# CRITICAL ANALYSIS OF CONTENT OF CRIME UNDER SELECTED COMMON LAW AND CIVIL LAW JURISDICTIONS

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**Abstract**

*This paper examined the Critical Analysis of the Content of Crime under selected Common Law and Civil Law Jurisdictions. The paper delved into historical background of these legal systems and how they have evolved over time. The paper highlighted the similarities and differences between common law and civil law jurisdictions. The analysis included case studies and references from legal literature to support the argument presented. Overall, this paper served as a valuable resource for researchers, legal practitioners, and policymakers in appreciation of the nuances of crime and the legislation in different legal systems. It is known that law is the regulator of the conduct of people in the society; law is a command to an uncommendable commander. Nearly every day, people commit one civil wrong/crime or another against person property or public. The focus of this article is on definition of law/crime, types of law/crime, sources of law/crime and elements of crime. The research methodology applied was purely doctrinal in nature because it involved the use of primary and secondary sources of information, primary sources included statutes and case laws, while secondary sources included textbooks, encyclopedia, dictionaries, and internet sources. It also included internet sources, summarily the resources materials used in the cause of writing this article was purely both traditional and digital or virtual library, therefore it was a library based in nature. It also included comparative analysis of content of crime under common law and civil law jurisdictions. The paper made several recommendations which if implemented would help improve the practice in those jurisdictions.*

**Keywords***: Law, Crime, Jurisdiction, Civil Law Jurisdiction and Common law jurisdictions*

## I.0 Introduction

Law according to Late Justice Kayode Esho, "Law as a social modulator and social engineering which is in consonance to sociological school of jurisprudence" and where there is no law there is no sin hence, the maxim "*Sines legel sines poena"* applies. Law can be defined as the act of parliament either at the State house of assembly or National assembly. It is the body of rules and regulations made by the legislative body in the assembly to govern the modus operandi of the people living in a state for peaceful co-existence[3]. According to Oliver Wendell Homes, law is what the judges in Massachusetts say in the Court room and nothing more pretentious is what the law is. In consonance to John Austin, law is a command which is made by the sovereign been for an inferior being which must be obeyed, and it is always backed by sanctions[4]. The focus of this article is on how Law regulates the society and makes it crime free.

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[3] C C Wigwe, *Jurisprudence and Legal Theory (Read wide Publishers Accra Ghana, 2011)3.*
[4] n1.

## 2.0 Conceptual Clarification

### a. Law

According to Black Law dictionary, Law can be defined as the regime which orders human activities and relations through systematic application of force of politically organized society, or through social pressure, backed by force, in such a society, it is the legal system which respect and obey the law[5]. Law is the aggregate of legislation, judicial precedents, and accepted legal principles, it is the body of authoritative grounds of judicial and administrative action, it is the body of rules, standards, and principles that the court of a particular jurisdiction apply in deciding controversies brought before them[6].

In other way round law can be defined as set of rules or principles dealing with a specific area of a legal system[7]. It is the judicial and administrative process, legal action, and proceedings when settlements negotiation failed; they submit their dispute to the law[8]. Generally, law is neither local nor confined in application to persons[9]. Imperative law is a rule in the form of a command, a rule of action imposed on people by some authority that enforces obedience[10]. Written law is a statutory law (legal positivism) together with constitutions and treaties, as opposed to the judge made law (Realist School of Jurisprudence)[11]. Unwritten law is a rule, custom, or practice that has not been enacted in the form of a statute or ordinance (Natural Law School)[12].

### b. Criminal Law

According to Black Law Dictionary, criminal Law is the body of Law defining offenses against the community at large, regulating how suspects are investigated, charged, and tried, and establishing punishments for convicted offenders. It is also termed Penal Law[13]. It is the body of law that defines criminal offenses, regulates the apprehension, charging, and trial of suspected persons, and fixes penalties and modes of treatment applicable to convicted offenders.

Criminal law is only one of the devices by which organized societies protect the security of individual interests and ensure the survival of the group. There are in addition the standards of conduct instilled by family, school, and religion. The rules of the office and factory; the regulations of civil life enforced by ordinary police powers; and the sanctions available through tort[14] actions. The distinction between criminal law and tort law is difficult to draw with real precision, but in general one may say that a tort is a private injury whereas a crime is conceived as an offense against the public, although the actual victim may be an individual.

[5] B A Garner, *Black Law Dictionary* (9th Edition West Publishing Company, 2009) 962.
[6] *Ibid*
[7] n4.
[8] n5.
[9] (n 6).
[10] (n 7).
[11](n 8).
[12] (n 9).
[13] B A Garner, *Black's Law Dictionary* (9th Edition, West Publishing Company,2009) 431
[14] <https://www.britanica.com> accessed 10th November 2023.

