

## The Limitations of Legislative Reform<sup>1</sup>

Thank you, Chief Justice, for the all too kind introduction. I was flattered by it but, frankly, I was also made uneasy by it. I fear that it creates expectations that I am not able to fulfil. It implies that I have some wisdom to impart, some panacea to unfold, when the truth is that I do not have these things. Like all of you I am searching for answers.

As so-called professionals we have so fragmented our knowledge that, not only do we not have the answers, we seem to have lost the capacity of even asking the right questions. The assumption that rational men, preferably possessing a high degree of expertise, can cause events to happen rationally is no longer credible. Unfortunately our legal minds are the captives of this belief in an ordered world and we are desperately trying to substitute our own kind of order for that of the natural world. I am convinced that in so doing we waste a lot of energy and cause a great deal of human misery. We seem obsessed with the idea of enacting rules and creating structures to control and change others, when surely the only significant reform is self-reform. What is really needed is a superlative effort on the part of each of us to change ourselves.

However, the show must go on. So please allow me to share with you in an impressionistic way some of the concepts and realities with which I have been bombarded and which have in the last two years caused me to radically change my approach to the so-called reform of the criminal law. I do this not in any didactic way, but rather, hopefully, as a learning experience that will be mutually rewarding.

Let me at the outset subject you to a brief overview of our emerging society and the proper role, as I see it, that the law and legal institutions should play in that society. I should like to follow with a glimpse at some of the basic realities of the criminal justice system as well as at some of the myths. This will bring me to the alternatives which face a commission charged by Parliament with the responsibility of

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.<sup>2</sup>

When the Federal Law Reform Commission was created in 1971, it immediately came under considerable pressure to take the traditional path of such commissions: to try to modify the body of Canadian laws; to take into account changing societal attitudes by making recom-

---

1. Text of the Manitoba Law School Foundation Lecture, delivered November 5, 1973 at Robson Hall, University of Manitoba.

2. R.S.C. 1970, (1st Supp.), c. 23, s. 11(d).

mendations for amendments to those sections of the statutory law which were showing signs of the stress of changing conditions. The media, sections of the public, and many members of the legal profession urged haste. They perceived that much was amiss in our legal structures and sensed that reform was overdue.

This in itself was hardly surprising. The complex human problems which face us today are so deeply disturbing to most of us that, almost in a state of desperation and reflecting a truly remarkable propensity for self-deception, we call upon so-called "experts" to provide quick results. Demanding instant solutions may be an excellent way to relieve oneself of anxieties, but if traditional methodology is followed it is also almost certain that little will be effectively done in practical terms. That is, there might be a change of law on the books, but very little significant change, if any, in its application in the streets or in the courts. The extraordinary capacity of various parts of the criminal justice system to negate reforms with which they do not agree or for which they are not prepared is truly remarkable.

The traditional approach to law reform is based on the thesis that law embodies the mainstream thinking of society. Those who actually govern and those who administer the laws have always realized that the law and the mainstream values of a society were never in perfect synchronisation, but that the majesty of the law smoothed over the rough edges where the match was jagged.

The general western legal view of the national state is that a monopoly of power is held under a single authority; that the proof of that monopoly is that no individual or group can challenge it; and that the institutions of the state make and enforce the laws in the common interest.<sup>3</sup>

With this statement political analyst Leonard Beaton sums up what can best be regarded as a quaint view of relations between the law and the state. We can regard it as quaint because the conditions necessary for its validity have passed — and are perceived to have passed by too many people for the principle to be maintained. Mr. Beaton goes on in his analysis to point out that the most aware members of a society have always realized that this legal principle was essentially a myth.

It is inherent in the construction of a coherent legal system that fictions must be employed: and many of those concerned with the real government of states are well aware that this image of the national state is fictional. In fact, the institutions seldom rest on genuine monopoly of real power....A consensus is constantly being built from diverse elements and a failure to sustain this process will lead to the breakup of the state or to drastic alterations in its government.<sup>4</sup>

---

3. Leonard Beaton, *The Reform of Power*. New York: Viking Press, 1972, p. 14.

4. *Ibid.*

Mr. Beaton's view is that, while the monopoly of power is fictional, this is perceived only by the more aware of society's leaders, and it is therefore possible for them to tinker with the myth and use it as a catalyst in the building of consensus and accommodation.

