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Codification As Judicial Empowerment – The Stephen Code
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In the constitutional legitimacy debate that has dominated Canadian legal discourse since the introduction of the *Canadian Charter of Rights and Freedoms* in 1982, the standard response to judicial decisions the speaker dislikes, particularly decisions of our highest Court has become the allegation that this amounts to judicial law making, whereas the proper role of judges is clearly, so the speaker will piously claim, to only interpret the law. This discourse is particularly favoured by conservative commentators, but will do as an argument for progressive speakers as well if the decision in question is not agreeable. It would appear that Canada, in its constitutional era, at least as perceived by public debate, has made the transition from a common law jurisdiction where law making is part and parcel of the judicial job description to a statute-based civil law jurisdiction where law emanates legitimately only from Parliament or the provincial legislatures. The reality is of course that Canada continues to be bijuridical, that only Quebec is a civil law jurisdiction and that much of Canadian law is and continues to be judge-made. It is not accidental, however, that the argument arises in response to constitutional jurisprudence, over half of which concerns itself with criminal law. Criminal law in Canada is codified federal law. Our Code is based on the English Draft Bill of 1880, originally drafted by Sir James Fitzjames Stephen. One of the chief objections to codification in the 19th century was that it would make the law rigid, deprive it of its elasticity, which was understood as the ability of the law to develop incrementally along with changing social and political realities. The Stephen Code responded in a variety of ways to this objection.

In this paper, I want to consider the legislative history of the Stephen Code in England and Canada and explore briefly the legal and political meanings of codification. Finally, I hope to show that in response to the political pressures of the day, Stephen shaped his Code in a way that operated not only to preserve judicial law making powers, but also to enhance judicial powers to the detriment of Parliamentary law making and law reforming powers.

a) The Genesis of the Stephen Code

Let me begin with a few comments about the genesis of the Stephen Code. When Stephen returned from India in 1872, he brought with him experience with the implementation of the Macaulay Penal Code there. He also brought with him expertise in codification, having more or less single-handedly codified criminal procedure and evidence law, to name but two of the more prominent examples. These experiences convinced him that it is not only intellectually and philosophically desirable in the tradition of Bentham, but also practical to codify the criminal law. Practicality mattered because he was looking for work. He wrote the *Digest of Criminal Law*¹ and the positive reception the *Digest* received gave him the necessary credentials to be charged by Tory Attorney General Jack Holker, with the drafting of a criminal code for England. It is curious from a modern drafting perspective that he was given no substantive direction from Holker as to the areas where the government wanted to preserve the common law and where reform was intended. These decisions were left with the drafter.

This, he set out to do and a bill was introduced in 1878 in the House of Commons. When Jack Holker introduces the Bill on May 14, 1878, he noted that “[c]odification has, however, been resorted to in other Dominions of Her Majesty; and notably in India,

¹ Stephen, James Fitzjames, *A digest of the criminal law (crimes and punishments.)* (London: Macmillan, 1877).

where, some years ago, a penal code was enacted which has been found of the greatest use, and has given universal satisfaction.² Holker credited Stephen with the success of the Indian penal code. “The success of this penal code was, to a great extent, due to the labours of a very learned jurist and sound practical lawyer, who was formerly the legal member of the Council of India. I allude to Sir James Stephen – a name well-known to all who take an interest in the law, or in the philosophical literature of the country.”³ After emphasising the credentials of the drafter, Holker went on to acknowledge the experimental nature of the measure introduced. “It is an experiment to a considerable degree, and, being an experiment, it has not been thought right to make it of too ambitious a nature.”⁴ In Holker's view, codification was to benefit the lay person rather than lawyers, he noted that “codification means condensation, simplification, explanation, and amendment of the criminal law rather than any other branch; because the criminal law is necessarily so largely resorted to, it is, moreover, so largely administered by persons who are not trained lawyers, and who require some plain statement of the law for their guidance.”⁵ The lay persons Holker was contemplating however, are not ordinary citizens. They are lay persons involved in the administration of justice such as magistrates. This represents a significant shift from the ideal articulated by Bentham some 50 years earlier.⁶ As is well known, Bentham was of the view that a

² U.K., House of Commons (Hansard) Vol. 239 May 14, 1878 at 1937.

