A Note on the Law Reform Commission of Canada's Theoretical Approach to Criminal Law Reform

Even a superficial study of our present criminal system immediately reveals the pervasiveness of a classical, conservative, puritanical ideology. The classical ideology is essentially a conservative one because it advocates a return to former ways of thinking, glorifying as it does a mythical period in the history of mankind when things were supposedly much simpler. People knew exactly what was expected of them, because they believed in the absolutes of a Natural Law. Political institutions were an integral part of the total universal scheme, and the principal mission of the state (personalized in the monarch) was to maintain the integrity of the nation. In this regard, criminal law was called to play a vital role in the enforcement of morality. A decline of morality necessarily meant the destruction of the nation.

Since morality was at stake, nothing could stand in the way of the criminal process. No punishment was too great for a crime: the Code of 1648 of the Massachusetts Bay Colony, modeled on the Old Testament, prescribed the death penalty for rebellious sons.[1] Deterrence was the decisive factor. Whatever measure was needed to deter persons from the commission of a particular crime was justified.

Codification is often considered a progressive step towards law reform. However, if not regularly revised, codification tends to impede the natural development of the law and its adaptation to changing social conditions and attitudes. Our criminal code is a typical example of this.

The adoption of Sir James Stephen's criminal code by the Canadian Parliament in 1893 fitted nicely with the Victorian mentality of our society at that time. Since the business of criminal law was mainly to enforce morality, and since moral principles were considered immutable, what area of the law was better suited to codification than criminal law?

It is interesting in this respect to compare the distribution of powers under our federal system to that of the American federal system. The rising liberal-positivist ideology which clearly dominated the foundation period of the American nation was quite consistent with the idea of a diversification of criminal standards according to local morals and beliefs. By contrast, our federal system, inspired by a classical ideology perceived the criminal law as above the considerations of local cultural differences.

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[1]See Quinney, *The Social Reality of Crime* (Boston: Little, Brown, 1970), at 63.

The punishment aspect of our criminal process is also very much indicative of a classical ideology. Deterrence is adhered to in the belief that the criminal is solely responsible for his actions. If some form of rehabilitation is approved, it is in terms of moral conversion.

Seen in this light, the Law Reform Commission of Canada's approach to criminal law reform[2] appears quite revolutionary. The accent on decriminalization and restraint is clearly in radical opposition to the classical theory of criminal law, whose objective was to arrive at a comprehensive code of moral conduct. It is also strikingly consonant with the capitalist theory of economic liberalism which supports the least intervention possible by the state in the conduct of human affairs. It is at least a first indication of a liberal-positivist ideology.

Several other principles in the Commission's philosophy tend to confirm this finding. The whole concept of society as a "cooperative enterprise," the members of which "must have some give and take, must respect each other's needs and vulnerabilities, and must enjoy some mutual trust and reliance,"[3] is characteristic of the social contract theory that lies at the heart of the liberal-positivist philosophy. Society is seen as a human enterprise as opposed to the actualization of a transcendent destiny.

The social contract approach goes hand in hand with a pluralistic view of society. As long as morality is seen as part of the Natural Law, there can only be one perfect moral system. If two conflicting moral values emerge, there can only be one conclusion: one of them at least is wrong. But the liberal-positivist approach is entirely different: moral values are the result of human interaction and interests. Therefore, whatever conception one has of society and its usefulness to him will determine his particular set of values. As various cultural groups tend to have different views and interests, moral values inevitably come into conflict.

Having recognized a basic conflict at the root of human interaction, the liberal-positivist theory then sets out to resolve it through the concept of democracy. Liberal-positivist democracy, based essentially on the majority rule, is rendered possible through the legal fiction of the social contract. Regardless of their deep natural differences and capacities, once the members of a collectivity have mutually agreed to live together, they become legally equal. Since there are no natural values superior to others, prevailing values will be those that the majority decides are worthy of protection. Laws should emerge only from a consensus, and that consensus is the consensus of the majority.

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[2]See Law Reform Commission of Canada, *Our Criminal Law* (Ottawa: 1976).

[3]*Ibid.*, at 20.

