Discussion Paper

CRIMINAL LAW AS A MEANS TO POLLUTION CONTROL

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ABSTRACT

This paper is an exploration of legal means of pollution control within the context of comprehensive planning for water management. Although administrative means appear to be necessary to basic decisions, routine administration and day-to-day decisions within the framework of the basic decisions appear to be much more effectively accomplished through legal than through administrative procedures. Although both legal and administrative approaches have been considered in the past, remarkably little attention has been given to the idea of combining the two. The combination appears to be legally possible and to promise greater effectiveness in meeting the needs of comprehensive planning than either legal or administrative means alone. Each serves to overcome the deficiencies of the other rather than to compound the difficulties.

The most important advantage of this approach is that, while strengthening government authority for action, it firmly establishes the public will as the major decision-making power, rather than the bureaucracy. Thus better decisions can be more effectively enforced.

The system can be initiated immediately without inconvenience and it provides a machinery for continuing review, thus making it possible to maintain appropriate and timely provisions without disrupting social and economic activity.

RESUME

Ce mémoire étudie les procédés légaux de contrôle de la pollution au sein d'une planification d'ensemble de la gestion de l'eau. Bien que la procédure administrative semble être nécessaire aux décisions fondamentales, il est probable que l'administration courante et les décisions quotidiennes peuvent être assurées beaucoup plus efficacement par la voie légale que par des moyens administratifs. Dans le passé les aeux procédures ont été envisagées, mais on ne s'est guère penché sur l'idée de les combiner. Sur le plan légal la combinaison semble tout à fait réalisable, et son efficacité pour répondre aux besoins d'une planification d'ensemble semble devoir être supérieure à celle de l'une ou l'autre des procédures utilisées séparément. Chacune permet de combler les insuffisances de l'autre plutôt que d'accentuer les difficultés.

Le principal avantage de cette approche est que, tout en renforçant l'autorité du gouvernement au domaine des applications, elle permet à la population de s'exprimer en tant que force de décision primordiale, et diminue le rôle de la bureaucratie. Ainsi de meilleurs décisions pourront être mieux appliquées.

Ce système peut être mis en application dès maintenant sans inconvénient; il permet d'organiser une mise à jour constante, et par conséquent de prendre à temps des mesures nécessaires sans perturber l'activité sociale et économique.

It is becoming increasingly clear that the public views indiscriminate or excessive pollution as a social offence which should be dealt with by the federal government. One appropriate means for the federal government to institute pollution control would be through the Criminal Code. It would be logical to do so, both in respect to our governmental tradition and in respect to good water management. Comprehensive planning for water management is essentially a developmental concept. It implies economic expansion and growth and necessarily involves controversy over social values and economic priorities. It requires input and cooperation from all levels of government. There is room for a great deal of flexibility and legitimate difference of opinion about what we want to use our water for. Several different alternatives are viable and any decision is subject to reversal. Pollution abatement is part of water development in that it is a social improvement and possibly economically desirable. The extent of pollution abatement demand depends on the value we give it in relation to other water uses.

Pollution control is a different concept. It is not developmental in itself but a restraint on the free operation of our economic life. There are levels of pollution which are totally unacceptable and instances of pollution where control is essential to our ultimate survival. It is not relevant to this paper to discuss the definition of pollution or the level of acceptability in water quality. The argument assumes that agreement has been reached on these questions and concerns itself with the means to uphold this agreement.

The tendency of our political system is to allow as much freedom of choice to the individual as is compatible with the freedom of choice of others. This is, of course, not an invariable rule, but it is characteristic of our approach to social control and out legal system reflects this premise. Through the years the Canadian federal system has been used. To prevent the imposition on the whole country of developmental policies based on the economic and social values of part of it. Any comprehensive plans for water use will involve elements of value judgment either in ultimate objectives or in choice of priorities. To be effective they must be based on agreement and cooperation. Negotiations for such purposes as these can break down at any point and when this happens the whole package is lost, pollution control along with economic development. It would be useful therefore to accompany comprehensive water use planning with legislation directed specifically at pollution control. The simplest procedure, both politically and legally, to institute pollution control would seem to be through the criminal code, the standard vehicle for restrictive legislation in the public interest.