### 3.0 Principles of Criminal Law

The traditional approach to criminal law has been that a crime is an act or its omission that is morally wrong. The purpose of criminal sanctions was to make the offender give retribution for harm done and expiate his moral guilt; punishment was to be meted out in proportion to the guilt of the accused. In modern times more rationalistic and pragmatic views have predominated. Writers of the Enlightenment popularly known as *Siecle des Lmirere* such as Ceaser Beccaria in Italy, Montesquieu and Voltaire in France, Jeremy Bentham in Britain, and P.J.A. von Feuerbach[15] in Germany considered the main purpose of criminal law to be the prevention of crime. With the development of the social sciences, there arose new concepts, such as those of the protection of the public and the reform of the offenders. Such a purpose can be seen in the German criminal code of 1998, which admonished the courts that the "effects which the punishment will be expected to have on the perpetrator's future life in society shall be considered." In the United States Model Penal Code proposed by the American Law Institute in 1962 section 46 states that an objective of criminal law should be "to give fair warning of the nature of the conduct declared to constitute an offense and "to promote the correction and rehabilitation of offenders[16]." Since that time there has been renewed interest in the concept of general prevention, including both the deterrence of possible offenders (Retributive Theory) and the stabilization and strengthening of social norms (Utilitarian Theory).

### 3.1 Theories of Punishment

Since the essence of criminal law is to award sanctions and punishment to the accused that is later found to be a criminal in the court of law. Theories of punishment can be grouped into two namely:

1. **Retributive theory**: This school of criminal jurisprudence believes that the essence of criminal law is to deter other people from committing or omitting the act which can make such accused to be liable in law. Hence, this school believe that punishment should serve as deterrence to the other so as for the society to be crime free. This school is of opinion that the use of punishment is met for the correction of accused or criminals.
2. **Utilitarian theory**: This school is of opinion that the essence of criminal law in criminal jurisprudence is to reformate, rehabilitate, reeducate and to indoctrinate the criminal so as to become a better person in the society. This school does not believe in the use of punishment to correct accused persons.

### 3.2 Common Law and Code Law

According to black law dictionary, common law can be defined as the body of law derived from judicial decisions, rather than from statutes or constitutions. Common law is applicable in common law jurisdictions[17] such as Britain, United States of America, Nigeria, Ghana etc.

Common law is body of unwritten laws based on legal precedents established by the courts. Common law influences decision making process in unusual cases where the outcome cannot be determined based on existing statutes or written rules of law. The US common law system evolved from a British tradition that spread to North America during the 17th and 18th century colonial period. Common law is also practice in Australia, Canada, Hong Kong, India, New Zealand, and United Kingdom.

[15] <https://www.britannica.com> accessed 10th November 2023.
[16] Proposed United States Model Penal Code by American Law Institute (1962) s 46.
[17] B A Garner, *Black's Law Dictionary*, (9th Edition West Publishing Company, 2009) 313.

**Civil Law:** Civil law is a branch of law in common law legal systems such as England and Wales and the United States, the term refers to non-criminal law. The law is relating to civil wrongs and quasi contracts is part of the civil law. It also includes law of property related crimes such as theft vandalism is often suggested that civil proceedings are for the purpose of obtaining compensation for injury suffered. In England, the burden of proof in civil proceedings is in general with a number of exceptions such as committal proceedings for civil contents, balance of probabilities etc.

**Code law**: Is also a called a law code or legal code. It is a type of legislation that purports to exhaustively cover a complete system of law or a particular area of law as it existed at the time the code was enacted, by a process of codification. Although the processes are motivations for codification are similar in different law and civil law jurisdictions, their usage is also different.

**Codification:** It can be defined as the process of compiling, arranging, and systematizing the Laws of a given jurisdiction, or of a discreet branch of the Law into an ordered code[18]. The code that results from this process is called cases or statutes. Important differences exist between the criminal law of most English-speaking countries and that of other countries. The criminal law of England and the United States derives from the traditional English common law of crimes and has its origins in the judicial decisions embodied in reports of decided cases. England has consistently rejected all efforts toward comprehensive legislative codification of its criminal law; although now there is statutory definition of murder in English law as an offence under the common law of England and Wales (English legal system). It is considered the most serious form of homicide, in which one person kills another with the intention to cause either death or serious injury unlawfully[19]. Some Commonwealth countries, however, notably India, have enacted criminal codes that are based on the English common law of crimes. The criminal law of the United States, derived from the English common law, has been adapted in some respects to American conditions. In most of the U.S. states that common law of crimes has been repealed by legislation. The effect of such actions is that no person may be tried for any offense that is not specified in the statutory law of the state. But even in these states the common law principles continue to exert influence, because the criminal statutes are often simply codifications of the common law and their provisions are interpreted by reference to the common law. In the remaining states prosecutions for common law offenses not specified in statutes do sometimes occur. In a few States and in the Federal criminal code, the so called penal, or criminal, codes are simply collections of individual provisions with little effort made to relate the parts to the whole or to define or implement any theory of control by penal measures.

### 4.0 Classification of Crime

**Administrative crime:** An offence consisting of a violation of an administrative rule or regulations that carries a criminal sanction[20].

