DOCUMENT DE RÉFÉRENCES

BACKGROUND PAPER

# VERS UN NOUVEAU CODE CRIMINEL POUR LE CANADA

# TOWARDS A NEW CRIMINAL CODE FOR CANADA

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Vers un nouveau code
criminel pour le Canada :
document de references =
Towards a new criminal code
for Canada : background

A true code

is a pre-emptive, systematic, and comprehensive enactment of a whole field of law. It is pre-emptive in that it displaces all other law in its subject area save only that which the code excepts. It is systematic in that all of its parts, arranged in an orderly fashion and stated with a consistent terminilogy, form an interlocking, integrated body, revealing its own plan and containing its own methodology. It is comprehensive in that it is sufficiently inclusive and independent to enable it to be administered in accordance with its own basic policies.

Hawkland, *Uniform Commercial "Code" Methodology,*

84-968-282
84-968-283

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A code is a species of enacted law which purports so to formulate the law that it becomes within its field the authoritative, comprehensive and exclusive source of that law.

THE HONORABLE MR. JUSTICE SCARMAN‡

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## NOTE INTRODUCTIVE

Le présent document a pour but de fournir aux experts-conseils la documentation pertinente à la codification afin d'être en mesure, dans une première partie, de circonscrire le mandat de la Commission de réforme du droit du Canada.

La deuxième partie vous familiarisera avec les objectifs et les moyens que la Commission de réforme du droit du Canada entend utiliser en regard du droit pénal canadien.

La troisième et dernière partie consistera à comparer la codification du droit pénal avec d'autres pays.

Ces documents, qui sont des extraits de textes publiés, ont été classés pour faciliter la consultation. Nous les retrouvons en français et en anglais dans la mesure du possible; cependant certains textes ne sont reproduits que dans leur version originale.

## INTRODUCTORY NOTE

The purpose of the present document is to provide our consultants with the appropriate background information relating to the codification. In the first part, you will find the explanation of the mandate of the Law Reform Commission of Canada.

The second part will familiarize you with the objectives and means of the Law Reform Commission of Canada in relation to the Canadian Criminal Law.

Finally, the third part will compare the criminal law codification in foreign countries.

It consists of excerpts of published documents which have been classified for easy reference. Where possible, they are included in both languages, English and French. Otherwise, they are reproduced in the language in which they were originally written.

## PREMIÈRE PARTIE

## LE MANDAT DE LA COMMISSION DE RÉFORME DU DROIT DU CANADA

## PART ONE

## THE MANDATE OF THE LAW REFORM COMMISSION OF CANADA

## CHAPTER 23 (1st Supp.)

An Act to establish a commission for the reform of the laws of Canada

[*1969-70, c. 64*]

SHORT TITLE

Short title

**1.** This Act may be cited as the *Law Reform Commission Act.*

INTERPRETATION

Definitions

**2.** In this Act

"Commission"

"Commission" means the Law Reform Commission of Canada established by this Act;

"Minister"

"Minister" means the Minister of Justice and Attorney General of Canada.

( . . . . )

OBJECTS OF COMMISSION

Objects of Commission

**11.** The objects of the Commission are to study and keep under review on a continuing and systematic basis the statutes and other laws comprising the laws of Canada with a view to making recommendations for their improvement, modernization and reform, including, without limiting the generality of the foregoing,

(*a*) the removal of anachronisms and anomalies in the law;

(*b*) the reflection in and by the law of the distinctive concepts and institutions of the common law and civil law legal systems in Canada, and the reconciliation of differences and discrepancies in the expression and application of the law arising out of differences in those concepts and institutions;

(*c*) the elimination of obsolete laws; and

(*d*) the development of new approaches to and new concepts of the law in keeping with and responsive to the changing needs of modern Canadian society and of individual members of that society.

## CHAPITRE 23 (1er Supp.)

Loi prévoyant la création d'une Commission de réforme du droit du Canada

[*1969-70, c. 64*]

TITRE ABRÉGÉ

Titre abrégé

**1.** La présente loi peut être citée sous le titre: *Loi sur la Commission de réforme du droit.*

INTERPRÉTATION

Définitions

**2.** Dans la présente loi

«Commission»

«Commission» désigne la Commission de réforme du droit du Canada établie par la présente loi;

«Ministre»

«Ministre» désigne le ministre de la Justice et procureur général du Canada.

( . . . . )

OBJETS DE LA COMMISSION

Objets de la Commission

**11.** La Commission a pour objets d'étudier et de revoir, d'une façon continuelle et systématique, les lois et autres règles de droit qui constituent le droit du Canada, en vue de faire des propositions pour les améliorer, moderniser et réformer, et notamment, sans toutefois limiter la portée générale de ce qui précède, en vue de

*a*) supprimer les anachronismes et anomalies du droit;

*b*) refléter dans le droit les concepts et les institutions distinctes des deux systèmes juridiques du Canada, la *common law* et le droit civil, et concilier les différences et les oppositions qui existent dans la formulation et l'application du droit par suite des différences entre ces concepts et institutions;

*c*) supprimer les règles de droit tombées en désuétude; et

*d*) développer de nouvelles méthodes et de nouveaux concepts de droit correspondant à l'évolution des besoins de la société canadienne moderne et des individus qui la composent.

## ANNEXE DOCUMENTAIRE A

## DOCUMENTARY ANNEX A

DOC. A-1 DOUZIÈME RAPPORT ANNUEL (12e), Commission de réforme du droit du Canada, Juillet 1983, TWELFTH ANNUAL REPORT (12th), Law Reform Commission of Canada, July 1983.

DOC. A-2 TURNER J., (1970) Débats de la Chambre des Communes, Canada, Compte-rendu officiel (Hansard) (1970) 23 fév. pp. 3960-3963; TURNER J., (1970) Canada, Hansard House of Commons' Debates, Feb. 23, 1970, pp. 3960-3963.

Extrait du 12e rapport annuel de la Commission de réforme du droit du Canada.

## ☐ Le mandat de la Commission

La Commission de réforme du droit du Canada est un organisme permanent dont le mandat, conféré par le Parlement, est défini par l'article 11 de la *Loi sur la Commission de réforme du droit*. En bref, son mandat consiste d'abord à étudier et à revoir les lois et autres règles de droit qui constituent le droit du Canada, en vue de faire des propositions pour les améliorer, les moderniser et les réformer. La Loi lui confie notamment la responsabilité de développer de nouvelles méthodes et de nouveaux concepts de droit correspondant à l'évolution des besoins de la société canadienne et des individus qui la composent. En vertu de la *Loi sur la Commission de réforme du droit*, la Commission est également tenue de formuler des propositions de réforme reflétant les concepts et les institutions distinctes des deux systèmes juridiques du Canada, le common law et le droit civil. Cet objectif de la Loi fait de la Commission un médiateur idéal en vue de réconcilier ces deux systèmes dans la *formulation* et l'*application* du droit.

La Commission est légalement tenue de soumettre périodiquement à l'approbation du ministre de la Justice des programmes précis relatifs à l'étude de certaines lois ou de secteurs particuliers du droit. La Commission doit inclure dans ces programmes toute étude demandée par le Ministre lorsqu'il estime souhaitable, dans l'intérêt public, qu'une priorité spéciale lui soit accordée. La Loi autorise alors la Commission à effectuer les études et les recherches de nature juridique qu'elle juge nécessaires pour bien remplir son mandat, notamment au sujet des lois, des institutions et des systèmes juridiques canadiens ou étrangers.

La Commission doit, le cas échéant, utiliser les renseignements, les conseils et l'aide techniques ou autres dont disposent les ministères, directions ou organismes du gouvernement du Canada. Du reste, la Loi oblige ces derniers à mettre à la disposition de la Commission tous les renseignements et toute l'aide qui peuvent lui être nécessaires pour bien remplir son mandat.

En vertu de l'article16 de la *Loi sur la Commission de réforme du droit*, la Commission est tenue de préparer et de soumettre au ministre de la Justice un rapport sur les résultats de chaque étude ainsi que ses recommandations dans la forme qu'elle juge convenable pour en faciliter l'explication et la compréhension. En vertu de la Loi, le Ministre doit alors déposer le rapport devant le Parlement dans les quinze jours suivant sa réception ou, si le Parlement ne siège pas, dans les quinze jours suivant la reprise de la session.

ANNEXE DOCUMENTAIRE A

DOCUMENTARY ANNEX A

Excerpt from the 12th Annual Report of the Law Reform Commission of Canada.

## The Commission's Mandate

The Law Reform Commission of Canada is a continuing organization whose objects are established by Parliament and are described fully in section 11 of the *Law Reform Commission Act*. In brief, the Commission is to study and to keep under review the federal laws of Canada, with a view to making recommendations for their improvement, modernization and reform. Specifically included among the Commission's statutory objects is innovation in the development of new approaches to — and new concepts of — the law in keeping with, and responsive to, the changing needs of modern Canadian society and the individual members of that society. Specifically mandated by the *Law Reform Commission Act* is the Commission's making reform recommendations which reflect the distinctive concepts and institutions of the common-law and the civil-law legal systems of bi-jural Canada. This statutory objective also sets the Commission upon the path of reconciliation of differences and discrepancies in the *expression* and *application* of the law arising out of differences in those concepts and institutions.

The Commission is required by statute to submit, from time to time, for the approval of the Minister of Justice, specific programs of study of particular laws or branches of law; and it must include in such programs any study requested by the Minister to which, in his opinion, it is desirable in the public interest that special priority be accorded by the Commission. The Commission is then empowered by statute to initiate and carry out any studies and research of a legal nature as it deems necessary for the proper discharge of its functions, including studies and research relating to the laws, legal systems and institutions of other jurisdictions whether in Canada or abroad.

Wherever appropriate, the Commission is required to make use of technical and other information, advice and assistance available from departments, branches and agencies of the Government of Canada. Moreover, every department, branch or agency is under a statutory obligation to make available to the Commission all such information, advice and assistance as may be necessary to enable the Commission properly to discharge its functions.

Section 16 of the *Law Reform Commission Act* requires the Commission to prepare and submit to the Minister of Justice a Report on the results of each study, including the Commission's recommendations in the form which the Commission thinks most suitable to facilitate the explanation and understanding of those recommendations. The Minister, in turn, is required by the Act to cause each Report to be laid before Parliament within fifteen days of his receiving it or, if Parliament be not then sitting, within fifteen days after Parliament is next sitting.

TURNER J. (1970) Débats de la Chambre des Communes, Canada, Compte-rendu officiel (Hansard) (1970) 23 fév. pp. 3960-3963.

TURNER J. (1970) Canada, Hansard House of Commons' Debates, Feb. 23, 1970, pp. 3960-3963.

## LAW REFORM COMMISSION BILL

### ESTABLISHMENT, OBJECTS, POWERS AND DUTIES, ETC.

**Hon. John N. Turner (Minister of Justice)** moved that Bill C-186, to establish a commission for the reform of the laws of Canada be read the second time and referred to the Standing Committee on Justice and Legal Affairs.

He said: Mr. Speaker, the government is fulfilling a commitment which I made when I participated in a convocation at the Osgoode Law School in October, 1968, that within 18 months we would introduce a bill to establish a law reform commission for Canada.

[Mr. Howard (Skeena).]

In the interval, I have had the opportunity of discussing the nature of the proposed commission with several jurisdictions. This is the first time, to my knowledge, that there will exist in the legal world a law commission relating to the federal laws of a federal state. I had the opportunity last October of holding conversations on three separate occasions in London with the chairman of the English and Welsh Law Reform Commission, Sir Leslie Scarman, who a year earlier had been the guest of the Canadian Bar Association at its annual convention. He is now, and has been since its inception, the chairman of the Law Reform Commission in England. We were able to discuss the statutory framework of such a commission, the way in which it worked, its relationship to parliament, to the bench, the bar and the legal profession generally, as well as to the public. At the same time I had the opportunity of discussing the subject with Lord Kilbrandon, who is the chairman of the Scottish Law Reform Commission which has responsibility for Law reform in the Scottish system of law and jurisprudence. It is noteworthy that in the United Kingdom they should have decided to set up two separate law reform commissions for two separate systems of law. We, in Canada, have decided upon a single commission which will embrace within its purview two systems of law—the system of Anglo-American jurisprudence which obtains in nine of the ten provinces, and the civil law system which is practised in the province of Quebec and which derives from the Napoleonic Code and the French jurisprudence. We have also held discussions with members of the Ontario Law Reform Commission and reviewed the practice of the New York State Law Reform Commission.

The purpose of the bill before us is to establish a law reform commission in Canada. The commission will consist of a chairman and vice-chairman, two other full-time members and two part-time members. All appointments would be for a term not exceeding seven years for full-time members and not exceeding three years for part-time members. This would permit the commission to be renewed on a continuing basis. What we are attempting to institute here is a relatively small commission made up of personnel reflecting the priorities of law reform as they arise from time to time. I do not anticipate that the commission will provide a carrer. What we are looking for are men and women whose particular expertise and competence will

reflect the priorities of law reform in the next five to seven years; as these priorities are changed, the personnel of the commission will be rotated, and new men and women will be commissioned to meet the responsibilities and priorities of the next period of reform.

I said I wanted the best years of their lives—men and women, of legal competence primarily—though members could be drawn from other disciplines if that could be arranged to meet the priorities of law reform. At least four members of the commission must be from the legal profession, either barristers or judges, but, as I have said, there is room on the commission for others outside those professions. At least two members of the commission, including either the chairman or the vice-chairman, must represent and reflect the civil law system in Quebec.

The commission would have a permanent staff appointed under the Public Service Employment Act, and it would have power to contract out work for specific projects. It follows that the necessary specialized expertise would be available to it. We realize it would be impossible to incorporate within such a compact commission as is proposed, all the expertise, specialized legal knowledge and familiarity with allied disciplines necessary. So the commission will be empowered to employ on a relatively short-term basis, experts in particular fields under review.

The commission will enjoy a substantial degree of independence. For example, it will be able to receive proposals for law reform from any person; and it will have power to initiate and carry out such studies as it deems necessary. However, it will be required to submit its program to the Attorney General of Canada, and the Attorney General, or the Minister of Justice, will have authority to insert any program for reform into the commission's program for study, should he deem it in the interest of Canada, and the commission will be bound to give such a program special priority when required. This provision has been inserted so as to ensure that the research program and undertakings of the commission will be related to the priorities in law reform as they appear relevant from time to time, having regard to the priorities of the people as reflected by the debates in Parliament and so on. It is essential to the credibility of the commission that its programs be directed toward reforms, the need for which is felt by the government and reflected in Parliament.

The commission will be independent in its methods of working, in the establishment of its programs and in the conclusions which it reaches. The bill does not permit the Minister of Justice to control how the commission will perform its work once its programs and priorities are set. It does not permit the Minister of Justice to determine how its research shall be conducted. It does not permit the government or the Minister of Justice in any way to determine the recommendations which will be forthcoming from the commission.

• (3:10 p.m.)

The bill contemplates that the commission will consult broadly with the judiciary, members of the bar and persons engaged in teaching, research in legal and allied fields and with other interested bodies, including members of the public at large. The bill provides for the tabling of the commission's reports to the minister. It provides for the tabling of the annual report to the minister; and it provides for the tabling in Parliament of the program and studies approved by the minister.

In other words, the activities of the commission become the property of the people of Canada, through Parliament, in three stages. Once the program of studies is agreed upon by the commission, with the approval of the Minister of Justice, that program of studies must be tabled by the minister in Parliament and become public knowledge, and will be available to the Standing Committee on Justice and Legal Affairs and to Parliament as a whole.

Secondly, the commission must render an annual report to the Minister of Justice. The minister is bound to table that report on the floor of this House; and again that report will be made available to Parliament, presumably through the Standing Committee on Justice and Legal Affairs and on the floor of the House.

Finally—and this is most important—any report on any particular study made to the minister must be tabled by the minister, again in the House of Commons, where it will become available to Parliament and its committees.

[*Translation*]

Mr. Speaker, the objects of the Commission are specified in the bill. Indeed, its mandate will be to study and keep under review on a continuing and systematic basis the statutes and other laws and to make recommendations for their improvement, modernization and reform.

Without however, restricting the general scope of the above-mentioned objects, it may suggest especially the removal of anachronisms and anomalies in the law.

The Commission may also concern itself with the reflection in the law of the distinctive concepts and institutions of common law and civil law, as well as with the reconciliation, in the expression and application of the law, of the differences and discrepancies arising out of the differences between those two concepts or those two institutions.

I believe it to be a most important matter, since the federal judicial system should reflect both legal systems. It is therefore essential that the federal laws of the future not only be translations, but the reflection of both cultures and both concepts of law.

At the present time, when a bill or a policy to be put into a bill comes before the Department of Justice, the task is entrusted to a French-speaking editor familiar with the Civil Code, and an English-speaking editor, a lawyer versed in common law. The two versions are prepared at the same time and compared not specially for translation of words but for correspondence of concepts in both legal systems.

Thanks to that new commission for the reform of the laws, our federal legislative system will be not only bilingual but also bijural, that is will incorporate both legal systems.

Besides, the commission will be responsible for eliminating obsolete laws.

Finally, it will see to the development of new approaches to and new concepts of the law in keeping with and responsive to the changing needs of modern Canadian society and of individual members of that society.

[*English*]

It is contemplated that the commission may undertake joint projects with all other law reform commissions both abroad and at the provincial level. Several people with whom I talked before we drafted this legislation stressed the importance of not limiting the work of the commission strictly to the federal statutes but that we should keep in mind the general purview of the administration of justice that might involve the joint responsibility of the provinces.

There are a number of areas of the law that come quickly to mind. I could conceive of the necessity of having joint provincial legislation to back up the civil remedies enforcing the right to privacy. I could conceive a joint provincial legislation that would be necessary to reconcile our systems of evidence—criminal evidence, which is the responsibility of the federal government, and civil evidence, which redounds to the provinces.

The commission will be competent, in co-operation with provincial law reform commissions, to review these joint areas of the law. I hope that in this way the commission may be able to provide some measure of co-ordination in the general area of law reform in Canada. Such co-ordination appears to be desirable since there is still in Canada a relatively small pool of qualified persons in the form of legal experts upon which to draw.

As a matter of fact, the deans of Canadian law schools and the Association of Canadian Law Professors are somewhat concerned that the impetus toward law reform may well put tremendous pressures on the pool of legal resources and research in this country. I hope that the eventual chairman of this commission will, at an early opportunity, discuss with the Association of Canadian Law Professors and with the deans means to ensure that in planning a program of legal research and a program of reform they proceed in such way as not to place an immediate burden on law schools in Canada, to the detriment of law students. I think it is important that the primary responsibility of the academic profession in law remains the students in law, and that the necessary taking of their talents for the purpose of public law reform be done in such way as not to interfere with the curricula and programs of the law schools of this country. It is my hope that this law reform commission in Canada will mean that the law will never again stand still in this country; that we will have a body of experts able to suggest reforms in the law on a continuing rather than on an episodic basis.

What I mean is this. There are certain branches of the law that are so complicated in their federal aspects that it is virtually impossible at the departmental level to give them the necessary complete review from section one to section 1,000, or from A to Z. Immediately, I think of the Criminal Code of Canada, which is in need of thorough housekeeping, thorough revision, not merely in lawyers' law as it applies to the Criminal Code but also in many of the Code's social aspects.

Although the Department of Justice will continue to try to meet policy problems as they arise and to anticipate those policy problems, as we are going to do in a month or so

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in a new criminal law reform bill which relates to bail, to the right to privacy and so on, I think it is necessary that in the medium and in the long term there be a permanent body that is able to review statutes such as the Criminal Code, and to bring forward a consistent piece of legislation.

We have set up a new research section in the Department of Justice. This research section will have as its duty to research the law, to anticipate and to fulfil policy initiatives which we in the Department of Justice will have to take. I hope to be able to announce shortly the name of a director of this new research section. I also hope to be able to announce a new reorganization of the Department of Justice which will reflect the establishment of this research section.

• (3:20 p.m.)

I have always felt that in looking at the Department of Justice, the Attorney General's side has been stronger than that of the Minister of Justice. That is to say, that part of the department which acts as lawyer to the government and to the various departments of government, and prosecutes on behalf of the people of Canada in the enforcement of federal statutes, has been a stronger branch of the Department of Justice than has been that of the reform and research side of the law. We hope we will be able in this new research section to promote that aspect of reform and thereby provide liaison between the Department of Justice on a daily, short-term policy basis with an overview, if I might use the words of the President of the Privy Council earlier this afternoon, of the federal statutes as represented by the Law Reform Commission.

So, the establishment of this law reform commission in no way will derogate from the responsibility of the federal Department of Justice to anticipate and meet the policy of law reform within federal jurisdiction. I want to suggest that I hope the bill reflects the government's genuine concern about the serious and continuing improvement and reform of Canadian federal law.

I suggest as immediate priorities that the commission should have a complete rewriting of the Criminal Law as one of its' first projects. I mention also the necessity of revising, on a total basis, the Canada Evidence Act and, in doing so, arrange that the criminal laws on evidence correspond in so far as that is possible with the civil law on evidence across Canada, both within the civil law system of Quebec and the common law system obtaining in the other nine provinces.

I should think it is incumbent upon the commission at an early stage to examine public administrative laws in Canada, the workings of federal boards, commissions and tribunals, as well as the remedies of the citizen by way of administrative review and judicial review. I think this House, in a report of the committee chaired by the hon. member for Windsor-Walkerville (Mr. MacGuigan) studying statutory instruments, has shown how Parliament might better review some of its administrative procedures. I think we have to buttress this on a local and national basis.

I hope I have been able, in a general way, to outline to the House the purposes and general contours of the bill. If the House decides in its wisdom to move this bill forward into committee, then of course members from all sides of the House, who contributed to what I might term the outstanding work under the chairmanship of the hon. member for Welland (Mr. Tolmie) of the Standing Committee on Justice and Legal Affairs, will be able to examine this bill in the detail which I hope it deserves.

# DEUXIÈME PARTIE

## LA COMMISSION DE RÉFORME DU DROIT DU CANADA ET LE DROIT PÉNAL: OBJECTIFS ET MOYENS

# PART TWO

## THE LAW REFORM COMMISSION OF CANADA AND CRIMINAL LAW: OBJECTIVES AND MEANS

1. Aperçu historique du droit pénal au Canada.

1. Historical outline of the Canadian criminal law.

# APERCU HISTORIQUE DU DROIT PENAL AU CANADA (*)

(extrait de "Pour une codification du droit pénal canadien", avril 1976, Commission de réforme du droit du Canada, No cat. J 31-26/1976 et "Le Droit pénal dans la société canadienne", Gouvernement du Canada, Ottawa, août 1982.

Le Canada, sur le plan juridique, a subi l'influence des deux traditions. Cependant, en matière de droit pénal, pour des raisons d'ordre principalement historique, il a très tôt puisé aux sources britanniques, tant sur le plan du droit substantif que sur celui de la preuve et de la procédure.

Le droit anglais introduit au Canada était constitué à la fois par le véritable droit coutumier né de l'accumulation des précédents judiciaires, et par le droit écrit ou droit statutaire. La référence se faisait donc tout naturellement, au sein des tribunaux canadiens, à l'ensemble du système anglais, à sa méthodologie propre, et ce dès 1763 au Québec et 1792 en Ontario. Pendant longtemps donc, sur le plan juridique, le Canada pouvait être considéré comme une simple extension territoriale anglaise. Il n'existait pas à proprement parler un système pénal canadien distinct du système anglais, si ce n'est par certains textes statutaires autochtones prenant d'ailleurs pour modèle le droit anglais, et dont la portée restait toutefois limitée.

Or, l'examen du droit pénal canadien en ce dernier quart du vingtième siècle, révèle que la parfaite identité des deux droits est chose du passé. Le droit pénal canadien, bien que restant profondément imbu de la tradition du common law britannique, s'est progressivement séparé de son modèle et, tout en conservant avec lui d'indéniables attaches structurelles et idéologiques, a conquis ses propres lettres de créance.

Ce phénomène n'est souvent pas suffisamment mis en relief. Les personnes qui se sont installées sur le territoire canadien actuel venaient d'horizons divers et de cultures différentes. Le common law anglais taillé avant tout à la mesure anglaise, a dû se « canadianiser » quelque peu, et s'adapter à la mesure du continent, puisqu'il s'appliquait désormais à un milieu qui, culturellement, économiquement, géographiquement et socialement n'était pas identique au milieu britannique.

(*) Pour une étude plus exhaustive de l'histoire du droit pénal canadien, consulter MEWETT A.W., "The Criminal Law, 1867-1967", (1967) 45 R.du B. Can. 726-740; MACCLEOD A.J. & MARTIN J.C., "Offences and Punishments under the New Criminal Code", (1955) 33 R. du B. Can. 20-40; MACCLEOD A.J. & MARTIN J.C., "The Revision of the Criminal Code", (1955) 33 R. du B. Can. 3-19; SEDGWICK J., "The New Criminal Code; Comments and Criticisms", (1955) 33 R. du B. Can. 63-73.

Le droit pénal canadien s'est donc peu à peu éloigné du droit anglais, tout en conservant avec lui des liens évidents. Cet éloignement se situe à un double niveau. Tout d'abord au niveau du contenu même des règles de droit. Dans bien des cas, dont il serait inutile de vouloir dresser ici une liste exhaustive, le droit pénal canadien a emprunté une voie différente du droit britannique, et ce tant en matière d'infraction qu'en matière de preuve et de procédure. Ensuite, et pour les fins de la présente étude, c'est sans doute le point de séparation le plus important, la tradition canadienne a ressenti le besoin d'écrire le droit pénal substantif et la procédure, et de regrouper ces règles à l'intérieur d'un code.

Le débat entre le droit écrit et le droit non écrit n'a jamais eu au Canada les proportions qu'il a prises en Angleterre lorsque Bentham d'abord, puis Stephen ont défendu l'idée d'une codification des règles de common law. En 1893, le Canada se dotait d'un premier Code criminel s'inspirant largement du projet de Stephen, lequel avait lui-même puisé aux sources des travaux de la commission de réforme nommée par le gouvernement anglais en 1838. Les commissaires, à partir de ce projet et du droit statutaire canadien alors en vigueur, effectuaient à l'intérieur d'une même structure une consolidation du droit pénal de l'époque.

Comme on le sait, ce premier Code se maintint à travers les refontes de 1906 et de 1927, jusqu'à la réforme de 1955. La Commission de révision du Code criminel nommée en 1949 avait pour tâche essentielle non pas de créer véritablement un droit nouveau, mais bien de réorganiser le droit d'alors, de le rendre plus cohérent, et d'en simplifier certaines parties. La Commission remplit fidèlement le mandat qui lui avait été confié. Le Code criminel passa en effet de quelque 1100 articles à 753, à la suite d'un effort de compression et de la condensation en un seul texte de diverses variantes d'une même infraction. Il fit disparaître aussi bon nombre de dispositions désuètes et inutiles.

La réforme de 1955 a cependant constitué plus qu'un simple ravalement du droit pénal canadien de l'époque. Ainsi, pour ne prendre qu'un seul exemple, elle a grandement clarifié les règles de la négligence criminelle. L'article 247 du Code de 1893 faisait une négligence criminelle de ce qui semblait n'être au fond qu'une simple négligence civile. S'inspirant de la règle énoncée par Lord Hewart dans *Rex v. Bateman*, la Commission proposa la définition contenue à l'article 191 du Code de 1955 et y joignit les articles 192 et 193 relatifs à la négligence criminelle causant la mort ou des lésions corporelles.

Le Code de 1955 a aussi dépassé la seule clarification de certaines infractions puisant leur origine dans le common law britannique et a rompu ainsi avec le droit anglais. Le Code a en effet aboli les infractions issues du common law, à l'exception de l'outrage au tribunal et ainsi a donc véritablement coupé le cordon ombilical au niveau du droit des infractions. Ce phénomène est particulièrement important puisqu'il affirme, d'une part, l'engagement net dans l'écriture du droit, du moins quant aux textes d'incrimination, et d'autre part, un effort de canadianisation de l'ensemble.

En énonçant par écrit toutes les infractions, le Code de 1955 visait deux objectifs. D'une part, la traduction en langage législatif de certaines infractions de common law et donc pour la première fois, leur formulation précise. Il en fut ainsi du complot de common law, du méfait public, de l'indemnisation d'une caution. D'autre part, il rompait avec la tradition du droit coutumier, en posant le principe que désormais nul ne pouvait être déclaré coupable d'une infraction à moins que celle-ci ne soit expressément prévue par une loi du Parlement canadien. C'était concentrer entre les mains du législateur le pouvoir de créer des infractions, contrairement à la pure tradition du common law britannique.

Le Code de 1955 représente un jalon important dans l'évolution du droit pénal canadien, moins par sa facture même qui reste au fond une amélioration et une restructuration du Code de 1893, que par la rupture qu'il opère avec le common law anglais et donc par une première tentative du droit pénal canadien de s'associer à la famille des droits écrits.

Une comparaison entre le Code de 1955 et celui de 1893 révèle en effet peu d'innovation sur le plan du langage juridique et de l'architecture du code. La réforme de 1955 a dépoussiéré le droit, mais sans remettre en question la philosophie même du droit pénal, sa méthode et ses formes d'expression. On peut voir dans cet attentisme l'une des raisons qui a fait que le Canada a connu depuis tant de commissions d'enquête et de comités parlementaires sur des problèmes que l'actualité sociale exacerbait, comme la peine de mort, les châtiments corporels, l'aliénation mentale. Depuis la réforme de 1955, le droit n'a cependant pas souffert d'un immobilisme complet puisque certaines modifications apportées ont tenté d'éviter un trop grand décalage entre la réalité sociale et la réalité juridique. C'est ainsi que des amendements ont cherché à refléter au niveau de la loi les nouveaux états de la morale sexuelle, ou les nouvelles conceptions en matière d'avortement et de tentative de suicide.

Ces dernières années, les effets combinés d'un certain nombre de facteurs ont convaincu les gouvernements de la nécessité d'accorder priorité à la tâche complexe de réviser le droit pénal canadien. Le Canada, à l'instar des autres pays occidentaux entrés dans l'ère post-industrielle, a connu au cours des deux dernières décennies une augmentation constante de la criminalité classique en milieu urbain, une préoccupation croissante du public à l'égard d'un relâchement apparent des contrôles sociaux (illustré surtout par une augmentation du nombre des crimes violents), l'apparition de formes plus sophistiquées de criminalité en col blanc et de crime organisé, l'escalade des coûts du système pénal et la remise en question de son efficacité, les conflits périodiques dans les prisons et les pénitenciers, et des débats qui s'intensifient sur l'équilibre à établir entre les libertés civiles et les droits individuels, d'une part, et les pouvoirs accordés aux représentants de la justice pénale pour prévenir et déceler le crime, d'autre part.

En 1969, le Comité canadien de la réforme pénale et correctionnelle jugea nécessaire de recommander dans son rapport (le rapport Ouimet) "que le gouvernement constitue prochainement un Comité ou une Commission royale d'enquête pour étudier le droit pénal positif".

Le Parlement adopta l'année suivante, en 1970, une loi prévoyant la création de la Commission de réforme du droit du Canada qui était appelée, notamment, à "supprimer les anachronismes et anomalies du droit" et à "développer de nouvelles méthodes et de nouveaux concepts de droit correspondant à l'évolution des besoins de la société canadienne moderne et des individus qui la composent". Le ministre de la Justice proposait comme première priorité "que la Commission rédige à nouveau et au complet le Code criminel", compte tenu du fait, poursuivait-il, que "le Code criminel me vient tout de suite à l'esprit, car il a grand besoin d'une refonte complète par la révision, non pas seulement de ses aspects strictement juridiques, mais aussi de bon nombre de ses aspects sociaux". ([illegible])

Il faut voir dans l'expérience législative canadienne un premier pas vers une codification. Malgré ses défauts et ses lacunes, le Code criminel canadien représente une étape importante. Il marque en effet une certaine rupture avec la tradition purement coutumière de droit britannique classique, sans toutefois aller complètement dans le sens d'une véritable codification. L'évolution future de la législation en la matière montrera si le Canada pourra relever le défi et s'engager résolument dans un processus de codification nationale lui permettant un énoncé systématique et clair de sa philosophie pénale.

HISTORICAL OUTLINE OF THE CANADIAN CRIMINAL LAW (*)
(Excerpt from: "Towards a codification of Canadian Criminal Law, April 1976, Law Reform Commission of Canada, cat. no. J 31-26/1976 and "The Criminal Law in Canadian Society, Government of Canada, Ottawa, August 1982.

Canada's legal system has felt the influence of two great traditions. Chiefly for historical reasons, it drew only on British sources for its substantive criminal law, evidence and procedure.

. As introduced in Canada, English law consisted partly of common law, born of accumulated judicial precedents, and partly of written statutes. As early as 1763 in Quebec and 1792 in Ontario, the courts naturally patterned themselves upon English practices and procedures. For a long time, Canada's legal system so resembled that of England that in its law Canada was little more than an extension of England. It had no distinct system of criminal law, except for certain specific statutes of limited scope, modeled, at any rate, after English legislation.

A survey of Canadian criminal law of the preceding quarter of the twentieth century shows that although still deeply imbued with the English common law tradition, it slowly has departed from its model. Its structural and ideological links with the past remain evident, but it nevertheless has obtained its own credentials.

. The Canadian people came from many countries and cultural backgrounds. The common law was designed originally for Britain. The common law we have has become more "Canadian" with time, more applicable to an environment that culturally, geographically, economically and socially is surely not that of Britain.

Canadian criminal law has acquired its own character, in terms both of its contents and of the extent to which it is written. In many instances, which we need not enumerate, offences as well as evidence and procedure are different in Canada from what they are in England. Secondly, and more significantly for the purposes of our discussion, Canada found it necessary to bring its substantive criminal law and procedural rules together in a code.

(*) For a complete view of the historical part of the Canadian Criminal Law, see MEWETT A.W. "The Criminal Law, 1867-1967", (1967) Can. B. Rev. 726-740; MACCLEOD A.J. & MARTIN J.C., "Offences and Punishments under the New Criminal Code", (1955) 33 Can. B. Rev. 20-40; MACCLEOD A.J. & MARTIN J.C., "The Revision of the Criminal Code", (1955) 33 Can. B. Rev. 3-19; SEDGWICK J., "The New Criminal Code; Comemnts and Criticisms", (1955) 33 Can. B. Rev. 63-73.

In Canada the debate over whether the law should be written or not never approached the proportions reached in England when first Bentham and then Stephen defended the merits of codification of the law. In developing his plan for codification, Stephen had drawn on the studies of the English law reform commission of 1838. A Canadian drafting commission later drew upon Stephen's work and on the statutes then in force in Canada to consolidate the criminal law into a single structure. This structure, Canada's first Criminal Code, was adopted in 1893.

The first Code was maintained substantially unchanged through the revisions of 1906 and 1927 until the reform of 1955. The basic mandate of the Commission appointed in 1949 was not to draft new laws but to reorganize and clarify the existing ones. This the Commission did by reducing the Code from about 1100 to 753 sections and by redrafting offences into more concise statements and dropping many obsolete and superfluous provisions.

Yet the reform of 1955 was more than a simple overhaul of the criminal law as it then existed. For example, the law on criminal negligence was modified. The definition in Section 247 of the 1893 Code had seemed to make civil negligence punishable as a criminal offence. Referring to the rule stated by Lord Hewart in *Rex vs. Bateman*, the Commission adopted the definition found in section 191 of the 1955 Code and added sections 192 and 193 on criminal negligence causing death or bodily harm.

Beyond clarifying the existing provisions, the 1955 Code broke with the British tradition by virtually abolishing all "common law offences", except contempt of court. The Code thus became independent of English law while committing Canada to a written law with a distinct Canadian imprint.

The legislative definition of offences in the 1955 Code was an important step forward in two ways. First, since a number of common law offences had to be expressed in legislative terms, some of them were formulated precisely for the first time. Such was the case with the common law concepts of conspiracy, public mischief and indemnification of bondsmen. Second, the principle established in 1955 that no one could thereafter be found guilty on an offence not included in an Act of the Canadian Parliament represented a break with the common law tradition in that it deprived the courts of the power to create offences.

The 1955 Code was thus a milestone in Canadian criminal law not so much in terms of its contents, which are essentially those of the 1893 Code improved and re-structured, as by the break it made with English common law, and as a first tentative attempt to associate Canadian criminal law with the written systems of the world.

A comparison between the 1955 and 1893 Codes shows little difference in language or in basic design. The 1955 reform dusted off the old law without calling into question its philosophy, methods or forms of expression. This may explain why the Canadian government has since appointed so large a number of commissions of inquiry and parliamentary committees wrestling with such social issues as capital and corporal punishment, insanity, and so forth. Criminal law has not been stagnant since 1955. For example, recent amendments to the Code, such as those concerning sexual offences, attempted suicide and abortion, have brought criminal legislation closer to social attitudes.

In the past few years, the combined effect of a number of factors convinced governments that priority had to be given to the complex job of overhauling Canadian criminal law. Canada, like other Western post-industrialized nations, has experienced in the past two decades a continued growth in traditional "street" crime, growing public concern about the apparent breakdown in social controls (especially as shown in rising violent crime), the emergence of new forms of sophisticated white collar and organized crime, escalating costs for the criminal justice system and growing doubts about its effectiveness, recurring problems in prisons and penitentiaries, and intensified debates about the proper point of balance between civil liberties and individual rights on the one hand, and powers granted to criminal justice agents to prevent and detect crime on the other hand.

By 1969, the Report of the Canadian Committee on Corrections (Ouimet Report) felt it necessary to recommend "that the Government of Canada establish in the near future a Committee or Royal Commission to examine the substantive criminal law."

In 1970, Parliament responded by enacting legislation establishing the Law Reform Commission of Canada, whose mandate ranged from "the removal of anachronisms and anomalies in the law", to "the development of new approaches to and new concepts of the law in keeping with and responsive to the changing needs of modern Canadian society and of individual members of that society." The Minister of Justice of the day made the suggestion that "the Commission should have a complete re-writing of the criminal law as one of its first projects", in light of his view that "the Criminal Code of Canada . . . is in need of thorough housekeeping, thorough revision not merely in the lawyer's law as it applies to the Criminal Code, but also in many of the Code's social aspects."

What the Canadian Parliament has achieved so far must therefore be considered merely a first step toward a true codification. Despite its shortcomings, the present Criminal Code is a significant development in so far as it takes us some distance beyond the traditional common law. Only future legislative experience will show whether Canada is ready to take up another challenge and move forward to a national codification of its own policies of criminal law.

2. Philosophie de la Commission de réforme du droit du Canada en matière de droit pénal.

2. The approach of the Law Reform Commission of Canada to the reform of criminal law.

PHILOSOPHIE DE LA COMMISSION DE REFORME DU DROIT DU CANADA EN MATIÈRE DE DROIT PENAL (*)

(Extrait de "Notre droit pénal", mars 1976, Commission de réforme du droit du Canada, no cat. J 31 - 19/1976)

L'homme est un être social qui doit vivre en société. Société veut dire collaboration, vie en commun et partage de valeurs fondamentales. La fidélité aux valeurs suppose que leur violation entraîne une réaction de la part de celui qui y adhère pleinement. Il en est de même de la société qui, face à la violation d'une valeur à laquelle elle croit fermement, se doit de réagir publiquement, de dénoncer la violation et de voir à ce que la valeur soit réaffirmée. Le droit pénal constitue l'une des façons d'y parvenir.

Le droit pénal fonctionne à trois niveaux différents. Au niveau de la législation, il dénonce certaines actions et les prohibe. Au niveau du procès, il condamne solennellement et publiquement ceux qui les commettent. Au niveau de la sanction, il impose une punition au délinquant. Voilà ce que nous retirons du droit pénal. Bien plus que la dissuasion et la réadaptation sociale, il nous assure une protection indirecte en soulignant les valeurs fondamentales auxquelles nous souscrivons.

Cependant le droit pénal n'est pas le seul moyen, ni même le meilleur moyen de rehausser ces valeurs. En réalité, le droit pénal est un instrument grossier dont l'utilisation est coûteuse. C'est un instrument grossier parce qu'il ne peut avoir la sensibilité humaine d'institutions telles la famille, l'école, l'église ou la collectivité. Il est coûteux parce qu'il entraîne des souffrances, des pertes de liberté et des frais énormes.

Le droit pénal doit donc être un outil de dernier ressort. On doit y avoir recours le moins souvent possible. Le message qu'il véhicule ne doit pas être obscurci par l'exagération de la réaction sociale au crime, par la prolifération des lois, des infractions, des accusations, des procès et des sentences d'emprisonnement. Le glaive de la justice doit rester aussi longtemps que possible dans son fourreau. Le sens de la modération doit prévaloir, tant à l'égard de la portée du droit pénal qu'à l'égard de la notion de blâme, de l'utilisation du procès pénal et de la sentence.

(*) Pour des commentaires sur la philosophie de la Commission de réforme du droit du Canada voir E.P. HARTT, "Some Thoughts on the Criminal Law and the Future", (1973) 51 R. du B. Can. 59-70; M.R. GOODE, "Political Ideology of Criminal Process Reform", (1976) 54 R. du B. Can. 653-674.

## 2. La notion de blâme

En réaffirmant les valeurs et en dénonçant le crime, le droit pénal stigmatise aussi ceux qui le commettent. Il condamne ceux qui ont mal agi. Cependant, la culpabilité juridique doit être fondée sur la véritable culpabilité morale. Le délinquant doit avoir agi de façon intentionnelle, insouciante ou du moins négligente. Le véritable droit pénal a pour objet ces actions mauvaises, alors que l'étourderie et le défaut de se conformer à des normes désignées ne peuvent mettre en cause que le droit réglementaire.

Malheureusement, certains crimes véritables et la plupart des infractions réglementaires reposent sur le principe de la responsabilité stricte. On peut encourir la culpabilité pour ces infractions sans intention, sans insouciance, sans négligence, en d'autres termes, en toute innocence et en toute ignorance des faits. Une telle «culpabilité innocente» est injuste, inutile et inopportune. En principe, on devrait faire disparaître cette notion du droit canadien et la remplacer, en matière réglementaire, par la négligence qui pourrait faire l'objet d'une présomption contre l'accusé, quitte à ce que celui-ci renverse cette présomption par une preuve prépondérante de diligence raisonnable.

Nous reconnaissons cependant qu'en pratique, certaines personnes, particulièrement des administrateurs, craignent que le droit réglementaire ne puisse pas fonctionner si on adopte cette modification. Pour faire face à ces craintes, on pourrait mettre la défense de diligence raisonnable à l'épreuve pendant quelque temps, pour voir si le nouveau système fonctionne. Son fonctionnement serait également amélioré si les tribunaux pouvaient plus rapidement et avec moins de formalités décider du bien-fondé du moyen de défense. De cette façon, ils exerceraient la discrétion qui est présentement le fait des fonctionnaires. Il faudrait, à cet effet, mettre au point de nouvelles règles et de nouvelles procédures.

## 3. Le procès pénal

Si le rôle premier du droit pénal est de réaffirmer les valeurs fondamentales, le procès pénal prendra une importance plus grande.

La dénonciation des actions qui violent ces valeurs ne provient pas surtout du code ou de la peine qu'on inflige au délinquant mais du procès lui-même. Ce ne sont pas toutes les infractions qui méritent qu'on les juge de cette façon. Certaines ne sont pas assez graves. D'autres ne violent pas les valeurs fondamentales.

Certaines infractions présentent un degré de gravité très restreint. Bien qu'elles enfreignent des valeurs fondamentales, elle ne le font que de façon très relative. Elles ne devraient pas, par conséquent, faire l'objet d'un procès pénal. Nous recommandons à leur égard le recours à une mesure de déjudiciarisation.

D'autres infractions ne requièrent pas le procès pénal dans toutes ses formes parce qu'elles ne violent aucune valeur fondamentale. Une procédure d'arbitrage plus sommaire, plus rapide et moins entourée de formalités, convient mieux à ces infractions réglementaires. On doit évaluer la responsabilité et imputer le blâme en observant les principes de justice, les règles de droit et les règles de preuve, mais on peut y arriver sans le rite solennel et la majestueuse dignité dont s'accompagne le procès pénal traditionnel.

## 4. La sentence

Le droit pénal utilise comme instruments de condamnation et de dénonciation morales certains types de peines infamantes dont la plus importante est l'emprisonnement. L'emprisonnement n'a pas sa place en matière de droit réglementaire puisque celui-ci ne vise pas la condamnation morale et la stigmatisation. Malheureusement 70% des infractions réglementaires rendent ceux qui les commettent passibles d'une peine de prison. On doit changer cette situation et le secteur réglementaire doit exclure l'emprisonnement. Le véritable droit pénal doit également restreindre le recours à cette peine aux cas où elle est vraiment nécessaire, soit pour le délinquant qu'il serait dangereux de laisser libre, soit pour celui qui refuse de se soumettre à d'autres sanctions et pour celui qui a adopté un comportement tellement répréhensible qu'une peine non privative de liberté ne suffirait pas à le dénoncer. Dans les autres cas, les tribunaux devraient avoir recours à des peines plus constructives.

PHILOSOPHY OF THE LAW REFORM COMMISSION IN RELATION TO THE CRIMINAL LAW (*)
(Excerpt from "Our Criminal Law", March 1976, Law Reform Commission of Canada, Dat. No. J31- 19/1976)

Man is a social being who has to live in a society. Society means co-operation, a common life, a sharing of fundamental values. To hold a value sincerely, a person must react when it is violated. To share a fundamental value genuinely, society too must react publicly when it is violated, condemn the violation and take steps to reaffirm the value. One way of doing this is by the criminal law.

Criminal law operates at three different stages. At the law-making stage it denounces and prohibits certain actions. At the trial stage it condemns in solemn ritual those who commit them. And at the punishment stage it penalizes the offenders. This, not mere deterrence and rehabilitation, is what we get from criminal law—an indirect protection through bolstering our basic values.

But criminal law is not the only means of bolstering values. Nor is it necessarily always the best means. The fact is, criminal law is a blunt and costly instrument—blunt because it cannot have the human sensitivity of institutions like the family, the school, the church or the community, and costly since it imposes suffering, loss of liberty and great expense.

So criminal law must be an instrument of last resort. It must be used as little as possible. The message must not be diluted by overkill—too many laws and offences and charges and trials and prison sentences. Society's ultimate weapon must stay sheathed as long as possible. The watchword is restraint—restraint applying to the scope of criminal law, to the meaning of criminal guilt, to the use of the criminal trial and to the criminal sentence.

(*) For more comments on the philosophy of the Law Reform Commission of Canada in relation to the Criminal Law, See E.P. HARTT, "Some thoughts on the Criminal Law and the Future", 51 Can. B. Rev. 59-70; M.R. GOODE, "Political Ideology of Criminal Process Reform", (1976) 54 Can. B. Rev. 653-674.

## 1. Scope of Criminal Law

In re-affirming values criminal law denounces acts considered wrong. Accordingly it has to stick to really wrongful acts. It must not overextend itself and make crimes out of things most people reckon not really wrong or, if wrong, merely trivial. Only those acts thought seriously wrong by our society should count as crimes.

Not all such acts, however, should be crimes. Wrongfulness is a necessary, not a sufficient condition of criminality. Before an act should count as a crime, three further conditions must be fulfilled. First, it must cause harm—to other people, to society or, in special cases, to those needing to be protected from themselves. Second, it must cause harm that is serious both in nature and degree. And third, it must cause harm that is best dealt with through the mechanism of the criminal law. These conditions would confine the criminal law to crimes of violence, dishonesty and other offences traditionally in the centre of the stage. Any other offences, not really wrong but penally prohibited because this is the most convenient way of dealing with them, must stay outside the Criminal Code and qualify merely as quasi-crimes or violations.

## 2. Meaning of Guilt

In re-affirming values and denouncing crimes, criminal law stigmatizes criminal offenders. It condemns those guilty of wrongdoing. But guilt must rest on real culpability—the wrongdoer must act intentionally or recklessly, or at least negligently. Real criminal law concerns such wrongful acts; regulatory law is the proper place for carelessness and failure to attain requisite standards of diligence.

