Crofts & Burton "The Criminal Codes: Commentary and Materials"

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PART OF THE LEGAL FURNITURE

When a book on such a practical subject as criminal law in Australia reaches its sixth edition, it can safely be said that it has become part of the legal furniture. The practising legal profession, law teachers and, above all, students are far too discerning to tolerate repeated editions of a less than truly useful work.

I welcome this edition. As a student, practitioner and judge, I grew up in the un-reconstructed world of the criminal law of New South Wales, a non-Code State. In my days as inaugural chairman of the Australian Law Reform Commission in the mid 1970s, Mr. F.G. Brennan QC (later Chief Justice of Australia) used to despair of the ignorance and barbarity of the common law practitioners of criminal law, like me. He looked with astonishment at us from New South Wales, Victoria and South Australia who abjured the Griffith Code. Indeed, just before I first met him in 1975, and prior to his judicial appointment and later elevation to the High Court, he had played an energetic role in the ultimately unsuccessful attempt to devise a variation on the Griffith Code that would be acceptable (or could be sold) to all of the jurisdictions of Australia.

On the High Court, the Code judges (such as Justices Brennan and Toohey) sometimes lamented the lack of appreciation for their precious inheritance. They could not really understand why other Australian jurisdictions held out from its welcome embrace. Yet, although there are important differences between the language and approach to criminal law of the Code, and that of the law in non-Code jurisdictions, the opening pages of this book demonstrate that the differences must not be exaggerated. Whilst a code is a special statute, requiring a distinctive approach to its interpretation, it is still part of Australian law. As that law has generally developed (mainly in the hands, it should be said, of non-Code practitioners) many of the applicable rules of interpretation draw upon the general principles of the common law. Occasions will arise in Code States where it is relevant and useful to take into account the approach to basic criminal law principles of non-Code jurisdictions. Where there is ambiguity, the High Court has ordinarily favoured a meaning that achieves consistency in the interpretation of the governing law in all Australian jurisdictions; especially on matters of basic legal principle.

FRENCH CODIFIERS AND ENGLISH ATTEMPTS

The Emperor Napoleon once observed, correctly, that his most lasting legacy to the French nation and people would be the work of his legal codifiers in the early 19th Century. They replaced the French common law with the famous codes that now form the basis of the law in more jurisdictions of the world than follow the common law of England. Partly because of the example of the French codes, the pressure for codification of the English law, including criminal law, grew ever stronger during the course of the 19th Century. That pressure was stimulated by the scathing criticisms made by Jeremy Bentham, and his disciple J.S. Mill, of the chaos, uncertainty and

confusion of the English common law. Sir William Blackstone, in his *The Commentaries on the Laws of England* (1765-69), had presented an influential taxonomy of English law. But it mainly reproduced the law as it was. It did not seek to impose new conceptual frameworks or rational re-expressions of the law in the place of the myriad of rules made by the judges. This was an anathema to codifiers whose principal criticism of common law techniques was their lack of conceptual thinking and integrated design.

In England, in the mid-19th Century, the battle was joined between the codifiers who demanded that the United Kingdom copy the French replacement of the barbaric common law, and the defenders of the old system who felt that no code could ever fully replace the flexibility and justice of individualised decision-making.

THREE PENAL CODE MODELS

The Griffith Code, the law in the Australian States of Queensland and Western Australia, was but one of three late codifying efforts of the English criminal law that emerged as a response to this pressure for codification. Two of the drafts, respectively by Thomas Babington Macauley and James Fitzjames Stephen, were prepared in the 1830s and 1840s for the purpose of codifying the criminal law of England. In that ambition, they ultimately failed. Stephen's code drew on Macauley's, as later the Queensland Code of Sir Samuel Griffith would draw on both of them and on a New York code[1]. The British Parliament rejected the endeavour to codify the criminal law in England. But the Macauley and Stepen codes were to have a remarkable afterlife. The Macauley code, drafted when the author was but

[1] Entry on Samuel Griffith in A.W.B. Simpson (ed) *Biographical Dictionary of the Common Law* (Butterworths, London, 1984) 216 at 217

37, became the basis of the *Indian Penal Code* that applies to this day in India, Pakistan, Sri Lanka, Bangladesh, Malaysia, Singapore and elsewhere. By any account, this was an extraordinary achievement on the part of a very young English lawyer whose only experience in the practice of criminal law had been confined to a single prosecution of a man for 'stealing a parcel of cocks'[2]. Little wonder that the drafter is buried in Westminster Abbey. Students today can take heart from his success.

During the days of the British Empire, the colonial administrators had these three models which they could impose on the 'realms and territories' of the Crown 'beyond the seas', where English law had taken root. Different periods of colonial administration saw different versions favoured, according to the opinions then in vogue in the Colonial Office. The Griffith Code was much admired at a time that penal codes were being supplied to Africa and the Caribbean. The story of these trans-national borrowings and impositions is an extraordinary one. It still affects the daily lives of about a quarter of humanity.

