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THE REFORM OF CRIMINAL PROCEDURE:

From United Nations Policy to Canadian Law

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THE REFORM OF CRIMINAL PROCEDURE:
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Introduction

The reform of criminal procedure has always been a concern of the United Nations. Early in 1948, the United Nations adopted the *Universal Declaration of Human Rights*, which enshrines a series of principles, including equality before the law, presumption of innocence, the right to a fair and public hearing by an independent and impartial tribunal, and the right to defence of everyone charged with a criminal offence. These principles, supported by the majority of United Nations Member States, are the fundamentals in the reform of criminal procedure in various jurisdictions, including the West and the East, the South and the North.

Since the mid-1970s, and particularly during the last decade, the United Nations, its Congresses on the Prevention of Crime and the Treatment of Offenders, the Committee of Crime Prevention and Control and the newly established Commission on Crime Prevention and Criminal Justice, and various affiliated criminal justice institutions, have been engaged in continuous efforts to encourage and assist effective implementation of these general principles in the reform of national systems of criminal procedure. A variety of new instruments have been adopted through these efforts. These instruments provide policies, norms and guidelines, which not only reiterate and enrich the general

principles such as the independence of the judiciary, but also promote new concepts such as the protection of victims.

At least four subjects of this Beijing conference are also the emphases of United Nations criminal justice policies. They are:

- the independence of the judiciary;
- the role of defence counsel;
- the exclusion of evidence; and
- the protection of victims.

Given the diversity of social contexts, the implementation of international standards in national law and practice has to take into account the particular political, economic, cultural and legal conditions in various nations. Different approaches and models are used in different nations to achieve the same general principles that are embodied in United Nations policies. This diversity determines the need to promote the exchange of ideas and experiences between different nations.

The general concept underlying the four subjects as listed above is the basic protection of human rights. In Canada, the *Canadian Bill of Rights* of 1960 was the first Canadian federal legislative enactment to specifically set out fundamental human rights in the field of criminal process. However, since the Bill is only a statute and is subject to repeal, it was not until the advent of the Canadian *Charter of Rights and Freedoms* in 1982 that human rights in the criminal process were expressly protected in the Canadian Constitution. The Charter is paramount over other legislation because it is entrenched in the Constitution and is the supreme law of Canada. Under the Charter, the court can declare, on proper legal grounds, that state actions or laws have violated a "Charter right" and is invalid insofar as it conflicts with the Charter.

In Canada, the reform of criminal procedural law, including the implementation of United Nations policies in the criminal justice system, has been a long term process involving frequent interaction amongst different ideas, groups and communities, studies and debates. Drafts of a new *Criminal Code* and a new *Code of Criminal Procedure* were prepared some years ago, but not acted upon by Parliament. It is noteworthy that these proposals for reform are guided by seven governing principles:

1. The Principle of Fairness: Procedures Should be Fair;
2. The Principle of Efficiency: Procedures Should be Efficient;
3. The Principle of Clarity: Procedures Should Be Clear and Understandable;
4. The Principle of Restraint: Where Procedures Intrude on Freedom They Should Be Used with Restraint;
5. The Principle of Accountability: Those Exercising Procedural Power of Authority Should Be Accountable for Its Use;
6. The Principle of Participation: Procedures Should Provide for the Meaningful Participation of Citizens;
7. The Principle of Protection: Procedures Should Enhance the Protection of Society;[1]

Canada is committed to the process of implementing United Nations policies through its law reform, and in particular, through the judicial application of *Charter sections* in criminal proceedings. Indeed, during the last twelve years, Canadian courts have already brought about significant changes to the law of criminal procedure in this direction.

[1] For general information of criminal procedure reform in Canada, see Law Reform Commission of Canada (1988), *Report on Our Criminal Procedure*; and Law Reform Commission of Canada (1991), *Report on Recodifying Criminal Procedure.*

We have noted in our review that like Canada, the People's Republic of China is also making endeavors to reform criminal procedure. During the past fifteen years, the world has witnessed a transition in China from the period of the Cultural Revolution to a legal system moving towards the implementation of the rule of law, equality before the law, and the recognition of basic human rights. In particular, recent Chinese publications[2] indicate a significant departure of Chinese jurisprudence from Andrey Vyshinski's theory of using the criminal law mainly as a tool of the so called "class struggle". Furthermore, the preparation of a revised *Law of Criminal Procedure* in China appears to be consistent with the overall international trend of law reform in countries searching democratic forms of government, promoting the rule of law, and respect for human rights.

To share our Canadian experience of law reform, this paper highlights updated United Nations instruments in relation to the four subjects as listed above and examines the relevant development in the Canadian system of criminal procedure. It does not attempt to provide an exhaustive review of all the details of these developments, but only to provide a number of key examples of progress being made.

[2] See e.g., Fan, Chong-yi & Xiao, Sheng-xi (eds.) (1991). *The Study of Criminal Procedural Law: Review and Commentaries*. Beijing: Publishing House at China University of Political Sciences and Law. pp. 338-345.

1. The Independence of the Judiciary

1.1 Relevant United Nations Instruments

An important United Nations instrument in relation to this subject is the *Basic Principles on the Independence of the Judiciary*, that was prepared by the Committee on Crime Prevention and Control upon a request of the Sixth Congress, adopted by the Seventh Congress and welcomed by the General Assembly in 1985.[3]

The main points of the Basic Principles include:

- The independence of the judiciary shall be guaranteed by the State and enshrined in the national law.
- The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law.
- The judiciary shall have jurisdiction over all issues of a judicial nature.
- There shall not be any inappropriate or unwarranted interference with the judicial process.
- Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures.
- Judges shall be subject to suspension or removal only for reasons of incapacity or behavior that renders them unfit to discharge their duties.

