AN INTRODUCTION TO CRIMINAL LAW

Most law students think that they will find criminal law one of the most appealing of all the law subjects they have to study. Your own decision to study law may have been taken as a result of coverage of criminal cases in newspapers or on television, or interest generated by fictional portrayals of criminal proceedings. If so, what has attracted you is the criminal justice system, of which the criminal law is only one element. As traditionally studied in law schools, criminal law means the substantive criminal law, concerning itself largely with the issue of criminal liability. We cover some of the more important and well-known specific offences, such as murder, manslaughter, non-fatal offences of violence, and offences against property such as theft and criminal damage, and explore their detailed requirements as to liability. We also examine the extent to which there are any general principles governing criminal liability as a whole, e.g. are there any defences such as mental disorder applicable to offences generally, what are the rules on attempted crime or people who only assist in the commission of a crime.

Generally speaking our consideration focuses on guilt or innocence, rather than why crimes are committed or how criminals are sentenced. Criminal procedure is largely outside our remit although aspects of the powers exercised by the police, such as arrest and detention are dealt with on the Constitutional and Administrative Law course. Whilst we do cover the basic mechanics of the criminal process to begin with, a more critical/analytical review would be found in Criminology courses and more practical detail and procedure will be covered in the Legal Practice and Bar Training Courses etc. Similarly, the law of criminal evidence is normally taught as part of a separate subject. By and large, we are concerned with whether, on given facts, the defendant/accused (D), is liable for any offence and, if so, which offence. You will probably appreciate that, in practice, most contested cases involve disputes about the facts, not about the law (D denies that he was the person who robbed the bank or that he turned right without signalling, or whatever). Thus, even though we focus on the substantive law, this is a fundamental building block for your future studies of criminal law and procedure later on.

What is a Crime?

Academics have long quested for the Holy Grail of a general definition of a 'crime' which identifies the quality of an act or omission which makes it an offence ('crime' and 'offence' are synonymous). However, crimes are so many and varied and embrace such widely differing kinds of conduct that all attempts to illuminate the essential characteristics of a crime, whether based on moral criteria or otherwise, have proved fruitless. Writers have been forced to abandon the search for the 'nature' of a crime and to fall back on rather lame definitions based on the type of legal proceedings which may follow from the act. In other words, an act is a crime if it is capable of being followed by criminal proceedings, having one of the types of outcome (punishment, etc.) known to follow these proceedings. Thus, although there are some crimes, such as murder and theft, which are instantly recognisable as crimes, if you wish to know definitively whether particular conduct is a crime, you must have recourse to statutes and case law to see whether criminal proceedings and punishment can follow such an act. As Dine and Gobert point out (*Cases and Materials on Criminal Law*) this definition 'puts the cart before the horse'.

Furthermore it is clear that the European Court of Human Rights is free to reject a domestic law classification as non-criminal if the nature of the proceedings is characteristic of criminal offence proceedings (general enforcement by a public authority with punitive elements based on fault) with a significant penalty attached (see *Benham* v *UK* (1996) 22 EHRR 293 (imprisonment for failure to pay the community charge)). There is no 'magic' definition.

It is a case of the State deciding that certain conduct ought to be criminal because it is too important to leave it to the private citizen wronged to bring civil proceedings. The State takes it upon itself to discourage such conduct. Of course, the wheels of change run slowly and it is inevitable that conduct that is no longer considered to be in this category remains criminal, whilst conduct which is now considered worthy of criminal sanctions may not yet be criminal.

The Role of the Substantive Criminal Law

The rules governing criminal liability define what is and what is not criminal conduct and should therefore be clear and certain to enable people to ascertain in advance and with reasonable confidence whether any conduct will or will not involve criminal liability. Unfortunately, as we shall see, this is often far from the case.

More importantly, the substantive rules on criminal liability define the playing field upon which the apparatus of the criminal justice system can be brought to bear. The coercive powers of the police (search, arrest etc.) and the courts (to convict and sentence) are based on conduct defined as 'criminal' by the substantive law. The social control mechanism which is the criminal justice system is founded upon the rules prescribing what is and what is not a crime.

The Wolfenden Committee on Homosexual Offences and Prostitution ((1957) Cmnd 247) viewed the purpose of the criminal law (at para. 13) as:

> . . . to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are especially vulnerable . . . It is not . . . the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined.