[18] B A Garner, *Black Law Dictionary,(* 9thEdition West Publishing Company,2009) 294.
[19] <https://www.bcl.com> accessed 12th November, 2023.
[20] *B A Garner,* Black Law Dictionary *(9th Edition, West Publishing Company, 2009)* 427.

1. Commercial Crime: A crime that affects commerce especially a crime directed toward the property or revenues of a commercial establishment[21]. Examples include robbery of a business, embezzlement, counterfeiting, forgery, prostitution, illegal, gambling, and extortion.
2. Common law crime: Crime that is punishable under the common law, rather than by force of statue[22], Statutory crime.
3. Computer crime: Crime involving the use of computer, such a sabotaging or stealing electronically stored data[23]. (Cybernetic crime)
4. Constructive crime: Crime that is built up or created when a court enlarges a statue by altering or straining the statue's language, especially to drawing unreasonable implications and inferences from it[24].
5. Continuous crime: Crime that continues after an initial illegal act has been consummated[25]. A crime such as driving a stolen vehicle that continues over an extended period.
6. Corporate crime: Crime committed by a corporation's representatives (Agents) acting on its behalf[26] (Principal). Examples include price fixing and consumer fraud in which principal may not be vicariously liable. Although a corporation as an entity cannot commit a crime other than through its representatives (Agents), it can be named as a criminal defendant also termed as organizational crime or occupational crime.
7. Economic crime: It is no physical crime committed to obtain a financial gain or a professional advantage[27].

Crime or offense in Republic of Uganda can be defined as an act which can make or render the accused to be punishable or liable in law[28] section 2, hence the elements of crime in Uganda is as follows.

## 5.0 Elements of Crime in Section 2 Penal Code of Uganda

1. The act must be written in statutory instrument.
2. Punishment must be awarded for the act.
3. The plaintiff must be suffered damage/injury.
4. The law must be capable of restoring the plaintiff to the normal position had it been the wrong has not been committed (*restitutio integrum*).
5. Omission was not mentioned in the above definition of crime; hence omission is not a crime in Uganda.

   According to section 2 of Nigerian criminal code, crime can be defined as an act or its omission which will make the accused punishable or liable in law for such an act or its omission[29].

## 6.0 Elements of Crime in Section 2 Of Nigerian Criminal Code

1. The act or its omission must be written in statutory instrument.

[21] n21.
[22] n22.
[23] n23.
[24] n24.
[25] n25.
[26] n26.
[27] n27.
[28] Penal code Republic of Uganda, s 2.
[29] Criminal Codec Act s 2.

2. Punishment must be awarded for the act or its omission.
3. The plaintiff must be suffered damage/injury.
4. The law must be capable of restoring the plaintiff to the normal position had it been the wrong has not been committed (*restitutio integrum*).
5. In Nigerian criminal code omission is an offence punishable in law.

Although, both *Mens Rea* and *Actus Reus* are compulsorily necessary in the defense of civil wrong. Hence the Latin maxim *"actus no facit reum nissi mens sit rea"* i.e. an act must concur with the state of mind before commission of crime can be established. In the case of strict liability offences *mens rea* is irrelevant.

**7.0 Classification of Crime**

**i. Crime as a Public Wrong**

Sir William Blackstone defines crimes in two ways, in his work, first as, "An Act committed or omitted in violation of a 'Public Law' forbidding or commanding it". Since the definition limits the scope to violation of a 'public law', it would only cover political offences and such offences are only a segment of the great bulk of criminal law[30]. Again if 'public law' is to denote 'positive' or 'municipal laws' it would be too wide to cover all legal wrongs, while every legal wrong is not a crime. If 'public law' is to include both constitutional and criminal law, it ceases to define crime in the German sense, as crime is not to be defined with the help of constitutional law in Germany. At a second stage Blackstone modified his definition as: "A crime is violation of the public 'rights and duties' due to the whole community, considered as a community" Sergeant Stephen, while editing Blackstone's commentaries modified the definition to some extent and his definition is: "A crime is a violation of a right considered in reference to the evil tendency of such violation as regards the community at large".

It narrows down the scope of crime to violation of rights only, whereas criminal law fastens criminal liability even on those persons who omit to perform duty required by law. For instance, a police officer who silently watches another police officer torturing a person for the purpose of extorting confession is liable for abetting the said offence, as he is under legal duty to prevent torture[31]. The definition stresses that crimes are breaches of those laws, which injure the community. However, all acts that are injurious to the community are not necessarily crimes. For instance, a person's conduct may amount to a crime even though, instead of being injurious, it is, on the whole, an advantageous act. So, the definition fails to give an adequate and comprehensive definition.

