

CRIMINAL LIABILITY

Chapter synopsis

- I. Brief Outline of the Historical Development of Criminal Law
- II. The Function of Criminal Law
- III. The Criminalisation Decision – Justifications for Punishing
- IV. Legal Limits on Criminal Law
- V. Classification of Offences
- VI. Punishment

I. Brief Outline of the Historical Development of Criminal Law [1]

A. Before the Common Law

- 1. **Primitive societies** were characterised as tribal, rural, hierarchical and familiar, i.e. based on family or clan.
 - a. Ancient law in Ireland was Brehon law.
 - (1) Society revolved around kin or clan. Law was the customs of the clan and varied from clan to clan.
 - (2) No legislature or judiciary.
 - (3) Redress for wrongs was primarily left to the victim or kin of the victim.
 - b. Two principal concepts were found in most primitive societies.
 - (1) Outlawry.
 - (2) Blood feuds.
- 2. **Outlawry** – dispute between clan members. [2]
 - a. If a member committed a wrong against another member of the same clan he or she was deemed an outlaw.
 - b. The clan was entitled to attack the outlaw.
 - c. Pollock and Maitland: 'It was the right and the duty of every man to pursue the offender, to ravage his land, to burn his house, and hunt him down like a wild beast and slay him.'

3. **Blood feud** – dispute between members of different clans. [3]
 - a. The killing of a member of one clan by a member of another clan was sufficient to initiate a blood feud between the clans.
 - b. Blood feuds could be stopped by the payment of compensation, i.e. blood money.
 - (1) In Anglo-Saxon Britain, compensation was determined by an independent arbitrator. The greater the amount of vengeance, the greater the amount of compensation.
 - (2) Under Brehon law the amount of compensation was based upon the victim's honour price. Every person under Brehon law had an honour price.

B. Norman Invasion – Introduction of the Feudal System [4]

1. In general.
 - a. The Norman invasion of England in 1066 and Strongbow's landing in Ireland in 1172 began the establishment of a feudal structure in both countries.
 - b. Society no longer revolved exclusively around the clan.
 - c. The feudal system was characterised as a central system of power.
 - (1) All power emanated from the king.
 - (2) Power moved from the king down through the nobles, then down to the lowest serf.
2. The Crown began to exert control over criminal justice.
 - a. The ancient concepts of outlawry and blood feud were not conducive to order and the king's peace. Warring clans would not fight together on the battlefield for the king, etc.
 - b. The Crown removed the long tradition of the crime victim to claim compensation and instead took the money for the Royal treasury. (This was the origin of fines.)
 - c. By the Assizes of Clarendon 1166 and Northampton in 1179, murder, theft, arson and counterfeiting could only be dealt with in Royal Courts.
 - d. Eventually all crimes came under the jurisdiction of the king.

C. Early Common Law (Hanly, p.17) [5]

1. Criminal offences were generally divided into felonies and misdemeanours.
 - a. **Felonies** were serious breaches of the king's peace.
 - (1) 'Felony' comes from an old word meaning 'wicked' or 'treacherous'.

- (2) Felonies could not be bought off.
 - (3) Punishment – offender lost his land, his life and his chattels.
 - (a) Chattels are personal property, i.e. livestock, clothing and furniture.
- b. **Misdemeanours** were less serious offences.
 - (1) Originally called trespasses.
 - (2) Punishment – primarily by fines or corporal punishment.
- 2. **Importance of early Royal Courts.** [6]
 - a. No attempt was made by the early common lawyers to develop a comprehensive theory of criminal liability.
 - b. Attention in Royal Courts was directed to procedure. Procedural developments involved:
 - (1) Pardons (see [11]).
 - (2) Benefit of clergy (see [12]).
 - c. Attention to procedure resulted in substantive development, especially in the area of homicide.
 - (1) Anglo-Saxon law made no distinction between deliberate and accidental killing. Either could start a blood feud.
 - (2) Along with the ecclesiastical courts' insistence of intent, a tripartite distinction in the law of homicide developed in the Royal Courts. See [12].
 - d. **Tripartite distinction in homicides.** [7]
 - (1) **Deliberate killings** were punished by death and forfeiture.
 - (a) Benefit of clergy was not available.
 - (b) Similar to modern murder, see [325].
 - (2) **Chance medley**, or killings done in spontaneous quarrels.
 - (a) Did attract the benefit of clergy, and punishment consisted of forfeiture of chattels.
 - (b) See modern manslaughter [346] and provocation [336].
 - (3) **Accidental killings**, or those done in self-defence.
 - (a) A pardon could be granted and forfeiture of chattels was not enforced.
 - (b) See modern manslaughter [346].
 - e. **Other offences** – developed in a highly fragmented fashion.
 - (1) E.g. arson – originally confined to the burning of dwelling houses and barns. Fire damage to other structures was not arson.
 - (2) E.g. burglary – consisted of breaking and entering a house at night. Breaking and entering a house at any

other time was not a felony. A number of statutes were needed to rectify these anomalies.

D. Early Common Law Trials

[8]

1. **Felonies** – based upon information drawn up by a grand jury.
 - a. Grand jury was to represent the hundred in which the crime was committed.
 - (1) The hundred was similar to the modern electoral district. All English counties were divided into hundreds, or groups of villages and hamlets, etc. where 100 men lived.
 - (2) Purpose of grand jury was to determine if there was enough evidence to warrant a trial.
 - (a) If not, the accused was released.
 - (b) If so, according to the Assizes of Clarendon and Northampton the trial would take place on the basis of ordeal.

