



University of
Zurich^{UZH}

Institute of Law

Principles of Common Law Criminal Law – Substantive Aspects and Main Principles

Principles of Common Law

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Criminal Law

- History
- Policy
- Judge-made law
- The harm principle
- The components of a criminal offence
- Chosen principles
- Recent cases



History

- *“If a man strike out another’s eye, let him pay l.x. shillings...If the great toe be struck off, let xx shillings be paid...if it be the second toe, let xv. shillings be paid...if the middlemost toe be struck off, there shall be l.x. shillings...if the little toe be struck off let v. shillings be paid him.”*
- *“If a man have a spear over his shoulder and any man stake himself upon it...he [shall] pay the wer without the wite.”* (‘wer’ is V’s compensation, ‘wite’ is a fine)
- Early trials: period in which the object of the law-maker was rather to reconcile antagonists upon established terms than to codify crimes.
- Emergence of the jury trial in 1215.
- *“ It is a right of every Englishman to be tried by a jury of his peers”.* *Magna Carta*



Policy considerations in Criminal Law (also relevant to civil law)

- Factors bearing on «criminality»:
 - Does the offence involve a «moral wrong»?
 - Does the offence involve actual harm done ?
 - Are there severe penalties available upon conviction?
 - Who prosecutes and where?
 - Does the offender acquire a «criminal record» ?
 - Does «anti-social» behaviour pass the test?
 - Can an offence carrying a prison sentence be «not very criminal» ?
- Generalisation of UK criminal law: «conduct which is criminal usually involves a public wrong and a moral wrong».



Judge-made law – based on common law principles

- C v DPP [1996] per Lord Lowry:
- If the solution is doubtful, judges should be wary of imposing their own remedy.
- Show caution when Parliament has rejected reform.
- Disputed social policy less suitable area for judges than ‘purely legal’ problems.
- Fundamental doctrines should not be lightly cast aside.
- Finality and certainty must be achievable.



The validity of criminal law – should law enforce morality?

The morality principle

- **HLA Hart (1962):** “Must some reference to morality enter into an adequate definition of law or legal system? Or is it just a contingent fact that law and morals often overlap (as in their common proscription of certain forms of violence and dishonesty) and that they share a common vocabulary of rights, obligations, and duties?”
- **Should the criminal law enforce morality?:** “Ought immorality as such to be a crime?” (Hart 1962)
- **Legal moralism?** Common law criminal offence “of a conspiracy to corrupt public morals”, *Shaw v Director of Public Prosecutions (1961) 2 A.E.R., 446 AC 223 (1962)*. *Virtually any cooperative conduct is criminal if a jury consider it after the conduct occurred to have been immoral.*
- Should the courts function as the *custos morum* or “the general censor and guardian of the public manners?”
- The Obscene Publications Act 1959, publishers of D.H. Lawrence’s *Lady Chatterley’s Lover* were unsuccessfully prosecuted in 1961, upheld the publisher’s right to publish a novel with explicit sexual conduct as long as the interest of science, literature and learning shall be taken into consideration, and if it is proved on these grounds then



The harm principle

- **John Stuart Mill (1806-1873):** *“The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant.”*
- **Feinberg (1926-2004):** *“It is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor, and that there is no other means equally effective at no greater cost to other values.”*
- Legally theorising the harm principle: for Mill it is restrictive, for Feinberg it is permissive (ie. It allows criminalisation of certain behaviours)
- Harm does not have to occur – prohibiting conspiracies and attempts also reduces harm



Other principles

- **Legal Paternalism:** “It is always a good reason in support of a prohibition that it is probably necessary to prevent harm to the actor himself and that there is probably no other means that is equally effective...”
 - Seatbelt law, motorcycle helmet law
 - Not for the good of society and not against harming other citizens, but for one’s own protection
- **Legal Moralism:** “It can be morally legitimate to prohibit conduct on the ground that it is inherently immoral.”
 - Incest law, necrophilia law, child pornography law, bigamy law
 - Based on accepted moral standards which evolved out of biology, danger to minors, social norms...



