12/15/71

Memorandum 72-1

Subject: Comments of Justice Reynolds

Summary

Traditionally, new members have been provided background material relating to law reform and this material has been discussed at a Commission meeting and some thought has been given to the proper role and objectives of the Law Revision Commission. Justice Reynolds also made some valuable observations at our December meeting.

Attached is the background material relating to law reform. Also summarized in this memorandum are the observations of Justice Reynolds. This material is for background; we do not believe that any significant time at the meeting should be given to this material.

Justice Reynolds made one observation concerning our meeting procedures that I believe shows an area where improvement is needed. He noted that it was difficult for anyone to get in a word at the meeting and to make his point without interruption. This observation is discussed on page 4 of this memorandum and should be considered at the meeting.

Background Material on Law Reform

The Commission has traditionally distributed to new members background material relating to law reform and the various views as to the proper objectives and functions of law reform agencies. This material has then been discussed at a Commission meeting. The process has been of some value since it is worthwhile from time to time to give some thought to the objectives the Commission is seeking to achieve.

I am providing this background material herewith, but I suggest that it not be discussed at the meeting. We have much to accomplish and little time to accomplish it. The material is attached for those that are interested in it.

The following are the items attached:

(1) Cardozo's article--"A Ministry of Justice." Written in 1921, this article is the classic in the field.

(2) Traynor's article--"The Courts: Interweavers in the Reformation of Law." An interesting article discussing the need for establishing lines of communication between the legal scholars, the courts, and the legislature.

(3) Excerpt from "The Machinery of Law Reform in New Zealand." An analysis of the weakness of the New Zealand Law Revision Committee, concluding that, where political questions are involved, political considerations cannot be ignored.

(4) Articles from Western Ontario Law Review. A good comparative discussion of the law reform agencies in the United States and elsewhere.

Observations of Justice Reynolds

Justice Reynolds, who attended our December meeting, made some comments concerning the procedures he had observed in other law reform bodies and some observations concerning our procedures. There was no opportunity to discuss his comments and observations at our December meeting, and I believe that it would be worthwhile to discuss at least one of his observations at the January meeting since it indicates an area where I believe our procedures need to be improved.

1. Commissioners and consultants. Justice Reynolds noted that his agency and some other foreign organizations have full-time commissioners who formulate and submit the recommendations. His agency does not use research consultants although he noted that some other law reform committees do.

2. Political considerations. Justice Reynolds stated that his commission recommends what is "right" and ignores "political" considerations.

3. Urgency. Justice Reynolds stated that his commission works without any sense of urgency and takes the view that a little bit of work of the highest quality is better than a large mass of poor work.

4. Formality of procedures. Justice Reynolds stated that the fact that the commissioners were all full time permitted daily consultation on an informal basis by the commissioner who was preparing the particular recommendation and that decisions were made on a consensus basis rather than by voting on controversial issues.

5. Technical drafting. Justice Reynolds stated that he felt that the person in charge of the particular recommendation should be responsible for the technical drafting. Other commissioners should be concerned with policy determination, not with drafting. He noted that the camel has been described as the animal put together by a committee and expressed the concern that drafting by a commission at a meeting might result in a poor product.

This objection merits discussion. I believe that the Commission is properly concerned with the drafting of statutory provisions. A careful examination by the commissioners of proposed language has frequently disclosed deficiencies, and many times the Commission has been able to come up with the precise word or words needed to express the particular concept to be stated in the statute. At the same time, the Commission has not hesitated to refer matters back to the staff for further research and drafting. I personally believe that the past practice in this regard has been about as good as could be devised.

6. Interruptions of speakers at meetings. Justice Reynolds noted that it was difficult for anyone to get in a word at the meeting and to make his point without interruption. Professor Williams made the same observation. Recognizing that I am the worst offender in this respect, I believe that Justice Reynolds has put his finger on one aspect of our procedures that should be improved.

The December meeting was the first meeting in a number of years where we had seven commissioners present; during the past several years, we have had but from three to five commissioners present at meetings; it is likely that we will have six or seven commissioners present at each future meeting. For this reason alone, I believe that some improvement in our procedures is desirable. In addition, the schedule for the work on prejudgment attachment is bound to create a sense of urgency and frustration that will increase the likelihood of interruptions in the future if we do not recognize the problem and deal with it.

While it is important to recognize that there is a need to permit the expression of views without interruption, I know that merely recognizing that need will not be sufficient to deal with the problem. Accordingly, I suggest that the Chairman keep this problem in mind and call to the attention of myself and other offenders--if any--the need to permit persons to express their views without interruption. I would hope, however, that this objective could be accomplished without unduly increasing the formality at our meetings.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memorandum 69-65

EXHIBIT I

HARVARD
LAW REVIEW

VOL. XXXV DECEMBER, 1921 NO. 2

A MINISTRY OF JUSTICE

THE courts are not helped as they could and ought to be in the adaptation of law to justice. The reason they are not helped is because there is no one whose business it is to give warning that help is needed. Time was when the remedial agencies, though inadequate, were at least in our own hands. Fiction and equity were tools which we could apply and fashion for ourselves. The artifice was clumsy, but the clumsiness was in some measure atoned for by the skill of the artificer. Legislation, supplanting fiction and equity, has multiplied a thousand fold the power and capacity of the tool, but has taken the use out of our own hands and put it in the hands of others. The means of rescue are near for the worker in the mine. Little will the means avail unless lines of communication are established between the miner and his rescuer. We must have a courier who will carry the tidings of distress to those who are there to save when signals reach their ears. To-day courts and legislature work in separation and aloofness. The penalty is paid both in the wasted effort of production and in the lowered quality of the product. On the one side, the judges, left to fight against anachronism and injustice by the methods of judge-made law, are distracted by the conflicting promptings of justice and logic, of consistency and mercy, and the output of their labors bears the tokens of the strain. On the other side, the legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic

advice as to the workings of one rule or another, patches the fabric here and there, and mars often when it would mend. Legislature and courts move on in proud and silent isolation. Some agency must be found to mediate between them.

This task of mediation is that of a ministry of justice. The duty must be cast on some man or group of men to watch the law in action, observe the manner of its functioning, and report the changes needed when function is deranged. The thought is not a new one. Among our own scholars, it has been developed by Dean Pound with fertility and power.[1] Others before him, as he reminds us, had seen the need, and urged it. Bentham made provision for such a ministry in his draft of a Constitutional Code.[2] Lord Westbury renewed the plea.[3] Only recently, Lord Haldane has brought it to the fore again.[4] "There is no functionary at present who can properly be called a minister responsible for the subject of Justice."[5] "We are impressed by the representations made by men of great experience, such as the President of the Incorporated Law Society, as to the difficulty of getting the attention of the government to legal reform, and as to the want of contact between those who are responsible for the administration of the work of the Commercial Courts and the mercantile community, and by the evidence adduced that the latter are, in consequence and progressively, withdrawing their disputes from the jurisdiction of the Courts."[6] In countries of continental Europe, the project has passed into the realm of settled practice. Apart from these precedents and without thought of them, the need of such a ministry, of some one to observe and classify and criticize and report, has been driven home to me with steadily growing force through my own work in an appellate court. I have seen a body of judges applying a system of case law, with powers of innovation cabined and confined. The main lines are fixed by precedents. New lines may, indeed, be run, new courses followed, when precedents are lacking. Even then, distance and direction are guided by mingled considerations of

[1] Pound, "Juristic Problems of National Progress," 22 AM. J. OF SOCIOLOGY, 721, 729, 731 (May, 1917); Pound, "Anachronisms in Law," 3 J. AM. JUDICATURE SOC., 142, 146 (February, 1920).

[2] WORKS, IX, 597–612.

[3] 1 NASH, LIFE OF LORD WESTBURY, 191, quoted by Pound, *supra*.

[4] Report of Lord Haldane's Committee on the Machinery of Government (1918).

[5] *Ibid.*, p. 63. [6] *Ibid.*, p. 64.

logic and analogy and history and tradition which moderate and temper the promptings of policy and justice. I say this, not to criticize, but merely to describe. I have seen another body, a legislature, free from these restraints, its powers of innovation adequate to any need, preoccupied, however, with many issues more clamorous than those of courts, viewing with hasty and partial glimpses the things that should be viewed both steadily and whole. I have contrasted the quick response whenever the interest affected by a ruling untoward in results had some accredited representative, especially some public officer, through whom its needs were rendered vocal. A case involving, let us say, the construction of the Workmen's Compensation Law, exhibits a defect in the statutory scheme. We find the Attorney General at once before the legislature with the request for an amendment. We cannot make a decision construing the tax law or otherwise affecting the finances of the state without inviting like results. That is because in these departments of the law, there is a public officer whose duty prompts him to criticism and action. Seeing these things, I have marveled and lamented that the great fields of private law, where justice is distributed between man and man, should be left without a caretaker. A word would bring relief. There is nobody to speak it.

For there are times when deliverance, if we are to have it — at least, if we are to have it with reasonable speed — must come to us, not from within, but from without. Those who know best the nature of the judicial process, know best how easy it is to arrive at an impasse. Some judge, a century or more ago, struck out upon a path. The course seemed to be directed by logic and analogy. No milestone of public policy or justice gave warning at the moment that the course was wrong, or that danger lay ahead. Logic and analogy beckoned another judge still farther. Even yet there was no hint of opposing or deflecting forces. Perhaps the forces were not in being. At all events, they were not felt. The path went deeper and deeper into the forest. Gradually there were rumblings and stirrings of hesitation and distrust, anxious glances were directed to the right and to the left, but the starting point was far behind, and there was no other path in sight.

Thus, again and again, the processes of judge-made law bring judges to a stand that they would be glad to abandon if an outlet could be gained. It is too late to retrace their steps. At all events,

whether really too late or not, so many judges think it is that the result is the same as if it were. Distinctions may, indeed, supply for a brief distance an avenue of escape. The point is at length reached when their power is exhausted. All the usual devices of competitive analogies have finally been employed without avail. The ugly or antiquated or unjust rule is there. It will not budge unless uprooted. Execration is abundant, but execration, if followed by submission, is devoid of motive power. There is need of a fresh start; and nothing short of a statute, unless it be the erosive work of years, will supply the missing energy. But the evil of injustice and anachronism is not limited to cases where the judicial process, unaided, is incompetent to gain the mastery. Mastery, even when attained, is the outcome of a constant struggle in which logic and symmetry are sacrificed at times to equity and justice. The gain may justify the sacrifice; yet it is not gain without deduction. There is an attendant loss of that certainty which is itself a social asset. There is a loss too of simplicity and directness, an increasing aspect of unreality, of something artificial and fictitious, when judges mask a change of substance, or gloss over its importance, by the suggestion of a consistency that is merely verbal and scholastic. Even when these evils are surmounted, a struggle, of which the outcome is long doubtful, is still the price of triumph. The result is to subject the courts and the judicial process to a strain as needless as it is wearing. The machinery is driven to the breaking point; yet we permit ourselves to be surprised that at times there is a break. Is it not an extraordinary omission that no one is charged with the duty to watch machinery or output, and to notify the master of the works when there is need of replacement or repair?

In all this, I have no thought to paint the failings of our law in lurid colors of detraction. I have little doubt that its body is for the most part sound and pure. Not even its most zealous advocate, however, will assert that it is perfect. I do not seek to paralyze the inward forces, the "indwelling and creative" energies,[7] that make for its development and growth. My wish is rather to release them, to give them room and outlet for healthy and unhampered action. The statute that will do this, first in one field and then in others, is something different from a code, though, as statute follows statute, the material may be given from which in time, a

[7] 2 BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE, 609.

code will come. Codification is, in the main, restatement. What we need, when we have gone astray, is change. Codification is a slow and toilsome process, which, if hurried, is destructive. What we need is some relief that will not wait upon the lagging years. Indeed, a code, if completed, would not dispense with mediation between legislature and judges, for code is followed by commentary and commentary by revision, and thus the task is never done. "As in other sciences, so in politics, it is impossible that all things should be precisely set down in writing; for enactments must be universal, but actions are concerned with particulars." [8] Something less ambitious, in any event, is the requirement of the hour. Legislation is needed, not to repress the forces through which judge-made law develops, but to stimulate and free them. Often a dozen lines or less will be enough for our deliverance. The rule that is to emancipate is not to imprison in particulars. It is to speak the language of general principles, which, once declared, will be developed and expanded as analogy and custom and utility and justice, when weighed by judges in the balance, may prescribe the mode of application and the limits of extension. The judicial process is to be set in motion again, but with a new point of departure, a new impetus and direction. In breaking one set of shackles, we are not to substitute another. We are to set the judges free.

I have spoken in generalities, but instances will leap to view. There are fields, known to us all, where the workers in the law are hampered by rules that are outworn and unjust. How many judges, if they felt free to change the ancient rule, would be ready to hold to-day that a contract under seal may not be modified or discharged by another and later agreement resting in parol? [9] How many would hold that a deed, if it is to be the subject of escrow, must be delivered to a third person, and not to the grantee? [10] How many would hold that a surety is released, irrespective of resulting damage, if by agreement between principal and creditor the time of payment of the debt is extended for a single day? [11] How many would hold that a release of one joint tortfeasor is a release also of the others? How many would not prefer, instead

[8] ARISTOTLE, POLITICS, Bk. II (Jowett's translation).
[9] 3 WILLISTON, CONTRACTS, §§ 1834-1837; Harris v. Shorall, 230 N. Y. 343 (1921).
[10] Blewitt v. Boorum, 142 N. Y. 357, 37 N. E. 119 (1894).
[11] N. Y. Life Ins. Co. v. Casey, 178 N. Y. 381, 70 N. E. 916 (1904).

of drawing some unreal distinction between releases under seal and covenants not to sue,[12] to extirpate, root and branch, a rule which is to-day an incumbrance and a snare? How long would Pinnel's case[13] survive if its antiquity were not supposed to command the tribute of respect? How long would Dumpor's case[14] maintain a ghostly and disquieting existence in the ancient byways of the law?