[3] See General Assembly resolution 40/146, 1985.

On the recommendation of the Committee on Crime Prevention and Control, the Economic and Social Council adopted the *Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary* in May 1989.[4] The Procedures require Governments to adopt and implement in their justice systems the Basic Principles in accordance with their constitutional process and domestic practice, publicize the Basic Principles in their official languages, and make the text available to all members of the judiciary. In addition, the Procedures invite the relevant institutions of the United Nations to help Governments, at their request, in setting up and strengthening independent judicial systems.

Independence of the judiciary requires the exclusion of external interference to the judicial process, but does not deny the judicial power to oversee the entire criminal proceedings and to issue the writ of *habeas corpus.* The court can review pre-trial investigation and decide the lawfulness of arrest and detention made by the police. In 1988, the General Assembly approved the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*,[5] which provides that the exercise of police power to arrest a person, keep him under detention or investigate the case shall be subject to recourse to a judicial authority.[6] In addition, a person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial authority[7]. The court has the power to order an immediate release after the review.

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[4] See Economic and Social Council resolution 1989/60.

[5] General Assembly resolution 43/173, 1988.

[6] *Ibid.*, Principle 9.

[7] *Ibid.*, Principle 11, s.1.

Furthermore, the court is to be independent to decide whether an arrested person should be released on bail pending trial, although such decisions may not always be welcomed by the police.[8]

Independence of the judiciary requires the impartiality of the court in criminal proceedings. Under an adversarial system, the court shall "hear" the case rather than actively participating in the investigation of the case. The onus of proving the case is for the prosecution. The principle of the "presumption of innocence" is embodied in a number of United Nations instruments ranging from the 1948 Universal Declaration to the 1988 *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.* The Body of Principles, for example, states: "A detained person suspected of or charged with a criminal offence shall be presumed innocent ... until proved guilty according to law."[9] This requires the prosecutor alone to bear the onus of proving the guilt beyond a reasonable doubt.

1.2 The Canadian System

The primary role of the judiciary is to safeguard the supremacy of the law and to uphold the rule of law. In recognition of this role, the various branches of the Canadian government have been conscious of the need to preserve and enhance the independence of judges. In its early years, the Canadian legal system inherited the principle "independence of the judiciary" from the United

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[8] *Ibid.*, Principle 39.

[9] *Ibid.*, Principle 36.

Kingdom.[10] This principle is embodied in several pieces of legislation, including the *Constitution Act, 1867* the *Charter of Rights and Freedoms*, the *Judges Act*, and a number of federal and provincial statutes governing the courts. The *Constitution Act, 1867*[11] specifically acknowledges the principle through the judicial provisions respecting tenure, removal and the fixing and payment of salaries, annuities and allowances. In addition, the *Supreme Court Act*, *The Federal Court* , *The Judges Act* and other acts provide more specified procedures and criteria of judge appointment and removal, whereas the Charter entrenches the right of an individual citizen to have his case tried by an independent and impartial tribunal.[12]

The Charter by necessary implication guarantees the independence of the judiciary. Section 7 of the Charter provides that:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The independence of the judiciary has also been recognized and affirmed by Canadian Courts as one of the fundamental precepts of the Canadian justice system. Courts and judges are required to be independent from the legislative, and particularly the executive, branches of government.[13]

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[10] The preamble to the *Constitution Act*, 1867, (1982) states that Canada shall have a constitution similar in principle to that of the United Kingdom.

[11] See ss.91-101.

[12] For more discussion of judicial independence in Canada, see Canadian Bar Association (1985), *Report of the Canadian Bar Association Committee on the Independence of the Judiciary in Canada*.

[13] Valente v. The Queen (1985), 2 S.C.R. 673; The Queen v. Beauregard (1986), 2 S.C.R. 56. (Supreme Court Reports)

Section 11(d) of the Charter combines the principle of judicial independence with presumption of innocence and legality, stating that any person charged with an offence has the right:

> to be presumed innocent until proven guilty according to law in public hearing by an independent and impartial tribunal.

The Supreme Court of Canada has indicated that this principle applies to all types of judicial tribunals, including a court martial.[14] Based on the notion of checks-and-balances, the Canadian judiciary is clearly separate from the police, the prosecution, and other governmental branches. Direct interference of specific judicial proceedings from these groups is rare in Canada. Therefore, limiting direct administrative interference of criminal proceedings is not a serious concern in the post-Charter efforts to ensure judicial independence. Rather, the secure status of judges and their remunerations and benefits appear to have been the focus of case law in relation to judicial independence.

The process of judicial appointments is also undergoing reforms at both the Federal and Provincial levels. Most recently at the provincial level, the process starts from advertising vacancies and inviting qualified candidates to apply for appointment. Advisory committees have been established to review and make recommendations to the Attorney General. The committees usually consist of lawyers, law professors, judges, and lay persons working within the justice system. They are appointed by the government, but are not officials of the government. In principle, this process is designed to achieve professional

[14] R. v. Genereux (1992), 70 C.C.C. (3d) 1 (S.C.C.).

competence and employment equality and to be independent from influence by political patronage or special-interest groups. In the past several years, the Federal process has also been revised and made more accountable.[15]

Since the mid 1980's, the Supreme Court of Canada has repeatedly indicated that, to be "independent", the judiciary must have security of tenure, financial security and institutional independence with respect to matters of administration that relate directly to the exercise of their judicial function.[16] It is a long time belief that judges must be free from the fear of being removed from the office for performing their duties. Though appointed by the government, Canadian judges are protected by law against any arbitrary decisions of governments to remove them from the office. This applies to both federally and provincially appointed judges.