The components of a criminal offence at common law

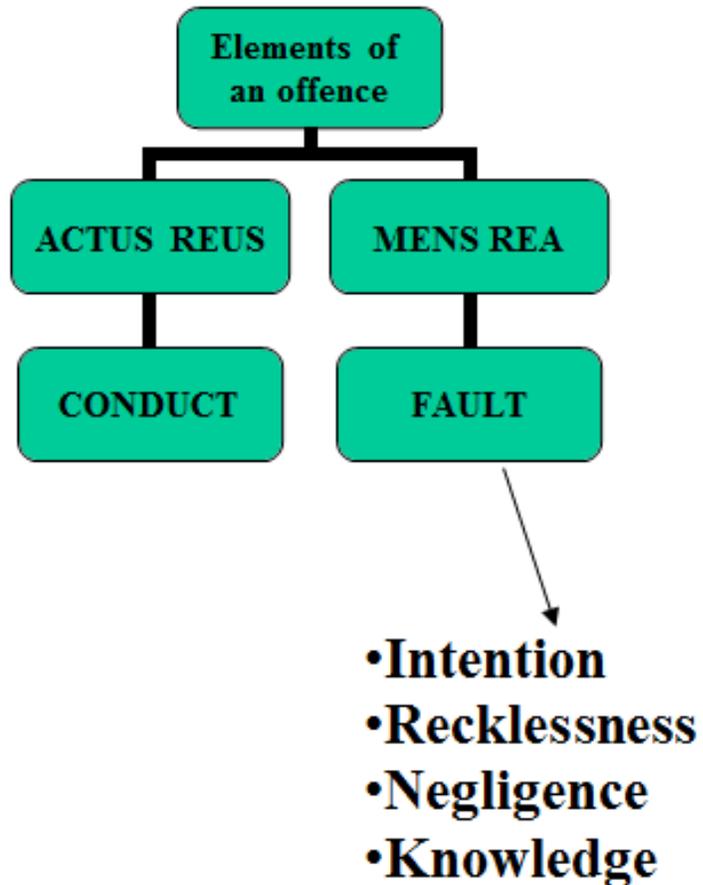
- Conduct element (*actus reus*)
 - Includes possession, state of affairs (being somewhere), actions, speech, omissions
- Consequence element (causation)
 - Causing something to occur: death, homicide, assault
 - There need be no consequence element if activity is enough: rape, drunk driving
- Circumstance element (\approx part of *mens rea*)
 - Fact, state of mind or of affairs that must accompany the conduct and/or consequence
 - Eg. Being under 16 for unlawful sexual activity (fact), lack of consent in rape (state of mind)
- Fault element (*mens rea*)
 - Six commonly used kinds of fault: intention, knowledge, belief, recklessness, negligence, dishonesty
 - May relate to past, present (belief in consent) or future (intention to endanger life)



Motive and Intention

- Remember: *actus reus* and *mens rea* must occur simultaneously for the offence.
- Intention as ‘decision’: Where X has settled on bringing a possibility about, this is intent.
- Intention-in-action: Engaging in an action in the belief that by so doing, that action, or some consequence, may come about.
- Transferred intention: I intend to kill/rape A but get B instead → murder/rape of B.
- Act of God: if I put a plant on the windows I’ll hope that lightning will strike and destroy it and it does – then intention to destroy the plant. If I open a cage hoping the parrot will escape and it does – intention.
- The problem with all of these principles, whether derived from case law or statute law, is that in the end the jury has to decide whether the defendant had the required intention (as he will deny it), whether he was capable of having the required intention (reasonable man different for all of us).

Strict Liability for some criminal offences



- No requirement of *mens rea* in respect of one or more elements of the *actus reus*
- Defies the principle «no punishment without fault»
- Liability based on presumptions which can be rebutted
- Public policy important, social concern, public safety
- Strict liability in sexual offences cases where one party is underage. No questions about knowledge.
- R v G (2009): House of Lords upheld conviction of 15 year old boy for statutory rape. Accepted factual basis was that defendant had intercourse with 12 year old girl who was consenting, believing her to be 15 years old.



Murder (England/UK)

- *Murder is a common law crime, developed mainly through individual cases.*
- *Partially codified in the Homicide Act 1957 and the Coroners and Justice Act 2009*
- *Lord Coke (1628-1644): “Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth within any country of the realm any reasonable creature in rerum natura under the king’s peace, with malice aforethought, either expressed by the party or implied by law.”*
- *Homicide Act 1957 s.1: “Where a person kills in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence”*
- *‘Express malice’: intent to kill.*
- *‘Implied malice’: intent to do serious harm.*
- *You need a state of mind to kill or inflict grievous bodily harm on the person and then perform the act of killing or grievously hurting them. If they die (consequence) → murder.*



The components of a criminal offence

- Conduct/consequence element must relate to fault element in the 'right way':
- Eg: Defendant sets out in his car looking for Victim in order to kill him. D accidentally runs over someone, who turns out to be V → criminal offence

- Conduct/consequence elements are 'objective categories' not D's individual choices:
- So, if D meant to kill Rod but killed Tod, that is murder; if D meant to rape Jane but raped Jill that is rape.

