دانشگاه آزاد اسلامی

دانشکده حقوق، الهیات و معارف اسلامی

English Legal Text 2
Criminal law

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Crime

In ordinary language, a crime is an unlawful act punishable by a state or other authority. The term crime does not, in modern criminal law, have any simple and universally accepted definition, though statutory definitions have been provided for certain purposes.

The most popular view is that crime is a category created by law; in other words, something is a crime if declared as such by the relevant and applicable law. One proposed definition is that a crime or offence (or criminal offence) is an act harmful not only to some individual but also to a community, society, or the state. Such acts are forbidden and punishable by law.

The notion that acts such as murder, rape, and theft are to be prohibited exists worldwide. What precisely is a criminal offence is defined by the criminal law of each relevant jurisdiction. While many have a catalogue of crimes called the criminal code, in some common law nations no such comprehensive statute exists.

The state has the power to severely restrict one's liberty for committing a crime. In modern societies, there are procedures to which investigations and trials must adhere. If found guilty, an offender may be sentenced to a form of reparation such as a community sentence, or, depending on the nature of their offence, to undergo imprisonment, life imprisonment or, in some jurisdictions, death.

Some jurisdictions sentence individuals to programs to emphasize or provide for their rehabilitation while most jurisdictions sentence individuals with the goal of punishing them or a mix of the aforementioned practices.

While every crime violates the law, not every violation of the law counts as a crime. Breaches of private law (torts and breaches of contract) are not automatically punished by the state, but can be enforced through civil procedure.

Criminal law

Criminal law, the body of law that defines criminal offenses, regulates the apprehension, charging, and trial of suspected persons, and fixes penalties and modes of treatment applicable to convicted offenders.

Criminal law is only one of the devices by which organized societies protect the security of individual interests and ensure the survival of the group. There are, in addition, the standards of conduct instilled by family, school, and religion; the rules of the office and factory; the regulations of civil life enforced by ordinary police powers; and the sanctions available through tort actions.

The distinction between criminal law and tort law is difficult to draw with real precision, but in general one may say that a tort is a private injury whereas a crime is conceived as an offense against the public, although the actual victim may be an individual.

Principles of criminal law

The traditional approach to criminal law has been that a crime is an act that is morally wrong. The purpose of criminal sanctions was to make the offender give retribution for harm done and expiate his moral guilt; punishment was to be meted out in proportion to the guilt of the accused. In modern times more rationalistic and pragmatic views have predominated.

Writers of the Enlightenment such as Cesare Beccaria in Italy, Montesquieu and Voltaire in France, Jeremy Bentham in Britain, and P.J.A. von Feuerbach in Germany considered the main purpose of criminal law to be the prevention of crime. With the development of the social sciences, there arose new concepts, such as those of the protection of the public and the reform of the offender .

Such a purpose can be seen in the German criminal code of 1998, which admonished the courts that the “effects which the punishment will be expected to have on the perpetrator’s

future life in society shall be considered." In the United States a Model Penal Code proposed by the American Law Institute in 1962 states that an objective of criminal law should be "to give fair warning of the nature of the conduct declared to constitute an offense" and "to promote the correction and rehabilitation of offenders."

Since that time there has been renewed interest in the concept of general prevention, including both the deterrence of possible offenders and the stabilization and strengthening of social norms.

Common law and code law

Important differences exist between the criminal law of most English-speaking countries and that of other countries. The criminal law of England and the United States derives from the traditional English common law of crimes and has its origins in the judicial decisions embodied in reports of decided cases.

England has consistently rejected all efforts toward comprehensive legislative codification of its criminal law; even now there is no statutory definition of murder in English law. Some Commonwealth countries, however, notably India, have enacted criminal codes that are based on the English common law of crimes.

The criminal law of the United States, derived from the English common law, has been adapted in some respects to American conditions. In the majority of the U.S. states, the common law of crimes has been repealed by legislation.

