

By s. 91:27 of the Constitution Act, 1867, Parliament has exclusive legislative authority in relation to “The Criminal Law” and “the Procedure in Criminal Matters.” Parliament’s criminal law power is wide. It is not limited to matters traditionally criminal; it includes the power to make new crimes. The criminal law power is “necessarily an expanding field” (PEI v. Egan). **Criminal Law Purposes** For legislation to be sustained under the criminal law power, there must be a relationship between the “legislative purpose” and the “nature of the prohibited conduct”. The Margarine case explicitly identified the common criminal law purposes that would sustain federal legislation under the criminal law power: “Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law ...” Prof. Le Dain commented that the Margarine court:

emphasized that in determining whether legislation that is in criminal law form has a bona fide criminal law purpose one must look at the supposed “evil” to which it is directed. The conclusion against validity in the Margarine case was based on a combination of two factors: margarine was admitted not to constitute a hazard to health, and the legislation was clearly concerned with the protection of dairy farmers from competition.... [T]he issue is not whether particular conduct is appropriate for criminal law prohibition, but whether the criminal law form is being used to pursue an ultra vires legislative purpose.... [T]he nature of the prohibited conduct is necessarily an important consideration in reaching a conclusion on this issue. [Duff and the Constitution (1974), 12 O.H.L.J. 261.]

Prof. Le Dain’s helpful analysis – that it is “the nature of the prohibited conduct” that determines whether the criminal law power can embrace it – leaves open an important question that still prompts debate in the cases. Must there be some degree of harm that the conduct risks causing to the public to activate Parliament’s criminal law power? Justice Major held that the prohibited activity “must pose a significant, grave and serious risk of harm to public health, morality, safety or security before it can fall within the purview of the criminal law power;” RJR v. MacDonald Inc. v. A.-G. Can., [1995] 3 S.C.R. 199. Justice Arbour disagreed: “[t]here is, as such, no constitutional threshold of harm required for legislative action under the criminal law power;” Malmo-Levine v. The Queen, [2003] 3 S.C.R. 571, at para 202.

The debate as to whether, and if so, how much harm is required to nourish use of the federal criminal law power can never be concluded in these terms. If harm is required, attempts to quantify the minimum risk of harm necessary to engage the criminal law power are bound to flounder. The concepts of harm and benignity are simply too fleeting to provide a solid springboard to launch constitutional power.

The real question that must be answered is whether the dominant purpose of the challenged

legislation is protection of vital public interests (notwithstanding ancillary impacts on private relationships). A positive answer to this question will sustain use of the criminal law power. By contrast, if the dominant purpose of the challenged legislation is to balance out private interests against each other, as is done by the private law of property, contract, tort and trusts, the legislation cannot be sustained under the criminal law power.

This form of analysis implies that legal provisions to balance private interests against each other will overlap considerably with protection of the public interest. This will give rise to much opportunity for concurrent federal and provincial action. The jurisprudence confirms the validity of this observation. The cases contain many examples of the concurrent use of criminal law and provincial regulatory powers. This is particularly true concerning risky behaviours that attract the criminal law sanction, including regulation of driving and dangerous products.

'Colourable' Legislation

One important limit on Parliament's criminal law power is the doctrine of colourability. Parliament obtains no authority to enact statutes under the criminal law power by casting statutes in the form of a prohibition and penalty for breach – legislation which says 'Thou shalt not, or else'. As we have seen, whether challenged legislation is validly enacted under the criminal law power is judged by reference to whether the object, purpose or effect of the legislation discloses a genuine criminal law purpose. Federal legislation that disguises a regulatory purpose behind the facade of prohibition and penalty will still be unconstitutional if the activities regulated fall within the provincial catalogue of powers.

This is the teaching of the *Insurance Corporation of British Columbia v. Unifund Assurance Company*, [2003] 2 S.C.R. 63 and *Margarine* cases. These cases found in challenged federal statutes legislative purposes to regulate the insurance and dairy industries, and struck down the statutes for that reason.

In *A.G. Canada v. A.G. Alberta*, [1916] 1 A.C. 588 the Privy Council considered the Dominion Insurance Act which provided that no company or person should do insurance business unless they had received a Dominion insurance licence. The Insurance Act fortified the prohibition with a penalty for contravention. The Privy Council ruled the Insurance Act was ultra vires the powers of Parliament. Following that defeat Parliament amended the Act, strengthening its enforcement with new provisions in the Criminal Code. These created a criminal offence to do insurance business without a Dominion licence. Counsel for Canada defended the amended

scheme on the ground that the earlier statute derived coercive force from the Insurance Act, whereas the new legislation created an indictable offence within the Criminal Code itself and was therefore a valid exercise of Parliament's criminal law power. Unpersuaded, the Court searched for "the true nature and character" of the enactment. This was determined to be "the regulation of the business of insurance within a province," a purpose which lay beyond federal jurisdiction. The Criminal Code amendments were struck down: *A. G. Ontario v. Reciprocal Insurers*, [1924] A.C. 328.