Unfortunately some real crimes and most regulatory offences rest on strict liability. Of these one can be guilty without intention, recklessness or negligence—in other words quite innocently and unawares. Such "innocent guilt" is unjust, unnecessary and inexpedient. It should in principle be excised from our law and, in the regulatory sector, replaced by negligence which may be presumed against the defendant but may be rebutted by his making out a defence of due diligence.

In practice, though, we recognize that some people, especially administrators, may have misgivings and doubt whether regulatory law could work with this replacement. To meet this doubt, a limited experiment at least, allowing the due diligence defence for a temporary period, would serve to test its workability. Its workability too could be increased if courts were enabled to determine the truth of the defence with greater speed and informality. That way the discretion now exercised by administrators would be exercised instead by the courts. For such exercise appropriate rules and procedure should be developed.

## 3. The Criminal Trial

If criminal law is looked upon as primarily reaffirming basic values, this puts more emphasis on the criminal trial. The prime denunciation of acts violating such values comes, not from the Code or even from the offender's punishment, but from the trial itself. Not all offences, though, deserve such trials. Some are not serious enough. Others do not violate basic values.

Some offences are not serious enough. Though contravening basic values, they do so only to a minor extent and so are best dealt with outside the criminal trial. For these we urge more use of the diversionary option.

Other offences do not need the full criminal trial because they do not contravene basic values. For these regulatory offences a quicker, more streamlined, more informal arbitration is appropriate. Responsibility must be assessed, liability established and principles of justice, law and evidence observed, but this can all be done without the solemn ritual and awesome dignity of the traditional criminal trial.

## 4. Criminal Sentences

As an instrument of moral condemnation and stigmatization, criminal law naturally makes use of certain shameful types of punishment of which the most important is imprisonment. Regulatory law, which is not concerned with moral condemnation and stigmatization, has no place for imprisonment. Unfortunately 70% of regulatory offences are punishable by imprisonment. This must be changed: prison must in general be excluded from the regulatory sector. It also must be restricted in the real criminal law and only used where necessary—for offenders too dangerous to leave at large, too wilful to submit to other sanctions, or too wrongful to be adequately condemned by non-custodial sentences. In other cases courts should use more positive kinds of penalty.

3. La réorganisation du Code criminel: style et rédaction.

3. Reorganizing the Criminal Code: style and writing.

LA REORGANISATION DU CODE CRIMINEL

(extrait de "Notre droit pénal" mars 1975, Commission de réforme du droit du Canada, no cat. J31- 19/1976)

On peut faire au moins quatre grands reproches à notre droit pénal. Il ne fait pas la distinction entre crimes véritables et infractions réglementaires. Il s'embarasse de trop de détails. Il emploie un langage et un style qui ne conviennent pas. Il s'inspire d'une philosophie victorienne qui n'est plus adéquate.

a) *Le crime véritable et l'infraction réglementaire*

On fait une distinction, en droit, entre la faute civile et l'infraction pénale. La première fait l'objet du droit civil et d'autres branches apparentées au droit. La seconde tombe sous l'empire du droit pénal. Cette distinction est particulièrement importante au Canada, à cause de la règle constitutionnelle qui réserve au Parlement fédéral la création du droit pénal.

Il y a cependant une autre distinction que nous avons signalée dans le document de travail n° 2 intitulé, «La notion de blâme». C'est une distinction interne en droit pénal, à savoir la distinction entre le crime «véritable» et la simple infraction réglementaire. La distinction est bien connue des simples citoyens, elle est admise en philosophie du droit et elle se fonde sur la logique et le sens commun. Le droit devrait aussi la reconnaître. Par conséquent, nous recommandons qu'on émonde le Code criminel de toutes les infractions qui ne représentent pas des actions à la fois mauvaises et graves.

**Nous recommandons** de plus que la distinction soit renforcée en réservant la stigmatisation de l'emprisonnement au crime véritable. Par conséquent *nous recommandons que le Code criminel précise qu'à l'exception de celles qui figurent au Code criminel aucune infraction ne rende son auteur passible d'une peine de prison. Lorsqu'une infraction réglementaire est commise de façon tellement délibérée qu'elle fait de l'acte un crime «véritable» qui mérite l'emprisonnement* (par exemple, l'omission volontaire de se conformer à certaines dispositions de la loi fiscale, pourrait être considérée comme de la fraude et mériter l'emprisonnement), *on devrait loger une poursuite sous le régime du Code criminel en accusant le prévenu du crime correspondant*. Lorsqu'une personne condamnée pour une infraction réglementaire refuse de se conformer à l'ordonnance ou à la sentence du tribunal, ce défi volontaire devrait, comme nous l'avons suggéré dans le document de travail n° 6 intitulé, «L'amende», constituer une infraction nouvelle punissable de l'emprisonnement par voie de déclaration sommaire de culpabilité.*

*En pratique, il y a bien des moyens d'arriver à cet objectif, mais, en principe, nous proposons que les infractions réglementaires graves, c'est-à-dire «criminelles», soient classées au Code criminel dans la catégorie des crimes.

b) *L'excès de détails*

Si l'on restreignait le Code criminel à la liste relativement courte des crimes véritables, il deviendrait un document simple et concis. A l'heure actuelle, il consiste en un assemblage lourd et complexe d'articles dont certains ont été ajoutés au fur et à mesure, pour régler des problèmes particuliers qui se présentaient. Un grand nombre d'entre eux ne sont pas nécessaires puisqu'ils ne servent qu'à particulariser des principes qui figurent déjà dans le Code. Étant donné, par exemple, qu'il existe un article qui prohibe la séduction, nous n'avons aucun besoin de la prohibition spéciale contre la séduction des passagères à bord d'un vaisseau. Étant donné qu'il existe une prohibition générale contre le vol, les articles prohibant le vol d'huîtres, de bestiaux et de bois à la dérive sont superflus. Étant donné l'infraction générale qui incrimine la cruauté envers les animaux, nous pourrions nous passer des dispositions spéciales qui traitent du transport du bétail et des combats de coqs. Cet excès de détails brouille le message clair, simple et direct du Code. L'on remplace par le produit d'une série d'accidents historiques le sens commun et le principe moral.

Pour faire retrouver sa simplicité et sa portée générale au Code, on devra le restructurer de façon plus rationnelle.

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Comme mentionnait Friedland:

> *Parliament must remove the uncertainty in the criminal law. The courts cannot achieve this result. However, simplification, clarification, and accessibility of the law do not necessarily mean fewer legislative provisions. Indeed, if anything, they require much greater detail than we presently have. You do not simplify by oversimplifying. How can we expect one short document such as the present Criminal Code to include provisions spelling out all aspects of criminal conduct, the general principles of the criminal law, and virtually the complete procedure for trying an accused? (...) The criminal law must be changed by legislation from an unsophisticated vehicle based on inarticulated and often unknown assumptions to a rational exposition from which people can with ease ascertain their rights and duties and the procedures for testing them.

(*) M.L. FRIEDLAND, "The Process of Criminal Law Reform", (1970) 12 Crim. L.Q. 150-151.

On devrait concentrer les efforts sur la définition des infractions les plus importantes. On devrait éviter d'entrer dans les détails et dans les applications particulières.

c) *Un style inadéquat*

Le Code criminel ne contient pas de principes directeurs. Il ne nous dit pas ce qu'est le droit pénal, à quoi il doit servir, quels sont ses objectifs. Il est largement formé, comme nous l'avons écrit plus haut, d'un ensemble de règles spéciales d'une complexité toujours croissante. Non pas que les détails soient inutiles. La précision dans la définition des infractions peut favoriser la clarté et la certitude. Chaque citoyen a le droit de savoir clairement ce qui est défendu. Le responsable de l'application de la loi a le droit de savoir exactement quand la loi lui permet d'intervenir. A cause de cela, dit-on, il est juste de décrire les prohibitions de façon détaillée, en mettant les points sur les «i».

L'argument n'est pas entièrement convaincant. En particulier, il n'est pas convaincant en ce qui regarde les crimes «véritables». Ces actions sont généralement reconnues comme étant à la fois graves et mauvaises. Cette reconnaissance est tellement générale et le fait que les actions soient mauvaises est tellement évident, qu'on ne permet pas de s'exonérer en plaidant l'ignorance de la loi. Que l'accusé ait connu ou non le libellé exact des articles du Code criminel portant sur l'homicide n'a rien à voir avec une accusation de meurtre. Il savait qu'il est mal de tuer. Le même raisonnement s'applique à tous les crimes fondamentaux où le droit pénal ne fait que souligner la connaissance générale du bien et du mal.

Cela étant, nous soumettons que les définitions détaillées ne sont pas nécessaires. En ce qui regarde une infraction pénale, le comportement peut tomber dans trois catégories différentes. La première catégorie est celle des actes clairement mauvais et clairement prohibés par l'article qui crée l'infraction. La seconde catégorie est celle des actes clairement légitimes que la prohibition ne vise évidemment pas. La troisième catégorie comprend des actes qui ne sont ni clairement mauvais, ni clairement légitimes: ils tombent dans la zone grise qui se situe entre ces deux extrêmes. Ce sont ces actes qui ont donné énormément de mal aux juristes et aux législateurs parce que la législation s'est toujours attachée à ces actes marginaux dans le but de les clarifier et de favoriser la certitude. Nous soumettons que cela n'est pas nécessaire en droit pénal. Toute action qui tombe dans cette zone grise n'est sûrement pas une action qu'on reconnaît généralement être à la fois mauvaise et grave. A ce titre, elle ne devrait pas être prohibée par le droit pénal. Après tout, le rôle du droit pénal est de souligner les valeurs et non de les caricaturer.

On ne doit donc pas attacher trop d'importance aux cas marginaux, au détriment du reste. Nous devons faire porter le droit sur ce qui est véritablement criminel. Le Code criminel de l'avenir devrait consister en une déclaration brève, concise et simple désignant les actes que condamne notre société. Il devrait être un résumé de nos principes fondamentaux de morale appliquée.

d) *Une philosophie inadéquate*

Notre Code criminel est en grande partie le produit de la pensée du dix-neuvième siècle. La pensée de ce siècle se caractérise par un consensus très général et un optimisme naïf. En général, les gens s'entendaient sur les principes moraux. Ils croyaient aussi que, comme chaque événement avait sa cause, de même tout problème avait sa solution, à condition de la trouver. De là, la conception que Bentham et ses disciples se faisaient de l'homme: des êtres mus par des mécanismes rationnels obéissant au principe du plaisir et de la peine. De là aussi, la croyance primitive en l'efficacité de l'intimidation.

Nous nous rendons compte aujourd'hui que ces croyances ne suffisent pas. On s'entend moins aujourd'hui sur bien des questions comme la sexualité, la religion et bien d'autres questions encore. On croit avec moins de confiance que tout problème est facilement soluble; les problèmes sont peut-être des éléments inéluctables de la condition humaine. On croit moins, également, à la conception de l'homme comme purement rationnel et mû uniquement par son intérêt. On a redécouvert les aspects sombres, irrationnels et inconscients de la nature humaine. La société ressemble de plus en plus à un système ouvert où chaque élément contribue à influer sur tous les autres de façon à produire un équilibre fondé sur le dynamisme des interrelations. Le crime est un des éléments de ce système.

Cela signifie qu'il n'existe pas de solution facile au problème de la criminalité, pas de panacée, pas de cure-miracle. La criminalité, tout comme la pauvreté, sera toujours des nôtres. Tant que les humains seront comme ils sont, ils affirmeront des valeurs morales et ils les transgresseront. Le crime fait partie de notre nature. Il est ici à demeure. Le problème est de décider quoi en faire.

Pour décider comment réagir au crime, nous devons avoir l'esprit ouvert et savoir affronter la réalité. Nous devons considérer le procès criminel comme une occasion d'apprendre, où l'accusé, la victime, les autres participants, nous tous, enfin, pouvons apprendre des leçons. Nous pouvons apprendre de quelle manière l'action de l'accusé est mauvaise, de quelle manière on peut réparer le préjudice causé et comment on peut réaffirmer et redécouvrir nos valeurs fondamentales. Nous devons surtout, en observant le drame judiciaire, éviter de faire de l'accusé le bouc émissaire de nos faiblesses et apprendre à reconnaître le mal qui est en nous. Nous devons apprendre ce qu'est un être humain.

Pour en arriver à cela, il faudrait plus d'imagination dans notre façon d'aborder le droit pénal. Nous devons être prêts à innover. Nous devrions accepter de faire des expériences au moyen de projets pilotes. Au lieu de tenter d'appliquer chaque fois la loi de façon générale sans connaître les résultats à en attendre, il serait utile de tenter diverses stratégies de façon temporaire dans des régions délimitées. Après un contrôle serré, nous serions alors en mesure de juger si nous voulons les généraliser. Cette façon de procéder nécessite un bon système de contrôle des résultats. Nous devons améliorer notre système de relevé et de compilation de données statistiques. Le progrès en droit pénal, comme dans toute entreprise humaine, est le fruit de la prudence, du réalisme et du pragmatisme. On va de l'avant pas à pas.

Ce changement d'attitude ne pourra arriver que si l'on attache plus d'importance à l'aspect éducatif du droit pénal. Nous avons trop l'habitude de la catégorie: le droit pénal d'un côté, l'éducation de l'autre. L'homme, cependant, n'entre dans aucune catégorie et son comportement forme un tout. Par conséquent, **nous recommandons** que le gouvernement prenne des mesures pour favoriser l'éducation en droit pénal des juges, des administrateurs du système pénal et de nous tous. D'abord, les juges ont le droit de suivre des cours et des programmes d'éducation permanente en droit pénal, en criminologie et en philosophie pénale; il y va aussi de notre droit. Ensuite, il serait bon qu'il y ait des principes directeurs portant sur l'administration de la justice, depuis le niveau d'intervention du Procureur général jusqu'à celui du simple policier ou du fonctionnaire, de façon à assurer à la fois la conformité générale aux principes de base et la responsabilité politique pour les décisions qui sont prises. Enfin, le gouvernement devrait lancer des programmes ayant pour but de renseigner les citoyens sur le droit pénal et la criminalité. On devrait mettre au point des programmes qui conviendraient aux écoles, aux universités, aux collèges communautaires et à tous les autres contextes éducatifs. A l'heure actuelle, notre droit pénal n'est pas suffisamment respecté. Les gens plus âgés sont peut-être cyniquement déçus; les plus jeunes peuvent ressentir l'ennui, le mépris, la désillusion, l'aliénation. Pour gagner de nouveau notre respect, le droit pénal doit retrouver sa place propre, et le procès pénal doit avoir à nos yeux un sens véritable. En somme, nous devons faire du droit pénal *notre* droit pénal. C'est à ce moment, et seulement à ce moment, que nous pourrons apprendre comment réagir devant la criminalité.

REORGANIZING THE CRIMINAL CODE
(Excerpt from "Our Criminal Law", March 1975
Law Reform Commission of Canada, Cat. no.
J 31- 19/1976)

Our criminal law suffers from at least four defects. It fails to differentiate between real crimes and mere regulatory offences. It descends into excessive detail. It uses a style and form of language that is inappropriate. And it is wedded to a Victorian philosophy which is now inadequate.

(a) *Real Crimes and Regulatory Offences*

In law there is a distinction between criminal offences and civil wrongs. The former are dealt with by the criminal law, the latter by different branches of the civil law. The distinction between criminal and civil law is particularly important in Canada because of the constitutional provision reserving the creation of criminal law for the federal Parliament.

There is, however, another distinction to which we drew attention in Working Paper 2, *The Meaning of Guilt*. This is a distinction within the criminal law itself. It is the distinction between "real" crimes and mere regulatory offences. The difference between the two is well recognized by ordinary citizens, accepted formerly by criminal jurisprudence and based on logic and common sense. It should be recognized by law. **We therefore recommend** that the Criminal Code be pruned so as to contain only those acts generally considered seriously wrongful and that all other offences be excluded from the Code.

In addition **we recommend** that the distinction be further signalized by generally restricting the stigma of imprisonment to real crimes. **We therefore recommend** that *the Criminal Code should make it clear that no offence outside the Code may be punished by imprisonment. Where a regulatory offence is committed with such deliberate intent as to make the act a "real" crime and warrant imprisonment*—wilful non-compliance with certain income tax provisions, for example, could amount to fraud and merit jail—*prosecution should be brought for the relevant Code crime.* And where a person convicted of a regulatory offence refuses to comply with the sentence or order of the court, this intentional defiance should, as we suggested in Working Paper 6, Fines, constitute a new offence punishable on summary conviction by imprisonment.*

(b) *Excessive Detail*

Restrict the Criminal Code to the relatively short catalogue of "real" crimes and we will have a terse and simple document. At present we have a complex, cumbersome collection of sections, many of which have been added from time to time *ad hoc*. Many are quite unnecessary because they but particularize matters covered by more general sections. Given, for example, a general section on seduction, we have no need for a particular prohibition

*In practice there are several techniques for facilitating this, but in principle our proposal is that really serious, i.e. "criminal", breaches of regulatory law should be designated as crimes in the Code.

against seducing female passengers on board ship. Given a general prohibition of theft, we scarcely require special sections on oysters, cattle and driftwood. And given a general rule against cruelty to animals, we could do without detailed provisions about cattle and cock-fighting. Such excess detail blurs the simplicity, obviousness and directness of the general message of the Code. Common sense and moral principles get replaced by the product of historical accident.

To regain generality and simplicity, the Code must be reorganized in a more rational framework.

Regarding simplification, Friedland was saying:

"Parliament must remove the uncertainty in the criminal law. The courts cannot achieve this result. However, simplification, clarification, and accessibility of the law do not necessarily mean fewer legislative provisions. Indeed, if anything, they require much greater detail than we presently have. You do not simplify by oversimplifying. How can we expect one short document such as the present Criminal Code to include provisions spelling out all aspects of criminal conduct, the general principles of the criminal law, and virtually the complete procedure for trying an accused? (...) The criminal law must be changed by legislation from an unsophisticated vehicle based on inarticulated and often unknown assumptions to a rational exposition from which people can with ease ascertain their rights and duties and the procedures for testing them."

Concentration should focus on the general definitions of the obvious basic crimes. Detailed particularities and applications are out of place and should be avoided as far as possible.

(c) *Inappropriate Style*

Our Criminal Code contains no general guiding principles. It nowhere says what criminal law is, what it is for or what it aims to achieve. Instead it consists largely, as we have said, of particular rules of ever increasing detail.

Not that detail serves no purpose. Precision in the definition of offences may promote clarity and certainty. The individual has a right to know clearly what is forbidden. The administrator has a right to know clearly when he can legally intervene. This, it is argued, justifies spelling the details out in black and white.

The argument is not totally convincing. In particular it is not convincing as regards "real" crimes. These are acts generally recognized as seriously and obviously wrong. So general is this recognition and so obvious is their wrongfulness that ignorance of law is not allowed as a defence. Whether or not the accused is familiar with the actual language of the Criminal Code sections on homicide is quite irrelevant on a charge of murder—he knows that it is wrong to kill. The same reasoning applies to all the basic crimes, where criminal law simply underlines our general notions of right and wrong.

This being so, we contend that there is no need for detailed definitions. When it comes to any criminal offence, there are three

wrongful and clearly forbidden by the relevant section. Another consists of acts clearly legitimate and untouched by the section's prohibition. And then there is a third class—those acts which are neither beyond peradventure wrongful nor yet beyond doubt legitimate: they fall into the grey area in between. Curiously it is the acts in this grey area that have given lawyers and legislators all the trouble, for in the interest of certainty and clarity legislation has traditionally concentrated on such marginal cases. This, we contend, is unnecessary in criminal law. Any act falling into the grey area must be an act not clearly recognized in general as obviously and seriously wrong. As such it has no business being forbidden by criminal law. After all, the purpose of the criminal law is to underline, not caricature, our values.

Marginal cases, then, must not be overemphasized. They must not become the tail that wags the dog. Instead we must concentrate on what is obviously criminal. The Criminal Code of the future should be a short, concise and simple statement of the kind of acts condemned by our society. It should be a summary of our basic principles of applied morality.

(d) *Inadequate Philosophy*

Our Criminal Code is largely the product of nineteenth century thought. That century was one of broad consensus and naïve optimism. People in general were agreed on many matters of morality. They also thought that just as every event had its cause, so every problem had its own solution if only we could find it. Hence the simple Benthamite view of human beings as mechanistically rational and motivated solely by the principles of pleasure and pain. Hence too the primitive faith in the effectiveness of deterrence.

Today we realize the inadequacy of those beliefs. There is less consensus now on many different matters—on sex, on religion and many other things. There is less confidence that every problem has a quick solution—problems may be an inevitable feature of the human condition. And there is less faith in the view of man as purely rational and acting in his own self-interest—the darker, irrational and unconscious side of human nature has been rediscovered. Society comes to look more like an open system in which each ele-

ment eventually feeds back and affects every other element and so produces constantly a dynamic interacting equilibrium. And crime is one element in that open system.

This means there are no quick solutions to crime. There are no patent medicines. There is no instant cure. Crime, like the poor, is always with us. As long as human beings remain the sort of creatures they are, they will hold moral values and they will also transgress them. Crime is part of our divided nature. It is here to stay. The problem is to come to terms with it.

To come to terms with crime we must have open minds. We must face up to reality. We must see each criminal trial as a learning opportunity, where the accused, the victim, the other participants and finally all of us can learn a variety of lessons—the way in which the act of the accused was wrong, the way to repair the harm done and the way to reaffirm and rediscover our basic values. Above all we have to learn, by looking at the court-room drama, to avoid projecting our own inadequacies on the defendant as a scapegoat but rather to face up to the evil in ourselves. We have to learn just what we human beings really are.

To do all this requires a more imaginative attitude to criminal law. We must be ready to try new things. We should be willing to experiment by means of pilot projects. Instead of making each new legislated approach apply across the board without prior indication of the outcome, we need to try out different strategies for limited periods in limited areas. Then after careful monitoring we can judge whether to put them into general operation. This needs good feedback. We must improve our gathering and recording of data. Progress—in criminal law as in human affairs—depends on caution, realism and pragmatism. The way ahead is forged step by step.

This change in attitude can only come from paying greater attention to the educational aspect. All too easily we compartmentalize—criminal law in one slot, education in another. Man, however, slots into no compartments and his activities constitute a whole. Accordingly, **we recommend** that government take steps to promote the education of judges, administrators and all of us about the criminal law. First, judges are entitled to—and we have a right that they should receive—programmes of initial and continuing training on criminal law, criminology and penal philosophy. Second, there is a need for administrative guidelines reaching from the Attorney-General right down to the individual enforcement officer or administrative official in the field, so as to ensure both overall conformity with basic principles and political accountability all along the line. Finally government should promote schemes for educating the citizen on crime and criminal law. Programmes must be devised for schools, for universities, for community colleges and other possible contexts for such education. At present our criminal law enjoys insufficient respect. Older people may be cynically disappointed; younger folk may be bored, contemptuous, disenchanted, alienated. To regain our respect the criminal law must come back into its proper orbit and the criminal trial must become something of meaning to us all. In short we have to make it *our* criminal law. Then, and only then, may we really learn to cope with crime.

4. La codification du droit pénal au Canada.

4. Codification of the criminal law in Canada.

## LA CODIFICATION: OBJECTIFS ET MOYENS

(extrait de "Pour une codification du droit pénal canadien", avril 1976, no cat. J 31-26/1976, pp. 47-67)

A. LES OBJECTIFS ....................

(1) Sur le plan matériel ....................
a) réalisation d'une codification véritable ....................
b) accessibilité générale du contenu ....................

(2) Sur le plan scientifique ....................
a) réflexion de l'identité canadienne ....................
b) moteur de la créativité judiciaire ....................

B. LES MOYENS ....................

(1) Organisation de la hiérarchie des normes juridiques
a) définition de la hiérarchie. ....................
1. les principes de la politique pénale canadienne ....................
(i) identification des principes ....................
(ii) formulation des principes ....................
(iii) orientation des principes ....................
2. les règles corollaires d'application générale
3. les règles particulières ....................
b) conséquences de la hiérarchie des normes juridiques ....................

(2) Création de règles d'interprétation ....................

L'exposé sommaire des deux grandes traditions juridiques et l'examen de l'évolution du droit pénal canadien ont montré que le fonctionnement actuel de ce droit se heurte à certaines difficultés et que le modèle actuel présente certaines lacunes qui suscitent souvent l'embarras du juge.

Il a été suggéré au cours de cette étude qu'une véritable codification du type de celles qui régissent aujourd'hui le fonctionnement de la justice dans de nombreux pays y compris aux États-Unis, pourrait constituer un remède efficace et dynamique. Ce remède serait d'autant plus approprié qu'il permettrait d'affirmer la personnalité canadienne et de rendre à la jurisprudence la créativité que les auteurs du Code criminel de 1955 avaient souhaité lui donner, et à laquelle les circonstances et les méthodes n'ont pas permis, comme on l'a vu, de s'épanouir.

La Commission de réforme du droit du Canada s'est donné pour tâche de « définir les politiques générales de la codification, pour ensuite concevoir la structure et, dans leurs grandes lignes, les principes généraux qui doivent se retrouver dans un code pénal », pour ensuite « préparer à l'intention de la profession juridique un document ayant pour objet de définir la nécessité et les modalités de la codification du droit pénal ». La présente partie a pour objectif de définir et de préciser ces potitiques d'écriture du droit.

Sans être astreint à rappeler encore une fois les avantages d'une véritable codification, il apparaît important de présenter ici une double série d'objectifs, dont la réalisation permettrait de concrétiser ces avantages. Ces objectifs s'analysent d'une part en relation avec les buts

précis que doit poursuivre la codification du droit pénal canadien et d'autre part en relation avec les moyens permettant de les traduire de la façon optimale.

## A. LES OBJECTIFS

Les buts recherchés se situent sur le double plan: matériel et scientifique. Sur le plan matériel, la codification des lois pénales doit être suffisamment complète pour faire le tour du droit positif actuel et suffisamment accessible non seulement au juriste mais encore à l'ensemble des citoyens. Sur le plan scientifique, la codification doit s'efforcer de traduire la réalité juridique canadienne d'une façon fidèle et de servir de moteur et non de frein à la créativité jurisprudentielle, meilleur gage de l'adaptabilité des lois.

### (1) Sur le plan matériel

#### a) *Réalisation d'une codification véritable*

Le premier objectif qui n'est pas particulier à la codification en tant que telle mais à toute révision consolidée des lois, est de permettre la réunion dans une structure unique, de tous les textes se rapportant au droit pénal, au sens large du terme. Malgré la codification de 1955, l'éparpillement de ces textes, leurs origines diverses, voire l'aspect coutumier de certaines règles importantes, imposent à l'esprit l'idée d'une fâcheuse dispersion empreinte parfois d'incohérence, et le sentiment corrélatif qu'une simplification bénéfique résulterait de leur consolidation à l'intérieur d'une même structure.

Réaliser cet objectif a été le rêve des auteurs de la première codification. En 1955, les personnes chargées de la nouvelle révision du Code pénal recevaient encore un tel mandat. Elles se sont efforcées, pour remplir leur tâche, d'insérer au Code une partie du droit statutaire restée jusque-là à l'extérieur et de consacrer par écrit un certain nombre de règles de common law dans leur forme originale ou modifiée. L'adoption du principe de la légalité de l'incrimination dans l'article 8 impliquait un pas décisif dans le sens de la codification. Le Code de 1955 n'a cependant jamais été exhaustif et le passage du temps le montre bien.

Des progrès sensibles pourraient déjà être réalisés par la seule intégration au Code pénal actuel de nombreux textes prévus par des lois particulières. L'objectif poursuivi n'est cependant pas celui-ci. Un véritable code ne se mesure pas en effet au nombre des dispositions qu'il

contient mais à leur logique, importance et qualité. Il ne s'agit pas de substituer au Code de 1955 un code pénal *totalement exhaustif* et donc d'effectuer une autre consolidation, elle-même vraisemblablement dépassée dans quelques années, mais bien un instrument sélectif, qui regroupe l'ensemble des textes fondamentaux et tient compte de la hiérarchie des normes législatives.

* Le Code pénal ne doit contenir que ce qui doit *rationnellement* permettre aux citoyens, aux praticiens et aux tribunaux, de faire à chaque cas d'espèce une application aussi simple que possible de la règle de droit, en respectant l'intention du législateur et l'optique sociale dans laquelle le droit a été conçu.

*) → Le droit actuel ne connaît pas, du moins de façon formelle, une véritable hiérarchie des sources écrites du droit criminel. On peut cependant, par un effort de rationalisation, placer au sommet la *constitution* et l'ensemble des textes d'ordre constitutionnel, qui forment la règle normative la plus fondamentale et la plus générale. Vient ensuite la *Déclaration canadienne des droits* qui, même si elle ne représente pas un texte véritablement fondamental en raison de l'interprétation restrictive que lui ont donnée les tribunaux, contient cependant, au moins à titre énonciatif, les postulats fondamentaux en matière de droit de l'homme et de libertés individuelles.

* Le *Code pénal* vient en troisième lieu. Il s'inspire étroitement des sources précédentes. Son rôle est de contenir non seulement les infractions proprement dites, mais aussi les principes juridiques fondamentaux du droit pénal dans son ensemble. De fait, le Code criminel actuel contient déjà, quoique de façon fragmentaire, incomplète et peu cohérente, certains de ces principes.

* En quatrième lieu, on retrouve les statuts ou *lois pénales particulières* qui, à propos d'une situation précise, dérogent aux principes généraux du Code pénal, les complètent ou cherchent à les appliquer dans un domaine spécifique.

En dernier lieu, enfin, on peut placer les *règlements* qui, dans une série d'instances déterminées, visent essentiellement à organiser l'application de la loi.

Une reconnaissance de cette hiérarchie des sources législatives est importante. Ainsi, l'interprétation d'un statut ou d'une loi particulière, devrait dans cette perspective être conforme aux principes établis respectivement dans la constitution, la charte et le Code. Sur le plan pratique, cette hiérarchie permet d'imputer au législateur l'intention

(*) Depuis la rédaction de ce document ci-haut mentionné, le Canada a adopté une nouvelle Constitution supplantant toutes les autres lois du Canada. Celle-ci contient une Charte des droits et libertés enchâssée dans la partie écrite de la Constitution (17 avril 1982).

de ne pas déroger aux principes exprimés dans une source hiérarchiquement supérieure, à moins d'en faire mention expresse. Ainsi, un règlement ne pourrait déroger aux dispositions prévues par une source supérieure comme le Code par exemple, puisque sa vocation est seulement de veiller à leur application à des cas particuliers.

Un code pénal moderne devrait définir les objectifs du droit pénal, les principes fondamentaux qui l'animent et les idées directrices du fonctionnement de la justice pénale. Les principes sont ceux qui ont été forgés au cours des années par la tradition canadienne et qui reflètent donc la réalité sociologique du pays.

Le *principe* constitue une norme décisionnelle fondamentale. Il prend donc la forme de postulats dégagés peu à peu par l'organisation sociale au sens large du terme. Il commande à son tour une série de règles particulières qui le concrétisent au niveau des domaines particuliers du droit. Cette hiérarchie est familière aux principaux auteurs du common law.

De par leur généralité et leur universalité, les principes confèrent aux règles qui les expriment leur cohérence en les rendant plus compréhensibles et plus efficaces. On peut constater que le Code criminel actuel possède de sérieuses carences quant à l'énoncé des principes; ainsi, ni le *mens rea*, ni le rapport de causalité, ni la culpabilité, ni le préjudice social n'y sont explicitement posés.

Après les principes viennent les *règles d'application générale* dont la portée s'étend à l'ensemble du droit pénal. Ces règles procèdent des principes dont elles ne sont souvent que corollaires. Elles consistent dans l'application d'un principe à une situation donnée. Elles ont donc une vocation plus restreinte, servant tantôt à conférer des droits ou à imposer des obligations dans des situations particulières, tantôt à assurer le fonctionnement des institutions en conformité avec les principes posés antérieurement. Ces règles d'application générale doivent également trouver leur place dans un code pénal puisqu'elles dégagent pour le juge comme pour le justiciable les principales conséquences des principes généraux de la politique législative criminelle.

En troisième lieu apparaissent les *règles particulières*. Elles découlent, comme les précédentes, des principes. Elles diffèrent d'elles cependant par leur portée plus spécifique. Elles doivent également figurer dans un code pénal scientifiquement conçu et organisé parce que, sans elles, il serait impossible de connaître le détail des principales incriminations et les modalités de leur répression.

Certaines d'entre elles peuvent cependant sans inconvénient majeur, rester extérieures au Code. Il en est ainsi notamment de celles qui visent la mise en œuvre de matières spéciales contenues dans une législation particulière qui contient accessoirement des incriminations, des peines et des règles nécessaires à l'application de la loi en question par les pouvoirs publics.

Le Code pénal est avant tout un recueil de normes. Toutes les normes cependant ne trouvent pas nécessairement leur place dans son sein. Le choix doit en être fait d'une part en tenant compte de celles qui sont déjà exprimées dans les sources qui lui sont hiérarchiquement supérieures, et, d'autre part, en fonction des valeurs sociales que la société, à travers les codificateurs, entend reconnaître formellement. Seules donc celles qui ont un certain caractère de permanence en dépit d'éventuelles modifications de détail peuvent s'y trouver. On comprendra aisément à cet égard le très grand soin qui doit être apporté à leur rédaction, pour leur conférer cette dimension générale.

Le Code pénal nouveau devra s'efforcer d'être exhaustif relativement aux principes et aux règles d'application générale. Il pourra comporter une partie générale, une partie spéciale, ainsi que les principes fondamentaux de la procédure, de la preuve et du sentencing.

Dans la partie générale devront figurer les principes concernant l'ensemble de la matière pénale ainsi que les règles d'application générale. Dans la partie spéciale, au contraire, apparaîtront les règles d'application particulière, concernant notamment les infractions.

En outre, d'autres règles d'application particulière, obéissant, sauf dérogation expresse décidée par le législateur, aux principes et règles formulés dans la partie générale, continueront à figurer dans des lois particulières et spécialisées. D'autres pourront de même être promulguées ultérieurement sans pour autant devoir être fatalement incorporées au Code.

Si le Code pénal veut dépasser le modèle d'une simple compilation ou d'un simple digeste, et exprimer clairement la philosophie pénale canadienne dans son ensemble, il doit être considéré comme représentant le fondement de l'ensemble du droit criminel. On devra donc extraire des lois existantes et insérer au Code, toute disposition qui peut être considérée comme appartenant au droit pénal fondamental. À l'inverse, certaines dispositions à caractère réglementaire ou certaines normes à usage spécialisé, qui se trouvent à l'heure présente dans le Code criminel, devront en sortir et prendre place dans des dispositions

La tâche des juges comme celle des avocats devrait être facilitée par la mise à leur disposition d'un instrument complet et structuré permettant de trouver rapidement les bases rationnelles du processus de décision. Il ne faudrait pas croire cependant que désormais le Code ne ferait plus place à l'interprétation des textes. Aucun texte ne peut prétendre à ce degré de perfection et il devra donc contenir des règles d'interprétation permettant de donner un cours dynamique à la créativité judiciaire.

## (2) Sur le plan scientifique

Sur le plan scientifique, deux objectifs doivent être recherchés: d'une part, la réalisation d'un ensemble reflétant fidèlement l'identité canadienne, d'autre part, l'établissement de règles aptes à faciliter et à orienter une créativité judiciaire nouvelle indispensable à l'actualisation des règles de droit.

### a) *Réflexion de l'identité canadienne*

Toute législation doit être taillée à la mesure d'une communauté déterminée. Elle doit donc s'y adapter parfaitement et traduire non seulement son organisation, son état social et l'état de ses mœurs, mais aussi ses aspirations dans tous les domaines. Comme l'a si justement écrit le criminaliste suisse Graven:

> Un code doit être le reflet en même temps que la régulation des mœurs. Un pays est une individualité avec ses caractères et ses besoins propres, dont il est impossible de ne pas tenir compte si l'on veut assurer son sain développement et sa croissance harmonieuse.

Après plus de 100 ans de confédération au cours desquels s'est forgée peu à peu l'identité nationale, le Canada a acquis une personnalité propre. Aux deux groupes venus d'Europe il y a quelques siècles et que séparaient des différences de langue, de religion et de culture, sont venus s'ajouter des immigrants venus de multiples pays et dont la culture et les traditions ont constitué un apport précieux à leur pays d'accueil. Au surplus, les deux groupes fondateurs ont subi une évolution différente de celle des ressortissants de leur patrie d'origine.

Sur le plan juridique, le droit reflète la vie sociale, parfois non sans un certain retard qu'il doit s'efforcer de rattraper quand une occasion favorable se présente. L'élaboration d'un code pénal fournit aujourd'hui cette occasion. Droit civil et common law ont évolué, comme on l'a vu, et leur antinomie de base, sans disparaître complètement, a perdu beaucoup de son acuité et de ses effets. L'attitude et la méthode des juges

opérant dans l'un et l'autre système, ne sont pas si différentes qu'on le prétend parfois.

b) *Moteur de la créativité judiciaire*

La législation pour pouvoir être adaptée à la réalité socio-culturelle ne doit pas être coulée dans un moule d'une rigidité absolue. C'est à tort que l'on s'imagine que les codes des pays modernes présentent cet inconvénient. En effet, la facture de ceux-ci est suffisamment souple d'une part, et le contenu des principes suffisamment élaboré d'autre part, pour éviter d'enfermer les tribunaux dans un carcan législatif.

Le Code criminel de 1955 ne souhaitait pas voir réduire le rôle de la jurisprudence. Ses auteurs, au contraire, avaient espéré que le juge disposerait de plus de liberté qu'autrefois dans l'interprétation des règles pour faire évoluer le droit parallèlement aux transformations de la société. Comme on l'a vu cependant, ce vœu, pour différentes raisons techniques, n'a pas été pleinement réalisé. Le juge canadien n'a pas eu, bien souvent, la possibilité de s'élever au-dessus d'une application littérale et statutaire des textes du Code criminel ou de diktats de précédents lointains dont l'adaptation au contexte canadien posait de sérieux problèmes. C'est cet écueil que le nouveau droit pénal canadien, à la lumière de l'expérience acquise, se doit d'éviter.

Le nouveau Code doit rester perméable à l'évolution sociale, d'autant plus qu'à l'époque moderne, cette évolution est plus rapide et plus profonde qu'autrefois. L'idée que seule la coutume permet de maintenir la règle de droit adaptée à l'état changeant des mœurs sociales est un mythe depuis longtemps éclaté. La mission d'un véritable code, scientifique, est précisément de constituer une base solide sur laquelle les tribunaux peuvent enraciner les constructions jurisprudentielles et ainsi adapter la règle de droit, dans la certitude de ne pas trahir pour autant la pensée du législateur. Le Code doit donc faciliter la créativité jurisprudentielle en énonçant les principes à partir desquels celle-ci peut s'exercer.

## B. LES MOYENS

La tâche de la Commission ne s'arrête pas à la définition des objectifs à atteindre. Elle doit également mettre en lumière les moyens qui peuvent permettre d'atteindre ces objectifs. En bref, il est indispensable de fournir à ceux qui collaborent à l'application de la règle de droit, les outils leur permettant de faire qu'une meilleure justice soit rendue.

La réalisation des objectifs menant à l'élaboration d'un code modèle, doit se faire en fonction de deux facteurs principaux, soit d'une part l'organisation de la hiérarchie des sources, et d'autre part la création de règles d'interprétation de la nouvelle législation.

## (1) Organisation de la hiérarchie des normes juridiques

a) *définition de la hiérarchie*

1. *les principes de la politique pénale canadienne*

Un code doit contenir, en toute priorité, les principes du droit pénal du pays et de l'époque pour lesquels il est fait. Pour parvenir à cette fin, trois étapes sont indispensables. Il faut d'abord identifier ces principes, ensuite les formuler, et enfin vérifier s'ils correspondent fidèlement à la politique pénale que l'État a décidé de suivre.

(i). identification des principes

La codification, qu'elle s'accompagne ou non d'une réforme du droit existant, ne saurait aboutir à un bouleversement total des principes qui sous-tendent le fonctionnement de la société, s'il n'y a pas de raison majeure de penser qu'ils doivent être abandonnés. L'entreprise poursuivie n'est pas une révolution mais bien plutôt une reconstruction.

C'est donc dans le droit pénal positif actuel que les principes doivent, en premier lieu au moins, être recherchés. La tâche est difficile puisque le Code criminel, et davantage encore les lois statutaires, se montrent souvent trop laconiques au niveau de l'expression de ces principes.

Cette situation est d'autant plus regrettable qu'elle compromet la cohérence et la certitude de la règle de droit. Ainsi, faute d'un énoncé de principe sur la nécessité du *mens rea*, il devient pratiquement impossible de trancher le problème de la responsabilité stricte, tant au niveau théorique que dans l'optique concrète d'une incrimination particulière. De même, en l'absence d'une théorie cohérente des rapports entre la capacité pénale et la culpabilité d'une part, et l'élément matériel de l'infraction d'autre part, il est difficile de distinguer avec certitude automatisme et aliénation mentale.

La recherche des principes est encore plus difficile lorsque le juriste doit les extraire d'une série d'arrêts souvent contradictoires et parfois empreints de subtilité casuistique.

La codification des principes aurait l'avantage de constituer une toile de fond nécessaire à la fois à la partie du Code traitant des diverses infractions et à celles qui rassembleront les règles de preuve, de procédure et du sentencing. De cette façon, les diverses branches du droit pénal apparaîtront comme le complément naturel, la suite logique des principes de base de la partie générale du Code, garantissant ainsi la cohérence d'une politique pénale d'ensemble et prévenant la fragmentation de celle-ci.

Le droit de fond, la procédure, la preuve et le sentencing ont chacun leur rôle et leurs règles propres. Toutefois, il n'existe pas de clivage net entre ces quatre domaines et il est donc quelque peu artificiel de vouloir à tout prix les séparer et d'en constituer autant de parties autonomes du droit pénal dans son ensemble.

Ces quatre domaines sont en effet complémentaires et ont l'un sur l'autre une influence déterminante au point qu'on ne peut décider parfois qu'en vertu d'une classification arbitraire, que certains relèvent d'un domaine à l'exclusion des autres.

Ainsi, les moyens de défense à certaines infractions se rattachent-ils au droit de fond, à la preuve, ou à la procédure? De même, pour en prendre un autre exemple, la présomption d'innocence doit-elle être rangée parmi les règles de fond, celles de la procédure, ou celles de la preuve? Le principe de l'autorité de la chose jugée concerne-t-il le fond du droit ou les conditions de recevabilité de la poursuite? La réforme doit être conçue comme un tout; elle doit imposer une coordination nécessaire entre ces différents domaines, et ce, même s'ils peuvent faire l'objet de codifications distinctes pour des raisons de commodité.

Le Code pénal doit donc énoncer les principes fondamentaux qui régissent la procédure et la preuve en tant que composantes du droit pénal. Il doit aussi parfois contenir certaines règles particulières à ces domaines lorsqu'elles ont une portée générale et se trouvent ainsi étroitement liées au fond. Pour n'en prendre qu'un exemple, derrière la règle selon laquelle l'accusé n'est pas un témoin contraignable, se dissimule un principe plus fondamental voulant que l'accusé ne puisse être tenu de fournir des éléments de preuve contre lui-même ou de s'incriminer.

(ii) formulation des principes

Une fois que les principes généraux auront été identifiés et recensés, l'étape suivante consiste à les formuler en vue de leur insertion au Code.

À ce sujet, on peut remarquer qu'en droit pénal canadien, la formulation des principes généraux dans le droit écrit revêt souvent une forme négative. Le législateur dit davantage en quoi ils ne consistent pas qu'en quoi ils consistent. Or, en présence de situations nouvelles, il peut être difficile de déterminer les lignes générales d'une politique pénale donnée en se fiant sur des énoncés négatifs.

Une attention particulière doit être aussi accordée aux termes de la formulation, pour qu'ils traduisent facilement l'objectif précédemment mentionné, à savoir la simplicité, la clarté et la précision. Cette formulation doit constituer un guide pour les praticiens du droit, et leur permettre de trouver les éléments de solution lorsque ni la loi, ni le précédent jurisprudentiel ne fournissent expréssement de réponse au problème juridique posé par l'espèce.

(iii) orientation des principes

Les principes insérés au Code doivent être inspirés par une politique gouvernementale d'ensemble cohérente, qui doit traduire fidèlement une authentique philosophie pénale basée sur l'acceptation de certaines valeurs sociales ou individuelles. C'est seulement à cette condition que le législateur manifeste qu'il n'est pas purement et simplement à la remorque de l'évolution des mœurs, mais qu'il entend faire progresser la communauté dans une voie conforme à l'intérêt général et à l'épanouissement harmonieux des aspirations de la personne humaine.

Codifier le droit pénal, c'est donc d'abord retrouver dans une philosophie pénale d'ensemble, les principes socio-moraux qui constituent la structure même de ce droit. C'est ensuite les traduire sur le plan du vécu. C'est enfin s'assurer que leur agencement et leur formulation en reflètent la logique interne et l'interdépendance.

Ainsi, l'interdiction du vol existe parce que notre société accepte et reconnaît le double concept de propriété privée et de propriété privative. Le vol, tel que l'entend notre droit, n'aurait aucun sens dans une société où cette double notion n'existerait pas. Ainsi, par exemple, dans une société hypothétique, où l'appréhension d'une chose est autorisée afin de lui faire remplir plus complètement sa fonction, on punira non pas celui qui s'empare d'un objet pour en priver un autre, mais celui qui le prend pour une finalité autre que celle à laquelle il est destiné par la collectivité.

Le Code pénal doit donc dans la formulation des règles, constamment avoir présent à l'esprit les répercussions des principes qu'il

pose sur l'ensemble du système social. Les postulats sociaux n'ont peut-être pas besoin d'être reproduits comme tels. Toutefois, le Code peut exprimer les règles juridiques qui en sont la conséquence, et auxquelles l'expérience législative et judiciaire ont conféré une certaine stabilité et une certaine cohésion. De cette façon, l'ensemble du droit pénal canadien apparaîtra comme un tout cohérent et non comme un ensemble disparate de règles créées au cours des ans par opportunisme judiciaire ou législatif. Par voie de conséquence, le Code pénal sera ce qu'il doit être, c'est-à-dire, une loi fondamentale, une véritable charte, dont les autres textes législatifs devront s'inspirer.

Comme on le sait, de multiples buts peuvent être attribués au droit pénal dans son ensemble (répression du crime, maintien de l'ordre public, protection de la société, prévention de la récidive, contrôle de la dangerosité de l'individu, resocialisation du délinquant...). Aucun d'eux n'est en fait exclusif dans notre tradition canadienne qui est beaucoup plus un dosage réciproque de ces différents objectifs.

Le Code doit refléter ce qui est parfois un délicat compromis entre des buts apparemment contradictoires. Toutefois, le Code est par rapport aux lois particulières dans une situation différente. Il doit avoir un certain caractère de stabilité et de permanence. Dans l'ensemble du droit et du système pénal, il s'attache davantage à la définition du crime en général, à la détermination de la responsabilité pénale et à l'imposition des sanctions. Il appartient à d'autres lois de veiller matériellement à la sécurité des personnes et des biens, de constituer des corps policiers, d'aménager les séjours carcéraux, de favoriser la resocialisation des délinquants.

Cependant, on le comprendra aisément, une coordination étroite doit exister entre le Code pénal et les autres manifestations législatives du droit pénal pour permettre une harmonisation de la politique canadienne d'ensemble.

2. *les règles corollaires d'application générale*

Comme nous l'avons vu, les règles diffèrent des principes en ce qu'elles découlent de ceux-ci, et constituent certaines de leurs applications en présence de situations spécifiques prévues par le législateur. La règle est une norme qui, dans une situation précise, confère à une personne certains droits, lui impose certaines obligations, ou encore fixe le fonctionnement d'une institution donnée. Un exemple concret permettra de mieux saisir le rapport entre principe et règle.

