

Some reflection on the relation between form and substance in criminal law

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In the last thirty years interest in the procedural aspects of law has grown tremendously. Nevertheless most authors see procedural law as subordinate to substantive law. In their view, the primary goal of criminal procedure is to facilitate substantive criminal law. Although in itself this view can be defended, this prevailing approach obscures the fact that the content of the norms, embodied in substantive law, partly depends on formal law, in particular the law of evidence. The significance of such norms in everyday life is determined to a large degree by the possibility of proving that they have been violated. If violations cannot be proved, they will go unpunished, with the consequence that no matter how strongly the norm may be embedded in public opinion, it will gradually lose its force.

In this paper an abstract reflection on the character of criminal law will demonstrate why in certain respects formal law takes precedence over substantive law, and why sometimes it does so dramatically (part I). Then the concept of intent will be used as an example to show how this can work out in practice (part II).

I The 'raison d' être' of criminal procedure

Is criminal law meant to punish sinners? Is that the reason it has been created? I don't believe so. One should clearly distinguish between punishing, as a human act, and the rules and principles of law that govern this activity. The aim of punishing people - no matter whether those aims have a repressive or a preventive character - are quite different from the reasons why punishment is regulated by law. It is no accident that criminal law came into existence; criminal law was created on purpose. This was not done to make it possible to punish; any more or less absolute ruler can (and probably will) punish without, or even in violation of criminal law. It cannot even be said that the norms that are embodied in substantive law are created by law. In principle, they are moral categories and as such are 'above the law'. They may be maintained by law, but can also be maintained in other ways. If maintained by law, in many cases they may be maintained by criminal, but also by private and/or administrative law.

What then is the quintessence of criminal law? Criminal law - as law - was created to protect the citizen against wrongful punishment. It is no accident that criminal law as a distinct field of law appears around the same time as public government. Criminal law is intended to protect the citizen against wrongful punishment, not by his fellow citizens, but by public government. Nor is it an accident that the concept of punishment itself is restricted to activities of public government. According to criminal law private punishment is no punishment!

How does criminal law protect the citizen against the public government? In the first place by creating an implicit rule or principle: punishment is only acceptable as a reaction to human behaviour (acts or omissions). Bad inclinations alone are never sufficient reason for punishment. Why? Probably because bad inclinations cannot be

proved unless they are manifested in human behaviour. Here then we have the core rule of criminal law, which gives it its main protective force: punishment is acceptable only if

- in a legal procedure has been found (formal aspect) that
- the citizen's behaviour fell within the terms of a more or less precise prohibitive rule or was not in conformance with a more or less precise instructive rule (substantive aspect).

Here we also find the cornerstones for an effective defence.

Because too much protection would even prevent a well-deserved punishment, the need to punish sinners and the need to protect the citizens against public government are symbiotic. There should be a balance between (the effects of) protective rules and the need to punish. This is strongly reflected in the way formal and substantive criminal law are constructed; many rules of criminal law are more 'punishing' than 'protective'. Nevertheless the *raison d'être* of criminal law as a field of *law* is determined exclusively by its protective aspects. The aims of criminal law are decidedly different from the aims of punishment.

We saw that - in principle - so-called substantive law does not create norms; it only indicates what norms may be maintained by punishment. But of course this is only the principle. Substantive law does *formulate* the norms, and in this way helps both to determine them and to influence their content. One of the main features of this process is that the basic norms (thou shalt not kill, thou shalt not steal, etc) are divided into a broad range of more specific norms and norms that are only meant to make it possible to comply with the basic norms (keep to the right when driving) or to control compliance (thou shalt keep books). This differentiation certainly aims at regulating the community; but it also provides for the need to clarify the norm. Substantive law gives meaning to the rule that criminal acts should be proven before they are punished; it does so by determining what exactly should be proven. Substantive law is less substantive than it seems to be!

The violation of the norm as specified by statute law has to be translated into an indictment; the prosecutor does not have to prove that the law has been violated, but rather has to prove that the indictment is correct. There are many different ways this has been implemented in domestic law; but the differences primarily have to do with the difficult question of the extent to which the judicial decision may be at variance with the original indictment. The principle seems to be the same everywhere: no punishment without a charge of illegal behaviour as formulated in an indictment and proven in a procedure guaranteeing the possibility of an effective defence.

