LAWS106 CRIMINAL LAW
Semester 1 2014

Week One: The Criminal Law

Chapter One of Text

What is a crime?

Professor Glanville Williams defines a crime as:
'A crime (or offence) is a legal wrong that can be followed by criminal proceedings which may result in punishment.'

The Aims of Criminal Law

THE PREVENTION OF HARM

- Forms the basis for the reach and limits of criminal law
- 'Harm principle' restrictions on individual liberty must be curtailed and are justifiable only in order to prevent harm to others
- Harm principle is a way of balancing the interests of the state while protecting the freedom and autonomy of the individual

THE PUBLIC INTEREST

- A primary justification for criminalisation is the 'publicness' of the conduct
- only labelled a crime if it is thought to be an offence against one or more individuals
- must be injurious to the public in general
- all private injuries, if they become sufficiently widespread, become detrimental to the public
- public wrongs = criminal law
- private wrongs = civil law

MORALITY

- for conduct to warrant classification as criminal it must involve a moral wrong doing
- not every transaction that can be considered morally wrong or injurious to the public interest is treated by out law as a crime
- the structure and general principles or criminal law can be identified and analysed in terms of how law explores, expresses and organises wickedness

Sources of the Criminal Law

- in the early days of the English criminal law, criminal cases were dealt with largely by local courts and except for spasmodic interventions by parliament much of the law was traditional and expounded by the judges from case to case
- there place was eventually taken by the Kings court
- Judicial activity was the main source of the criminal law at this time
- for a long period of time there was no system of appeals in criminal case
- informal system for appeals began in 18th century
- It is advisable to refer to statute first to ascertain whether or not an offence is specified under legislation.
- Cases will then provide definitions or applications of the law

The definitions of crimes

SUBJECTIVE BLAMEWORTHINESS

- It is generally accepted that punishment is justified only if the person to be punished is morally blameworthy.
- The dominant account in criminal law requires subjective blameworthiness; that is, knowledge and/or intention of wrongfulness.

The Maxim

"Actus non facit reum nisi mens sit rea"

'A vicious will without a vicious act is no civil crime, so on the other hand, an unwarrantable act without a vicious will is no crime at all'

- Classic writers on criminal law, used the maxim as a basis for justifying all those excuses which have been traditionally recognised as defences – infancy, duress, coercion, insanity or mental impairment.

A THEORY OF HUMAN ACTION

- According to the Austinian doctrine, a human act is a muscular contraction resulting from the operation of the mind or will.
- Such an 'act' is distinguished from it's surrounding circumstance (which may include past facts) and equally sharply from its consequences
- Therefore, what an ordinary person would consider and describe as 'my act of shooting my enemy' is analysed as a muscular contraction of 'my finger' is touching the trigger of a gun, the fact that the gun is pointing at 'my enemy'

THE CHANGING CONCEPT OF MENS REA

- It came to be though that blameworthiness rested in the existence, in every instance of a specific 'state of mind' prompting the muscular contraction in question
- It was and is argued that one cannot properly be blamed for some transaction, unless, at the time when one willed the muscular contraction that produced the particular consequences, ones mind at least correctly appreciated the existence of the surrounding circumstances and realised or foresaw the consequences.
- Such a blameworthy state is normally termed in modern writing as 'recklessness'; if there is added to it desire to produce the consequences, the resultant blameworthy mental state is often termed as 'intention'.
- The word 'reckless' may also properly be used to describe the gross negligence and carelessness of a person who neither intender nor foresaw the consequences of his/her actions.

THE PROBLEM OF NEGLIGENCE

- The problem of negligent behaviour has loomed large in modern discussions of mens rea
- Negligence may be defined as a failure to comply, in any given activity, with the standard of care that a reasonable person engaging in that activity would adopt
- For the purpose of those crimes that may be committed negligently (eg. Manslaughter) the criminal law insists upon a higher degree of negligence than does the civil law
- Sometimes argued that since negligence involves a negative state of mind – that is, a failure to advert to possible consequences the notion of degrees of negligence is non sensical because there can be no degree of inadvertence.