³ Ibid.

⁴ Loc. Cit. at 1939

⁵ Loc. Cit. at 1938.

⁶ This view continued in Canada. For example, in preparation for the revision of the Code in 1927, the Revised Statutes Commission recommended a retention of existing section numbers and inclusion of amendments as best possible within the existing organizational structure of the Code. To do otherwise, the Commissioners suggested would leave “magistrates and others familiar with the old Criminal Code (...) for some time at loss to find the sections where the old law has been reproduced.” This result was less palatable than renumbering despite the fact that it was “clear that to retain the old numbers would require incorporating the amendments into sections with which they were, more or less, cognate, but would not

rational, universal, criminal law addressed to the citizenry could be devised. Stephen recognised that a particular criminal code may not travel across national boundaries. The reasons for this were found in the role that criminal activity and the expertise of criminal law adjudicators play in a particular society. Throughout his speech, it is clear that Holker was very concerned about the scope of the task he was asking Parliament to perform. He explained that the Bill had been limited to indictable offences to avoid overwhelming Parliament. Similarly, he noted that statutory offences would remain separate from the new criminal code which would instead focus on offences normally considered crimes.

The bill fails. It fails because MPs do not feel that they have the time and necessary expertise to debate the bill clause by clause, but that they are not prepared to enact such an important piece of legislation on the say-so of a mid-level bureaucrat from the colonial office. For Stephen, this must have been a disappointment, though he gets the deal he had asked of Holker when he undertook the drafting charge: a serious consideration and a Royal Commission. He also gets, and this is of some importance, a judicial appointment to the Court of Queen's Bench, so he is now sitting as a judge, largely in criminal matters. The Royal Commission includes him and three other judges, but not the Lord Chief Justice. The Commission sits for about six months and redrafts the bill, making a number of important changes, but leaving the basic structure of the Code intact. One change I want to highlight is that the original Stephen bill left the common law to develop

permit of as scientific drafting as could be obtained by making new sections. (Canada, Commissioners Appointed to Revise the Public General Statutes of Canada (1928). Special Report by the Commissioners Appointed to Revise the Public General Statutes of Canada, Ottawa: F.A. Acland Printer to the King's Most Excellent Majesty: 159 p.

further as long as it was not expressly overridden by the bill. The Commission bill abrogates common law offences, but continues statutory offences. The Commission bill fails as well, for many of the same reasons as the original bill, Parliament is not prepared to enact such an important piece of legislation on the say so of four judges any more than they were prepared to enact it on the say so of one (now) judge. Lord Chief Justice Cockburn provides extensive commentary on the Bill to Parliament, lauding the goal of codification, but taking serious issue with the particular draft put before the House. He argues that the Code is not sufficiently comprehensive and that it does not reflect the common law accurately. He also argues that some of the express changes to the law are undesirable. History has not been kind to the Lord Chief Judge. All of the changes he takes issue with have since become law in both England and Canada. The bill is once again redrafted and reintroduced in 1880, in the last days of the conservative government. When the government falls, the bill is not reintroduced by the Liberals, who are rather preoccupied with Parnell and Irish Home Rule. This could be the end of the story and if it was, this paper would not have been written.

b) Enactment of the Stephen Code in Canada

Fast forward ten years and cross the Atlantic however, and you find at work Sir John A. MacDonald, the first prime minister of Canada, who, in 1867 had secured the criminal law power to the federal government but who was faced with a country where the criminal law was dispersed over many statutes, many of them provincial, and an uneven reception of the English common law in the dominion. This matters because it essentially meant that even though the power to make criminal law was federal, the actual resulting law was not uniform across the country. The codification of the criminal law in Canada

thus became a national project, the legal equivalent of the building of the railway, uniting the country under one law.⁷ This project was achieved in 1892, based on the Stephen Code. It was augmented, but remained structurally the same. One of the interesting features of Canadian codification compared to the English and continental European codification projects is its linkage to the formation of a national identity.⁸