I have chosen extreme illustrations as most likely to command assent. I do not say that judges are without competence to effect some changes of that kind themselves. The inquiry, if pursued, would bring us into a field of controversy which it is unnecessary to enter. Whatever the limit of power, the fact stares us in the face that changes are not made. But short of these extreme illustrations are others, less glaring and insistent, where speedy change is hopeless unless effected from without. Sometimes the inroads upon justice are subtle and insidious. A spirit or a tendency, revealing itself in a multitude of little things, is the evil to be remedied. No one of its manifestations is enough, when viewed alone, to spur the conscience to revolt. The mischief is the work of a long series of encroachments. Examples are many in the law of practice and procedure.[15] At other times, the rule, though wrong, has become the cornerstone of past transactions. Men have accepted it as law, and have acted on the faith of it. At least, the possibility that some have done so, makes change unjust, if it were practicable, without saving vested rights. Illustrations again may be found in many fields. A rule for the construction of wills established a presumption that a gift to issue is to be divided, not *per stirpes*, but *per capita*.[16] The courts denounced and distinguished, but were unwilling to abandon.[17] In New York, a statute has at last

[12] Gilbert v. Finch, 173 N. Y. 455, 66 N. E. 133 (1903); Walsh v. N. Y. Central R. R. Co., 204 N. Y. 58, 97 N. E. 408 (1912); *cf.* 21 COLUMBIA L. REV. 491.

[13] 5 Coke, 117; *cf.* Jaffray v. Davis, 124 N. Y. 164, 167, 26 N. E. 351 (1891); Frye v. Hubbell, 74 N. H. 358, 68 Atl. 325 (1907); 1 WILLISTON, CONTRACTS, § 121; ANSON, CONTRACTS, Corbin's ed., p. 137; Ferson, "The Rule in Foakes v. Beer," 31 YALE L. J. 15.

[14] 2 Coke, 119.

[15] In jurisdictions where procedure is governed by rules of court, recommendations of the ministry affecting the subject-matter of the rules may be submitted to the judges.

[16] I state the law in New York and in many other jurisdictions. There are jurisdictions where the rule is different.

[17] Petry v. Petry, 186 App. Div. 738, 175 N. Y. Supp. 30 (1919), 227 N. Y. 621, 125 N. E. 924 (1919); Matter of Durant, 231 N. Y. 41, 131 N. E. 562 (1921).

released us from our bonds,[18] and we face the future unashamed. Still more common are the cases where the evil is less obvious, where there is room for difference of opinion, where some of the judges believe that the existing rules are right, at all events where there is no such shock to conscience that precedents will be abandoned, and what was right declared as wrong. At such times there is need of the detached observer, the skilful and impartial critic, who will view the field in its entirety, and not, as judges view it, in isolated sections, who will watch the rule in its working, and not, as judges watch it, in its making, and who viewing and watching and classifying and comparing, will be ready, under the responsibility of office, with warning and suggestion.

I note at random, as they occur to me, some of the fields of law where the seeds of change, if sown, may be fruitful of results. Doubtless better instances can be chosen. My purpose is, not advocacy of one change or another, but the emphasis of illustration that is concrete and specific.

It is a rule in some jurisdictions that if A sends to B an order for goods, which C, as the successor to B's business, takes it on himself to fill, no action at the suit of C will lie either for the price or for the value, if A in accepting the goods and keeping them believed that they had been furnished to him by B, and this though C has acted without fraudulent intent.[19] I do not say that this is the rule everywhere. There are jurisdictions where the question is still an open one. Let me assume, however, a jurisdiction where the rule, as I have stated it, prevails, or even one where, because the question is unsettled, there is a chance that it may prevail. A field would seem to be open for the declaration by the lawmakers of a rule less in accord, perhaps, with the demands of a "jurisprudence of conceptions," [20] but more in accord with those of morality and justice. Many will prefer to turn to the principle laid down in the French Code Civil:

---

[18] Decedent's Estate Law, § 472; L. 1921, c. 379.

[19] Boulton v. Jones, 2 H. & N. 564 (1857); 1 WILLISTON, CONTRACTS, § 80; *cf.* Boston Ice Co. v. Potter, 123 Mass. 28 (1877); Kelly Asphalt Co. v. Barber Asphalt Paving Co., 211 N. Y. 68, 71, 105 N. E. 88 (1914).

[20] Pound, "Mechanical Jurisprudence," 8 COLUMBIA L. REV. 605, 608, 610; Hynes v. N. Y. Central R. R. Co., 231 N. Y. 229, 235, 131 N. E. 898 (1921).

"L'erreur n'est une cause de nullité de la convention que lorsqu'elle tombe sur la substance même de la chose qui en est l'objet. Elle n'est point une cause de nullité, lorsqu'elle ne tombe que sur la personne avec laquelle on a intention de contracter, à moins que la considération de cette personne ne soit la cause principale de la convention."[21]

Much may be said for the view that in the absence of bad faith, there should be a remedy in quasi contract.[22]

It is a rule which has grown up in many jurisdictions and has become "a common ritual"[23] that municipal corporations are liable for the torts of employees if incidental to the performance or non-performance of corporate or proprietary duties, but not if incidental to the performance or non-performance of duties public or governmental. The dividing line is hard to draw.

"Building a drawbridge, maintaining a health department, or a charitable institution, confining and punishing criminals, assaults by policemen, operating an elevator in a city hall, driving an ambulance, sweeping and cleaning streets, have been held governmental acts. Sweeping and cleaning streets, street lighting, operating electric light plants, or water works, maintaining prisons, have been held private functions."[24]

The line of demarcation, though it were plainer, has at best a dubious correspondence with any dividing line of justice. The distinction has been questioned by the Supreme Court of the United States.[25] It has been rejected recently in Ohio.[26] In many jurisdictions, however, as, for example in New York, it is supported by precedent so inveterate that the chance of abandonment is small. I do not know how it would fare at the hands of a ministry of justice. Perhaps such a ministry would go farther, and would wipe out, not merely the exemption of municipalities, but the broader exemption of the state.[27] At least there is a field for inquiry, if not for action.

It is a rule of law that the driver of an automobile or other vehicle who fails to look or listen for trains when about to cross a railroad, is guilty of contributory negligence, in default, at least,

---

[21] Code Civil, Art. 1110.
[22] ANSON, CONTRACTS (Corbin's edition), 51; KEENER, QUASI CONTRACTS, 358–360.
[23] 34 HARV. L. REV. 66.
[24] *Ibid.*, 67.
[25] Workman v. The Mayor, 179 U. S. 552, 574 (1900).
[26] Fowler v. City of Cleveland, 100 Ohio St. 158, 126 N. E. 72 (1919).
[27] Smith v. State, 227 N. Y. 405, 125 N. E. 841 (1920).

of special circumstances excusing the omission. I find no fault with that rule. It is reasonable and just. But the courts have in some jurisdictions gone farther. They have held that the same duty that rests upon the driver, rests also upon the passenger.[28] The friend whom I invite to ride with me in my car, and who occupies the rear seat beside me, while the car is in the care of my chauffeur, is charged with active vigilance to watch for tracks and trains, and is without a remedy if in the exuberance of jest or anecdote or reminiscence, he relies upon the vigilance of the driver to carry him in safety. I find it hard to imagine a rule more completely unrelated to the realities of life. Men situated as the guest in the case I have supposed, do not act in the way that this rule expects and requires them to act. In the first place, they would in almost every case make the situation worse if they did; they would add bewilderment and confusion by contributing multitude of counsel. In the second place, they rightly feel that, except in rare emergencies of danger known to them, but unknown to the driver, it is not their business to do anything. The law in charging them with such a duty has shaped its rules in disregard of the common standards of conduct, the every-day beliefs and practices, of the average man and woman whose behavior it assumes to regulate. We must take a fresh start. We must erect a standard of conduct that realists can accept as just. Other fields of the law of negligence may be resurveyed with equal profit. The law that defines or seeks to define the distinction between general and special employers is beset with distinctions so delicate that chaos is the consequence. No lawyer can say with assurance in any given situation when one employment ends and the other begins. The wrong choice of defendants is often made, with instances, all too many, in which justice has miscarried.

Illustrations yet more obvious are at hand in the law of evidence. Some of its rules are so unwieldy that many of the simplest things

---

[28] Read v. N. Y. C. & H. R. R. R. Co., 125 App. Div. 223, 107 N. Y. Supp. 1068 (1908); s. c., 165 App. Div. 910, 150 N. Y. Supp. 1108 (1914), aff'd., 219 N. Y. 660, 114 N. E. 1081 (1916); Noakes v. N. Y. C. & H. R. R. R. Co., 121 App. Div. 716, 106 N. Y. Supp. 522 (1907), 195 N. Y. 543, 88 N. E. 1126 (1909). For the true rule see Wolfich v. N. Y., N. H., & H. R. R., 93 Conn. 458, 106 Atl. 325 (1919); 31 YALE L. J. 101.

of life, transactions so common as the sale and delivery of merchandise, are often the most difficult to prove. Witnesses speaking of their own knowledge must follow the subject-matter of the sale from its dispatch to its arrival. I have been told by members of the bar that claims of undoubted validity are often abandoned, if contested, because the withdrawal of the necessary witnesses from the activities of business involves an expense and disarrangement out of proportion to the gain. The difficulty would be lessened if entries in books of account were admissible as *prima facie* evidence upon proof that they were made in the usual course of business. Such a presumption would harmonize in the main with the teachings of experience. Certainly it would in certain lines of business, as, *e. g.*, that of banking, where irregularity of accounts is unquestionably the rare exception. Even the books of a bank are not admissible at present without wearisome preliminaries.[29] In England, the subject has for many years been regulated by statute.[30] Something should be done in our own country to mitigate the hardship. "The dead hand of the common-law rule . . . should no longer be applied to such cases as we have here." [31]

We are sometimes slow, I fear, while absorbed in the practice of our profession, to find inequity and hardship in rules that laymen view with indignation and surprise. One can understand why this is so. We learned the rules in youth when we were students in the law schools. We have seen them reiterated and applied as truths that are fundamental and almost axiomatic. We have sometimes even won our cases by invoking them. We end by accepting them without question as part of the existing order. They no longer have the vividness and shock of revelation and discovery. There is need of conscious effort, of introspective moods and moments, before their moral quality addresses itself to us with the same force as it does to others. This is at least one reason why the bar has at times been backward in the task of furthering reform. A recent study of the Carnegie Foundation for the Advancement of Teaching deals with the subject of training for the public profession of the law.[32] Dr. Pritchett says in his preface:[33]

[29] Ocean Bank v. Carll, 55 N. Y. 440 (1874); Bates v. Preble, 151 U. S. 149 (1894).
[30] 42 & 43 Vict. c. 11; Stephen, Digest of the Law of Evidence, Art. 36.
[31] Rosen v. United States, 245 U. S. 467 (1918).
[32] Bulletin No. 15, Carnegie Foundation.
[33] *Ibid.*, p. xvii.

"There is a widespread impression in the public mind that the members of the legal profession have not, through their organizations, contributed either to the betterment of legal education or to the improvement of justice to that extent which society has the right to expect."

The Centennial Memorial Volume of Indiana University contains a paper by the Dean of the Harvard Law School on the Future of Legal Education.[34]

"So long as the leaders of the bar," he says,[35] "do nothing to make the materials of our legal tradition available for the needs of the twentieth century, and our legislative lawmakers, more zealous than well instructed in the work they have to do, continue to justify the words of the chronicler — 'the more they spake of law the more they did unlaw' — so long the public will seek refuge in specious projects of reforming the outward machinery of our legal order in the vain hope of curing its inward spirit."

Such reproaches are not uncommon. We do not need to consider either their justification or their causes. Enough for us that they exist. Our duty is to devise the agencies and stimulate the forces that will make them impossible hereafter.

What, then, is the remedy? Surely not to leave to fitful chance the things that method and system and science should order and adjust. Responsibility must be centered somewhere. The only doubt, it seems to me, is where. The attorneys-general, the law officers of the states, are overwhelmed with other duties. They hold their places by a tenure that has little continuity, or permanence. Many are able lawyers, but a task so delicate exacts the scholar and philosopher, and scholarship and philosophy find precarious and doubtful nurture in the contentions of the bar. Even those qualities, however, are inadequate unless reinforced by others. There must go with them experience of life and knowledge of affairs. No one man is likely to combine in himself attainments so diverse. We shall reach the best results if we lodge power in a group, where there may be interchange of views, and where different types of thought and training will have a chance to have their say. I do not forget, of course, the work that is done by Bar Associations, state and national, as well as local, and other voluntary bodies. The work has not risen to the needs of the occasion. Much of it has been

[34] Pound, "The Future of Legal Education," 259.
[35] *Ibid.*, 268.

critical rather than constructive. Even when constructive, it has been desultory and sporadic. No attempt has been made to cover with systematic and comprehensive vision the entire field of law. Discharge of such a task requires an expenditure of time and energy, a single-hearted consecration, not reasonably to be expected of men in active practice. It exacts, too, a scholarship and a habit of research not often to be found in those immersed in varied duties. Even if these objections were inadequate, the task ought not to be left to a number of voluntary committees, working at cross purposes. Recommendations would come with much greater authority, would command more general acquiescence on the part of legislative bodies, if those who made them were charged with the responsibilities of office. A single committee should be organized as a ministry of justice. Certain at least it is that we must come to some official agency unless the agencies that are voluntary give proof of their capacity and will to watch and warn and purge — unless the bar awakes to its opportunity and power.

