Law Reform Commission of Canada
Commission de réforme du droit du Canada

# criminal law

# towards a codification

STUDY PAPER

Canada

Law Reform Commission
of Canada

# Towards a Codification of Canadian Criminal Law

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# Notice

This study paper was prepared by the research staff of the Law Reform Commission of Canada. The Commission would be grateful if all comments could be sent to:

Secretary
Law Reform Commission of Canada
130 Albert Street
Ottawa, Ontario
K1A 0L6

# Contents

# Introduction

**1.01.** For the past four years, the Law Reform Commission of Canada has conducted a series of studies in criminal law encompassing substantive law, evidence, procedure and sentencing. Some of these studies set out general principles for criminal law reform, others propose a number of specific and practical changes in existing legislation.

**1.02.** In this paper, the Commission is concerned with the methods of translating its recommendations into law. The problem is twofold: first, choosing a framework for law reform, second, determining as precisely as possible a way to express it through legislation which will take into account Canadian society's identity.

**1.03.** In its first general report, the Commission stated its desire to "codify" Canadian criminal law. "Codification" is a confusing term because it often has been used in different meanings or to cover different situations. Sometimes it means the compilation or the rearrangement of disparate laws and regulations. Sometimes it denotes a basic piece of legislation as is the case in civil law countries. In Canada, the "Criminal Code", the first written formulation of Canadian common law, is an example of the former type of "codification". The "Uniform Commercial Code" of the United States also provides an example of a fundamental, though technical, statute. A brief survey of these texts reveals fundamental differences in both their structure and content.

**1.04.** The Law Reform Commission wishes to place the discussion of codification above a dispute over terms or a mere quarrel of words. Indeed, the problem is not one of choice between existing models of legislation, be they American, English, French or any other, but, rather one of understanding the social and legal reality of Canada in order best to express our law in a way which corresponds to our reality. This objective has in recent years led the Commission to consult extensively the Canadian public. Today, it has prompted the Commission to publish a study on the general framework of Canadian criminal law reform.

**1.05.** The consensus of opinion holds that Canadian criminal law ought to have the following features. It ought, first, to be flexible so that it can be constantly adapted to changing social needs and avoid the hardships that applying the letter of the law can cause in certain circumstances. Second, the law ought to be reasonably predictable, for public and specialists alike need to know the precise impact of legal rules. Third, it ought to be accessible so that it may be known and understood and thus fulfill its informative function. Fourth, the law ought to be certain so that the scope of its application by the courts is readily ascertainable and not arbitrary. Finally, it ought to come to grips with real problems and genuine concerns to become a dynamic force for progress.

**1.06.** If these criteria are to be met fully, an appropriate way for implementing them through legislation must be found. However, legislation, whatever its form, is but a part of the legal reality of a given country. Indeed, the form, content and construction of legislation is permeated by customs and habits and further influenced by attitudes of the community towards legislation and case law. Hence, a discussion of the merits of codification in Canada involves more than a comparison between code and statutes, or between written and unwritten law. It involves also an effort to find legislative language, which in turn implies the acceptance of a specific framework of legal reasoning and thinking.

Such is the purpose of the present paper.

- Part One is devoted to clearing up ambiguities and dispelling a number of common biases concerning codification. Here we are seeking an impartial position, so that one can determine objectively and critically the prospects for reform.
- Part Two turns to an analysis of the present state of Canadian criminal law. This was deemed necessary to pinpoint its deficiencies for purposes of law reform.
- Part Three is concerned with fundamental objectives of codification, and with the most appropriate methods for achieving them.

Since proposing a possible model for codification implies suggestions for a new legal structure, the respective roles of the legislature and of the courts must be seen in a new light. Codifying the criminal law will enhance judicial creativeness only if Parliament provides legislation giving the courts more guidance than at present concerning legislative policies and purposes. This should improve coordination between the judicial and legislative branches, making the legal process more democratic and the expression "legislative intent" more than an empty phrase.

What then is the best way of expressing the legislative intent in form, structure and content? Before this question can be answered, two issues must be resolved. As a first step, the differences between Canada's two legal traditions, the sources of our present law, must be understood. It is of utmost importance to identify clearly the principles from each system that the new law should retain.

Furthermore, no attempt to reform the law must sacrifice content to form. The content itself must moreover embody faithfully Canada's cultural and legal traditions. One must begin then with a clear picture of these traditions, so that when it comes to choosing between different methods of formulating criminal law the most appropriate one may be adopted.

The task of the Law Reform Commission is not, however, limited to a statement of the Canadian criminal law as it now is, but it should also endeavour to propose a structure that will allow for ongoing criminal law reform.

# PART ONE

## The Great Traditions

**1.07.** Though Canadian law emanates from two great traditions, the common law and civil law, specialists trained in one of these often fail to understand the other. There are lawyers for whom any idea of codifying criminal law is questionable if not basically wrong. They fear that codification represents a break with the Anglo-American tradition, disregards the principles of British justice, and would lead to the eventual adoption of an inquisitorial system of criminal justice. At the same time, civilians associate the common law system with outmoded formalism and outdated procedures which they consider unwieldy and anachronistic.

The purpose of the first part of this study is to dispel certain myths based on ignorance both of institutions and of history. This reflection should lead to discovery of the true identity of Canadian law. Legislation, especially in respect of criminal matters, must reflect sociological reality. Criminal legislation, if it is well adapted to a given society, should harmonize with it in every way. Although it is far from a replica of either country, Canada's historical origins lie mainly in Britain and France. Identification of Canadian reality, in contrast with these two great legal traditions, is possible only after a brief historical summary.

**1.08.** It is customary, among Western lawyers, to contrast two great "families" or systems of law: the civil law system and the common law system. This classification is chiefly a result of the separate historical development of each tradition. Law is the product of society, and the attitude of a given society to a given body of law depends essentially on the character of the social group that devised the law. Any such group is in turn a reflection of history and socio-cultural characteristics. The contents and mode of expression of a body of law thus reveals a great deal about a particular culture or civilization. One should not be led astray on this point by the similarity and sometimes the universality of given legal problems, or by the fact that different countries often have the same ap-

proach to identical problems. The identity of a given legal system does not depend on the way the law defines a problem or on its choice of judicial solutions. For example, the fact that most countries impose severe punishment for murder does not necessarily mean that murder is perceived in the same way by all of these countries or that the expression of the socio-cultural prohibition against it is the same in all cases. Beneath the prohibition against murder lie social and cultural phenomena that are specific to each country. If a worthwhile comparison is to be made between common law and civil law, it is important not to draw superficial parallels. The analysis must penetrate to the true essence of the systems, for similarities between legislation and judicial rulings are not enough. In the past, comparisons of the civil law and the common law have been more an exercise in superficial analysis of legal and judicial solutions than an inquiry into the reasoning techniques and methodology of the two systems. This study pursues the latter approach. It is not intended to be theoretical or philosophical, but rather an exercise in applied research.

**1.09.** The differences that exist between the common law and the civil law must be placed in the right perspective, so that they are not seized upon as an easy pretext for the maintenance of a comfortable status quo. As we shall try to show in the following pages, the two currents of legal thought no longer differ in the way they did centuries ago or as some people may believe they still do.

## A. HISTORICAL FOUNDATIONS OF THE DIVERGENCE BETWEEN THE TWO TRADITIONS

**1.10.** The divergence between the civil law and common law traditions has often been noted and discussed. Some writers, perhaps with exaggeration, have analyzed it in terms of a civilization gulf between Britain and Continental Europe. For a more realistic view, it may be advisable to review briefly the history of the two systems.

**1.11.** An historian would say that only "recently" in the history of mankind did the common law and the civil law systems take divergent paths. Indeed, until the thirteenth century, the law in Great Britain and in mainland Europe evolved in a similar way. During that century, however, a renaissance of Roman law took place in Italy and France. These countries discovered the principles of Roman law and the compilations of Justinian, a law which was both systematic and logical. Roman law subsequently had considerable impact on the criminal law of the rest of Europe, especially in the Netherlands.

**1.12.** England was the exception. In 1234, Henri III forbade London lawyers even to teach Roman law, as he saw it as a threat to his authority. Many hypotheses have been put forward to explain England's course; its insularity, its centralized form of administration of justice, its political organization, its insistence on the procedural aspect of law. Whatever the true reasons, from that time on, English law parted from continental law and began to develop into an autochthonous and autonomous system.

**1.13.** In France the criminal law underwent change in the late Middle Ages with the introduction of inquisitorial procedure (*jus extraordinarium*) from the late Roman Empire. It was first adopted by the ecclesiastical courts and gradually the civil courts followed suit. From a political standpoint, the inquisitorial procedure fostered a harsh system of criminal justice that was neither secular nor adversary, and a technical system that stressed the active role of the judge. It was finally made official by the Great Royal Ordinances of 1453, 1498, 1539 and 1670 concerning criminal procedure.

Great Britain, on the other hand, retained the adversary system considered by them as a means of protecting the fundamental rights and liberties of the individual, especially against the attacks of political power. It was to become an example and ideal for the French philosophers of the eighteenth century struggling against royal absolutism.

The parting of the two systems had a series of important consequences on the level of legal philosophy.

**1.14.** To begin with, as English law developed in its closed system, case law became the principal source of law. In the absence of written statutes, English judges relied on good sense and natural justice to arrive at what they believed to be a fair and realistic solution in each case. A certain cohesion was maintained in their judgments through adherence to precedents. The *Year Books*, edited and published in French as early as 1290, are a precious source in this respect. English justice had already begun then to stress the importance of judicial precedents, as opposed to legislation. Statutory law did not really develop until the nineteenth century, but from then on was to become increasingly important.

**1.15.** Second, as the *Year Books* show, procedure was crucial to the development of English law. Trials in those times bear the stamp of formalism, substantive law developing through procedural forms known as writs. The classical adage *"remedies precede rights"* well describes that

process. Procedure gave British law its empirical character and its distrust of generalizations and sweeping principles. Each case was treated separately, and each problem was studied on its own merits and not with reference to a general concept or principle. Law was thus seen more in terms of *"remedies"* than in terms of *"rights and duties"*.

**1.16.** Third, English law did not take the form of a general written custom applicable to a specific territory, but rather that of a judicial tradition of universal application. Over the centuries, the common law ceased to be based simply on a cross-fertilization of specific cases and isolated rulings. Links developed and a mature system of law, one with its own distinctive characteristics, gradually emerged.

**1.17.** Europe's experience was totally different, for Roman law was seen as clearly superior to Germanic-European and local customs. Welcoming the rationalization of basic legal principles carried out by the Roman lawyers and commentators, Europe gradually amalgamated them with the newer concepts of the Christian tradition and of the canon law. Political developments, more particularly the growth of absolute royal power, also led to an emphasis on legislation at the expense of case law. Continental judges, especially in France, carried out the edicts of the King relying more in civil cases than in criminal cases, on the general principles drawn from Roman law.

The continental judge, moreover, was aware that he was asked to handle cases not according to *his* understanding of what was just and fair, but according to solutions that were just and reasonable almost by definition, since they proceeded logically from abstract principles of general application. Even if the then existing European law was affected to some extent by formalism and remained attached to procedure, the latter was considered to be merely a means and not a creative source of substantive law. Rules of substantive law were not dependent on procedure. The continental jurist therefore reasoned more in terms of *"rights"* and *"duties"* than in terms of *"remedies"*.

**1.18.** Finally, in the thirteenth to fifteenth centuries, such continental countries as Germany with the *Sachsenspiegel*, Spain with the *Siete Partitas* and France with *les Coutumiers* became aware of the importance of customs and of the necessity of setting them down in writing. Roman law nevertheless continued to play a supplementary role in areas not specifically covered by *les Coutumiers*, which were themselves sometimes imbued with Roman law principles. Roman law was not, however, equally accepted in all the countries of mainland Europe. Germany, for example, with two successive adoptions was more deeply influenced by it

than France. Yet, all European countries were to varying degrees influenced by the Roman law.

**1.19.** The French codification of the early 19th century, which was to have a worldwide impact, made the contrast with common law the more apparent. As we have seen, the separation of the two systems took place earlier than 1804, and should not be attributed to the mere writing of a code. Even though the two systems are usually contrasted by reference to written law as opposed to unwritten law, this by far is not the essential point. The divergence goes much deeper.