The Canadian codification project from its inception has consistently been a project of forming a national identity. In criminalising certain conduct Canadian society was to express the values most fundamental to it. The law reform commissioners of 1976 expressed this idea by identifying as a scientific objective of the new codification project the creation of “a body of law accurately reflecting our Canadian identity, and to set

⁷ This is not to say that this national project aimed at greater independence from England. Rather, it aimed to integrate the Dominion. On April 27, 1869, Sir John A MacDonal remarked in the House of Commons that “in (...) criminal Bills, the language was as nearly as possible the language of the criminal law of England. The language used in such measures in the Lower Provinces might be shorter and more concise, but he had chosen rather to adhere to that before the House, because it was of the greatest importance - and the members of the legal profession would fully appreciate this - that the body of the Criminal Law should be such that the Judges in the Superior Courts should have an opportunity of adjudicating upon it as on English law. It would be of incalculable advantage that every decision of the Imperial Courts at Westminster should be law in the Dominion. On every principle of convenience and conformity of decision with that of England, he thought it well to retain the English phraseology.” (Canada, Debates of the House of Commons (Hansard) 27th April 1869 p. 89). Les Bas Provinces is today’s Quebec, and there is no doubt that the French tradition has been much more concise in its formulation of penal law. The rejection of this precedent in favour of the more confused and convoluted English reminds me of the ultimate victory of Microsoft over Apple. Clearly superior technology is rejected on the basis of market share and compatibility. However, the difference in country conditions between Canada and England was not lost on Sir John A. MacDonal who, less than a month later, on May 4, 1869 advises the House that “there are reasons, in this country only, that the restrictions imposed upon carrying weapons should not be so general as those which prevailed in England. We were exposed to irruptions from the neighbouring States of lawless characters in the habit of carrying weapons, and where (sic!) it known that our people were prohibited from defending themselves, these parties might be encouraged to greater depredations. It was, therefore, not intended to adopt the restriction which had been made to prevent the carrying of pistols, or similar weapons of defence.” (ibid. p. 171f).

⁸ The bilingual, bijuridical nature of Canada created additional challenges for a common law based system of criminal justice: “Les principes de ce droit n’ayant aucune similitude avec les usages qui l’aviaient régie en cette matière, ignorant la langue dans laquelle les precedents qui font le droit commun étaient écrits, éloignée de son etude par son formalisme et la bizarrerie de ses termes techniques, quoique pénétrée de sa grande humanité, elle témoigna une très-grande indifférence à s’en instruire.” Loranger, T. J.-J. (1879). “Codification des lois criminelles.” *La Thémis* - 1: 269-274.

down rules that will result in facilitating a special brand of traditional creativeness."⁹ The Canadian goal of codification was therefore subtly different from the English goal: it represented the assertion of a federal power base, not merely an attempt to consolidate and reform a branch of substantive law.

2) A Typology of Codification

Just as the goals of codification can vary, the understanding of what it means has been the subject of some dispute. Let me begin this part by setting out three competing definitions of codification which all inform the codification debate with ever shifting emphasis. At its most basic and least ambitious, codification can mean the translation of judge-made rules into statutory language. Even this modest goal is daunting. At the time Stephen drafts the 1878 bill, there are literally thousands of rules in need of such translation, though a number of consolidation acts had begun the task. In this understanding of codification, the result is one or more statutes enacted by a legislature, expressing the rules formerly existing at common law. The next meaning of codification to consider is more ambitious in scope. It contemplates the gathering of statutory and common law rules into a complete, systematic and unified rule book covering an entire area of law. The result here is a single code that covers the entire area of law and which must reconcile any contradictory rules, but also fill in all the gaps that may have been left to decide for future cases at common law. Finally, a third meaning of codification is the systematic law reform of an area of law. On this understanding, the codifier not only gathers the rules, common law and statutory, fills in any gaps that become apparent, but also reconsiders the wisdom and systematic place of each rule with a view to improving