Under Canadian law, a judge can only be removed either because he has reached the mandatory retirement age or he has failed to be of *good behaviour*. The various Court Acts, Judges Act and provincial statutes set seventy-five as a mandatory retirement age for a federally appointed judge, and seventy for most provincial judges.[17] In general, however, the standard of "good behaviour" is not clearly defined in law and is subject to

[15] For a general description of the judicial appointment process, see the Judicial Appointments Advisory Committee, Province of Ontario (1992), *The Judicial Appointments Advisory Committee (A Three-Year Pilot Project): Final Report and Recommendations*. For general information regarding the process of judicial appointment and removal at the federal level, see Minister of Justice and Attorney General of Canada (1993), *A New Judicial Appointments Process*; and Commissioner for Federal Judicial Affairs (1993), *Judicial Appointments: Information Guide*.

[16] See e.g., R. v. Genereux (1992), 70 C.C.C. (3d) 1 (S.C.C.), and Valente v. R. (1985), 23 C.C.C. (3d) 193 (S.C.C.).

[17] See Gall, G. L. (1990), *The Canadian Legal System* (3d), Toronto: Carswell, at pp. 226-7.

discretion. Section 65 of The *Judges Act* 1985 provides a list of behaviors that constitute incapacity or unfitness to hold office, such as:

(a) age or infirmity,
(b) having been guilty of misconduct,
(c) having failed in the due execution of his office, or
(d) having been placed, by his conduct or otherwise, in a position incompatible with the due execution of his office.

"Misconduct" certainly includes deliberate wrongdoing against the law, violation of basic ethics of the legal profession, and gross negligence of duty, such as abusing power, being involved in a sex scandal, taking any gift from the parties, and even attending a feast arranged by a party of an ongoing proceedings. However, whether the term also refers to negligence or stupidity of a less serious nature is still open to debate.

In most cases, the entities in charge of internal inquiries and investigation on the incapacity issue are the Canadian Judicial Council and the various provincial Judicial Councils. The Council only undertakes an inquiry at the request of the Minister of Justice of Canada or the Attorney General of a province, and after its inquiry, reports to the Minister or the Attorney General. If there are sufficient grounds, the Council may recommend a removal of a judge. Criminal investigation against a judge, however, is conducted by the police.

There have been a number of incidents where lower court judges in Canada were removed for committing misconduct, although no superior court judge has ever been removed.[18] In an Ontario case, for example, a judge was removed for attempting to solicit sexual gratification from a prostitute scheduled to appear before him and from a policewoman whom he believed to be a prostitute awaiting trial, and for falsely testifying as to these incidents.[19] In a less serious case, an Ontario Provincial Court Judge was removed for threatening police officers who enforced the local parking bylaw with contempt.[20] Criminal conviction of a judge is rare in Canada.[21]

The Charter has also embodied the remedy of *habeas corpus* as a constitutional right by stating in s.10 (c) that everyone has the right on arrest or detention,

> to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Although the use of *habeas corpus* has rarely been an issue in post-Charter cases, the exercise of the right to bail under section 11(e) of the Charter is currently a concern in practice and in particular amongst the police and crime witnesses. This section states that any person charged with an offence has the right not to be denied reasonable bail without just cause. In some cases, freely

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[18] There have been two attempts to remove superiour court judges. The most recent case in Ontario ended in the judge resigning before the matter was dealt with by parliament.

[19] Ibid., footnote 17 at pp. 222-3.

[20] Ibid, at p. 232.

[21] For more discussion, see ibid., at 234.

granted bail without prior consultation with or notification to relevant police services have generated police animosity towards a court and caused potential fear of retaliation to the witnesses. While recognizing the independence of the judiciary, efforts to improve the coordination between different branches of the criminal justice system are still needed.

The post-Charter era has also witnessed an expansion of judicial activism in legislative and administrative matters. As the constitutional guardian in Canada, the Supreme Court of Canada has redefined its relationship to the legislative and the executive branches of the government so as to maximize its capacity to protect civil rights and liberties against legislative and executive encroachment by declaring specific pieces of enactment and administrative decisions void.[22] This is considered as a new concept of judicial independence. However, there are ongoing debates concerning whether or not the Canadian judiciary should continue to play the traditional extra-judicial roles of providing advisory opinions to the governments and providing judges to serve on commissions of inquiry. To some critics allegations are made that, the judiciary are often used by the government for political gains and partisan purposes. "The reference and inquiry statutes", they write, "treat Canadian judges in some respects as Attorney General, members of the cabinet available to render advice and recommendations at the Prime Minister's request and convenience", and therefore, are likely to undermine the public's faith in the impartiality and independence of the courts.[23]

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[22] According to an in-depth study, approximately 5,000 Charter cases were litigated in Canadian courts between 1982 and 1990, and the Supreme Court of Canada decided about twenty-five cases raising Charter issues each year in the later 1980s. See Holland, K.M. (1990), "Judicial Activism and Judicial Independence: Implications of the Charter of Rights and Freedoms for the Reference Procedure and Judicial Service on Commissions of Injury," *CJLS/RCDS* Vol.5: 95-109, at p.105, quoted from F.L.Morton, *Charter Database Project*, The University of Calgary, Calgary, Alberta, 1990.

