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Canada

The Criminal Law in Canadian Society

Highlights

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THE CRIMINAL LAW IN CANADIAN SOCIETY

HIGHLIGHTS

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PREFACE

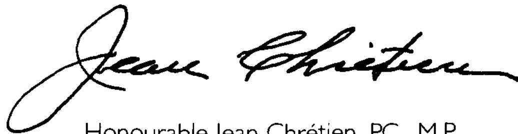
This document sets out the policy of the government of Canada with respect to the purpose and principles of the criminal law. As such, it is unique in Canadian history. Never before has the Government articulated such a comprehensive and fundamental statement concerning its view of the philosophical underpinnings of criminal law policy.

Canada's Criminal Code is nine decades old, and the common law on which it is based spans centuries. In recent years, the need to reflect upon the basic assumptions of our criminal law has become apparent. Growing crime, growing public concern about crime, growing public expenditures for criminal justice, and growing doubts about the ability of the criminal justice system to solve the problem have had the combined effect of convincing federal and provincial Ministers responsible for criminal justice of the need for a thorough review of Canadian criminal law in all its aspects.

As a result, the Department of Justice, in cooperation with the Ministry of the Solicitor General and in close consultation with the provinces, has embarked on the Criminal Law Review. This Review will begin with recommendations of the Law Reform Commission of Canada, and will require detailed examination of all substantive and procedural aspects of Canadian criminal law.

The Criminal Law in Canadian Society, issued at the outset of this complex process, is aimed at providing a basic framework of principles within which these more specific issues of criminal law policy may be addressed, and assessed.

As Minister of Justice, I believe this statement offers the foundation for a credible and effective criminal law, reflecting the needs and values of Canadian society.



Honourable Jean Chrétien, P.C., M.P.
Minister of Justice

TABLE OF CONTENTS

I. Criminal Law

1. Who Is Affected? 1
2. Who Is Involved? 2
3. Why a Criminal Law Review? 3
4. How Will We Approach the Review? 4

II. The Nature of Crime

1. What Do We Mean By "Crime"? 5
2. Crime 1901-1980 5
3. Our Perceptions of Crime 7
4. In Search of an Explanation 7
5. What Have We Learned? 8
6. Looking to the Future 9
   (a) As Crime Evolves 9
   (b) As Resources Dwindle 10
   (c) As Attitudes Evolve 10

III. Our Criminal Justice System: Questions and Concerns

1. How effective is our justice system in combatting crime? 11
2. How effective are non-criminal measures? 12
3. How can our system be more responsive to victims? 13
4. How can we balance the power of the state and the rights of the individual? 13
5. How can we make our justice system more accountable? 14
6. How can we improve our sentencing process? 15

IV. Canadian Criminal Law: Reshaping Its Role

1. Its Proper Purpose 18
2. Its Proper Scope 19
   (a) When should the criminal law be applied? 19
   (b) When are criminal law penalties the appropriate response? 20
3. To whom should criminal law penalties apply? 20
4. How far should the criminal law go in pursuit of its aims? 21

V. Toward A Criminal Law Policy: A Framework

1. Our Criminal Law Focus 23
2. Statement of Purpose and Principles 23

VI. The Next Step: Discussion and Debate 27

1. CRIMINAL LAW

1. Who Is Affected?

Imagine a scene in your neighbourhood where a couple are engaged in a heated quarrel. The situation turns ugly as one threatens to hurt the other. If the police are called in, should an attempt at reconciliation or mediation be made, or should criminal charges be laid?

In another situation, a group of teenagers are experimenting with drugs, and are apprehended by their school teacher. In accordance with the law, charges are laid and the youths are subsequently convicted. The ringleader is jailed for six months, and the others are heavily fined. All have criminal records for life. Does this seem fair? Is the punishment worse than the crime itself—especially since there were no victims? Is there a better way of protecting youths from dangerous drugs?

In still another case, a merchant is caught selling fish for fertilizer purposes without the required permit. Although most people might argue that he is not a criminal in the same sense as a bank robber, the merchant is subject, at least in theory, to virtually the same range of penalties: heavy fines and imprisonment. He is subject to "criminal" procedures: charges laid by police, appearance in the criminal courts and trial by judge. Is this necessary? Is it appropriate? Should a distinction be made between "criminal" and "regulatory" offences—both in terms of the method of treatment and the range of penalties?

In a final scenario, a sophisticated business person has used a computer to gain access to the financial records of a rival firm. Should the first response be to use the full force of the criminal law and the criminal justice system to deal with such offences? Or would it be a case of "too little, too late"? Could resources be used in a more effective way to prevent such crimes—for instance, built-in computer safeguards to prevent unauthorized access?

The above scenarios are representative of a wide range of challenging questions facing Canadians with regard to the future directions for criminal law policy in Canada. Should family disputes be dealt with through criminal procedures rather than via attempts to reconcile the parties through community services? Should so-called "victimless" offences such as drug abuse, prostitution and gambling be crimes? Should criminal penalties continue to be applied to acts that simply violate regulations? Should the criminal law be the primary means of dealing with new or emerging anti-social conduct such as theft by computer or destruction of non-renewable resources? In all these cases, are there more effective and fair responses that could be used?