**ii. Crime as a Moral Wrong**

The word crime owes its genesis to the Greek expression '*Krimos*', which is synonymous with the *Sanskrit* word '*Krama*', meaning social order. Thus, the word crime is applied to those acts that go against social order and are worthy of serious condemnation. The word crime has also its origin in a Latin word, meaning 'to accuse' and a *Sanskrit* word *'kri'* (to do). Combining the modem meaning of both the roots, crime is a 'most validly accusable act'. Raffaele Garofalo defines crime in some

[30] W Blackstone, Blackstone Commentaries on the Laws of England, (4th Edition Clarendon Press Oxford London, 1769)1.
[31] S Stephen, The Stephen Lawrence Inquiry (Sirwmof Cluny Publishers, 1999)1.

sociological perspective in the following words: "Crime is an immoral and harmful act that is regarded as criminal by public opinion, because it is an injury to so much of the moral sense as is possessed by a community a measure which is indispensable for the adaptation of the individual society[32]". In this definition Garofalo says that crimes are those acts, which no civilized society can refuse to recognize as criminal and are redressable by punishment. He considers crime to have been some act 'labeled' as criminal by public opinion. His emphasis is also on the moral wrong, but there is quite an array of conduct which, though derogate from the cherished value of the community, are not considered crimes, for instance, immoral acts like ingratitude, hard heartedness, callousness, disregard for sufferings of others, though immoral, do not constitute crime. There are likewise some harmless crimes like vagrancy and loitering, some prophylactic crimes like consorting and possession of prohibited goods for example, weapons, drugs, illegal imports, and goods unlawfully obtained, but because social expediency requires that.

**iii. Crime as a Conventional Wrong**

Edwin Sutherland, notable criminologist defines crime in terms of criminal behaviour as: "Criminal behaviour is behaviour in violation of criminal law. No matter what the degree of immorality, reprehensibility, or indecency of an act, it is not a crime unless it is prohibited by criminal law[33]. The criminal law in turn is defined conventionally as a body of specific rules regarding human conduct which have been promulgated by political authority. Which apply uniformly to all members of the class to which the rules refer and which are enforced by punishment administered by the State? Characteristics of which distinguish the body of rules regarding human conduct from other, are therefore politicality, specificity, uniformity and penal sanction. This definition is rules also consistent with the concept '*nulla poena sines lege'*, which means there is no crime without law. Sutherland does not define crime as such. He merely enumerates the characteristics of a crime and says that crime is a violation of a criminal law, the essentials of crime being a behaviour which is prohibited by the State as an injury to the State and against which the State may react, at least as a last resort by punishment.

**(iv) Crime as a Social Wrong**

Crime is said to be as old as society itself. The definition, form and concept of crime, however, change with passage of time and regimes and attitudinal dimensions of society. Some crimes, in course of time, become obsolete and some assume new and broader line dimensions. Accordingly, definitions pour out from various jurists and criminologists depending on the times they live in. John Gillin, a renowned sociologist gives a sociological definition of crime, as he says: Crime is an act that has been shown to be actually harmful to society, or that is believed to be socially harmful by a group of people that has the power to enforce its beliefs, and that places such act under the ban of positive penalties. Another sociological concept of crime is seen in The 'Organic 'Analogy Theory', which understands human society as made up of inter related organs and any act which disrupts or threatens to disrupt the functioning of the system is criminal.

[32] B R Garofalo, Criminology (Gyan Books Ltd Indian, 2013)1.
[33] E H Sutherland, White Collar Crime, (2nd Edition, Holt, Rinehart and Winston Publishers, 1961)1.

By adhering to this analogy, it forms a consensus of society and any action perpetrated by any person constitutes an act of crime and the person is also criminal. In Soviet Russia crime has been defined in terms of socially dangerous acts. "A socially dangerous act (commission or omission) provided for by the criminal law, which infringes the Soviet social or state system, the social economics system, socialist property, and the other rights of citizens or any other socially dangerous acts provided for by the criminal law, which infringes the socialist legal order, shall be deemed to be a crime. Thomas defines crime "as an action which is antagonistic to the solidarity of that group which an individual regards as his own. These social interests are to be protected and preserved and realization of these calls for repressive measures and these may be called punishments[34]". Doal defines crime as "an act which the law prohibits and punishes, which is almost and always immoral according to the prevailing ethical standards which is usually harmful to society and whose repression is in the long run necessary or supposed to be necessary for preservation of existing social order." This definition was in line with the natural law school theory which emphasized on preservation of moral, culture of the society and fear of God. To Elliot and Merrill, crime constituted" anti-social behavior which the group rejects and to which it attaches penalties". Crime has also been defined as "violation of prevalent group norms, including conduct", an act by a member; of a given social group. Which by the rest of the members of that group is regarded as so injurious as showing such a degree of anti-social attitude in the actor that the group publicity, overtly and collectively reacts by trying to abrogate some of the rights. Whether crime is a product of nature or of society is difficult to decide on. However, it cannot be denied that what is or is not called a crime will depend upon the society. John Stuart Mill, the utilitarian thinker said, human beings owe to each other help to distinguish the better from the worse and encouragement to choose the former and avoid the latter. They should be forever stimulating each other to increase the exercise of their higher faculties and increased direction of their feelings and aims. In the conduct of human beings towards one another it is necessary that general rule should, for the most part, be observed in order that people may know what they have to expect.