- Conduct/Fault must occur simultaneously:
- Eg: If D wants to kill his neighbour V today and a week later accidentally runs him over (without planning or wanting to do so anymore) → not murder because *actus reus* and *mens rea* did not occur together
- (Will probably be manslaughter)



Murder

- 1st degree murder:
 - Killing intentionally
 - Killing where there was an intention to inflict serious harm, coupled with an awareness of the risk
- 2nd degree murder
 - Provocation: rage, fury, reasonable person loss of control, sense of having been seriously wronged
 - Diminished responsibility
- Voluntary manslaughter
 - Abused wives
 - Reduced conviction from murder under partial defences: diminished responsibility or suicide pact
- Involuntary manslaughter



Involuntary Manslaughter

- By unlawful or dangerous act (constructive)
 - Criminal act, not negligent or by omission
 - Dangerous: risk of harm
 - Causation between act and death of victim
- By subjective recklessness
 - Defendant knew or should have known that what he was doing might result in death (risk)
- By gross negligence
 - Defendant breached duty of care to victim
 - The breach caused the death
 - The breach was gross



Diminished responsibility and suicide pact (partial defences to murder)

- *S. 2 Homicide Act 1957 as amended by s.52 Coroners and Justice Act 2009*
- *If successfully pleaded, both reduce the conviction from murder to manslaughter (not absolution of liability)*
- *Requirements for diminished responsibility:*
 - Abnormality of mental functioning caused by a recognised medical condition
 - Which provides an explanation for the defendant's acts or omissions in being party to the killing
 - Which substantially impaired their mental ability to either (here, similar to involuntary intoxication)
 - Understand the nature of their conduct
 - Form a rational judgment
 - Exercise self-control
- *Suicide pact: agreement between 2+ individuals to commit suicide. If one kills the other but fails to kill himself – if demonstrates existence of suicide pact – conviction reduced from murder to manslaughter.*

