Why Criminal Law Is a Mandatory Subject

The study or practice of criminal law in other jurisdictions is not adequate preparation for Canadian criminal law and procedure. This is because there is no body of law or area of practice that is as culturally and politically driven as the law of crimes. As a result, in spite of many core similarities, the law of crimes varies dramatically from jurisdiction to jurisdiction. More importantly, each jurisdiction develops its own legal culture which must be understood before competence can be attained. This is particularly so in Canada. Four reasons can be identified.

First, the criminal law of Canada is complicated by federalism in a uniquely Canadian way. The federal government holds jurisdiction over the definition of criminal law and procedure, but the administration of criminal justice falls within provincial jurisdiction. There is therefore an array of federal and provincial laws that touch the topic. Canadian practitioners must understand the subtle interplay of federal and provincial rules.

Second, unlike the criminal law in some other common law states, common law offences are not permitted in Canada. More importantly, basic Canadian criminal offences are included in a criminal code that has no general part. In other words, the principles that identify and animate the criminal law are not found in the statutes but are buried as underlying principles in the case law. The law cannot therefore be understood simply by reading the Criminal Code and related statutes, or by relying on general principles of statutory interpretation, or even by reading the leading cases in a discrete area. Competence in the criminal law of Canada requires competence in the criminal law generally.

Third, no body of law is as heavily amended as the criminal law. These changes are often politically driven. Feminist critique in the 1980's resulted in wholesale change in the law of sexual offences; notorious gang related incidents in the 1990's resulted in major changes to the firearms offences and the creation of association based provisions dealing with organized crime; terrorism offences were created in the aftermath of 9/11. There has been dramatic change in the law of sentencing during the last decade and a half, which has produced unique Canadian sentencing tools.

The current preoccupation is with corporate liability and white collar crime. While other nations have modified their laws as a result of these or other influences, different approaches have been taken internationally. The law of crimes is so heavily and diversely amended around the world that the Canadian law differs dramatically even from other systems that began with the English Common law, including those nations that use the same model criminal code that was adapted here in 1893.

Fourth, and most importantly, no area of Canadian law is as touched by the Canadian Charter of Rights and Freedoms as the criminal law. The most heavily litigated constitutional provisions, the “legal rights” sections, impose a range of constitutional limits on investigative and enforcement powers that differ from other jurisdictions; the law of search, arrest and detention, bail, jury trials, and trial procedure are all touched if not defined by the Charter.

The Charter has also influenced the very definition of offences and defences, including the development of constitutionally minimum levels of mens rea or criminal fault, rules not found in other jurisdictions. No-one can practice criminal law adeptly without mastering the criminal-constitutional law which is best learned during the larger study of criminal law.

In no area of the law is more at stake for individuals than penal or criminal law. Those who are prosecuted stand to lose their liberty and to suffer stigma and social censure. This risk, coupled with the unique features of Canadian criminal law, support the broad consensus that Criminal Law and Procedure should be a mandatory course for those seeking to qualify for the practice of law in Canada.