**iv. Crime as a Procedural Wrong**

Crime has also been viewed from an angle that calls it a procedural wrong. John Austin defines crime in terms of the nature of proceeding, thus: "A wrong which is pursued by the Sovereign or his subordinate is a crime (public wrong). A wrong which is pursued at the discretion of the injured party and his representatives is a civil wrong (private wrong)". Prof. Kenny took the task of modifying the definition of Austin to some extent to proffer his own definition thus: "Crimes are wronging whose sanction is punitive, and is in no way remissible by any private person, but is remissible by the crown alone, if remissible at all." This definition is also not free from lacunae. The definition lays stress on remission by the crown, but there are number of compoundable offences that are remissible by some gratification from the accused. Crime has so far not been satisfactorily defined by any definition, and in this respect, Russell says: "Criminal offences are basically the creation of the criminal policy adopted from time to time by those sections of the community who are powerful, or astute enough to safeguard their own security and comfort by causing the Sovereign power in the State to repress conduct, which they feel may endanger their position." In the same way, Roscoe Pound has also put forth his opinion in this respect and says: A final answer to the question 'what is Crime? It is impossible because law is a living one, changing thing, which may at one time be uniform, and at another time give much room

[34] Thomas Morawetz, Criminal Law (Taylor and Francis Publishers, Connecticut,2000)

for judicial discretion, which may at one time be more specific in its prescription and at another time much more general.

v. **Crime As A Legal Wrong**

Jurists define crime as "wrong which the government deems injurious to public at large and punishes through a judicial proceeding in its own name" This definition of crime depends on the laws promulgated by the government from time to time. Any act becomes a crime at any time if it is declared to be so by a crime as soon as the state deems so. According to Tappan "Crime is an intentional act or omission in violation of criminal law, statutory law and case law, committed without defense of justification, and sanctioned by the State as a felony or misdemeanor".

According to the legal approach, crime is an act defined by law. Unless the elements specified by statutory, or case law are present and proved beyond a reasonable doubt a person may not be convicted of a crime. Tappan also maintained that non legal definitions were too loose, too ambiguous, and left too much room to the definer to determine what crime is.

Crime is an intentional act or omission according to a part of the definition of Tappan. Mere thinking about committing an act will not constitute crime. Sometimes words may also be construed as acts, as it reason or abetting another to commit a crime. Likewise, failure to do an act may also constitute crime but there must be a legal duty to act in a particular case, the act of omission must be voluntary. An act or omission must also be intentional, that is, criminal intent or *mens rea* must be present, because ancient maxim says, "evil intent is the essence of crime". There are, however, exceptions granted to the existence of criminal intent. There must be an act or omission in violation of a criminal law, both statutory or case law.

An act when done with intent must also be an act in violation of criminal law. One distinction, however, that is to be made in a discussion of crime is between criminal law and non-criminal law: Criminal wrongs and civil wrongs are often one and the same act as viewed from different standpoints, the difference being not one of nature but one of relation. When a criminal wrong has been committed, the State or Federal government brings the action against the person who is accused of committing the crime that is the State is the prosecutor and the accused the defendant. In a non-criminal wrong the act is against an individual and the person brings the action against the doer, the defendant, and is called plaintiff. In a criminal case, the state may seek any of the following probation, imprisonment, fine payable to the state or capital punishment In a non-criminal suit the party against whom the action is brought may have to pay monetary damages to the plaintiff.

According to Black Law Dictionary, offence can be defined as a violation of the Law[35], a crime often a minor one (Simple Offence). It is also termed criminal offence. Offence can be classified as follows:

1. **Acquisitive Offense**: It is an offence characterized by the unlawful appropriation of another's property[36]. e.g., Larceny

[35] B A Garner, *Black Law Dictionary* (9th Edition, West Publishing Company, 2009)1186.
[36] n36.

2. **Allied Offense**: It is a crime with elements so similar to those of another that the commission of the one is automatically the commission of the other[37].
3. **Arrestable Offense**: It is an offence for which the punishment is fixed by Law or for which a statute authorizes imprisonment for 5years, or an attempt to commit such an offense[38]. This statutory category, created in 1967, abolished the traditional distinction between Felonies and Misdemeanors.
4. **Bail able Offense**: It is a criminal offence for which a defendant may be released from custody after providing proper security[39], e.g., Misdemeanor theft is a bail able offense.
5. **Capital Offense**: This is a crime for which death penalty may be imposed; it is also termed Capital Crime[40].