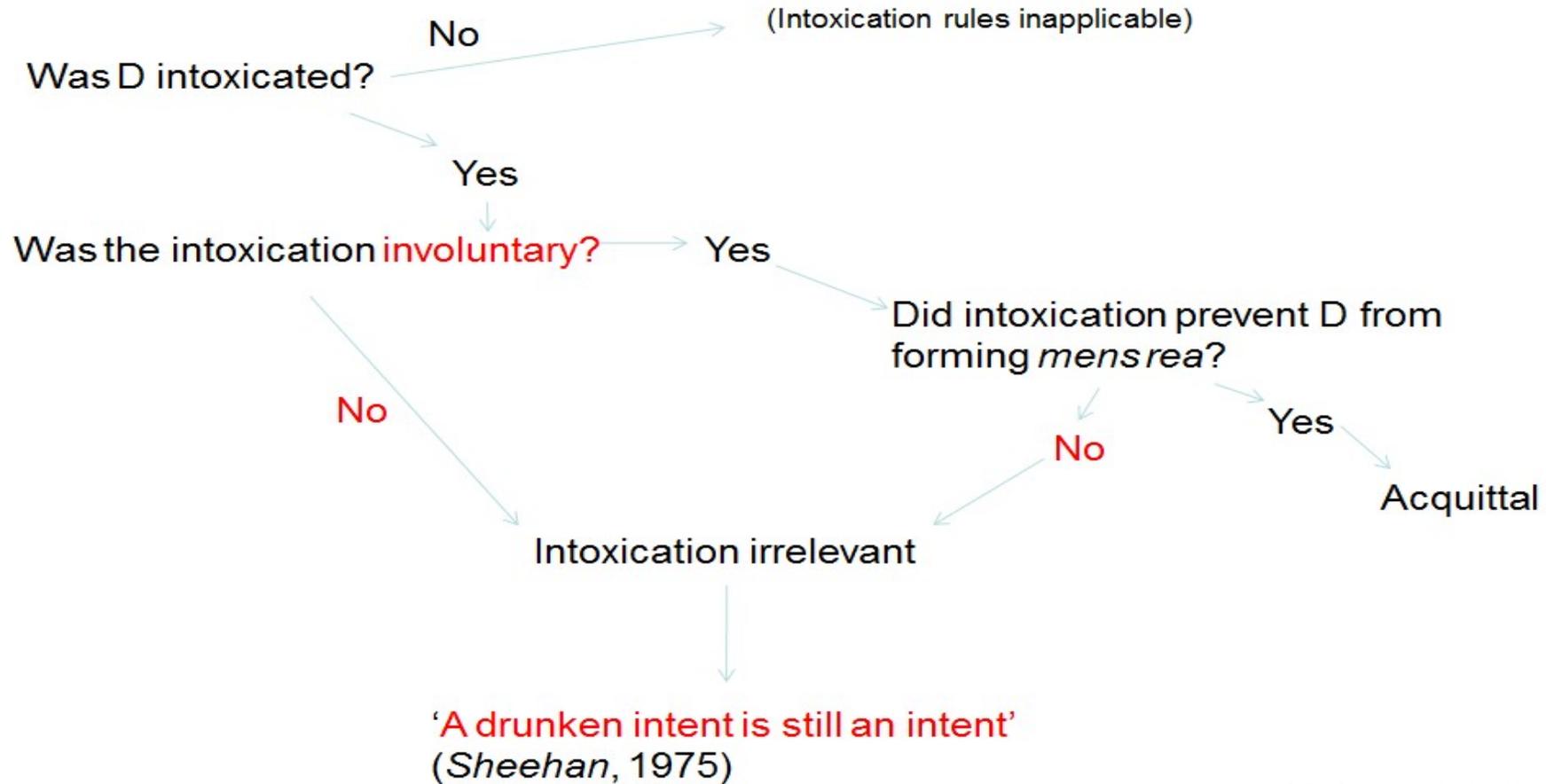


Recklessness

- Recklessness: taking an unjustified risk
- Closing your mind to the obvious
- Cases cannot agree whether it is
 - Performing an act that creates and obvious risk without giving any thought to the possibility of such a risk, OR
 - Foreseeing risk and going on to take it unreasonable
- Perception of the risk – what about a defendant who is stupid, disabled or unimaginative ?
- Reasonable person test: would a reasonable person, possessing the qualities of the defendant at the time, have been able to perceive the risk? Age of the accused and their mental capacity.
- So... neutral man or defendant?
- And now imagine you are on jury duty and you have to wrap your mind around this...



Intoxication – and intent





Causation

- Cause in fact vs Cause in law: at which point can one hold the Defendant legally responsible
- «But for» causation: It must be proved that but for the defendant's act or omission, the event would not have occurred.
- Need not be the sole cause but need to have «contributed significantly» to the damage.
- A number of situations that could influence legal causation/break the chain of causation
 - Natural or abnormal events
 - Third party interventions: free, deliberate and informed, not accidental (disputed law)
 - Victim's own reaction: Jehovah's witnesses refusing blood transfusion
 - Medical treatment
- Egg shell skull rule: the defendant must take their victim as they find them, ie any pre-existing medical conditions. Eg. D wanted to beat V up, but V was sick and died → manslaughter



Omissions

- Is there a general duty to actively safeguard the interests of others?
- English law is very protective of personal autonomy: if you never got involved in the first place, then you have no duty to act.
- No duty to help someone dying on the pavement.
- Not allowed to make the situation of the victim worse or cheer on the defendant. But: case of army officers observing one of their own raping a woman – they did not say anything – not guilty.
- *“when a person has created or contributed to the creation of a state of affairs which he knows, or ought reasonable to know, has become life-threatening, a...duty on him to act by taking reasonable steps to save V will normally arise”*
- Contrast with France: «*non-assistance à personne en danger*» = duty to help someone in trouble.
- Note: this is about personal autonomy and independence. Doctors have a duty to help patients, and parties to a contract have duties under the contract (although no general duty of good faith).



Self-defence

- ECHR Art. 2: *“Everyone's right to life shall be protected by law...Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence”* (applies to state officials)
- Criminal Justice and Immigration Act 2008 : force used in self-defence must be necessary and proportionate
- *“The degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was disproportionate in those circumstances.”*
- Force used in prevention of crime must be ‘reasonable in all the circumstances’ (which may imply a necessity element).
- (Force can sometimes be proportionate but not necessary, or necessary but not proportionate, depending on the circumstances)
- Reasonableness of the force: difficult assessment. Can you kill to prevent rape or injure to prevent theft?



Duress and Necessity

- Duress is a defence to all offences except murder. Idea: if someone's will is overborne, it is not their own.
- There has to be a threat of death or serious physical injury (interestingly not psychological)
- There must be a nexus / relationship between the threat and the crime, usually nominated in the threat
- There must be no evasive action that the defendant could have taken. Any other action
- The defendant cannot rely on threats they have voluntarily laid themselves out to (refusing orders of a gang or IRA after willingly joining them)
- Mistaken belief in duress has to be reasonable. Jury checks characteristics or a reasonable person.

