Framework 3.1 – Crime and Criminal Law

The Definition of Crime

In the words of Ontario Justice McDermid from the decision of R v. Ssenyonga (1993), "Crimes are wrongful acts that the State recognizes as deserving of control and punishment in the interests of society as a whole." Society's views are therefore important in deciding what is a crime and what is not. These views are manifested as society elects the federal Members of Parliament who in turn are responsible for passing and amending legislation with respect to criminal law; **subsection 91(27)** of the Constitution Act, 1982 grants authority over criminal law to the federal government. There are of course many other actions that are controlled and punished in our society, but which are not referred to as "crimes", such as minor traffic violations. These **regulatory offences** are generally not considered as serious by society and are contained in other federal or provincial legislation.

The Criminal Code

The Criminal Code is not the only federal statute to deal with crime and punishment, but it is the most comprehensive. It lists the specific actions that are considered crimes, how they are to be prosecuted, and the specific penalties that may be imposed upon conviction.

Judge-Made Criminal Law

As we saw in previous sections, judges base their decisions on legislation and legal precedents, both of which may be ambiguous in a particular case. They therefore often engage in active interpretation. In criminal law, judges will sometimes expand definitions of crime to cover behaviour not specifically addressed by the drafters of the Criminal Code. This is known as **extending the ambit of the offence**. For example, in **R. v. Cuerrier, 1998**, the Supreme Court of Canada decided that the accused should be convicted of aggravated assault after knowingly exposing sexual partners to HIV.

The Purposes of the Criminal Law

There are three essential components of any criminal legal system; itemizing the unacceptable behaviours, identifying violations, and imposing sanctions. Establishing such a criminal legal system achieves two primary purposes; retribution and the protection of society.

Retribution

Retribution includes denouncing and punishing *past* wrongful behaviour. This reaffirms the values of the society and delivers the justice that it demands. Our society believes that the punishment should fit the crime, so retribution should be sought in a way that respects the rights and freedoms of the accused. For example, the **Canadian Association of Elizabeth Fry Societies** works across the country to protect the rights of female prisoners. The Toronto Elizabeth Fry Society was largely responsible for the repeal of provisions contained in the Female Refuges Act in 1958. This Ontario legislation resulted in the unfair imprisonment of many young women for being "unmanageable or incorrigible."

The Protection of Society

The **protection of society** is achieved by preventing *future* wrongful behaviours. This can be achieved in three ways; by deterring wrongful behaviour, by isolating those who are sentenced to prison, and by rehabilitating those that are convicted. Deterrence may also be subdivided into two distinct purposes; the **specific deterrence** of the accused and the **general deterrence** of others from committing the same crime. The most challenging question may be how much the state should be able to rely on the protective principle when exercising its power over criminal law. Most people agree that criminal law should function to prevent physical harm to others and to prevent damage to their property, but should it also be used protect our way of life, or to prevent an individual from harming themselves, or to uphold the popular sense of morality? Over the years, philosophers, politicians, and criminal theorists have relied on the following principles to justify the intervention of criminal law as a form of protection:

- *offence principle*: the prevention of offence to others will benefit society
- *private harm principle*: the prevention of harm to individuals for their sake
- *public harm principle*: the prevention of harm to public institutions or practices
- *legal paternalism*: the prevention of individuals harming themselves
- *legal moralism*: the prevention of immoral acts will benefit society

Who Commits Crimes?

Many theories have been put forward throughout history to explain criminal behaviour, but at the turn of the 20th century, two main schools of thought were being followed: The group of theorists known as the **Chicago School** argued that criminal behaviour was mainly due to social and environmental factors. **Sigmund Freud**, on the other hand, believed that all humans had criminal tendencies, and that most of us developed the ability to control those tendencies in childhood. Some people, however, do not adequately develop those controls due to problems in childhood such as not properly identifying with their parents.

In the latter part of the 20th century, criminologists were somewhat surprised by the fact that crime rates continued to grow despite the fact that individuals were generally parented more carefully and protected by a more elaborate social safety net. Careful studies were then carried out which revealed that social status and the income of the parents have very little direct effect on the likelihood that children will be drawn to crime. It is the love, supervision, and positive modelling of behaviour by parents that seem to be the most important factors. This **modern theory** is certainly in line with the prevalence of white-collar crime in today's society, such as fraud or negligent cost-cutting measures.