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POLLUTION AND WATER USE PLANNING

This sort of legislation would be unlikely to operate as a restraint against comprehensive planning for water use, since it is inconceivable that a comprehensive plan would not include this same restraint. On the contrary, to institute a system of pollution control and to familiarize society with the idea of a restraint on the use of water for waste disposal would facilitate the introduction of comprehensive planning through disassociating from it its major restrictive characteristic. Comprehensive planning would assume the character of a release from restraint in that it would offer a cheaper, more efficient means to an already accepted goal.

TYPE OF LEGISLATION

Criminal legislation, if it is to be effective, must be specific, absolute, necessary to the protection of the public, uniformly applicable and it must be enforceable. These characteristics have been counted against its use for pollution control on the grounds that uniform standards are neither necessary nor desirable for effective public protection and if applied would have adverse effects on economic development. However, blanket uniform standards are not necessary to achieve these characteristics. The rigidity of the criminal code is a necessary characteristic of its application only, not of its content. Its content is at the discretion of Parliament. There are many sections of the criminal code which contain qualifying clauses and allow for exceptions. Our judicial process allows a wide latitude for individual consideration of cases. The kind of legislation appropriate to pollution control would contain restrictions relating to specific substances and specific concentrations of substances, with specific types of cumulative effect and specific amounts of cumulative effect. Since local conditions, such as rate of streamflow, amount of water, climate, and other uses of water vary radically for different locations, the degree and type of safety measures necessary must be considered individually for each case. Restrictions advisable in one instance may be unnecessary in another. However, it would appear possible to define rigid, universal regulations which do not compel uniformity. This concept of criminal legislation is not innovatory, but analogous to the Food and Drugs Act. This analogy can be illustrated by demonstrating the applicability of Part 1, Section 7 of the Food and Drugs Act to the pollution problem.

> "No person shall import, offer for sale, or sell any food or drug represented by label or advertisement to the general public as a treatment for any of the diseases, disorders or abnormal physical states named or included in Schedule A or in any amendment to such schedule."

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The prohibition does not prevent the using of these drugs or the treating of the conditions. It regulates the use of them by limiting the decision as to their use of qualified experts. In other words, it requires a doctor's prescription.

This would appear to be a suitable approach to may pollution problems. There is no need to prevent the production or use of most substances and it would be very costly in material comfort to do so. The ecological balance of a water system is a very complex matter and what is harmful in one place may well be beneficial in another. By instituting a system of informed control over potentially harmful practices we can achieve adequate public protection without incurring the unnecessary and undesirable costs of over-protection.

PRINCIPLES OF ENFORCEMENT

To be effective the regulations under such legislation must be binding to the letter of the law, making actions in contravention of the law illegal and indictable, whether or not harm ensues. Where it is established that a regulation is not necessary to the protection of the public interest it could be appealed and the regulation amended by Order-in-Council. Where the public interest is shown not to be adequately protected the regulations would have to be revised to include this protection. A provision of this sort is necessary because of the uncertainty of scientific knowledge about the effect of foreign substances in the environment. Where there are reasonable grounds for considering a substance potentially harmful its use must be controlled. As our knowledge increases the regulations could be revised to reflect this greater certainty. To some extent the regulations would have to based on a common sense assessment of informed judgement. For instance, even though we do not fully understand the implications of long exposure to radioactivity we are convinced that the probability of harmful effect is great enough that rigid control is maintained over its disposal. Today, there is a succession of new waste matter whose effects are not fully understood. This lack of knowledge must be weighed as a factor in regulating its use, together with the economic and social implications of its control. The decision reached in each case would depend ultimately on common sense.

An example of this approach can be studied in the following discussion of the application of the Regulations under the Food and Drugs Act. The defendant has used sulphur dioxide as a meat preservative. Although it seems to have been harmless, sulphur dioxide was not on the list of allowable preservatives.

> "We start with the fact that the selling of food, not only unfit for human consumption but dangerous was a criminal offence at common law. If death followed, the vendor, if he knew it was unfit or 'dangerous' might be indicted for manslaughter.

