Criminal Law

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Introduction

The law is our most basic democratic institution. It is the standard operating environment for all regulatory and enforcement agencies. It dictates the who, what and why of civil and criminal liability and the how much, or quantum, of relief or punishment. In very broad terms the criminal law is a code or system of rules for social order and control based on prevailing moral values. Without it there would be anarchy and chaos. It creates and enforces mutually beneficial private and public rights and responsibilities. It is the sum of the mandatory restrictions accepted by a civilised state for controlling behaviour and determining relationships.

The source of all political power and judicial authority to make criminal or regulatory laws is the consent of the governed. Their compliance, however, is conditional on promised protection against harm being given and fundamental rights and liberties being respected. Bad laws fail to do one or the other of these. They inevitably lead to social unrest and eventually, civil disobedience. Revolutions usually have their beginnings in inequities in legal structures. Those with long law enforcement experience will know that whether or not people comply with the law depends on the kind of law they are expected to observe. If laws are unreasonable or ridiculous, then they will be treated with the contempt they deserve.

Clearly, social problems are not solved simply by passing more rules and regulations. Laws tend to be fixed and rigid. They either apply in a given case or they do not and are not easily modified to achieve a just, as distinct from strictly legal, result. A fairer alternative is needed to prevent hardship or even oppression, hence, the idea of justice. This is an abstract notion with a strong moral element. It is characterised by a sense of fairness, equality, evenness, openness, tolerance and balance. It is accessed by judges at their discretion when needed to not only do the right thing but to make sure the thing is done right.

The chief role of any criminal *justice* system is to prevent or penalise criminally offensive conduct. This is achieved by increasing the certainty of detection

(actual or perceived) and imposing punishment severe enough to discourage others. Law enforcement agencies are responsible for the former while the courts deal with the latter. A characterising feature of the law, distinguishing it from a mere social convention, is enforcement. Breaking the law has to have consequences.

Both detection and imposing punishment have to be met consistently with traditional due process and procedural justice requirements. A person should walk free only if they are innocent and not because of some technicality or investigative deficiency. The blameless suspect, on the other hand, should never be bothered by unjustified official action or undeserved punishment. Furthermore, those who enforce the law must themselves respect it, including its hard won common law protections, even if they tend (or appear) to frustrate or defeat the fight against crime. This means that the balance between crime fighting and liberty is always in tension.

This balance is thrown into sharp relief when society seeks to prevent serious crime, such as by arresting suspected terrorists and I discuss this issue later in this chapter. I begin, however, by exploring a range of uncertainties that are widely applicable for imposing punishment across a range of serious crimes. First I deal with rule uncertainty and imprecision in the language of the law. I then move on to uncertainty in liability for punishment, uncertainty in court processes, the advantages and disadvantages of uncertainties associated with discretion and finally, luck. In the second part of the chapter I discuss legal issues associated with moving from punishment to prevention, elaborating on the possible impacts on freedom and liberties, as well as investigative power.

Rule uncertainty and imprecision in the language of the law

Criminal justice should be administered according to known rules properly interpreted. The law has an array of built-in mechanisms for removing interpretive doubts. The overriding function of a court interpreting statute is to ascertain and give effect to parliamentary intention and to do its best to attain the legislative objects. To achieve this, Acts are construed in line with fixed and universally accepted standards.

Once the purpose of legislation is clear, the judicial task—itself not always easy—is to give full force and effect to it, not to defeat or obstruct it. Courts also perform the important role of keeping the law in a serviceable state through an indispensable, ongoing process of reconsidering older principles to ensure

that interpretation of the law is consistent with contemporary community values. Although fidelity to the law has a limiting influence on interpretation precedents, it is often ignored openly and correctly.

Despite built-in safeguards, so-called rule uncertainty or imprecision in the language of the law can be an instrument of injustice. Modern legislation is often complicated and hard for even the legally trained to understand and interpret. Words and phrases can have different meanings depending on the context and purpose. As J McHugh said in *Theophanous v. Herald and Weekly Times Ltd* (1994) 182 CLR 104 at 196:

The true meaning of a legal text almost always depends on a background of concepts, principles, practices, facts, rights and duties which the authors... took for granted or understood, without conscious advertence, by reason of their common language or culture.

