BOOK REVIEW

STUDIES ON SENTENCING: LAW REFORM COMMISSION OF CANADA (1974)

The Law Reform Commission of Canada has issued to the public one of its major working papers and two background papers. The working paper is entitled "The Principles of Sentencing and Dispositions"; the background papers are, *The Alternatives to the Adversary System,* prepared by Professor John Hogarth; and, *The Reform of Punishment,* the work of Professor Paul Weiler.

In the Foreword to the book the Commission has advised us that these papers represent only the beginning work in the field of sentencing and dispositions. They are to be followed by more detailed work on such matters as restitution and compensation, fines, diversion, imprisonment and release. The contrasting papers of Professor Hogarth and Professor Weiler articulate the tensions which must be resolved in a contemporary re-examination of the criminal process.

(A) The Working Paper on Principles

This paper is a general introduction to the subject of sentencing and dispositions. The purposes of the paper are:[1]

> . . . to raise what are seen to be core issues in sentencing and dispositions, to indicate a general approach or position on these issues, to suggest that fairness and rationality in sentencing would be encouraged by a legislative statement of principles and criteria and to invite public discussion on these points.

If it may be assumed that the criminal law has as one of its premiere purposes the protection of societal values then one of the chief functions of the sentencing process is to clarify and define those values. In this paper, the Commission emphasizes that the educational effect of the criminal law, and particularly the sentencing process, cannot be minimized. On the one hand, behaviour may be influenced by the approval of law abiding conduct. On the other hand, any sentence which is dictated by a Court may clarify that prescribed conduct is more or less blameworthy than it was at a former time. This may be particularly true in a society characterized by shifting values and physical mobility.

It seems also that criminal activity is an inevitable by-product of social organization. From that point, the paper guides the reader through growing doubts respecting the deterent effects of sentencing and some of the conclusions of recent literature and opinion to the effect that rehabilitation is not the ideal that it was once argued to be, as the guiding principle of the sentencing process. Despite these doubts, the paper suggests that the criminal law must continue to impose sanctions in order to discourage criminal activity. Sentencing and dispositions may be utilized to identify the wrong done to shared social values, may reaffirm these values, and assist in the restoration of social equilibrium subsequent to investigation.

If a conflict model is adopted, then obvious implications are presented not only for the conflict resolution but also for the role of the state and

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[1] Studies on Sentencing: Law Reform Commission of Canada, Interim Report (1974) at 3.

the victim. The paper states that[2] ". . . in many crimes the state can afford to forego its paramount role and permit the victim to take an active part in settlement and mediation. Even in cases proceeding to trial, the victim's role and interests should be given greater priority than they are in the usual criminal trial."

If crime is to be recognized as one aspect of social conflict then some provision must be made for disposing of cases without conviction or even the usual criminal sanctions. The question then arises whether the wrong committed is deserving of trial and sentence or whether settlement and mediation would suffice. The Commission suggests that an educative and sanctioning effect would be a by-product of the arrest and trial, and the settlement and mediation procedures. Accordingly, the criminal sanction may thereby be operative at three levels: pretrial diversion by settlement and mediation, the trial itself, and the sentence of the Court.

If the educative function is to be paramount, emphasis will have to be placed on restitution supplemented by a criminal injuries compensation scheme to encourage the reconciliation of the offender, victim and society. Although the Commission suggests that many offences can be dealt with fairly and justly on the basis of restitution it notes that deprivation of liberty will be necessary in some cases, particularly where the offence is aggravated, where the offender falls into the recidivist category, or where evidence suggests that the offender, if released, would commit additional crimes of violence.

An important aspect of sentencing philosophy posited is the claim the victim has upon society for compensation for criminal injuries:[3]

> While compensation could be based on charity, or on a notion that society is in breach of its promise of protection to the individual, it may be preferable to see compensation as a claim arising from the reciprocity of social living. In the interests of a free and open society, some minimal level of crime must be tolerated; the alternative is a closed society, heavily fortified and severely repressive. In the interests of pursuing a relatively open society, however, recognition should be given to those who are victims of crimes and whose injuries cannot be totally compensated through restitution.

