

CRIMINAL LAW: TEXT AND MATERIALS. By C.M.V. CLARKSON. [London: Sweet & Maxwell. 1984. xxxiv+590pp. Hardcover: £26.00 Limp: £16.95]

THIS book was written for English undergraduate law students but is available in Singapore. The co-authors describe the aim of the book as, “to examine the main principles and rules of the criminal law and to expose the theoretical bases upon which they are founded.” On inspection, this statement indicates not one but two quite separate aims, often requiring quite different approaches, a point which the authors do not always seem to recognise. What the current rules are is sometimes difficult to extract from the authors’ discussion of what they might, or should, be. The authors describe their approach as an attempt to, “cover the range of competing views and present them in a discursive manner allowing the reader to make his own choices — while not being afraid to state our own preferences.”² In fact, the desire of the authors to state their own preferences seems to have been the principal reason for writing of the book. It is more like an argument towards an ultimate thesis than a selected set of materials designed to assist first year students to begin thinking about relevant issues. This thesis is only explicitly stated in the final chapter of the book, “Towards a General Theory of Criminal Law”, but as the authors themselves explain, the whole of the previous discussion has been “concerned to introduce the beginnings of [this] overall theory of the criminal law.”³

The authors’ thesis is not a complex one. In the authors’ opinion, the imposition of punishment is the distinguishing characteristic of criminal law. Because punishment necessarily causes harm to the person punished, every claim to a right to impose punishment must be

¹ Preface v. The page numbers refer to *Criminal Law: Text and Materials*.

² Preface vi.

³ p. 572.

morally justified. The question underlying any theory of liability can thus be simply stated: when is the imposition of punishment by society morally justified? It is the essence of the authors' thesis that punishment can only be justified when a blameworthy person causes a prohibited harm. They summarise this proposition in the form of a basic equation: $BLAME + HARM = CRIMINAL LIABILITY$.⁴ The words "and not otherwise" might also be added. In this equation, blame involves a moral assessment of conduct, based on an analysis of a person's state of mind at any relevant time, the degree of responsibility a person has for the acts or omissions complained of, the presence of any justification or excuse and so on. Harm involves "the violation of an interest perceived to be sufficiently important to warrant protection via the criminal law".⁵ Most violations are direct, as in actual physical attack or theft of property. However, modern offences of attempt impose liability even when there is no direct harm of that sort. The authors justify the criminalisation of attempts because attempts generate what the authors call 'second order harms', that is, violations of a right to security from violations. Clarkson and Keating do suggest other theoretical and practical limitations upon the use of the criminal sanction.⁶ However, they also accept that the requirement of blame in the basic equation may be subject to limited exception, for example with respect to regulatory offences such as minor traffic offences or violations of public health codes. In addition, their notion of harm is very broad and flexible, so that a systematic application of the theory to the criminal laws of any society today would not preclude the criminalisation of almost any conduct which that society found sufficiently threatening.

But, the impact of the theory is not limited to the decision to criminalise or not to criminalise particular behaviour. Perhaps the most important benefit would be in the development of a systematic and consistent approach to sentencing. It is not only the general claim to a right to punish which must be justified, but the imposition of a particular punishment in each particular case. For this purpose, the authors suggest the development of a comprehensive system of classification of comparative degrees of blame and degrees of harm. Degrees of blame and harm are presently unevenly reflected in judicial sentencing. The authors suggest the distinguishing factors should be identified, and the consequent grades of blame and harm made explicit, standardised and written down. The classification could be made express by means of a series of narrowly defined offences in which relevant combinations of different grades of blame and harm are clearly distinguished in separate offences, each of which is assigned appropriate penalties, or in the form of maximum sentences in a comprehensive sentencing guide. The best alternative is probably a combination of both, depending upon the nature of the sentencing factor which must be considered. For example, the use of a weapon could remove a defendant's conduct from the offence of "using force" to the offence of "using force by means of a weapon". However, the defendant's personal circumstances are factors which can only properly be considered at the sentencing stage. It would also be important to ensure that the range of penalty for each class should be narrow, thereby diminishing the problem of sentencing

⁴ p. 572.

⁵ p. 575.

⁶ pp. 60-65.

disparity, which the authors describe as having reached alarming proportions in many common law states.

The presentation and defence of this theory has apparently determined both the format and the substance of the work. The format is a combination of descriptive text, extracts from original materials expressing different points of view on the relevant topics, and additional text commenting upon the views expressed and defining important policy issues for readers to consider. It is this format which explains the second phrase of the book's title, *Text and Materials*.

As to substance, the book covers issues relating to the imposition of punishment in some detail. However, the discussion of the criminal law itself is confined to general principles of liability and defence, the different forms of homicide, non-fatal offences against the person and rape. The discussion of general principles in a work which is designed to illustrate a theory of liability is inevitable. The specific offences were selected by the authors as the offences which best illustrate those general principles. Property offences were rejected for this purpose on two grounds; that discussion of property offences today had more to do with the problems of statutory interpretation in the field of criminal law than with general issues of criminal liability, and that in any case, property offences are increasingly omitted from modern criminal law courses. With respect, the superiority of the non-fatal offences for the purpose for which they were chosen is open to serious question, and the first of the grounds offered for excluding property offences cannot be accepted as sound. Property offences, ranging from theft and robbery to criminal breach of trust and trespass are the mainstay of any criminal law practice. They are as much in need of theoretical consistency as homicide, as fraught with sociological implications as rape, and raise the same problems of gradations of harm and blame-worthiness as the non-fatal offences. The same might be said for drug and traffic offences, also excluded from the book. Perhaps a lack of space can explain the latter omissions but, in view of the authors' interest in a theory of liability, the omission of any mention of corporate or vicarious liability can only be regarded as surprising and unfortunate.

