

## **SOC 3395: Criminal Justice and Corrections:** **Lecture 3: Criminal Law & Criminal Justice in Canada 1**

While many may feel that the CJS is entirely focused on enforcement, processing offenders, and punishment, to understand its operation we must also concern ourselves with the role of law in society. For example, when processing an accused through the system we need to consider what an offence is in the first place, how it is assessed, how laws are made, and the rights of accused. Thus, we must consider the source, nature, purpose and content of law in Canada, along with differences therein.

As noted last class, we may distinguish between substantive and procedural aspects of criminal law. The former refers to the body of legislative materials defining those actions that will be punished by the state if violated (i.e. the legal definition of crimes in our society). The various components of substantive criminal law provide a framework for defining criminal acts - and the various actors in the CJS must interpret these in individual cases. Sometimes this can be quite controversial.

Procedural criminal law, in contrast, involves the way in which the rights and duties of individuals may be enforced in the steps through which offenders pass on their way through the system (e.g. evidence, search and seizure, right to counsel, etc.) Many “due process” rights (a.k.a. “Principles of fundamental justice” ) under procedural criminal law are found in s.8-14 of the Charter. Procedural criminal law is important because it signals the primacy of demonstrating legal rather than factual guilt, raising a number of obstacles to conviction in order to protect the rights of criminal suspects. Moreover, since s.7 of the Charter guarantees the right to LL&SOTP, and not to be deprived thereof without the principles of fundamental justice being followed, courts have been going further and ruling on procedural issues not enumerated between ss.8-14 that involve issues of fundamental justice. These principles of fundamental justice are found in the basic tenets of our legal system and courts decide whether each case follows the principles or constitute a violation (e.g. disclosure, right to remain silent, self-incrimination, etc.).

The constitutionality of both substantive and procedural criminal law has been ruled on in many criminal cases since the introduction of the Charter. For purposes of illustration, let us consider Canadian laws on sexual assault. Prior to 1983, there were four offences related to “rape.” The key offence, s. 143, required the complainant to be female, the accused male, they couldn’t be married to each other, sexual intercourse had to occur, and this had to be without the consent of the woman. In addition, there were offences of attempted rape, and indecent assault (against male and female). The penalty for rape was life; the others carried sentences of either 5 or 10 years. Needless to say, the form these offences took led to

much criticism, particularly that they reflected the gender dichotomy and cultural perceptions of gender relations functional to male status dominance. As a result, new legislation was passed in 1983 making the new offence of “sexual assault” one that could happen to both sexes, also enabling spouses to be charged for the first time. Protections for women were also introduced prohibiting cross examination on their past sexual history. Three levels of sexual assault were now defined, level 1 (least physical injury), Level 2 (weapons, threats, bodily harm), and Level 3 (wounding, maiming, disfiguring or endangering life). Maximum penalties are 10 years, 14 years, and life respectively, though level 1 is a hybrid offence leaving the prosecutor room to proceed by indictment or summary conviction (max 10 years or 18 months respectively).

The most controversial aspect of these new provisions has undoubtedly been the “rape shield” provision prohibiting the offender from introducing evidence re: the victim’s past sexual conduct. This had been a major problem in the past, knowledge of this potentially grueling ordeal in court (i.e. cross examination) resulting in many victims not reporting the crime. Yet, defense counsel have not been happy with this provision, and in 1991 successfully argued before the SCC in the Seaboyer case that this violated an accused’s right to a fair trial. The following year, parliament passed amendments no longer banning this outright, but outlining the legal parameters for determining the admissibility of such evidence in sexual assault trials.

Then, in 1994, the SCC accepted the argument of “extreme drunkenness” as an appropriate defense in general intent crimes, including sexual assault (Daviault). Shortly thereafter, many charged with sexual assault successfully defended themselves using this argument. This led to an uproar, parliament passing amendments in 1995 eliminating this defense for offences requiring general intent, but not for specific intent, such as murder.

Also in 1995, the SCC ruled that a woman’s counseling records had to be handed over to a judge if the defense persuades the judge that the records may contain information useful in the defense of the accused. O’Connor held that otherwise the accused would not have a fair trial. As a result, parliament in 1997 passed legislation restricting the full disclosure of such records and outlining a 2 stage balancing process to determine whether such records should be disclosed. This was upheld in subsequent cases.

In 2000, the 1992 amendments to the rape shield law were unanimously upheld by the SCC (Darrach). It was felt that the law in this case, had it been otherwise, would have invaded the victim’s right to privacy and would discourage the reporting of other crimes of sexual

violence. Some critics have argued that such rulings resulted in unfair trials for men charged with sexual assault as they are “sometimes totally unable to raise relevant facts and arguments.” Others counter that lawmakers have created a fair way to keep prejudicial myths about women out of the courtroom while preserving the accused’s right to a fair trial. Results on production (vs. disclosure to the defense) have been mixed since.

