

SOCIAL AGENT AND DELINQUENCY

Applying the concept of social agent in the field of criminology and of penal law is aimed at advancing criminological research and analyzing the operations of penal justice from a perspective other than those generally in use. This, summarized in a very few words, is our principal objective.¹

I. LEGAL FICTION OR ANALYTICAL FRAMEWORK. THE AMBIGUITY OF ANY DEFINITION

A normative discipline such as penal law is based on a definition of man capable of varying and that can be thought of both as a “fiction” and as an “analytical framework”. As legal fiction

Translated by R. Scott Walker

¹ See “Acteur social et délinquance. Une grille de lecture du système de justice pénale”, Colloque Louvain-la-Neuve, 1989. The present essay uses as point of departure the preparatory working document for this conference that summarizes the preparation sessions presided over by Fr. Tulkens, president of the Department of Criminology and of Penal Law of the Catholic University of Louvain. The Acts of this conference were published with the title *Acteur social et délinquance*, Coll. de Psychologie et de sciences humaines, Brussels, Edit. Mardaga, 1990, 475 pp.

first of all, in the sense that it represents a convention from which rules can be deduced. But at the same time it claims to have a scientific value in the manner in which it translates certain aspects of human reality.

Thus classic² or neo-classic penal law is based on a definition of man conceived as “subject endowed with free will” and considers him in light of this definition as responsible for his actions and as capable of being subjected to a penalty in the strict sense.

On the other hand, in light of the work of late-Nineteenth century Italian positivists such as Lombroso, Ferri and Garofalo,³ considered linked to the birth of criminology, the definition of man is different since here the point of departure is the affirmation of an absolute determinism characterizing human behavior. According to this point of view it is no longer a matter of developing a penal code based on the notion of penalty, but rather a code of social defense whose measures would seek to prevent delinquent behavior from recurring or even prevent it from occurring at all by seeking to eliminate its causes. In both cases the definition of man underlying the logic of the action can be thought of as a “fiction” in the usual sense understood by the dictionary, namely “a procedure for supposing a situation in order to deduce its legal consequences”. In other words, the fact of defining man either as endowed with free will or as a “being whose behavior is determined” is a convention (or a supposition) from which a certain number of consequences can be drawn at the level of penal definitions and judiciary interventions.

This operational aspect of the definition is also found when we examine it from the perspective of morality. To speak of free will refers us to the possibility that man has to choose between a good act and a bad act and to determine his behavior consequently, with this prior definition necessary in order to make a certain idea of morality operative. In the determinist perspective, the moral option is arranged differently; it is based on the fact that society, through a system of rewards and punishments, or

² See Beccaria, *Des délits et des peines*, 1764.

³ See for example C. Lombroso, *L'Homme criminel*, Paris, Alcan, 1887, the first Italian edition of which appeared in 1876; E. Ferri, whose *La Sociologie criminelle* also appeared in French translation (Paris, Alcan, 1881); and finally Garofalo, *La Criminologie*, French translation Paris, Alcan, 1905.

even through a system of treatment and social protection, intervenes as “factor” aiming to condition or to influence behavior.

But this is but a first element implied by the definition adopted. Behind the notion of free will or of determinism there is not only a definition that underlies a manner of dealing with a problem, there is also the aim of touching on an aspect of reality (and here we prefer speaking of a framework for interpreting or an analytical framework).⁴

When Italian positivists, as we have noted, refer to a causal analysis of delinquent behavior in order to explain it and to be able to intervene at the level of causes, they consider their analysis to be “scientific” and contrast it to the “abstract” explanation of the classic proponents. In other words the positivists sought to bring the problem of delinquency from the realm of law in order to situate it in the realm of science and thereby to provide a solution. In the problematic involving understanding and control of delinquency, we can say that the doorway used by Italian positivists was the scientific perspective that determines a manner of seeing from which they claim to deduce a manner of controlling problematical forms of behavior by organizing “practices” of social defense.

On the other hand, for classic penologists who, following Beccaria, emphasized the notion of free will at the end of the Eighteenth century, the doorway used to approach this same problematic initially was made up essentially of political concerns. It is necessary to recognize every subject as a holder of rights and the delinquent as a subject required by the social contract to respect the rules that permit society to form and maintain itself.

This political perspective was nevertheless quickly overtaken by investigation into the psychological reality of free will. At the beginning this question was simply raised as an immediate element of conscience, or even as an evident fact, or finally, in a more moralist fashion, as linked to the notion of guilt. Subsequently, throughout the Nineteenth century, it was cited by psychiatrists in order to deny free will and the positions taken by

⁴ The analysis of knowledge considered as frame of reference or interpretation has been especially developed with regard to criminology in C. Debuyst, *Modèle éthologique et criminologie*, Brussels, P. Mardaga, 1985.

the Italian positivists. However, alongside these questions we can often see quite subtle discussions developing around this topic among philosophers and psychologists, with authors such as Delboeuf, Fouillé and many others joining in.⁵

