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Sociology of Law as a Humanist Development Strategy with regard to the South African Criminal Justice System

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This article is a sequel to the author's previous article, "Sociology of law as dialogue between law and society: Berger's phenomenological approach applied". In the previous article it was explained that sociology of law, as dialogue between law and society will firstly inform members of society of their ability as active and co-creators of the meaning of law (and the administration thereof), and will secondly inform administrators of justice (as exponents of law) of the social consequences of their official action. Sociology of law is subjected to the 'acid test' of humanism: it is measured against three criteria which are distilled from the assumptions of a humanist conception of society. It is shown that sociology of law is a humanist development strategy with regard to the South African criminal justice system. Sociology of law as a humanist development strategy must be viewed as a triangle with three interrelated sides:

- (1) Ethics of law which can be linked to our Bill of Human Rights as enshrined in chapter two of the Constitution of South Africa;*
- (2) Sociology of law per se enables us to absorb the meaning of and conflict in the law in our consciousness; and*
- (3) Politics of law, which in the light of ethics of law and sociology of law, purports proposals for transformation of the South African criminal justice system.*

It is argued that the South African criminal justice system must develop to a 'humane' criminal justice system, if it wants to effectively contribute to crime prevention in South Africa. This implies that it is imperative for the criminal justice system and crime prevention strategies to take note of the contribution that sociology of law can make in this regard.

1. Introduction

To fully grasp the essence of this article, it is imperative that the reader must understand what the author's article entitled "Sociology of law as dialogue between law and society: Berger's phenomenological approach applied" proposes. According to the said article, social institutions (for example courts) represent law as an *objective* reality, but man is co-creator of these social institutions as a *subjective* reality. It was explained that through sociology of law, law will become a logic structure of meaning. It will now be shown that the author's conception of *sociology of law* is in fact a humanist development strategy with regard to the South African criminal justice system.

First we will examine the assumptions of a humanist conception of society.

2. Four assumptions of a humanist conception of society

A humanist ontology views the social reality as a reality (that consists) of human meanings. This reality is part of an ongoing process of creating meaning. Man is an *active and creative* participant in his/her social reality. During this we share our experiences with each other. That is why the social structure has no other meaning besides the manner it appears in the consciousness of man (Alant et al 1987:17; Alant 1990:43-50; Van der Merwe et al 1990:196, 200-210).

The above ontology is embedded in assumptions (as theoretic substructure) of a humanist conception of society.

2.1. Assumption 1: Society is experiential

This assumption can be regarded as the point of departure for humanist sociology. It deals with the important distinction between man, plants and animals. What differentiates man from plants and animals? The humanist answer is that humans have self-consciousness and that the human world is meaningful (Alant 1990:43-45; Anon 1995:3-4; Anon 1996:4-7; Van der Merwe et al 1990:201-203).

2.1.1. Humans have self-consciousness

The assertion that humans possess self-consciousness has two important implications:

- The possession of self-consciousness purports that man can consider his/her behaviour through the eyes of others. This consideration means that man can adjust his/her behaviour according to the expectations he/she *thinks* others have.
- The possession of self-consciousness purports that man has the ability to *choose* between different possible *alternatives* with regard to his/her action. This implies that man is *aware* of his/her ability to participate as (creative) co-creators of his/her world. The participation as co-creator of our life-world is very important to humanists. Humanists emphasise that it is detrimental to man's dignity when man is denied his/her fundamental right to cognitive participation in his/her society. In paragraph 2.5 it will be shown that when man has lost or forgotten his/her ability to participate as co-creator of his/her social reality, a condition of "undialogical consciousness", known as alienation, will be said to exist. (Alant 1990:43-44, Anon 1996:19; Romm et al 1990:152-153).

The notion that humans possess self-consciousness distinguishes humans from plants and animals. This notion can be explained as follows:

I (as a human) am busy writing. Then there is an interruption (i.e. I am being stopped while writing). Later, after this interruption, I can *think* back where I was before being interrupted and then proceed from there.

Conversely, a tapping beetle (as an animal) is busy with his/her tapping ritual/ Then this tapping beetle is stopped (interrupted). This tapping beetle is not able to think back where he/she was before being interrupted. Now this tapping beetle reacts according to his/her pre-programmed instincts and starts afresh with his/her tapping ritual.

