

Introduction to Criminal law

1.1 What is criminal law?

Criminal law is that body of law that forms part of the Kenyan legal system. It is concerned with “behavior which makes a person liable for punishment by the state.”¹ For example, such behavior may include: killing another person, stealing from another, rape, corruption etc.

1.2 Defining a crime

A crime in the Kenyan context can be defined as an act or an omission prohibited and punished by written law. The determination of what amounts to a crime requires a legal analysis process of its constituent element.

Key for this section is to offer a general understanding of the term “crime” as it relates to civil law, individual liberties and societal morals. Often, when one asks the question, what is the nature and characteristics of a crime, the answer turns on distinguishing crimes to civil wrongs as well as morality questions.

Criminal law deals with public wrongs or “*wrongs in rem*”; civil law is concerned with private wrongs or wrongs against a particular person(s). Sometimes, these distinctions overlap each other as acts that are civil in nature can also amount to crimes.

The public nature of a wrong lies in distinguishing civil and criminal wrongs and procedures in the following terms:

- Who is the complainant?
- Who is in control of over the respective proceedings?
- The nature of remedy
- The standard and burden of proof
- The application of statutes of limitation.

This can be summarised as follows:

	Nature/Characteristic	Criminal wrong	Civil wrong
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¹ Nicola Padfield, Criminal Law, (Oxford University Press: 2014, 9th Edition) 1.

1.	Nature of duty owed	Society at large	Interpersonal level
2.	Complainant	Any member of the public	The claimant
3.	Control of proceedings	Office of the Director of Public Prosecutions (ODPP)	The claimant in person
4.	Nature of remedy	Punitive/sanctions	Compensatory/restitution
5.	Standard of proof	On a balance of probabilities	Beyond reasonable doubt
6.	Burden of proof	Always on the state	Always on the claimant
7.	Application of Statutes of Limitations	Does not apply	Applies

1.3 Public order versus individual liberty in the application of criminal law

- Fundamental individual liberties
- Absolute/limited?
- Extent of limitation and crimes

1.4 Crimes as moral wrongs

On the question of criminal law and moral conduct: There is consensus among legal scholars on the role of morality in criminal law.

- See: *Shaw v DPP (1962) AC 220, (1961) 2 All ER 446*
- The Wolfenden Report on Homosexual Offences and Prostitution (1957) Cmnd 247
- Lord Devlin, *The enforcement of morals (1965)*

While persons cannot be prosecuted on the basis of morality, the significance of protecting the shared public morality necessitates the criminalization of certain acts and not others.

1.5 Classification of crimes

Kenya has adopted the common law practice of distinguishing crimes as felonies or misdemeanours. (section 4 Penal Code of Kenya)

- **Felonies** – serious crimes punishable by death or imprisonment for more than three years
- **Misdemeanours** – less serious crimes punishable by fine, probation, or imprisonment for less than three years.

This practice of distinguishing crimes was abolished by statute in England (See: Administration of Justice (Felonies and Misdemeanours) Ordinance, cap 328 of 1991) but it still applies in Kenya.

In England, crimes are classified differently:

- i. statutory or common law offences;
- ii. arrestable and non arrestable offences; and
- iii. indictable or non indictable – forum of trial

1.6 Rationale for studying criminal law

The study of criminal law in Kenya can be justified in three ways:

- To influence policy on preventing crime in the society
- To influence policy on how to improve the criminal justice system
- To provide students with career paths