The effect of such actions is that no person may be tried for any offense that is not specified in the statutory law of the state. But even in these states the common-law principles continue to exert influence, because the criminal statutes are often simply codifications of the common law, and their provisions are interpreted by reference to the common law. In the remaining states prosecutions for common-law offenses not specified in statutes do sometimes occur.

In western Europe the criminal law of modern times has emerged from various codifications. By far the most important were the two Napoleonic codes, the Code d'instruction criminelle of 1808 and the Code pénal of 1810.

The latter constituted the leading model for European criminal legislation throughout the first half of the 19th century, after which, although its influence in Europe waned, it continued to play an important role in the legislation of certain Latin American and Middle Eastern countries.

The German codes of 1871 (penal code) and 1877 (procedure) provided the models for other European countries and have had significant influence in Japan and South Korea, although after World War II the U.S. laws of criminal procedure were the predominant influence in the latter countries.

The Italian codes of 1930 represent one of the most technically developed legislative efforts in the modern period. English criminal law has strongly influenced the law of Israel and that of the English-speaking African states.

French criminal law has predominated in the French-speaking African states. Italian criminal law and theory have been influential in Latin America.

Since the mid-20th century, the movement for codification and law reform has made considerable progress everywhere. The American Law Institute's Model Penal Code stimulated a thorough reexamination of both federal and state criminal law, and new codes were enacted in most of the states.

England enacted several important reform laws (including those on theft, sexual offenses, and homicide), as well as modern legislation on imprisonment, probation, suspended sentences, and community service.

Sweden enacted a new, strongly progressive penal code in 1962. In Germany a criminal code was adopted in 1998 following the reunification of East and West Germany. In 1975 a new criminal code came into force in Austria.

New criminal codes were also published in Portugal (1982) and Brazil (1984). France enacted important reform laws in 1958, 1970, 1975, and 1982, as did Italy in 1981 and Spain in 1983. Other reforms have been under way in Finland, the Netherlands, Belgium, Switzerland, and Japan .

The republics formerly under the control of the Soviet Union also have actively revised their criminal codes, including Hungary (1961), Bulgaria (1968), Uzbekistan (1994), Russia (1996), Poland (1997), Kazakhstan (1997), Ukraine (2001), and Romania (2004).

Comparisons between the systems of penal law developed in the western European countries, and those having their historical origins in the English common law must be stated cautiously. Substantial variations exist even among the nations that adhere generally to the Anglo-American system or to the law derived from the French, Italian, and German codes. In many respects, however, the similarities of the criminal law in all states are more important than the differences.

Certain forms of behavior are everywhere condemned by law. In matters of mitigation and justification, the continental law tends to be more explicit and articulate than the Anglo-American law, although modern legislation in countries adhering to the latter has reduced these differences.

Contrasts can be drawn between the procedures of the two systems, yet even here there is a common effort to provide fair proceedings for the accused and protection for basic social interests.

The definition of criminal conduct

Legality

The principle of legality is recognized in almost all legal systems throughout the world as the keystone of the criminal law. It is employed in four senses. The first is that there can be no crime without a rule of law; thus, immoral or antisocial conduct not forbidden and punished by law is not criminal.

The law may be customary, as in some common-law countries; in most countries, however, the only source of criminal law is a statute.

Second, the principle of legality directs those criminal statutes be interpreted strictly and that they not be applied by analogical extension. If a criminal statute is ambiguous in its meaning or application, it is often given a narrow interpretation favorable to the accused.

This does not mean that the law must be interpreted literally if to do so would defeat the clear purpose of the statute. The Model Penal Code incorporates a provision that was enacted in some U.S. state laws. The code recommends that its provisions be construed “according to the fair import of their terms,” which comes closer to the European practice.

Third, the principle of legality forbids the application of the law retroactively. In order that a person may be convicted, a law must have been in effect at the time the act was committed.

Fourth, the language of criminal statutes must be as clear and unambiguous as possible in order to provide fair warning to the potential lawbreaker. In some countries statutes may even be considered inapplicable if they are vague.

