Crime and the law

Addressing questions on the definition of "law" is always a difficult task (Dworkin 2006), and addressing questions that have to do with the definition of criminal law is not an exception. To the lay person the criminal law is a series of definitions of offences (what academics call "the special part"), whereas criminal law scholars tend to think of it as a set of general principles and conditions of criminal liability. (On the "General part" of the criminal law, see (Green 2000). What, as a matter of law, is treated as a "crime" in a particular jurisdiction is obviously determined by the legislation of that jurisdiction, but in general it can be said that a crime is any activity which is punishable by means of the criminal process (Fletcher 1998). Although this definition is tautologous, it is important to understand the outer boundaries of the concept, if we are to make meaningful estimates of the costs of crime. In order to do we can limit ourselves to an analytical approach focused on identifying the central features of contemporary criminal law systems (Duff and Zalta 2002): we do not need to undertake a metaphysical investigation about what a crime "really" is (but see (Moore 1997).

In general, criminal law is used in circumstances where society wants to express its disapproval of an act or omission by imposing significant personal sanctions against the person responsible, with typically some notion of moral or personal responsibility (Ashworth 2000; Ashworth 2003).

In order to capture the personal responsibility element, the vast majority of criminal infractions require that the perpetrator act either intentionally or negligently (mens rea). In Common Law countries penal systems usually contain a small subset of "strict liability" (no fault) offences, a much contested category (Simester 2005). Continental criminal lawyers regard the existence of strict liability pockets in criminal law with suspicion (Roxin 2006). However, differences between the systems are more apparent than real. Both in terms of procedure and the consequences of their infringement "strict liability offences" in Common Law jurisdictions are treated in a way similar to what in Continental legal systems are described as regulatory "violations" and taken to be outside the realm of the criminal law (Duff and Zalta 2002).

Most legal systems draw a distinction between more serious and less serious offences, for the purposes of determining both process and available punishments. So, for example, more serious offences, which are often punished by imprisonment are tried in higher courts and/or liability is determined by a jury. In the common law jurisdictions the relevant distinction has been between a "felony" and "misdemeanour" (Hall 1960). Civil law countries follow a similar

distinction under various names (e.g.: “Verbrechen-Vergehen” or “Delitos y faltas”, see (Stratenwerth and Kuhlen 2004) (Mir Puig 2006). In some common law countries, the terminology has been changed to, for example, that between “indictable” and “summary” offences (Ormerod 2005). In England and Wales, some crimes are known as “either way offences” in that the defendant can choose between being tried summarily in the lower court or on indictment in the higher court (Ormerod 2005).

Between the legal definition of crime and the common understanding of the concept there is a large difference. The common understanding is to what may be described as “mainstream” crimes (sometimes referred to as “mala in se”), conduct which is morally wrongful and leading to criminal offences in almost all mature societies and “regulatory crimes” (or “mala prohibita”), conduct which is morally neutral but which is prohibited in a particular jurisdiction by specific legislation (Wootton 1963), (Wells 2001). Since the distinction is not always easy to apply, it is best to treat the matter as on a spectrum between the two concepts (Sutherland 1945). Mala in se, or mainstream crimes, are typically classified into offences against the person (violent and non-violent), property and public order (Ormerod 2005). Mala prohibita defy classification because they cover a huge range of regulatory controls including those governing commercial, industrial and professional activity (Ogus 2004).

Another frequently encountered distinction is between “blue collar” and “white collar crime”. The problem is that these concepts have different connotations in different contexts (Bensman 1988). Since its first use the concept of “white collar crime” has oscillated between the reference to the (high) social status of the criminal and the type of crime and the fact that it was committed in the course of one’s occupation (Sutherland 1940, 1945). This latter use prevails today (Weisburd and Waring 2001). So, also, in modern times “blue collar crime” tends to refer to the nature of the crime and the situation from which it arises, rather than to the perpetrator. Thus it covers crimes of violence, but also “street crime”, including vandalism and shoplifting, while “white collar crime is associated with "... those illegal acts which are characterized by deceit, concealment, or violation of trust and which are not dependent upon the application or threat of physical force or violence” (FBI 1989). “White collar” crime also significantly overlaps with “corporate crime” (Simpson 2002). The latter can be interpreted very broadly to include “conduct of a corporation or of employees which is proscribed or punishable by law” (Braithwaite 1984), but more narrowly as where that illegality is pursued for organizational rather than individual ends (Jamieson 1994).