The Committee concluded that the criminal law should not be used to impose society's current moral standards on non-conformist individuals (even assuming these standards are readily ascertainable). This probably represents the prevailing view of the judiciary now (but *cf. Brown* [1994] 1 AC 212 where some of the judges concluded that sado-masochistic sex that led to actual bodily harm or worse was not something that could be legally "consented" to as they believed it was "not in the public interest"). The truth is that whilst there might be a large measure of agreement about the central core of any criminal law, the issue of whether conduct on the periphery should be criminal often involves balancing a number of competing considerations and interests, and is ultimately a matter of social, economic and political judgement.

SAQ 1

Is there any conduct (a) which is not criminal which you would like to see made criminal and (b) which is criminal which you think should be de-criminalised?

Classification of Offences

Offences are classified into different categories for procedural purposes. The detail of these categories is deliberately omitted here as the course is not concerned with procedural detail and you will learn what is required in the next stage of your training. At this stage, it is enough that you have a basic understanding of the types of offences:

- Summary offences
  - Relatively minor offences.
  - E.g. common assault under s39 Criminal Justice Act 1988.
  - Case will be heard at a magistrates' court (or sometimes dealt with by police e.g. fixed penalty notice, or even a "telling off").

- Offences triable either way ("indictable" because they **can** go to the Crown Court)
  - A wide range of offences from minor offences through to more serious crimes.
  - E.g. theft, burglary, some criminal damage.
  - Starting point is that case is heard in the magistrates' court, but can be "sent" by magistrates to the Crown Court depending on the circumstances, or if the defendant "elects" to be tried in the Crown Court.
  - Usually the sorts of crimes which can potentially be serious, but depend on the circumstances. E.g. theft of a bottle of milk from the supermarket is not all that serious, but theft of an extremely valuable asset is more serious.

- Indictable only offences
  - The most serious offences.
  - E.g. murder, rape, terrorism.
  - Case must be tried at the Crown Court before a judge and jury

The basic elements that make up a crime

In general terms each criminal offence is made up of the same elements although there are exceptions to this which will be explained at the beginning of the course. These elements are:

- Actus Reus – the conduct element
  - the forbidden conduct: an act, omission (failure to act) or state of affairs

- Mens Rea – the fault element
  - the state of mind or fault required for the crime in question
    - Intention
    - Subjective recklessness
    - Negligence (Gross negligence or ordinary negligence)

- The absence of a defence

If all the actus reus and mens rea elements are present, and the defendant does not have a valid defence they will be guilty of the crime.

Burden of Proof

It is a fundamental principle of English law reinforced by Article 6(2) of the European Convention of Human Rights, that a person is innocent until proved guilty (although inroads on the 'right of silence' be seen as a serious derogation from the principle). This means that the legal burden of proving that D committed the alleged offence is placed squarely on the

prosecution. It must prove 'beyond reasonable doubt' that D committed the crime charged (*Woolmington* v *DPP* [1935] AC 462.

In *Woolmington*, D had shot dead his estranged wife. He claimed that the gun had gone off accidentally when he was showing it to her. The trial judge had directed the jury that it was up to D to satisfy them that the killing was not murder, i.e. an accident. The House of Lords held this to be a misdirection, Viscount Sankey LC stating:

> 'Throughout the web of the English Criminal Law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's guilt . . . the principle . . . is part of the common law of England and no attempt to whittle it down can be entertained'.

Thus, the prosecution had to establish that D killed with the requisite intention to kill or cause serious injury in order to secure a conviction for murder.

SAQ 2

How would the prosecution be able to prove what was going on in D's head when the gun went off?

At the trial in the Crown Court, the prosecution will first present its case, calling witnesses to the incident, scientific evidence (e.g. fingerprints or bloodstains), evidence as to D's motive, circumstantial evidence, e.g. linking D with the scene of the crime and any statements he has made under police interrogation. Assuming the prosecution has made out a prima facie case, the defence presents its case calling its own witnesses (including, if it wishes, the accused himself) and evidence (e.g. alibi evidence supporting a claim that the accused was miles from the scene of the crime). At the close of evidence each side in turn makes a closing address to the court. The trial judge then has to sum up for the jury. They must review the evidence for the jury, summarising each side's case, pointing out discrepancies and weak points and focusing the jury on the crucial issues to be determined on the facts. The judge must also direct them on any relevant law. Thus, in a murder trial, the judge must explain the legal ingredients of murder and what the jury must be satisfied about before it can convict. If D is claiming a defence, e.g. that he acted in self-defence, the judge would have to explain the legal requirements of such a defence.