## B. AREAS OF DIVERGENCE

**1.20.** The differences between the common law and civil law systems have been exaggerated. Too much stress has been given to certain elements of difference which are only of historical value as a way of putting forward one's own system at the expense of the other.

### (1) The Traditional Areas of Divergence

**1.21.** The first traditional dissimilarity that exists between common law and civil law concerns the hierarchy of legal sources. The common law is based above all on case law, and, hence, gives special significance to the judicial expression of the law. Civil law, on the other hand, considers legislation as the primary source, and judicial decisions are viewed only as practical and concrete applications of the legislator's will.

**1.22.** This dissimilarity obviously finds support in history, as the common law was built up through the slow accumulation of judicial decisions by judges who, like those of today, sought in precedents theoretical support for their own decisions. Because the development of English statutory law did not really start until the 19th century, English courts were left with nearly all the responsibility of creating the law. By a process akin to sedimentation, a certain number of rules and principles having the force of law slowly grew out of the mass of cases.

**1.23.** A number of historical factors also underlie the pre-eminence of legislative sources in those countries that followed the civil law model. First, there was Europe's early discovery of the *"rationes scriptae"* of Roman law, that is the creation of a theoretical system of abstract rules of law. A second factor, in France at least, was that by the end of the 18th century, the conservatism of the higher Courts (Parliament) had been combined in the public mind with the distrust of a Judiciary which had

failed to achieve its independence from royal power. It was therefore no accident that the ancient maxim *"May God save us from the justice of the Courts"* was in a sense recalled by article 5 of the French Civil Code of 1804, which forbids judges from laying down general rules in settling the cases before them.

**1.24.** The civil law tradition recognizes written law as the only imperative source of law. In theory, cases remain a secondary source that must be as faithful as possible to the legislator's intention. Moreover, since France has never experienced anything like the conflict that existed in England between the legislature (*statutory law*) and judicature (*judge-made law*), the rules of interpretation applicable to written law have remained different in the two countries. In his efforts to discover the legislative will behind a statute, a civil law judge frequently refers to reports and parliamentary debates that lead to the adoption of the legislation. Should the law be obscure, the judge thinks it his duty to give it the meaning intended by the legislator. The legislator, on the other hand, does not think it necessary to work out all the details of application, for he knows that the courts will use general principles to determine the precise meaning of the legislation. In civil law countries (except for the prohibition of the use of analogy in interpreting penal statutes), restrictive interpretation of statutes never became the general rule, but was reserved to exceptional cases as, for example, to retroactive laws. The courts' attitude in legislative interpretation is illustrated by Article 1156 of the French Civil Code (Article 1013 of the Quebec Civil Code), which states that in case of doubt about the intention of the parties to a contract such intention shall be determined by "interpretation" and not by the literal meaning of the terms used. One may find another example in the Italian Civil Code of 1942 which provides that the judge shall not, in interpreting the law, give it any other meaning than that resulting from the usual sense of the words and the legislator's intention.

**1.25.** Common law courts, on the other hand, had a tendency to consider statutes emanating from Parliament a restriction on their creative power, and accordingly favored literal and restrictive interpretation as an additional method, along with notions of fairness expressed in the called "principle of legality", of assuring adequate protection of the accused's rights. As a result, Parliament felt it necessary either to draw up legislation in great detail so that the courts could not disregard the legislation's purpose or, as happened in 1850 and 1889 in England, to lay down canons of interpretation in a specific statute. That is why, even today, common law statutes contain lists of definitions of terms, much to the surprise of civil law lawyers.

**1.26.** Under the traditional common law system, a good judge was one who stayed within the very letter of the statute and thus looked up to precedent as a mode of judicial creation; under the civil law system, on the other hand, a good judge was one who inquired into the "spirit" of the law and sought to render a decision faithfully implementing the legislator's intention. It is clear, however, that the distinction regarding the sources of law is much more a question of attitude than a genuine theoretical divergence. Today, no common lawyer would question the supremacy of Parliament and hence of statutory law. The common law judge nonetheless is inclined to create law where the legislator's intention is not clear and, when doing so, does not seek guidance from a theoretical structure of general principles in order to discover the legislator's intent. He turns rather to precedents, and failing that, to his own sense of what is fair and just.

**1.27.** From the philosophical standpoint, the continental law system, as it is expressed in the nineteenth century codifications, reflects both a positivistic approach to the rule of law and a desire for a clear separation between the legislative and the judicial power. It logically rejects judicial precedents as a formal source of law, since only Parliament can legislate. The underlying assumption is that, whatever the problem, the judge will find the solution to it in the legislation. Furthermore, as the latter does not consist exclusively of rules of immediate application but also of principles and general theories, the judge in most cases will have little difficulty in supporting his decision on general grounds. If he then "creates" law, he does so by lending a practical dimension to an express or implied theoretical principle and not by referring to earlier decisions on the same subject as binding precedents. Although aware of the impact of "jurisprudence constante", he never feels strictly bound by judicial precedents.

**1.28.** This difference of approach concerning the hierarchy of legal sources is also expressed in the legal methodology. In this respect, a distinction is often made, and possibly overstressed, between inductive and deductive methods.

**1.29.** The average common lawyer is said to be wary of general principles and abstractions. It is said he distrusts theoretical precepts of general application, for he believes that the primary function of law is to find a fair solution to each case on its own merits and not in its relationship to other cases concerned with the same basic principles. As judicial precedent is his primary source of reference, he is not naturally inclined to generalize the scope of legal rules. His task in a particular case

is more to try and ascertain how the ratio-decidendi of other cases can be applied or distinguished. An exhaustive factual analysis of cases thus is of prime importance.

**1.30.** It follows that what often appears to be idle technicalities to the civil law lawyer is sound logic to the common law lawyer who, in order to find analogies applicable to his case, must often work his way through a great mass of precedents which yield apparently contradictory versions of the law. When he reaches his decision, each of these seemingly incompatible judicial precedents will have added a detail, an exception or a new dimension to the legal principle finally set forth. It is not therefore surprising to find in the common law principles that hardly seem worthy of the name, so numerous and varied are the exceptions to them. The rule concerning hearsay evidence is a typical example.

To sum up, the common lawyer deals with a case by examining all the relevant precedents, by analyzing them minutely and by trying to assess their impact; he then turns back to the case at hand, and attempts to determine this previous dicta's effect upon it.

**1.31.** The methodology and reasoning of the civil law lawyer differs from that of his common law counterpart. He begins his study of a case by reference not to other cases, but to legislation. His search is for explicit or implicit principles with which to solve his problem. Should the relevant legislation be obscure or debatable, he then tries to identify the *"esprit de la loi"* going beyond its literal meaning. Only then does he refer to law reports for cases in support of or against his opinion.

However, common law lawyers are increasingly concerned with statutes, and civil law lawyers with the study of case law. The difference in methodology, though real, is thus less important in practice than in theory. Such is the case in Canada. When applying the provisions of the Quebec Civil Code, a Quebec judge does not proceed quite as his French colleague would. On the other hand, a judge in Ontario or Manitoba does not follow the same exact pattern as his English brother, who in turn differs from his 19th century predecessor.

**1.32.** The difference between the two traditions perhaps may lie in the very conception of what law is. From a civil law viewpoint, for reasons that are chiefly of historical nature, law is above all a science. Every judgment should comply with legal theory. For a traditional civilian lawyer, there exist a number of precepts and abstract principles from which rules needed for the solution of precise cases are logically and

naturally derived. Therefore, law is above all an abstraction, a science complete with its own principles, rules and specific methodology.

**1.33.** It is also a system in which logic is imperative, leaving no room for the presence of contradictory solutions that would prevent overall harmony and coordination. A civil law lawyer confronted with major discrepancies between cases will wait and hope for a legislative change to settle the debate. He does not trust the courts to discover in their wisdom an acceptable compromise. This attitude towards law also influences the reasoning of jurists and the drafting techniques of statutes.

**1.34.** Thus, to give but one example of civil law methodology, the European jurist clearly separates in his mind a number of legal fields such as public law and private law, whereas no such distinction exists in common law. The civil law lawyer's choice of terms is also a reflection of his different mental structure. He speaks, for instance, of *"droit du mariage"*, of *"contrat de louage de choses"* and of *"le droit des obligations"*. The common law lawyer refers for the same to *"husband and wife"*, to *"lessor-lessee relationships"*, and to *"contract or tort law"*. Similarly, the civilian system constantly refers to *"rights"* and *"obligations"*, considering it more important to state what a person's rights are under given circumstances than to lay down detailed procedures for asserting such rights or for obliging others to respect them. The rule of law emanates from general principles and abstractions of legal theory, while evidence and procedure remain subordinate to substantive law. Common law thinking is basically different.

**1.35.** The common law lawyer looks at legal rules mainly in a pragmatic way, as tools to resolve or remove conflicts. Law is conceived as a tool of practical application. It is good if it leads to solutions or compromises, whether or not it is the consequence of a higher logical principle. It is regarded as more of a technique than a science, or at least the technical and practical aspects of the subject receive more attention than its theory. The common law lawyer usually looks for the principles behind a legal rule only after a solution to the conflict has been found. Therefore, principles may be discovered only after many years, when continuity of precedents has conferred to the solution a quality of permanence and generality. It is considered crucial that judgments be just and equitable; their conformity to legal theory in each particular case is less important. With its origins in procedure, the common law has often been described as basically "a law of remedies". It is through the "writ of habeas corpus", for example, that the common law vindicated the individual's freedom from wrongful detention. With regard to criminal cases, justice is considered to have been done under the common law if

the accused has had a "fair trial", and "fairness" to the accused is deemed achieved in principle when the rules of procedure and evidence have been followed. As René David has expressed it:

> *Follow a fair and proper procedure, thinks the English jurist, and you are almost sure to arrive at a just solution. The French jurist, on the contrary, thinks that the judge must be told what the just solution is.*
>
> (*Le droit anglais*, No. 316, p. 359)

**1.36.** The English jurist, then, has a conception of law that ranks experience above logic. A solution is considered acceptable if it settles a dispute fairly, even if it should prove difficult to integrate with the whole body of law. Procedure and evidence thus are much more important in England than in continental Europe, because common law philosophy considers them the main safeguards against an unequitable application of substantive law rules. It must not be forgotten that in England the fight for individual liberties was won not in Parliament but in the courts, and because of procedure. The legislator was seen as a threat to freedom, the judge as its defender. This traditional view nurtured the esteem in which "judge-made law" has been held.

**1.37.** It is no longer correct, except possibly in the United States, to see the courts as the sole or even the principal bastion of liberty in common law countries, since the democratic process is the people's main defence against despotism and flagrant legislative abuses. Many governments, moreover, impose moral or legal limitations upon their own powers by passing legislation such as the Canadian Bill of Rights and by signing international treaties. Morally or legally, such documents help to protect democratic society against possible abuses. Other modern developments also act as a curb to governmental powers. Our mass media, for example, inform the public of the government's intentions and lend support to or criticize government bills. The media provide a voice to opposing parties or pressure groups. The legislator is thus obliged to take into consideration the political consequences of his acts. Finally, a number of countries have found it necessary to create a supplementary defence for citizens who may feel that they are unfairly treated by governmental action. The ombudsman is a good example in this regard. For all these reasons, judges no longer find themselves alone as champions of individual freedom.

## (2) Biases

**1.38.** Some deeply rooted prejudices remain against the approach of the common law and against even the idea of codification. These myths and antagonisms stem from misconceptions about the two systems. In Canada, where both systems co-exist, such misconceptions are especially not to be tolerated. Canada has the best opportunity to carry out a reform embodying the finest of both common law and civil law traditions.

### (a) *Biases Regarding Codification*

**1.39.** The strongest bias may well be against the civil law system of codification. The reason for this is simply that while civil law has never felt threatened by common law, some common lawyers have viewed codification as a threat because their countries have from quite an early date considered replacing the common law with it. In 1614, for example, Sir Francis Bacon proposed codifying England's criminal law. For political reasons this idea was not followed, and a few years later the Coke Commission's recommendations were to meet the same fate. In the nineteenth century, a second serious effort toward codification was likewise defeated.

**1.40.** One may indeed ask if misconceptions regarding the very idea of codification do not arise from a lack of accurate information, or from the fear of abandoning a legal world within which one feels confident. Some attacks on codification deal in platitudes and generalizations, revealing perhaps only more a fear of change than an unquestioning faith in the excellence of the common law system. Most of our readers are aware of the problem and it is necessary to touch on it only briefly.

