THE RECENT EROSION OF CRIMINAL LAW PROTECTIONS (JEFF CONLEY) - APORTES AL DERECHO / REVISTA JURÍDICA DE UFLO UNIVERSIDAD / AÑO 2023 / VOL. 07 / Nº 07 / ISSN 2618-4192.

The recent erosion of Criminal law protections

Jeff Conley[1]

Abstract

Since the events of September eleventh, 2001, there has been a major change within the application of criminal law protections within Canada. These changes have resulted in the erosion of criminal law protections that once shielded Canadian citizens from the monopoly of power that the state exercises. Nevertheless, these changes have left Canadian's defenseless against the legal system as the cardinal rules that Beccaria (1963) once theorized as the foundation of criminal law have shifted to a manner of precautionary policing. The goal of this paper is to provide an understanding of how these principles work in practice, over theory, through using relevant examples to denote the significance they have on Canadians. By the end of this paper, it will have been demonstrated with clarity that there has been a significant change in the criminal law procedures that Canadian's once knew, and that legislation now protects the government from society, rather than society from the government.

Keywords: criminal law; Canada; protections; precautionary harm; corrective training

[1] Jeff Conley is an undergraduate student at the Algoma University campus located in Sault Ste. Marie Ontario, Canada, who is completing a combined specialization BA in the studies of Law and Justice and History. His research includes themes of contemporary Canadian history and the influence that criminal law has within this study. Through applying legal principles to Canadian history, he is able to illustrate how these once cardinal protections within the legal system have eroded within Canadian jurisdictions.

La reciente erosión de las protecciones del derecho penal

Resumen

Desde los acontecimientos del 11 de septiembre de 2001, ha habido un cambio importante en la aplicación de las protecciones del derecho penal en Canadá. Estos cambios han resultado en la erosión de las protecciones del derecho penal que alguna vez protegieron a los ciudadanos canadienses del monopolio del poder que ejerce el Estado. Sin embargo, estos cambios han dejado a los canadienses indefensos frente al sistema legal, ya que las reglas cardinales que Beccaria una vez teorizó como la base del derecho penal se han convertido en una forma de vigilancia policial preventiva. El objetivo de este artículo es proporcionar una comprensión de cómo funcionan estos principios en la práctica, más que en la teoría, mediante el uso de ejemplos relevantes para indicar la importancia que tienen para los canadienses. Al final de este artículo, se habrá demostrado con claridad que ha habido un cambio significativo en los procedimientos de derecho penal que alguna vez conocieron los canadienses, y que la legislación ahora protege al gobierno de la sociedad, en lugar de a la sociedad del gobierno.

***Palabras clave**: derecho penal; Canadá; daño precautorio; disciplina correctiva*

I. Introduction

This essay will examine a main theme that has had a recent urge within criminal law.

This essay will course analyze multiple concepts that support the argument that the principles of criminal law society once knew as defined through Beccaria no longer exist. Furthermore, examples will be used to argue that the criminal safeguards that once protected individuals from the government's monopoly of power are no longer present within the judicial system. This is important as the erosion of these rights have left individuals defenseless against state power, and the procedures that criminal law was once forged upon regarding concrete social harm and protecting the rights of the accused have completely changed.

II. Disappearance of criminal law principles

II. 1. Criminal law and its historical evolution

September eleventh, 2001, can be seen as a distinctive change within criminal law principles according to legal scholars. The criminal law that was known in society for hundreds of years changed

after the events of September eleventh and resulted in a paradigm shift regarding the erosion of criminal law principles. Before evaluating this shift, it is important to understand what criminal law used to entail. Italian philosopher Beccaria (1963) helped shape what criminal law looked like for past centuries and hypothesized a style of criminal law that rooted out the arbitrary nature of criminal law within the Middle Ages. He stated that society needed to have clear laws that were understood and published, and that no one could be prosecuted for a behavior that was not a crime before an action was committed. Furthermore, he argued that punishment had to be proportional to the crime in action, and that everyone had to go through due process and stand before a trial where the facts of the case were analyzed to ensure that no one could be convicted without evidence or proof beyond a reasonable doubt. This is significant as everything known about criminal law was adopted by constitutions emerged during Beccaria's thoughts (Beccaria, 1963). Nevertheless, this mindset is not prevalent within present day law. Before the attacks of September eleventh, a crime was an action that had a very clear physical act and intention. If there was no action or intention, then there could be no crime. Again, the criminal law process was based and forged on protecting the rights of the accused. The mind set was that the criminal system would ensure that no innocent person would suffer a criminal punishment.