Le principe de la légalité veut qu'il n'y ait d'autres conduites criminelles que celles prévues par le législateur, de façon à prévenir le citoyen des conséquences du comportement incriminé. Ce principe est admis par toutes les législations du monde ou à peu près. Le corollaire de ce principe est la non-rétroactivité de la loi pénale qui constitue une règle. Elle est en quelque sorte incluse dans ce dernier, puisque le citoyen doit avoir été prévenu à l'avance des suites pénales que son comportement peut entraîner. Il s'agit donc bien là d'une règle, mais d'une règle d'application générale qui doit trouver sa place dans la partie générale d'un code pénal, à un endroit voisin du principe dont elle découle.

De même, l'application immédiate des lois plus douces est une règle; elle a un caractère général et déroge à la règle de non-rétroactivité parce que l'application immédiate ne peut porter aux libertés individuelles l'atteinte habituellement redoutée d'une loi rétroactive. Elle aussi doit donc prendre place dans la partie générale.

Les règles d'application générale qui découlent des principes doivent figurer dans la partie générale du Code pénal. À l'heure actuelle, le Code criminel canadien contient des règles fort nombreuses: les unes créant des infractions, d'autres des moyens de défense, d'autres des sanctions, alors que certaines énoncent des préceptes de preuve ou des mécanismes de procédure. Il est toutefois difficile de trouver une unité de pensée logique d'une partie à l'autre du Code criminel actuel.

Plusieurs de ces règles d'application générale remplissent une fonction interrelative en déterminant la portée des principes ou en leur apportant au besoin des tempéraments. Elles peuvent s'enchaîner les unes dans les autres, ou se substituer les unes aux autres, en fonction de la nature de l'infraction ou du choix opéré par l'une des parties au procès pénal.

Certaines autres règles d'application générale ont une vocation opérationnelle et assurent le fonctionnement d'institutions dont le champ d'application s'étend sur l'ensemble du droit pénal. Tel est le cas, par exemple, des règles qui concernent la tentative, la complicité, etc. Le mot anglais « doctrine » paraît assez bien traduire cette réalité.

Ces deux types de règles ont leur place dans la partie générale du Code pénal. L'objectif à atteindre dans l'aménagement de cette partie sera alors double, soit les ordonner et les présenter de façon rationnelle et aussi éviter toute dissonance ou contradiction entre elles. La partie générale d'un véritable code doit tenir compte de cette interdépendance et se présenter comme un tout parfaitement cohérent. La recherche de cette

qualité est indispensable, étant donné le rang dominant attribué au Code et l'éventualité de recourir à son contenu pour parvenir à l'application des autres règles du droit pénal, y compris celles qui figurent dans la partie spéciale du Code.

3. *les règles particulières*

Le droit pénal contient certaines dispositions qui, tout en constituant des normes obligatoires, n'ont cependant ni le caractère de principes, ni celui de règles d'application générale.

Celles qui se trouvent dans le présent Code et qui incriminent divers agissements, formulent les éléments constitutifs des infractions ainsi créées, et déterminent à quelles peines leurs auteurs sont exposés, devraient se retrouver également dans la partie spéciale du nouveau Code.

Un grand nombre d'autres doivent cependant demeurer encore demain, comme elles le sont aujourd'hui, extérieures au Code pénal.

Les unes figurent dans des dispositions aujourd'hui éparses, c'est-à-dire dans la masse énorme du droit statutaire. Les autres figurent dans des lois particulières que le Code pénal n'envisage pas d'intégrer, en raison de leur caractère temporaire ou accessoire, ou bien parce qu'en dépit de leur importance matérielle ou pratique, elles relèvent d'un domaine étroitement spécialisé. Elles établissent des incriminations et des sanctions (lois fiscales, loi sur les secrets officiels, loi sur les jeunes délinquants), édictent des règles procédurales (loi sur l'extradition) ou encore prévoient l'exécution de certaines sanctions (loi sur les pénitenciers).

L'importance de ces règles particulières dans la vie pratique est variable. Leur nature juridique est toutefois identique: ce sont toutes des normes utilisées pour le bon fonctionnement du pouvoir étatique, émanant du législateur, mais dont le domaine d'application est limité à l'objet, plus ou moins étendu, qui leur est propre. Elles n'ont donc d'autorité que dans ce cadre restreint. L'adoption d'un code pénal véritable aurait pour effet de les subordonner aux principes et règles énoncés dans celui-ci. De la sorte, le système dans son ensemble pourrait assurer une plus grande harmonie entre les différents textes. Ces règles en effet ne pourraient contredire les principes et les règles d'application générale consacrés par le Code et représentant la politique pénale générale.

b) *conséquences de la hiérarchie des normes juridiques*

Le vœu de la Commission est d'insérer dans le Code pénal éventuel certains principes généraux de la procédure, de la preuve et du sentencing. C'est là marquer le désir de voir la partie générale du Code pénal contenir les principes qui dominent l'ensemble de la science pénale.

Ce rôle éminent que la partie générale du Code pénal est appelée à jouer à l'égard de la preuve, de la procédure et du sentencing, devra lui être reconnu à fortiori à l'égard de l'ensemble des règles particulières contenues dans la partie spéciale du Code ou dans d'autres textes législatifs épars.

L'objectif est d'importance et constitue une pièce capitale de la construction envisagée par la Commission.

Il aurait été en effet théoriquement possible, comme nous l'avons déjà souligné, de faire du Code pénal un ensemble regroupant toutes les dispositions ayant un rapport quelconque avec le droit criminel. C'est d'ailleurs la première idée qui vient à l'esprit, même si elle apparaît très vite comme irréalisable sur le plan matériel, et finalement fâcheuse sur le plan de la méthode. C'est pourquoi le Code pénal, notamment dans sa partie spéciale, ne peut être que relativement exhaustif.

Mais le but poursuivi par une compilation exhaustive peut être atteint d'une façon plus sûre et surtout plus souple, si l'on pose en principe que toutes les règles contenues dans les innombrables textes renfermant des dispositions pénales, se trouvent subordonnées à la partie générale du Code pénal.

Nul ne songerait à contester cette dépendance au sein même de la structure du Code. Les règles de la partie spéciale doivent être soumises à celles édictées dans la partie générale.

Il doit en être de même de toutes les autres règles particulières, aussi bien celles provenant de lois dont l'aspect pénal est manifeste, que celles qui se retrouvent dans certains articles d'une législation ne touchant pas le domaine pénal, et ayant pour but d'en assurer l'exécution. (« *Toute infraction à la présente loi...* »)

Pour que cette subordination hiérarchique ne soit pas un vain concept mais corresponde au contraire à une réalité tangible, elle doit avoir un certain impact au niveau des tribunaux. Ainsi, lorsqu'il s'agira par exemple d'interpréter une disposition d'une loi particulière, cette interprétation devra s'effectuer en conformité avec les principes établis

dans la constitution, dans la Déclaration canadienne des droits et enfin dans le Code pénal.

La consécration de ce principe a une conséquence capitale: elle permet d'imputer au législateur, dans le cadre d'une politique criminelle qu'il s'efforce de mettre en œuvre, l'intention de ne pas déroger aux principes exprimés par une source plus fondamentale.

Il ne saurait y avoir là cependant qu'une présomption simple. Il faut en effet reconnaître au législateur, lorsqu'il pose des règles particulières, la faculté de déroger expressément aux principes et surtout aux règles d'application générale qui, autrement, eussent été applicables à la nouvelle réglementation établie. Il est possible, en effet, que dans certaines circonstances spéciales, le caractère temporaire, le caractère d'urgence ou la fonction très spécialisée de la législation ainsi édictée nécessite, dans l'intérêt général, une exception à la politique pénale habituellement suivie. Du moins faudra-t-il que cette exception soit expresse. La chose n'est pas nouvelle, puisqu'elle se produit déjà lorsqu'il s'agit d'une règle dérogeant à la Déclaration canadienne des droits. Ces exceptions, parce que dérogatoires aux règles ordinaires de droit, devraient, au surplus, être interprétées restrictivement. Ainsi, si d'aventure le législateur entend modifier dans une loi particulière le principe actuel de la présomption d'innocence, il devra le décider clairement dans le texte même de la loi particulière pour signifier son abandon de cette présomption fondamentale dans le cas précis.

Une autre conséquence de ce principe est que si les pouvoirs publics estiment nécessaire d'abandonner de façon globale une règle d'application générale, ou même un principe figurant dans la partie générale du Code pénal, ils ne pourront le faire que par une modification expresse de la disposition en question.

La codification ne doit pas, en effet, aboutir à figer le droit pénal. Si l'évolution sociale conduit à modifier dans l'avenir, des conceptions fondamentales reconnues jusque-là, le législateur doit rester libre de les abandonner plus ou moins complètement. Cependant, si la codification a été bien faite et si les principes et les règles d'application générale ont été judicieusement choisis, cette hypothèse devrait demeurer exceptionnelle.

On a pu remarquer que s'il a été prévu d'intégrer dans la partie générale du Code, les principes du droit, de la procédure, de la preuve, et du sentencing, la même préoccupation n'a pas été exprimée à l'égard des règles qui visent à mettre en œuvre ces matières.

La raison fondamentale en est qu'il paraît raisonnable de faire figurer seulement les plus importantes de ces règles dans la partie générale, mais de laisser les autres trouver leur place dans les codes qui seront respectivement consacrés à ces matières.

## (2) Création de règles d'interprétation

Un des objectifs du Code pénal, et particulièrement de sa partie genérale, est de fournir au juge des instruments techniques lui permettant de mener à bien la tâche qui lui est impartie. Cette considération ne doit jamais être perdue de vue. Si important qu'apparaisse le souci d'une logique dans l'aménagement du droit, il ne doit jamais paralyser la pratique. Le Code reste avant tout, en effet, un instrument pratique qui doit être une aide véritable pour le juge.

Pour favoriser au maximum la créativité jurisprudentielle et permettre ainsi la perméabilité du droit nouveau à l'évolution sociale, il apparaît nécessaire d'inclure les règles d'interprétation des textes à l'intérieur même du Code pénal.

Les dispositions classiques de la loi sur l'interprétation ne devraient pas s'appliquer purement et simplement au nouveau Code étant donné la structure et l'esprit du droit nouveau. Celles-ci ont en effet été conçues dans une autre perspective et l'option d'une codification véritable implique l'adoption de l'approche de la mentalité et des canons d'interprétation propres à cette technique.

Il est donc éminemment souhaitable d'écarter la loi d'interprétation en principe, sauf à ce que certaines de ses dispositions soient reprises quant à leur contenu du moins dans les règles d'interprétation contenues au Code pénal.

Les règles d'interprétation nouvelles doivent tout d'abord dispenser le législateur de recourir aussi souvent qu'il l'a fait jusqu'à présent aux énumérations et aux définitions. En effet, à partir du moment où le texte législatif n'est plus présenté et perçu comme une restriction au pouvoir créateur du juge, il n'apparaît plus nécessaire de préciser minutieusement le sens à donner aux mots, et de favoriser ainsi nécessairement une interprétation littérale des textes.

Le recours aux définitions ne peut être utile que pour abréger une très longue expression revenant plusieurs fois dans le texte, ou pour éviter une ambiguïté lorsque cette expression est susceptible de plus d'une acception et porte à équivoque dans le contexte où elle est employée.

L'objectif essentiel est au contraire de permettre au juge de saisir nettement la volonté du législateur et, lorsque ce dernier ne l'a pas exprimée de façon parfaitement explicite, de donner au tribunal les moyens pratiques de la découvrir avec une certitude suffisante.

Lorsque la difficulté paraît neuve, le juge devra, bien entendu, partir du texte qui porte sur la question. Ce texte ne sera pas toutefois envisagé seulement dans sa réalité intrinsèque et littérale, mais devra être replacé dans son contexte et donc être examiné à la lumière des règles d'application générale ou des principes auxquels il se rattache. Le juge devra pouvoir dépasser la lettre du texte pour en retrouver l'esprit, du moment qu'il demeure à l'intérieur du cadre de l'intention du législateur et ne dénature pas celle-ci sous prétexte d'interprétation.

Pour préciser celle-ci, le juge doit avoir la possibilité de la rechercher en se reportant au processus suivi par le texte depuis le moment où il a été proposé au Parlement à l'état de projet. Le recours aux travaux préparatoires doit être encouragé, même s'il doit être employé avec prudence. De même en est-il des documents préalables à l'élaboration du texte et des commentaires qui l'ont accompagné. De plus, le juge doit être autorisé à éclairer la disposition dont le sens lui apparaît douteux, en s'aidant du principe de la hiérarchie des sources et en présumant, comme il a été dit plus haut, que le législateur n'a pas entendu déroger aux solutions découlant de ces principes ou règles d'application générale.

Lorsque, au contraire, le problème s'est déjà posé à l'autorité judiciaire et que la solution donnée par le Code est identique, il est normal que le juge examine alors avec attention la solution que ce problème a déjà reçue dans le passé. Il pèsera alors les décisions antérieurement intervenues et pourra adhérer à la solution qu'elles ont adoptée.

Comme on l'a vu précédemment, le système de la codification, loin de tarir la source jurisprudentielle, doit, au contraire, lui donner plus de liberté et plus d'ampleur.

On peut se poser à cet égard le problème de la transition entre l'ancien droit et le nouveau droit. Quelle peut être, par exemple, la valeur de la jurisprudence antérieure à l'entrée en vigueur du nouveau Code, lorsqu'il s'agit d'interpréter les dispositions de ce dernier? Trois positions sont possibles.

La première a été résumée par un auteur de common law qui voudrait voir bannir toute référence quelle qu'elle soit au droit et à la source jurisprudentielle antérieurs.

> And I submit, that when one does codify, we should sweep away the debris of the past and provide that no prior statute and no decision of any court, made before the effective date of the codifying statute, may be cited or relied upon in any court or for any purpose.
>
> (BELL, R., « *Comparative Summing Up* » in *La Réforme Législative* (1971), 9 Coll. Int. Dr. Comp. 57)

Une telle position ne nous apparaît pas réaliste. Le droit s'inscrit dans un continuum et il serait artificiel de vouloir rompre complètement avec le passé, surtout lorsque la codification nouvelle s'inspire précisément des états du droit antérieur et que la réforme, par exemple, consiste à inscrire au Code un principe antérieurement connu et appliqué.

La seconde position possible se situe à l'opposé. Elle consiste à utiliser pleinement législation et jurisprudence antérieures. Elle aussi pèche par excès. Il ne faudrait pas en effet, puisque la technique législative du droit nouveau diffère de l'ancienne, que la référence soit un prétexte pour maintenir un état du droit que la codification a voulu changer, ou pour conserver des méthodes d'interprétation ou des attitudes judiciaires que la codification a pour but de remplacer. En d'autres termes, il ne serait pas opportun pour l'avenir même du nouveau Code pénal de retomber dans les difficultés déjà signalées et auxquelles la codification entend remédier. Ainsi, il ne serait pas souhaitable qu'au lieu de se livrer à une étude des textes et des principes qui les sous-tendent, les tribunaux continuent à prendre pour source de droit le common law antérieur et délaissent l'exégèse des textes au profit de la source jurisprudentielle lorsque la chose n'a pas sa raison d'être.

La troisième position possible est celle qui nous paraît la plus réaliste. Elle consiste à permettre, voire même à encourager la référence au droit législatif ou jurisprudentiel antérieur lorsque la continuité des règles l'impose. Ce droit peut en effet être utilisé à bon escient comme « *rationes scriptæ* » et donner un éclairage précieux aux nouvelles dispositions législatives, dans la mesure où celles-ci font exception au droit antérieur ou au contraire ne font que le reproduire. On doit cependant être conscient de ce que cette référence doit être faite avec prudence, et ne doit pas faire perdre de vue à la fois le contenu de la réforme et son esprit, et le changement de méthodologie et de processus de raisonnement entraîné par le passage à un droit véritablement codifié.

Enfin, toujours sur le plan des règles d'interprétation, il ne faut pas oublier que l'interprétation des textes doit varier selon les secteurs du droit pénal et l'objet que la disposition a en vue. Les textes établissant des incriminations ou des peines doivent être interprétés strictement, ceux qui posent des règles de procédure peuvent recevoir une interprétation plus large; enfin, ceux qui établissent des causes d'irresponsabilité doivent faire l'objet d'une interprétation libérale. La partie générale du Code pénal doit préciser ce point dans ses dispositions relatives à l'interprétation.

Les règles d'interprétation des textes ne constituent pas le seul procédé technique dont le Code doit avoir pour objectif de doter le pouvoir judiciaire.

Ainsi, sur le plan des règles de fond, il ne sera certes pas superflu de délimiter les contours respectifs des délits instantanés et des délits continus, ainsi que ceux des infractions formelles qui sont consommées, et non pas seulement tentées, avant même que le résultat recherché par l'auteur ne soit obtenu. Dans un domaine voisin, on peut penser que la tâche du juge serait facilitée par la codification de la construction jurisprudentielle sur le commencement d'exécution. Signalons également, dans le domaine de la responsabilité pénale, l'utilité d'une clarification de la notion de désordre mental et des notions voisines. La réalisation de cet objectif et la systématisation de certaines règles disséminées à l'heure actuelle dans la masse jurisprudentielle, devraient aider le juge dans l'application quotidienne du droit.

En conclusion, les objectifs dont nous avons fait la description ne peuvent être atteints avec efficacité que dans la mesure où la codification permet d'une part de cristalliser les grands principes du droit pénal, expression concrète d'une politique législative pénale d'ensemble, d'autre part de créer le complément à ce premier moyen est la création des règles d'interprétation particulières qui permettront aux tribunaux de donner un maximum d'impact à la réforme et de lui conférer un dynamisme qui manque peut-être au droit actuel.

# OBJECTIVES AND MEANS OF CODIFICATION

(extract from "Criminal Law - towards a codification", April 1976, cat. no J 31-26/1976, pp. 47-67)

A. THE OBJECTIVES ..........

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(a) The creation of a genuine code ..........
(b) Accessibility of the law ..........

(2) Scientific objectives ..........
(a) Reflection of the Canadian identity ..........
(b) Enhancement of judicial creativeness ..........

B. MEANS ..........

(1) Organization of a hierarchy of legal norms ..........
(a) Definition of the hierarchy ..........
1. The principles of canadian penal philosophy ..
(i) Identification of the principles ..........
(ii) Formulation of the principles ..........
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2. The corollary rules of general application ......
3. The particular rules ..........

(b) Consequences of the hierarchy of judicial norms

(2) Creation of rules of interpretation ..........

The foregoing summary of the two great legal traditions and the examination of the development of Canadian criminal law show that at present Canadian criminal law is beset by difficulties and shortcomings that often prove an embarrassment to the courts.

It has been suggested in the present study that codification comparable to the systems found in many countries and in a number of States in the United States would prove an effective remedy. Codification would serve to express Canadian identity and would also entrust the courts with the creative role the draftsmen of the 1955 Code originally intended.

The Law Reform Commission of Canada has set itself the task of "defining the general policies that should govern codification, designing a structure for a new Criminal Code, and presenting an outline of the principles that should be stated therein", and then to "prepare a document for the consideration of the legal profession in an effort to establish the need for codification and define appropriate means for carrying it out".

The purpose of this part is to define in very general terms policies for codification.

There is no need to reiterate the advantages of codification. It is important however to analyze the ways through which these advantages may be achieved. Our analysis is twofold: first, the objectives that must be achieved through a codification of Canadian criminal law; second, the means whereby the objectives may be achieved.

## A. THE OBJECTIVES

The objectives are of two kinds: practical and scientific. From a practical point of view, codification of the criminal law should be both a comprehensive expression of existing positive law and be sufficiently clear to be accessible not only to the legal profession but to the general public. From a scientific point of view, codification should reflect the legal reality of Canada faithfully and should allow for, not hinder, the adaptation of the laws to social change.

### (1) Practical objectives

#### (a) *The Creation of a Genuine Code*

The first objective, which is common to both codification and consolidation, is to bring all existing criminal legislation together in one comprehensive structure. Indeed, despite the 1955 Code, criminal provisions are scattered throughout the nation's legislation, their origins are diverse, even some fundamental rules of criminal law are unwritten. The impression created is one of a disorganization bordering on incoherence. There is a basic need for simplification through a comprehensive consolidation.

The draftsmen of the first Canadian Code had in mind such a codification. The draftsmen in 1955 sought the same goal. For the sake of comprehensiveness, the 1955 Commission included in the new Code many previously separate statutory provisions and some Common law rules in their original or a modified form. The principle of legality set forth in section 8 marked a decisive step towards codification. Time has shown, however, that the 1955 Code is far from exhaustive.

Considerable progress could be made by simply incorporating all existing criminal statutes into the present Code, yet that is not the objective of codification. The success of codification is not measured in terms of the number of its provisions, but rather in terms of the quality, completeness and internal logic of its provisions. No point would be served by substituting a *totally exhaustive* code for the one of 1955; this would result in just another consolidation that shortly would become outdated. On the contrary, what is needed is an instrument of fundamental provisions at the same time selective and comprehensive and setting forth a hierarchy of written sources.

The Criminal Code should contain guidance for citizens, attorneys and judges wishing to apply a law to a given case in a way most straightforward and consistent with underlying intention and social context.

At present, Canadian criminal law does not, at least in any formal way, set down a hierarchy of its written sources. In such a hierarchy, first place belongs to the *Constitution* and constitutional statutes, which contain the fundamental and basic rules of the country's social order.

The *Canadian Bill of Rights* comes next. Although not truly a fundamental statute because of the restrictive interpretation it has received in the courts, it is nonetheless declaratory of human rights and civil liberties. (*)

Third place belongs to the *Criminal Code*. It is to a large extent a reflection of the first two sources and, as such, it should set forth not only specific offences but also the basic principles of criminal law. Some of these principles may already be contained in the 1955 Criminal Code, but in a form that is fragmentary, incomplete and not very coherent.

In fourth place, we have a number of *specific criminal statutes*. Intended to deal with specific situations, these statutes either supplement the general principles of the Criminal Code, provide an instance of their application, or in some cases depart from them.

*Regulations* come last, designed as they are to provide mechanisms for adapting statutes to particular circumstances and for actually carrying out their policies.

This order of priorities should receive formal recognition. A given statute should always be interpreted in conformity with the principles of the Constitution, the Bill of Rights and the Criminal Code, in that order. In practice, this entails the assumption that a particular statute may not derogate from the principles stated in a higher ranking source, unless the statute contains an explicit statement to that effect. A regulation, for example, could not override the provisions of a higher ranking source such as the Criminal Code, since regulations are intended only to particularize the application of a statute.

A modern Criminal Code should state the aims and purposes and essential principles of criminal law, as well as the concepts governing criminal justice. The principles to include in the Code are those Canadian tradition has shown over the years to be in harmony with our needs.

(*) Since the writing of the above, Canada has adopted a new Constitution superseding all the laws of Canada. It contains and entrenches a Charter of Rights and Liberties. (April

A principle is the guidepost for decision-making. It embodies standards that society has worked out over lenghty periods of time. It yields in turn a series of rules that particularize the principle and allow it to be applied in numerous fields. This order of generality is familiar to the main common law authors.

Being general and universal, principles give coherence to the rules explicitly or implicitly from them, *rendering these rules more understandable and effective.* The present Criminal Code is deficient in this respect. For example, neither *mens rea,* causal relationship, the prerequisites of guilt nor harm are adequatly identified and defined.

After the principles come the *rules of general application.* Their scope extends to the whole of criminal law. They are often only the corollaries of the principles and are designed to apply in particular situations. More specific than the principles, they create rights or impose duties under given conditions, or ensure that an institution stays within the framework of the general principle. Such rules of general application must be articulated in the Criminal Code, since they inform the courts and the public of the consequences that flow from the principles governing a particular criminal policy.

*Particular rules* like the general rules are derived from principles, but differ in their degree of specificity. They also must be included in a scientifically designed Criminal Code, since they set out the definition of offences and sanctions.

However, some particular rules can be left outside the Code without creating problems. Especially those intended for the guidance of public authorities in the application of statutes and not concerned chiefly with offences and penalties.

A Criminal Code is above all a compilation of norms. Not every norm, though, need be formulated. In fact, the codifiers have to select those to include in the Code on the basis of what is found already in higher sources and what society requires to have formally stated. Only rules that are likely to be more or less permanent, subject to minor changes, rightly belong in a Criminal Code. Its formulation must be chosen carefully if it is to have this general dimension.

It follows that the new Code must be exhaustive in its statement of principles and rules of general application. It could contain a General Part, a Special Part, and basic principles of precedure, evidence and sentencing.

General principles belong in the General Part, as do rules of general application. The Special Part should contain the rules of special application, particularly those regarding offences, though not all existing rules have to be stated in the Code itself. Some of them can exist outside the Code as part of specific statutes, but will nevertheless be subject to the principles and rules of the Code unless a contrary intention is clearly expressed. Others, enacted after the Code comes into force, will not necessarily have to be incorporated into it.

Our Criminal Code cannot transcend its compilation or digest function and clearly express the whole of Canada's penal philosophy unless it is seen as the fountainhead of all our criminal law. It follows that where statutes outside the present Code contain provisions considered basic to criminal law, these provisions should be detached and placed in the new Criminal Code. Conversely, some regulatory texts and specific rules which now are in the Code should be removed and stated in separate statutes. This is the case, for example, with all the sections of the present code dealing with firearms, dangerous driving, transportation of cattle and lotteries.

Provisions concerning temporary or purely technical matters thus should be excluded from codification, leaving only those rules that are relatively permanent and stable. The Code need not and should not include offences enacted only in response to temporary social upheavals, nor should it deal with the technical details of the application of the law. With regard to international cooperation against crime, for example, the Code should set forth the guiding principles and the essential rules respecting extradition. The procedural details of extradition could remain in a separate statute as it does at present. In summary the criteria for inclusion of any matter in the Code are permanence, durability and frequency.

(b) *Accessibility of the Law*

General accessibility is the second practical objective. Codified laws should be comprehensible to the general public as well as to lawyers. In other words, any intelligent lay person should be able to grasp a law's commands simply by reading it, without having to seek expert assistance or make lengthy studies of judicial precedents and commentaries.

To attain this objective, principles as well as rules must be stated clearly and concisely, while still retaining the precision so essential in law. Words should not be used in ways that vary from current usage and

meaning. The meaning of sentences must be clear. Substance must not be lost in a morass of conditions and exceptions.

The style of the Code is necessarily different from that of other enactments. If the provisions respecting offences under the Criminal Code were as technical and casuistic as those of a typical statute, they would lack permanence and universality and moreover be ineffective from an educative point of view.

However, the Code must not sacrifice certainty in its attempt to be concise; it must not omit the details of explanations necessary for carrying out the legislative purpose. Without some detail, the Code would be so vague it would create difficulties for the official applying it. Too much emphasis on concisiveness could so deprive the Code of certainty and predictability that judges would have to fall back on scattered and often confusing precedents in order to determine the meaning of the law.

On the other hand, the Code should not be confined to generalities to the point where its application depends on statutes and regulations to implement it.

Having to resort to these enactments or regulations is undesirable for two reasons. In the first place, although statutes normally are clear enough and receive sufficient publicity to make the maxim "ignorance is no excuse" partly true, this hardly applies to regulations that may put a specialist to the test in discovering their meaning or sometimes even their very existence. In the second place, whenever regulations become too important, it means that administrators acting through delegation are usurping the law-making power that in a democratic state belongs to the people through their representatives.

The Code's accessibility is vital in view of Parliament's absolute duty to provide the citizen with a fair and complete warning of both the prohibitions and the consequences attached to their violation.

Fulfillment of this duty also allows the criminal law to play the educative role often assigned to it. To the extent that personal conscience and community morality do not identify for the individual the limits of social tolerance, comprehensive legislation defining offences in a clear form will be necessary. Comprehensive prohibitions also serve to supplement and reinforce the other morality-creating institutions (the family, the church, the school, etc.) in society. The citizen is apprised of the additional stigma society attaches to forbidden behaviour, and in the process public order is shaped.

The legal profession would also benefit from the existence of a code. Lawyers as well as judges need a complete and well-structured instrument to facilitate their task of finding, without undue delay, logical and authoritative bases for the decisions they are called upon to make.

At the same time, one must be realistic. No written statement of the law can claim such a degree of perfection that its meaning is always beyond doubt. The Code therefore should encourage vigorous creative interpretation of its provisions by establishing clear and useful rules of interpretation.

## (2) Scientific Objectives

Broadly speaking, the scientific objectives should be to create a body of law accurately reflecting our Canadian identity, and to set down rules that will guide and facilitate a special brand of judicial creativeness.

### (a) *Reflection of the Canadian Identity*

Legislation must be tailored to a particular community, expressing not only its structures, traditions and customs but also its aspirations for the future. As the Swiss criminologist Graven has so accurately observed:

> A code must at once reflect and regulate *mores*. A country is an individual entity, possessing unique needs and characteristics which may not be set aside if its healthy growth and development are to be assured.

More than one hundred years after Confederation, Canada has forged a national character and developed its own special identity. To the two culturally different European nationalities which arrived here several centuries ago has been added the invaluable contribution of the cultures and traditions brought to Canada by immigrants from many other parts of the world. In addition, the two founding peoples themselves have developed in their life in Canada customs that did not originate either in England or France.

Law reflects society, though it may often lag behind and have to be modernized from time to time. It is time now for an updating of Canadian criminal law. As we have seen, the civil and common law have evolved in such a way that their basic differences are now less marked and less important. Furthermore, even the approaches and methods of judges in the two systems vary less than is sometimes held to be the case.

(b) *Enhancement of Judicial Creativeness*

Legislation must always be in accord with socio-cultural facts. It cannot be fashioned too rigidly, and most modern codes are not in fact rigid. Through flexible wording on the one hand and fully stated principles on the other, the modern code leaves to courts the leeway they need.

The authors of the 1955 Criminal Code, far from wishing to curtail judicial discretion, tried to provide judges with greater freedom to interpret the law. As we have seen, however, various technical problems have acted to prevent full realization of this design. Canadian judges have frequently interpreted provisions of the Code too literally, treating them as if they were statutes, or else they have relied on distant precedents without considering their applicability to current problems. Profiting from this experience, the new Code should be written so as to discourage such extremes of interpretation.

The new Code must be more responsive to social evolution, especially since society is changing faster and more profoundly than ever before. The idea that customs by themselves can keep the law in harmony with new social mores no longer can be considered sound. For that very reason there is need for a code that sets out the intentions of Parliament clearly and provides flexible guidelines for judicial decisions which are faithful to those intentions and which correspond with the social context.

B. MEANS

The Commission's work is not restricted to defining objectives. The means of attaining these objectives must also be examined. Only with the right tools can those charged with implementing the law improve the quality of justice.

Creation of a model code is a two stage process. First, organize a hierarchy of legal norms; second, formulate rules of interpretation.

## (1) Organization of a Hierarchy of Legal Norms

(a) *Definition of the Hierarchy*

1. *The Principles of Canadian Penal Philosophy*

First priority for the Code is a statement of the principles of criminal law. Before this can be accomplished, the principles must first be

identified, then formulated, and finally examined carefully to ensure they correspond with governmental policies on criminal law.

(i) Identification of the Principles

Codification, whether or not accompanied by a reform of existing law, cannot upset the working assumptions of society unless those assumptions are shown to be obsolete. What the code intends is a reconstruction, not a revolution.

It follows that the first place to look for principles is in the country's positive criminal law. The task is difficult because the Criminal Code generally says little about principles and statutes outside the Code say even less.

A criminal law without stated principles — the present situation — denies the law coherence and certainty. For example, the absence of a stated principle concerning the necessity of *mens rea* makes it practically impossible to solve the problem of strict liability, either theoretically or in particular cases. Similarly, the want of a coherent theory on the relationship between responsibility and guilt on the one hand, and the nature of the offence on the other, renders the difference between automatism and insanity problematical.

Principles are even more difficult to discover when they must be sought in a series of precedents often contradictory and equivocal.

Codification of principles will provide a necessary background for both the part of the Code dealing with specific offences and the portion containing the rules of procedure, evidence and sentencing. The various branches of the criminal law would then be seen as complementary derivatives of the principles of the General Part. Overall coherence and unity, not the present fragmentation, would be the Code's hallmark.

Although substantive law, procedure, evidence and sentencing have distinct functions and rules, the boundary between them is not clear-cut. Any separation would be artificial.

These four areas of law in fact are complementary. Each influences the other to the extent that it is sometimes only by arbitrary classification that a rule is assigned to one area and not another. For example, do the defences to certain offences come under substantive law, evidence or procedure?

To take other examples, should the presumption of innocence be considered as substantive law, procedure or evidence? Does the principle of *res judicata* belong to substantive law or to procedure? One purpose of the law reform is to ensure proper coordination between all areas of a given field of law, even if each area is codified separately for reasons of convenience.

The Criminal Code, therefore, must state the fundamental principles governing procedure and evidence as constituents, parts of the criminal law. In these same areas, the Code must also state those particular rules which are of general import and thus are closely linked to the basic rules. For example, the rule declaring that the accused is not a compellable witness is linked to the far more basic principle that the accused may not be compelled to furnish evidence against himself.

(ii) Formulation of the Principles

When all the general principles have been identified and compiled, the next step is to formulate them for insertion in the Code.

In this regard, we note that in Canadian criminal law, general principles, on those rare occasions when they are formulated, are set out in a negative form. The legislature says more about what they are not than about what they are. Negative statements can make it extremely difficult to develop sound policy for meeting new situations.

Special attention is also required to ensure that the terminology chosen will be simple, clear and precise. The Code should direct jurists toward the solution, even when neither written law nor judical precedents explicitly treat the problem at hand.

(iii) Orientation of the Principles

The Code should derive the principles of criminal law from a broad and coherent policy on crime articulated by the government. This policy should in turn reflect a genuine criminal philosophy, one that is based on the acceptance of certain social or personal values. Only in this way can the legislature avoid trailing passively in the wake of changing values and provide leadership in the promotion of the general welfare and the self-fulfillment of the individual.

It follows that the first step in drafting a Criminal Code is to discover those social and moral principles from which a framework of a philosophy of penal law can be constructed. The next step is to bridge the

gap between these principles and reality. Finally, the principles must be ordered and formulated taking into account their internal logic and interdependence.

For example, society prohibits theft only because we have accepted the concept of private and exclusive ownership. Theft, as defined by the criminal law, has no meaning if isolated from these underlying concepts. For example, in a hypothetical society, one allowing people free access to things as long as they put these to good use, the person punished would not be the one who takes it for a purpose which society does not consider valid.

When drafting a Criminal Code, then, one must always consider the impact of the rules on the existing social structure. Society's assumptions do not have to be stated in so many words, but the Code should express the legal norms derived from these assumptions which have acquired a degree of stability and cohesion through legislative and judicial experience. This will enable the Code to be what it should be: a fundamental law, a *magna carta* for criminal legislation, and the basis for subsequent related statutes.

Criminal law serves a variety of ends. Among these are the repression of crime, the maintenance of public order, the control of dangerous individuals, the expression of society's disapproval of socially harmful conduct, rehabilitation of offenders and so forth. None of these ends has dominated the Canadian tradition, which has rather sought accommodations among them.

The Code must also reflect this delicate compromise between seemingly conflicting ends. However, because the Code requires more permanence and stability than other legislation concerned with the same problems, it should be confined to the general definition of crime, the determination of criminal liability, and the imposition of sanctions. It is for other enactments to look after the physical security of persons and property and to provide for police and incarceration services and rehabilitation.

Nonetheless it is evident that the Criminal Code must closely cooperate with other legislation to present a comprehensive and unified policy on criminal matters.

2. *The Corollary Rules of General Application*

It has already been said that rules, though derived from principles, are different from them in that they apply only in specific

situations anticipated by the legislature. A rule is a norm which, under prescribed circumstances, creates rights or duties or perhaps decides how an institution will function. A concrete example should demonstrate the relationship existing between principles and rules.

The principle of legality states that no conduct may be held criminal unless it is expressly proscribed by legislation. The policy it expresses is that persons should be forewarned as to what conduct is punishable under the law. This principle is enshrined in criminal law legislation almost everywhere in the world. Its corollary, the statement that no criminal law shall be applied retroactively, constitutes a rule. The rule is a particularization of the fair warning notion contained in the principle. The rule, however, has general application and should be in the General Part of a Criminal Code, near the principle from which it is drawn.

Similarly, there is the rule that remedial legislation may be applied retroactively; it is allowed to derogate from the principle of non-retroactivity because its retroactive enforcement does not involve the threat to personal liberty criminal law ordinarily poses. This rule, too, has general application and belongs in the General Part of the Code.

All rules of general application derived from principles, as already indicated, belong in the General Part of the Criminal Code. The present Canadian Code contains a great variety of rules, some creating offences and others establishing defences, some prescribing penalties and others dealing with evidence and procedure. They are scattered throughout the Code, however; there is no logic to their placement.

Many rules of general application are interrelated with principles which either determine their scope or mitigate them in certain cases. Such rules may be linked together or substituted for one another, according to the nature of the offence or the choice made by the parties to the litigation.

Another set of rules are those of general application that enable institutions to function properly. They cover the whole of criminal law. Such is the case, for example, with the rules concerning attempts, complicity, etc. These rules may well be called "doctrines".

In organizing the General Part of the Code the objective should be to order and present all its rules rationally and to avoid any clash or contradiction among them. The General Part of a code must take account of their interdependence and ensure that every included rule

is part of a fully coherent whole. Coherence is indispensable, considering the dominant rank of the new Code and the likelihood its General Part will be used in the application of other rules of criminal law, especially those of the Special Part.

3. *The Particular Rules*

Criminal law contains certain provisions which, despite their obligatory character, are neither principles nor rules of general application. Those found in the present Criminal Code and that identify what acts are criminal, explain what elements constitute the offences thus created, and prescribe penalties for them, should find their place in the Special Part of the new Criminal Code.

A great many other particular rules are outside the criminal Code and will probably remain so in the future. Some of these are now dispersed throughout the realms of statutory law. Others are in special acts that will not be integrated in the Criminal Code because they are temporary or because, despite their practical importance, their application is restricted to highly specialized fields. They may establish offences and penalties (taxation acts, the Official Secrets Act, the Juvenile Delinquent Act), lay down procedural rules (the Extradition Act) or provide for the implementation of penalties (the Penitentiary Act).

What particular rules have in common is their function; they assist in the work of government. However, they are authoritative only in the limited field traced out for them by law. With the adoption of a true criminal code, they would be subordinated to the code's principles and rules of general application. As a result, there would be greater harmony throughout the criminal law. A particular rule must not be allowed to contradict the principles and the rules of general application which are based on general criminal law policy.

(b) *Consequences of the Hierarchy of Judicial Norms*

The Commission wishes to include certain general principles on procedure, evidence and sentencing in the General Part of the proposed Criminal Code, where they will exert a dominant influence on the whole of criminal law. Moreover, due to the pre-eminence assigned to the General Part, these principles on evidence, procedure and sentencing will be controlling with respect to all particular rules in the Special Part of the Code and various other legislative texts.

This objective is important and constitutes one of the main features of the Code envisaged by the Commission.

As we pointed out earlier, it would theoretically be possible to prepare a code comprising all the legal texts that deal in any way with crime. This approach, though superficially attractive, is impractical and, when all points are considered, unsound. The Criminal Code can be only relatively exhaustive, especially in its Special Part.

The major advantage of an exhaustive compilation can nevertheless be realized if implementators of the Code accept as fundamental the idea that all the rules in the countless enactments containing penalty provisions are subordinate to the Criminal Code.

No one is likely to dispute the principle of code interpretation that renders the rules of the Special Part. But, as indicated above, this applies equally to all particular rules, those contained in other substantive criminal legislation, as well as those of any statute aimed at implementing such legislation; for example, the kind of section that begins: "*Every person who has violated any provision of this Act...*".

If this hierarchical relationship is to be effective, it must become operative in the courts. Judges will be required to interpret a particular act in accordance with the Constitution, the Canadian Bill of Rights and the Criminal Code, in that order of priority.

Acceptance of this principle is of paramount importance. Upon enactment of the Code, courts and other appliers of the criminal law must assume that no subsequent legislation is intended to derogate from the principles stated in a higher source.

There will be no hard and fast rule to this effect, however, since government may always enact legislation that explicitly derogates from principles and rules of general application. Temporary, urgent or very specialized legislation, designed to cope with a particular problem, may for the common good, make an exception to normal practice in the criminal law. This has been seen with regard to the Canadian Bill of Rights. Such derogations, as just noted, must be explicit and, in view of their departure from the usual rules of law, interpreted restrictively. For example, should the government for some particular reason wish to pass a special act affecting the fundamental principle of presumption of innocence, it must state its intention to do so clearly and furthermore spell out the breadth of the exception in unmistakable terms.

A further consequence of this hierarchy of norms is that should the government one day decide to abolish completely a rule of general application or even a principle in the General Part of the Code, it will require explicit legislation to that effect.

Nothing will be unchangeable under codification. If principles now held immutable should in the future become less so, the government of course must be free to abolish or alter them. This will happen only in exceptional cases if the codification is a sound one and its principles and rules of general application have been carefully chosen.

While the principles governing procedure, evidence and sentencing ought be in the General Part of the Code, the Commission does not see the same need as regards rules of implementation in these fields. It seems more logical to include only the more important of these rules in the General Part, leaving the others to be dealt with in subsequent codes on each subject.

## (2) Creation of Rules of Interpretation

As we have indicated, an important objective of the new Criminal Code, particularly its General Part, is to furnish judges with the technical instruments needed for their key task of applying the law. The ordering of the law, however essential, must not hamper practice. A code is first a practical instrument, aiding the courts in their work.

To maximize judicial creativeness and hence the adaptibility of the new Code to social evolution, the rules of interpretation should be in the Code itself.

Considering the new Code's structure and spirit, the classical provisions of the present *Interpretation Act* should not be aimlessly applied to the Code. The *Interpretation Act* was written with other needs in mind, and the success of the new Code depends in part on the adoption of rules and criteria of interpretation specially suited to its structure and contents.

It is therefore highly desirable in principle to set aside the *Interpretation Act* although some of its contents will still be useful, at least with regard to the rules of interpretation needed for the new Criminal Code.

The new rules of interpretation should first of all make it unnecessary to rely on enumerations and definitions as much as has been done in the past. Once a legislative text no longer is perceived as a restric-

tion on judicial creativeness, there will be no need to define each term in minute detail, a process which inevitably encourages a literal interpretation of the law.

Definitions should be used only to obviate the necessity of reiterating long expressions of code material or to avoid ambiguity where a particular expression is used in a context that permits more than one interpretation.

When a difficulty arises, the judge of course will begin by considering what the particular enactment says on the matter. The enactment will not be construed literally or be isolated from its context. Moreover, it will be construed with due regard for the governing principles and rules of application. The judge must be enabled to penetrate beyond the letter to the spirit of the law, interpreting creatively while carefully respecting the legislative intention.

To determine that intention, the judge may have to retrace the law's history back to the time it was tabled in Parliament as a bill. Judges will be encouraged to examine, although prudently, the preliminary studies, documents and commentaries concerning the statute in question. Finally, the judge presiding in the case should be authorized to clarify an unclear provision by refering to sources further up in the hierarchy, always assuming, as mentioned above, that the government did not intend to override higher-ranking principles and rules.

If a problem has been dealt with by the courts before the enactment of the Code and in a way compatible with it, the judge may no doubt refer to the previous decisions, weighing them carefully and adhering to their line of thought.

Codification, as we have explained, does not eliminate the use of precedents. It gives them more liberty and scope.

In this regard, what changes in present practice will be necessitated by the new system of law? What, for example, will be the value of previous precedents in interpreting the new Code? Three positions are possible.

The first was summed up by a common-law author who thought, once a code is established, to banish any reference to previous precedents.

> And I submit, that when one does codify, we should sweep away the debris of the past and provide that no prior statute and no decision of any court,

made before the effective date of the codifying statute, may be cited or relied upon in any court or for any purpose.

(Bell, R., "Comparative Summing Up" in *La Réforme Législative* (1971), 9 Coll. Int. Dr. Comp. 57)

The Commission feels that such a position is unrealistic. The creation of law is an ongoing process, and it would be unnatural to break completely with the past, especially when the new codification not only is based on earlier law but the reform itself consists in embodying in the Code concepts developed and applied in the Canadian experience down through the years.

One could go to the other extreme and accord to previous case law the same authority as before. That also is not justified. References to the old system must not be allowed to maintain the status quo that codification has sought to change nor to preserve judicial attitudes and methods of interpretation that codification is intended to replace. The new code will hardly be effective if all the old difficulties are allowed to re-emerge. It is therefore hoped that the courts will engage in a critical analysis of the written law and its principles, rather than continue to rely on the common law and its precedents.

The third position is the more realistic in our view. It consists of permitting and even encouraging references to earlier legislation and case precedents when necessary. Earlier legislation and rulings may well be used as *rationes scriptae* to throw much-needed light on new legislation when the latter either creates exceptions to earlier legislation and rulings or simply reproduces them. But the reference to the past must be made with great caution; it must not cause the courts to lose sight of the contents of spirit of the reform, nor of the change in methodology and reasoning that results from true codification.

Finally and still with regard to rules of interpretation, it must be remembered that the interpretation of texts will vary according to the sector of criminal law involved and the purpose of the provision in question. Sections on offences or penalties must be interpreted strictly; those laying down rules of procedure may be given a broader interpretation; and finally those describing causes of irresponsibility should be liberally considered. The General Part of the Code should cover this point in its provisions governing interpretation.

The rules of interpretation contained in the Code should not be the sole way the Code assists the courts in handling technical points. It certainly would be helpful to have set forth in the basic rules clear

statements on what constitutes completed as opposed to continuing unlawful conduct, and when an offence is deemed to have been formally commited and consummated, and not merely attempted, even before its author has attained his end. To refer to another example, clarification of the relationship between mental disorder and criminal liability would no doubt be very valuable. Such clarifications, together with a systematic presentation of the myriad rules now disseminated through many volumes of law, would be of great assistance to the courts in their work.

In conclusion, the objectives we have described are achievable only under a codification that crystallizes the key principles of a broad government policy on criminal law and creates the necessary complementary rules of interpretation. If these conditions are met, the court will be in a position to complete the reform and give the law the dynamic character it lacks now.

ANNEXE DOCUMENTAIRE B

DOCUMENTARY ANNEX B

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DOC. B-1 MEWETT A.W. "The Criminal Law, 1867-1967", (1967) 45 R. du B. Can. 726-740;

DOC. B-2 MACCLEOD A.J. & MARTIN J.C., "The Revision of the Criminal Code", (1955) 33 R. du B. Can. 3-19;

DOC. B-3 HISTOIRE DE LA CODIFICATION, "Codification, Reform and Revision: The Challenge of a modern Federal Criminal Code (1971) 4 DUKE L.J. 665-672;

DOC. B-4 LA PREUVE, Commission de réforme du droit du Canada, no cat. J32 - 3/3/1975 Etude préliminaire, Preliminary Study, Juillet-July 1973.

Etrait de MEWETT A.W., "The Criminal Law, 1867-1967", (1967) 45 R. du B. Can. 726-740.

Excerpt from MEWETT A.W., "The Criminal Law", 1867-1967", (1967) 45 Can. B. Rev. 726-740.