**1.41.** Codified law is barren and sterile, or so we are often told. Because it is written, it is said to be too rigid, to leave insufficient room for judicial creativity, to curtail the judge's discretionary powers (which powers are seen to guarantee equity and justice), and to be unresponsive to changing social reality. The inevitable conclusion, thus, is the less codification the better. Traditional common law is praised, while the alleged limitations on the courts imposed by written law are denounced.

**1.42.** No great effort is required to realize that such attacks on codification are unfounded and betray a lack of understanding of what codification really is. To carry the negative arguments to the point of ab-

surdity, if these statements against codification were true, it would follow that all nations of Europe and South America, as well as most Asian and African countries, to say nothing of the United States, have shown themselves incapable of devising an adequate system of criminal law. In fact, people now realize that adapting law to a changing society is very often more a task for the legislator than for the judge: witness the impressive development of statutory law in common law countries since the nineteenth century.

**1.43.** Some English lawyers have recognized the absurdity of such reasoning.

> Nor do we see much merit in the argument that codification would destroy the flexibility of our system. Not even the French codes (relatively the most rigid of all), have proved inflexible, and the German and Swiss codes, which granted wide discretion to the judiciary to decide "ex aequo et bono" or according to the judge's conscience, have created systems which are far less rigid than ours. Finally, we see no merit in the claim that only that kind of law which has been developed through judicial pronouncements and made binding with the help of a doctrine of precedents has the attribute of certainty. It would be facetious to rely, in rebuttal, merely on the well worn (and much cherished) phrase about "the glorious uncertainty" of English law. Instead, we rely on what has already been said about the immense difficulty of ascertaining the law relating to any particular subject, the unresolved conflicts between judicial decisions, and the many doubtful points which are not covered by any binding decisions at all.
>
> (Gardiner, B., and Martin A., *Law Reform Now*, London, Gollanx, 1964, Nos. 11-12)

**1.44.** The attitude of some people toward codification once again is based on a misconception. To begin with, codification does not mean that the entire body of law must be set down in the finest detail. The task would be impossible by its very nature, since no one can foresee all the particular applications of the law or could obviate every conceivable difficulty of interpretation. In that sense, the notion of a "complete" code is mythical, absurd and utopian. Codification is not a formal unity of all legal rules. Its purpose is achieved if it expresses in clear terms the general rules and the basic, distinctive principles of criminal law philosophy. The Code should contain guiding principles for both judges and lawyers. It need not solve each case specifically. It should reflect the positive law in a series of clear, simple rules deliberately shorn of countless details and, as far as possible, be free of those elements previous judicial experience has shown to be obscure or deficient.

**1.45.** Secondly, codification must not be considered as a vote of non-confidence in the courts or as something that will suppress their

creativity to the point of reducing them to "judging machines". It has been said frequently that codification removes all elasticity from the application of the law by reducing or eliminating judicial discretion. The best comment on this assertion (one that Stephen himself made) is that in our modern era, legislation is the best tool for adjusting the law to circumstances. As paradoxical as it may seem, in practice a code leaves judges more freedom and discretion than they have under the binding authority of precedent. At common law, a judge opposed to a solution established by an equal or superior tribunal in the distant past may be forced to apply it, unless, by formalistic and often contrived techniques of "distinguishing", he manages to shake off the yoke. Except in the United States, outright refusal to follow the precedent is very rare. Under these circumstances, it is inaccurate to maintain that the common law gives judges more discretion and more powers. Such was the case in England in the thirteenth and fourteenth centuries, but not today. As Stephen has said, the so-called "elasticity" of the common law means only that its accumulated precedents constitute innumerable fine points. What freedom the judge has is thus gained by selecting one precedent at the expense of another, or by setting aside some troublesome decision through finding a way to "distinguish" it from the case at bar.

**1.46.** Far from eliminating judicial discretion, a code actually strengthens it in two ways. First, in a codified system the judge must continually use his discretion to interpret legislation and the concepts embodied therein. This task is not a purely mechanical or automatic application of the law. In addition, codes contain several articles worded so as to allow the judge to adapt them to circumstances. For example, in dealing with the problem of illegally obtained evidence, the French legislator has stipulated in Article 172 of the Code of Criminal Procedure, that such evidence cannot be admitted if the examining magistrate has obtained it *"in violation of the rights of the defence"*. The meaning of those words has remained vague and general, so that each court must interpret them anew in each individual case.

If anything, codification would unshackle judicial discretion and thus add flexibility to Canadian law. It would eliminate much of the rigidity stemming from the tendency to over-emphasize precedent in a system based solely on the continuity of case law.

**1.47.** Thirdly, codified law is as responsive to social change as common law. The original definition of defamation in the French Criminal Code, for example, dit not prevent it from being applied when a person's reputation was damaged by means of a modern broadcasting technique that surely was not in existence when the law was promulgated. Similarly,

the general principles set forth in Article 1384 of the French Civil Code, enacted in 1804, have afforded satisfactory solutions to problems of liability resulting from automobile accidents. Two points must be noted in this regard.

First of all, our present laws, and especially our criminal laws, are complex. We are no longer living in the days of perfect correspondence between social and religious standards and legality, the days when "crime" was the simple legal expression of religious or social prohibitions. A whole sector of criminal law has since become technical, and the legislator has therefore had to intervene. It is not that the courts have failed to do their duty, but criminality has taken new forms which are difficult to cope with under old structures and under a philosophy that binds judges to a strict and literal reading of prohibitions. The result has been a multitude of statutory and strict liability offences. Since judicial creativity is based on analogies, and since analogies in criminal law have their limits, defining criminal conduct has become much more a legislative than a judicial responsibility.

**1.48.** Finally, part of codified law consists of general principles. It sets forth in abstract language a philosophy concerning crime which remains eminently adaptable to social change. On the other hand, the criticism that codified law resists adaptation to social realities may appear to be justified in regard to specific offences and particularized rules. But the same criticism is then equally applicable to customary law. For example, if gambling and prostitution normally have been considered crimes under the law, and if society is of the opinion that they should cease to be crimes, then it is likely under common law as well as codified law that legislation will be needed to express the will of the people. It is therefore wrong to over-emphasize the common law's "responsiveness" to social needs and the alleged lack thereof in a codified system. A critical and detailed study would no doubt show that, whatever the legal system, Parliament always plays the major role in updating the law.

**1.49.** Fear that a codified system may age prematurely and become outmoded is often the consequence of a confusion between statute and code. In the purest British tradition, a statute should spell out everything down to the smallest detail. Its criteria of excellence are meticulousness and precision. Hence, the rule often becomes complex, and one can lose sight of it in the profusion of details. Yet the more a law goes into minutiae, the greater are its chances of rapid obsolescence, especially when it was drafted with immediate goals in mind. Tax laws and many provisions of Canadian criminal legislation well illustrate this point.

To judge codified law by the canons of statutory law, as many people do, is to overlook the fact that the former is based on essentially different criteria of generality, simplicity and conciseness. It is not concerned with foreseeing all circumstances and covering all the details of every conceivable case. Its only purpose is to lay down the basic principles of the law from which practical applications can then logically be derived. Being abstract and general, it is able to include all cases within its scope without explicitly solving each one, thus leaving sufficient room for a large amount of judicial creativity.

**1.50.** To conclude, there can be no doubt that in modern times codification represents a perfectly acceptable lawmaking technique. It does not mean the end of judicial powers or final submission to a set of positive or fixed rules unresponsive to social needs. On the contrary, to codify is to restore logic to a contradictory and often obscure collection of dicta. It also serves to reconsider and reorganize the existing statutory law, to regroup criminal rules into a single and coherent whole, and to systematize the principles underlying them.

(b) *Biases Regarding Common Law*

**1.51.** Common law is often misunderstood by advocates of the civil law system who criticize it for being scattered and piecemeal in its approach, for depending on technicalities, for lacking guiding principles, and for leaving too much to the individual initiative of the courts. This view is obviously biased in that it fails to discriminate between the common law of our times and that of the sixteenth and eighteenth centuries. Today's judge does not operate in the same way as his predecessor did centuries ago. The latter created law on the basis of custom in order to compensate for a total lack of written law, but the contemporary judge is much more concerned with interpreting existing statutes. In doing so, however, he still "creates" law by adapting them to new circumstances, this being the limit of his discretion, for he cannot ignore or act contrary to specific provisions of the written law.

**1.52.** It is equally false to deny internal logic and guiding principles to common law and to argue that it is not therefore really a system. The logic of common law simply is found elsewhere, that is in the accumulation over the years of thousands of judgments. From these, fundamental concepts emerge and are affirmed and refined. Theoretical and practical relationships thus arise among the various sectors of law. For example, the law on "theft" could not develop through case law without parallel developments in the area of property rights. Such logical connections

between categories are perhaps less apparent in the common law than in a codified system because they are not usually expressed in the statutes themselves, and can sometimes be discovered only through extensive studies of the case law. Textbooks and annotated codes have played an important role in representing judicial dicta as the law.

**1.53.** Third, the common law is not nearly as piecemeal and disparate as it appears or as it tends to be pictured by civilians. It is, however, no doubt more difficult to identify rules in common law than in codified law even though every rule in a codified system is not necessarily reduced to writing. The Continental European lawyer must not rely on a simple knowledge of the code rule. Like his common law counterpart, he must complete his analysis of a given statutory text by a careful study of the meaning, scope and limits assigned to it by the judiciary.

**1.54.** Finally the assertion that authority of precedent is an impediment to the law's evolution and an encouragement to overemphasize technicalities must be discussed in its true context. Common law courts have developed a series of judicial techniques and interpretations which allow them to minimize or avoid the force of precedents where and when they disagree with them. This feature of common law appears extremely technical and somewhat artificial to the lawyer of the civil law tradition.

**1.55.** In the search for the real differences between the two traditions, it is important not to dwell on their individual historical backgrounds as a justification for maintaining minor differences and for refusing to take from one to solve basic contemporary structural problems in the other.

**1.56.** History explains very well why two traditions united at the beginning subsequently became so separated. It does not, however, explain current areas of dissimilarity, nor does it help in comprehending them. Canada is not directly concerned today with either eighteenth-century English common law, or nineteenth-century French criminal or civil legislation. Canadian criminal law has grown independent of its English model, even if only in its codification attempt. Similarly, Quebec's civil law has moved away from the Napoleonic Code, though it retains certain of its general principles, its terminology and its basic legal philosophy.

Despite differences inherent in the systems themselves, there appears to be more affinity between a Canadian common law judge and a Quebec civil law judge, than between the former and an English judge and between the latter and a French magistrate. Using their own methods and

training, Quebec judges, like their colleagues in Ontario, British Columbia or Saskatchewan are concerned above all with Canadian legal realities. Canadian judges discuss Canadian problems, reflect the national outlook, and have the same perception of our criminal law because they live in one milieu.

## (3) Advantages of Codification

**1.57.** A system of codified law is certainly not a universal panacea for every ill of a given legal system, nor should it be a purely intellectual exercise, carried out simply for the pleasure of seeing all the rules of the criminal law arranged in what appears to be a coherent and tidy whole. As René David once wrote, codification is above all a "style".

**1.58.** Law reform cannot take place unless it adopts a judicial method and process capable of withstanding the test of daily use, and through which the administration of justice can be improved and facilitated. To the accused, to judges and to the attorneys involved daily in cases, a true codification of criminal law would represent an unquestionable advantage.

**1.59.** Law, especially criminal law, is made for the citizen, not the lawyer. Too often lawyers ignore this simple fact. Modern societies are faced with an evergrowing complexity of laws, and, as already noted, perfect correspondence between social and religious standards and legal rules of conduct is no longer true. Moreover, crime itself has become more technical and taken new forms, thus calling for a more precise and specific drafting of legal prohibitions.

**1.60.** Secularization of criminal law has a major impact on the methodology of law reform, since the ordinary citizen can no longer be sure that religious and moral standards will be helpful guides for ascertaining in advance the prohibitions of the criminal law. Statutory offences are increasing in number and strict liability in many fields has replaced, as the standard of liability, the individual's blameworthy frame of mind. In certain areas social and legal prohibitions are growing farther apart. Even if assault, murder and rape continue to be crimes as they have been for centuries, it is far from certain that the average citizen sees anything wrong in the possession of certain objects which is prohibited by a seemingly technical piece of legislation.

