

CARD, CROSS & JONES  
**CRIMINAL LAW**

*Twenty-first Edition*

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Great Clarendon Street, Oxford, OX2 6DP,  
United Kingdom

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Eighteenth edition 2008

Nineteenth edition 2010

Twentieth edition 2012

Impression: 1

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Published in the United States of America by Oxford University Press  
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data

Data available

Library of Congress Control Number: 2014931711

ISBN 978-0-19-870230-6

Printed in Great Britain by  
Ashford Colour Press Ltd, Gosport, Hampshire

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# 1

## Introduction

### OVERVIEW

This chapter deals with the following introductory points:

- the characteristics of criminal offences;
- the purposes of the criminal law;
- the courts of criminal jurisdiction;
- jurisdiction;
- maximum sentences;
- the sources of the criminal law;
- the European Convention on Human Rights and the Human Rights Act 1998; and
- codification of the criminal law.

**1.1** This book is concerned with the substantive criminal law of England and Wales, ie the law relating to the general principles of legal liability for an offence (otherwise known as a ‘crime’) and specific offences. There are around 11,000 offences at a conservative estimate. This book does not attempt to deal with all of them. It concentrates on those which are more serious in nature.<sup>1</sup> The law of criminal procedure and of criminal evidence is outside the scope of this book, as is that relating to the disposal of offenders, although occasionally the context requires reference to be made to parts of those areas of law.

## The characteristics of criminal offences

### Key points 1.1

A criminal offence is a legal wrong for which the offender is liable to be prosecuted on behalf of the State, and if found guilty liable to be punished.

**1.2** A wrong is a breach of a rule; it may be moral or legal according to whether the rule is one of morality or law. Legal wrongs may be civil or criminal or both. The distinction

<sup>1</sup> For a discussion of a much wider range of offences see Card and English *Police Law* (13th edn, 2013).

between a civil wrong (such as a breach of contract, a tort or a breach of trust) and a criminal wrong (a crime) depends upon that between civil and criminal law. The civil law is primarily concerned with the rights and duties of individuals among themselves, whereas the criminal law defines the duties which a person owes to society.

**1.3** The principal legal consequence of a crime is that the offender, if he is detected and it is decided to prosecute, is prosecuted on behalf of the Crown (ie the State), even in the case of a private prosecution,<sup>2</sup> and if he is found guilty is liable to be punished.

**1.4** Civil law is not exclusively concerned with the definition of wrongs, for it embraces the law of property, which largely consists of the rules governing the methods whereby property may be transferred from one person to another, and the law of succession, which concerns the devolution of property on death. There are, however, several branches of the civil law which exist in whole or in part to provide redress for wrongs; the most important of these are contract, tort and trusts.

One purpose of the law of contract is to provide redress for breaches of legally binding agreements. The aggrieved party may claim damages as claimant in civil proceedings, and the amount which he recovers is assessed on the basis of the loss which he has sustained in consequence of the non-fulfilment of the contract.

The object of the law of tort is to provide redress for breaches of duties which are owed to persons generally and do not depend on an agreement between parties. If A assaults B, or publishes a libel concerning B, or causes B personal injury by the negligent driving of a motor car, A commits a tort and is liable to be sued by B in civil proceedings. In these cases the claimant's damages will almost always be assessed on the basis of the loss sustained in consequence of the tort.

One purpose of the law of trusts is to provide redress for breaches of trust. A breach of trust occurs where someone who holds property as trustee for another fails to carry out the duties of his office, for example by making an improper investment or wrongfully converting the trust property to his own use. He is then civilly liable to make good the loss occasioned to those on whose behalf the property was held.

**1.5** The foregoing account of civil wrongs should be sufficient to indicate the two important respects in which they differ from crimes. In each instance the wrongdoer's liability is based (with very limited exceptions) on the loss which the wrongdoer has occasioned, and in each instance the law is brought into play (and proceedings can be discontinued) at the option of the injured party. Generally speaking, no one can be obliged to sue for damages for a breach of contract, a tort or a breach of trust. On the other hand, where a crime has been committed, the wrongdoer is liable to punishment, which is a very different thing from being ordered to compensate the victim of the wrong,<sup>3</sup> and as a general rule a criminal prosecution may proceed although the victim has been fully compensated and desires it to be discontinued.<sup>4</sup>

<sup>2</sup> It is possible for a prosecution for most offences to be instituted and conducted by a private individual on behalf of the Crown, but this is rare. Prosecutions for some offences can only be instituted by or with the consent of the Attorney General or the Director of Public Prosecutions (in effect the Crown Prosecution Service of which the Director is the head).

<sup>3</sup> If a convicted person is ordered to pay a fine, this is paid to the State and not to the victim. However, the criminal courts have power to order, instead of or in addition to the punishment imposed, that a convicted person pay compensation to the victim.

<sup>4</sup> *Smith v Dear* (1903) 88 LT 664.

**1.6** As already indicated, the same conduct may be both a civil wrong and a crime. There are many cases in which someone who commits a tort is also guilty of a crime. Assaults and collisions between vehicles are two out of numerous examples. Where a crime is also a civil wrong, criminal and civil proceedings may usually take place concurrently and the one is normally no bar to the other.

An exception of general importance to this rule is that, where criminal proceedings are taken in a magistrates' court in respect of an assault or battery by or on behalf of the victim (ie a private prosecution), civil proceedings in respect of it against the defendant are barred if the defendant obtains the magistrates' court's certificate of the dismissal of the complaint or, having been convicted, undergoes the punishment imposed.<sup>5</sup> A certificate of dismissal must be issued if the magistrates decide that the offence is not proved, or if proved is so trifling as not to merit any punishment.

**1.7** The principal criticism of the definition of a crime for the purposes of the law of England and Wales set out in para 1.3 is that it fails to indicate what types of conduct are included in the category of crimes. The answer is that a definition is not the same thing as a description; its aim is simply to draw attention to the features which distinguish that which is being defined from other things of the same kind. In any event, it is impossible to find a concise formula which will cover every kind of criminal conduct. As Lord Atkin said in 1931 in *Proprietary Articles Trade Association v A-G for Canada*,<sup>6</sup> 'The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: is the act prohibited with penal consequences?'

## The purposes of the criminal law

**1.8** Views vary as to a precise list of purposes of the criminal law but the list contained in the American Law Institute's Model Penal Code, first published in 1962,<sup>7</sup> commands a good deal of support<sup>8</sup> since it reflects the fine balance between the punishment of offensive behaviour and the exercise of individual autonomy:

- '(a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests;
- (b) to subject to public control persons whose conduct indicates that they are disposed to commit crimes;
- (c) to safeguard conduct that is without fault from condemnation as criminal;
- (d) to give warning of the nature of conduct declared to be an offence;
- (e) to differentiate on reasonable grounds between serious and minor offences.'

<sup>5</sup> Offences Against the Person Act 1861, ss 44 and 45.

<sup>6</sup> [1931] AC 310 at 324.

<sup>7</sup> Proposed Official Draft, Art 1, 1.02(1). The Code has been adopted by a number of states in the USA.

<sup>8</sup> But see Robinson 'The Modern General Part – Three Illusions' in *Criminal Law Theory* (2002) (Shute and Simester (eds)) 79 for criticism.

A constant question in reading this book should be the extent to which our criminal law satisfies these purposes.

## The courts of criminal jurisdiction

### Key points 1.2

There are two types of courts where cases against persons accused of criminal offences are heard in the first instance. One is a magistrates' court; the other is the Crown Court. Figure 1.1 shows the outline of the structure of trial and appellate courts of criminal jurisdiction and the following paragraphs explain this, beginning at the bottom.

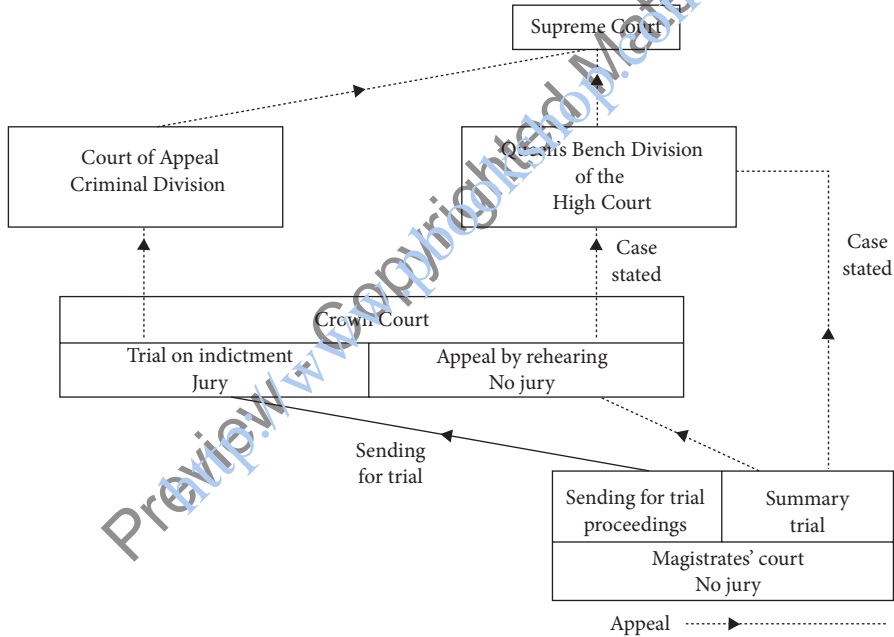


Figure 1.1 The Criminal Courts in England and Wales

## Magistrates' courts

**1.9** Magistrates' courts have two functions in criminal matters. The first is that of a court of summary jurisdiction, which determines cases without a jury. Over 95 per cent of all criminal cases which come before the courts are determined by magistrates' courts. Leaving aside the special provisions relating to defendants under 18, magistrates' courts deal with two types of offence under this jurisdiction:

- *Summary offences* These are offences which, if committed by an adult, are by statute triable only summarily (ie without a jury in a magistrates' court).<sup>9</sup> They comprise a large number of relatively minor offences, such as assault, battery, wilful obstruction of a constable in the execution of his duty and taking a conveyance without authority, as well as a host of regulatory offences.<sup>10</sup>
- *Offences triable either way* These are offences, such as fraud and unlawful wounding, which, if committed by an adult, are triable either in the Crown Court on indictment<sup>11</sup> or summarily in a magistrates' court.<sup>12</sup> The following procedure applies when the defendant (D) appears or is brought before a magistrates' court charged with an either-way offence.

