Criminal Law Futurology[*]

The Hon Justice Michael Kirby[1]

Futurology: A Rash and Hazardous Speculation

Future unpredictability: With the publication of the *Criminal Law Review* in 2004, a 50th anniversary article appeared, written by Professor A T H Smith, on 'Criminal Law: The Future' (2004). In it, the author declared that seeking to predict the future of the criminal law struck him as being 'a form of rash and hazardous speculation'. The reason he gave for his disinclination to tackle the task was that 'the whole process is too subject to the vagaries of events and the directive whim of politicians, to be a risk-free venture'.

All futurology is dangerous because of the limited capacity of human beings to imagine the events and challenges that lie just around the corner. The October Revolution in Russia, the advent of Hitler's regime in Germany and the events of 11 September 2001 are just three illustrations of large events with great consequences for the criminal law, that could not easily have been predicted even by the most erudite and knowledgeable of experts.

Sometimes the shape of the criminal law will be moulded, or at least influenced, by rational procedures. Thus, in the middle of the nineteenth century, the criminal law commissioners in England struggled with the reform of substantive criminal law, doing so partly in response to the changing economic and social climate of the time (Great Britain nd; Radzinowicz 1948). In more recent decades, in many common law countries, law reform bodies, established after the model of Lord Scarman's Law Commissions, have endeavoured to stamp on developments of criminal law doctrine and principle the outcome of rational analysis and widespread debate.

The 19th century codifiers: In the British Isles, the nineteenth century attempts to codify the criminal law failed. However, the product of the labours of the codifiers of that time was not wholly wasted. The codes that lay unattended in Britain were taken up with enthusiasm by the imperial administrators in India and in other parts of the British Empire. In Australia, for example, the Stephen Code of Criminal Law formed the basis for the efforts of that great

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* Opening Address for the International Society for the Reform of the Criminal Law conference, Edinburgh, 26 June 2005, Michael Hill QC Recognition Lecture.
Michael Hill was a leading advocate at the Criminal Bar, not just in England but in many countries of the common law. He was President of the International Society for the Reform of Criminal Law at the time of his death. He had friends throughout the world -- especially in the Commonwealth of Nations (Del Buono 2003). He practised in that stressful and demanding branch of the law for forty-five years, earning a formidable reputation for professional excellence and service to the wider cause of the Bar and the criminal law.
Part of one section of this lecture concerning transnational crime has been derived, with adaptation, from the author's earlier essay on 'The Future of Criminal Law' (1999) *Criminal Law Journal*, vol 23, p 263 at pp 267–269.

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Australian lawyer, Sir Samuel Griffith, whose Queensland Criminal Code is still substantially in force in the States of Queensland and Western Australia and has influenced the codes adopted in Tasmania and, more recently, in the Northern Territory of Australia. In several parts of the Commonwealth of Nations, the existence of these codes evidences a shared criminal jurisprudence that goes far beyond generalities. Professor Richard Fox has observed that the process of sharing has not concluded:

> The idea is to bring Australian law closer to that of our Asian neighbours such as Malaysia, Singapore, Sri Lanka, India and Pakistan that also possess British-based criminal codes akin to those in three Australian States. An exchange of ideas with regional neighbours on standards of criminal law, criminal justice and punishment should be welcomed given the need for close cooperation with them in responding to cross-border crime (Fox 2002:113).

The dream of codification has never been extinguished. Professor Smith, for example, is unrepentantly a long-time advocate of the promulgation of a code of criminal law (see for example Smith 1986). So are other leading judges and lawyers of the United Kingdom, including Lord Bingham of Cornhill, the senior Law Lord (Bingham 1998).

But if entire codification of criminal law still seems a long way off in those jurisdictions of the common law world that have not yet embraced the notion, the advance of the basic idea since the 1960s has received a fillip from the work of the Law Commissions in the United Kingdom. Professor Smith observes:

> Like the predecessors of the nineteenth century, the Law Commission resolved that the best path ahead was through reform in penny numbers, incremental developments substantially being amalgamated into one large code. Viewed through that lens, it is fair to say that the Law Commission has achieved an enormous amount in the last thirty years or so. Starting with the *Criminal Damage Act* 1971, the Commission reformed conspiracy,[2] criminal attempts[3] and (in the same year) forgery and counterfeiting[4] and in 1986 the law relating to public order.[5] The work of the Commission continues; it is planning to issue a Draft Bill on the law of complicity[6] as part of the codification exercise (Smith 2004:975).