Whether we are affected by such questions as part of a family, as victims of crime, or as members of a community—one thing is certain. As members of Canadian society we are all affected by the fundamental social issues that lie behind these specific questions.

Crime—the way we define it, and the way we deal with it—is a social issue that concerns us all. At the level of government, our criminal justice system provides a formal and structured response to crime, involving police, prosecutors, judges, correctional officials and parole boards. But the formal system should be seen to represent only one element of a more complex and broadly-based "system" of response to crime. At the community level we have developed informal responses that have a much more important role to play than we think. In our families, schools, churches and clubs, our social values are taught and reinforced. There is also a wide range of community agencies oriented to deal with the prevention, treatment and response to crime and its effects. As well, there is a growing conviction that individuals and organizations must assume a greater and more direct role in dealing with crime in our communities.

The criminal law—as it is written in our statutes—is just one of the tools of the criminal justice system. In asking ourselves what role the criminal law should play in answering these and other questions, we are taking part in developing a criminal law policy.

2. Who Is Involved?

Criminal law affects us all—it reflects the society we live in. But what do we know about crime in Canadian society? What concerns do we have with our criminal justice system? How can we reshape our criminal law to reflect the society we wish to live in?

Over the next several years, Parliament will consider such questions as it examines the results of the Criminal Law Review that has recently been launched by the federal government in co-operation with the provinces. This process will involve public reflection and response to basic questions about the very nature of Canadian criminal law.

3. Why a Criminal Law Review?

As our social problems change over the years, so must the response of the criminal law to these problems.Our first Criminal Code was enacted by Parliament in 1892. Since then, Canada, like other post-industrial nations, has experienced a growth in traditional street crime, changing values and public attitudes towards certain crimes and the criminal process, increasing pressure to utilize criminal justice resources more effectively, and the emergence of new forms of 'technology crimes'. As well, there has been growing public concern about the apparent breakdown of social controls generally, as well as increasing skepticism on the part of professionals about the limited effectiveness of traditional criminal justice institutions.

In order to respond to the changing needs of society, amendments have been passed to the Criminal Code to address particular issues as they arose and as they were perceived at the time. Consequently, since 1892, the Criminal Code has been the subject of an almost continuous process of piecemeal and patchwork amendment. There has never been a comprehensive criminal law policy upon which the amendments could be based. Underneath and between the patches there remains an ever-aging document which essentially reflects a 19th century society.

In 1970, the Law Reform Commission of Canada was established, partly in response to demands for a review of the purpose and scope of the criminal law. Since that time, the Commission has published a host of formal reports and working papers on various aspects of the criminal law. In 1977, the Parliamentary Subcommittee on the Penitentiary System in Canada echoed the need identified by the Law Reform Commission for "a major commitment to fundamental reform. . . involving a thorough, open and necessarily painful candid assessment of what the criminal justice system ought to do."

In 1979, all federal and provincial Ministers responsible for the various aspects of the criminal justice system in Canada agreed that a thorough review of the Criminal Code should be undertaken as a priority. As a result of that agreement, a detailed proposal was developed to launch the Criminal Law Review, which is aimed at developing a modern, responsive and effective Canadian criminal law.

4. How Will We Approach the Review?

Over the next few years, the Criminal Law Review will systematically examine all aspects of Canadian criminal law. The work has begun with a focus on the analyses and recommendations of the Law Reform Commission, which is scheduled to complete work on more than fifty individual projects addressing the substantive and procedural aspects of the criminal law by the end of 1985. This will involve an assessment of not only the Criminal Code, but also of a wide range of laws, regulations and institutions. The primary aim of the exercise is to develop recommendations to the federal Parliament focusing on reforms to the Criminal Code and to other federal statutes having criminal law provisions.

This Highlights document is aimed at initiating the involvement of Canadians in the Criminal Law Review process. It provides a general introduction and overview of some of the fundamental facts, issues and concerns which must be addressed in reshaping Canadian criminal law. This document is a summary of "The Criminal Law in Canadian Society," which provides a more thorough analysis and review, and contains more substantial supporting documentation and data.

In addition to providing a general orientation to the Criminal Law Review and its importance to Canadians, the two documents play a key role in establishing a conceptual framework for the exercise. In this Highlights document we will begin with a review of crime—perceptions and reality. Having established this context, we will turn to a discussion of questions and concerns related to our overall criminal justice system. We will then sharpen our focus on Canadian criminal law, and approaches to reshaping its role. Finally, we will outline a proposed framework for a comprehensive criminal law policy which will guide specific reforms in Canada for years to come.

II. THE NATURE OF CRIME

Ask most people whether "crime" has grown in recent years and they would most likely reply that it has jumped significantly. And they would be right. Ask the same people if more than, say, 10% of all crimes in Canada involve violence and they would likely reply "yes, most definitely". And they would be wrong.

Our perceptions of crime are usually dependent not on personal experience, but on reports of crime that we see in newspapers and magazines and hear on radio and television. What in fact are we dealing with when we speak of crime in Canadian society?

1. What Do We Mean By "Crime"?

Mention the word "crime" to a person on the street and chances are that images of assaults, robbery, and murder will spring to mind. "Crime" and "violent crime" have become almost synonymous in our vocabulary. Naturally, then, when we hear that crime rates are up, we assume that violent crimes are more pervasive.