If D indicates an intention to plead guilty to the either-way offence, the magistrates' court proceeds straight to sentence (or commits D to the Crown Court for sentence, if the magistrates' court considers that the Crown Court – which has greater sentencing powers – should deal with D).

If D indicates an intention to plead not guilty, 'allocation of trial proceedings' are held to determine whether the offence should be tried by the magistrates' court or in the Crown Court. In the light of the representations made and of any information as to D's previous convictions (if any), the magistrates' court may decide that the case is so serious that it should not try it. If it decides that Crown Court trial is not necessary, it cannot proceed to summary trial without D's consent, since D has the right to elect trial in the Crown Court.

In cases of serious or complex fraud or of child abuse, these provisions can be short-circuited by the service of a notice by the Director of Public Prosecutions (or certain other people in the case of fraud), in which case D must be sent to the Crown Court.

The second function of a magistrates' court relates to sending D to the Crown Court for trial where an offence triable only on indictment (ie only in the Crown Court), such as murder, manslaughter, rape or robbery, is involved or where an offence triable either way is not to be tried in a magistrates' court. Sending for trial is a necessary preliminary in most cases to a trial in the Crown Court. In sending for trial proceedings, the magistrates' court does not consider the evidence against D; it must send D for trial regardless of whether there is enough evidence on which a reasonable jury could find D guilty. The magistrates' court determines the Crown Court location to which D is to be sent, and whether to send D in custody or on bail. It can also make orders to ensure that the evidence of a prosecution witness is available to the Crown Court where the witness will not voluntarily provide it.

**1.10** A magistrates' court must normally be composed of at least two lay magistrates unless a specific exemption applies. The maximum number is three.

The jurisdiction of a magistrates' court may also be exercised by a legally qualified District Judge (Magistrates' Courts), or any other judge qualified so to act, sitting alone.

<sup>9</sup> Interpretation Act 1978, Sch 1. If it is one of the handful of offences listed in the Criminal Justice Act 1988, s 40 an offence normally triable summarily only may be tried on indictment in the Crown Court if it is linked with an indictable offence charged in the indictment: see paras 7.35 and 10.114 for examples of these offences.

<sup>10</sup> As to regulatory offences, see para 1.42.

<sup>11</sup> The indictment is the formal legal document containing a list of the charges against a defendant in the Crown Court.

<sup>12</sup> Interpretation Act 1978, Sch 1.

Lay magistrates are not required to possess any legal qualifications: for legal advice they rely on a justices' clerk or a member of the clerk's staff who is an authorised legal adviser.

**1.11** There are special provisions in respect of defendants under 18. Nearly all prosecutions of those under 18 are conducted in youth courts in less formal proceedings before a District Judge (Magistrates' Courts) or a bench of two or three lay magistrates of whom normally at least one must be a man and one a woman.

## The Crown Court

**1.12** The Crown Court has exclusive jurisdiction over all offences which are triable only on indictment and over any offence triable either way which has been sent to it for trial. The following judges sit in the Crown Court: High Court judges, Circuit judges, Recorders (who are part-time judges), District Judges (Magistrates' Courts) and 'qualifying judge advocates' (who normally act as judges in the armed forces legal system).

If D pleads not guilty in the Crown Court the case is tried by judge and jury.<sup>13</sup> It is for the jury to determine the facts and whether or not D is guilty, but they will do so on the basis of a direction from the judge on the relevant law.

Another function which the Crown Court has is to hear appeals from magistrates' courts. Juries are not used in these cases, but the judge sits with magistrates (the maximum number being four). Only D may appeal.<sup>14</sup> An appeal may be against sentence or (but only if D pleaded not guilty) against conviction on a point of fact or of law (or of both). An appeal to the Crown Court against conviction takes the form of a complete rehearing. Where an appeal is founded on a point of law alone it is usually thought preferable to appeal by case stated to the Queen's Bench Division of the High Court, dealt with later.

The Crown Court also deals with cases where a magistrates' court commits for sentence someone who has pleaded guilty to, or been found guilty of, an offence triable either way, on the ground that its sentencing powers are inadequate. These cases are heard by a judge sitting alone.

## Appellate Courts

### *Queen's Bench Division of the High Court*

**1.13** Judges in this Division hear appeals by case stated on points of law or jurisdiction from magistrates' courts and from the Crown Court when that court has heard an appeal from a magistrates' court. Either side may appeal. Cases are dealt with by the Administrative Court, which is part of the Queen's Bench Division. They are heard by a single judge or by a Divisional Court. A Divisional Court consists of two (or sometimes three) judges, one of whom is usually a Lord Justice of Appeal, ie a member of the Court of Appeal. An appeal by case stated simply consists of hearing legal argument and a decision on that basis. There is no rehearing of the facts and witnesses.

<sup>13</sup> Exceptionally, under the Criminal Justice Act 2003, Pt 7 a judge may permit a trial without a jury in a case of potential or actual jury tampering.

<sup>14</sup> A case where D has been convicted by a magistrates' court may be referred to the Crown Court by the Criminal Cases Review Commission, in which case it is treated as an appeal by D against conviction or sentence or both, as appropriate.



**1.14** Judges in the Queen's Bench Division also deal with claims by a 'person aggrieved' for judicial review in relation to the jurisdiction of the Crown Court other than its jurisdiction in matters relating to trials on indictment, and in relation to magistrates' courts. As in an appeal by case stated, the court simply hears legal argument and decides on that basis. It is not concerned with the correctness of the decision on its merits but with whether it was lawfully, reasonably and proportionately reached. Claims for judicial review are not appeals as such. Consequently, they do not appear in the chart in Figure 1.1.

Like appeals by case stated, judicial review cases are dealt with by judges sitting in the Administrative Court. Permission from a single judge is required before a claim for judicial review can be made. If it is granted, a claim for judicial review may be heard by a single judge or a Divisional Court.

In cases where the facts are involved the appropriate course is to appeal by case stated, so that they can be set out in the 'case stated'.

### *Criminal Division of the Court of Appeal*

**1.15** The most important function of the Criminal Division is to hear appeals from the Crown Court by D against conviction or sentence or both. Such an appeal to the Court of Appeal may only be brought with its leave or with a certificate from the trial judge that the case is fit for appeal. In the case of an appeal against conviction the court must allow the appeal if it thinks that the conviction is unsafe; otherwise it must dismiss the appeal.

A case where there has been a conviction in the Crown Court may be referred to the Court of Appeal by the Criminal Cases Review Commission, in which case it is treated as an appeal by D against conviction or sentence or both, as appropriate.

**1.16** The Court of Appeal also hears appeals by the prosecution against rulings by the trial judge in the Crown Court (for example, that there is no case to answer or that proceedings should be stayed for abuse of process).

Where a person has been acquitted on indictment of a specified serious offence, the Court of Appeal may quash the acquittal and order a retrial where new and compelling evidence of guilt comes to light.

**1.17** Under the Criminal Justice Act 1972, s 36, the Attorney General may refer to the Court of Appeal for clarification a point of law involved in a case in which D was acquitted in the Crown Court. The opinion of the Court of Appeal does not affect the acquittal but provides authoritative guidance for the future.

Under the Criminal Justice Act 1988, s 36, the Attorney General can refer a sentence imposed in the Crown Court to the Court of Appeal if it appears to be unduly lenient. This power exists only in relation to offences triable only on indictment and certain serious offences triable either way. On such a reference the court may increase the severity of the sentence.

**1.18** The Criminal Division usually sits in at least three and, on occasions, as many as six courts. By way of exception to the general requirement that cases before it must be heard by not less than three judges, a two-judge court may hear appeals against sentence. The court will normally consist of the Lord Chief Justice or the President of the Queen's Bench Division or a Lord Justice of Appeal plus two High Court judges, but a single Circuit judge may also sit as one of the judges of the court.

## Supreme Court

**1.19** Either side may appeal to the Supreme Court from a decision of the High Court (whether by a single judge or a Divisional Court) in ‘a criminal cause or matter’ or from a decision of the Court of Appeal (Criminal Division). The Supreme Court came into existence in 2009. It took over the appellate functions of the House of Lords.

Appeal to the Supreme Court is only possible if the necessary conditions are fulfilled and leave is granted either by the court appealed from or by the Supreme Court. The necessary conditions which must be fulfilled are:

- the court below must certify that a point of law of general public importance is involved; and
- either the court below or the Supreme Court must be satisfied that the point of law is one which ought to be considered by the Supreme Court.

A point of law referred to the Court of Appeal by the Attorney General may be further referred to the Supreme Court, and so may a point of law involved in a sentence referred to the Court of Appeal by the Attorney General.

**1.20** The Supreme Court consists of a President, Deputy President and Justices of the Supreme Court, although acting judges may be appointed. Cases before the Supreme Court are normally heard by a court consisting of five or seven judges, headed by the President or Deputy President.

## Jurisdiction

### Key points 1.3

The courts of England and Wales are only concerned with conduct which is an offence against English law, or, to put it another way, with offences over which they have jurisdiction.

Generally, jurisdiction can only be exercised by the courts of England and Wales over an offence if it was committed in England and Wales (territorial jurisdiction),<sup>15</sup> but there are exceptions where jurisdiction can be exercised over an offence committed wholly outside England and Wales (extra-territorial jurisdiction).

A detailed examination of this matter is outside the scope of this book, but the following should be noted.