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"Section 224 of the Code makes it a criminal offence to knowingly sell food unfit for consumption. Food may be rendered unfit or potentially dangerous by adulteration. This case arises only because the mixing of sulphur dioxide with meat to the extent disclosed in evidence is not injurious to health. But the subject of legislation is adulteration of food (properly classified as a crime) and what constitutes adulteration must, at least within reasonable limits, be left to the judgment of Parliament in the light of the best knowledge available at the time. The subject of food purity, free from adulteration by the admixture of baser ingredients, is so important and the need to preserve its purity so great to prevent widespread calamity that precautions of the most detailed character must be taken to ensure it. These restrictions may be unnecessarily wide and open to criticism but that does not affect the principle. By the regulations Parliament entrusted to the Governor-in-Council the power and duty to make regulations prescribing what preservatives might or might not be used in or upon meat or meat products. Eight are permitted, viz., common salt, sugar, saltpetre, wood smoke, vinegar, spices, alcohol and refined sodium nitrate. Greater scientific knowledge may induce Parliament or the Governor in Council to add sulphur dioxide to the list. In that event it would doubtless be necessary to prescribe the quantities that could safely be used. This might involve the danger that careless manufacturers would use too much or too little and for aught we know excessive quantities might be injurious to health.

"In the meantime, it is reasonable to provide in dealing with a product in which it is essential to maintain purity, that with other preservatives available, sulphur dioxide may not be used at all. We may assume that the framers of the regulations were aware of the facts disclosed in evidence, viz., that this preservative is used, at least in part, to enable the dealer to offer the product for sale from 12 to 18 hours later than he otherwise could if no preservatives, permissible preservatives, were used. What happens if the dealer should be careless and sell after 20 hours elapse: or if a larger quantity should be used than 0.46 to 2,000 parts? The meat inspector stated that this quantity 'so far as a poison is concerned' would be inert but he does not state possible results if by mistake or design a larger proportion should be used.

> "These considerations point to the conclusion that, granted the general subject of the adulteration of food may be the subject of legislation by the Dominion Parliament under the heading 'criminal law', it must follow, reasonably and necessarily that it may define precisely the ingredients that may or may not be used. Nor is it any less a crime because it may be shown scientifically that some of the ingredients prescribed may not, if used in proper quantities, be deleterious at all. It is not a sine qua non, as many provisions of the Criminal Code show, that injury to property or to the person must necessarily follow the commission of the unlawful act. This contingency is recognized inasmuch as the penalty is less severe if injurious results do not follow....
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> "The primary object of this legislation is the public safety--protecting it from threatened injury. If that is its main purpose--and not a mere pretence for the invasion of civil rights--it is none the less valid because it may be open to a criticism, from which few acts are free, that its purpose would be served equally well by accepting the opinion of others, viz., that sulphur dioxide might with safety be added to the list of usable preservatives. Tampering with food by the introduction of foreign matter, however good the intentions, should be regarded as highly dangerous to lower the bars, or to remove restrictions which, rightly or wrongly, Parliament in its wisdom thought fit to prescribe.[1]

The significant point of this discussion for pollution control is that the law is based on the best knowledge available, is designed to protect the public, and cannot therefore be broken with impunity. The possible fallibility of regulations is admitted. The offender is not charged with threatening harm, he is charged with breaking the law. The very fact that our knowledge is fallible makes it imperative that a set of rules be defined and adhered to. This point is very important since it makes enforcement effective. If it were necessary to prove scientifically that a substance was in fact harmful, then very few regulations could be made, since in many instances proof would require many generations of controlled experiment. Obviously this will not do. We cannot where we are reasonably certain that harm to the public will ensue make it a deliberate policy to allow the presumably harmful activity to occur indiscriminately. In the absence of absolute knowledge and in the face of reasonable certainty it is necessary to define by regulation what is harmful and to throw the burden of proof on him who disagrees.

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1. Standard Sausage Co. v. Lee (1933) 4DLR 501. quoted in B. Laskin, Canadian Constitutional Law, (Toronto: Carswell Co., 1966) p.p. 900-901.

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The form the legislation should take is one which states the right of the federal government to make and enforce regulations for pollution control. Such legislation would require licenses for waste disposal privileges and carry graded penalties for abuse of the licensing regulations. Any regulations would specify that the amount of allowable waste is measured in relation to the condition of the receptacle according to considerations defined by the regulations such as the capacity of the receiving water and the water use pattern of the vicinity. In this way it would be possible to consider each individually without uniform standards, yet have rigidly uniform enforcement of the law.