To me one of the basic problems confronting the Law Reform Commission is that in the technological age we are now entering information is disseminated too widely and too fast for this elitist fiction to be maintained. Too many people today perceive as fiction the premise that the state understands best the people's total, generalized self-interest and can make laws to regulate society in accordance with it. If knowledge of the society's interest is a prerequisite for the national state's ability to govern, then I am questioning the capacity of the typical nation-state to deliver government in the technological age. In this sense, I believe it is the responsibility of bodies such as the Law Reform Commission to explore new ways of helping the state to deliver government.

During the past two decades, social scientists have been devoting increasing effort and attention to the "accelerative character" of change being experienced by societies such as our own. On a popular level the observations and theories of Kahn, McLuhan, Toffler, and Theobald have been widely read, discussed and explained before a broad sector of the lay public. Impatience, confrontation, multiplying pluralism, ephemeralization, and institutional fragmentation are rapidly becoming accepted features of our society.

We are, however, not dealing solely with a legal crisis, but rather with a breakdown of the underlying order upon which law is based. The social system associated with industrial society into which most of us were born is dying. It is all part of a much larger revolution; the shift to a new post-industrial society is taking place. And, whether we like it or not, we must accept that this new era will be radically different from the world with which we are familiar and which we would naturally like to see maintained. Instead, the new order will have fragmented value systems, new institutions, and different conceptions of reality and of eternity. Our present legal institutions were designed to serve a social order that, if not already dead, is dying. It is unrealistic to expect that, unchanged, they are capable of playing a significant role in the radically new world that is already upon us.

The important point is that, in the past, the members of society, the public, the people whose lives were regulated by the law, by and large accepted the myth that the law represented their values, and it was upon this apparent consensus, or at least acquiescence, that the criminal justice system operated. Today, this is simply not the case. There are, in effect, fewer and fewer mainstream values left to which to adjust the law. For a series of complex reasons that are inadequately understood by many whose job it is to respond to the challenge they represent, legal specialists are faced with a society that is fragmenting into pluralism.

The belief pervades that the law, like all other institutions, is grappling with the phenomenon described popularly as "future shock", an alienation caused by the too rapid onset of new information and ideas where communication is instant and implications immediate. Historically, such critical developments have evoked energetic response by governments. But perhaps the most significant development in our present era is that responses by government alone - however energetic - are no longer adequate. It is not the government or its appointed commissions that will decide what measures are appropriate to deal with the problems of the communications era. The people will decide.

But before we can let that phrase stand, we must first strip it of all its traditional political rhetoric. It is not just a question of participation by the general public in the simple sense of seeking advice before adding to or changing the body of the law. Rather, the Commission's approach rests on the understanding that there are in Canada, as in all other industrialized nations, widely diverse groups of people who are beginning to perceive themselves, their country, the law, and their future in totally different ways.

This is not a breakdown of mainstream values; that is a false as well as a negative view. It is a splitting into many streams, all of which need to be accommodated in the legal processes toward which we must try to evolve.

To understand this diversification, it is necessary to go beyond such concepts as minorities or special interest groups on the fringes of the basic social structures. The overview that is emerging sees the developing pattern as one of perceptual peer groups - groups which are each developing their own particular sets of attitudes to society, depending on which of the many rapid changes they are exposed to in the explosion of ideas and influences that characterize our era. In a free, pluralistic society, every citizen should be free to adopt his own ethic, choose his own lifestyle, and live his own life, provided that he does not fall below a minimum standard of acceptable public order.

It is against the background then of this rapidly developing pluralistic society - and not of the ordered world that lives now only in our memories - that the challenges which confront any contemporary law reforming body must be understood. Initially I saw our responsibility solely in terms of legislative reform, that is, in rewriting the laws which we now have. We would improve and update the Criminal Code, add a chapter on general principles, eliminate obsolete provisions and include new sections to deal with new problems. Basically, this is an extension of "housecleaning", but such an extension that you would get a whole new house, replacing each section of each wall until eventually you've built yourself a new and better house. However, your new building is limited by the inherent plan and structure of the old one. The

new code would possibly be much better than the present one with its many deficiencies, but it would be a code of the same type as the present one, subject to the same type of problems and drawbacks even though enjoying the same type of advantages.