“Organized crime” is different again and is, perhaps, even more elusive with there being very many and very varied attempts at definition (Von Lampe 2007) (has collected over 100 different definitions). Perhaps the core ideas are that the prohibited activity should be committed by two or more individuals, that the means include violence and/or deception; and that the objective is some form of power, political or economic (Maltz 1976): see also (Paoli 2002).

Although most types of mainstream crime are treated as such in most jurisdictions, there is obviously a wide variation both in the definitions of readily acknowledged offences and in the outer boundaries of what constitutes criminal behaviour: (Beirne 1983; Pradel 2002) and for a valuable introduction to the problems of comparing national definitions of crime, see (Nijboer 2005). Identifying the core meanings of familiar crimes is important not only for the purpose of compiling and comparing data on the commission of crimes in different jurisdictions (see (European Sourcebook 2006); and, on victim surveys, (Block and Block 1984)), but also for applying international legal instruments, such as those protecting human rights, to criminal procedures (Guinchard 2005). Identifying the core is particularly problematic in the areas of fraud (Green 2000; Attorney General's Office 2006) and computer crime (Tavani 2000) or cybercrime (Gordon 2006).

Since legal definitions are created for legal purposes, it has been questioned how useful they are for other purposes; for example, they are not directly translatable into sociological indices, so that what is, in the latter context, “normal” is nevertheless defined as a crime (Wilkins 2004). Some efforts have been made to define and classify crimes according to the amount of social harm they create (Tifft 2006), but inevitably such labels and classification are based on subjective notions of harm and the definitions become not only culturally-dependent, but also normative (Ruggiero 2007).

A related but conceptually different matter is that of the adequate crime definition (a normative question). Since criminal law employs the harshest state sanctions in order to ensure compliance, there is an academic consensus that it should only be used as a last resort or ultima ratio (Jareborg 2005). Policy makers, however, do not seem too convinced (Husak 2004). (Simester and Sullivan 2000) estimate the number of criminal statutes in England to be about 8,000, and the excessive quantity and breadth of criminal offences has also troubled other European commentators (Fiandaca and Musco 2007). Some attempts have been made to draw a line between conduct deserving of criminal sanctions and conduct deserving moral sanction or non criminal legal response. Continental lawyers have insisted that immoral conduct that does not injure or endanger a “legal good” cannot be properly criminalized

“Rechtsgüterschutz Prinzip”, see (Amelung 1972). A parallel development has taken place in Common Law jurisdictions: under the “harm principle” no conduct should be criminalized unless it causes “harm to others” (Feinberg 1984). Given the vagueness and malleability of the expressions used (“legal good”, “harm to others”), however, these approaches have not been successful in providing a clear view as to the proper reach of the criminal law: history as well as actual practice show both principles fail to set any real constraints on the scope of the criminal law (Harcourt 2001; Hefendehl, von Hirsch et al. 2002; Burney and von Hirsch 2006).

In the final analysis the notion of what is a ‘crime’ is determined by the content of the criminal law: a crime is what the law says is a crime. One merit of taking an economic approach to law is that it can be used to develop some positive propositions about what kinds of activities are likely to be criminalised. By viewing criminal law as one amongst several instruments that can be used as a means of deterring socially-harmful activity it becomes easier to develop theories about legal development and law reform and to understand how the evolution of criminal law may be a reflection of changes in underlying economic and social conditions: (Bowles, Faure et al. 2008).