II. 2. The transformation

The criminal law system used to be set on a foundation that focused mainly on the protection of the accused. The bulk of criminal law used to be centered around the idea of protecting individuals from the state and the monopoly of force it had. These principals nonetheless are now disappearing, and individuals do not have the protections they once had when the state exercises this monopoly of power. Consequently, due to this erosion people are now limited and defenseless against states power. Procedure has now completely changed within the criminal justice system.

II. 3. Erosion of mens rea and actus reus

A crime used to require both *mens rea* and *actus reus*. That is a voluntary action with a distinct thought processor intention following the action itself. However, this is no longer present within criminal law. Within Canada, there has been a great number of crimes adopted with no strong *actus reus*. Within the Criminal Code (CC), there are many crimes that are merely thought crimes, or crimes with no physical acts; such as conspiracy. For centuries it was understood that in criminal law a behavior to constitute a crime needed an action as well. Furthermore, *mens rea* typically referred to intention, negligence, and knowledge. However, impact is now included within the umbrella of *mens rea*. This is wrong as criminal law used to require a very clear *actus reus* and *mens rea*. Today however it is dependent on how the crime was perceived.

THE RECENT EROSION OF CRIMINAL LAW PROTECTIONS (JEFF CONLEY) - APORTES AL DERECHO / REVISTA JURÍDICA DE UFLO UNIVERSIDAD / AÑO 2023 / VOL. 07 / Nº 07 / ISSN 2618-4192.

II. 4. Move from intentional mens rea (subjective test) to impact on victim

A victim can now feel threatened regarding a crime, and their impact can constitute a crimea bout their feelings. This is a huge change within criminal law procedures, and yes, it is argued that this western phenomenon empowers the victim, but it also erodes the rights of the accused. It does not matter anymore what the intentions of the perpetrator was or even negligence. Traditionally what counted was the intention of the perpetrator or negligence, but negligence was seen in an objective way through the eyes of the judge and jurors. Now, criminal law allows things to be judged through the eyes of the victim. Criminal law was supposed to be impartial where a third party of either judge's or jurors would provide answers, not the victims.

II. 5. Adoption of blank criminal laws and broad definitions

Governments today now have the power to arrest, detain and charge people with crimes that are very broad by definition, or every day conducts. This is a direct in version of Beccaria's argument that laws need to be clear and published (Beccaria, 1963). Nonetheless, this is not the case in present day criminal law as this theory has eroded. Crime in the past used to entail mainly physical harm, or theft but this is not the case today, virtually everything can be considered a crime through the process of using blank penal laws which are argued to be unconstitutional. This was extremely evident during the quarantine act of Covid-19 in which statements were made such as "if you do not comply with a government official's request, you can be detained and arrested". If you do something and learn that it was a crime after the fact, this is extremely dangerous. Nevertheless, there are very broad criminal laws which result in people being convicted and going to prison. Many of Canada's laws in the CC are so broad that almost anything can be considered a crime, and there is very little society can do to combat this as the safeguards that were once used to protect citizens from the government have eroded.

III. The means of Corrective training

III. 1. Criminal punishment

Criminal punishment has changed overtime, but the goal of punishment itself remains relatively stable. In essence, the goal is for those in power, or the ruling class is to exercise influence over those who they seek to control through normalizing judgment and conduct. Power was used in punishment that ranged from physical to psychological, but the goal is the same: to make everyone comply to the rules established from powers above. Simply put, power is used as a discipline. In turn, society internalizes these rules because we believe them, and we don't question them. We have adopted this ideology as if it was our own because we believe it is the right thing to do. Now punishment works through discipline, and it is a way that those in power such as the government, make those without

power think that what they are doing is right, rather than following external ideologies that differ. The success of disciplinary power in "training" depends on the following three elements:

III. 1. a) Hierarchical observation

The idea of hierarchal observation is that society is always observed from those in power. As Foucault (1995) theorized, in certain institutions, society is viewed and conforms to what is told of the mouth of fear of being reprimanded. This theory can be illustrated using the panopticon in prison. A panopticon is a large tower that a prison guard would sit in and look down on the prisoners to see everything, even though in reality, he could not view every niche action. Nevertheless, this form of separating power through hierarchical observation results in prisoners refraining from doing wrong because they are believed to be seen. This is relevant today through surveillance instead of panopticons, but the outcome is the same. Society refrains from doing wrong because it is micromanaged and viewed in every element of life, and because of fearing punishment or challenging the notion of those in power, we internalize it and follow accordingly. Furthermore, the erosion of principles in criminal law that used to safeguard society from this monopoly of state power make it impossible to not conform without punishment.