There are many reasons why law reform should be done this way. One is that, if we give ourselves this sort of limited objective, there is some hope we might finish and achieve something within a reasonable time span and come up with some acceptable amendments and proposals fairly soon. Another reason is that it would enable us to attack particular segments in a piecemeal but systematic manner. We could work on theft and fraud, for example, and come up with proposals which could be incorporated in the present Code; then turn to, say, homicide and do the same with that, and so on. Bit by bit we could overhaul the whole Code.

There's a lot to be said for this piecemeal approach. Not only is it the Common-Law approach and in line with our legal tradition, it also has the attraction of convenience. Those involved in applying the law in the courts would rather, I suspect, adapt bit by bit to new laws than have to adapt overnight to a whole new code. So I think the step-by-step approach would be more convenient for practitioners and judges, more in line with the way legal reform has tended to be carried out in the past, and simpler for those doing it.

It is indeed this view which is reflected in the format of the original research program of the Commission. But, speaking now solely for myself and not for the Commission, I have gradually become more and more dissatisfied with that concept. I began to see law reform not as providing a set of answers expected to have continuing validity, but as a process of successive approximation, a process whereby a society finds out about its laws and about itself, something much wider than and fundamentally different from a mere analysis of enacted legislation.

Perhaps the laws we should aim for will be in no way like the ones we have; and perhaps what we should be doing now is working out the principles and policies of the new criminal laws while not bothering yet about how they should actually be written. In other words, we would not rewrite the Criminal Code, but rather concentrate on the sort of things we would want the new code to achieve and the values we would want it to reflect. Unfortunately, if we followed this format exclusively, there would be no recommendations to the Minister for a long time, and we would be accused of "not doing anything".

But cannot "anything" cover things other than concrete proposals embodied in draft legislation? Suppose three years' attention to the criminal law resulted in no concrete proposals whatsoever, but did produce well-considered, well-argued and well-articulated reflexions on

the limited use of the criminal law; on the lack of moral justification for using it in certain areas of life; on the need to get all those involved in its administration to attend to the fact that they are participants in an interacting system; on the role and possible value of crime itself in society; on the importance of clarifying what, if any, our aims are in having a criminal law; on the value of having criminal laws so written that the ordinary citizen can readily understand them; and so on. And suppose working papers setting out well-reasoned views on all these matters were published. Would all this really add up to "nothing"? It would mean sorting out myth from reality and getting down to what the law is really all about.

With this approach, suggested draft legislation would not be included as part of the working papers. Because although the form that the new legislation would take is uncertain, to me at least one thing is certain and that is that it shouldn't take the existing form. The one thing we do not want to do, surely, is arrive at conclusions on substance and principle and then turn the whole thing over to a professional draftsman to put it into law. For we should want the code to be what we say it is, not what someone captivated by all the evils of the Common Law drafting tradition wants to say it is. Surely here is a marvellous opportunity to get away from the Common Law tradition that writing laws is a mystery that can only be learnt by long experience in the draftsman's office, and move towards the Civil Law tradition which looks upon the writing of laws as being like writing anything else, i.e., basically a matter of grammar and style. In this way we might produce a Criminal Code that the ordinary man could understand and to which he could relate. We should be able to express the rules of law and the values underlying them in simple language so that ordinary citizens can understand them, criticize them, and participate in the process of changing them. Once the language of the law becomes specialized, law reform becomes the exclusive jurisdiction of experts.

I think it is fair to say that my dilemma is shared to some degree at least by others at the Commission. We feel obligated to carry out the undertakings in our research program and as practical lawyers we would like to accomplish something useful in the law within a reasonable time. On the other hand, we would like to bring about a better understanding in ourselves and others of the whole criminal justice system. To me there is relatively little payoff if reform is confined solely to legislative change, while the wider approach presents interesting and exciting possibilities.