That is why humanists assert that animal behaviour is governed by pre-programmed instincts and that human behaviour is not governed by pre-programmed instincts.

The fact that human behaviour is not governed by pre-programmed instincts, which relates to the above humanist notion of humans' possession of self-consciousness, gives humans the ability to *choose* between different alternative choices. Remember that for humanists it is important that man must be an active and creative co-creator of his/her social reality.

Man's ability to alternative choices can be explained as follows:

Eating may be regarded as an "instinct". But different cultures eat in different ways. This difference relates to HOW these people from different cultures conceptualise "eating" in different

ways. "In other words, the need to eat leaves room for humans to exercise different choices [with regard to eating]" (Alant 1990:44; Van der Merwe et al 1990:202).

It is now necessary to take a look at the composition of man's world of meaning.

2.1.2. The human world is meaningful

Humanists view the world as a world of meaning. Remember that the humanists' ontology views the social reality as a structure of meaning. Meaning is facilitated with the aid of *symbols*. Symbols are [mental] constructions which only exist in man's consciousness. These symbols have no inherent self-explanatory composition or meaning; but exist only in accordance to the meaning that man has attached to them.

This implies that symbols are the "building bricks" of man's social reality. That is why symbols can be regarded as constructions that are "responsible for the development of meaning in the human world" (Van der Merwe et al 1990:202).

Meaning can be attached to a symbol according to the use of this symbol (e.g. front-door). Human interaction presupposes (mostly) an exchange of symbols. That is why when we have internalised a symbolic concept (e.g. front-door), we can think of a front-door although no front-door is in our presence. Consequently, it must be clear that symbols can be regarded as "communication agents" of meaning. Symbols ease meaning and indicate lines of conduct (Van der Merwe et al 1990:203-204).

Society is continuously engaged in two dialectical meaning-making processes:

1. Society "is attempting to make sense of the world in terms of commonly shared categories by confirming traditional meanings"; and
2. Society is at the same time "revising these meanings and attempting to perceive things in a new light" (Alant 1990:45).

Traditional meanings are *confirmed* through the process of institutionalisation - a particular meaning becomes accepted as a "generally shared" category of meaning, for example, a front-door as part of an entrance to a house). Traditional meanings are *questioned or revised* through innovation (e.g. when we view a front-door as an artistic object). A process of de-institutionalisation begins when enough people have questioned or revised a traditional pattern of meaning (Alant 1990:45; Van der Merwe et al 1990:203-204).

Because humanists view society as continuously engaged in two dialectical meaning-making processes, humanists proceed to explain society as a dialectical phenomenon. Humanists argue that institutionalisation and de-institutionalisation "can only be properly understood by examining the way in which people render the world around them meaningful. Societal processes are explained by examining the way in which people construct meanings, either confirming old meanings, or offering novel interpretations of these meanings" (Alant 1990:45).

In short, "the human world is rooted in man's ability to construct a meaningful reality" (Alant 1990:44).

The fact that meanings must be shared in order to become confirmed, relates to the assumption that society is inter-subjective.

2.2. Assumption 2: Society is intersubjective

In paragraph 2.1.2. it was shown that humanists view society as a structure of meaning. The assumption that society is intersubjective, implies that these meanings (which constitute society) can never be exclusively private.

It is important to note that "intersubjectivity can never be fully grasped if not explained in terms of a structure that facilitates sharedness and uniqueness¹ ["otherness"] at the same time" (Alant 1990:47).

- SHAREDNESS (or common sense knowledge) refers to our shared everyday knowledge which has been confirmed (Alant 1990:46).
- Man's ability of self-consciousness enables him/her to be different. This "OTHERNESS" implies that different people can have different interpretations of what seems to be the same world (Alant 1990:46).

That is why society as an intersubjective reality "means that human beings share a common understanding of the world, but that they also tend to experience this world in different ways: human life is characterised by sharedness (common understanding) as well as otherness (different interpretations)" (Alant 1990:46). This notion can be illustrated with the symbol of "marriage".

- Marriage suggests a type of connectedness. This refers to the "sharedness" of the symbol of marriage.
- Marriage can have different manifestations (e.g. lobola or arranged marriages). This refers to the "otherness" of the symbol of marriage (Anon 1996:7-8).