***The elements of crime: There are two major types of elements of crime in Black Law Dictionary, namely.***

1. ***Mens Rea***: This means state of the mind, *mens rea* that is guilty mind, it is the state that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime. It is a criminal intent or recklessness, it is an evil intention to an act or its omission[41], the *mens rea* for theft is the intent to deprive the rightful owner of the property, the *mens rea* for rape is for the accused to have closed the doors and the windows, undressed the lady, and even without penetration rape has been committed because of the evil intention.
2. ***Actus Reus***: That is physical element or physical guilty act, it is a wrongful deed that comprises the physical components of a crime and that generally must be coupled with *mens rea* to establish criminal liability[42]. The *Actus Reus* for theft is the taking of or unlawful control over property without the owner's consent. Hence, the Latin Maxim "*Actus Non Facit Reum Mens Sit Rea*" that is an act must concur with the state of mind before establishment of criminal ability.

Although most legal systems recognize the importance of the guilty mind, or *mens rea*, the statutes have not always spelled out exactly what is meant by this concept. The Model Penal Code has attempted to clarify the concept by reducing the variety of mental states to four. Guilt is attributed to a person who acts "purposely," "knowingly," "recklessly," or, more rarely, "negligently." Broadly speaking, these terms correspond to those used in Anglo American courts and continental European legal theory. Singly or in combination, they appear largely adequate to deal with most of the common *mens rea* problems. They have been adopted literally or in substance by a majority of U.S. States and clarify and rationalize a major element in the substantive law of crimes. Under the Model Penal Code and in most States, most crimes require a showing of "purposely," "knowingly," or "recklessly." Negligent conduct will support a conviction only when the definition of the crime in question includes it.

[37] (n36)11.
[38] n38.
[39] n39.
[40] Nn40.
[41] B A Garner, *Black Law Dictionary* (9th Edition, West Publishing Company, 2009)1075.
[42] n42.

### *3 Liability without mens rea*

Some penal offenses do not require the demonstration of culpable mind on the part of the accused. These traditionally include statutory rape, in which knowledge that the child is below the age of consent is not necessary to liability. There is also a large class of "public welfare offenses," involving such things as economic regulations or laws concerning public health and safety. The rationale for eliminating the *mens rea* requirement in such offenses is that to require the prosecution to establish the defendant's intent, or even negligence, would render such regulatory legislation largely ineffective and unenforceable. Such cases are known in Anglo American law as strict liability offenses and in French law as *infractions purement matérielles*. In German law they are excluded because the requirement of *mens rea* is considered a constitutional principle.

### *4 Ignorance and mistake*

In most countries the law recognizes that a person who acts in ignorance of the facts of his action should not be held criminally responsible. Thus, one who takes and carries away the goods of another person, believing them to be his own, does not commit larceny, for he lacks the intent to steal. Ignorance of the law, on the other hand, is generally held not to excuse the actor; it is no defense that he was unaware that his conduct was forbidden by criminal law. This doctrine is supported by the proposition that criminal acts may be recognized as harmful and immoral by any reasonable adult.

The matter is not so clear, however, when the conduct is not obviously dangerous or immoral. A substantial body of opinion would permit mistakes of law to be asserted in defense of criminal charges in such cases, particularly when the defendant has in good faith made reasonable efforts to discover what the law is. In West Germany the Federal Court of Justice in 1952 adopted the proposition that if a person engages in criminal conduct but is unaware of its criminality, that person cannot be fully charged with a criminal offense; this has since been incorporated as rule in the German criminal code. Law and practice in Switzerland are quite similar. In Austria mistake of law is a legal defense. In the U.S. the Model Penal Code would allow a defense of mistake of law, but this would rarely include a mistake such as the existence or meaning of the law defining the crime itself.
It is universally agreed that in appropriate cases persons suffering from serious mental disorders should be relieved of the consequences of their criminal conduct. A great deal of controversy has arisen, however, as to the appropriate legal tests of responsibility. Most legal definitions of mental disorder are not based on modern concepts of medical science, and psychiatrists accordingly find it difficult to make their knowledge relevant to the requirements of the court.

Various attempts have been made to formulate a new legal test of responsibility. The Model Penal Code endeavored to meet the manifold difficulties of this problem by requiring that the defendant be deprived of "substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law" as a result of mental disease or defect. This resembles the Soviet formulation of 1958, which required a mental disease as the medical condition and incapacity to appreciate or control as the psychological condition resulting from it. The same may be said of the German law, although the latter includes in mental illness such disorders as psychosis and neurosis in addition to psychosis and provides for various gradations of diminished responsibility. Several U.S. jurisdictions, including federal law, have abandoned the volitional prong of the insanity test and

returned to the ancient English rule laid down in *M'Naghten's Case*[43]. According to that case, an insane person is excused only if he did not know the nature and quality of his act or could not tell right from wrong. The English Homicide Act of 1957 also recognizes diminished responsibility, though to less effect. The act provides that a person who kills another shall not be guilty of murder "if he was suffering from such abnormality of mind as substantially impaired his mental responsibility for his acts or omissions in doing or being a party to the killing." The primary effect of this provision is to reduce an offense of murder to one of manslaughter.

