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# **Criminal Law in England and Wales - in a nutshell**

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# Overview of the lecture

- Four topics
  - What is criminal law
  - The court structure in criminal matters
  - The sources of English criminal law
  - The concept of a crime in English criminal law

# 1) What is Criminal Law

- The substantive rules relating to the establishment of criminal liability and imposition of punishment
- What is punishment?
  - Conceptual definition
    - Tasioulas: ‘(a) the deliberate infliction of hard treatment, (b) on an alleged wrongdoer, (c) because of the alleged wrongness of their conduct, (d) by someone who claims the authority to inflict it for that reason, where (e) the hard treatment is intended to communicate to the wrong-doer justified censure for their wrongdoing’.

- ECHR Art 6(2): Engel criteria
  - the legal classification of the offence under national law
  - the very nature of the offence
  - the degree of severity of the penalty that the person concerned risks incurring

- 2) The purpose and justification of criminal law
  - 1) *Prevention*: To influence people to abstain from engaging in criminal conduct
  - 2) *Retribution*: To punish the offender proportionately because he deserves it (just desert)

- Criminalization
  - The political decision to prohibit certain conduct (or omissions)
  - Harm principle
    - Mill ('On Liberty'): 'The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.'
    - Feinberg: It is always a good reason in support of penal legislation that it would be effective in preventing harm to persons other than the actor and there is no other means that is equally effective at no greater cost
  - The minimalist approach?