In fact, less than 10% of all crimes in Canada involve violence. One explanation for the gap between our perceptions and reality is quite simple. Over the last century, our government has undergone a vast expansion and has become involved in regulating many areas of social and economic activity. In order to do so, new statutes have been written, and new offences created. As a result, in addition to the approximately 350 offences found in the Criminal Code, Canadians are subject to an estimated 20,000 federal offences (e.g. Income Tax Act, Fisheries Act), and 20,000 provincial offences (e.g. highway traffic acts, environmental protection acts), as well as countless offences created by municipal laws. A "crime" is therefore committed not only when one person assaults or robs another, but whenever someone waterskis at night or sells fish for fertilizer without a permit. In other words, even though most of the conduct being sanctioned might not be thought of as "criminal" in the usual sense, the sanctions (fines and imprisonment) available for dealing with breaches are thought of as "criminal punishments".

2. Crime 1901-1980

Let's take a closer look. Between 1901 and 1965 there was a 2500% increase in the number of convictions for all offences in Canada—an astonishing figure. But what does it tell us about crime in Canada? A careful examination reveals that 98% of this total increase took the form of summary convictions—for less serious offences—rather than convictions for indictable offences—normally reserved for the more serious crimes. A further breakdown reveals that 90% of this 98% was accounted for by traffic offences. What the astonishing increase reflects, therefore, is not a frightening increase in violent crimes since the turn of the century, but rather a phenomenal increase in the use and misuse of motor vehicles.

During the period of 1966-1980, the rate of both non-violent and violent crimes grew significantly. However, since 1973 we have had no data on actual convictions. The result is that all recent rates are based on crimes reported to police—not convictions. Since we know that only a portion of the offences "reported to police" result in a charge actually being laid against someone, and fewer still result in a conviction, comparing earlier crime rates with recent rates is a little like comparing apples with pumpkins.

If we isolate the Criminal Code offences reported to the police between 1970 and 1980, we can see a significant growth in both property and violent offences reported. Property crimes have been on a steady increase throughout the past decade. Rates of reported violent crimes are not so consistent, and the growth in certain violent crimes such as robbery and wounding seems to have levelled off from 1975-1980 after significant increases from 1970-1975. The murder rate has actually dropped since 1975.

In comparison with the United States, the rate of property crimes has grown at a somewhat faster pace in Canada. For some property offences, the per capita rates in each country are now quite similar. In the case of crimes of violence, however, the reverse is true. The disparity between the two countries has widened. In 1979, there were almost five times as many crimes of violence per 100,000 population in the United States as in Canada.

3. Our Perceptions of Crime

In February 1982, more than 2,000 Canadians were asked the following question in a national Gallup survey: "In your opinion, of every 100 crimes committed in Canada, what percent involve violence—for example, where the victim was beaten up, raped, robbed at gun point and so on?" The responses to this question reveal that most Canadians think that more than half of all crimes involve violence, whereas in actual fact, the incidence is less than one in ten.

The same Gallup survey revealed that the perception of the Canadian public is that serious crime is more of a problem than it really is. It is generally believed we are closer in levels of violence to the United States than in fact we are; that the number of murders has increased in the past six years when in fact it has decreased; that people released from prison on parole are more likely to commit crimes of violence than the facts support; and, that courts send fewer people to prison than in fact they do.

The image of crime created by our perceptions and misconceptions poses a special dilemma. On the one hand, Canadians have, by legislative definition, labelled a vast range of activities and offences as "criminal"—subject to the full and direct impact of the formal criminal justice system. On the other hand, as is shown by public opinion surveys, their everyday thoughts and concerns about crime focus most heavily on the relatively rare phenomena of violent crimes of the sort widely depicted in the media.

Our perceptions of crime greatly influence our expectations of the criminal justice system. Therefore, clearly there is a need for us to understand better the reality of crime and what we mean by "criminal" conduct.

4. In Search of an Explanation

Theories about the causes of crime have been around as long as crime itself. Explanations have taken many forms, embracing biological, psychological, sociological, historical, political, architectural, economic and ideological theories. These theories often depended on the questions that were posed, the perspectives of the questioners and the fashions of the times. Some of these theories may now appear as silly and irrelevant, others sensible and insightful. To date, however, none of them has been very helpful and all have given rise to unending debate.

During the early decades of this century, theories tended to concentrate on psychological explanations for crime. The suggestion that crimes were committed by "maladjusted individuals" complemented the already existing movement to rehabilitate criminals—that is, to turn them into productive members of society.

As the general condition of individuals improved over time, and more elaborate social networks were established, crime continued to grow. Less simplistic theories were then sought. Theories began to focus on the "vast expansion of opportunity" as the incentive for crime. Other explanations for the increase in crime included: the large proportions of historically "crime prone" youth in the population as a result of the post-war baby boom; dramatic shifts in population in search of employment opportunities to large urban centres; the increasing rate of family breakdown; and, the almost universal presence of television in Canadian homes.