This notion of "sharedness" and "otherness" is of significant importance with regard to our new Constitution (Act 108 of 1996) : "[T]he substance of the Bill of Rights [i.e. chapter two] lies in its interpretation" (Van Huyssteen 1996: 297). The Constitution instructs judges of the Constitutional Court "to apply certain values in the process of interpretation [i.e. "sharedness"]", but individual judges will understand these concepts differently, and each judge's understanding will be determined by his/her [own] values [i.e. "otherness"]" (Van Huyssteen 1996:300).

The illustration with the *symbol* of marriage relates to the assumption that society is symbolic.

2.3. Assumption 3: Society is symbolic

In paragraph 2.1.2. it was shown that symbols (as communication agents or facilitators of meaning) are the "building blocks" of man's social reality. It was also shown that symbols are [mental] constructions which only exist in man's consciousness. This implies that the social reality is symbolic; and that this symbolic social reality cannot exist independently or isolated from the consciousness of participating members of society (Alant 1990:47; Anon 1995:5).

This *cognitive* participation to the social reality (as a structure of meaning) is thus based on the attribution of meaning (to symbols which are the "building bricks" of man's social reality) (cf Romm 1990:119). But man is an active and creative co-creator of his social reality. This implies that man's continuous attribution of meaning gives man human freedom to participate in the co-creating of his/her social reality (as a "precarious" structure of meaning). When man is denied this participation, a state of alienation will be said to exist.

It is important to note that DIALOGUE is an important "antidote" for alienation.

2.4. Assumption 4: Society is dialogical

This assumption focuses on man's ability as co-creator of his/her social reality. This relates to man's ability to *participate* in the *social* construction of his/her social reality (as a structure of *meaning*). This participation involves negotiation, debate and dialogue. Such dialogue occurs on four levels (Anon 1995:5).

2.4.1. The dialogue between "tradition" and "novelty"

This level of dialogue refers to the dialogue between the past, present and future as acts of consciousness. Remember that for humanists meaning exists only in man's consciousness, and society is a structure of meaning of which man is a co-creator. Previous generations produced or developed norms and values for later generations. But because man (as member of later generations) has self-consciousness, man has the ability to choose between alternative options. This implies that man can say "no" to the past (and its norms and values) (cf Barchiesi & Van Huyssteen 1996:491). This notion of dialogue emphasises the humanist view that the social reality is an ongoing process of creating meaning (interpretation).

For example, previous generations viewed a woman's role as "mother of the house and raiser of children", but today, due to the dialogue between "tradition" and "novelty", it is acceptable to find women in the roles of corporate executives who work outside the house - opposite to the "traditional" roles of a woman (Alant 1990:45; Anon 1995:6; Van der Merwe et al 1990:208).

2.4.2. Dialogue as contextuality

If we want to explain X's behaviour, it is necessary to note how X attributes meaning to his/her actions in the particular circumstances. This means the way in which X gives meaning to a particular situation, depends mainly on X's reaction to specific conditions present in this particular situation. This implies that meanings are created and developed in situational contexts. That is why we need to know the "who? what? when? and why? of any social interaction" (Alant 1990:48; Anon 1995:6).

2.4.3. Dialogue as reflexivity

This level of dialogue or negotiation is very important. Reflexivity can also be called an attitude of "dialogical living". This is because reflexivity implies dialogue between one's own ideas and viewpoints, and ideas and viewpoints that differ from one's own ideas and viewpoints.

This implies a reflexive attitude and a willingness to listen to alternative viewpoints. Consequently this level of (reflexive) dialogue relates to the notion of "sharedness" and "otherness" which was discussed in paragraph 2.2. That is why a reflexive attitude (among people as co-creators of their social reality) suggests both allowing different viewpoints (different people might have different interpretations of "the same thing"); and a willingness to reconsider one's *own* original viewpoint.

This implies that dialogical interaction is lost when only one of "sharedness" or "otherness" is allowed. If dialogical interaction is lost, man then has lost his/her ability of dynamic co-creation of his/her social reality. Then a state of alienation will be said to exist (Alant 1990:49; Anon 1995:6; Van der Merwe et al 1990:209).