[23] Quoted from Holland, *Ibid*., 104.

2. The Role of Defence Counsel

2.1 Relevant United Nations Instruments

In 1985, the Seventh Congress adopted resolution 18 in which the Congress requested Member States to protect lawyers against undue restrictions and pressures in the exercise of their functions. Five years later, the Eighth Congress adopted the *Basic Principles on the Role of Lawyers*, which were subsequently welcomed by the General Assembly in 1990.[24]

The Eighth Congress recommended the Basic Principles to Governments for implementation within the framework of their national legislation. Main points of the Basic Principles include:

- All persons should have guaranteed access to lawyers and legal services in all stages of criminal proceedings.[25]
- All persons should be immediately informed of their right to counsel upon arrest or detention or when charged with a criminal offence.[26]
- All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer without delay and in full confidentiality.[27]

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[24] United Nations (1991), Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders: Report prepared by the Secretariat, at pp.117-123.

[25] *Basic Principles on the Role of Lawyers*, s.1.

[26] *Ibid.*, s.5.

[27] *Ibid.*, s.8.

- Any such persons who do not have a lawyer shall be entitled to have a lawyer assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.[28]

Under these principles, defence counsel shall play an active role in all stages of the criminal proceedings, including the period of pre-trial investigation, the trial and appeal stages, and the post-sentencing stage.

The Basic Principles also set forth a twofold series of duties and responsibilities for lawyers. On the one hand, lawyers shall always loyally respect the interests of their clients[29] and perform three categories of responsibilities to them:[30]

- Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;
- Assisting clients in every appropriate way, and taking legal action to protect their interests;
- Assisting clients before courts, tribunals or administrative authorities, where appropriate.

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[28] *Ibid.*, s.6.

[29] *Ibid.*, s.15.

[30] *Ibid.*, s.13.

On the other hand, to reduce misconduct in legal practice, lawyers are required to act freely and diligently in accordance with the law and with recognized standards and ethics of the legal profession.[31]

Considering the actual situation of legal practice, the Basic Principles call upon Governments to ensure that lawyers in their jurisdictions: (a) are able to perform all of their professional functions without intimidation, interference, harassment or improper interference; (b) are able to travel and to consult with their clients freely; and (c) shall not suffer prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.[32] In addition, Governments are to recognize that all communications and consultations between lawyers and their clients within their professional relationship are confidential.[33]

The 1988 *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* also provide a number of norms in relation to the right to counsel in criminal proceedings. The main points are:

- A detained person shall have the right to be assisted by counsel as prescribed by law.[34]
- If the person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority

[31] *Ibid.*, s.14.

[32] *Ibid.*, s.16.

[33] *Ibid.*, s.24.

[34] *Supra* n.4, Principle 11, s.1.

in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.[35]

- A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel, and be allowed adequate time and facilities for this purpose.

2.2 The Canadian System

Some years ago, a Canadian law scholar wrote:

> The right to receive legal advice and assistance is fundamental to our concept of fairness in criminal proceedings. However, the best legal counsel in the world is not going to be of much help if he only enters the picture at the trial stage when all the damage may be done at the pre-trial stage.[36]

Traditionally, the right of an accused person to counsel at all stages of the criminal proceedings is a well founded principle in common law countries. Under section 10(b) of the Charter, it is properly provided as a right on arrest or detention:

> to retain and instruct counsel without delay and to be informed of that right.

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[35] *Ibid.*, Principle 17, s.1, Principle 18, ss.1 & 2.

[36] Mewett, A.W. (1988), *An Introduction to the Criminal Process in Canada*, Toronto: Carswell, at pp. 21-22.

In Canada, whether or not an accused has the right to counsel during the time of investigation is not an issue in court. Rather, a main concern in post-Charter case law is how to ensure the exercise of this right. To this point, the position of the court has been very consistent: Although the right to counsel is a right of the accused person, the state has the duty to assist him exercise this right.

This duty requires the state provide reasonable opportunities and means to the accused person for the exercise of his right, including the provision of an access to a telephone, a duty (counsel) lawyer and financial aid if necessary. In *R. v. Brydges* (1990),[37] the Supreme Court of Canada indicated that where an accused person in effect requests the assistance of counsel, a police officer is under a duty to facilitate contact with counsel by giving him a "reasonable opportunity" to exercise his right to counsel. Furthermore, where the person expresses a concern that he is unable to afford a lawyer, the officer has a duty to inform him of the availability of legal aid.

In *R. v. Manninen* (1987), the Supreme Court of Canada decided that it is not necessary for an accused person to make an express request to use the telephone to contact counsel, the arresting officer has the duty to facilitate contact with counsel which includes the duty to offer use of a telephone. In the same case, the Court holds that section 10(b) of the Charter also imposes on the police the duty to cease questioning or otherwise attempting to elicit evidence from the detainee until he has had a "reasonable opportunity" to obtain advice from counsel as to how to exercise his right.[38]

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[37] 53 C.C.C. (3d) 1.

[38] 34 C.C.C. (3d) 385.