Since the 1970s, economists have entered the debate, suggesting that crime is not an irrational reaction to society's norms, but rather a perfectly efficient "rational economic strategy". If you lacked the funds to buy certain goods, you could always acquire them illegally—usually with relatively low risks of detection and apprehension. According to this view, it would be futile to try to rehabilitate those criminals who commit the bulk of crimes—crime against property for gain. The proper response, they argued, would be to increase the element of risk by protecting property more carefully and by concentrating on steps that would increase the likelihood of detection, apprehension and conviction of criminals.

5. What Have We Learned?

The overwhelming conclusion we are left with after our search is that there is no single, satisfactory explanation for the cause of crime. After centuries of trying to explain crime, we know little about how to prevent or stop crime by traditional methods of punishment or treatment. To complicate the matter further, the broad spectrum of acts that we classify as "crimes" today makes it unlikely that we will ever come up with one answer to this complex problem.

Furthermore, even if we did uncover the "cause" of crime, assuming that there is one, it would not necessarily assist us in determining what to do about crime. Regardless of the "root causes", we must recognize that crime exists, that it must be responded to, and that criminal law is one important—but not the only—tool to deal with crime.

At the heart of this Criminal Law Review process is the need to rethink and reshape the criminal law so that it effectively responds to "crime", however we define it, in our society.

6. Looking to the Future

Will crime in the year 2001 resemble crime as we knew it in 1901? While it is always perilous to attempt to predict the future, it does seem likely that many of the factors that contributed to our current situation will continue to influence the general shape of future events. In formulating a criminal law policy, however, we must take into account the fact that crime is not static—it evolves as society evolves. We must also bear in mind that resources are becoming less abundant, and attitudes are changing. What are the implications of this process of evolution for criminal law policy?

a) As Crime Evolves

Despite the fact that the "crime prone" baby-boom population is passing into middle age and beyond, most experts predict a continuing growth in traditional "street crime", bearing in mind that much of what we refer to as "street crime" includes crimes that occur in the home between people who are well known to one another.

New technological advances bring with them sophisticated, potentially harmful activities that may call for a criminal law response. On the positive side, the use of new computerized technology will provide police with better investigative tools and supply individuals with preventive and protective devices for their homes and businesses. At the same time, however, new avenues may open up for white collar crimes which involve the manipulation of this new technology. Computers may also be used to violate the privacy of individuals.

As the economy continues to be influenced by large national and transnational organizations, and members of the public become more dependent in their daily lives on the operations of these networks, it is the public that risks experiencing the intentional and unintentional harmful effects of the activities of these organizations.

The trend of recent years away from neighbourhoods and public places to increasingly enclosed, isolated and self-contained private spaces (e.g. shopping malls, condominiums, total institutional environments) has resulted in a rapid expansion of the private security industry. This development raises concerns about the rights of individuals, accountability and access. At the same time, the erosion of private and shared space in other urban areas has led to the growth of what some call "crime generated by urban design".

b) As Resources Dwindle

The effect of the present climate of fiscal restraint will bear heavily in the future on criminal justice agencies. Presently, the major portion (66%) of criminal justice expenditures is spent on policing. For the year 1979-1980, two billion dollars were spent on police services—an average expenditure per officer of $35,000 for an estimated 60,000 officers. In addition, nearly one billion dollars was spent on corrections.

Support for fiscal restraint comes from the increasing tendency among professionals to voice doubts about the effectiveness of traditional criminal justice institutions, programs and policies into which most of the resources are funnelled. Planning for a less abundant future involves the use of more innovative and cost effective approaches to crime, which will limit the role of government, restrict the use of costly imprisonment as a sanction, and increase reliance on community-based, victim-oriented restitution and reparative sanctions.

c) As Attitudes Evolve

The criminal law and criminal justice system are tools of society designed to achieve common public goals. They must therefore be reflective of and responsive to evolving public attitudes and values.

As we look at trends in both attitudes and actual practices in recent decades we see some support for limiting the use of criminal law sanctions in general, and imprisonment in particular, to offenders who are violent and dangerous, and who cannot be adequately dealt with through any other means.

These patterns in the use of criminal law, however, have not been explicitly endorsed in a guiding policy. Furthermore, there are many notable exceptions and apparent contradictions. For example, a significant proportion of prisoners in institutions are there for default in payment of fines or for relatively minor offences of a non-violent nature, such as traffic violations.

One of our primary objectives in the Criminal Law Review process, therefore, will be to establish a more explicit basis for the application of criminal law, reflective of current and emerging public values and attitudes.

III. OUR CRIMINAL JUSTICE SYSTEM: QUESTIONS AND CONCERNS

How effective is our criminal justice system in reducing crime? Are there other more effective measures we could be using? What happens to the victims of crime? Are police, prosecutors, judges, correctional officials and parole boards accountable to anyone for the decisions they make? Why do similar offenders who commit similar crimes in similar circumstances sometimes get very different sentences? How much criminal law should there be anyway?

These questions are directed at the workings of our criminal justice system as a whole. As is apparent from these questions, the criminal law, as it is written in our statutes, is only one part of the overall system of justice in Canada. This means that our task—to examine this one part—will first involve a check on the condition of the overall machine. For a start, there is a host of questions and concerns about the system that must be considered.

1. How effective is our justice system in combatting crime?

It is now generally concluded from past experiences that the criminal justice system cannot realistically be expected to eliminate or even significantly reduce crime and rehabilitate unwilling offenders. We have learned that it is not the penalties on the statute books, nor even the severity of prison sentences handed down by the courts, that are the most effective responses to crime.