But such discussions took place at too general a level to avoid the criticism of the positivists who reproached these authors for not taking into account the importance of physiological and social infrastructures. It was necessary, in both psychiatry and in criminology, to wait for the phenomenological current that began around 1925 to restore to this psychological reality of free will a meaning that could claim, even though in an indirect manner, both to have scientific status and to be useful for clinical concerns. This indirect manner was the taking into account, in addition to the legal fiction and to a certain extent in addition to the range of determinisms, of the notion of freedom or responsibility as experienced; and here it is necessary only to recall the works of French or Belgian psychiatrists such as A. Hesnard,⁶ D. Lagasch,⁷ or E. De Greeff.⁸ The latter, around 1930, was one of those in the field of treatment of abnormal delinquents who opposed the reality of experienced feeling to the reductive manner of linking irresponsibility to a determinist interpretation and, for this reason, criticized the Belgian law of Social Defense covering this same category of delinquents, which had been voted into effect that same year.⁹

It is true that we have spoken of an indirect approach to the notion of free will. Indeed the position of E. De Greeff in no way excludes the existence of forms of determination capable of influencing behavior. But, according to the author, it is necessary to understand these in an infinitely more complex manner and to recognize the fact that, even when it is a matter of abnor-

⁵ See M.O. Gribomont, *Libre arbitre, responsabilité, suggestions criminelles de 1880 à 1920*, mémoire licence, U.C.L., 1989.

⁶ Hesnard, A., *Psychologie du crime*, Paris, Éd. Payot, 1963.

⁷ Lagache, D., *Le Psychologue et le criminel*, Oeuvres complètes, vol. 2, Paris, P.U.F., 1977.

⁸ De Greeff, E., *Introduction à la criminologie*, Paris, P.U.F., 1948.

⁹ "La notion de responsabilité en anthropologie criminelle", *Revue de droit pénal et de criminologie*, Brussels, May 1931.

mal subjects, they do not perceive themselves as “driven” by external causes and they see themselves as “agents” of their acts.

Beyond the notion of free will and the determinist interpretation proposed by the positivists, the “scientific” analytical framework then becomes more complex. It can express a psychological and political reality that it would be difficult to eliminate and that no longer has a great deal to do with the fiction upon which penal law rests. It would even call this fiction into question, and it could be said that the present difficulties of penal law and of criminology are no doubt linked to the fact that a form of inconsistency in this regard has reached a critical threshold.

How can this first point be concluded? We would say that no matter what the positions taken, the definitions are always ambiguous. This is so because they refer us first to a fiction whose meaning is even more complex than the one we have assigned it until now. This is no doubt an acceptable and accepted convention from which the rules have been established in order to resolve a specific difficulty—here the problem posed by delinquency. But in addition, apart from this notion of simple convention, there also exists in the term fiction the idea of a utopian view of things. The definition given tends to bring pressure to bear on reality so that the perspective proposed transforms in and imposes on it a certain way of operating. In light of law under the *ancien régime*, the notion of free will certainly had this dynamic role in the imagination, not to say will, of Beccaria and the philosophers of the Eighteenth century. It has as backdrop the ideal of what it is important to be, namely a “reasonable man”. It can also be said that, for Italian positivists, the taking into account of determinisms alone as explanation for behavior can be placed in an evolutionist Darwinian perspective dominated by a certain idea of what should be the progress of humanity and of the meaning that it is then important to give to the “measures of social defense”.

As a result scientific data appear simultaneously, although variably, as points of departure and as foundations for these fictions whose meaning can be variable. This does not seem surprising to us because we must admit that scientific information does not simply express reality “as it is”, but it represents reconstructions performed based on the frames of reference that necessarily are

part of the ideological perspectives prevalent in a given period and region.¹⁰

We feel these various explanations are necessary because it is important to see clearly the status of definitions in the sector of interest to us. These definitions “function” both as fictions (with the utopian dimensions these contain) and as analytical frameworks. It is important to be aware of this. If we then define man as “social agent”, we must take this term at these two levels. Moreover, we do this because such a definition of man seems to us more adequate and more satisfying than the two others.

II. WHY THE NOTION OF SOCIAL AGENT? DEFINITION AND JUSTIFICATION OF ITS USE

First of all, what definition can be given to it? Initially this definition can only be very broad. It is important to specify it and especially to bring out its nuances from uses made and the consequences that result from it. When we speak of “man endowed with free will” or “man subject to determinisms”, these are also broad definitions that have meaning only through their usage. Included under the term “social agent” are the ideas that, first of all, the subject is not a passive being whose behavior can result from a play of determinism; that he also is not an abstraction to the extent that the personal point of view he expresses depends on the position he occupies in the social order, on his history and the projects around which his activity is organized; and that finally he is called to be an agent in the framework of interrelations (this term being understood in a broad sense), in other words “active” or intervening, and that because of this he is confronted with power plays and, within or beyond these plays, with the importance that procedures of recognition have in the development of his own identity. These few clarifications represent, in their generality, an initial approach making it possible for us, in the history of criminology, which is not long but which exists,

¹⁰ We understand the term ideology in the ordinary meaning given to it by H. Dumont (*Homo aequalis*, Paris, Gallimard, 1977): “The ensemble of ideas and values—or images—common in a society or prevalent in a given social milieu” (p. 27).