Australian rationalisations: In Australia, the parallel labours of the federal and State law reform commissions have made similar contributions to clarification and restatement of criminal law, procedure and the law and practice of sentencing (see for example ALRC 1975; ALRC 1980; for more recent investigation see ALRC 2005). But in a federal state like Australia, where (as in the United States) responsibility for the content of criminal law, procedure and practice lies generally with the States rather than the federal polity, systematic reform is a messy business. It is even messier than that inflicted on the criminal law in the United Kingdom by the many requests of the Home Office to review particular fields of the law (such as partial defences to murder, provocation and diminished responsibility (LawCom 2004; see Smith 2004:976)) which tend to side-track the reforming agency from a coherent and logical development of basic legal principles, causing Professor Smith to despair 'whether that is an entirely desirable state of affairs' (Smith 2004:976).

In Australia, in addition to the law reform agencies, three elements have added to the stimuli for consistent development of criminal law across the nation.

First, there is the role of the national final court, the High Court of Australia, in developing and re-expressing the general principles of criminal law, so far as possible, in a

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2 *Criminal Law Act* 1977 (UK).
3 *Criminal Attempts Act* 1981 (UK).
4 *Forgery and Counterfeiting Act* 1981 (UK).
5 *Public Order Act* 1986 (UK).
6 Law Commission (England & Wales), *Annual Report* 2003/2004, p 22.

way that is consistent throughout the nation.[7] In matters of fundamentals, the Court has embraced an approach that encourages the greatest possible commonality in the statement of the law applicable in different jurisdictions. Secondly, a committee of federal and State law officers has been established to develop a model criminal code, aimed to influence broad principles and the expression of substantive offences both in federal and State jurisdictions.[8] Already, these proposals have proved influential in the re-expression of criminal law. Thirdly, the growing involvement of the Federal Parliament in matters of criminal law has altered the balance between national and sub-national regulation of this area of the law, such as was contemplated a century ago when the Australian Constitution was written. Because of the national, indeed international, character of many challenges to crime-fighting and revenue protection today, highlighted by numerous Royal Commissions and other enquiries, the federal law-makers in Australia have begun to flex their muscles. They have promoted the regulation of crime on a national scale in a way that occurred earlier, within similar constitutional constraints, in the United States of America.

Once a national crime fighting agency is established, whether the Federal Bureau of Investigation in the United States or the Australian Federal Police after 1979 in Australia, means are quickly discovered to expand national involvement in combating crime that have a sufficient federal constitutional basis to sustain national laws (Fox 2002:112–113). As a result of this expansion of federal involvement in criminal justice in Australia, a new federal *Criminal Code Act* 1995 (Cth) has come into force. It is an ambitious project. It is intended not only to produce a complete and revised criminal law applicable to matters of federal concern but, through the collaborative agreement of the Standing Committee of State and Federal Attorneys-General in Australia, to produce a model criminal code that, it is hoped, will eventually be adopted by each Australian jurisdiction.[9]

Professor Fox has noted that this outcome is still a long way from being realised. But the practical impetus towards a heightened rationalisation of criminal law and practice, as well as enforcement procedures, comes about in a single country from the realisation that effective responses to criminal and other anti-social conduct commonly require coordination and consistency in the substantive and procedural laws involved. This is a realisation as important for federations such as Australia as for other States, such as the United Kingdom — and for regional groupings of States such as the European Union.

The clash of civilizations: If it is difficult enough to predict rapid movement towards consistent laws and principles on criminal offences and procedures in a single country, the difficulty is multiplied enormously when dealing with the future of criminal law and practice in countries with ethnic, religious or other divisions or as between different countries manifesting such divisions.

Professor Samuel Huntington has expounded a theory of a cultural fault line dividing countries that share the values of Western democracies and those that do not, notably countries in the Islamic world.[10] Other writers have suggested that the cultural fault line in question is not between the West and the Muslim world so much as between societies that

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7 *The Queen v Barlow* (1997) 188 CLR 1 at 32 citing *Wallace v The Queen* (1961) 108 CLR 56 at 75–76.

8 For example, the report of the Commonwealth Model Criminal Code Officers' Committee of the Standing Committee of Attorneys-General, *Model Criminal Code*, Ch 3: *Theft, Fraud, Bribery and Related Offences, Final Report* (1995) was considered in *Peters v The Queen* (1998) 192 CLR 493; 98 A Crim R 250 at 258, 274, 281.

9 See for example *Charlie v The Queen* (1999) 199 CLR 38 (para [16]) referring to the definition of murder in the Model Criminal Code.

10 In his book *The Clash of Civilisations and Remaking of World Order* (NY, 1996).

coalesce in different ways on a 'barometer of tolerance', stimulated by divergent views concerning fundamentalist religions, whether Islamic, Christian, Jewish, Hindu or otherwise (see for example Inglehart & Norris 2003:63). Analysed in this way, societies quite often divide in their attitudes towards such issues as divorce, abortion, gender equality and treatment of homosexuals. Attitudes to such topics, sometimes grounded in understandings of religious texts written hundreds or even thousands of years earlier, present significant difficulties for those who seek modern international principles to guide humanity to common solutions to problems of the criminal law in the century ahead.