"When harm has resulted from someone's negligence, if we say of that person that he has acted negligently we are not thereby merely describing the frame of mind in which he acted... we are referring to the fact that the agent failed to comply with a standard of conduct with which any ordinary person could or would have complied; a standard requiring him to take precautions against harm"

- There can be degrees of negligence
- Negligence is said to be gross if the precautions to be taken against harm are very simple, such as persons who are but poorly endowed with physical and mental capacities can easily take.

STRICT LIABILITY

- Crimes created by such statutes are called crimes of strict (or absolute) liability
- So-called regulatory offences provide an example of one of the ways the which the law has shaped out perception of immoral and moral behaviour. Thus drink driving is a class of strict liability offence, the law does not care whether or not the driver knew they were over the limit, but only whether they were over the limit.

ACTUS REUS

- Physical elements of a crime
- Directly translates to = "An act cannot by guilty – only humans can be"

** non sensical

- Convenient way of distinguishing between the 'non mental or external elements of a given crime from the mental (internal) element

EVIDENCE OF THE MENS REA

- In practice, we do not have any difficulty attributing a particular mental state to another person if we know enough, by our observation or the observation of others reported to us, about his/her conduct
- Eg. where a person fires a pistol at another from point blank range, there is normally little difficulty in deciding that he or she intended harm to that other

SUBJECTIVE AND OBJECTIVE STANDARDS

- It is often uncertain what the accused's state of mind may have been
- Two ways of determining what a person's thoughts or desires were on a given occasion, which are;
- (a) by asking the person; and
- (b) by considering what a reasonable person, behaving as that person was seen to behave on that occasion, would have thought or desired in order to produce such behaviour
    - (b) is preffered over (a) by judges.

Who can commit crimes?

INFANCY

- Crimes can only be committed by those 'legal persons' who can perform mental and physical acts in the exercise of a choice to do or refrain from doing them
- eg. a baby in arms cannot have a mens rea or perform an actus reus
- Common law accordingly held that a child under 7yo was incapable of committing a crime and cannot be convicted
- In all jurisdictions minimum age of criminal responsibility has been raised to 10yo
    - common law still requires that until he or she attains the age of 14 years, it is necessary to show that, as well as possessing the appropriate state of mind for the crime in question the defendant knew that the act was wrong
        - this is called the presumption of *doli incapax* (incapable of wrong doing) as well as proving all elements of the offence the prosecution must bring evidence to rebut this presumption

CORPORATIONS

- A Corporation is a legal person and, as such, may be convicted of a crime.
- Since a corporation may act only through its officers or employees, may be attributed to the corporation
- The present rule is that the corporation will be liable for the criminal acts of its officers or employees if it can be shown that those acts were, in reality, the acts of the corporation
- A corporation cannot be imprisoned

IMMUNITIES – THE SOVEREIGN, ETC

- Common law held that 'the king is the fountain of justice' and 'the king can do no wrong'
    - Neither of these can be taken on face value today
- It is clear that the reigning Sovereign cannot be put on trial in the courts for a crime
- The same also applies to his/her representative in the Commonwealth (the G-G) and the states (the Governor)
    - can be brought to trial after they have ceased to hold office for criminal acts performed while in office
- Aliens who commit criminal acts within the jurisdiction may be arrested and bought to trial in the same way as citizens

The Aims of Punishment

RETRIBUTION

- Retributive theory views a crime as a wrong which of its very nature, justifies the infliction upon the criminal of a certain amount of punishment
- It requires that punishment be inflicted even though it would serve no apparent purpose
- Theory sets a maximum on the amount of punishment, and increases or decreases this maximum depending on the degree of wrong

- However the theory doesn't require the infliction of any punishment at all; it merely limits the amount

DETERRENCE

- You can deter a person from committing an act that will bring him/her a certain degree of pleasure by holding out as a prospect the infliction upon that person of a slightly greater degree of pain if he or she should commit the act.
- It would require far more sever prospect of punishment to deter a starving person from stealing a loaf of bread than it would to deter a comparatively wealthy person from committing fraud in order to buy a second yacht; yet most people would consider the latter more deserving of punishment.
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DETERRENCE AND CERTAINTY

- 'Especial need for certainty in criminal law'
- theoretical link between certainty and general deterrence is plain:
- If one wishes to deter people from engaging in various activities by holding out to them a threat of punishment, it seems essential to state quite clearly and precisely what the forbidden activity is; it would seem that the threat cannot have any effect on the mind of the prospective criminal unless he/she can associate it easily with a proposed activity on his/her part.