2. Trial by ordeal.

[9]

- a. It was believed that God would protect the innocent.
- b. Abandoned – all trials by ordeal were abandoned in 1215 when the Church refused to allow clerics to participate in trials. This led to the creation of the petty jury.
- c. Three trials by ordeal most commonly employed were trial by combat, hot iron or water.
 - (1) **Trial by combat** – introduced by the Normans, where the king's champion would fight the accused to the death. Fell into disuse by medieval times, was seldom used by about 1485, but only formally abolished in the nineteenth century when duelling was outlawed.
 - (2) **Trial by hot iron** – a red-hot iron was placed into the hand of the accused and the hand bound. After a few days the hand was examined. If the hand had blistered, the accused was guilty.
 - (3) **Trial by water** – the accused was bound and thrown into a river or lake. If the accused floated, he or she was guilty. This was a favourite trial for women accused of witchcraft.

3. Trials by jury.

[10]

- a. Petty jury had the burden of deciding the guilt or innocence of the accused.
- b. Originally trial by jury was optional.

- (1) The accused could decide to be tried by God and Country (jury trial) or be put in prison *forte et dure* (indefinite imprisonment).
- (2) Statute of Westminster I (1275) implemented *prison forte et dure*, but it was misread as *peine forte et dure*, which literally means 'the strong and hard pain'. The trial involved the accused being crushed to death with heavy weights.
- c. Early jury trials were very different from the trials of today.
 - (1) Trials were remarkably brief.
 - (a) Baker noted that as late as the nineteenth century, the average Old Bailey trial only took a few minutes.
 - (b) Until the Trials for Felony Act 1836, the accused had no right to counsel. It was feared that allowing counsel would lengthen trials.
 - (2) The accused could not force witnesses to attend until the Criminal Law Amendment Act 1867.
 - (3) The accused could not give sworn evidence on his own behalf until the Criminal Evidence Act 1898.
 - (4) Juries – for a guilty verdict, unanimity was required.
 - (a) Juries deliberated very little.
 - (b) The same jury could hear several capital cases in the same day.

E. Punishments under the Early Common Law

[11]

- 1. **Felonies** were punished severely.
 - a. Originally penalty was mutilation appropriate to the crime, e.g. a thief lost his or her hand.
 - b. Soon replaced by hanging and forfeiture.
 - c. Treason penalty was being drawn and quartered as well as forfeiture.
 - d. Pardons – the accused could avoid the usual penalties by seeking a pardon from the king.
 - (1) Pardons were often sold and Parliament felt it necessary to enact the Statute of Northampton in 1328, limiting pardons to killings done accidentally or in self-defence.
 - e. Transportation – from James I (1603–25), a convicted felon could be transported to a colony where he or she could provide slave labour.
- 2. **Misdemeanours** were usually punished with a whipping and/or fines.

F. Influence of the Church on the Development of Criminal Law **[12]**

1. Outlawry and blood feuds.
 - a. While the Crown wanted to get rid of these ancient concepts to consolidate power, etc., the Church wanted to get rid of them to save souls.
2. The birth of *mens rea*.
 - a. The Church argued for moral culpability (responsibility) in criminal matters, which led to the beginning of a theory of criminal responsibility.
 - b. Equated crime with sin.
 - (1) To sin a sinner had to purposely defy the will of God.
 - (2) Therefore, to commit a crime an offender had to purposely defy the law.
3. Defences of infancy and insanity were recognised and expanded over time.
 - a. McAuley and McCutcheon note that:
 - (1) By 1330 lunatics convicted of homicide began to receive a king's pardon.
 - (2) Near this time the doctrine of *doli incapax* emerged and the parameters of the defence of infancy began to develop.
 - (a) *Doli incapax* – children under the age of seven (First Holy Communion) were deemed incapable of committing crimes.
 - (b) Doctrine of *doli incapax* survived almost in its original fourteenth-century form in Ireland until the Children Act 2001. See [175].
 - b. See [179] *et seq* regarding the defence of insanity and [174] *et seq* regarding the defence of infancy.
4. **Escaping punishment.**
 - a. **Sanctuary** – places of worship were beyond the remit of the civil authorities. Offenders would seek to escape the harsh justice of the early common law by seeking sanctuary in churches. Civil authorities were reluctant to despoil places of worship with force.
 - (1) Parish churches – in small parochial churches a person seeking sanctuary could only be granted forty days of refuge. After forty days the offender could surrender for trial or agree to leave the country. If the offender chose to leave the country, he or she would be given safe passage to the nearest port and allowed to leave. If the offender returned, he or she could be executed.

- (2) Great religious houses, such as the large abbeys, where there was no limit on refuge. Some large religious houses attracted large communities of sanctuarians, much to the annoyance of the Royal authorities. Sanctuary was severely limited and finally abolished in 1623.
- b. **Benefit of clergy** – developed in the reign of Henry II after his conflict with Thomas a Beckett. Clerics accused of a crime were handed over to the Church authorities to be tried in ecclesiastical courts under the Canon law, where punishments were less severe than in the Royal Courts.
 - (1) Neck verse – the test for determining whether an offender was a cleric was based upon literacy. If the offender could read a particular Psalm, known as the neck verse, he was found to be a cleric and given to the Church to try.
 - (2) Expansion – the neck verse test was abolished in 1706 and the benefit expanded substantially. The benefit was finally abolished in 1827.

