Principles of Criminal Law

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As someone who has been a part-time lecturer in a university law school for some years, while continuing to practice at the Bar, I have often been struck by the apparent chasm between the academy and practitioners. At times, it seems that academic lawyers and practicing lawyers live in two different worlds, speaking different languages and with completely different views of the law.

Practitioners, at least those in the private profession, tend to focus on the minutiae of particular cases with which they are dealing. They immerse themselves in the factual, tactical, psychological, emotional, evidential, and, above all, practical, issues which each case throws up.

Of course, the law is the framework within which the practitioner operates and sometimes a particular legal rule or principle will be of critical importance. In order to provide good advice to clients, and to represent them effectively in any legal environment, the law needs to be known. Occasionally, uncertainty as to the true legal position will require some consideration of the arguments which might be marshalled to achieve a particular legal outcome. But, for the most part, the practice of law is about real people, what they have done in the past and what they might do in the future, about real things, on the micro rather than the macro level.

For academic lawyers, a large part of what makes the practice of law fascinating for practitioners is simply missing. There is no direct involvement with people with real legal problems, needing help in a complex world. There is no opportunity to taste the satisfaction which comes from applying knowledge of the law to help clients avoid legal pitfalls, resolve disputes and emerge victorious from litigation.

Accordingly, the academic lawyer must find job satisfaction elsewhere. Traditionally, one source was developing mastery of a field of law, organising it and making sense of it. Such knowledge could be passed on by lectures to students and, by the writing of legal texts, to the wider legal community. Many academic lawyers still engage in this task. However, over the last few decades the legal academy has increasingly turned its focus to a different priority - critique of the law.

While the academy has always seen one of its roles as legal criticism, this had tended to be simply one of a number of functions. In the process of explicating the law, it is necessary to examine the principles and policies upon which it is based. While they might be the subject of criticism, the focus of criticism tended to be narrow. Logical fallacies, poor reasoning, inconsistencies in approach, conflicting principles, were the primary tools. That has all changed by the injection of what might be called, loosely, sociology and politics.

The dominant model of academic legal study and analysis now involves an attack on the social and political underpinnings of the law. There is little interest in descriptive endeavours, or in the minutiae of particular cases. While there may be some explication of what the law is, this is usually only a prelude to a comprehensive attack on, and dismantling of, that law. No doubt, considerable intellectual excitement can be derived from the trashing of judicial authority figures and lawmakers, and from the advancing of deeply felt political and moral views with the goal of achieving some model of justice.

I should make it clear that I am not condemning such forms of academic endeavour. It cannot be doubted that the law is politics, and that the content of the law derives from complex historical, political, social and moral forces. Anyone is entitled to challenge the underpinnings of the law and to advance a particular political perspective or agenda, so long as they are honest about what they are doing. One may question whether law schools should be dominated by such an agenda, but there is noting wrong in it forming part of the academic world.

Rather, the point I wish to make is that such academic critical legal analysis increases the rift between academic lawyer and practitioner. Books written in accordance with such analysis tend to be structured and written in a way which makes them of little use to practicing lawyers. Perhaps that is too strong. They tend to speak a language and have a focus which is alien to the practitioner. While they may contain much that may be useful, it will tend to be submerged in material that is not.

Again, I should make the obvious point that this may be of little concern to the academic. Books are written for different audiences. Some legal texts are written for practitioners. Others are written for students, to provide the written material upon which the task of legal teaching is to be based. Given that legal teaching is increasingly being dominated by political and social criticism, it is hardly surprising that legal texts are being written based upon that model. Understanding that makes it easier to see why such texts may appear, at least on first inspection, to offer little to the practitioner.

Nevertheless, the legal practitioner should not be too quick to judge. Even someone involved in the day to day realities of the practice of law should occasionally stand back and look at the bigger picture. Long held assumptions should be challenged. More pragmatically, consideration of legal criticism may inform more prosaic, more down to earth, concerns.

This long discursus is by way of introduction to a book on the criminal law which reflects the changing academic paradigm. In the preface, the authors write:

> This book is a result of our commitment to showing how the principles of criminal law reflect the changing social, political and moral concerns about wrongful conduct and particular groups. We set ourselves the daunting task of describing criminal laws across every Australian jurisdiction and, wherever possible, challenging these accounts from interdisciplinary vantage points. Reflecting our broad variety of interests, we have drawn upon a range of disciplines including criminology, criminal justice studies, feminism, legal history, human rights, legal theory, medicine, psychology and sociology, to illuminate the substance and operation of the criminal law. ... What we do hope to impart is a critical orientation to the criminal law, rather than simply a description of the rules, principles and substantive definitions applicable in every jurisdiction. In terms of presentation, we deliberately set out to differentiate this book from other textbooks by including case studies, perspective sections and shorter aside boxes, tables and diagrams. We hope that this translates into a user-friendly book that provides starting points for critical reflection, class discussion and further research into specific areas. Beyond providing critiques of the law, we are keen to point the way toward reform.