The Federal Parliament of Canada was quick to act on the criminal law powers ascribed to it under the British North America Act[1] and to begin the task of consolidating the overwhelming mass of previously existing colonial laws. These were made up basically of common law importations as applicable to colonial conditions, but there was also a substantial amount of legislation from colonial assemblies. In Upper Canada, for example, an Act of 1836 provided for the right to have defence counsel for persons accused of a felony;[2] in the Province of Canada, an Act of 1851 set out various appeal procedures and other reforms.[3] There were also enactments relating to speedy trials,[4] coinage offences,[5] accessories and abettors of indictable offences,[6] kidnapping[7] and the like. Furthermore, most of this legislation was paralleled in similar, but by no means identical enactments in the other Provinces of British North America.[8]

The year 1869 saw the real beginning of the campaign to consolidate the criminal law of Canada and one session produced Dominion legislation on a variety of substantive and procedural matters. These included Acts on forgery, larceny, malicious injury to property, offences against the person and coinage offences and, in the procedural field, on juvenile offenders, summary convictions, indictable offences and the significant Criminal Procedure Act which remains the basis of much of our present procedure.[9]

[1] (1867), 30 & 31 Vict., c. 3, s. 91, para. 27, "the criminal law, including the procedure in criminal matters".
[2] (1836), 6 Will. 4, c. 48.
[3] (1851), 14 & 15 Vict., c. 13.
[4] (1857), 20 Vict. 27.
[5] (1857), 20 Vict. 30.
[6] (1864), 27-28 Vict. 19.
[7] (1865), 29 Vict. 14.
[8] For example, New Brunswick (1860), 23 Vict., c. 34 (false pretences), (1860), 23 Vict., c. 23 (criminal procedure), (1862), 25 Vict., c. 10 (offences against the person), Nova Scotia (1855), 18 Vict., c. 9 (evidence).
[9] These were consolidated in the Revised Statutes of 1886.

Between 1869 and 1892 a series of enactments continued this process[10] and by the latter date much of the bulk of the work of consolidation had been done. However, there still existed a large amount of pre-Confederation provincial criminal legislation which resulted in the Canadian criminal law presenting a more or less confused picture (depending upon whether the date was closer to 1869 or 1892) of such common law offences as were introduced into the Provinces[11] and remained unaltered, provincial legislation which had not been repealed by its assumption under Dominion authority[12] and the ever increasing body of Dominion statute law.

For a large part of the nineteenth century, the idea of codification of the criminal law had been mooted in England and elsewhere in the English-speaking world. In 1838 in England the first Criminal Law Commissioners were appointed to report on and draft such a code and in 1878, largely as a result of the work of Sir James Stephen, the English Draft Code, dealing with indictable offences, was formulated. Although this formed the basis of two Bills presented to the English Parliament, both attempts to introduce a comprehensive criminal code were abortive.

In Canada, the Bill Respecting Criminal Law of 1892 was expressed by Sir John Thompson to be founded on the Draft Code prepared by the Royal Commission in Great Britain in 1880, on Stephen's *Digest of the Criminal Law*, the edition of 1887, Burbidge's *Digest of the Canadian Criminal Law* of 1889 and the Canadian statutory law.[13] He quoted from the *Commission Report* to define the codification as follows:[14]

> It is a reduction of the existing law to an orderly written system, freed from needless technicalities, obscurities and other defects which the experience of its administration has disclosed. It aims at the reduction to a system of that kind of substantive law relating to crimes and the law of procedure, both as to indictable offences and as to summary convictions.

The proposed Code contained little in the way of change. In introducing the Bill on its second reading, the Attorney General stated:[15]

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[10] For example, Cruelty to Animals, 1880, Penitentiaries, 1883, Procedure, 1887.

[11] The dates, of course, vary. Quebec, 1763; Ontario, 1792; British Columbia, 1859; Manitoba, Saskatchewan, Alberta, and the Northwest Territories, and the Yukon, 1870; Nova Scotia, New Brunswick and Prince Edward Island, presumably from the date of their legislative independent existence in 1758.

[12] Authority to repeal such provincial legislation passed to the Dominion. *R. v. Halifax Electric Tramway Co.* (1898), 1 C.C.C. 424.

[13] Hansard, vol. 1 (1892), p. 1312. [14] *Ibid.* [15] *Ibid.*, p. 1315.

> Substantially it follows the existing law. It proposes, however, to abolish the distinction between principals and accessories. It aims at making punishments . . . more uniform. It discontinues the use of the word "malice" and the word "maliciously". . . . It defines murder and in cases of doubt settles what murder is. With that view it defines provocation . . . . It deals with the offence of bigamy . . . . it proposes to abolish the term "larceny" and to adopt the term "theft" instead . . . . With regard to the law of procedure, I propose to abolish the distinction between felonies and misdemeanours . . . . It is proposed likewise to abolish the provision of the existing law with regard to venue . . . . It abolishes writs of error and provides an appeal court.

The debate on the Bill did not prove particularly edifying. The Grand Jury, though threatened, was saved from abolition. There was some discussion on territorial jurisdiction, and an argument, which has surprisingly modern over-tones, on the wisdom and applicability of the McNaughton Rules. The House was unhappy about some of the powers of arrest which were to be given to peace officers and to private persons, and several of the proposed maximum penalties were changed without very much discussion. On June 28th, 1892, after the third reading, the Bill finally passed the House, received Royal Assent on July 9th, 1892, and came into force on July 1st 1893.[16]

A series of amendments resulted in the consolidations of 1906 and 1927, but neither of these could be called revisions. In 1947, a Royal Commission to Revise the Criminal Code was appointed, reported in 1952 and in 1953 the Revised Code was enacted.[17] This revision did not greatly alter the structure or substance of the original Code, no attempt being made to consider or redefine fundamental criminal law concepts. The system of punishments was rationalized, certain procedural reforms were introduced and a relatively small number of specific offences were either redefined or introduced.

One significant change was that enacted by section 8, stating:

> Notwithstanding anything in this Act or any other Act no person shall be convicted
> (a) of an offence at common law,
> (b) of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland, or
> (c) of an offence under an Act or ordinance in force in any province, territory or place before that province, territory or place became a province of Canada . . . .

The original Code, while comprehensive, did not purport to reduce

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[16] (1892), 55-56 Vict., c. 29.    [17] S.C., 1952-54, c. 51.

all the Dominion criminal law into one statute. It preserved a number of previously enacted provisions, listed in the schedule, and while section 5 provided that no person shall be proceeded against for any offence against any Act of the Parliament of England, Great Britain or the United Kingdom unless made expressly applicable to Canada, it was silent as to the applicability of common law offences. The British North America Act had preserved the existing common law (insofar as received and not altered by statute) for the original provinces[18] and a series of Acts[19] provides the same for the other provinces and territories. It is thus not surprising to find that in the 1906 consolidation various sections appeared expressly preserving the criminal law of England in various provinces. Those not listed in the Code, had the criminal law preserved in other statutes.[20] Prior to the enactment of section 8 of the 1953 revision, prosecutions were successful for such common law offences as abuse of office in taking fees wrongfully,[21] public mischief,[22] champerty and maintenance[23] and perhaps barratry.[24]

It was thus not until 1953 that all common law offences were abolished throughout Canada. It is interesting to note that, in contrast, the first English Draft Code proposed the abolition of all common law offences not specifically enacted in the Code. It could not, however, be maintained that prosecution for common law offences was a very frequent occurrence in Canada after 1892, and the Revision Commissioners decided that there was no point in preserving them after 1953. Instead, all those thought applicable to Canada were specifically enacted, such as compounding indictable offences,[25] indemnification of bail,[26] public mischief[27] and common law conspiracy.[28] On the other hand, faced with the difficulty, if not impossibility of attempting to codify common law defences, the Commissioners merely recommended, and Parliament enacted, section 7 (2) providing:

> Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence

[18] S. 129.
[19] *E.g.*, the Alberta Act, 1905, the Saskatchewan Act, 1905, *etc.*
[20] Criminal Code, s. 10 for Ontario; s. 11 for British Columbia: s. 12 for Manitoba.
[21] *R.* v. *Graham* (1910), 17 O.W.R. 660, 2 O.W.N. 326, 17 C.C.C 264.
[22] *R.* v. *Leffler* (1936), 67 C.C.C. 330.
[23] *R.* v. *Bordoff* (1938), 70 C.C.C. 35.
[24] *MacKenzie* v. *Goodfellow* (1908), 13 O.W.R. 30.
[25] Criminal Code, s. 121.
[26] Criminal Code, s. 119 (2) (b).
[27] Criminal Code, s. 120.
[28] Criminal Code, s. 408 (2).

> under this Act or any other Act of the Parliament of Canada, except insofar as they are altered by or are inconsistent with this Act or any other Act of the Parliament of Canada.

The Criminal Code does not purport, of course, to contain all the criminal law of Canada. A surprisingly large number of federal statutes, such as the Extradition Act,[29] Official Secrets Act,[30] Penitentiary Act,[31] Customs Act,[32] Post Office Act[33] and the like contain important criminal provisions respecting various acts, but two in particular the Juvenile Delinquents Act[34] and the Narcotic Control Act[35] should be noted.

After some seventy-five years, it is possible to evaluate the impact of the Code on the criminal jurisprudence of Canada and to make some estimate of the trends which appear to be emerging. The Code, being a codification to a large extent of the existing common law is not a Code in the civil law sense of being the *fons et origo* of the law. Most of its substantive provisions have their counterpart in English and Commonwealth law, both statutory and common law. It is not surprising, therefore, that Canadian courts have, in the past, relied heavily upon precedents from England. Nevertheless, the codification entailed the development of a substantive amount of Canadian criminal jurisprudence. While it is true that the original Code of 1892 followed very closely the English Draft Code which, in turn, followed closely the existing common law, the considerable number of alterations, developments and amendments has led to an ever-increasing gap between Canadian and English criminal law. Indeed, in all the major areas, it is difficult to think of many sections of the Code in which interpretations by English courts would be, in themselves, of immediate relevance.

Offences against the person, particularly homicide, many sexual offences, most property offences, offences relating to the administration of justice, the law relating to parties to offences, the provision respecting habitual criminals and dangerous sexual offenders as well as practically the whole of the law of procedure bear no relation to existing criminal law of England.

The introduction of codal legislation necessarily reduces the scope of judicial law-making, but no Code of this character can be so precise as to reduce the judiciary's function to that of a mere administrator and the Criminal Code is less precise than

[29] R.S.C., 1952, c. 322, as am.
[30] R.S.C., 1952, c. 198.
[31] R.S.C., 1952, c. 206, as am.
[32] R.S.C., 1952, c. 58, as am.
[33] R.S.C., 1952, c. 212, as am.
[34] R.S.C., 1952, c. 160.
[35] S.C., 1961, c. 35.

many others. Furthermore, while section 7(2) preserves the common law defences, a number have been altered by the Code to the extent of requiring specifically Canadian interpretations, such as, for example insanity or compulsion. In addition, the peculiar provisions relating to homicide necessitate that even where English decisions are adopted or considered (such as *Bratty* v. *A.-G. Northern Ireland*[36] or *A.-G. Northern Ireland* v. *Gallagher*[37]) their application is by no means automatic.

[36] [1961] 3 All E.R. 523, 46 Cr. App. Rep. 1.
[37] [1961] 3 All E.R. 299.

It is not, I think, unfair to characterize the basic approach of the Supreme Court to criminal matters as traditional. Looking at recent decisions, one has difficulty in seeing any outstanding landmarks in criminal jurisprudence, though this is not to say that there have not been a number of welcome judgments. The development of the decisions on capital murder has been encouraging, and the cases involving obscenity,[51] drunkenness,[52] *mens rea*,[53] automatism,[54] and conspiracy[55] have been helpful. Less encouraging have been the court's decisions on the restricted nature of the defence of coercion[56] or the circumstances of the admissibility of confessions.[57]

The law of evidence and the law of procedure have remained remarkably static over the past century, but this is due less to the courts than to the legislature. Within the relatively detailed federal and provincial Evidence Acts, the courts have had little chance to develop the law, though the Supreme Court has, as far as possible, preserved the right of the accused to choose not to testify, however much this right has been whittled away by provincial legislation.[58] Similarly, the procedural rules still stem very largely from the Criminal Procedure Act of 1869[59] with little judicial development.

In the penological area, some considerable progress has been made, though the situation is by no means one to induce complacency. The *Fauteux Committee Report* of 1956[60] is a significant document. Although much of it remains unimplemented, it is a statement of the essential interrelation between substantive criminal law, the administration of justice and the effective use of criminal sanctions. Many provincial Departments of Reform Institutions have embarked upon programmes of building and development

[51] *R.* v. *Brodie* (1962), 132 C.C.C. 161, 37 C.R. 120; *Dominion News & Gifts (1962) Ltd.* v. *R.*, [1964] 3 C.C.C. 1, 42 C.R. 209; *R.* v. *Cameron*, [1966] 4 C.C.C. 273, 44 C.R. 49.
[52] *R.* v. *Mitchell*, *supra*, foonote 44; *R.* v. *Lachance*, [1963] 2 C.C.C. 14, 39 C.R. 127.
[53] See cases cited, supra, footnote 50.
[54] *Bleta* v. *R.*, *supra*, footnote 45.
[55] *Wright, McDermott and Feeley* v. *R.*, [1964] 2 C.C.C. 207; *Kour* v. *R.*, [1964] 2 C.C.C. 97, 42 C.R. 210.
[56] *R.* v. *Carker (No. 2)*, [1967] 2 C.C.C. 190.
[57] *O'Connor* v. *R.*, [1966] 4 C.C.C. 352, 48 C.R. 271.
[58] See *Batary* v. *A.G. Sask.*, [1966] 3 C.C.C. 152, 46 C.R. 35.
[59] (1869), 32-33 Vict., c. 29.
[60] Report of a Committee to enquire into the principles and procedures followed in the remission service of the Department of Justice of Canada (1956).

to conform to more enlightened concepts of rehabilitation. The establishment of a system of parole under the National Parole Board has similarly constituted a step in the right direction.

This brief survey of the development of criminal law in Canada over the past one hundred years pinpoints several defects and it would be beneficial to see what lessons can be drawn.

Even the original Code of 1892 was not subject to the intense and sophisticated enquiry which one would have expected of such a major piece of legislation. Most of the preliminary work had been done by the English Commissioners and it is clear, from a reading of *Hansard*, that the movers of the Bill Respecting Criminal Law were content to present a combination of the English Draft Code and the Canadian statutory law, as explained by Burbidge's *Digest*. This is not to say that they were not aware that some of the English Draft Code was not applicable, nor that conditions in England were not necessarily duplicated in this country. It does mean, however, that there was no distinctly Canadian examination of any of the fundamental premises upon which the Bill was based. It was, essentially, a codification of existing law.

The numerous amendments present a shocking indictment of the process of criminal legislation. Maximum penalties have been fixed without the slightest regard for the objectives in mind;[61] major alterations have been based upon the panic induced by isolated criminal activities;[62] compromises between the Senate and the House have resulted in legislation supportable on no grounds;[63] and absurd formulas adopted which disguise real aims.[64] The only revision, that of 1953, should not be underestimated for the Commissioners did, indeed, remove anomalies, rationalize punishments and make procedural reforms. But their terms of reference were limited in the extreme and did not change the fundamental reflection of the Code. Thus, tampered with and tinkered with, it remains the monument of the eminent Victorian, Sir James Stephen.

Two striking object-lessons emerge. The first is that the process of criminal legislation must be removed from the petty political arena as quickly as possible, and the second is that criminal law can no longer be regarded in isolation from the other aspects of

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[61] See Hansard debates on the Draft Bill, vol. II (1892), pp. 2840, 2846, 2964, *et seq*.

[62] For example, Hansard, vol. VI (1947), pp. 5026-5037.

[63] *E.g.*, s. 202 (d).

[64] For example, the definition of obscenity, s. 150 (8); the capital murder provisions, s. 203 A.

the criminal process, the investigation, the trial and the disposition of the offender.

To take the second lesson first, it may not, at first sight, make very much difference whether one has a Criminal Code or a Penal Code, but a Criminal Code starts from a fundamental premise that the substantive and procedural "criminal law" can be neatly tied up in a package and presented as a comprehensive unit. It presupposes that one can talk in the abstract about "a crime", about, for example, the offence of abortion, or of selling obscene literature, or of murder. It presupposes, also, that the legislative problems can be solved as a literary exercise—the problem of adequately defining, for example, obscene literature, of delimiting the scope of capital murder or of establishing the criteria for finding a person a habitual criminal. In fact, what has become apparent in the last century is that the whole criminal process is not a series of compartmentalized topics. The substantive criminal law cannot be divorced from its social context, and criminal legislation is at least as much a matter of analysing the social problem, discussing alternatives, thinking of the investigative problems, deciding upon the sanction and weighing the consequences as it is of proper drafting. In my opinion, any Code has to reflect all of these issues and this is better done in the framework of a comprehensive Penal Code than in the framework of an isolated Criminal Code, for the former would, insofar as it is possible within the federal jurisdiction, provide for the conduct of investigation, the process of trial, the technique of sentencing and the disposition of the offender, as well as for "criminal law and procedure".

The difficulty in this country has been the lack of adequate machinery for reform. There have been Commissions and Committees which have had significance. The Fauteux Committee has already been mentioned, and the Archambault Commission[65] of 1938 presented a report which was forward-looking and useful. One must not overlook the worth of the reports of more recent departmental committees on capital punishment,[66] juvenile delinquency[67] and hate propaganda.[68] But such *ad hoc* enquiries are not at all the answer to the difficulty. There has never been any enquiry into the fundamental basis of the Code, as such, nor can

[65] Royal Commission to Investigate the Penal System of Canada (1938).

[66] Capital Punishment: material relating to its purpose and value, Department of Justice (1965).

[67] Department of Justice, Committee on Juvenile Delinquency (1965), Allen J. Macleod, Q.C., Chairman.

[68] Department of Justice Special Committee on Hate Propaganda in Canada (1966), Maxwell Cohen, Q.C., Chairman.

*ad hoc* recommendations ever take the place of such an enquiry There is no machinery for putting even those recommendations in their proper social and legislative context.

This leads to the second object lesson. All legislation in the Canadian system must be political in the sense of being an enactment of the Sovereign in Parliament. No one, presumably, would wish it otherwise. But both the House and Senate need, and are entitled to receive advice and the more aware one becomes of the real significance of criminal legislation, the more urgent becomes the need for advice. No one can give advice without the data which only research can bring forth, the statistics upon which assumptions are based, comparative studies, social and moral implications, how isolated proposals will fit into the general scheme and so on.

The most urgent need, it appears is for some sort of permanent criminal law reform machinery which will undertake these tasks and will tender advice to the appropriate Minister. What he does with it, is, of course, a political question which is for him and Parliament to decide. But the present hit-or-miss method of reform which is sparked by a newspaper story, by a private member's interest, by an influential agitator, has highlighted the most outstanding problem of Canadian criminal law, the simple problem of criminal legislation.

Whatever one may consider the function of the criminal law to be, it is apparent that the criminal process is a complex interaction of sociological, psychological and legal phenomena—and doubtless this is true of the whole legal process. Whereas in the year 1867 the criminal law was considered to be virtually the exclusive preserve of the criminal lawyer, today it is recognized that no adequate system can be devised without the help of other specialists. The function of the law is to resolve the problems of society, but the lawyer does not abdicate his responsibility by turning to others for assistance. The plain fact of the matter is that the lawyer can no longer himself answer the questions he must ask. The development of the law and the legal system must be the responsibility of the lawyer and must remain his responsibility, for he, alone, knows what questions to ask. He must also know of whom those questions should be asked.

Nowhere is this more apparent than in every area of the criminal process. It is not so much the techniques which need examining as the fundamental premises upon which the entire structure is based. One talks blandly about the rules of evidence without considering whether the conceptions of inference-finding and assumption of relevance and weight upon which they are based are valid. How can anyone tell what acts ought to be criminal in character without examining the function of the criminal law in society? Could not the sociologist and psychologist usefully analyse the effects and methods of police investigation and the role of the police in the community?

The sad conclusion is that the criminal law has not progressed in one hundred years nor can it progress beyond a slight re-shuffling within assumed boundaries so long as those boundaries are accepted as absolutes. There have, of course, been changes that, within the structure, have been beneficial and to that extent advances have been made. But it is not a cause for congratulation that Sir James Stephen would be quite at home with the Criminal Code of 1967.

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MACCLEOD A.J. & MARTIN J.C., "The Revision of the Criminal Code", (1955) R. du B. Can. 3-19.

MACCLEOD A.J. & MARTIN J.C., "The Revision of the Criminal Code", (1955) 33 Can. B. Rev. 3-19.

# The Revision of the Criminal Code

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When the revised Criminal Code[1] comes into force on April 1st, 1955,[2] it will mark another forward step in the development of criminal law in Canada.

The present code[3] has been in force since 1893. During that time it has not gone without criticism. It has, by some, been deprecated for its inconsistencies, ridiculed for its archaisms, disparaged for its verbosities and derided for its ambiguities. But the critics have rarely challenged the fundamental principle involved, namely, that the criminal law of Canada should be in the form of a code. At most, the recital of imperfections, real or supposed, has been an argument, not for a new kind of vehicle, but only for a newer model.

What, then, was the primary purpose of the revision? As disclosed by the terms of reference[4] of the Royal Commissioners who were charged with the duty, the purpose was not to effect changes in the law but to remove those features that had aroused the most criticism. There is nevertheless a substantial amount of new law in the new code. This should not cause surprise, for a certain amount

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[1] Statutes of Canada, 1953-54, c. 51.

[2] Proclaimed to come into force on April 1st, 1955. See Canada Gazette Extra, Sept. 20th, 1954; also Canada Gazette, Oct. 2nd, 1954, Vol. 88, p. 3297.

[3] R.S.C., 1927, c. 36.

[4] "(a) revise ambiguous and unclear provisions;
(b) adopt uniform language throughout;
(c) eliminate inconsistencies, legal anomalies or defects;
(d) rearrange provisions and Parts;
(e) seek to simplify by omitting and combining provisions;
(f) with the approval of the Statute Revision Commission, omit provisions which should be transferred to other statutes;
(g) endeavour to make the Code exhaustive of the criminal law; and
(h) effect such procedural amendments as are deemed necessary for the speedy and fair enforcement of the criminal law." (Report of Royal Commission on the Revision of Criminal Code (Queen's Printer, Ottawa); also printed in Appendix, Senate Hansard, May 14th, 1952, p. 226)

of variation was the inevitable result of a conscientious effort on the part of the Royal Commissioners to carry out their instructions. Later, when the draft bill prepared by the Royal Commission was introduced in Parliament — which was, of course, not restricted by terms of reference — the tendency there was not only to seek to clarify the law but to improve it by making out and out changes in what had previously been the policy of the law.

The first criminal code for Canada was passed in 1892, but its story really begins with Sir James Fitzjames Stephen, the English jurist whose position in the field of the criminal common law is comparable to that of Blackstone in the common law generally. For a time early in his career Stephen was Secretary to the Council in India. During his term of service in that country, he was much impressed by the law reforms that had been accomplished under British rule. Upon his return to England in 1872 he was, by contrast, equally disturbed by the lack of system in the law of his own country.

Much might be said about Stephen's earlier efforts at law reform, but it is sufficient to mention here that in 1877 he published his *Digest of the Criminal Law of England*, a work well suited to form the basis for a penal code. His proposal that the criminal law could, with advantage, be codified was supported by the Attorney General, Sir John Holker, and in 1878 a criminal code drafted by Stephen was introduced in Parliament. The parliamentarians of the day must have found it dull stuff, for the brother and biographer of Stephen says that "the House of Commons could not spare from more exciting occupations the time necessary for its discussion".[5] A reading of the debates leaves the impression that, although the Attorney General presented the bill vigorously and persuasively, it received no more than lukewarm support. Indeed, it might even be said that the discussion in the house suggests that the members were well acquainted with the anomalies in the English criminal law that might be removed by codification, but looked on them with such affectionate regard that they would not see them go.

Notwithstanding the lack of enthusiasm in Parliament for the measure, a royal commission was appointed to examine it. This body presented a revised draft bill in 1879, but too late in the year for it to be considered by Parliament. It was on this bill that the Lord Chief Justice, Sir Alexander Cockburn, wrote his well-known

[5] Leslie Stephen, Life of Sir James Fitzjames Stephen (1895) p. 380.

criticism.[6] "I do not know", says Leslie Stephen,[7] "whether the fate of the measure was affected by Cockburn's opinion. In any case the change of Ministry in 1880 put an end to the prospects of the code for the time. In 1882, to finish the story, the part relating to procedure was announced as a Government measure in the Queen's speech. That, however, was its last sign of life. The measure vanished in the general vortex which swallows up such things, and with it vanished any hopes which Fitzjames might still entertain of actually codifying a part of English law."

Although Stephen's efforts did not come to fruition in England, the idea of a codification of the criminal law along the lines suggested by him took hold in Canada. It appealed especially to Sir John Thompson, the Minister of Justice of the day, and in 1891 he introduced in Parliament a measure to codify the criminal law. This draft bill, embodying many of the provisions in the Stephen code, was referred by the government to judges, lawyers and other persons from whom useful suggestions might be expected. With the changes that were made as a result of their advice, it was introduced again in Parliament in 1892. The drafting of the bill was done by Mr. Robert Sedgewick, at that time the Deputy Minister of Justice, who was appointed a judge of the Supreme Court of Canada in 1893, and by Mr. Justice G. W. Burbidge of the Exchequer Court of Canada, who had published an edition of Stephen's Digest adapted for Canadian use. It was, of course, the responsibility of the Minister of Justice to pilot the bill through the House of Commons, and Hopkins, his biographer, says that "so skilfully, ably and persistently did he stamp his views upon every page that, in point of fact, the Canadian Code of 1892 deserves to be called after its maker far more than did ever the famous Code Napoleon".[8]

[6] "Not only is there much room for improvement as regards arrangement and classification, but the language used is not always perspicuous, or happily chosen, while the use of provisoes, an objectionable mode of legislation, is carried to an unusual excess, nor is the intention always clear; and, what is still more important, the law is, in many instances, left in doubt, and I am bound to say, in my opinion, not always correctly stated. As to this, however, I ought to add that I am often left in doubt whether particular passages are intended to be a statement of the existing law or a proposed alteration of it. With regard to the avowed alterations of the law, some of which are of a somewhat radical and daring character, I will say no more for the present than, while change may be desirable, in some instances the change proposed — I refer particularly to the admissibility of an accused person as a witness — would be, as I shall be prepared to show by-and-bye, a grievous mistake." (Report of the Committee appointed by the Treasury to inquire into the system of conducting the legal business of the Government, 1888)

[7] *Op. cit.*, p. 381.

[8] J. Castell Hopkins, Life and Work of Sir John Thompson (1895) p. 382.

Mr. Hopkins says that "Sir John Thompson's work in this connection is indeed a lasting memorial to his wonderfully luminous legal intellect, and to his rank as a really great Minister", and he quotes a contemporary tribute (certainly fervid even if not completely accurate), which goes as follows: "It is as true as a proposition in Euclid, that the criminal law of Canada is above that of any nation or State on the face of the earth. It embodies most of the suggestions of Bentham, Becarri [*sic*], Livingston, Mackintosh and Romily [*sic*], and hundreds of others which never occurred to them, and is the first attempt on a national scale to make criminal law synonymous with justice, and substitute civilization and Christianity for barbarism."

Notwithstanding these complimentary views, amendments to the statute were introduced in Parliament almost immediately and have been introduced at almost every session since. Some of the results of this process of legislative patching are described in the words of the Minister of Justice in introducing the new Criminal Code bill in the House of Commons in 1953:[9]

> By the year 1948, as one would expect, the Criminal Code required a thorough overhaul. As a result of many amendments that have been made during the course of some 56 years there was a lack of uniformity of language and many provisions were ambiguous and unclear. It contained inconsistencies and anomalies. It was sometimes difficult to find the law in connection with the particular matter because separate provisions relating to that matter had been placed in different parts of the code at different times during these years. What was even a graver offence was that as a result of these extensive amendments made over a long period of time there was a substantial amount of overlapping and repetition. This state of the criminal law constituted a very serious inconvenience to practising lawyers and to the administration of justice.
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> Provisions relating to matters of procedure which were quite appropriate in 1892 were not at all suitable in the light of the substantial increase in the work of the criminal courts resulting, among other reasons, from the very substantial increase in the population of Canada between 1892 and 1948.

The Minister then describes the steps taken by the government:

> Accordingly the examination and study of the Criminal Code was authorized by order in council P.C. 527 on February 3, 1949, during my term of office; but the original recommendation for the adoption of this course had been made by my distinguished predecessor, Right Hon. J. L. Isley,[10] as the then minister of justice early in 1948, almost, I would point out, six years ago.

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[9] Hon. Stuart S. Garson, House of Commons Hansard, Dec. 15th, 1953, p. 943.

[10] Now Chief Justice of Nova Scotia.

> The task of preparing the new consolidated code was assigned to a commission consisting of Hon. W. M. Martin, chief justice of Saskatchewan, chairman; Mr. Justice Fauteux and Mr. F. P. Varcoe, Q.C., deputy minister of justice.[11]
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> In relation to the charge that is sometimes made that too many prosecutors have been engaged in the drafting of this code, I would like to point out that the counsel for this commission was a very able criminal defence lawyer of long experience, Mr. Arthur Slaght, Q.C. of Toronto.
>
> The commission was to have the assistance of a committee comprising Mr. Robert Forsyth, Q.C., now Judge Forsyth, Toronto; Mr. Fernand Choquette, Q.C., now Justice Choquette, Quebec; H. J. Wilson, Q.C., deputy attorney general of Alberta, and again two outstanding defence lawyers, Mr. J. J. Robinette, Q.C., Toronto, and Mr. Joseph Sedgewick, Q.C., Toronto. The personnel of the committee was subsequently increased and Mr. W. C. Dunlop, Q.C., Halifax, Mr. H. P. Carter, Q.C., St. John's, Newfoundland, and Mr. T. D. MacDonald, Q.C., Ottawa, became members of the committee.
>
> Then, as some members of the commission and the committee found that their judicial duties or their law practices, made it impossible for them to devote the very large amount of time that was necessary to get their commission work completed, the committee was reorganized by an order in council on September 26, 1950. Again on May 10, 1951 by order in council a second commission consisting of Hon. W. M. Martin, chief justice of Saskatchewan, chairman; Hon. Mr. Justice Fernand Choquette, Quebec, His Honour Judge Robert Forsyth, Toronto, Mr. H. J. Wilson, Q.C., Edmonton, Mr. Joseph Sedgwick, Q.C., Toronto, and Mr. A. A. Moffat, Q.C., Ottawa, was set up and they proceeded with the work and largely finished it.

The earlier commission and committee had confined themselves largely to reaching decisions on legislative policy and the second commission continued and completed this work. By mid-summer of 1951 the work of drafting could begin. One member of the Commission, Mr. A. A. Moffat, Q.C., was able to work in Ottawa on behalf of his fellow commissioners on a full-time basis, and so was one of the writers of this article,[12] who had acted as research counsel to the earlier commission and continued to act in that capacity for the second commission. The other writer of this article[13] was made available by the Department of Justice as draftsman. The drafting procedure was essentially the same as is followed for any bill prepared in the Department of Justice. That procedure has been described in an article[14] in this Review as follows:

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[11] See a brief account of the progress made before July 1949 in (1949), 27 Can. Bar Rev. 707.

[12] J. C. Martin, Q.C.

[13] A. J. MacLeod.

[14] E. A. Driedger, The Preparation of Legislation (1953), 31 Can. Bar Rev. 33, at p. 39.

The draftsman has now reached the point where he can begin to draft the bill. Working by himself, he prepares a first draft of the proposed bill or, in the case of a lengthy or complicated bill, a first draft of a portion of it. He cannot work with other people looking over his shoulder and offering comments. And no satisfactory draft can be prepared by a group of draftsmen acting as a drafting committee; they will all have different ideas about how the work should be done, there will be endless discussions over trivialities, and the end product will be at best only a compromise. Drafts can be discussed, criticized and tested in a discussion group, but the responsibility for setting up the draft or making any changes must devolve upon one person. Usually the draftsman goes over this first draft and prepares one or more revisions before discussing it with the sponsors. When the revision is submitted to the sponsors for consideration and comment, and after they have had an opportunity of considering and discussing it, a further conference with the draftsman takes place. All the defects and imperfections of the first draft, so far as they can be seen, are discussed and a fresh draft is prepared and submitted. The process continues until the sponsors and the draftsman are both satisfied with the form and content.

The Royal Commission made its report to the Minister of Justice on January 22nd, 1954. It was accompanied by the draft bill which, as amended by Parliament, constitutes the new Criminal Code. The bill was first introduced in the Senate on May 2nd, 1952, as Bill No. H-8.[15] After second reading it was referred to the Senate Banking and Commerce Committee which appointed a subcommittee under the chairmanship of Senator Salter A. Hayden of Toronto.[16] The subcommittee considered the bill in detail during the remainder of the session, but the time available did not permit it to make a final report to the main committee before Parliament adjourned.

During the summer of 1952 the bill was revised in the Department of Justice in the light of the discussions that had taken place in the Senate subcommittee and also in the light of representations received in the department from individuals and organizations. When Parliament reassembled, in November 1952, the measure was

[15] "One of the quite important reasons why we in the Department of Justice and in the Government decided to avail ourselves of the services of your honourable chamber on this occasion was the magnificent work which you did for us in considering the Bankruptcy Bill of 1949, and which I, as the minister in charge of that bill in the House of Commons, am confident did much more than cut our task in that house in two; I should think it probably reduced it by about 90 per cent. When that bill came there with your *imprimatur* upon it, the impression we had was that that was about all that was required in our debate. I hope that the same confidence will be entertained with respect to your efforts on the bill now before us." (The Hon. Stuart S. Garson, Q.C., Senate Hansard, May 13th, 1952, p. 207)

[16] The members of the subcommittee were: Senators Bouffard, Hayden, Farris, Hugessen, Fogo, Roebuck, Haig, Vien and Robertson.

introduced, again in the Senate, as Bill O and was again referred to the Banking and Commerce Committee. A subcommittee, consisting of the same senators who had dealt with the bill in the spring of 1952, was again set up to examine it. The Senate passed the bill, with amendments, on December 17th, 1952, immediately before the Christmas adjournment.

The bill went to the House of Commons in January 1953 as Bill No. 93. After second reading it was referred to a special committee of seventeen members, mostly lawyers.[17] That committee, under the chairmanship of Mr. Don F. Brown, the member for Essex West, held thirty-seven meetings, during which it examined the bill clause by clause and, in addition, heard oral representations[18] and studied briefs[19] from a very large number of organizations. Of the proceedings of the committee, the Minister of Justice stated in the House of Commons:[20]

> I must say, Mr. Speaker, that the members of this committee certainly held and presented strong views, with great force and zeal; and sometimes their controversies became a bit heated. But they were always objective and, best of all, they were non-political.

The special committee tabled its report, with its recommendations for amendment, in May 1953. The time remaining before the prorogation of Parliament—early that year because of the approaching Coronation—was not however enough to enable the bill to be proceeded with and it died on the order paper.

A general election was held in the summer of 1953 and a new Parliament assembled in December. The Criminal Code bill was introduced immediately, this time in the Commons instead of in the Senate.[21] There was no move, this time, to refer the bill to a special or standing committee. Instead, it received in the Committee of the Whole House a clause by clause examination that lasted from early January until almost mid-April.

[17] The members were: Messrs. Browne (St. John's West), Cameron, Cannon, Churchill, Garson, Henderson, Laing, MacInnis, MacNaught, Macnaughton, Montgomery, Noseworthy, Pinard, Robichaud and Shaw.

[18] For example, by representatives of the Canadian Congress of Labour, the Trades and Labour Congress, the Canadian Welfare Council, the Canadian Mental Health Association and the Association of Civil Liberties.

[19] For example, from the National Council of Women, the Manitoba Bar Association, the Federation of Law Associations of Ontario, the Bar of the Province of Quebec, and the Executive Council of the Canadian Chamber of Commerce.

[20] The Hon. Stuart S. Garson, Q.C., House of Commons Hansard, Dec. 15th, 1953, p. 945.

[21] It was, of course, sheer coincidence that this bill bore the number 7, the same number under which the 1892 Code had been passed by Parliament.

The bill, with the amendments made in the Commons, was in the Senate early in May and was referred to the Standing Committee on Banking and Commerce. There it was considered until early June, when it was reported and passed with something less than a dozen relatively minor amendments. One important service performed by the Senate at this stage, however, was to make twenty-six changes in the French text of the bill to ensure uniformity of interpretation in English and in French. When it was returned to the House of Commons on June 15th, 1954, the Senate amendments were accepted, and thus, almost five and one-half years after the revision had been authorized by the Governor in Council, the new code was finally passed by Parliament. Although it received royal assent on June 26th, 1954, the act itself provides that it is to come into force on proclamation.

The order in which material is arranged in the new code remains substantially the same as in the old. The new code has twenty-six parts, two more than its predecessor has had since 1950. A given subject matter is, of course, not necessarily to be found in a part bearing the same number as previously, but the code still opens with provisions of general application, proceeds to the creation of specific offences, then to procedure, and ends with forms. Part I contains provisions having general application, more particularly on the circumstances in which conduct, which otherwise would be an offence, is justified or excused. Parts II to XI create offences. Each of these parts covers a certain class or category of offences. For instance, Part II deals with offences against public order, Part IV, sexual offences, public morals and disorderly conduct, and Part X, offences relating to currency. Part XII contains the law on the jurisdiction of courts to try offences and Parts XIII and XIV cover arrest, search and seizure. Parts XV to XVII deal with preliminary inquiries and the trial of indictable offences with and without a jury. Part XVIII sets out the law on appeals in the case of indictable offences. Parts XIX to XXII deal with procuring the attendance of witnesses, general provisions on imposition of punishment, preventive detention for habitual criminals and criminal sexual psychopaths and the enforcement of recognizances. Part XXIII concerns the extraordinary remedies, *habeas corpus*, *certiorari*, *mandamus* and prohibition. Part XXIV, formerly Part XV, sets out the procedure to be followed for the disposition of summary conviction offences. Part XXV contains transitional provisions and makes appropriate amendments to

other acts of Parliament in which, under the present law, the Criminal Code is mentioned. The last part in the new code contains precedents for formal documents that are necessary in the administration of the criminal law.

The new code is substantially shorter than its predecessor. It has 753 sections, compared with more than 1,100 in the present code. The code filled 418 pages in the Revised Statutes of 1927, while in the annual statutes of 1953-54 it occupies only 289 pages of the same size. This shortening has been achieved largely by consolidation and the deletion of unnecessary provisions. The Royal Commissioners reported to the Minister of Justice as follows:

> The work of consolidation is designed to do away with duplication and needless repetition, and provisions are drafted in a form that, where possible, eliminates particularization and reduces to a minimum the need for amendment. For example, the present Code contains provisions dealing with false entries in books of account. Section 413 makes it an offence for an officer of a corporation to make false entries. Section 414 makes it an offence for a clerk or servant to falsify books of account, etc. Section 418 makes it an offence to falsify books of account to defraud creditors. Sections 484 and 485 make it an offence to make false entries in books of account of a government or of a bank. In all these instances the gravamen of the offence is that it is done with an intent to defraud. In the consolidation of these provisions (clause 340) particularization is eliminated and it is made an offence *with intent to defraud* to falsify books of account, etc.
>
> Another instance of consolidation to which attention is directed and which is intended to meet existing and future conditions, is to be found in Part X which deals with counterfeiting. The object of this Part is the protection of the currency. By a comprehensive definition of currency and the consolidation of provisions which dealt separately with the various kinds of coin and with paper money, a simple and complete code relating to this subject has been evolved.
>
> Consolidation has also been carried out in matters of procedure. One instance of this is the creation of a separate Part (Part XIX) dealing with the calling of witnesses and the taking of evidence on commission. At present these matters are dealt with in the several procedural Parts. This has resulted in the enactment of a great number of provisions, each group designed to cover the subject for the purposes of the proceedings dealt with by the Part in which they appear.
>
> Your Commissioners have therefore consolidated in one Part (Part XIX) all provisions relating to compelling the attendance of witnesses and the taking of evidence on commission.
>
> It has been found that many sections of the Code relating to particular offences may be omitted because the offences are capable of being dealt with in one general provision. For example, sections 358-388 create many separate offences for different kinds of theft. These sections are dropped and only one offence of theft is created for which appropriate punishment is provided. It is pointed out that this is in

conformity with the policy of Parliament as a similar step was recently taken in respect of the offence of forgery.

As this extract from the report points out, many particular descriptions of offences are omitted from the new code because they can be covered by general provisions. The offence of theft is an outstanding illustration. The present code describes certain offences of theft by reference to the occupation of the person who does the prohibited act. Section 359, for example, makes it an offence for a person who, "being a clerk or servant . . . steals anything belonging to or in the possession of his master or employer"; or "being a cashier, assistant cashier, manager, officer, clerk or servant of any bank or savings bank steals any bond, obligation, bill obligatory or of credit, or other bill or note, or any security for money, or any money or effects of such bank, or lodged or deposited with any such bank"; or "being employed in the service of His Majesty . . . steals anything in his possession by virtue of his employment". Section 360 relates to theft committed by a tenant or a lodger. Elsewhere there is a different approach, and the offence is defined by reference to the thing that is stolen. Section 366 provides that "every one is guilty of an indictable offence and liable to five years' imprisonment who steals any printed vote or proceeding, newspaper, printed paper or book, packet or package of patterns or samples of merchandise or goods, or of seeds, cuttings, bulbs, roots, scions or grafts, or any post card or other mailable matter, other than a post letter, sent by mail". Other provisions authorize imprisonment for two years for stealing railway tickets, fourteen years imprisonment for stealing cattle, two years imprisonment for stealing a dog, seven years imprisonment for stealing oysters, six months imprisonment for stealing a plant growing in a greenhouse or conservatory, and so on. In the new code the offence of theft is created by section 280,[22] and a host of different *descriptions* of that offence is, very properly, permitted to drop into legislative limbo.

Assault is another example of the use of one general provision in substitution for a number of particular provisions. Section 296 of the present code provides, in paragraph (e), that a person is guilty of an offence who "on any day whereon any poll for an election,

[22] "280. Except where otherwise prescribed by law, every one who commits theft is guilty of an indictable offence and is liable

(a) to imprisonment for ten years, where the property stolen is a testamentary instrument or where the value of what is stolen exceeds fifty dollars, or
(b) to imprisonment for two years, where the value of what is stolen does not exceed fifty dollars."

parliamentary or municipal, is being proceeded with, within the distance of two miles from the place where such poll is taken or held, assaults or beats any person". Similarly, section 292 (c) provides that every one is guilty of an indictable offence who "assaults and beats his wife or any other female and thereby occasions her actual bodily harm". Both these provisions have been dropped from the new code, for the reason that it is not necessary to define the offence by reference to particular times, places or persons, but is sufficient merely to say that a person who commits an assault commits an offence.

The Royal Commission recommended also the deletion of a number of provisions because the same ground is covered in other acts of Parliament. The manufacture, importation and sale of living bacteria is dealt with, for example, in section 222A of the present code and also by the Pest Control Products Act.[23] Section 224 of the present code makes it an offence for a person to expose for sale articles that he knows are unfit to be used as human food; the same ground is covered by the Food and Drugs Act.[24] Section 504A relates to the activities of money lenders; they are already dealt with, in identical terms, by the Small Loans Act.[25] To take a final example, section 506 relates to offences in respect of copyright, a matter that is dealt with adequately in the Copyright Act.[26]

Later in this issue will be found a discussion of some changes in the law recommended by the Royal Commission and adopted by Parliament. But at least two changes proposed by the Commissioners were not approved in principle by the government and were not in the bill as introduced in Parliament. Take first the definition of "seditious intention". Just when the actual drafting of the new code was beginning, the Supreme Court of Canada handed down judgment in *Boucher* v. *The King*.[27] The main point in that case was the question whether, in all cases, "seditious intention" included an intention to incite to acts of violence or public disorder. The Commissioners apparently thought that the law defining "seditious intention" should be codified for, although they did not say so in their report, the draft bill accompanying it contained a definition that seems clearly to be based on the *Boucher* decision. That definition[28] provided, in effect, that a seditious intention means an

[23] R.S.C., 1952, c. 209.

[24] R.S.C., 1952, c. 123.

[25] R.S.C., 1952, c. 251.

[26] R.S.C., 1952, c. 55.

[27] [1951] S.C.R. 265. See Brewin, Comment (1951), 29 Can. Bar Rev. 193.

[28] "60. (4) For the purposes of this section 'seditious intention' means an intention

intention to bring into hatred or contempt or to cause disaffection against the administration of justice in Canada or, where the administration of justice is not involved, an intention to incite persons to engage in violence or in public disturbance or disorder. The result is that "seditious intention" remains undefined under the new code to the same extent as under the old.[29]

The other proposal that, as a matter of policy, did not find favour with the government was the abolition of minimum punishments for the offences of driving while intoxicated, driving with ability impaired and theft from the mails. The Commission reported to the Minister of Justice:

> Your Commissioners consider that all minimum punishments should be abolished and none are continued in the draft Bill.
>
> In 1878 Sir John Holker, then Attorney General of England, in introducing the original Draft Code in the House of Commons, said:
>
> 'Minimum punishments were a great evil, and I am happy to say that these punishments have been to a very considerable extent set aside by recent legislation; and now a very large discretion is confided to judges, and they are enabled, upon their view of the circumstances, to mitigate the punishment almost to any extent. I think that is right.'

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(a) to bring into hatred or contempt or to cause disaffection against the administration of justice in Canada, or

(b) to incite persons to engage in violence or in public disturbance or disorder

(i) by bringing into hatred or contempt or causing disaffection against

(A) Her Majesty, or

(B) the government or constitution of Canada or a province,

(ii) by causing discontent or disaffection among, or promoting feelings of ill-will or hostility between, different classes of persons in Canada, or

(iii) by advocating or teaching the use, without the authority of law, of force as a means of accomplishing a change of government or of the institutions of Canada;

but no person shall be deemed to have a seditious intention by reason only that he intends, in good faith,

(c) to show that Her Majesty has been misled or mistaken in her measures,

(d) to point out errors or defects in

(i) the government or constitution of Canada or a province,

(ii) the Parliament of Canada or the legislature of a province, or

(iii) the administration of justice in Canada,

(e) to procure, by lawful means, the alteration of any matter of government in Canada, or

(f) to point out, for the purpose of removal, matters that produce or tend to produce feelings of hostility and ill-will between different classes of persons in Canada."

[29] The English draft code also proposed to define sedition. Its definition, with necessary changes, was included in the Canadian Criminal Code Bill in 1892, but was struck out in Parliament to leave the definition to the common law.

Chief Justice McRuer in Vol. 27 of the Canadian Bar Review (1949), p. 1003, writes in part as follows:

> 'It is much easier to justify a fixed punishment for murder, with all the safeguards of review that have been thrown around the execution of the sentence, than a minimum sentence for theft of a motor vehicle. An arbitrary law of the latter character tends to corrupt the administration of justice by creating a will to circumvent it. Even parliament itself has shown such a disposition by the enactment of section 285 (c) of the Criminal Code which, although appearing to create a separate crime, defies the legal mind to distinguish it from theft properly defined.'

When the bill was introduced in Parliament the Minister of Justice referred to the Commission's views and also to the fact that minimum punishments for these three offences had been restored.[30] They remained in the bill as finally passed.

There were also some recommendations made by the Royal Commissioners that did not find acceptance in Parliament. Some instances are given elsewhere in this issue, namely, the proposal that the trial *de novo* on summary conviction appeals should be abolished, that such offences as sedition, bribery of judicial officers, rape and causing death by criminal negligence should not be required to be tried by jury, and that an appeal procedure should be provided where habeas corpus is involved. Two other illustrations should not be overlooked however. The first of these was a section designed to meet the situation created by a conflict in decisions[31] on the question whether the Crown or the court should determine how an offence will be dealt with when it is punishable either by indictment or on summary conviction. The Commission proposed that "where an offence is punishable by indictment or on summary conviction the prosecutor is entitled to elect whether the proceedings shall be by indictment or on summary conviction". A clause in the bill, in this form, was rejected by the special committee of the House of Commons.