II *Showing intent*

Only illegal behaviour may lead to punishment; a 'criminal mind' alone is not enough. But there should also be a *mens rea*; illegal behaviour in itself is insufficient, too. Although in many cases involving minor offences it is not necessary to prove a *mens rea* and it is up to the defendant to show that he could not help what he did, or even was justified in doing what he did, the prosecutor often has to prove *intent* before punishment is allowed. In other cases (proof of) intent will make it possible to impose a heavier penalty than without such proof. Generally the statutes governing criminal

law do not explain exactly what intent is. The layman will be tempted to say: intentional behaviour is acting knowingly and willingly. He is right.

Probably all systems of law have to deal with the problem that it is very difficult to prove the existence of what is nothing more than a state of mind, moreover a *past* state of mind, if the defendant denies his guilt or even if he simply remains silent. As a result, the practical significance of the concept of mens rea is primarily determined by specific rules of evidence. There are certain differences in the methods used by the courts in Europe, but the net results are more or less the same - although not quite, as we will see.

The most important rule in this field is a general principle of the law of evidence, to wit that absolute certainty is not necessary (and is usually unattainable, as well); proof 'beyond reasonable doubt' suffices. Another principle, accepted by all jurisdictions, is that by applying general rules of experience subjective elements like intent can be deduced from objective, cognizable, facts. In such a case Roman law already said: *res ipsa in se dolum habet*. If somebody shoots a bullet into someone else's head from short distance, this fact alone enables the court to deduce that he did so intentionally. The possibility that his external behaviour did not correspond with his internal disposition may be ignored as being highly improbable. This is acceptable until the defendant produces an (other) explanation. Then most jurisdictions want this explanation to be expressly refuted and to show the reasons for this refutation.

If these two principles don't bring sufficient recourse, the court may assess the defendant's behaviour by using the 'common citizen', the 'man on the Clapham omnibus', as a standard. It may be assumed that what experience shows him to have intended or to have known under the given circumstances is what the defendant intended or knew. Unfortunately most defendants are not common citizens ... Again it is up to the defendants to show that and to show the extent to which they differ from others.

Some legal scholars thought that under these circumstances intent, knowingly and willingly committing the offence, is not a subjective element, but is quite objective. When the state of mind of the defendant is deduced from cognizable behaviour, from facts, those *facts* would determine whether there was intent; this would make the defendant's *real* state of mind irrelevant. They would be right if not for one reason: sometimes it is possible to *disprove* the intent deduced from cognizable behaviour, or in any case an effort to do so will be permitted.

Of course the courts don't *have* to deduce intent from the behaviour of the defendant; their inner conviction that in the given case this deduction is acceptable is the decisive factor. And in the end it is also the court that determines what the common citizen would have known or would have desired to do. The courts in reality don't know this citizen, and cannot know him, simply because he does not actually exist. He is only a construction! The risk is that in reality what the courts imagine to be in the mind of the common citizen is more like what is in the mind of the common judge. A related and even greater risk is that the courts don't base their decisions on what the common citizen would have known, but on what he *should* have known, etc. This introduces a

normative element into the game. It leads the courts to the acceptance of intent, when in reality at most it was a case of recklessness: no malice, but sheer stupidity.

The problems of proving intent double in the case of attempt. There was a certain behaviour, but no result; did the defendant attempt to achieve that result, or not? Here we want to assess whether the behaviour of the (silent, or denying) defendant was intended to produce a certain prohibited result. To do so we first have to assess whether this behaviour was apt to cause that result; only if this is true, does it make sense to answer the next question, whether this behaviour was also meant to achieve that result. Both questions will be answered by applying more or less the same methods - the methods we used to assess intent.

So far we have discussed what can be described as a common opinion in the western systems of law. But what if someone plants a bomb in a busy bus station and phones the police five minutes before the bomb is set to explode? Let us assume the worst and suppose that the police arrive too late; ten people die in the explosion. Our man is arrested a few days later and denies that he intended to kill people; he says: I only wanted to incite terror, I warned the police in order to prevent people from being harmed. The first question is: should we believe him or was he fully aware that five minutes would not be enough time to clear the surroundings? If we don't believe him, an evidential problem has to be resolved. If we do, a second question rises. He did not want people to die, but according to the common citizen rule it may be assumed that he knew there was a substantial risk that the police would arrive too late (or that policemen would be killed)- does this mean that he intended to kill nevertheless?

