

# COURTS AND SENTENCING IN THE 1980's<sup>1</sup>

by

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## **Introduction**

This journal is concerned with low intensity conflict, which includes criminal acts such as terrorism, politically-inspired violence, rioting and intimidation. Such offences are dealt with in Canada under the criminal code as ordinary crime: to do otherwise, to accept them as acts of war and respond violently, would be to surrender legitimacy and undermine the legal structure that a government exists to protect. The Courts, therefore, are in the front line of our defences against this form of conflict.

My task is not to attempt a full analysis of future trends in Court procedures and sentencing, but to provide a very personal viewpoint on how I think these trends may develop in Canada. It is a simplified and compressed account, designed to stimulate interest in this important field.

## **Courts**

The criminal justice process is not logical or systematic but is a valiant attempt to combine a wish to control crime with a concern for the protection of individual rights. That combination, to some minds, represents an impossible dream. It is seen as impossible because of a lack of consensus about strategies and goals. Each actor on the criminal justice stage carries with him attitudes and viewpoints which are particular to his training and which tend to isolate him from those working within the system who do not share those views. Different attitudes about the values and ends to be promoted in the system leads to problems in communication and understanding between different professional groups dealing with the same situation — crime and its aftermath, sentencing. The major actors in the criminal justice process have for the most part been able in the past to pursue values particular to their function.

Prosecutors fight crime by convicting offenders most efficiently. Defence lawyers ensure that their clients are acquitted or only convicted if the evidence establishes every ingredient of the charge beyond a reasonable doubt. The police wish to see the streets free of crime and of those who they believe criminal. Police have difficulty when they have made a professional judgment that a person ought to be arrested and charged, in understanding that the evidence available may be insufficient to justify a conviction. Police and prosecutors, who see their central role as that of fighting crime and convicting the guilty, have a particular perspective with regard to the role of the criminal justice system which often differs from that of the defence lawyer, and the Judge.

In the 1980s economic and political pressures placed upon the administration of criminal justice and the Courts will mean that the actors in the process — police, defence lawyers, prosecutors, judges — will become more accountable to the public for their activities and levels of productivity as determined by political and economic values. The system is costly and must be seen as productive. Legal aid, for example, is requiring higher levels of accountability on the part of

lawyers who take cases. Appeals must be justified for public monies are being spent. As values favouring productivity become ascendant there will be greater emphasis upon normative behaviour required for the purpose of analysis by computer and economic as well as managerial tools. Productivity will be linked with efficiency for administrative purposes. In order to achieve this, the analysis of Court processes will result in higher visibility of those processes and of the individual behaviour of actors involved in those processes. This will result in a de-mystification and de-ritualization of Court procedures. It will also mean that procedures will become inflexible as they are regulated for quantification and analysis.

In order to achieve the aim of managerial and economic efficiency there will be a necessary decrease in idiosyncratic behaviour within the system. This will mean that prosecutors, lawyers, and Judges will have to conform to statutory and administrative norms. For example, the unique discretionary component utilized in plea bargains where reciprocal relationships between the defence lawyer and the prosecutor presently predominate, will be replaced by a full-time administrator of plea bargains who will reduce charges on the basis of guilty pleas according to government imposed standards. Plea bargaining will not be legislated out of existence as long as it makes economic sense, i.e. the more guilty pleas entered, the more productive the system in terms of convictions entered. This is, of course, only one measure of productivity, but it may become the predominant measure of the future.

This emphasis upon managerial or administrative efficiency, combined with an economic sense of productivity, will inevitably increase general societal or community interests at the expense of the individual and the protection he has traditionally enjoyed within the criminal trial process. We are witnessing in the 1980's the death of the concept of "*mens rea*" — the guilty mind and a clear shifting to a concept of accountability for actions taken. In this sense, criminal trials will increasingly come to resemble civil trials concerned with questions of negligence. The burden of proof in a criminal trial — proof beyond a reasonable doubt in order to convict an accused person — will also shift. In the future, these shifting standards of proof, currently seen in certain provisions of the Narcotic Control Act, will increase so that the burden will be shifted upon the accused to establish his innocence once a *prima facie* case has been established by the prosecution. The burden may indeed be shifted to the accused to establish his innocence once the allegation has been made. This is a development which ought to be viewed with great concern by those who require the Court and criminal justice system to uphold values of individual justice above the demands of productivity and efficiency.