Consequently, this implies that alienation is a state of "undialogical consciousness", which in turn relates to dialogue as a structure of *consciousness*.

2.4.4. Dialogue as a structure of consciousness

It was shown that a humanist ontology views the social reality as a reality (that consists) of human meanings. Man is co-creator of these meanings, because of his/her ability of self-consciousness. These meanings are facilitated with the aid of symbols. Symbols are *mental* constructions which only exist in man's consciousness. This is why this level of dialogue implies that man must understand [i.e. in his/her consciousness] his/her ability to reconsider and question meanings which confront man. This notion suggests that all participants in any social interaction must reconsider their own individual viewpoints (Alant 1990:49-50); Van der Merwe et al 1990:209-210).

That is why dialogical thinking implies "that the subject matter under discussion must include the subjectivities (intersubjectivity) of all participants. Social reality is understood to be rooted in the experience [which exists only in the consciousness] of participants. And dialogue thus becomes the method whereby the intersubjective experience of reality is established" (Alant 1990:50).

In short, dialogical consciousness "implies that people can question a given situation, that they are open to alternatives, that they can make choices, and that they can revise their life-world in the light of their understanding of alternative positions ... [D]ialogical consciousness is a precondition for development towards a more humane society, and not the introduction of new structures *per se* (for example laws...)" (Holscher & Romm 1989:111).

It is important to note that the above humanist assumptions of society, relate to humanists' concepts of alienation.

2.5. Society and alienation

Alienation refers to a condition of "undialogical consciousness" where man has lost or forgotten his ability to choose between alternative actions. In this we believe man consequently forgets his/her ability to participate as co-creator of his/her social reality.

According to Berger, social institutions (e.g. courts) represent society as an objective reality, but man is a co-creator of this reality as a subjective reality (Steyn 1997:9-10). Berger asserts that an alienated person is unaware of his/her ability to make alternative choices; and to participate as co-creator of his/her social reality (Steyn 1997:10). According to Berger such an alienated person then acts in "bad faith". For example, Berger asserts that a judge acts in "bad faith" when this judge believes that there was no other choice "but to sentence a man to death" (Steyn 1997:9).

When man forgets this ability as co-creator of his/her social institutions (the meaning of) these social institutions becomes reified - unchangeable or "thing-like". Man then accepts these social institutions without question (Steyn 1997:9).

Stated differently: alienation is a condition of uncritical acceptance of the status quo, because people have ceased to question their social reality; people view their choices as final; and people stick to existing solutions (in a belief that these existing situations are not revisable).

That is why humanists believe that if a person (X) in a "power" position (e.g. a judge or magistrate) forces his/her will onto another, both X and these others will be alienated from society. Remember that it was shown that if only one of "sharedness" or "otherness" is allowed, dialogical interaction is

lost and consequently, a state of alienation will be said to exist. Humanists emphasise that such persons with "power" in society should always bear in mind the existence of counter viewpoints (Van der Merwe et al 1990:211). This relates to the importance of reflexive dialogue in society.

It is important to bear in mind what humanism's theoretical substructure purports when we take a look at a humanist conception of development.

3. A humanist conception of development

In accordance with the humanist assumptions, Romm et al (1990:136) define humanist development as "a process of aimed change ... with a view to establish a more humane society"; and "the process through which a purposeful attempt is made to establish a way of living in society which is of a dialogical nature". Remember that it was shown that dialogue is an important "antidote" for alienation.

This definition implies that the "humanness" of any development programme must be measured against the mentioned humanist assumptions. It is important that any developmental action (or decisions) must emanate from dialogical consciousness (cf par 2.4.4.). this emphasises the notion that all alternative viewpoints must (consciously) be reconsidered (Romm et al 1990:163-137).

Berger views development as an invitation to *cognitive* participation: "Berger indicates that the *participation* he has in mind to guarantee 'humane' policy programmes [similar to the author's conception of what the 'activities' of sociology of law should purport], does not merely allow people to make choices in terms of some pre-given definition of the situation. Rather it amounts to inviting people to participate in the very process of defining the situation in which the action is to take place" (Alant 1990:119). This is the same notion that Holschler and Romm (1989:108-137) had identified in Berger's writing and applied in their dialogical intervention as a political strategy (Steyn 1997:11)

What then is the responsibility of the social scientist (as a development agent) of "humane" policy programmes? Gouldner (in Polma 1979:257-258) emphasises that social scientists "do have a right, if not a responsibility, to inform men about what they might do to relieve human suffering [i.e. diminish alienation] and to discover [more humane] alternative social arrangements" [i.e. "dialogical living"]. Stated differently: Gouldner will assert that a development agent (of policy programmes) must elicit a reflexive attitude in society. Such an attitude will "better" or maintain the "humanness" of society.