## Territorial jurisdiction

**1.21** Normally, the application of the general requirement that to be an offence against English law an offence must be committed in England and Wales is easy since either all the essential elements of an offence occur in England and Wales or they do not, and this may be

<sup>15</sup> In construing a statute, there is a well-established presumption that, in the absence of clear and specific words to the contrary, an ‘offence-creating provision’ was not intended to make conduct outside the territorial limits of England and Wales an offence triable in an English and Welsh court: *Air India v Wiggins* [1980] 2 All ER 593, HL.

true even in situations where there is a foreign element. In *Treacy v DPP*,<sup>16</sup> for instance, it was held by a majority of the House of Lords that a person who posts in England and Wales an unwarranted demand with menaces addressed to a person abroad can be convicted of blackmail because the offence is complete when the demand is posted, with the result that the offence is wholly committed in England and Wales. Similarly, in *El-Hakkaoui*,<sup>17</sup> it was held that a person can be convicted of possessing a firearm with intent by means thereof to endanger life, even though the intention relates to endangering life abroad, if the possession of the firearm is in England and Wales.

### *Partial commission in England and Wales*

**1.22** What is the situation where part of the essential elements of an offence takes place in England and Wales and part abroad (including Scotland and Northern Ireland)? Until 2004, it appeared to be the law that an offence was committed in England and Wales (and therefore subject to the jurisdiction of the English and Welsh courts) if its final essential element (the specified consequence in the case of a result crime) occurred in England and Wales,<sup>18</sup> but not<sup>19</sup> if some earlier requisite act or occurrence happened in England and Wales but the final essential element occurred outside England and Wales.<sup>20</sup> In 2004, however, the Court of Appeal in *Smith (Wallace) (No 4)*<sup>21</sup> held that a court of England and Wales would have jurisdiction even though the final essential element did not occur in England and Wales, if a substantial measure (ie part) of the activities constituting the offence was committed in England and Wales and it could not reasonably be argued that there were serious reasons of international comity (ie recognition of another State's laws) why the offence should be tried in another country.

### *Special rules*

**1.23** Jurisdiction over offences of a fraudulent or similar nature is subject to the provisions of the Criminal Justice Act 1993, Part 1, dealt with in Chapter 12.

There are also special rules relating to jurisdiction over the inchoate offences of encouraging or assisting crime, conspiracy and attempt. These are dealt with in Chapter 14.

### *Territorial limits*

**1.24** The territorial limits of England and Wales for the purposes of territorial jurisdiction are as follows, depending on whether or not the offence is a summary one. For the purpose of offences triable only on indictment and offences triable either way, the boundary of England and Wales is, round the coast, the outer limit of territorial waters.<sup>22</sup> In the case of summary offences, the boundary is where the land meets the open sea according to the prevailing state of the tides, but tidal rivers, creeks and harbours within the jaws of the land also fall within that boundary.<sup>23</sup>

<sup>16</sup> [1971] AC 537, HL.      <sup>17</sup> [1975] 2 All ER 146, CA. Also see *Berry* [1985] AC 246, HL.

<sup>18</sup> *Ellis* [1899] 1 QB 230; *DPP v Stonehouse* [1978] AC 55, HL.

<sup>19</sup> Unless statute otherwise provided.

<sup>20</sup> *Harden* [1963] 1 QB 8, CCA; *Manning* [1999] QB 980, CA.      <sup>21</sup> [2004] EWCA Crim 631.

<sup>22</sup> Territorial Waters Jurisdiction Act 1878, s 2.

<sup>23</sup> *Keyn* (1876) 2 Ex D 63 at 168, per Lord Cockburn CJ. See also *Loose v Carlton* (1978) 41 P & CR 19 at 34; *Anderson v Alnwick DC* [1993] 3 All ER 613 at 620. Statute may provide that a particular summary offence can be committed in territorial waters.

## Extra-territorial jurisdiction

**1.25** ‘Extra-territorial jurisdiction’ refers to jurisdiction over an offence which has no connection at all with the territory of England and Wales. The following are examples.

Various statutes giving effect to international conventions provide that the courts of England and Wales shall have jurisdiction over offences covered by the conventions by whomsoever and wheresoever they may be committed. One example is the Aviation Security Act 1982, s 1 of which punishes with a maximum of life imprisonment the unlawful seizure, by force or threats, of control of an aircraft while it is in flight, whether or not the aircraft is registered in the United Kingdom. The Aviation Security Act 1982, s 2 makes similar provision concerning acts of intentionally destroying, damaging or endangering the safety of any aircraft.

Other examples of extra-territorial jurisdiction are murder and manslaughter committed by a person within one of the categories of British citizenship in any country or territory outside the United Kingdom,<sup>24</sup> and a long list of sexual offences against a person under 18 committed by a United Kingdom national or United Kingdom resident (or someone who is such a national or resident when the prosecution is brought) in any country or territory outside the United Kingdom.<sup>25</sup>

Any offence committed by a person within one of the categories of British citizenship in a foreign country outside the United Kingdom is triable in England and Wales if, at the time of the offence, he was an employee of the Crown, and was acting (or purporting to act) in the course of his employment.<sup>26</sup>

### *Jurisdiction over offences on board ships and aircraft outside the United Kingdom*

**1.26** The Merchant Shipping Act 1995, s 281 gives the courts of England and Wales jurisdiction over an offence charged as having been committed:

- by a person within one of the categories of British citizenship:
  - on board any United Kingdom ship on the high seas;
  - in any foreign port or harbour;
  - on board a foreign ship ‘to which he does not belong’ (ie is not a crew member); or
- by any other person on board any United Kingdom ship on the high seas.<sup>27</sup>

Further discussion of this and of other ship-related provisions – such as that in the Merchant Shipping Act 1995, s 282, which deals with the rules to be applied to offences against property or persons committed ashore or afloat outside the United Kingdom by persons who at the time of the offence are, or have been during the previous three months,

<sup>24</sup> Offences Against the Person Act 1861, s 9.

<sup>25</sup> Sexual Offences Act 2003, s 72 and Sch 2 (para 9.123).

<sup>26</sup> Criminal Justice Act 1948, s 31.

<sup>27</sup> Although the drafting of s 281 appears to limit its provisions to offences committed under the Merchant Shipping Act 1995 (MSA 1995), the Magistrates’ Courts Act 1980, s 3A, and the Senior Courts Act 1981, s 46A, both inserted by the MSA 1995, Sch 13, provide that s 281 applies to other offences under the law of England and Wales as it applies in relation to offences under the MSA 1995. ‘High seas’ in s 281 means all oceans, seas, bays, channels, rivers, creeks and waters below low water mark and ‘where great ships go’, unless they are within the body of a county: *R v Liverpool JJ, ex p Molyneux* [1972] 2 QB 384, DC.

employed on a United Kingdom ship – is beyond the scope of this book. So is the discussion of the Civil Aviation Act 1982, s 92, which extends our criminal law to conduct in British-controlled aircraft or United Kingdom-bound foreign aircraft<sup>28</sup> while in flight outside the United Kingdom.

## Maximum sentences

**1.27** Where an offence triable in the Crown Court, whether because it is indictable only or triable either way, is referred to in this book, reference is made to the maximum term of imprisonment which can be imposed by the Crown Court on conviction before it. That term also applies to someone committed for sentence by a magistrates' court. Except in the case of murder and certain other cases, the Crown Court may fine the offender instead of, or in addition to, imprisoning him. There is no limit on the fines which the Crown Court may impose.

**1.28** Where an offence triable summarily only is referred to in this book, the maximum sentence is set out. Many summary offences are not imprisonable. Where they are the maximum term varies from offence to offence but the maximum for any one offence is six months' imprisonment;<sup>29</sup> it will be 51 weeks if, and when, an amendment, made by the Criminal Justice Act 2003,<sup>30</sup> comes into force. The maximum which can be imposed on summary conviction for an either-way offence is normally six months' imprisonment,<sup>31</sup> it will be 12 months if, and when, an amendment, made by the Criminal Justice Act 2003,<sup>32</sup> comes into force.

There are also limits on the fines which magistrates' courts may impose. The maximum fine which they may impose on conviction of most offences triable either way is a standard sum, known as the 'prescribed sum' or 'statutory maximum'. At the time of writing that sum is £5,000. In the case of summary offences, the maximum fine is normally governed by the level (on the standard scale of fines) assigned to the offence in question. The standard scale is shown in Table 1.1 (correct at the time of writing).<sup>33</sup>

Table 1.1 Standard scale of fines

Level on scale	Amount of fine
1	£200
2	£500
3	£1,000
4	£2,500
5	£5,000 <sup>34</sup>

<sup>28</sup> In the case of a foreign aircraft the conduct must also be an offence under the law of the foreign country.

<sup>29</sup> Powers of Criminal Courts (Sentencing) Act 2000, s 78(1).

<sup>30</sup> See the Criminal Justice Act 2003, ss 280 and 281.

<sup>31</sup> Magistrates' Courts Act 1980, s 32(1); Powers of Criminal Courts (Sentencing) Act 2000, s 78(1).

<sup>32</sup> See the Criminal Justice Act 2003, s 282.

<sup>33</sup> Criminal Justice Act 1982, s 37; Interpretation Act 1978, Sch 1.

<sup>34</sup> The Secretary of State has power to amend the amount of maximum fines.

When the Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 85, is brought into force, the references to a maximum fine of £5,000 will be replaced by a reference to a fine of any amount.

## Sources

**1.29** There are two main sources of English criminal law: common law and legislation. EU law and the European Convention on Human Rights are increasingly becoming important sources.

## Common law

### Key points 1.4

Virtually all the general principles of criminal liability are to be found in the common law, ie judge-made law. On the other hand, very few offences are now governed by the common law.

**1.30** Common law is that part of English law which is not the result of legislation, ie it is the law which originated in the laws applied by the royal courts after the Norman conquest. These decisions of the judges came to be recorded and published, and in due course began to be cited in subsequent cases before the courts. This led to the development of the doctrine of precedent, under which the reported decisions of certain courts are more than just authoritative legal statements whose effect is persuasive since they can be binding (ie must be applied) in subsequent cases.

