The American Series
of
Foreign Penal Codes

22
Social Protection Code
A New Model of Criminal Justice

SOCIAL PROTECTION CODE : A NEW MODEL OF CRIMINAL JUSTICE

by
Tadeusz Grygier

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THE
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CENTER
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FOREWORD

The publication of Volume Twenty-Two of the American Series of Foreign Penal Codes represents the first presentation in the Series of a Model Penal Code. It is a welcome and timely innovation. The twentieth century has witnessed a malestrom of transformations in philosophical, scientific, political and social realms. Good and bad, these transformations have changed the world. It is important that traditional criminal law jurisprudence be reassessed and reconstructed from the new angles of vision which are rooted in these transformations. Professor Grygier's Social Protection Code manifests *a* modern scientific and philosophical consciousness. It is a bold and provocative alternative at the levels of theory and practice. It rejects the traditional core concepts of *mens rea* and of retribution. It embodies a pragmatic, empirical approach to criminal law jurisprudence. It is a significant contribution to the continuing public debate on competing penal ideologies.

This Code deserves a vigorous evaluation and critique. Critical issues which can be raised include the following. First, protection of a society as a central organizing principle seems questionable in the twentieth century—this bloodiest of epochs where so much of the horror has been perpetrated by society through the state apparatus. I refer to the familiar litany of war, aggression, holocaust, and genocide, as well as to systems of domination characterized by racism, classism and sexism, and applied in different forms in East and West and in the Third World. From this perspective, many state officials are agents of Leviathan and their inclinations to outrage should be a focal concern in any proposed model code.

Second, a number of provisions are objectionable from a civil libertarian perspective. These include: the misdemeanor of taking an "active part in a public gathering

in which violence or threats are used" (§89) which invites *agent provocateur* sabotage of the right to public assembly and to free speech; the felony of "seriously undermin[ing] the military, economic or political security of the State" [§108 (1) (d)] which could provide a field day for repressive prosecution of critics of a regime; the misdemeanor of "aid[ing] foreign propaganda directed against the interests of the State. . . ." (§109); and the crime of "seek[ing], acquir[ing] or transmit[ting] without authority any information kept secret in the interest of the State. . . ." (§43).

Lastly, the rejection of the *mens rea* principle contains explicit exceptions without, however, specifying adequate criteria to rationalize these deviations (see §§10-16).

I am grateful to Professor G.O.W. Mueller, who initiated the publication of the American Series of Foreign Penal Codes and who is now the Chief of the United Nations Section on Crime Prevention and Criminal Justice, for his Postscript to this Code.

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PREFACE

The Social Protection Code and its Introduction represent a distinctive model of criminal justice. This new model code is unlike any *penal* code because it rejects the concepts of guilt and punishment. It is not restricted to any country: it is a model for any civilized country to follow. At the same time it is a very private document, a reflection of humanitarian, libertarian and utilitarian personal philosophy. It represents an integration of the several, seemingly unrelated disciplines in which I was trained and in which I have worked; of my experience of various cultures from the different continents on which I have lived; and of the different systems of thought reflected in the four languages (Polish, Russian, English and French) in which I have taught.

In this brief Preface there is no room to elaborate the solution to the problem of determinism versus indeterminism, a problem which has plagued us for centuries.[1] In general, behavioural scientists tend to be deterministic and so follow the old tradition established by Parmenides, some 500 years before the Christian era, in his theory of the identity of physical existence and of ideas. Parmenides maintained that everything is determined and nothing changes. Heraclitus, on the other hand, said that you cannot step twice into the same water because everything flows and changes; but he was just as deterministic as Parmenides. So were Democritus, Epicurus, the Atomists, the Stoics, and, much later, the many Christian thinkers (mainly Protestant, from Luther and Calvin on) who believed in predestination. In modern Western philosophy, Hobbes, Spinoza and Leibniz were predeterminists, though Leibniz was seldom consistent. In the physical sciences determinism appeared to be firmly established by Newton and Laplace, but with the advent of particle mechanics we have a return to inde-

terminism of a peculiar kind: what is not predetermined appears to be completely random, still allowing no place for free will.

Legal philosophers, on the other hand, believe in free will, in the tradition of Plotinus, the last of the great Greek philosophers. This tradition was revived by Descartes and Bergson in France and by certain modern philosophers, historiosophers and scientists in England, notably Sir Isaiah Berlin,[2] Jacob Bronowski[3] and Sir Karl Popper[4]. But none of these share the lawyers' belief that one can distinguish clearly between the guilty, who have criminal intent, and the innocent, who are by law incapable—or guiltless—of forming such an intent.

In abolishing this juristic distinction, as in abolishing certain other concepts taken for granted in the legal systems to which we belong, I have been, like a specialist in ecology, concerned with the removal of rubbish. This is one of the reasons why my Code is so short. However, as we know from recent studies of human ecology, especially of pollution, nothing can be entirely removed; it can be only recycled. In the recycling process what was previously garbage may become something useful. This can be done in the criminal justice system if we adopt a consistent philosophy and stop indulging in ethnocentricity and double-think.