The English language is notoriously ambiguous and can often bear more than one meaning. Even using the same conventions for ascertaining meaning, experienced lawyers and judges disagree. Despite popular belief to the contrary, the law is not black or white but various shades of grey.

Uncertainty in liability for punishment

Being punished for socially bad or harmful actions depends solely on the notion of fault—a subjective mental element involving four recognised states of mind: intent, knowledge, recklessness and negligence. Knowledge of wrongness or, at the very least, heartless indifference as to the probable or possible outcome of action is required for a finding of criminal fault. Strict or absolute liability for offending behaviour irrespective of any state of mind is rare and generally found in public health, administration or safety contexts.

Yet these important states of mind cannot be proved directly or with absolute certainty. They can be admitted but otherwise can only be inferred from conduct. This involves unreliable behavioural interpretations and dubious social assumptions.

Uncertainty in court processes

The fundamental purpose of courts is to do justice according to law. This essentially includes applying the relevant law to proven facts. The most

important function, of course, is ascertaining responsibility for and penalising crime-related wrongdoing. But criminal litigation is not a search for the truth. It is not about conclusiveness, but sufficiency.

In our adversarial tradition the alleging party is required to prove a contested charge by putting on so much supporting evidence so as to remove the protective veil of the presumption of innocence. The settled standard of proof is 'beyond reasonable doubt'. This is a formally undefined but well understood term. This is a lower degree of persuasion than certainty, but higher than probability and higher again than mere possibility. A precautionary principle is applied to guard against the applied greater social wrong of wrongful conviction.

Logic and reason apply but do not always rule or prevail. Decisions are often made based on unsubstantiated assumptions or received wisdom. For instance, as a general forensic rule, the unlikely is deemed to happen sometimes but not very often. Likewise, it is only when the likely is rejected that the improbable might be true (Young 1998). An allegation or case is not proved where the competing possibilities are of equal likelihood or the choice between them can only be resolved by conjecture. Thus, the more serious the allegation the surer the court needs to be before being satisfied of guilt. Grave suspicion or unsubstantiated but strong belief is insufficient.

The rules of evidence are designed to ensure fairness in the forensic process. Thus, irrelevant evidence is inadmissible. Exclusionary rules and discretions operate to reject overly prejudicial or insufficiently probative material for fear that it will give rise to impermissible lines of reasoning. For example, despite the logical relevance of a person's past misconduct to his culpability for subsequent similar conduct, the courts generally refuse admission because of the risk of misuse on the basis that past misconduct is not always the best predictor of future behaviour. Likewise, the sexual history of an alleged rape victim is not regarded as sufficiently relevant because it might distract from the issue of consent. Nevertheless, the rules of evidence can be applied differently, and sometimes unequally, due to the level of independence and discretionary scope judges have in procedural matters.

There are a range of other potential problems in court processes. Guilty people can look innocent and vice versa. Witnesses can be convincingly adamant about their own reliability, especially eye witnesses, and yet be completely mistaken as to identity. False witnesses can be almost impossible to spot or irresistibly charming. Science has clearly shown that body language or demeanour as indicators of the truth are overrated. For some witnesses lying is almost an art. Others tell the truth unconvincingly. Apparently neutral testimony can have an undeclared bias.

Not all relevant and probative information is automatically received. Faith in the veracity of those responsible for the enforcement of the law can be misplaced. For example, fabricated confessions or 'verballing' was a widespread police practice in the 1970s and 1980s.

Juries are also a source of unpredictability. Jury reasoning is totally protected from disclosure. Thus there is no way of forecasting how different juries will view the same set of facts or ascertaining the basis on which their decision was made.

