

CRIMINOLOGY AND THE LAW

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## Criminology and the Law

### INTRODUCTION

Part I of this paper provides a brief explanation of the nature and purpose of Criminology. It is intended to serve as a background for the discussion of the main topic, contained in Part II and entitled Criminology and Law Reform.

### PART I

#### THE NATURE AND PURPOSE OF CRIMINOLOGY

Essentially, criminology is an expression of concern for human behaviour in relation to the promotion of a constructive society.<sup>1</sup> As such, it is, speaking paradoxically, a discipline which has emerged as a result of deficiencies in other, and more relevant, disciplines whose function should be to deal directly with this problem.<sup>2</sup> This, in its turn, has fostered an isolated interest in certain negative aspects of human behaviour by those who find this a satisfactory pursuit.<sup>3</sup> This is explicable on historical grounds, for there can be observed an increasing concern for what may be called "criminal" behaviour and for the efforts of those in established disciplines to deal with the problem.

It is in the work of Beccaria<sup>4</sup> that one may find the first attempt to explain the problem and propose remedies. His viewpoint is that of an Italian lawyer<sup>5</sup> looking at the then prevailing social situation. Following him came Bentham<sup>6</sup>, and his peculiar blend of philosophical output<sup>7</sup> included much writing on this problem. His treatment of it was socially comprehensive. After him followed another Italian, Lombroso<sup>8</sup>. Although his contribution has recently been wrongly considered to be the work of an inadequate psychiatrist, the fact remains that it was, despite its specialised quality, related to wider social issues. Thus it was that he found himself in conflict with both Church and State<sup>9</sup>. Lombroso's contemporary in France, Tarde<sup>10</sup>, a one-time magistrate-cum-bureaucrat and sociologist, gave his attention to the problem of criminal behaviour by attempting to explain it, by proposing remedies, by referring to statistics, educational psychology and sociology.<sup>11</sup> His sometime contemporary, Durkheim,<sup>12</sup> was the first to present a formal course in sociology at a University - that of Bordeaux - and he, too, set himself to work in the field of what we would now call criminology. Naturally enough, he considered it to be within the context of a sociological

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1. It has a positive objective, as is assumed to be the case with anyone concerned with the survival of the human species.
  2. In particular, Moral Philosophy, Theology, Political Science, Education and Economics.
  3. In the writer's opinion these are spurious forms of Criminology and by exploiting a negative situation they produce an artificial problem clouding the real issues.
  4. 1738-1794. His essay, "Dei Delitti Delle Pene", though brief, is considered a classic in criticism and understanding.
  5. Lawyers in Italy in his day required a broad basis of education before specialising in law. In more recent times Scots lawyers followed this prevalent civilian tradition.
  6. 1748-1832.
  7. Utilitarianism.
  8. 1835-1909.
  9. So far as the Church was concerned, his work supported the doctrine of determinism, as opposed to the Church's classical doctrine of free will. Secular opposition was against, inter alia, his criticism of dietary deficiencies among the peasant class.
  10. 1834-1904.
  11. This was emerging as a distinct discipline.
  12. 1858-1917.

understanding of society. He is, perhaps, best known today for his theory of anomie, which, in his day, was closer to philosophy.<sup>13</sup>

Straddling the nineteenth and twentieth centuries comes the Italian lawyer, Garofalo.<sup>14</sup> Among other things he attempted to propose a more satisfactory definition of criminal behaviour and, in addition, reforms in criminal procedure. This he did on the basis of an appreciation of the structure and function of society which was wider than that of his predecessors. At about the same time Ferri<sup>15</sup> was making his contribution in the field. He was trained as a lawyer and had been Lombroso's pupil and afterwards his colleague. He became much involved in social matters and then entered politics, first as a communist, then as a sociologist and ultimately, (for which he has met with severe criticism), as a fascist. His thoughts on criminology centred round mass education and political action. For these he regarded a strong central government as a prerequisite.