CERTAINTY AND CODIFICATION

- The desire for certainty lies behind the pressures for stating the criminal law in the form of a complete code
- However a code is bound to fail in achieving complete certainty

<u>Discretion, The Prerogative of Mercy and the Role of the Jury</u>

THE ROLE OF DISCRETION

- Police officers in their daily work must continually decide which of the many transgressions occurring within their view they will officially notice. If an officer decides to notice, that officer must then also decide how far he/she goes. Sometimes it will be appropriate for the offender to be let off with a warning. At other times, an arrest or report offence to superior officers.
- 'Plea bagaining'
- Where a trial results in guilty verdict the judge has a wide discretion as to the penalty.

THE PEROGATIVE OF MERCY

- The power of the Crown to pardon an offender has been recognised as part of the Royal prerogative since ancient times and is known technically as the prerogative of mercy.
- It is is demonstrated at some time after the trial that an accused was not in fact guilty, the Crown will issue what is known as a free pardon which has the effect of wiping out the conviction.

MOTIVE

- For present purposes, a 'motive' may be loosely defined as the circumstances leading a person to take certain action

THE ROLE OF THE JURY

- Fact finding body
- Apply those facts to the principles of law expounded to them by the judge
- This analysis leads to the preposition that, if the facts appear clearly enough from the evidence, the judge can direct the jury as to the verdict which they return.
- The law places in their hands the power of giving the ultimate decision on the general issue of whether the accused is guilty or not guilty.

<u>Criminal Procedure and Evidence – Preliminary</u>

- There are long established rules and standards which apply to criminal prosecutions
    - conveniently described as 'criminal procedure'

DOUBLE JEOPARDY

Special Pleas

- In *Green v United States (1957) 355* US 184, Black explained the rationale of the principle of

double jeopardy as follows:

"The State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting them to embarrassment, expense and ordeal and compelling them to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty"

- At common law, the principle of double jeopardy found expression in the special please of *autrefois convict* (previously convicted) and *autrefois acquit* (previously acquitted)
- These please operated as a bar to the further prosecution of an indictment for a criminal offence

The previous jeopardy:

- It is immaterial whether the first acquittal or conviction was on indictment or on summary proceedings

What constitutes jeopardy?

- Previous trial must have proceeded to a verdict

Abuse of Process

- The pleas of *autreofis acquit* and *autrefios convict* are not sufficient to cover ALL cases in which an accused might be placed in jeopardy which an accused might be placed in jeopard more than once for the same matter
- Eg. the driver of a train causes an accident in which 100 people are killed. The crown believes the accident was due to the gross negligence of the accused and prosecutes the driver for manslaughter of one passenger. If the accused were to be acquitted, the plea of *autrefois acquit* would not prevent a further prosecution of the driver for the manslaughter of another passenger. Since the victim is different, the offence is not the same.

Perjury

- Where an accused has been acquitted of an offence, he/she may not be convicted of perjury in respect to evidence given by him/her at that earlier trial

Proposals for Change

- The decision of the High Court in *R v Carroll* involving the escape from punishment

<u>The Burden and Standard of Proof</u>

LAW AND FACT

- Lawyers regard all cases as being separable into two main constituents – the facts and the law
- The resolution of every case depends on ascertaining the facts and applying them to the appropriate rule of law
- The criminal rules differ from those in civil cases because a criminal conviction carries aiwht it a moral stigma which is usually though not always absent in civil cases

THE TWO BURDENS

- In some cases, it is stressed that the burden of proof never shifts
- In others, the judge will remark that at a certain stage of the case the burden of proof shifted from one party to the other and perhaps that it shifted back again at a later stage

THE LEGAL BURDEN

- The first sense in which the term 'burden of proof' is used is as referring to the rules directing the trier of fact, the jury or, in cases w/o jury, the judge, what to do if they are unable to determine where the truth lies
- In that case the burden of proof has been defined as:
  - "The peculiar duty of him who has the risk of any given proposition on which the parties are at issue – who will lose the case if he does not make this preposition out, when all has been said and done"
- In criminal cases, the risk of failure to persuade the trier of fact lies normally on the prosecutor and not on the accused
- The 'risk of failure to persuade' is one meaning of the phrase 'burden of proof'

THE EVIDENTIAL BURDEN

We ought to ask:

1. Upon whom does the duty of producing evidence (the evidential burden) lie?
2. Upon whom does the risk of non persuasion as to the issues (the legal burden) lie?