II. The Function of Criminal Law (Hanly, p.19)

[13]

A. In General

- 1. Aim of criminal law is social control.
 - a. However, all law is designed to achieve social control.
 - b. Criminal law is distinguished from other areas of law because of punishment.
- 2. Protection – criminal law protects:
 - a. Individuals.
 - b. Society.
- 3. Historically.
 - a. Early criminalisation, i.e. the justifications for what conduct should be criminal offences, lacked any theoretical foundation.
 - (1) Crimes were created by judges (sometimes Parliament) to stop conduct that threatened the social order.
 - (2) Social order was the Crown and Church.
 - (a) Treason – reflected the Crown's interest.
 - (b) Adultery, murder, sodomy – reflected religious prohibitions.
- 4. Today, preservation of society is not the only aim – quality of society is of importance. [14]
 - a. By protecting values deemed important enough to need criminal law protection.

- b. Reduction of crime.
 - (1) This requires actual enforcement of the criminal law.
- c. Ashworth has identified the enactment of numerous regulatory offences, e.g. health and safety regulations with strict liability and criminal sanctions.
- d. Wilson has identified the protection of both public and private interests.
 - (1) Support of public interests in:
 - (a) Preventing physical harm, e.g. murder, manslaughter, etc.
 - (b) Proscribing personal immorality that are injuries to society's well-being, e.g. bigamy, incest, bestiality, etc.
 - (c) Preventing moral corruption of the young, e.g. gross indecency, statutory rape, etc.
 - (d) Maintaining the integrity of the State and administration of justice, e.g. treason, perjury, tax evasion, etc.
 - (e) Maintaining public order and security through offences, e.g. riot, affray, public intoxication, etc.
 - (2) Support of private interests in remaining free from:
 - (a) Undesired physical interference, e.g. assault, false imprisonment, etc.
 - (b) Being offended through crimes such as indecent exposure.
 - (c) Undesired interference with property, e.g. theft, etc.

B. Function of Criminal Law

[15]

- 1. Is to set boundaries for:
 - a. Individual behaviour.
 - b. The State regarding its power to coerce and punish individuals.
 - c. However, Clarkson believes that the function of criminal law is one of maintaining and securing maximum compliance with the values important to society as needing the protection of criminal law.
 - (1) When values are maintained, most people do not commit crimes.
 - (2) For those who do commit crimes, the law uses stigmatic punishment as a mechanism for preventing or minimising criminal activity.
 - (3) The net aim is securing a reduction in crime.

2. **Setting boundaries for individual behaviour.** [16]
 - a. By determining the conduct that should be deemed criminal, i.e. criminalisation decision.
 - (1) Educative deterrence – criminal law is used to reaffirm selected important social values.
 - (2) Declaring an activity criminal has an influence on conduct and beliefs.
 - b. By reserving criminal law to control conduct that cannot be regulated by:
 - (1) Other means of social controls, e.g. education, religion, social convention.
 - (2) Other areas of law, e.g. tort, contract, etc.
 - c. By defining the circumstances where criminal liability arises.
 - (1) Setting forth what conduct is criminal. See criminal liability [121].
 - d. By structuring the criminal offences – see classification of offences [38].
 - e. By punishing offenders – individual and general deterrence.
 - (1) Individual deterrence – offender will find punishment so disagreeable he or she will not reoffend.
 - (2) General deterrence – punishment of offender will deter others from crime.
3. **Setting boundaries for the State to coerce and punish individuals.** [17]
 - a. By determining the conduct that should be deemed criminal and therefore limiting power to punish conduct not identified.
 - (1) Legality principle – *nullum crimen lege, nulla poena sine lege*.
 - (a) Translated: ‘No crime without law, no punishment without law.’
 - (b) Meaning: An individual cannot be convicted of a criminal offence unless his or her conduct was defined as criminal before he or she acted.
 - (2) Criminal laws should be clear and precise to allow the defendant to adjust his or her conduct.
 - (3) Interpretation of imprecise or ambiguous criminal laws should be strictly construed, i.e. should be biased in favour of the defendant.
 - b. By reserving criminal law to control conduct that cannot be regulated by other means of social controls or other areas of law.

- c. By defining the circumstances where criminal liability arises keeps the State from punishing for activities that do not fall within the parameters of the statute, etc.
- d. By structuring the criminal offences and thereby setting forth available punishment that can be inflicted for the particular offence.
- e. By requiring proportionality between offence and punishment.

C. Theories of How Criminal Conduct Should Be Identified.
(Hanly, p.9–14)

1. **Two primary theories have been advocated:** [18]
Liberal theory – respect should be shown to the autonomy of individuals.
Moral theory – criminal law should enforce and reflect morality and only punish behaviour that is morally wrong.
2. **Liberal theory** – associated with the ‘harm principle’. [19]
 - a. Liberalism – John Stuart Mill (1859).
 - (1) The only purpose for which power can be exercised over the will of a member of a civilised community is to prevent harm to others.
 - (a) Liberty requires that the only legitimate reason for criminalising behaviour is that it causes harm to others.
 - (b) Criminal law should not be used to control conduct that is not harmful or to prevent a person from harming himself.
 - b. Reformed liberalism – Jeremy Bentham (1748–1832). [20]
 - (1) The primary aim of criminal law is deterrence.
 - (2) Argued that for criminal law to be effective in preventing harm to others, it had to act as a deterrent.
 - (3) For criminal law to act as a deterrent it requires clarity and predictability.
 - (a) Clarity requires that criminal law must be clearly stated.
 - (b) Predictability – criminal law must be known in advance.
 - i. Critical of common law offences where a judge could declare conduct a crime where before it was not known as a crime.