Statutes of limitation

All systems of law have statutes restricting the time within which legal proceedings may be brought. The periods prescribed may vary according to the seriousness of the offense. In German law, for example, the periods range from 3 years for minor offenses to 30 years for crimes involving a life sentence.

General statutes limiting the times within which prosecutions for crimes must be begun are common in continental Europe and the United States. In England there is no general statute of limitations applicable to criminal actions, although statutes for specific crimes frequently have included time limits.

In many countries there are no statutes of limitations for particularly heinous offenses, including capital felonies in the United States and genocide and murder in Germany. In 1968 the UN General Assembly adopted a Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.

Similarly, there is no statute of limitations for prosecutions of the offenses of genocide, crimes against humanity, and war crimes under the Rome Statute creating the ICC.

The elements of crime

It is generally agreed that the essential ingredients of any crime are (1) a voluntary act or omission (actus reus), accompanied by (2) a certain state of mind (mens rea). An act may be any kind of voluntary human behavior. Movements made in an epileptic seizure are not acts, nor are movements made by a somnambulist before awakening, even if they result in the death of another person.

Criminal liability for the result also requires that the harm done must have been caused by the accused. The test of causal relationship between conduct and result is that the event would not have happened the same way without direct participation of the offender.

Criminal liability may also be predicated on a failure to act when the accused was under a legal duty to act and was reasonably capable of doing so.

The legal duty to act may be imposed directly by statute, such as the requirement to file an income tax return, or it may arise out of the relationship between the parties, as the obligation of parents to provide their child with food.

The mental element

Although most legal systems recognize the importance of the guilty mind, or mens rea, the statutes have not always spelled out exactly what is meant by this concept. The Model Penal Code has attempted to clarify the concept by reducing the variety of mental states to four.

Guilt is attributed to a person who acts “purposely,” “knowingly,” “recklessly,” or, more rarely, “negligently.” Broadly speaking, these terms correspond to those used in Anglo-American courts and continental European legal theory.

Singly or in combination, they appear largely adequate to deal with most of the common mens rea problems. They have been adopted literally or in substance by a majority of U.S. states and clarify and rationalize a major element in the substantive law of crimes.

Under the Model Penal Code and in most states, most crimes require a showing of "purposely," "knowingly," or "recklessly." Negligent conduct will support a conviction only when the definition of the crime in question includes it.

Liability without mens rea

Some penal offenses do not require the demonstration of culpable mind on the part of the accused. These traditionally include statutory rape, in which knowledge that the child is below the age of consent is not necessary to liability. There is also a large class of "public welfare offenses," involving such things as economic regulations or laws concerning public health and safety.

The rationale for eliminating the mens rea requirement in such offenses is that to require the prosecution to establish the defendant's intent, or even negligence, would render such regulatory legislation largely ineffective and unenforceable.

Such cases are known in Anglo-American law as strict liability offenses, and in French law as infractions purement matérielles. In German law they are excluded because the requirement of mens rea is considered a constitutional principle.

There has been considerable criticism of statutes that create liability without actual moral fault. To expose citizens to the condemnation of a criminal conviction without a showing of moral culpability raises issues of justice.

In many instances the objectives of such legislation can more effectively be achieved by civil sanctions, as, for example, suits for damages, injunctions, and the revocation of licenses.

Ignorance and mistake

In most countries the law recognizes that a person who acts in ignorance of the facts of his action should not be held criminally responsible. Thus, one who takes and carries away the goods of another person, believing them to be his own, does not commit larceny, for he lacks the intent to steal.

Ignorance of the law, on the other hand, is generally held not to excuse the actor; it is no defense that he was unaware that his conduct was forbidden by criminal law. This doctrine is supported by the proposition that criminal acts may be recognized as harmful and immoral by any reasonable adult.

The matter is not so clear, however, when the conduct is not obviously dangerous or immoral. A substantial body of opinion would permit mistakes of law to be asserted in defense of criminal charges in such cases, particularly when the defendant has in good faith made reasonable efforts to discover what the law is.