A second proposal that failed to find favour, this time in the Senate, was a clause in the Commission's draft bill to provide that, where an accused is charged with theft of anything and it is established that he obtained it by false pretences, he may be convicted of obtaining by false pretences, and where he is charged with obtaining

[30] The Minister said: "In the bill now before this chamber minimum punishments have been restored in respect of offences relating to the Post Office and in respect of drunken driving or driving while ability is impaired. Upon a purely pragmatic basis we think it is better, in relation to these specific kinds of offences, to maintain the minimum penalties." (Hon. Stuart S. Garson, Q.C., Senate Hansard, May 13th, 1952, p. 210)

[31] *R.* v. *West* (1915), 25 C.C.C. 145 (Ont.); *R.* v. *McNabb* (1919), 32 C.C.C. 166 (Alta.); *R.* v. *Belmont* (1914), 23 C.C.C. 89 (Que.).

anything by false pretences and it is established that he stole it, he may be convicted of theft. This was an adaptation from the Indictments Act of the United Kingdom. It was clearly designed to cover the case where an indictment contained only one count, say theft, but the evidence at the trial proved the accused guilty only of obtaining by false pretences. It would have relieved the Crown from the necessity of including both counts in an indictment where it was not perfectly clear that the offence committed was one or the other. The clause was deleted on the ground that it was unnecessary.[32]

The enactment of the new code in 1954 and its coming into force in 1955 do not mean that the work of criminal code revision is at an end. The present law on such matters as the defence of insanity in criminal cases, capital punishment, corporal punishment and lotteries continues unchanged in the new code, although there was no lack of enthusiasm in Parliament for amendment. The special committee of the House of Commons, in its third and final report,[33] said:

> At various times during the course of its work, the following matters pertaining to the Criminal Law were directed to the attention of your Committee; namely:
>
> (a) The Defence of Insanity.
>
> (b) Capital Punishment.
>
> (c) Corporal Punishment.
>
> (d) Lotteries.
>
> Although these matters are well within the scope of the Terms of Reference, your Committee is of opinion that these questions are of such paramount importance that they could and should not be dealt with merely as incidentals to the consolidation or revision of the present Criminal Code embodied in Bill 93.
>
> The Committee upon the material before it was not prepared to recommend a change in the present law respecting the defence of insanity, lotteries and the imposition of punishment by whipping and by sentence of death, but unanimously has come to the conclusion, and so recommends, that the Governor General in Council give consideration to the appointment of a Royal Commission, or to the submission to Parliament of a proposal to set up a Joint Parliamentary Committee of the Senate and the House of Commons, which said Royal Commission or Joint Parliamentary Committee shall consider further and report upon the substance, and principles of these provisions of the law aforesaid, and shall recommend whether any of those provisions should be amen-

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[32] Proceedings of the Standing Committee on Banking and Commerce of the Senate, Tuesday, December 16th, 1952, p. 75.

[33] Minutes of Proceedings and Evidence of Special Committee on Bill No. 93, No. 7, p. 297.

ded and, if so, shall recommend the nature of the amendments to be made.

When the Minister of Justice was introducing the Criminal Code bill in the House of Commons in December 1953 he referred to this recommendation as follows:[34]

> We therefore are of the view that the proper course for us to recommend to this house is the appointment of a joint committee of both houses of parliament to inquire into and to report upon the question of whether the criminal law of Canada relating to (a) capital punishment; (b) corporal punishment or (c) lotteries should be amended in any respect and, if so, in what manner and to what extent.
>
> After careful consideration however, we reached the opinion that the defence of insanity to a charge involving criminal responsibility, as laid down by the law and applied by the courts, is a question involving expert legal and psychiatric knowledge in respect of which it seemed to us that it would be at least difficult in the first instance for a committee of laymen to reach a dependable opinion which would inspire confidence.
>
> To us therefore it seemed preferable that the question of the defence of insanity on a charge involving criminal responsibility should be studied by a royal commission made up of recognized experts in the fields of law and psychiatry. Then if it were considered helpful or appropriate the report of such a royal commission could be made available to the parliamentary committee in connection with its consideration of the subject of capital punishment.

Accordingly, a parliamentary committee was appointed under the joint chairmanship of Senator Salter A. Hayden, Toronto, and Mr. Don F. Brown, Member of Parliament for Essex West. It heard evidence from February until June 1954. The printed report of its proceedings runs to more than 800 pages, but even with that volume of evidence it finally reported to the house that "it will not be able to complete at the current session of this Parliament its inquiries into the matters referred to it for report and, accordingly, recommends: 1. That a corresponding Committee be established and appointed early in the next session of this Parliament to resume the studies and continue the inquiries initiated by this Committee. . . ".[35]

Two royal commissions were appointed in March 1954 to inquire into the law of insanity as a defence in criminal cases and the state of the law on criminal sexual psychopaths. Both are under the chairmanship of the Honourable J. C. McRuer, Chief Justice of the High Court of Justice for Ontario. The terms of reference of the

[34] The Hon. Stuart S. Garson, Q.C., House of Commons Hansard, Dec. 15th, 1953, p. 941.

[35] Minutes of Proceedings and Evidence, Joint Committee of the Senate and the House of Commons on Capital and Corporal Punishment and Lotteries, No. 18, Tuesday, June 15th, 1954, p. 749.

first are:[36] "To inquire into and report upon the question whether the criminal law of Canada relating to the defence of insanity should be amended in any respect and, if so, in what manner and to what extent". The terms of reference of the second are:[37] "To inquire into and report upon the question whether the criminal law of Canada relating to criminal sexual psychopaths should be amended in any respect and, if so, in what manner and to what extent". At the time of writing neither of the royal commissions has reported to the government, but both have held hearings in the Maritimes and in Western Canada.

Another indication of increased activity in the field of criminal law was the appointment by the Minister of Justice, late in 1953, of a committee to inquire into and report upon the policies and practices followed in the Remission Service of the Department of Justice and to make recommendations for improvement. This committee is under the chairmanship of Mr. Justice Fauteux of the Supreme Court of Canada.[38] The Remission Service of the Department of Justice is the branch of government that, under the direction of the Solicitor General, the Honourable W. Ross Macdonald, Q.C., administers the Ticket of Leave Act and advises on the exercise of the royal prerogative of mercy. The Ticket of Leave Act provides a procedure whereby a person undergoing imprisonment upon conviction for an offence under an act of Parliament may be released on parole before the expiration of his sentence. The committee visited institutions and held discussions with officials in the United Kingdom and a number of continental countries in the summer of 1954. At present they are visiting Canadian institutions.

The history of the rewriting of the Criminal Code, from the time the Royal Commission commenced its work until the new act finally received the royal assent, indicates that there was not always unanimity. The Commissioners themselves reported that "as to some

[36] The other members are: Dr. Gustave Desrochers, Assistant Superintendent of St. Michel Hospital at the City of Quebec; Her Honour Judge Helen Kinnear, County Court Judge for the County of Haldimand, Ontario; Dr. Robert O. Jones, Professor of Psychiatry at Dalhousie University, Halifax, Nova Scotia; and Joseph Harris, Esquire, of Winnipeg, Manitoba.

[37] The other members are: Dr. Gustave Desrochers, Assistant Superintendent of St. Michel Hospital at the City of Quebec, and Her Honour Judge Helen Kinnear, County Court Judge for the County of Haldimand, Ontario.

[38] The other members are: W. B. Common, Q.C., Director of Public Prosecutions for the Province of Ontario, J. Alex. Edmison, Q.C., Assistant to the Principal of Queen's University, Kingston, and Joseph McCulley, Warden of Hart House, University of Toronto.

of the provisions of the draft Bill there was a difference of opinion. While the draft Bill presented reflects in some respects the view of the majority only, no useful purpose can be served by indicating specifically the matters in which differences of opinion were not fully resolved."[39]

In Parliament, the discussion of particular provisions was frequently long and usually searching. Amendments followed no discernible pattern — they ranged from the insignificant to the fundamental. Some were exculpatory, others were punitive. Some were prompted by motives of magnanimity, others resulted from compromise. Nevertheless, whether in the Commission or in Parliament, two considerations were at all times paramount. These are illustrated by two extracts from the record.

The Minister of Justice, toward the end of his statement in the Senate when the bill was introduced in Parliament for the first time, said:[40]

> In closing, there is one general observation I would like to make. In opening I pointed out that the revision was not undertaken for the purpose of effecting changes in broad principles. Our system of criminal jurisprudence embodying as it does the high principles of the British system provides as fair and just a system as it is possible to devise to ensure that justice will be accorded to all. I am sure that those who have studied the Bill will agree that the Commission in its work, and this bill now before you, Sir, have maintained those principles.

Seven months later the bill was again in the Senate. While it was being considered by the Banking and Commerce Committee, Senator A. W. Roebuck referred to a conversation between himself and the Minister of Justice:[41]

> Last session I was having a discussion with him — I may repeat this story in the house, because I think it is good — and he said something about government policy. I replied 'I don't care a hoot for government policy; I want a good Code.' And the Minister's answer was 'A good Code is the government's policy.'

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[39] Report of Royal Commission on the Revision of the Criminal Code (Queen's Printer, Ottawa, 1954); also printed in Appendix, Senate Hansard, May 14th, 1952, p. 236.

[40] The Hon. Stuart S. Garson, Q.C., Senate Hansard, May 13th, 1952, p. 214.

[41] Proceedings of the Standing Committee on Banking and Commerce of the Senate, Dec. 15th, 1952, p. 29.

HISTOIRE DE LA CODIFICATION
(extrait de 'Codification, Reform and Revision, The Challenge of a modern Federal Criminal Code (1971) 4 DUKE L.J., 665-672.)

HISTORY OF CODIFICATION
(Excerpt from "Codification, Reform and Revision: The Challenge of a modern Federal Criminal Code (1971) 4 DUKE L.J., 665-672)

The subject of codification is intimately connected with the idea of a written law. It is part of the seemingly universal demand for a complete, intelligible, and authoritative statement of the precepts governing the relation of the individual's personal conduct and the state and the demand that, in a civilized community, every man should be assured of knowing what he may and may not do. Few did not call Caligula tyrant when he published his decrees on the columns of Rome too high to be read, in order that he might have more subjects to punish. The idea of a written law accessible to all is thus related to the idea behind our Bill of Rights. It is a part of the quest of a government of laws and not of men, and its history reaches into antiquity.[8]

*The Roman Law Background*

Roman law itself had a tradition of written law. Down to the codification of Justinian, the Twelve Tables (450 B.C.) constituted the theoretical foundation of the *ius civile*. Indeed, Justinian was not the first to envision a code. We are told that Julius Ceasar had among other plans that of making a digest of the law, reducing the *ius civile* to method, and bringing together the finest and best of the essential works on the law.[9] But it was not until 429 that Theodosius II appointed a commission to compile the imperial legislation after

of the American Law Institute on its Model Penal Code. *See generally* Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425 (1968). The overall problem of codification on the state level is considered in Hearings, *supra* note 5, pt. 2. Empirical data on its impact in Wisconsin (1956), Illinois (1962), and New York (1967) is contained in Hearings, *supra* note 5, pt. 2. *See also Symposium: Recodification of the Criminal Laws*, 4 J. LAW REFORM 425-85 (1971).

7. 3 THE COLLECTED PAPERS OF FREDRIC WILLIAM MAITLAND 439 (H. Fisher ed. 1911).

8. For a complete treatment of the history of codification, see 3 R. POUND 673-738, upon which I have heavily drawn.

9. *See* D. DUDLEY, THE CIVILIZATION OF ROME 101 (1962). On the background of the Twelve Tables as a victory for the rule of law of the *plebians* against the *patricians* during the Republic, see *id.* at 34.

Constantine. Although this project failed, a subsequent commission completed a work known as the Theodosius Code, which took effect in 439. It was not, however, what we know as a modern code, but was rather little more than a compilation of the law then in effect.[10]

The real work of codification in the Roman law did not begin until 528. Substantially one hundred years after Theodosius' first start, the emperor Justinian, at the insistence of his minister Tribonian, set out to codify the whole of the body of Roman law. A commission of ten, composed of judges, lawyers, and one law professor was appointed to prepare a complete revision of imperial legislation. Its product is known as the "Code," and it was completed in a year. Next, Justinian appointed another commission of sixteen, this time composed of judges, lawyers, and four law professors, to compile and systematize the text book learning of the Roman law—contained in the treatises of the great jurisconsuls and their commentaries. This was completed, rather hastily, in three years, and its product was known as the "Digest"—given legal authority in 533. Finally, an instructional text was prepared for students by a commission of three, Tribonian and two law professors. Known as the "Institutes," it, too, was given legal authority. Together with the subsequent legislation of Justinian, compiled into what we call the "Novels," these various parts are what we now speak of as Justinian's codification—the great *Corpus Juris Civilis*. Like the Theodosian Code, it was not what we would call a code today, but it was an enormous achievement. It put in systematic form the results of a thousand years of development of Roman law, and it has inspired other legal systems to this day.[11]

*The First Beginning: The Carolina*

In the modern world, the penal code of the German Emperor Charles V—the *Constitutio Criminalis Carolina*—which was promulgated in 1552, is the first important legislation that might be properly called a code. It was commonly known as the Carolina, even though the Emperor himself had little to do with its development and enactment.[12] A product of the revived interest in Roman law of the Italian jurists of the sixteenth century, the Carolina was primarily

10. *See* 3 R. POUND 681-87.

11. Gibbon aptly observed: "The vain titles of the victories of Justinian are crumbled into dust; but the name of the legislator is inscribed on a fair and everlasting monument." 2 E. GIBBON, THE DECLINE AND FALL OF THE ROMAN EMPIRE 322 (1932).

12. 3 R. POUND 687.

procedural in character. Yet it is chiefly renowned for introducing into continental legislation aspects of the general doctrines of the criminal law in connection with its treatment of defenses to crimes and its seminal examination of sentencing policy. Nevertheless, at the time of its consideration it was widely opposed,[13] and its acceptance was made possible only by the famous "Savings Clause," which provided: "In gracious consideration of the electors and the princes and the States [the Emperor did not] desire . . . to detract from their ancient and well established legal and customary usages."[14]

On the whole, the effect of the Carolina may be said to have been beneficial, particularly in the south of Germany, where it moved toward a more humanitarian system of punishments, placing checks on the otherwise virtually unlimited discretion of judicial officers. But its accompanying movement toward national uniformity came at a high price in the North, for the Carolina provided that a conviction could not be obtained upon mere circumstantial evidence. This led to the general introduction of torture to obtain sure proof by confession, a practice not widely followed in the North at the time of the Carolina's promulgation.[15]

*Codification in France*

Despite the early start of the Carolina in Germany, it was in France following the Revolution that codification played its most important role on the European continent. Reform, of course, antedated the Revolution in France.[16] It was in the platform of the Party of the Revolution, however, that the ideas of reform were best expressed: equality, individuality, mitigation of the severity of the penal system, the suppression of discretionary powers of judicial officers to define crimes and assess punishments, the abolition of crimes against religion and private morality, publicity for criminal

13. The City of Ulm, at the Town Assembly at Esslingren in 1523, for example, declared that the Code "tends solely to the disadvantage of the States of the realm . . . ." C. VON BAR, HISTORY OF CONTINENTAL CRIMINAL LAW 216 (1916).

14. *Id.*

15. *Id.*

16. Catherine II of Russia encouraged a number of individual philosophers and actually gave instructions for drafting a criminal code. Frederick the Great, influenced by the ideas of the Encyclopedists, began his reign by the abolition of torture. In France itself, Colbert, minister of Louis XIV (1667-70), projected a code, and a beginning was made in a series of royal ordinances. Two other attempts were made under Louis XV, but it was not until after the Revolution that these beginnings bore fruit. *See generally* C. VON BAR, *supra* note 13, at 315-19.

procedure, assistance of counsel, the end of the compulsory oath of the accused, and the institution of the jury. Montesquieu, Beccaria, and Voltaire all called for a reform of the prevailing system of arbitrary criminal justice, and their call was heeded in France.

In 1793, after the Revolution was underway and at the direction of the Convention, the process of reform began, and Cambaceres brought forth a draft civil code. Out of suspicion of its Roman law influence, however, it was rejected as not being revolutionary; it was felt that an attempt should be made to realize the philosophical idea of simple democratic laws accessible to all citizens and a vote was taken to appoint a committee of philosophers to draw up such a new draft. As might be expected, nothing came of this suggestion, and success had to await a new Justinian.

In 1800 Napoleon, as First Consul, took up the matter with characteristic vigor, appointing a new commission of four. Within four months, a new draft, following many of Cambaceres' proposals, was put together. This code, too, met with political opposition—politics has always played its part. Napoleon responded by reforming the legislative body and, in March, 1804, he obtained the successful approval of the code that today bears his name, and which has served as a model for other codes throughout the world. The civil code was soon followed by codes of civil procedure, commercial law, and, of course, penal law and criminal procedure.[17]

Montesquieu, Beccaria, and Voltaire had called for reform, but it was the ideas of Jeremy Bentham, the English utilitarian, that were used in its implementation. Bentham's works had been translated and published in France in 1802, and his doctrines undoubtedly formed the basis of the new penal code. Nevertheless, the code was at once reactionary and forward looking. Justice was not its aim, save in the requirement that penalties be proportionate. Instead, it rested solely on a need to punish which flowed from the concept of deterrence. Reform of the individual was not even considered. On the other hand,

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17. A commission, composed of Vieillard, Target, Oudard, Treillhard, and Blondel, had been appointed under the Consulate to consider the codification of the criminal law. Its report was first considered by the criminal courts, and key issues, formulated by Napoleon himself, were debated in the Council of State. Nevertheless, principally because of Napoleon's opposition to the jury, action was suspended for three years. Consequently, the code of criminal procedure was not enacted until 1808, while the penal code was not enacted until 1810. Neither went into effect, however, until 1811. The government waited until then to put them into effect, so that a newly reorganized magistrary would be ready to receive them. On the codification efforts of Napoleon, see generally J. HEROLD, THE AGE OF NAPOLEON 146-49 (1963).

its definition of crimes, while an improvement over the system of unlimited discretion of the Old Regime, still gave too wide a scope to criminality. Barbarous mutilations were also authorized, and its system of imprisonment was a fraud, for there were no penitentiaries appropriate for the various punishments. As a work of codification, though, the code was drawn with simplicity, clearness, and order; under its sentencing provisions, punishments were no longer absolutely fixed, and the important advance of a maximum and a minimum term of imprisonment was also introduced.

In the meantime, a reaction against legislative codification set in along with the disenchantment that followed the abandonment of the simplistic eighteenth-century notion that human reason was adequate and beneficial for every task. The Revolution of Reason had, after all, given way to the Reign of Terror and the rise of Napoleon himself. Indeed, after these events, few men of reason remained optimistic about the nature of man. In the place of the earlier optimism of the school of reason, the more realistic approach of the historical school arose, skeptical as to the efficacy of lawmaking and thoroughly disbelieving in the necessarily good results of codification or reform.

*The Highest Achievement: The German Civil Code*

General interest in codification after Napoleon did not revive in Europe until the last quarter of the nineteenth century, when the legislative activity of the German Empire led to a succession of new codes. The most important of these was the German civil code, drafted by a commission appointed in 1874, which consisted of six judges, three lawyers, and two professors. The code went through several drafts, and when a final draft was published, general criticism by all segments of German society was solicited. Every part of the code was subjected to searching criticism, and at the end of three years the controversial parts were brought together and a new commission—composed of eight judges, two lawyers, and one professor—was appointed to draft a code de novo, taking into consideration the criticism and experience obtained from the earlier edition.[18] When the civil code was published in 1896, to take effect in 1900, it was a product of twenty-three years of extraordinarily thorough work, and it serves as a model for the production of an enduring, satisfactory codification.[19]

18. 3 R. POUND 699.

19. For a more complete and fully documented account of the experience with the German Civil Code, see 3 MAITLAND, *supra* note 7, at 474-88.

*Codification at Common Law*

In contrast to this activity on the continent, codification of the common law was first proposed in 1614 by Francis Bacon, then Attorney General, who suggested that the penal laws should be reviewed by a commission "to the end that such as are obsolete and snaring may be repealed; and such as are fit to continue and concern one matter, may be reduced respectively into one clear form of law."[20] A series of political controversies, however, intervened and Parliament was dissolved before it could act on Bacon's plan. Bacon then persuaded the King to take the matter up by royal commission. The commission consisted of seven lawyers, including Sir Edward Coke, and although it found some six hundred statutes fit to be repealed, it again failed to affect reform because of political controversy. Consequently, the English common law, by the time of the American Revolution, had never experienced comprehensive codification. Unlike its Roman law rival after the time of Justinian, there was no single source from which its contours could be determined—it was, in Coke's famous phrase, a work of "artificial reason," the meaning of which had to be gathered by long study of statute and text.[21]

*Codification in the United States*

*Livingston's Code.* In the United States, during our formative years, agitation for codification was relatively widespread. It grew out of local hostility toward English institutions and English law in the period after the Revolution and the favorable attitude that existed toward things French that followed the advent of Jeffersonian democracy. It was also the product of the excellent reception given in the United States to the writings of Bentham, particularly by men like Edward Livingston of Louisiana,[22] the father of the American codification movement.

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20. 5 J. SPEDDING, THE LETTERS AND THE LIFE OF FRANCIS BACON 41 (1869).

21. The unsuccessful efforts of Stephen in England and the successful efforts of Macaulay in India, *see* 3 R. POUND 707-08, are omitted here not out of an attempt to depreciate their value, but because of a limitation of space in this section, and a desire to trace only the direct line of development in the United States.

22. In 1803, at the age of 39, Livingston, the son of a prominent New York family, was both the United States Attorney for New York and the Mayor of the City of New York itself. Following a yellow fever epidemic that year, Livingston suffered serious financial reverses. Consequently, he sold his possessions, resigned his positions, and left New York to seek a new life in Louisiana, where he quickly rose to become a leading member of the bar. *See generally* Hall, *Edward Livingston and his Louisiana Penal Code*, 22 A.B.A.J. 191 (1936).

On February 10, 1820, the General Assembly of Louisiana, in the tradition of French law, passed a historic act providing that there be prepared for the state a comprehensive code of criminal law founded upon the principle of crime prevention; the code was also clearly and explicitly to define all offenses in understandable language and to proportion the various punishments among the offenses defined.[23] Livingston, a scholar familiar with Roman, comparative, and the common law alike, received the appointment to prepare the new code. Although fire tragically and totally destroyed his first manuscript, Livingston started afresh and produced the work we know today in 1824. The code, however, was not adopted by the state legislature, largely because of the provincial opposition of the Louisiana bar—it was too far ahead of its time. Nevertheless, it gathered the unremitted praise of men like Bentham, Kent, Story, and Marshall. It also formed the basis of a proposed federal penal code later offered by Livingston as a representative in Congress from the state of Louisiana. But like the Louisiana legislature, Congress never acted on Livingston's proposed code.

*The Field Code.* While Livingston's work did not immediately bear fruit, David Dudley Field's work in New York did. In the New York Constitutional Convention in 1846, Field, another disciple of Bentham, urged a general code, and largely as a result of his advocacy the Constitution of 1847 provided for a commission to undertake procedural reform and codification of the law.[24] The commission was appointed in 1847, and by 1850 complete codes of civil and criminal procedure were submitted to the legislature. Although the code of civil procedure alone was adopted at that time, in 1857, the legislature again called for codification and Field was appointed commissioner. By 1865, penal, civil, and criminal codes had been produced, as well as civil and criminal procedure codes; but again Field's work met with less than full acceptance, as only the code of criminal procedure was adopted. The penal and criminal procedure codes, however, were widely adopted elsewhere.[25]

Seldom has one man achieved as much as Field, yet it must be acknowledged that the codes were by no means always well drawn, and often they presupposed too great a knowledge of pre-existing law.

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23. 1 The Complete Works of Edward Livingston on Criminal Jurisprudence 1 (1873).

24. N.Y. Const. art. 6, § 24 (1846).

25. *See* 3 R. Pound 709-13.

Again, as was the case with Livingston's efforts in Louisiana, the task of codification in New York proved to be more than one man could undertake, even with help and eighteen years of tireless work.[26]

26. For developments in state penal codification since the Field Code, see G. MUELLER, CRIME, LAW, AND THE SCHOLARS: A HISTORY OF SCHOLARSHIP IN AMERICAN CRIMINAL LAW (1969).

CODIFICATION (extrait de "La preuve", Juillet 1973, Commission de réforme du droit du Canada, no cat. J32 - 3/3/1975. Etude préliminaire).

## Codification

Un certain nombre d'avocats et de juges ont exprimé des réserves au sujet du besoin de réforme et de codification des règles de la preuve. Ils soutiennent qu'il n'est pas nécessaire de réviser sans délai la plupart des règles de la preuve et ils doutent qu'un code puisse aider à la réalisation de l'objectif que nous avons énoncé, soit celui de s'assurer que les règles de la preuve soient "facilement connues, compréhensibles et applicables d'une façon précise".

Il serait possible d'écrire tout un livre sur les avantages d'une codification, et de fait, les écrits sur le sujet sont nombreux. Toutefois, nous nous demandons si une discussion générale serait utile. Etant donné qu'il est impossible de décider a priori si une règle particulière de la preuve est facilement connue ou facile à déterminer, si elle mène, dans la plupart des cas, au meilleur résultat, si elle peut être élaborée d'une façon satisfaisante ou si un code est une chose réalisable, il semblerait préférable d'étudier à fond chaque règle de la preuve avant de formuler des commentaires y afférents. Nous reconnaissons que nous avons répondu à une question que nous voulions poser, en énonçant, dans la préface accompagnant nos quatre premiers documents préliminaires, notre objectif comme étant la codification de l'ensemble des règles de la preuve, particulièrement à cause de l'ambiguité de l'expression "code". Il aurait été plus juste de dire que nous entendions étudier les règles de la preuve, consulter les intéressés et déterminer ensuite quelles règles de la preuve devraient être révisées le cas échéant, et si ces règles devraient être incorporées dans un texte législatif s'appuyant sur la common law ou si elles devraient être incorporées dans un texte législatif remplaçant entièrement les principes de la common law. Bien sûr, la section de recherche ne voulait pas laisser entendre que du fait de l'adoption d'un code de la preuve, l'évolution jurisprudentielle du droit de la preuve ne pourra plus se faire; selon nous, l'adoption d'un code renfermant des dispositions souples est possible.

Certains de ceux qui ont formulé des critiques au sujet du concept d'un code de la preuve se préoccupaient des problèmes qui semblent inhérents à la rédaction de textes législatifs. Les articles que nous proposons ont pour but de fournir un résumé utile de nos recommandations et de permettre à ceux qui nous font connaître leur opinion de s'arrêter particulièrement à ces articles, et de faire des critiques y afférentes. Assurent-ils la réalisation des principes directeurs visés? Sont-ils complets? Sont-ils compréhensibles? Ces articles sont bien sûr rédigés dans une forme très préliminaire; de fait, de Commission de réforme du droit étudie actuellement tout le problème de la rédaction des textes législatifs. Toutefois, les commentaires formulés jusqu'à maintenant au sujet du projet de loi et des différentes interprétations possibles nous aideront énormément lorsque nous rédigerons de nouveau le projet de loi.

Dans la préface qui accompagnait nos premiers documents préliminaires, nous avons dit que bien que nous n'envisagions pas un code de la preuve énonçant en détail toutes les étapes du procès et de l'admission de la preuve, le code devrait être suffisamment complet pour servir de guide utile au tribunal, aux avocats et à toute personne intéressée aux procédures judiciaires. Actuellement, nous ne savons pas encore si nous recommanderons la codification des règles de la preuve, mais nous croyons que le code serait un moyen utile d'étudier les principales règles de la preuve et les rapports qu'elles ont entre elles. Nous croyions qu'il serait peut-être utile d'essayer d'ébaucher ces questions. L'expression "document préliminaire", sous les rubriques, dans la liste qui suit, indique qu'un document préliminaire a été publié sur le sujet et qu'il est possible de trouver des dispositions plus détaillées dans le document pertinent. La section de recherche étudie actuellement le oui-dire et les privilèges.

CODIFICATION (Excerpt from "The Evidence", July 1973, Law Reform Commission of Canada, Cat. no. J32- 3/3/1975. Preliminary study.)

## Codification

A number of lawyers and judges have expressed reservations about the need for reforming and codifying the law of evidence. They contend that there is no urgent need for a revision of most rules of evidence at the present time and doubt whether any code can achieve our stated objective of making the law of evidence "readily known, understandable and capable of precise application".

A book could be written on the advisability of codification, and indeed the literature on the subject is voluminous. However, we question whether a debate carried on at that level of generality would be meaningful. Since it cannot be decided *a priori* whether a particular rule of evidence is readily known or easy to determine, whether it leads in most cases to the best result, whether it is capable of satisfactory juristic development or whether a code is institutionally feasible, it would appear intellectually more sound to apply particular criticisms to each area of the law of evidence after that area has been thoroughly studied. We admit that we begged a question we wished to ask by stating our objective in the Preface to our first four Study Papers to be the codification of the whole of the law of evidence, particularly because of the ambiguity of the word "code". It would have been more accurate to have said that we intended to study the law of evidence, consult with interested persons, and then determine which, if any, rules of evidence should be revised, whether the rules should be embodied in a statutory scheme that builds on the common law, or whether the rules should be embodied in a statutory scheme that entirely pre-empts the principles of the common law. The project, of course, never intended that the adoption of a Code of Evidence would foreclose subsequent judicial development of the law of evidence; we do not regard a code with flexibility as a contradiction in terms.

Some of those who criticized the concept of a Code of Evidence did so because they were concerned about the problems that appear to be inherent in statutory drafting.

The draft proposed sections are included in our Study Papers to provide a convenient summary of our recommendations, to permit those responding to our papers to direct their attention and comments specifically to the sections, and to obtain criticism of the drafting. Does it embody our policy objectives? Is it complete? Is it understandable? These draft sections are, of course, very preliminary; indeed, the Law Reform Commission is presently studying the whole problem of legislative drafting. However, the comments on the drafting and the different possible interpretations of the sections that we have received so far will be extremely useful in any re-draft of the sections.

We said in the Preface to our first Study Papers that although we did not envisage a Code of Evidence detailing every step in the trial and in the admission of evidence, a Code should be comprehensive enough to serve as a helpful guide to the court, lawyers, and anyone interested in courtroom procedures. Although we are not sure now that we will recommend codifying the law of evidence, we think that a Code is a worthwhile device within which to study the major areas in the law of evidence and their inter-relationship. We thought it might be useful to outline tentatively those areas of study. The words "Study Paper" after the headings in the following outline indicate that a Study Paper has been issued on that subject and the detailed provisions can be found in the relevant Study Paper. The Project is presently working on hearsay and privilege.

## TROISIÈME PARTIE

## LA CODIFICATION ET LES AUTRES PAYS

## PART THREE

## CODIFICATION AND FOREIGN COUNTRIES

ANNEXE DOCUMENTAIRE C

DOCUMENTARY ANNEX C

# ANNEXE DOCUMENTAIRE C

# DOCUMENTARY ANNEX C

Doc. C-1 THE MODEL PENAL CODE, American Law Institute proposed official draft, July 2962;

Doc. C-2 PENAL LAW OF NEW YORK, State of New York, McKinney,s Consolidated Laws of New York, Book 39, 1981;

Doc. C-3 WECHSLER H., "Revision and Codification of Penal Law in the United States", (1983) 7 Dalh. L.J. 219-235;

Doc. C-4 NORTON J.E., "Criminal Law Codification: Three Hazards", (1978) 10 Loyola Un. of Chic. L.J. 61-74;

Doc. C-5 AVANT-PROJET DU CODE PENAL FRANCAIS, Commission de Révision du Code pénal, Ministère de la Justice, Juillet 1980;

Doc. C-6 REY-LOPEZ M., "Aspects et problèmes de la codification pénale à l'heure actuelle", (extraits) (1965) 20 Rev. de Sc. Crim. & de dr. Pén. Comp. 33-48;

Doc. C-7 MARSH N., "Law Reform in the United Kingdom: A new Institutional Approach", (1971) 13 William & Mary L.R. 263-285;

Doc. C-8 SUTTON K.C.T., "The Pattern of Law Reform in Australia (extraits, excerpts) (1969) Lect. at University of Queensland 4-6;

Doc. C-9 MUELLER G.O.W., "The German draft Criminal Code 1960, An Evaluation in Terms of American Criminal Law", (1961) Univ. of Ill. L. Forum 25-29.

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# PENAL LAW

**Laws 1965, Chapter 1030**

**Effective September 1, 1967**

**As amended to December 1, 1979**

AN ACT providing for the punishment of offenses, constituting chapter forty of the consolidated laws

Became a law July 20, 1965, with the approval of the Governor. Passed, three-fifths being present.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

# CHAPTER 40 OF THE CONSOLIDATED LAWS

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Herbert Wechsler*

# Revision and Codification of Penal Law in the United States

I am honored by the invitation to address you and happy to join in your tribute to the memory of Horace Read.

Dean Read was a pioneer in the perception that this is a legislative age, one of the greatest legislative eras of all time. He was concerned that lawyers be equipped to deal effectively with the ever growing corpus of the statutory law and he made valuable contributions to that end. Whether the larger legislative role in the development of law that he depicted and foresaw was a phenomenon that he regarded with approval or regret, I must confess I do not know. But speaking for myself, I do not hesitate to say that I regard it—and I have regarded it for almost half a century—as essential to maintain a living law.

Courts have, to be sure, an important role to play in the refreshment and refurbishing of legal norms, and I do not depreciate their contributions. But judicial capacity and function do not extend to the critical, creative reexamination and rethinking that our law so badly needs in many fields. Law must be regarded for this purpose through legislative rather than judicial eyes, for only at the legislative level is it possible, as Justice Roger J. Traynor of California put it long ago, "to write on a clean slate, in terms of policy transcending case or controversy, and to erase and rewrite in response to community needs."[1]

You in Canada surely have endorsed this point of view as the Law Commission concept has now taken hold both nationally and provincially. We in the United States agree increasingly in principle, though we are not disposed to place reliance on a single public agency but rather on a plurality of centers of initiative—private as well as governmental—to carry on what is assuredly an endless task. The progress we have made leaves much to be desired but there have been

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*Harlan Fiske Stone Professor of Constitutional Law Emeritus in Columbia University, Director of the American Law Institute, formerly Chief Reporter for the Model Penal Code. The seventh Horace E. Read Memorial Lecture delivered at Dalhousie Law School on October 29, 1981.

1. "Comment on Courts and Lawmaking" in *Legal Institutions Today and Tomorrow* (Paulsen ed. 1959) at 50.

significant achievements. I place in this category the revision and codification of the penal law in many of our jurisdictions.

I

In the United States, as in Canada, criminal law began with the reception of the English common law and antecedent legislation, plus a small addendum of colonial enactments. It was an obscure system, if indeed it may be called a system, fraught with technicalities and bloody in the punishments that it endeavored to impose on the unfortunates within its toils. Livingston and others made a valiant effort to refurbish this inheritance but on the whole their efforts were abortive. Legislation did reduce the number of the capital offenses but generally went no further than to fix the lesser penalties to be imposed. If it undertook a definition of offenses, the text was very likely to be drawn from Blackstone's repetition of judicial formulations. Principles, rules and doctrines measuring the scope of liability and of defenses were dealt with very rarely in the statutes and remitted consequently to the common law.

The first protest against this state of things to bear substantial fruit was that of David Dudley Field. His crusade for written law produced results in New York State, including a penal code proposed in 1865 and enacted in 1882. The draft was copied in a number of our western states, including California, where codification was a popular program a century ago. The Code was, however, a minor achievement, for Field was not at home in penal law and neither he nor his colleagues were disposed to confront its basic problems. Hence, their draft purported only to compile and organize existing statutes, with minor additions thought—sometimes erroneously—to restate the common law. Even the systematic arrangement that the Code developed was abandoned in New York in later years in favor of an alphabetical sequence, totally obscuring any sense of function or relation in the statutory norms.

The result, as I appraised the situation thirty years ago,[2] was that, notwithstanding the importance of the penal law to society and to the individual, we did not have an integrated, reasoned *corpus juris* in this field. Such statutes as we had were fragmentary, old, disorganized and even accidental in their coverage, far more important in their gloss than in their text, producing a medley of enactment and of common law that only local history explained. Basic doctrines governing the scope and measure of the liability had received scant

2. See "The Challenge of a Model Penal Code" (1952), 65 *Harv. L. Rev.* 1097.

attention from the legislature; and discriminations that distinguished minor crime from major criminality, or otherwise had large significance for the offender's treatment, rested all too often upon factors unrelated to the ends that law should serve.

The growth of the law had been, moreover, very largely fortuitous: the statutes of an older state simply transplanted to a younger, as from Georgia to Illinois or New York to the Dakotas; accretions formulated on an *ad hoc* basis by a multitude of most particular enactments, often inconsistent or redundant, responding to the pressures and excitement that arose from time to time; systematic inventories of the total system rarely made and if made totally abortive, as in Illinois in 1935. In the first half of this century, the only one of our jurisdictions that produced a reexamination and revision of its penal law was Louisiana in the Code of 1942, a project with immediate practical objectives that forced a limited conception of the goal to be achieved.

Moved by considerations of the sort I have set forth, the American Law Institute (a private organization of judges, lawyers and law teachers devoted to the clarification and improvement of the law) undertook, with the generous financial support of the Rockefeller Foundation, to formulate and draft what we boldly called a Model Penal Code. The method of procedure, as in all the projects of the Institute, was to designate reporters whose submissions were reviewed by an eclectic body of Advisers and thereafter by the Council of the Institute and by the Institute itself in its annual meetings. In nine successive years the Institute considered a succession of printed drafts presenting formulations covering different aspects of the Code, with a complete official draft considered and approved in 1962.

The hope that animated this substantial undertaking was not to achieve uniformity in penal law throughout the country, where, as you know, criminal legislation is primarily a state and not a national responsibility, reversing the Canadian position. The goal was rather to facilitate and stimulate the systematic reappraisal of existing systems, based upon a fresh consideration of the problems they must face and of their possible solutions. It was a hope that has been realized beyond our fondest expectations.

Revision work was started in a number of the states even as the Institute began its work, producing new codes in Wisconsin effective in 1956; Illinois in 1962; Minnesota and New Mexico in 1963; New York in 1967; Georgia in 1969; Kansas in 1970; Connecticut in 1971; Colorado and Oregon in 1972; Delaware, Hawaii, New Hampshire,

significant achievements. I place in this category the revision and codification of the penal law in many of our jurisdictions.

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Moved by considerations of the sort I have set forth, the American Law Institute (a private organization of judges, lawyers and law teachers devoted to the clarification and improvement of the law) undertook, with the generous financial support of the Rockefeller Foundation, to formulate and draft what we boldly called a Model Penal Code. The method of procedure, as in all the projects of the Institute, was to designate reporters whose submissions were reviewed by an eclectic body of Advisers and thereafter by the Council of the Institute and by the Institute itself in its annual meetings. In nine successive years the Institute considered a succession of printed drafts presenting formulations covering different aspects of the Code, with a complete official draft considered and approved in 1962.

The hope that animated this substantial undertaking was not to achieve uniformity in penal law throughout the country, where, as you know, criminal legislation is primarily a state and not a national responsibility, reversing the Canadian position. The goal was rather to facilitate and stimulate the systematic reappraisal of existing systems, based upon a fresh consideration of the problems they must face and of their possible solutions. It was a hope that has been realized beyond our fondest expectations.

Revision work was started in a number of the states even as the Institute began its work, producing new codes in Wisconsin effective in 1956; Illinois in 1962; Minnesota and New Mexico in 1963; New York in 1967; Georgia in 1969; Kansas in 1970; Connecticut in 1971; Colorado and Oregon in 1972; Delaware, Hawaii, New Hampshire,

Pennsylvania and Utah in 1973; Ohio, Montana and Texas in 1974; Florida, Kentucky, North Dakota and Virginia in 1975; Arkansas, Maine and Washington in 1976; South Dakota and Indiana in 1977; Arizona and Iowa in 1978; Missouri, Nebraska and New Jersey in 1979; and Alabama and Alaska in 1980. Of these 34 enactments it is fair to say that 33 (excluding only Wisconsin) were in some part influenced by the positions taken in the Model Code, though the extent to which particular formulations or approaches of the Model were adopted varied extensively from state to state. Georgia, Kansas, Minnesota, New Mexico and Virginia, for example, were content with much less ambitious efforts in their revisions than Delaware, Hawaii, Kentucky, New Jersey, New York, Pennsylvania, Oregon and Utah. What is important is, however, that the legislative process has at long last made a major effort to appraise the content of the penal law by a contemporary reasoned judgment — the prohibitions it lays down, the excuses it admits, the sanctions it employs, and the range of the authority that it distributes and confers.

Nor is the process over yet. Draft codes prepared in jurisdictions where enactment failed, notably California, Massachusetts, Michigan, Oklahoma, Tennessee and Vermont, may still be revived (though not I suppose in Idaho where the model was enacted effective January 1, 1972, but promptly repealed as of the following April 1, in response to the objection of the prosecutors). There are also pending bills in West Virginia and Wyoming that may pass.[3] Congress, moreover, has been working a full decade on the drafting of an integrated code of our federal criminal law, based on the 1971 report of the National Commission on Reform of Federal Criminal Laws. Many bills have been prepared and hearings held; and there may still be motion on the project.[4]

Finally, I should note that quite apart from the general revisions I have mentioned, there was much reliance on the Model Code in legislation addressed to specific problems, such as jurisdiction, double jeopardy, responsibility, attempts, theft, abortion, obscenity and capital punishment. There has also been a gratifying use of the material by courts as an interpretative aid and in restating or reshaping areas of the unwritten law. From July 1959 to April 1, 1981, drafts of the Model, tentative or final, were cited by our appellate courts in 1339 cases, 134 of them in Pennsylvania, 89 in New York, 86 in Massachusetts and 58 in the Supreme Court of the United States.

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3. The Wyoming Code has now been enacted, effective July 1, 1983.
4. I have added as an Appendix a chart describing the current status of criminal code revision in the jurisdictions of the United States. See *infra* at 233-235.

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Such is the magnitude of the legislative development in penal law that I wished to call to your attention. It is a movement that developed strength without a pre-commitment to particular reforms, its impetus essentially a moral sentiment: the need for reassurance that when so much is at stake for the community and for the individual, care has been taken to make law as rational and just as law can be. Would I be wrong in thinking that this is essentially the sentiment that animates the approach of your national Law Reform Commission to the revision of the Criminal Code, as expressed, for example, in its 1977 report (*Our Criminal Law*), which I regard as a distinguished document?

That our development was greatly facilitated by the Model Penal Code and its availability as a point of departure for revision work is not only my own opinion; that influence has been attested by the scholars and, indeed, by the revisers themselves. The Model Code, however, did not stand alone. The American Bar Association Standards Relating to the Administration of Criminal Justice, prepared during the years from 1964 to 1973 (and since republished in a revised edition), the 1967 report of the President's Commission on Law Enforcement and the Administration of Criminal Justice (*The Challenge of Crime in a Free Society*), the support in a later administration of the National Advisory Commission on Criminal Justice Standards and Goals, the establishment by Congress of the Law Enforcement Assistance Administration and its willingness to provide substantial grants in aid for penal law revision—yielded in combination supporting stimuli of great significance. Moreover, once the Illinois and New York codes had been enacted in 1961 and 1965, they functioned most effectively as models for the work in other jurisdictions, mitigating the political hazard of reliance on a source that might be denigrated as theoretical or academic. As the process advanced from year to year, traditional habits of legislative imitation were thus accorded ever wider scope, facilitating new enactments.

## II

I come now to the hardest portion of my task, to give some indication of the content of the codes and of the progress I believe they have achieved. Their variations in the treatment of specific subjects, not to speak of the details of legislative language, are, of course, too numerous to canvass in a lecture. That they merit more attention than they thus far have received from legal scholars is quite clearly indicated by the three-volume study our Institute has published on the definitions of specific crimes (Model Penal Code and

Commentaries, Part II, 1980) and will be demonstrated further by forthcoming volumes on Part I, the general provisions. I shall attempt no more than to describe some of the common characteristics of the codes, adding as time permits selected illustrations of their treatment of important problems.[5]

Following the example of the Model Penal Code, the new codes are organized in general and special parts, with the general much more extensive in its treatment of pervasive problems than was heretofore the case in our tradition, and the special, embodying the definitions and gradations of specific crimes, organized functionally in terms of the interests sought to be protected or the evils sought to be averted by the penal law.

In the Model Code the general provisions begin with a preliminary article addressed to purposes and principles of construction, territorial applicability, the classification of offenses, time limitations, multiple prosecutions and double jeopardy, the burden of proof and presumptions. Article 2 attempts to formulate general principles of liability and exculpation, including the modes of culpability, with emphasis upon the mental element; causality; strict liability; complicity; the criminal liability of corporations and associations and of persons acting or responsible for acting on their behalf; the defensive significance of mistake, intoxication, duress, consent, military orders and entrapment. Article 3 deals with the general principles of justification for conduct that would otherwise be criminal, including broad provisions on the choice of evils and privileged instrusions upon property and narrower provisions on the use of force in self-protection, the protection of other persons and of property, in crime prevention, law enforcement and the discharge of various responsibilities for care, discipline and safety. Article 4 is addressed to the significance of mental disease or defect and immaturity in excluding criminal responsibility, along with the procedural problems presented when such issues have been raised. Article 5 deals with inchoate crimes: attempts, solicitation and conspiracy and the prohibited possession of offensive weapons or the instruments of crime. Article 6 delineates the authorized methods of disposing of offenders on conviction, including fines, suspension of sentence, probation and imprisonment, fixing the limits of all prison sentences for the several grades and degrees of offenses that the code employs. Article 7, finally, sets

5. For earlier but somewhat more extensive descriptions, see, *e.g.*, Wechsler, "Codification of Criminal Law in the United States: The Model Penal Code" (1968), 68 *Colum. L. Rev.* 1425, "The Model Penal Code and the Codification of American Criminal Law" in *Crime, Criminology and Public Policy* (R. Hood ed. 1974) at 419.

forth criteria for withholding sentence of imprisonment, placing the defendant on probation, imposing fines, ordering imprisonment for an extended term, and multiple sentences for multiple offenses. It also deals with many aspects of sentencing procedure.

Part II of the Model contains the definitions of specific crimes. It does not purport to be exhaustive but there is a full treatment of crimes involving danger to the person, such as homicide, assault, reckless endangering, threats, kidnapping, false imprisonment and criminal coercion; the sexual offenses; the major offenses against property, including arson, criminal mischief, burglary, robbery, theft, forgery and fraudulent practices; offenses against the family, such as bigamy, incest, abortion, endangering child welfare and persistent non-support; offenses against public administration, including bribery and corrupt influence, perjury and other falsifications, obstructions of governmental operations and abuse of office. Lastly, offenses against public order and decency, like riot, disorderly conduct, public drunkenness, crimes of desecration and the violation of privacy, as well as lewdness, prostitution and obscenity are dealt with in detail.[6]

The codes reflect to a remarkable degree these concepts of organization and coverage, with the result that there is now in place an elaborate set of general provisions, formulating elements of liability and grounds of exculpation deemed to qualify or supplement the definition of specific crimes, save as exceptions may be made on special grounds; and there is a full legislative treatment of the definitions and gradations of the common crimes.

Not all the codes, I hasten to make clear, address all the problems dealt with in the Model but most of them, I think it fair to say, confront most of the issues that the Model undertook to draw. This works a quite dramatic change, I hardly need to say, in the content of our statutory law.

## III

Passing beyond these general descriptions, I wish, before concluding, to present the substance of some common features of the codes involving major substantive improvements, drawing examples from both general and special parts, within the limits of my time.

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6. Parts III and IV of the Model Code dealing with correctional matters and the organization of a Department of Correction address problems that are not upon the whole treated in the new codes and I, therefore, pass their content by in this discussion.

*I. Mens Rea and the Modes of Culpability.*

It is, I think, the general opinion that the most dramatic breakthrough in the general provisions inheres in the widespread acceptance of the treatment of *mens rea* in Article 2 of the Model Code.