Elsewhere, Bonger<sup>16</sup> was setting out to explain the problem of crime on the basis of economic inequality. Like others before him, he was influenced by the available work of other scholars. In Bonger's case the main influence was the work of Karl Marx. In the case of the Italian and French scholars already mentioned, it was the classical philosophers and the more recent men such as Descartes, Locke, Montesquieu, Hobbes, Rousseau, Comte, and, of course, the Theologians who influenced their work. Darwin also may be mentioned as having played a supportative role in this respect.

Each of these men dealt with the problem of criminal behaviour against the background of the society in which he had been brought up and received his formal education. Each would have been as well-informed as his contemporary facilities would allow upon such relevant disciplines and matters as moral philosophy, the function and structure of the state and such-like. Put another way, each might truly be said to have been informed about, and fully aware of, the positive aspects of human behaviour. One may have preferred one particular primary discipline to another, but they were all aware of the total situation. By the processes of comparison and properly relating their work to other disciplines, they all made their contribution.

Clearly concerned for criminal behaviour though these scholars were, and distinctly though they appreciated the contrast between the positive and negative aspects of behaviour, none of them can claim the distinction of having invented the discipline of Criminology<sup>17</sup>. To us this may appear paradoxical now, but they may be forgiven, for they had endeavoured to relate their work to pre-existing disciplines.

Many modern field-workers, however, concern themselves with the problem of crime in this way without specially labelling themselves: thus, a psychologist, sociologist or anthropologist can, and does, concern himself with the negative aspect of human behaviour as determined by his own discipline. There is, similarly, neither point nor advantage in claiming to be a criminologist or in declaring that one is involved in another "-ology", Criminology. This is indeed the rule to be commended and encouraged by the true Criminologists.<sup>18</sup> In practical terms, any-one desirous of information and help in this field can approach whoever he likes. There is no particular magic in being dubbed a "criminologist". The giving of valid advice is not the prerogative of one who is qualified in "criminology". Even so, "Criminology" is now spreading as an accepted discipline under that name: we ask, perforce, 'What is so peculiar

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13. The absence of specialities at that time provided a broader view than is usual today.

14. 1852-1934.

15. 1856-1929.

16. 1876-1940.

17. The term first appeared around 1890.

18. See Part II.

about its nature and purpose that its growth seems so assured?'

To answer this question we must resume our historical narrative from where we put it down. The rise of empiricism, particularly in the behavioural sciences, led to increasing disinterest in the works of the men already mentioned. Their philosophies were thought to be invalid or, rather, not capable of verification. An unverifiable assertion was regarded as nonsense. The "new men", the analytical philosophers such as Russell and Carnap, sought to describe and explain events in terms of mathematics and logic. Such sources encouraged the statisticians to come into their own. The social sciences, as they became known, turned away from false gods and pursued ruthlessly such things as co-efficients, differentials and  $\chi^2$ . The new methodology had arrived, and one of its results was that the positive criteria of living were ignored in favour of the negative side. The courts, and the penal institutions especially, were appreciated to be filled with "problem persons." They could provide the laboratory facilities and a pathway to a respectable "-ology". The rush along this pathway has never been stemmed, but it is wiser that those who engage in research into problems of crime should do so in what may be referred to as neutral territory, namely Criminology, for biased inquiry incurs the opprobrium of established disciplines which are still concerned with the comprehensive approach.

Thus, along with the upsurge of the social or behavioural sciences there has come an ever-increasing number of soi disants criminologists dedicated to the solution of the problem of crime. How they may have to manipulate, or "arrange", humanity to do it has been of no concern to them.<sup>19</sup> The only people, indeed, who can honestly claim to be criminologists today are those who recognize that the early proponents were right in principle if not in fact and that the problem is one for those disciplines which examine the situation comprehensively. The true Criminologist is in the nature of a philosopher; his task is to accumulate a sufficient knowledge of relevant disciplines so as to be able to crystallize the essence of any particular problem and refer it appropriately.<sup>20</sup> Accordingly, criminology is to be seen as a merely procedural discipline, not a substantive one.

An understanding of these relevant disciplines is therefore necessary.