- ii. Referred to common law as 'dog law' because individuals were summarily punished after acting.
 - (4) For effective deterrent, proportionality required between crime and punishment.
 - (a) Level of punishment has to be equal to the level of harm.
 - (b) A rational criminal would conclude that the cost of punishment outweighs the benefits of crime and the criminal would make a rational decision not to commit the crime.
 - c. Other harm theories. [21]
 - (1) Paternalism – conduct should be criminal when it causes harm to others or to the actor himself.
 - (2) Offence principle – in attempting to deal with one of the primary criticisms of liberalism (reasonable people can differ on what is harm), Joel Feinberg advocated limiting harm to 'serious offences to a person's interest'.
 - d. Criticisms of harm principle. [22]
 - (1) Difficult to apply and controversial.
 - (a) Reasonable people can disagree over what is offensive or insulting.
 - (2) Anthropocentric, i.e. human focused.
 - (a) Focuses on individual harm rather than harm to the community.
 - (b) If there is no harm to humans, State intervention is not justified.
 - e. Successful use of harm principle as it:
 - (1) Influenced debates concerning issues such as consent in rape cases.
 - (2) Influenced debates concerning decriminalising homosexuality.
 - (3) Influences debates concerning decriminalising prostitution and marijuana.
- 3. **Moral theory** – associated with Lord Devlin in the 1960s. [23]
 - a. Criminal law should enforce and reflect morality and only punish behaviour that is morally wrong. Social order requires social solidarity or a widespread consensus that offending is wrong; subjecting offenders to punishment maintains that consensus and discourages future offences.
 - b. Criminal law is seen as an expression of moral condemnation and should punish conduct that threatens or undermines the common morality.

- c. Criticism – common morality is derived from Christian teachings and does not reflect a pluralist society. Even among Christian groups, views differ greatly on such things as abortion, divorce and euthanasia.
- 4. **Alternative theories of justification for criminal law** [24]
 - a. **Welfare theory** – Ashworth has identified feminist theorist Nicola Lacey as having developed an alternative justification for criminal law premised upon the values, needs and interests which a society has decided through its democratic processes are fundamental to its functioning and therefore require protection by criminal law.
 - b. **Republican theory** – developed by John Braithwaite and Phillip Pettit – promotes a republican conception of freedom with ‘dominion’, with freedom being held to be non-domination. Intervention by the law should be a measure of last resort, thus non-legal forms of regulation, such as informal social norms and practices, should be employed because they maximise dominion.
 - c. **Radical criminology** – criminal law represents the vested interests of the powerful. Aim of criminal law is the maintenance of social, economic and class structure. Only conduct falling foul of the interests of the elite are criminalised.
 - d. **Economic theory** – associated with Posner. Object of criminal law is to discourage ‘market bypassing’ and thus it discourages ‘economically efficient’ acts, e.g. stealing a neighbour’s television. The thief has bypassed the market where the owner would have received value for his television. Criticism – it does not help to distinguish between crimes and torts and it does not explain victimless crimes. Clarkson opines that it fails to recognise the moral context of criminal law.

III. The Criminalisation Decision – Justifications for Punishing (Hanly, p.9) [25]

A. Concerns a Discussion of the Policy Considerations of Making Certain Conduct Criminal

1. What social interest might be furthered by criminalising the conduct?
2. How might the social interest be furthered if the conduct is criminalised?
3. What are the costs of criminalising the conduct, i.e. weigh the costs against the benefits?

4. What is the probable result of balancing the costs and benefits of criminalising the conduct?

B. Applied – John and Mary are unmarried adults and were engaged in consensual sexual intercourse on a bench in the town centre at four o'clock in the morning. They were spotted by a taxi driver, who called the police because he believed that a rape was being committed. Should such conduct be a crime?
[26]

1. What social interest might be furthered by criminalising the conduct?
 - a. Liberal view – the role of the criminal law is to prevent and deter harm to others, thus eliminating harm to others is the social interest to be furthered.
 - (1) What harm is done to any person when two consenting adults engage in consensual sexual activity in a public place in the middle of the night?
 - (a) Is the potential to offend others enough? Some might argue that adult consensual sexual conduct can be viewed on TV at night, so why not in a public area?
 - (b) What about the taxi driver who suspected a rape was being committed? Was he harmed by the conduct rather than merely being offended?
 - b. Moral view – criminal law should reflect and enforce the core moral values in society.
 - (1) What core moral values might be furthered by criminalising two consenting adults engaging in sexual intercourse in a public area at night?
 - (a) The basic premise is that sexual activity is a private matter and should not be performed in a public place.
2. How could the interests identified be furthered?
 - a. Liberal view – criminalising sexual conduct in public will stop most of the activity, therefore it is less likely that others will be offended.
 - b. Moral view – criminalising the conduct will reinforce society's belief that sexual activity is a private matter that should not be a public activity.
3. What are the costs of criminalising the conduct?
 - a. Liberal view:
 - (1) Cost = individuals not allowed to engage in consensual sexual conduct in a public place.