In most property cases juries are asked to consider whether someone has behaved dishonestly, according to the standards of decent, honest members of the community. Strangely, however, research shows that there is no consensus in our society about what honesty is. A study by Drs Emily Finch and Stefan Fafinski of Brunel University found that women are more likely than men to see ethically dubious actions as dishonest but are less inclined than their male counterparts to convict a person charged with these actions. The research challenges the law's assumption that the majority of people hold the same views about what conduct is dishonest and found that there was a great deal of disagreement even in very basic situations. For example, 92% of women thought that it was dishonest to make an insurance claim for pre-existing damage to a car, compared with 85% of men. Only 47% of women, however, would be prepared to convict somebody of fraud on this basis compared with 55% of men. Age has an equally strong influence on perceptions of dishonesty. Older people take a tougher line. Finally, people are less likely to consider an action dishonest if they have done it themselves. Thus, under the present system, two defendants charged with the same crime may stand different chances of being convicted according to the sex and age profile of the jury and whether any juror has committed any similar acts themselves (Henderson 2009).

Peer pressure in the jury room can also influence people to change pre-existing strongly held views. In addition, in a climate of fear, unsatisfactory evidence can be given greater weight than it deserves for the sake of community protection.

Discretion

The competing and often conflicting concurrent demands of individual justice and the public interest in denunciation, protection and deterrence can create real dilemmas for judges. Although there are established ranges based on comparable precedents, no two cases are the same. People's personal circumstances can vary infinitely even when their offences are broadly similar. While many important areas of the law involve discretionary and, therefore uncertain, decision-making, criminal sentencing is one of the most common.

Discretion is the technique for contextualising legal decisions in a way which experience reveals is impossible by the use of rules alone (Evans 2001). It enables non-rule based decisions to be made within a rational framework. Its main virtue is its potential to produce morally sensitive and nuanced decisions in mediating between competing values and interests. There is a risk of serious injustice in preferring precedent to principle. Judges must not be prevented from doing justice in a particular case because of too strict adherence to precedent or legislative 'straight jacket' which leaves them with no fairer alternative.

The uncertainty associated with discretion has both positive and negative aspects. The positive effects are that a judge's sense of the moral answer to a question or to the justice of a cause has been one of the great shaping forces of the common law (*McFarlane v. Bayside Heath Board* (2002) 2 AC 59 at 85). Examples include the discussion by Brennan J in *Mabo v. The Queen (No.2)* (1991) 175 CLR 1 at 42 where the value of non-discriminatory treatment of indigenous interests influenced the majority conclusion that the extinguishment of rights based on social policy had no place in the contemporary law of Australia, even though it had not been previously recognised in the cases or statute. Another example is provided by *The Queen v. L* (1991) 174 CLR 379 where the High Court held that older authorities did not establish that marriage involved the irrevocable consent of the wife to sexual intercourse at the will of the husband. The majority considered that even if that proposition was supported by previous authority it could not longer be accepted because it is '...so out of keeping with the view that society now takes of the relationship between the parties to a marriage'. These cases demonstrate sound discretion guided by laws. Discretion must be governed by rule not humour, it must not be arbitrary, vague and fanciful, but legal and regular. It is not merely a matter of individual opinion. The objective fairness of an order is still assessable by reference to the judicial method.

Nevertheless, discretion can be inconsistent, confused and divergent. One of its most negative features is an increased scope for decision-makers to fall into error. It can also permit a judge to substitute his or her own personal standards rather than give effect to legal policy or legal value. In reality all discretionary decisions are laden with latent or undeclared attitudes or beliefs about social facts, values and trends. Judges are always making contestable choices between competing considerations and conflicting interests. There are core relationship values deeply imbedded so as to be almost merged with the organising concepts and principles used by the law to resolve disputes. Some are so obvious that they can be safely assumed to be taken for granted by everyone. In respect of others there is plenty of room for rational differences between honest and informed minds. Of course it does not follow that decisions or approaches which do not have a high level of community support must be wrong.