It is generally accepted that almost all Canadians break the law at some point in their lives. However, most of these crimes are not serious and are committed during adolescence. Crimes committed at older ages are generally committed by males at either extreme of the social spectrum; at one end we find street crimes that are usually committed out of desperation and at the other end is white-collar crime that is typically motivated by greed. A contentious issue that brought the issue of acting out of desperation to the forefront was the phenomenon of "**squeegee kids**" in Toronto. These individuals were trying to earn money by offering to clean the windshields of cars as they waited at intersections. Many citizens complained, however, that the squeegee kids were too aggressive and sometimes threatening. The Ontario government then

passed the **Safe Streets Act, 2000**, which banned squeegee kids and aggressive panhandlers. The legislation was fought in court, and although it was upheld by the Ontario Court of Appeal, there are still many who feel it unfairly restricted the actions of citizens who may have simply been desperate to earn a living as they struggled to survive on the streets.

Who are the Victims of Crime?

Fear of crime motivates many people to take preventative measures such as avoiding certain places, staying in their home, purchasing alarm systems, or taking self-defence classes. Here are some statistics collected by Statistics Canada in 1999 regarding who is actually involved in crimes in Canada:

- 50% of reports of victimization involved personal crimes such as assault, sexual assault, and robbery
- 35% involved household crime such as breaking and entering, theft, and vandalism
- Women and men suffered similar rates of victimization, but women were more likely to be victims of sexual assault, and men were more likely to be victims of assault and robbery
- Young persons aged 15 to 24 reported the highest rate of personal victimization
- People who regularly engaged in evening activities outside the home are at the greatest risk of personal victimization
- Low household income was associated with a greater likelihood of violent crime and a lower likelihood of personal theft
- Urban dwellers reported more incidents of personal victimization than people in rural areas
- Suspects in most violent crimes were males who acted alone
- Most violent crimes were committed by someone known to the victim
- Approximately 60% of offences were not reported to the police
- Women were much more likely to live with the fear of crime than men

The Elements of an Offence

To obtain a conviction, the Crown must prove each and every element of the offence with which the accused is charged beyond a reasonable doubt. There are two basic elements of an offence; the ***actus reus*** is the wrongful act or omission of the accused, and the ***mens rea*** is the criminal intent of the accused. Depending on the offence, the basic elements may then be subdivided into other elements.

Actus Reus

The *actus reus* of an offence is often easy to identify from the wording of the legislation. The *actus reus* of some crimes, though, may include some elements that are open to interpretation by the courts. Most criminal offences require that the accused take some **action**, but some crimes may be committed by **failing to take action** where a duty to act exists, such as a parent failing to provide the "necessaries of life" for their children. It is generally accepted that the actus reus must be committed voluntarily; it must be the conscious choice of an operating mind. If an accused is involved in a wrongful act due to a medical condition or mental illness, the Crown may not be able to prove the *actus reus* due to the inability of the accused to control their actions.

Mens Rea

Mens rea is the blameworthy state of mind that accompanies the commission of the actus reus in a criminal offence. It is the second basic element that must be proven beyond a reasonable doubt by the Crown. Some provisions in the Criminal Code state the specific *mens rea* that must be proven for a conviction, using words such as "willfully", "intentionally", "negligently", or "fraudulently." Some provisions do not use any such words to describe the *mens rea* and therefore require more interpretation by judges.