This theory was elaborated and applied in the *Reference Re S.5(a) of the Dairy Industry Act (Margarine Reference)*, [1949] S.C.R. 1. The theory is that despite the presence of a prohibition under penal sanction, statutes must have a true criminal law purpose to pass constitutional muster. Courts will strike down "colourable" statutes – federal legislation which tries to disguise regulatory purposes lying within provincial jurisdiction by casting the statute as a prohibition enforced by criminal sanction for breach.

Provincial Penalties

By section 92(15), the provinces have legislative authority to impose punishment by imprisonment, fine and other penalty. The provincial power to punish is essentially ancillary to the regulatory jurisdiction conferred by the catalogue of provincial powers in section 92. Section 92(15) provides for the imposition of penalties to enforce provincial prohibitions or provincial regulation of conduct. The power to regulate or prohibit the conduct to which the penalty attaches must be found elsewhere in the catalogue of powers s. 92 confers on provincial legislatures. Section 92(15) confers no power to regulate or prohibit conduct; it only confers power to enforce by penalty an otherwise valid provincial prohibition or regulation.

Civil Remedies

May Parliament enforce by civil remedy valid federal prohibitions or regulation of conduct? Generally speaking, Parliament may enforce by civil penalty any prohibition or regulation of conduct it enacts where the standard of conduct relates to a matter coming within Parliament's s. 91 powers, including the criminal law power. This is to be distinguished from prohibiting risk creating activities normally within provincial jurisdiction where enforcement of the prohibition is by civil remedy for damages caused.

Parliament may set standards of conduct pursuant to its catalogue of powers and enforce obedience by civil remedy. Parliament may not set standards of conduct relating to matters within provincial jurisdiction and enforce compliance by civil remedy (or even by criminal penalty for that matter).

While easy to state in the abstract, this principle causes difficulty in application. This is because tort law lies within the exclusive legislative authority of the legislatures. The fundamental theory of tort law is to impose reasonable standards of conduct to prevent the creation of reasonably foreseeable risks of harm, and therefore to act as a disincentive to risk-creating behaviour (Resurface Corp. v. Hanke, 2007 SCC 7, para 6).

It is sometimes difficult to disentangle the creation of a duty of care in tort (take care not to...) from a prohibition in criminal law (don't...). Distinguishing between the two is complex because the difference goes beyond form and language. As we have seen, the difference lies in the subtle distinction between the intention to balance out private relationships from the intention to protect the public interest. Therein lies the difficulty: if the federal prohibition has a valid criminal law purpose relating to protecting the public, enforcement may be by civil action for damages caused or by criminal sanction. If the federal regulation in essence balances out private relationships, it cannot be saved by the addition of a criminal penalty, nor would civil enforcement be valid either.

A related analytical problem is to distinguish criminal prohibitions aimed at protecting the public from risk creating behaviour, from civil duties of care that discourage risk creating behaviour by making the originator of the risk pay.

The criminal law paradigm essentially prohibits or regulates risky behaviours. The private law paradigm essentially compensates for damages caused by risky behaviours. Though the two paradigms run at tangents to each other, it remains true that both criminal and private law systems intend to discourage risky behaviours. Therein lies the difficulty for constitutional analysis. The criminal law and private law systems are not congruent, but they overlap in purpose. It is why risky behaviours may be validly and concurrently embraced by both civil and criminal law systems, each system authorized by separate constitutional provisions.

Parliament may impose civil remedies in damages for purposes other than enforcing regulation of conduct deemed offensive to the public interest. Parliament may provide for restitution of

property stolen, or payment of damages in lieu. In this example, the criminal law power extends to novel methods of enforcement, sentencing and punishment, notwithstanding that these might overlap with civil damages in private law.

The essential requirement for enactment of civil remedies pursuant to the criminal law power is integration of the remedy into a valid federal regulatory scheme, the central thrust of which is an intention to protect the public interest. This is the fundamental inspiration of *MacDonald v. Vapour Canada*, supra. and *R. v. Zelensky*, [1978] 2 S.C.R. 940. The integration may occur by the remedy being a rational, functional means of enforcing the regulation of conduct; it may occur by elaboration of sentencing theory or otherwise. The crucial point is that civil remedies may be part of regulatory schemes authorized under the criminal law power so long as the object, purpose and effect of the scheme as a whole relates to a valid criminal law purpose.

Administration of Justice in the Province

By s. 92:14 of the Constitution Act, 1867 provincial legislatures have exclusive legislative authority in relation to "The Administration of Justice in the Province". This power entitles the provinces to establish police forces, prosecution services, penitentiaries, parole services, and ancillaries agencies associated with the administration of criminal justice in the province. This power is elaborated in the cases that follow.