For those who believe that such issues can be discussed at meetings such as the present, and who hope to see the differences ironed out by processes of rational debate, empirical observation and prudent give and take on all sides, the competing belief that the criminal law should be founded in holy texts, of whatever religion, presents something of an obstacle. In such matters, where the religious text is believed to be applicable, binding and clear, there may be no room for compromise or rational debate. The slaughter of large numbers of people in earlier centuries in Western countries, over minute and seemingly esoteric differences of religious doctrine, stands as a warning to us of the difficulty of making progress in the face of such obstacles where they arise.

Homosexual offences as a touchstone: The criminal law, in different societies, is inevitably shaped by views concerning the role of women in society; access to divorce and other means of independence from males; availability of abortion in some, or any, circumstances; and acceptance of homosexuality as justified or intolerable. Ronald Inglehart and Pippa Norris, in their post-Huntington analysis, take attitudes to private adult homosexual acts as a touchstone for the divisions that are found in different parts of the world that inevitably affect the state of the criminal law:

> The way a society views homosexuality constitutes another good litmus test of its commitment to equality. Tolerance of well-liked groups is never a problem. But if someone wants to gauge how tolerant a nation really is, find out which group is the most disliked, and then ask whether members of that group should be allowed to hold public meetings, teach in schools and work in government. Today, relatively few people express overt hostility towards other classes, races or religions, but rejection of homosexuals is widespread. In response to a [World Values Survey] question about whether homosexuality is justifiable, about a half of the world's population say 'never'. But as is the case with gender equality, this attitude is directly proportional to a country's level of democracy. Among authoritarian and quasi-democratic States, rejection of homosexuality is deeply entrenched: 99% in both Egypt and Bangladesh, 94% in Iran, 92% in China, and 71% in India. By contrast, these figures are much lower amongst respondents in stable democracies: 32% in the United States, 26% in Canada, 25% in Britain, and 19% in Germany.
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> Muslim societies are neither uniquely nor monolithically low on tolerance towards sexual orientation and gender equality. Many of the Soviet successor states rank as low as most Muslim societies. However, on the whole, Muslim societies not only lag behind the West but behind all other societies as well ... Perhaps most significant, the pattern suggests that the younger generations in Western societies have become progressively more egalitarian ... but the younger generations in Muslim societies remain almost as traditional as their parents and grandparents, producing an expanding culture gap (Inglehart & Norris 2003:68).

It is inevitable that this culture gap will affect the present and future content of the criminal law. No society dedicated to issues of international reform of the criminal law can afford to be blind to these global phenomena. We see glimpses of them in manifestations of religious and cultural fundamentalism in Western countries. But they are writ large in other countries where religious fundamentalism is at an earlier stage of historical evolution.

Forces For Internationalisation

International law and institutions: The foregoing analysis of the deep cultural divide that still exists in the world over values reflected in the criminal law might lead a superficial observer to despair and to conclude that the twenty-first century, like the centuries that went before, will be marked by substantial, even increasing, evidence of differences in the basic principles and practices of the criminal law — impossible to reconcile and difficult even to discuss.

However, this would be an incorrect conclusion for a number of reasons, some of which I will now mention. The most obvious is evident at this conference. We live in a world where aeroplanes can bring us within a day virtually to anywhere on the planet. We are linked by telephone, facsimile, email and the Internet in virtually instantaneous daily communication. This integration stimulates the growth of translational law and of international institutions. It encourages a shared concern, at least to some degree, about the provision of adequate and just responses to events happening outside a country's own jurisdiction, as revealed in the global media and as portrayed as a legitimate concern of human beings everywhere.

Considerations such as these explain the establishment of the first international tribunals to deal with conduct that was seen to require a response from the organised institutions of humanity.

The International Military Tribunals, established at Nuremburg and Tokyo after the Second World War, are a good example, More recently, the horrors of the genocide inflicted on the Cambodian people during the Khmer Rouge regime between 1975 and 1979 have led to a recommendation for the establishment of a tribunal to try the surviving Khmer Rouge officials.[11] The government of Cambodia agreed instead to the establishment of a domestic tribunal that would include international judges. Wrangling over the financing of the tribunal has delayed the establishment of the body; but more recent signs appear hopeful for progress.

On the other hand, the International Criminal Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda have been established under the auspices of the United Nations. Despite defects of costs and efficiency, they each assert the application of criminal law principles to persons who have offended against international humanitarian law.