## PART II

### CRIMINOLOGY AND LAW REFORM

Bearing in mind the pragmatic approach which the writer considers the most constructive so far as Criminology is concerned, an analysis of the purpose of law must be made in order to consider the question of alternatives in terms of its objectives.

The purpose of law may be said to be to control behaviour in such a way as to produce a peaceful and orderly society. By reference to the civil branches of law a person is, theoretically, able to understand not only how to conduct himself in a variety of circumstances connected with his everyday life but also what are likely to be the consequences for default. The Criminal Law makes him aware of prohibited behaviour and of the consequences of its breach.

The difficulty facing any individual without legal training who wishes to avoid a breach of the law is a language barrier,

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19. It appears to have escaped notice that the unpredictability of man is his unique attribute. The present insistent demand is that he must conform in a uniform manner. Thus humanity undergoes a metamorphosis and becomes a unit explained in terms of percentages and as the method decrees so the individual is expected to conform.
  20. A representative list of disciplines is set out in Appendix A.

legalistic jargon. He must undergo a metamorphosis whereby he relinquishes the attributes which identify him as a member of the human race and instead take on other attributes which identify him as a legal entity. He changes from a human being into an artificial creature thereafter known in terms of legalistics. One might go further and say that, irrespective of any voluntary involvement in law, every individual is in some way subjected to this metamorphosis; he will, for example, be considered by bureaucrats in terms of legalistics.

Though law can be an effective method of control, its quality and extent are symptomatic of the lack of good faith amongst individuals in society. This is tantamount to saying that each new addition to the law or increased severity in existing law is an indictment of failure on those in authority in any society who should be doing everything possible to promote and encourage good faith amongst its members.

Whether those in authority find this difficult to do or whether they are unwilling to promote good faith, the fact nevertheless remains that law is a very convenient method of regulating behaviour. Its legalistic attitudes and processes produce in place of the natural uniqueness or the unpredictability of every individual person, a uniform legal description which, once provided, can form the basis of a regulated process of disposal of any legally defined issue. This is why the law is so concerned with certainty, and predictability; this is why the relative, unpredictable matter of justice - that is a fair solution considered in the light of prevailing circumstances - is an incidental, even coincidental, matter.

Thus, recognizing law's nature and degree of effectiveness in relation to its objective, the pragmatic question arises: 'is there in fact no alternative way of furthering social well-being'? If not, then law must, with all its artificiality and limitation, be accepted. If it is the case that no alternative exists, then the further question arises: 'can law improve itself to such an extent that it becomes more closely related to humanity and rids itself of an isolationist role peculiar to itself'?

Deliberation will show that each question may be answered in a similar way, the distinction being largely a matter of degree. If one assumes that there is no alternative to law as a means of promoting and encouraging social advancement in a human way, one is in fact saying that other substantive disciplines concerned with human behaviour are either incapable of being, or failing to be, applied in a way which would promote this objective. The theologian, the philosopher, the educationalist, the exponents of psychological medicine and others are not applying themselves to the problem in the way which the nature and purpose of their respective disciplines indicate that they should.

It is not unusual to find in law, and especially in criminal law, references to morality, both religious and secular, psychological medicine, and, more recently, even to sociology. The consequence is that it is recognized that such substantive disciplines indicated by these references have an important role to play, but that inferentially they appear incapable, so far as the attitude of law is concerned, of doing so.

When law refers to a moral issue and deals with it legalistically, it recognizes the importance of morality while revealing that it considers the proper disciplines involved, *viz*, theology and moral philosophy, to be ineffective so far as such matters are concerned. The same can be said for any other discipline borrowed by the law.

Consequently it would seem that, for another discipline to regain that which properly belongs to it, that discipline must demonstrate its effectiveness in practical terms. If this is demonstrated it will become a matter for that discipline, and law will relinquish its interest. We would therefore seek another alternative or alternatives to law.

This poses a further question: 'why is this not being done'?