In the context of courts with criminal jurisdiction, it is the decisions of the Supreme Court (or the House of Lords), the Court of Appeal (Criminal Division), a Divisional Court of the Queen's Bench Division of the High Court and a judge sitting in the Administrative Court of that Division which have binding effect. Whether or not such a decision is binding in a particular case depends on the relative standing of the court which made the decision and the court in which that decision is subsequently cited. The reason is that the doctrine of precedent depends on the principle that the courts form a hierarchy which, in the case of courts with criminal jurisdiction, is in the following descending order: Supreme Court (or House of Lords); Court of Appeal (Criminal Division); Divisional Court of the Queen's Bench Division; a judge in the Administrative Court; Crown Court and magistrates' courts. The basic rule is that a decision by any of the courts above the Crown Court is binding on those courts below that in which it was given. On the other hand, the Supreme Court is not bound by its own decisions or those of the House of Lords, nor is a judge of the Administrative Court bound by decisions of other High Court judges, although in both cases the previous decision will normally be followed. In comparison, the Court of Appeal and a Divisional Court are bound by their own previous decisions, except in a number of defined exceptional circumstances.

It is not every part of the judgment of an appellate court which constitutes the ‘decision’ for the purposes of the doctrine of precedent but only the reasons or principles applied by the appellate court in resolving an issue before it (the ‘ratio decidendi’). Other statements on the law by the appellate court which are not necessary to the resolution of an issue before it (‘obiter dicta’) can never constitute a binding precedent, although they may be of persuasive authority for subsequent cases, their strength depending on the eminence of the court.

In terms of trial in the Crown Court, it must be borne in mind that it involves trial by jury,<sup>35</sup> and, subject to D’s right of appeal, their verdict is final. The jury are subject to the trial judge, who directs them on the relevant law. The trial judge’s directions on the law do not constitute a binding precedent for the future, and are not even of persuasive authority unless the judge is a High Court judge.<sup>36</sup> It must be emphasised that, in such a case, the principles enunciated by the High Court judge must be ascertained solely by reference to his words and without reference to the verdict of the jury, which may have been unexpected by the judge, or even contrary to his direction on the law.

Reference will occasionally be made to decisions of the Judicial Committee of the Privy Council, which is the final court of appeal from the British dependent territories and certain Commonwealth countries. Except in the most exceptional circumstances, decisions of the Judicial Committee do not bind English courts but are of very strong persuasive authority. Reference will also be made to decisions by appellate courts in Northern Ireland, the Commonwealth or the United States. Such decisions are of persuasive authority only.

## Common law offences

**1.31** From the twelfth to the fourteenth centuries the judges elaborated the rules relating to the more serious offences which came to be known as ‘felonies’. In the fourteenth century less serious offences known later as ‘misdemeanours’ were similarly evolved. A few misdemeanours were subsequently created by the rulings of the judges in particular cases and by the Court of Star Chamber. After the Restoration some of the latter were developed by the judges, who always claimed the right of defining certain acts as misdemeanours, although they never attempted to do so in the case of felonies. However, in modern times statute has played a preponderant part in the criminal law. As a result of the abolition of many common law offences by statute, often accompanied by their replacement by statutory offences, fewer than 20 offences now exist at common law. Their definition cannot be found in an Act of Parliament, but must be sought in the rulings of the judges.

Where conduct falls within the ambit of a statutory offence as well as the ambit of a common law offence it should be prosecuted as the statutory offence unless there is good reason for doing otherwise.<sup>37</sup>

<sup>35</sup> For an exception, see para 1.12, n 13.

<sup>36</sup> *X Ltd* [2013] EWCA Crim 818. Contrast the view of Ashworth ‘The Binding Effect of Crown Court Decisions’ [1980] Crim LR 402.

<sup>37</sup> *Rimmington; Goldstein* [2005] UKHL 63. See also *Dady* [2013] EWHC 475 (QB); *Akpom* [2013] All ER (D) 273 (Nov), CA. The avoidance of a time limit, of a particular defence or of a maximum penalty which applies to the statutory offence cannot ordinarily amount to a good reason: *Rimmington; Goldstein*. The rule referred to in the text does not apply if Parliament has expressly retained the common law offence: *Dosanjh* [2013] EWCA Crim 2366.



Prima facie, not only the definition of the offence itself but also the punishment to be awarded is contained in the common law, but several statutes prescribe specific punishments for certain common law offences. For example, murder is an offence at common law; in no statute is there to be found a definition of it, but by reason of the wealth of judicial pronouncements it is possible to construct a comprehensive definition of the offence. The punishment for murder is, however, governed by statute; it is a mandatory sentence of life imprisonment. Manslaughter also remains an offence at common law; imprisonment for life is laid down as the maximum punishment by statute but, by way of contrast with the case of murder, a lesser sentence of imprisonment, a fine or even a conditional or absolute discharge is possible. Other examples of common law offences described in this book are public nuisance and conspiracy to defraud, for the first of which the punishment on conviction on indictment is still prescribed by the common law.

Where the punishment for a common law offence is not laid down by statute, the judge may sentence D to be imprisoned for a period or fined an amount, or both, to be fixed at the judge's discretion.<sup>38</sup> In theory, this could lead to some very anomalous results because, in the case of a common law offence for which no maximum punishment is provided by statute, the court could impose a longer sentence than it could in the case of a more serious offence, the punishment of which is dealt with by statute. There is, however, an overriding requirement that the punishment should not be excessive, and there is no reason to suppose that the present rule gives rise to any injustice in practice.

## General principles of criminal liability

**1.32** The common law remains the source of virtually all the general principles of criminal liability. Examples of such principles are the defences of insanity and duress (whether by threats or of circumstances) and the rules concerning participation in crime. These general principles apply to offences in general (although they do not always apply to every offence). In particular, when a new offence is created by legislation, it is assumed that they apply to that offence unless the contrary is indicated.

## Limits on judicial law-making

### Key points 1.5

Although the judges have the power to make law, they do not have power to create new offences or to widen existing offences so as to make punishable conduct of a type not previously punishable.

**1.33** Historically, the theory underlying the development of the common law was that new cases simply illustrated the application of existing doctrine to varying facts, or, in other words, that the role of the judge was to discover and declare what the law already was, not to make it.

<sup>38</sup> *Morris* [1951] 1 KB 394, CCA, approved by the House of Lords in *Verrier v DPP* [1967] 2 AC 195, HL.



In the last 40 years or so the position has changed. It has become generally recognised that judges do make law. As Lord Reid, one of the greatest judges of the twentieth century, said in 1972, 'We do not believe in fairy tales any more. So we must accept the fact that for better or worse judges do make law.'<sup>39</sup> The judges' power to make law is, however, limited. It does not permit the judicial extension of the criminal law by the creation of new offences or the widening of existing ones.

Until modern times, the judges did reserve the right to create new offences under the guise of declaring what the law already was. However, in 1972, the House of Lords in *Kneller (Publishing, Printing and Promotions) Ltd v DPP*<sup>40</sup> unanimously rejected the existence of a residual power vested in the courts to create new offences. It also rejected a residual power so to widen existing offences as to make punishable conduct of a type not hitherto subject to punishment. In 2005, these points were reaffirmed in *Rimmington; Goldstein*.<sup>41</sup> The next year, in *Jones*,<sup>42</sup> Lord Bingham (with whose speech Lords Rodger and Carswell agreed) stated that it had become an important democratic principle in this country that it is for Parliament, and not the executive or the judges, to decide what conduct should be treated as lying so far outside the bounds of what is acceptable in our society as to attract criminal penalties.

**1.34** The judicial creation of offences is open to the following further objections:

- there is a danger that the creation of new offences under the guise of developing old law promotes uncertainty concerning the extent of the legal rule; and
- the existence of a judicial power to create new offences would contravene the principle that no one should be punished for acts which were not criminal when they were performed. This principle, the 'principle of non-retroactivity', forms part of what is called the 'principle of legality' or 'the rule of law'.

Another part of the principle of legality is the 'principle of legal certainty',<sup>43</sup> according to which those subject to the law must be able to ascertain what the law is and therefore to foresee any legal consequences of particular actions, rather than being taken by surprise after the event. The principle of legality is even more important from the point of view of the liberty of the subject than other principles, such as those embodied in the doctrine that D's conduct must be voluntary or in the rule that guilt must be proved beyond reasonable doubt. The principle of legality is enshrined in the European Convention on Human Rights (ECHR), Article 7 which provides that 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence... when it was committed.'

These objections are equally applicable to the judicial extension of existing offences so as to make punishable conduct of a type not hitherto subject to punishment.

**1.35** There is a fine line between widening existing offences so as to make punishable conduct of a type hitherto not punishable and the clarification and application of established

<sup>39</sup> 'The Judge as Law Maker' (1972) 12 JSPTL 22.

<sup>40</sup> [1973] AC 435, HL.

<sup>41</sup> [2005] UKHL 63. Just as the courts have no power to create new offences, so they have no power to abolish existing offences; that is a task for Parliament: *ibid*.

<sup>42</sup> [2006] UKHL 16 at [29].

<sup>43</sup> Otherwise known as the 'principle of fair warning'.

offences to new circumstances within their scope. The House of Lords in *Kneller* recognised that the latter was permissible. This is a view shared by the European Court of Human Rights which has interpreted the ECHR, Article 7 as not outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.<sup>44</sup> This may seem to be an appropriate way of resolving any tension which might otherwise exist between the principle of non-retroactivity and the need for the law to develop so as to be responsive to changing social conditions, but the fact remains that the law can always be changed by Parliament and legislative changes can always be prospective, whereas judicial changes are retrospective.<sup>45</sup>

The question of where the 'fine line' referred to is to be drawn was raised by the decision in 1991 of the House of Lords in *R*,<sup>46</sup> a decision subsequently given statutory effect, that a husband could be convicted of raping his wife if he had sexual intercourse with her without her consent. This involved the abolition of the previous proposition of law, formulated in the eighteenth century, whereby a husband could not be so convicted. That proposition, which had been subjected to a number of limited exceptions in the 1940s to 1970s, was based on the notion that a wife was a subservient chattel of her husband and by marriage gave her irrevocable consent to sexual intercourse with him. The House of Lords held that, since that notion was now clearly unacceptable, the proposition should be held no longer to be applicable. There is a strong case for saying that this decision involved an impermissible widening of the offence so as to make punishable conduct of a type not hitherto punishable, rather than simply being an application of the offence to new circumstances (the changed social position of wives) within its scope. Subsequently, the European Court of Human Rights in *SW and CR v United Kingdom*<sup>47</sup> had to consider a complaint that the House of Lords' decision was in violation of the ECHR, Article 7. The Court held that Article 7 had not been contravened. Its reason was that there had been an 'evident evolution' of the law in the decisions of the English courts which was consistent with the essence of the offence and it was reasonably foreseeable to the complainants (if necessary, with legal advice) that the court might embark on the adaptation of the offence in question. This bold decision indicates that decisions which appear to change the law are unlikely to contravene Article 7, unless the development was unforeseeable.