We now know that the criminal justice system may improve its effectiveness through prevention on the one hand and increasing the certainty of detection, apprehension, conviction and punishment on the other. In any case, only after we discover the weaknesses in the system, can we concentrate on its strengths—that is, its ability to respond to crime through thorough investigations, prosecutions and court procedures.

When we sharpen our focus in the next chapter to consider whether new laws should be written to deal with new forms of crime, we must keep in mind how limited the effectiveness of that very response has been in the past. Also, bearing

in mind that the costs of our criminal justice system grow every year, it is becoming increasingly important to know how to be more effective with the same or lower levels of resources.

2. How effective are non-criminal measures?

"There ought to be a law" is a response we are all familiar with. But in reality, that response has not been very effective in stunting the growth of crime. As we saw earlier, the more laws we write, the more possibilities for crime we create. Alternatives do exist. Instead of a single focus on the law, our approach could be broadened to incorporate greater use of non-criminal measures such as crime prevention strategies and community programs.

Can we afford to start building more effective measures? The answer is "yes". Many alternative measures are not costly to develop. Many already exist in our communities, and simply need to be enhanced or refocused. In our families, schools, churches and clubs, we share moral and cultural beliefs, traditions, and expectations. We express our disapproval of anti-social acts and thereby strengthen the values shared in our community. Those are the day-to-day community responses to crime that we often take for granted. The formal criminal justice system appears only at the very end of this continuum of social control measures.

In the past few decades, communities have increasingly relied on governments to combat the anti-social conduct that we have more and more come to consider as "crime". Governments are now increasingly heard to say that crime is a community responsibility and that governments cannot be expected to "do it all". Communities, for their part, are beginning to realize that governments really do seem unable to combat crime alone. Criminal law measures tend to react after the crime has been committed and the criminal has been apprehended. As we have learned, that response comes too late.

Placing a greater emphasis on community involvement and other social measures to combat crime, we could direct our energies and resources to preventive measures at early stages. We could also make more effective use of community organizations and programs—including voluntary associations—to cope with a wide variety of social problems which would otherwise be dealt with through the criminal justice system. These include problems associated with broken homes, alcohol and drug abuse, social dependency, and employment—to name but a few.

3. How can our system be more responsive to victims?

What happens to the homeowner whose yard is damaged by vandals? Isn't there less interest in seeing the vandals punished than in recovering the cost of the damages? Where is the vandal when it comes time to pay for the broken fence?

The criminal justice system traditionally has not seen itself as the appropriate institution to deal directly with these concerns. While no reliable figures are available, it is generally believed that restitution by offenders to victims could be ordered by courts in a greater number of cases.

Another major problem facing victims of crime is that their immediate emotional, financial and physical needs in the wake of a crime are usually ignored. Victims are rarely given any information about the process they are entering when they report a crime or participate in an investigation or prosecution. Often they do not even learn the outcome of the case. For witnesses this can mean repeated court appearances, loss of wages, difficulties with transportation and child care, and in some cases of insensitive treatment, it can mean a loss of faith in the criminal justice system.

What about compensation to victims of violent crimes? In most provinces compensation awards are available but they must be sought through an administrative process that is totally separate from the criminal justice system.

The concern of the criminal justice system has historically been the conflict of the state versus the individual, whereas the civil system has provided the forum for conflicts between individuals. The criminal and civil systems could be made more responsive to the needs of victims in order to focus the criminal justice system more clearly on the positive goal of reparation rather than the negative goal of punishment.

4. How can we balance the power of the state and the rights of the individual?

Are police powers too limited? Are courts left powerless to prevent pre-trial release of serious offenders? Are trial procedures too lengthy and cumbersome because of the careful attention given to the legal rights of the accused? Or are the powers of the state too strong, not subject to effective review and not sufficiently respectful of individual rights?

In the last decade, police powers have become a newsworthy issue in Canada. Earlier attitudes of complacency have been jolted by repeated allegations concerning the abuse of police powers, and the public has become more aware of the tension between police effectiveness and individual rights. The debate surrounding the new Charter of Rights and Freedoms, and recent commissions of inquiry

have led to increased public pressures to strengthen human rights guarantees. In response, police have argued that over the last twenty years, there has been an erosion in their ability to combat crime. Effective public protection, they argue, requires enhanced police powers. The problem is, how can we balance the need for more effective law enforcement with the need to safeguard human rights and freedoms?

The implementation of the Charter will be of special importance in any future discussions and balancing efforts. It may be that certain aspects of the criminal law will require amendment to comply with the Charter, and in that context an examination of our existing law has already begun. In addition, it will be a continuing duty in the context of the Criminal Law Review to scrutinize proposals for change to ensure compliance with the Charter.

5. How can we make our justice system more accountable?

When called to a dispute or to the scene of a crime, how much discretion should the police officer have in deciding whether to make an arrest and lay a charge? Should there be guidelines to aid the officer in making these decisions? Once the charge is laid, how is it decided if there is enough evidence to warrant prosecution or if it is in the public interest to prosecute?

Once a conviction is registered, how does a judge decide whether the offender should be given a fine or a term in jail? What criteria should parole boards use to decide whether the offender ought to be released?