Those from other disciplines certainly desire to further their own objectives so that each becomes effective, but each is being precluded from doing so because the law places itself between them and the objective. The law does so by assuming its interest in sanctions.<sup>21</sup> Not only does the law do this but it does so in a way which brings further criticism from exponents of other disciplines, namely that it does not deal with the borrowed discipline comprehensively but takes only as much as appears useful for its purpose. Although in examining these criticisms one might think that there is machinery within our society for allotting to each relevant discipline all matters appertaining to it, this allotment is, in fact, prejudiced by the activities of the law because it dictates the terms for such involvement.

The solution to this problem appears therefore to be in the hands of the law:<sup>22</sup> the law should be required initially to encourage the proper involvement of relevant disciplines by directing such issues to them, even though some legal involvement be retained. With the development of facilities through experience such matters should later become the sole concern of the proper discipline.

In somewhat simple terms, therefore, issues coming to the notice of the law which involve morality, psychological medicine and the like should be initially referred to the proper exponents of those disciplines with some interest retained originally but ultimately with none qua matters of responsibility and consequences.<sup>23</sup>

Comments by prominent lawyers in a number of countries ranged from outright opposition born of traditionalist views to sincere concern for doing something of this kind.

The questions remaining are: 'should there be reference to others and if so by what means'?

To assist discussion a few examples are given for consideration:

1. Any issue involving questions of mental abnormality should automatically be referred to the exponents of psychological medicine. If abnormality is found or considered to have been present at a relevant time, the subject should be dealt with by them. If not, then it should be dealt with by law without further consideration of the mental state.<sup>24</sup>
2. Any issue involving morality should automatically be referred to the exponents of moral philosophy or theology for assessment and consequence. If it is not considered to be a question of morality, the law should deal with it without further consideration of the issue.
3. Persons thought to be suffering from the consequence of conviction should be available for inquiry by those in relevant disciplines to encourage positive behaviour.
4. The nature of those consequences should be broadly divided into those depriving a person of liberty and those which do not. They should be basically linked with restoring the status quo coupled with educational programmes for encouragement of positive living.
5. To facilitate this the criminal law could be taken out of the realm of public law and apportioned in regard to requirements and consequences as parts of the civil branches. The substance and application of law should be concerned with the assessment of behaviour and consequences

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21. This may well be to protect the law in the face of its own inadequacies which also could be hidden by convenient borrowing from other disciplines.
  22. It is conceded that politics is the real starting point but whatever the intention there, it is subject to "advice" by lawyers and eventually expressed legalistically. Hence the need for lawyers to initiate proposals.
  23. Though a protective procedural role would be quite proper.
  24. In such cases the diagnosis should be medical not legal.

as an extension of contract, torts, family law, etc, the severe consequences now contained in the criminal law being settled on an inter partes basis. In this way matters of restitution, damages and compensation would be considered privately not publicly, and whatever additional consequences are considered necessary to remedy the immediate situation could be based on the improvement of behaviour by involving those competent in such matters. In so doing, the positive side of law in the matter of guidance and requirements regarding behaviour could be so arranged that it becomes more readily acceptable through instruction and thus furthers the principal objective. This would obviate the negative character of criminal law, the converse of such prohibitions being usually expressed in the remark "do not break the law." Instead of this, the positive side of law could be emphasised, indeed inculcated as and when necessary, thus providing more effective guidance as to behaviour.

#### APPENDIX A

Anthropology (both social and archaeological)  
Psychology (general, experimental, clinical and social)  
Psychiatry (experimental and clinical)  
History (social, political and economic)  
Sociology (institution and group inter-relationship)  
Philosophy (particularly moral philosophy)  
Political Science (particularly political motivation and  
expression)  
Economics (particularly distribution of wealth)  
Education (Religious, Secular, and mass disseminating media)  
Statistics (both descriptive and analytical)  
Comparative Religions (particularly bases and disseminating  
techniques)  
Medicine (functional including human biology)  
Architecture (particularly town planning and amenities)  
Law (both public and private)  
Science (particularly technology and aids to behavioural  
expression)

I.F. McDonald