Consequently it is clear that we need certain *criteria* to measure "humaneness" of policy programmes. Groenewald and McKay (1990:136-137) had distilled three such criteria from the above-mentioned humanist assumptions.

4. Three criteria for humanised development

4.1. Creative participation

Development programmes must ensure as far as possible the creative participation [i.e. different and changing meanings] of all sectors and social actors of a community, as well as the development agent (Groenewald & McKay 1990:136-137). Remember that humanists emphasise the importance of man as co-creator of his/her life-world and Berger emphasises the importance of man as

co-creator of his/her society as a structure of meaning (Steyn 1997:6). That is why the criterion of creative participation implies that:

- Development agents must bring about as many as possible social actors' participation to the development process.
- Social actors' contribution can change over time.
- This must be anticipated by the development agents.
- Development programmes may not be forced [i.e. "undialogical" and "alienated"] upon people (Groenewald & McKay 1990:136-137; Romm et al 1990:140-141).

Humanists assert that people do not realise their ability to creatively participate, because they are caught in "ideological; consciousness" (Beselaar 1990:4). Ideological consciousness is a consciousness which "refuses to admit that his/her own notion of the situation is a challengeable [cognitive] human construction" (Romm et al 1990:143). This relates to the next criterion.

4.2. Bringing (or raising) to consciousness

"Bringing to consciousness refers to the process whereby the [development agent] as well as the members of the community are aware of the symbolic nature of social reality" (Groenewald & McKay 1990:137). This means that bringing to consciousness implies that members of society must be made aware of their ability to fully participate as co-creators of their society; and of the need to continuously confront themselves with contradictions in their world of meaning (Anon 1996:15; Groenewald & McKay 1990:137).

Remember if man is denied the freedom to participate in the co-creation of his/her social reality, a state of alienation will be said to exist.

4.3. Reflexivity

In paragraph 2.4.3. it was shown that a reflexive attitudes suggests both allowing different viewpoints and a willingness to reconsider one's own original viewpoint.

That is why the criterion of reflexivity implies that all participants must realise that all viewpoints and solutions must constantly be subjected to re-evaluation (Groenewald & McKay 1990:137; Romm et al 1990:144; cf McKay 1990:100). Humanists believe that the development of "dialogical consciousness" will enhance the level of reflexivity (Romm et al 1990:144).

Each sentence passed in a criminal court of law, will influence the *individual* in particular and *society* in general. This prompts us to take a closer look at the phenomenon of sentencing.

5. Sentencing in a criminal court of law

To find the 'eidos' (essential characteristics) of sociology of law, three sciences with regard to jurisprudence must be viewed in dialectical cohesion. It was explained in Steyn (1997), that when Berger's phenomenological and humanist approach is applied to these three sciences with regard to jurisprudence, it appears to fit like a glove.

5.1. Ethics of law

In essence ethics of law implies the ethical maintainability or condemnability of certain legal rules; and an "active" process where meaning is created by man. Existing meaning has been reconsidered, and is either accepted or rejected (Steyn 1997:10).

Meanings of law are not cast in stone, but are interpretative units. Ethics of law implies a continuous process of creating meaning and revised interpretation of (existing) law. Ethics of law, in accordance with externalisation, is thus an active process where man creates meanings of law. This "active-ness" implies development and change in the meanings of law (Steyn 1997:13).