APPLICATION

The efficiency of the over-all water management system in operation at the time such a license were issued would have a major bearing on the amount of effluent allowable. Thus, the immediate and rigid enforcement of strict regulations could seriously disrupt economic activity or cause considerable local hardship. This would be a threat to the potentially effective operation of the legislation. The federal government should therefore agree to suspend enforcement where this is likely to happen pending the completion of a cooperative federal-provincial comprehensive water-management study and the implementation of sound water management practice under the Canada Water Act. In the event that the province did not want to cooperate the federal government could propose unilateral action by either side. Where this proved unacceptable the federal government could then enforce the pollution control regulations. In practice pollution would usually be defined for the area through the operation of the Canada Water Act and the function of the criminal code would be to ensure the enforcement of the decision agreed upon by all parties concerned.

THE TYPE OF ADMINISTRATION

It would be desirable for the ongoing administration of such pollution control regulations to establish a responsible body such as a Pollution Control Board. The members of this body could, if it seemed politically desirable, be appointed by the provinces. The functions of this Board would be to recommend to the Governor-in-Council a body of regulations regarding pollution of the environment. It ought to be responsible for coordinating and assessing the results of all related governmental and private research and should be empowered to cause investigation and research as it saw fit. It should incorporate a system for inspection and monitoring and should be able to bring cases to court. It should incorporate an appeal board where applications are considered for changes in the regulations or exemptions from them where conditions warrant.

A similar organization to that of the International Joint Commission would be appropriate. The Board would have a small number of members, no more than twelve, appointed by the Governor-in-Council and a small staff of their own choosing. Most of its functions would require a larger staff and for this purpose subsidiary boards could be

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made up from the Departments of the Civil Service, or from the provincial civil service of the province or provinces concerned in the particular study. These subsidiary boards would act as advisors to the Board and have no authority or permanency as separate bodies. The Board would be responsible to the Minister of Energy, Mines and Resources in his capacity as coordinator of water resources research.

JURISDICTION

This approach is significantly different from the approach from comprehensive planning. Starting with water use in a consideration of the various problems leads to a study of the jurisdictional situation in regard to water. Jurisdiction is confused. Proprietary rights to resources belong to the provinces. Fisheries is a federal responsibility. Civil rights are provincial and navigation is federal. Arguments can be produced for introducing water legislation under any one of these heads, but none of them covers every use of water equally well. Wherever an argument is produced under one head which affects any other, an equally good argument can be produced for the other side. For instance, legislation intended to protect the fisheries through the federal prohibition of pollution will probably not be effective. The provinces could contend that it is not in the public interest to pay the necessary costs for such a tenuous benefit as expanded fisheries. Unfortunately the literature for comprehensive planning has tended to consider water as primarily a natural resource and discussions of water ownership have been given prominent attention. This approach introduces difficult and unnecessary complications and makes the federal position substantially weaker since natural resources are owned by the provinces and the provinces have jurisdiction in questions of property. There is no single area of jurisdiction in Canada which is both suitable for water use management and strong enough to enforce pollution control, but there is adequate jurisdiction to accomplish both these ends provided we use the appropriate area for the different aspects of the whole question. Comprehensive planning is a means to the solution of problems, not an end in itself. We adopt comprehensive planning as the best means to identify a problem and to determine its solution. Implementation of the solution is a different question and must be accomplished by the relevant jurisdiction.

CRIMINALITY AND CIVIL RIGHTS

For purposes of legislation, pollution must be described as an activity since our legal system works in terms of the activities of identifiable persons, not things. "Criminality is primarily personal and sanctions are intended not only to serve as deterents but to mark a personal delinquence."[2] In these terms pollution would be described as the disposal of wastes into the environment in such a way, place, or quantity, as is deemed undesirable and has been defined as such by federal-provincial agreement through the operation of the Canada Water Act. Given the expected public support if it were so defined it could

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2. Laskin, op.cit., p.869

clearly be a matter falling into the category of criminal law and as such be unquestionably a matter of federal concern with no overlapping of jurisidiction. The following quotations from Laskin's Canadian Constitutional Law show that it has become a well-established principle of our legal system that the criminal law has precedence over rights under other heads.