This analysis begins by classifying the material objective elements of crimes as involving either the nature of the actor's conduct (shooting a gun, driving a car, writing a check) or the attendant circumstances (a crowded street, a drunken driver, an empty bank account) or a result of conduct (causing death, injury, deception or financial loss). The problem of the mental element arises obviously with respect to each of the objective elements that give the actor's conduct its offensive quality and are included for that reason in the definition of the crime or that negate an excuse or justification that would otherwise obtain.

After declaring that "a person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable," the Code defines the further elements of culpability in terms of only four familiar concepts: purpose, knowledge, recklessness and negligence. The minimal statement is that one may not be convicted of a crime "unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense." This formulation recognizes that the required mode of culpability may not only vary from crime to crime but also from one to another material element of the same offense, meaning by material element, you will recall, those aspects of conduct, attendant circumstances or result that give behavior its offensive quality. In homicide, for example, the law may require proof that the defendant killed purposely or knowingly to establish that a murder was committed. But if self-defense is claimed in exculpation, it may suffice to negative the defense that the actor's belief in his peril did not rest on reasonable grounds. When and if that is so, negligence is all the law requires with respect to the existence of attendant circumstances precluding the defense—which in this context it is useful to treat as an element of the offense.

One of the virtues of this method of analysis is that it invites attention to the wisdom of such stark distinctions as to culpability respecting different elements of an offense. The Code makes some attempt to promote uniformity upon this issue by providing that when "the law defining an offense prescribes the kind of culpability that is sufficient for" its commission "without distinguishing among the material elements thereof, such provision shall apply to all the

material elements of the offense, unless a contrary purpose plainly appears." It also states what we believed to be the common law position that when "the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto." The legislature in defining crimes may thus draw such distinctions among offenses or the elements thereof as it deems wise, but if it fails to articulate decisions of this kind, the Code prescribes the norms that shall prevail.

The basic culpability conceptions are defined. The distinction between acting purposely and knowingly is very narrow, since awareness that the requisite external circumstances exist is a common element. But action is not deemed purposive with respect to the nature or results of an actor's conduct, unless "it was his conscious object to engage in conduct of that nature or to cause such a result." Though acting knowingly suffices to establish liability for most offenses, there are situations where the law requires purpose, such as treason, complicity, attempt, solicitation and conspiracy, to cite but few examples. Purpose is, moreover, frequently employed in determining the gravity of crimes for purposes of sentence.

Recklessness, as the Model Code defines the term, involves conscious risk creation. It resembles acting knowingly in that a state of awareness is involved but the awareness is of risk, short of practical certainty with respect to a result or deliberate blindness to a high probability with respect to the existence of a fact. The risk consciously disregarded must be "substantial" and must, moreover, be "unjustifiable", since even substantial risks often may be taken properly, depending on their nature and the character and purpose of the conduct. A surgeon may perform an operation though he knows it very likely to be fatal, if he thinks that it affords the patient's only chance. The ultimate question put, when all is weighed, is whether the actor's disregard of the known risk "involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." That is a standard that can be given further content only in its application to a concrete case.

Negligence is distinguished from acting purposely, knowingly or recklessly in that it does not involve a state of awareness. It is the case where the actor "should be aware of a substantial and unjustifiable risk that a material element [of an offense] exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross

deviation from the standard of care that a reasonable person would observe in the actor's situation." Gross deviation is again the ultimate standard that can gain further content only in its application to a concrete case. Much more than the "ordinary negligence" of tort law is, of course, involved. Even so, the Model accepts negligence as sufficient for liability only in exceptional cases where maximum preventive effort is essential, as in homicide or causing bodily injury, or where it alleviates strict liability or otherwise effects a mitigation in the rigor of the antecedent law.

As I reflect upon this recitation, I am appalled, as you must be, by its inordinate abstraction. I say, however, in defense that compared to the judicial exegesis of *mens rea* that these formulations were intended to supplant, with its plethora of words and phrases of the most uncertain meaning—the Code concepts are a model of clarity and of precision. Their adoption now with only minor verbal variations in the penal codes of half of our states and their inclusion in all of the federal proposals provide assurance that they have not been too abstruse for sympathetic legislative comprehension, that, indeed, they present a viable statutory treatment of this ancient and elusive problem.

*2. Strict Liability.*

The emphasis on culpability does not, of course, preclude the legislature from insisting on strict liability in given areas, as there is a strong tendency to do with respect to such matters, for example, as mistake respecting the age of the victim when that is material in a sexual offense. It can be said, in general, however, that the new codes have responded to the efforts in the Model to cut down upon such areas. They have unhappily been less responsive to the frontal attack that the Model mounted on strict liability in regulatory statutes located outside the penal code but employing penal sanctions.

The Code proposal is, in substance, that unless negligence at least is proved, a violation of the statute may be dealt with only by a fine or civil penalty or forfeiture, not by a sentence of probation or imprisonment; and the conviction does not constitute a crime. The result would be quite similar to that favored by the Canadian Law Reform Commission in recommending that "every offence outside the Criminal Code admits of a defence of due diligence" (*Our Criminal Law*, at 32-33), except that the burden of persuasion would not necessarily be shifted to the defendant. No more than a handful of the codes have thus far accepted this solution. Most go no further than to provide, as New York does, that a "statute defining a crime, unless clearly

indicating a legislative intent to impose strict liability" shall "be construed as defining a crime of mental culpability."[7] This is a declaration that could have a large effect, however, since statutes of this kind are typically silent with respect to any culpability requirement, simply condemning doing or not doing this or that. I see signs in our decisions now that judicial hospitality to strict liability is very much on the decline. With deregulation on the rise, legislative hospitality may be declining too.

It is surely not a subtle point to insist that the law of crime cannot be insulated from the demands of justice with respect to allocating blame and punishment. The court that pronounces a conviction must be able to declare that the defendant acted wrongly in the conduct held to constitute a crime. This is a matter of intrinsic fairness to the person who is judged, but it is more than that as well. The law promotes the general security by building confidence that those whose conduct does not warrant condemnation, those who seek and take care to live within the law, will not be condemned as criminal. This is a value of enormous moment in a free society. It is intrinsic to the sense of justice that alone gives moral force to the proscriptions of the penal law.

*3. Other General Provisions Relevant to Culpability.*

The point of view I have expressed animates other general provisions of the codes that time does not permit me to discuss. I have in mind especially the widespread recognition of a defense based upon reasonable reliance on official statements of the law; the general insistence upon purpose as the mode of culpability in complicity rather than an objective test of probability; the mitigation of corporate liability when neither the board of directors nor a high managerial agent is involved in the commission of the offense; the extension of the defense of duress to all offenses, measured by whether "a person of reasonable firmness" in the actor's situation "would have been unable to resist" the pressure; the articulation of a general defense of entrapment; the introduction in some of the codes of a broad justification based on a necessary choice of evils, coupled in some jurisdictions with insistence that belief in the existence of justifying circumstances should suffice to exculpate, unless the belief is recklessly or negligently formed and recklessness or negligence, as the case may be, establishes the culpability required for commission of the offense charged; the effort to impose reasonable limits on the use of deadly

[7] N.Y. *Penal Law* 15.15 (2).

force in law enforcement, especially to effect an arrest; the reformulation in more than half our jurisdictions of the criterion determining the significance of mental disease or defect as a ground of exculpation (in terms of lack of "substantial capacity" to appreciate the wrongfulness of conduct or to conform conduct to the requirements of law); the broadening of the concept of criminal attempt, subject to the introduction of a defense of voluntary renunciation; the limitation of criminal conspiracy to cases where the object is commission of a criminal offense and the introduction there as well of a defense of voluntary renunciation.

In net effect, I submit that these formulations and reformulations relate liability to culpability more fairly and precisely than the antecedent law. That is in my book a significant advance.

## IV

I have spoken at such length about the general provisions because they are the most distinctive innovation of the new codes but there is much of interest in the special parts as well, to which a brief allusion should be made.

The treatment of homicide has been reworked in most of the revisions, employing the three categories of murder, manslaughter and negligent homicide, with murder often differentiated into two degrees. As to the scope of criminality, the most important change is the abandonment in many jurisdictions of the rule that any death causally attributable to an otherwise unlawful act is at least manslaughter and the narrowing, or in a few cases the elimination, of felony murder. With respect to the grading of criminal homicide, the most important change is the extensive abandonment of deliberation and premeditation as determinants of gravity in favor of a broad criterion for reducing an intentional homicide from murder to manslaughter if it is committed "under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse," judging the matter "from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be." The further complications in states striving to maintain a capital sanction in the face of shifting constitutional adjudication would demand another lecture to describe.

I should add that most of the revisions now include a supplementary provision of the Model Code defining an offense of "reckless endangering", committed if a person "recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury." This generalization, with the definition of

recklessness carrying the main burden of its content, suffices typically to supplant a multitude of more particular enactments addressed to particular types of conduct or particular risks, with the inevitable gaps that they entail.

In the area of sex offenses, some twenty of our jurisdictions have thus far followed the example of the Model Code in excluding private consensual conduct from the scope of criminality, unless children are victimized or there is coercion or other imposition. Many jurisdictions had, moreover, greatly relaxed the condemnation of abortion, though only Hawaii and New York had gone as far in this regard as Britain in the Act of 1967, before we all discovered that a course that we thought wise in point of policy was a constitutional imperative.

Finally, I do not hesitate to say that even in the most familiar areas, rape, kidnapping, arson, property destruction, burglary, robbery, extortion, theft and criminal fraud, a study of the codes will demonstrate how large an opportunity obtained for disciplined reformulation, reducing abusive overkill, eliminating wild proliferation by simple consolidation, filling gaps that had developed through the years, and reconsidering distinctions, especially between the major crimes and minor criminality. It is modest judgment to aver that great improvements have been made.

## V

I have reserved for last a comment on the way the codes have dealt with the most difficult and most intractable of all the problems of this field, the sentencing and treatment of offenders.

The Model Penal Code had recognized how totally anarchical our legislation was in every one of our jurisdictions in its prescriptions as to sentence, especially the length of prison terms that might be imposed upon conviction, the availability and size of fines, the permissibility of dispositions that do not involve detention, like probation or suspension or conditional discharge, the determinants of eligibility for release before the expiration of a prison term, either because of earned reductions or upon parole.

The anarchy was most extreme in relation to prison terms where it was not uncommon for the statutes to employ more than a dozen different minima and maxima, mandatory or permissive, attached in each case to the provision that defined the crime. The Code offered a remedy upon this point that proved quite workable in drafting, namely, to establish for the purposes of sentence a small number of categories to one of which every offense or degree of offense would be

assigned, with the nature of the disposition authorized the same for each offense within the category. The draftsmen of the Model thought that three degrees of felony, with maximum prison terms of life, ten years and five were all that were required for the serious offenses, with one year and thirty days for lesser crimes, misdemeanors and petty misdemeanors.[8]

The choice of three and two involved, of course, an element of arbitrary judgment. The crucial point was to confine the variation within reasonable bounds.

Almost all of the new codes employed this plan in drafting, though they differed markedly as to the number of the sentencing categories employed. New York, for example, used five classes for the serious offenses rather than three, primarily I think for added scope in plea bargaining, but the result was not unsuitable in my opinion.

There was, however, some acceptance of other positions of the Model Code, such as that judicial discretion to forego a sentence of imprisonment should be unfettered except, perhaps, in murder; that minimum prison sentences should not be mandated by statute but should rather be discretionary with the court, so long as a substantial spread between the minimum and maximum obtains; that all releases ought to be upon parole; that criteria should be developed and enacted calling on the courts to forego sentence of imprisonment unless it is adjudged essential in a given case for a reason that the Code declares to be sufficient, including to avoid depreciation of the offender's crime; and that parole criteria should call for release when eligibility had been attained unless retention is believed to be essential for a reason that the Code declares to be sufficient, including that release at that time would depreciate the seriousness of the crime.

I say that there was some acceptance of these positions and would have asserted with some confidence ten years ago that the acceptance would increase. I make no such prediction now. The protest against disparity in sentences, the miserable state of most of our penal institutions, the growth in the incidence of violent crime, the revolt against the paternalism inherent in the rehabilitative goal, the resurgence of retributive emotions clothed in philosophical pretensions have produced counter-forces in our culture the ultimate results of which are unforeseeable in my opinion. Certain it is that a number of our jurisdictions have moved backwards towards determinate sentences with a large element of legislative mandate; that parole has been

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8. See generally Wechsler, "Sentencing, Correction and the Model Penal Code" (1961), 109 *U. Pa. L. Rev.* 465.

abolished in some jurisdictions and now struggles to survive; that individualization, with all the benevolence that it implies, is charged to be tyrannical. Meanwhile, prison sentences grow longer, the prison population rises and resources for its maintenance decline!

I view none of this with equanimity but I expect the pendulum to swing again in a more hopeful direction. I envy those of you who are still young enough to witness this revival when it comes.

## *Appendix*

*Status of Substantive Penal Law Revision*†

*I. Revised Codes: Effective Dates:* (38)

- * Ala. Code tit. 13A (1978 Special Pamphlet: Criminal Code); 1/1/1980.
- * Alas. Stat. tit. 11 (Oct. 1978 Pamphlet); 1/1/1980.
- Am. Samoa Code tit. 15 (1979 Cum. Pocket Supp.); 1/1/1980.
- * Ariz. Rev. Stat. Ann. tit. 13 (1978); 10/1/1978.
- * Ark. Stat. Ann. tit. 41 (1977 Replacement Vol. 4); 1/1/1976.
- * Colo. Rev. Stat. Ann. tit. 18 (1978 Replacement Vol. 8); 7/1/1972.
- Conn. Gen. Stat. Ann. tit. 53a (West 1972); 10/1/1971.
- * Del. Code Ann. tit. 11 (1979 Replacement Vol. 7); 7/1/1973.
- Fla. Stat. Ann. tit. 44 (West 1976); 7/1/1975.
- * Ga. Code Ann. tit. 26 (1978); 7/1/1969.
- * Haw. Rev. Stat. tit. 37 (1976 Replacement Vol. 7A); 1/1/1973.
- * Ill. Ann. Stat. ch. 38, § 1-1 (Smith-Hurd 1972); 1/1/1962.
- Ill. Unified Code of Corrections, Ill. Ann. Stat. ch. 38, § 1001-1-1 (Smith-Hurd 1973); 1/1/1973.
- * Ind. Code Ann. tit. 35 (Burns, 1979 Replacement Volume); 10/1/1977.
- Iowa Code Ann. tit. 35 (Criminal Code), tit. 37 (Corrections Code) (West 1979); 1/1/1978.
- * Kan. Stat. Ann. ch. 21 (1974); 7/1/1970.
- * Ky. Rev. Stat. Ann. chs. 500-534 (Bobbs-Merrill, 1975 Replacement Vol. 16); 1/1/1975.
- La. Rev. Stat. Ann. tit. 14 (West 1974); 1942.
- * Me. Rev. Stat. Ann. tit. 17-A (1981 Pamphlet); 5/1/1976.
- Minn. Stat. Ann. ch. 609 (West 1964); 9/1/1963.
- * Mo. Ann. Stat. tit. 38 (Vernon 1979); 1/1/1979.
- * Mont. Code Ann. tit. 45 (1981); 1/1/1974.
- Neb. Rev. Stat. ch. 28 (1979 Reissue of Vol. 2A); 1/1/1979.
- * N.H. Rev. Stat. Ann. tit. 62 (1974); 11/1/1973.
- * N.J. Stat. Ann. tit. 2C (West, 1981 Special Pamphlet); 9/1/1979.

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† as of April 1982 (54 jurisdictions). This chart was prepared and is maintained by Rhoda Lee Bauch, The American Law Institute, 435 W. 116 St., New York City 10027.

* indicates publication of substantial commentary

N.M. Stat. Ann. ch. 30 (1978); 7/1/1963.
* N.Y. Penal Law (McKinney 1975); 9/1/1967.
N.D. Cent. Code tit. 12.1 (1976 Replacement Vol. 2); 7/1/1975.
* Ohio Rev. Code Ann. tit. 29 (Baldwin, Oct. 1979 Replacement Unit); 1/1/1974.
Ore. Rev. Stat. tit. 16 (1977 Replacement Part); 1/1/1972.
* Pa. Cons. Stat. Ann. tit. 18 (Purdon 1973); 6/6/1973.
* P.R. Laws Ann. tit. 33 (1980 Cum. Pocket Supp.); 1/22/1975.
S.D. Codified Laws tit. 22 (1979 Revision); 4/1/1977.
* Tex. Penal Code Ann. (Vernon 1974); 1/1/1974.
Utah Code Ann. tit. 76 (1978 Replacement Vol. 8B); 7/1/1973.
Va. Code tit. 18.2 (1975 Replacement Vol. 4); 10/1/1975.
* Wash. Rev. Code Ann. tit. 9A (1977); 7/1/1976.
* Wis. Stat. Ann. tit. 45 (West 1958); 7/1/1956.
* Wyo. Criminal Code of 1982, ch. 75, 1982 Wyo. Sess. Laws —; 7/1/1983.

*II. Current Substantive Penal Code Revision Projects:*

*A. Revision Completed; Not Yet Enacted:* (5)
* District of Columbia (Basic Criminal Code being reviewed by Council of the District of Columbia)
* Massachusetts (Special Legislative Committee preparing new bills)
* Michigan (Second Revised Criminal Code, H.B. 4842, introduced 9/18/1979, under study by Joint Senate/House Committee)
* United States (S. 1630, 97th Cong., reported with amendments by Senate Judiciary Committee 1/25/1982; H.R. 6915 reported favorably in 96th Cong. by House Judiciary Committee reintroduced in 97th Cong. as H.R. 1647 and referred to House Judiciary Committee)
* West Virginia (Proposed Code, printed in bill form with commentary, being studied by full Judiciary Committees of Senate and House; Hearings to be held prior to introduction in 1983 Legislature)

*B. Revision Under Way:* (2)
* North Carolina, South Carolina (second effort)

*C. Contemplating Revision:* (2)
Mississsippi, Rhode Island

*III. Revision Completed but Abortive:* (6)
* California (S.B. 27 not reported out of Assembly Committee on Criminal Justice in 1977)
Idaho (Idaho Penal & Correctional Code tit. 18, enacted effective 1/1/1972 but repealed effective 4/1/1972)
* Maryland (Partial enactments: responsibility; theft and related offenses. Further submission suspended.)

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* indicates publication of substantial commentary

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Oklahoma (S.B. 46 not reported out of Senate Committee on Criminal Jurisprudence in 1977)
* Tennessee (S.B. 600 reported in 1977 to have failed in Committee)
* Vermont (Bill passed by House as amended; reported in 1976 to have failed in Senate Judiciary Committee)

*IV. No Over-All Revision Planned:* (1)

Nevada (recodification with minor changes enacted 1967)

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* indicates publication of substantial commentary

# COMMENTARY

## Criminal Law Codification: Three Hazards

JERRY E. NORTON*

While Europeans have a long tradition of legal codification, running back to the Code Napolean of 1804,[1] in the United States true codification is still a relatively new notion. Lack of familiarity with codification still causes problems in jurisdictions adopting codes.

No serious codification proposal was made in the United States until David Dudley Field drafted a New York civil code in the late nineteenth century. The resulting Field-Carter controversy remains a classic in the debate over codification.[2] While the debate concerning the desirability of adopting a comprehensive general code continued, more humble codification of particular areas of the law, especially in commercial fields, had a clear beginning at the turn of t' twentieth century. Early codifications of negotiable instrument l... and sales law culminated in the middle of the twentieth century with the most ambitious American codification to date, the Uniform Commercial Code.[3]

As the popularity of the concept of codification grew in the commercial law area, inevitably its feasibility in other areas of law was also considered. In the early 1950's the American Law Institute began its efforts toward the development of a codification of the criminal laws,[4] which resulted in the Model Penal Code in 1962.[5] While the work of the American Law Institute [ALI] was in progress, committees in Wisconsin and Illinois were working to propose criminal codes adopted in 1955 and 1961 respectively.[6] The Illinois

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1. For a brief history of European codification, *see* J. MERRYMAN, THE CIVIL LAW TRADITION, 27-34 (1969).

2. For a discussion of the Field-Carter controversy and for further citations, *see* E. PATTERSON, JURISPRUDENCE, 421-25 (1953).

3. For a brief history of the codification movement in commercial law, *see* R. SPEIDEL, R. SUMMERS, & J. WHITE, TEACHING MATERIALS ON COMMERCIAL TRANSACTIONS, 16-26 (1st ed. 1969).

4. For discussions of the early organizations of this project, *see* Wechsler, *The Model Penal Code Project of the American Law Institute*, 20 U. KAN. CITY L. REV. 205 (1951-52), and Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1952).

5. For a discussion of some of the high points and limitations in the finished product, *see* Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594 (1963).

6. *See* WISC. STAT., §§ 939 to 949.18 (1975); ILL. REV. STAT. ch. 38, §§ 1-1 to 90-11 (1977);

Criminal Code utilized some of the concepts proposed in the then incomplete Model Penal Code.[7] Since 1962, a number of states have adopted criminal codes patterned to a greater or lesser degree on the American Law Institute model.[8] The modern trend toward codification of criminal laws makes a clear understanding of the term "code" particularly important.

THE MEANING OF "CODE"

The terms "code" and "codification" are sometimes misused as synonyms for "statute" and "statutory." Thus misused, the terms "code" and "codification" are frequently attached to that which is only a compilation of various statutes passed by the legislature at different times and having potentially different meanings from one another. A true code, however,

> is a pre-emptive, systematic, and comprehensive enactment of a whole field of law. It is pre-emptive in that it displaces all other law in its subject area save only that which the code excepts. It is systematic in that all of its parts, arranged in an orderly fashion and stated with a consistent terminilogy, form an interlocking, integrated body, revealing its own plan and containing its own methodology. It is comprehensive in that it is sufficiently inclusive and independent to enable it to be administered in accordance with its own basic policies.[9]

This definition emphasizes that a code is an integrated whole, the feature that most distinguishes it from a compendium of independent statutes. It suggests that the user of a code must first search for meaning within the code itself; resort to common law and other secondary authority comes only after this initial step has been pursued. Although different codifications vary as to how systematic and comprehensive they are, the principle of comprehensive treatment remains the same.

THE HAZARDS

Because the codification movement is still new in American law

COMMITTEE FOREWORD, TENATIVE FINAL DRAFT, PROPOSED ILLINOIS REVISED CRIMINAL CODE (1961).

7. *See* COMMITTEE FOREWORD, TENTATIVE FINAL DRAFT, PROPOSED ILLINOIS REVISED CRIMINAL CODE (1961).

8. A proposal is currently pending in Congress for the codification of federal criminal laws. S. 1437, 95th Cong., 1st Sess. (1977). This proposal appears to have departed significantly from the Model Penal Code.

9. Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L. F. 291, 292. *See also* People v. Hairston, 46 Ill. 2d 348, 356, 263 N.E.2d 840, 846 (1970): "The entire Criminal Code and each of its sections must be considered in determining the legislative intent. . . ."

it is not surprising that some hazards remain to be uncovered. Certain problems in criminal law have long been apparent. For example, the codifier must consider whether or not the definition of the crime, defense, or principle of criminal liability will be politically acceptable to the legislative body which is to adopt it. The drafter of a criminal code also continuously faces the hazard that his verbal articulation of the crime, defense, or principle of criminal liability might contain an undesired loophole or extension. However, these hazards have been recognized since the very beginning of the codification movement. Less obvious are particular hazards in the application of the criminal code by working judges and lawyers.[10]

Because a new codification usually does not totally alter the criminal law within the adopting jurisdiction, judges and lawyers may apply it in most cases using much the same terminology and concepts that they used before the code was adopted. Finding that the end result under the code is much the same as before — the crimes are likely to have the same names and basically the same elements — they are also likely to continue to use common law terms and pre-code attitudes toward statutory construction.

me of the primary hazards in working with a criminal code may be ıllustrated by considering a single recent decision by the Illinois Supreme Court. Undoubtedly examples could be drawn from any number of decisions from states which have recently codified their criminal law. But some of the worst potentials for mischief seemed to coalesce in this one case.

In *People v. White,*[11] the defendant was charged with armed robbery. His only defense, intoxication, was rejected by the trial court; his conviction was affirmed by the appellate court. The decision of the appellate court and the argument of the State before the Illinois Supreme Court may be summarized as follows: (1) robbery is a general intent crime, (2) the intoxication defense is available only for specific intent crimes, and (3) therefore, the intoxication defense is not available in a robbery prosecution.

The Illinois Supreme Court accepted the second premise without discussion, that the intoxication defense is available in prosecutions for specific intent crimes, but not for general intent crimes. However, the majority disagreed with the first premise, that robbery is a general intent crime. After reviewing the history of robbery statutes in Illinois together with their interpretations by the courts, the

10. For a discussion of problems in interpreting the first modern criminal law codification, the Louisiana Criminal Code of 1942, *see* Michael, *Present Problems in Louisiana Substantive Criminal Law,* 11 LOY. L. REV. 71 (1961-62).

1˙ 7 Ill. 2d 107, 365 N.E.2d 337 (1977).

majority concluded that robbery and armed robbery are specific intent crimes. Nevertheless, while the majority would permit the intoxication defense to be raised, they concluded that the evidence introduced by the defendant at his trial was insufficient as a matter of law to negate the intent required for armed robbery.

A further discussion of the court's opinion in the *White* case may best be organized in the context of the hazards encountered.

FIRST HAZARD: RETENTION OF PRE-CODE VOCABULARY AND CONCEPTS

To the careful reader of the Illinois Criminal Code of 1961 who is otherwise unfamiliar with criminal law, the very statement of the premises of this appeal would make little sense. "Intent" is defined by the code,[12] but the terms "specific intent" and "general intent" are nowhere to be found. They are carry-overs from the pre-code times.

The continued use of the terms "general intent" and "specific intent" may largely be the fault of the drafters of the code. They created a classification of crimes without assigning names inviting the continued use of older terms which may also carry with them the freight of obsolete concepts.

The Illinois Criminal Code defines four mental states — intent, knowledge, recklessness, and negligence.[13] Section 4-3(b) provides that if the statute defining the offense prescribes a particular mental state, that mental state applies to each element of the crime. This section continues:

> If the statute does not prescribe a particular mental state applicable to an element of an offense (other than an offense which involves absolute liability), any mental state defined in Sections 4-4 [intent], 4-5 [knowledge] or 4-6 [recklessness] is applicable.

Using section 4-3(b), one may attempt to classify the crimes in the code according to the mental element involved. The crime of attempt, for example, requires that it be committed "with intent," so it is possible to term it an "intent" crime.[14] The statute defining assault, however, is silent on the mental element required.[15] Using section 4-3(b), it is obvious that any of the three mental elements — intent, knowledge, or recklessness — would satisfy the mental element of the offense. Should one describe assault as an "intent-knowledge-reckless" crime after reading the quoted language from

12. ILL. REV. STAT. ch. 38, § 4-4 (1977).
13. *Id.*
14. *Id.*
15. *Id.*

section 4-3(b)? Such an awkward description leads to the temptation to use pre-code terminology; "general intent" may serve to describe an offense such as assault for which no specific mental element is prescribed. To distinguish these offenses from those such as attempt, where intent is the prescribed mental state, we may be tempted to call the latter "specific intent" crimes.

This use of "general intent" to define a concept in the code not otherwise given a name has utility of convenience. Moreover, there is some non-code support for using "general intent" to describe a general minimum *mens rea.*[16] Unfortunately, the general-specific intent dichotomy carries with it historical usage beyond its convenience as labeling for code concepts. The more traditional meaning of general intent was the intent to perform the *actus reus,*[17] which has nothing to do with the mental elements regarding the consequences of the act. This traditional meaning of general intent is incorporated elsewhere in the code — the section requiring a *voluntary* act.[18] Continuing the historical dichotomy, "specific intent" was used to describe "a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime."[19] Used in the traditional sense, neither "general intent" r "specific intent" has anything to do with the meaning of "intent" as it is found in the Illinois Criminal Code. The confusion caused by this second use of specific intent and general intent is illustrated by a recent Illinois appellate court opinion which held battery to be a "specific intent" crime,[20] although the code section provides that one commits the offense if he acts "intentionally *or knowingly.*"[21]

Undoubtedly, some of the continued use of the general-specific intent dichotomy, especially in the context of the intoxication defense, simply represents a habit of thought carried over by judges and lawyers from pre-code law. Code drafters could have done much to avoid the confusion had they supplied a term of art to describe the general *mens rea* class. However, the fault does not lie exclusively with the drafters of the Illinois code. As early laborers at codification, the drafters of the Illinois code had little American experience to aid them in articulating general principles of criminal

16. *See* W. LaFave & A. Scott, Handbook On Criminal Law, 201, 202 (1972); J. Hall, General Principles of Criminal Law, 142-45 (2d ed. 1960).

17. *Id.*

18. Ill. Rev. Stat. ch. 38, § 4-1 (1977).

19. W. LaFave & A. Scott, Handbook on Criminal Law, 202 (1972). *See also* R. Perkins, Criminal Law, 762-64 (2d ed. 1969).

20. People v. Hayes, 37 Ill. App. 3d 772, 774, 347 N.E.2d 327, 329 (1976).

21. Ill. Rev. Stat. ch. 38, § 12-3 (1977).

liability. A major source was the unfinished American Law Institute's Model Penal Code, which also lacks a term for the general *mens rea.*[22]

In its 1970 *Study Draft of a New Federal Code,* the National Commission on Reform of Federal Criminal Laws proposed a term which might have prevented a similar problem in interpreting any new federal criminal code. Under this proposal, if the statute defining the offense were silent as to the mental element required, the proof would have to show that the act was done "willfully."[23] The proposal defined "willfully" to include "intent," "knowledge," and "recklessness."[24] While one might criticize the use of the term "willfully," which may carry some undesired traditional freight of its own, at least the proposal would have included a defined term of art to describe a concept in the code, without tempting one to resurrect the specific-general intent dichotomy. Unfortunately, the proposed Federal Criminal Code now pending before Congress contains no term to define the general *mens rea* element — "willfully" or otherwise.[25]

By using the pre-code terms "specific intent" and "general intent," the Illinois Supreme Court in *White* potentially reintroduced a concept alien to the meaning of "intent" as defined in the Illinois Criminal Code.

Second Hazard: Reading a Code only as a Group of Statutes

In deciding *People v. White,* the supreme court had to first determine what mental element is required for the crimes of robbery[26] and armed robbery.[27] The statutes defining these crimes are silent on this element. It seems apparent from section 4-3(b) that any of the three mental states — intent, knowledge or recklessness — would suffice.

Neither the majority nor the concurring opinion in the *White* case discussed the code language. The discussion turned immediately to the comments of the drafting committee concerning the robbery section. The words from the committee comments became the focal point for the majority opinion:

22. The same problem exists in the Louisiana Criminal Code. *See* Michael, *Present Problems in Louisiana Substantive Criminal Law,* Loy. L. Rev. 71, 83-87 (1961-62).

23. National Commission on Reform of Federal Criminal Laws, Study Draft of a New Federal Criminal Code, § 302(2) (1970).

24. *Id.* § 302(1)(e).

25. S. 1437, 95th Cong., 1st Sess. (1977).

26. Ill. Rev. Stat. ch. 38, § 18-1.

27. *Id.*, § 18-2.

> This section codifies the law in Illinois on robbery and retains the same penalty. No change is intended.*** No intent element is stated as the taking by force or threat of force is the gist of the offense and no intent need be charged. (See *People v. Emerling*, 341 Ill. 424, 173 N.E. 474 (1930).[28]

Writing for the majority in *White*, Mr. Justice Goldenhersh demonstrated persuasively that the *Emerling* decision cited by the drafting committee resulted from a misreading of earlier cases and statutes. Therefore, the majority concluded that properly read, the law in existence prior to the new code required intent for the crime of robbery. And since the legislature intended to bring about no change, intent is required under the code.

> In our opinion, as indicated by the Committee Comments, the General Assembly, upon enactment of sections 18-1 [robbery] and 18-2 [armed robbery] of the Criminal Code of 1961, intended no change in the existing law and there is no indication of a "legislative purpose to impose absolute liability for the conduct described." We hold that the appellate court erred and that the intent to deprive the person from whom the property is taken permanently of its use or benefit is an element of the crimes of robbery and armed robbery.[29]

It is worthy of note that this language appears to assume that the choice available is between recognizing intent as an element or imposing absolute liability.

In a special concurring opinion, Mr. Justice Dooley called attention to the problem caused by treating a conclusion in the comments of a legislative drafting committee as though it were a judicial opinion.

> The question before us cannot be resolved on whether the committee improperly cited *Emerling* as authority for the proposition that intent need not be charged or proved in a robbery case. The stark fact is that the committee which drafted the Criminal Code of 1961 did not introduce into sections 18-1 or 18-2 a specific intent requirement.[30]

Even more fundamental than the problem suggested by the concurring opinion is the approach to interpretation utilized. In interpreting the robbery sections, the court approaches the problem with the assumption that the answer is to be found in the language and

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28. People v. White, 67 Ill. 2d 107, 110, 365 N.E.2d 337, 338-39 (*quoting* ILL. ANN. STATS. ch. 38, § 18-1, Comm. Comments (Smith-Hurd 1970)).

29. People v. White, 67 Ill. 2d 107, 117, 365 N.E.2d 337, 342.

30. *Id.* at 125, 365 N.E.2d at 346 (Dooley, J., concurring).

history of the code section itself. The code section is viewed as a single statute in a compilation, not as a part of a comprehensive legislative package. Other code sections are cited and discussed, but they are treated almost as secondary authority.

Section 4-3(b) of the Illinois Criminal Code of 1961 is not a monument to clarity. However, it is probably as clear as similar provisions found in most other codifications. The full utilization of any code requires that questions of interpretation be approached initially with a presumption that the answers will be found within the code itself.[31] Part of the interpretation problem may be attributed to the fact that there is a long history of calling any compilation of random penal statutes a "code," even though it does not represent an organized body of interrelated principles. For example, both Chapter 38 of the Illinois Revised Statutes and Title 18 of the United States Code are called criminal codes, although they are very different in operation and format.

Drafters of codes might alleviate the problem of ignored and overlooked sections dealing with general principles by using a device utilized in the Uniform Commercial Code — cross references. Such cross references would emphasize to the user of the code that he is reading but a part of an integrated whole, encouraging him to first look for clarification within. Of course, it would also give him direction as to where to look.

### THIRD HAZARD: DRAFTERS' COMMENTS

It is axiomatic that when any statute is enacted, the words of the statute are the law, not the reasons given by the proponent of the legislation. Comments by the proponents and drafters may be important in understanding the meaning of the words of the statute,[32]

31. Apparently the Illinois Supreme Court has also overlooked Article 4 of the Criminal Code in dealing with the offense of attempt murder. Under § 8-4, the crime of attempt is committed when one, "with intent to commit a specific offense," performs an act in furtherance of that offense. ILL. REV. STAT, ch. 38, § 8-4. In People v. Muir, 67 Ill. 2d 86, 365 N.E.2d 332 (1977), the court found that the meaning of "intent" is found in the murder statute: "He knows that such acts create a strong probability of death or great bodily harm to that individual or another." ILL. REV. STAT. ch. 38, § 9-1 (a)(2). Four months later, in People v. Trinkle, 68 Ill. 2d 198, 369 N.E.2d 888 (1977), the court reached what appears to be the opposite conclusion: "It is not sufficient that the defendant shot a gun 'knowing that such act created a strong probability of death or great bodily harm . . . .' " *Id.* at 201, 369 N.E.2d at 890. The *Trinkle* decision did not specifically overrule - or even cite - *Muir.* Although the central question in both *Muir* and *Trinkle* was the meaning of "intent" in the attempt offenses section, neither case cited or discussed the code section defining intent: ILL. REV. STAT. ch. 38, § 4-4. For a discussion of these and other Illinois cases dealing with this problem, *see* W. LAFAVE, MODERN CRIMINAL LAW: CASES, COMMENTS AND QUESTIONS, 479-85 (1978).

32. The Committee Comments are "a source to which we may properly look in determining the legislative intent" behind the Illinois Criminal Code. People v. Touhy, 31 Ill. 2d 236, 239, 201 N.E.2d 425, 427 (1964).

but those comments do not replace the meaning of the words in the statute as the law.[33]

Nevertheless, comments are simply less soporific to read than legislative pronouncements. They shed more light on underlying policy reasons for the rule, and make the premises leading to the rule more obvious. The reader can also fault commentary, as the majority opinion in *People v. White* demonstrates, while it is difficult to argue with a legislative command except on constitutional grounds. For these reasons, there may be a temptation to interpret the commentary, rather than the code. In discussing the mental element in the robbery sections, it is not unfair to suggest that the majority opinion in the *White* case adopted as its major legal premise the words in the commentary, "No change is intended." Relying upon this major premise, the court went on to determine the prior state of the law which was to be preserved by the code.

The *White* case demonstrates another instance in which the drafters' comments to the Illinois Code appear to have prevailed over the language of the code; this involves the effect of voluntary intoxication. The relevant section of the code says that "[a] person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition . . . (a)[n]egatives the existence of a mental state which is an element of the offense; . . . ."[34] After criticizing the previous statutory formulation, the committee comment comes to the rather inexplicable conclusion that "[t]he new Code makes no change in the substantive law as to intoxication but states the governing principle in a more intelligible form. . . ."[35]

Once again, section 4-3 seems to make it clear that there is a "mental state which is an element of the offense"[36] for every crime, except for minor offenses which qualify for absolute liability.[37] Some crimes, such as attempt, contain a specific mental state in the statute defining the offense. Other crimes, such as assault, lack such specification. However, this absence does not mean that there is no "mental state which is an element of the offense." Section 4-3(b) requires proof of intent, knowledge or recklessness.

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33. *See, e.g.*, Certain Taxpayers v. Sheahen, 45 Ill. 2d 75, 84, 256 N.E.2d 758, 764 (1970), where the court stated: "The legislative intent should be sought primarily from the language used in the statute. Where the language of the act is certain and unambiguous the only legitimate function of the courts is to enforce the law as enacted by the legislature."

34. ILL. REV. STAT. ch. 38, § 6-3 (1977).

35. ILL. ANN. STAT. ch. 38, § 6-3, Comm. Comments (Smith-Hurd 1970).

36. ILL. REV. STAT. ch. 38, § 6-3 (1977).

37. Under ILL. REV. STAT. ch. 38, § 4-9 (1977), absolute liability exists only if the offense is a misdemeanor not punishable by incarceration or by a fine in excess of $500, or if the statute defining the offense clearly indicates such a purpose.

Applying this analysis to the voluntary intoxication section,[38] it appears that the intoxication defense should be available in all but absolute liability offenses. In the case of a prosecution for the crime of attempt, responsibility would be avoided if intoxication prevented the formation of the "intent" which the attempt statute requires for perpetration of that crime. But it would also annul responsibility in an assault prosecution if it precluded the defendant from "consciously disregard[ing] a substantial and unjustifiable risk,"[39] which is required for recklessness — a "mental state which is an element of the offense" through the application of 4-3(b).

It is interesting to compare the language of the Illinois statute with that of the Model Penal Code. The Illinois code section provides that an intoxicated person is responsible unless such condition, "negatives the existence of a mental state which is an element of the offense. . . . "[40] This provision is not unlike the first subsection of the Model Penal Code section on intoxication: "(1) Except as provided . . . , intoxication of the actor is not a defense unless it negatives an element of the offense."[41] The potential for change which this subsection, standing alone, might possess was not overlooked when it was presented to the American Law Institute in May of 1959. Consequently, a second subsection was also proposed:"(2) When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial."[42]

The addition of this subsection represented a conscious choice by the ALI to retain the American practice of recognizing only a limited defense of intoxication, rather than adopting the English rule of treating intoxication as one aspect of the overall determination of *mens rea,* as advocated by at least one of the ALI Advisory Committee members.[43] No language similar to subsection 2 is found in the Illinois code, even though the Illinois section was proposed after the ALI debate.

If the Illinois code makes the defense of intoxication available in

38. ILL. REV. STAT. ch. 38, § 6-3(a) (1977).
39. *Id.* § 4-6.
40. *Id.* § 6-3(a).
41. MODEL PENAL CODE § 2.08 (Proposed Official Draft, 1962).
42. *Id.*
43. *See* MODEL PENAL CODE § 2.08 (Tent. Draft No. 9, 1959). Judge Learned Hand objected to the special rule approach. *See* Wechsler, *Foreword, Symposium on the Model Penal Code,* 63 COLUM. L. REV. 589, 591 (1963). For the views of an opponent of the Model Penal Code formulation of the intoxication defense, *see* Packer, *The Model Penal Code and Beyond,* 63 COLUM L. REV. 594, 599-601 (1963).

all prosecutions, not just those requiring intent, it does indeed amount to a change in the law from that which existed prior to its adoption.[44] Yet one searches in vain among the Illinois decisions for a discussion of the words of the code. Among the appellate court decisions, the words of section 6-3(a), defining the intoxication defense, are quoted only in general statements amounting to dictum.[45] Where the defense of intoxication is at issue, the courts have stated as the operative law the pre-code rule that the defense is available only for intent crimes. They have even gone a step further to say that for the defense to apply, the intoxication must be so extreme as to suspend entirely the power of reason.[46] This latter extention defines the defense objectively, even though the mental element involved, intent, is defined by section 4-4 as a subjective mental state.[47]

The Illinois Supreme Court has never squarely faced the intoxication defense since the adoption of the new code. In the *White* case the language of both the majority and concurring opinions appears to assume that the defense applies only to "specific intent" crimes. However, since they found robbery to be a "specific intent" crime, they did not need to decide whether the intoxication defense applies to other crimes.

The appellate court decisions limiting the intoxication defense to intent crimes[48] have ignored the language of the code. Operationally, the law has been drawn from the drafters' comments: "The New Code makes no change in the substantive law as to intoxication. . . ."[49] In these opinions, as in the *White* majority's use of the comments to interpret the robbery statute, the drafters' comments have taken precedence over the words of the legislation.

Legislative history has long been used as an instrument for statutory interpretation. However, it has generally been relied upon only where the legislative language is ambiguous; presumably it is never to be used to alter the clear meaning of the legislative language.[50]

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44. *See, e.g.*, People v. Bartz, 342 Ill. 56, 67, 173 N.E. 779, 783 (1930).

45. *See, e.g.*, People v. Hunter, 14 Ill. App. 3d 879, 884-85, 303 N.E.2d 482, 485 (1973).

46. *See, e.g.*, People v. Fleming, 41 Ill. App. 3d 1, 3, 355 N.E.2d 345, 348 (1976).

47. Ill. Rev. Stat. ch. 38, § 4-4 (1977), provides that a person acts with intent "to accomplish a result or engage in conduct described by the statute defining the offense, when his conscious objective or purpose is to accomplish that result or engage in that conduct." Thus, even if one were to assume that the intoxication defense is limited to intent crimes, it would appear that the defense would be available whenever intoxication prevents the formation of the "conscious objective or purpose" to accomplish the specific result, whether or not the power of reason has been entirely suspended.

48. *See* note 45 *supra*.

49. Ill. Ann. Stat. ch. 38, § 6-3, (Smith-Hurd 1970).

50. *See* note 33 *supra*.

The resort to comments by courts may often be attributed to the habit of approaching statutes as singular pronouncements, rather than as fragments of a codified whole. Thus, interpreting a specific statute, a court is likely to turn initially to the comments concerning the specific statute, rather than to other statutes within the code.

Use of drafters' comments in Illinois is further complicated by the fact that the comments are not, strictly speaking, *legislative* intent. The committee which drafted the code was made up of distinguished Illinois judges, lawyers and law teachers. In addition to the proposed code sections, they wrote comments concerning their work. As distinguished as the committee was, it was not the legislature. The comments by this committee are thus only the comments of an interested group of citizens. Only inferentially may they be taken as the intent or understanding of the legislature; the legislative pronouncement was the code, not the commentary.[51]

Undue emphasis upon drafters' comments may be a hazard not easily avoided. Perhaps drafting committees should circulate no commentary, or if they do so, they should avoid commenting upon changes which would result. In many instances, however, such solutions would be practically unwise. Commentary is a valuable device for understanding a codification, especially while it is new, and before judges and lawyers have had experience in working with it. Further, the legislature may insist upon some explanation of the meaning and impact of the proposal. Short of abolishing commentary, a suggestion made earlier might be helpful: if the commentary includes cross references, anyone relying upon the commentary will be drawn to other code sections which bear upon the issue involved. Thus the commentary itself might contain guidelines for its use.

## Conclusions

The codification movement in criminal law is to be welcomed. With it, the substantive law of crimes has benefited through more precise definitions not only of the rules defining offenses themselves, but also of the doctrines and principles of criminal responsibility. It has also permitted the discarding of some of the more irrational concepts which have encumbered criminal law. At the same time, the codifications have not ordinarily included major changes from common law traditions.

51. Thus, while the reports of such citizen committees may be examined in determining legislative intent (*see* note 32 *supra*), they occupy a less authoritative position than the reports of legislative committees. Cases hold that the latter "may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure." Duplex Printing Press Co. v. Deering, 254 U.S. 443, 474 (1920).

The fact that criminal codes have usually resulted in the fine-tuning of traditional law, rather than complete reconstruction, has contributed to the hazards discussed above. Had the codes completely revamped the vocabulary and concepts of criminal law, judges and lawyers would probably have been more aware of the need to reconsider their assumptions in light of changes in legislative formulation. Because vocabulary and concepts are not completely altered in the new codes, most cases are resolved in the same way used prior to codification, apparently making detailed examinations of code sections unimportant. As a result, code sections inconsistent with prior law are likely to be ignored or simply overlooked.

Of course, judges and lawyers should be admonished to read a code as an unified whole, not as a compendium of legislative miscellania. But drafters of codes and those charged with writing code commentary should also be aware of the hazards in applying these relatively new inventions. As legislative drafters they may do so by making certain that each important concept is identified by a term of art, even if they must invent a term to identify a concept which differs from the traditional one. Definitional sections prominently placed may also encourage the user to refer first to the code for meaning.

Drafters of commentary could aid the user by suggesting other code sections relevant to statutory construction. A useful model may be the Uniform Commercial Code comments, which typically list cross references and definitional cross references.

Finally, it may help to avoid the erroneous use of drafters' comments if the drafters of commentary avoid stating that no change is intended when, in fact, the wording of the statute has been changed. Such words in the commentary, at least in the Illinois experience, may assume greater importance than the code section itself. Again, the Uniform Commercial Code comments may be instructive.[52]

The benefits of criminal codes are many. The organized, rational exposition of the substantive criminal law may avoid many of the uncertainties, inconsistencies and undue technicalities which have plagued the common law of crimes. Not only may these benefits be lost by the improper use of codes, but the law may be made worse

52. *See, e.g.*, U.C.C. § 3-106 Comment. Following citation to the prior statute, the comment continues:

> Changes: Reworded:
> Purposes of Change: The new language is intended to clarify doubts arising under the original section as to . . . .

than if codes had not been adopted at all. If readings of legislative pronouncements and judicial opinions lead to opposing conclusions, one may wonder whether clarity and rationality would not better be served by repealing the legislation. For codes to be beneficial, they must be followed; to be followed, they must be understood.

DOC. C-5 175

COMMISSION DE RÉVISION DU CODE PÉNAL

# AVANT-PROJET
## DE
# CODE PENAL

**TITRES I et II**

*PARTIE SPECIALE*

O

*JUILLET 1980*

MINISTÈRE DE LA JUSTICE - 13 PLACE VENDOME - 75001 PARIS

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ANNEXE II

COMPOSITION DE LA COMMISSION DE REVISION DU CODE PENAL

# Aspects et problèmes de la codification pénale à l'heure actuelle *-1

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* Les opinions exprimées sont celles de l'auteur et non pas celles des Nations Unies.
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## IV. — LES PROBLÈMES DE LA CODIFICATION

Les problèmes de la codification sont nombreux. Nous examinerons ici les suivants : *a*) avantages et désavantages de la codification; *b*) comment faire un code pénal; *c*) la responsabilité pénale; et *d*) la formulation des délits en particulier.