### **Sources of Criminal Law in Canada:**

Canadian criminal law is derived from the British common law. Originating during the reign of Henry II with a desire to create a strong central government, a court system was instituted that tried cases on the basis of laws passed by the government and applicable to all citizens. Judges were appointed to specific territories, but, over time, began to exchange information about their rulings. Over time, this growing body of knowledge began to take over old customs that saw crimes as interpersonal disputes: now they were seen as wrongs against the state. A common group of legal principles centered around this axis gradually developed and were applied to all citizens regardless of their circumstances. At the same time, judges came to decide cases on the basis of previous judgements in similar cases (i.e. precedent). This practice evolved into a rule, called *stare decisis*, which requires the judiciary to follow previous decisions of higher courts in similar cases. This still operates in Canada today. In a given case, judges will check how other courts have reached their decisions in similar cases, and will use these as a guide. Yet, judges can also make differing rulings by distinguishing the fact situation or noting that the social conditions underlying earlier rulings no longer apply.

Originally, the common law wasn’t written down, so judges had to discuss things among themselves. Because this was so cumbersome, written sources of criminal law soon emerged. In Canada, these currently consist of our Constitution, statute law, case law, and administrative law. First, the Constitution Act sets out that only the federal government can enact criminal laws and procedure. Laws contrary to the Charter and the rest of the Constitution Act may be found unconstitutional. Secondly, statute law consists of systematic codifications of offences, which are continually updated (e.g. the Criminal Code). Both the federal government and the provinces can enact statute, but only the federal government can enact criminal law. Statutes always over-rides case law, except in constitutional matters where the power of parliament is limited by rights and freedoms that cannot readily be infringed on by the government. Third, case law involves published examples of the judicial application and interpretation of laws as they apply in a particular case. These may be appealed, but, once appeals are finished, the final ruling stands. Finally, administrative laws, or regulations, are written by regulatory agencies that have been given power by governments to develop and enforce rules in specific areas (e.g.

pollution, securities, etc.)

All of these forms of criminal law are applicable to our CJS. Yet, questions frequently arise about their use. Can laws be used by powerful groups to gain personal advantages? Nobody is supposed to have an advantage under the rule of law, and society must be governed by clear legal rules rather than by arbitrary personal wishes. To protect society from individual or group self-interests, the rule of law is meant to ensure that laws are created, administered and enforced on the basis of acceptable procedures promoting fairness and equality. The basic elements of the rule of law are: (1) scope (everybody, including government, is covered by the law and it is to be applied in a socially equal fashion); (2) character (law should be public, understandable, and clear in its requirements; and (3) institution (institutions must produce an independent judiciary, written laws and the right to a fair hearing for the law to be fair and just).

One of the most important aspects of the rule of law is the Charter. Enacted in 1982, it differs from common and statute law because it applies mostly to the protection of the legal rights of criminal suspects and offenders, the powers of the various CJS agencies, and criminal procedure during a trial. The sections concerned with the operation of the CJS have had an enormous impact on criminal procedure in Canada, especially as they apply to the rights of accused and the powers of CJS agencies. It has played an important role in establishing and enforcing certain fundamental principles such as due process, right to a fair trial, and freedom from cruel and unusual punishment. S.7 protects individuals from being denied basic rights such as LL&SOTP “except in accordance with the principles of fundamental justice as specified by s.1. Sections 8-10 deal with the rights of suspects when detained and arrested by police. S.8 deals with the right to be secure from unreasonable search and seizure (e.g. a warrant should be obtained on evidence meeting an objective standard). S.9 guarantees that everyone has the right to be free from arbitrary detention or imprisonment (i.e. police don’t have complete discretion to detain citizens, but have to follow an objective standard: “reasonable suspicion” first). S.10 lists a variety of specific rights given to individuals detained by police: (a) to be informed as soon as possible of the reasons for arrest; (b) to retain and instruct counsel and be informed of that right; © habeas corpus (not to be denied reasonable bail). There are also sections dealing with an accused’s rights in court. S.11 (a) requires an accused to be informed without unreasonable delay of the specific charges; (b) gives an accused the right to be tried within a reasonable time; ©) protects an accused from having to testify; (d) outlines the presumption of innocence; (e) not to be denied reasonable bail; (f) the right to a jury trial when maximum penalty 5+ years; (g) an individual’s act/omission can only be construed as an offence if illegal at the time; (h) protects against double jeopardy; and (I) to punish the accused only on the basis of the penalties available at the time of the

offence. S.12 protects individuals from cruel and unusual (i.e. grossly disproportionate”) punishment. S.13 protects witnesses from self-incrimination, and s.14 guarantees the accused and witnesses the right to an interpreter. S. 15(1) and (2) are concerned with equality rights and specify the need for the equal protection of all persons within our CJS as well as equality before and under the law (s.28 also guarantees gender equality). Finally, s. 24 deals with remedies in the criminal process. S.24(1) allows for a stay of proceedings preventing a prosecutor from proceeding. More common, s. 24(2) outlines a test whereby accused who apply can have it determined whether their rights have been violated and the CJS brought into disrepute because of illegal evidence. If it is determined that (1) evidence was gathered in a way that infringed or denied any Charter rights; and (2) this brings the administration of justice into disrepute (on the “reasonable person test”), then the evidence in question will be excluded from consideration.