There is a strong presumption in favour of the correctness of discretionary decisions and conclusions, which adds a degree of certainty. Appeals against discretionary judgment can only properly succeed if founded on the application of wrong principle, mistaken facts or if significantly relevant factors were not taken into account. Otherwise, even a questionable discretion-based decision is immune from alteration even if a majority disagree with it.

Luck

Like all other human institutions criminal litigation is also at the mercy of luck. Neither greater knowledge nor superior skill guarantees success in every case. Nor does better preparation. Merits do not always prevail. Good cases are routinely beaten by weaker ones due to the unexpected or unanticipated, better legal representation or presentation, false but credible witnesses or documents, court or jury error, and bad tactical advice or strategic choices.

Not only are outcomes in the criminal arena uncertain; they are not even reasonably or rationally predictable. This is because the law is vague, ambiguous, internally inconsistent and lacking in clarity. It is imprecise, inexact, indefinite and liable to cynical manipulation and distortion giving rise to judicial divergence and dissent and deep confusion within the profession. Only in the legal realm, for instance, could you find a statement of allegation worded like this:

On an unknown date [or should that be a date unknown?] (the accused) murdered (the victim) at Brisbane or elsewhere in the State of Queensland.

Then there are problems connected with unproved, unprovable, improbable or unknown facts and circumstances. Despite the inconvenience of these uncertainties there has been little interest or research into the notion of reducing levels of doubt in the law. This may be because the controlling doctrine of precedent, which requires identity of outcomes in cases that are relevantly the same, sees consistency, not certainty, as the key performance indicator. Or it may equally reflect resigned acceptance of the law's susceptibility to cynical manipulation by or on behalf of vested interest. Alternatively it might simply be due to the ongoing process of rejection and replacement of long standing values or ideals with new ones to keep pace with changing social conditions.

Future fears—moving from punishment to prevention

Harvard law professor and well known human rights activist, Alan Dershowitz, suggests shifting from punishing proven past wrongs to trying to prevent likely future harms, because the classic theory of deterrence is inapplicable in religious- or politically-based fanaticism. He suggests that pre-emption is not necessarily inconsistent with democratic ideals and argues prevention is the most efficient, effective and, in some cases the only, practical method of detecting and dealing with dangerousness. Nevertheless, the potential forensic value of pre-emption often tends to conceal the very real threat it represents to basic criminal process rights and democratic protections, including the freedom of speech and association, the right to liberty, reputation, privacy and personal security.

The problem with this thinking is that the prediction of possible future harm depends on drawing and acting on rational inferences drawn from past or existing facts. Evidence or information suggestive of the risk of something happening in the future because it might have happened in the past may be very useful in a law enforcement setting, but usually has no place in the court room. The issue for the law is whether or not a specific alleged event has in fact occurred. Very often for law enforcers it is whether something that has happened might happen again or whether something that might or might not have happened might happen again or for the very first time (Hirst 2005). However, the probability and gravity of assessed future crime does not justify depriving suspects of their liberty or denying them the same freedoms which their anticipated actions refuse their victims.

Nevertheless, there are examples of a risk assessment approach by the courts in a different context. In *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666 the issue was whether a long-term non-citizen resident of Australia with a minor drug conviction should be deported to his country of origin under migration laws in the national interest because of suspected involvement in the illicit drug trade. The decision was not governed by the criminal rules of evidence but was subject to procedural fairness constraints. This is also a good example of where uncertainty can give rise to judicial dissent, which is itself a cause of uncertainty in the law but is not without its own utility. Two members of the court held that, as a matter of law, conduct could not support a deportation order unless it was established as a probability. Suspected but unproved conduct should be excluded from the decision-making process. However, the minority judge held that suspected but unproven misconduct was sufficient when making determinations about the national interest and community risk. His Honour found that there was nothing contrary to the principles of natural

justice or logic in placing real suspicion based on proven facts and to assessing its significance as part of the totality of the relevant matters in protecting the national interest and predicting future risks.