We have already seen that there is—and ought to be—a considerable amount of leeway in society's overall response to criminal and other anti-social behaviour. But how much leeway and discretion should there be in the formal criminal justice system?

In Canada, considerable decision-making discretion is given either by law or tradition to police, prosecutors, judges, correctional officials and parole boards. Discretion is generally viewed as a desirable and necessary tool for criminal justice agents, allowing them the flexibility to respond to the widely-varying cases with which they are faced. On the other hand, we are aware of the undesirable consequences that result from paying too little attention to the structuring and over-seeing of such discretion.

Two of the major concerns with discretion are the disparity in the use of discretion and its lack of visibility and accountability. If similar offenders in similar circumstances are treated differently for unexplained or unjustified reasons, then we have a problem with disparity, and our notions of fairness and even-handed justice are violated. Concern over lack of visibility and accountability arises when

questions that are asked by the public are left unanswered. Why are charges suddenly "dropped"? Why do judges give different sentences to apparently similar offenders?

Decisions made in the operation of the criminal justice system have a direct impact on the rights and freedoms of individuals. Accountability in all its dimensions—legal, financial, public and political—must therefore be a theme which is specifically addressed when we begin to formulate a criminal law policy.

6. How can we improve our sentencing process?

Why does the nature and length of sentence imposed on offenders vary from province to province and county to county? Why are there no explicit policies or principles of sentencing in Canada? How can we make our sentencing options more innovative and more effective?

Although the Criminal Code sets maximum prison sentences for many offences, those sentences are typically so much higher than the average sentence for the crime that they cannot be said to provide any real guidance to lawyers, judges or convicted persons. In addition, there is confusion surrounding the practice of charging and negotiating guilty pleas. There is confusion about the manner in which such processes as parole, temporary absence, and mandatory supervision affect the sentence imposed. As is often said, it is important that justice is done—but it is also important that justice is seen to be done.

To add to our confusion in this area, virtually nothing is known about the effects of a particular sentence on a particular offender or on the community in general. It is suggested, therefore, that we should be very careful and restrained in our use of punishments that directly affect individual freedom and dignity. Unfortunately, the criminal justice system does not currently provide for a range of meaningful sentence alternatives. At present there are few options between imprisonment, which is severe and potentially damaging, and probation or discharge which sometimes provide minimal or no supervision and control.

The imposition of a sentence represents a critical point in the criminal process. It is at the stage of sentencing that the criminal justice system most consciously and visibly expresses its denunciation of certain behaviour, attempts to deter people from further wrongdoing or orders redress of the harm done. Developing explicit principles of sentencing will therefore be an important part of the overall Criminal Law Review process.

IV. CANADIAN CRIMINAL LAW: RESHAPING ITS ROLE

Criminal law—as it is written in our statutes—is but one of the tools available to society for dealing with anti-social conduct. Keeping in mind that criminal law as a tool has limited possibilities, we must ask ourselves some basic questions to establish what the nature of that tool ought to be. In order to approach these questions thoughtfully, it is first necessary to articulate our underlying premises and assumptions.

What kind of conduct ought to be considered criminal? Are there too many offences in Canadian law that are insufficiently serious in nature to warrant the full force of the criminal law? Or should we outlaw more anti-social behaviour than we presently do?

Should we use the criminal law to reinforce values threatened by conduct such as prostitution? Do we unduly stigmatize individuals by applying criminal penalties to such offences as failure to comply with regulations? Or do we need to expand the criminal law to deal with new or emerging anti-social conduct such as theft by computer, destruction of non-renewable resources or the manufacture of unsafe products?

In asking ourselves what role the criminal law should play in society, we are asking the question that is central to this Criminal Law Review process. It requires us to consider what purpose the criminal law should serve, what conduct the criminal law should prohibit, and the lengths to which the criminal law should go in pursuit of its aims.

Defining more clearly what should fall under the purview of "criminal law" is one of the essential steps in reshaping that law. Presently, the sorts of penalties and the kinds of legal proceedings that apply to a person who commits, for example, an assault, apply also to a person who fails to comply with technical regulations such as those under the Fisheries Act. Both offenders may be punished by a fine or imprisonment. In both cases, trials may be held in the same courts and sentences passed by the same judges. To the offender in jail it is no consolation, and it makes little difference to know, that the conviction was for an offence under the Fisheries Act rather than for a "crime" under the Criminal Code.

Although many of the laws which define offences are located in statutes other than the Criminal Code, they may be identical in all important respects to "criminal laws". As part of the process of defining what we mean by "criminal law" and "crime", we must include in our considerations those offences that have criminal-like consequences.

I. Its Proper Purpose

The criminal law has as its major purposes the pursuit and preservation of justice and the protection of society. By justice, we mean ensuring equity and fairness. We mean providing a guarantee of the rights and liberties of individuals and ensuring a fitting social response to wrongdoing. The protection of society encompasses the preservation of peace, the prevention of crime as well as the protection of the public.

The twin objectives of justice and the protection of society do not always exist in a state of perfect balance, however. As we saw earlier, these objectives sometimes seem to be in conflict with each other. In reshaping the criminal law we must continually strive to reconcile the two.