The House of Lords' decision in *R* can be contrasted with its decision in *Norris v Government of the United States of America*<sup>48</sup> where the House of Lords reiterated the importance of the principle that the courts do not have power to create new offences or to widen existing ones so as to make punishable conduct of a type not hitherto subject to punishment. The question before the House was whether an agreement for price-fixing constituted the common law offence of conspiracy to defraud, there being no previous decision which even suggested that it did unless there were aggravating elements (notably misrepresentation and deception) bringing the agreement within the existing boundaries

<sup>44</sup> *SW and CR v United Kingdom* (1995) 21 EHRR 363, ECtHR.

<sup>45</sup> By way of exception, in a wholly exceptional case where it is in the interests of justice to do so, the Supreme Court may declare that one of its decisions is not to operate retrospectively: *Re Spectrum Plus Ltd* [2005] UKHL 41.

<sup>46</sup> [1992] 1 AC 599, HL. See Giles 'Judicial Law-Making in the Criminal Courts: The Case of Marital Rape' [1992] Crim LR 407. For another example, see *Tan* [1983] QB 1053, CA.

<sup>47</sup> (1996) 21 EHRR 363, ECtHR. <sup>48</sup> [2008] UKHL 16.

of conspiracy to defraud. The House of Lords held that such an agreement could not constitute a conspiracy to defraud unless there were such aggravating elements; it would be wrong to extend the offence of conspiracy to defraud to cover price-fixing agreements in themselves. It distinguished *SW and CR v United Kingdom*, on the ground that the extension of the law of rape to cover sexual intercourse by a husband with his non-consenting, cohabiting wife was the culmination of a gradual change in the law of marital rape. Thus, the extension had been reasonably foreseeable at the time of the conduct in question, whereas it would not have been so foreseeable in respect of an extension of conspiracy to defraud to cover price-fixing agreements (such an extension only having been first suggested in an article long after the conduct in question).

**1.36** The introduction by judicial decisions of new defences, or the development of existing defences to meet new circumstances, is not open to the same objections as advanced earlier, since this favours the defendant. In terms of new defences, Lord Mustill said this in *Kingston*,<sup>49</sup> where the House of Lords refused to recognise a defence of involuntary intoxication:

'I suspect that the recognition of a new general defence at common law [by judicial decision] has not happened in modern times. Nevertheless, the criminal law must not stand still, and if it is both practical and just to take this step, and if judicial decision rather than legislation is the proper medium, then the courts should not be deterred simply by the novelty of it.'

Despite Lord Mustill's first sentence, it would seem that the defence of duress of circumstances, described in Chapter 16, is a new defence recognised in modern times by judicial decision. With this it is interesting to contrast the refusal by the House of Lords in *Clegg*<sup>50</sup> to introduce a partial defence of excessive self-defence to murder, which would have reduced that offence to manslaughter. Lord Lloyd, with whose speech the other Law Lords agreed, said:

'I am not averse to judges developing law, or indeed making new law, when they can see their way clearly, even where questions of social policy are involved... But in the present case I am in no doubt that your Lordships should abstain from law-making. The reduction of what would otherwise be murder to manslaughter in a particular class of case seems to me essentially a matter for decision by the legislature, and not by this House in its judicial capacity.'<sup>51</sup>

Parliament has now introduced a provision which will achieve such a reduction in some cases of excessive self-defence, as will be seen in Chapters 8 and 16.

**1.37** In *C v DPP*,<sup>52</sup> where the House of Lords refused to abolish the common law rebuttable presumption that a child aged 10 to 13 was incapable of committing an offence, Lord Lowry, with whom the rest of the House of Lords agreed, stated that judicial law-making should be approached by the courts on the following basis:

<sup>49</sup> [1995] 2 AC 355 at 375.

<sup>50</sup> [1995] 1 AC 482, HL.

<sup>51</sup> *Ibid* at 500.

<sup>52</sup> [1996] AC 1. See para 15.3.

‘(1) if the solution is doubtful, the judges should beware of imposing their own remedy; (2) caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated while leaving the difficulty untouched; (3) disputed matters of social policy are less suitable areas for judicial intervention than purely legal problems; (4) fundamental legal doctrines should not be lightly set aside; (5) judges should not make a change unless they can achieve finality and certainty.’<sup>53</sup>

The common law presumption was subsequently abolished by statute, as explained in para 15.3.

## Textwriters

**1.38** In criminal law, as in other branches of English law, statements in textbooks and articles in legal journals have no binding force. This means that a court is not bound to apply them in the same way as it must follow the directions contained in a statute or the principle to be inferred from a decided case.

Nevertheless, some mention should be made of certain works which are treated with great respect by the judges. To go back only so far as the seventeenth century, the writings of Sir Edward Coke (d 1634) are as important in the sphere of crime, which is dealt with in his *Third Institute*, as in other branches of the law. There is also the statement of the criminal law of a slightly later period in the unfinished *History of the Pleas of the Crown* by Sir Matthew Hale (d 1676).

In the eighteenth century, Sir Michael Foster (d 1763) left a valuable set of reports with notes and appendices entitled *Crown Law*, while Hawkins (d 1746) wrote a treatise on *Pleas of the Crown* which was used by Sir William Blackstone (d 1780) in the compilation of the fourth book of his *Commentaries*, which deals with criminal law. Finally, Sir Edward Hyde East (d 1847) published a general treatise on criminal law, known as *Pleas of the Crown*, in 1803; this book is regarded as the successor to the treatises of Coke, Hale and Foster.

All these works are regarded as of persuasive authority on the law as it stood when they were written. Several of the standard works of the nineteenth century have been re-edited and, although they are not authoritative in any strict sense of the word, some of them are still relied on. They include *Stephen's Digest of the Criminal Law* and *Archbold's Pleading, Evidence and Practice in Criminal Cases*. Modern works which are frequently quoted include *Smith and Hogan's Criminal Law*, *Smith's Law of Theft* and *Blackstone's Criminal Practice*.

The increasing importance of writers is shown by the following quotation from the speech of Lord Mustill in *A-G's Reference (No 3 of 1994)*:<sup>54</sup>

‘Before leaving this part of the appeal I would acknowledge the extensive citation by counsel of passages from learned writers, present and past. There is no space to name them all here. All have proved valuable, even if not all of the opinions expressed have been adopted. Notwithstanding the strong practical character of the criminal law it has over the years gained immeasurably from systematic analysis by scholars who have had an opportunity for research and reflection denied to those immersed in the daily life of the courts. I hope that the practice of drawing on these materials will be continued and enlarged.’

<sup>53</sup> Ibid at 28.

<sup>54</sup> [1998] AC 245 at 262.

# Legislation

## Key points 1.6

Statute is the principal source of specific offences. The source of many minor offences, however, is to be found in subordinate legislation. Offences created by statute or subordinate legislation are known as statutory offences.

## Statute

**1.39** The vast majority of offences are defined and regulated by statutes, ie Acts of the United Kingdom Parliament which have been duly passed through both Houses and received the Royal Assent,<sup>55</sup> or by subordinate legislation. There are at least 700 indictable offences (ie offences triable in the Crown Court); all but the small number of common law offences are regulated by statute. All summary offences, of which there are estimated to be well over 10,000, are regulated by statute or by subordinate legislation.

**1.40** Statute may create an entirely new offence. There are many instances of serious offences being created by statute, from time to time in the history of the criminal law, to punish acts which were not previously punishable. It is in the sphere of the less morally reprehensible offences, however, that Parliament has been most active.

Apart from the creation of new offences by statute, it is also necessary to bear in mind, in order to have a full and proper understanding of the criminal law, that many offences which now exist by virtue of statute were originally common law offences.

**1.41** It follows from what has been said that in England and Wales we have no single Criminal Code such as exists in most countries. The result is that, with the exception of common law offences and those created by subordinate legislation,<sup>56</sup> the criminal law of England is contained in a range of statutes. The Offences Against the Person Act 1861, for example, covers a variety of offences which are broadly defined as being committed against the person, including such crimes as wounding with intent to do grievous bodily harm, administering poison, using explosives, assaults, bigamy and abortion. The Theft Act 1968 and the Criminal Damage Act 1971 cover most offences against property. The Sexual Offences Act 2003 covers all but a few sexual offences.

**1.42** In addition to Acts of the kind mentioned in the last paragraph, there is a large number whose main object is to regulate particular activities such as the sale of food or other trading activities, health and safety at work, public health, environmental matters and other public welfare matters, but which contain offences aimed at those carrying out a particular business or activity (rather than the public in general) for which punishments

<sup>55</sup> Since 2011, the National Assembly for Wales has had power to enact Acts of the National Assembly for Wales, made under the Government of Wales Act 2006, Pt 4 and Sch 7, which require Royal Assent and only apply in relation to Wales, on any matter within its legislative competence. That competence is limited to 20 devolved areas, which include the environment, food safety, health and health services, aspects of social welfare, and town and country planning.

<sup>56</sup> Para 1.43.

are prescribed. They are not essentially concerned with the criminal law, but they certainly create offences (known as regulatory offences) and as far as they do so must be regarded as one of the sources of the criminal law. This already large category is increasing because in modern times the State has assumed the responsibility for controlling and curtailing a range of activities which previously anyone was free to undertake.

## Subordinate legislation

**1.43** A statute may give power to some body such as the Queen in Council, a government minister or a local authority<sup>57</sup> to make regulations and prescribe for their breach.