The paper also deals with the problem of disparity in sentencing and dispositions, particularly that disparity which often emerges in the length of prison terms for similar offences. A failure to follow common principles is often the reason cited for such disparity. The view is expressed that the solution to this problem does not lie in taking away discretion from prosecutors, judges or parole personnel but rather in structuring the exercise of discretion through a statutory statement of principles, purposes, standards and criteria. It is also suggested that additional aids to the uniform exercise of discretion would be written reasons, sentencing councils and decisions openly arrived at with provisions for appellate review.

(B) The Hogarth Paper

As is obvious from the title of this paper, *Alternatives to the Adversary System,* the reader is called upon to re-examine the premises upon which the existing system is based and its limitations as well as alternatives to it. Professor Hogarth develops criteria for such a re-evaluation and on the basis of such criteria he examines the criminal process in the

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[2] *Id.* at 32.

[3] *Id.* at 33.

light of present existential necessity and the function of institutions in the administration of criminal justice. Various conceptual models are then presented and the author adopts a social-educative model. An attempt is then made to describe the functions of a model which clarify the interaction of concepts, institutions, the public and the community. In the final analysis this paper outstrips the narrow question of sentencing and deals with the function of the criminal justice process as a whole. Further, Professor Hogarth's working model[4] is designed to provide a framework for specific discussions about concrete proposals for action.

(C) The Weiler Paper

Professor Weiler has examined the philosophical and moral justifications of the varieties of punishment and their relation to correction, reward, moral persuasion, and treatment. The range of prohibited conduct is examined as well as the reasons underlying prohibitions and societal reactions. The traditional justifications for punishment, *i.e.*, deterrence and retribution, are then considered. An attempt is also made to relate the logic of criminal sanctions to the institutional framework and the nature of responsibility and liability. The practice of corrections and the so-called rehabilitative ideal is examined through an attempt to clarify these principles of sentencing.

Unlike the Hogarth paper which calls upon imagination in seeking

[4] *Id.* at 81-88: (1) Emphasis would be placed on providing offenders and victims with opportunity, as a matter of first refusal, to deal with problems that exist between them without intervention on the part of the state. The criminal justice system as we now understand it would be seen as a backup system to be used when the seriousness of the crime makes it impossible to consider an out of Court settlement or where either party to the offence feels that there is a threat to his civil rights in subjecting himself to less formal mechanisms.
(2) The entire system would not be founded on the concept of a battle between the parties based on the notion of irreconcilable interests between them and would instead be directed towards reconciliation.
(3) The social-educative model would be a multi-tiered one, involving mechanisms of conflict resolution in the community without intervention of any kind, the use of individuals and agencies that might facilitate resolutions to conflicts that cannot be settled by the individuals directly concerned, diversion back to the community whenever police officers and Court officials can achieve a mediated settlement between the parties, and the formal adjudicative system containing most of the elements of our existing system with a vastly reduced intake.
(4) Crown Attorneys and Defence Counsel would be encouraged to replace adversarial posturing vis-a-vis one another with roles which are cooperative, constructive and conciliatory.
(5) An intake policy would have to be established at each Court. The elements of the policy would include mediation between offenders and victims, voluntary arbitration, and diversion to voluntary social services.
(6) Mediation or voluntary arbitration would be explored in all cases of crimes committed within continuing relationships, while diversion would primarily be used in cases of crimes without direct victims, such as drug offences.
(7) Absent would be the notion of absolute irreconcilability of interests between the state and the individual. Underlying this would be the assumption that public officials in the administration of criminal justice, in most instances, can be trusted.
(8) Offenders would be seen as responsible persons having both the right and duty to make restitution rather than members of a special category of irresponsible criminals needing help.
(9) Lay persons would be involved in every step of the process. At the formal level there would be involvement in the Court itself as lay assessors sitting with professionally trained judges (as in the Scandinavian system). Lay persons could also form part of Court Committees in both the juvenile and adult field, the function of which would be to advise the Court of the needs of the community within which it operates.
(10) Citizens would also have direct access to police officers. The police would be encouraged to become integrated into the community, working on a host of social planning problems in collaborating with others. It would mean a decentralization of police functions, the breakup of para-military structures and a restructuring of police priorities in the direction of crime prevention as opposed to law enforcement.
(11) The public would also have a direct role to play in corrections. Parole decisions would be decentralized, with local parole boards attached to each institution and lay persons sitting on these boards on a rotation basis.
(12) Large prisons would be dismantled and relocated in small units with easy access of the services available in the community.
(13) By far the most important change needed is a fundamental structural change in the role of the police in the community. It is important that the police be seen as a social service and be integrated at the planning and organizational level with other social services. This means that in each community officers will be directly involved in general social planning processes in which problems of coordination and delivery of services would be discussed with other relevant agencies and individuals concerned.
(14) Finally, there is a need to establish a clearing house of information on police innovation. Provincial and Federal governments can play important roles in funding experiments, monitoring them and disseminating results. Only in this way will it be possible to take full advantage of novel attempts to find more constructive roles for police officers in a rapidly changing society.