How the committee should be constituted, is, of course, not of the essence of the project. My own notion is that the ministers should be not less than five in number. There should be representatives, not less than two, perhaps even as many as three, of the faculties of law or political science in institutes of learning. Hardly elsewhere shall we find the scholarship on which the ministry must be able to draw if its work is to stand the test. There should be, if possible, a representative of the bench; and there should be a representative or representatives of the bar.

Such a board would not only observe for itself the workings of the law as administered day by day. It would enlighten itself constantly through all available sources of guidance and instruction; through consultation with scholars; through study of the law reviews, the journals of social science, the publications of the learned generally; and through investigation of remedies and methods in other jurisdictions, foreign and domestic. A project was sketched not long ago by Professor John Bassett Moore, now judge of the International Court, for an Institute of Jurisprudence.[38] It was to do for law what the Rockefeller Institute is doing for medicine. Such an institute, if founded, would be at the service of the min-

[38] Report of Dean of Columbia University Law School for 1916.

isters. The Commonwealth Fund has established a Committee for Legal Research which is initiating studies in branches of jurisprudence where reform may be desirable. The results of its labors will be available for guidance. Professors in the universities are pointing the way daily to changes that will help. Professor Borchard of Yale by a series of articles on the Declaratory Judgment [37] gave the impetus to a movement which has brought us in many states a reform long waited for by the law.[38] Dean Stone of Columbia has disclosed inconsistencies and weaknesses in decisions that deal with the requirement of mutuality of remedy in cases of specific performance.[39] Professor Chafee in a recent article [40] has emphasized the need of reform in the remedy of interpleader. In the field of conflict of laws, Professor Lorenzen has shown disorder to the point of chaos in the rules that are supposed to regulate the validity and effect of contracts.[41] The archaic law of arbitration, amended not long ago in New York through the efforts of the Chamber of Commerce,[42] remains in its archaic state in many other jurisdictions, despite requests for change. A ministry of justice will be in a position to gather these and like recommendations together, and report where change is needed. Reforms that now get themselves made by chance or after long and vexatious agitation, will have the assurance of considerate and speedy hearing. Scattered and uncoördinated forces will have a rallying point and focus. System and method will be substituted for favor and caprice. Doubtless, there will be need to guard against the twin dangers of overzeal on the one hand and of inertia on the other — of the attempt to do too much and of the willingness to do too little. In the end, of course, the recommendations of the ministry will be recommendations and nothing more. The public will be informed of them. The bar and others interested will debate them. The legislature may reject them. But at least the lines of communication will be open. The long silence will be broken. The spaces between the planets will at last be bridged.

---

[37] 28 YALE L. J. 1.
[38] 34 HARV. L. REV. 697.
[39] The "Mutuality" Rule in New York, 16 COLUMBIA L. REV. 443.
[40] "Modernizing Interpleader," 30 YALE L. J. 814.
[41] 30 YALE L. J. 565, 655; 31 *id.*, 53.
[42] Matter of Berkovitz, 230 N. Y. 261, 130 N. E. 288 (1921).

The time is ripe for betterment. "Le droit a ses époques," says Pascal in words which Professor Hazeltine has recently recalled to us. The law has "its epochs of ebb and flow."[43] One of the flood seasons is upon us. Men are insisting, as perhaps never before, that law shall be made true to its ideal of justice. Let us gather up the driftwood, and leave the waters pure.

Benjamin N. Cardozo.

New York City.

[43] H. D. Hazeltine, 1 Cambridge L. J. 1.

Memorandum 69-65

EXHIBIT II

Interweavers in the Reformation of Law

The Courts

By Roger J. Traynor, Chief Justice of California*

We are all going to miss Senator Tydings this morning and no one wishes more than I that he could have been here and that I could have been in the audience with all of you. I think I would have been in the audience too had I merely been summoned to pinch-hit for "God, for Country and for Yale"; but of course there was nothing else to do but to heed the summons from the President of the State Bar of California, for if there is one thing I am proud of it is the bench and bar of California and the splendid cooperation between them.

It is the current vogue to endorse law reform as our forerunners once endorsed the status quo. The very term law reform now conveys assurance, like a miracle fabric, that all will be well as soon as it is pressed or unpressed into service. If one fabric fails, the facile remedy is to fabricate another and another via the legislative process.

Receptive though we may be to an abundance of new riches in the law, we cannot let them accumulate in such haphazard heaps that they confuse the law at the expense of rational reform. Hence, as legislatures increase their already formidable output of statutes, courts must correspondingly enlarge their responsibility for keeping the law a coherent whole.

Ordinarily a legislature makes much more law in a session via statutes than a court does over a long period of time via the painstaking application or adaptation of common law rules and the occasional innovation of a new one. By definition legislators are the experimental lawmakers, free to draft laws on a massive scale or *ad hoc* in response to what they understand to be the needs of the community or the community of interests they represent. The legislators themselves are experiments of a sort; they are on trial until the next election and must prove in the interim that they can make laws acceptable to their time and place, even though many of them may not be lawyers.

What a legislature does, however, it can undo without much ado. If some of its purported miracle fabrics fail to prove

* Roger J. Traynor at the 40th Annual Convention of The State Bar of California, Monterey, September 27, 1967.

miraculous, they need no longer remain on the shelves. We can lament that they sometimes do, but we need not despair; they rarely survive indefinitely. Bumbling though the legislative process may be, it is more readily self-correcting than the judicial process. Given its flexibility, we can accept amiably that when a legislature is good, it can be very, very good, but that when it is bad, it is horrid. We can also in some measure resign ourselves to how ingeniously it sometimes abstains from any action, how mysteriously it sometimes moves its wonders not to perform. We can reconcile ourselves to its swings of quality so long as the people exercise responsibly their power to keep it a do-gooder, a reformer of the law.

It could not be otherwise in the modern world that for better or worse the legislatures have displaced courts as our major lawmakers. We have come a long way from the time when courts were on guard to keep statutes in their place in the shadow of precedent. In most of their affairs people who seek out new rules of law now look to the next legislative session, not to the day of judgment. In street wisdom, it is easier to legislate than to litigate. A legislature can run up a law on short notice, and when it has finished all the seams it can run up another and another. It is engaged in mass production; it produces piecework of its own volition or on order. The great tapestry of Holmes's princess, the seamless web of the law, becomes ever more legendary.

Whatever our admiration for ancient arts, few of us would turn the clock back to live out what museums preserve. The law of contracts was once well served by delightful causeries of learned judges that clarified the meaning of obligation. Such causeries, however, proved inadequate to provide an expansion and diversification of words to correspond with that of business enterprise. Thus it fell to the legislators to spell out whole statutes such as insurance codes and the uniform laws dealing with negotiable instruments, sales, bills of lading, warehouse receipts, stock transfers, conditional sales, trust receipts, written obligations, fiduciaries, partnerships, and limited partnerships.

There followed in the United States another development, a state-by-state adoption of the Uniform Commercial Code, the culmination of years of scholarly work sponsored by the American Law Institute and the Commissioners on Uniform State Laws. Such statutes can take a bird's-eye view of the total problem, instead of that of an owl on a segment. They can encompass wide generalizations from experience

that a judge is precluded from making in his decision on a particular case. Legislatures can break sharply with the past, if need be, as judges ordinarily cannot. They avoid the wasteful cost in time and money of piecemeal litigation that all too frequently culminates in a crazy quilt of rules defying intelligent restatement or coherent application. They can take the initiative in timely solution of urgent problems, in contrast with the inertia incumbent upon judges until random litigation brings a problem in incomplete form to them, often too soon or too late for over-all solution.

As the legislators tend their factories replete with machinery for the massive fabrication of law, judges work away much as before at the fine interweaving that gives law the grace of coherent pattern as it evolves. Paradoxically, the more legislators extend their range of lawmaking, of statutory innovation and reform at a hare's speed, the more significant becomes the judges' own role of lawmaking, of reformation at the pace of the tortoise. Even at a distance from the onrushing legislators they can make their presence felt. It has been known since the days of Aesop that the tortoise can overtake the zealous hare; La Fontaine has noted that it does so while carrying a burden. The frailty of the hare is that for all its zeal it tends to become distracted. The strength of the tortoise is its very burden; it is always in its house of the law.

Unlike the legislator, whose lawmaking knows no bounds, the judge stays close to his house of the law in the bounds of stare decisis. He invariably takes precedent as his starting-point; he is constrained to arrive at a decision in the context of ancestral judicial experience: the given decisions, or lacking these, the given dicta, or lacking these, the given clues. Even if his search of the past yields nothing, so that he confronts a truly unprecedented case, he still arrives at a decision in the context of judicial reasoning with recognizable ties to the past; by its kinship thereto it not only establishes the unprecedented case as a precedent for the future, but integrates it in the often rewoven but always unbroken line with the past.

Moreover, the judge is confined by the record in the case, which in turn is confined to legally relevant material, limited by evidentiary rules. So it happens that even a decision of far-reaching importance concludes with the words: "We hold today only that . . . . We do not reach the question whether . . ." Circumspectly the weaver stops, so as not to confuse

the pattern of transition from yesterday to today. Tomorrow is time enough for new weaving, as the facts of tomorrow come due.

A decision that has not suffered untimely birth has a reduced risk of untimely death. Insofar as a court remains uncommitted to unduly wide implications of a decision, it gains time to inform itself further through succeeding cases. It is then better situated to retreat or advance with a minimum of shock to the evolutionary course of the law, and hence with a minimum of shock to those who act in reliance upon judicial decisions. The greatest judges of the common law have proceeded in this way, moving not by fits and starts, but at the pace of the tortoise that steadily makes advances though it carries the past on its back.

The very caution of the judicial process offers the best of reasons for confidence in its recurring reformation. A reasoning judge's painstaking exploration of place and his sense of pace, give reassurance that when he takes an occasion dramatic leap forward he is impelled to do so in the very interest of orderly progression. There are times when he encounters so much chaos on his long march that the most cautious thing he can do is to take the initiative in throwing chaos to the winds. The great judge Mansfield did so when he broke the chaos of stalemated contractual relations with the concept of concurrent conditions. Holmes and Brandeis did so when they cleared the way for a liquidation of ancient interpretations of freedom of contract that had served to perpetuate child labor. Cardozo did so when he moved the rusting wheels of *Winterbottom v. Wright* to one side to make way for *Buick v. McPherson.* Chief Justice Stone did so, in the chaotic field of conflict of laws, when he noted the leeway in the United States Constitution between the mandate of the full faith and credit clause and the prohibition of the due process clause.

To a reasoning judge, each case is a new piece of an ever-expanding pattern, to be woven in if possible by reference to precedent. If precedent proves inadequate or inept, he is still likely to do justice to it in the breach, setting forth clearly the disparity between the square facts before him and the usually benign precedents that now fail to encompass them. He has also the responsibility of justifying the new precedent he has evolved, not merely as the dispossessor of the old, but as the best of all possible replacements. His sense of justice is bound to infuse his logic. A wise judge can strengthen his overruling against captious objections, first by an exposition of the injustice engendered by

the discarded precedent, and then by an articulation of how the injustice resulted from the precedent's failure to mesh with accepted legal principles. When he thus speaks out his words may serve to quicken public respect for the law as an instrument of justice.

He is hardly eager to take on such tasks if he can do otherwise. He knows that a new rule must be supported by full disclosure in his opinion of all aspects of the problem and of the data pertinent to its solution. Thereafter the opinion must persuade his colleagues, make sense to the bar, pass muster with scholars, and if possible allay the suspicion of any man in the street who regards knowledge of the law as no excuse for making it. There is usually someone among them alert to note any misunderstanding of the problem, any error in reasoning, any irrelevance in data, any oversight of relevant data, any premature cartography beyond he problem at hand. Every opinion is thus subject to approval. It is understandable when a judge faced with running such a gamut marks time instead on the line of least resistance and lets bad enough alone.

Moreover, he may still be deterred from displacing an inherently bad or moribund precedent by another restraint of judicial office, the tradition that courts do not ordinarily innovate change but only keep the law responsive to significant changes in the customs of the community, once they are firmly established.

The tenet of lag, strengthening the already great restraints on the judge, is deservedly respected. It bears noting, however, that it is recurringly invoked by astute litigants who receive aid and comfort from law that is safely behind the times with the peccadillos of yesteryear and has not caught up with their own. At the slightest sign that judge-made law may move forward, these bogus defenders of stare decisis conjure up mythical dangers to alarm the citizenry. They do sly injury to the law when the public takes them seriously and timid judges retreat from painstaking analysis within their already great constraints to safe and unsound repetitions of magic words from the legal lore of the year before much too long ago.

Too often the real danger to law is not that judges might take off onward and upward, but that all too many of them have long since stopped dead in the tracks of their predecessors. They would command little attention were it not that they speak the appealing language of stability in justification of specious formulas. The trouble is that the formulas may encase notions that have never been cleaned and

pressed and might disintegrate if they were. We might not accept the formulas so readily were we to realize what a cover they can be for the sin the Bible calls sloth and associates with ignorance. Whatever the judicial inertia evinced by a decision enveloped in words that have lost their magic, it is matched by the profession's indifference or uncritical acceptance. Thus formula survives by default.