Intoxication is usually not treated as mental incapacity. Soviet law was especially harsh; it held that the mental disease defense was not applicable to persons who committed a crime while drunk and that drunkenness might even be an aggravating circumstance. American law is similar. In German law, on the other hand, intoxication like any other mental defect is acceptable as a defense in criminal cases.

### *6 Mitigating Circumstances and other Defenses*

The law generally recognizes several particular situations in which the use of force, even deadly force, is excused or justified. The most important body of law in this area is that which relates to self-defense. In general, in Anglo American law, one may kill an assailant when the killer reasonably believes that he is in imminent peril of losing his life or of suffering serious bodily injury and that killing the assailant is necessary to avoid imminent peril Sections 286-293 of Criminal Code[44] and sections 59-67 of Penal Code[45]. Some jurisdictions require that the party under attack must try to retreat when this can be done without increasing the peril. Under many continental European laws and in most U.S. States, however, the defendant may stand his ground unless he has provoked his assailant purposely or by gross negligence or unless the assailant has some incapacity such as inebriation, mistake, or mental disease. Other situations in which the use of force is generally justifiable, both in Anglo American law and in continental European law, include the use of force in defense of others, in law enforcement, and in defense of one's dwelling. Use of force in the protection of other property is sometimes limited to nonlethal force.

The use of force may also be excused if the defendant reasonably believed himself to be acting under necessity. The doctrine of necessity in Anglo American law relates to situations in which a person, confronted by the overwhelming pressure of natural forces, must make a choice between evils and engages in conduct that would otherwise be considered criminal. In the cited case of *United States* v *Holmes*[46]. A longboat containing passengers and members of the crew of a sunken American vessel was cast adrift in the stormy sea. To prevent the boat from being swamped, members of the crew threw some of the passengers overboard. In the trial of one of the crew members, the court recognized that such circumstances of necessity may constitute a defense to a charge of criminal homicide, if those sacrificed be fairly selected, as by lot. Because this had not been done, a conviction for manslaughter was returned. The leading English case, *Regina* v *Dudley and Stephens*[47],appears to reject the necessity defense in

[43] R v M'Naghten (1843) 8 E R 718; and (1843) 10 Cl & F.200.
[44] C C A Ss 286-293.
[45] P C Ss 59-67.
[46] United States V. Holmes 391 U.S.936 (1968)
[47] *Regina v Dudley* (1884) 14 Q.B.D 273

homicide cases. In German or French courts, however, the defendants would probably have been acquitted.

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

### *7 Some Particular Offenses*

All advanced legal systems condemn as criminal the sorts of conduct described in the Anglo American law as treason, murder, aggravated assault, theft, robbery, burglary, arson, and rape[48]. With respect to minor police regulations, however, substantial differences in the definition of criminal behaviour occur even between jurisdictions of the Anglo-American system. Comparisons of the continental European criminal law that based on the English common law of crimes also reveal significant differences in the definition of certain aspects of more serious crimes. Continental European law, for example, frequently articulates grounds for mitigation involving considerations that are taken into account in the Anglo-American countries only in the exercise of discretion by the sentencing authority or by lay juries. This may be illustrated with respect to so called mercy killings. The Anglo-American law of murder recognizes no formal grounds of defense or mitigation in the fact that the accused killed to relieve someone of suffering from an apparently incurable disease. Many continental European and Latin American codes, however, provide for mitigation of offenses prompted by such motives and sometimes even recognize in such motives a defense to the criminal charge.

### *8 Degrees of participation*

The common law tradition distinguishes four degrees of participation in crime. One who commits the act "with his own hand" is a (*principis criminis)* principal in the first degree. His counterpart in French law is the *auteur* (literally, "author"), or *coauteur* when two or more persons are directly engaged. A principal in the second degree is one who intentionally aids or abets the principal in the first degree, being present when the crime occurs; this is comparable to the French concept of *complicité par aide et assistance*, although in some countries, as, for example, Germany, that have adopted a wider (more subjective) interpretation of the concept, it includes the activity of *coauteurs I e. aider, accomplice and abettor*. In Anglo American law one who instigates, encourages, or counsels the principal without being present during the crime is called an accessory before the fact; in continental law this third degree of participation is covered partly by the concept of *instigation* and partly by the above-mentioned *aide et assistance*. The fourth and last degree of participation is that of accessory after the fact, who is punishable for receiving, concealing, or comforting one whom that person knows to have committed a crime so as to obstruct the criminal's apprehension or to otherwise obstruct justice.

In continental legal systems this conduct has become a separate offense. Italian and Austrian law treat all participants in a crime as principals in the first degree, except for accessories after the fact. The Model Penal Code and the law in most U.S. states treat the actions of an accessory after the fact as a separate statutory offense. In the other three degrees of participation, the accessory is treated as a principal in the first degree.

[48] <https://www.britannica.com> accessed 20th November 2023.

