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.

This article treats the principles of criminal law. For treatment of the law of criminal procedure, *see* procedural law: Criminal procedure.

Principles Of Criminal Law

The traditionai 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.

Substantive Criminal Law

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Portrait of Voltaire, *c.* 1740.
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Substantive criminal law is composed of the following elements: the definitions of the types of offenses that are held to be punishable; the classification of crimes (as, for example, felonies and misdemeanours in the United States, or *crime*, *délit*, and *contravention* in continental law); the principles and doctrines applied to the judgment of crime that qualify the provisions of criminal legislation (such as self-defense, necessity, insanity, and so forth); and principles determining national jurisdiction over crimes with an international aspect (crimes committed by foreigners, by nationals abroad, or on ships and aircraft outside the national territory and waters).

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 (*nullum crimen sine lege*, "no crime without a law").

Second, the principle of legality directs that 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 favourable 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. This aspect of the principle is embodied in the ex post facto provisions of the U.S. Constitution and such international treaties as the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 1950) and the International Covenant on Civil and Political Rights (entered

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into force 1976). It is also embodied in the Rome Statute creating the International Criminal Court (ICC; ratified 2002).

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.

Protection against double jeopardy

Legal systems generally include some restriction against prosecuting a person more than once for the same offense. In Anglo-American law the most difficult problems of double jeopardy involve the question of whether the second prosecution is for the "same" or a "different" offense. It is held that acquittal or conviction of an offense prohibits subsequent prosecution of a lesser offense that was included in the first. According to the U.S. Supreme Court in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact that the other does not. In continental European law, on the other hand, the question is whether the second prosecution concerns the same "material fact" or "historical event," and the state cannot subject a person to a second trial for any offense arising out of the same factual situation.

A problem under the federal system of the United States is whether an offender may be prosecuted under both state and federal law for the same conduct (the specific offenses being different). A number of state laws have prohibited state prosecutions after acquittals or convictions in a federal court or in the court of another state for offenses involving the same conduct. However, the U.S. Supreme Court has held that such multiple prosecutions by separate sovereigns are not prohibited by the double jeopardy clause of the Fifth Amendment to the U.S. Constitution.

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 the [illegible]

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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.

Requirements of jurisdiction

The jurisdiction of a court refers to its capacity to take valid legal action. All governments claim territorial jurisdiction over crimes committed wholly or partly within their territory, including flag vessels (i.e., vessels registered in that country) and embassies. The Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963) and the Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970) recognize that states have the right and even the duty of jurisdiction with respect to any crime committed upon aircraft registered in that state. Most nation-states also claim nationality jurisdiction over certain crimes committed by their nationals, even when they were committed in other countries. A third jurisdictional basis is known as protective-principal jurisdiction, which gives criminal jurisdiction over offenses committed against national interests. For example, persons who forge currency of a country may commit a crime against that country even if the forgeries are executed beyond the borders by persons who are not citizens. A fourth jurisdictional basis of late 20th-century origin and with less universal acceptance is similar to the third and is known as passive-personality jurisdiction. In certain circumstances, violent crimes against nationals may give rise to jurisdiction even if the crimes occur beyond the borders and the offenders are not nationals. For example, when in 1985 the United States attempted to arrest the hijackers on the Italian cruise ship MS *Achille Lauro* because of the brutal shipboard murder of American citizen Leon Klinghoffer, the claimed jurisdiction of the U.S. over the hijackers may have been based on passive personality. Finally, international law recognizes that there are universal jurisdiction crimes that may be tried by any country, regardless of where the crimes occurred or the nationality of the offenders or the victims. A long-accepted example of universal crimes giving jurisdiction to all national courts is piracy on the high seas; all countries have jurisdiction to try pirates. In the 20th century, war crimes, crimes against humanity, genocide, and torture were added to the list of crimes giving rise to universal jurisdiction.

Most legal systems do not exercise the full range of jurisdiction they might claim. In U.S. law, for example, Congress has passed statutes permitting prosecutions under all of the jurisdictional bases listed above. However, the jurisdiction of the federal

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courts is generally limited to acts occurring in whole or in part within the boundaries of the United States unless extraterritorial jurisdiction is expressly granted or implied by the statute creating the crime. The U.S. Supreme Court held in *U.S. v. Bowman* (1922) that most crimes enacted by Congress are to be read as covering only acts committed in the United States. However, this is not true of "criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction." U.S. states, while they may have some justifications for asserting extraterritorial jurisdiction, almost exclusively limit criminal jurisdiction to the territorial basis. However, the crime need not be completed within the state. Where, for example, an offender fires a bullet across a state border, striking a victim in a second state, who dies in a third, each of the three states may have territorial jurisdiction to try the offender.

Nationals who commit crimes in foreign countries may be extradited but only if required or authorized by treaty with the country concerned. The constitutions and laws of some countries prohibit their nationals from being extradited to other countries. For example, motion-picture director Roman Polanski fled to France in 1978 to avoid being imprisoned for child sexual assault in California. Because he held dual French and Polish citizenship, he avoided extradition.

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 behaviour. 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

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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.

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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.

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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.

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if the defendant was carrying out military orders

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 behaviour 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* (literally, "author"), or *coauteur* 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; this is comparable to the French concept of *complicité par aide et assistance*, although in some countries, as, for example, Germany, that have adopted a wider (more subjective) interpretation of the concept, it includes the activity of *coauteurs*. 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. Italian and Austrian law treat all participants in a crime as principals in the first degree, with the exception of accessories after the fact. The Model Penal Code and the law in most U.S. states treat the actions of an accessory

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after the fact as a separate statutory offense. In the other three degrees of participation, the accessory is treated as a principal in the first degree.

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

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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 attempt, 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." *See also* criminology.

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