- (2) Benefits = individuals will not be harmed, i.e. offended or upset.
- b. Moral view:
 - (1) Cost = individuals not allowed to engage in consensual sexual conduct in a public place.
 - (2) Benefits = upholding social value that sexual activity is a private matter.
- 4. What is the probable result of balancing the costs and benefits?
 - a. Liberal view – if upsetting or offending another is sufficient ‘harm’, conduct should be criminalised.
 - b. Moral view – conduct should be a crime.

IV. Legal Limits on Criminal Law – many limits developed in the common law and were incorporated into the Constitution and others come from international sources. [27]

A. Constitution (Hanly, p.5; 38–44) [28]

- 1. Principle of legality, see [33].
 - a. Article 15 – no retroactive criminal laws:
 - (1) An individual cannot be convicted of a crime when the activity engaged in was not a crime on the date performed.
 - (2) E.g. on 1 June Sean shot a fox that was killing his geese. On 1 July the Oireachtas enacted a statute making it an offence to kill foxes. Sean cannot be convicted under the statute for killing the fox on 1 June.
- 2. Personal rights. [29]
 - a. Article 40.1 provides that every person shall be held equal before the law.
 - b. Article 40.4.1 provides that no person shall be deprived of personal liberty except in accordance with law.
 - (1) Subsections provide specific procedures for taking a *habeas corpus* case to the High Court.
 - (2) *Habeas corpus* – roughly translated means ‘to bring forth the body’. This procedure allows a person who is being denied his or her liberty to be brought before a court to determine the legality of the detention.
 - (3) Note: Article 40.4.7 allows for the refusal of bail on the grounds of reasonable suspicion that the accused might commit a serious offence if set free on bail.
 - c. Article 40.5 provides that a person’s home is inviolable and is not to be forcibly entered except in accordance with law.

3. Criminal trials. [30]
 - a. Right to trial by jury – Article 38.5 provides that anyone charged with a criminal offence, other than a minor offence or one to be tried before a special or military court, is entitled to a jury trial.
 - b. Right to public trial – Article 34.1 requires that justice must be administered in public except in special and limited circumstances.
 - c. Right to due process – Article 38.1 requires that all criminal trials must be conducted in due course of law.
 - (1) All criminal trials must be conducted fairly with due regard for the personal rights of the accused.
 - d. Independent judiciary – Article 35.2 provides that judges are independent and subject only to the law and the Constitution.
4. Criminal legislation. [31]
 - a. Article 40.4 – criminal legislation must respect the right of personal liberty protected by 40.4.
 - b. Article 15.2.1 vests exclusive law-making power in the Oireachtas.
 - (1) It is no longer possible (as it was under the common law) for the courts to prohibit actions where there is a clear need for prohibition.
 - (2) However, the courts still retain the power to declare and expand upon existing common law rules.
 - c. 21st amendment (2001) prohibits the reintroduction of the death penalty.
5. Sentencing forms an integral part of the administration of justice. *Deaton v. AG* [1963] IR 170. [32]
 - a. As a result sentencing must conform to the constitutional requirements of justice, fairness and independence that apply to all aspects of a criminal trial.
 - b. Proportionality – Irish courts are constitutionally prohibited from imposing sentences that are excessive in relation to the crime and the degree of blameworthiness of the offender.
 - c. *People (AG) v. O'Callaghan* [1966] IR 510, Walsh J. held that the concept of personal liberty protected by the Constitution prevents the punishment of any person in respect of any matter of which he or she has not been convicted.
 - (1) No preventative justice – an offender cannot receive a sentence that is excessive in relation to the crime committed and the degree of guilt.

- (2) Incapacitation theory of punishment (see [42]) is not allowed.
- d. Power to pardon – Article 13.6 provides the President with the power to commute or remit punishments imposed by the courts.

B. Common Law

[33]

1. Principle of legality requires that an individual cannot be convicted of a crime when the activity engaged in was not a crime on the date performed. This principle was endorsed in the Constitution. Additionally, there are two supporting postulates:
 - a. Criminal laws should be clear and precise to allow the defendant to adjust his or her conduct.
 - b. Interpretation of imprecise or ambiguous criminal laws should be strictly construed, i.e. should be biased in favour of the defendant.
2. Principle of proportionality is an important and recurring concept in criminal law. [34]

- a. All justification defences contain a proportionality requirement.
 - (1) An individual is not justified in using unreasonable or non-proportional force in defending himself/herself or another.
- b. Punishment is required to be proportionate.
 - (1) E.g. Flood J. in *People (DPP) v. WC* [1994] ILRM 321 – ‘The selection of the particular punishment is subject to the constitutional principle of proportionality...’.