The proper exercise of the right to counsel relies on the accused person's understanding of the jeopardy he is facing. In *R. v. Black* (1989), it is decided that a person can only exercise his s.10(b) right in a meaningful way if he knows the charge, and that he is entitled to a "reasonable opportunity" to contact counsel again if the police change the charge.[39] In a recent decision, *R. v. Bartle* (1994), the Supreme Court of Canada ruled that police officers may not require an impaired-driving suspect to take a breathalyser test until the person has been given a "reasonable opportunity" to contact a lawyer, whatever the time or place.[40]

Since the Charter entered into force, the term "detention" has been interpreted by the court to such a broad extent that even a temporary stop for a breathalyzer test on the road side is also included. In *R. v. Therens* (1985), the Supreme Court of Canada decided that section 10(b) applies to arrest and any kind of detention which constitutes a deprivation of liberty by physical constraint or a control over the movement of a person by a police officer or other agent of the state. Therefore, a person subject to a demand for a breathalyzer test under the *Criminal Code* is considered "detained", and has a right to counsel without delay.[41]

Overall, in Canada, the role of the defence counsel is to protect and advance the best interests of the accused person, rather than protecting the interests of the state or the public interest, which is the responsibility of the police and the prosecution. The state has the entire machinery of investigation and

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[39] 50 C.C.C. (3d) 1.

[40] Unreported as yet Supreme Court of Canada Judgement, September 30, 1994 part of six cases heard by the court on the issue.

[41] 18 C.C.C. (3d) 481.

prosecution to preserve public interests, whereas the accused person can only rely on himself, friends, relations and especially his counsel to protect his interests. It is simply against the notion of fairness if defence counsel is required to cooperate with the state in criminal proceedings. Requesting defence counsel to defend public interests by breaching the trust underlying his relationship with the client undermines the fundamentals of the adversarial system, which is ultimately far more harmful to a modern society than any single ordinary criminal incident.

We note that in China it is a controversial subject as to whether or not the defence counsel should report to the police a hidden criminal incident involving his client.[42] Under the Canadian law, largely due to the solicitor-client privilege, defence counsel is not required to report anything to the authorities. However, in theory, whether counsel does so in a case of emergency to prevent a gross loss of lives (e.g., knowing there will be an explosion of a nuclear bomb for terrorist purpose) is an interesting issue. Indeed, the Canadian Bar Association's *Code of Professional Conduct* (1988) has not eliminated the possibility of future development on this issue. The Code states:

> The lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and should not divulge such information unless disclosure is expressly or impliedly authorized by the client, *required by law* or otherwise permitted or required by this Code.[43]

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[42] See *supra* n.2, at pp. 94-100.

[43] See Canadian Bar Association (1988), *Code of Professional Conduct*, s. 4. Ottawa: Canadian Bar Association.

It would be interesting to see, as our Chinese colleagues suggested in their work in 1991, that the law sets out exceptions to the duty of no disclosure.[44] Such exceptions, however, should be expressly stipulated in a statute and should only used for the purpose of preventing imminent danger to life or public safety, e.g., an ongoing plot of murder, an ongoing terrorist operation, or a human caused environmental disaster.

[44] See *supra* n.2, at pp. 99-100.

3. The Exclusion of Evidence

*3.1 **Relevant** United Nations **Instruments***

In the law of criminal procedure and evidence, exclusion of evidence serves as an effective remedy to violations of substantive and procedural requirements including human rights. This underlies the following statement of the 1988 *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, which aims at a comprehensive protection of detainees' rights:

> Non-compliance with principles such as the right to counsel, the right against torture, and the right against arbitrary detention in obtaining evidence shall be taken into account in determining the admissibility of such evidence against a detained person.[45]

The use of torture to obtain evidence has been a long term concern of the international community. In 1975, the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders and the General Assembly adopted a *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,[46] which declares that the use of torture to obtain information for confession in a criminal investigation is an offence to human dignity and shall be condemned as a

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[45] *Supra* n.4, Principle 27.

[46] General Assembly resolution 3452 (XXX), 1975.

violation of international human rights standards that are proclaimed in the *Universal Declaration of Human Rights*.[47]

In 1979, the General Assembly adopted the *Code of Conduct for Law Enforcement Officials prepared by the Committee on Crime Prevention and Control*.[48] The Code sets forth important norms for the collection of criminal evidence by the police. It requires that, in the performance of their duty, law enforcement officials shall respect and protect human dignity and uphold the human rights of all persons. The Code states that, under any circumstances, no law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment. Furthermore, law enforcement officials are required to prevent and oppose any violations of the rules against the use of such treatment or punishment.[49]

In 1989, the Economic and Social Council adopted the *Guidelines for the Effective Implementation of the Code of Conduct for Law Enforcement Officials*, a document prepared and recommended by the Committee on Crime Prevention and Control.[50] The Guidelines require Governments to accept the principles of the Code in national legislation and practice, make it applicable to all law enforcement officials, and publish the Code to the general public.

In the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, main points in relation to the protection against torture, cruel and inhuman treatment, and self-incrimination include:

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[47] Articles 1 & 2.

[48] General Assembly resolution 34/169, 1979.

[49] *Ibid.*, Articles 1, 2, 5, & 8.

[50] Economic and Social Council resolution 1989/61.

- All persons under any form of detention shall be treated in a humane manner and with respect for the inherent dignity of the human person.[51]
- No person under any form of detention shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[52]
- It shall be prohibited to take undue advantage of the situation of a detained person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.[53]
- No detained person while being interrogated shall be subject to violence, threats, or methods of interrogation which impair his capacity of decision or his judgment.[54]
- The duration of any interrogation of a detained person and of the intervals between interrogations shall be recorded and certified in such form as may be prescribed by law.[55]
- A detained person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary to appropriate authorities vested with reviewing or remedial powers.[56]

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[51] supra n.4, Principle 1.

[52] *Ibid.*, Principle 6.