In serious crimes, one of the standard requirements for the prosecution is to prove that D had a particular state of mind at the time of performing the prohibited conduct. This is the *mens rea* for the crime and the definition of each crime will prescribe precisely what the requisite state of mind is. Usually it will be either an intention to do something (e.g. kill, injure) or a realisation that the conduct involves a risk of doing something (e.g. killing, injuring). This brings us to **SAQ 2**: how can it be proved beyond reasonable doubt what D was thinking at the time of the act? After all, we cannot look inside D's head and if he says he did not intend to fire the gun, have we not got to give him the benefit of the doubt and take his word for it? The first point is that it is clearly open to the jury to disbelieve D's evidence in the same way as that of any other witness. For example, that evidence may be contradicted by D's earlier confession to the police. Witnesses may have seen the incident or overheard D threatening P and their evidence may be inconsistent with D's version.

What the jury must do if it wishes to convict in cases where D denies he had the requisite intention or foresight (realisation) is to find that intention or foresight from proof of what actually happened, what D did and the surrounding circumstances. This rule of commonsense is enshrined in s. 8 of the Criminal Justice Act 1967 which contains instructions for how D's intention or foresight of a harmful consequence (e.g. death) must

be proved if and when the definition of the offence charged requires it to be proved. It reads:

> A court or jury, in determining whether a person has committed an offence,–
>
> (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but
>
> (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.

Thus, the prosecution has the legal burden of proving beyond reasonable doubt the presence of all the ingredients of the crime and that D was the person who committed it. That is the position where, for example, D simply denies that he was the person who did it.

The position is more complicated if he admits to performing the acts but claims they do not amount to the crime because he has a defence, e.g. he acted in self-defence or under duress or he was insane. It would be ridiculously onerous for the prosecution if, in every trial, it had to deal with and eliminate every possible defence which D might have raised and the law does not require it to do so. An evidential burden (termed by some 'the burden of going forward') is placed on D to put forward some credible evidence to support his claimed defence. Only if he does this will the prosecution then have the legal burden of disproving this defence. For example, in *Woolmington*, D claimed that the shooting of his wife was an accident and that, despite appearances, he did not intend to kill or cause serious injury. For this to become an issue in the trial compelling the prosecution to disprove it, D would have to provide *some* evidence to support it, e.g. by his own testimony at the trial, testimony from friends as to his good relationship with his wife, or that he had no reason to kill.

Unusually, there are one or two defences where D's burden is even higher. He bears the burden on the "balance of probabilities" – persuading the court that, more likely than not, he satisfies the conditions for the claimed defence. There is one instance at common law – the defence of insanity. Since the law presumes everyone sane unless the contrary is proved, if D claims to have been insane when acting, he must prove it on the balance of probabilities. This is the only exception to the rule developed by the common law but it is always possible for the legislature to make exceptions to it expressly or impliedly by statute (*Hunt* [1987] 1 All ER 10, HL), for example in the partial defence of diminished responsibility under the Homicide Act.

Do you think it is right that the burden of proof should be reversed in some cases? Does it infringe the presumption of innocence?

SAQ 3

Taking D's claim in *Woolmington* that the shooting was an accident, would the jury be entitled to convict him, if he produced some evidence to support his claim, but the jury ultimately disbelieved him?

We need to conclude this section of notes with a little more about the standard of proof required. You will have noticed that, in those exceptional instances where the legal burden of proof is placed on D, it is of a lower standard than applies when the burden is on the prosecution. D need only establish his defence 'on the balance of probabilities' – his claim is more likely to be true than not (the same standard borne by the claimant in civil cases).

Where D has only an evidential burden, the standard is even lower than this. D need only point to material which might cause the jury to have a reasonable doubt about his guilt (*Lee Chun-Chuen* v *R* [1963] 1 All ER 73, PC).

When the legal burden of proof is laid on the prosecution it is the more onerous one of proof 'beyond reasonable doubt' (*Woolmington*). This means that, even if on balance the jury thinks that D did commit the offence charged, it must acquit if it entertains any reasonable doubt that he may not have committed the offence. Therefore, in **SAQ 3**, the jury should not convict if it thinks D's claim might reasonably be true, even though, on balance, it thinks it is probably not true. The benefit of any reasonable doubt has to be given to D.

Appeals

For now, a few key points should be stressed.

An appeal by the defendant from the magistrates' court is usually heard in the Crown Court, but it is possible for either side to appeal to the Queen's Bench Division of the High Court on points of law (so-called "case stated"). After that, the only avenue of appeal is to the Supreme Court.