Social Agent and Delinquency

to find points of attachment from which reference to this notion will assume its full meaning.

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The specific feature of a criminological perspective is that it is situated at the boundaries of psychology, sociology and even biology; and adepts of these various disciplines can quite easily have their own intellectual traditions from which this notion of social agent can take on meaning and even dominate. It is important to see how they come together without creating confusion; to see also how major objections made both to the notion of free will and to that of human determinism (and we noted these in the elements of a definition we provided earlier) can be answered and how. It is in this spirit that we will examine a few historical points, which obviously are merely fragmentary and the choice of which will betray a certain arbitrariness.

In a more properly psychological orientation, we have already noted a change in perspective with regard to an interpretation of delinquent behavior by a certain number of criminologists in the period 1925-1930, namely the movement from an analysis that the essentially stressed causal characteristics capable of explaining the movement into action and in which the subject was considered to be the object of determinisms, to another perspective that could be termed phenomenological. Here the emphasis was placed on the first person, that is on the *I* of the delinquent and the fact that, in a certain manner, the transgressional behavior seemed to him to be the best if not the only solution. All the work of the Belgian criminologist E. De Greeff is centered around this concept. The delinquent is considered an "agent" or as acting from his own point of view which it is important to recognize as reality and which cannot be eliminated by recourse to a causal explanation.

Here is the first manner of defining a delinquent as "agent" and by this fact as having his own point of view. However, here he is not a social agent. The term "social" is in fact an added nuance to this point of view, and De Greeff never clearly stated this nuance. When we speak of the delinquent's point of view, it is not simply some point of view or another, which might be

an aberration¹¹ and which for this reason would be void of any social significance and would appear as an expression of a pathological factor. More correctly it is a point of view that is opposed to other points of view and that takes its place in the framework of a social relation. This means that delinquency cannot only be defined as a negative and deficient act but, more broadly, as expression of a sociopathic link or relationship between a subject and the social group, or between groups whose statuses differ in the framework of a power relationship and that such a difference thereby renders any process of recognition difficult. Here we can go beyond E. De Greeff and refer to the work of the French psychiatrist M. Colin¹² and his team who, between 1960 and 1970, stated the problem in these terms. We then find the notions of acting subject, with a point of view proper to him that must be recognized. We also have the fact that there is a link between this point of view and the position the subject occupies in the interrelational or societal framework and that when it is a matter of delinquency, that is of conflictual behavior, this interrelation would manifest sociopathic characteristics. This is a first way of stating the problem of social agent.

A second order of data provided by the history of criminology can be found in the perspective taken by the American school of Chicago (1920-1930). This school of thought attempted to reconstruct the “natural” history of subjects or groups of subjects who, in the American society of that period, marked by an anarchic liberalism, sought to imagine solutions for surviving in the cracks of organized social life: the life of gangs of youths described by Thrasher¹³ or at the level of individual cases by C. Shaw,¹⁴ or again specific solutions for survival such as can be found in certain marginal groups.¹⁵ Throughout these analyses

¹¹ But which would then take on a pathological meaning. A tradition developed in this sense and it was recently the topic of bibliographical analysis: “The Thinking Criminal Cognitive Model of Lifestyle Criminality”, *Criminal Justice Research Bulletin*, U.S.A., vol. 4, No. 4, 1989.

¹² Colin, M., *Étude de criminologie clinique*, Paris, Édit. Masson, 1963.

¹³ Thrasher, F., *The Gang*, Chicago, Univ. of Chicago Press, 1st ed., 1927.

¹⁴ Shaw, C., *The Natural History of a Delinquent Career*, Chicago, University of Chicago Press, 1931.

¹⁵ *L'École de Chicago. Naissance de l'écologie urbaine*, Paris, Édit. du Champ urbain, 1979. See also chapter 2, “Ethnographes à Chicago” in Hannerz U., *Ex-*

Social Agent and Delinquency

certain elements refer us to the term “culture” (or sub-culture) defined as an ensemble of behavioral techniques or schemas that a certain number of subjects have in common, which they transmit from one to another and through which they resolve or seek to resolve the difficulties of life. Such a definition leads us to say that culture or sub-culture can be seen as an “invention” of a lifestyle that, in the social framework known by the subject, seems to present an efficacy that makes it possible for him to integrate himself in a certain way into the social body. This means that here again, in a different but just as real a manner, we find the delinquent as social agent in the sense that the group to which he belongs provides a solution, acceptable or unacceptable, to a social problem of survival that he is actually facing.

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Beyond this historical perspective, we could look at sociologists who have given the notion of social agent its currency, that is A. Touraine¹⁶ and M. Crozier.¹⁷ Even though they have not been our point of departure (which would have been perfectly legitimate, however), what interests us is the possible use of the perspectives of these authors in the criminological realm.