⁹ Law Reform Commission of Canada, *Towards a Codification of Canadian Criminal Law*, (Ottawa: Information Canada, 1976) at 45 para. 3.24.

the law in the area. Depending on the state of the law prior to this effort, this can amount to a wholesale scrapping of the existing set of rules and the implementation of an entirely new set as was done in the context of the bourgeois revolutions of Continental Europe. It should be understood that the typology I have set out is just that and that in any actual codification effort, it is more typical to see a mixture of these goals with different emphasis rather than the straight prototype. However, under any definition of codification, the relationship of the new rule book or rule books and the common law must be clarified. Again, there are basically three options: abrogation, derogation and reconciliation. Abrogation means the whole-sale abolition of the common law by enactment of the Code. In the area of criminal law, it requires that offences previously recognized to be crimes at common law cease to exist unless they are now included in the Code and that going forward, the courts have no power to create new offences. It also means that any exculpatory circumstances such as self-defence previously recognized at common law are either included in the code or are rendered inoperative and that the courts have no power to exculpate in circumstances other than those contemplated by the Code. Abrogation represents a complete power shift from the judiciary to the legislature to make new law. A less aggressive form of codification involves derogation. Under that model, the common law continues to exist unless it is expressly or impliedly repealed by a contrary enactment in the Code. The effect of derogation is less capable of description in categorical terms than abrogation because its precise scope depends on the Code. If the Code is very comprehensive, there is little chance of a continued existence of common law offences or defences previously recognized. If it has large gaps, the prior common law will continue to fill those gaps. Similarly, the future power of courts depends on the

Code. If the Code recognizes a power of judges to create new offences, then obviously, it continues to exist, if it does not, then it ousts that power. Codes that derogate require very careful analysis to determine whether power has changed hands or not. Reconciliation, despite the positive ring of the term, arises from failure of the Code to deal with its relationship with the common law and leaves it to judicial decisions to integrate the Code into the existing system. It tends to result in an interpretive rule that the Code merely confirms the common law. A reconciling code has unpredictable patterns of power and would tend to strengthen judicial power.

3) The Political Meaning of Codification

We have seen that neither the meaning nor the legal implications of codification are settled. What was much more settled in 1870s England was the political meaning of codification. Codification was French, rationalist, universalist, upper-middle class or bourgeois and raised suspicion of rigidity on the one hand and, perversely, revolutionary tendencies on the other.¹⁰ French and rationalist go hand in hand, of course, and for many patriotic Englishmen, codification was the legal equivalent of conceding the Battle of Waterloo. It did not help that the most famous and successful example of codification bore the name of Napoleon. Ever since Bentham, who coined the term and was its chief advocate, codification was also thought to be universalist, i.e. advocating law that would be rationally arrived at and that would be the same across the entire world.¹¹ This did not endear the notion to English parliamentarians, many of whom had passing, and some had intimate, experience with life elsewhere in the Empire and who could not easily be

¹⁰ Maria Luisa Murillo, "The Evolution Of Codification In The Civil Law Legal Systems: Towards Decodification and Recodification" *J. Transnational Law & Policy* (2001) Vol. 11:1 at 3.