Stare decisis, to stand by decided cases, conjures up another phrase dear to Latin lovers—*stare super antiquas vias*, to stand on the old paths. One might feel easier about that word *stare* if itself it stood by one fixed-star of meaning. In modern Italian *stare* means to stay, to stand, to lie, or to sit, to remain, to keep, to stop, or to wait. With delightful flexibility it also means to depend, to fit or to suit, to live, and, of course, to be.

Legal minds at work on this word might well conjecture that to stare or not to stare depends on whether *decisis* is dead or alive. We might inquire into the life of what we are asked to stand by. In the language of *stare decisers: Primo*, should it ever have been born? *Secundo*, is it still alive? *Tertio*, does it now deserve to live?

Who among us has not known a precedent that should never have been born? What counsel does not know a precedent worn so thin and pale with distinctions that the court has never troubled to overrule it? How many a counsel, accordingly misled, has heard the court then pronounce that the precedent must be deemed to have revealed itself as overruled *sub silentio* and ruminated in bewilderment that the precedent on which he relied was never expressly overruled because it so patently needed to be?

The notion yet persists that the overruling of ill-conceived, or moribund, or obsolete precedents somehow menaces the stability of the law. It is as if we would not remove barriers on a highway because everyone had become accustomed to circumventing them, and hence traffic moved, however awkwardly. The implication is that one cannot render traffic conditions efficient without courting dangers from the disturbance of established habit patterns. We have reached such a pass, we are wont to say, that it is for the legislature and not the court to set matters aright. No one says it more than the courts themselves.

Why? One speculation is that the popular image of the legislature as the lawmaking body, in conjunction with a popular notion of contemporary judges as primarily the maintenance men of the law, has engendered an auxiliary notion that whatever incidental law courts create they are

bound to maintain unless the legislature undertakes to unmake it.

One can speculate further that the occupational caution of judges makes them reluctant to take the initiative in overruling a precedent whose unworthiness is concealed in the aura of stare decisis. It takes boldness to turn a flashlight upon an aura and call out what one has seen, at the risk of violating quiet for the benefit of those who have retired from active thought. It is easier for a court to rationalize that less shock will result if it bides its time, and bides it and bides it, the while it awaits legislative action to transfer an unfortunate precedent unceremoniously to the dump from the fading glory in which it has been basking.

Thus courts have maintained their own theater of the absurd. For generations since the 1787 rule of *Jee v. Audley*, for example, they earnestly pretended that ancient crones could have babies. Again, even after the advent of conclusive blood tests to the contrary, they could still pretend that anyone might be a father. Flattering though it may have been to a crone to be viewed as a possible mother of the year though she would never have a child to show for it, it can only have been disquieting to a man to be named as an actual father of someone who was no child of his.

Fortunately all is not saved. In retrospect we come to see how well courts now and again do clear a trail for those who come after them. They have significantly expanded the concept of obligation. They are recognizing a much needed right to privacy. They are recognizing a right to recovery for prenatal injuries and intentionally inflicted mental suffering. They are also recognizing liability once precluded by charitable or governmental immunities. Their now general acceptance of the manufacturer's liability to third persons for negligence has stimulated inquiry into appropriate bases for possible strict liability for injuries resulting from defective products. There is more and more open preoccupation with compensation for personal injuries, which is bound in turn to augment the scope of insurance.

Courts are also recognizing new responsibilities within the family as well as new freedoms. They are recognizing the right of one member of the family to recover against another. They are recognizing women as people with lives of their own, transcending their status as somebody else's spouse or somebody else's mother, transcending somebody else's vision of what nonentities they should be.

In conflicts of law wooden rules are giving way as surely as wooden boundary lines. Comparable changes are on the

horizon in property law that will reflect new ways of holding and transferring property, and evolving concepts of land use, zoning, and condemnation. Criminal law is beginning to reflect new insights into human behavior. Landmark cases in constitutional law evince major changes in the relation of the federal government to the states.

A judge participates significantly in lawmaking whether he makes repairs and renewals in the common law via the adaptation of an old precedent or advances its reformation with a new one. He does so on a variety of fronts, in the interpretation of statutory or constitutional language as well as in the analysis of traditional common law problems.

Rare are the statutes that rest in peace beyond the range of controversy. Large problems of interpretation inevitably arise. Plain words, like plain people, are not always so plain as they seem. Certainly a judge is not at liberty to seek hidden meanings not suggested by the statute or the available extrinsic aids. Speculation cuts brush with the question: what purpose did the legislature express as it strung its word into a statute? An insistence upon judicial regard for the words of a statute does not imply that they are like words in a dictionary, to be read with no ranging of the mind. They are no longer at rest in their alphabetical bins. Released, combined in phrases that imperfectly communicate the thoughts of one man to another, they challenge men to give them more than passive reading, to consider well their context, to ponder what may be their consequences. Such a task is not for the phlegmatic. It calls for judicial temperament, for impassive reflection quickened with an awareness of the waywardness of words.

There are times when statutory words prove themselves so at odds with a clear legislative purpose as to pose a dilemma for the judge. He knows that there is an irreducible minimum of error in statutes because they deal with multifarious and frequently complicated problems. He hesitates to undertake correction of even the most obvious legislative oversight, knowing that theoretically the legislature has within its power the correction of its own lapses. Yet he also knows how cumbersome the legislative process is, how massive the machinery that must be set in motion for even the smallest correction, how problematic that it will be set in motion at all, how confusion then may be worse confounded.

With deceptively plain words, as with ambiguous ones, what a court does is determined in the main by the nature of the statute. It may be so general in scope as to invite

judicial elaboration. It may evince such careful draftsmanship in the main as to render its errors egregious enough to be judicially recognized as such, inconsistent with the legislative purpose.

The experienced draftsmen of tax laws, among others, find it impossible to foresee all the problems that will test the endurance of their words. They did not foresee the intriguing question whether the United States is a resident of the United States, which arose under a revenue act taxing interest received by foreign corporations from such residents. What to do when a foreign corporation received interest from the United States? Mr. Justice Sutherland decided that this country resided in itself. He found a spirit willing to take up residence though the flesh was weak, if indeed not entirely missing. The ingenuity of the solution compels admiration, whatever misgivings it may engender as to our self-containment.

So the courts now and again prevent erratic omissions or errant words from defeating legislative purpose, even though they thereby disregard conventional canons of construction. We come upon an intriguing but quite different problem when we consider what should be the fair import of legislative silence in the wake of statutory interpretation embodied in the occasional precedent that proves increasingly unsound in the solution of subsequent cases. Barring those exceptional situations where the entrenched precedent has engendered so much reliance that its liquidation would do more harm than good, the court should be free to overrule such a precedent despite legislative inaction.

It is unrealistic to suppose that the legislature can note, much less deliberate, the effect of each judicial interpretation of a statute, absorbed as it is with forging legislation for an endless number and variety of problems, under the constant pressure of considerations of urgency and expediency. The fiction that the failure of the legislature to repudiate an erroneous judicial interpretation amounts to an incorporation of that interpretation into the statute not only assumes that the legislature has embraced something that it may not even be aware of, but bars the court from reexamining its own errors, consequences as unnecessary as they are serious.

It is ironic that an unsound interpretation of a statute should gain strength merely because it has stood unnoticed by the legislature. It is a mighty assumption that legislative silence means applause. It is much more likely to mean ignorance or indifference. Thus time after time a judicial

opinion calls out loud and clear that there is an unresolved problem or patent injustice that can be remedied only by the legislature. The message may be heard round the world of legal commentators who listen intently for such reports. Rarely, however, does it reach the ears of legislators across the clamor and the static of legislative halls. It would be high comedy, were it not for the sometimes sad repercussions, that we are wont solemnly to attribute significance to the silence of legislators. There can be idle silence as well as idle talk.

In spelling out rules that form a Morse code common to statutes and judicial decisions, and in the United States common even to the constitution of the country and the constitutions of the states, courts keep the law straight on its course. That high responsibility should not be reduced to a mean task of keeping the law straight and narrow. It calls for literate, not literal judges.

The very independence of judges, fostered by judic office even when not guaranteed by tenure, and their continuous adjustment of sight to varied problems tend to develop in the least of them some skill in the evaluation of massive data. They learn to detect latent quackery in medicine, to question doddered scientific findings, to edit the swarm spore of the social scientists, to add grains of salt to the fortune-telling statistics of the economists. Moreover, as with cases or legal theories not covered by the briefs, they are bound in fairness to direct the attention of counsel to such materials, if it appears that they may affect the outcome of the case, and to give them the opportunity to submit additional briefs. So the miter square of legal analysis, the marking blades for fitting and joining, reduce any host of materials to the gist of a legal construction.

Regardless of whether it is attended by abundant or meager materials, a case may present competing considerations of such closely matched strength as to create a dilemma. How can a judge then arrive at a decision one way or the other and yet avoid being arbitrary? If he has a high sense of judicial responsibility, he is loath to make an arbitrary choice even of acceptably rational alternatives, for he would thus abdicate the responsibility of judgment when it proved most difficult. He rejects coin-tossing, though it would make a great show of neutrality. Then what?

He is painfully aware that a decision will not be saved from being arbitrary merely because he is disinterested. He knows well enough that one entrusted with decision, traditionally above base prejudices, must also rise above the

vanity of stubborn preconceptions, sometimes euphemistically called the courage of one's convictions. He knows well enough that he must severely discount his own predilections, of however high grade he regards them, which is to say he must bring to his intellectual labors a cleansing doubt of his omniscience, indeed even of his perception. Disinterest, however, even disinterest envisaged on a higher plane than the emotional, is only the minimum qualification of a judge for his job. Then what more?

He comes to realize how essential it is also that he be intellectually interested in a rational outcome. He cannot remain disoriented forever, his mind suspended between alternative passable solutions. Rather than to take the easy way out via one or the other, he can strive to deepen his inquiry and his reflection enough to arrive at last at a value judgment as to what the law ought to be and to spell ut why. In the course of doing so he channels his interest .n a rational outcome into an interest in a particular result. In that limited sense he becomes result-oriented, an honest term to describe the stubbornly rational search for the optimum decision. Would we have it otherwise? Would we give up the value judgment for an abdication of judicial responsibility, for the toss of the two-faced coin?

In sum, judicial responsibility connotes far more than a mechanical application of given rules to new sets of facts. It connotes the recurring formulation of new rules to supplement or displace the old. It connotes the recurring choice of one policy over another in that formulation, and an articulation of the reasons therefor.

Even so much, however, constituting the judicial contribution to lawmaking, adds up to no more than interweaving in the reformation of law. If judges must be much more than passive mechanics, they must certainly remain much less than zealous reformers. They would serve justice ill by weaving samplers of law with ambitious designs for reform. Judges are not equipped for such work, confined as they are to the close work of imposing design on fragments of litigation. Dealing as they do with the bits and pieces that blow into their shop on a random wind, they cannot guess at all that lies outside their line of vision nor foresee what may still appear.

As one who has declared himself against the perpetuation of ancient fabrics that no longer shield us from storms, if they ever did, I should like now to voice a cautionary postscript against judges rushing in where well-meaning angels of mercy tread, hawking their new methods of fabrication.

The zealots of law reform too often are as indifferent to exacting standards of quality control as the mechanics of the status quo. Moreover, we cannot be so tolerant of heedless ventures in new directions in courts as in legislatures, given the constant risk that judicial error will become frozen as stare decisis.

We could wish that modern legislatures, often abundantly equipped to carry the main responsibility for lawmaking, would be weaving grand designs of law as informed and inspired reformers. Instead we must rue with Judge Friendly *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*. He laments that "the legislator has diminished the role of the judge by occupying vast fields and then has failed to keep them ploughed."

Certainly courts are helpless to stay the maddening sequences of triumphal entry and sit-in. What is frustration to them, however, could be challenge to the scholars. Steeped in special knowledge of one field or another, they can well place their knowledge at the service of legislatures for the plowing of the fields, for their sowing and their care. Who but the scholars have the freedom as well as the nurturing intellectual environment to differentiate the good growth from the rubbish and to mark for rejection the diseased anachronism, the toadstool formula, the scrub of pompous phrases?

There is a tragic waste in the failure to correlate all our machinery for vigil to maximum advantage. Is it not time to break the force of habit that militates against steady communication between legislators in unplowed fields and scholarly watchbirds in bleachers? It is for no more sinister reason than lethargy that we have failed in large measure to correlate the natural resources of legislators who have an ear to the ground for the preemption of new fields and of scholars who have an eye on their long-range development.

Perhaps we can make a beginning by calling upon legislators to take the initiative in establishing permanent lines of communication. The scholars can hardly take that initiative, for they are not lobbyists. Why not invite their ideas through the good offices of a legislative committee that can insure their careful consideration? Why not, particularly when some legislatures are now equipped with permanent legislative aids, and here and there law schools have now set up legal centers, and there remains only to set up permanent lines of communication between them? The natural agency for such communication is a law revision commission such as those long since established in New York and California

or the ones established for England and Scotland by the 1965 Law Commissions Act.

A law school offers an ideal environment for such a commission. It could there devote itself wholeheartedly to the formulation and drafting of statutes as well as to continuing re-examination of their fitness for survival. It could withstand the prevailing winds of pressure groups as it made timely use of the abundant wasting assets of scholarly studies. One can hardly imagine more valuable interchange for the law than that between those entrusted to review it critically and those entrusted to draft proposals for its revision. On a wide front they could collaborate in long-range studies of legal needs that would richly complement the applied research that legislatures recurringly ask of their legislative aids. In turn the work of the commissions would offer hearty sustenance not only to the law reviews but to all the other projects of a law school, not the least of which is the classroom. Such permanent relationships between law schools and law revision commissions, going far beyond today's occasional associations, would strengthen their beneficent influence on legislation.