Even more important than the foregoing *ad hoc* institutional responses, is the creation by the United Nations of the International Criminal Court (Kirsch & Holmes 1999; Aranjani 1999; Murphy 1999; cf Kirby 1998). The Rome Conference agreed to the Statute for that Court in July 1988. Its first members have now been elected. The opposition of the United States of America to the new court, and various reservations and restrictions upon its jurisdiction, present obstacles the full extent of which will only become clear with the passage of time. Yet, notwithstanding such opposition, the court has been established. It sends a clear signal that those who breach international law will not necessarily, in the future, escape accountability because of political positions they have enjoyed in their home countries. Increasingly, they will be rendered accountable before the bar of humanity.

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11 Report pursuant to General Assembly Resolutions 52/135 (Sir Ninian Stephen, Chairman, Rajsoomah Lallah and S R Ratner. 18 February 1999), unreported.

This development is akin to the creation of the Royal Courts of Justice in England in the reign of King Henry II. Gradually, it may be expected that an international court, exercising international jurisdiction, will bring the operation of international law to bear upon autocrats and tyrants who breach the international laws of genocide and the laws on crimes against humanity, war crimes and the crime of apartheid. We may not see the full achievement of this objective in our lifetime; but it will come.

Similarly, as the Pinochet litigation in England demonstrated, some crimes are now treated as crimes of universal jurisdiction.[12]

Where such crimes are brought to the notice of national courts, it may be no excuse that the crimes did not occur within their physical jurisdiction. The old aphorism 'All crime is local' must necessarily be reconsidered in the contemporary world. Criminal conduct today can sometimes be viewed as having connections with a number of competing jurisdictions. Thus, recently, in the High Court of Australia, it was held that a criminal assault allegedly performed by an Australian serviceman on a beach in Thailand, concededly amenable to, but not prosecuted in, the Thai criminal courts, was also liable to prosecution before an Australian tribunal sitting in Queensland on the basis of an Australian military interest in upholding military discipline of its service personnel both at home and overseas.[13]

Transnational crime: An even more urgent stimulus to the reconciliation of criminal law and procedures in different countries will come about because of the human inter-connections that exist today in ways that did not exist in earlier times.

Overwhelmingly, such inter-connections serve the interest of humanity. But out of some of them arise anti-social conduct which different societies will seek to tackle in different ways. Such anti-social conduct will sometimes demand effective systems of criminal law and effective law enforcement across national boundaries. In particular fields, such as those concerning drug law enforcement, overseas corruption of officials and overseas child sex tourism, the legislatures of various countries have begun to respond.[14] It is inevitable that there will be more national legislation of this kind. Nevertheless, unless expressed in treaty obligations accepted by differing nation states, such legislation will remain local. It will be invoked in a traditional way against persons within the reach of the jurisdiction concerned.

A glance at the statute books that reflected the concerns of the codifiers of the mid-nineteenth century, shows how criminal law tends to reflect the perceptions of anti-social conduct current at the time that the law was written. Thus, an examination of the *Crimes Act* 1900 (NSW), upon which I cut my professional teeth, discloses various offences reflecting the values and concerns of the turn of the last century when that law was made. The offences included concealment of the birth of a child (s 85), abduction of a woman against her will (s 86); bigamy (s 92); breaking and entering a place of Divine worship (s 106); cattle stealing (s 127); stealing dogs (s 132); stealing trees in pleasure grounds (s 140); malicious damage to agricultural machines (s 210); malicious damage to works of art in museums (s 244); forgery of Her Majesty's seals of any British colony (s 253); forgery of an East India bond (s 260); and many other similar crimes of high particularity. The list reflects the social, religious, economic and personal concerns of an earlier age. A contemporary and future list of anti-social conduct would have to address a different range of activities.

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12 See eg *R v Bow Street Metropolitan Stipendiary magistrate, Ex parte Pinochet Ugarte (Amnesty International Intervening [No 3]* [2001] 1 AC 147 at 275–276, 290–292 (HL); Bracegirdle 1999; see also Kirby 2004:240).

13 *Re Colonel Aird, Ex parte Alpert* (2004) 78 ALJR 1451.

14 See eg *Criminal Code Amendment (Bribery of Foreign Public Officials) Act* 1999 (Cth); *Crimes Act* 1914 (Cth), Pt IIIA ('Child Sex Tourism').

The nature of modern information technology also presents acute problems for private international law. Whose legal regime is to apply to the diffuse international components of information technology transactions? Where an electronic message is generated in country A, switched in countries B and C, transits countries E, F, G and H, is processed in countries I and J, stored in country K and involves damage in yet other countries, present rules for resolving conflicts of laws, including in respect of the operation of criminal law[15] will sometimes seem inadequate. The rapid expansion of the Internet makes problems of this kind both urgent and puzzling.

