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Principled Criminal Law Reform: Could Macaulay Survive the Age of Governing through Crime? Reflections from the Floor

Mark FINDLAY

Singapore Management University, markfindlay@smu.edu.sg

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Reflections from the Floor

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Abstract

In response to the detailed discussion of histories and characteristics of codification described in the chapters of this book, these thoughts are designed to identify essential challenges to principled law reform. It is conceded that the political imperatives and pragmatic control agendas driving contemporary criminal law and procedure are more influential in constructing future directions for liability and sanction determinations than the integrity of a principled approach to criminal law, codified or otherwise.

The intention of these reflections is to briefly and thematically examine the fate of principled law reform in modern criminal jurisdictions. In so doing, codification, and Macaulay's code for India as an exemplar are reflected against the inconsistent expediency of contemporary criminal law reform. The political utility of the penal sanction in an era of 'governing through crime' is suggested as the reason why criminal law as we know it may be a 'lost cause'.

Why is it that more than 150 years on, Macaulay's criminal code would, if presented today, be nothing less than a model of principled law reform despite its roots in early 19th century legal theory and British imperial concerns? In his chapter Chris Clarkson identifies the state of codification in the contemporary criminal law and process of England and Wales as a 'tale of woe'. Despite a brighter picture being painted by Matthew Goode as to the state of codification in Australian Commonwealth law, the take up rate for the model Criminal Code in vital state and territory legislation is, he admits, sporadic at best. How might we explain the radical aversion to criminal law codification in current common law law-making?

The anti-codification environment cannot be explained through any political reluctance to explore the utility of the penal sanction. Quite the contrary! We live in an age where, up until the cost-benefit critique on government in the wake of global financial collapse, the industries of criminal justice such as surveillance and risk assessment are flourishing under an aggressive political sponsorship and a punitive popular wisdom. Parliaments and their bureaucracies spend more time legislating and institutionalizing the penal sanction, than any other regulatory form at their disposal. Bob Sullivan critiques the burgeoning of a prophylactic criminal law through a radical reliance on strict liability offences and civil sanctions that short-circuit even the most meager remaining protections of criminal justice due process. Protective orders, preventive detention, confiscation of assets and the assertion of victim interests have been manifest through an explosion of patchy micro-reform which has left the criminal law even in code states devoid

[1] J. Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford: Oxford University Press, 2007).

of consistency and predictable principle. Attacks on the principles which would underlie any codified 'General Part' are a feature of present day 'law and order' legislative activity. Strict and absolute liability rejections of subjective responsibility, omissions and duty founding criminal conduct and constructing causation, and reverse onus provisions for exculpation, are just some of the legislative rush from foundational features of traditional criminal justice. And as Michael Hor notes regarding joint criminal enterprise, activist judicial interpretation has complimented moves away from subjective fault.

Additional impediments against a codification sentiment in contemporary politicized criminal law reform are the rejection of central considerations behind the code project, identified in Neil Morgan's chapter as the jewels in Macaulay's crown. Symmetry, simplicity and consistent subjective standards of liability cannot be found even in the conservative and protectionist atmosphere of criminal justice law-making. Defences have largely contracted in scope, coverage and application under the oppression of the reasonable person and even in the face of efforts to return their scope through judicial activism. Stanley Yeo reviews the incompatible applications of necessity and duress. The *lawful use of force* through the private defence, of excessive self defence and the protection of house-holder property (Cheah Wui Ling) when looked at against the demise of provocation (Ian Leader-Elliot), and the other restrictive excuses (Gerry Ferguson) tend to confound the search for a consistent calcification of factors effecting liability. Macaulay achieved what centuries of legislative and judicial intervention have unraveled. Why so?