III. 1. b) Normalizing judgment

Judgment is an ideology that the thoughts of those in power need to be internalized by the subjects they overlook. This is done through using a two-step system; both micro-penalties, and rewards. Both systems aim to make society conform to ideologies and societal norms through internalizing the thoughts of those in power. Society will only conform to these notions if they actually believe them to be true. For example, if someone goes to work, and respects the government, they are thought to be rewarded through employment and freedoms that advance them on a social ladder. In essence, it is the belief that if you do the right thing, you are rewarded, but should one deviate from these standards, and they will be punished such as cancelled, or fired from their job. The main premise that normalizing judgment has on society is that of adopting the ideologies of those in power. This normalization makes people homogenous, where everything is uniform and the same. This in turn creates masses within society who will not question authority. It is not possible now for society to deviate this judgment because the government can now criminalize anything they deem fit.

III. 1. c) Examination

The government examines society to see if its members have conformed to the notion of ideologies of its rulers. In every aspect of life people, are monitored through exams and evaluations. Foucault (1995) discussed that these examinations result in people being seen as cases that governments can

use to judge whether one has conformed or needs to be corrected, reprimanded, and punished. This is very evident throughout the main theme of the course as the surveillance society we live in produced by trackers, data, and CCTV cameras allow the government to invade on society's privacy and criminalize every day conducts or deviations from norms.

IV. Shift in precautionary harm

IV. 1. Anti-Terrorism laws and threats to nationalsecurity

The government uses the adoption of anti-terrorism laws that were created after 2001 as a means of viewing people's emails, search histories and more. The idea in theory was good as it allowed for governments to prevent harm before it occurred. However, this enables the government the ability to spy on everyone and demonstrates the rhetoric of a panopticon being used to analyze everything we do. This is practically all over the western world. This is an inversion of the criminal law principles that were once present in law. The focus used to be on social harm, but now the focus is on threats to society. Governments adopt new crimes under the guise of protecting society, rather than monitoring behavior or thought. This results in many of these new crimes being victimless, where no one is harmed, and the social aspect is very vague. In other words, it is a risk to society that is not concrete. This is evidently demonstrated through the new kind of social harms in "Threats against national security" as governments can criminalize anything that MAY endanger society before it happens. This is dangerous as it allows the government to criminalize any conductor thought that they believe has the potential to harm society. This is an erosion of the principle of social harm as it is impossible to say that a crime has been committed if no harm occurred. Nevertheless, this allows governments the ability to spy on its citizens.

IV. 2. Surveillance society:

Many of the measures that the government has adopted are implemented in a way that is problematic to society. This can be seen through the recent shift in society being monitored in every aspect of life. It is argued that the recent development is a shift of the harm principle we once knew as the focus of criminal law is no longer protecting society from the government; rather protecting the government from society. We live in a society where we are monitored through cameras everywhere and virtually nothing done online, or in a public or private setting is going unnoticed. Between phones and trackers there is nothing you can do online that goes untraced regard less of the precautions one can take. This is argued to be a safeguard that the government has adopted to protect itself from society and illustrates the shift to precautionary harm, through monitoring its subjects.

V. Over use of court orders

V. 1. The criminalization of conducts that are not crimes (Broadness)

The court system often imposes court orders on conducts, that are in themselves not crimes. For example, if someone commits a crime, they can be imposed with probation from certain actions such as being restricted from driving a vehicle, after driving under the influence. This seems straightforward and just. However, court orders have been adopted in very broad terms and there many kinds of probations that can be imposed even if they are not related to the crime that person was accused of. Court orders are used to criminalize conducts that are not present within the Criminal Code. This is dangerous as it allows the court system to make drastic decisions that can impact one's life and subjects them to the monopoly of power the state has.

Court sanctions can criminalize everyday conducts such as using a credit card, talking to someone, or going places. Due to these court orders being so broad, it is often difficult for individuals to live a normal life while adhering to these orders. Consequently, many people end up breaking these court orders to maintain any quality of basic life and then get convicted.

Simply put, there has been an erosion of criminal law principles that once existed to protect individuals from the state's monopoly of power. Society does not have these protections anymore, and this allows the state to impose any sanction they choose to. These very broad definitions of court orders, relate to the theme that has traversed criminal law through recentyears, that being: if a government wants to penalize you, they can and they will. This is because these broad definitions allow for practically anything to be criminalized, even if they are not listed within the Criminal Code. This is the method that governments use to do whatever they want with individuals.