3. Presumption of innocence – the defendant is innocent until proven guilty. [35]

- a. The burden of proof – the defendant must be proved guilty beyond a reasonable doubt.
 - (1) Note: The burden of proof is not the same thing as the standard of proof.
 - (a) Burden of proof is concerned with who bears the duty of proof, i.e. the prosecution.
 - (b) Standard of proof relates to the level of proof required to convict the defendant, i.e. the defendant must be proved guilty beyond a reasonable doubt.
- b. *Woolmington v. DPP* [1935] AC 462 – Viscount Lord Sansky wrote the often quoted statement: ‘...throughout the web of the English criminal law one golden thread is always seen, that it is the duty of the prosecution to prove the prisoner’s guilt.’ [36]

- (1) Woolmington Principle – even where the prosecution can establish both elements of the offence (*actus reus* and *mens rea*, see [52 *et seq*]) its duty is not complete. The presumption of innocence also requires that the prosecution negate every explanation or defence consistent with the innocence of the defendant.
- (2) Exceptions:
 - (a) A statute may place on the defendant the burden of disproving certain elements of the offence.
 - (b) The defence of insanity must be proved by the defence.
- (3) Falsity of ‘golden thread’ quote – per McAuley and McCutcheon: ‘[a]s we have seen, even if we go back no farther than the nineteenth century, this claim is transparently false.’ See generally [10].

C. International Sources

[37]

1. Section 2 of the European Communities Act 1972 – that all treaties and other Acts of the Communities are binding on the State and part of the domestic law of the State.
2. International agreements – the Supreme Court has repeated that with regard to international agreements, Article 29.6 means that in the absence of incorporation the Convention is not part of domestic law. *In Re O’Laighleis* [1960] IR 93.
 - a. Hogan and Whyte state that the European Convention on Human Rights and other international agreements have had a significant indirect effect in domestic law.
 - (1) The European Convention for the Protection of Human Rights and Fundamental Freedoms was adopted by Ireland in 1950.
 - (2) The Convention protects a number of rights, all of which can impact on Irish criminal law and/or justice. For example, the right to marry and found a family has implications for the prison service. The rights protected include:
 - (a) The right to life.
 - (b) The right to freedom from torture or degrading treatment or punishment.
 - (c) The right to freedom from slavery, servitude and forced or compulsory labour.
 - (d) The right to liberty and security of the person.

- (e) The right to a fair and public trial within a reasonable period of time.
 - (f) The right to freedom from retrospective criminal law and no punishment without law.
 - (g) The right to respect for private and family life, home and correspondence.
 - (h) The right to freedom of thought, conscience and religion.
 - (i) The right to freedom of expression.
 - (j) The right to freedom of assembly and association.
 - (k) The right to marry and found a family.
 - (l) The right to an effective remedy.
 - (m) The prohibition of discrimination in the enjoyment of the rights as set out under the Convention.
- (3) The European Convention on Human Rights Act 2003:
- (a) Places a general duty on Irish courts to interpret Irish law in a manner compatible with the Convention and to take account of the decisions of the European Court of Human Rights (ECHR).
 - (b) Where such interpretations are not possible, the Irish courts may declare Irish law as incompatible with the Convention.
 - (c) Incompatible declarations do not affect the validity of Irish law, but a party may seek redress before the ECHR, or petition the State for *ex gratia* payment.
 - (d) The most likely areas of Irish criminal law open to challenge under the Convention are those areas with imprecise definitions:
 - i. manslaughter under Article 7.
 - ii. lawful use of lethal force under Article 2.
 - iii. insanity defence under Article 6.
- (4) European Convention for the Prevention of Torture and Other Inhuman or Degrading Treatment or Punishment (1987) was ratified by Ireland in 1988.
- (a) A committee of independent experts, one from each State, is mandated to examine the treatment of persons deprived of their liberty.
 - (b) Committee makes regular visits to places of detention in Member States and publishes reports. It has highlighted the need for States to make regular inspections of places of detention, etc.

V. Classification of Offences (Hanly, p.17–9) [38]

A. Under the Common Law (see generally, brief history [5])

1. Felonies are more serious crimes, e.g. murder, rape and kidnapping.
 - a. Sentence for felonies was usually the death penalty and forfeiture.
2. Misdemeanours are less serious crimes.
 - a. Sentence for misdemeanours was usually fines or imprisonment.
3. Criminal Law Act 1997, section 3 abolished the distinction between felonies and misdemeanours.

B. Criminal Law Act 1997, Section 3 [39]

1. Arrestable offences are any offences that carry a penalty of at least five years' imprisonment.
 - a. An arrestable offence also covers attempts to commit an offence that carries a penalty of at least five years' imprisonment.
 - b. Section 4(1) and 4(2) provide that a person committing or having committed an arrestable offence may be arrested without a warrant by the police or a private citizen.
 - c. A citizen's arrest may only take place to prevent the offender from avoiding arrest by the police.
 - d. Section 7(2) provides that it is an offence to impede the arrest of anyone who has committed an arrestable offence.
2. Summary offences are of a minor nature and are tried in the District Court without a jury. They are usually prosecuted by the police or some other State agency, such as the Environmental Protection Agency.
3. The Criminal Justice Act 2006, section 8 amended arrestable offences to include offences at common law punishable by five or more years' imprisonment.

VI. Punishment is what Marks a Criminal Offence from Actions Prohibited by Other Agents of Social Control [40]

A. Theories (Hanly, p.19–36)

1. **Retribution** – punishment is right or wrong. [41]
 - a. Historically retribution meant vengeance, i.e. an eye for an eye.
 - (1) Punishment is justified on the basis that a crime has been committed.
 - (2) *Lex talionis* – the infliction upon the wrongdoer is the same injury inflicted upon the victim.