In West Germany the Federal Court of Justice in 1952 adopted the proposition that if a person engages in criminal conduct but is unaware of its criminality, that person cannot be fully charged with a criminal offense; this has since been incorporated as rule in the German criminal code. Law and practice in Switzerland are quite similar.

In Austria mistake of law is a legal defense. In the U.S. the Model Penal Code would allow a defense of mistake of law, but this would rarely include a mistake such as the existence or meaning of the law defining the crime itself.

Responsibility

It is universally agreed that in appropriate cases persons suffering from serious mental disorders should be relieved of the consequences of their criminal conduct. A great deal of controversy has arisen, however, as to the appropriate legal tests of responsibility.

Most legal definitions of mental disorder are not based on modern concepts of medical science, and psychiatrists accordingly find it difficult to make their knowledge relevant to the requirements of the court.

Various attempts have been made to formulate a new legal test of responsibility. The Model Penal Code endeavoured to meet the manifold difficulties of this problem by requiring that the defendant be deprived of "substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law" as a result of mental disease or defect.

This resembles the Soviet formulation of 1958, which required a mental disease as the medical condition and incapacity to appreciate or control as the psychological condition resulting from it.

The same may be said of the German law, although the latter includes in mental illness such disorders as psychopathy and neurosis in addition to psychoses and provides for various gradations of diminished responsibility.

Several U.S. jurisdictions, including federal law, have abandoned the volitional prong of the insanity test and returned to the ancient English rule laid down in M'Naghten's Case (1843) 8 Eng. Rep. 718, 722. According to that case, an insane person is excused only if he did not know the nature and quality of his act or could not tell right from wrong.

The English Homicide Act of 1957 also recognizes diminished responsibility, though to less effect. The act provides that a person who kills another shall not be guilty of murder "if he was suffering from such abnormality of mind…as substantially impaired his mental

responsibility for his acts or omissions in doing or being a party to the killing." The primary effect of this provision is to reduce an offense of murder to one of manslaughter.

Intoxication is usually not treated as mental incapacity. Soviet law was especially harsh; it held that the mental-disease defense was not applicable to persons who committed a crime while drunk and that drunkenness might even be an aggravating circumstance.

American law is similar. In German law, on the other hand, intoxication like any other mental defect is acceptable as a defense in criminal cases.

Mitigating circumstances and other defenses

The law generally recognizes a number of particular situations in which the use of force, even deadly force, is excused or justified. The most important body of law in this area is that which relates to self-defense.

In general, in Anglo-American law, one may kill an assailant when the killer reasonably believes that he is in imminent peril of losing his life or of suffering serious bodily injury and that killing the assailant is necessary to avoid imminent peril.

Some jurisdictions require that the party under attack must try to retreat when this can be done without increasing the peril. Under many continental European laws and in most U.S. states, however, the defendant may stand his ground unless he has provoked his assailant purposely or by gross negligence or unless the assailant has some incapacity such as inebriation, mistake, or mental disease.

Other situations in which the use of force is generally justifiable, both in Anglo-American law and in continental European law, include the use of force in defense of others, in law enforcement, and in defense of one's dwelling. Use of force in the protection of other property is sometimes limited to nonlethal force.

The use of force may also be excused if the defendant reasonably believed himself to be acting under necessity. The doctrine of necessity in Anglo-American law relates to situations in which a person, confronted by the overwhelming pressure of natural forces, must make a choice between evils and engages in conduct that would otherwise be considered criminal.

In the oft-cited case of United States v. Holmes, in 1842, a longboat containing passengers and members of the crew of a sunken American vessel was cast adrift in the stormy sea.

To prevent the boat from being swamped, members of the crew threw some of the passengers overboard. In the trial of one of the crew members, the court recognized that such circumstances of necessity may constitute a defense to a charge of criminal homicide, provided

that those sacrificed be fairly selected, as by lot. Because this had not been done, a conviction for manslaughter was returned.

