
THE GENESIS OF THE CANADIAN CRIMINAL CODE OF 1892 by Desmond Brown (Toronto: University of Toronto Press, 1989) pp. 253.

Desmond Brown's account of the genesis of the *Criminal Code* of 1892 coincides interestingly with modern-day efforts at *Criminal Code* reform. For this reason alone the book will attract the attention of modern-day law reformers. Its account of the political dynamic behind the passage of the first Canadian *Code* is of special interest: it is a tale of dramatic accomplishment, but one which resulted as much from stratagems as from merit, and perhaps necessarily so. Re-codification in our time proposes changes no less dramatic; what must necessarily happen to realize such changes remains to be seen.

Brown's book is much more than a history of the 1892 *Code*. It begins briefly by introducing certain first principles of codification. In the second chapter he outlines the British experience in codification - a failure - and distinguishes it from the Canadian experience. These opening chapters introduce some prevailing themes in the book. One, for example, is the impossibility of codification in the absence of substantive change, and without the controversies which attend such change. Another is the tension which exists between common lawyers and codifiers, including the codification of a "general part" in criminal law. Yet another, inter-related theme, is the role of political strategy and rhetoric - altogether apart from considerations of merit - in achieving codification.

Brown appears intent in his book to establish that the 1892 *Code* is of distinctly Canadian origin. He notes that fully 70 per cent of the *Bill's* provisions were conceived domestically. This comes as somewhat of a surprise: typically, in such historical accounts as exist, one sees little more than the name of Sir James Fitzjames Stephen, the great English codifier. Brown shows however that Stephen's code was only a starting point; he argues that the Canadian *Code's* maker was not Stephen, but then-Justice Minister Sir John Thompson, together with a group of inspired Justice department officials.

Clearly the most interesting parts of Brown's book are those where he describes the *Code's* progress through Parliament. Immediately following publication in 1887 of the *Revised Statutes of Canada* efforts were renewed to draft a *Criminal Code*. The *Revised Statutes* had, to some extent, changed the form, but not the substance, of statutory criminal law in Canada. Further changes were soon to follow. Brown notes that then-Supreme Court justice Sir Henri-Elzear Taschereau, in 1889, proposed to draft a new code. But Taschereau, a Liberal appointee, was thwarted by Conservative Justice Minister Thompson. For the task of drafting a *Bill* Thompson called on his own Justice department officials; two years later, in 1891, a *Bill* emerged.

Thompson introduced the *Bill* in Parliament with little fanfare; his strategy was to stir up as little interest as possible in the Opposition and press ranks. According to Brown, the strategy worked and the *Bill* got first reading. However, events of the day overtook the *Bill* and no second reading occurred.

the nation-states ... learn to get along with each other as well as the culturally diverse cantons of Switzerland do, then diplomatic immunity may become an anachronism."²² Since neither we nor our children, nor our children's children are likely to see such a development, one can safely recommend McClanahan's *Diplomatic Immunity* as a useful introduction to one aspect of diplomatic law.

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²² *Ibid.* at 176 and 184.

The following year, in 1892, a superficially revised *Bill* - the revisions resulting from a process of public consultation between 1891 and 1892 - went before Parliament. The new *Bill* received first reading on March 8, 1892. Second reading occurred on April 12, 1892. Of critical importance, Brown suggests, is the fact it passed second reading without ever having been distributed to Members of the House of Commons. The Members appeared satisfied with Thompson's careful and brief characterization of the *Bill* as little more than a consolidation of existing law; they were assured it proposed no substantive changes. Of course, this was hardly so. Brown contrasts this view with a speech the following day in the Senate which, more correctly, stated the *Bill* "involved gigantic changes" to the criminal law. Indeed, the Senate was where the draft code faced its most serious crisis - the result, Brown writes, of the fact Senators saw the *Bill* for what it was - not merely codification but also substantive reform.

Following second reading in the House of Commons a special committee was formed to analyze the 1892 *Bill*. No significant controversies emerged in committee, and the *Bill* went to the Committee of the Whole for detailed analysis. There, substantial changes did take place including removal of proposals to emasculate the grand jury system and to codify the law of sedition. Nevertheless by far the bulk of the 1892 *Bill* was unaltered and it received third reading in the House of Commons on June 28, 1892. Despite its rough ride in the Senate, the *Bill* survived the Upper House. The new *Code* was proclaimed on July 1, 1893.

In a lengthy Epilogue, Brown notes that the effect of the initial codification has been an unremitting effort at re-codification. In only four sessions of Parliament since 1892 have *Bills* not been introduced to change the statutory criminal law. The next major reform occurred by 1955, cutting down the size of the *Code*, eliminating totally common law offences, and including sedition. Clamour for further changes gained force in the 1960s with the result of the formation of the Law Reform Commission of Canada.

Current-day criminal law reformers would add to Brown's Epilogue what they called an historic event in January, 1990 when the federal government announced *Criminal Code* reform would proceed apace. This followed years of work by law reform commission and Justice Department teams culminating in an ambitious and imperfect *Draft Code* in 1988. The *Draft Code*, given its compass, has met with relatively little informed commentary or debate. The Canadian Bar Association has only recently called upon its member committees to study and make recommendations on the *Draft*. Sweeping changes are envisaged -- including the codification of a "General Part" setting out the bases of liability together with excuses and justifications, the inclusion of new offences of negligence and of positive obligations and duties, and a new system of defining offences according to conduct, circumstances and consequences.

This is not the place to fully enumerate these changes. Nevertheless, once more the themes which prevailed in 1892 are seen 100 years later. Of most concern will be any attempt to characterize the 1988 draft *Code* as little more than a re-ordering of existing law. With the proposed codification of the "General Part", for example, the 1988 *Code* could dramatically alter existing law.

Though clearly, as mentioned, Brown's book is more than a history of *Criminal Code* reform, it is not a history of substantive criminal law. Lawyers will find less substantive law in the book than they would probably like. The absence of substantive law, however, is understandable. Such a task would be mammoth and would be of relatively little interest to the reader of history. As it is, the book is a good read, anecdotal, containing much of the personalities and styles of the players of the day. The reader seeking a tracing of the history of any particular part of the substantive law is better directed to other more specific sources. One example is the recent publication by Rick Libman *The Law of Robbery* (Toronto: Carswell, 1990); the author there usefully sets out the history of the specific offence.

A final note: Brown's book was preceded by at least two of his own works from the University of Alberta - a short monograph he prepared in 1981 "Statute Law Revision, Consolidation and Codification: Definitions and Differences. The Historical Context of the Canadian Criminal Code of 1892" and in 1986 the longer Ph.D. dissertation "The Criminal Code of 1892: A Comparative Study in Codification." It appears that the book is gleaned from the latter work, with certain parts unfortunately excepted: much interesting writing in the dissertation - on ancient codes and on French and German codes - is left out; the book could only have benefitted by their inclusion.

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