### 1. *Avantages et désavantages de la codification.*

Brièvement indiqués les avantages de la codification sont les suivants : *a*) *légalité,* car d'habitude les codes pénaux sont promulgués comme des lois, ce qui renforce le principe *nullum crimen, nulla poena sine previa lege,* tandis que les dispositions pénales spéciales sont assez souvent établies par des décrets-lois ou des ordonnances; *b*) *certitude,* dans le sens que les principes sur la responsabilité pénale, ainsi que les définitions des délits sont établis

d'une manière raisonnablement durable; c) *garantie*, puisque sauf dans des cas spéciaux, le code pénal implique automatiquement l'application du code de procédure pénale; d) *accessibilité*, car même les non-professionnels peuvent toujours s'informer du contenu et de l'étendue de la loi pénale; e) *non rétroactivité*, car l'expérience montre que sauf pour le bénéfice du délinquant, aucun code n'a été promulgué avec un effet rétroactif, condition qui n'est pas toujours observée par les décrets ou les ordonnances pénales; f) *unité de système et de langage*, tous les deux facilitant l'interprétation et l'application de la loi pénale; et g) *économie*, puisque, en principe, le code pénal évite la répétition et la contradiction, tellement fréquentes dans d'autres systèmes.

Ces avantages sont considérablement réduits lorsque le code pénal devient une sorte de relique vénérable constamment rajeunie pour la maintenir en vie. Tel est le cas des Codes pénaux français, bolivien, haïtien, autrichien, espagnol, allemand, etc. Parfois le caractère de relique est caché. C'est ce qui arrive avec le Code pénal turc dont la date de 1926 cache celle de 1889. Malgré le raccommodage fréquent dont ces codes ont besoin, ils constituent des anachronismes dont la valeur, sauf la valeur sentimentale, est très réduite. Leurs textes offrent des contrastes qui, tout en étant intéressants du point de vue de l'histoire et même de l'archéologie pénales, tel le français, le bolivien et l'autrichien, rendent l'application du code assez difficile et souvent injuste. En tout cas, même pour le professionnel, leur maniement est délicat.

Tout cela pose la question de la durée d'un code pénal. La réponse n'est pas facile car elle relève de deux facteurs assez différents et complexes. Le premier est celui de la transformation du pays, dont la rapidité, les modalités, la régularité, etc., comptent pour beaucoup. Le second est constitué par la structure et le contenu du code pénal. Lorsque celui-ci a été rédigé d'après un critère préconçu politique, économico-social ou d'école, la vétusté du code se précipite. Pour la dissimuler, on a recours à des modifications partielles de son texte. Celles-ci sont plus fréquentes lorsque le code originel a pris l'attitude que j'appelle « providentialiste », c'est-à-dire celle de tout prévoir en établissant toute une série de définitions et de cas, le tout appuyé sur une individualisation légale. Il peut même arriver que la réforme ne soit pas rajeunissante mais vieillissante. Tel a été le cas, parmi d'autres, des réformes espagnoles de 1944 et 1963 et de la réforme turque de 1958. Toutes les deux ont fait reculer les textes des codes respectifs.

Au rythme actuel de la vie, il me semble que la période de cinquante à soixante ans — deux générations — doit être considérée comme une période raisonnable de vie pour un code pénal toujours plus affecté par des changements économiques, sociaux et politiques qu'un code civil. Bien entendu, ces changements n'affectent pas tout le code mais plutôt les articles ou les sections de la partie spéciale. Cela veut dire que si la partie générale est rédigée d'une manière souple, en évitant autant que possible les définitions et la casuistique, elle peut avoir une vie beaucoup plus longue. Dans certains pays comme le Mexique, la codification pénale est devenue presque une occupation journalière parmi les professionnels, ce qui est dû en partie au régime fédéral et en partie à la facilité avec laquelle les Codes pénaux sont suggérés, préparés, promulgués et, bien entendu, remplacés. La facilité devient volubilité pénale au Venezuela où entre 1862 et 1926 trois Codes pénaux et quatre révisions ont été promulgués. Le Brésil a introduit la curieuse modalité d'avoir un Code pénal incomplet. Celui en vigueur, promulgué en 1940, ne contient pas les délits contre l'Etat. Ces délits, connus au Brésil comme *delitos contra a ordem politica et social*, sont l'objet du décret-loi nº 431 de 1938, qui a été suivi par d'autres. Le code et le décret-loi furent promulgués par Getulio Vargas, ce qui semble expliquer le dualisme. Comme méthode, elle est mauvaise. Malheureusement, elle a été suivie dans le projet de 1963 préparé par M. Nelson Hungria.

L'absence d'un code pénal donne lieu à une situation très peu satisfaisante à cause de la confusion, de la contradiction, de l'insécurité et du manque d'accessibilité qui en résultent. Tel est le cas de l'Angleterre, où les désavantages de la codification pénale sont encore dépassés par ceux d'une législation pénale éparpillée allant du XIVe siècle jusqu'à nos jours. Un tel système n'offre pas plus de souplesse que la codification pénale, d'ailleurs pratiquée par l'Angleterre dans ses anciennes colonies. La loi pénale anglaise est encore plus encombrante, casuistique et contradictoire que n'importe quel code pénal. Ajoutons à cela que le langage juridique anglais, moins évolué que celui d'autres pays, ne se caractérise pas par la clarté.

### 2. *Comment faire un code pénal.*

Faire un code pénal nouveau est facile, beaucoup moins facile est de rédiger un code qui reflète la réalité et les besoins pénaux

d'un pays tant du point de vue national qu'international. Voici, en résumé, les façons les plus utilisées pour préparer un code pénal :

*a*) *Confection.* — Comme toute confection, celle d'un code pénal présente des modalités très différentes dans lesquelles la mode pénale, c'est-à-dire les conceptions d'école et les théories pénales jouent un rôle prépondérant. Parfois on se sert du droit comparé mais d'une manière plutôt superficielle sans entrer dans l'examen analytique des résultats obtenus par l'application des codes qu'on mentionne. Parfois la jurisprudence et les statistiques nationales sont pris en considération mais d'une manière assez limitée. En général, il s'agit d'un travail doctrinal et érudit, qui suit de très près un modèle, une école ou une théorie déterminés ou un mélange des théories sans se soucier beaucoup de la réalité et des besoins existants en matière pénale. Ecole, théorie et technique sont donc les ingrédients principaux. Tel a été le cas d'un bon nombre des codes pénaux en Europe et en Amérique latine et de la plupart des projets. Les modèles les plus fréquemment utilisés ont été, dans le passé, les Codes pénaux français et espagnol et dans une certaine mesure les Codes belge et italien (1889). Plus récemment l'italien (1931) et le suisse ont été suivis. Parmi les projets, ceux de l'Allemagne sont très souvent utilisés en Espagne et en Amérique latine par les partisans de la prétendue « théorie juridique du délit ».

Bien que critiquable, cette méthode a donné par d'autres raisons que la méthode elle-même, des résultats parfois assez satisfaisants. Tel a été le cas du Code pénal du Chili de 1870 où le modèle finalement choisi fut heureusement le Code espagnol de 1850, de beaucoup supérieur au Code belge de 1867 qui avait été suggéré. Le modèle espagnol s'adaptant beaucoup mieux que le belge aux caractéristiques historiques du pays.

Cette méthode, qui très souvent n'a d'autre racine nationale que celle d'avoir été employée par des professionnels nationaux, a été particulièrement suivie en Amérique latine où presque chaque école, théorie, code ou projet étranger, parfois à tour de rôle, peuvent se vanter d'être représentés. Cela explique la variété et la profusion des codes et des projets qui ont très souvent une vie éphémère. Le cas du Venezuela, déjà mentionné, est symptomatique. Un autre est celui du Code pénal du Mexique de 1929, tellement défectueux qu'il fut remplacé deux ans après par celui de 1931, encore en vigueur. Un autre exemple est offert par l'Argentine, dont le premier Code pénal, celui de 1887, n'était pas un code pénal national

d'après les critiques de l'époque. Cela explique pourquoi en 1890 une commission fut nommée pour introduire les réformes nécessaires. Le résultat a été le Code pénal de 1922, en vigueur, qui bien entendu a été suivi de plusieurs projets de réforme[1].

*b) Transplantation.* — Comme méthode, la transplantation est plutôt une variante, bien que simplifiée, de la confection. Elle consiste tout simplement à importer un texte pénal et à l'adopter avec quelques modifications. Parmi d'autres cas, on peut citer ceux d'Haïti et de la République dominicaine, dont les Codes pénaux en vigueur sont des transcriptions du Code pénal français de 1810; citons aussi les cas des anciens Codes pénaux du Mexique (1871) et du Nicaragua (1879), reproduisant dans une grande mesure le Code pénal espagnol de 1870, ou encore les anciens Codes pénaux de San Salvador (1826) et de la Bolivie (1831) qui étaient des transplantations du Code pénal espagnol de 1822. Le Code pénal bolivien de 1834, encore en vigueur, n'est qu'une version de ce même Code pénal espagnol. Plus récemment le Code pénal turc de 1926 est la traduction, avec quelques modifications, du Code italien de 1889. De nos jours, le Code pénal du Maroc de 1962 est aussi une version du Code pénal français.

Parfois, pour des raisons historiques, la transplantation donne des bons résultats mais ceux-ci sont très souvent limités dans le temps et même dans l'espace. Ainsi, on peut se demander quelle a

1. En 1962, le Gouvernement argentin semble avoir changé d'avis et une Commission consultative en matière pénale est nommée. Dans son rapport de 1963, la Commission, après un examen des questions pénales plus urgentes, suggère une série de recommandations dont les suivantes concernant la partie générale sont tout à fait justifiées : suppression des courtes peines privatives de liberté; élargissement de la suspension conditionnelle de la peine; réduction de l'individualisation légale et unification de la *réclusion* et de la *prison*, dont la distinction dans la pratique n'existait pas, en une seule peine d'emprisonnement. Par contre, les réformes concernant la partie spéciale constituent un mauvais exemple de casuistique pénale encadrée dans une fâcheuse terminologie technico-juridique. Ainsi, en plus des modifications tendant à remplacer ou à rendre plus compréhensible des dispositions déjà existantes, la Commission suggère l'incorporation de vingt et une nouvelles infractions et de dix-neuf circonstances aggravantes, la plupart de celles-ci concernant l'homicide et le vol. Dans son décret-loi n° 4878/63, le Gouvernement a laissé de côté les bonnes recommandations et a incorporé au code les plus critiquables de la Commission. Ainsi, dans la partie générale, où la fiction *réclusion-prison* est maintenue, ceci a été ajouté : tout condamné à des peines de *réclusion* ou *prison* doit verser tous les trois mois, pendant toute la durée de la peine, en faveur des fonds destinés à la création et à l'amélioration des établissements et des services pénaux, dix pour cent de son revenu. Un tel égarement pénal, criminologique et pénologique est difficile à justifier. Presque le même commentaire est mérité par l'incorporation dans le code d'une partie de la casuistique proposée pour la partie spéciale en plus de celle que le Gouvernement, *de motu proprio*, a estimé nécessaire. V. *Reformas al Código penal. Informe de la Comisión asesora en materia penal. Decreto ley n° 4878/63, Ministerio de Educacion y Justicia*, Buenos Aires, 1963.

été l'étendue de l'application des codes transplantés au XIX$^e$ siècle dans la plupart des pays de l'Amérique latine. La question se pose encore aujourd'hui dans certains de ces pays et d'une façon plus aiguë dans la plupart des nouveaux pays africains, malgré tout son apparat constitutionnel et juridique. Parfois, la transplantation est presque une nécessité, née du désir de transformer le pays. Tel est le cas, parmi d'autres, de la Turquie. Dans ces cas, il faut faire la distinction entre l'adaptation du code au pays et l'acceptation du code par ceux qui le manient et l'appliquent. Cette dernière, donne lieu à une « professionnalisation nationale » du code qui transforme celui-ci en un code national. Malheureusement, les groupes professionnels sont parfois assez forts pour soutenir qu'il s'agit d'un code ayant ce caractère. C'est ce qui arrive aujourd'hui en Turquie, où la déformation professionnelle est tellement profonde dans certains groupes qu'ils favorisent, comme réforme pénale, la transplantation, avec quelques modifications, du Code pénal italien de 1931.

c) *Modification.* — Par des modifications successives et fréquentes on peut parvenir à avoir un Code pénal hybride qui tout en étant vétuste, est en partie nouveau. Parmi d'autres, tel est le cas des Codes pénaux français, espagnol, allemand, belge et hollandais. Parfois, la modification est plus profonde et est appelée révision. Un cas spécial est celui du Code pénal italien de 1931 dont, bien que révisé, on peut se demander si, dans beaucoup d'aspects, il est un code qui réponde aux idées et aux conceptions politico-sociales et économiques du régime actuel de l'Italie.

Par des modifications fréquentes on parvient ainsi à avoir des codes désaxés où des délits nouveaux sont jugés très souvent d'après d'anciennes conceptions et des règles sur la responsabilité et le système des peines. Bien que les inconvénients de ce manque d'équilibre interne entre les dispositions du Code pénal puissent être adoucis dans certains cas, par une pratique judiciaire intelligente et souple, la justice criminelle en souffre sérieusement.

d) *Evaluation.* — Par évaluation on entend ici la méthode la plus appropriée pour la rédaction d'un code pénal. Elle comprend deux étapes. Dans la première, on ramasse et analyse une série de données, dont quelques-unes ne sont pas strictement pénales ou criminologiques ; dans la seconde étape on rédige le code d'après les résultats obtenus au cours de la première étape.

Si tout code doit refléter la structure et satisfaire les besoins pénaux de la communauté nationale comme telle et comme partie d'une communauté internationale, la première étape est justifiée. A titre d'exemple les données à rechercher et à analyser sont les suivantes :

*a*) la population nationale, sa distribution et ses tendances. La distribution par âges est importante car elle aide, avec d'autres facteurs, à établir, selon le système traditionnel, les différentes limites d'âge pénal. Aussi est-il important d'établir la corrélation entre ces groupes d'âge et ceux qui se manifestent plus fréquemment dans les tendances plus saillantes de la criminalité. Comme indice et non comme facteur à lui seul, cette corrélation est importante en ce qui concerne le système de sanctions à établir ;

*b*) un aperçu sur la structure politique, sociale, économique et culturelle des différents groupes sociaux et leurs conditions de vie et leur corrélation avec les tendances de la criminalité ;

*c*) déterminer quelles sont les sources de richesse et de production, ainsi que les aspects les plus importants concernant leur transformation, leur transport, leur distribution et leur consommation qui ont besoin d'être réellement protégés par le code pénal et non par des lois plus ou moins spéciales ;

*d*) rôle de la jeunesse dans la structure et les activités les plus importantes de la communauté. Cela est important car la responsabilité pénale doit d'abord être déterminée par cette participation à caractère social, économique et culturel, et non seulement par des considérations médico-psychologiques ;

*e*) tendances et fluctuations de la criminalité dans les cinq dernières années et leur possible projection dans l'avenir immédiat ;

*f*) corrélations et divergences entre les statistiquesde la police, les statistiques judiciaires et les statistiques pénitentiaires. Il est important d'établir (I) le pourcentage des cas par rapport à ceux de la police qui parviennent aux tribunaux et donnent lieu à une peine d'emprisonnement effective, (II) le pourcentage des courtes peines privatives de liberté et leur durée moyenne, et (III) le pourcentage des autres peines, leur durée moyenne et les délits plus graves qui y correspondent ;

*g*) données statistiques sur la récidive ; sursis sans ou avec probation, et résultats obtenus ; fréquence et effectivité de l'amende et durée moyenne de la détention préventive ;

*h*) renseignements sur l'état général de la santé mentale et facilités existant pour traiter les malades mentaux ;

*i*) données sur les mœurs, surtout en ce qui concerne les rapports sexuels ;

*j*) détermination de l'étendue à donner à la protection pénale de l'Etat et à celle des droits de l'homme ;

*k*) données sur les rapports internationaux vis-à-vis d'autres Etats et des organisations internationales, ainsi que les activités de celles-ci nécessitant une protection pénale dans le domaine national ;

*l*) renseignements sur les articles du Code pénal en vigueur (I) qui n'ont jamais été appliqués ou appliqués rarement, et (II) dont l'application a donné lieu à des difficultés sérieuses ;

*m*) étude de la jurisprudence, surtout des cas controversés ;

*n*) étude des lois pénales spéciales ou des lois contenant des dispositions pénales importantes en vue de les incorporer éventuellement dans le code nouveau ou de demander leur abrogation ou leur réforme.

La seconde étape doit s'occuper de la rédaction du code pénal. Entre autres, on suggère les question suivantes :

*a*) réduire autant que possible l'étendue du code pénal en évitant (I) les définitions ; (II) la casuistique ; (III) les articles longs, et (IV) les répétitions. Les articles doivent être rédigés d'une manière susceptible de s'accommoder autant que possible des changements présents et futurs ;

*b*) suppression du dualisme peine-mesure de sûreté. Au lieu du terme peine, le code peut se servir de l'expression mesures pénales ou de traitement pénal. A cet effet, une liste variée et souple pourra être établie, mais une seule mesure privative de liberté doit être incluse. La durée maxima de toute mesure doit être établie dans la partie générale. Les dénominations des prétendues mesures de sûreté comme des mesures éducatives, curatives, etc., seront évitées ; de même les courtes peines privatives de liberté seront remplacées, sauf dans des cas exceptionnels, par des mesures appropriées ;

*c*) l'individualisation judiciaire doit être élargie autant que possible et l'individualisation légale supprimée ou réduite au minimum. Aucune énumération des circonstances atténuantes ou aggravantes n'est nécessaire ni dans la partie générale ni dans la

partie spéciale. Le juge aura pleine liberté pour les apprécier d'après les circonstances ;

*d*) les contraventions seront exclues du code non pas en les escamotant comme l'a fait le projet allemand qui les a absorbées dans les *Vergehen*, mais en les renvoyant aux règlements de police ou autres. Ces règlements ne pourront imposer des sanctions ou des mesures dépassant celles établies par le Code pénal. Toute arrestation imposée par la police pourra être sur demande remplacée par une amende ou une autre mesure pénale dans le cadre établi par la loi.

### 3. *La responsabilité pénale.*

Sous l'influence d'une série de théories, le concept de la responsabilité en matière pénale a été critiqué et même dénié. Cette thèse est non seulement sociologico-juridiquement injustifiée et scientifiquement fausse, mais aussi illogique, car si la responsabilité est exclue du domaine pénal on ne voit pas de raison pour ne pas l'exclure de tout autre domaine juridique, économique, social, industriel, administratif, judiciaire, etc.

Comme tant d'autres thèses, dérivées d'un néo-positivisme ou d'un scientisme déviés, celle-là semble ignorer que la responsabilité n'est pas un concept mais une attitude et une nécessité. Comme telle, elle forme une partie indispensable de la plupart des actions et des rapports humains et la supprimer signifierait nier toute sorte d'organisation individuelle et collective. Un humanisme et un humanitarisme faux ont aussi facilité cette thèse de la suppression de la responsabilité. Ce qu'il faut c'est éviter de la construire d'une manière dogmatique et formelle, comme élément d'un système juridique, mais l'affirmer comme expression d'une exigence politico-sociale.

Brièvement, la culpabilité pénale doit dépasser l'étape psychologique où elle se trouve encore pour entrer dans une étape nettement sociologique. Cela signifie : *a*) que l'intention et la négligence ne sont pas les seuls éléments à considérer et que toutes les deux font partie d'un même processus psychologico-sociologique ; *b*) que l'intention et la négligence ne sont séparables que dans leurs formes extrêmes ; *c*) que le droit pénal ne s'intéresse pas à toutes les formes de négligence mais seulement à celles qui entrent dans le but de la loi pénale, qui, bien entendu, ne protège la communauté et la personne que contre les attaques extrêmes ; *d*) que la règle générale,

d'après laquelle les délits intentionnels sont punis plus sévèrement que ceux causés par négligence doit être abandonnée. Cela veut dire que dans certains cas la mesure pénale imposée à ces derniers peut être aussi sévère que celle imposée pour un délit intentionnel; et *c*) que puisque la négligence admise est seulement celle qui a des conséquences graves, tout délit est puni dès lors qu'il a été commis intentionnellement ou par négligence, et celle-ci ne constitue donc pas une exception.

Bref, comme il a été déjà dit, la culpabilité est conçue comme l'expression d'une attitude individuelle vis-à-vis du système fondamental des valeurs, et non comme un processus purement psychologique, et d'après le rôle que chacun selon sa condition, situation et position est supposé jouer dans la communauté. Donc, tout en étant individuelle, aucune attitude ne constitue une entité isolée car toute attitude est, en principe, acquise et en rapport étroit avec la communauté. D'autre part, toute attitude implique volonté, appréciation et décision de la part du délinquant, même si toutes les trois se sont formées inconsciemment. La formation d'attitudes est déterminée en grande mesure par la condition, la situation et la position du délinquant dans un groupe social déterminé. En conséquence, la culpabilité, tout en se référant à un acte relativement isolé, n'est pas la culpabilité d'une personne isolée mais d'une personne qui fait indissolublement partie d'un groupe. En d'autres termes, la culpabilité et la responsabilité sont mesurées aussi par rapport à la communauté et non seulement par rapport à une personne isolée. Tout en gardant la culpabilité comme un élément essentiel, le droit pénal doit s'appuyer sur une base beaucoup plus vaste. Cela explique pourquoi il est inutile d'énumérer les circonstances atténuantes et aggravantes et la nécessité d'élargir autant que possible l'individualisation judiciaire, car sauf dans des cas exceptionnels, la loi pénale ne peut pas déterminer *a priori* — individualisation légale — la nature de la mesure à imposer et encore moins son étendue dans chaque cas. L'uniformité actuelle par laquelle chaque délit, ou les différents cas d'un même délit, a sa peine établie *a priori*, ne correspond pas à une conception sociale de la culpabilité et de la responsabilité pénales. Il peut arriver qu'un délit de trahison puisse être moins sévèrement puni qu'un délit d'homicide ou qu'une autre infraction.

Conformément à ce qui vient d'être dit, l'énumération actuelle des causes de non-culpabilité et de justification dont la distinction

n'a jamais été claire, doit être abandonnée. Elle répond à des conceptions et techniques déjà dépassées. En ce qui concerne les premières, les formules psychiatriques même si elles sont combinées avec des éléments biologiques, physiologiques, etc., sont insuffisantes; de même les énumérations constituées par la légitime défense, l'état de nécessité, l'obéissance à la loi, l'exercice d'un droit, etc. Toutes ces formules et ces énumérations sont des manifestations d'un cycle qui ne s'est pas encore arrêté. Il faut aller de l'avant et aboutir à une seule formule capable d'amalgamer toute cause possible d'exemption de la responsabilité pénale. Cela ne signifie pas confondre l'exemption de non-culpabilité avec celle d'illégalité (antijuridicité) mais tout simplement simplifier la loi laissant au juge la liberté de faire au besoin, et s'il est possible, la distinction nécessaire. En tout cas, il est évident que de nos jours la loi, même si elle est légitime, ne peut pas tout justifier, encore moins l'ordre légal. De même, l'exercice d'un droit. En ce qui concerne la légitime défense, elle s'est élargie de telle manière qu'une formule casuistique, qui avait sa place dans les codes du XIXe siècle, ne suffit plus. Ajoutons que les cas d'état de nécessité, où les deux biens en conflit sont égaux, attendent encore une solution juridique. Aujourd'hui, la vie est trop complexe et les situations de conflit sont tellement diverses que la loi ne peut pas prétendre les renfermer dans des formules légales.

La solution peut se trouver dans le principe de non-exigibilité, c'est-à-dire qu'une autre conduite n'était pas exigible. Ce principe se trouve à la base de la défense légitime, de l'état de nécessité, de l'obéissance à la loi et même de certaines formes de non-culpabilité. Historiquement, on trouve des antécédents dans les textes des anciens commentateurs. De nos jours le principe est reconnu dans la théorie et la pratique pénales de beaucoup de pays. Bien que seulement comme cause d'exclusion de la culpabilité, je l'avais déjà utilisé dans mon projet pour la Bolivie. Aujourd'hui, j'irai plus loin. En tout cas, en 1947, dans mon livre *Qué es el delito ?*, j'avais déjà mentionné le rôle plus étendu que le principe était destiné à jouer en droit pénal. Il est significatif que le projet allemand de 1962, ainsi que celui de 1960, tout en parlant d'*Entchuldigender Notstand*, s'occupe de la non exigibilité dans la section consacrée à la *Notwehr und Notstand*, ce qui prouve l'impuissance de la technique juridique pour faire une distinction nette entre illégalité (antijuridicité) et culpabilité. La partie générale du projet pour

Porto Rico, rédigé par Francisco Pagan, insère la non-exigibilité sous la rubrique de la culpabilité. La même méthode avait été déjà suivie par le professeur Soler dans son projet pour l'Argentine, ici examiné. Dans son projet pour le Brésil, M. Nelson Hungria, en suivant en partie le subterfuge juridique du projet allemand de 1960, dit que l'état de nécessité ne se donne que lorsque le mal a éviter est un mal majeur. Un tel subterfuge confirme l'impuissance de la théorie juridique du délit. M. Nelson Hungria place la non-exigibilité sous l'ample titre *Do crime*.

Finalement, la conception sociale de la responsabilité pénale justifie celle des personnes juridiques. Elle a été accueillie par le projet pour Porto Rico. Elle est déniée par ceux qui basent le droit pénal sur une conception individualiste et psychologique de la culpabilité.

4. *La formulation des délits en particulier.*

Conformément aux considérations précédentes, la formulation des délits doit être aussi concise et souple que possible. La casuistique ne signifie pas garantie mais inégalité. De plus, du point de vue criminologique et pénologique, elle ne se justifie pas. Elle répond à une administration de la justice à caractère « providentialiste », rétributive et dosée. En me bornant à quelques exemples, les cas suivants sont examinés.

La protection pénale de l'Etat ne demande pas un nombre d'articles aussi élevé que celui que lui accordent les codes pénaux ou plus encore les lois ou les ordonnances pénales spéciales, où, sous un concept exagéré de la sûreté de l'Etat, on accumule parfois de nombreuses infractions qui n'ont rien à voir avec cette sûreté. Un tel excès, malheureusement assez courant aujourd'hui, est le résultat d'une subordination de la loi pénale à des fins politiques, dont une des victimes est le code pénal. Cette subordination soulève l'importante question des effets criminogènes de l'abus de la loi pénale déjà mentionnés [1].

On peut se demander si la protection pénale de l'Etat doit occuper la place qu'elle a encore dans la systématique pénale. Lors de la rédaction de mon projet de Code pénal pour la Bolivie, j'avais

1. Ces effets, qui dans une grande mesure sont dus à la subordination de la loi pénale à des fins politiques, ont été examinés dans mon essai « Aspectos criminógenos de la ley penal », qui sera publié dans le *Bulletin de la Société internationale de criminologie* (2e semestre, 1964).

déjà soulevé la question. A titre de compromis, la protection de l'Etat fut placée sous le titre des délits contre l'organisation du peuple bolivien. Je me suis naturellement prononcé de toutes mes forces contre l'expression « délits contre la personnalité de l'Etat », tellement fictive et dangereuse, qui a été introduite par le Code pénal italien et imitée par d'autres textes.

Une telle extension est expliquée en disant que l'interventionnisme croissant de l'Etat et de ses fonctions demande cette protection. L'interventionnisme est évident, mais on a l'impression que ce ne sont pas toujours les fonctions nouvelles qui ont la plus grande part de cette protection, mais plutôt les anciennes, c'est-à-dire celles qui se réfèrent au pouvoir politique de l'Etat. Ainsi, dans le projet du Code pénal allemand cent seize articles sont attribués à la protection de l'Etat et à son organisation, c'est-à-dire 24% de la totalité du projet et 33% de tous les délits particuliers. De ces cent seize, soixante-dix, c'est-à-dire 60%, sont accordés à l'aspect politique. Remarquons que sous l'étiquette Etat, et en dehors de ces 60%, les délits contre l'administration de la justice et la fonction publique, qui doivent être considérés comme des biens juridiques indépendants, sont inclus. Tout cela montre l'étendue démesurée accordée à l'Etat et le rôle réduit accordé à la communauté comme telle. A vrai dire, la communauté demeure protégée presque comme en passant et d'une manière modeste dans quelques articles, la plupart sous le titre de délits contre l'*öffentliche Ordnung*.

Dans les projets allemand et argentin, les délits contre les personnes sont encore traités comme ils l'étaient dans le passé. Ainsi, dans le premier, pas moins de vingt-trois articles, avec des nombreux cas, sont consacrés aux délits contre la vie et l'intégrité corporelle. Les distinctions entre homicide simple, meurtre, homicide sur demande, par négligence, et infanticide sont maintenues. Ce critère objectif établissant des cas particuliers, qui en soi-même constitue la négation d'un droit pénal de culpabilité, se retrouve en matière de blessures où j'ai compté trente-deux cas différents.

Dans le projet argentin on a l'homicide simple, l'homicide qualifié qui comprend huit modalités différentes parmi lesquelles on a inclus d'une manière presque subreptice le génocide, l'homicide commis sous une émotion violente, l'infanticide, l'homicide-suicide, l'homicide par pitié et l'homicide par négligence. En ce qui concerne les blessures, le critère casuistique et objectif est, bien entendu,

maintenu. Dans le projet du Venezuela, en ce qui concerne l'homicide j'ai compté dix-sept cas différents. Celui du Brésil en contient onze. Comme contraste, le projet japonais n'en contient que deux, ce qui prouve, comme le note M. Juhei Takeuchi dans sa très intéressante *Introduction*, que la casuistique pénale peut être réduite considérablement.

Remarquons que le *Model Penal Code* continue lui aussi cette tradition casuistique démodée, en incluant l'homicide criminel, le meurtre, l'homicide atténué (*manslaughter*) l'homicide par négligence, l'aide au suicide, plus une série de circonstances atténuantes et aggravantes pour ces délits.

Les exemples peuvent être multipliés pour presque tous les délits. Malgré le progrès criminologique et pénologique, les délits continuent à être formulés comme ils l'étaient par les premiers codes pénaux du XVIIIe siècle ou même avant. La différence est seulement formelle, mais la technique est presque la même.

## V. — Remarques finales

Il est évident que le problème de la codification se pose différemment dans chaque pays. Dans les pays moins développés, une expression qui a une valeur relative, l'étape préparatoire esquissée ici est difficile à remplir car très souvent certaines données manquent ou ne sont pas faciles à rassembler. Néanmoins, dans une certaine mesure, on parvient toujours à en obtenir quelques-unes si l'effort nécessaire est fait. Tel a été le cas de la Bolivie déjà mentionnée et tel a été le cas de l'Ethiopie avec le Code de 1958 préparé par le professeur Graven, qui est resté dans le pays pendant une longue période pour mieux préparer le projet. Comme un des derniers mauvais exemples, celui du Venezuela avec son nouveau projet de Code pénal est significatif. Le *Rapport annuel du ministère de la Justice* pour 1960 indiquait comment il était en train d'être confectionné. Il disait que le code serait le résultat : *a*) d'une étude de toutes les législations pénales postérieures au Code Zanardelli qui, d'ailleurs, a inspiré le code pénal en vigueur ; *b*) du droit pénal libéral en recueillant les fruits des écoles traditionnelles ; *c*) des apports de l'école technico-juridique ; et *d*) des enseignements de la science pénale allemande. Notons que dans cet étrange mélange, le Venezuela, c'est-à-dire sa réalité et ses besoins, et les données permettant de les connaître ne sont même pas mentionnés.

Les statistiques, qui bien qu'incomplètes existent, les études criminologiques faites, qui bien que peu nombreuses sont parfois remarquables, sont aussi ignorées, de même la réalité judiciaire et pénitentiaire et les tendances de la criminalité. Le projet, paru en 1961, contient un *Exposé des motifs*, qui tout en étant moins ambitieux que le rapport de 1960, montre que la méthode suivie est celle de la confection dans sa forme la plus pure. Cela explique qu'aucune mention ne soit faite de la structure, des caractéristiques, des transformations, des tendances actuelles, de la communauté, des besoins pénaux nouveaux, des données statistiques, de la recherche criminologique, etc. Par contre, on fait référence à un grand nombre de législations étrangères. La lecture du projet donne souvent l'impression, surtout en ce qui concerne la partie générale, de se trouver en face d'un tout petit traité de droit pénal où on a essayé de tout inclure. Malgré les mérites de certaines parties, le projet semble être quelque chose d'un peu irréel, venant d'un monde purement théorique et qui ne parvient pas à nous convaincre qu'il s'agit d'un texte avec lequel on va protéger les biens les plus importants du Venezuela et des Vénézuéliens. Et pourtant, au Venezuela il y a des professionnels qui sont bien capables de préparer une vraie réforme pénale.

La codification pénale telle qu'elle est demandée par l'étude et l'analyse de la réalité pénale, ne pourra pas s'implanter tant que le droit pénal est conçu, construit et enseigné comme une *arm-chair* discipline. Le droit pénal dogmatique, technique, systématique et érudit par excellence appartient au passé mais à cause d'une série d'intérêts créés, il est encore avec nous et considéré plutôt comme l'objet d'une profession que comme l'expression d'une fonction sociale.

Il serait intéressant d'entreprendre une enquête pour voir quelles sont les dispositions des codes pénaux qui ne sont jamais appliquées ou dont l'application s'avère un sérieux conflit avec la réalité. Ce droit pénal analytique, frère de la criminologie et de la pénologie analytiques, dont je me suis occupé ailleurs, montrerait l'inutilité d'une grande partie du système pénal d'aujourd'hui et celle aussi de la casuistique providentialiste de nos Codes pénaux. Encore plus, il montrerait l'inégalité et l'injustice de l'individualisation légale qui s'obstine encore à opérer avec des doses pécsnal qui en manière de pillules pénologiques sont administrées dans chaque article, alinéa et subalinéa conformément à une *adminis-*

*tration de la justice* formelle, inégale et lente. Souvent je me suis demandé quelles sont les bases sur lesquelles s'appuie cette justice. Pourquoi ces limites soigneusement établies, même dans les codes qui se vantent, un peu naïvement, de se baser sur le prétendu état dangereux, et non pas d'autres limites allant plus bas ou plus haut ; pourquoi une telle sorte d'emprisonnement et non cette autre aussi établie par la loi sur l'évaluation des biens juridiques, qu'on donne comme fondement de tous ces subtils *distinguo,* est fictive. Heureusement, que parfois ces excès et décalages sont atténués par la pratique judiciaire. Cela, en étant souhaitable, montre le caractère purement spéculatif d'une grande partie de nos codes pénaux.

Remarquons que le droit pénal ici préconisé est un droit plus facile à interpréter et à appliquer que celui de nos jours. En ce qui concerne les pays moins développés, ce droit pénal souple s'adapte beaucoup mieux à leur évolution et transformation que le droit pénal dogmatique et casuistique encore cultivé, favorisé et importé par leurs élites dirigeantes.

# LAW REFORM IN THE UNITED KINGDOM: A NEW INSTITUTIONAL APPROACH

NORMAN MARSH*

> The minds of men are the great wheels of things; thence come alterations and changes in the world; teeming freedom exerts and puts forth itself; the unjust world would suppress its appearance; many fall in this conflict, but freedom will at last prevail, and give law to all things.**

## I

The seventeenth century author of the quotation was too optimistic. The movement for law reform between 1640 and 1660 was not lacking in good ideas; many of them have been adopted in later times and have proven their practical value, and others are in the process of being carried out or at least actively debated.[1]

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** Warr, *The Corruption and Deficiency of the Laws of England Soberly Discovered*, 11 June 1648, Harleian Miscellany, iii, 251, in D. VEALL, THE POPULAR MOVEMENT FOR LAW REFORM 1640-1660, 240 (1970).

1. *See* D. VEALL, THE POPULAR MOVEMENT FOR LAW REFORM 1640-1660, 235-36 (1970), which mentions among the reforms which already had been anticipated or proposed in the period 1640-1660, if not earlier, the admission of counsel for the defence on a charge of treason in 1697 and of felony in 1738, likewise of witnesses for the defence in 1695 and 1702 respectively; the abolition of *peine forte et dure* in 1772, leading in 1827 to a refusal to plead being treated as a plea of not guilty; the drastic reduction in the number of capital offences betwcn 1808 and 1861 [leading, it may be added, to the suspension of the death penalty in 1965 and its abolition in 1970, except for treason and certain forms of arson, with the death penalty for the latter (Royal dockyards, etc.) proposed for abolition in LAW COMMISSION, REPORT ON OFFENCES OF DAMAGE TO PROPERTY, LAW COM. No. 29 (1970)]; the abolition of benefit of clergy for all except peers in 1827 and for peers in 1841; and the abolition of forfeiture for felony and treason and of drawing and quartering of persons condemned to death for treason in 1870. More generally, in the sphere of criminal law Veall refers to the anticipation by seventeenth century reformers of the modern concern for the causes of crime and for humane and individualized forms of punishment. As far as civil proceedings are concerned, Veall lists the introduction of English as the legal language in 1731; the tentative beginning of registration in connection with land in the eighteenth and nineteenth centuries, only now clearly aiming at registration of titles on a compulsory basis for the whole country; the Fatal Accidents Act 1846; the setting up of County Courts on a country-wide basis in 1846; and the reorganisation of the higher courts and the fusion of law and equity between 1873 and 1875. And, lastly, Veall sees the achievement of a seventeenth century proposal in the appointment of Law Commissioners in 1965.

The law reformers of that period, however, failed to achieve any very substantial changes capable of resisting the inevitable reaction in the years immediately following the Restoration in 1660. No doubt an important reason for this failure was the fact that "Cromwell's government was never able to free itself from the vice of its origin." [2] For the purposes of this article, however, it is important to draw attention to another factor which crippled the work of the reformers. Although it is far from true that the reformers were without practical experience in the law,[3] they were opposed by the majority of the bar and the judiciary. The reform of the law was—and is—a highly technical process. Without a broad measure of support among lawyers as a whole, the reformers were all too easily checked by the delaying manoeuvres or simple non-cooperation of those on whom the responsibility for working out the practical implications of the reforms necessarily fell.

> The reforming lawyers were not in the magic circle of privileged lawyers, but they could have been put into positions of authority where they would have been able to ensure that law reform was implemented. Cromwell had created the New Model Army from men who knew what they fought for and loved what they knew, and it was this Army which had brought victory in the Civil War. What was wanted was a New Model Justiciary of lawyers who had clear ideas about law reform and felt strongly about them.[4]

The lesson of the period seems to be that law reform will be most successful when it forms part of the institutional functioning of the legal system itself. It is not that the lawyers all want the reforms, but they are much more ready to accept them when they appear to come out of the legal system itself. Although Lord Chancellor Gardiner may have had a rather different point particularly in mind, his remarks in the Lords' debate on the Law Commissions Bill in 1965 gain added weight in the present context: "It may be your Lordships' experience that things in life do not get done unless it is somebody's job to do them. It has never been anybody's job in England who would do it to see that our law is in good working order and kept up to date." [5] It is "anybody's job in England *who would do it.*" (Emphasis supplied). The qualifica-

2. Nourse, 75 L.Q.R. 528-29 (1959).
3. *See, e.g.*, VEALL, *supra* note 1, at ch. IV.
4. *Id.* at 239.
5. 264 PARL. DEB., H.L. (5th ser.) 1146 (1965).

tion is obviously important, but it requires some elaboration. In the first place, we may ask what is the nature of the job in question, in other words, what is meant precisely by *law reform* in this particular context. Obviously we are concerned with a good deal more than *lawyer's law*, if the latter means only technicalities of law which are of exclusive concern to lawyers themselves. On the other hand, we must recognize that there will be changes effected by law—for example, the setting-up of a National Health Service or the nationalisation or de-nationalisation of an industry—which, in regard to the broad principle involved, cannot be said to involve special legal expertise. The kind of law reform which in the United Kingdom has presented a legal problem of machinery and institutions concerns those areas of law, which, whether or not they involve deep economic, social, or political issues, are in danger of being neglected because (a) the non-lawyers who are interested in them are frightened off by their legal complexities, and (b) the lawyers either do not want, or feel it is not their business to initiate, change in those areas.

The sphere of contract, for example, is of every-day importance to the layman in business and to other non-lawyers in many relationships, such as that between landlord and tenant. One of its fundamental social, rather than legal, issues is the extent to which it is desirable to assume an equality of bargaining power between contracting parties or to make adjustments in the law of contract to allow for inequality. But legal expertise is required to untangle the legal knots in which the courts can all too easily become enmeshed in the effort to effect a working compromise betwen unrestricted freedom of contract and protection of the less powerful, and legal expertise and practical legal experience are equally required to ensure that a tangle once cleared up does not re-occur. Whether the solution lies to some extent in statutory prohibitions of clauses excluding the ordinary obligations of contract or, in certain areas, may demand a more sophisticated formula, allowing a court or some other body to distinguish between "reasonable" and "unreasonable" exclusion clauses depends on the proper application of these types of expertise.[6]

6. When Lord Reid in Suisse Atlantique Societe d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale, [1967] A.C. 361, 406 said that the so-called doctrine of "fundamental breach" [as to the history of which in the English courts see G. CHESHIRE & C. FIFOOT, LAW OF CONTRACT 119-27 (7th ed. 1969) and Harbutt's Plasticine Ltd. v. Wayne Tank & Pump Co. Ltd., [1970] 2 Q.B. 447] was an attempt to conceal behind a phrase the real social and economic issue of equality of bargaining which "is a com-

Given that Lord Gardiner was concerned with law reform in this sense, his suggestion that there has been no one in England whose job it is to carry it out requires further explanation in a second respect. How is it possible to make such an assertion, bearing in mind the great contribution made by the English judges to the development of the law? Of course, the law cannot stand still. As new problems arising from hitherto unthought of factual situations come before the courts, the law must in the nature of things develop; but whether that development will amount to reform is another matter. Five considerations, some of which, if not entirely new, have at least intensified in recent years, and others, more or less inherent in a system of judge-made law, suggest that English law cannot, at least for the future, rely on that system as the main instrument of law reform.

First, it is no longer possible for the judge in modern English society to make those bold assumptions about family life and about relations between landlord and tenant, employer and employee, citizen and the State which underlie many reforms of a seemingly legal character. On the one hand, he lives in an era where many value assumptions are being challenged; on the other, he does not enjoy quite the unquestioned prestige, the charismatic authority, enjoyed by his Victorian forbearers.[7]

plex problem [affecting] millions of people" and that "the solution should be kept to Parliament," he was concerned only to draw the line between judicial law-making and law reform ultimately embodied in a statute. But how much should be put in a statute, in what way it should be expressed, and how much experience and policy, are areas where Parliament may be assisted by expert advice. ENGLISH & SCOTTISH LAW COMMISSIONS, JOINT REPORT ON EXEMPTION CLAUSES IN CONTRACTS (1969); LAW COMMISSION, FIRST REPORT: AMENDMENTS TO THE SALE OF GOODS ACT 1893, LAW COM. No. 24 (1969) recommended that in consumer contracts, clauses exempting a party from liability under sections 12-15 of the Sale of Goods Act 1893 should be prohibited, and they have reviewed the arguments for and against control by a judicial test of reasonableness of similar exclusion clauses in other contracts, although they were equally divided as to the desirability of such a test. The English Law Commission has also recommended a total prohibition on exclusion clauses providing for exemption from liability which would otherwise arise between vendor and purchaser or lessor and lessee in respect of quality defects in the dwellings (or of dangerous defects in any premises) dealt with by the contract. *See* LAW COMMISSION, CIVIL LIABILITY FOR VENDORS AND LESSORS FOR DEFECTIVE PREMISES, LAW COM. No. 40 (1970).

7. There are many reasons for this. The anthropologist and the social psychiatrist may attach some importance to a changed climate in which the father-figure [a judicial role according to JEROME FRANK, LAW AND THE MODERN MIND, 203 (1970)], in the past facilitating judge-made law, has been dethroned. The statistically-minded legal historian may emphasise the relatively high income and consequent sense of security which English judges of the superior courts formerly enjoyed (£5,000 per annum from early in the nineteenth century until 1954). This figure should be compared with the modest salary

As the House of Lords recognised, after a decade or more of attempted judicial innovations designed to provide protection in the matrimonial home for the deserted wife,[8] and after an even longer period of judicial experiments aimed at protecting the economically weaker party to a contract from unfair exemption clauses,[9] reform of the law may raise issues which in present conditions are more appropriately dealt with by the legislature.

Secondly, judge-made reforms are dependent on the issue coming before the courts, and more particularly on the issue reaching an instance which places the court in a position to overrule, ignore, or distinguish any awkward precedents which stand in the way of reform. This chance element is accentuated by another factor, namely, the respective means of the parties to the litigation in question. Between the litigant who qualifies for legal aid and the man, or more often the corporation or government body, for whom costs matter less than a satisfactory legal result, there is a large group of potential litigants deterred by lack of means from fighting a case through the courts and, if necessary, to the House of Lords. Sometimes it may profit a litigant with a business in which the same issue may reoccur, to settle a case in spite of a favourable ruling in, say, the Court of Appeal, in order to prevent a possible rever-

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of the County Court judge, for whom, by the Act of 1846 instituting this grade of judge, a maximum salary of £1,200 per annum was fixed; by World War II it had risen to £2,000 per annum. Taking present taxation rates of higher incomes into account, the difference in salary between High Court and County Court judges—£14,500 as compared with £7,850 per annum—is much less marked. *See* 313 PARL. DEB., H.L. (5th ser.) 1339 (1970). A lawyer may point to the derogations from judicial authority implicit in the entrusting of many quasi-judicial decisions to extrajudicial persons or bodies, although here there has been a notable counterattack from the courts. *See, e.g.*, Padfield v. Minister of Agriculture, [1968] A.C. 997. Even more tellingly, he could emphasise the striking increase in the members of the higher judiciary since World War II which tends to mean that the typical judge is less respected, not because he is necessarily less worthy of respect, but simply because he is a more common, and therefore a less widely and personally known, figure of the establishment. In R. ENSOR, COURT AND JUDGES IN FRANCE, GERMANY AND ENGLAND (1933), the author gave the following figures: Lords of Appeal in Ordinary (House of Lords)—7; Lord Justices (Court of Appeal)—5 (plus the Master of the Rolls); Justices of the High Court—25 (plus the Lord Chief Justice and the President of the Probate, Admiralty and Divorce Division). From a debate in the House of Commons on December 16, 1970, 808 PARL. DEB., H.C. (5th ser.) 1487 (1970), it appears that the comparable figures are now 10, 14 and 68 respectively.

8. *See* National Provincial Bank Ltd. v. Ainsworth, [1965] A.C. 1175, which led to legislative reform by the Matrimonial Homes Act 1967. The earlier judicial attempts (notably by Lord Denning) to protect the wife's "equity" in the family home are dealt with by P. M. BROMLEY, FAMILY LAW 375 (4th ed. 1971).

9. *See* note 6 *supra;* G. CHESHIRE & C. FIFOOT, LAW OF CONTRACT 111-27 (7th ed. 1969).

sal in the House of Lords. Indeed, this is rather more likely since the House of Lords assumed power to overrule its own decisions. In such circumstances the average party to a case is likely to prefer the cash in hand to the doubtful distinction of running a large financial risk in the interests of a possible reform of the law.[10]

A third and even more important consideration may be summed up by a slight modification of a well-known aphorism: hard cases make not so much bad as unsystematic, incoherent and therefore, from the point of view of the law as a whole, uncertain law. In other words, the hard case invites an equitable decision, which is not bad in itself, but requires a broader base of principle than the judge in that particular case is entitled to provide. If he does reach such a decision, he only prepares the way for a further spate of litigation which may ultimately have to be stemmed by legislation.