The leading English case, Regina v. Dudley and Stephens (1884) 14 Q.B.D. 273, appears to reject the necessity defense in homicide cases. In German or French courts, however, the defendants would probably have been acquitted.

In general, the use of nonlethal force may be excused if the defendant reasonably believed himself to be acting under duress or coercion. Lethal force may be justified if the defendant was carrying out military orders, he believed to be lawful.

Incapacity

The position regarding the criminal capacity of minors is: Children under 10 years of age are not criminally responsible for their actions. They are presumed incapable of forming mens rea.

However, the courts and local authorities do have powers outside the criminal law to deal with such children. Furthermore, where a child under 10 commits and offence at the instigation of an adult, that adult may be liable through the innocent agency of the child.

Children over the age of 10 have full criminal responsibility. However as might be expected, there are important differences in approaches to the punishment of yard and adult offenders.

Duress

A person may have a defence where they can show they were forced to commit the crime because of threats made to them by another person.

This is known as acting under duress. For this defence to be successful, the defendant must show that he was forced to act as he did because, as a result of what he reasonably believed the threatener to have said or done, he had good reason to fear that if he did not act in this way, the threatener would kill him or cause him serious physical injury and that a reasonable man acting in the circumstances as the defendant reasonably believed them to be and sharing those

characteristics of the defendant that would influence the effect of the threat upon him, would not have responded differently.

This defence is also available the threat of death or serious injury aimed not at the defendant himself but a someone whom he is under a duty to protect.

This obviously includes members of his family and may, in appropriate circumstances include strangers, e.g. where an armed robber threatens the life of a customer in order to force a bank cashier to hand over money.

Duress you rest is not a defence where:

1. The defendant had an opportunity before the commission of the offence to avoid the threatened consequences.

2. The source of the Threat is an organization which the defendant joint voluntarily and the knowledge that threats of this kind might be made.

Necessity

There is no general defence of necessity. However, the courts have recognized a limited form of necessity defence, often referred to as duress of circumstances. This covers situations where the defendant has been forced to act, not as a result of threats made by another person, but in response to the circumstances in which he finds himself.

The causative circumstances must be external to the defendant. Therefore, this defence is subject to the same two-part (subjective-objective) test and the same limitations as the defence of duress by threats.

Self-defence

Where a person is faced with a violent, unlawful or indecent assault, he may be justified in using force in self-defence to repel the assault.

Both the decision to use force and degree of force used must be objectively reasonable in the circumstances as he subjectively believed them to be in deciding the question of reasonableness regarding both issues, the following factors must be taken into account:

This circumstances as the defendant honestly believed them to be, even if this belief was mistaken.

The time available to the defendant to consider what to do.

Thus, a decision to use force or a degree of force used which may appear unreasonable with hindsight may be regarded as reasonable when the circumstances as the defendant believed them to be and the time available for reflection are taken into account.

There is no requirement that the degree of force used be objectively proportionate to that threatened, or that the defendant sought to retreat or avoid the confirmation. These are simply factors to be taken into account in deciding whether the defendant's conduct was reasonable.

Using force in defence of others or in defence of property is governed the same principles outlined above.

Some particular offenses

All advanced legal systems condemn as criminal the sorts of conduct described in the Anglo-American law as treason, murder, aggravated assault, theft, robbery, burglary, arson, and rape. With respect to minor police regulations, however, substantial differences in the definition of criminal behavior occur even between jurisdictions of the Anglo-American system.

Comparisons of the continental European criminal law with that based on the English common law of crimes also reveal significant differences in the definition of certain aspects of more serious crimes.

Continental European law, for example, frequently articulates grounds for mitigation involving considerations that are taken into account in the Anglo-American countries only in the exercise of discretion by the sentencing authority or by lay juries.

This may be illustrated with respect to so-called mercy killings. The Anglo-American law of murder recognizes no formal grounds of defense or mitigation in the fact that the accused killed to relieve someone of suffering from an apparently incurable disease.