Underlying these two purposes is the premise that criminal law is primarily a punitive institution. Whether justified in the name of treatment, rehabilitation, denunciation, deterrence or incapacitation, the sanctions meted out by the criminal law are, and always have been, perceived as punishment by those to whom they are applied. This is not to say that criminal law punishments must be harsh, cruel, or inhumane. Quite the contrary. Just as the age-old doctrine of "an eye for an eye" means that it is unjust to take more than an "eye" for an "eye", the objective of justice requires that limits be imposed on the extent to which punishments may be inflicted.

No social institution as important or complex as the criminal law can afford the luxury of picking just one purpose—no matter how intellectually simple and satisfying that selection might be. Social purposes are never simple, they require constant dialogue and balancing.

2. Its Proper Scope

The basic problem confronting criminal law and the criminal justice system is a confusion, at the most basic level, about what it is that the criminal law ought to be doing. There has never been an explicit policy to assist legislators in the amendment or creation of criminal laws in the Criminal Code and other statutes. The time has arrived to consider just what conduct the criminal law should deal with, and to whom criminal penalties should be applied.

a) When should the criminal law be applied?

Few people have trouble with the notion that armed robbery is a form of conduct that should be "outlawed" or that the penalty for armed robbery should include a term of imprisonment. Most would agree that armed robbery is a "real" crime. But what about the thousands of offences created under some 300 federal statutes (and their regulations) other than the Criminal Code? Which offences under these statutes and regulations are "real" crimes, and which are merely "regulatory" offences ?

In re-examining the criminal law, it will be necessary to establish criteria that distinguish "real" crimes from regulatory offences, so that we can clarify which offences ought to be subject to criminal penalties. That process will also require a consideration of whether some offences in the Criminal Code would be more appropriately dealt with by regulatory law or by the exercise of private morality. If some of these offences can be dealt with effectively through regulation and public education, then perhaps they should be spared the full force of the criminal law.

The traditional emphasis of criminal law on the allocation of blame and the punishment of offenders does not seem to be the most effective or the most appropriate response to all forms of criminal conduct. In some cases of property damage, for example, criminal law penalties neither serve the interests of the victim nor restore the social harmony disturbed by the criminal act. As a consequence, there is growing interest in the use of alternatives to the criminal process in dealing with certain disputes that are more in the nature of civil wrongs between two parties than "real" criminal offences. It is suggested, for example, that in some cases criminal prosecution could be "stayed"—deferred—in order to allow the offender to compensate the victim for harm done. Caution, of course, would need to be exercised in pursuing any such new approaches to dealing with crime, to avoid the danger of the new approaches themselves becoming as intrusive as traditional approaches.

b) When are criminal law penalties the appropriate response?

Two questions are raised concerning the use of criminal law penalties in response to anti-social behaviour. First, does the conduct result in serious harm to other people or to society? Second, will the enforcement measures be more severe than is appropriate considering the conduct? At first glance these questions appear to be simple and straight-forward. They are not.

Once again we are faced with the task of trying to maintain a delicate balance. We must weigh the seriousness of the conduct against the harshness of the response. If the conduct can be controlled by the forces of public opinion, regulation or education, then perhaps we should not use the full force of the criminal law as a response.

After years of study by commissions in Canada and other western countries, one theme emerges: the criminal law ought to be reserved for reacting to conduct that is truly harmful. Criminal law should be used only when the harm caused or threatened is serious, and when other less coercive or less intrusive means do not work or are inappropriate.

3. To whom should criminal law penalties apply?

Once it is established what kind of conduct should be made criminal and for what purpose, it must be asked to whom the penalties should be applied, and how far the criminal law ought to go in pursuing its aims.

Should criminal law be used to punish those who contravene the law by causing harm through accident, carelessness or lack of diligence? Or should criminal law be applied only to those who are culpable—that is,those who contravene the law intentionally, recklessly or as a result of negligence?

These questions are more familiar to lawyers than they are to the public, and are the subject of much legal debate. However, the general concept of responsibility or "culpability" is more familiar to us all, and must remain the cornerstone of criminal punishment. The concern of society is to punish only those who are culpable of criminal conduct.

There are more difficult legal questions—when should an individual be excused from criminal liability (e.g. by reason of insanity, drunkenness, or entrapment)? Should a particular offence require proof of intent, recklessness, or only negligence for a finding of criminal liability? In what situations would individuals acting on behalf of organizations be liable for their conduct? These issues are currently under study by the Law Reform Commission and will be brought under the purview of the Criminal Law Review, when the Commission makes its recommendations in these areas.

4. How far should the criminal law go in pursuit of its aims?

The manner in which we go about applying the criminal law to certain conduct is central to our notions of justice, equity and fairness. The criminal process—the way in which we wield the tool of criminal law—is as essential to our understanding of the criminal law as the substance of the law itself.

The time-honoured principles—the presumption of innocence, the right not to be subject to arbitrary arrest or detention, the right to a fair hearing before an independent and impartial adjudicator, and freedom from cruel and unusual punishment—are now entrenched in the Constitution of Canada. Other important principles are found in the laws of evidence which, for example, require the prosecution to prove every material element of an offence beyond a reasonable doubt, and protect individuals against self-incrimination.