Debate plays an essential role in the formation of this consensus, for the legal fiction of social equality does not eradicate the natural inequality between individuals. It simply ignores it for a particular, legal purpose. Those individuals who are naturally superior to the others because of their higher degree of intelligence and aggressiveness have no right, in a democratic system, to impose their will otherwise than by the sole force of persuasion. Liberal-positivist theory places an infinite value on the capacity of reason to resolve all differences. Whatever their individual interests may be, it is believed that through public discussion and understanding, members of the collectivity can be brought to share the same ideals and to recognize the overall "public interest."

The importance of public debate also lies at the heart of the Commission's report. This almost unlimited faith in the virtues of public debate is perhaps most striking in the Commission's discussion of private ownership. After having classified this subject as one of special concern, in light of increasing pollution, depletion of resources, poverty, unemployment, inflation, race conflicts, terrorism and alienation, the Commission then lays down its program:[4]

> Immediately we plan to improve and simplify the present law on property offences. Later we hope to initiate more general consideration of the basic problem and so foster debate across the country — in schools, colleges and universities, in churches, societies and community associations, in police forces, prisons and indeed all contexts where there is concern with social justice. That way we may eventually achieve a general consensus on ownership.

In order to emphasize the consensual aspect of the Commission's philosophy, Professor Goode of Dalhousie University has felt the need to oppose the so-called value-consensual model of the Commission to the more contemporary value-antagonism model.[5] The natural reaction which came from Professors Barnes and Marlin,[6] of Carleton University, was one of "surprise that of all commissions such criticisms should be directed at the Law Reform Commission of Canada,"[7] reminding Professor Goode that, "the first chairman, Mr. Justice E. P. Hartt, stressed the fragmentation of values in modern society."[8] Indeed, the writings of the Commission consistently point to a pluralistic approach.

Despite a passing remark that, "not all applications of the value antagonism model are Marxist,"[9] Goode's article obviously tends to

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[4] *Ibid.*, at 21.

[5] M. R. Goode, *Law Reform Commission of Canada — Political Ideology of Criminal Process Reform* (1976), 54 Can. B. Rev. 653.

[6] J. Barnes and R. Marlin, *Radical Criminology and the Law Reform Commission of Canada — A Reply to Professor M. R. Goode*, (1977) 4 Dalhousie L. J. 151.

[7] *Ibid.*, at 153.

[8] *Ibid.*

[9] *Supra*, footnote 5, at 666.

equate consensus with liberal-positivist theory and conflict with radical theory. Such equation appears both misleading and unnecessary, for it fails to take into account the sort of non-radical form of pluralistic thinking that Lukes has illustrated.[10]

A true value-consensual model is one which results from a classical theory of society. Liberal-positivist theory attempts to resolve the fundamental conflict of values and interests by introducing the concept of democracy based on a rationally developed consensus. Radical or critical theory is also founded upon a value-antagonism model, but it maintains that the fundamental social conflict continues in existence beyond the deceitful appearances of consensual democracy. By failing to make these distinctions clear, Goode has understandably made himself vulnerable to the following criticism:[11]

> Goode's technique of argument is to take isolated passages from Commission papers and to identify in these resemblances to the descriptive liberal-positivist or value-consensus theory. He then recites the attacks made on the theory and concludes that the Commission's work must suffer from the same deficiencies.

Goode's criticism of the Commission's approach would have been stronger and more credible had it not attempted to deny the presence of a value-antagonism model, but had instead attempted to show that the type of pluralistic approach adopted by the Commission is the liberal-positivist kind, as contrasted with the radical kind. However, nothing in the article indicates that Goode himself approves of the radical approach. The only object of his comment was to show that the Law Reform Commission had not given sufficient consideration to the ideas of the new criminologists and, by failing to do so, had done nothing more than to rationalize the *status quo.*

This conclusion is questionable. One must take a very distorted view of the Commission's approach to be able to say that it supports the *status quo.* The present criminal system, as we have seen, is based on a puritanical ideology which is hardly comparable to the philosophy of the Commission.

The distinction between "social law reform" and "legal law reform," as expounded in a recent article by Professor Samek of Dalhousie University,[12] sheds a new light on the present controversy. Legal law reform, it is said, seeks merely to bring the law in line with modern social conditions. Social law reform, on the other hand, is an attempt to use the legal process as a means of changing our social conditions

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[10]S. Lukes, *Power: A Radical View* (London: Macmillan, 1974).