I am convinced that the criminal law as a body of rules has little meaning to the average citizen. The rules are brought to life by the criminal process which may be defined as the activities of the police, of the courts and of correctional agencies. The ordinary citizen comes into contact with individuals who represent the law and with whom the law is

identified, and it is from interaction with these individuals that most people learn about the law. By not limiting ourselves to the Criminal Code, we are saying that the men and women involved in the criminal justice system, the police, the lawyers, the judges, corrections people, victim and offender alike, are just as important to the process of law reform as are the statutory enactments; and by focusing on the opinions, attitudes and preconceptions of the actors, by analysing and trying to understand what factors make the criminal justice system work and by communicating them to the public in language stripped of legal jargon, we will reach a point where the recommendations can be understood and accepted.

The real challenge of criminal law reform lies in becoming involved in doing law reform through innovation, experiment, and public education as opposed to merely making legislative recommendations to Parliament.

It was in this spirit that the Commission initiated the pilot community law reform project in East York in Metropolitan Toronto, where for a period of several months an inter-disciplinary team under the direction of Dr. John Hogarth became part of a selected community to study in minute detail the criminal law in action. The purpose of that project was to define situations giving rise to the invocation of the criminal justice system, to evaluate the effectiveness of existing methods of crime prevention and control and to develop alternative ways of resolving disputes, and to do all these things from a "street" or "people-oriented" perspective.

The research stage has now been completed and the final report is being prepared. I do not intend to deal in detail with the findings as they will be published in due course, but the lessons learned have had a considerable impact on my approach to criminal law reform. In many instances, the results only confirm what we already suspected but about which the system carefully avoided doing anything. For example, present findings indicate that in a high percentage of cases (including both offences against persons and against property) the victim and the accused are linked in a continuing relationship, usually in a family or neighbourhood context, and that in such circumstances some type of mediation procedure with reconciliation in view far surpasses, in terms of desirable social goals, the adversarial process. The victim's needs are better served; the accused is brought to a better understanding of the wrong done to the victim; and the flexibility of tactics in conciliation makes better allowance for the grey areas of a dispute than does the ordinary criminal trial which tends to see disputes entirely in black-and-white terms, with either one side or the other the total winner. Finally, instead of being hopelessly alienated one from the other by the adversary process, the accused and the victim return to their continuing relationship at an improved level, and both the parties and society

benefit. The whole operation becomes more of a learning experience for everyone. On the whole, a great deal of the evidence gathered supports the thesis that the criminal process as a technique for problem solving is inherently unsuited to deal with many of the issues to which it presently addresses itself.

As is probably apparent to you by now, certain critical decisions have had to be made about the process of criminal law reform. These decisions were precipitated by the growing belief that changes in the text of the law itself, i.e., changes in statutory enactment, would fail to bring about total changes in the criminal justice system. In the very limited time I have left, please allow me to share with you in point form some further considerations that have influenced our thinking.

1. The budget for the administration of criminal justice for all jurisdictions in Canada has increased by 400% in the last ten years. At the present time the direct cost of dealing with crime in this country is approximately one billion, three hundred million dollars per year. This includes the cost of the courts, judges, penitentiaries, police, and correctional services but does not include indirect costs such as welfare for families of the incarcerated. The allocation for the criminal courts is estimated at one hundred million dollars or only 8% of that total budget.

2. We have more people incarcerated now than at any previous time, not only in terms of gross numbers but by percentage of population according to the Canadian Penitentiary Service, 9,231 in federal institutions alone, in December 1973, up 10.4% over December 1972). A disturbingly large percentage of those persons are the economically and culturally deprived and the group with the highest arrest rates in our society are the young: 53.2% of those admitted to institutions were unemployed; 72.1% had less than a grade 9 education; 40% were under 24 years of age. Even when conceding that the main purpose of the criminal law is to protect society, do we really believe that the poor and the young are the major threat? Do we have the complex and expensive machinery of justice geared to the really important questions?

3. During the past 100 years, criminal law has expanded exponentially. Penal sanctions are being attached to all kinds of behaviour as the state attempts to exercise control over social life in a manner that has no precedent. The decriminalization of certain types of conduct has attracted much publicity and serves to mask the extension of the criminal sanctions to a wide variety of human activity that is not considered either immoral or socially dangerous by the majority of citizens. Only about 6% of federal offences are now contained in the Criminal Code. It is estimated that the Canadian citizen could in theory be convicted of any one of some 40,000 different offences under federal, provincial or municipal laws.