An appeal from the Crown Court is heard in the Criminal Division of the Court of Appeal. When D appeals on a point of *law*, following a trial in the Crown Court, the Court of Appeal must decide whether the trial judge's explanation of the law to the jury was correct. It is important to understand that it is not the appeal court's function to retry the case and substitute its verdict for that of the jury. In the Crown Court the jury is the arbiter of fact, it decides on the evidence whether the defendant is guilty or innocent but if the D may have been prejudiced by an error of the trial judge in explaining the law to the jury, the Court of Appeal must give D the benefit of any doubt. If the jury might have returned a different verdict, the court must overturn the original conviction, sentence or both. Again, the final avenue of appeal from the Court of Appeal is to the Supreme Court.

Reform of the Criminal Law

It will quickly become evident that the English criminal law is in many areas in something of a chaotic state. It is often incoherent, illogical and lacking in clarity. Even its most basic concepts are uncertain.

The Law Commission is at the forefront of the push for reform and its output of material on criminal law in recent years has been phenomenal. At the heart of the Law Commission's endeavours is a proposal for a comprehensive criminal code to replace much of the existing law. This draft Criminal Code, as it is now generally known, was published by the Law Commission as *The Report and Draft Criminal Code Bill for England and Wales in 1989* (Law Com. No. 177). It was based on the work of a small team of distinguished academic lawyers comprising the late Professor Sir John Smith, the late Professor Griew and Professor Dennis. Volume I includes the Commission's recommendations, a draft Criminal Code Bill and Appendices. Part I of the Bill covers the general principles of liability and Part II deals with specific offences. Appendix B gives illustrations of how the Code might operate in particular fact situations. Volume II offers a commentary on some of the Code's provisions.

Regrettably, codification does not appear to be imminent (although success with the Law Commission's Sentencing Code – see Sentencing Act 2020 – may change this). The Commission has recently produced reports and consultation papers on more specific and discrete topics, such as:

- Partial defences to Murder in 2004;

- Murder, Manslaughter and Infanticide in November 2006;
- Conspiracy and Attempts in October 2007;
- Intoxication and Criminal Liability in January 2009; and
- Insanity and Automatism Summer 2012.
- Hate Crimes 2013
- Unfitness to Plead 2016

The Commission issues a consultation paper discussing the existing law, indicating its preliminary views on changes and inviting comments from readers. Following consideration of these comments, it issues a report containing its final recommendations, which can differ quite dramatically from the initial consultation paper. These reports and papers often contain most lucid expositions of the current law and its anomalies and it is extremely instructive to read these sections of them.

Some of the Commission's Reports have resulted in changes to the law, for example, the Sexual Offences Act 2003, the Fraud Act 2006 and the Coroners and Justice Act 2009.

Human Rights Act 1998

The Human Rights Act 1998, which came into force on 2 October 2000, in effect incorporated the provisions of the European Convention on Human Rights into domestic law, thus paving the way for accused persons to argue that current interpretations of penal laws contravene rights enshrined in the Convention. This forces the courts either to reinterpret existing principles and statutory provisions so as to accord with Convention rights or, in the case of statutory provisions, to precipitate legislative amendment by declaring them incompatible with the Convention.

SUMMARY

Criminal law is the study of the substantive law of criminal liability looking at general principles of liability and some specific offences. It is not a study of procedure, evidence, or sentencing. There is no standard definition of a 'crime' – it is simply conduct allowing criminal proceedings and punishment. Substantive criminal law defines the parameters of the criminal justice system by defining what is and what is not criminal conduct.

- *Classification of offences by mode of trial* – least serious by magistrates, most serious by jury in Crown Court, or triable either way by magistrates or the Crown Court depending on the circumstances.

- *Appeals* – fairly complex rules. Often concerns whether or not the trial judge has explained the law correctly to the jury.

- *Burden of proof* – prosecution has legal burden of proving D's guilt beyond reasonable doubt (*Woolmington*). Applies to most defences although D would have an (evidential) burden of adducing credible evidence to put the defence 'in play'. Exceptionally, D may have legal burden of proving 'on balance of probabilities', e.g. insanity. Proof of D's state of mind often required – in absence of D's admission, state of mind must be inferred from circumstances (*cf.* s. 8 of the Criminal Justice Act 1967).

- *Reform* – Law Commission's consultation papers and reports on specific topics.