The extra-territorial operation of laws, including the criminal laws of the United States of America, has caused legislative responses in several countries. The issue is partly a political one (Robinson 1986:fn 15). However, integrated information technology has undoubtedly presented the need for new approaches and new principles, including in the field of criminal law. The technology has also presented the urgent need of improved cooperation between police services in differing jurisdictions. Faced by the practical obstacles involved in transborder crimes, it will sometimes be an understandable response of police and prosecutors to concentrate on familiar local crimes where the transborder complications do not arise. Yet it may be that transborder crime works greater harm upon a greater number, affecting more victims and causing greater losses to those afflicted. This can arise where what is involved includes old-fashioned couriers physically crossing borders with illegal goods.[16] However, it will also arise where modern technology is utilised in the service of harmful anti-social objectives.

The types of crimes that involve transnational activity include the operations of criminal organisations providing crime groups with extra geographic reach, more flexibility and an increased capacity to avoid detection (Wardlaw 1999:2–3). They also include activities designed to facilitate transnational crime, such as the corruption of officials of foreign governments and corporations and the moving of profits off-shore within the organisational structure of corporations. They include involvement in the market for illicit drugs (Wardlaw 1999:5), money laundering, participation in illegal fishing, bio-piracy and undermining the 1987 Montreal protocol aimed to ban the use of carbon fluorocarbons (Wardlaw 1999:9).

Such developments have led one Australian expert to comment:

> The use of technology by criminals, either to commit sophisticated crimes or to evade law enforcement action, is a common theme. Computers and telecommunications enable many of the emerging crimes of economic significance. To combat these crimes, law enforcement will need to gain and maintain technological capacities appropriate to selected areas of investigation. ... [S]uch capabilities will need to be expanded considerably and the level of technical skills will need to be enhanced throughout the organisations as investigations come to routinely require the ability to understand the exploit advanced technologies. Similar arguments apply to areas such as understanding the world of international banking and finance. These trends will have implications for a range of recruitment and training issues, equipment acquisitions and operational policies (Wardlaw 1999:10).

These developments have obvious implications for the expression of specific crimes within the substantive criminal law. Otherwise, prosecutors will be forced back, in responding to harmful and anti-social conduct, to reliance upon broadly expressed crimes such as conspiracy, with the consequent explosion in the size and complexity of trials (and other defects) that typically accompany the prosecution of such charges.

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15 cf *Director of Public Prosecutions v Doot* [1973]AC 807 at 817 per Lord Wilberforce; *Libman v The Queen* (1985) 21 CCC (3d) 206 at 211–212 per La Forest J; *Lipohar v The Queen* (1999) 200 CLR 485.

16 Such as are discussed in *Nicholas v The Queen* (1998) 193 CLR 173.

Terrorism Offences

Terrorism laws after 9/11: The dramatic events that occurred in the United States on 11 September 2001 have led to a raft of laws and governmental policies in many countries adopted to respond to the perceived dangers of global and local terrorism.

This is not the occasion to review the many laws that have been enacted or the court cases that have tested the boundaries of such laws. Suffice it to say that, in a number of quite different jurisdictions, final courts of appeal throughout the world have been fairly consistent in insisting that new criminal offences must conform to constitutional and human rights norms and must provide a measured response to the dangers of terrorism that does not endanger adherence to the rule of law itself.

This was so in the early South African case of *Mohamed v President of the Republic of South Africa*,[17] where the Constitutional Court insisted that the State must not bend its laws to its own ends and must avoid any temptation to use questionable measures in responding to crimes of terror.[18] There have been similar decisions in the Supreme Court of the United States concerning judicial scrutiny of cases involving non-citizens detained as terrorist suspects in the United States Guantanamo Bay facility in Cuba.[19] In the United Kingdom, both in the English Court of Appeal[20] and in the House of Lords,[21] British judges have insisted that 'constitutional dangers exist no less in too little judicial activism as in too much'.[22] Lord Hoffmann remarked:[23] 'Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community'.

In Indonesia, in July 2004, the new Constitutional Court, by majority, struck down a conviction imposed on a person accused of involvement in the bombings at Bali in October 2002. The court did so on the basis that the accused had been prosecuted under a special terrorism law introduced as a regulation six days *after* the bombings whereas the new Constitution of Indonesia forbids retrospective criminal punishment.[24] In Israel, no stranger to acts of terrorism, the High Court upheld a challenge to the route of the national 'security fence' as excessive to the postulated needs of national defence.[25]

These cases constitute important evidence of a fairly consistent stance on the part of final courts, operating under different constitutional and legal regimes, insisting that counter-terrorism laws must remain just that. They must remain laws. They do not afford a *carte blanche* for unbridled power to executive governments or their agencies to pursue whatever they conceive as in the national interest in responding to the perceived dangers of terrorism.

Keeping proportion: It is undoubtedly true that new elements in the contemporary world have added to the dangers presented by modern practitioners of terrorist offences. These include the greater destructive power of many modern weapons, available or potentially available to the terrorist, and the willingness of increasing numbers of fanatical supporters of terrorist objectives to sacrifice their own lives in pursuit of their causes.