It will be argued, however, that the cost to the state of protecting these individual rights is inordinate, particularly in competition with other political priorities, i.e. the protection of environment and energy resources. These other societal needs are competing for the same taxpayer dollar at a time when the taxpayer is resisting further incursions by the state into his shrinking pocket. Thus, the administration of criminal justice will be seen more and more in "macro" rather than "micro" terms and the traditional emphasis, developed in 19th century England, upon individual rights will suffer severe de-emphasis.

The glut of population in urban centres and the need to control mass deviant behaviour undermines the administration of justices' emphasis upon individual rights and protections.

Numbers require processing efficiently and fairly, thus inhibiting concepts such as "*mens rea*" and individual rights are seen to be counter-productive to new conceptual frameworks. For example, in Ontario certain new provisions have been implemented relating to assumptions of guilt if one does not contest certain provincial infractions. This is the thin edge of the wedge, for once the value of individual rights and the presumption of innocence is seen as counter-productive by governmental and political authorities in response to demands for administrative and economic efficiency, civil liberties as such, will no longer be seen, philosophically, as key to a democratic society. Society itself is not demanding a high level of sensitivity on the part of the criminal justice process to individual rights and civil liberties. The public's response to R.C.M.P. infractions is a good indication of the general public's acceptance of official crime, as long as it is seen in aid of a good cause. Changes which are inevitable in our concept of democracy and individual liberty in a mass society concerned about scarce resources and generally attuned to the acceptance of governmental authority, will filter through rather quickly in the 80's to the administration of criminal justice, the Courts and the sentencing process. The general public has never been particularly sympathetic to legal and procedural doctrines asserting individual rights and protections in the face of public prosecution or even the police decision to arrest.

Part of the move towards consistency and efficiency will mean an increased emphasis on training in order to inculcate basic values and orientation upon those actors who play central roles in the administration of justice through the Court system. This need for retraining will fall, most particularly, upon the judiciary. The fact that one is a competent lawyer and a friend of the party in power will no longer suffice for an appointment to the bench. More will be required. The German system of apprentice Judges, who are put into the judicial mainstream shortly after graduation from law school by way of further education relating directly to a judicial role, is a likely alternative. This means younger Judges who are products of a particular training in orientation replacing those who have grown up within the adversary system. A Judge, accordingly, will become a true civil servant exercising less discretion, less judicial independence and acting more in conformity with political and popular values. A judicial appointment will become a career in itself, not a goal of those who wish to cap a successful legal career by an appointment to the bench.

The Court structure itself is seen by some as inefficient and unwieldy because of its hierarchical structure as well as its complex, lengthy and costly system of appeals. The streamlining of procedures and processes is taking place in Western Canada. Integration of Court levels bespeaks more emphasis upon productivity and economy rather than status. Computerization of Court lists and of Court processes in general will avoid present discretionary decisions within the process and subject less to individual judicial preferences and more to those values seen as administratively and economically sensible.

Part of this streamlining process will mean fewer trials by jury. Such trials are

already seen as inefficient and time-consuming. Similarly, there will be fewer lengthy trials as a result of new procedural rules and evidentiary provisions. For example, witnesses in a case can be examined prior to trial by way of videotape. The relevant excerpts may be viewed by the Judge prior to the rendering of his decision. Even examination and cross-examination may eventually be seen as too time-consuming and non-productive. This too can be completed outside the Courtroom in a more economic setting by way of videotaping. Only those matters which are agreed as directly relevant to the issues may be submitted to the Judge after editing by a law clerk on consent of the parties. Only then would the Judge render his decision on the basis of what will be primarily visual and written material presented to him. Even the relevant law will be available on a print-out merely by pressing the right keys. This development resembles the Continental European system where much of the evidence and argument is presented in written form. This approach could cut the length of trials by 80% or 90% and avoid the problems of delay and availability of Courts and Judges which bedevil the present system.

Emphasis upon what is in the best interests of the general community in combination with the dictates of the new economies, could lead to an early demise of the adversary system as we know it. Instead, that system will be replaced by what might be called a "family" or "community model". This model is not so much concerned with individual rights but with the needs of the community and the reintegration of those adjudged responsible for deviant behaviour back into normative roles in society. This model could also be called a "therapeutic model" because it bespeaks a rather patrimonial state doing what is seen to be in the best interests of the state as interpreted by legislators, psychologists, para-psychologists, social workers and civil servants. Deviation from the norm will be sanctionable only in the sense that deviational thought and actions will have to be reprocessed, reconditioned and replaced by training or deprivation sessions. The rights of the state or the rights of the individual become irrelevant to this process which is primarily concerned with reintegration of the errant individual rather than with his or her punishment.