We could say that A. Touraine makes a distinction between the socialized man and the natural man. The socialized man is the one who adopts rules that are, in a certain sense, imposed on him by society. It seems that the author in this respect is adopting Durkheim’s heteronomic conception according to which these rules are external to man so that conscience, understood in its primary sense, can only be a reflection of the established order.¹⁸

The opposite of this “socialized man” would be the natural man, that is the one who, when faced with the strait jacket of

plorer la ville, Paris, Édit. de Minuit, 1980; and, in a broader manner, Digneffe, F., *Éthique et délinquance. La délinquance comme gestion de sa vie*, Geneva, Coll. Déviance et Société, 1989.

¹⁶ Touraine, A., *Le Retour de l'acteur. Essai de sociologie*, Paris, Fayard, 1984.

¹⁷ Crozier, M., Friedberg, E., *L'Acteur et le système*, Paris, Seuil, 1977.

¹⁸ See on this aspect of A. Touraine the work of P. Tap, *La Société pygmalion, intégration sociale et réalisation de la personne*, Paris, Dunod, 1988, pp. 197-205.

rules and social roles as they have been defined, makes an appeal for life, liberty, creativity.¹⁹ It is from this perspective that Touraine analyses the awakening of minorities confronted by a central state power that does not take their own identity into account. This revolt (individual or collective) against the rules in the name of liberty and of identity is for Touraine the “other side of social life” that, although remaining in a fundamentally defensive track, risks appearing in the name of an “identity that is more and more natural and less and less social”.²⁰ Thus it becomes crucial that this defensive reaction (against the rules and social roles as they are defined) is fulfilled or transformed “by becoming a demand, a protest raised against the power that destroys not identity but the capacity for autonomous action on the part of groups or of individuals”.²¹ This means that there would be the establishment or the attempt at establishment of social relationships within which the possibilities of expression of this identity could and should be found. It is in the course of this second stage that we can actually speak of the subject as “social agent”; in expressing his point of view (or his demands) in a language shared with his interlocutor, he becomes a “social agent”.

An analytical framework of this type is no doubt complex, but it leads us to place the problem of delinquency in relation to the capacity of a group or an individual to perform such a revolutionary movement. It would no doubt be too simple to say that delinquency characterizes individuals and groups knowing or experiencing an identity challenge without having the possibility of integrating it into a process of social recognition. Nevertheless, this question was raised in a particularly clear manner by F. Dubet²² in his analyses of groups of youths living in social housing in the Paris region. The problem is that generally for young people at present, the notions of political or trade union struggles referred to by A. Touraine are totally devalued and no longer represent a force capable of producing such a “revolution”. Is it not possible to think that other values can play this role and

¹⁹ Touraine, A., *op. cit.*, p. 166.

²⁰ Touraine, A., *op. cit.*, p. 173.

²¹ Touraine, A. *op. cit.*, p. 177.

²² Dubet, F., *La Galère: jeunes en survie*, Paris, Fayard, 1987.

Social Agent and Delinquency

in that case this notion of revolution, for this particular group, might appear to differ from what Touraine witnessed around 1965?

For the matters of interest to us, the question is nevertheless raised. In light of the notion of social agent, delinquency could be defined as the impossibility or the difficulty of achieving this status of “interlocutor” for existing structures. If this is so, it is indeed because the notion of social agent (in A. Touraine’s conception) places us at the level of participation in the development of the rule, no matter what the controlling institution in question might be—family, school, factory, office, neighborhood, society. In other words it is of the “controlling” order. When an individual or a group inevitably feels “enclosed” in the framework of the “controlled”, they can think of their behavior only in terms of subordination or revolt. Delinquency would be of that order.

M. Crozier’s point of view seems somewhat different and more flexible in that he believes that, in any institution whatsoever, there is a greater margin of freedom and room to manoeuvre than we imagine. By using certain kinds of strategies, it is always possible to make use of these margins. This affirmation also rejoins discussions of the interiorization of the rules that took place in an entirely different domain, that of child psychology.²³ In contrast to Piaget and Kohlberg, who held that the young child perceives moral rules as imposed from the outside and beyond any discussion, other authors have raised the objection that, when quite young, a child is already capable of testing the effectiveness with which a rule is imposed on him and of developing strategies for making the adult take his point of view into consideration. The opposition between heteronomous morality and autonomous morality established by J. Piaget, who located the former in the period of up to around twelve years of age, is not at all as evident as that, and a child would seem capable of becoming a “social agent” earlier than thought.

The question is not resolved, however; for the problem lies in

²³ Lickona, T. (ed.), *Moral Development and Behavior: Theory Research and Social Issues*, New York, Holt, Rinehart and Winston, 1976.

being able to state it well. It is not a matter, when faced with rules and their consequences, of “getting off easy” or at the least cost. That would be essentially of the order of a defensive reaction that perhaps represents the moment when the rule is learned. More precisely it is a matter of acquitting oneself “justly”, that is by establishing true social relations in which each one feels himself recognized as interlocutor.

