have to decide what measures or punishments should be taken i.e. at the sentencing stage → as a person without motive should be punished more lightly than someone with a motive?

1.3 Subjective and objective mental states / mens rea standards

- Subjective standards = conducting an inquiry into the accused’s actual state of mind at the time he or she engaged in certain activities constituting the actus reus
  - Not subjective in the sense that they require the fact-finder to make an assessment of the situation as the fact-finder reads it, but on the actual state of mind
- Objective standards = asking the fact-finder to consider the hypothetical question of what the state of mind of a reasonable person would have been if they had found themselves in the accused’s position
  - What they ought to have foreseen and what precautions they should have taken
- Intent = state of mind most frequently associated with act and consequence elements in the actus reus
  - Those who intend to bring about a particular consequence are regarded as having the most blameworthy state of mind, deserving the severest punishment
- Generally, actus reus requirements are being watered down and are assuming less significance than the mens rea requirements for **serious offences**
- For less serious, mens rea is less important

1.4 Euthanasia

1.4.1 Homicide and assisting suicide

- Those who help to bring about death of the terminally ill are guilty of homicide or aiding and abetting suicide, the consent of the deceased is no defence (*Crimes Act* s 31C(1))
- Those who are not competent to make the decision to die
  - *Justins* [2008] NSWSC the deceased had Alzheimer’s and been given a glass with a drug in it
  - Central issue here was whether the deceased had the mental capacity to commit suicide
This is because it determines who causes the death i.e. if there was no capacity to decide, the accused would be on murder charge but if there was capacity would be assisting suicide.

1.4.2 Euthanasia and the medical profession

- Illegal in Australia (but rarely prosecuted) per CA:
  - E.g. intentionally taking life = murder (s 18)
  - E.g. assisting suicide = s 31C
    - Limited permission to withdraw nutrition and hydration for patients in persistent vegetative state
- *Airdale NHS Trust v Bland* – there is a distinction between discontinuation of treatment and actively bringing a patient’s life to an end
- S 31C(2) of CA makes it an offence to incite or counsel another person to commit suicide but only if that person commits or attempts to commit suicide as a consequence (*AG v Able*)
- Legalising consensual euthanasia
  - *Rights of the Terminally Ill Act 1995* in the NT – became the first Australian jurisdiction to permit medical practitioners to assist terminally ill patients over the age of 18
  - Series of regulations and steps though → not that simple
  - Overridden by Cth Parliament
  - If doctors are already killing their patients, then why not insert regulation on them? They are currently doing it with no guidelines or rules

1.4.3 Arguments against Euthanasia?

- Strong moral argument on the sanctity of life – especially that those lives of the vulnerable are still valued by society
- Where do you draw the line of where it is legal and where it is illegal?
- The victims may not have the capacity to make the decision that they want to die

1.5 Problem A – Homicide and Euthanasia

- Does she have the capacity to make the decision to die?
- She is in extreme pain – what impact does this have on her decision?
- *Justins* – is there capacity for a reasoned choice? Doesn’t need to be rational or reasonable
- Intention – David meant to hit his mother but does not appear to be motive
- Getting the accused’s mental state is about *inference*
2 Principles of Criminal Law?

2.1 Debates about the definition of crime

- What is a crime?
  - Positivist definition:
    - A crime is a legal wrong that can be followed by criminal proceedings which may result in punishment (Glanville Williams)
    - Positivism would argue that we can learn about criminal law through reading criminal law acts
  - Issues:
    - Sometimes the criminal law is used to regulate conduct and not prohibit:
    - E.g. power of police to take children where there may be risk or a subsequent crime
    - Paternalism
    - Encourages particular vision of parenting
  - Discretion can be so broad that it is hard to see the legal wrong:
    - Again, criminal law is working to regulate
    - E.g. Terrorism: what actually constitutes a terrorist organisation?
    - The purpose here is not about prohibiting the act of being in a terrorist organisation, but again is about regulation
    - Broader than just terrorists, those who associate with terrorist organisations are criminally liable
  - Sociological definition:
    - Crime is culturally defined, and history and context are crucial in its definition (Alan Norrie)

2.2 Rationales

- Basis for criminal liability
  - Moral individualism (Norrie)
  - Principle of autonomy – individuals should be treated as responsible for their actions
  - Presumption of free will
    - Person held responsible if they could have done otherwise
    - Is it correct to presume free will? Is this a perspective of the privileged?
    - Individuals should be respected and treated as capable of exercising choice – otherwise not seen as moral persons
  - Harm

2.3 The ‘general’ principles of criminal law

- The rule of law
- The principle of legality and the constitution
• Presumption of innocence
  o *Woolmington v DPP* [1935] AC
    ▪ Once the prosecution had proved he had shot his wife, the onus was on the defendant
    ▪ BUT the presumption of innocence is the golden thread that underlies the whole criminal law
  o Formal reminder to the prosecution that the state has to prove guilt, rather than literally assuming that the defendant will be innocent
  o Burden of proof
    ▪ Legal burden
      • Prosecution to prove all elements of the crime and rebut all available defences → beyond reasonable doubt
      • Accused: defence of mental impairment and defence of SIAM where provided by statute
    ▪ Evidential burden → balance of probabilities
      • Prosecution to prove all elements of crime
      • Accused – defences
        o Allows the defence to say that their action was involuntary
  • The principle of equality before the law
  • The principle that intention not motives goes to guilt
  • The principle that each crime requires both an external/physical element as well as a guilty mind