**1.61.** Criminality, in the broad sense, is no longer coterminous as in earlier societies with a religious taboo or an act that the "good" citizen

would not commit. The anonymous nature of the corporate veil coupled with the technical character of some offences have made it especially necessary to draft laws with no loopholes.

**1.62.** These factors at least partly explain why the average citizen's understanding and awareness of the law is so poor, or, in other words, why he knows less and less about the laws by which he is governed. A well known rule states that ignorance of the law is no defence. Yet legal prohibitions cannot find their justification in the mere fact that they are regularly enacted. The average citizen must be given an opportunity to know and understand them. Criminal law is both educative and preventive and it is contradictory to issue prohibitions unknown to many citizens (except through a legal fiction), when a better-informed population might avoid the prohibited conduct and the penalties it carries.

**1.63.** Codification of criminal law could represent a positive step in dealing with this problem. Laws will be more accessible to lay people if they are reorganized in a logical, coherent way, with a clear statement of the principles on which they are based. Few people possess the training required to proceed as the lawyer does, weighing the impact of a legal rule through a critical analysis of the relevant court decisions and their interpretation. Yet restructuring the law is not enough and one must go one step further. Lay people will derive no benefit from legal materials that are too technical or are drafted only for specialists. This, of course, is the principal shortcoming of "codifications", the statutes are written for lawyers and not for the general public.

**1.64.** The language and structure of a modern code should be generally intelligible and accessible to everyone. There lies the challenge, however, since for reasons already explained, the codifiers cannot generalize to the point of sacrificing when precision is required because of the technical nature of the prohibited conduct. The Code must therefore strike a balance. This can best be achieved by thinking more in terms of potential use rather than in terms of the intellectual gratification of the draftsman. In this regard, one must distinguish between rules of substantive law and rules of evidence and procedure. The latter, which deal with the handling of a case, although ultimately meant for the benefit of all, are designed mainly for judges and lawyers and therefore may be drafted in a more technical and pragmatic form. This is not true, however, of many provisions of substantive law which must be readily understood by everyone.

**1.65.** Codification offers the public a considerable advantage in the form of general information. Making law more accessible brings it down

to the level of the average citizen, and helps to prevent crime through education. It must not be forgotten that the viability of a given institution depends mostly on its acceptance by citizens who in fairness must therefore have access to it, to its rationale and must be allowed to criticize it.

**1.66.** An English author recently described the problem in his country as follows:

> The unwieldiness of English law has reached a degree which raises one of the more agonizing problems of democracy: the question whether the citizen is placed in a position to ascertain the law by which he lives, without incurring unreasonable trouble and disproportionate expense. The answer, we fear, is in the negative. There are well over 300,000 reported cases in common law and equity; the statute law, in its most compact edition, fills 42 large volumes; and delegated legislation, over the past 50 years only, runs into a series of 99 tomes. The number of legal problems which can be answered by reference to one single source of law is infinitesimally small; in the vast majority of cases it is necessary to refer to judicial pronouncements "and" statute law (both parliamentary and delegated). Even in that relatively less troublesome category of cases which can be answered by reference only to statute law, the answer is hardly ever easy to find; for this country has a time-honoured practice of passing a great many statutes, each dealing with only a small part of a subject and making no reference to previous statutes on that subject unless these are amended or repealed.
>
> (Gardiner, G., and Martin, A., *Law Reform Now*, London, Gollanz, 1964, Nos. 10-11)

**1.67.** Similarly, an American author from Louisiana, where the interaction of codified and common law is especially keen, has observed that codification alone offers a valid solution to the contemporary technical problems of law reform:

> Men today in increasing numbers are demanding knowledge of the law. They are becoming impatient with much of its antiquated language, its complex and tenuously-useful fictions, because they are finding more and more that they are affected by the law, that they are proper addressees, and they wish to know that they may act accordingly. As we have pointed out, modern law is written law, whether it be found in the reported opinion of a court, the words of a statute, the ruling of an administrative agency or the executive order of the president. As the multiplicity of law increases, a demand for orderly presentation begins to be made. Even with its defects, mainly of man himself, the method of codification, newly adapted to our age, with provision for periodic revitalization, still appears to be the most useful tool for the doing of the task of stating the law clearly and concisely that man may know the rules and principles that are to govern his actions.
>
> (Stone, F., *A Primer on Codification* (1959), 20 Tul, L., Rev. 303)

**1.68.** The entire legal profession would benefit from a genuine codification of criminal law. Criminal law has become so complex that the modern lawyer himself, no matter how dedicated he or she is to fairness and justice, cannot locate in the morass of legislation and case law the basic principles governing the system as a whole. Let us consider, for example, how greatly simplified the task of Canadian judges would be if the rules of evidence were codified in a single and coherent document. No longer would the judge wishing to make a simple decision or overrule an objection be forced to consult countless textbooks, digests and other compilations concerning the unwritten law on one of the many exceptions to the exclusion of hearsay evidence.

**1.69.** Similarly in matters of substantive law, a code containing not only prohibitions but also statements of policies and fundamental rules of criminal law would be a valuable guide for the judge confronted with a new situation. Instead of finding the justification for a principle in a long chain of precedents, of doubtful import in some instances, the judge could refer to codified statements and draw conclusions from them by using basically the same methods and reasoning he uses at present. Moreover, the uncertainty inherent in the application of precedents would at least be replaced by the relative certainty of clearly set out legal principles. At the same time, the courts would no longer be forced to decide between divergent or contradictory precedents.

Codification would thus enhance the two qualities that society looks for in the law: predictability and certainty. The lawyer who can refer to a code for guidance will find it easier to determine the impact of a particular law and to predict how the courts are likely to apply it in given cases. He will find that legal rules are not made rigid by codification, they simply become more precise and certain with greater opportunity for continuous adaptation to new conditions and society's changing needs.

# PART TWO

# The Canadian Tradition

**2.01.** Canada's legal system has felt the influence of two great traditions. Chiefly for historical reasons, it drew only on British sources for its substantive criminal law, evidence and procedure. These indeniably close ties between Canadian and English criminal law however, must not be overstressed. The Canadian legal system and solutions differ from the English, as much as Quebec civil law differs from that of France. In responding to our specific social and cultural needs, Canadian law has acquired an identity of its own, both in form and substance. When searching for the legislative vehicle that will best express Canadian law, one must adopt a critical attitude, seeing where its strengths lie and where it might be improved. This requires an examination of both Canada's legislative experience and case law.

## A. THE CANADIAN LEGISLATIVE EXPERIENCE

**2.02.** As introduced in Canada, English law consisted partly of common law, born of accumulated judicial precedents, and partly of written statutes. As early as 1763 in Quebec and 1792 in Ontario, the courts naturally patterned themselves upon English practices and procedures. For a long time, Canada's legal system so resembled that of England that in its law Canada was little more than an extension of England. It had no distinct system of criminal law, except for certain specific statutes of limited scope, modeled, at any rate, after English legislation.

**2.03.** A survey of Canadian criminal law of the preceding quarter of the twentieth century shows that although still deeply imbued with the English common law tradition, it slowly has departed from its model. Its structural and ideological links with the past remain evident, but it nevertheless has obtained its own credentials.

**2.04.** The Canadian people came from many countries and cultural backgrounds. The common law was designed originally for Britain. The common law we have has become more "Canadian" with time, more applicable to an environment that culturally, geographically, economically and socially is surely not that of Britain.

**2.05.** Canadian criminal law has acquired its own character, in terms both of its contents and of the extent to which it is written. In many instances, which we need not enumerate, offences as well as evidence and procedure are different in Canada from what they are in England. Secondly, and more significantly for the purposes of our discussion, Canada found it necessary to bring its substantive criminal law and procedural rules together in a code.

**2.06.** In Canada the debate over whether the law should be written or not never approached the proportions reached in England when first Bentham and then Stephen defended the merits of codification of the law. In developing his plan for codification, Stephen had drawn on the studies of the English law reform commission of 1838. A Canadian drafting commission later drew upon Stephen's work and on the statutes then in force in Canada to consolidate the criminal law into a single structure. This structure, Canada's first Criminal Code, was adopted in 1893.

**2.07.** The first Code was maintained substantially unchanged through the revisions of 1906 and 1927 until the reform of 1955. The basic mandate of the Commission appointed in 1949 was not to draft new laws but to reorganize and clarify the existing ones. This the Commission did by reducing the Code from about 1100 to 753 sections and by redrafting offences into more concise statements and dropping many obsolete and superfluous provisions.

**2.08.** Yet the reform of 1955 was more than a simple overhaul of the criminal law as it then existed. For example, the law on criminal negligence was modified. The definition in Section 247 of the 1893 Code had seemed to make civil negligence punishable as a criminal offence. Referring to the rule stated by Lord Hewart in *Rex vs. Bateman,* the Commission adopted the definition found in section 191 of the 1955 Code and added sections 192 and 193 on criminal negligence causing death or bodily harm.

**2.09.** Beyond clarifying the existing provisions, the 1955 Code broke with the British tradition by virtually abolishing all "common law offences", except contempt of court. The Code thus became independent

of English law while committing Canada to a written law with a distinct Canadian imprint.

**2.10.** The legislative definition of offences in the 1955 Code was an important step forward in two ways. First, since a number of common law offences had to be expressed in legislative terms, some of them were formulated precisely for the first time. Such was the case with the common law concepts of conspiracy, public mischief and indemnification of bondsmen. Second, the principle established in 1955 that no one could thereafter be found guilty on an offence not included in an Act of the Canadian Parliament represented a break with the common law tradition in that it deprived the courts of the power to create offences.

**2.11.** The 1955 Code was thus a milestone in Canadian criminal law not so much in terms of its contents, which are essentially those of the 1893 Code improved and re-structured, as by the break it made with English common law, and as a first tentative attempt to associate Canadian criminal law with the written systems of the world.

**2.12.** A comparison between the 1955 and 1893 Codes shows little difference in language or in basic design. The 1955 reform dusted off the old law without calling into question its philosophy, methods or forms of expression. This may explain why the Canadian government has since appointed so large a number of commissions of inquiry and parliamentary committees wrestling with such social issues as capital and corporal punishment, insanity, and so forth. Criminal law has not been stagnant since 1955. For example, recent amendments to the Code, such as those concerning sexual offences, attempted suicide and abortion, have brought criminal legislation closer to social attitudes.

**2.13.** In its most recent version, that of 1970, the Code is divided into twenty-five parts. Unfortunately, this arrangement lacks logic and cohesion. Part IV of the Code is a good example. With no apparent logic or reason, it covers offences ranging from rape to obstructing religious ministers, from distributing pornography to seduction of females aboard ships, from indecent acts to negligence in performing burials and so forth.

Similarly Part VI, by far the longest with 86 sections, in many respects is arranged artificially. For example, the offence of malicious propaganda would fit better with offences concerning the security of the State. Part VIII is yet another example. One had difficulty in discerning the logical connection between fraudulent transactions relating to commerce and trade and offences concerning freedom of association (strikes, picketing and unions).

**2.14.** The 1955 Criminal Code thus suffers from a lack of internal logic. The sequence of its sections is almost a matter of chance. The Code, moreover, does not deal comprehensively with the general principles of criminal law. On the contrary, the haphazard arrangement of those sections which do deal with general principles obscures more than clarifies their interrelationships. This is not to say that there is no logic in the 1955 Code; however the logic is not apparent. Only a specialist can find his way in it.

**2.15.** What the Canadian Parliament has achieved so far must therefore be considered merely a first step toward a true codification. Despite its shortcomings, the present Criminal Code is a significant development in so far as it takes us some distance beyond the traditional common law. Only future legislative experience will show whether Canada is ready to take up another challenge and move forward to a national codification of its own policies of criminal law.

## B. THE CANADIAN JUDICIAL EXPERIENCE

**2.16.** Only part of Canadian criminal law appears in legislation. The rest is accounted for by more than 100 years of case law, which helped to compensate for deficiencies in the statutes brought to light by experience in the courts. It is impossible to make an overall judgment on the quality of the contribution of Canadian courts to the development of Canadian criminal law. In order to do this, one would have to consider the different areas of criminal law one at a time, and compare the creative skills of Canadian courts with that of the courts in other countries. This would clearly be beyond the scope of the present study.