Perhaps the story of law reform would get better as it went along if scholars steadily established quality controls for the weaving of law, spurring legislators to legislate when necessary and to legislate well, and untangling the problems that advance upon courts, to smooth the task of judicial decision. There comes to mind a story of pioneering times called The Weaver's Children, which begins:

"Many years ago a little woolen mill stood in a ravine . . . The little mill filled the space between a rushing stream and a narrow road."

The mill might symbolize the world of scholars, in law schools or on law revision commissions, in legislatures or courts, as well as in public or private practice. The weavers in the mill would keep a weather eye out for the volume and course of the rushing stream, of life itself, to calculate the tempo for the weaving of statutes. They would also keep a weather eye out for traffic conditions on the narrow road, estimating therefrom the tempo at which motley caravans could unload their variegated sacks of litigation. The mill would be a model of rational methods of weaving.

One might envisage such a development less as a happy ending to the story of law reform than as an ideal way for it to be continued. So I have thought, in saying now and again, that the law will never be built in a day, and with luck it will never be finished.

Excerpt from "The Machinery of Law Reform in New Zealand"

EXTRACT FROM ADDRESS BY HON. MR HANAN ON THE FUTURE OF LAW REFORM, DELIVERED AT NEW ZEALAND LAW SOCIETY'S CENTENNIAL LAW CONFERENCE APRIL 1969

"Like many other countries, not long ago we examined our machinery for law reform. I will not say that we have followed the fashion in this, because we were well up with the field, and opened up the matter with our own needs in mind. And unlike most other countries, we felt that what we had was essentially satisfactory. We therefore chose to overhaul the old motor rather than to get a brand new law commission model. There has been some criticism of this, but it is my conviction that the course we have chosen is the wisest one for us. The proof of the pudding is in the eating, and if we take the pragmatic view and look at the results expressed in legislation our system gains by comparison.

Our main weakness - let me be quite frank about it - is in our facilities for research (which ought to include social as well as purely legal inquiry) and for turning proposals into Parliamentary legislation. Partly it is an absolute shortage of the highly qualified and specialised staff that we need and partly a lack of sufficient finance. These deficiencies I may add are not confined to New Zealand. It is not easy to convince any Minister of Finance that legal research deserves much of a priority among so many competing claims to spend the taxpayers' money. Usually the economic benefits of law reform are impossible to express in costing terms. Even the social benefits are often indirect.

The task is to persuade Governments that law reform is important and that it cannot be done properly on the cheap. This is a slow process, and if we are to get anywhere it is essential to have the support of the legal profession.

However, the point I make now is that this difficulty will still exist if we want to set up a Law Revision Commission closer to those that operate in Great Britain, New South Wales and Ontario, for example.

There is moreover a further danger with a fulltime Commission. By turning the responsibility for law reform over to a more or less autonomous body there may be a risk of losing the necessary close contact with the ordinary political and administrative system. If this happened it could well mean less rather than more reform. What we should be careful to avoid - and we have succeeded in avoiding it in the past - is to have a series of admirable and thoughtful reports most of which simply gather dust in pigeonholes. It is my belief that under our system - in which the different interests including Her Majesty's Opposition participate in the actual preparation of proposals - we win support for change much more readily than under any conceivable alternative.

The former Law Revision Committee did its best work in fields that from a political point of view were non-contentious. Where a particular matter has political implications, even if it also has an element of "lawyers law", difficulties arise. As the scope of law reform widens and more fundamental problems are attacked the contentious element will inevitably increase. Where there are important political considerations, it may well be best to pursue improvement through the ordinary political process rather than through the normal law reform machinery. It would for instance have been completely unsatisfactory to turn the preparation of legislative proposals for establishing an Ombudsman over to a Law Revision Committee or Commission, however distinguished."

WESTERN ONTARIO LAW REVIEW

Published by the students of the Faculty of Law
at The University of Western Ontario

CITE AS: Western Ont. L. Rev.
INDEXED: The Index to Legal Periodicals
DISTRIBUTED BY: The Carswell Company Limited,
145 Adelaide Street West,
Toronto 1, Ontario.

VOLUME 8 LONDON, ONTARIO, CANADA 1969

SOME THOUGHTS ON THE GROWTH OF LAW REFORM AGENCIES

Richard Gosse*

> It is my hope that we will soon be able to establish a National Law Reform Commission to explore on a continuing rather than on an episodic basis, the frontiers available to our National Government to make and amend laws in a Just Society.

This Kennedy-like declaration of governmental intent was made by the federal Minister of Justice, the Honourable John Turner, Q.C., to a special convocation of the Law Society of Upper Canada at Osgoode Hall on October 18, 1968.[1] Just a few months earlier, in June, the Attorney General of British Columbia announced that a law reform commission was to be established in his Province. On January 1st, 1968, Alberta's Institute of Law Research and Reform came into existence under an agreement between the University of Alberta, the Law Society and the government of that province.[2] Since then a similar but less formally-organized research institute was set up at the University of Manitoba. In 1964, the Province of Ontario created the first permanent agency in Canada and, in fact, in the Commonwealth for engaging in systematic and continuing law reform.[3]

What has brought about this sudden concern with law reform agencies in Canada? Must every province have one? How was it that we managed without them until now?

Society obviously did not get along without them. Many of our unchanging laws simply became more archaic every year. Apart from changes which should be made in the common law, a glance through the statutes quickly demonstrates the need to bring our legislation into the twentieth century in both substance and form. Although the cause of systematic law reform has long been dormant, contemporary society will no longer put up with the law lagging behind its needs. Politicians have become aware of this fact. Law reform agencies have become politically viable, if not politically essential.

---

* Q.C., B.A. (McGill); LL.B. (U.B.C.); D.Phil. (Oxon.); of the British Columbia and Ontario Bars; Professor of Law, Queen's University; Counsel to Ontario Law Reform Commission.

1 (See Frontiers of Law and Lawyership (1969), 12 Can. Bar Jo. 7 at p. 12.) Mr. Turner had actually made an earlier public pronouncement to this effect on October 8th at a Symposium on the Quest for Justice at the opening of the new law school building at the University of New Brunswick. It is clearly a government proposal: See Can. H.C. Deb., January 23, 1969, at p. 4725.

(a) Since this article was written a Bill has been introduced in the British Columbia legislature to establish a Law Reform Commission in that Province. See Bill No. 29.

2 See W. F. Bowker, Alberta's Institute of Law Research and Reform (1968), 11 Can. Bar Jo. 341.

3 *The Ontario Law Reform Commission Act, 1964*, c. 78.

I. THE NEED

A. The Legislatures

Legislatures are, of course, continually engaged in law reform. They frequently act on reports of their own select and standing committees, on reports of Royal Commissions, and on bills which have come forward as a result of work in government departments. Usually, however, this kind of legislative action ignores large areas of private law — such as contract, tort and property law. The legislators, too, are inclined to be concerned with what appear to be matters of pressing concern to the public at the moment. As R. E. Megarry, the distinguished writer and teacher, and now Chancery judge, wrote in the Canadian Bar Review twelve years ago:

> Law reform is a tender plant. In this modern world, it can usually be achieved only by legisation: and, in the legislatures of the world, law reform tends to be crowded out by the great affairs of state, and by what most (but by no means all) lawyers would regard as the lesser affairs of political strife.[4]

B. The Judiciary

What about the judiciary? The subject of law reform cannot be discussed without considering the contributions which the judicial process can and does make to the reform and development of the law, the limitations of judicial law-making and the future of the courts' role as a law reform agency.

That the Canadian judiciary could, if it chose, play a creative role in law reform is beyond question.[5] The Canadian judiciary, however, can hardly be described as having played, in the past, an active part in law reform. It has been conservative and inarticulate — reflecting, undoubtedly, the national character. Whether or not the age, education and background of those now on the bench and those who are now being appointed is such that a movement can be made away from the traditional Canadian approach is doubtful. The great obstacle is the emphasis which has always been laid on the doctrine of **stare decisis.**[6]

The strict theory of precedent was expressed by Lord Eldon over one hundred and fifty years ago:

---

[4] Law Reform (1956), 34 Can. Bar Rev. 691, at p. 691.

[5] See Paul Weiler, Two Models of Judicial Decision-Making (1968), 46 Can. Bar Rev. 406; R. J. Traynor, The Courts: Interweavers in The Reformation of Law (1967), 32 Sask. L.R. 201; W. Friedmann, Limits of Judicial Law Making and Prospective Overruling (1966), 29 M.L.R. 593.

[6] Mark R. MacGuigan, Precedent and Policy in the Supreme Court (1967), 45 Can. Bar Rev. 626; A. Joanes, Stare Decisis in the Supreme Court of Canada (1958), 36 Can. Bar Rev. 175.

> . . . it is better the law should be certain, than that every Judge should speculate upon improvements in it.[7]

In this decade, the theory was reiterated by Lord Simonds:

> For to me heterodoxy, or, as some might say, heresy, is not the more attractive because it is dignified by the name of reform. Nor will I be easily led by an undiscerning zeal for some abstract kind of justice to ignore our first duty, which is to administer justice according to law, the law which is established for us by Act of Parliament or the binding authority of precedent. The law is developed by the application of old principles to new circumstances. Therein lies its genius. Its reform by the abrogation of those principles is the task not of the courts of law but of Parliament.[8]

No doubt virtually all Canadian judges would be in sympathy with that statement. Yet it has been suggested that, in the Supreme Court of Canada, at least, it may be time for a change. Professor Mark MacGuigan has recently written, perhaps a little hopefully:

> . . . although the Supreme Court's past devotion was to precedent, its future commitment must surely be to policy.[9]

However, the Supreme Court has not given any indication that it is prepared to start out afresh. In fact, it has refrained from doing so. In The Queen v. George, Cartwright, J. declared:

> . . . I do not propose to enter on the question, which since 1949 has been raised from time to time by the authors, whether this Court now that it has become the final Court of Appeal for Canada is, as in the case of the House of Lords, bound by its own previous decisions on questions of law or whether, as in the case of the Judicial Committee or the Supreme Court of the United States, it is free under certain circumstances to reconsider them.[10]

Yet, only six months later, the House of Lords itself made a dramatic break from the doctrine of precedent with the pronouncement of the Lords of Appeal in Ordinary that the House of Lords, while continuing to treat former decisions of the House as normally binding would in future depart from a previous decision "when it appears right to do so". Lord Gardiner, L.C., speaking on behalf of himself and the Lords of Appeal in Ordinary, stated:

> Their lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some

---

7 *Sheddon* v. *Goodrich* (1803), 8 Ves. 481 at p. 497; 32 E.R. 441 at p. 447.
8 *Scruttons* v. *Midland Silicones*, [1962] A.C. 446 at pp. 467-8.
9 MacGuigan, op. cit., fn. 6, at p. 665.
10 [1966] S.C.R. 267 at p. 278.

> degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules . . . nevertheless, . . . too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law.[11]

Apart from the instinctive reluctance of Canadian courts to loosen the bonds of stare decisis and to view themselves as policy-making bodies, there are other limitations on the judiciary as law reformers. The nature of the judicial process is such that whatever reforms do result from it are haphazard. Case law develops, in the main, from litigation between private parties, whose objects are normally to achieve a practical benefit to themselves, not to improve the law. Cases are usually settled or not further proceeded without regard to the state that the law will be left in. Even if the purpose of litigation is to determine what the legal result will be in a particular case, the motivation is clarification not reform. Furthermore, the courts are confronted with particular fact situations, which prevent the adequate formulation of the basic legal principles which should operate in the relevant area of the law. The courts, of course, have no control over the timing and advancement of litigation. Matters which need reforming may not come before the courts. Law which needs reforming may be regarded as well-settled and beyond dispute. Even if a judgment is wrong in law, there may be no appeal and it is a matter of pure chance whether the same issue will come up in a subsequent case which is appealed. Many years may pass before an appeal court has an opportunity to reverse a bad decision. When that opportunity occurs, the appeal court may decide to leave the law as it is for the reason that people may have relied on it for many years in the conduct of their affairs.

Perhaps most important of all is that law reform by the judiciary is restricted in its scope. The courts cannot repeal statutes: they cannot, for example, abolish dower or alter the statutory distribution schemes which apply to the estates of intestates.

An objection sometimes raised to judicial law-making is what has been referred to as the "Retrospectivity Bugaboo".[12] When a decision is overruled, the overruling decision would normally apply to all past situations. To avoid the problem of restrospectivity the United States Supreme Court has evolved the doctrine of prospective overruling. Under this doctrine, which has so far been confined in its application to a relatively few matters, the overruled principle continues to apply to past situations. It has been said that this doctrine may open up as many difficulties as it solves and that it is unlikely that the English courts would adopt it as a declared principle.[13]

---

11 [1966] 3 All E.R. at p. 77.
12 W. Barton Leach, Property Law Indicted (1967), at p. 14.
13 W. Friedmann, Limits of Judicial Law Making and Prospective Overruling (1966), 29 M.L.R. 593 at p. 605.

Even if judges do become more policy-oriented, it is obvious that the courts cannot fulfil the need for systematic reform. On the other hand, it may be that the creation of agencies charged with the responsibility of formulating law reform will remove to some extent the pressure which has been building to have judges become innovators.

II. THE GROWTH

A. Elsewhere

Something should be said about the formation of law reform agencies outside Canada. This will help to provide a perspective to the recent happenings in this country. The growth of these agencies in common law jurisdictions began some thirty years ago and they are now to be found in various parts of the Commonwealth and the United States.