***9 Conspiracy***

Under the common law, conspiracy is usually described as an agreement between two or more persons to commit an unlawful act or to accomplish a lawful end by unlawful means[49]. This definition is delusively simple, however, for each of its terms has been the object of extended judicial exposition. Criminal conspiracy is perhaps the most amorphous area in the Anglo-American law of crimes. In some jurisdictions, for example, the "unlawful" end of the conspiracy need not be one that would be criminal if accomplished by a single individual, but courts have not always agreed as to what constitutes an "unlawful" objective for these purposes. Statutory law in some American states, following the lead of the Model Penal Code, have limited conspiracy offense to the furtherance of criminal objectives. The European codes have no conception of conspiracy as broad as that found in the Anglo-American legal system. In some of the continental European countries, such as France or Germany, punishment of crimes may be enhanced when the offense was committed by two or more persons acting in concert.

**Differences between Civil Law and Common Law**
**Difference and similarities between common Law and Civil Law Jurisdictions**

**1. The Role of Legal Precedents**

One difference has to do with the process of setting legal precedents. This is a function that is associated with common law. The goal is to evaluate a case in the light of what occurred and how those actions relate to laws that are already in place.

Attorneys will argue for or against the relevancy of one or more precedents when pleading their cases. They may also introduce recognized legal scholars into the proceedings as a means of promoting a specific precedent and its application to the case at hand, although the influence of legal scholars is somewhat limited.

The court may or may not consider a specific precedent as being relevant to the case. If the court does determine that it is relevant, the outcome of the present case may be applied to similar cases in the future.

According to Oliver Wendell Homes, law is what the judges in Massachusetts say in the Court room and nothing more pretentious is what the law is. In consonance to John Austin, law is a command which is made by the sovereign been for an inferior being which must be obeyed and it is always backed by sanctions[50].

**2. Precedents Verses Laws Codified by Legislation**

While some laws are enacted based on past court rulings, it's also possible for laws to come into being using the legislative process. This is where the concept of civil law comes into play.
Elected or appointed representatives prepare, evaluate, and ultimately vote on whether a new law will be passed and considered binding in the future. This results in a written constitution of laws that apply

[49] Criminal Code Act s 516.
[50] (n2)1.

to everyone living within that jurisdiction. This is generally considered a characteristic of civil law and leaves much less room for interpretation.

In a civil case, the role of the lawyer is to protect the rights of his or her client, either by offering a prosecution or a defense. Civil law has to do with legal actions that are not considered criminal in and of them. However, it is sometimes possible to file a civil action against an individual or an entity after a criminal conviction takes place, or even if the attempt at criminal prosecution is not successful.

**3. Legal Actions Related to Criminal Activity**

Aspects of common law govern actions that are defined as crimes by current laws. This would include cases where assault, theft, murder, or other actions currently considered crimes are the focus. The ruling in the case is based on whether the weight of evidence indicates guilt. The deciding party in a criminal case may be a judge or a jury. Based on the verdict rendered by the jury, the judge will then pass sentence based on past legal precedents.

Within common law, judicial actions are considered binding. That is, because they are made based on precedent, the ability to present reasonable doubt or not, and in many countries a presumption of innocence unless it is possible to prove otherwise.

**4. Legal Actions Related to Claims of Negligence**

Civil law comes into play when there are claims of negligence or other injuries that are not related to alleged criminal activities. This could include cases that involve personal injury, damage to property, or other negative effects that occur due to the intentional or unintentional negligent actions allegedly taken by the accused.

With civil cases, the outcome focuses solely on the plaintiff and the defendant. For example, if there's a dispute about the terms governing an offshore term deposit account, the court's ruling will only affect the bank where the account is established and the account holder. That outcome does not impact any third party. It is true that the outcome could create the grounds for new judicial or legislative action that results in a law. However, the award granted, or decision made by the court only applies to this specific case and does not establish specific punitive damages for any future cases.

**5. Judicial Decisions in General**

Judges and courts in many nations make decisions or pass judgments based on a variety of factors. Those who function within the realm of the criminal courts rely heavily on the binding actions of past criminal courts. They are also sworn to uphold current criminal laws. The same court or a higher court may overturn the decision. There is also some potential for the decision to be overturned by legislation. Within a civil court, precedents do carry some weight, as do the opinions of legal scholars. What is different is the judge is not necessarily bound to follow a narrow interpretation of current laws. The focus is more on how those laws apply in the case at hand. In rendering a decision, the court may establish the groundwork for eventually altering, expanding, or otherwise changing a law that has been in effect for some time. There is also often an appeals process that makes it possible for another court to review and possibly reverse the lower court's decision.

To sum up the differences, common law does not necessarily rely on codified laws or a written constitution. Civil law is typically codified within current laws or within a constitution.

Common law often focuses on alleged criminal activity, while civil law is more likely to deal with damages or injuries related to negligence. Decisions within common law are considered binding in general, while the decisions in a civil case apply to that case only.

**Conclusion**

A content of crime is a global pandemic and because of which Law, application of Rule of Law and constitution with full force constitutionalism is highly imperative to make our society crime free.