**2.17.** It nevertheless is necessary to review Canadian judicial experience briefly. Such an analysis, however restricted, must be attempted in order to determine the role of the courts in the creation, interpretation and clarification of the law. At the same time, a general analysis of our case law should also shed light on its relationship with tradition, and therefore help identify more precisely the standards of law reform.

### (1) Creation of Rules by the Judiciary

**2.18.** In the classical British common law tradition, the courts are seen as the guardians of the development of the law. Parliament in intervening as little as possible gives judges more freedom to adapt legal

standards to social needs. It is this tradition that identifies the common law with creativeness and explains the common lawyer's distrust of written law, and his fear that it becomes too rigid and loses touch with reality unless constantly amended by legislation. However, we have already seen how this objection to written law, though once justified, is largely anachronistic.

**2.19.** With the Code of 1955, Canada did not join ranks with the countries who share the written law tradition. Section 7 of the Code still leaves the common law of England applicable to a large extent. Indeed, English common law as of April 1, 1975 is still in force in Canada in so far as it does not conflict with the Code or any other federal statute. The same is true concerning British common law relating to general principles and the rules governing justification, excuses and defences. It follows that where statutes in Canada are silent on these matters, common law continues to apply. In point of fact, section 7 takes in not only English common law but English statutes as well. However, as England has little or no legislation in many areas of criminal law, section 7 refers mainly to the case law of England.

**2.20.** By definition, section 7 contemplates only the principles and rules of common law that were in existence when the Code was adopted, that is the principles and rules applied by the courts in 1955 and having force of law through the authority of precedent. Yet this section is open to conflicting interpretations. A literal interpretation of the section would bind the Canadian courts to apply the common law as it was in 1955. Under a liberal and perhaps less legalistic construction consistant with the intentions of the 1955 Commission, section 7 invites Canadian courts to adapt criminal law to changing conditions.

**2.21.** Giving an example of the situation may be helpful. In interpreting an indictment for theft, a Canadian court cannot, by virtue of section 8, apply any definition other than the one laid down in the Code, not even one drawn from the common law. Yet when it comes to assessing any defences, justifications or excuses the accused might have, the court must refer to the English common law at least in so far as it does not conflict with Canadian statutes. The same situation arises in regard to evidence and procedure, but there the courts may look to English statutory law as well as common law.

**2.22.** However, English law's supplemental role is less important than it may seem. In practice, Canadian law has developed its own rules of procedure, leaving but a marginal role to the common law. Moreover, the Criminal Code also defines certain defences and lays down basic rules

of criminal liability. Pertinent examples here are found in the general provisions of sections 12, 13 and 16 on infancy and insanity, section 17 on duress, section 19 on ignorance of the law, sections 34 to 37 on self-defence, and so forth.

A number of specific provisions complete this general picture of justifications, excuses and defences in the Canadian Criminal Code. Section 215 makes provocation a mitigating excuse in case of murder, section 251 deals with the therapeutic exception to abortion, and section 254 provides good faith as a defence in bigamy cases. Public good is also a defence in matters of libel, sedition, hate propaganda and obscenity (sections 275, 61, 281.2(3) and 159(3)). Particular grounds of defence exist as well in many criminal statutes.

In spite of these constraints on the scope of section 7, there remain a number of common-law excuses, justifications and defences which are not codified and therefore may still be applied. One example is the defence of "necessity", which is rarely invoked but was given new life by the Supreme Court of Canada in *Morgentaler v. The Queen.*

**2.23.** Whether the reference to the common law in section 7 is seen as indicative of an inability to codify or as an attempt to increase the flexibility of Canadian law, an important fact remains: the effect of the section is to make the courts responsible for the evolution of the law, and its adaptation to social change. Whether the courts have fulfilled this duty remains to be determined.

**2.24.** In certain areas, Canadian courts have shown creativeness with seemingly good results. The delicate problem of non-insane automatism is a good example.

By definition, an accused who was unconscious when committing an offence cannot be said to have had *mens rea.* However, according to legal tradition, the mere state of unconsciousness is not insanity as defined in section 16 of the Criminal Code unless it resulted from a disease. The courts faced a dilemma on this point, it being clearly against the principle of *mens rea* to convict a person of an offence when he was not conscious he was acting and his action therefore was beyond his will and control. With the growing acceptance of psychiatric evidence, pleas of automaton increased in number.

**2.25.** A review of Canadian case law on this question is especially relevant here. It reveals some of the difficulties Canadian courts have experienced in their creative role.

Certain cases at the end of the nineteenth century which referred to the commission of a crime in a somnambulistic state opened the door to automatism. The Ontario Court of Appeal refused to allow this defence, being of the opinion that it could not be assimilated with any recognized defence. Four years later the Nova Scotia Court of Appeal adopted the contrary view. It ruled that, section 16 of the Criminal Code notwithstanding, any state of unconsciousness, irrespective of its cause, was a just ground for acquittal. In 1966 the Saskatchewan Court of Appeal recognized the defence of automatism resulting from a head injury, reaction to medication or the like.

**2.26.** In 1957, the *Kemp* case in England had set a limit to the defence of automatism by distinguishing it from insanity and deciding that unconsciousness caused by any disease, mental or organic, in that case arteriosclerosis leading to "a congestion of blood in the brain", amounted to insanity and not automatism. Finally, in 1961, the House of Lords in the leading case of *Bratty vs. D.P.P.* settled the law on automatism. In the *Bleta* case of 1964, the Supreme Court of Canada appeared to take for granted the validity of the defence of automatism against a murder charge discussing neither the principles at stake, nor the bases nor conditions of the defence. The Supreme Court did not inquire into whether the defence was consistent with Canadian criminal law in general, nor did it examine the extent to which the rules laid down by the House of Lords in the *Bratty* case were suitable to Canada's legal and social context.

**2.27.** The fidelity of the Canadian courts to the English model lingered in other fields, with less happy consequences. In spite of the room in section 7 for liberal interpretation, Canadian courts have failed to treat the British common law as flexible and adaptable to the Canadian reality; instead, they have applied the common law much in the same manner as they would have a provision of a statute. A few examples will illustrate the situation.

**2.28.** Drunkenness is not defined as a defence by the Criminal Code. When the 1892 Code was adopted there were no clear precedents recognizing drunkenness as a defence. However, in 1920, in the famous case of *D.P.P. vs. Beard,* Lord Birkenhead of the House of Lords summed up the law on the matter in three propositions. Since then, and except as regards the burden of proof, Canadian courts have considered these propositions to be as authoritative as a statute. In the *Beard* case, the House of Lords established that drunkenness was a defence if the accused, because of drink, had been unable to form the "specific intent"

required for the commission of the offence. In 1931 the Supreme Court nevertheless applied the propositions of the *Beard* judgment to a case of murder without paying any special attention to the limiting role of specific intent. In 1960 the Supreme Court ruled on the question again. It made no reference to its previous judgment. Relying on the *Beard* case to distinguish between general and specific intent, on the facts of the case (a violent assault) it disallowed the defence of drunkenness with respect to the former. The result is that nearly all Canadian courts now accept the plea of drunkenness as a defence only where the offence requires a specific intent.

**2.29.** Today, intoxication by drugs or alcohol raises important social and legal issues. With regard to general social policy, if such intoxication is admissible as a defence it could be argued that drug users would be granted immunity from criminal prosecution. One might have expected Canadian courts to study this problem in our specific social context, and suggest a comprehensive approach to the problem. Yet, far from doing this and making good use of their power under section 7, the courts have looked to the 1920 judgment for the rules applicable to intoxication, taking the three propositions in it and construing them out of context. Everything has taken place as if Lord Birkenhead and not the Canadian Parliament had legislated on the matter. It is rather disquieting the courts have never felt the need to revise the *"Birkenhead Act"*.

**2.30.** This conservative tendency to rely on English judgments has had some curious implications. Canadian courts have often felt more at ease with common law precedents than with a Canadian statute requiring original interpretation. The problem of insanity is a good illustration. Canadian courts have interpreted section 16 as if it were a restatement of the McNaghten rules. Until the Commission of Inquiry, the McRuer Commission, drew their attention to the basic difference in terminology, and therefore in substance, between the McNaghten rules and section 16, judges in many cases instructed juries to decide whether or not the accused "know" the nature and quality of his acts. *"To appreciate"* and *"to know"* the nature and quality of one's act are two quite different things, but by clinging to British law the courts had obscured this fact.

**2.31.** The defence of duress was treated in a similar fashion until the Supreme Court, in the *Carker* case, ruled that duress was available as a defence only within the definition set forth in the Code.

**2.32.** Canadian courts have also relied on English common law in developing the laws of evidence, seeking the English judicial precedent

applicable in each case as if the precedent were a statute. With relatively few exceptions, they see their role as one of searching for rules of evidence among centuries of confusing and often contradictory cases instead of formulating clear evidentiary rules. The result is an outmoded and infinitely complex law of evidence. Basic principles regardless of their finality have become choked in a tangle of countless rules and exceptions, without anyone questioning the system as a rule from a modern Canadian point of view. The dust of centuries past seems to make the old common law rules sacred and untouchable, above time and country, and an inexhaustible source of solutions for Canadian problems.

**2.33.** Without being only critical of the creativeness of Canadian courts, some observations may be made. First of all, Canadian case law unfortunately has not seen fit to use all the resources given to it by Parliament through section 7 of the Criminal Code. Creativeness has been very low, limiting itself to a mimicry of English precedents. Canadian case law has sometimes failed even to keep pace with developments in England, sadly lagging behind through its attachment to precedents no longer considered valid by English courts. Canadian courts in addition have seemed quite ill at ease when required to apply both the common law and the Criminal Code in reference to the same matter. They appear to have difficulty in reconciling case law with statutes.

Finally, the solutions of English cases are often imported indiscriminately, that is, without adequate scrutiny of the social, cultural and legal conditions of the country from which the law was taken and those of the country in which it is to be applied.

## (2) Interpretation of the Criminal Code by the Judiciary

**2.34.** In addition to their duty to create law, the second major responsibility of Canadian courts has been to interpret the Criminal Codes of 1893 and 1955. The task has not been an easy one since neither the 1955 Code nor its predecessor is a genuine code and neither has provided judges with any statement of the principles of Canadian penal philosophy, the basic rules of criminal law, or their underlying social postulates. Canadian judges, with rare exceptions, considered the Code in force as simply another statute and treated it as such. They followed the best traditions of statutory interpretation by using and relying on the common law to construe the Criminal Code and by giving some provisions of the Code a purely literal interpretation.

**2.35.** In viewing the Criminal Code simply as traditional common law compiled in statutory form, the courts felt that they should faithfully

reflect the common law. Instead of trying to ascertain the legislative intention behind a particular Code provision, they often based their decisions on precedents, elevating the authority of the latter and treating legislative enactments as no more than codified precedents.

**2.36.** Many of the prohibitions of the Criminal Code fail to state the requisite mental element for the particular offence; only the definition of the *actus reus* of the offence is exhaustive. When interpreting the Code Canadian courts have often met this problem by referring to the case law of Commonwealth countries to determine the legal requirements of criminal guilt. With regard to strict liability, the courts have gone directly to the common law for rules of interpretation that limit *mens rea* in respect of regulatory offences.

**2.37.** The interpretation of section 16 of the Code by reference to the McNaghten rules is another example of the courts' tendency to treat legislation as merely a written version of the common law. Such an attitude poses serious risks for the interpretation of statutes and retards development of a character of Canadian criminal law.

**2.38.** Even more serious is the fact that in other instances Canadian courts have abdicated their creative role. They have failed to consider the totality of Canadian criminal law and then seek solutions within that framework. The judicial interpretation of the sections of the Code dealing with aiding and abetting is illustrative.

The desicions of the Canadian courts respecting aiding and abetting may be valid in law. However, the decisions were based not on the interpretation of the sections of the Criminal Code but by reference to English precedent. This presents a serious departure from section 8, the section that abolished common law offences. That the courts have gone astray in this respect is very evident if one recalls that Parliament enacted legislation which replaced the common law rules on complicity as early as 1892.

**2.39.** The Canadian courts have not been totally dependent on the common law, however. In so far as sedition is concerned, the Criminal Code and the common law are in accord on the constitutive elements of the crime. This did not prevent the Supreme Court, in the *Boucher* case, from setting aside the common law and refusing to consider as seditious an act likely to provoke hatred between social classes. The Supreme Court limited the scope of the offence taking into account the Canadian social context.