However, it was over a hundred years ago that the idea first germinated. Lord Westbury, who later became Lord Chancellor, asked in an address to the Juridical Society:

> Why is there not a body of men in this country whose duty it is to collect a body of judicial statistics, or, in more common phrase, make the necessary experiments to see how far the law is fitted to the exigencies of society, the necessities of the times, the growth of wealth, and the progress of mankind?[14]

In 1918, in England, the Committee on the Machinery of Government reported:

> There is no functionary at present who can properly be called a Minister responsible for the subject of Justice . . . We think that a strong case is made out for the appointment of a Minister of Justice. We are impressed by the representations made by men of great experience, such as the President of the Incorporated Law Society, as to the difficulty of getting the attention of the government to legal reform . . . .[15]

Two distinguished jurists in the United States immediately responded to this idea. Both Dean Roscoe Pound[16] and Justice Cardozo[17] urged the creation of a ministry of justice to engage in law reform. Dean Pound wrote:

> We need a body of men competent to study the law and its actual administration functionally, to ascertain the legal needs of the community and the defects in the administration

---

[14] (1859), 2 Juridical Society Papers 129 at p. 132.
[15] Cd. 9230, (Lord Haldane was Chairman of the Committee.)
[16] Roscoe Pound, Anachronisms in Law (1920), 3 Journ. Am. Jud. Soc. 142.
[17] Benjamin Cardozo, A Ministry of Justice (1921), Harv. L.R. 113.

> of justice not academically or a priori, but in the light of everyday judicial experience and to work out definite, consistent, lawyer-like programs of improvement[18]

The State of New York was the first to react to this call. Under three successive Governors, Alfred E. Smith, Franklin D. Roosevelt, and Herbert H. Lehman, a temporary commission created in 1923 led to the establishment of the New York Law Revision Commission in 1934.[19] This was a permanent body and it continues to operate today.

A few months earlier, on January 10th, 1934, Lord Sankey, then the Lord Chancellor, set up the Law Revision Committee. It produced eight reports in a five year period, ceasing to function in 1939. A new body, the Law Reform Committee, was established by the Lord Chancellor, Lord Simonds, in 1952. This latter Committee is still in existence, although its work now seems much curtailed by the Law Commission which was formed in 1965. The Law Reform Committee reported on sixteen different occasions between 1953 and 1967. Both these Committees were very much part-time affairs, dealing only with such lawyer's law as the Lord Chancellor referred to them. Two other reform committees have been in existence in England for some time. These are the Lord Chancellor's Private International Law Committee, dating from 1952, and the Criminal Law Revision Committee, which is appointed by the Home Secretary and has been in operation since 1959.[20]

One member of the Law Reform Committee was Gerald Gardiner, who resigned from it because he felt that it was ineffectual. Gardiner published, along with Andrew Martin, a book in 1963 entitled "Law Reform Now", in which he urged a more organized approach to law reform:

> Nothing less will do than the setting up within the Lord Chancellor's Office of a strong unit concerned exclusively with law reform in that wide sense which also includes codification, so far as in the peculiar system of English law codification may be desirable and feasible.[21]

The following year, the Labour Party won the general election and Gerald Gardiner became Lord Chancellor in Prime Minister Wilson's

---

18 Pound, op. cit., fn. 16, at p. 146.

19 As to the early history of law reform agencies in New York, see John W. MacDonald, The New York Law Revision Commission (1965), 28 M.L.R. 1 at p. 5 et seq. See also Legal Research Translated into Legislative Action (1963), 48 Cornell Law Quarterly 401 by same author.

20 As to the background of law reform in England, see R. E. Megarry, op. cit., fn. 4; E. C. S. Wade, The Machinery of Law Reform (1961), 24 M.L.R. 3; N. Hutton, Mechanics of Law Reform (1961), 24 M.L.R. 18; F. E. Dowrick, Lawyers' Values for Law Reform (1963), 79 L.Q.R. 556; Chorley, The Law Commission Act, 1965, 28 M.L.R. 675; D. W. M. Waters, Law Reform and the English Law Commission: A Model for Saskatchewan (1967), 32 Sask. L.R. 1.

21 at p. 8.

cabinet. Lord Gardiner had apparently induced Mr. Wilson to include law reform in the Labour Party's platform and, it has been said, he made the establishing of a Law Commission a condition of his acceptance of the position of Lord Chancellor.[22]

In 1965, the Law Commission was established by statute[23] with five full-time Commissioners. One of the five appointments made was Andrew Martin, Lord Gardiner's co-author. The same statute also created the Scottish Law Commission, to consist of a Chairman and not more than four other Commissioners, to be appointed by the Secretary of State and Lord Advocate. In Northern Ireland, there has been an official called the Director of Law Reform since 1965.[24]

Other parts of the Commonwealth have followed suit. New Zealand established a Law Revision Committee in 1937, designed to carry out the same general function as the English Law Revision Committee. The New Zealand Committee, however, did not publish reports or give detailed reasons for its recommendations.[25] In 1965, the Minister of Justice announced he was reorganizing the law reform machinery into a more positive force. He appointed a Law Revision Commission, of which he is chairman and established four standing committees.[26]

In Australia, New South Wales established a Law Reform Commission in 1966, with four full-time Commissioners.[27] In January, 1968, Western Australia set up a Law Reform Committee, consisting of three part-time members and an executive officer.

Meanwhile in the United States, California in 1953[28] and Michigan in 1965[29] organized Law Revision Commissions patterned after the New York prototype. Other states have also set up law reform

---

22 Chorley, op. cit., fn. 20, at pp. 679-681.

23 Law Commissions Act, 1965, c. 22.

24 See Law Reform in Northern Ireland, Programme and Report of the Director of Law Reform 1965/66. Cmd. 507.

25 B. J. Cameron, Law Reform in New Zealand (1956), 32 N.Z.L.R. 106. The composition of the New Zealand Committee was radically different from its English counterpart. The Attorney General himself was chairman and there was representation from the Government, the Opposition, the Law Society, the University and the legal department of state. The bench was represented for a time, but were dropped from membership when they ceased to attend. When the Committee was first set up, the Chief Justice agreed to become a member on the condition that he was not asked to take part in the Committee's discussions.

26 New Zealand, The Development of its Laws and Constitution (vol. 4 of The British Commonwealth Series) (1967), 2nd ed., at p. 492 et seq. The four standing committees were: Public and Administrative Law, Contracts and Commercial, Property Law and Equity, and Torts and General Law.

27 The Commission was established on January 1st, 1966, by a resolution of the Executive Council. The following year, its status was established by the *Law Reform Commission Act, 1967*.

28 Cal. Stat. of 1953, c. 1445: Government Code, ss. 10300 to 10400.

29 Mich. Stat. of 1965, Act No. 412.

agencies. These include Louisiana, New Jersey, North Carolina and Oregon.[30]

There are, of course, the two general agencies of reform in the United States, the American Law Institute and the Conference of Commissioners on Uniform State Laws. The American Law Institute is a non-governmental permanent institution, supported by the legal profession. Its chief function has been to produce "restatements" of the law, although it has also played a significant part in the developing of model legislation such as the Uniform Commercial Code. The Conference of Commissioners on Uniform State Laws produces model statutes, much like its opposite member in Canada. However, it has been more successful as it has had a full-time organization and there has been much greater depth in personnel.

B. Canada

Canada's sudden interest in law reform agencies should not therefore be regarded as surprising when viewed in the light of developments in the common law world. The introduction of such agencies in common law jurisdictions is a relatively new step, occurring for the first time only thirty-odd years ago. Even so, Canada has been a latecomer. This was due to the fact that there was virtually no impetus towards legal reform in this country until a few years ago. Nor were there the facilities and personnel available for the kind of research that is required. Good law libraries and available law teachers are essential. Until the growth of the law schools after World War II, there was a lack of both. In 1945, there were but twenty full-time law teachers in Canada. Now, however, there are nearly three hundred.

Perhaps the turning point in terms of general awareness came with the Report of the Canadian Bar Association Committee on Legal Research in 1956.[31] The Report stated:

> A new duty is today incumbent upon the legal profession. This is the duty of law reform.
> . . . we feel . . . that on both the federal and provincial planes some permanent body or bodies should be created charged with the continuing and systematic promotion of law reform . . .
>
> In a federal state, the problem of selecting the most appropriate kind of organization to promote law reform is especially difficult. Certain factors, however, are inescapable in Canada. Reform will have to be effective in eleven jurisdictions, one federal and ten provincial. The resources of the different provinces vary greatly . . .
>
> It is our opinion that the time is appropriate for the development of permanent law-reform machinery in Canada.

---

30 See MacDonald, op. cit., fn. 19, at p. 9.
31 (1956), 34 Can. Bar Rev. 999.

> We think that the Canadian Bar Association should take the initiative in setting up this machinery, in cooperation with the Minister of Justice, the Attorneys-General of the provinces, the provincial law societies and bodies like the Conference of Commissioners on Uniformity of Legislation in Canada. We are not in a position, however, to recommend the precise form that the necessary committee or committees should take. Whether there should be a single national council, with provincial committees, or separate bodies in each province, and whether they should be official or unofficial, are questions to which a great deal more attention will have to be given . . . . [32]

Although concrete results did not immediately follow, the Report gave recognition and respectability to the cause of law reform. It was adopted by the Council of the Canadian Bar Association.[33]

Ontario in 1964 was, as indicated at the outset of this article, the first province to set up a permanent law reform agency with full-time staff. Alberta did so in 1968 and British Columbia has announced its intentions of doing so.

Manitoba, since 1962 has had a Law Reform Committee, which was formed by the Attorney General, who is its chairman. It is a cumbersome group of over thirty members consisting mainly of busy practitioners, has no full-time personnel or funds, and only meets about three times a year. In the spring of 1968, however, the Legal Research Institute of the University of Manitoba was organized at the University. It is, at this stage, a university institution, although the committee governing its affairs has on it two representatives from the government and one from the law society. There are also five members of the faculty on the committee. The Institute has a part-time Director, Professor J. M. Sharp. There is no formal arrangement with the provincial government at this point and the control of the Institute is clearly within the faculty.

Quebec provided for a Commission for the Revision of the Civil Code in 1955,[34] but it did not become operational until 1961. It is not, however, a permanent commission and is to exist only until the revision is complete. Meanwhile, it continues on an annual basis, authorization being granted each year to extend its term for a further year. The Commission is under the Presidency of Professor Paul-André Crépeau, of the Faculty of Law at McGill. It has twelve committees, each responsible for a different area of the law.

The Canadian Bar Association meanwhile pushed for the organizing of a commission at the national level. At its annual meeting in 1966, the Association passed the following resolution:

---

32 Ibid., at pp. 1034 to 1037.
33 Ibid., see fn. 1.
34 S.Q. 1954-55, c. 47.

> Resolved that this Association recommend that the Government of Canada should forthwith consider the advisability of establishing in Canada a Federal Law Commission.[35]

Private members' bills were introduced in the House of Commons in 1966 and 1968 to establish a Canada Law Reform Commission.[36] Neither received second reading. As we have seen, the federal Minister of Justice has recently announced his government's intention of setting up such a commission.

There are two other Canadian bodies which should be mentioned, The Foundation for Legal Research and The Conference of Commissioners on Uniformity of Legislation in Canada.

The Foundation for Legal Research was organized in 1960, as a result of a recommendation of the 1956 Canadian Bar Association Report on Legal Research.[37] The 1968 Report of the Foundation shows that little has yet been accomplished in the way of completed research.[38] The capital fund of the Foundation is nearly $125,000. Grants have been made totalling $27,400. Two major grants were of $10,000 each to:

(1) W. B. Common, former Deputy Attorney General of Ontario and Professor Alan Mewett for a study on the philosophy of sentencing; and,

(2) Professor M. L. Friedland to assist in a study on the processes of law reform.

It is understood the first of these is virtually complete and that the second is substantially under way. The funds for The Foundation, at least at this stage, are being raised largely from the profession. A contribution of $100 a year for ten years entitles one to be a Fellow of The Foundation. However, not all members of the legal profession will be invited to join. The Foundation proposes to restrict membership in The Fellows to not more than five per cent of the profession. Initial invitations went to some 500 members of the profession, who were apparently selected by the foundation's trustees. After their first meeting, The Fellows will select those who will be invited to join them. How successful this exclusive club will be in promoting

---

35 Proceedings of the Canadian Bar Association, Forty-Eighth Annual Meeting, September 2nd, 1966, at p. 171. The resolution had come from the Administrative Law Section and had originally called for a "National" Law Reform Commission. The Resolutions Committee, apparently politically sensitive, recommended that "National" be changed to "Federal". This was agreed to.

36 Bill C-72, given first reading on January 24th, 1966, was sponsored by R. A. Bell, who was then a Progressive Conservative M.P., and a member of the Ontario Law Reform Commission. Bill C-64, given first reading on September 20th, 1968, was sponsored by S. Schumacher, a Progressive Conservative from Alberta.

37 See 34 Can. Bar Rev. 999 at p. 1056.

38 Important Developments Forecast in Canadian Legal Research (1968), 6 Can. Bar Jo. 599.

research and reform remains to be seen. Dean C. A. Wright, who was a member of the Committee on Legal Research, strongly opposed the recommendation that a legal research foundation be created. He stated:

> A legal research foundation as recommended in the report may perform work that seems to have an immediate practical appeal to both profession and public. It will do nothing to create legal researchers devoting their lives to unspectacular projects having as their chief aim the inculcation of a spirit of research and scholarship in each individual member of the profession. Indeed . . . I believe it may impede this process.[39]

It is too early to tell whether Dean Wright's fears were justified.

