



University of
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Institute of Law

Principles of Common Law Criminal Law – Part 1 Substantive Aspects and Main Principles

Principles of Common Law

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Lecture 5

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Criminal Law

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



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

- 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?

- **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 ex post facto 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

- 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)



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)



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 (see tort lecture)
 - 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: cojoined 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

- Principle of abatement
- Judicial reasoning: Stare Decisis



https://www.masslive.com/news/index.ssf/2015/01/aaron_hernandez_murder_trial_w.html