In other words, evaluating chance cannot be reduced to a scientific formula. It is not a determination about what will happen based on what has or might have happened in the past. Rather it is an informed opinion or discretionary judgment based on possibilities rather than probabilities. Probable previous offending can sustain a 'possible risk in the future' finding or alternatively possible past behaviour may support a 'probable future risk' finding.

Future risk is not capable of definite or scientific proof. It is founded on assumptions, conjecture, intuition, belief, suspicion and even guesswork. It is a forecast of 'what might be' based on 'what might have been' and other omens. The same body of evidence may produce two equally rational and reasonable but opposing conclusions, neither of which is exactly right or wholly wrong. It may rest on a lingering doubt or, to put it another way, an alleged but unproven, or possible not probable or conclusive, fact. Even doubt itself may be an indicator of future risk. The inability to know for sure may support a conclusion that there is a real risk not worth taking.

Freedom and liberties

Australia is a liberal democracy founded on common law principles and precedents (*R v The Secretary of State for Home Department; Ex Parte Pierson* [1998] AC 539 at 587) inherited on settlement from England. Government power and political authority is derived from the consent of the governed. Compliance with enacted laws is exchanged for and conditional on guaranteed protection against harm and the freedom of living without fear. A little liberty is sacrificed for larger advantages.

Everyone is subject to the law regardless of their wealth or power. The so-called rule of law is democracy's answer to the divine right of Kings. However, everyone also has a degree of 'inviolability' that even the welfare of society as a whole cannot override. Invasion of this space, even in the name of the law, is a wrong that cannot be made right, even by a greater good enjoyed by many.

The freedoms in this realm are deeply rooted in history and tradition and they are enjoyed by citizens conferred or recognised by the law and respected by the state under the terms of the social contract. Civil liberties differ from human rights which are the prerogative of citizens and non-citizens alike regardless of race or nationality. Their practical content was worked out over the centuries

on a case by case basis by judges as a shield from official abuse and a safeguard against oppression of the weak by the strong. The practical operation of the law is subject to their observance.

Each is aimed at avoiding miscarriages of justice stemming from the enforcement of the criminal law and making officials exercising public discretionary power fully accountable for their actions. They exist because while laws are necessary they are insufficient on their own for a fair and just society. In this way society itself retains paramount authority, not those who make or enforce the law. Included in their ranks are all the implied criminal justice protections such as those against arbitrary search, arrest and detention, the right to a fair and speedy trial, the right of silence and privilege against self-incrimination without forensic disadvantage, trial by jury, proof beyond reasonable doubt and access to appellate review.

According to John Rawls (2005, p. 3) these fundamental civil liberties are uncompromising. None can be surrendered or diminished except and only to the extent needed to avoid an even greater injustice. The relevant concept of fairness is continually redefining itself to take account of changing circumstances so as to bring it into line with contemporary standards and values. However, being sourced solely in precedent and not constitutionally guaranteed, they are not strictly enforceable as legal rights. Thus, the judges remain their sole legal guardians. The presumption against unjustified modification of established implied common law freedoms was recently given practical expression by the Full Court of the Federal Court in *Minister for Immigration & Citizenship v. Haneef* (2007) 163 FCR 414.

Investigative power

In 2005, federal anti-terror legislation authorised administrative (i.e. non-judicial) preventative detention and incommunicado confinement of unconvicted terrorist suspects for the purposes of interrogation or preventing imminent attack. This 'better safe than sorry' attitude ignores a case by case analysis of the social costs and benefit of the loss of rights.

Despite fundamental common law-based objections, executive detention of terror suspects is now a common anti-terror measure. In what has become known as the terror age, there is a temptation to trade protection for freedom and to compromise traditional values. Extraordinary rendition and the euphemistic 'enhanced interrogative techniques' to procure intelligence or evidence are controversial examples. Though neither is justified in the civilised world, both have been widely practiced or condoned by western democracies in the last decade. Our common commitment to the rule of law and universal human rights

were all suspended during this time. We forgot the answer to the question: what is wrong with torturing terrorists who would readily do the same to us if they could?