- b. Modern retribution – is known as ‘just deserts’.
 - (1) Rejects *lex talionis* – offenders receive punishment simply because they deserve it.
 - (2) Central theme is the belief that human beings are free, autonomous beings who act as they choose to act.
 - (3) Focus of approach is totally on the past criminal conduct of the offender.
 - (a) Future conduct is not relevant.
 - (b) Rehabilitation is not relevant.
 - (c) Deterrence is not relevant.
- c. Objective of punishment = retribution, i.e. a punishment that is proportionate to the harm caused to the victim.
- d. Criticism – it places a limit on the punishment that can be imposed and morally innocent offenders receive the same punishment as offenders who intentionally engaged in the criminal activity.
- 2. **Utilitarianism** – flows from Bentham’s work, see [20]. [42]
 - a. Simple classical form – holds that human action, either individual or collective, is justified on maximising human happiness or welfare.
 - (1) **Punishment is justified** to the extent that it has the potential result of better consequences than the failure to punish.
 - (2) **Basic premise** – punishment is a harm, thus it can only be used if some benefit accrues that would outweigh the harm inflicted, i.e. generally the reduction of crime.
 - (3) Deterrence is stressed – utilitarianism looks forward to the future.
 - (a) General deterrence – the defendant is punished to send a message to the public to forego criminal activity in the future. The defendant is used as a means to a desired end, i.e. the reduction in crime.
 - (b) Specific or individual deterrence – the defendant’s punishment is meant to deter the defendant from future criminal conduct. Specific deterrence can occur in two ways:
 - i. Incapacitation – the defendant’s imprisonment prevents him or her from committing crimes.
 - ii. Deterrence by intimidation – after the defendant’s release the punishment undergone will remind the defendant that if he or she chooses to commit another offence more pain (punishment) will be inflicted.

- b. **Non-classical utilitarianism** has the same goal to reduce crime. [43]
 - (1) Rehabilitation advocates the use of punishment to reform the offender rather than attempting to stop criminal conduct by fear of punishment.
 - (2) Sentence imposed should be the one most likely to rehabilitate the offender, not the one that the crime required or deserved.
- c. **Objectives of utilitarianism.** [44]
 - (1) Classical utilitarianism = deterrence and incapacitation.
 - (2) Non-classical utilitarianism = rehabilitation.
- d. Basic criticism of deterrence, incapacitation and rehabilitation – there is no necessary connection with the crime committed.
- 3. **Hart's mixed theory** – separates the purpose of punishment from the question of who should be punished and how much. [45]
 - a. Purpose of punishment – only justified on utilitarian/reductionist grounds.
 - b. Who shall be punished and how much – retributionist view that only offenders who have done wrong will be punished and not excessively.
 - c. Criticism of mixed theory – offences without moral fault, such as statutory rape and public welfare offences, would not be criminal activities.

B. Sentencing – *Judge had Almost Absolute Discretion in Imposing Sentences until Enactment of the Criminal Justice Acts 2006, 2007.* [46]

- 1. Constitutional requirements, see [27].
- 2. Statutory requirements:
 - a. Criminal Justice Act 1951, section 8 allows courts to take into account offences admitted to by a defendant who has been convicted of another offence.
 - (1) Advantages to the defendant is under section 8(2), which prohibits any subsequent prosecution for the offences taken into account.
 - b. Criminal Justice Act 1993 contains two provisions that can affect sentencing.
 - (1) Section 2 allows the DPP to appeal to the Court of Criminal Appeal any sentence thought to be unduly lenient.
 - (a) CCA has the power to substitute a new sentence or to refuse the appeal.

- (2) Section 5 provides that when sentencing a defendant for sexual or violent offences it must take into account the effect of the offence upon the victim.
3. **Objectives of sentencing** – Irish courts follow an amalgamation of three punishment theories: retribution, deterrence and rehabilitation. [47]
- a. Note: The Constitution will not allow any form of preventative justice such as incapacitation sentencing. *People (AG) v. O'Callaghan* [1966] IR501.
 - b. When sentencing, the judge must take into account factors in mitigation, i.e. those factors that would tend to reduce the sentence and result in leniency. See [49].
 - c. When sentencing, the judge must take into account facts in aggravation, i.e. those factors that would tend to increase the sentence, e.g. gratuitous violence, offender has previous convictions, an elderly or young victim.
4. Guilty pleas [48]
- a. Discount for early guilty plea – an early guilt plea is a relevant factor to be taken into account when sentencing an offender. *People (DPP) v. Tiernan* [1988] IR 250.
 - (1) Three justifications have been put forward for allowing the discount.
 - (a) Guilty plea may be an expression of genuine remorse.
 - (b) By admitting the charge, the defendant spares the victim the ordeal of testifying and being cross-examined.
 - (c) An early guilty plea allows the criminal justice system to be more efficient.
 - (2) Discount or reduction in sentence is not automatic for an early guilty plea. Section 29(2) Criminal Justice Act 1999 allows courts to impose maximum sentences where a guilty plea is received.
 - b. Where a defendant does not plead guilty, he or she may not be punished with the imposition of a heavier sentence. [49]
 - c. Leniency has been granted due to:
 - (1) The age of the offender.
 - (a) Young offenders are given a chance to mend their ways.
 - (b) Elderly offenders or those who find prison life exceptionally difficult through some other personal characteristic, such as illness or race. *DPP v. Clark* (1997) unreported CCA – the defendant was a Jamaican

who was serving a seven-year sentence. His nationality made prison life difficult. His sentence was reduced to five years.