[53] *Ibid.*, Principle 21, s.1.

[54] *Ibid.*, Principle 21, s.2.

[55] *Ibid.*, Principle 23.

[56] *Ibid.*, Principle 33.

Aside from torture, arbitrary detention and violation of the right to counsel can also affect the admissibility of evidence. The *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* also provides:

- Arrest and detention shall only be carried out strictly in accordance with the law and shall be ordered by a judicial or other authority.[57]
- Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.[58]
- A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.[59]
- No person shall be kept under detention pending investigation or trial except upon the written order of a judicial or other authority.[60]
- Communications between a detained person and his counsel shall be inadmissible as evidence against him unless they are connected with a continuing or contemplated crime.[61]

3.2 The Canadian System

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[57] *Ibid.*, Principle 2.

[58] *Ibid.*, Principle 10.

[59] *Ibid.*, Principle 32.

[60] *Ibid.*, Principle 37.

[61] *Ibid.*, Principle 18, s.5.

Torture is a serious offence under the Canadian law. Under section 269.1 of the *Criminal Code*, an official who inflicts torture on any other person is guilty of an indictable offence and is liable to imprisonment for a term not exceeding fourteen years. Significantly, section 269.1(4) bars the admission of any statement obtained as a result of torture.

Prior to the Charter, however, the sole determinative factor of admissibility was the relevance of the evidence, if the case did not involve the use of torture. This indicated a different approach as compared with the systems in the United States and Australia, where fairness and legality are considered to be equally important. In other words, illegally obtained evidence was admissible in Canadian courts, provided that such evidence was relevant to the case. The court, while accepting the evidence, would either look at the matter of illegality separately (e.g., by imposing a sanction on the wrongdoer) or leave the matter to the relevant police department for a internal disciplinary settlement. In 1970, the Supreme Court of Canada in the *R. v. Wray* case made it clear that evidence could be excluded based on the consideration of bringing the "administration of justice into disrepute".

The test has advanced further since the Charter came into force. The Charter, in section 24(2), prescribes a general rule to address the relationship between illegality and admissibility. The complete section reads:

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Following this significant step towards inadmissibility of evidence, defence counsel in Canada have been trying and continue to try to exclude illegally obtained evidence. Indeed, exclusion of evidence based on illegality has become one of the most frequently raised issues of criminal procedural law in the courts. However, under section 24(2), illegality in itself is not enough for an exclusion. There are two additional conditions: first, the evidence must be obtained in a manner which infringes a Charter right; second, the admission of this evidence would bring the administration of justice into disrepute.

This Canadian rule appears different from its counterparts in a number of other common law jurisdictions. As Mewett has described, the American law excludes all illegally obtained evidence and all evidence that is derived from the illegality (with notable exceptions developed by the Courts). The Australian and the Scottish laws either give the courts a discretion to exclude illegally obtained evidence which is basically admissible or give them a limited discretion to admit illegally obtained evidence which is basically inadmissible.[62] In essence, section 24(2) of the Charter does not exclude all illegally obtained evidence, let alone all evidence that is derived from the illegality. Rather, it allows the court to use its

[62] See *supra* n.32, at p.173.

discretion to define what would "bring the administration of justice into disrepute".

The Supreme Court of Canada has made a series of decisions in relation to section 24(2). The Court holds that section 24(2) is the sole basis for the exclusion of evidence because of an infringement or denial of a right or freedom guaranteed by the Charter.[63] In the landmark case of *Collins v. R.* (1987),[64] the Court stresses that the purpose of the exclusionary rule of this section is not to remedy police misconduct, but to prevent having the administration of justice brought into further disrepute by the admission of the evidence in the proceedings. The Court formulated a threefold test, which is objectively based on the understanding of an average person in the community. As the Court prescribed in this case, the question is would the admission of the evidence bring about such a consequence in the eyes of a reasonable man, dispassionate and fully apprised of the circumstances of the case? To find an answer, the Court holds, that three groups of factors should be considered:

First, the effect of the admission of the evidence on the fairness of the trial should be considered with reference to the nature of the evidence obtained and the nature of the right violated. Real evidence obtained which existed irrespective of the violation of the Charter does not render a trial unfair by its admission.

Second, the seriousness of the Charter violation bears on the disrepute that will result from judicial acceptance of evidence thereby obtained. Good faith on the part of the officials is relevant, and if alternate means of obtaining the

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[63] See R. v. Therens (1985), 18 C.C.C. (3d) 481.

[64] 33 C.C.C. (3d) 1.

evidence without violating the Charter were available, the violation is more serious.

Third, evidence should not be excluded if the effect of such exclusion would bring the administration of justice into further disrepute than its admission.

The rules in Collins requires careful consideration of a variety of factors and especially the balance of interests. In other court decisions, the Supreme Court of Canada has limited the flexibility of these rules. For instance, in one case, the Court holds that evidence obtained directly by a violation of the right to counsel (s. 10(b) of the Charter) must be excluded even if the violation was in good faith.[65]

Significantly, in a 1991 case, the Supreme Court of Canada decided that the admission of self-incriminatory evidence obtained by a Charter breach will generally render the trial unfair, notwithstanding that there may be other admissible evidence which incriminates the defendant. The Court also stated that the seriousness of a Charter violation favours exclusion of tainted evidence, and is not attenuated by an assertion of investigative good faith. The seriousness of the offence, however, is not *per se* justification for admission.[66] The most recent decision of the Supreme Court in a case involving a DNA sample obtained "dishonestly" by the police in a sexual assault case. The court stated that..."A consent given where both the right to be informed of the charge and of the right to counsel have been violated is not a valid consent, and without that consent, the taking of the blood here was an unlawful and unreasonable seizure." and the evidence was properly excluded.[67]

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[65] Rahn v. R. (1985), 18 C.C.C. (3d) 516 (S.C.C.); and R. v. Therens (1985), 18 C.C.C. (3d) 481 (S.C.C.).