INCIDENCE OF THE EVIDENTIAL BURDEN

- In a murder case, for example, the prosecution bears the evidential burden of showing that the accused has raised a defence or chosen to exercise his/her rights to silence

INCIDENCE OF THE LEGAL BURDEN

- General rule is that the person who makes a claim must establish it
- In a criminal case, the prosecution must bear the risk both of failing to establish all or any of various elements, and of failing to rebut any defence raised by the accused

STANDARD OF PROOF

- What standard or degree of certainty must the adjudicator reach in order to be able to say: "i have decided that so-and-so occurred"?
- In criminal case, the prosecution must establish the guilt of the accused 'beyond reasonable doubt"

THE GOLDEN THREAD

"Throughout the web of the English Criminal Law one golden thread is always said to be seen, that is the duty of the prosecution to probe the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exclusion. If, at the end of and on the whole of the case, there is reasonable doubt, created by the evidence given by either the prosecution or the prisoner has to whether the prisoner killed the deceased with malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

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- ****** Two 'exceptions' to the general rule – the defence of insanity, and the special provisions made by statutes

THE INSANITY EXCEPTION

- It is clear that If an accused was insane at the time of committing the act or omission that comprises the external element of the offence, that person could not have committed an offence
- It is also plain that the prosecutor does not have to prove, in every case, that the accused was sane at the time of the alleged crime.
- The evidential burden of proving insanity lies on the accused.
- It is sometimes said that every person is presumed to be sane, but this is another way of stating the effect of the rule rather than a justification for it
- In *Davis v United States* (1895) 160 US 469, the United States Supreme Court held the burden to rest upon the prosecution. Harlan J asked rhetorically at (488):

  How, then, upon principle or consistently with humanity, can a verdict of guilty be properly returned if the jury, entertained a reasonable doubt as to the existence of a fact which is essential to guilt, namely, the capacity in law of the accused to commit the crime?
- It is sometimes said that the difficulty of disproving insanity constitutes a justification for placing the burden upon the accused.
- However, it is equally difficult to disprove other defences in respect of which the burden is clearly not upon the accused.

STATUTORY EXCEPTIONS

- Some statutes distinctly place a legal burden of proof upon the accused.
- Eg. s233B of the Customs Act 1901 (Cth) (now repealed) which cast the burden of proving reasonable excuse as a defence to a charge of possession of prohibited drugs upon the accused.
- Other examples in VIC concern the sexual offences against children contained in ss 45-50 of the Crimes Act 1959 (Vic), to which the defence may be raised that the defendant honestly and reasonably believed that the victim was of age.
    - Where this is done, the burden placed upon the accused is, as with insanity, on the standard of the balance of probabilities.

- On occasion, some courts have shown a willingness to interpret ambiguous statutes as casting a legal burden upon the accused.
    - See for example, *R v Edwards* [1975] QB 27; *Johnson v R* (1976) 11 ALR 23.
      The decision in the latter case was incidentally, reversed by a subsequent amendment to the relevant statute. The tendency is unfortunate.

The Golden Thread of the *Woolmington* case is properly regarded as central to our concepts of fairness in a criminal trial, and it is submitted that the provisions of a stature should be treated as breaking that threat only where that intention is expressly set out in the statute.