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17 2001 (3) SA 893.

18 2001 (3) SA 893 at 921 [68].

19 *Rasul v Bush* 542 US 1 (2004).

20 *Secretary of State for the Home Department v M* [2004] EWCA Civ 324.

21 *A (FC) v Secretary of State for the Home Department* [2004] UKHL 56.

22 [2004] UKHL 56 at [41] per Lord Bingham.

23 [2004] UKHL 56 at [96].

24 *State v Masykur Abdul Kadir*, Supreme Court of Indonesia, unreported, noted *Sydney Morning Herald* 24 July 2004, 1.

25 *Beit Sourik Village Council v Government of Israel*, HC 2056/04 High Court of Israel, 86 (2004). See Kirby 2005, at 341.

These developments have led some observers to urge the need for a much broader legal response to terrorism and to the greater number of people and organisations that terrorism is said now to encompass. Particularly because of the vulnerability of public utilities and infrastructure and the potential global reach of modern terrorism, it is said that modern societies need a broader range of laws to tackle the new enemies. Hence the suggested requirement for wider powers of telephonic interception; larger powers of surveillance at the points of entry into facilities and countries at risk; controls over lawyers appearing for terrorist accused, obliging them to secure security clearances; promotion of networks of liberal and moderate anti-terrorists; and wider facilities for the detention of terrorist suspects for longer intervals than has been traditionally regarded as compatible with the rights of unconvicted persons to enjoy their liberty.

There is little doubt that these developments will continue to present important challenges to the content and application of the criminal law. In free societies, there will be disagreements about such developments. Such disagreements will sometimes exist with greater strength outside the political branches of government that commonly become caught up in the excitement encouraged by undisclosed secret information said to justify legal reactions out of line with past traditions.

In Australia, the Secretary of the federal Attorney-General's Department (Mr Robert Cornall) has declared, in effect, that the world has changed since 11 September 2001 and that criminal and other laws and policies must change accordingly (Cornall 2005:5). He has suggested that we all just have to get used to it:

> [T]hings are a bit different now. Australia and Australians have been nominated as terrorist targets. We have to ensure that we take all the steps necessary to protect the safety of our community as a whole and, in the process, to protect the rights of individuals within our society. This aim is totally consistent with the *Universal Declaration of Human Rights* which states in Article 3 that every person has the right to life, liberty and security of person. Our individual rights have to sit comfortably with this over-riding human right to which everyone in our community is entitled. The Australian Parliament has already addressed some of these issues. Examples can be found in legislation giving [the Australian Security Intelligence Organisation] questioning and detention powers; allowing police access to stored emails under a search warrant; and establishing a means for classifying information to be tendered as evidence in criminal trials provided strict conditions are met (including requiring the lawyers to obtain security clearances). I do not see these moves as an infringement of individual rights. I see them as reflecting the extent that we, as a society, agree that our individual rights fit within the overall interests of the Australian community as a whole in a more dangerous world.

Of course, every government and parliament that has sought to place restrictions on individual rights has claimed justification by reference to the rights of the mass of individuals in the community as a whole. Doing so involves nothing new, including in Australia. In 1950, the Federal Parliament enacted the *Communist Party Dissolution Act* 1950 (Cth). That Act provided for the dissolution of the Australian Communist Party and communist organisations. It disqualified communists from holding public offices. It imposed criminal offences upon persons who continued to be members of such unlawful organisation[26] or who obstructed in any way the moves taken to dissolve the organisations or who sought to distribute designated books, papers, documents and records.

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26 *Communist Party Dissolution Act* 1950 (Cth), s 7(1). See also s 21.

The Act was ultimately struck down by the High Court of Australia as constitutionally invalid.[27] A referendum to amend the Australian Constitution to permit such a law was defeated in 1951. This happened at the same time as a similar law was enacted, and upheld, in the United States of America[28] and as like laws were adopted in South Africa, Malaya and in several other nations, some of which have been continued in substance to this very day. Most observers would accept that the more proportional, restrained approach to combating the 'terrorist' potential of the communists in the 1950s, pursued in Australia following its court decision, was wiser and more effective than the sometimes hysterical legal over-reactions adopted in other countries. Despite the First Amendment values of freedom of expression and freedom of assembly, the United States was shamed during those times by the activities of Senator Joseph McCarthy and the House Un-American Activities Committee and by the failure of the courts to rise to the challenges presented by such extremes. Those who do not learn from the lessons of history are bound to repeat its mistakes.