What is written on the Griffith Code in this book would be fully understood by lawyers in Nigeria and Jamaica. However, one great weakness of this extraordinary export of penal law from England was a tendency that venerable codes sometimes seem to attract, of resisting changes in the precious shared code language, now operating in most places for more than a century. So it has proved, for example, in the old code provisions on so-called "unnatural offences" (s.377 of the *Indian Penal Code*). Those offences have been repealed in the land of their origin (England) and in

[2] Entry on T.B. Macauley in Simpson, *Ibid,* 330 at 332.

developed countries of the Commonwealth of Nations which had earlier copied their language in modern legislation (Australia, Canada, New Zealand etc.). In most places-else, the provisions of the codes remain in place to stigmatise sexual minorities, to occasion blackmail, harassment and discrimination, and to impede the struggle against the spread of the human immuno-deficiency virus that causes AIDS. In fact, of the 53 countries of the Commonwealth of Nations, where one or other of the three criminal code models apply, 41 retain the unlovely provisions which thus shore up and immure from reform penal rules that most scholars and informed observers today would see as exceeding the proper limit of the function of the criminal law[3].

Although the Australian code jurisdictions (including the variants in Tasmania, the Northern Territory and the new federal *Criminal Code Act*) have accepted reform of this area of the law, the path of reform elsewhere in code countries is extremely slow or non-existent.

NEED FOR A CRITICAL APPROACH

This history teaches the need for a healthy scepticism about codes, as of all laws. Times change. Scientific knowledge expands. Social attitudes evolve. Even a famous and ancient criminal code needs to be constantly reviewed and thought about as a 'work in progress'. It is when a code, or any other law, takes on the appearance of 'holy writ' that the time has come for critics to question it and to subject its text to experience based on contemporary knowledge and values.

[3] Human Rights Watch, *This Alien Legacy: The Origins of "Sodomy" Laws and British Colonialism*. Washington DC (2008).

All of this is background to what I see as the importance and special value of this new edition of this standard text. Criminal law and procedure, and even basic doctrines, change in response to shifting social needs, concerns and understandings. Just because criminal law is expressed in the form of a code does not release the law's practitioners, or other citizens, from the need to study it in the context of other legal and social developments. In the past, perhaps, texts on the criminal law of Code jurisdictions in Australia have tended to adopt a 'black letter' approach, even denying the possibility that the boundaries of criminal law are inevitably fluid, to some extent. The present authors have rejected this purely verbal view and, in my view, correctly. Any law, whether judge-made, statutory or codified, is necessarily expressed in language. The English language, particularly, is prone to ambiguity because of its diverse linguistic roots. Giving meaning to words inevitably imports different values. An accomplished lawyer will be aware of this reality and will try to be transparent in grappling with it.

Appreciating this feature of the law demonstrates the special value that this book has. It gives a solid grounding in the criminal law stated in the Codes. At the same time, it fosters a critical reflection on the law and seeks to inspire practitioners, students and other readers to question why the law is the way that it is and what values might be openly or implicitly reflected in it. To some extent, it is the failure of practitioners and students in most of the countries where the colonial penal codes still apply, to question the inherited laws in particular respects that have frozen the criminal law so that it continues to be a counter-productive oppression, contrary to basic human rights.

The authors' recognition of the values that criminal law reflects is shown in their discussion of the nature of criminal law and their observations on why criminal law is as it is. Inescapably, criminal law and procedures are vital to every society. They afford a measure and reflection of the extent to which each society respects individual human rights and upholds universal civilised values.

Once these features of criminal law are appreciated, it becomes possible, as the authors have done, to place particular criminal offences into their contemporary perspective with the assistance of appropriate historical, social and political commentaries. As this edition shows, criminal law and procedure (including sentencing) never stand still. So the edition has been brought up to date to cover recent wide-ranging reforms to the law of homicide in Western Australia and to analyse the current and proposed sentencing changes in Queensland and Western Australia.

SERVING SOCIETY'S DEEPEST NEEDS

A specially valuable section of the book for students is that part that deals with contemporary Australian controversies such as the laws on battered women syndrome, paedophilia, euthanasia, suicide, consent to self-harming sexual activity and consent to customary punishments. The treatment of these and like subjects will help students to understand why, on such topics and others (e.g. abortion), there are commonly strongly held and opposing points of view that can only be appreciated if we are aware of the conflicting arguments.

If the codes of Macauley, Stephen and Griffith are amongst the most enduring legacies of the British Empire, the reasons can be found in these pages. They are laws that deal with the deepest needs of every society to enjoy peace, security and mutual respect. To those needs, the Australian and Imperial codifiers made a crucial and still persisting contribution. Successive judges have offered important elaborations, captured in these pages. And text writers, such as the present authors, have subjected the outcomes to vigilant and critical scrutiny because they know that the law never stands still, but must always adapt to serve a changing society.

Michael Kirby

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