In several jurisdictions the answer to the second question is an unqualified 'yes'. There the whole concept of intent has been broadened; intent not only includes *dolus*, 'full' intent, but also *dolus eventualis*, a concept that probably was developed, and in any case was adopted a long time ago, in Germany. Most continental lawyers prefer the term 'conditional intent' to the Latin term of *dolus eventualis*, but I will not follow them for the simple reason that some English authorities use the term 'conditional intent' to mean something rather different.¹

The concept of *dolus eventualis* was adopted without much hesitation - but also without mentioning its source - by the Dutch legislator, who in those days (the 1880's) was strongly influenced by German doctrine. Statute law itself does not recognize *dolus eventualis* in either Germany or the Netherlands; but in the Netherlands it was in any case the legislator himself who did so, in his comment on the Penal Code. The courts simply followed. The concept has also been generally accepted in Spain, where the German influence is still rather strong.

Dolus eventualis exists when the defendant is aware that his behaviour may have certain consequences prohibited by law, but still does not desist from that behaviour. Some authors imagined somewhat different criteria, such as would he have acted as he did if he had known for sure that the prohibited consequences would follow? Of course, no one will really be able to answer such a question; any answer would be pure

¹ See e.g. M.J. Allen, *Textbook on Criminal Law*, Blackstone, London, 2e dr. 1992, p. 175: 'we will kill him if he cheats us'.

speculation and as such worthless. In practice, this criterion leads to the same result as the definition given above.

What justifies assimilating *dolus eventualis* with 'full' intent is that in both cases the defendant may be reproached for a wrongful state of mind, a kind of malice; he fully accepted the possibility of committing a crime. This is different if the defendant sees the possibility of a certain result, but thinks: oh, this will not happen. His state of mind may be frivolous, but it is not malicious. And of course the situation is quite different if the defendant did not foresee the possibility of the illegal result at all, but should have foreseen this result.

Again the problem is how to know and how to prove what went on in the defendant's mind. Of course, the solution is the same as for 'full' intent: no absolute certainty is required, deduction from cognizable behaviour is allowed, the construct of the 'common citizen' may be used. And again the inner conviction of the courts will be decisive. The risks are also the same.

Much debate has been focussed on the following questions: would it be sufficient if the actor thinks certain consequences are *possible*, or should he think them *probable*? And what is decisive - their probability or what he thinks of their probability? In practice these nuances have no importance at all. We will never know what the defendant really thought; the courts have to deduce their decisions from the cognizable facts. As a result we will only be able to conclude that there was (sufficient) awareness, and whether the prohibited consequences were probable and not only that they were possible; and if what we conclude about what the defendant thought depends on the probability of the prohibited consequences as such, it is impossible to distinguish between probability and what the defendant thought about this probability.

However, I have to recall that our hypothetical bomber posed two different problems:
- if we believed him to have 'fully' intended to kill, we would hardly be able to prove his full intent.

- and if we accepted his own explanation, the question was whether there was nevertheless a state of mind equivalent to an intention to kill.

We answered the second question by saying that if he willingly and knowingly took the risk that people would have died, his state of mind was - as far as we are concerned - the same as that of someone who fully intended to kill. In doing so, we simultaneously resolved our first problem: when there is no difference in the law between full intent and *dolus eventualis*, it is sufficient to prove *dolus eventualis*. In this way *dolus eventualis*, although a concept from substantive law, acquires an important role in proving intent.

Now I will give some examples to illustrate what I have said before and to emphasize how much the courts tend to ascribe the state of mind the defendant should have had to the defendant when using the concept of *dolus eventualis*.

First I will give two examples from the most hazardous field, that of attempt:

* a poacher has been detected by the police. He tries to escape in his car. A policeman steps into the road and gives him a signal to stop. Instead he drives on and obliges the policeman to save himself by diving into the bank. Did the defendant intend to kill the policeman or did he only want to frighten him out of his way? If the policeman had not dived, he certainly would have been killed, and without any doubt the defendant was aware of this. What will the reasoning of the court be? Is this a case of *dolus*, a case of *dolus eventualis*, or neither one? Did the defendant really take the risk that the policeman did not, or could not, dive in time? Or was he (perhaps too) sure that he would?

The following case has more or less of the same character:

* a young Turk has been denied admittance to a dance hall without any acceptable reason. This dance hall has a large parking area. The young man goes back to his car, but when driving away he suddenly sees one of the door-keepers walking across the parking lot. He speeds up and drives his car straight in the direction of the door-keeper and chases him around the parking lot, until his victim saves himself by diving out of the way. What is this: a simple threat, or an attempted murder?