In shaping the future of criminal law, in response to the threats of terrorism, it is essential to retain a sense of proportion. Every day more people die from AIDS than died in the attacks in the United States on 11 September 2001. Yet none of the same legal, economic, political and psychic energy has been mustered to confront that challenge to humanity, to the economy and the toll of human suffering, that was so quickly mobilised to respond to the perceived dangers of terrorism. I agree with the Australian, James Wolfensohn, in his final remarks as the head of the World Bank, in rebuking both that organisation and the leaders of the world for their failure to confront the AIDS crisis.[29] He said:

> Somehow the penny hasn't dropped, that this was something that was at the very core of human development ... This was a human tragedy and it could be averted and it could be treated.

In shaping the future of criminal law, it is all too easy to respond uncritically and excitedly to popular political imperatives. The shocking images of buildings collapsing in New York and of a nightclub burning in Bali can stimulate lawmaking energy in a way that faceless, unknown dead and dying in far away developing countries fail to achieve. This disproportion and lack of proper perspective will stand as an indictment to the current generation, just as the lack of adequate response to the Holocaust and the Khmer Rouge genocide stand as a rebuke to the indifferent world of the twentieth century in earlier times.

And now a little torture: As if to reinforce the foregoing point, it has recently been suggested by two Australian scholars of considerable repute that the 'war on terrorism' may sometimes justify torture. According to reports, Professor Mirko Bagaric and Ms Julie Clarke of Deakin University advanced the proposition that torture should be permitted where the evidence suggests that it is the only means, due to the immediacy of the situation, to save the life of an innocent person (*Sydney Morning Herald* 2005:13; see also Bagaric 2005:12–13). In such circumstances, torture (so it was said) is a kind of self-defence or necessity. Inflicting a relatively small amount of harm on a wrong-doer may be warranted by saving an innocent person or persons. In such a case, the authors stated that it verges on 'moral indecency' to prefer the interests of the wrong-doer.

I have great respect for Professor Bagaric whose writings in criminal law and punishment are of the highest quality. However, on this occasion I differ from him. It is impossible for interrogators to know with any certainty that a suspect has real information

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27 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1. See esp at 187–188, 193.

28 *Dennis v United States* 341 US 494 (1951) upholding the validity of the *Smith Act*.

29 Reported *Australian*. 19 May 2005, p 7.

about a threat. Permitting torture encourages its abuse. Even, if in a very rare case, it might save lives, in the majority of other cases where it might be used in practice it would cause greater suffering than it prevents. Moreover, torture adds the cloak of apparent justification to oppressive conduct that is all too prevalent in today's world (Saul 2005:13). Typically, torture produces misinformation. In contemporary conditions, talk of supervised torture sends the wrong message at the wrong time to the wrong people. Unfortunately, this is not a theoretical issue. As Professor Bagaric has himself noted, torture reportedly now occurs in 132 nations. We should do nothing to afford excuses to the torturers of the world.

The fact that Australians are seriously talking about the justifications for torture shows the extent to which disproportion and abuse of rights has recently travelled in discourse about criminal law and procedure. It is possible that, in our response to the perceived and actual challenges of terrorism, we will embrace a little torture, carefully administered — just as the government of the United States of America, has embraced indefinite detention of suspects and attempted to put those suspects outside the scrutiny and supervision of its courts. I hope that this does not happen in other countries. If it does, I trust that the voices of lawyers and other citizens will be lifted against such excesses, wherever they exist, and in favour of adherence to the rule of law and fundamental human rights. The International Society for the Reform of Criminal Law should be one such voice.

Transnational media circus: The extent to which international attention to criminal law is part of contemporary society has been illustrated recently in Australia in a highly publicised case.

The case concerned an alleged attempt of a young Australian tourist, Schapelle Corby, to import a quantity of marijuana into Bali in Indonesia. The accused, a beauty student whose plight was picked up by large sections of the Australian media, was convicted by the Indonesian court and sentenced to twenty years imprisonment. Appeals are pending both by the prisoner and by the prosecutor, who had asked for a penalty of life imprisonment. By Indonesian law the maximum penalty for the offence was death. Twenty years imprisonment may not have been an unusual punishment for the offence by Indonesian standards, when the accused has pleaded not guilty but has been convicted. However, encouraged by weeks of unrelenting front page media attention, many Australians were convinced that Ms Corby was innocent and had been unfairly dealt with by the Indonesian criminal justice system.

It is not my purpose to add needlessly to the words written on this case. I have only a few points to make. Every day, as judges and practising lawyers know, cases similar to that of Ms Corby come before courts in Australia and throughout the world. Few, if any, of them enjoy the torrent of attention that this one secured. Most are ignored by media and the public — totally. What was so special about the *Corby* case? Does it suggest that some media organisations, with investments or commercial interest in the case, set out to manipulate public opinion in a drama or entertainment in which an individual accused person's fate is truly at stake? This was not a soap opera or make-believe. This was not a docu-drama. This was about a real person and a real loss of liberty.