# 3) The criminal court structure

## UK Court Structure

### What is the Structure of the UK Court System?

Court Structure of Her Majesty's Courts Service

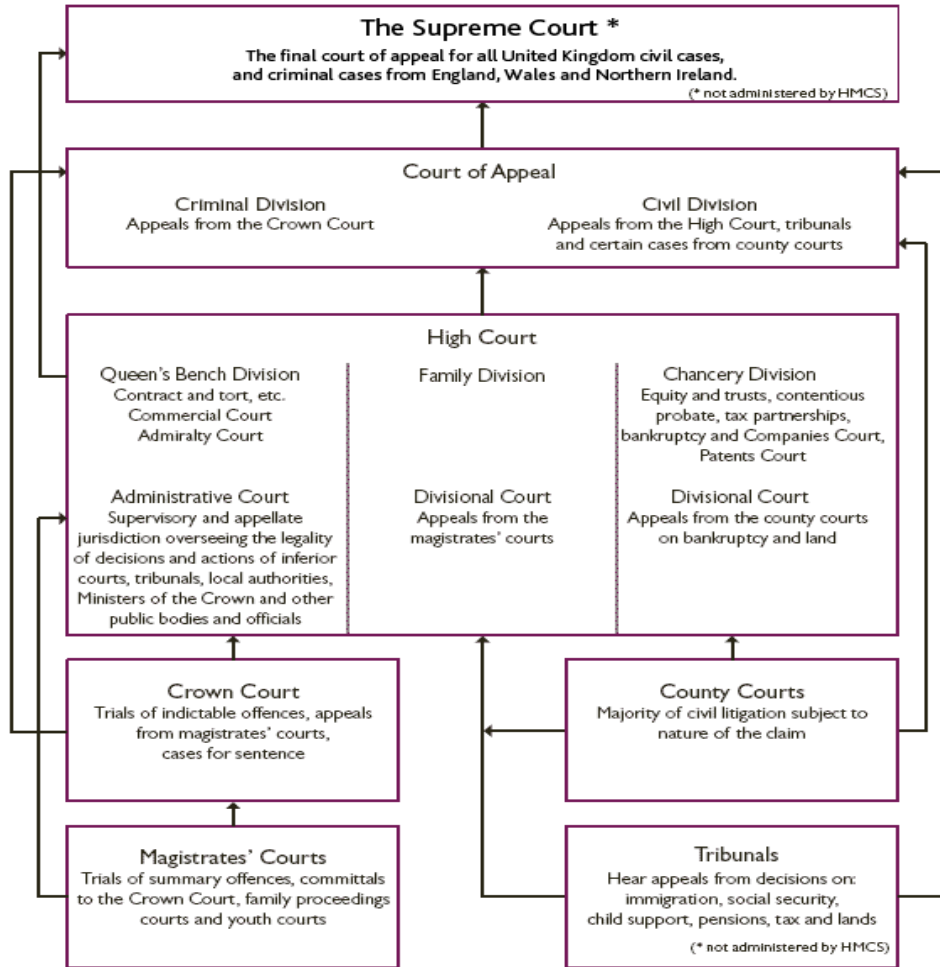


Diagram reproduced from Her Majesty's Courts Service – Structure of HMCS

- Magistrates
  - Dates back to 1195 (Richard I: keepers of the peace)
  - First instance in criminal cases (summary offences)
    - Summary offences (defined by statute): minor offences such as traffic offences, driving without qualification etc.
    - Either-way offences: offence is triable either on indictment (in Crown Court) or summarily (in Magistrates Court)
      - Fraud, theft, sexual activity with a child under the age of 16 etc.
    - Magistrates' court can refuse jurisdiction
  - Lay judges or a district judge
    - Bench consists of three lay judges (guided by justices' clerk) or a district judge
  - Maximum penalty: 6 months custodial sentence for one
    - 12 months for two or more either-way offences



## – Appeals

- To the Crown Court
- To the High Court (by way of case stated)
- Further appeal to the High Court or to the Supreme Court

- Crown Court
  - Sits in 92 locations in England & Wales
    - Judge and jury (12 lay persons)
    - Circuit judge or recorder (part-time)
      - Holding as post of recorder (for CC)
      - 10 year Crown Court qualification
    - Also High Court judges

## – Main tasks

- Hears indictable offences and some either-way offences
  - Indictable offences: more serious offences (murder, robbery, rape etc.) – jury trial
  - Sentencing of those who are convicted in the Crown Court, either after trial or on pleading guilty
- Sentencing of defendants committed from magistrates' courts
- Appeals from magistrates' courts (fact & law&sentence)

## – Appeals

- To the Court of Appeal (indictment)
- High Court (appeals from Magistrates')

- High Court of Justice (EWHS)
  - Established 1875
  - Three divisions
    - The Queen's Bench Division
    - The Chancery Division
    - The Family Division
  - Maximum of 108 judges (High Court Judges)
    - Holding the post as a circuit judge and possesses a 10 year High Court qualification
    - Customary knighthood

- Hears appeals from the Magistrates' court (the Divisional Court of the QBD)
  - Only points of law, or that the magistrates acted beyond their jurisdiction
  - Further appeal to the Supreme Court
    - Point of law & leave to appeal

- Court of Appeal (CA)
  - Established 1875
  - A criminal division (led by the Lord Chief Justice) and a civil division
  - Hears appeals on points of law from the Crown Court
    - Appeals must have certificate of fitness for appeal by trial judge, and be granted leave to appeal by the CoA
  - 38 Lord Justices of Appeal (LJ)
    - Holding post of the High Court and 10 year High Court qualification
    - Customary knighthood

- The Supreme Court of the United Kingdom (ULSC)
  - Supreme court in all matters under English and Welsh law, Northern Ireland law and Scottish civil law
  - Established by the Constitutional Reform Act 2005 and began work on 1 October 2009
    - Replaced the House of Lords judicial committee (Lords of Appeal in Ordinary; Law Lords)
  - Hears appeals on points of law from the High Court and the Court of Appeal
    - Requires certification that the point of law to be of general interest and leave to appeal is granted by the SC
  - 12 Justices
    - 15 years of Supreme Court qualifications
    - Peerage



## Other actors

- Solicitor
  - "GP"
- Barrister ("specialist")

- The Lord Chief Justice of England and Wales (1234)
  - The most senior judge in E&W and President of the Courts
  - The Lord Thomas of Cwmgiedd 2013-2017
  - Incumbent: Sir Ian Burnett, 1 October 2017-
- Attorney General
  - Political appointee and legal adviser to the Government
  - Power to prosecute in certain situations, and can refer cases to the CoA on points of law and sentencing
- Solicitor General
  - The Attorney General's deputy
- Director of Public Prosecutions (DPP)
  - Head of the Crown Prosecution Service (CRS), which oversees prosecution of criminal offences

## 4) The sources of English criminal law

- The main traditional source has been the common law
  - Common law – civil law
  - Developed through court decisions (*stare decisis*) and institutional writers (e.g. Sir William Blackstone)
- No written Criminal Code (uncertainty?)
- Today the bulk of the criminal law is found in scattered statutes
  - Offences against Persons Act 1861
  - Theft Act 1968
  - Serious Crime Act 2007 etc.
- Codification?