And then another example from the field of road traffic:

* a 19 year old boy has just bought a new motor bike. To show off he drives it through the neighbourhood at a speed of 120 kilometres per hour at the moment that children are leaving the local school. He drives straight into a group of children, killing two of them. Murder, manslaughter or just death by negligence?

French and Belgian doctrine generally depart from the supposition that one intends all the usual consequences of one's behaviour; we already find this supposition in the authoritative works of Garraud.² As a result the concept of *dolus eventualis* is hardly needed; some authors reject it completely; others are only very reluctant to accept it. As in Germany, the Netherlands and Spain no *dolus eventualis* will be accepted in relation to unusual consequences of a defendant's behaviour, unless he himself declares that he foresaw those consequences and acted nonetheless, the only practical difference between these two positions is encountered in that very exceptional case.

In England and Wales the law not only has quite a different structure, but even academic discussions regarding intent and culpability have scarcely been influenced by continental opinions; thus a comparison always promises interesting results. First of all it is noteworthy that the English seem to be less reluctant than most continentals to completely by-pass evidential problems by creating 'offences of strict liability', thus broadening criminal liability. But under English law either 'intent', 'recklessness' or '(gross) negligence' has to be shown for most crimes as well in order to get the defendant convicted – recklessness and gross negligence together being more or less equivalent to Dutch 'guilt' (*culpa*). Because England and Wales do not have a codified general body of criminal law, discussions of the meaning of these concepts are

² The most important is R. Garraud, *Traité théorique et pratique de Droit Pénal Français* ; I used the 2d edition, published by Larose, Paris, Vol. 1 1898, p. 545.

strongly related to specific crimes. We will have a closer look at the crimes of murder and rape.

'Murder' must be distinguished from 'manslaughter', comparable to the distinction between 'moord' en 'doodslag' in Dutch law - but on quite different lines. The concept of murder is intended to cover really reprehensible killings,³ while the several categories of manslaughter (including the Dutch 'dood door schuld') all have in common that the defendant is not sufficiently blameworthy to be classified as a murderer. As a result the distinction is not only extremely blurred, but also influenced by normative elements. Manslaughter functions as a dustbin category.

Like Dutch and German law, English law sought to include under the category of murder all those who acted with extreme recklessness 'on the basis that such gross recklessness evidences indifference to the value of human life and a willingness to kill which can be as reprehensible as most intentional killings.'⁴ Gross recklessness *could* include *dolus eventualis*:

* Mrs. Hyam poured petrol through the letterbox of the house of her lover's new mistress in the hope (so she alleged in court) of frightening her into leaving the neighbourhood, and ignited it, knowing people were asleep in the house. Two children died in the ensuing fire. Mrs Hyam's actions were characterised as 'extreme recklessness' and she was convicted of murder.⁵

The House of Lords nowadays prefers a somewhat less outspoken approach,⁶ although juries still may qualify a reckless killing as murder. The new criterion seems to be more strict than that used on the continent to determine *dolus eventualis*: it must be established that the defendant had 'virtual certainty' of ensuing death.⁷ Many think this unsatisfactory; '(.) violent protesters or terrorist bombers who do not necessarily mean to kill (.), could escape liability for murder if a clear and narrow definition of intention were specified'.⁸ But in another aspect the law in England and Wales is harsher than Dutch law, for example. Intention to cause *grievous bodily harm* suffices for murder if the victim (unexpectedly) dies (an example of so-called 'constructive liability'). 'The (.) rationale behind this rule is that a defendant who really intends to inflict serious bodily harm is running a grave risk that death might result from his actions'.⁹ Again the evidential problem is bypassed. Here Dutch law created a separate offence, 'zware mishandeling met dodelijk gevolg'.

In any case Mrs. Hyam's actions should be qualified as either murder or manslaughter. The distinguishing criterion is the probability of the result. 'Under current law, if one intends to break one's victim's leg (.) but instead she is killed, one is guilty of murder. But if one sets fire to a house foreseeing that the death of the occupants is *likely*, one is only guilty of manslaughter. This is clearly absurd.'¹⁰ Nevertheless, where 'the defendant subjectively foresees a risk of death or serious

³ Compare s. 210.1(1)(b) of the American Model Penal Code (1962): murder is to kill another 'recklessly under circumstances manifesting extreme indifference to the value of human life'. To complicate things further, in the US manslaughter is criminal homicide 'committed recklessly' (s. 210.3).