(2) Hardship to the defendant's family.

(3) Co-operation with police.

5. **Mandatory minimum sentences** – The Criminal Justice Acts 2006 and 2007 provide for mandatory minimum sentences for convictions under the Misuse of Drugs Act 1977.

C. Types of Criminal Sanctions (Hanly, p.23–7) [50]

1. Prohibited sanctions:

- a. Death penalty – Criminal Justice Act 1990 formally abolished the death penalty and the 21st amendment prohibits its re-introduction.
- b. Corporal punishment – Criminal Law Act 1997, section 12 expressly prohibits corporal punishment.
- c. Teacher immunity – corporal punishment imposed upon a student has been abolished by section 24 of the Non Fatal Offences Against the Person Act 1997.

2. **Sanctions available:** [51]

- a. **Fines** may be imposed as a penalty in themselves or in addition to some other penalty. Fines are the most common sanction imposed. The amount of the fine depends on the statute. Due to the effect of inflation on the effectiveness of fines, the Law Reform Commission in its *Report on the Indexation of Fines* (1991) recommended that fines be linked to a price index. If a fine is not paid, the defendant may be imprisoned in addition to the fine.
- b. **Imprisonment** – the most severe punishment available under Irish law. In its *Report on Sentencing* (1996), the Law Reform Commission recommended that imprisonment be viewed as the sanction of last resort.
- c. **Forfeiture** – under various Acts property used in furtherance of an offence, e.g. car used in smuggling, or property that directly or indirectly represents the proceeds of crime, e.g. Proceeds of Crime Act 1996, may be forfeited.
 - (1) Most important provisions found in the Proceeds of Crime Act 1996 as amended by the Proceeds of Crime (Amendment) Act 2005.
 - (2) Statutes enforced by the Criminal Assets Bureau (CAB).
 - (3) Statutes permit the forfeiture of property in Ireland and,

in some cases, outside Ireland with a value of €13,000 where the property directly or indirectly represents the proceeds of crime.

- (4) *Gilligan v. Criminal Assets Bureau* [2001] 4 IR 113. The appellants argued that the protections under Article 38 of the Constitution (see [30]) to criminal defendants rendered the 1996 Act unconstitutional. The Supreme Court ruled that:
 - (a) Proceedings under the 1996 Act were civil in nature.
 - (b) There is no constitutional right to use the proceeds of crime, therefore there was no interference with constitutionally protected property rights.
- d. **Community service orders** – introduced into Irish law by the Criminal Justice (Community Service) Act 1983. Any court may impose a community service order against any offender over the age of sixteen. It can only be imposed in lieu of imprisonment. The Law Reform Commission in its *Report on Sentencing* (1996) recommended removal of this restriction. The order can require between forty to 240 hours of unpaid work performed under the supervision of a probation officer. The offender must consent to the order.
- e. **Probation** may be applied to any offender who has been convicted of an offence punishable by imprisonment. There are two forms:
 - (1) District Court – absolute discharge. After concluding that the offence has been proved, the defendant is released without formally proceeding to a conviction.
 - (2) Conditional discharge – allows any court to release the offender following conviction, subject to the defendant entering into an agreement to keep the peace, i.e. to behave, for a period up to three years. If the offender breaches the agreement he or she must appear and be sentenced for the original offence.
- f. **Compensation orders** may be imposed either as an alternative to some other sanction or in addition to another sanction. Under the Criminal Justice Act 1993 the courts have the power to order an offender to pay compensation to the victim, and this should be exercised unless the court has good reason not to impose it. The payment of compensation, however, does not preclude a sentence of imprisonment. *People (DPP) v. McLaughlin* [2005] IECCA 91.

- g. **Crime Prevention Orders** – Pursuant to Section 25 of the Criminal Justice Act 2007 upon conviction for certain indictable offences the court may make a post-release order. The order may last up until the maximum term of imprisonment for the offence, or ten years, whichever is shorter.

Review Questions

1. Should it be a criminal offence to cheat on (a) the Leaving Cert exam or (b) university exams?
2. In 2002 the United Nations Human Rights Committee said that it was satisfied that the ban on dwarf tossing was not abusive, but necessary in order to protect public order, including considerations of human dignity. Many dwarfs who previously earned a living by allowing themselves to be thrown as a pub game have fought the ban, saying that it discriminates against them. Should dwarf tossing be a criminal offence?
3. 'Six months for series of nuisance offences', *Irish Times*, 12 July – 'A man who committed a series of public nuisance offences, including having sex on the street, vomiting in a video shop and damaging the door of an amusement arcade, was jailed for six months yesterday...'. Should it be a crime for:
 - (a) Two consenting adults to engage in sexual activities in a public place?
 - (b) A person to vomit in a shop?
 - (c) A person to urinate in a shop, public place or in a private garden?
 - (d) A person to kick and injure the door of an amusement arcade when he was denied access for being intoxicated?
4. Michael has plead guilty to raping his former girlfriend, Rita. Michael has offered to pay Rita €15,000 in compensation. Rita would like to know if she accepts the compensation offered whether Michael would automatically not receive a prison sentence.
5. Tim and Tom have a bet regarding whether the Central Criminal Court will impose the maximum sentence for a notorious serial rapist who has plead guilty to ten charges of rape. Tim thinks that the law does not allow maximum sentences if a defendant pleads guilty. Tom thinks that it does. Who is correct?