Judicial Interpretation

There is an **interpretive presumption** with Criminal Code offences that *mens rea* is required for each and every element of the *actus reus*. This means that judges must infer that Parliament intended the requirement of *mens rea*, even when it is not specifically mentioned. One critical question in these cases is whether to hold the accused to an **objective** or a **subjective** standard of culpability. Consider as an example, the offence of assault contained in subsection 265(1) of the Criminal Code:

> **265.** (1) A person commits an assault when
> (*a*) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

Although the *mens rea* for the application of force is specifically stated as "intentionally", there is no mention of the *mens rea* for the other element of the actus reus, namely not having the consent of the victim. Should the Crown be required to prove subjectively that the accused actually knew that the victim was not consenting to the application of force, or should the Crown simply have to demonstrate objectively that a **reasonable person** would have realized that there was no consent at the time that force was applied? In recent years, courts in Canada have been moving away from objective standards of proof and more **toward subjective standards** with the prevailing opinions being that criminal liability should be reserved for those who consciously choose to behave criminally. Once the courts decide upon either an objective or a subjective standard of proof, then that standard must be followed for all trials of that particular offence. In order to appreciate the difference between an objective and a subjective standard of proof, consider the English case, **R. v. Lamb**. The accused had pointed a gun at his best friend, believing that there was no bullet in the chamber, and pulled the trigger. Unfortunately, he was mistaken, and he killed his friend. He clearly had not intended to do harm. Should that be enough for a finding of "not guilty" for criminal assault, or should the standard have been, "Would a reasonable person point a gun at their best friend and pull the trigger and expect no harm to be done?"

Absolute and Strict Liability

Both the provinces and the federal government have constitutional authority to create regulatory offences, such as those related to traffic, pollution, and unfair or dangerous commercial practices. One important difference between regulatory offences and crimes is the burden of proof that must be met by the Crown. Regulatory offences used to be **absolute liability** offences, meaning that the prosecution only had to demonstrate that the accused had committed the *actus reus; mens rea* was irrelevant. However, in 1978 the Supreme Court of Canada relaxed this standard with their decision in **R. v. Sault Ste. Marie**. From that point on the standard of proof for regulatory offences has been

strict liability. This means that once the Crown has established that the *actus reus* had been committed, the accused can then avoid liability by proving that they took **reasonable care** to avoid committing it. The exercise of such reasonable care is also called **"due diligence."** The Court saw strict liability as a fair compromise between absolute liability and criminal liability based on *mens rea*. One example that illustrates the standard of strict liability is the British Columbia Court of Appeal's decision from R. v. MacMillan Bloedel (2002), in which the court found that the accused company was not guilty of the offence of permitting a deleterious substance to be deposited in water frequented by fish. Although it was determined that diesel fuel from the accused's pipes had leaked into the environment, the court found that the cause of the leak was not **"reasonably foreseeable"** by the accused and that they had been duly diligent.

The Impact of the Canadian Charter of Rights and Freedoms

The "legal rights" contained is sections 7 to 14 of the Charter protect individuals during the processes of being investigated, charged, arrested, detained, or tried by the state. They embody the recognition that individuals charged with an offence are entitled to fair treatment. Due to the imbalance of power that exists between the accused and the state and the potential for human rights violations, it is important that these rights be guaranteed by the constitution. For example, in the decision from **Re British Columbia Motor Vehicle Act, 1985**, the Supreme Court of Canada struck down a section of the Motor Vehicle Act that created an absolute liability offence. Since imprisonment was one of the potential sanctions, the offence was found to violate the accused's right to liberty under s.7 of the Charter.

Another byproduct of the Charter was the enactment of the **Young Offenders Act** in 1984. The previous legislation, the Juvenile Delinquents Act, 1908, allowed for the infringement of fundamental rights, such as legal representation, disclosure, appeal, cross-examination of witnesses, and the right to not be unjustifiably detained. The Young Offenders Act increased the age range for criminal responsibility to 12 to 17 inclusive, ensured the accused youth were dealt with fairly, and created a broader range of sentences for the court to impose, such as absolute discharges and community service. The Young Offenders Act was then replaced by the **Youth Criminal Justice Act** in 2003, which encourages community-based sentences for less serious crimes, but also introduced the option of sentencing as an adult for the most serious crimes. In 2006, the Supreme Court of Canada held that the provisions of the Youth Criminal Justice Act do not allow for sentencing based on the principle of general deterrence; it must be based on the specific deterrence of the accused, as well as his or her rehabilitation and the protection of society. Removing the goal of general deterrence resulted in lighter sentences in many cases.