⁴ C.M.V. Clarkson, *Understanding Criminal Law*, Sweet and Maxwell, London, 3e dr. 2001, p. 202.

⁵ *Hyam v DPP* (1975) AC 55.

⁶ See e.g. Clarkson, o.c. 58/59 and p. 204. Although this means that *Hyam* is overruled, a conviction for murder would still be possible.

⁷ A. Ashworth, *Principles of Criminal Law*, Clarendon Law Series, OUP, Oxford 1991, p. 232/233.

⁸ Clarkson, o.c. p. 61.

⁹ Clarkson, o.c. p. 203. For 'constructive manslaughter' engaging in committing any unlawful act from which death results suffices, when this act is (albeit but slightly) dangerous (*idem* p. 207).

¹⁰ Clarkson, o.c. p. 205.

injury (but the degree of foresight fails to come within the (..) test of intention required for murder), the defendant will be liable for manslaughter.'¹¹

There seems to be no common opinion regarding whether foresight *is* intention or only *evidence* of intention.¹² In any case mere foresight of the *probability* of a consequence does not constitute intent: 'In determining whether a person has committed an offence a court or jury:

a. shall not be bound by law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but

b. shall decide whether he did intend or foresee that result by inference to all the evidence, drawing such inferences from the evidence as appears proper in the circumstances.'¹³

The courts found that 'evidence of knowledge of likely consequences, or from which knowledge of likely consequences can be inferred, is evidence by which intent may be established but it is not (..) to be equated with intent. If the jury find such knowledge established, they may, and using common sense they probably will find intent proved, but it is not the case that they must do so.'¹⁴

The 1956 Sexual Offences Act, section 1(2), decided comparable disputes connected with rape by defining this offence as follows: 'A man commits rape if (a) he has sexual intercourse with a person (..) who (..) does not consent to it; and (b) at the time he knows that the person does not consent to the intercourse or is reckless as to whether that person consents to it' – 'reckless' meaning that the defendant 'could not care less' whether the other person was consenting.¹⁵

We may conclude that in English law as well the tendency exists to resolve evidential problems by providing for more or less 'objective' criteria, so as not to be completely dependant on what the defendant wishes to reveal about his state of mind. And, as in France and Belgium, without accepting the concept of 'dolus eventualis' the same result *can* be reached.

III *Some conclusions*

Enough about the relation between substantive and procedural law; I expect that the results of our reflections on the content of the concept of intent have shown clearly enough how closely intertwined those two fields of the law are - - to put it mildly. I only want to add that the concept of dolus eventualis as such also seems to have been accepted by the ICTY, in the Blaskic case (3 March 2000): 'any person who, in ordering an act, knows that there is a risk of crimes being committed and accepts that risk, shows the degree of intention necessary (recklessness) to incur responsibility for having ordered, planned or incited the commitment of crimes' (Judgement par. 474), the authoritative French text uses the term 'dol eventuel' rather than 'recklessness'.

This brings me to a different subject, namely harmonisation. Within the European Union there is an ongoing discussion regarding whether we should try to harmonise penal law. The new European Arrest Warrant not only emphasizes the importance of

¹¹ Clarkson, o.c. p. 207.

¹² Ashworth, o.c. p. 150/151; Clarkson, o.c. p. 60.

¹³ Criminal Justice Act 1967, s. 8.

¹⁴ James LJ in Mohan (1976) QB 1 at p. 11.

¹⁵ Ashworth, o.c. p. 306.

this discussion; it also provides the supporters of harmonisation with new arguments. We can decide that the extradition law will no longer apply to someone who is suspected of murder by the judicial authorities of another member state of the Union, but that this person may simply be surrendered to those authorities. But does this not suppose that a person defined as a murderer in, say, Italy, is also defined as a murderer in England? Without taking any positions on this particular subject, I would propose that harmonisation of statute law alone is a futile effort without looking at the concepts that underlie the texts of the statutes. The study of concepts that are being used everywhere within the Union, such as intent, makes this clear enough. Perhaps the harmonisation should even begin with those concepts because they are fundamental, but also because it seems that they do not generally differ from one another as much as their more detailed implementation in statute law does in many cases. Where there are differences, perhaps the best approach would be to simply neglect them. I am convinced that the new International Criminal Courts will prove to be powerful and stimulating players in this field. And this again emphasises the importance of comparative law: before harmonising the law, one should know what the law is. I fear that there is still a great deal to be done here.

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