One is generally aware of the fact that ethnic identity—the sharing of some aspects of the common culture—is defined primarily by descent. One is born into an ethnic group just as one is born into a race, which defines the biological as opposed to cultural group differences[5]. It is obvious, although one tends to doubt this, that one's religious beliefs, especially one's doctrines, are matters of ascription rather than achievement: one is born into a doctrine rather than adopting it[6]. In some countries religions contain more than one ethnic group; in some they are characteristic of particular ethnic groups; in some—as in Northern Ireland—they are the main characteristics that distinguish between two different cultural groups, each commanding absolute loyalty

to itself and hatred of the other, and neither having very much to do with God.

Law and justice fall into the same category. Just as with religion, we are ascribed to a legal system. As with religion, we tend to believe that our system of justice is true and that laws that are radically different from ours represent falsehood and injustice. Just as we have created and then inherited our common image of God, we have created and inherited the image of "natural justice" and now claim that "natural justice" is independent of culture. We deny that what is "natural" at one point in space/time is unnatural at another. When we are hard-pressed and short of other arguments we state simply that our system of justice "works" and imply that other systems cannot possibly work.

By what criterion does our system of justice work? By the criterion of inequality of sentences? Or, if we justify such inequalities by the exigencies of treatment, does our justice work by this criterion? Or by the criterion of overcrowded courts, justice delayed and manipulated, plea bargaining that allows defendants with clever lawyers to plead guilty to minor offences they did not commit and thus avoid conviction for serious crimes they did in fact commit? What is the criterion of justice done and what is the criterion of justice seen to be done? Seen by whom? Through the eyes of reason or those of superstition?

It is time to recognize that it is not the function of law to enforce human doctrines under the pretence that they represent God's will. We need a criminal justice system that will attempt a rational resolution of human conflicts, that will control the behaviour of individuals and groups for the protection of the community and for the sake of the greatest happiness of the greatest number, a system that always will be tempered by tolerance, fairness and mercy, without which no true happiness can exist.

The principle of protection, unaided by any philosophical underpinnings, has long guided life in the

North; it is the cultural heritage of the Eskimo people of Greenland, of the North Western Territories of Canada and of the islands of the Canadian polar regions. When the climate is too severe there is no room for retributive justice: Kantian philosophy is out of the question. Instead of the Kantian imperative, which states that certain acts are simply wrong and ought to be punished, the Inuit imperative states that certain things are simply necessary and ought to be done. Eskimos do not think in terms of guilt and punishment, but in terms of practical solutions aimed at the protection of the community: in the cold realities of the North protection is not for comfort but for survival.

In my report on crime, justice and social policy in the North[7] I suggest that the enforcement of our punitive laws, dominated by the concept of guilt, is in conflict with the native peoples' tradition. There was a consensus among our informants that White law cannot impose White standards on the native population of Canada. But it is not enough just to recognize the local peculiarities and to refrain from enforcing Canadian laws: we should go further and assimilate the good points of the Eskimo tradition, especially its flexibility, practicality and tolerance, so as to reform our own laws. "A law that is simple, rational, humanistic and relatively tolerant, written in accordance with modern science and not simply with traditional jurisprudence . . . would be more acceptable to native peoples of the North." But we also need it.

This Code represents an attempt to formulate such a law, a law as universally applicable as punitive laws have been, though they differ in expression.

This Code is unlike any *criminal* law both in its purpose and in its definition of crime. The Code has its roots as much in philosophy and science as in jurisprudence, and some of its concepts are closer to the civil than to the criminal law. It represents a three-dimensional model of criminal justice, whose first outline—at that time in two dimensions—I perceived in terms of geometry and applied statistics (factor analysis) and pre-

sented to the First Inter-American Congress on Criminology and Criminal Law (San Juan, Puerto Rico, 1971).

The synthesis undertaken in this model means more than the results of comparative, inductive or deductive mental processes: it represents a different insight into the principles of justice. But what is insight?

In the preface to his volume on insight, Father Bernard J.F. Lonergan, S.J., says:[8]

> In the ideal detective story the reader is given all the clues yet fails to spot the criminal. He may advert to each clue as it arises. He needs no further clues to solve the mystery. Yet he can remain in the dark for the simple reason that reaching the solution is not the mere apprehension of any clue, not the mere memory of all, but a quite distinct activity of organizing intelligence that places the full set of clues in a unique explanatory perpective.

This act of understanding, then, is insight. Each insight is unique. Physical reality as *we* see it is, in part, a projection. Each of us, as Plato explains in his theory of ideas,[9] sees reality in his own way, projects into it his own mind. Art, which is the symbolic representation of reality, is the same. As Oscar Wilde says, each of us interprets a piece of art in his own way, on his own responsibility.[10] The same applies to science and law. It must, consequently, apply to our picture of the criminal justice system.

It is impossible to develop fully the concepts behind this Code in this short Preface or in the Introduction, but I have attempted to do so in the recently completed book mentioned above. This is still being revised, because just as it resulted in this Code, so its final form should reflect the insights gained in legal drafting.