[11]*Supra,* footnote 6, at 155-156.

[12]R. A. Samek, *A Case for Social Law Reform* (1977), 55 Can. B. Rev. 409.

and institutions themselves to bring them more in line with our ideals and aspirations.

The Law Reform Commission has unequivocally stressed the need for significant social reform and has stated its confidence that public debate will indirectly result in various types of social reform. However, the Commission has also taken the position that it would be illusory and wrong to think that criminal law can and should be used for social reform purposes:[13]

> In itself criminal law never brings about the good society, it just removes some of the more obvious impediments to it and helps provide the framework within which that society can create itself. Criminal law has limited aspirations.

The Commission's objective in dealing with the criminal law system is therefore clearly limited to bringing it in line with present social conditions, while hoping that the present social conditions will improve. In this context, Barnes and Marlin have quite correctly perceived the Commission's report as a tremendous breakthrough. But, if one was expecting from the Commission a totally new outlook on society, one will naturally be very disappointed. In this regard, Barnes' and Marlin's statement that, "much of the Commission's work, then, is consistent with the findings of the radical criminologists,"[14] is indeed preposterous.

Radical criminology has emerged largely from the earlier studies and findings of labelling theorists, who were reacting against the traditional approach to criminals based on deviance. On the principle that crime is in the eyes of the beholder, labelling theorists inverted the perspectives by taking the attention away from the officially designated "criminals" and re-directing it at the formulators of crime. Their studies attempted to show that the real reasons for the apparent crime epidemic in the lower classes of society did not lie in the convicted criminals themselves, but lay mainly in the fact that those in the upper classes of society had the entire discretion to decide what type of behaviour was going to be labelled as "criminal" and what type of criminal behaviour was going to be detected and prosecuted. Labelling theory, referred to as the "ideology of the underdog,"[15] is a typically idealistic approach to the social reality of crime.

Radical criminologists have drawn upon the studies of the labelling theorists in criticizing the unidimensional approach of traditional criminology. But they have refused to confine the problem within the traditional bounds of criminal law theory. In their view, the manifestation

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[13]*Supra*, footnote 2, at 7.

[14]*Supra*, footnote 6, at 153.

[15]See R. V. Ericson, *From Social Theory to Penal Practice: The Liberal Demise of Criminological Causes* (1977), 19 Can. J. of Criminol. & Corr. 1: 170 at 179.

of crime is but one element in the overall scheme of social interaction. The only effective way to bring about any significant change is by contributing to the destruction of these social attitudes and institutions that are completely inconsistent with freedom and mutual respect. Therefore the only effective action is a political action, *i.e.* one that affects the relations of power within the social sphere.

Barnes and Marlin find that the Commission's affinity with the radical criminologists is evidenced by the fact that both groups "favour a withering away of law as an instrument of centralized social control."[16] The analogy is absurd. The Commission's advocacy of restraint in the use of criminal law is akin to the capitalist principle of liberalism. It is based on the belief that, rather than controlling crime, criminal law used abusively will only cause more problems. Radical theorists, on the other hand, generally advocate an increased use of the legislative process if one wishes to achieve meaningful social reform without resorting to violence. The "withering away of law" is not perceived as an immediate concern, but as the natural consequence of an eventual society based on freedom.

It may be added, in passing, that the mere suggestion of a government-appointed law reform commission composed mainly of jurists taking a radical approach to criminal law reform is almost unimaginable.

But even without expecting the Commission to go as far as embracing the principles of radical criminology, one would not be entirely unjustified, it seems, in hoping that the Commission might approach criminal law reform from the point of view of social law reform, to a limited extent at least. Instead of placing as much emphasis on decriminalization and on the distinction between "real crimes" and "regulatory offences," the Commission could advocate a more equitable redistribution of the criminal law among all sectors of society. This would imply not only removing some of the minor street offences (whose presence on the books is mainly due to cultural differences) but also tightening up on white-collar crime. It would also imply a re-orientation of the law-enforcement process towards various commercial, industrial, administrative and political activities. One hopes these are directions in which the Commission will move in formulating future recommendations.

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[16] *Supra*, footnote 6, at 153.

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