**2.40.** The statutory nature of our criminal law has had another important effect on the courts' behaviour. Far from considering the Code as a fundamental law that must be interpreted as such, the courts in many cases have given to it a strictly literal interpretation, consistent with the way common law courts have traditionally treated statutes. An example will illustrate this point.

**2.41.** Section 24 of the Criminal Code punishes for "attempt" "every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out his intention". The person making the attempt thus must have an intention, but the nature of the intention is not precisely defined. The problem that arose in the case of attempted murder, therefore, was to decide whether it required evidence of an intent to kill, or only evidence that the accused had one of the states of mind constituting the *mens rea* of murder under the Code (for example, meaning to cause bodily harm that the knows is likely to cause death and being reckless whether death ensues or not). On this important question, the Supreme Court, faithful to its view of the Code as merely a statute, adopted a textual and literal interpretation of the relevant sections.

**2.42.** It is not our purpose to criticize the reasoning of the Supreme Court. One may even support their reasoning on the ground that it is the inevitable result of a literal interpretation of the legislation. One may further contend that the *mens rea* of an attempt, like the *actus reus,* must take on the elements of the offence being attempted. Moreover, the Code in its present form hardly makes it easier for the Supreme Court to determine the general philosophy of the criminal law and to express that philosophy in the interpretation of separate provisions. Be that as it may, this literal interpretation has had the effect of enlarging the *mens rea* for attempted murder "beyond" that which is recognized in both English and American common law.

**2.43.** The Supreme Court in the *Trinneer* case adopted the same approcah concerning accomplices to constructive murder. The problem was to determine whether the consequence that must be foreseen by the accomplice is the death of the victim or his "murder" as defined in section 213. The Court's choice of the latter, though perhaps justified by a literal reading of section 21(2), greatly enlarged the scope of accomplice liability for murder. The Court did not consider the policy ramifications of this step.

**2.44.** The few examples given above show some of the difficulties encountered by Canadian courts in their efforts to interpret the Criminal

Code. Sometimes they have considered the legislation as merely common law in writing and have subordinated its provisions to the jurisprudential sources of the common law, at the expense of a truly national interpretation of the Criminal Code. At other times, faced with legislative provisions that clearly departed from the common law tradition, they seemed fascinated by the statutory character of the Code, as a result interpreting it in a strictly literal fashion.

## (3) The Clarification of the Law by the Courts

**2.45.** Perhaps the most fundamental role of the courts in a given legal system is to clarify the law in cases of ambiguity, obscurity and conflicting interpretations. For the guidance both of the general public and of law specialists, the courts must decide between different interpretations of a legal text, with the higher courts resolving contradictory or opposing theories advanced by the lower courts. There must be a degree of certainty and foreseeability in every legal rule. The common law jurists have been most insistent on this point, since their legislatures leave much of the law-making process to the courts.

**2.46.** In many instances the Canadian courts carry out this role well. There are other instances, however, in which they have experienced less success. In these latter cases, one cannot help thinking that the existence of a true Criminal Code, stating the base of an authentic policy, would have been of invaluable assistance to the courts in their effort to apply the law. To illustrate the situation as it now stands, one may turn to the field of strict liability, a subject which the Commission has studied in depth.

**2.47.** As we have seen, by drafting section 7(3) of the Criminal Code in the terms it did, Parliament invited the courts to look after the evolution of the law and adapt it to new conditions. As Paul Weiler so correctly pointed out in his study of the work of the Supreme Court, the courts need basic general principles to enable them to fulfill this vital function. One of these principles is *mens rea,* according to which no person is to be found guilty unless he has committed an act with a blameworthy state of mind.

The principle of *mens rea* is essential from the standpoints of sociology, psychology, criminology. Sociologically, it means that the law will not intervene in people's lives except where some one chooses to violate it. Psychologically, it assures the citizen that his conduct will be judged by reference to other people's behaviour. For the criminologist,

it provides the main support for a deterrence-centered philosophy of criminal law. Finally, for the penologist, *mens rea* offers a basis for adapting the punishment to the character of the lawbreaker.

**2.48.** Though nowhere expressly stated in the Criminal Code, the concept of *mens rea* does underlie the provisions of sections 12, 13 and 16. Moreover, Canadian law deals with the problem by referring to the common law tradition (*actus non facit reum nisi mens sit rea*).

However, the *mens rea* principle is not applied universally; courts have traditionally interpreted "crimes" to include *mens rea* while excluding it for "regulatory offences". This has created two kinds of criminal liability: one based on fault and another generally referred to as strict liability.

**2.49.** From the beginning of the nineteenth century, strict liability has been an integral part of the common law of crimes. Nevertheless it has amply been demonstrated by the Commission's studies of the question that it is impossible to define this doctrine precisely or to determine exactly its scope and limits. The numerous judgments on the question leave the jurist in doubt, unable to foresee how the rules of strict liability will be applied in a given case.

**2.50.** Such uncertainty as well as the discrepancies in the cases are made more serious by the fact that it is extremely important for society and the courts to know the full scope of the exceptions to the *mens rea* principle. What has caused the uncertainty and discrepancies? One answer that naturally comes to mind is that nearly all decisions on the question are lower court judgments, very much concerned with the facts of the case involved. Yet, the matter is not as simple as that. Even from the few judgments delivered by the Supreme Court on strict liability, it is impossible to find clear, precise and well-established rules on which subsequent cases might be patterned. The Supreme Court has decided, for example, that the crime of illegally possessing narcotics requires *mens rea*, but the crime of illegally possessing lobsters does not. The Court has not provided tests that are sufficiently clear and definite to be capable of application beyond the particular case. There is no attempt to rationalize the concepts involved, or to put an end to the prevailing confusion.

**2.51.** Moreover, one searches in vain through Canadian case law for some rational and coherent general statement of the rules governing the admissibility of the defence of mistake of fact as opposed to the inadmissibility of a mistake of law. Common law has provided the following

definition for a mistake of fact: "the absence of *mens rea* consists in a belief held reasonably and in good faith by the accused in a state of facts the existence of which would have made his conduct blameless". This rule raises difficulties and question marks: What distinction is to be made between "fact" and "law"? Is it enough for the error to be made in good faith or must it be reasonable as well? Canadian courts have found no satisfactory answers to these controversial points. The difficulty this poses for a court operating without legislative guidance is evidenced by a very recent judgment of the House of Lords concerning the second question above, in which five opinions were written covering nearly 40 pages.

**2.52.** The foregoing brief discussion shows that in certain areas, Canadian courts have not met the challenge of clarifying the law with the view of making it both understandable to lawyers and non-specialists and reasonably certain and predictable.

**2.53.** The criticisms we have made of Canadian criminal law in both the legislative and judicial fields may appear severe. This is the Commission's intention because it wishes to make it clear that Canada, while it has preserved the English common law tradition in appearance, has been unable to benefit fully from the advantages that tradition offered.

**2.54.** One reason is that to some extent Canadian law had already begun to depart from its model and to develop a tradition of its own. This departure from English law, which occurred partly through the written consolidations of Canadian law and principally because of differences in Canada's political, cultural, social and economic context, could not proceed smoothly at first. Before an autonomous, truly independent Canadian tradition could develop, the basic reliance on England had to be brought to an end. Canada did not dare to do this in its Criminal Codes of 1893 or 1955, and that fact prevented Canadian courts from completely "Canadianizing" the law.

**2.55.** Canadian criminal law has now reached a new stage of development. Although still steeped in common law for its own purposes, studying it in terms of the special requirements of its own social and cultural context.

# PART THREE

# Objectives and Means of Codification

**3.01.** The foregoing summary of the two great legal traditions and the examination of the development of Canadian criminal law show that at present Canadian criminal law is beset by difficulties and shortcomings that often prove an embarrassment to the courts.

**3.02.** It has been suggested in the present study that codification comparable to the systems found in many countries and in a number of States in the United States would prove an effective remedy. Codification would serve to express Canadian identity and would also entrust the courts with the creative role the draftsmen of the 1955 Code originally intended.

**3.03.** The Law Reform Commission of Canada has set itself the task of "defining the general policies that should govern codification, designing a structure for a new Criminal Code, and presenting an outline of the principles that should be stated therein", and then to "prepare a document for the consideration of the legal profession in an effort to establish the need for codification and define appropriate means for carrying it out".

The purpose of this part is to define in very general terms policies for codification.

**3.04.** There is no need to reiterate the advantages of codification. It is important however to analyze the ways through which these advantages may be achieved. Our analysis is twofold: first, the objectives that must be achieved through a codification of Canadian criminal law; second, the means whereby the objectives may be achieved.

## A. THE OBJECTIVES

**3.05.** The objectives are of two kinds: practical and scientific. From a practical point of view, codification of the criminal law should be both a comprehensive expression of existing positive law and be sufficiently clear to be accessible not only to the legal profession but to the general public. From a scientific point of view, codification should reflect the legal reality of Canada faithfully and should allow for, not hinder, the adaptation of the laws to social change.

### (1) Practical objectives

#### (a) *The Creation of a Genuine Code*

**3.06.** The first objective, which is common to both codification and consolidation, is to bring all existing criminal legislation together in one comprehensive structure. Indeed, despite the 1955 Code, criminal provisions are scattered throughout the nation's legislation, their origins are diverse, even some fundamental rules of criminal law are unwritten. The impression created is one of a disorganization bordering on incoherence. There is a basic need for simplification through a comprehensive consolidation.

**3.07.** The draftsmen of the first Canadian Code had in mind such a codification. The draftsmen in 1955 sought the same goal. For the sake of comprehensiveness, the 1955 Commission included in the new Code many previously separate statutory provisions and some Common law rules in their original or a modified form. The principle of legality set forth in section 8 marked a decisive step towards codification. Time has shown, however, that the 1955 Code is far from exhaustive.

**3.08.** Considerable progress could be made by simply incorporating all existing criminal statutes into the present Code, yet that is not the objective of codification. The success of codification is not measured in terms of the number of its provisions, but rather in terms of the quality, completeness and internal logic of its provisions. No point would be served by substituting a *totally exhaustive* code for the one of 1955; this would result in just another consolidation that shortly would become outdated. On the contrary, what is needed is an instrument of fundamental provisions at the same time selective and comprehensive and setting forth a hierarchy of written sources.

**3.09.** The Criminal Code should contain guidance for citizens, attorneys and judges wishing to apply a law to a given case in a way most straightforward and consistent with underlying intention and social context.

**3.10.** At present, Canadian criminal law does not, at least in any formal way, set down a hierarchy of its written sources. In such a hierarchy, first place belongs to the *Constitution* and constitutional statutes, which contain the fundamental and basic rules of the country's social order.

The *Canadian Bill of Rights* comes next. Although not truly a fundamental statute because of the restrictive interpretation it has received in the courts, it is nonetheless declaratory of human rights and civil liberties.

Third place belongs to the *Criminal Code*. It is to a large extent a reflection of the first two sources and, as such, it should set forth not only specific offences but also the basic principles of criminal law. Some of these principles may already be contained in the 1955 Criminal Code, but in a form that is fragmentary, incomplete and not very coherent.

In fourth place, we have a number of *specific criminal statutes*. Intended to deal with specific situations, these statutes either supplement the general principles of the Criminal Code, provide an instance of their application, or in some cases depart from them.

*Regulations* come last, designed as they are to provide mechanisms for adapting statutes to particular circumstances and for actually carrying out their policies.

**3.11.** This order of priorities should receive formal recognition. A given statute should always be interpreted in conformity with the principles of the Constitution, the Bill of Rights and the Criminal Code, in that order. In practice, this entails the assumption that a particular statute may not derogate from the principles stated in a higher ranking source, unless the statute contains an explicit statement to that effect. A regulation, for example, could not override the provisions of a higher ranking source such as the Criminal Code, since regulations are intended only to particularize the application of a statute.

**3.12.** A modern Criminal Code should state the aims and purposes and essential principles of criminal law, as well as the concepts governing criminal justice. The principles to include in the Code are those Canadian tradition has shown over the years to be in harmony with our needs.

A principle is the guidepost for decision-making. It embodies standards that society has worked out over lenghty periods of time. It yields in turn a series of rules that particularize the principle and allow it to be applied in numerous fields. This order of generality is familiar to the main common law authors.