Perhaps the worry for codification advocates exists in the project itself. Macaulay's code is adept, carefully theorized, consistent, liberal in the true sense and, above all else, inviolate. There is also irony here in that concerns about effective and legitimate criminal law helped to make Macaulay's code a legislative priority, a pattern also seen in the enactment of other 19th century British jurisdiction codes that stamped imperial outreach as much as trade or military interests. Its translation into the Indian Penal Code and its more recent colonial derivatives demonstrates the power of political expedience over the beauty of an artful code. Even if Macaulay's intent and construction had survived its first major legislative incarnation, it would have faced the challenges against change. Without systematic re-codification particularly in a changing international rights environment (Cheah Wui Ling; Ian Leader-Elliot), codes are barriers to reform in themselves. Integrity fights dynamism in the same way it is poisoned by tortuous and ill-conceived political expediency.

What are these challenges to change (codified or otherwise) towards a rational criminal law? They include the following, to mention a few:

- The disconnection between what principle endorses and legislators do;
- The often irrational connection between community aspiration, political fear-mongering and legal limits;
- The tensions on the apparatus of the criminal law because of increasing preventive and prophylactic encroachments;
- The monopoly of the state over the penal sanction (through investigation, prosecution and punishment) alienating the parties perpetrating and suffering harm, and who would otherwise have a strong interest on real and predictable, rather than didactic and normative outcomes, resulting from this tether to the state;

- Arcane connections with institutional and process frameworks preceding even Macaulay;
- The unhealthy and de-historicised modern alliance between the criminal law and Austinian sovereignty when in their earlier incarnations the principles on which the criminal law rests were a specific and operational break on state power;
- The contemporary use of the criminal law through a proliferation of regulatory offences and civil penalty options, against the otherwise law-abiding community; and
- The obsession with appellate case law rather than legislative activism as the scholarship of criminal law, thus proliferating the judicial rationalist rather than legislative pragmatist perspective.

The answer to institutional myopia, if not to political capture, lies in both a recognition of the value of codification and a routine and rigorous commitment to re-codification. Perhaps, however, as Bob Sullivan suggests, with the regrettable developments in criminal conduct conceptualizing, fundamental questions need to precede a codification commitment about the modern concept of crime, and what theory, if any, informs the purpose of the criminal law.

It could be said about the current era of governing through crime that the normative informs the substantive and depends on (and directs) the procedural dimensions. In reality, the legislative purpose is in reverse. The necessity to translate political interest into regulatory form turns what Bentham hoped for a *legislative science* into a technology of short-term governance. To return to the conditions of the *science* the codification project needs to be imagined against the contexts of:

- The nature and significance of harm, pre-determining and constraining fault;
- The manner in which the accused has 'wronged' the victim;
- The extent to which the accused acts with knowledge, intent or emotional disturbance to explain his or her responsibility for the 'wrong' (both from the perspective of culpability and excuse);
- Appropriateness of the predictive and preventive functions of the law; and
- The need to shake free of confusing and pre-existing legislative technologies (such as attempt, causation, common purpose).

It could be said that codification as a practical tool for justice relies as much on considerations of proof, as it does on semantic debates about justice and form. Having the G*eneral Part* settled around default offences and defences might assist in this recognition. Macaulay's Benthamite rejection of judicial re-interpretation of principle, puts the challenge back to the codifiers to achieve a dynamic language for the law, which is community sensitive and flexible in facing the demands of modernity, while resilient to expedient modification of core principles. Hence, the need for contemporary codification projects to properly reflect rights and the rule of law when considering the harm and responsibility from serious wrong.

As the era of governing through crime demonstrates in legislative activity, the principles of criminal law are at their most vulnerable when determined as being at odds with the control function of governability. It is one thing for politicians to ignore essential historical reflection about the role of criminal justice in resisting the excesses of the state. However, legislative reformers and some criminal law scholars seem more interested in making sharper the

governance application of the criminal law, and ignoring its essence in restricting rather than facilitating state power and authority.

This incapacity to see the criminal law as an active element in 'separation of powers' and its critical importance to the rule of law and constitutional legality is evidenced in the flight from subjective responsibility. Criminal laws now commonly prefer probable consequences as defeating actual knowledge, 'within contemplation' in place of foresight of certainty, and the strange construct of subjective foreseeabilty.