Development in ethics of law has manifested in a Bill of Human Rights which is entrenched in chapter two of the new Constitution, Act 108 of 1996 (cf Barchiesi & Van Huyssteen 1996:291). "[T]he substance of the Bill of Rights lies in its interpretation" (Barchiesi & Van Huyssteen 1996:479). In this vein, it is significant to note the following:

- Section 10 stipulates that everyone (including members of society and administrators of justice) has an inherent dignity [which in humanist terms, implies that man may not experience a state of alienation], and the right that this dignity must be respected and protected. Remember humanists emphasise that it is detrimental to man's dignity when man is denied his/her fundamental right to cognitive participation in his/her society.
- Section 13 stipulates that nobody (including judges and magistrates) may be submitted to slavery and compulsory labour [i.e. for humanist actions which promote alienation]. This notion is supported by section 23(1) which stipulates that everyone (including administrators of justice) has the right to fair labour practices [i.e. in humanist terms labour practices which are free of alienation].
- Section 11 stipulates that everyone (including your innocent and law-abiding citizens as members and co-creators of society) has the right to life. Remember that the Constitutional Court (CCT/3/94) decided to abolish the death penalty (cf Van Huyssteen 1996:303).
- Section 7(1) compels the state to respect, protect, promote and effect the rights in the Bill of Rights, even if it necessitates the development of law (section 8(3)(a)).

In this vein it must be noted that it is said that our new Constitution implies a new "culture of justification". This suggests "a culture in which every exercise of power [inter alia government and its officials' exercise of government power] is expected to be justified" (Mureinick in Van Huyssteen 1996:302). This implies that government officials who act with "undialogical consciousness", are alienated from society, and from their roles as "government officials".

Ethics of law influences and co-exists with sociology of law.

5.2. Sociology of law

Sociology of law is interested in *norms of decision* which help to shape the *norms of conduct* (Steyn 1997:11). Sociology of law implies a description and understanding of "Why does law work the way it does?" The author has noticed the social phenomenon of people's [including both members of the public and administrators of justice] mostly unsatisfied reaction (and thus implied alienation) in the local media to sentences passed in a criminal court of law.

For example, "I would have sentenced Mr Sithole to death but the politicians have done away with it. The politicians should have realised that doing away with it was a big mistake." (Judge Curlewis in *Sunday Times*, 7 December 1997).

This relates to the notion that sociology of law enables man to absorb the meaning of and conflict in the law of our consciousness (Steyn 1997:11). With regard to sentencing in a criminal court of law, the author came to understand, through sociology of law, the following:

In *S v Zinn* 1969 (2) SA 537 (A) the Appeal Court [then the highest judicial authority in South Africa] postulated a triad of considerations when imposing a "suitable sentence": the crime, the offender, and the interests of society. (cf Kriegler 1993:651; Snyman 1991:15; Snyman 1992:26).

A bird's-eye view of this triad reveals the following:

- The crime consideration means that the court [i.e. the presiding officer] must take note of the seriousness of the damage or harm caused by the crime (Snyman 1992:26).
- The offender consideration means that the court must take note of the personal circumstances of the offender (e.g. why had X committed this murder?); and of the prospect (if any) that X may become a law-abiding member of society (Snyman 1992:26).
- The interests of society consideration means that the court must take note of the approved indignation of society (Kriegler 1993:653; Snyman 1992:26).

This triad of considerations must be viewed in cohesion with the aims of punishment (or sentence) (Kriegler 1993:652). This notion was acknowledged and applied in *S v [Eugene] de Kock* 1997 (2) SASV 171.

A bird's-eye view of the aims of punishment reveals the following:

- Deterrence refers to the notion that punishment must give expression to the repugnance and righteous anger of society. That is why the sentence must aim to ensure that the offender does not repeat his deviant behaviour; and must aim to be an example and deterrent to other potential criminals to inhibit themselves from such criminal activities (Kriegler 1993:653). Deterrence is the main aim of punishment, and the following three aims are only additional (Kriegler 1993:652).
- Prevention purports basically the same as deterrence (*S v De Kock* on 190 c-d).
- Reform refers to the prospects of reforming the offender to become a law-abiding member of society (*S v De Kock* on 190 d-e).
- Retribution refers to the biblical injunction of "an eye for an eye". The importance of retribution has in recent times diminished (*S v De Kock* on 191 a-g).

Jurists are taught very little about the passing of sentence and that is why jurists know very little about the passing of sentences. The South African criminal justice system needs an *understanding* of the underlying social pathology (Kriegler 1993:650).