The limited coverage of substantive offences has important consequences for potential users of the book. A student who is interested in common law perspectives upon criminal justice issues should find the book interesting. A student looking for a comprehensive coverage of English offences will have to look elsewhere. For Singapore students, this is not necessarily a disadvantage. The principles of liability which underlie criminal law in Singapore are derived from English common law, but the specific offences, particularly those relating to the omitted areas of property and drugs, are significantly different from their English counterparts and would require separate treatment in any case. The material that has been included is sufficient to ensure the book should nevertheless be of interest to a student of criminal law in Singapore.

In the first eighty pages, issues relating to punishment and the criminalisation of particular conduct are explored in considerable detail. One hundred and forty-five pages of the work deal with the nature of, and relationships between, the basic concepts of *actus reus* and *mens rea*, still central to an analysis of criminal offences in Singapore. Those parts of that discussion relating to status offences and offences by

omission are particularly interesting, as is the analysis of the concept of recklessness and the implications of liability for negligent behaviour as an alternative to strict liability. By contrast, the discussion of the relationship between *actus reus* and *mens rea* suffers from the omission of the Commonwealth cases familiar to Australasian, Indian and African lawyers which deal with the problem of concurrent *actus reus* and *mens rea* over time.⁷ The authors' inclusion of mistake, whether of fact or law, as an aspect of the relationship between the *actus reus* and *mens rea*, rather than as a substantive defence presents an unusual and interesting perspective. Perhaps the reader might have benefited from a discussion of recent developments in the area of mistake which suggest possible limitations to the general rule that ignorance of the law is no excuse, but the authors' observations are nevertheless worth reading.

There are also substantial chapters dealing with the principles underlying the general defences, causation, inchoate offences and parties to crime. Each of these chapters provides considerable scope for constructive criticism and creative thought. A Singapore student struggling with the multiplicity and complexity of Singapore legislation concerning offences involving more than one defendant may be moved to endorse with some feeling the authors' concluding words on that subject:⁸

Even if not all the substantive ideas expressed in this section are fully accepted, it is nevertheless hoped that one fact has clearly emerged. Rules of criminal liability cannot be rationalised or reformed in a vacuum. This can only be done by reference to a coherent theory of criminal liability...

However, there is one disappointing feature of the book from a non-Englishman's point of view. English and North American authors, and the United States Model Penal Code are almost the only original sources referred to. Discussion of alternative theories or approaches is similarly confined to examples derived from the jurisprudence of the common, as distinct from the civil or the socialist, law world. This is unfortunate because the nature of the issues addressed, and the format used, by Clarkson and Keating, invite a much wider coverage, including civil law or socialist perspectives. In particular, issues such as the purpose and justification of punishment, the nature and severity of punishment which should be imposed, the problem of sentencing disparity, the decision whether to criminalise certain conduct in the first place, and the legitimacy or otherwise of *ex post facto* criminal laws are all universal in the sense that every society which has a form of criminal law must consider them. No doubt the collection of a series of extracts from English and North American writers into one volume does provide the introduction to common law perspectives on these issues the authors intended. However, some of the points which the authors conclude to be matters of common consent, might have appeared less certain or self-evident if the practices and beliefs of other criminal justice systems had been considered. Is there, as the authors suggest, general agreement that it is only justifiable to punish actual offenders? What of the notion of parental responsibility for offences committed by their children, or preventive detention which is in effect a form of punishment for offences which the detainee might commit?

⁷ E.g. *R. v. Ramsay* [1967] N.Z.L.R. 1005; *S v. Masilela* 1968 (2) SA 558 (AD); *R. v. Moore and Dorn* [1975] C.L.R. 229.

⁸ At p. 447.

Similarly, do all systems accept the principle that the state has a right to decide not to punish known or proved offenders, or to punish them in a manner recognised as less than they really deserve? It is true that the authors do not purport to have written the book for the international market. Nevertheless, broader perspectives would certainly have added interest and depth to the discussion, and perhaps more authority to the authors' conclusions.

Some form of criminal law is almost certainly as old as the notion of law itself. Early notions were no doubt very simple and required little explanation to be generally understood. Even today, most people have some idea of the nature and content of their society's criminal law, although now criminal laws and criminal justice systems are as complex and contradictory as the societies they serve, and may appear hopelessly confusing to the ordinary layman. Part of the reason for this is the manner in which our modern criminal laws have developed. There have been theories of contract, theories of duty, treatises on the principles of banking, sale of goods and other aspects of commercial law for decades, even centuries. No common lawyer would ever deny the importance of these theories in giving coherent shape and meaning to the body of the common law. A healthy criminal law needs sound legal theory as much as any other organ in the body. Yet there has never been a comprehensive theory of liability under the criminal law, at least not in the common law world, since the passing of the dominance of the church. Perhaps the consumers of criminal law have never had sufficient standing to complain. Whatever the cause, while not everyone may agree with the theory Clarkson and Keating have proposed, none can do otherwise than welcome the attempt. The authors have raised many questions which Singaporean students may one day wish to consider.