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In a definition of social agent in criminology, these various elements must be taken into account. Such a definition is both complex as well as precise, for we begin to see how it could function as a valid interpretative grid. The term criminology, however, must be understood in a broad sense;²⁴ this means it is not simply defined as the “study of crime and the criminal”. It refers us as well, just as it should, to the study of social reaction. First of all, to the social reaction that institutes rules and determines what will be delinquent behavior (and in this respect, present studies clearly show the role of various pressure groups in this determination; Touraine’s analyses, which we just examined, already indicated this); and then to the social reaction that functions through application of the law, when there are manifest pressures aiming at defining or orienting this application and where we can also posit the very real existence of operating margins.

When we understand criminology in a broad sense (that is, one that includes the social reaction) and if we accept to define man as being (potentially) a social agent, we note that the law, its creation, its application and the transgressions that are perpetrated against it, form an ensemble in which the roles are intertwined and whose elements are difficult to separate without altering a part of the meaning that each of them might have. Defining man as endowed with “free will” or as essentially “determined by external causes” obviously saves us from any obligation to con-

²⁴ It should not be overlooked that already in 1927 E. Sutherland included in his definition of criminology, “the processes of development of laws, of the infraction of laws and reaction provoked by the infraction of laws”; See Vold, *Theoretical Criminology*, N.Y., Oxford Univ. Press, 1958, chap. 14. Thus this idea is in no way a new one.

Social Agent and Delinquency

sider the creation of law and its application since in these perspectives there is naturally a tendency to consider that the law constitutes an immutable reality that exists for itself and that it is applied in an almost automatic manner based on criteria predetermined for this purpose. However, if we define man as “social agent”, both of these *a priori* viewpoints become difficult to defend in light of analyses resulting from many works that have dealt with these two themes over the past twenty years. In this respect using the notion of social agent is no doubt one means, in both criminology and in penal law, of integrating results of these studies into a global view and of ensuring that in the various fields of criminology the paths of research do not run strictly parallel without any chance of ever meeting. This is perhaps the most serious justification for use of the concept that we can propose.

III. THE NOTION OF SOCIAL AGENT: THE THREE LEVELS AT WHICH IT IS LOCATED IN THE CRIMINOLOGICAL CONTEXT

The notion of social agent thus refers us to the process of elaboration of the law as well as to the process of its application or transgression. As we have already said, each of these levels interacts with the others, and we will have the opportunity to demonstrate this. However, it is useful to distinguish them in order to describe them. We will do so briefly here, referring the reader to detailed analyses of the various processes concerned that can be found in presentations made during the conference “Social Agent and Delinquency”. In the rapid list that we shall give here, we will be stressing the first of the three levels—creation of the law—that criminologists have probably overly neglected until now.

CREATION OF THE LAW

The process of incrimination (or of decriminalization) is the process in which a deed or a specific kind of behavior is determined to be (or no longer to be) an infraction that thereby is the

occasion (or no longer the occasion) for a sanction or other measure. This is indeed a process because it begins when an agent assumes the initiative of demanding recognition for an interest that should be protected by law (or of allowing an interest to be expressed by doing away with a law forbidding it). It can just as easily be either an individual or a collective agent, organized formally or informally.

For more than twenty years studies have described such a process in various respects. However, it is true that stating the problem in this manner can be astonishing, for major penal infractions seem to be imperatives that have been imposed since the beginning of time, and it is difficult to see how they could have been the result of decision.

To answer this perplexity, it seems necessary to us to distinguish between incriminations—which it is perfectly feasible to do²⁵—however, without our being able to deduce whether we are dealing with infractions that are different in nature. On the one hand there is what we have called the hard kernel of penal legislation; on the other what we might consider as “incrimination in act” or incriminations made in the present, the constitutive process of which is thereby more directly analyzable since it is current. For the sake of facility, we will begin with the latter.

INCRIMINATIONS IN ACTS AND IN THE PRESENT

We find these especially in certain sectors. Thus in the realm of economic penal law, sociological analyses, later followed by psycho-sociological analyses, in the course of the legislative process and within the pressure groups that are “constituents” of the rule, bring to light the manner in which consideration takes place of the interests of the various groups, concerned by the future law, which manifest themselves. Initially we see references made to various values capable of justifying the legal dispositions to be set up; but if this is so at the outset, progressively we see a second stage in which the “most common” values and interests as-

²⁵ Since Garofalo, it might be said, who distinguished natural crimes from “statutory” crimes.

sume the leading role in terms of justification, even though these are also the most abstract, that is the most general, because they are the values around which a certain consensus can be formed most easily. But on the other hand, this general character of interests and values retained only covers over differences and conflicts that are still capable of reappearing at the level of interpretation of texts and of determination of their fields of application.²⁶

In the framework of what J. Rémy²⁷ has called a sociology of daily life, we could also note all the laws that control the environment not only in terms of agents exercising an “instituting” pressure” (and here we see that interests can be protected even if they do not correspond to the logic of dominant groups), but also in terms of the subjects required to respect them. When we speak of “subjects”, we could just as easily say subjects who are transformed into social agents in the sense that, after creation of the law, there also appears, at the level of those who must apply it and respect it, the use of a capacity for interpreting the rules, of negotiating eventual exceptions, etc. At this level it is important to consider not only the position these subjects occupy, which determines to a certain extent the power they possess, but also the types of strategies pursued so that ultimately they can bring their point of view to bear.