Judge Kriegler (1993:652) implies a need for a more modern approach to the aims of punishment. The author is of the opinion that Judge Kriegler's concern is justified. Let me explain. It was stated that deterrence is the most important aim of punishment (cf Kriegler 1993:652). But harsh sentences do not cause any decline in criminality, and the reforming potential of a prison sentence is (mostly) only a myth (Kriegler 1993:650; 663).

Why? Remember that sociology of law seeks *inter alia* to inform administrators of justice of the *social* consequences of their official action (see Steyn 1997: 11). Baron and Byrne (1994:470) also

explain that for effective punishment, it is imperative that punishment must follow *immediately* after the alleged murder, then it implies clearly that an "effective prison sentence" is a myth and serves to remove the offender out of society only for a (very) short period of time (cf Kriegler 1993:668). It is imperative that crime prevention strategies should take note of the cause of this myth.

This myth deepens when one notes that the prosecutor (as representative of the community) is compelled to communicate the interests of society to the magistrate in the lower courts before a magistrate passes a sentence, and that the "precious" court time of the court must not be wasted with unnecessary formalities with regard to evidence before sentence (Kriegler 1993:655-657). Section 76 (3) of Act 51 of 1977 also demands that the presiding officer (magistrate in the lower courts) must properly record the informal communication with regard to sentence (Kriegler 1993:656).

The author's experience as a prosecutor in the lower courts, however was otherwise. Suppose the prosecutor addresses the court for longer than half an hour. If one examines the case record where it was hand-written, then only "prosecutor: no argument" is recorded. If the case was recorded mechanically on tape, and these tapes have been transcribed, no single word of the prosecutor's argument was typed.

This has the following implications:

- Section 76(3), with regard to the prosecutor's argument before sentence in the lower courts (where most of the criminal cases are finalised) is at best also only a myth.
- There is a contradiction: Section 76(3) compels a magistrate to properly record the prosecutor's conveyance of the interests of society, but either the magistrate enters (fraudulently) "no argument" in writing, or the prosecutor's argument is deliberately omitted in the transcribing of the tapes.

Consequently it can be argued that the interests of society, as conveyed by the prosecutor to the magistrate, are lost. This implies that prosecutors and magistrates are alienated from their roles as administrators of justice, and that members of society are alienated (through their exclusion) from the meaning of an "appropriate sentence".

Sociology of law, as dialogue between law and society, seeks to inform administrators of justice [as exponents of law] of the social consequences of their official action [South African administrators of justice are alienating members of society from the criminal justice system by denying members of society participation in the meaning of appropriate sentences, and are consequently arriving at "mythological" appropriate sentences]. It also seeks to inform (members of) society that they are active and co-creators of (the meaning of) law and the administration thereof [all members of society should participate as co-creators of the meaning of the law with regard to an "appropriate" sentence].

Both ethics of law and sociology of law influence and co-exist with politics of law.

5.3. Politics of law

Politics of law implies:

- The *improvement* of a legal system, because the existing legal rule [how to arrive at an "appropriate sentence" in the criminal justice system] is logically out of step with the principles of law [the new Constitution with its implied humanist contents of the Bill of Human Rights]; and

- That man's *own* [law] products exercise control over man's social behaviour [the South African criminal justice system which is supposed to maintain social order],

But, because ethics of law (externalisation); sociology of law (internalisation) and politics of law (objectivation) *coexist and influence* each other, it is implied that these [law] products will also *change and develop* continuously (Steyn 1997:11).

Shaw (1996:164) states that the rigidity of the South African penal system is problematic: "alternative forms of sentencing are virtually unavailable and where they are [available] magistrates seem... unwilling to use them ... What is urgently needed is an investigation into community forms of sentencing for some categories of offenders".

The contents of section 93 of Act 32 of 1944 *inter alia* allow a magistrate to appoint assessors to be of assistance to him in deciding whether extenuating circumstances were present. Note, however, that these assessors have no authority to participate in the decision of an "appropriate sentence". Only the magistrate can decide on an "appropriate sentence" (*S v Malgas* 1996 (1) SASV 73 on 76i-77c).

It is proposed therefore that the contents of section 93 of Act 32 of 1944 must be developed [in terms of section 8(3)(a) of our new Constitution] to allow, during the phase of passing sentence, the appointment of a jury. This jury must consist of:

- the prosecutor;
- the magistrate;
- members from that particular society; and
- sociologist of law (as a development agent, and consequently as a facilitator of dialogue between law and society).