In order that the criminal law ensures its fragile commitment to individual liability, all sorts of legislative and judicial travesty have been done to the concept of 'responsibility' in practice. Community sentiment is translated through the over-bearance of the mind of the ordinary person, whose ordinariness is anything but settled. Collective sentiment is not understood as organizational cultures or through contribution to the overall criminal enterprise, but mystified through participation and complicity and equated with the principal offender. Degrees of participation and distance from the offence are conflated for an artificial purpose of punitive severity. When the fault element for complicity and the substantive offence differ significantly as to knowledge and intention, the degree of compromise over the fault for complicity is at its most apparent in the face of political will. The law is now so often satisfied with 'ought to have' as much as 'known'. And yet again, the protection of a consistent approach to fault and wrong comes back to proof. If the law's understandings of a consistent and comprehensive process of proof were trusted in popular culture and politics (not distorted as with the intoxication defence to satisfy moral preference), then the deductive nature of knowledge may be enough to connect it with reason and rationality, without such legislative distortion.

In 2000 Andrew Ashworth published a critique intoning 'Is the criminal law a lost cause?'[2] In addressing the explosion of criminal legislation in England and Wales in a climate of inconsistency,[3] Ashworth wondered whether criminal offences could anymore be distinguished from other wrongs by reference to content or by procedural and functional distinctions. In an effort to make that case he relied on four interlinked principles which he believed to form the core of the criminal law:

1. Criminal law should only be used to censure persons for substantial wrong-doing;
2. Criminal laws should be enforced respectful of equal treatment and proportionality;
3. Persons accused of substantial wrong-doing ought to be afforded the protections of due process (in minimum form as declared in the European Convention on Human Rights);
4. Maximum sentences and effective sentence levels should be proportionate to the seriousness of the wrong-doing.

With these themes Macaulay and all committed codifiers after him, would no doubt have little with which to disagree. Principled law-making is not just about consistency, compatibility and comprehension. As Leader Elliott suggests in his chapter when examining wrong-doing sufficient for criminalization, it is errant not to recognize human rights foundations, even in the face of cultural idiosyncrasy.

[2] A. Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225.
[3] A. Norrie, *Crime, Reason and History* (2nd Ed.) (London: Butterworths, 2001).

Yet, in recognizing the difficulty of the principled approach to distinguishing modern criminal law-making, Ashworth admits that:

> Having demonstrated the difficulties in that approach, we move from the descriptive to the normative, in search of features for a model of criminal laws which is more principled, conceptually more coherent, and constitutionally and politically more appropriate. …
>
> What emerges is nothing so concrete as a formula for determining whether or not certain conduct should be criminalised. Rather, arguments are presented in favour of a more principled development of the criminal law, recognising the essential links between procedure, enforcement and sentence. Without a principled approach of this kind, the criminal law is likely to remain something of a lost cause.[4]

These observations surrounding the challenges facing principled criminal law-making (codified or otherwise) distil down to the dangerous symbiosis of state interest and criminal law in the governing through crime era. Macaulay was no infant when it came to appreciating the politicality of the legislative endeavour. In his letter to Lord Auckland, Governor General of India, covering his submission of the draft Penal Code, Macaulay observed:

> We are perfectly aware that law-givers ought not to disregard even the unreasonable prejudices of those for whom they legislate. So sensible are we of the importance of these considerations …. The power of constructing the law in cases in which there is any real reason to doubt what the law is amounts to the power of making the law. …[W]e are confident that your Lordship in Council will not grudge anything that may be necessary for the purpose of enabling the people who are placed under your care to know what the law is according to which they are required to live.[5]

Criminal law reform should be concerned about the integrity, durability and the effectiveness of the criminal law, enhancing a genuine rule of law rather than facilitating narrow and reactive policing impulses. The challenges of principled law reform would be minimized through a tight code and a routine and rigorous commitment to re-codification in a climate of continual critical reflection concerning the rights and responsibilities of those the law serves.

[4] Above n. 2, at pp.225–226.

[5] T.B. Macaulay, J.M. Macleod, G.W. Anderson and F. Millett, *A Penal Code Prepared by the Indian Law Commissioners* (London: Pelham Richardson, 1838) pp. i, v, viii.