Many continental European and Latin American codes, however, provide for mitigation of offenses prompted by such motives and sometimes even recognize in such motives a defense to the criminal charge.

Degrees of participation

The common-law tradition distinguishes four degrees of participation in crime. One who commits the act "with his own hand" is a principal in the first degree. His counterpart in French law is the auteur or coaster when two or more persons are directly engaged.

A principal in the second degree is one who intentionally aids or abets the principal in the first degree, being present when the crime occurs.

In Anglo-American law one who instigates, encourages, or counsels the principal without being present during the crime is called an accessory before the fact; in continental law this third degree of participation is covered partly by the concept of instigation and partly by the above-mentioned aide et assistance.

The fourth and last degree of participation is that of accessory after the fact, who is punishable for receiving, concealing, or comforting one whom that person knows to have committed a crime so as to obstruct the criminal's apprehension or to otherwise obstruct justice. In continental legal systems this conduct has become a separate offense.

Conspiracy

Under the common law, conspiracy is usually described as an agreement between two or more persons to commit an unlawful act or to accomplish a lawful end by unlawful means. This definition is delusively simple, however, for each of its terms has been the object of extended judicial exposition.

Criminal conspiracy is perhaps the most amorphous area in the Anglo-American law of crimes. In some jurisdictions, for example, the "unlawful" end of the conspiracy need not be one that would be criminal if accomplished by a single individual, but courts have not always agreed as to what constitutes an "unlawful" objective for these purposes.

Statutory law in some American states, following the lead of the Model Penal Code, have limited conspiracy offense to the furtherance of criminal objectives. The European codes have no conception of conspiracy as broad as that found in the Anglo-American legal system.

In some of the continental European countries, such as France or Germany, punishment of crimes may be enhanced when the offense was committed by two or more persons acting in concert.

In most countries the punishment of agreements to commit offenses, irrespective of whether the criminal purpose was attempted or executed, is largely confined to political offenses against the state.

Some extension of the conspiracy idea to other areas has occurred, however. Thus, in the Italian code of 1930, association for the purpose of committing more than one crime was made criminal.

None of these continental European provisions, however, has the generality of the original Anglo-American concept. None, for example, condemns agreements to achieve objectives not otherwise criminal.

Attempt

In Anglo-American law there is a class of offenses known as inchoate, or preliminary, crimes because guilt attaches even though the criminal purpose of the parties may not have been achieved.

Thus, the offense of incitement or solicitation consists of urging or requesting another to commit a crime. Certain specified types of solicitation may be criminal, such as solicitation of a bribe, solicitation for immoral purposes, or incitement of members of the armed forces to mutiny.

The Model Penal Code also treats conspiracy as an inchoate crime, as do a number of U.S. states. Other states and federal law treat conspiracy as a separate principal offense, sometimes punishing it more severely than the crime that is the object of the conspiracy.

For example, the U.S. Supreme Court in Clune et al. v. U.S. (1895) affirmed a sentence of two years' imprisonment for conviction of conspiracy to obstruct the passage of the mails, although the maximum sentence for the crime of obstructing the mails itself would have been a fine only, not to exceed $100.

The most important category of inchoate offenses is attempted, which consists of any conduct intended to accomplish a criminal result that fails of consummation but goes beyond acts of preparation to a point dangerously close to completion of the intended harm.

The line between acts of mere preparation and attempt is difficult to draw in many cases. In continental European and some Anglo-American legal systems, attempt may also consist of conduct that would be criminal if the circumstances were as the actor believed them to be. A defense of "impossibility" is recognized only if the mistake is shown to be absolutely unreasonable.

Unlike the law of some continental European countries, no defense has traditionally been granted to an offender who voluntarily desists from committing the intended harm after that person's conduct has reached a point beyond mere preparation.

The Model Penal Code and several American state codes, however, provide for an affirmative defense if it can be shown that the actor "abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."