Together (i.e. intersubjectively), and through dialogical consciousness, they must co-create the meaning of an "appropriate sentence" for every individual criminal case. This is important as, if a magistrate (in a "power" position) forces his will onto the others, a state of alienation will continue to exist. Thus the meaning of an "appropriate sentence" will be a construed quality; and implies that a conscious proactive dialogical process has occurred (cf Steyn 1997:10-11).

According to Gouldner "self-reflexivity would bring us [sociologists of law] to a critical self-examination" (Polma 1979:262-263). That is why the author will now proceed to establish, according to the three criteria as set out in paragraph 4 of this paper, whether his conception of sociology of law is a humanist developing strategy with regard to the South African criminal justice system.

6. Evaluation

6.1. Creative participation

In paragraph 4.1., it was shown that development programmes [in this case sociology of law] must ensure as far as possible the creative participation (i.e. different and changing meanings) of all sectors (and social actors) of a community. Thus the criterion of creative participation implies that development agents [sociologists of law] must bring about the participation of as many social actors as possible.

Sociology of law as a *humanist development strategy* invites the magistrate, prosecutor, members of society (as co-creators of their society) and the sociologists of law to form a jury (cf Holscher & Romm 1989:123).

Creative participation also implies that the development agent must anticipate that social actors' contributions can change over time. Sociology of law emphasises that the proposed jury should function with "dialogical consciousness" in the spirit of "reflexive dialogue".

Creative participation also implies that development programmes may not be forced upon people. Sociology of law implies an invitation to dialogue between administrators of justice and members of society.

Consequently, the author argues that sociology of law complies with the criterion of creative participation.

6.2. Bringing (or raising) to consciousness

Bringing to consciousness implies that members of society must be made aware of their ability to fully participate as co-creators of their society. Sociology of law seeks to inform members of society that they are active and co-creators of the meaning of law [and the administration thereof]. Furthermore, in imitation of Berger, sociology of law envisages development (of the meaning of an "appropriate sentence") as an invitation to cognitive development.

Bringing to consciousness also implies that members of society must be made aware of the need to continuously confront themselves with contradictions in their world of meaning. Sociology of law enables man to understand [in his/her consciousness] the meaning of and conflict in the law in his/her society (cf Steyn 1997:11). Furthermore, sociology of law seeks to inform administrators of justice (as official exponents of law, and as ordinary co-creators of society) of the social consequences of their official action.

Consequently, the author argues that sociology of law complies with the criterion of bringing (or raising) to consciousness.

6.3. Reflexivity

Reflexivity implies that all participants must realise that all viewpoints and solutions must constantly be subjected to re-evaluation. Sociology of law emphasises the importance of "reflexive dialogue". This implies that all members of the proposed jury in each criminal case should allow *different* viewpoints; and should be willing to *reconsider* his/her own original viewpoint (cf Romm et al 1990:151).

Humanists believe that the development of a "dialogical consciousness" will enhance the level of reflexivity. It was shown that sociology of law envisages that the meaning of an "appropriate sentence" in each criminal case should be a construed quality; and implies that a conscious proactive dialogical process has occurred. Consequently, the author argues that sociology of law complies with the criterion of reflexivity.

In short, sociology of law as a humanist's development strategy must be viewed as a triangle with three interrelated sides:

- 1) Ethics of law which can be related to our Bill of Human Rights as enshrined in chapter two of the Constitution of South Africa;
- 2) Sociology of law *per se* enables us to absorb the meaning of and conflict in the law of our consciousness; and
- 3) Politics of law which, in the light of ethics of law and sociology of law, puts forward proposals for the transformation of the South African criminal justice system.

7. Conclusion

It was shown that the sociology of law is a humanist development strategy with regard to the South African criminal justice system. It is argued that the South African criminal justice system must develop into a "humane" criminal justice system, if it wants to effectively contribute to crime prevention in South Africa. This implies that it is imperative for the *criminal justice system* and *crime prevention strategies* to take note of contributions that the social sciences (especially sociology of law) can make in this regard.

Notes

1. Author's own emphasis

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