In this book I have tried to develop my concepts on the broadest possible foundation. I have drawn on everything of substance that I know, from the fields of anthropology through law, medicine, philosophy,

physics, psychology, sociology and social work, up to zoology. My knowledge is often necessarily superficial, but its breadth is essential to this undertaking. If I included anthropology and zoology it was not just to complete the alphabet, which in turn completes our *Gestalt* of encyclopedic knowledge, but in order to complete my perception of the world around us. The study of law and justice in primitive societies demonstrates how primitive we really are; while zoology provides striking evidence that the very structure, let alone the physiology of an organism, may be affected by the social situation in which the organism functions. In none of the sciences have I found any evidence in favour of the concept of "natural justice," which often means guilt-ridden, punitive justice. There is neither guilt nor punishment in nature: only behaviour and its consequences.

I have, therefore, replaced the whole concept of justice, which most of us share across the continents, by a new concept, reflected in the title of my Code. A new insight means that even familiar objects acquire new meanings. The attack on the existing system must come from a broad front. Father Lonergan faced the same problem and he acquitted himself well, at least to my satisfaction. He said:[11]

> Probably I shall be told that I have tried to operate on too broad a front. But I was led to do so for two reasons. In constructing a ship or a philosophy one has to go the whole way; an effort that is in principle incomplete is equivalent to a failure. Moreover, against the flight from understanding half measures are of no avail. Only a comprehensive strategy can be successful. To disregard any stronghold of the flight from understanding is to leave intact a base from which a counter-offensive promptly will be launched.

In all legal systems, and in common law countries more than in those of the *droit civil*, we have been inclined to identify the historical with the moral; this we

must stop doing, and think things through.

I am not trying to build a new ship of criminal justice. I do not even believe that such a ship would float. We need a bigger ship, that of social justice, of which the criminal justice system is only a part.

Even then I am not trying to build something entirely new. I am trying to rebuild a ship which is in such a state of disrepair that I sometimes wonder whether it really exists. It looks like a heap of rotten timbers but I feel there must be some sound planks worth preserving. In fact, there are many.

Despite fundamental differences, especially in the General Part, from all criminal codes in existence, this Code has been influenced by a variety of codes and legislative projects (such as Helen Silving's proposal for the Criminal Code of Puerto Rico, the 1921 Enrico Ferri project, the 1962 American Law Institute's Model Penal Code, the 1971 draft Federal Criminal Code of the United States, and several others). The series of *"Codes pénaux européens,"* edited by Marc Ancel, and the *American Series of Foreign Penal Codes,* founded by G.O.W. Mueller, were particularly useful in this respect. I am indebted to the editors of the two series as well as to Mlle. Yvonne Marx (Paris), Professors Filippo Gramatica (Genoa), Brunon Holyst (Lodz), Marian Cieslak (Gdansk), St. Walczak (Warsaw), C.H. Hendry (Toronto), N. Kittrie (Washington), H.-H. Jescheck (Freiburg i. B.), M. Chagnon, Z. Jaworski, F. Sussman and V. Szyrynski (Ottawa), Mr. W.T. McGrath, Mrs. M. Reeves and several colleagues in criminology in Ottawa, all of whom encouraged me to persist in my task when I had neither secretary nor assistants, and all my applications for grants had been rejected. Later, the University of Ottawa gave me a travel grant which allowed me to discuss my concepts and local laws and problems in Europe, and a Canada Council Research Leave Fellowship came when I was already abroad. I am also grateful to the present Editor of the *American Series of Foreign Penal Codes,* Professor John Delaney, for his encouragement and critical but constructive comments.

Discussions in a number of foreign universities and research centers were most valuable. A typical example of their value comes from Greece and consists of the introduction of two words—"even legal"—in the Section dealing with the deprivation of liberty accompanied by cruelty, extortion or serious danger to the life or health of the victims. The two words in question prohibit beyond any doubt abuses of "legal" detention of prisoners; in Greece they would have reduced problems in pursuing court action against the former dictators and their collaborators. My stay in Germany, whose new Penal Code is based firmly on the concepts of guilt and punishment, convinced me that a very different code can be administered fairly and humanely, without undue rhetoric of denunciation or moralistic overtones; conversely the spirit of this Code could be violated in practice in a totalitarian state if it were adopted there. Every law can be abused and this one is no exception.

At least equal in importance to that of the study of the various penal codes was the fact that the Code was first drafted simultaneously in English and French and, later, in English, French and Polish. Any formulation was first rendered in English, which is almost a stenographic language, capable of representing one's thoughts quickly and concisely. The second version of any statement was usually French, and this is where precision was achieved, since the French language, unlike the forgiving English, demands precision. Once precision was attained, in French and in Polish (at the request and with the help of the Institute of Crime Problems of Warsaw)[12] each phrase was re-translated into English, which is an extremely adaptable language, relatively easy to translate into, and which permits, although it does not demand, both economy and precision.

I am much indebted to those who helped me with the linguistic and conceptual problems in the various versions: Mlle Monique Auger with the first French version, Dr. K. Poklewski Koziell with the second French and the Polish versions, and Mrs. Evelyn Gibson and my wife Patricia with the final English version.