The Association of Canadian Law Teachers is currently conducting a study into what is now being done in legal research in Canada. This project is really a follow-on from the 1956 Report on Legal Research.[40]

The Conference of Commissioners on Uniformity in Canada, which has met annually since 1918, has produced some useful model legislation[41] but it can hardly be described as an active reform body. It has no full-time staff and its membership consists largely of lawyers from the departments of the Attorneys General. The budget of the Conference gives an idea of the scope of its operations. The governments of Prince Edward Island and Quebec contribute $100 each a year, and the remaining provinces $200 each. The chief expenditure is for the printing of the proceedings of the annual meetings.[42]

At the international level, agreement on uniformity in the conflict of laws may well now lead to law reform in this country. Canada has at last become a member of the Hague Conference on Private International Law and was a signatory to the Final Act, containing three draft conventions, of the Eleventh Session on October 26th, 1968. The draft conventions were:

I Convention on the Recognition of Divorces and Legal Separations.

II Convention on the Law Applicable to Traffic Accidents,

III Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.[43]

---

39 (1956), 34 Can. Bar Rev. 999 at pp. 1063-1064.

40 A Committee was appointed for this purpose at the 1967 annual meeting of the A.C.L.T. The Committee consists of Mark MacGuigan, M.P., chairman, Dean G. F. Curtis, Wilbur Bowker, Director of the Alberta Institute of Legal Research and Reform, and Professor A. Linden.

41 See, for example, Model Acts recommended from 1918 to 1961 inclusive, Conference of Commissioners on Uniformity of Legislation in Canada (1962).

42 See the Treasurer's Report, Proceedings of Forty-Ninth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1967), Appendix B, pp. 44-45.

43 Final Act of the Eleventh Session of The Hague Conference on Private International Law, October 26th, 1968.

Signing only signifies that the delegates have agreed to submit the draft conventions to their respective governments. In the past, many of the matters dealt with by the Conference were within provincial jurisdiction and the rules of the Conference made it virtually impossible for federal governments to participate. These have recently been changed[44] so that it has become possible for such countries as Canada and the United States to adhere to the Conference. How the federal and the provincial governments proceed from this point should prove an interesting exercise. Where a convention deals with a matter wholly or partly within provincial jurisdiction, it appears that the provinces will each be asked by the federal government if they wish to approve the convention. Then, depending on the terms of the particular convention[45] and the number of the approving provinces, the federal government may sign, ratify or accede to the convention so as to extend it to the approving provinces. The composition of the six-man Canadian delegation to The Hague is of significance. Although the delegates were appointed by Ottawa, and officially represented the federal government, four were chosen from a list of nominees of the provincial Attorneys General and one was nominated by the Conference of Commissioners on Uniformity of Legislation in Canada. The sixth was R. Bedard, Q.C., an associate deputy minister in the federal Department of Justice. Included in the four chosen from the provinces' nominees were Professor Paul-André Crépeau, the President of the Commission for the Revision of the Civil Code in Quebec, and H. Allan Leal, Q.C., Chairman of the Ontario Law Reform Commission.[46]

III. OBJECTS AND STRUCTURE

A. Objects

The terms of reference of the well-established law reform agencies are usually in such wide terms as to embrace a study of any legal subject. The duties of the New York Commission, for example, are

---

44 See J. G. Castel, Canada and The Hague Conference on Private International Law: 1893-1967 (1967), 45 Can. Bar Rev. 1.

45 See, for example, Article 14 of the Convention on the Law Applicable to Traffic Accidents, contained in the Final Act of the Eleventh Session of The Hague Conference on Private International Law, October 26th, 1968. Article 14 states, in part:

> A State having a non-unified legal system may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its legal systems or only to one or more of them, and may modify its declaration at any time thereafter, by making a new declaration.

46 The other two were S. Lyon, Q.C., Attorney General of Manitoba and H. E. Read, O.B.E., Q.C., former Dean of the Dalhousie Law School and a long-time Nova Scotia Commissioner to the Conference on Uniformity. L. R. MacTavish, Q.C., who is Ontario's Senior Legislative Counsel, was the nominee of the Uniformity Commissioners.

set out in a statutory provision[47] (which has been copied in California[48] and Michigan[49]), as follows:

> 1. To examine the common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms.
>
> 2. To receive and consider proposed changes in the law recommended by the American Law Institute, the commissioners for the promotion of uniformity of legislation in the United States, any bar association or other learned bodies.
>
> 3. To receive and consider suggestions from judges, justices, public officials, lawyers and the public generally as to defects and anachronisms in the law.
>
> 4. To recommend, from time to time, such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state, civil and criminal, into harmony with modern conditions.

Less emphasis is laid on anachronisms in the statute which establishes the Ontario Law Reform Commission. The enactment simply states that it is the function of the Commission:

> . . . to inquire into and consider any matter relating to,
>
> (a) reform of the law having regard to the statute law, the common law and judicial decisions;
>
> (b) the administration of justice;
>
> (c) judicial and quasi-judicial procedures under any Act; or
>
> (d) any subject referred to it by the Attorney General.[50]

The act governing the English and Scottish Law Commissions is equally broad, but expressly includes codification and consolidation.[51]

---

47 N.Y. Stat., 1934, c. 597, s. 1; McKinney's Consolidated Laws of New York, Book 31, s. 72.

48 Cal. Stat. 1953, c. 1445, s 2; Government Code, s. 10330.

49 Mich. Public Acts 1965, Act No. 412.

50 S.O. 1964, c. 78, s. 2.

51 *The Law Commissions Act, 1965*, c. 22, s. 3 (1) provides:

> 3. Functions of the Commissions. (1) It shall be the duty of each of the Commissions to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernization of the law, and for that purpose —
>
> (a) to receive and consider any proposals for the reform of the law which may be made or referred to them;

(continued on page 24)

However, notwithstanding such wide functions, the actual work carried by law reform agencies is subject to a number of limiting factors. These include budgetary considerations, personnel available for research, the philosophy of the particular agency as to the kind of work it should engage in, and the extent to which there is outside control over programmes. This last factor will depend on whether studies can be initiated by the agency itself, by the agency with the approval of the government or the legislature, or only by the agency on referral from the government.

With respect to outside control, there are two related questions:

1. Should there be some governmental or legislative control over the topics studied by a law reform agency?
2. Should the government be able to refer matters to the agency for study or should the agency be free to choose its own topics?

The Ontario and New York Commissions may initiate projects without the approval of any outside authority such as the Attorney General or the legislature. However, there is budgetary control. For instance, the budget of the Ontario Law Reform Commission is reviewed by the Treasury Board and is included in the Attorney General's estimates, which means it must pass through the Legislature. In both Ontario and New York, it should be added, projects may be referred to the respective commission by the government.

The programme of the English Law Commission must be submitted to the Lord Chancellor whose approval is apparently necessary. He, in turn, is required to lay before Parliament any programmes prepared by the Commission and approved by him.[52] Similarly, the California Commission must submit its programme to the legislature. The California Commission is expressly required by statute to confine its studies to topics which are so approved.[53]

(b) to prepare and submit to the Minister from time to time programmes for the examination of different branches of the law with a view to reform, including recommendations as to the agency (whether the Commission or another body) by which any such examination should be carried out;

(c) to undertake, pursuant to any such recommendations approved by the Minister, the examination of particular branches of the law and the formulation, by means of draft Bills or otherwise, of proposals for reform therein;

(d) to prepare from time to time at the request of the Minister comprehensive programmes of consolidation and statute law revision, and to undertake the preparation of draft Bills pursuant to any such programme approved by the Minister;

(e) to provide advice and information to government departments and other authorities or bodies concerned at the instance of the Government with proposals for the reform or amendment of any branch of the law;

(f) to obtain such information as to the legal systems of other countries as appears to the Commissioners likely to facilitate the performance of any of their functions.

52 1965, c. 22, s. 3 (3).

53 Cal. Stat. 1953, c. 1445, s. 2; Government Code, S. 10335.

The New South Wales Law Reform Commission only considers matters referred to it by the Attorney General.[51] In practice, however, the Attorney General's referrals are generally made after informal discussions with the Commission and on recommendation by it to him.

In order to carry out their functions effectively, should law reform agencies be able to operate independently in their choice of programmes? Should they be free from political interference in this respect? Conceding that there must be budgetary control, should it be applied only on an overall basis and not to particular projects?

On the other hand, if matters can be referred to an agency by the government, there is always the possibility that it will be used as a means of relieving the government from discomfort created by current political issues. In this respect, it may act as a supplement to the Royal Commission technique. Furthermore, the government may be anxious to have a particular report in a hurry and exert pressure on the agency to speed up its activities. If that sort of influence were succumbed to, the quality, and perhaps character, of the agency's work would decline.

With respect to whether subjects chosen for reform studies should be restricted to non-controversial matters in the area of "lawyer's law", there are two divergent philosophies.

Professor John W. MacDonald, chairman of the New York Commission, has expressed the conservative position, which is the view of his agency:

> In its relationship to the Legislature, the Commission has been scrupulous in its recognition of legislative supremacy. It has sought to avoid recommendations on topics in which the primary question was one of policy rather than one of law. This practice has been based on an opinion that the best work of the Commission can be done in areas in which lawyers have more to offer to solve the question than other skilled persons or groups.[55]

An examination of the studies initiated by the Commission shows that it has endeavoured to keep to this policy. As a result, it has been subjected to some criticism. One learned writer has referred to the New York Commission as having remained "a body of rather minor significance".

The English Law Revision and Law Reform Committees also confined themselves to "lawyer's law". The New South Wales Commission is restricting its programmes, as a matter of policy, to areas which are likely to be non-controversial.

The more activitist point of view was put by Professor Lord Lloyd of Hampstead in the House of Lords debate on the first report of the English Law Commission. He remarked:

---

54 S.N.S.W. 1967, s. 10 (1).
55 MacDonald, op. cit., fn. 19, at p. 15.

> The old fallacy that there is a sphere of "lawyer's" law which is purely technical, and can be divided from legislation involving policy, retains its hold on few serious students of the law today. All law inevitably involves policy decisions of some kind. It is therefore idle to maintain that the Law Commission should in some way avoid investigating and making proposals regarding policy matters.[56]

Sir Leslie Scarman, the Chairman of the English Law Commission, takes the latter view:

> I challenge anyone to identify an issue of law reform so technical that it raises no social, political or economic issue. If there is any such thing, I doubt if it would be worth doing anything about it.[57]

He pointed out that, in dealing with the law of contract, and the law of landlord and tenant, social and economic questions cannot be avoided. One must consider whether the law of contract should be based on freedom of contract or some other principle, such as fairness, and also the extent to which the law should interfere with freedom of contract in order to protect such groups as consumers and tenants.[58]

Neverthless, Sir Leslie appears to believe that policy can and should be left to the legislature, which may be assisted in reaching its conclusions by advice from the law reform agency on the implications of possible solutions. He gave as an illustration of this approach, the Law Commission's handling of the subject of divorce. The Commission's report, "Field of Choice", states:

> It is not, of course, for us but for Parliament to settle such controversial social issues as the advisability of extending the present grounds of divorce. Our function in advising you must be to assist the Legislature and the general public in considering these questions by pointing out the implications of various possible courses of action. Perhaps the most useful service that we can perform at this stage is to mark out the boundaries of the field of choice.[59]

The Report recommended exit rules for marriage without committing itself, in the words of Sir Leslie, "to any but the most obvious social judgments". The most significant of these was that the objective of a good divorce law should be, once a "marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness, and the minimum bitterness, distress and humilia-

---

56 277 H.L. Deb., cols. 1269-1270. (Nov. 16, 1966.)
57 Leslie Scarman, Law Reform: The New Pattern, The Lindsay Memorial Lectures Delivered at the University of Keele, November 1967, at p. 28. (1968).
58 Ibid., at pp. 28-29.
59 Law Com. (6) at p. 5.

tion."[60] Thus, said Sir Leslie, the "perennial dilemma of a law reform agency" was solved.[61]

Legislatures, of course, must decide policy in the end. Yet surely law reform bodies must give the social and economic issues consideration if their advice as to the implications of various solutions is to be meaningful. Furthermore, surely it is the function of these bodies to put forward solutions to problems, which although they may be "legal" on the surface, are basically economic or social. These solutions can only be formulated by either making certain assumptions or by having a data-collection expedition.

The Ontario Law Reform Commission, for example, has been examining in its Family Law Project the problem of property relations between husband and wife.[62] The consideration of whether some form of community property regime is suitable for Ontario involves social questions of great significance. In its Landlord and Tenant Project, the Commission has made recommendations which, if implemented, would amount to a substantial interference with the freedom of the parties to enter into their own bargain. These recommendations included proposals for Rental Review Officers and Rental Review Boards. The Interim Report of the Commission states:

> There is no doubt that many tenants are the victims of landlords who are taking advantage of the acute housing shortage in some areas to charge excessive and in some cases unreasonable rents. This results from the fact that in those areas there are too many prospective tenants bidding in the market where there are too few rental units available. It is obvious that the only effective long term solution to this problem is to increase the supply of housing units available for sale or rent. Until this long term solution can be realized a serious social evil will continue.[63]

The Commission, however, stopped short of rent control:

> The wisdom of such controls is something that requires a wide economic study and policy decisions that go far beyond the powers of this Commission as a law reform body.[64]

The Commission's study included a survey of landlord and tenant problems, conducted by questionnaire of 3000 tenants and 400 landlords in Toronto.[65]

B. Structure

What kind of personnel should a law reform agency have? There are two essentials — first class minds and time. The use of personnel

---

60 Ibid., at para. 15.
61 Scarman, op. cit., fn. 57, at pp. 32-33.
62 Family Law Project Study, Part IV, Chs. 1 and 2.
63 Interim Report on Landlord and Tenant Law Applicable to Residential Tenancies (1968), at p. 69.
64 Ibid., at p. 70.
65 Ibid., Appendix A.

varies. Some commissions have members who are full-time, some part-time. The extent that agencies will employ full-time staff depends on whether research work is contracted out (usually to law school teachers) or done within the agency.