I think the authors have largely succeeded in their goals. They have

demonstrated that many criminal justice principles are historically contingent, 'evolving to accommodate changing social, political and moral expectations about the proper function and limits of the criminal law'. Fundamental assumptions upon which much of the criminal law is based are isolated and examined. Recent developments in psychiatry and psychology are highlighted. Useful tables and summaries of the existing law are provided. Discussion of important judgments is often incisive and thoughtful. Areas of the criminal law which have tended not to receive much academic discussion are comprehensively analysed. For the mort part, criticisms of the law are reasonably balanced and well-informed. Proposals for reform are often sensible and cautious.

That said, and adopting the 'critical' mode, some negative points can be made:

- Some claims about the criminal law are supported by questionable authority. Thus, the proposition that 'the right to a fair trial may be viewed as [a] right to a trial that is reasonably fair in the circumstances' (p.103) is supported by an extract from the judgment of Brennan J in Jago v District Court (NSW), failing to mention that his was a minority position on the High Court. Similarly, English and American sources are often relied upon to support doubtful statements about the Australian criminal justice system (see, for example, p.122).
- Some discussions of the parts of the criminal law have failed to keep up with recent developments. For example, the discussion of the law relating to the defences of necessity and duress is severely compromised by the lack of reference to the important decision of Rogers (1996) 86 A Crim R 542.
- Doubtful claims are made, only supported by the writings of other critical legal scholars. This technique is adopted in relation to, for example, the questionable proposition that a jury will be required to apply an 'underlying male standard' when considering the 'reasonableness' of actions said to have been taken in self-defence (p.307). Another example is the assertion that unlawful police conduct is 'permitted, in effect, licensed' by the law, supported by a 1981 English sociological text (p.873).
- Some assertions about the legal system do not accord with my observations of the day to day operations of the courts. They seem to derive primarily from ideological positions. For example, at p.96 the authors write:

  > In the lower courts, where most suspects are processed, an 'ideology of triviality' pervades summary proceedings. Rather than venerate fairness values, empirical research has revealed that trial procedures, especially those in lower courts, operate as ritualised degradation ceremonies.

Unfortunately, the 'empirical research' is not summarised and the references in support are to other texts, including a 1979 American book. Another example is the proposition advanced at p.97 that 'judicial rhetoric venerates fairness and legality in the administration of criminal justice while systematically denying them in the specific application of rules, discretions and remedies'. Evidence for this rather strong claim is not provided, at least at that point in the book.

- Legal arguments which do not find favour with the authors are sometimes demolished by careful use of language. Thus, it is observed that 'defence counsel have argued that rape trials should be permanently stayed on the ground that 'rape shield laws', which aim to limit humiliating and degrading cross-examination on the complainant's sexual history, violate the accused's right to a fair trial' (p.105). A rather more neutral formulation would have acknowledged that those defence counsel no doubt submitted that the accused was prevented from obtaining important evidence by those very laws. An even more egregious example is the proposition that 'the fair trial principle' has 'been invoked to stay proceedings where the complaint is substantially delayed because the complaint relates to sexual abuse perpetrated on the victim as a child' (p.105). Putting to one side the assumption that the complainant was indeed a victim of sexual abuse, the failure to refer to the impact of what is often decades of delay on the possibility of an effective defence is unfortunate.
- Criticism is advanced of law reform bodies which fail to consider external perspectives on the law, without acknowledging that sometimes those bodies operate on the basis of terms of reference which preclude such analysis. Thus the Model Criminal Code Officers Committee should not be criticised for failing to engage in lengthy analysis of 'the relevance of culture and setting to drug use and the effectiveness of alternative approaches to drug control based on regulation rather than criminalisation' (at 34) in its discussion of serious drug offences, when the Committee's task was narrowly circumscribed by its political masters.

Interestingly, in the preface to their book the authors acknowledged that 'writing about law from an interdisciplinary perspective is not without its own hazards and pitfalls'. Quoting a Canadian law professor writing in 1998, they referred to disparagement from more traditional legal academics and scholars in other disciplines who 'do not always appreciate encroachments by their neighbours'. They expressed 'optimism that the Australian legal community will be receptive of such endeavours'.

In my experience, the authors have little to be concerned about in the academic legal community. It seems clear that critical, inter-disciplinary, legal analysis is no handicap to career advancement. Quite the reverse. On the other hand, the private profession will not be so receptive. As for the views of political scientists, psychologists, sociologists and other like experts, I will leave it to them to judge.

Reviewed by Stephen Odgers S.C.