This method of creating minor criminal offences is much easier than enacting a statute. It is not new but is of increasing importance. In modern times most newly created offences are created by subordinate legislation. A good example of the power to create offences by subordinate legislation is that of the Secretary of State for Transport under the Road Traffic Acts to make regulations. Acting under this power, regulations have been made which cover a very large number of different subjects, contravention of which is an offence. Such matters as the efficiency of brakes and the use of car horns are to be found not in the Acts themselves, but in the regulations.

Subordinate legislation made under statutory powers, otherwise known as delegated legislation, is essentially of two kinds in England and Wales. The more important kind are Orders in Council made by the Queen in Council and regulations made by Ministers. Generally, these must be made by statutory instrument and are subject to the rules governing publication and procedure contained in the Statutory Instruments Act 1946. The considerable number of offences created by statutory instrument are almost wholly regulatory. Frequently they are punishable with imprisonment if the court thinks it appropriate. The other kind of subordinate legislation, byelaws, are made by local authorities and certain other bodies authorised by statute and require ministerial confirmation. As from a day to be appointed, byelaws made under specified statutory provisions by a Welsh county council or county borough council or certain other bodies in Wales will not require ministerial confirmation.<sup>58</sup> Although general in operation, byelaws are restricted to the locality or undertaking to which they apply.

## The increase in statutory offences

**1.44** The amount of criminal legislation has increased in modern times. The most common reason for this is the increasing burden of implementing EU measures or a treaty obligation. Another reason is the increasing number and extent of regulatory systems. A third reason is that increasingly Parliament has tended to respond to a perceived social

<sup>57</sup> In 2010, the Law Commission estimated that there were over 60 national regulators with power to make criminal law, alongside trading standards authorities and 486 local authorities: Law Commission *Criminal Liability in Regulatory Contexts* (2010) Law Com Consultation Paper No 195, para 1.21.

<sup>58</sup> Local Government Byelaws (Wales) Act 2012, s 6, an Act of the National Assembly for Wales.



problem by making its manifestation an offence, sometimes to limited, if any, effect. Since 1990, for example, a range of offences has been introduced to deal with raves, collective trespasses, stalkers, keepers of dangerous dogs and squatters in residential buildings.

In 1969, *Halsbury's Statutes*, a leading collection of statutes, contained 800 pages in its Criminal Law section; in 2011 it contained 5,250 pages. Estimates<sup>59</sup> vary but at their most conservative they indicate that well over 3,000 offences were created in the ten-year period 1997–2007. In 2010, the Coalition Government committed itself to introducing a new mechanism to prevent the proliferation of unnecessary new criminal offences by creating a gateway to scrutinise all legislation containing criminal offences and by publishing annual statistics on the number of new offences. Guidance contained in the Coalition Government's *Criminal Offences Gateway* requires civil servants to get 'Gateway clearance' if they propose to use legislation to create a new offence, repeal, re-enact or amend an existing offence, or create an enabling power providing for the creation or extension of criminal offences in subordinate legislation. The Secretary of State for Justice will approve proposals only if satisfied that the proposed offences are necessary. An independent research project<sup>60</sup> has indicated that this appears to be reducing the proliferation of offences in England and Wales.

In its paper *Criminal Liability in Regulatory Contexts*,<sup>61</sup> the Law Commission has provisionally proposed that:

- The criminal law should only be employed to deal with wrongdoers who deserve the stigma associated with criminal conviction because they have engaged in seriously reprehensible conduct. It should not be used as the primary means of promoting regulatory objectives.
- Harm done or risked should be regarded as serious enough to warrant criminalisation only if:
  - in some circumstances (not just extreme circumstances), an individual could justifiably be sent to prison for a first offence, or
  - an unlimited fine is necessary to address the seriousness of the wrongdoing in issue, and its consequences.
- Low-level criminal offences should be repealed in any instance where the introduction of a civil penalty (or equivalent measure)<sup>62</sup> is likely to do as much to secure appropriate levels of punishment and deterrence.

The Law Commission has taken the view that, if there are too many bodies with the power to create criminal offences whenever they like, the first two provisional proposals described will be insufficient to promote principled and restricted use of the criminal law. Accordingly, it has provisionally proposed that criminal offences should be created and (other than in minor details) amended only by statute.

<sup>59</sup> Chalmers and Leverick 'Tracking the Creation of Criminal Offences' [2013] Crim LR 543.

<sup>60</sup> Ibid at p 551. <sup>61</sup> Law Com Consultation Paper No 195.

<sup>62</sup> I.e. penalties, orders and remedies that can be applied to someone without that application necessarily having to be decided through a hearing in a criminal court; para 3.51 of the Consultation Paper.

## EU law

**1.45** The effect of EU law on the substantive criminal law of England and Wales is of considerable importance, just as it is in relation to the law of criminal procedure and evidence.

Although EU legislation cannot of itself create offences punishable in England and Wales and has to be implemented by domestic legislation, EU legislation is having an increasing impact on our substantive criminal law, for example in areas such as bribery, drug-trafficking, environmental matters, terrorism, VAT evasion and carousel frauds, people-smuggling, child prostitution and child pornography, as well as regulatory matters such as the use of tachographs in commercial vehicles. The implementation of EU legislation accounts for the majority of new offences in English and Welsh law each year.<sup>63</sup>

In many instances where EU legislation has had an impact this has been the product of a *choice* by the UK government to fulfil its obligation to implement a piece of EU legislation by doing this by way of criminal offences and penalties. However, developments in the last 25 years or so have meant that EU legislation can *require* Member States to create criminal offences and penalties, as explained in subsequent paragraphs.

The decisions of the EU Court of Justice also impact on the decisions in English and Welsh courts.

**1.46** The Maastricht Treaty of 1992 established the ‘three pillars’ of the EU. Two pillars have been relevant to the criminal law: the ‘first pillar’ and the ‘third pillar’.

The first pillar was the European Community (EC), covering a range of competences including the single market, economic and monetary union, the common agricultural and fisheries policies and environmental protection. Generally criminal law was outside the competence of the EC. However, the decision of the European Court of Justice in 2005 in *Commission of the European Communities v Council of the European Union*<sup>64</sup> was to the effect that EC legislation made under the first pillar could require Member States to enact criminal offences and penalties (although it could not specify the penalty range) for breaches of EC environmental protection legislation when this was necessary to ensure that that legislation was fully effective.<sup>65</sup> The applicability of this decision to other essential objectives of the EC was left unclear.

More important for the criminal law was the third pillar, ultimately named ‘Police and Judicial Co-operation in Criminal Matters’ (police and criminal justice measures) and given the objective of creating an ‘area of freedom, security and justice’. Most of the EU Council’s framework decisions<sup>66</sup> resulting from the pursuit of this objective relate to police co-operation, the creation of EU agencies for co-operative working and the mutual recognition of the orders and decisions of courts and criminal justice agencies in other

<sup>63</sup> See Chalmers and Leverick ‘Tracking the Creation of Criminal Offences’ [2013] Crim LR 543 at 554–556.

<sup>64</sup> Case C-176/03 [2005] 3 CMLR 20, ECJ.

<sup>65</sup> See Directive 2008/99/EC on the protection of the environment through criminal proceedings, which has been implemented by the United Kingdom.

<sup>66</sup> An EU law-making device created in the Amsterdam Treaty of 1999.



Member States. Some of the framework decisions, however, were designed to ensure a common approach to particular types of offence, which Member States were obliged to implement in their legislation by way of criminal offences and penalties. Framework decisions were abolished as a law-making device by the Lisbon Treaty of 2007, which came into force in 2009.

The Lisbon Treaty gave the United Kingdom the right, at any time before June 2014, to opt out of the 133 police and criminal justice measures created under the third pillar. The United Kingdom cannot pick and choose; the opt out, if exercised, must be in respect of all those measures, although the United Kingdom could opt back in in respect to any particular measure. In July 2013, the Prime Minister notified the EU Council that the opt-out would be exercised and that the Government would then negotiate to opt back into 35 individual measures. With one exception, none of the framework decisions dealing with a common approach to types of offences would be included in the opt-in, but this is unimportant in legal (as opposed to political) terms because the relevant types of conduct have already been made criminal in English law and will undoubtedly remain so.

Under the Lisbon Treaty the three pillars and the powers under them were merged. As a result, the EU was given powers to make Regulations and Directives in respect of the matters hitherto within the third pillar. The United Kingdom is not, however, bound by such a measure except where it opts in. There is no power to opt out of an opted-in measure.

**1.47** EU legislation also has potential, which should not be ignored, as a source of defences or rules. For example, a defendant would not be liable for an offence if it conflicted with a directly applicable or effective rule<sup>67</sup> of EU law, which would take precedence over the offence to the extent that it was inconsistent.<sup>68</sup> As a further example, for the purposes of the offence of fraudulent evasion of a prohibition on importation, contrary to the Customs and Excise Management Act 1979, s 170(2), the prohibition can be one imposed by a directly applicable rule of EU law.<sup>69</sup>

**1.48** Lastly, it may be noted that domestic criminal legislation *must* normally be interpreted, so far as possible, to accord with or facilitate EU legislation (even if that EU legislation does not have direct effect).<sup>70</sup> This rule does not, however, apply to legislation implementing a framework decision, although there is a presumption in favour of interpreting such a provision in a way which accords with the United Kingdom's international obligations under the decision.<sup>71</sup>

<sup>67</sup> A directly applicable rule is one which is part of domestic law without the need for implementation in domestic law. Only EU Regulations are directly applicable. A directly effective rule is one which confers rights enforceable in domestic law by an individual *against* the State, or by an individual or the State against an individual without being so implemented. Unlike EU Regulations, EU Directives cannot have the latter effect.

<sup>68</sup> See Case C-121/85 *Conegate Ltd v Customs and Excise Comrs* [1987] QB 254, ECJ and DC; *Searby* [2003] EWCA Crim 1910.

<sup>69</sup> *Sissen* [2001] 1 WLR 902, CA, provides an example.

<sup>70</sup> Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1992] 1 CMLR 305, ECJ; *Webb v EMO Air Cargo (UK) Ltd* [1993] 1 CMLR 259, HL.

<sup>71</sup> *Assange v Swedish Prosecution Authority* [2012] UKSC 22.