"Diversion" reflects this aversion to trial and is presently the tip of this process. Rather than subject petty-offenders or juveniles to the trial process and the stigma that attaches to guilt, or the freedom which attaches to innocence, juvenile and petty-offenders are diverted from this process in order to change their thinking about the offence they have committed by dealing with the victim directly. Similarly, rather than punishing them for an offence, diversion programs encourage community work as compensation to the community for the wrongs they have committed both to the community and the victim. The offender is to learn by this experience and be reintegrated into the community by a resumption of an allegiance to community values. By comprehending the harm he has done to the others and to the community, he better understands his obligations as a good citizen. The question of the rights of the offender is irrelevant to such an approach.

This development of the "family" or "community model" means a historic break in fundamental philosophy between the actors in the system, Judges, lawyers, police, prosecutors, and consumers, both the offenders and the public. The system inevitably is going to be seen as more therapeutic in orientation and

less oriented to the legal values and to the traditions protecting individual rights. Definitions of what constitutes the "community" interest will be political-legislative choices and not subject to much judicial control.

The public's access to information about the system is bound to increase. That information results in increased knowledge about the Courts and their functioning and a decrease in the mysticism and symbolism surrounding the Courts. This decrease may also reduce the influence and authority of the Courts, the paternalistic view of the Courts may be replaced rather by public acceptance and accommodation to an open system which reflects current public and political values. Courts thus become less remote and less frightening to members of the public. There is a promotion of openness and frankness which is already being reflected in decisions relating to the computerization of information in the United States as it relates to Courts and their functions. For example, in *Richmond Newspapers v. Virginia*, a decision of the Supreme Court of the United States rendered in July 1980, the Chief Justice said,

"The first amendment goes beyond the protection of the press and self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."<sup>22</sup>

In Canada the right to an open Court was articulated most recently by Chief Justice Freedman, of the Manitoba Court of Appeal in *F.P. Publications v. The Queen*.<sup>3</sup> The new federal *Freedom of Information Act*<sup>4</sup> accelerates the process.

Open Courts, the public's access to information, along with a historic break in the values that have dominated the Courtroom and its procedures, will lead to radical changes in the administration of justice during the 1980's.

### **Sentencing**

Gerhardt Mueller has observed:

"In a human life span, sentencing and corrections have gone through four distinct eras: from the era of retribution, which was marked by relatively fixed, severe, although not necessarily brutal, sentences there was a passage to the so-called era of utilitarianism. During this latter period there was a spirit of unbounded optimism which created the conviction that the crime rate could be controlled by manipulating sentencing and correctional schemes, whereby the behaviour of individual perpetrators or of whole potential offender groups could be redirected. There followed, well into the 1970's, an era of humanism which aimed at a more equitable and more liberal recognition of the human rights of those caught in the meshes of the criminal justice system. Sentencing and corrections then entered a fourth phase, preceded by pointed research which aimed at examining what does work and what does not, which concluded that nothing does work as expected, and thereby initiated the era of nihilism."<sup>25</sup>

Sentencing nihilism has had a tremendous impact in the United States. I expect that that impact is not too far removed from what we can expect in Canada. On the legislative side in the United States, bills are being introduced, and some have passed, virtually abolishing the existing sentencing model and returning to various forms of fixed sentencing schemes in operation around the turn of the century.

On the judicial side, Judges are angry and frustrated over what is interpreted to be an attack on the judiciary in an effort to deprive them of an important judicial discretionary function, namely, sentencing. By and large, the new movement calls for a return to the traditional penal approach, for reduced discretion by the agents of the criminal justice system and a diminution of the rehabilitative ideal.