Thus in such a concept we could see victims of a situation in which there is no rule to protect them (for example, lack of consumer protection) seeking to form a pressure group in order to create such rules. Moreover, we could also see a reaction from victims of a rule, that because of its level of abstraction is imposed on everyone in a general manner thereby engendering abuses or a lack of consideration of interests that are thus covered over. Such victims tend rather naturally to become social agents in order

²⁶ As a general reference we could mention the report of Professor P. Rock presented during the 13th Conference of Criminological Research at the Council of Europe (Nov. 1978); “Public Opinion and Penal Legislation”. See also, in *Acteur social et délinquance*, the contributions of P. Landreville (Montreal) and of P. Lascoumes.

²⁷ Rémy, J., Voyé, L., and Servais, E., *Produire ou reproduire. Sociologie de la vie quotidienne*, Brussels, E.V.O., 1978.

to bring about recognition for themselves of a certain operating margin or even of an exception within the law.

In short we could say that the social agent (seen at the level of the citizen confronted by the law but also playing a role in its definition) is “one who refuses to be defined as an abstract entity, and who knows that in order to have a place in the social sphere, he must deal with abstractions” (J. Rémy). We see the advantage of applying the analytical framework proposed by A. Touraine that supposes the existence of two phases in the manner in which the subject affirms his point of view: on the one hand a defensive reaction, reminder of his identity, of his own interests; and on the other, establishment of a social relationship by using appropriate language in order to bring his viewpoint to bear. According to the definition we have just provided, playing the role of social agent supposes, directly or indirectly, the capacity of “playing” with abstractions. But in fact forms of behavior can be organized or anchored at each of these two moments (as we have already seen in speaking of delinquency). Such an analysis is comparable to the one made by F. Duyckaerts²⁸ from a psychological perspective and speaking of the two forms of adaptation.²⁹ He distinguished between creative adaptation that, when faced with a challenge, supposes the reinvention of a social relation in a language acceptable to the different parties involved and, on the other hand, regressive adaptations. In this second case the regression can take the form of an attitude of withdrawal (that is, in the examples cited, the victims remain in a position of being victims without defending themselves), or that of aggressive and destructive behavior. In either case one is unable to use abstractions, or more precisely a language adequate for bringing a point of view to bear. This inability places us be-

²⁸ Duyckaerts, F., *La Notion de normal en psychologie clinique*, Paris, Vrin, 1954.

²⁹ Here we understand the term adaptation in the sense that we can say that all behavior is adaptive and that, in a disturbing situation, a subject will react in such a way as to attain a new position of equilibrium. This is what the author calls adaptation understood in its primary sense. On the other hand, when we speak of adaptation understood in its secondary sense, the notion of adaptation is seen in relation to a given normative framework. We are adapted or unadapted in relation to certain requirements imposed on us from the outside.

Social Agent and Delinquency

fore the alternative withdrawal/aggression and is expressed by an impossibility to achieve the status of social agent in the sense of the definition we have just given to it, namely that the subject has neither the power nor the ability to make himself heard as a pressure group in development of the law and its interpretation. He is "stuck" between these two types of possible regressions. Delinquency can quite well be understood in an example of this type; and a work such as that of F. Dubet, following in the tradition of A. Touraine, demonstrates this clearly. This is no doubt but one possible explanation; it is certain that, depending on the sectors in question, other problems and other explanations arise. Thus in economic delinquency or even professional delinquency, we could speak of agents in the sense that subjects participate in social relations while constantly seeking to test the limits of the law, by using the voids it includes or the injustices it allows, that is by playing with the limits of the permitted and the unpermitted.

THE HARD KERNEL OF PENAL LEGISLATION

For so-called traditional infractions, it is difficult to determine, at the level of "creation of the law", the mechanisms through which various pressures are exercised in order to define such behavior as infractions. It is as if there existed such a strong consensus with regard to these infractions that the rule forbidding them seems evident while at the same time it seems to condition all social life. The problem in this case lies in knowing of what the "incriminating" subject is the agent. Is the rule forbidding homicide or rape or theft the result of a societal effort that, *in illo tempore*, was the expression of pressure whose parameters were, here too, the affirmation of interests and values? Historical research would be useful in order to see how these classic incriminations were formed. But in the present state of things, namely there where we find rules already firmly expressed and referring us no doubt to another series of problems, the question is to know of what the "incriminating" subject can still be the agent? He would be an agent, we might say, for maintaining the rule; not only maintaining it in general, but maintaining it in certain

particular circumstances. He would be so in the pressure he exercises to have the rule obeyed by recommending a specific sanction or a certain type of measure capable of resolving the problem posed by the incriminated behavior if any definition other than a penal one was given to it. This means that apart from a more properly historical perspective, the analysis to be made should deal with the values and interests involved in the play of pressure groups that seek to establish a given type of penalty for a given type of delinquency, with these categories often being abstract categories (for example, sexual delinquents)³⁰ in which the subject is no longer seen other than through the limited element that makes him enter into this category and from which his characteristics are reconstructed. It must also deal with the play of pressure groups who seek to anticipate the areas of non-application or exception or even a penal disqualification for certain types of behavior. It is evident that this second type of infraction requires further analysis. We will return to it in the final section.