As noted earlier, the rights guaranteed by the Charter have been supplemented by the SCC by an interpretation of s.7 that “the principles of fundamental justice” are broader than the rights specifically guaranteed above. This has been most notable in relation to the right to remain silent, an accused’s right to disclosure of all the Crown’s relevant evidence, an accused’s right to make full answer and defense; and in relation to the detention of those found not guilty by reason of insanity.

### **The Nature of Crime:**

Canada has a system whereby all criminal law is made by the federal government. In this respect, different approaches - general and legal - are used to explain what a crime is in our society. At the general level, a crime can be defined as any action (1) that is harmful; (2) prohibited by the criminal law; (3) that can be prosecuted by the state; (4) in a formal courtroom environment; and (5) for which punishment can be imposed. At the legal level, a mental and physical element is added, as well as “attendant circumstances” or a causal link between the act and the harm that results. It also specifies that certain aspects of the criminal act in question must be proven in a court of law. Our criminal law is based on 7 principles traditionally determined and followed by legislators and the courts, and these must exist in every criminal act. This *corpus delicti* involves the duty of the state to prove legality, *mens rea*, *actus reus*, concurrence of *mens rea* and *actus reus*, harm, causation, and punishment. Basically, the harm forbidden in penal law must be imputed to any normal adult who voluntarily commits it with criminal intent, and such a person must be subjected to the legally prescribed punishment. Let us look at each of these 7 elements in turn.

Legality means that, in order for an act to be considered criminal, it

must be forbidden by penal law. There can be no crime unless there is a law that forbids the act in question: *nullum crimen sine lege*.

*Mens rea* is the mental element of a crime. This involves the assumption that becoming involved in a criminal act results from a guilty mind (often referred to as intent, though this is but a subcategory of *mens rea*). This rests on the idea that a person has the capacity to control his behavior and the ability to choose between different courses of action. Fantasizing about committing a crime without doing so isn't illegal, but such thoughts accompanied by prohibited acts or omissions are. Nor is doing something without the requisite mental element a crime. Both must be present. *Mens rea* is also distinct from motive (i.e. the reason for committing a crime), though this may provide evidence of intent and may be counted as an aggravating factor in sentencing. When *mens rea* is discussed in terms of intent, this may take one of 2 forms. Some offences require only general intent (inferred from the action or inaction of the accused, such as pointing a gun and firing it at the victim in culpable homicide). Specific intent requires something more, that the prosecution prove, beyond a reasonable doubt, that this was done "with intent" or for the purposes of." Sticking with our homicide example, the person must be shown to have the actual intention of producing some further consequence beyond the actus reus (e.g. the death of the victim). In addition to offences of general and specific intent, there are three distinct levels or degrees of mens rea ranging from the most to the least culpable states of mind - intent, knowledge and recklessness. The highest degree of culpability is found in the former, with offences containing words like "intentional" and "wilful." Knowledge is used to indicate that an accused possessed an awareness of a particular circumstance (e.g. "Knowingly" uttering a threat). Recklessness refers to situations where the accused violates a law simply by lacking the appropriate care and attention about something he is doing. Many defenses in court can be made on the basis that the appropriate mens rea elements don't apply (e.g. acting in self defense or under duress).

*Actus reus* is essentially the act or omission prohibited by the law. This is the physical or action element of a crime, generally referred to as the guilty act or the evil act (e.g. a punch, shove, etc. directed at another). Usually this has to be traced to the accused him or herself. Some have recently attempted to modify this to make parents responsible for the actions of their children. Omissions as well as acts can constitute an actus reus (e.g. negligence). Also, for some offences, a person doesn't have to be physically involved with another (e.g. uttering threats, criminal conspiracies).

*Concurrence* involves the idea that intent both precede and be related to the specific prohibited action or inaction that was or was not taken.

*Harm* is important, since our legal system places much importance on the belief that conduct is criminal only if it is harmful. This ideal is reflected in the notion of due process, which holds that a criminal statute is unconstitutional if it bears no reasonable relationship to the matter of injury to the public. This means that there has to be a victim. As a result, some argue that if the offence is a "victimless crime," (e.g. gambling, prostitution, marijuana), then it's not the law's business. The argument is that making these vices a crime does more harm than good.

Also in this regard, harm isn't merely physical injury, it may also include psychological harm, harm to public institutions, and concern about one's well being (e.g. stalking, perjury, and hate crimes).

*Causation* refers to crimes that require that the conduct of the accused produce a specific result. So long as the act or omission of the accused started a series of events that led to harm, causation has occurred. This comes into play most often in cases where the *mens rea* and the *actus reus* are widely separated in time.

Finally, the criminal law must state the sanctions for every crime in order that everyone be aware of the possible consequences for specific actions. The Criminal Code does this.

Next two classes: criminal defenses, case illustrations of mens rea, the classification of offences, the seriousness of crime and criminal law reform.