The two goals which seem most prominent in the recent American sentencing reforms are:

1. The curing of sentencing disparity; and
2. The reduction of offender uncertainty.

While the major trend of the new sentencing movement has been intended to reduce the initial disparity produced by the sanctioning Court, the other trend has been directed towards reducing subsequent uncertainties in the confinement term. The most extreme remedy proposed and tried has been the total abolition of the parole board. Under such circumstances, the sentencing Court would be compelled to impose a definite term of confinement, with very limited possibilities of modification. Even under reforms which permit the retention of the parole board, a redefinition of the board's authority could severely curtail its discretionary power. By narrowly and precisely defining the requirements for parole and by limiting judicial discretion the human and individual component which has been part of sentencing is repressed. Instead, legislators attempt to minimize judicial post-trial discretion by promoting values aimed at swift, certain, and uniform punishment for those persons whose behaviour fits the proscriptions contained in the criminal code. Sentencing will become mechanistic and Judges seen as quasi-automatons following legislative instructions rather than their own individual perceptions.

### **Conclusions**

This legislative tendency limits freedom and increases bureaucracy. The computerization of the system and the politically — and publicly — motivated demands for economies are speeding the criminal justice system as well as the sentencing process along a road which will maximize governmental control over the system, the actors within the system and the offender-consumers, at the expense of due process and individual protections which have been the cornerstone of the Anglo-American system of justice. If our country has to deal with politically-motivated crime on any scale, the tendency of political leaders, police and public alike may be to accelerate this process and to put "law and order" well ahead of individual rights. Such a reaction would be objectionable on both moral and practical grounds. For in resisting insurrection, a liberal nation must demonstrate to its opponents and to the world that its legal system is based upon the rule of law. Those who decry these bureaucratic and mechanistic developments must be heard. The legal system has not maintained the kind of public credibility that will be required to sustain the system through troubled times ahead. One may hope for regular institutional change but be prepared for perilous times as the Courts and the administration of justice face the pressures of the 1980's.



## Footnotes

1. This is an edited version of an address given by the author at a seminar on Criminal Justice Futures, sponsored by the Federal Department of the Solicitor General and the Ontario Department of the Provincial Secretary, in July 1980.
2. *Supreme Court Reporter*, vol. 100, no. 18A, 15 July 1980.
3. *F. P. Publications (Western) Limited v. Conner Prov. J.* (1980), 1 w.W.R. 504 (Man. C.A.).
4. Access to Information Act, Bill C-43, First reading July 17, 1980.
5. See G.O.W. Mueller, "The Future of Sentencing: Back to Square One" in Brian A. Grosman, *New Directions in Sentencing*, (Scarborough, Canada, 1980).

## SAKHAROV'S LETTER FROM EXILE<sup>1</sup>

*Introduction by Maurice Tugwell*

In January 1980 the Soviet authorities stripped Andrei D. Sakharov of his state awards and sent him to "internal exile". Observers believed that the action had been taken to punish President Carter for his retaliations against the invasion of Afghanistan and for his personal support of Sakharov and the dissidents' cause, and to further suppress internal dissent before the Moscow Olympics.<sup>2</sup>

Sakharov was credited by Nikita Khrushchev with being "the father of the Soviet hydrogen bomb", which, as a leading Russian scientist, he had helped develop. He won the Stalin Prize, the Lenin Prize, and was three times named a Hero of Socialist Labour. No living Soviet citizen outside the Politburo had received such honours. Khrushchev conceded: "I knew him and was profoundly impressed by him. Everyone was. He was, as they say, a crystal of morality among our scientists".<sup>3</sup> Sakharov became known in the West for his 1968 essay, *Progress, Coexistence and Intellectual Freedom*, in which he advocated the eventual convergence of communism and capitalism in a universal democratic system. Earlier, he had been a key actor on the Soviet side in the drawing up of the Nuclear Test Ban Treaty.

His coexistence essay was heresy to the Communist Party and its publication marked the end of his career as a reluctant nuclear physicist. In 1970 Sakharov formed a Committee on Human Rights and gradually moved to a central position in the dissident movement earning the Nobel Peace Prize in 1975. His former status as national hero and his reputation in the West posed difficult problems for the KGB, and for years they seemed uncertain how to deal with him. News of his statements and activities reached millions of Soviet citizens by Western radio broadcasts. Through the tactics of exposing and shaming the authorities, he was able to help countless fellow citizens. But the KGB were patient and resourceful. By putting enormous psychological pressures on Sakharov and his activist wife, they dulled the bright edge of his optimism, and by his exile to the Volga River city of Gorky, an area closed to foreigners, they hoped to silence him.