The contours of what is criminal. (FEATURE on Criminal Law)

Bowal, Peter, and Benjamin Lau
LawNow 29.6 (June-July 2005): p8(3).

"If we do not maintain justice, justice will not maintain us. "--Francis Bacon, 1615

We often hear the expression that "something is (or ought to be) criminal." This usually signals that the behaviour referred to is more than bad, wrong, unethical, or illegal. It is of the status of criminal, which is to say, it is in the worst category known to our legal and social system, our most serious moral wrongs. Crime, like obscenity, is hard to define, but we seem to know it when we see it.

There is continuous review in Canada on what actions should be labelled as criminal (criminalization) and which current crimes might be downgraded in modern society to mere regulatory offences (de-criminalization).

The federal government, which is responsible for all criminal law across the country. is choosing to criminalize more corporate misbehaviour which affects employees, the environment, and capital markets. Occupational health and safety breaches and retaliation against whistle-blowers, both of which until last year were regulatory offences, are now crimes.

On the other hand, alcohol consumption and gambling, activities once considered victimless crimes--but crimes nevertheless--have now been repealed or are merely regulated in less coercive and more remedial ways. Homosexual behaviour is no longer a crime Some jurisdictions regulate prostitution and drug use in the interests of health, instead of prosecuting them. The decriminalization of marijuana for medicinal or small-scale recreational use is currently the subject of Bill C-17. Possession of small quantities may soon be a mere ticketable provincial regulatory offence, like consuming alcohol in public or jaywalking. These changes may begin with judicial decisions, especially Charter cases.

The realms of crime and mere regulatory offences are important to distinguish. One must acknowledge a criminal record when asked, such as when applying for a job or travelling internationally. By comparison, convictions for regulatory, offences such as speeding violations or parking tickets do not yield a criminal record, and those convictions are not required to be disclosed. Here we describe the history of the development of criminal law in Canada, including the judicial structuring of criminality. We see that the answer to "what is criminal?" is found in the contours of contemporary society.

The History of Criminal Law in Canada

Prior to Confederation, the Canadian colonies not only created courts and legislatures on the English model, but they also took over the law, including the criminal law, from England. Each province had also assembled its own criminal law in response to local concerns. This resulted in a patchwork of crimes across the country. Prime Minister Sir John A. Macdonald's "national policy" included the consolidation of provincial criminal laws into a national criminal code after the founding of the Dominion of Canada in 1867. The new British North America Act (renamed the Constitution Act, 1867) "also conferred exclusive legislative authority over "the Criminal Law [and] the Procedure in Criminal Matters" to the national government. The first Canadian Criminal Code in 1892 contained both substantive and procedural law. It was based on the 1879 draft code of English jurist James Fitzjames Stephen (which failed to pass in Westminster) and the Canadian consolidation.

Since its passage in 1892, the Code has not undergone any wholesale revision. Several series of amendments have been made, the most important in 1955 from a commission appointed with the specific mandate of updating and improving the Code. Even then, the substantive revision was minor. The important change was to abolish English and Canadian common law (judge made) offences. No one can be convicted of a crime unless it is legislated by Parliament, although an accused may still assert any common law defences. Various amendments, dealing with particular issues, have been made almost annually to the Criminal Code ever since.

Crimes versus Quasi-Crimes

While only the federal government in Canada may create crimes, both federal and provincial levels of government can create quasi-crimes (regulatory offences). Section 92(15) of the Constitution Act, 1867 clothes the provinces with power over "the Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects [under provincial control]."

Quasi-crimes at all levels serve an important regulatory function across the full scope of our personal lives and of business. Hence motor vehicle traffic, human rights, pollution control, alcohol consumption, advertising and other trade practices, public health, stock trading, and occupational safety are all regulated in the public interest by offences called quasi-crimes.

Quasi-crimes are generally less serious than real crimes from the Criminal Code, and although penalties include fines and imprisonment, penalties are generally less severe than those for real crimes. About 40,000 criminal and quasi-criminal offences are prosecuted annually in Canada.

The Definition of Crime

Offences enacted by different levels of government may overlap, and this might raise a constitutional division of powers problem since only the federal government can enact crimes. Several judicial decisions have considered the federal government's jurisdiction over the criminal law under our Constitution. These cases have become the principal source for the definition of crime.

The criteria for what is criminal have not been easily discovered. Viscount Haldane pronounced in the Board of Commerce, 1922, case that the federal government has criminal law jurisdiction "where the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence". Lord Atkin proposed an alternative definition of crime in the P.A.T.A., 1931, case:

"The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences?"

This definition would appear to enable Parliament to expand its jurisdiction indefinitely by framing its legislation as a formal prohibition accompanied by a penalty. In the Margarine Reference (1948), the Supreme Court of Canada said that, in addition to a prohibition and penal sanction, criminal legislation must "serve a public purpose which can support it as being in relation to criminal law." Public purposes include "public peace, order, security, health, morality ... these are the ordinary though not exclusive ends served by the law." The Margarine Reference case also established that criminal law must contemplate conduct harmful to an individual or to the public. In establishing the relation between harm and the criminal law, Justice Rand stated,

"A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened." [Emphasis added]

In R. v. Butler, 1992, the Supreme Court contemplated whether the Criminal Code provisions on obscenity were reasonable limits on freedom of expression. Since the prohibitions were not concerned with morality but rather the "avoidance of harm to society", the purposes were proper for the criminal law. In determining whether the provisions passed the test for reasonableness under section 1 of the Charter, Justice Sopinka stated,

"[The impugned legislation] is designed to catch material that creates a risk of harm to society. It might be suggested that proof of actual harm should be required ... it is sufficient in this regard for Parliament to have a reasonable basis for concluding that harm will result and this requirement does not demand actual proof of harm. [Emphasis added]

Butler supports criminal law that addresses the reasonable apprehension of harm as well as actual harm.