• Issues:
  o Misleading to think about a cohesive list of general principles
  o The way the law has developed has reflected social relations and conflict

2.4 *Ashworth and Horder, ‘Criminalisation’*

• The criminal law is often justified as a device for the protection of social order
• They argue that in a liberal state, there is something equivalent to a right not to be punished which should place the burden of proof firmly on those who would wish to turn non-criminal activity into criminal offences
• While legislature has power to decide what constitutes criminality, often the real practical power of whether the offence has taken place is left to the enforcement agents. Thus the exercise of discretion is essential to the ‘practical instances of criminalisation’

2.4.1 The principle of individual autonomy

• Justification for criminal laws is individual autonomy: each individual should be treated as responsible for their own behaviour
• Individuals have free will to make decisions so they should thus be held accountable for what they do, cf. determinism
• ‘Preconditions of criminal liability’: general assumption that sane adults can be held liable for their conduct and matters within their control except where they can point to excuses for their behaviour
• Normative aspect of the principle as well: each individual should be afforded respect, equal concern and be seen as capable agents choosing their acts and omissions
• HLA Hart is key to this principle: an individual should not be held criminally liable unless they have the capacity and fair opportunity to do otherwise
• In some ways, the principle of individual autonomy pays little attention to the social context in which all of us are brought up and the possible powerlessness in which we may have to live

2.4.2 The principle of welfare

• Perhaps principle of individual autonomy is too limited
• This welfare theory emphasises the state’s obligation to create the social conditions that are necessary for the exercise of full autonomy by individual citizens
• This principle recognises the social context in which the law must operate and gives weight to collective goals
• Group of qualified rights i.e. human rights, demonstrates the inevitability of conflicts between autonomy and welfare

2.4.3 The harm principle and public wrongs

• (1) The state is justified in criminalising any conduct that causes harm to others or creates an unacceptable risk of harm to others
  • John Stuart Mill: the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others
  • Has the objective of restricting the criminal law from penalising conduct regarded as immoral or otherwise inappropriate, but not harmful
  • What is harm? (H. Gross)
    o Violations of interests in retaining or maintaining what one is entitled to have
    o Offences to sensibility, pornography, prostitution
    o Impairment of collective welfare – health safety security
    o Violations of governmental interests – tax violations, bribing
• (2) Addition of wrongfulness: it is not just harm alone that justifies criminalisation, but the wrongful causing of harm → wrongful in the sense of capably assailing a person’s interests, or abusing them
• Does it need to amount to a “moral wrong” to be criminal? Is this essential?
• (3) The public element in wrongs is important
  o Issue: how can we tell which wrongs done to individuals are sufficiently public to warrant the condemnation of the criminal law?
  o Antony Duff says that the answer lies in the public valuation of the wrong → we need to see the wrong as being also ‘our’ wrong
  o The public element has nothing to do with location (i.e. in public or in private)
Should the state protect the value? Is it worth something to the community as a polity?

- Once the concept of harm is extended to harming others, the possibilities for criminalisation are enormous

### 2.4.4 The minimalist approach

- The criminal law should not be used for minor wrongs
- Four main components:
  1. The principle of respect for human rights
     - E.g. any laws should protect freedom of religion and thought, the right to privacy
     - Only intervention is allowed if it is necessary for a democratic society
     - E.g. the Evangelical Christian having a sign that was homophobic, allowed to interfere with those rights of religion and freedom b/c of the disorder/violence it would create
  2. The right not to be subjected to state punishment
     - There need to be very high standards for the justifications given for criminalising conduct
     - Burden of proof shall lie on those who would impose criminal liability
     - Basically criminal law should be reserved as a legislative technique of last resort, used only for serious and harmful conduct
  3. The principle that the criminal law should not be invoked unless other techniques are inappropriate
     - In some instances perhaps it is better to leave the censuring to morality, social convention and peer pressure
  4. The principle that conduct should not be criminalised if the effects of doing so would be as bad as, or worse than, not doing so
     - E.g. decriminalisation of some drugs could more argued to be more productive than criminalisation, which actually only promotes cycles of inequality in some situations and is therefore counter-productive

### 2.4.5 Morally wrong behaviour

- There is an argument that society should be able to use the criminal law to curtail behaviour that threaten the existence of the society (Devlin)
- But does Devlin have a loose concept of morality?
- Some paternalism is appropriate so as to ensure the protection of the young and the mentally disordered

### 2.4.6 Remote harms

- One argument for criminalisation is that certain conduct may create an opportunity for serious harm to be caused subsequently