> "Any act which is prohibited with penal consequence is a criminal act, and the law by which such act is prohibited and penalty imposed is criminal law... Criminal law in its widest sense is reserved for the exclusive legislative jurisdiction of Parliament."[3] (p.889).
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> "There seems to be nothing to prevent the Dominion, if it thinks fit in the public interest, from applying the criminal law generally to acts and omissions which so far are only covered by provincial enactments."[4] (p.851).
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> "Provincial authority in relation to property and civil rights in no way prevented the Dominion from enacting that certain uses of property and certain acts in relation to property were criminal."[5] (p.849)
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> "Laws...designed for the promotion of public order, safety or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights."[6] (p.849)
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> "The only limitation on the plenary power of the Dominion to determine what shall or shall not be criminal is the condition Parliament shall not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in s.92. It is no objection that it does in fact affect them. If a genuine attempt to amend the criminal law, it may obviously affect previously existing civil rights. The object of the amendment to the criminal law as a rule is to deprive the citizen of the right to do that which apart from the amendment, he could lawfully do."[7] (p.850)

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3. Ibid., p.889
4. Ibid., p.851
5. Ibid., p.849
6. Ibid., p.849
7. Ibid., p.850

Since the federal government has exclusive jurisdiction in criminal matters it has an obligation, not simply a right, to protect the public from abuse of pollution control regulations.

COMMUNITY RESPONSIBILITY

Comprehensive planning requires that whole areas be considered as a unit. Pollution must, by its very nature, be considered in a wide context. Except in a few instances of extremely dangerous substances such as radio-active materials any definition of an act as polluting depends upon the state of the receiving waters and the water use pattern of the area concerned. In large urban areas the literal application of this approach would be unduly restrictive, working counter to the public interest and therefore probably ineffective. The level of water quality desired for these areas must therefore be established by consideration of the collective interest of all those concerned in the area and since the criminal law requires a legal entity which can be considered as an offender, therefore all those using the area must be responsible collectively under the criminal code for the state of its water. This is particularly relevant in a consideration of industrial pollution.

There has been in the past a tendency to take industry out of the community and to consider that industrial pollution control is exclusively an internal problem of industry. Financial incentives and other forms of moral and economic encouragement have been proposed. This approach stems from the view that industry should not expect society at large to pay the cost in loss of water quality of the economic activities of one segment of the population. This is a reasonable premise, but there are many ways to distribute cost, and the question of financial liability should not be confused with the more important question of integrated efficient control in the public interest. Industry is in any event only one of many polluters, none of whom should have this privilege. The implication that pollution is especially connected with industry is incompatible with fact and sounds very much like an attempt to find a scape-goat. The most serious pollution problems facing us today result from the congestion of population and economic activity in urban areas. The most important single cause of the eutrophication of Lake Erie is domestic sewage. Unlike a more rural area where pollution can be deemed to be primarily the effect of the waste from one or two identifiable industries, in the case of large urban areas it is difficult to isolate particular activities as culpable. Clearly the municipality, or township, as the case may be, must therefore assume responsibility for pollution control. Proportionate culpability and benefit could be reflected in the taxation structure as with other community services.

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A further danger in the persuasive approach to industry is that it implies the abandoning of our power to determine the quality of our own environment to an impersonal organization whose interest are directly counter to pollution control. The amount of pollution control enjoyed by society under such a system would depend entirely on the paternalistic interest industry shows in deciding for us what is for our good. If the question is studied in this light, in order to meet the problem of pollution by congestion we should in our own interest and in the interest of controlling pollution turn the whole question if incentives to industry into one of subsidies to communities. These can be granted with conditions or by negotiation through the provinces. The Canada Water Act would be the appropriate vehicle.

Once we have established that a community can be a polluting entity it is much simpler to meet the problem of pollution caused by a number of polluters, none of whom is individually particularly liable. If an entire community is responsible for the control of the entire effluent from all its activities then it can be compelled by the federal government to maintain a reasonable standard of water quality. This does not mean that we put the mayor in jail. It means that we install the necessary treatment facilities and charge their cost to the community. Whether the community can afford to pay is not relevant to water management, but is a question to be considered in the context of poverty and economic depression.

Similarly, where the quality of water is adversely affected by activities upstream the upstream community can be charged with pollution under the criminal code.

This approach would, of course, be applicable only as a final stage of pollution control. It assumes that a rational system of water management such as that proposed by Professor J. H. Dales in his book, Pollution, property, & prices (University of Toronto Press, 1968) is in effect.

THE JUST SOCIETY

An advantage of the use of the criminal law which is not usually adequately appreciated by advocates for pollution control is that it protects against an unreasonable charge through the use of the courts. Where so much coercive power is vested in a bureaucracy the independent protection guaranteed by the judiciary is essential to its ultimate success. The temptation to abuse power through a disproportionate zeal born of lack of perspective is thus kept in check.