## European Convention on Human Rights and Fundamental Freedoms and Human Rights Act 1998

### Key points 1.7

The European Convention on Human Rights and Fundamental Freedoms (ECHR), taken together with the Human Rights Act 1998 (HRA 1998), is of major importance.

The HRA 1998 gives teeth to the 'Convention rights' specified in it:

- by a special provision about statutory interpretation designed, so far as possible, to give effect to legislation in a way which is compatible with the Convention rights;
- by providing for certain courts to make a declaration of incompatibility if legislation cannot be interpreted so as to be compatible; and
- by making it unlawful for a public authority, such as a court, local authority or police officer to act in a way incompatible with a Convention right.

**1.49** The criminal law can have considerable implications for the exercise of legitimate rights and freedoms. However, it was not until the HRA 1998 that the rights and freedoms guaranteed by the ECHR<sup>72</sup> were accorded special status under the law of England and Wales.

**1.50** The HRA 1998 'brings home' the Convention rights. Essentially what this means is that remedies are available in courts and tribunals (hereafter simply 'courts') in England and Wales in respect of the Convention rights. This has not been achieved by the incorporation of the Convention rights into English law. Unlike directly applicable or effective EU legislation, the Convention does not automatically take priority over English law. Parliamentary sovereignty has been retained. Our domestic courts have not been given a power to disapply (ie not enforce) incompatible Acts of Parliament,<sup>73</sup> but the effect of the main provisions in the Act comes close to permitting disapplication without disturbing parliamentary sovereignty. On the other hand, subordinate legislation<sup>74</sup> incompatible with a Convention right can be quashed unless (leaving aside the possibility of revocation) primary legislation prevents removal of the incompatibility.<sup>75</sup>

### Impact of the HRA 1998

**1.51** The HRA 1998 has had a widespread and dramatic impact on the criminal law of England and Wales. The Convention rights are highly influential in the drafting of criminal legislation. In addition, the HRA 1998 requires judges to interpret legislation, so far as

<sup>72</sup> The ECHR was concluded in 1950. <sup>73</sup> HRA 1998, s 3(2)(b).

<sup>74</sup> For the purposes of the HRA 1998, Acts of the National Assembly for Wales are 'subordinate legislation': HRA 1998, s 21(1).

<sup>75</sup> HRA 1998, s 3(2)(c).

possible, in a way compatible with Convention rights and, if they cannot, the higher courts can declare that legislation incompatible with the ECHR. So far, in terms of judicial decisions, the ECHR and HRA 1998 have had more effect in respect of criminal procedure and evidence than the substantive criminal law, but there have been cases where they have been of importance in the latter respect. Examples are referred to at relevant points in this book.

### *Statutory interpretation*

**1.52** The HRA 1998, s 3 provides that primary legislation and subordinate legislation must, 'so far as it is possible to do so, be read and given effect in a way which is compatible with the Convention rights.'<sup>76</sup> The courts, where necessary, will prefer a strained but possible interpretation which is consistent with Convention rights to one more consistent with the statutory words themselves, by giving them a narrower meaning than their ordinary meaning (called 'reading down'). This is radically different from traditional techniques of statutory interpretation. There are, however, limits, as indicated by 'as far as possible'. A court cannot construe a statute in a way which Parliament could not conceivably have intended. Perverse interpretation or extensive redrafting is not permissible. In the rare case where the mismatch between Convention rights and the statute is this great, a competent court will have to make a declaration of incompatibility.

**1.53** The effect of s 3 is illustrated by *Lambert*,<sup>77</sup> which was concerned with the excuse available under the Misuse of Drugs Act 1971, s 28 to a person charged with possession of a controlled drug (or certain other drugs offences). Section 28 provides that it is an excuse for D 'to prove that he neither knew of nor suspected nor had reason to suspect' that the substance in question was a controlled drug. A majority of the House of Lords held that, in order to be compatible with the presumption of innocence in the ECHR, Article 6(2), 'prove' in s 28 had to be 'read down' as imposing an evidential burden<sup>78</sup> rather than a persuasive burden on D, notwithstanding the apparently unequivocal nature of 'prove'.

**1.54** *Ghaidan v Godin-Mendoza*<sup>79</sup> is the leading decision on the courts' interpretative obligation under s 3. There, the House of Lords held that the obligation under s 3 is the core remedial function under the HRA 1998, and the making of a declaration of incompatibility is an exceptional course of last resort. The House stated that the operation of s 3 does not depend on any ambiguity in the legislative provision; it can require a provision to bear a meaning which departs from the unambiguous meaning which it would otherwise bear. However, it stated that s 3 reached its limits if a compatible interpretation would be inconsistent with a fundamental feature of the legislation; to give such an interpretation would be to cross the constitutional boundary, respect for the will of Parliament, which s 3 seeks to demarcate and preserve. The House added that, provided that boundary was not crossed, the obligation under s 3 authorises (and may require) the court to insert or remove words which may change the meaning of the provision or depart from Parliament's intention in order to make the provision compatible, provided that it does not conflict with a fundamental feature of the legislation. This approach was referred to with approval by Lord Bingham in the criminal appeals in *Sheldrake v DPP*.<sup>80</sup>

<sup>76</sup> HRA 1998, s 3(1).

<sup>77</sup> [2001] UKHL 37.

<sup>78</sup> Para 4.1.

<sup>79</sup> [2004] UKHL 30.

<sup>80</sup> [2004] UKHL 43 at [28].

**1.55** A Minister of the Crown in charge of a Bill in Parliament must, before Second Reading, make a written statement about the compatibility (or otherwise) of the Bill with the Convention rights.<sup>81</sup> In practice, such a statement is printed on the face of a Bill. This might be expected to provide a strong assurance that a Bill certified as compatible with Convention rights is in fact compatible but there have been instances where a Bill whose compatibility is contentious has been so certified.

### *Declaration of incompatibility*

**1.56** If a magistrates' court or the Crown Court is unable to interpret a statutory provision compatibly with a Convention right, it will have to proceed as normal. The issue of incompatibility can then be raised on appeal. A judge of the High Court, a Divisional Court, the Court of Appeal and the Supreme Court, if satisfied that a provision of primary legislation is incompatible with a Convention right, may then make a declaration of incompatibility.<sup>82</sup> They may also make such a declaration in respect of a provision of subordinate legislation which is incompatible if satisfied that (disregarding the possibility of revocation) the primary legislation prevents removal of that incompatibility,<sup>83</sup> which it normally will.

**1.57** If a declaration of incompatibility is made, the validity of the provision is unaffected. The Government and Parliament are not required to take remedial action. A fast-track route for taking remedial action is provided by the HRA 1998, s 10.

### *Unlawful actions*

**1.58** It is unlawful for a public authority such as a court, government minister or department, local authority or police officer, to act<sup>84</sup> in a way incompatible with a Convention right, unless:

- as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
- in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.<sup>85</sup>

By the HRA 1998, s 9(1), where there has been unlawful action of this sort by a court the avenue of recourse is by way of appeal or judicial review.

## The Convention rights

**1.59** The Convention rights are those rights under the ECHR and Protocols to it which are specified by the HRA 1998, s 1 and set out in Sch 1. Those rights which particularly have the potential to impact on the criminal law are:

- right to life (Article 2);
- right not to be subjected to torture or inhuman or degrading treatment or punishment (Article 3);

<sup>81</sup> HRA 1998, s 19.

<sup>82</sup> HRA 1998, s 4(1) and (2).

<sup>83</sup> HRA 1998, s 4(3) and (4).

<sup>84</sup> 'Act' includes a failure to act: HRA 1998, s 6(6).

<sup>85</sup> HRA 1998, s 6(1)–(3).

- right to liberty and security (Article 5);
- right to a fair trial (Article 6);
- right not to be subjected to punishment without law (Article 7);
- right to respect for private and family life (Article 8);
- right to freedom of thought, conscience and religion (Article 9);
- right to freedom of expression (Article 10);
- right to freedom of assembly and association (Article 11);
- right to peaceful enjoyment of possessions (First Protocol, Article 1);
- right not to be condemned to death or executed (Thirteenth Protocol, Article 1).

Article 14 prohibits discrimination in the enjoyment of the Convention rights on grounds of status, eg sex, race, religion or sexual orientation.

**1.60** The Convention rights have relevance across the whole range of English criminal law, for example, in relation to the fatal use of force in self-defence or the prevention of crime, and euthanasia (Article 2), parental chastisement (Article 3), the defence of insanity (Article 5), the imposition on D of the burden of proving a defence (Article 6), the boundaries of consent in relation to sexual behaviour or bodily harm (Article 8), incitement to racial or religious hatred, obscene publications and contempt of court (Article 10) and various public order offences concerning processions, assemblies and protests (Articles 10 and 11).

## Application of Convention rights

**1.61** The HRA 1998, s 2(1) provides that, in determining a question which has arisen in connection with a Convention right, a court must take into account the case law of the European Court of Human Rights. The terms of s 2(1) make it clear that these decisions are not binding on an English or Welsh court;<sup>86</sup> they are to be taken into account along with other relevant decisions, such as those of the Privy Council or of courts in constitutional cases elsewhere in the common law world. There is a right of individual petition to the European Court of Human Rights, and a failure to apply a decision of that Court could lead to an application to it.

**1.62** The strength of the Convention rights varies. For example, the rights in Article 2 (right to life), Article 3 (prohibition of torture or inhuman or degrading treatment) and Article 7 (no punishment without law) are absolute, permitting no interference without

<sup>86</sup> Although the Supreme Court will normally apply principles clearly established by the European Court of Human Rights, there will be rare occasions where the Supreme Court has concerns as to whether a decision of the European Court of Human Rights sufficiently appreciated or accommodated a particular aspect of our domestic process. In such a case it can decline to follow the European Court of Human Rights' decision, giving its reasons: *Horncastle* [2009] UKSC 14.