Our notions of justice require that state interference with individual liberty can only be justified where it is clearly necessary in the interest of society as a whole, and must be no greater than is necessary to protect the interests of society. This concept of "necessity" means that state intervention should be the minimum necessary and adequate to achieve justice and the protection of society. Furthermore, it applies to each stage of the process—from Parliamentary consideration in creating an offence, to the officer who is deciding whether to lay a charge, from the judge who is considering the form and amount of punishment to impose, to correctional officials deciding how a sentence should be administered.

A logical extension of the concept of necessity is the belief that punishment must not exceed the harmful effects of the crime itself. In this context, all financial and social costs, including those of imprisonment, must be taken into account.

V. TOWARD A CRIMINAL LAW POLICY: A FRAMEWORK

1. Our Criminal Law Focus

In this paper we have undertaken a general review of the responsibilities of our communities and our criminal justice system in responding to crime and anti-social conduct. We have also focused most specifically on the role of criminal law itself as one of a range of possible responses to conduct we define as "criminal". This discussion and review has been aimed at establishing the proper context for our most important and immediate task at hand, namely, the establishment of a framework for the role of criminal law as a legislative tool.

The framework, expressed in terms of a statement of purpose and principles, attempts to draw together fundamental concepts and relationships—placing criminal law within the context of a broader and more balanced social response to crime and its effects.

2. Statement of Purpose and Principles

Recognizing that:

In the Charter of Rights and Freedoms, Canada has guaranteed certain rights and freedoms consonant with the rule of law and with principles of justice fundamental to a free and democratic society;

Canada has, in addition, undertaken international obligations to maintain certain standards with respect to its criminal justice system;

The criminal law is necessary for the protection of the public and the establishment and maintenance of social order;

The criminal law potentially involves many of the most serious forms of interference by the state with individual rights and freedoms; and

Criminal law policy should be based on a clear appreciation of the fundamental purpose and principles of criminal law;

It is appropriate to set forth a statement of purpose and principles for the criminal law in Canada.

Purpose of the Criminal Law

The purpose of the criminal law is to contribute to the maintenance of a just, peaceful and safe society through the establishment of a system of prohibitions, sanctions and procedures to deal fairly and appropriately with culpable conduct that causes or threatens serious harm to individuals or society.

Principles to be Applied in Achieving this Purpose

The purpose of the criminal law should be achieved through means consonant with the rights set forth in the Canadian Charter of Rights and Freedoms, and in accordance with the following principles:

(a) the criminal law should be employed to deal only with that conduct for which other means of social control are inadequate or inappropriate, and in a manner which interferes with individual rights and freedoms only to the extent necessary for the attainment of its purpose;

(b) the criminal law should clearly and accessibly set forth:

  (i) the nature of conduct declared criminal;

  (ii) the responsibility required to be proven for a finding of criminal liability;

(c) the criminal law should also clearly and accessibly set forth the rights of persons whose liberty is put directly at risk through the criminal law process;

(d) unless otherwise provided by Parliament, the burden of proving every material element of a crime should be on the prosecution, which burden should not be discharged by anything less than proof beyond a reasonable doubt;

(e) the criminal law should provide and clearly define powers necessary to facilitate the conduct of criminal investigations and the arrest and detention of offenders, without unreasonably or arbitrarily interfering with individual rights and freedoms;

(f) the criminal law should provide sanctions for criminal conduct that are related to the gravity of the offence and the degree of responsibility of the offender, and that reflect the need for protection of the public against further offences by the offender and for adequate deterrence against similar offences by others;

(g) wherever possible and appropriate, the criminal law and the criminal justice system should also promote and provide for:

  (i) opportunities for the reconciliation of the victim, community, and offender;

  (ii) redress or recompense for the harm done to the victim of the offence;

  (iii) opportunities aimed at the personal reformation of the offender and his reintegration into the community;

(h) persons found guilty of similar offences should receive similar sentences where the relevant circumstances are similar;

(i) in awarding sentences, preference should be given to the least restrictive alternative adequate and appropriate in the circumstances;

(j) in order to ensure equality of treatment and accountability, discretion at critical points of the criminal justice process should be governed by appropriate controls;

(k) any person alleging illegal or improper treatment by an official of the criminal justice system should have ready access to a fair investigative and remedial procedure;

(l) wherever possible and appropriate, opportunities should be provided for lay participation in the criminal justice process and the determination of community interests.

VI. THE NEXT STEP: DISCUSSION AND DEBATE

The "Statement of Purpose and Principles" is designed to guide the Criminal Law Review in its consideration of the specific substantive and procedural issues it must address over the next few years. This marks an important beginning—the result of which should be a criminal law that is credible, effective and reflective of the interests and values of all Canadians. As we have seen, it is not the law itself, nor even the criminal justice system, that has the major impact on creating a just, peaceful and safe society. It is the attitudes and behaviour of the public and the understanding and support they give to our system of justice that is the key. After all, our criminal justice system and its institutions exist to serve us and to ensure justice and the protection of society. For this reason, the issues discussed in this paper are intended to be seen as a starting point for Canadians to discuss and consider the role of the criminal law in Canadian society.

This document is aimed at highlighting and summarizing key points of a more thorough analysis of Canadian criminal law presented in "The Criminal Law in Canadian Society".

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