While an arguable case for permissible levels of pressure in questioning extremely dangerous suspects can be made, the war on terror, like the war on drugs, cannot be won by violating dignity, democracy and legality. By definition ‘major crime’ covers offending that is serious although not organised, and of significance to the community, requiring special investigative expertise or power. Such crimes include serial gangland-style killings, terrorist attacks, bomb threats, extortion and other threats to national security. However, we currently have no morally or legally effective way of deterring religious extremists or ideologues willing to die for their cause on the promise of rewards in the afterlife that cannot be matched in this one.

If extremism is not the answer to extremism, then how should an effective criminal justice system in a modern civilised world react within appropriate limits to those posing serious danger? When ordinary law enforcement powers and methods are rightly or wrongly seen as inadequate protection against crime, there are inevitable calls for tougher than usual responses. Desperate times are said to justify drastic measures. People have a right to feel safe and secure in their homes and homeland. The question is what action can, or should, a civilised country like Australia take to achieve this legitimate aim without drifting too far from its moral and legal moorings? Preventative detention as a social protection and control mechanism is an option. However, indefinite non-conviction-based detention should be used sparingly and only in clear cases—that is, where there is an unacceptable risk of future dangerousness.

The crime commissions set up at state and federal level in the 1990s to investigate and prevent the spread of organised and major crime in this country have a swag of unusually wide and far-reaching powers for investigation to aid them in discharging their important statutory duties. The most intrusive and controversial are their coercive capacities in conducting secret compulsory hearings involving inquisitorial rather than adversarial procedures, such as interrogation on oath without the traditional protection of the privilege against self-incrimination or right to silence.

Inquisitorial procedures (other than torture) can no doubt be justified when they produce more social good than harm. However, the use of coercive power has definite limits in the democratic criminal domain. The truth should not be pursued ‘by any means’ or at all costs, without moderation (*Whitehorn v. R* (1983) 71 A. Crim. R. 107 at 125). Truth, like all other good things, may be loved unwisely, pursued too keenly and cost too much (*Pearse v. Pearse* (1846) 63 ER 950 at 957).

Anti-terrorism measures and investigative hearings powers weaken the protection traditionally afforded by the common law to liberty of the individual and reflect a change in social values by favouring the administration of justice over human freedom and dignity. The hearing's powers should not be used routinely or be available in every justifiable case. They should be resorted to only when absolutely necessary for fear of destroying the very values said to be protected.

Nevertheless, the safeguards against over-exuberant use of the investigative hearings powers, including judicial review, are largely inadequate and fall well short of the strict judicial controls recommended. For example, the use of police brutality to elicit information about crime, as long as it was not used in court as evidence of guilt in criminal proceedings, is not technically a violation of the right to silence. The law steps in only to exclude the fruit of the poison tree from evidence, not to stop cruelty in interrogations. There is no constitutional guarantee against the use of torture to obtain involuntary confessions *per se*, only about their admissibility.

The mandatory principles of the common law would exclude an involuntary confession obtained by torture as not only unfair and contrary to acceptable standards of human decency but also unjust and unreliable (cf. *A & Ors v. Secretary of State* [2004] EWCA Civ 1123). There is also discretionary judicial power to reject illegal or improperly obtained evidence as a matter of public policy.

Conclusion

Uncertainties in the legal process and in policing serious crime intersect in important ways. Uncertainties commonly found when the law responds to serious crime—like rule uncertainty and discretion—can impact on the ultimate success of policing efforts.

In preventing and penalising such crimes of increasing community concern as terrorism, we must seek to prevent legal uncertainties from undermining the inherent values on which our legal system is based and ensure that judicial discretion continues to be available to deliver just outcomes in situations in which the law might otherwise operate to unjustifiably harsh effect.

Our approach to these emerging threats must necessarily continue to respect civil liberties and individual freedoms and uphold our society's fundamental tenets of democratic government and the rule of law. It is imperative that the response of policing and legal systems is subject to close scrutiny and that relevant policy is informed by political and public debate.

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