APPLICATION AND TRANSGRESSION OF THE LAW

a) Application of the law:

Whether we approach the problem from the judgement rendered by the judge (who officially has the power to stigmatize) or from the provisional judgement of an indictment or even from opinions delivered by the press, a neighbor or similar, there is an interaction in which one of the agents singles out another and seeks to impose on him the fact that he is delinquent while bringing into play the resulting consequences.

At the level of application of the law, we will limit ourselves to distinguishing two categories of persons:³¹ on the one hand

³⁰ On this, see everything that has been said with regard to “moral entrepreneurs”, who as a result of a serious incident stir up an opinion campaign that reaches as high as the legislature, even leading to some modification of the law (the starting point for this type of analysis is H.S. Becker, *Outsiders*, New York, Free Press, 1st. ed., 1963).

³¹ A detailed analysis would require many more details. Thus we will not speak here of victims, who form a third category. What we will say can only be taken

those who participate directly and officially in the application of the law (police, judges, lawyers, etc.) and those with respect to whom an intervention takes place—delinquents. If we take the first of these two categories of protagonists, we must presume here the possibility of an initiative that goes beyond the role of a simple executant. In this hypothesis the essential element would seem to be that of being able to give a certain rationality to execution of the law that itself, initially, depends in particular on the manner in which the delinquent is defined: as subject “endowed with free will” or as individual seen through his “dangerousness” or as “social agent”. It is evident that at this level, as at the others, although judicial agents no doubt have an operating margin, this margin is not unlimited, so that their initiatives are directly linked to the place they occupy in the penal system (judge, police officer, prison director, social worker, psychologist, etc.) and to the type of particular relationship that each of them is capable of having with the delinquent.

On the other hand, delinquents can also be considered as social agents, and for several reasons. First, by having the possibility of negotiating the intervention and, then, the capacity of refusing the image imposed on them from the outside, thereby avoiding the consequences of institutionalization. Or again, even though accepting the definition of delinquent that is imposed on them, by seeking to manifest their point of view not by considering attenuating circumstances or excuses but by working from an ideal position of defense during a trial; we are referring to the remarks made by Habermas.³² Here we enter into a critical view of the penal process and of what could be “true” justice seeking to overcome various contradictions.

And finally, in the framework of execution of penalties, the delinquent is generally reduced to the role of passive object. We can or could imagine a system that would allow him to become

as a very limited point of view whose value lies in pointing out several of the principal areas of reflection. See in *Acteur social et délinquance* the presentations by Ph. Robert, F. Ost, M. van de Kerchove and G. Houchon.

³² Habermas, J., *Morale et communication*, Paris, Édit. du Cerf, 1986. See, for example, the rules that should apply to a discussion: every subject capable of speaking and acting should take part in discussions; each one should be able to challenge any affirmation whatsoever, etc., p. 110 et seq.

“active”—for example in the manner of resolving the difficulties that make his social insertion problematic—thereby creating a coherent policy that in fact engages the responsibility of all protagonists.

b) Transgression of the law:

This level is that of the delinquent seen from the viewpoint of his own delinquency. We will limit ourselves to a single question. In respect of the notion of social agent, when we speak of delinquency the problem appears first of all in the form of an impossibility or an inability to attain this status. The reasons for this impossibility might be of a socio-economic order and the analytical framework proposed by Touraine shows us this. (Here we insist on the fact that this is not a causal explanation that would make socio-economic factors the cause of ...; it is essentially a process analysis that gives a margin of freedom to the action or non-action possible for the subject within a given interrelation and social structure.)

These reasons could also be more profound and, continuing along the lines of the observations of F. Duyckaerts, we might come up with a post-Lacanian psycho-analytical discourse. This refers us, over and above laws, to the fundamental law, that is to the law that specifies conditions for the existence of society and for the existence of social life in any form whatsoever. It consists in those taboos that create the social order, such as prohibition of murder or incest, no matter what particular or various forms these may be expressed in from one society to another. Delinquency could appear, here also, as the impossibility for a subject to be able to structure his behavior according to these fundamental necessities that are of the order of the very being of the social and legal spheres.³³

This discussion seems essential to us. And yet a certain ambiguity remains. For although it is truly important to affirm this dimension and to formulate the problem of delinquency as a possible transgression of this fundamental order, it is no less true

³³ See in *Acteur social et délinquance*, the presentation by J. Schotte and J. Kinable.

that it is made concrete under the form of laws that are in fact the expression of a societal desire, and that through this desire confusion can arise between the Law and laws, that is between the fundamental level and the manner in which it is expressed and especially in which it is used in the forms that power is expressed. At this point once again the questions arise that have been dealt with in previous paragraphs.