[66] R. v. Broyles (1991), 68 C.C.C. (3d) 308 (S.C.C.).

[67] R. v. Borden (1994) judgement rendered by the Supreme Court on September 30, 1994 as yet unreported.

4. The Protection of Victims

4.1 Relevant United Nations Instruments

Preparation of instruments for the purpose of protecting victims of crime is a relatively new area in United Nations criminal justice programs, although the discussion of victimology has a longer history of development. In this field, the most important United Nations instrument is the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, which was recommended by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and adopted by the General Assembly in 1985.[68]

Subsequently, in 1986-90, the Economic and Social Council adopted two resolutions for the implementation of the Declaration through national and international actions.[69] In its resolution 1989/57, the Council called upon Member States to ensure that victims are kept informed of their rights and opportunities with respect to redress from the offender, from third parties or from the State, as well as of the progress of the relevant criminal proceedings and of any opportunities that may be involved. Furthermore, the Eighth Congress in 1990 adopted a resolution entitled *Protection of the Human Rights of Victims of Crime and Abuse of Power*, recommending that Governments take into account the provisions of the Declaration in framing their national legislation, ensure the availability of public and social support services for victims, and foster culturally appropriate programs for victim assistance, information and compensation.[70]

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[68] General Assembly resolution 40/34, 1985.

[69] Economic and Social Council resolutions 1989/57 and 1990/22.

[70] See supra n.32, at pp. 194-196.

The Declaration defines "victims" as persons who, individually or collectively, have suffered harm, through acts or omissions that are in violation of criminal laws, including those laws proscribing criminal abuse of power;[71] as well as the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.[72] The term "harm" includes physical or mental injury, emotional suffering, economic loss or substantial impairment of fundamental rights.

Four types of protections are prescribed in the Declaration for the victims:

(1) The right to have access to justice and fair treatment

Victims are entitled to access to the mechanisms of justice and to prompt redress for the harm that they have suffered.[73] Governments should establish judicial and administrative mechanisms to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights.[74] They should be informed of the proceedings and the disposition of their cases, allowed to present their concerns at appropriate stages of the proceedings, obtain assistance throughout the legal process, and be protected from intimidation and retaliation.[75]

(2) The right to have restitution

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[71] See Declaration, s.1.

[72] *Ibid.*, s.2.

[73] *Ibid.*, s.4.

[74] *Ibid.*, s.5.

[75] *Ibid.*, s.6.

Offenders of third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependents. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.[76] Restitution should become an available sentencing option in criminal cases, in addition to other criminal sanctions.[77] Restitution includes restoration of the environment in cases of substantial harm to the environment.[78] Where public officials acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State.[79]

(3) The right to obtain compensation

When compensation is not fully available from the offender or other sources, States should endeavor to provide financial compensation to:

> (a) Victims who have sustained significant bodily injury or impairment of physically or mentally incapacitated as a result of serious crimes;
>
> (b) The family, in particular dependents of persons who have died or become physically or mentally incapacitated as a result of such victimization.[80]

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[76] *Ibid.*, s.8.

[77] *Ibid.*, s.9.

[78] *Ibid.*, s.10.

[79] *Ibid.*, s.11.

The establishment of national funds for compensation to victims should be encouraged.[81]

(4) The right to receive assistance

Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.[82]

Police, justice and other personnel concerned should receive training to sensitize them so the needs of victims, and guidelines to ensure proper and prompt aid.[83]

4.2 The Canadian System

Starting from the early 1970s, victims assistance became a major concern of criminal justice in Canada. In the 1970s, as Leger noted, two types of victims attracted public attention throughout Canada, namely abused children on the one hand, battered wives and victims of sexual offences on the other. Meanwhile, there has been an increasing use of restitution and other forms of reparative sanctions by the courts, although criminal injuries compensation programs had existed in Canada since the late 1960s.[84]

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[80] *Ibid.*, s.12.

[81] *Ibid.*, s.13.

[82] *Ibid.*, s.14.

[83] *Ibid.*, s.16.

From the early 1980s onwards, efforts have been made to coordinate victims assistance groups, develop relevant training programs for criminal justice staff, and raise public awareness.[85] For example, in 1989, the Canadian Organization for Victim Assistance (C.O.V.A.) was founded as a new national initiative, focusing on promotion of coordination between various public and private sectors of victim assistance. Such organizations collect and disseminate information on criminal victimization and justice for victims, prepare common ground for discussion and the exchange of ideas between the government, law enforcement and private sector organizations, distribute publications, and offer seminars and training sessions, and conduct researches.

Canada actively contributed in the preparation of the 1985 Declaration of the United Nations and started the corresponding legislative process to amend the Criminal Code in the 1980s. In 1984, Canada hosted an interregional preparatory meeting in Ottawa to draft a resolution for the Seventh Congress, which laid down the groundwork for the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*. In its report, the meeting agreed that the criminal justice system should take into consideration the victims' view of the effects of the crime at such stages as sentencing and parole and recommended the use of "victim impact statements" (i.e., the victim's assessment of the damage suffered) in more jurisdictions.[86] At the meeting, while victim assistance provided by the police and

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[84] Leger, G. (1985), Victims of Crime (Discussion Paper), in *Report of the Interregional Preparatory Meeting for the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders on Topic III: "Victims of Crime"*, Ottawa, 9-13 July 1984, Distr. GENERAL A/Conf. 121/IPM/4 10 September 1984. Canada: Ministry of solicitor General. pp.1-22.