In the global market of media entertainment, serious debate about international issues of criminal law and punishment is usually furthest from the minds of the industry. It remains for lawyers and other experts to attempt to clarify the real issues to be debated in such a case: Is the present international approach to drug use and drug addiction just, sensible and effective? Is there a more effective and just approach, at least for some such cases and some drugs? Is twenty years imprisonment (still more, death) for such an offence, wherever it takes place, self-evidently excessive? Can the disparity between punishments for such an

offence in Australia and Indonesia be justified by peculiar local needs and the attitudes of the public in different countries? Do such punishments, in any case, deter those to whom they are targeted? Is there disharmony between the punishments inflicted for such offences and other punishments involving crimes of corruption, terrorism, violence and other anti-social conduct? Can there ever be a useful comparison between the criminal laws and legal punishments imposed in the judicial systems of countries so different as Australia and Indonesia? Is it futile, or useful, to compare such punishments? Whatever lawyers say, is it inevitable that such comparisons will take place today, given the character of global media and the application of modern satellites, cable television and universal communications? Is this just part of the world we live in?

In the coverage of the *Corby* case, some thoughtful analysis of the special features of the Indonesian criminal justice system has been published referring to differences from the system operating in Australia. For the most part, however, community debates in this and like cases have been visceral, not informed. It seems likely that this will continue to be the case, given that xenophobia and jingoism are never far from the surface in contemporary popular media. A body such as the Society for the Reform of Criminal Law aspires to more objective standards. Globalism is inevitable and desirable, including in discussion of criminal law and punishment. But for any real progress to be made in common understandings about such matters, it would be preferable for the discussion to be disentangled from media entertainment.

For all that, widespread public debate over criminal law and punishment is ultimately healthy and productive. Strong public controversies in other countries sometimes help to produce reform of the criminal law nearby. The outcry at the Shar'ia sentence to stoning of a woman prisoner for adultery in Northern Nigeria is a case in point. But what of the protests at the flogging and execution of homosexuals in Saudi Arabia? Unrest over the torture to extract confessions in Chechnya? The uproar over the United States treatment of untried persons accused of terrorist offences, held for nearly four years in Camp X-Ray in Guatanamo Bay in Cuba? The widespread discomfort over the detention of children and others in migration facilities established in remote parts of Australia and the disproportional numbers of Aboriginals in Australian prisons? Perhaps there is a lesson for the criminal law and like provisions in today's world. All of us are on trial. The public is watching in every country and is ready to express its disagreement where law and its procedures appear unjust and excessive. Little by little, the voice of humanity, expressing human values may influence for the good the correction of wrongs and excesses of criminal law and procedure everywhere. It will not happen overnight. But it does happen and sometimes in unexpected circumstances.

Striking the Right Balance

There are many other topics that a survey of the future of criminal law should cover (see for example Dunford 2004/5:49–50). However, the few that I have mentioned will suffice to chart some of the issues for the years ahead.

If Michael Hill were with us in Edinburgh, he would be full of ideas and thoughts, bright words and wise contributions. In the matter of criminal law and procedure, he was, as we should be, 'a pillar in [the] temple'. He was, and we should be, 'strong as a rock'. He was for us, and we should be for those who follow, 'a guide, a buckler and an example'.

Criminal law is, and must forever be, the fulcrum and central element of the law of any civilised society. It must strike the right balance between the needs of the community, representing the mass of individuals and the rights and privileges of an individual, accused

of crime, facing all the power of the organised State. The interests of criminal law, and its subject matter, vary over time. There can never be a final word. There is no code that says it all for every age and for all countries and people.

To every age is given the responsibility of striking the right balance between the State and the individual. We know from earlier times — times of torture and oppression even in our own legal tradition — that mighty wrongs can be done in the name of the State and by means of the criminal law and its procedures. As the world of growing integration and vulnerability faces new challenges and greater awareness, it is the obligation of today's practitioners of criminal law to adapt the substantive principles of the criminal law, to adjust its procedures, to add to its armoury where necessary and to respond to new challenges. But all this must be done within a framework of international law, fundamental human rights, growing enlightenment and the sharing of experience.

Passing fads, momentary hysteria, populist enthusiasm must all be kept firmly in check. In the matter of criminal law, the eyes must be fixed on a distant horizon because the values at stake, and the balances struck, define the kind of society in which the law operates for all people. Those values are fundamental. That is why they are so important. It is why virtually everyone has a point of view about them.

Let Robert Burns have the last word, in language apt for Michael Hill and applicable also to ourselves:

> But, Lord, remember me an'mine
> Wi' mercies temporal and divine,
> That I for grace an' gear may shine,
> Excelle'd by nane,
> And a' the glory shall by Thine,
> Amen, Amen!
> (Burns 1996:688).

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