¹¹ Sanford H. Kadish, "Codifiers of the Criminal Law: Wechsler's Predecessors" (1978) *Columbia Law Review*, Vol. 78, No. 5. 1098 at 1099.

persuaded that the same law worked regardless of what we might now call “country conditions”. It also seemed to prefer theoretical musings about the role of law in society to hundreds of years of experience in the administration of justice as represented by the common law. Stephen similarly cautions: “Any code which was not founded upon and did not recognize these characteristics of the law of England would give up one of its most valuable characteristics. The generality of language which is characteristic of the foreign codes would be wholly unsuited to our own country, and it would necessitate the re-opening and fresh decision of a great number of points which existing decisions have settled.”¹²

Its class locus did not help either. The upper classes, still the prime recruitment ground for both the judiciary and Parliament in 1878, were suspicious of codification because of its association with bourgeois revolutions in Continental Europe. That also explains the suspicion of revolutionary tendencies. What is worthy of some more discussion is the idea of rigidity or absence of what, in the discourse of that time, was described as “elasticity”. Elasticity was supposed to be the chief quality of the common law, i.e. its ability to develop along with the changing times and to adapt to new situations as they arose. Stephen notes, quite correctly, that this quality is more imaginary than real, because elasticity only exists where there is no precedent and after almost a millennium of English criminal law, there are not too many instances without precedent. But it is clear that there was much support, both in the judiciary and in Parliament, for the judicial power to develop the law on an “as needed” basis. Elasticity is a positive spin on the rejection of the legality principle. Legality requires the spelling out of prohibitions in

¹² History, Vol. III p. 355f.

clear and certain terms, so as to provide the citizen with notice. The rationale for the legality principle is that any actor can choose to engage in legal conduct and avoid illegal conduct only if the line between the two forms of conduct are sufficiently clear. Stephen does not subscribe to this idea in a strong sense. Firstly, he was convinced that the understanding of criminality was historically fairly stable. He felt that just about anything that might require criminalization had been criminalized: “there is every reason to believe that the criminal law is and for a considerable time has been sufficiently developed to provide all the protection for the public peace and for the property and persons of individuals, which they are likely to require under almost any circumstances which can be imagined;”¹³ It is also an implicit rejection of the rational actor theory that underlies so much criminal law justification.

This brings me to the question of how Stephen positions his Code politically and the legal consequences of the political position. You will recall that the political obstacles to codification were its philosophical and political ties to the French revolution and French rationalism, the rationalist ideal of universality and the resulting undervaluation of local difference and historical experience and lastly its alleged rigidity, an ostensible result of removing judicial power and discretion to the legislature. Stephen works hard to sever the French connection. He does this by replacing France with India. Rather than advocating a French rationalist universalist code, he promotes a legislative initiative that Britain had successfully piloted in India and that was capable of adaptation to the noticeably different conditions in England. India is represented as the tough case, if it worked there, implementation in England will be a breeze. He recognizes the importance of local

¹³ Criminal Code Bill Commission Report at 10.

difference by pointing out that codification in England will be able to follow the common law much more closely, as that body of law is already and naturally adapted to English conditions.¹⁴ In this context, he notes that unlike the Indian Code, the English Code does not require a general part since the general principles of criminal liability are well developed at common law and do not require codification. This is more than a little disingenuous. Stephen certainly recognized the usefulness of a general part: “Indeed the arrangement of the subject [of penal legislation] is obvious and natural in itself. The general principles which apply to the whole subject naturally come first (...).¹⁵ The true reason for not including a general part was clearly political: “I do not think that this method of legislative expression could be advantageously employed in England. It is useful only where the legislative body can afford to speak its mind with emphatic clearness, and is small enough and powerful enough to have a distinct collective will and to carry it out without being hampered by popular discussion. A criminal code drawn in the style of the Indian Penal Code could never be passed through Parliament, and even if it could I do not think English judges and lawyers would accept and carry out so novel a method of legislating.¹⁶

He also takes a number of steps to increase judicial discretion, the most notable of which is the removal of minimum punishments. In their place, he bestows on judges the power

¹⁴ Stephen seems to have considered the types of conduct to be usefully criminalized to be both historically stable and nearly universally applicable. He notes that the “Indian Penal Code may be described as the criminal law of England (...) modified in some few particulars (they are surprisingly few) to suit the circumstances of British India.” (History, Vol. III at 300). Regional variation was mostly introduced in the mode of legislative expression, in criminal procedure and in the law of evidence.