[85] For more information about the progress in the 1980s, see Solicitor General of Canada (1982), *Canadian Urban Victimization Survey* (#1-#10); Waller, I. (1987), *The Role of the Victim in Criminal Procedure*, Ottawa: The Canadian Sentencing Commission; Weiler, R. and Desgagne, J.G. (1984), *Victims and Witnesses of Crime in Canada*, Ottawa: Department of Justice; and *Federal-Provincial Task Force on Justice for Victims of Crime*, 1988, Ottawa: Supply and Services Canada.

by the community were identified as "two particularly important means for meeting the needs of victims",[87] experts from various regions of the world stressed that restoration of victims' losses by the offender was a legitimate and proper aim of sentencing and penal policy, and should be recognized and utilized as such by the judiciary.[88]

In the *Criminal Code*, there are sections on the provision of compensation to the victim for the loss of property as a result of crime and compensation to *bona fide* purchasers of property obtained as a result of crime,[89] but these provisions are considered insufficient to protect the victims.

In 1987, Bill C-89, an Act to amend the *Criminal Code* sections in relation to victims of crime, received first reading before Parliament.[90] It was subsequently passed in 1988. The non-contentious amendments contained in the Act deal with important issues such as the protection of the identity of victims and witnesses of sexual offences and extortion offences, proof of ownership and value of property, and the use of victim impact statements. This part of the legislation was proclaimed into force in 1988. The legislation also expands the current restitution provisions in the *Criminal Code* and provides for a victim fine surcharge to be imposed on offenders convicted or discharged of offences under

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[86] See Ibid., in *Report of the Interregional Preparatory Meeting for the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders on Topic III: "Victims of Crime"*, item 33.

[87] *Ibid.*, item 35.

[88] *Ibid.*, item 38.

[89] See Criminal Code, ss.725 and 726.

[90] For detailed discussion of this Act, see House of Commons, Issue No.65 (1988), *Taking Responsibility: Report of the Standing Committee on Justice and Solicitor General on its Review of Sentencing, Conditional Release and Related Aspects of Corrections.* Canada: Canadian Government Publishing Centre.

the *Criminal Code*, Part III or IV of the *Food and Drugs Act* or the *Narcotic Control Act*.

The new restitution sections suggest at least two important changes to the compensation sections. They are:

First of all, the court is authorized, under section 725, to order, at the time of imposing a sentence, the accused to make restitution to the victim of the crime on application of the Attorney General of the province or on its own motion, rather than waiting for the victim to make an application.

Second, the court is required to consider restitution in all cases involving damage, loss to or destruction of property as a result of the commission of an offence or where pecuniary damages are incurred as a result of bodily injury and where property obtained as a result of the commission of the offence has been sold to a bona fide purchaser. Specific criteria are provided under the new section 725 to determine the limits of restitution in the case of damage to the property and in the case of bodily harm to the victim.

Third, significantly, the new section 727.3 specifically gives priority to the payment of restitution over an order of forfeiture or an order to pay a fine.

Fourth, while the court is required to consider the offender's ability to make restitution, the offender can apply to extend the period or vary the installments of a restitution order. However, if the offender fails to comply with the order and cannot establish reasonable excuse for the failure, victim of the crime can enter the order as a judgment in the superior court and enforce it as a civil judgment. In addition, the court can impose a term of imprisonment for failure to comply with the order.

These restitution provisions have yet to be proclaimed into force. The proclamation is desirable to victims' groups across Canada, but the implementation of these sections requires a sufficient amount of resources and some sophisticated changes to the systems in the provinces.

A more recent attempt to change the law regarding sentencing is the introduction of Bill C-41. Bill C-41, The Sentencing Act, as tabled in June 1994 before Parliament, virtually proposes no change to the unproclaimed restitution sections in the *Criminal Code*, except changes in the numbers (ss. 738-741.2 in Bill C-41). Therefore, the Bill is unlikely to cause a change in a real sense with respect to these sections unless the cost and administration issues are resolved. No agreement has been reached between the provincial and federal governments to implement these provisions at the time of this writing.

Conclusions

As a final thought we need to remind ourselves that, in theory, there are generally two models of criminal process, i.e., the Crime Control Model which focuses on the effective repression of crimes, and the Due Process Model which focuses on protection of individuals' rights.[91] The reform of criminal procedure has to maintain a proper balance between both values. The implementation of basic principles and general norms in national law and judicial process is far more difficult than formulating the principles and norms themselves. No country has worked out a perfect solution to the conflicts between the two models, although great progress has been achieved in many parts of the world.

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[91] Packer, H.L. (1968). *The Limits of the Criminal Sanction*. Ca: Stanford University Press.

In the last fifty years, and in particular the last decade, the overall world trend of criminal law reform has been the promotion and implementation of fundamental principles of human rights for a free and secure society. Moving in the same direction, law reforms in various jurisdictions demonstrate a harmonization of basic concepts, norms, and principles. With the ending of the Cold War era, and other major political, social and political shifts of power, this symposium makes it possible for law reformers in the East and the West to closely cooperate with each other in this great course for the benefit of all human beings and citizens of this every increasing interdependent planet.