In RJR-MacDonald Inc. v. Canada (Attorney-General), 1995, federal legislation banning cigarette advertisements was challenged as ultra vires Parliament's criminal law jurisdiction. The Supreme Court invoked the Margarine Reference test to determine the constitutional validity of the legislation. Did the prohibition "serve some legitimate public purpose" and prevent harm? The Court ruled seven to two in favour of constitutionality. Justice La Forest said the "public evil" was "the detrimental effects caused by tobacco consumption" and the fact that "tobacco kills". The legitimate public purpose was protection of Canadians from a harmful drug.

In R. v. Hydro-Quebec, 1997, the Supreme Court considered whether the regulatory nature of the Canadian Environmental Protection Act was criminal. In a five to four decision, the Court upheld the legislation which was intended to safeguard the public against the "public evil" of pollution. For something to be a crime, it must risk harming an individual or the public. In the years following, this reasoning was affirmed in R. v. Cuerrier, 1998, where Justice Cory held that there was "no prerequisite that any harm must actually have resulted." A "significant risk" of harm suffices for an act to be criminal.

Other law reform reports and studies confirm the nature of criminal law. The Canadian Committee on Corrections report in 1969, entitled Towards Unity: Criminal Justice and Corrections (The Ouimet Report), stated that no act should be a crime unless it represents a serious threat to society; its incidence, actual or potential, is substantially damaging to society; and it may not adequately be controlled by social or legal forces other than the criminal process. No law should cause social or personal damage greater than that which it was designed to prevent.

The Law Reform Commission of Canada has likewise said that criminal law should be confined to wrongful acts seriously threatening and infringing fundamental social values. A crime must cause harm to other people, to society or, in special cases, to those needing to be protected from themselves. The harm must be serious both in nature and degree. The harm must be best dealt with through the apparatus of the criminal law.

Modern Criminal Law Statutes and Enforcement

As we have already seen, only the federal government has the constitutional authority to make crimes. The Criminal Code of Canada contains virtually all criminal offences and procedure. However, other federal statutes, such as the Controlled Drugs and Substances Act, the Income Tax Act, and the Competition Act, create offences which are substantially indistinguishable from Criminal Code offences and very, often involve equally high penalties.

The provinces have an important criminal law enforcement function. Section 92(14) of the Constitution Act, 1867 grants the provinces jurisdiction over "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and Criminal Jurisdiction ..." Accordingly the provinces are constitutionally responsible for the implementation, enforcement, and prosecution of criminal law.

Criminal Law Reform: A Mirror on Society

Proposals for criminal law reform are made by the Law Commission of Canada, a permanent body established by legislation for that ongoing purpose. The Criminal Code is a haphazard work. Amendments have mostly been political and expedient reactions, at the cost of long-term coherence of criminal justice. The need to reduce random political influence from the process and to introduce independent policy, advice has been recognized for a long time. This was one of the reasons for creating the Law Commission of Canada.

The Law Commission of Canada systematically reviews the criminal laws and procedures to determine whether they continue to meet the needs of society. A current Law Commission study entitled What is a Crime? is probing broad questions about crime and punishment. It is investigating contradictions and ambiguities in the criminal law. How and where do we draw the line between acceptable and unacceptable behaviour?

Not all harmful acts qualify as crimes. Criminal law is reserved for wrongful acts which seriously threaten fundamental social values. Definitions and conceptions of crime reflect the cultural values of the day Over the years, we have redefined what we consider criminal conduct, particularly in regards to property offences. The industrial revolution transformed our understanding of property and our ways of doing business. New crimes emerged to secure economic realities. What we consider violent crimes, on the other hand, has remained constant, although there are notable rewrites such as ending the spousal immunity, rule in rape in 1983. Most recently amendments creating new crimes have been designed to deal with terrorism.

A tour through the Criminal Code today also turns up crimes in categories relating to the public order (e.g., riots), reputations (e.g., hate propaganda), weapons, the administration of justice (e.g., bribery), contracts and trade (e.g., fraud), property (e.g., arson and robbery), currency, sexual impropriety, privacy (e.g., interception of communications), motor vehicles (e.g., drunk driving), personal physical security, proceeds of crime, animals, and suicide. Some peculiar crimes are still alive, but they are essentially unenforced and are likely to some day disappear. These legacy crimes include prize fighting, "offences against the Queens authority, and person", sedition, blasphemous libel, criminal interest rates, unlawful solemnization of marriage, and duelling.

Crime, though known to all societies, largely defines a society, because it mediates the powerful forces of security, morality, and control. Crime is the best-known subject of the law--it figures most prominently in the public consciousness. It is on the front page and at the top of the news. While we are more likely to be victims of crime than perpetrators, we are fascinated by it. It may be managed and under control, but it is never eradicated. It attracts the greatest human rights protection because it is, by far, the most coercive area of our law. It is the one domain that consumes, by far, the most resources in the legal system. Politically charged, it is a galvanizing force: we all have an opinion on crime and crime control measures, and some aspect of crime is often an election issue. As social attitudes shift, our definitions and dimensions of crime are constantly refashioned in response.

Peter Bowal is a Professor of Law with the Haskayne School of Business, University of Calgary and Benjamin Lau is a Research Assistant at the University of Calgary in Calgary, Alberta.