4. Studies carried out concerning the effects of different kinds of sanctions have produced one common finding: it makes little difference what type of sentence is passed or what type of treatment program is imposed on prisoners. To a large extent, their return or non-return to crime appears to be governed by factors other than the measures we take towards them.

Increasing psychiatric or treatment services, increasing numbers of institutions, or increasing state control through longer sentences are not likely to reduce the most common offences under the Criminal Code, namely, non-violent offences against property. Whether such measures are likely to have an appreciable effect even in respect of violent offences against persons is problematical:

5. We must recognize that there are serious limits to what the state can achieve through the formal agencies of social control, including, of course, the criminal justice system. The major agents of crime control are not the police and the courts. A much more significant factor is the attitude of one's peers - family, friends, colleagues, neighbours. Self-respect, as mirrored by one's peers, has always been a powerful deterrent. If this deterrent is no longer working for the many offences proliferating in our laws and clogging our courts, how can the police be expected to cope? How can the number of offences committed fail to increase?

6. The amount and type of crime is to a great extent a political question. The real vital choices about combating crime have to be made by governments when they are debating policies that affect the organization and structure of society. To quote from a recent address by Nils Christie, a Norwegian criminologist:

Parliament can exercise greater influence on the future pattern of violence when it makes decisions on industrialization, than on development of police or prisons. Political decisions that cause people to flock to the cities have more effect on the incidence of violence than lavish spending to repair damage already caused by other decisions.... It is here, with reference to the basic organization and structure of our societies, that the vital debate on criminal policy must be conducted.<sup>5</sup>

7. And finally, there is the public concern about increasing crime. Unfortunately, there are no crime statistics for the court system after 1971 and so we are not sure of the exact picture. But we must be careful not to infer an increase in crime when we are really talking about an increase in police activity. As an example, the Federal Government reported recently - in answer to an Opposition question in the House of Commons<sup>6</sup> - that the graph curve of marijuana seizures was rising steadily,

---

5 Nils Christie, "The Delinquent Stereotype and Stigmatisation" Lecture given at the International Congress on Criminology, Belgrade, September 17-22, 1973, p. 13

6 Hansard, House of Commons, 1973, Question No. 1484.

maintaining a position consistently behind the rise in the numbers of RCMP drug enforcement personnel. There was no significant difference in the two curves at any point. Marijuana arrests, like parking tickets, are, it seems, a function of police activity. They no more solve the drug problem than they solve the traffic problem. Stepping up the war against crime will provide employment in the anti-crime industry but will do little to solve the underlying problems that exist in society.

And so the list of considerations and premises could go on almost indefinitely but, fortunately for you, my time doesn't.

Therefore, may I close by a very general statement concerning the role of the criminal law in our present society. I believe that in many crucial instances the criminal law can no longer be an instrument by which we express our choice of one set of values over another. Rather, I see the law as providing the means by which multiple sets of values can co-exist and develop. Our law cannot always be used to decide who is right. Many basic disagreements dividing our society today do not involve one party being right and the other wrong. Often both parties are right, given the model of reality they are using. The multiple perceptions are a characteristic of contemporary society. The quest for justice will be continually frustrated so long as we fail to recognize that criminal justice is dependent upon social justice.

What must be undertaken is the re-thinking of the entire system of values in our society, because it is obvious that the problems of our legal system are mere reflections of the more general problems which plague our society. It is ridiculous for anyone to think that changes in our statutory law alone will to any large degree alleviate our legal or other societal ills.

The debates on values, which will quickly involve basic questions concerning crime and the criminal justice system, must be brought out into the open - into the marketplace - and the issues articulated, defended, examined and questioned, not only by the professionals but also by the lay-public whose involvement then becomes accompanied by responsibility. This to me is absolutely essential because we must recognize and never lose sight of the fact that the reform of the criminal law and its processes is as broad as the question: "In what kind of society do we want to live?"

MR. JUSTICE E. PATRICK HARTT\*

---

\*Chairman, Law Reform Commission of Canada.