An excellent example of this kind of legal development is provided, as far as English law is concerned, by the efforts of the courts to free the principles of liability governing occupiers of land in relation to their visitors from the rigid categorisation of such visitors into invitees, licensees, and trespassers.[11] Before the Occupiers Liability Act 1957 some judges, either by widening the conception of invitee or by stiffening the lower standard of duty required of an occupier vis-a-vis a licensee, had in effect, come near to anticipating the Act of 1957. But the law remained in a very unsatisfactory state because it lacked the broad general principle of a common duty of care owed to visitors in general, which was at last supplied by the Act. The example is by no means of only historical interest. The complexities of the invitee and licensee distinction are still relevant in a number of jurisdictions within the common law area—for example, in the United States and in Canada; and, as far as liability to trespassers is concerned, the English courts are now in a dilemma very similar to that which faced them before the Occupiers Liability Act.[12]

10. American lawyers will bear in mind that in England cases cannot be accepted by solicitors and counsel on a contingent fee basis.

11. *See also* the history of the wife's "equity" in the matrimonial home (Note 8 *supra*). These remarks should by no means be taken as showing any lack of appreciation for the bold, reforming judge. It is he who frequently alerts the public to the need for reform. The point made here is that the inherent nature of his function limits his capacity to achieve *satisfactory* reform.

12. *See* Herrington v. British Railways Board, [1971] 2 Q.B. 107 in which the Court of Appeal deplored the confused state of the law as to the liability of an occupier toward

Fourthly, it must be remembered that the reforming decision, which is welcomed by the critical academic lawyer, long familiar and impatient with some outdated but hitherto accepted piece of conventional legal wisdom, may be extremely unjust to the unsuccessful party. The latter is, in effect, the victim in a case of retrospective law-making. The danger of injustice by departing from the expected patterns of judicial behaviour was emphasised by the House of Lords when they announced in 1966 that they would no longer be necessarily bound by their own previous decisions. They would, they said, "bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and final arrangements have been entered into and also the especial need for certainty as to the criminal law." [13]

There is a fifth consideration which it would, in the context of English law, seem natural to bear in mind when assessing the potentialities of the judiciary as a source of law reform. It concerns, of course, the important part played by stare decisis in the English legal system. Clearly there is less scope, at least for rapid change, where that principle prevails than by the clean-sweeping enunciation by the legislature of some new general principle.[14] On the other hand, there is now, as has already been mentioned, the announcement, admittedly in very guarded terms, of the House of Lords that it no longer regards itself as necessarily bound by its own decisions. Although advantage has already been taken of this new power, or rather the assertion of freedom from a self-imposed restriction,[15] and although there are some indications of freedom from their earlier decisions spreading to courts below the level of the House of Lords,[16] it would seem premature to welcome in a new era of judge-

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trespassers and clearly thought that liability, even toward trespassers, should depend on what was reasonable in the circumstances.

13. [1966] 1 W.L.R. 1234. *See* Jones v. Secretary of State for Social Services, [1972] 1 All E.R. 145. English courts have not adopted the device of prospective overruling, familiar to lawyers in the United States and recently taken up by the Supreme Court of India. *See* 9 JOURNAL OF THE INDIAN LAW INSTITUTE 596 (1967).

14. *Compare,* for example, the gradual extension of "cruelty" in matrimonial law, particularly since the Matrimonial Causes Act 1937, culminating in Gollins v. Gollins, [1964] A.C. 644 and Williams v. Williams, [1964] A.C. 698, *with* the generality of the grounds of divorce set out in the Divorce Reform Act 1970, §§ 1, 2 namely breakdown of marriage proved by, *inter alia,* behaviour of the respondent "in such a way that the petitioner cannot reasonably be expected to live with the respondent."

15. London Street Tramways Ltd. v. London County Council, [1898] A.C. 375.

16. Lord Denning M.R. at all events has expressed the view that the Court of Appeal is no longer bound by its own decisions: Eastwood v. Herrod, [1968] 2 Q.B. 923, 934; Ballie v. Lee, [1969] 2 Ch. 17.

been important, but of limited scope. They can only deal with such matters as are specifically referred to them by the Lord Chancellor and the Home Secretary respectively, and these two Ministers have many pressing preoccupations apart from law reform. The members of the committees, drawn from the judiciary and the legal profession, practising and academic, with the assistance of legally trained officials acting as secretaries, have neither the jurisdiction nor, in view of the commitments of their everyday jobs, the time to consider *law in the round* and on that basis to work out an *overall strategy of reform* with all the implications of wide-sweeping consultation in and outside the sphere of the law which such a programme would involve.

## II

The foregoing critical sketch of the machinery of law reform which existed in England before the Law Commissions Act 1965 may help to explain the underlying purposes of that Act and the aims of the Law Commissions in giving effect to it. In describing the main features of the Act, and in summarising the work done under it, attention has been directed mainly to the deficiencies of the earlier system—or lack of system—for dealing with law reform and to the ways in which the Act, and more than five years of practical work by the Commissions, have dealt with these deficiencies.

It is not suggested that the innovations introduced by or under the Act can claim originality on the world scale,[23] although it may well be that, in its combination of various features, what may be called the British "Law Commission approach" to the problem of effecting law

the former, should be mentioned CRIMINAL LAW REVISION COMMITTEE, report on THEFT AND RELATED OFFENCES, CMND. No. 2977 (1966) now substantially implemented in the Theft Act of 1968.

23. In Appendix 4 to its LAW COMMISSION, FOURTH ANNUAL REPORT, LAW COM. No. 27 (1968-69) the Law Commission listed 42 reform agencies in the Commonwealth, the United States and other countries, with some common law tradition. The oldest body mentioned is the National Conference of Commissioners on Uniform State Laws of the United States, set up in 1892; the most recent is the Ceylon Law Commission, set up by an Act of 16 January 1969, which closely follows the United Kingdom Law Commissions Act. To this list must now be added the Canadian Law Reform Commission 1970. The Chairman of the English Law Commission, Mr. Justice Scarman, and the present writer have contributed a joint paper to the Commonwealth Law Conference at New Delhi, 1971, in which they find it possible to say that, at least as far as the Commonwealth is concerned, "lawyers have come to accept that a fully developed legal system should contain a legal institution whose duty it is to keep the law under review, with the object of promoting its systematic development and reform."

reform in a democratic country does mark a significant advance of more than purely local interest. And in the United Kingdom, although there has never been any earlier institution set up by Act of Parliament as a permanent agency to keep all the laws under review, it may be said that some precedent was provided by the attempts at law reform made between 1640 and 1660[24] and the appointment in the nineteenth century of Criminal Law and Real Property Commissions.[25] Yet the influence of these not very exact precedents was minimal compared with the much more recent proposals for a new law reform agency made by Lord Devlin in 1962[26] and, in greater detail, by the authors of a chapter on "The Machinery of Law Reform" in *Law Reform Now*, published in 1963. One of those authors, Gerald Gardiner, Q.C., became Lord Chancellor in the two following Labour governments and in that capacity was responsible for introducing the Law Commissions Act 1965; the other, Andrew Martin, Q.C., served five years as one of the first Law Commissioners.

The text of the Law Commissions Act is given as Appendix A to this article. At the risk of over-simplification, comment is here concentrated under four main headings, prefaced by a note on the implications of the Act for the United Kingdom as a whole and followed by a short note on the typically British problem of the consolidation and revision of statutes.

### *Geographical Scope of the Law Commissions Act*

Scotland, unlike Wales, has a legal system and body of law separate from that of England. Therefore, the Act of 1965 provides Scotland with a Scottish Law Commission consisting, like its English counterpart, of five members.[27] Again like England, the chairman of the Commission is a judge, first Lord Kilbrandon, now Lord Hunter of the Court of Session. The Act requires the two Commissions to work in close coopera-

24. *See* VEALL, *supra* note 1, at 79-84.

25. *See* XV W. HOLDSWORTH, HISTORY OF ENGLISH LAW 142-96 (1965).

26. LORD DEVLIN, SAMPLES OF LAWMAKING 27 (1962). "I believe that it would be beneficial if there were a small body of men who devoted the whole of their time, working perhaps with the aid of a larger body of consultants meeting from time to time, to a systematic tidying-up of the law as well as to making proposals for wider reforms."

27. Only two, however, have full time appointments. It is a consideration of some general interest—not only in the British context—that the problems of a separate system of law applying to a relatively small population may not be substantially less than those arising under a system covering a large population, but it is common to think that the former justifies a more modest law reform agency than the latter.

tion, and in fact a number of their projects have been[28] or are being[29] jointly run. This article has looked at the institutional machinery for law reform mainly from the English and Welsh point of view, and the same limitation applies to the following review of the practical working of the Law Commissions Act, but, broadly speaking, it is thought that, both in respect of the past deficiencies of the machinery for law reform and with regard to experience under the Act, it is possible to speak for Great Britain as a whole. As far as Northern Ireland is concerned, the Law Commission is responsible for the field of law which is reserved to the Parliament at Westminster. A Director of Law Reform was appointed in 1965 by administrative order in Northern Ireland to deal with matters within the legislative competence of the Province.

## *The Law Commissions System*

### *Comprehensiveness*

The Law Commissions take under review *all the law.* This comprehensive approach is important, because, as has already been indicated, judicial innovations introduced when a particular case comes before the courts—indeed even statutes passed to deal with special topics—are apt to create almost as many problems as they solve.

This does not mean that nothing can be done within or independently of the Commissions until they have ready a complete codification of the whole of the law. In the first place, the Commissions have used their power under section 3(1) of their Act to make an "immediate remedial response" to situations which call for urgent attention, whether called to their notice from outside the Commissions or raised on their own initiative. This normally leads to a formal request by the government agency concerned to make a report with proposals for reform under section 3(1)(c).[30] Second, the former agencies for law reform can still

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28. *E.g.*, ENGLISH & SCOTTISH LAW COMMISSIONS, JOINT REPORT ON INTERPRETATION OF STATUTES, ENG. LAW COM. No. 21 & SCOT. LAW COM. No. 11 (1969).

29. The two Commissions are jointly engaged in the preparation of a common contract code for their two countries.

30. A recent example is provided by the advice given in LAW COMMISSION, LIMITATION ACT OF 1963, LAW COM. No. 38 (1970). It was particularly concerned with hardship created by a decision of the Court of Appeal, Lucy v. Henley, [1970] 2 Q.B. 393 (C.A.), in interpreting that Act, as a result of which the dependents or personal representatives of persons who die as a result of diseases contracted in industry might, where the nature of the disease and its cause does not become immediately obvious, find themselves deprived of any remedy a year after the death of the victim of the disease.

be used to supplement the work of the Law Commission.[31] Indeed, the Law Commissions can and sometimes do recommend that a particular problem be investigated by another body rather than themselves. In the third place, the Law Commissions are adopting for the most part a "gradualist" rather than an "all-at-once" technique of reform. What is important is that the Commissions seek to maintain a general awareness of the whole pattern of the law into which a specific change can be specifically fitted. Moreover, it is becoming increasingly common for government departments concerned with "programme legislation," with which in its initial stages the Law Commissions have not been concerned, to ask the advice of the Commissions under section 3(1)(e) of the Act to ensure that their legislation is in keeping with other branches of the law, either as at present or as likely to be reformed.[32] This comprehensive approach of the Law Commissions, however, raises the question whether it can be reconciled with undoubted ultimate responsibility of the government of the day for the general pattern of the Law. This question can only be answered in the light of the second feature of the Law Commissions system here considered.

*Independence of Advisory Function*

As the function of the Law Commissions is, in any event, advisory only—it is for the government or for a private member, who succeeds in getting the necessary Parliamentary time, to introduce legislation implementing the Commissions' proposal—it may be thought that the independence of the Commissions is a matter of somewhat theoretical importance. But governments have many other preoccupations than law reform. In the democratic party system of government, law reform is not a topic which normally excites the party whips who are anxious to

31. An important recent example of an ad hoc Royal Commission on a law reform subject is that on assizes and quarter sessions of which Lord Beeching was Chairman. The ROYAL COMMISSION REPORT, CMND. No. 4153 (1970), has been substantially implemented in the Courts Bill of 1970. Generally speaking, the Law Commissions have left procedure and organisation of the courts alone and concentrated on substantive law. They would not regard this as a permanent feature of their work, but would probably feel that, in the initial phase of new institutions, before the Commissions have gathered weight and momentum, these matters, perhaps the most resistant to change owing to the many powerfully entrenched interests affected, are better left for the special treatment of a Royal Commission or direct governmental initiative.

32. *See, e.g.*, the *Misuse of Drugs Bill* of 1970 which raised questions beyond the medico-social issues involved as to the proper mental element in crime. *See* Warner v. Metropolitan Police Commissioner, [1969] 2 A.C. 256 and Sweet v. Parsley, [1970] A.C. 132.

give preference to proposals which will win a favourable response from the electorate. It is, therefore, important that there should be an independent body which can put forward proposals for law reform on their merits without undue regard to passing political considerations.

The two Commissions are not, strictly speaking, departments of government, although they are part of the machinery of government. Those appointed as Commissioners—five for each Commission, with a maximum term of office of five years, subject to renewal[33]—are all lawyers.[34] But they do not formally represent the views of the different branches of the law, although the fact that the chairman of each Commission is (while not under the Act required to be) a member of the higher judiciary is an indication of the independent role the Commissions are expected to play.

The Commissions take the initiative in proposing programmes of items for investigation with a view to reform, and then their reports on these items, once made, must be presented to Parliament and published. The appropriate Ministers (the Lord Chancellor for the Law Commission, the Secretary of State for Scotland, and the Lord Advocate for the Scottish Law Commission) have, it is true, a power to veto a proposed investigation, but the power has been rarely used. In any event, the proposed investigation is normally set out by the Commissions in very general terms in a situation where it would be politically difficult for an administration to refuse to allow even an enquiry. However, it must be mentioned that the Law Commission was unable to pursue further an enquiry into liability for "dangerous things and activities" when it came to the

33. The first English Commissioners were all appointed for five years. Four were reappointed for varying terms, to provide continuity of experience, in 1970, and one returned to practice at the Bar. The Scottish Law Commission was originally appointed with a full-time Chairman and three part-time Commissioners. On the completion of the term of office of one of the latter in 1968, his place was taken by another part-time Commissioner and a further Commissioner was appointed on a full-time basis. Subject to these changes, the Law Commissions have begun their second quinquennium with the same body of Commissioners as initially in 1965.

34. The Law Commission originally consisted of a High Court Judge (chairman), a Queen's Counsel who had had an extensive common law practice, a second Queen's Counsel who had combined practice with a part-time university chair in international and comparative law, a professor of commercial law who had also had a considerable number of years experience of practice as a solicitor, and the present writer. There was at the time some feeling that the point of view of solicitors should be more strongly represented, and a special consultant, a very experienced solicitor, was therefore attached to the Commission, constituting in effect a sixth Commissioner. As the new appointee in 1970 was a solicitor, the post of special consultant was allowed to lapse, although the solicitor concerned continued to assist the Commission in a part-time capacity.

conclusion that what was really involved was the whole principle of liability for negligence in personal injury cases,[35] which it was not allowed to question even by launching an investigation. Further, the Law Commission's proposal that an enquiry should be undertaken on a broad basis into administrative law, although not by the Commission but by a widely representative committee or Royal Commission,[36] was not accepted. The Commission was asked by the government to undertake, as a first step, a more modest enquiry into the present remedies for the judicial control of administrative decisions.

Delicate issues are at stake in these fields. It can at least be said that, in the long run, the existence of the Commissions ensures that the areas of law affected, even if not immediately subject to a full investigation with proposals for reform, are in one way or another brought to the notice of the public. For one thing, no veto can prevent the Commissions from making such comments on their work, as they think fit in the Annual Report which each Commission is required to make and which the appropriate Ministers are bound to present to Parliament.

The independence of the Commissions is not a right to give uninstructed and arbitrary advice, but rather entails independence in reaching decisions after an exceptional degree of consultation with all the interests affected. The independence of the Commissions is thereby strengthened, because Parliament may be more ready to accept their advice when it knows these proposals have been made only after a wide canvassing of different viewpoints. Consultation is nothing new in law reform. Nevertheless, because in scale and method of consultation the

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35. *See* LAW COMMISSION, CIVIL LIABILITY FOR DANGEROUS THINGS AND ACTIVITIES, LAW COM. No. 32 (1970). The report, although in a sense leading to no conclusion, was able to analyse, at length, the present very confused law governing strict liability at common law for dangerous things and activities. It also clearly rejected any proposal for reform on lines similar to those laid down in the American Law Institute's RESTATEMENT OF TORTS, §§ 519-20 (1938) which imposes strict liability for "ultra-hazardous activities." It was not at all opposed to strict liability as such, but it considered that the test proposed in the RESTATEMENT would make for uncertainty. Further, after a seminar attended by a wide cross section of lawyers (a frequent preliminary consultative device of the Commissions), the Commission took the view that what was more relevant to strict liability was not the nature of the danger involved, but the respective positions of the plaintiff and the defendant with regard to the practical possibility of insuring against the accident in question. This in turn led to the insurance position in regard to personal injury and to the question of substitution of strict liability for the negligence principle there applicable, and thus the report brought the veto into operation.

36. *See* LAW COMMISSION, ADMINISTRATIVE LAW, LAW COM. No. 20, CMND. No. 4059 (1969).

Commissions have made many innovations, it seems justifiable to give it special prominence. It may be that the techniques of consultation which the Law Commissions have developed are at least as important as the actual reforms which they have proposed because much of the difficulty of achieving law reform has been a problem of means rather than ends.

*Consultation*

What is perhaps new in the consultative techniques evolved by the Commissions—not, it must be noted, laid down in their Act—is the ***manner***, the ***timing*** and the ***scale*** of the consultation. The process can best be illustrated by following the course of a project of the Law Commissions from the time that it appears as an item in an approved Programme until the stage when the completed report on the item is laid before Parliament with a draft Bill giving effect to the recommendations made in the report.[37]

First, a detailed Working Paper with provisional recommendations, usually including information about the relevant legal position in other countries,[38] is prepared by a small team in the Law Commission, headed by one or two Commissioners. After the Working Paper has been discussed at length by the Commission as a whole and, as a result, often rewritten or amended, it is distributed in an edition of about 1500 copies, not only to the various interests in the legal sphere—the judiciary, practising, and academic lawyers (the latter two categories have set up special committees to deal with Law Commission papers)—but also to many lay organisations particularly interested in the subject-matter. Further, it is sent, as a matter of course, to the relevant government departments and to the national press, both general and legal.[39] It is worthy of note

37. The practice of accompanying reports with a draft Bill, always an excellent test of the feasibility of a proposal, was rare before 1965. Following the example set by the Law Commissions, which normally attach a draft Bill to each of their Reports, it has become more common for any body making proposals involving legislation.

38. The Law Commissions are required by § 3(1)(f) of the Act to obtain information on the relevant law of other countries.

39. The legal "weeklys" generally print a summary of the Working Paper which the Commissions are careful to provide. Working Papers occasionally feature in the general press. Final reports, however, are given very considerable coverage in the national "dailys," sometimes with "leader" articles commenting on them. The Law Commissions take considerable pains to prepare appropriate press summaries which may bring out the salient issues of interest to lay readers. In general, it may be said that the Law Commissions have attached great importance to keeping their work before the general public

that the Commissions, although they welcome informal oral consultations, do not hold anything in the nature of formal hearings. On the whole their experience is that the most satisfactory results are obtained from carefully prepared Working Papers which are not content to ask questions but which also set out in detail the basic material from which answers can be given, with some guidance as to the provisional thinking of the Commissioners, and a survey of other possible solutions with their accompanying advantages and drawbacks. It has been found that although this technique involves much work, in the long run it spares the Commission many irrelevant and time-wasting suggestions.

After an interval of perhaps six months to a year the comments received on the Working Paper are considered, first by a specialist team within the Commission who, with or without a general consultation with the Commission as a whole depending on the tenor of the comments received, proceed to prepare a draft Report. This Report, generally at this stage without an accompanying draft Bill, is debated by the whole Commission and sent back for any necessary amendments and the addition of the Bill, which is supplied by Parliamentary draftsmen attached to the Commission, in often prolonged consultation with the Commissioners and their staff.[40] The Report as presented to the Lord Chancellor (in the case of the Law Commission for England and Wales) will not only outline the present law in the area covered by the Report and set forth the recommendations therewith, together with the implementing draft Bill, but it will also deal in detail with the process of consultation, including the names of those consulted and (unless there is some problem of confidentiality) the views they have expressed. The Law Commissions see the ultimate object of the elaborate process of consultation as assisting Parliament on matters of often great technical detail which can seldom be adequately investigated in the course of Parliamentary

and the individual Commissioners speak quite frequently on the subject at meetings, over the radio, and in the form of articles for the legal and general press. Their underlying thought has been that law reform is a cause which must be kept in the public eye if it is to achieve practical results.

40. Daily contact in a common organisation between representatives of the highly specialized and expert small corps of Parliamentary Draftsmen and the lawyers of the Commission, without such training but with sometimes critical ideas on British drafting, has probably been of considerable advantage to both sides and to the draft legislation for which the Law Commissions are responsible. In the past, this kind of dialogue, at least in such a close and continuous form, was more uncommon in the normal relationship between the office of Parliamentary Counsel and the government department promoting legislation.

debate. This assistance is ineffective unless the scope and nature of the consultation is clearly set out on the face of the Report.

*Adequacy of Technical Resources*

The English Commissioners are assisted by a total staff of about 50, of whom slightly over half are trained lawyers. The Scottish Law Commissioners have a relatively small staff. The resources which have been made available to the Law Commission, although not particularly striking by comparison with, for example, the departments concerned with law reform in some European Ministries of Justice, are considerable by earlier British standards.[41] The Law Commission has thereby undoubtedly been helped to produce, within five years, a large number of Working Papers and final reports, a fact which, even apart from their content, is not without importance. A new institution, in a sense on trial, has been seen by Parliament and the public as capable of producing results.

*An Addendum on Consolidation of Statutes and Statue Law Revision*

There is an as yet unmentioned aspect of the Law Commissions' work specifically referred to in their Act, which requires some comment. The comment should be brief; first, because the problems involved are of a peculiarly British character—they are by no means so acute even in those parts of the Commonwealth which in general follow the common law tradition; and second, because it is doubtful how strictly relevant they are to an article primarily concerned with the institutional machinery for law reform. Nevertheless, it would give a misleading impression of the work of the Law Commissions to suppress all reference to the consolidation of statutes and to statute law revision.

By consolidation is meant the preparation for re-enactment of a number of older statutes, dealing with the same or allied subject-matter, in a single new Act rationally arranged and, as far as possible, expressed in modern language. The present state of the Statute Book, including statutes on an enormous variety of subjects that spread over some 700 years, is a formidable barrier to the understanding and use of that very large part of the law in the United Kingdom which is embodied in a statutory form. But the Law Commission did not invent the technique

41. The total average cost of the Law Commission for the years 1967-68, 1968-69, and 1969-70 was about £160,000 per annum (independent of rent and rates for buildings and stationery). The comparable figure for the Scottish Law Commission was £40,000.

of consolidation—it has been going on for over a hundred years—although, it is true that it has been to some extent a secondary responsibility of the relatively small and much overworked office of Parliamentary Counsel, the primary function of which is to draft all of the central government Bills, irrespective of the department from which the proposal for legislation comes. What the Law Commissions have done, pursuant to their statutory responsibilities in this field, is to provide, from time to time, a programme of statutes to be consolidated and a scheme of priorities. Thus, it was decided at an early stage, for example, to concentrate on two masses of legislation, namely those concerned with taxation and with rent restriction, which are of great practical importance to lawyer and layman alike. The work undertaken has resulted in the consolidation of two statutes, the Income and Corporation Taxes Act 1970 and the Rent Act 1968.

In one respect, the Law Commissions have made a new contribution to the technique of consolidation. A particular difficulty of consolidation is to satisfy the Joint Select Committee of the two Houses of Parliament, to which Consolidation Bills are sent, that no change has been made in the law. Some latitude to cover minor matters is allowed by the Consolidation of Enactments (Procedure) Act 1949, but the Law Commissions have found that work on consolidation could easily be frustrated because it could not be sensibly done without some adjustments of the law of little real importance but too substantial to come within the procedure of the 1949 Act. The Law Commissions have now been able to secure agreement on a procedure whereby what is essentially a Consolidation Bill is accompanied by reasoned Law Commission recommendations for change. If approved by the Joint Select Committee, the Bill goes forward like a pure Consolidation Bill and is normally ensured of a speedy formal enactment.

Closely allied with consolidation is what is technically called statute law revision. This involves not reform or even re-enactment, in an organised and modern form, of old statutes, but the total repeal of statutes which no longer have any practical effect, because they have, without being ever formally repealed, been entirely superseded by later Acts or they deal with situations which, in their nature, can never arise again—*i.e.*, they are "spent."

Parliamentary Counsel have in recent years been responsible for statute law revision, as well as consolidation and statute law revision Bills, which also go before a Joint Select Committee. Here too, under their general

responsibility for the planning of statute law revision, the Law Commissions have attempted some innovations of technique. They have tried to widen the category of obsolete statutes—*i.e.*, not merely those which have been superseded or spent but also those which have ceased to have any practical utility. The task is delicate, as Parliament is properly jealous of its prerogative in these matters; but a procedure has come to be accepted whereby, in a Bill of statute law revision type, statutes which are for all practical purposes dead letters (although not formally superseded or "spent") may be included.[42] The important point is that these Bills are given the relatively speedy procedure of the Joint Select Committee of the two Houses and do not have to compete for a place with ordinary legislation.

## III

An article which is concerned with the institutional problems of law reform—with methods rather than with results—would seem misdirected if it devoted too much attention to the actual reforms which have been proposed or are under consideration by two particular law reform agencies in the context of their interconnected legal systems. In any event, the information is easily available in the Annual Reports of the Law Commission and of the Scottish Law Commission from 1965-66 and 1970-71.[43] Nevertheless, a member of the Law Commission may reasonably be expected to give some general impression of the fields of law with which he, together with his colleagues, has been concerned over the past five years and some indication of the Commission's activities in the future. Such a survey, however, must be distinguished from a list of "achievements." A more reliable test for the latter is the list of reports of the Law Commission given in Appendix C, together with

42. *See* LAW COMMISSION, STATUTE LAW REVISION, FIRST REPORT, LAW COM. No. 22, CMND. No. 4052 (1969) with a draft Statute Law (Repeals) Bill covering many obsolete constitutional, ecclesiastical, property, Sunday observance, hall-marking, Commonwealth, and other enactments; *see also* LAW COMMISSION, STATUTE LAW REVISION, SECOND REPORT, LAW COM. No. 28, (CMND. No. 4433 (1970) with a draft Wild Creatures and Forest Laws Bill repealing a number of enactments from The Charter of the Forest 1297 to a schedule in the Crown Estate Act 1961; LAW COMMISSION, STATUTE LAW REVISION, THIRD REPORT, LAW COM. No. 37, CMND. No. 4546 (1970) with a draft Statute Law (Repeals) Bill dealing, *inter alia*, with enactments relating to Irish peers, ecclesiastical matters, banking and war-time, and emergency situations. The first has been implemented by the Statute Law (Repeals) Act of 1969, the second and third are covered by the Wild Creatures and Forest Laws Act 1971 and the Statute Law (Repeals) Act 1971 respectively.

43. In Appendix B are set out the Published Working Papers (in Scottish terminology Memoranda) and Reports of the two Commissions from 1965 to January 1971.

the extent to which they have been or are in the process of being translated into legislation.

The Law Commission is engaged in codifying the law of contract (jointly with the Scottish Law Commission), the law of landlord and tenant, the criminal law, and family law. The contract code and the landlord and tenant code are being drafted more or less as a single operation. This has not, however, ruled out projects in advance of the codes, such as a report on sections 12-15 of the Sale of Goods Act 1893 and the extent to which parties should be permitted to contract out liability under those sections[44] and another report on commercial tenancies under Part II of the Landlord and Tenant Act 1954.[45] The criminal code and the code of family law are being built up stage by stage. Thus, before the Law Commission was established the Criminal Law Revision Committee had taken in hand the drastic simplification of a number of crimes involving dishonesty which finally resulted in the Theft Act 1968. The Law Commission followed with a draft Bill on broadly similar lines covering crimes of damage to property,[46] and is at present engaged in preparing reports on forgery and perjury. At the same time, with the assistance of an outside Working Party, it is working out the general principles (mental element, parties to crime, inchoate offences, etc.) applicable over the whole field of the criminal law.[47] Similarly in the sphere of family law a number of reports[48] of the Law Commission have

44. English & Scottish Law Commissions, Joint Report of Exemption Clauses in Contracts, Eng. Law Com. No. 24 & Scot. Law Com. No. 12 (1969).

45. Law Commission, Landlord and Tenant, Law Com. No. 17 (1969) now implemented by the Law of Property Act of 1969.

46. Law Commission, Criminal Law, Report on Offences of Damage to Property, Law Com. No. 29 (1970), now implemented by the Criminal Damage Act 1971.

47. See Published Working Papers 17, 29, 30, and 31. No. 17 is an introductory paper on the general principles of the criminal law. No. 29 deals with the territorial and extraterritorial extent of the criminal law. Nos. 30 and 31 are concerned with strict liability in regulatory legislation and the mental element in crime generally.

48. Law Commission, Reform of the Grounds of Divorce: The Field of Choice, Law Com. No. 6, Cmnd. No. 3123 (1966) is interesting in regard to its technique. It was in the form of an Advice by the Lord Chancellor to consider the practical implications of the proposals put forward in the report, "Putting Asunder," of the Group appointed by the Archbishop of Canterbury to consider from the point of view of the Church of England the grounds for divorce. The Law Commission did not, in view of the socially controversial issue involved, directly make recommendations but set out various possible courses of reform and their practical implications. The matter was taken further by two Private Members' Bills, on which the Law Commission gave assistance, and the second of these eventually became law as the Divorce Reform Act of 1969. On family law matters see also Law Commission, Blood Tests and Proof of Paternity, Law Com. No. 16 (1969); Law Commission, Conjugal Rights, Law Com.

been published, some of which have already been implemented by Parliament.[49] The Law Commission is now preparing a report on matrimonial property.

Apart from work on codes, the Law Commission is working on a variety of reforms concerned with the transfer of land, and, at different points, has touched on the law of torts, as, for example, with regard to the limitation of actions, assessment of damages, civil liability for animals and for defective buildings, and the categories of strict liability (*Rylands v. Fletcher* liability and liability for nuisance and for independent contractors) which exist at common law.[50] It has recently been engaged in a simplification of the remedies—in particular *certiorari*, *prohibition*, and *mandamus*—available for judicial control of the administration.[51] To these topics should be added a miscellaneous category of projects which usually arise from requests for advice from government departments or from suggestions from the legal or general public.[52]

Finally, mention should be made of a report on the interpretation of statutes,[53] a subject of direct importance to the Commissions (the report was made jointly with the Scottish Law Commission) which must necessarily use the instrument of statutes to bring about their proposals. The report has not as yet resulted in legislation, but it may have served a useful purpose in reviewing the rather confused case law in this field and in helping to encourage a more purpose-directed approach to interpretation than the rather literal approach which has often characterized, at

No. 23 (1969); LAW COMMISSION, FINANCIAL PROVISION IN MATRIMONIAL PROCEEDINGS, LAW COM. No. 25 (1969); LAW COMMISSION, BREACH OF PROMISE, LAW COM. No. 26 (1969); LAW COMMISSION, NULLITY, LAW COM. No. 33 (1970); LAW COMMISSION, POLYGAMY, LAW COM. No. 42 (1971). Except for the last two mentioned all these reports have been implemented (see Appendix C), and the last is before Parliament.

49. These include the Divorce Reform Act of 1969, establishing "breakdown" as the basic ground for divorce; the Matrimonial Causes and Property Act of 1970, dealing with financial provision in matrimonial proceedings; and the Law Reform (Miscellaneous Provisions) Act of 1970, abolishing the old action for breach of promise of marriage.

50. *But see* note 35 *supra*.

51. *See* note 36 *supra* and the accompanying text which explains the narrow scope of this enquiry.

52. A typical example is the report LAW COMMISSION, ADMINISTRATIVE BONDS, LAW COM. No. 31 (1970). The necessity for administrative bonds had been questioned in a suggestion for reform made by the Law Society, the professional organisation of solicitors. It is also interesting in that it concerned a question of procedure; on the whole —at least on a major scale—the Law Commission has been rather slow to take up procedural matters for the reasons given in note 31 *supra*.

53. ENGLISH & SCOTTISH LAW COMMISSION, JOINT REPORT ON THE INTERPRETATION OF STATUTES, ENG. LAW COM. No. 21 & SCOT. COM. No. 11 (1969).

least until recently, the interpretation of statutes by judges in the United Kingdom.

## IV

In concluding this article, it seems desirable to return to its starting point. Law reform, in the sense of changes in the law which require the goodwill and technical cooperation of lawyers, if it is ever to be achieved, needs an institutional framework. In the nineteenth century great reforms were effected under the all-pervading influence of Benthamite philosophy, but the task was easier because law was assigned a severely limited role in society. Today much more is expected of the legal system, but there is no immediately obvious scale of values by which the law reformer can operate. An adequately staffed legal institution, independent of the executive but forming part of the machinery of government, is needed as a preliminary to the democratic decisions of the legislature: (1) to organise a system of wide-reaching consultation regarding the aims to be pursued; (2) to devise, in the light of the best technical experience, the means to those aims, and (3) to symbolize and to maintain the interest of the community in securing a legal system which brings modern law to the needs of modern man.

In England, up to 1965, the reform of the law was a somewhat haphazard affair, being instigated either by the setting-up of an ad hoc body with clearly defined terms of reference to report on a specific issue, or by referring to a standing committee specific topics for it to investigate. The ad hoc committee could act only within its terms of reference and was dissolved upon submission of its report. The standing committee, on the other hand, has an honourable history, going back to 1934,[3] and it still exists today in the shape of the Lord Chancellor's Law Reform Committee and the Home Secretary's Criminal Law Revision Committee. However, it has no power of initiative, no power to plan the future development of the law, and it consists of members of the legal profession serving only part-time.[4] With the passing in 1965 of the Law Commissions Act, law reform in England was at last put on a systematic basis, with a field of activity which in the past had been largely the preserve of the courts and of the legal profession being placed in the hands of a statutory body. As Mr. Justice Scarman, the Chairman of the Law Commission, has recently pointed out in his Lindsay Memorial Lectures on law reform,[5] the Act was a recognition by Parliament that reform of the law was a problem in the sphere of machinery of government, with responsibility for that reform resting squarely on the legislature.

The Act involved the constitution by legislation of a body independent of the government, the legislature, and the legal profession, which was to "take and keep under review all the law . . . with a view to its systematic development and reform",[6] and to initiate

a planned programme of law reform and make recommendations for the implementation of any proposed reforms. The overhaul of the law was taken out of the hands of the legal profession, with its overcautious approach and entrenched opposition to radical ideas, and its haphazard and somewhat unproductive methods of reform, and the whole concept of the reform of the law was put on a scientific and rational basis. The architect of this new approach was the Lord Chancellor, Lord Gardiner, who prior to his appointment had been highly critical of existing methods for achieving law reform.[7] On his elevation to the Woolsack His Lordship continued to espouse the cause of reform and his views found ultimate expression in the Law Commissions Bill introduced by him at Westminster in 1965.

In accordance with the commission's independent status, it was decided that it should be a small body of experts, five in number. The Lord Chancellor exercised his prerogative to select commissioners on a full-time basis, and of the appointees one was a judge (the chairman), one was a retired barrister, and the other three could properly be described as academic lawyers, although two of them had professional experience. Of these academic lawyers, two were experts in comparative law,[8] which was fitting in view of the provision in the Act enjoining the commission to have such regard to the legal systems of other countries as was appropriate. It has been said that "the old Law Reform Committee, which had been solidly representative of the legal profession, was now replaced by a small group of men whose views were likely to be well in advance of those generally held in the profession."[9]

The achievements of the United Kingdom Law Commission in the three years since its establishment have not been spectacular, but they have been solid. Its first programme of law reform, approved and published in 1965, contained seventeen specific proposals, including such big and important tasks as the codification of the law of contract, the examination of civil liability for animals and for dangerous things and activities, and the codification of the law of landlord and tenant. The commission's second programme, approved in 1967, envisaged the codification of the criminal law and a comprehensive examination of family law with a view to its systematic reform and eventual codification.[10] Land law and the interpretation of statutes have also come under examination.[11] A number of final reports (some resulting in legislation)[12] have been issued, but this is far outweighed by the working papers which have been circulated for comment.[13] In addition, the commission has had to consider miscellaneous law reform proposals and requests for advice from outside, and has also done consider-

able work in the field of consolidation and statute law revision. It has, for instance, begun a review of the whole of the statute law in chronological order, with a view to proposing the repeal of all that cannot positively be shown to perform a useful function.[14]

It is obvious that the notable progress that has been made could have been achieved only by having law commissioners who were engaged full-time in the task of simplifying and modernizing the law, and also by having a competent full-time research and clerical staff on whom the commissioners could call. In 1968 the English commission had a special consultant (a solicitor who acted as a liaison officer with the legal profession), and a staff of forty-six, including four draftsmen and fifteen other lawyers, as well as a library of some eight thousand volumes, with which to implement its ambitious programme for reform.[15] Law reform of these dimensions is not cheap. But the very fact that the operation is expensive may mean that the commission will be more effective. When the Law Commissions Bill was being debated in the House of Lords, Lord Simonds had doubts about the wisdom of setting up a commission, but remarked that as it was going to cost the Government £200,000 a year, the Government might pay some attention to what it said.[16]

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# THE GERMAN DRAFT CRIMINAL CODE 1960–AN EVALUATION IN TERMS OF AMERICAN CRIMINAL LAW

*BY GERHARD O. W. MUELLER* *

## I

### INTRODUCTION

#### *(1) American Views on Codification*

COM

There is virtually no disagreement among American scholars about the aims and methods of penal code draftsmanship. But there is disagreement on whether or not we are ready to codify what we have. At least three views are extant on this point.

(1) The conservative view holds that unless and until the academicians have so far succeeded in systematizing criminal law and in reducing it to well-defined principles, codification should not be attempted, else it would turn into little more than a casuistic and digest-like statement of the law. Moreover, the conservatives say, the available criminological data are insufficient, so that their legislative affirmance is not feasible.

The conservative view was expressed long ago by our great criminal jurist, Joel Prentice Bishop: "Let me suggest, therefore," he said, "that we

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*For acknowledgments, see text at p. 29* infra. *The author is grateful to Professors Richard Honig (Göttingen, Germany) and Horst Schröder (Tübingen, Germany), both presently visiting professors at New York University, for many helpful suggestions.*

[1] Harno, *Rationale of a Criminal Code*, 85 U. PA. L. REV. 549 (1937).

suspend our quarrel over this question of codification until our law has received such juridical culture as to inform us, and enable us to agree among ourselves, just what and how many are its elementary principles, reduced to their smallest proportions. We have already seen that to ascertain this is the proper work of the jurist; it is absolutely outside the functions of the judge."[2] The conservative view still has many adherents in America, and their reasoning is simple: Bishop was right in 1888. Virtually nothing has happened since to ascertain the "elementary principles, reduced to their smallest proportions," hence, codification is inappropriate at this time.

(2) The opposing view holds that the academicians will never succeed in the above task because they are always much too impractical in outlook, or too lazy, or too incompetent, or too slow, or will never agree, and that if we were to wait for the final word from either the legal academician or the criminologist, we could wait till Domesday. Hence, we might as well terminate the existing chaos (so it is said) and do as good as we can by codifying what we have and know.

This view is predominant among American judicial councils and legislative reform committees. The results may be met in the daily practice of the courts applying the state "penal law" or "code," which is the product of such reasoning. Not even Wisconsin forms an exception to this position, though the Wisconsin effort shows the exercise of more than customary intelligence in "codification."[3]

(3) There is an ambitious third view, as thoroughly American as can be, of almost boundless confidence and spirit: Yes, it is true that our law is not yet systematized and reduced to its principles, and it is true that criminology is far from being able to give us final answers. And just because of that we should codify and in doing so achieve the penultimate perfection in theoretical schematization and systematization, using the best available criminological knowledge, but leaving things flexible enough to permit ready improvement if and when new knowledge becomes available. But we certainly cannot content ourselves with, in essence, casuistically repeating in code form all the cobwebbed nonsense which is mixed in with the sound wisdom of the ages.

This view corresponds most nearly to the position which the American Law Institute has taken. Obviously, compromises with original high standards and ideals had to be made, but on the whole, the work proceeds with unabated enthusiasm and confidence. Whether the codifiers will reach the high mark they set for themselves—which is to be hoped—we cannot tell until the finished product is before us.[4]

[2] Bishop, *The Common Law as a System of Reasoning,—How and Why Essential to Good Government; What Its Perils, and How Averted,* 22 Am. L. Rev. 1 (1888).

[3] See Remington, *Criminal Justice Research,* 51 J. Crim. L., C. & P.S. 7, 10 (1960).

[4] In general, see Wechsler, *The Challenge of a Model Penal Code,* 65 Harv. L. Rev. 1097 (1952), and numerous other writings by Professor Wechsler.

*(2) Codification and Reform in America and Germany*

After many years of contemplation, observation, and preparation, America began her criminal-law reform in the early 1950's. It was—typical for America—private initiative, rather than government determination, which initiated the enormous effort of creating a Model Penal Code. The story is too well-known to require repetition here. From 1953 to date, under the able leadership of Chief Reporter Wechsler, twelve volumes of drafts and comments have been placed before the membership of the American Law Institute, and the Institute's debates are recorded in several volumes of the *Proceedings of the American Law Institute*. Unfortunately, the debates of the reporters and consultants have not been publicly preserved. The twelve volumes of tentative drafts cover about 2,000 printed pages of 4¼" by 7" print block and, of course, the work is not yet completed, though it is gradually nearing completion. The American Law Institute's effort is unprecedented in the annals of Anglo-American law, both as to volume and quality.

At about the same time, the Government of the German Federal Republic determined that the time had come for its own criminal-law reform. The existing German Penal Code is now three generations old, though it is no longer really the code of 1871; but rather, constant amendments have kept it fairly in step with the necessities of the times. Much has been learned since, often the hard way, and—at least in the opinion of the Ministry of Justice—a nation which now prided herself in good government and economic progress certainly did not want to fall behind in her cultural-political duty of protecting the citizenry against crimes through the latest known methods of crime control.

For Germany there were several precedents for such an undertaking, foremost the creation of the Imperial Penal Code in 1871, but especially the reform efforts of the early twentieth century when almost all German criminal-law scholars combined to create a sixteen-volume work, *Comparative Treatment of German and Foreign Criminal Law* (1905-1909), preceding various, although unsuccessful, drafts of a new German penal code.[5] The reform work is now completed. The government draft is before Parliament and the final step is up to the politicians who, significantly enough, constantly consulted with the draftsmen and advisers so as to avoid subsequent political snags on the floor of Parliament. The proceedings of the draftsmen's conferences were constantly reported in the *Zeitschrift für die gesamte Strafrechtswissenschaft* and the printed drafts, comments, and accompanying materials are now before us in twenty-six volumes, covering over 9,000 pages of 5½" by 10½" print block. Lawyers from all branches

[5] For the history of these reform efforts, see Jescheck, *German Criminal Law Reform: Its Development and Cultural-Historical Background*, in ESSAYS IN CRIMINAL SCIENCE 393 (Mueller ed. 1961).

of the profession, including several German professors of criminal law, have participated in this magnificent task. The criminologists were consulted on all criminological issues, and experts from near and far were heard. Comparative studies were undertaken by the Institute of Foreign and International Criminal Law at the University of Freiburg, i.B., Germany, so that no innovation of foreign penal law remained undetected. Surely, nothing further could possibly have been done to provide knowledge and enlightenment for the purpose of drafting the code. The task of the German draftsmen had been eased by the fact that the Germans had long ago discovered the "elementary principles, reduced to their smallest proportions"—to quote Mr. Bishop once again. No major debates were carried on to determine whether or not the time was right for re-codification of the German law. The German Government took this for granted, though doubt about the need for re-codification was expressed in various quarters. There had been over a century and a half of systematic study and analysis prior to the present codification effort. As a matter of fact, even at the halfway mark, during the 1870's, the theoretical problems of doctrine had undergone so much analysis that the codifier at that time could proceed with relative unperturbedness to put into a code the German criminal law in its most concise possible form, and with a fairly logical crime concept pervading the entire code. Today this crime concept is even more refined, though certainly in basic accord with that of the halfway point in the Imperial German Penal Code. On the criminological side, the Germans seem to have been convinced that, on the whole, the "auxiliary sciences" have not succeeded in proving anything which would require a radical departure from the wisdom of the ages, though they did avail themselves of the benefit of some relatively modern correctional inventions—with, incidentally, no more heuristic proof of their efficacy than we have in this country.

### *(3) The American Evaluation of the German Draft Penal Code*

The Ministry of Justice of the German Federal Republic has invited a number of foreign experts on criminal law to comment on the German draft in the light of juridical experience in foreign countries. Such a request was received by the Comparative Criminal Law Project of New York University, with sincere urgings to evaluate freely the German draft in the light of current American views on criminal law and criminology. This is indeed a formidable task, much beyond the capacity of a single individual whose possible bias may slant the evaluation. Let there be no mistake about it, the wide divergences of opinion on the current American scene increase the likelihood of such bias: we have fifty-seven distinct criminal jurisdictions in our nation, in competition—if not conflict—with another, and on the levels of adjudication and theory the disagreements exceed by far anything the codes may contain. The author, therefore, solicited the views of various American colleagues of the Advisory Committee of the Com-

parative Criminal Law Project, several of whom were kind enough to let him have the benefit of their views. All these opinions were considered, many are specially mentioned, and others are freely utilized throughout this paper. Among those whose views were particularly helpful are: Professor John LL. J. Edwards, Dalhousie University, Nova Scotia, Canada; Professor Roy Moreland, University of Kentucky; Professor Rollin Perkins, University of California (Hastings); and Professor Arthur H. Sherry, University of California (Berkeley). The author is greatly indebted to them. The late Professor Edwin R. Keedy of the University of Pennsylvania had embarked on the task of aiding this evaluation when death took him from our midst.

A number of our comments have become moot (and are therefore here omitted) because the defects we spotted were cured by alterations in the draft as it ultimately emerged. The crucial sections of the latest draft, the version introduced in the Upper House, and adopted by the Cabinet, to which this paper constantly refers, are appended. The instant paper will be made available to the Ministry of Justice of the German Federal Republic in the hope that it may be of benefit during the last stages of the reform endeavor.

It would exceed all bounds of reason to attempt an analysis of the entire draft code in one short paper. I prefer, therefore, to restrict myself to summary comments on the general scope of the code (ch. II.(1)), the sanctioning (ch. II.(2)) and procedural (ch. II.(3)) provisions in the General Part, as well as the Special Part (ch. II.(4)), and to concentrate instead more closely on the General Part (ch. III), *i.e.*, the principles and doctrines which provide the setting for the operation of a code, the molds into which the amalgamation of human conduct and specific norm is poured to form "crime."

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LISTE GENERALE DES DOCUMENTS

GENERAL LIST OF DOCUMENTS

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DOC. A-1 DOUZIÈME RAPPORT ANNUEL, Commission de réforme du droit du Canada, Juillet 1983, TWELFTH ANNUAL REPORT;

DOC. A-2 TURNER J., (1970) Débats de la Chambre des Communes, Canada, Compte-rendu officiel (Hansard) (1970) 23 Fév. pp.3960-3963; TURNER J., (1970) Canada, Hansard House of Common's Debates, Feb. 23, 1970, pp. 3960-3963.

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DOC. B-2 MACCLEOD A.J. & MARTIN J.C., "The Revision of the Criminal Code", (1955) 33 R. du B. Can. 3-19;

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## ANNEXE DOCUMENTAIRE C

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