

Epilogue: Emphasising the Positive

IT IS EVIDENT from the eight chapters above that, while some obligations can be identified unambiguously as ‘positive’ (in the sense that they require action, rather than abstinence), there are many contexts in which obligations have positive and negative aspects intertwined. For example, some offences have elements that criminalise acts and other elements that criminalise failures to act: rape and other sexual offences may provide an example, insofar as they specify both an intentional act and the absence of a reasonable belief based on the taking of steps to ascertain whether the other party consents. For the purposes of this volume such offences have been treated as offences of omission, on the reasoning that liability for such offences can only be established if the failure to fulfil a duty (in sexual offences, to ascertain whether the other party consents) is proved. Insofar as an omission is an essential part of an offence, that offence requires a special set of justifications, according to the arguments set out in Chapter 2. A similar intertwining is evident when we consider the obligations of the state. Indeed, as we shall see, there is an inevitable tension between the state’s obligation to provide its subjects with security and the state’s obligation of justice, and within the obligation to provide security there can be overlaps between duties to create prohibitions and duties to criminalise omissions.

The relevant obligations of the liberal state include the duty to provide security and the duty of justice, and more needs to be said about them both. As argued in Chapter 2.2 and Chapter 3.4, the state ought to develop structures and institutions capable of minimising threats to security of the person. In most theories of political obligation, this duty of the state is presented as the corollary of the subject’s undertaking to obey the law: the subject yields some of her or his freedom to the state in return for the promise of reasonable efforts being made to minimise threats to personal security. The citizen’s duty to pay taxes can be rationalised on a similar model, as the corollary of the expectation that certain public services will be provided. More generally, the state’s duty to provide security requires it, among other things, to ensure that it maintains emergency services capable of responding when a person is in physical danger (see Chapter 2), to afford special protection to the rights of children (see Chapter 7), to ensure that there are criminal laws in place to protect people from violations of their rights, and to ensure the due enforcement of those laws (see Chapter 8).

All of these three elements in the duty to provide security amount to positive obligations in their own right – in the sense that they require the state to take certain actions – but our focus here is on the second and third of these duties. In terms of political theory the state must have a duty to enact laws prohibiting murder, violence, sexual attacks and so forth. Such laws are justifiable both as censuring those who commit such egregious wrongs and as a form of deterrence to minimise the occurrence of those wrongs. We saw in Chapter 8 that European human rights law and other international human rights documents support the view that states have a positive obligation to have such laws in place, for the protection of the rights of (potential) victims. We also saw, in Chapter 8.2 particularly, that there are some rights that yield both a positive obligation (to have in place laws that protect sexual integrity) and a negative obligation (to ensure that any such laws do not trespass on the liberty of adults to follow their sexual choices).

Persuasive though the argument for the state's duty to provide security undoubtedly is, the problem is to be able to know where it ends. If we continue to confine the argument to offences that criminalise conduct against personal security, the question of limits on criminalisation seems difficult to answer. There may be a political irresistibility in claims of the need to enhance security, public safety, social defence, public protection – a vocabulary that sometimes seems to make an unanswerable case. Attempts to answer the case can be made by, for example, mobilising empirical evidence to cast doubt on claims of the effectiveness of a law in providing protection, or by drawing attention to arguments of principle against criminalisation (on which see Chapter 1 above), or by insisting on the limitations stemming from the State's duty of justice (to be reviewed below). It is important to bear in mind the starting-point – that criminal laws are necessary to minimise the deprivation of citizens' fundamental rights, and to censure those who attack or endanger those rights – and to reflect that the citizen's right to be free from unwarranted coercion and unjustified conviction should also be maintained. Thus within the state's duty to provide security, properly elaborated, there should be found a constraint in the form of the security of individuals from unjustified state intrusions on their liberty.¹ Put bluntly, security should not be seen as a one-way street in which greater state powers for 'public protection' are regarded as unqualified goods.