Appeals

- At common law, appeals in criminal cases were comparatively rare.
- A convicted prisoner could appeal against the conviction only by way of writ of error which was confined to inquires into the sufficiency of the formal written record that embodied neither the details of the evidence nor the directions given by the judge to the jury as discussed above

POWERS OF APPELLATE COURTS

- The powers of the Supreme Court in relation to appeals are spelt out by statute:
  Crimes Act 1958 (Vic) ss 568 – 569
  Criminal Appeal Act 1912 (NSW) ss 6,7,8.
- In Vic, a separate Court of Appeal has been established, with jurisdiction in both criminal and civil matters
  Constitution (Court of Appeal) Act 1994
- One important difference between English Court of Appeal (Criminal Division) and it's predecessor and those of the corresponding appellate courts in the Australian States.
    - Both sets of courts have power to dismiss an appeal if satisfied that no substantial miscarriage of justice has occurred.
    - This power however, is treated as being exercisable only if the court is satisfied that a jury which was not acting perversely would inevitably have convicted the accused if it had received correct instructions from the trial judge.
    - It's only power in England used to be to quash the conviction and order the release of the prisoner, who, because of the double jeopardy rule, could not be put on trial again.
    - In the Australian states, however, the appellate court has an express statutory authority, when it allows an appeal, either to order a retrial of the accused or to quash the conviction and order immediate release.
    - The English Court of Appeal was given a general power to order retrial after a successful appeal: Criminal Justice Act 1988 s 43(2).

APPEALS AGAINST ACQUITTAL

- At present, the Crown has no general right of appeal against a jury's verdict of acquittal.
- If, however, the accused is convicted by a jury and the conviction is reversed by an appellant court, then it is open to the Crown to seek an appeal against that decision to the High Court of Australia.
- Where a case results in acquittal, the Crown may, in each of the Common Law states, refer any point of law which arose in the case to the Full Court or Court of Appeal for its opinion:
  Crimes Act1958 (Vic) s 450A
  Criminal Appeal Act 1912 (NSW) s 5A
    - The appeal is heard the normal way, but if the Court of Appeal decides in favour of the crown, the decision, although being precedent for future cases, has no effect upon the accused's acquittal. For this reason, these appeals are sometimes referred to as 'acedemic appeals'.

APPEALS AGAINST SENTENCE

- In each state there are provisions which enable a prisoner to appeal against the sentence passed on him or her, subject to obtaining leave from the appellate court:
  Crimes Act 1958 (Vic) s 567;
  Criminal Appeal Act (NSW) s 5.
- Where the sentence is thought to be too lenient, the Attorney- General has the right to appeal against sentence:
  Crimes Act 1958 (Vic) s 567A;

Criminal Appeal Act (NSW) s 5D.

- In Victoria and NSW, the appellate court has power to increase the sentence even in cases where the appeal has been brought by the prisoner:
- Crimes Act 1958 (Vic) ss 567A(4), 568(4)
  Criminal Appeal Act 1912 (NSW) ss 5D, 6(3)
- This power is attended with a number of qualification due to the obvious risks attached to the defendant.

WEEK ONE LECTURE

What is the law?

Experience has shown that law is one of the great civilising forces in human society, and that the growth of civilisation has generally been linked with the gradual development of a system of legal rules, together with machinery for their regular and effective enforcement

The rule of law

- All laws should be prospective, publicised and clear •Laws should be relatively stable
- The making of laws should be guided by open, stable, clear and general ruleS
- The independence of the judiciary must be guaranteed
- The principles of natural justice must be observed
- The courts should be easily accessible
- The discretion of the crime prevention agencies should not be allowed to pervert the law

Sources of law

- Common law : judge-made law – E.G. murder, manslaughter
- Statute law : commonwealth & state
- Focus in this course is on common law and state law

Statutory interpretation

Statutory interpretation is not merely a collection of maxims. It is a distinct body of law.

HOW DO I APPROACH STATUTORY INTERPRETATION?

- Read legislation closely -the provision
  - the Act as a whole
  - the legislative history
  - the wider context
- Use interpretive ‘tools’ e.g. extrinsic materials
- Be familiar with the Interpretation Acts
- Know the law of interpretation
- Use your legal imagination – What did Parliament intend?