In *Kay v Lambeth LBC* [2006] UKHL 10, the House of Lords held that where a domestic court would normally be bound to follow the decision of a court higher in the domestic hierarchy of courts, but that decision appears to be inconsistent with a later decision of the European Court of Human Rights, the domestic court is bound to follow the domestic precedent. See also *Riat* [2012] EWCA Crim 1509.

exception, whereas the rights set out in Articles 8 to 11 are qualified rights because they permit interference if it can be justified against specified criteria.

**1.63** Common to the analysis of a problem allegedly involving any of the Convention rights is the requirement that there must have been an interference with that right; a Convention right must have been ‘engaged’. In deciding this it must be borne in mind that the European Court of Human Rights has often emphasised the importance of a broad approach to interpretation of the Convention, according full weight to the object and purpose of the ECHR, rather than a narrower, more literal approach, in order to make the rights accorded by the ECHR effective.<sup>87</sup> The case law of the European Court of Human Rights helps in many areas in this task of interpretation. Where there is an interference with one of the absolute rights that is the end of the matter in terms of whether there has been a breach of the ECHR.

**1.64** Where a qualified right is engaged, justification for the interference typically (see Articles 8 to 11) requires the following criteria to be satisfied:

- the interference must be ‘prescribed by law’ or ‘in accordance with the law’;
- any interference must have a legitimate aim; and
- the interference must be ‘necessary in a democratic society’ in the interests of that legitimate aim and proportionate to the pursuit of that aim.

### *Prescribed by law/in accordance with the law*

**1.65** ‘Lawfulness’ means more than merely ‘authorised’ by law. The European Court of Human Rights has held that, in addition, for a rule to be ‘prescribed by law’ or ‘in accordance with the law’, it must satisfy the requirements of the principle of legal certainty:

- *Accessibility*, ie the law must be adequately accessible: the citizen must be able to have adequate information, in the circumstances, of the legal rules applicable in a given case.
- *Foreseeability*, ie the law under which action is taken must be ‘formulated with a sufficient degree of precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.’<sup>88</sup> The European Court of Human Rights has held that a law which failed to describe the conduct covered by it otherwise than by reference to the standards of ordinary people did not meet the present requirement,<sup>89</sup> whereas it has been held that a law which described the behaviour covered ‘by reference to its effects’ did.<sup>90</sup>

<sup>87</sup> See *Wemhoff v Germany* (1968) 1 EHRR 55, ECtHR; *Loizidou v Turkey* (1995) 20 EHRR 99, ECtHR.

<sup>88</sup> *Sunday Times v United Kingdom* (1979) 2 EHRR 245, ECtHR (a case concerned with ‘prescribed by law’ in Art 10). ‘Prescribed by law’/‘in accordance with the law’ in Arts 8, 9 and 11 are to be read in the same way: *ibid*, para 48; *Silver v United Kingdom* (1983) 5 EHRR 347, para 85; *Malone v United Kingdom* (1984) 7 EHRR 14, para 66; *Steel v United Kingdom* (1998) 28 EHRR 603, ECtHR.

<sup>89</sup> *Hashman and Harrup v United Kingdom* (2000) 30 EHRR 241, ECtHR; para 10.75.

<sup>90</sup> *Steel v United Kingdom* (1998) 28 EHRR 603, ECtHR.

### *Interference for a legitimate aim*

**1.66** The legitimate aim of the interference referred to in Articles 8 to 11 must be one of the aims specified as a potential justification in the article concerned, such as the prevention of crime or disorder, or the protection of the rights and freedoms of others.

### *Necessary in a democratic society*

**1.67** The reference to a ‘democratic society’ in Articles 8 to 11 means that regard must be had not only to the legitimate aim which the interference was intended to protect but also to the importance of the freedom in question in such a society. It is not enough that the interference is simply reasonable or desirable; there must be a ‘pressing social need’ for it, although it need not be indispensable.<sup>91</sup> According to the jurisprudence of the European Court of Human Rights, whether an interference is ‘necessary in a democratic society’ involves the application of the principle of ‘proportionality’. ‘Proportionality’ requires that the interference be ‘proportionate to the legitimate aim pursued’.<sup>92</sup> It is intended to ensure that a fair balance is struck between the relevant right of the individual and the legitimate aim(s) which the interference sought to protect.

Interference with a right may be disproportionate if, for example, it applies to more cases than necessary or if it interferes more than necessary in cases where it properly applies. Where there has been a prosecution and conviction the basic issue is whether the prosecution, conviction or sentence (or any related order), taken individually or together, is or are proportionate to a legitimate aim under the relevant Article.

The proportionality of a legislative interference is judged by looking at the current effect and impact of the provision, not the position when it was enacted or came into force.<sup>93</sup>

### *Articles 5 to 7: principle of legal certainty*

**1.68** As noted in para 1.34, the principle of legal certainty, described in para 1.65, lies at the heart of Article 7 (no punishment without law).<sup>94</sup> So far challenges to offences based on grounds of vagueness have failed in a number of cases.<sup>95</sup> However, such a challenge succeeded in *Rimmington; Goldstein*,<sup>96</sup> where the House of Lords overruled a number of decisions on the common law offence of public nuisance on the ground that as interpreted and applied in them the offence lacked the clarity and precision which Article 7 requires. As a result the offence now seems to satisfy the requirement.

**1.69** The principle of legal certainty applies as well to Articles 5 (right to liberty and security) and 6 (right to a fair trial), whose terms require reference to the principle.<sup>97</sup>

<sup>91</sup> *Handyside v United Kingdom* (1976) 1 EHRR 737, para 49, ECtHR; *Silver v United Kingdom* (1983) 5 EHRR 347, para 85.

<sup>92</sup> *Ibid.* <sup>93</sup> *Wilson v First County Trust Ltd* [2001] UKHL 40.

<sup>94</sup> *Kokkinakis v Greece* (1993) 17 EHRR 397, ECtHR.

<sup>95</sup> See *Cotter* [2002] EWCA Crim 1033; *Misra* [2004] EWCA Crim 2375 (see para 8.107).

<sup>96</sup> [2005] UKHL 63. <sup>97</sup> See, eg, *Steel v United Kingdom* (1998) 28 EHRR 603, ECtHR (Art 5).



## Codification

### Key points 1.8

Codification refers to the formulation of a branch of the law in a single set of statements (a Code), replacing and superseding all existing rules, whether derived from the common law or from legislation, in that area. Reference has already been made to the fact that English law does not contain a Criminal Code.

**1.70** The criminal law desperately requires codification. Reference has already been made to the multitude of statutory offences and to the huge increase in recent times. There is also a mass of case law relating to the criminal law; often this consists of long judgments, sometimes by individual appeal judges saying different things. As a result, important parts of the criminal law are complex, ambiguous, uncertain, inconsistent or difficult to discover. This has implications in terms of the principle of legal certainty.<sup>98</sup> In addition, some parts of the criminal law are archaic.

These defects could be cured by a Code containing the general principles of liability and specific offences.

At the request of the Law Commission, a group of distinguished academic lawyers prepared a report, published in 1985,<sup>99</sup> formulating the general principles of liability which should be contained in a Code, including a standard terminology to be used in it, together with a draft Criminal Code Bill. In the light of the support shown for the principle of codification of the criminal law, the Law Commission published a report in 1989,<sup>100</sup> including a revised and expanded version of the draft Criminal Code Bill. Much of this draft Code simply restated in the standard terminology the then existing law. Parts of it, however, resolved matters of inconsistency or uncertainty under the existing law, while other parts incorporated various proposals for reform made in modern times. It became clear that a Bill as large as the Criminal Code Bill would present logistical difficulties for Parliament, and that this might increase the Government's reluctance to give parliamentary time to a Bill which offered it no political or strategic advantage. For this reason, the Law Commission decided to put forward a number of shorter draft Bills dealing with discrete areas of law as a way of making progress on the codification of the criminal law. The plan was that, when enacted, these Bills would eventually be consolidated into a Criminal Code Act. However, despite a number of Law Commission reports since 1993 implementing this strategy, successive governments have dragged their feet in terms of giving effect to them by introducing Bills in Parliament.<sup>101</sup>

**1.71** The Law Commission announced in 2008 that it had removed the codification project from its programme of work because of the increasing difficulty of the task due to 'the complexity of the common law, the increased pace of legislation, layers of legislation on a

<sup>98</sup> Para 1.65.

<sup>99</sup> *Codification of the Criminal Law: A Report to the Law Commission* (1985), Law Com No 143.

<sup>100</sup> *Law Commission A Criminal Code for England and Wales* (1989), Law Com No 177.

<sup>101</sup> 30% of these reports have been fully implemented and 30% partially implemented.



topic being placed one on another with bewildering speed, and the influence of European legislation'. Instead the Commission's current strategy is to focus on specific projects to reform the criminal law and to simplify and improve it, although the Commission aims to return to the codification of the criminal law at some time in the future.<sup>102</sup> 'Simplification' involves:

- giving the law a clearer structure;
- using more modern terminology;
- making the law in a given area more consistent with other closely allied areas of law; and
- making the law readily comprehensible to ordinary people by ensuring that it embodies sound and sensible concepts of fairness.<sup>103</sup>

## FURTHER READING

- |   |  |
|---|--|
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| Duff 'Rule Violations and Wrong Doings' in <i>Criminal Law Theory: Doctrines of the General Part</i> (2002) (Shute and Simester (eds)) 47 | Stevenson and Harris 'Simplification (of the Criminal Law) as an Emerging Human Rights Imperative' (2010) 74 JCL 516 |
| Emmerson, Ashworth, and Macdonald <i>Human Rights and Criminal Justice</i> (3rd edn, 2012)  | Ward and Akhtar <i>Walker and Walker's English Legal System</i> (11th edn, 2011) Pts I, II and IV                    |
| Hirst <i>Jurisdiction and Ambit of the Criminal Law</i> (2003)  | G Williams 'The Definition of Crime' (1955) 8 <i>Current Legal Problems</i> 107                                      |
| Lamond 'What is a Crime?' (2007) 27 OJLS 609  |  |

<sup>102</sup> *Tenth Programme of Law Reform* Law Com No 311, paras 1.2–1.6, 2.24 and 2.25.

<sup>103</sup> Law Commission *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (2010), Law Commission Consultation Paper No 193, para 1.1.