alternatives to the adversary system, the Weiler paper reminds the reader that behind the recent humanization of the administration of criminal justice even greater injustices than heretofore witnessed may come to the surface.

Professor Weiler has argued that at the roots of the retributive position one fundamental claim is made—that punishment must be defended primarily in terms of the justice in its distribution, not the social utility of its infliction:[5]

> The specific proposal of 'retribution' is that punishment should be distributed to those who deserve it. The conclusion is demanded by principles of fairness; these in turn are founded on the value of equality in the relationship of persons within a society. Accordingly, the retributive argument is a relatively concrete implication within the criminal law of a general theory of justice in social philosophy.

Professor Weiler admits that this argument is not well received by the modern mind. He suggests that the question to be emphasized is not, "Will punishment make the members of society happier?"; but rather, "Is punishment the right thing to do?".

His paper also argues that there are tendencies internal to the administration of criminal justice which make retribution increasingly relevant. The argument is made that within the utilitarian perspective punishment is essentially a bet about the future. The offender's immediate unhappiness is invested in the hope that this will produce a general return in the form of a safe and secure social system. That no longer appears to be a good gamble in the light of recent knowledge respecting crime and the responses of our criminal justice system to it. Professor Weiler argues that there is little reason for optimism about the prospects of deliberately engineering a drop in the level of crime. Treatment does not work in practice and its theoretical underpinnings are shaky. Also, no more promising are the prospects of measures to achieve "law and order", either through stiffer sentences, unleashing the police, or handcuffing the parole board. Professor Weiler states that they might achieve some margin of deterrence but only by eroding the authority or the moral acceptability of the criminal law, which accounts for much of its preventive influence.

The fact that we can hardly miss what the offender has inflicted upon his victim and what society does to him in response is true. With that in mind the author notes the following:[6]

> We are rightly sceptical about our ability to bend the future to our will through the criminal sanction but we can be clear sighted about its immediate impact on the relative position of the criminal and the law abiding. The pressing issues of criminal law reform in Canada are largely of this latter type, the fairness in the distribution of punishment. I believe we can safely navigate these shoals only through some defensible version of retributive justice.

(D) Summary

It is sometimes customary at the conclusion of a book review to recommend it to a specific class of readers. That is not the case with this work. Recent events in Canada have exhibited such salient conflict over sentencing practices that the issues raised in the various papers contained in this study must be considered by all of us.

In keeping with its policy, the Commission has avoided the use of

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[5] *Id.* at 201.

[6] *Id.* at 204.

technical jargon which results in a very readable work which may be digested as easily by the layman as by the professional.

Although the Commission suggests in the Foreword that both those views expressed by Professor Hogarth and Professor Weiler are right, and that a body such as the Law Reform Commission of Canada has to find its way in this very real tension, the reader is left to draw his own conclusions.

—A. CLAYTON RICE*

*Assistant Professor of Law, Faculty of Law, University of Alberta, Edmonton.