Precedent

- Basic rules of precedent is stare decisis
  - Each court is bound by the decision of a court higher in the same hierarchy.
  - It is the ratio decidendi of a case whicH is binding.
- Ratio decidendi & obiter dictum

Ratio decidendi & obiter dictum

- Meaning of *Ratio Decidendi*
  - 'Underlying principle or rule of law on which the decision of the case rests'
  - Can be more than one ratio in a case: Ratio need not be contained in any exact words of the actual decisions
- In not *ratio decidendi,* can be *obiter dictum (*or *obiter dicta)*
  - That is, statements of legal principle that are not essential to the decision for the case

What is criminal law?

- The rules of statute and common law which direct that certain actions are punishable by the state in accordance to the separation of powers

THE CRIMINAL LAW IN PRACTICE

- Why is the Criminal Law treated so seriously by society?
- Criminal Law and Rule of Law
- Notion of Fairness in the Criminal Trial

WHAT MAKES THE CRIMINAL LAW EFFECTIVE?

- Fear of sanction
- Widespread education of and knowledge about the law •Punishment of offenders
- Rehabilitation of offenders
- Endorses a feeling of safety in the community
- Holds individuals accountable for their actions
- This is intrinsically linked to the aims of the criminal law

Aims of the criminal law

- Punishment of the offender? Yes
- But also
  - Protection of the offender
  - Protection of the community

PUNISHMENT OF THE OFFENDER

- Rehabilitation
- Deterrence
- Proportionality of sentencing
  - Old method of an eye for an eye = no longer appropriate
  - Do community opinions match the judiciary

PROTECTION OF THE OFFENDER

- Rule of Law
- Access to justice
- Protected by the processes
- Independent judiciary

PROTECTION OF THE COMMUNITY

- Retributive sentence
- Deterrence: Specific deterrence
- Therapeutic jurisprudence
- Restorative justice

Crimes that will be dealt with in this course:

- Fatal offences
- Non-fatal offences
- Sex-offences
- Property Offences
- Cyber Offences
- Inchoate Offences
- Federal Offences

Criminal liability

- Causation
- Voluntariness
- *Mens Rea*
- *Actus Reus*

Strict liability

- No mens rea requirement
- The commission of the actus reus/physical element of the offence is sufficient to prove guilt
- Defence of honest and reasonable mistake of fact appleis
- definition is embedded in the legislation
- page 599 of dictionary

Absolute liability

- no mens rea requirements
- no defence of honest and reasonable mistake of fact
- Page 5 of dictionary

Burden of proof

- In criminal cases the prosecution usually bears both the legal and evidential burden of proof (Woolmington v DPP [1935] AC 462) in relation to all facts that relate to the guilt of the accused
- CIVIL: burden lies with the person bringing the action

Standard of proof

- Criminal : Beyond Reasonable Doubt
- Civil : On the balance of probabilities

Parties in a criminal case

- Defence
  - Accused Person (not defendant)
  - Defence
- Prosecution
  - Crown
  - Police
  - Prosecution

Week Two: Homicide

Chapter Four of Text

Some general propositions about criminal homicide

- The institutional writers divide homicide, the killing of one person by another into three categories:
  - –-- justifiable, excusable and felonious.
- Blackstone, basing himself on Coke, wrote that 'the first has no share of guilt at all; the second very little; but the third is the highest crime against the law of nature, that a man is capable of committing.'
- Excusable and justifiable homicides are those killing committed in necessary self-defence and similar situations
- Felonious homicides, in Coke and Blackstone taxonomies, comprised suicide, murder and manslaughter.

'Of sound memory and of the age of discretion'

- Only a person of sound memory and the age of discretion can be guilty of murder.
- 'Sound memory' merely means 'sane' or 'not mentally impaired'.
- Questions of mental impairment and related defences, such as diminished responsibility or substantial impairment by abnormality of mind are considered later.

'Unlawfully'

- A person can only be liable for murder where the killing was unlawful. The old common law distinguished two forms of lawful homicide – justifiable and excusable.
- Justifiable homicide was regarded as springing from the killer's right or duty to kill in the situation in which that person was placed, and resulted in a complete acquittal of all wrongdoing.
- Excusable homicide was regarded as morally blameworthy, but not deserving of criminal punishment; the killer's goods were, however, forfeited to the Crown. The practice of forfeiture has long since been abolished, and some argue there is no longer any significance to the distinction between the two forms of lawful homicide.