With regard to the delinquent, however, we should examine one final problem, and we will do so by way of conclusion: the problem of responsibility as it can be defined with regard to the notion of social agent. For ultimately the delinquent is not merely someone who has violated a law, but he is also someone who is responsible for his act, in relation to a victim whose rights have been violated. How can such a problem be dealt with?

It seems to us necessary to make three observations. The first is that the notion of responsibility is complex; the various meanings it can assume are constantly in danger of overlapping.³⁴ First there is penal responsibility, in the legal sense of the word, which implies that certain conditions must be fulfilled before a subject can be responsible (among others, conditions of age and mental health). Next there is the feeling of responsibility projected onto a subject considered guilty of an act as a result of what social psychologists call a process of attribution.³⁵ The notion of penal responsibility is obviously important in the sense that it represents a means of implicating the author of an infraction by considering a certain number of guarantees. The question becomes more delicate when a sanction or measure is linked almost automatically to a determined act of transgression,³⁶ for such a practice rests on a certain number of presuppositions linked to the voluntary and affective characteristics of the subject. It is at this level that the difficulties linked to multiple meanings of the term

³⁴ Debuyst, C., "De la notion de punition à celle de responsabilisation. De l'ambiguïté d'une problématique", in *Normes et valeurs*, Centre de recherches de Vaucresson, 1987.

³⁵ See, for example, the work by J. Leyens, *Sommes-nous tous des psychologues?*, Brussels, P. Mardaga, 1983; and also Debuyst, C., *Modèle éthologique et criminologie*, ch. 2, "La notion d'infraction comme mode d'interprétation".

³⁶ Report of the Canadian Commission on Determination of Penalty, *Réformer la sentence. Une approche canadienne*, Feb. 1987.

responsibility appear. To what extent does this responsibility, as it is understood by the penal code, correspond to responsibility as experienced by the various subjects (whether they be the violator, the victim, public opinion, etc.)? This is not unimportant, for the manner in which it is experienced determines the representations through which the notion of justice takes form, so that in the interrelations that develop, it is important to attain it across the "points of view" of those concerned.

A second remark is more specifically criminological in the sense that we can ask what the notion of social agent adds to the level of responsibility experienced by the subject himself. At this level it does not seem possible to us to have a general response because in itself delinquency does not form an homogeneous entity. The only point in common between different infractions is their forbidden nature; but this behavior of transgression, when examined from the point of view of the agents, takes place in quite different situations that must be seen as such. We could say that delinquent behavior is behavior that poses a problem for the social group and that has been defined as such; but the fact that it poses a problem does not imply the solution that must be given to it nor the interpretation that can be made of it. A great deal of questions could be asked in this respect. We will only ask one that touches on common delinquency, the kind that is generally handled by ordinary courts. How and to what extent does the subject feel concerned by the act committed and the consequences that have resulted from it? To what social reality does this situation of involvement/uninvolvement that he manifests refer us? What does the transgression represent, not only at the level of what is experienced but also at that of the imagined, the rationalized, the mythified? One can say that it is in such a context that the transgression takes on meaning and it is important to state this meaning when it is a matter of intervening in the judicial sphere. To do so rests on the idea that no intervention can go very far if the notion of responsibility as experienced does not take shape somewhere. Not so much responsibility experienced in relation to an infraction committed (which represents one thing), but responsibility experienced in relation to a social reality for which it is important to specify, for the subject, the field and the terms (which seems to us ultimately most important). This

Social Agent and Delinquency

supposes that, in one way or another, the subject is an agent in this social reality, or that he sees himself in reference to the status of actor.

A final remark leads us to say that the position we have adopted is perhaps not the usual one. Indeed if one takes as point of departure the fiction of free will or that of determinism, attention is brought to bear principally on the delinquent, on the responsibility (or lack of responsibility) that is recognized for him and in light of which the penalty (or measure) is taken. An author like E. De Greeff even said that the notion of responsibility was the lever with which society could move an individual, i.e. that makes it possible to make the measures taken legitimate.³⁷ If we take as point of departure the fiction of the social agent, the perspective becomes more complex and the circuit followed is almost the opposite one. The law, the determination of its field and its application appear as the result of a human deed and of decisions taken with all their ambiguity at the level of established consensus. Even if the values to which reference is made are the strong points of the collective consciousness, the manner in which they are used risks posing a problem and becoming more destructive than their affirmation might lead us to think.³⁸ It is such a dialectic, it might be said, that must be taken into account.

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³⁷ De Greeff, E., *Les Instincts de défense et de sympathie*, Paris, P.U.F., 1947.

³⁸ Debuyst, C., *op. cit.*, ch. 5, "Les règles morales et l'ambiguïté d'une référence aux valeurs".