## 5) The concept of crime in English Law

- Two main elements: *actus reus* and *mens rea*
- *Actus reus* (the objective element)
  - Acts, occasionally omissions, possessions
    - Consequences: Causality (but-for test, of substance)
    - Exception: Automatism (involuntary conduct)
      - Ashworth: ‘a claim that the ordinary link between mind and behaviour was absent, or that the link had become distorted in some fundamental way’
      - Limitations: 1) insane automatism, 2) automatism through intoxication or 3) prior fault
  - Permission to act: self-defence/necessity

- The subjective element
  - Criminal capacity
    - The minimum age of criminal responsibility is 10
      - Is this reasonable?
        - » Can a 10 years old understand the wrongness of an act?
        - » Can a 10 years old understand the implications of criminal responsibility?
        - » Does a 10 years old have sufficient understanding of the proceedings so that he can participate in them meaningfully?

## – Insanity

- M’Naghten’s Case (1843):
  - In order to establish an insanity defense, it must be clearly proven that at the time of the act, the accused was laboring under such a defect of reason from disease of the mind that he did not know the nature and quality of the act he was committing; or if he did know it, he did not know what he was doing was wrong.

- Fault and *Mens rea* – objective responsibility?
  - Ashworth: ‘Criminal liability should be imposed on persons only if they were sufficiently aware of what they are doing, and of the consequences it may have, that they can fairly be said to have chosen the behaviour and its consequences.’
  - The mental element varies according to the offence

- Sweet v Parsley [1970] AC 132: where Parliament has not indicated otherwise there is a presumption of *mens rea*
  - Lord Reid: ‘...there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea. ... it is firmly established by a host of authorities that mens rea is an essential ingredient of every offence unless some reason can be found for holding that that is not necessary’



- B v DPP [2000] 2 AC 428
  - The presumption is a ‘constitutional principle’
  - Lord Nicholls, relied on Sweet and Parsley:
    - ‘The question, therefore, is whether, although not expressly negatived, the need for a mental element is negatived by necessary implication. "Necessary implication" connotes an implication which is compellingly clear. Such an implication may be found in the language used, the nature of the offence, the mischief sought to be prevented and any other circumstances which may assist in determining what intention is properly to be attributed to Parliament when creating the offence.’

- Varieties of fault
  - 1) Objective (strict) liability in certain cases
    - Many offences, particularly minor ('not truly of criminal character') ones are often based on strict liability
    - Deyemi and Edwards [2008] 1 Cr App R 25
      - Objective responsibility: possession of stun gun that defendants thought were a torch

- R. v G [2009] 1 AC 92 : Rape of child under 13 years of age
  - Objective responsibility: no defence that the accused believed the other person to be aged 13 or over
  - G. v. the United Kingdom, No. 37334/08, 30.8.2011
    - No violation
    - In principle the Contracting States remained free to apply the criminal law to any act which was not carried out in the normal exercise of one of the rights protected under the Convention and, accordingly, to define the constituent elements of the resulting offence. It is not the Court's role under Article 6 (1-2) to dictate the content of domestic criminal law, including whether or not a blameworthy state of mind should be one of the elements of the offence or whether there should be any particular defence available to the accused.

## – 2) Intention

- Desire, but low probability
- No desire, but high probability
  - R. v Woollin [1999] 1 AC 82: ‘the jury [is] not entitled to find the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty ... as a result of the defendant's actions and that the defendant appreciated that such was the case’

### – 3) Recklessness

- The perpetrator believes that his conduct will give rise to risk of harm, and it is unreasonable to run the risk that he foresees
  - I.e. awareness of risk (wide spectrum of cognitive awareness)
- R v. G [2004] 1 AC 1034: A person acts recklessly in respect of a result when he is aware of a risk that it will occur, and it is, in the circumstances known to him, unreasonable to take that risk.

– 4) Criminal negligence

- Mens rea: only intent or recklessness
- Eg. Road traffic offences (Road Traffic Act 1988 s. 3)
- No foresight of a risk of harm, but a reasonable man would have been aware of the risks of running *actus reus*, and would thus have abstained from doing so
- Ashworth: ‘The culpability of the unexercised capacity’

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