VI. Erosion of criminal law safeguards

VI. 1. Increase in the use of propensity evidence

Within Criminal law the use of propensity evidence was forbidden. Propensity evidence refers to a rule regarding that just because someone committed certain actions in the past, it is not just to assume they committed the same or similar action they are being accused of now without providing reasonable evidence. However, this cardinal rule that was once present in law, no longer exists. This is a direct example of the erosion that has taken place within criminal law, as safeguards that were once present to protect individuals from being accused on anything other than proof beyond a reasonable doubt has been faded out.

VI. 2. Defamation law suit against accused who denies they have committed a crime

Up until recently, if you were accused of a crime, you had the right to defend yourself.

However, you can not do this now. Although you can in theory, it is very likely to have negatives that far outweigh the benefits. The things that one says within their defense can be used against them if someone files a defamation lawsuit regarding the defenses made. This is a way of restricting the constitutional process of defending yourself in trial, and it is argued to be not only unconstitutional, but a clear demonstration of the erosion of safeguards society once had against governments exuding a monopoly of power. By the government permitting these defamation law suits, they are restricting both the right and ability to defend in a criminal trial. This makes it hard for one to defend themselves against their government as they are essentially powerless and unprotected. It is argued that governments should have limits and respect them. However, these limits are now blurred.

VII. Counterarguments

VII. 1. Counterargument for disappearance of criminal law principles

One may argue that the disappearance of criminal law principles is just a continuation of the ever changing ways that law has been administered within society. However, although they may as know ledge that yes, law is in fact changing, it is changing at a rate that is too rapid and negating principles and safeguards that it was forged upon for hundreds of years. The principles of criminal law that were seen as essential within Beccaria's time are now being thrown out for a shift in protecting the government rather than its citizens (Beccaria, 1963). This is irrational as the government already has a monopoly of power over its citizens and does not need the same protections that its people do. Nevertheless, it is argued that criminal law should return to the goal of ensuring that no innocent person shall suffer a criminal punishment.

VII. 2. Counterargument for the use of corrective raining

Though one may argue that the use of corrective training is extremely effective as it creates individual units from a mass of bodies through using elements of Hierarchical observation, normalizing judgment, and examination to create a homogeneous society of control. It is argued that society should challenge the status quo and question things that are present in everyday life. This is important because the status quo is being imposed on society by force. So, if society critically questions and analyzes these theories, it can allow for reflection on how these institutions truly work.

VII. 3. Counterargument for the shift in precautionary harm

While yes, the argument can be made that a shift in precautionary harm-based governance through anti-terrorism laws, threats of national security, and surveillance is important because it does have real implications such as stopping real harm, this was not the point I was arguing. Rather, I was using these examples to demonstrate that while the laws have subsistence of societal benefits underpinned within them, it allows for governments to micromanage its citizens, and invade privacy. This is argued to be a safeguard that the government has adopted to protect itself from society and illustrates the shift to precautionary harm, through monitoring its subjects.

VII. 4. Counterargument for the use of court orders

Court orders have relevance as they can act as deterrents to stop from engaging in prohibited behavior out of fear of being prosecuted. Yes, this is true. However, the main argument is that the broadness of definitions and criminalization of every day conducts that are not present within the Canadian Criminal Code illustrate the monopoly of power that governments have over its citizens. This is important as it illustrates a theme that has traversed criminal law principles in recent years, that being: if a government wants to penalize you, they can and they will. This is because these broad definitions allow for practically anything to be criminalized.

VII. 5. Counterargument for the erosion of criminal law safeguards

While the erosion of criminal safeguards such as the recent insurgence of importance placed on a victim's testimony empowers them and can therefore be seen as a positive, it has negative consequences on the accused. The two eroding safeguards I focused on depict the corruption that is now rampant within the criminal court system and shows that victims are no longer protected through processes that used to be there.

VIII. Conclusion

Through carefully analyzing the disappearance of criminal law principles, the means of corrective training, the recent shift in criminal law moving to precautionary harm, the overuse of court orders, and the erosion of criminal law safeguards, this essay has demonstrated that the elements of criminal law, society once knew no longer exist. Furthermore, this essay has provided examples to illustrate that criminal law has shifted from a focus of concrete social harm to a shift of precautionary harm, or protecting the government from its society, rather than protecting society from the government. This is significant as society no longer has protections from the monopoly of power the government

has. This in turn allows the government to have unchecked power that is not limited and authorizes it with the ability to criminalize any conduct, or thought they deem appropriate. This is dangerous as it often results in victimless crimes and unconstitutional procedures that were once unthinkable in criminal law.

Bibliography

- Beccaria, C. (1963). *On Crimes and Punishments*. Indianapolis: Bobbs-Merrill.

- Foucault, M. (1995). *Discipline and Punish: The Birth of the Prison*. New York: Vintage Books.