Being general and universal, principles give coherence to the rules explicitly or implicitly from them, *rendering these rules more understandable and effective.* The present Criminal Code is deficient in this respect. For example, neither *mens rea*, causal relationship, the prerequisites of guilt nor harm are adequatly identified and defined.

**3.13.** After the principles come the *rules of general application.* Their scope extends to the whole of criminal law. They are often only the corollaries of the principles and are designed to apply in particular situations. More specific than the principles, they create rights or impose duties under given conditions, or ensure that an institution stays within the framework of the general principle. Such rules of general application must be articulated in the Criminal Code, since they inform the courts and the public of the consequences that flow from the principles governing a particular criminal policy.

**3.14.** *Particular rules* like the general rules are derived from principles, but differ in their degree of specificity. They also must be included in a scientifically designed Criminal Code, since they set out the definition of offences and sanctions.

However, some particular rules can be left outside the Code without creating problems. Especially those intended for the guidance of public authorities in the application of statutes and not concerned chiefly with offences and penalties.

**3.15.** A Criminal Code is above all a compilation of norms. Not every norm, though, need be formulated. In fact, the codifiers have to select those to include in the Code on the basis of what is found already in higher sources and what society requires to have formally stated. Only rules that are likely to be more or less permanent, subject to minor changes, rightly belong in a Criminal Code. Its formulation must be chosen carefully if it is to have this general dimension.

**3.16.** It follows that the new Code must be exhaustive in its statement of principles and rules of general application. It could contain a General Part, a Special Part, and basic principles of precedure, evidence and sentencing.

General principles belong in the General Part, as do rules of general application. The Special Part should contain the rules of special application, particularly those regarding offences, though not all existing rules have to be stated in the Code itself. Some of them can exist outside the Code as part of specific statutes, but will nevertheless be subject to the principles and rules of the Code unless a contrary intention is clearly expressed. Others, enacted after the Code comes into force, will not necessarily have to be incorporated into it.

**3.17.** Our Criminal Code cannot transcend its compilation or digest function and clearly express the whole of Canada's penal philosophy unless it is seen as the fountainhead of all our criminal law. It follows that where statutes outside the present Code contain provisions considered basic to criminal law, these provisions should be detached and placed in the new Criminal Code. Conversely, some regulatory texts and specific rules which now are in the Code should be removed and stated in separate statutes. This is the case, for example, with all the sections of the present code dealing with firearms, dangerous driving, transportation of cattle and lotteries.

**3.18.** Provisions concerning temporary or purely technical matters thus should be excluded from codification, leaving only those rules that are relatively permanent and stable. The Code need not and should not include offences enacted only in response to temporary social upheavals, nor should it deal with the technical details of the application of the law. With regard to international cooperation against crime, for example, the Code should set forth the guiding principles and the essential rules respecting extradition. The procedural details of extradition could remain in a separate statute as it does at present. In summary the criteria for inclusion of any matter in the Code are permanence, durability and frequency.

(b) *Accessibility of the Law*

**3.19.** General accessibility is the second practical objective. Codified laws should be comprehensible to the general public as well as to lawyers. In other words, any intelligent lay person should be able to grasp a law's commands simply by reading it, without having to seek expert assistance or make lengthy studies of judicial precedents and commentaries.

To attain this objective, principles as well as rules must be stated clearly and concisely, while still retaining the precision so essential in law. Words should not be used in ways that vary from current usage and

meaning. The meaning of sentences must be clear. Substance must not be lost in a morass of conditions and exceptions.

The style of the Code is necessarily different from that of other enactments. If the provisions respecting offences under the Criminal Code were as technical and casuistic as those of a typical statute, they would lack permanence and universality and moreover be ineffective from an educative point of view.

**3.20.** However, the Code must not sacrifice certainty in its attempt to be concise; it must not omit the details of explanations necessary for carrying out the legislative purpose. Without some detail, the Code would be so vague it would create difficulties for the official applying it. Too much emphasis on concisiveness could so deprive the Code of certainty and predictability that judges would have to fall back on scattered and often confusing precedents in order to determine the meaning of the law.

**3.21.** On the other hand, the Code should not be confined to generalities to the point where its application depends on statutes and regulations to implement it.

Having to resort to these enactments or regulations is undesirable for two reasons. In the first place, although statutes normally are clear enough and receive sufficient publicity to make the maxim "ignorance is no excuse" partly true, this hardly applies to regulations that may put a specialist to the test in discovering their meaning or sometimes even their very existence. In the second place, whenever regulations become too important, it means that administrators acting through delegation are usurping the law-making power that in a democratic state belongs to the people through their representatives.

**3.22.** The Code's accessibility is vital in view of Parliament's absolute duty to provide the citizen with a fair and complete warning of both the prohibitions and the consequences attached to their violation.

Fulfillment of this duty also allows the criminal law to play the educative role often assigned to it. To the extent that personal conscience and community morality do not identify for the individual the limits of social tolerance, comprehensive legislation defining offences in a clear form will be necessary. Comprehensive prohibitions also serve to supplement and reinforce the other morality-creating institutions (the family, the church, the school, etc.) in society. The citizen is apprised of the additional stigma society attaches to forbidden behaviour, and in the process public order is shaped.

**3.23.** The legal profession would also benefit from the existence of a code. Lawyers as well as judges need a complete and well-structured instrument to facilitate their task of finding, without undue delay, logical and authoritative bases for the decisions they are called upon to make.

At the same time, one must be realistic. No written statement of the law can claim such a degree of perfection that its meaning is always beyond doubt. The Code therefore should encourage vigorous creative interpretation of its provisions by establishing clear and useful rules of interpretation.

## (2) Scientific Objectives

**3.24.** Broadly speaking, the scientific objectives should be to create a body of law accurately reflecting our Canadian identity, and to set down rules that will guide and facilitate a special brand of judicial creativeness.

### (a) *Reflection of the Canadian Identity*

**3.25.** Legislation must be tailored to a particular community, expressing not only its structures, traditions and customs but also its aspirations for the future. As the Swiss criminologist Graven has so accurately observed:

> A code must at once reflect and regulate *mores*. A country is an individual entity, possessing unique needs and characteristics which may not be set aside if its healthy growth and development are to be assured.

**3.26.** More than one hundred years after Confederation, Canada has forged a national character and developed its own special identity. To the two culturally different European nationalities which arrived here several centuries ago has been added the invaluable contribution of the cultures and traditions brought to Canada by immigrants from many other parts of the world. In addition, the two founding peoples themselves have developed in their life in Canada customs that did not originate either in England or France.

**3.27.** Law reflects society, though it may often lag behind and have to be modernized from time to time. It is time now for an updating of Canadian criminal law. As we have seen, the civil and common law have evolved in such a way that their basic differences are now less marked and less important. Furthermore, even the approaches and methods of judges in the two systems vary less than is sometimes held to be the case.

(b) *Enhancement of Judicial Creativeness*

**3.28.** Legislation must always be in accord with socio-cultural facts. It cannot be fashioned too rigidly, and most modern codes are not in fact rigid. Through flexible wording on the one hand and fully stated principles on the other, the modern code leaves to courts the leeway they need.

**3.29.** The authors of the 1955 Criminal Code, far from wishing to curtail judicial discretion, tried to provide judges with greater freedom to interpret the law. As we have seen, however, various technical problems have acted to prevent full realization of this design. Canadian judges have frequently interpreted provisions of the Code too literally, treating them as if they were statutes, or else they have relied on distant precedents without considering their applicability to current problems. Profiting from this experience, the new Code should be written so as to discourage such extremes of interpretation.

**3.30.** The new Code must be more responsive to social evolution, especially since society is changing faster and more profoundly than ever before. The idea that customs by themselves can keep the law in harmony with new social mores no longer can be considered sound. For that very reason there is need for a code that sets out the intentions of Parliament clearly and provides flexible guidelines for judicial decisions which are faithful to those intentions and which correspond with the social context.

## B. MEANS

**3.31.** The Commission's work is not restricted to defining objectives. The means of attaining these objectives must also be examined. Only with the right tools can those charged with implementing the law improve the quality of justice.

Creation of a model code is a two stage process. First, organize a hierarchy of legal norms; second, formulate rules of interpretation.

### (1) Organization of a Hierarchy of Legal Norms

(a) *Definition of the Hierarchy*

1. *The Principles of Canadian Penal Philosophy*

**3.32.** First priority for the Code is a statement of the principles of criminal law. Before this can be accomplished, the principles must first be

identified, then formulated, and finally examined carefully to ensure they correspond with governmental policies on criminal law.

(i) Identification of the Principles

**3.33.** Codification, whether or not accompanied by a reform of existing law, cannot upset the working assumptions of society unless those assumptions are shown to be obsolete. What the code intends is a reconstruction, not a revolution.

It follows that the first place to look for principles is in the country's positive criminal law. The task is difficult because the Criminal Code generally says little about principles and statutes outside the Code say even less.

**3.34.** A criminal law without stated principles — the present situation — denies the law coherence and certainty. For example, the absence of a stated principle concerning the necessity of *mens rea* makes it practically impossible to solve the problem of strict liability, either theoretically or in particular cases. Similarly, the want of a coherent theory on the relationship between responsibility and guilt on the one hand, and the nature of the offence on the other, renders the difference between automatism and insanity problematical.

Principles are even more difficult to discover when they must be sought in a series of precedents often contradictory and equivocal.

**3.35.** Codification of principles will provide a necessary background for both the part of the Code dealing with specific offences and the portion containing the rules of procedure, evidence and sentencing. The various branches of the criminal law would then be seen as complementary derivatives of the principles of the General Part. Overall coherence and unity, not the present fragmentation, would be the Code's hallmark.

**3.36.** Although substantive law, procedure, evidence and sentencing have distinct functions and rules, the boundary between them is not clear-cut. Any separation would be artificial.

These four areas of law in fact are complementary. Each influences the other to the extent that it is sometimes only by arbitrary classification that a rule is assigned to one area and not another. For example, do the defences to certain offences come under substantive law, evidence or procedure?

To take other examples, should the presumption of innocence be considered as substantive law, procedure or evidence? Does the principle of *res judicata* belong to substantive law or to procedure? One purpose of the law reform is to ensure proper coordination between all areas of a given field of law, even if each area is codified separately for reasons of convenience.

**3.37.** The Criminal Code, therefore, must state the fundamental principles governing procedure and evidence as constituents, parts of the criminal law. In these same areas, the Code must also state those particular rules which are of general import and thus are closely linked to the basic rules. For example, the rule declaring that the accused is not a compellable witness is linked to the far more basic principle that the accused may not be compelled to furnish evidence against himself.

(ii) Formulation of the Principles

**3.38.** When all the general principles have been identified and compiled, the next step is to formulate them for insertion in the Code.

In this regard, we note that in Canadian criminal law, general principles, on those rare occasions when they are formulated, are set out in a negative form. The legislature says more about what they are not than about what they are. Negative statements can make it extremely difficult to develop sound policy for meeting new situations.

**3.39.** Special attention is also required to ensure that the terminology chosen will be simple, clear and precise. The Code should direct jurists toward the solution, even when neither written law nor judical precedents explicitly treat the problem at hand.

(iii) Orientation of the Principles

**3.40.** The Code should derive the principles of criminal law from a broad and coherent policy on crime articulated by the government. This policy should in turn reflect a genuine criminal philosophy, one that is based on the acceptance of certain social or personal values. Only in this way can the legislature avoid trailing passively in the wake of changing values and provide leadership in the promotion of the general welfare and the self-fulfillment of the individual.

**3.41.** It follows that the first step in drafting a Criminal Code is to discover those social and moral principles from which a framework of a philosophy of penal law can be constructed. The next step is to bridge the

gap between these principles and reality. Finally, the principles must be ordered and formulated taking into account their internal logic and interdependence.

**3.42.** For example, society prohibits theft only because we have accepted the concept of private and exclusive ownership. Theft, as defined by the criminal law, has no meaning if isolated from these underlying concepts. For example, in a hypothetical society, one allowing people free access to things as long as they put these to good use, the person punished would not be the one who takes it for a purpose which society does not consider valid.