¹⁵ History, Vol. III at 300

¹⁶ History, Vol. III at 304.

to impose any punishment up to a maximum punishment but including a power to discharge the accused absolutely, essentially an acquittal following a finding of guilt. In his first draft (and adopted as such in Canada), he leaves in place the judicial power to convict based on common law offences and the power to create new offences. This is also borrowed from the Indian Penal Code and according to Stephen serves “rather as an answer to any cry which might be raised as to the danger of a general repeal of the unwritten common law than upon any more serious ground.”¹⁷ Finally, he also expressly preserves the judicial power to develop defences.

4) Not a Failure – A Near Success

All of this was politically astute and it is for this reason that the Stephen Code came as close as it did to becoming the law of England. Its history should not be considered a history of political failure, but a history of political near success. And it did become the law in many places in the colonies and dominions, including Canada. There, the political compromises Stephen made continue to haunt us. By tipping its hat low to the common law, the new code is as convoluted as the common law that preceded it. Judicial discretion is writ large all over the code. Stephen did not pretend otherwise: “Upon the whole, a detailed examination of the Draft Code will show that in respect of elasticity it makes very little if any change in the existing law. It clears up many doubts and removes many technicalities, but it neither increases nor diminishes to any material extent, if at all, any discretion at present vested in either judges or juries.”¹⁸

¹⁷ History, Vol. III p. 305

¹⁸ History, Vol. III p. 358.

Judicial sentencing discretion has given rise to an escalation of maxima on the part of Parliament and the haphazard reintroduction of minima.

The Canadian Parliament in 1892 reverted to the position taken in the original Stephen bill as to the continuation of the common law. Even though the power to create new offences was legislatively removed in 1955, a tradition of interpretation now exists that permits judges to reinterpret existing offences so as to create new ones. And the power to create new defences continues. The worst defect of the Stephen Code is the absence of a general part. There is no guide to interpretation. This was because Stephen thought that the interpretation of penal legislation did not differ materially from other statutory interpretation: “A criminal code must of course be construed like any other act of parliament, but it would be incongruous to embody in a criminal code the general rules for the construction of statutes, even if it were considered desirable to reduce them to a definite form.”¹⁹

This means that judges are not bound by any kind of principled approach to interpreting or applying the Criminal Code. The impact of this absence of an interpretive rule in the Canadian Code caused the Commissioners of 1987 to include the following provision:

1(3) Interpretation

(a) The provisions of this Code shall be interpreted and applied according to the ordinary meaning of the words used read in the context of the Code.

(b) Where a provision of this Code is unclear and is capable of more than one interpretation it shall be interpreted in favour of the accused.²⁰

¹⁹ History, Vol. III p. 350.

²⁰ Report, 31 at p. 16.

At the outset, I had hoped to show that in responding to political pressures of 1878, the Stephen Code created numerous legal problems. The topic of my paper is a paradox. The received wisdom is that codification shifts power to legislatures. The Stephen Code clearly did not do that. You may be left with the impression that even if it did not shift power to Parliament, it still does not warrant the title, judicial empowerment, the abolition of sentencing minima notwithstanding. This view underestimates one final important point about codification: A judicial power existing at common law only ever exists subject to legislative expression. A codified judicial power is imbued with democratic legitimacy and is far more difficult to remove. For this reason, the codification of common law judicial power in the Stephen Code has operated to shift more power to the judiciary. This was not lost on Stephen's contemporaries. George Howell, parliamentary secretary to the Trades Union council of Britain noted in 1879: "it is one thing to put up with defective or obsolete laws, it is a very different thing to re-enact, and thereby to give a new lease of life and renewed authority to a law tolerated perhaps only because it is practically unenforced."²¹

²¹The Codification of Criminal Law (London: Author, 1879) at 5.