- Necessity: idea that you push someone out of the way of an incoming truck. They get hurt, but avoid death.
- Famous case: Dudley – shipwrecked sailors with no food, ate one of their own. Guilty of murder, necessity not recognised, although sentence reduced from hanging to imprisonment.
- Necessity as duress of circumstances (hybrid defence): reckless driving from fear of death
- Necessity in medical cases: conjoined twins, had to be disconnected to save one but Dr knew the other would die: allowed as defence against murder but VERY LIMITED, usually to their own circumstances.



Automatism and Insanity

- The defence of automatism is applicable to all offences, unlike provocation and can lead to full acquittal.
- Understanding automatism: Failure of *actus reus* based on the idea of human action, which requires voluntariness of the action. Automatism prevents any act being complained of becoming the *actus reus* of the offence because it eliminates the part where the human is mentally responsible for his action.
- Requires a total destruction of the defendant's control over his actions, not an impaired control.
- Insanity: disease of the mind. Generally applicable to all offences. You are not acquitted, you are labelled «not guilty on grounds of insanity».
- Burden of proof on defendant. Standard: balance of probabilities, not beyond all reasonable doubt.
- Insanity: lack of moral responsibility for the offence. Usually means D is going to a mental institution.
- Based on the idea that you have no capacity to reason (as opposed to not using it)
- Not know what you are doing, or if you do know, not appreciate that it is «wrong». Case-by-case check.



Hernandez Case

- Intent to commit murder
- Victims' rights
- Judicial opinion balances
- Principle of abatement as recognised by case law
Stare Decisis





Theft and deprivation of property

- Protection of property is sacred – law for the care of security.
- Theft Act 1968 (statutory intervention to clean up the common law)
 - There must be property
 - Belonging to another
 - Defendant must appropriate the property (actus reus)
 - Unlawfully (without lawful reason)
 - Dishonestly (mental element)
 - It is immaterial whether the real owner was induced by threats or fraud to hand over the property (held at gunpoint or lied to by his investment manager) → still theft
- Rule under English law: finders keepers. If you find something in the street, it is yours
- Making off without payment – used for people who eat in a restaurant and then leave without paying



Fraud and dishonesty

- Fraud is about trickery and deception.
- Fraud Act 2006: types of fraud
 - Fraud by false representation (made knowingly)
 - Fraud by failure to disclose information if under duty to do so
 - Fraud by abuse of position
- Mens rea: intention to make loss or risk of loss
- Actus reus: doing the actions required to get the victim to do what you want them to (lie, write, pretend)

- Fraud is usually about misleading statements
- Remember no general duty of good faith under English law
- Corporate and Financial Fraud



Attempt (an offence)

- So long as the crime lies only in the mind, it is not punishable, because often there is no plan to actually execute the crime, and often-times not even a serious intention of executing it.
- Punishment of attempt = punishment of an imperfect crime. The defendant could have gotten lucky.
- Public policy: you still want to discourage people from crime.
- Requirements:
 - *Mens rea* (mindset and intention) for the crime
 - *Actus reus*: more than merely preparatory to the commission of the offence. Past preparing, you have to be actually trying
- Impossible attempts:
 - Legal: the law you are trying to break does not exist
 - Factual impossibility: shooting a corpse is not attempted murder



Briefly

Other punishable offences

- Sexual offences: rape, sexual assault
- Conspiracy to commit a crime
- Corporate liability (particularly US)
- Complicity
- Non-depriving property offences: breaking your property

Remember

- Under English and US law, you have to accuse someone of a specific offence. Cannot go to court saying 'I think I was wronged' – the lawyer has to decide on a line of reasoning and go that way.
- The judge will not help the lawyers. The common law system is adversarial (judge as observer), while civil law systems tend to be inquisitorial (the judge takes over and can substitute one crime for another).



Race and criminal law in America

Ahmaud Arbery https://en.wikipedia.org/wiki/Murder_of_Ahmaud_Arbery

Kyle Rittenhouse
https://en.wikipedia.org/wiki/Kenosha_unrest_shooting





Muhammad Aziz poses for photos outside the courthouse after his conviction in the killing of Malcolm X was vacated, on November 18, 2021. https://en.wikipedia.org/wiki/Muhammad_Abdul_Aziz