**3.43.** When drafting a Criminal Code, then, one must always consider the impact of the rules on the existing social structure. Society's assumptions do not have to be stated in so many words, but the Code should express the legal norms derived from these assumptions which have acquired a degree of stability and cohesion through legislative and judicial experience. This will enable the Code to be what it should be: a fundamental law, a *magna carta* for criminal legislation, and the basis for subsequent related statutes.

**3.44.** Criminal law serves a variety of ends. Among these are the repression of crime, the maintenance of public order, the control of dangerous individuals, the expression of society's disapproval of socially harmful conduct, rehabilitation of offenders and so forth. None of these ends has dominated the Canadian tradition, which has rather sought accommodations among them.

The Code must also reflect this delicate compromise between seemingly conflicting ends. However, because the Code requires more permanence and stability than other legislation concerned with the same problems, it should be confined to the general definition of crime, the determination of criminal liability, and the imposition of sanctions. It is for other enactments to look after the physical security of persons and property and to provide for police and incarceration services and rehabilitation.

Nonetheless it is evident that the Criminal Code must closely cooperate with other legislation to present a comprehensive and unified policy on criminal matters.

2. *The Corollary Rules of General Application*

**3.45.** It has already been said that rules, though derived from principles, are different from them in that they apply only in specific

situations anticipated by the legislature. A rule is a norm which, under prescribed circumstances, creates rights or duties or perhaps decides how an institution will function. A concrete example should demonstrate the relationship existing between principles and rules.

**3.46.** The principle of legality states that no conduct may be held criminal unless it is expressly proscribed by legislation. The policy it expresses is that persons should be forewarned as to what conduct is punishable under the law. This principle is enshrined in criminal law legislation almost everywhere in the world. Its corollary, the statement that no criminal law shall be applied retroactively, constitutes a rule. The rule is a particularization of the fair warning notion contained in the principle. The rule, however, has general application and should be in the General Part of a Criminal Code, near the principle from which it is drawn.

Similarly, there is the rule that remedial legislation may be applied retroactively; it is allowed to derogate from the principle of non-retroactivity because its retroactive enforcement does not involve the threat to personal liberty criminal law ordinarily poses. This rule, too, has general application and belongs in the General Part of the Code.

**3.47.** All rules of general application derived from principles, as already indicated, belong in the General Part of the Criminal Code. The present Canadian Code contains a great variety of rules, some creating offences and others establishing defences, some prescribing penalties and others dealing with evidence and procedure. They are scattered throughout the Code, however; there is no logic to their placement.

**3.48.** Many rules of general application are interrelated with principles which either determine their scope or mitigate them in certain cases. Such rules may be linked together or substituted for one another, according to the nature of the offence or the choice made by the parties to the litigation.

Another set of rules are those of general application that enable institutions to function properly. They cover the whole of criminal law. Such is the case, for example, with the rules concerning attempts, complicity, etc. These rules may well be called "doctrines".

**3.49.** In organizing the General Part of the Code the objective should be to order and present all its rules rationally and to avoid any clash or contradiction among them. The General Part of a code must take account of their interdependence and ensure that every included rule

is part of a fully coherent whole. Coherence is indispensable, considering the dominant rank of the new Code and the likelihood its General Part will be used in the application of other rules of criminal law, especially those of the Special Part.

3. *The Particular Rules*

**3.50.** Criminal law contains certain provisions which, despite their obligatory character, are neither principles nor rules of general application. Those found in the present Criminal Code and that identify what acts are criminal, explain what elements constitute the offences thus created, and prescribe penalties for them, should find their place in the Special Part of the new Criminal Code.

**3.51.** A great many other particular rules are outside the criminal Code and will probably remain so in the future. Some of these are now dispersed throughout the realms of statutory law. Others are in special acts that will not be integrated in the Criminal Code because they are temporary or because, despite their practical importance, their application is restricted to highly specialized fields. They may establish offences and penalties (taxation acts, the Official Secrets Act, the Juvenile Delinquent Act), lay down procedural rules (the Extradition Act) or provide for the implementation of penalties (the Penitentiary Act).

**3.52.** What particular rules have in common is their function; they assist in the work of government. However, they are authoritative only in the limited field traced out for them by law. With the adoption of a true criminal code, they would be subordinated to the code's principles and rules of general application. As a result, there would be greater harmony throughout the criminal law. A particular rule must not be allowed to contradict the principles and the rules of general application which are based on general criminal law policy.

(b) *Consequences of the Hierarchy of Judicial Norms*

**3.53.** The Commission wishes to include certain general principles on procedure, evidence and sentencing in the General Part of the proposed Criminal Code, where they will exert a dominant influence on the whole of criminal law. Moreover, due to the pre-eminence assigned to the General Part, these principles on evidence, procedure and sentencing will be controlling with respect to all particular rules in the Special Part of the Code and various other legislative texts.

**3.54.** This objective is important and constitutes one of the main features of the Code envisaged by the Commission.

As we pointed out earlier, it would theoretically be possible to prepare a code comprising all the legal texts that deal in any way with crime. This approach, though superficially attractive, is impractical and, when all points are considered, unsound. The Criminal Code can be only relatively exhaustive, especially in its Special Part.

The major advantage of an exhaustive compilation can nevertheless be realized if implementators of the Code accept as fundamental the idea that all the rules in the countless enactments containing penalty provisions are subordinate to the Criminal Code.

**3.55.** No one is likely to dispute the principle of code interpretation that renders the rules of the Special Part. But, as indicated above, this applies equally to all particular rules, those contained in other substantive criminal legislation, as well as those of any statute aimed at implementing such legislation; for example, the kind of section that begins: *"Every person who has violated any provision of this Act..."*.

**3.56.** If this hierarchical relationship is to be effective, it must become operative in the courts. Judges will be required to interpret a particular act in accordance with the Constitution, the Canadian Bill of Rights and the Criminal Code, in that order of priority.

**3.57.** Acceptance of this principle is of paramount importance. Upon enactment of the Code, courts and other appliers of the criminal law must assume that no subsequent legislation is intended to derogate from the principles stated in a higher source.

**3.58.** There will be no hard and fast rule to this effect, however, since government may always enact legislation that explicitly derogates from principles and rules of general application. Temporary, urgent or very specialized legislation, designed to cope with a particular problem, may for the common good, make an exception to normal practice in the criminal law. This has been seen with regard to the Canadian Bill of Rights. Such derogations, as just noted, must be explicit and, in view of their departure from the usual rules of law, interpreted restrictively. For example, should the government for some particular reason wish to pass a special act affecting the fundamental principle of presumption of innocence, it must state its intention to do so clearly and furthermore spell out the breadth of the exception in unmistakable terms.

**3.59.** A further consequence of this hierarchy of norms is that should the government one day decide to abolish completely a rule of general application or even a principle in the General Part of the Code, it will require explicit legislation to that effect.

Nothing will be unchangeable under codification. If principles now held immutable should in the future become less so, the government of course must be free to abolish or alter them. This will happen only in exceptional cases if the codification is a sound one and its principles and rules of general application have been carefully chosen.

**3.60.** While the principles governing procedure, evidence and sentencing ought be in the General Part of the Code, the Commission does not see the same need as regards rules of implementation in these fields. It seems more logical to include only the more important of these rules in the General Part, leaving the others to be dealt with in subsequent codes on each subject.

## (2) Creation of Rules of Interpretation

**3.61.** As we have indicated, an important objective of the new Criminal Code, particularly its General Part, is to furnish judges with the technical instruments needed for their key task of applying the law. The ordering of the law, however essential, must not hamper practice. A code is first a practical instrument, aiding the courts in their work.

To maximize judicial creativeness and hence the adaptibility of the new Code to social evolution, the rules of interpretation should be in the Code itself.

**3.62.** Considering the new Code's structure and spirit, the classical provisions of the present *Interpretation Act* should not be aimlessly applied to the Code. The *Interpretation Act* was written with other needs in mind, and the success of the new Code depends in part on the adoption of rules and criteria of interpretation specially suited to its structure and contents.

It is therefore highly desirable in principle to set aside the *Interpretation Act* although some of its contents will still be useful, at least with regard to the rules of interpretation needed for the new Criminal Code.

**3.63.** The new rules of interpretation should first of all make it unnecessary to rely on enumerations and definitions as much as has been done in the past. Once a legislative text no longer is perceived as a restric-

tion on judicial creativeness, there will be no need to define each term in minute detail, a process which inevitably encourages a literal interpretation of the law.

Definitions should be used only to obviate the necessity of reiterating long expressions of code material or to avoid ambiguity where a particular expression is used in a context that permits more than one interpretation.

**3.64.** When a difficulty arises, the judge of course will begin by considering what the particular enactment says on the matter. The enactment will not be construed literally or be isolated from its context. Moreover, it will be construed with due regard for the governing principles and rules of application. The judge must be enabled to penetrate beyond the letter to the spirit of the law, interpreting creatively while carefully respecting the legislative intention.

**3.65.** To determine that intention, the judge may have to retrace the law's history back to the time it was tabled in Parliament as a bill. Judges will be encouraged to examine, although prudently, the preliminary studies, documents and commentaries concerning the statute in question. Finally, the judge presiding in the case should be authorized to clarify an unclear provision by refering to sources further up in the hierarchy, always assuming, as mentioned above, that the government did not intend to override higher-ranking principles and rules.

**3.66.** If a problem has been dealt with by the courts before the enactment of the Code and in a way compatible with it, the judge may no doubt refer to the previous decisions, weighing them carefully and adhering to their line of thought.

Codification, as we have explained, does not eliminate the use of precedents. It gives them more liberty and scope.

**3.67.** In this regard, what changes in present practice will be necessitated by the new system of law? What, for example, will be the value of previous precedents in interpreting the new Code? Three positions are possible.

**3.68.** The first was summed up by a common-law author who thought, once a code is established, to banish any reference to previous precedents.

> And I submit, that when one does codify, we should sweep away the debris of the past and provide that no prior statute and no decision of any court,

made before the effective date of the codifying statute, may be cited or relied upon in any court or for any purpose.

(Bell, R., "Comparative Summing Up" in *La Réforme Législative* (1971), 9 Coll. Int. Dr. Comp. 57)

The Commission feels that such a position is unrealistic. The creation of law is an ongoing process, and it would be unnatural to break completely with the past, especially when the new codification not only is based on earlier law but the reform itself consists in embodying in the Code concepts developed and applied in the Canadian experience down through the years.

**3.69.** One could go to the other extreme and accord to previous case law the same authority as before. That also is not justified. References to the old system must not be allowed to maintain the status quo that codification has sought to change nor to preserve judicial attitudes and methods of interpretation that codification is intended to replace. The new code will hardly be effective if all the old difficulties are allowed to re-emerge. It is therefore hoped that the courts will engage in a critical analysis of the written law and its principles, rather than continue to rely on the common law and its precedents.

**3.70.** The third position is the more realistic in our view. It consists of permitting and even encouraging references to earlier legislation and case precedents when necessary. Earlier legislation and rulings may well be used as *rationes scriptae* to throw much-needed light on new legislation when the latter either creates exceptions to earlier legislation and rulings or simply reproduces them. But the reference to the past must be made with great caution; it must not cause the courts to lose sight of the contents of spirit of the reform, nor of the change in methodology and reasoning that results from true codification.

**3.71.** Finally and still with regard to rules of interpretation, it must be remembered that the interpretation of texts will vary according to the sector of criminal law involved and the purpose of the provision in question. Sections on offences or penalties must be interpreted strictly; those laying down rules of procedure may be given a broader interpretation; and finally those describing causes of irresponsibility should be liberally considered. The General Part of the Code should cover this point in its provisions governing interpretation.

**3.72.** The rules of interpretation contained in the Code should not be the sole way the Code assists the courts in handling technical points. It certainly would be helpful to have set forth in the basic rules clear

statements on what constitutes completed as opposed to continuing unlawful conduct, and when an offence is deemed to have been formally commited and consummated, and not merely attempted, even before its author has attained his end. To refer to another example, clarification of the relationship between mental disorder and criminal liability would no doubt be very valuable. Such clarifications, together with a systematic presentation of the myriad rules now disseminated through many volumes of law, would be of great assistance to the courts in their work.

**3.73.** In conclusion, the objectives we have described are achievable only under a codification that crystallizes the key principles of a broad government policy on criminal law and creates the necessary complementary rules of interpretation. If these conditions are met, the court will be in a position to complete the reform and give the law the dynamic character it lacks now.