More tellingly, the state's duty of justice should also be a source of significant limits on pursuit of the duty to provide security. The two principles operate in tension with one another, although there are certainly respects in which (in practice) the tension is too slight or entirely absent, as with the serious strict liability offences discussed in Chapter 4. To the extent that the duty of justice is taken seriously, however, it operates as a constraint on legislative endeavours put forward as necessary for greater security. The foundations of the duty of justice lie in the obligation of the liberal state to respect its subjects as responsible

¹ See further L Zedner, *Security, Key Ideas in Criminology Series* (2009), 157–58.

moral agents within a political community. The state should respect the individual worth of each person, rather than regarding them as mere numbers. Treating individuals as responsible moral agents means at least four things:

- i) Requiring the state to abide by rule-of-law values, which prescribe that the law be clear, certain, stable and set out in advance (see Chapters 4, 5 and 6 above), so that individuals are able to decide how to conduct themselves in full knowledge of the consequences;
- ii) Recognising the state's duty to publicise its criminal laws, so as to ensure that the law can operate as a guide to conduct and so that individuals can, without undue effort, find out what the law is (see Chapters 2 and 3);
- iii) Requiring advertence as a precondition of criminal liability, which means that, in principle, offences should require proof of intention, recklessness or knowledge as to the prohibited consequence or circumstance (see Chapters 4, 5 and 6 above), so that individuals are not open to criminal conviction for accidental or unknown events unless a strong case has been made out for punishing (gross) negligence;
- iv) Requiring the state to take due account of the reduced capacity of some subjects, particularly children, so that they are not open to criminal conviction when their capacities are not sufficiently developed (see Chapter 7).

These positive obligations flow from the state's duty of justice which, in turn stems not so much from the European Convention on Human Rights or other international obligations as from a relationship between the state and its subjects that insists on respect for individuals as responsible agents. It is plain from Chapters 4 and 6, on strict liability and on possession offences respectively, that what is here termed a positive state obligation has often been entirely ignored by the government and the legislature in this country. Strict liability offences and possession offences may be created without even a mention, let alone any open consideration, of the principles set out above. Similarly, in relation to Chapter 3, offences are often created or extended without adequate publicity (adequate in the sense of being designed to reach those who might be thought likely to fall foul of the new law). Further, we noted in Chapter 7 that in the UK there has been variable recognition of the special rights of children in the criminal process: even if we pass over the vexed but fundamental issue of the age of criminal responsibility, there are several respects in which the law appears to hold children to the same standards of expected behaviour as adults. It was argued in Chapter 7 that this is wrong, and that it stems partly from a failure to recognise the problem and partly from a political reluctance to be seen to 'soften' the law for the young.

The eight chapters are not entirely about the positive obligations of the state in respect of criminal law, however. Chapter 3 argues that individuals should accept a positive obligation to make reasonable efforts to know the criminal law: the thrust of that chapter is that the state has an obligation to take steps to make it easier for individuals to fulfil their duty, but that individuals have the

duty nonetheless. This argument was taken further in Chapter 2, where a whole range of positive obligations on individuals to take action in particular situations was sketched out. The strongest case presented in favour of positive obligations on individuals was at the confluence of three streams of argument – the priority of life, the principle of urgency, and the principles of opportunity and capacity. Beyond that, there was detailed discussion of the boundaries of other positive obligations arising from the family or household, from voluntarily incurred obligations, from situations of causal responsibility, and from civic responsibilities. The argument for positive obligations stemming from civil responsibilities required several steps of contentious reasoning, and led to proposals for an offence of failure to report serious crimes, which some would oppose on the grounds that it might usher in a society dominated by suspicion, betrayal, intimidation and worse. However, these issues have been discussed too little by criminal lawyers as well as by governments and their law reform agencies. Chapter 2 shows that the traditional common law reluctance to impose criminal liability for omissions is supported by some good reasons and some less good reasons. Let us hope that the chapter acts as a stimulus for re-appraisal of the shape of the criminal law, particularly in respect of positive obligations on individuals.

It is evident that the chapters in this volume represent, not a description of existing Anglo-American criminal law and its supporting doctrines, but rather a set of normative arguments in favour of the state recognising the importance of respecting individuals as responsible agents when shaping its criminal laws (or, where they are not fully responsible agents, as with children, shaping its criminal laws to make due allowance for that fact), and correspondingly a set of normative arguments in favour of imposing clearer and, indeed, further positive duties on individuals which may result in criminal conviction for failure to carry them out.