Both the New York and Ontario Commissions contract out the large part of their research work. In the past three years, the Ontario Commission has engaged the services of fifteen Ontario law teachers to undertake substantial studies on various topics. On the other hand, the English and Scottish Law Commissions and the New South Wales Law Reform Commission carry out the major part of their research with their own staff.

The English Law Commission consists of five full-time Commissioners,[66] together with a full-time staff of forty-six of whom twenty are lawyers.[67] It should be remembered that the English Commission is also engaged in consolidation and codification. Four of the lawyers on their staff are draftsmen.

The New South Wales Commission consists of four full-time members.[68]

The New York and Ontario Commissioners, with the exception of the chairman of the latter, are part-time. Their function is largely one of policy-making rather than of engaging in research and report writing.

Members of these Commissions have been drawn from the bench, the practitioners and the law faculties. The English have clearly felt that either judges are specially suited to be chairmen or that they give an air of respectability to a body which may recommend radical innovations. The chairmen of the Lord Chancellor's Law Revision and Law Reform Committees and the Home Secretary's Criminal Law Revision Committee have always been members of the judiciary. Sir Leslie Scarman and Lord Kilbrandon, the chairmen of the English and Scottish Law Commissions, both hold judicial office. The chairman of the New South Wales Commission is required to be a judge.[69] New York's Commission, however, is headed by a law professor and Ontario's by a former law school dean.

The other four members of the English Law Commission are three academics, who were described in the House of Lords at the time of their appointment as three "Leftish dons",[70] and a barrister. The New South Wales Commission has, in addition to its chairman,

---

66 Law Commissions Act 1965, c. 22, s. 1.
67 The Law Commission, Third Annual Report 1967-1968, (Law. Com. No. 15), para. 88.
68 The New South Wales statute provides for not less than three nor more than six commissions. See s. 3 (2).
69 See s. 3 (2) (a).
70 265 H.L. Deb., col. 452, (April 14, 1965.) They are L. C. B. Gower, M.B.E., N.S. Marsh, Q.C., and Andrew Martin, Q.C.

a law professor, a barrister and solicitor. The New York Commission has nine members, four of whom are ex officio as chairmen of the committees on the judiciary and codes of the state senate and assembly, and two of whom must be law professors.[71] The others are practitioners. The Ontario Commission has five members.[72] Three are practising members of the profession, one a former Chief Justice, and one a law school dean, as mentioned above.

In New York, those members who are not ex officio are appointed for five year terms.[73] The same term is the maximum period of appointment in England (although a re-appointment may be made).[74] In New South Wales, the chairman, if he was a Supreme Court judge at the time of his appointment, holds office until he is seventy (or longer, if the instrument appointing him so states). The other members of the New South Wales Commission may be appointed to terms not exceeding seven years, but are eligible for re-appointment.[75] In Ontario, the statute lays down no period of tenure and the Commissioners have been appointed for an indefinite term.

IV. THE FUTURE

What areas of the law could we expect a National Law Reform Commission to be concerned with? Most of the so-called "lawyer's law" lies within provincial jurisdiction. In particular, property, contract and tort law are, in the main, fields of law which are of provincial concern. Nevertheless, they have federal aspects which could be the subject of reform studies. For example, there are the federal expropriation laws and the problem of the immunity of the federal Crown from lawsuit.

The Minister of Justice has so far mentioned two areas, civil rights and criminal law, which he believes should be dealt with by the national commission he proposes. He has stated:

> And it is my thought that such a Commission might well be charged with a particular responsibility involving a continuous evaluation of the fundamental rights and freedoms of the citizen as these may be found expressed in legislative enactments both old and new.[76]

---

71 The two law professors are Professor John W. MacDonald of Cornell, the chairman, and William H. Mulligan, Dean of the Fordham Law School.

72 See S.O. 1964, c. 78, s. 1.
H. Allan Leal, Q.C., former Dean of Osgoode Hall Law School, who is the chairman, the Honourable J. C. McRuer, S.M., former Chief Justice, who is vice-chairman, the Honourable R. A. Bell, Q.C., of Ottawa, W. Gibson Gray, Q.C., of Toronto, and W. R. Poole, Q.C., of London.

73 N.Y. Stat., 1934, c. 597, s. 1; amended 1944, c. 239; McKinney's Consolidated Laws of New York, Book 31, s. 70.

74 *The Law Commissions Act 1965*, c. 22, s. 1 (3). (U.K.)

75 *Law Reform Commission Act, 1967*, s. (3). (N.S.W.)

76 Turner, op. cit., fn. 1, at p. 12.

Apparently Mr. Turner had in mind something similar to the McRuer Commission Inquiry into Civil Rights,[77] except that it should be on a continuing basis. Should this be the case and if it is expected that the national commission would, say, produce in three or four years findings which are equivalent in stature to the McRuer Report, a heavy burden would be imposed on the resources of the commission and one wonders how much other work it will be able to accomplish in this period. Naturally, much will depend on how generous the federal government is in establishing the commission and whether it is structured in such a way that it can be highly productive. The continuing review envisaged would be much less demanding than the initial task.

Criminal law is the other area which the Minister has specifically mentioned.[78] In moving the second reading of the omnibus Criminal Code amendment bill in the House of Commons on January 23rd, 1969, Mr. Turner linked the creation of the national law reform commission with continuing reform of the criminal law. Speaking of the proposed amendments to the Code, he said:

> If in the light of experience any changes or additions to the Criminal Code appear not to have been in the public interest, they can always be changed or repealed at any time.[79]

The more controversial provisions of the bill ease somewhat the existing prohibitions with respect to abortion, homosexuality and lotteries.[80] If the national commission is to make recommendations on these subjects, on what basis is it to do so? Would the members of the national commission be able to free themselves from their own prejudices in such matters? Would the commission's exercise be largely one of speculation into what is acceptable politically and by the public?

Other areas which a national law commission might review are bankruptcy law, patent and copyright law, the combines legislation, and divorce and marriage. It might also concern itself with such an elementary matter as whether or not there should be a Statute of Limitations which should apply to federal causes of action.

What of the provinces? Must every province have a law reform commission? Expense is involved. The annual budget of the Ontario

---

77 Royal Commission Inquiry into Civil Rights. The first three volumes of the Commission Report were released in February, 1968. It is expected that the remaining volumes will be released later this year, at which point the Commission's task will be completed.

78 Turner, op. cit., fn. 1, at p. 12; Can. H.C. Deb., January 23, 1969, at p. 4725.

79 Can. H.C. Deb., January 23, 1969, at p. 4725.

80 Bill No. C-150, Ss. 7, 13 and 18 (amending the Criminal Code by adding ss. 149A and 179A and amending s. 237).

Commission, for example, is near the $200,000 mark.[81] Can suitable personnel be found and afforded? Newfoundland and Prince Edward Island do not have law schools. The territories are, of course, in a very difficult position. Yet each jurisdiction must be concerned with the general reform of its laws and someone within that jurisdiction must assume that responsibility. Certainly, it is not sufficient for one province to blindly copy the reforms of another. Not only do local conditions vary, but the law which is being changed by the adoption of a reforming statute may not be the same. The Conference of Commissioners on Uniformity could, of course, approve as model statutes, enactments passed as the result of the recommendation of some provincial commission. In this way, each province would have the opportunity to study the particular act. However, how meaningful such studies would be must be doubtful in view of the way in which the Conference has operated in the past. In any event, every statute can be improved upon and copying is no substitute for further research and analysis. There are two other possibilities. It might be feasible for two or more provinces to form a joint agency. It may be that the National Law Reform Commission, when it is created, could play some helpful role, although the federal government might wish to avoid the possibility of being charged as an interloper.

The agencies that are being created must have a liaison with one another. Nearly every law reform agency in the common law world maintains an active interest in the research and reports of the other agencies. In this respect, it would be helpful if there was some central body which kept track of past and current research undertaken by law reform bodies. Within Canada, there is a special opportunity for co-operation. Law reform agencies in this country might informally agree as to a distribution of projects. This would enable their resources to be more effectively utilized.

Law reform is most certainly upon us. The continued growth and interrelationship of law reform agencies in Canada and elsewhere will prove both productive and exciting.

---

81 See Estimates for the Fiscal Year ending March 31st, 1969, of the Province of Ontario, at p. 19. The estimate was $190,000. The current budget figure for the New York Law Commission is in the neighbourhood of $170,000. The estimated cost of the English Law Commission for the year ending March 31st, 1969, was £145,000. See the Civil Estimates 1968-69, III - 45. (Session 1967-68, Paper No. 126.)

THE WORK OF THE LAW COMMISSION FOR ENGLAND AND WALES

the Hon. Mr. Justice Scarman*

In introducing the Law Commissions Bill into the House of Lords in 1965, the Lord Chancellor, Lord Gardiner, referred to the speech of his distinguished predecessor Lord Brougham before the House of Commons on February 7, 1828. This speech, lasting over six hours and delivered to a "thin and exhausted" chamber, heralded the great era of nineteenth century law reform in England, which, inspired by the writings of Bentham and implemented through the efforts of a succession of Victorian Chancellors, culminated in the Judicature Acts of 1873-5.

The following fifty years or so was a period of relative quiescence in which the great changes of the middle part of the nineteenth century were being assimilated by the profession and by the courts. But beginning with the real property legislation of 1925, the twentieth century too has seen a gradually increasing concern with the development of the law and the need for its reform. The creation of the Law Commission by the Law Commissions Act of 1965[1] is the most recent and significant recognition of the importance of ensuring that the law remains attuned to the needs of contemporary society.

Unlike most of our European neighbours, we in Britain have never had a central government agency responsible for the development and administration of the law — we have no Ministry of Justice. Such functions as are performed by a Ministry of Justice in those civil law and Commonwealth jurisdictions which possess one are in England shared amongst a number of Government departments. Two of the most important of these are the Home Office, which is responsible for the criminal law and penal system, and the Lord Chancellor's Office, which exercises a general control over the administration of the civil law and those branches of the substantive civil law which do not fall within the province of any of the more specialized departments. Thus before 1965 the investigation of any problem of law reform, which could not be undertaken simply within a government department, had to be entrusted to a Royal Commission or to a standing or ad hoc committee of judges, academic and practising lawyers, civil servants and laymen who gave their services part-time. The standing committees include the Law Reform Committee to which aspects of the civil law could be referred by the Lord Chancellor, and the Criminal Law Revision Committee, which, as its name implies, deals with the criminal law at the instigation of the Home Secretary.

---

* O.B.E., LL.D. Judge of the High Court, Chairman of the Law Commission.

1 The Act set up two Commissions: "The Law Commission" which is responsible for the law of England and Wales (and certain aspects of the law of Northern Ireland) and with which this account is solely concerned; and "The Scottish Law Commission" which deals with the law of Scotland.

Such committees have done, and continue to do, a great deal of immensely valuable work in the field of law reform. Yet the time and resources which they have been able to devote to any particular project are severely limited and it therefore became evident that comprehensive reform could only be achieved by a body which had this as its sole task and which was equipped with a professional staff on the scale required.[2] In the words of Lord Gardiner, who was a member of the Law Reform Committee for a number of years before his appointment as Lord Chancellor:

> "You cannot reform the law of England in your spare time on an occasional afternoon."[3]

Quite apart from the limitations which were necessarily imposed on the scope of any law reform inquiry conducted on this basis, the work of the standing committees was also handicapped, to some extent at least, by the lack of any power to select subjects for review or to allocate priorities for reform. These decisions were taken by the governmental department concerned.

The Law Commissions Act of 1965 sought to overcome these defects by setting up a permanent body consisting of a Chairman and four other full-time Commissioners. The Act provides that persons appointed to be Commissioners must be drawn from those

> "suitably qualified by the holding of judicial office or by experience as a barrister or solicitor or as a teacher of law in a university".[4]

The Commissioners are assisted by some twenty full-time lawyers and an administrative staff.

The general duty of the Commission is set out in s.3(1) of the 1965 Act. It is to

> "take and keep under review all the law with which [it is] concerned with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactment, the reduction of the number of separate enactments and generally the simplification and modernization of the law . . . ".

The responsibilities of the Commission are thus not conceived in terms of sporadic or occasional intervention in isolated areas of the law which may be referred to them, but in terms of continuous scrutiny and review of all the law.

---

2 See the White Paper: "Proposals for English and Scottish Law Commissions" Cmnd.2573.

3 Second Reading Debate on Law Commissions' Bill (Volume 264 House of Lords Debates, col. 1153).

4 S.1(2) In fact the Commissioners consist of one Judge, three Queen's Counsel and one Solicitor. Three of the Commissioners have experience as teachers of law in a university.

The Act goes on to define the specific functions which the Commission is required to carry out in the discharge of its overall duty. The Commissioners are required to prepare and submit to the Lord Chancellor programmes for the examination of different branches of the law with a view to reform, and to recommend the agency (whether the Commission or another body) by which any such examination should be carried out.[5] This latter point is important since it illustrates the planning or co-ordinating role of the Commission. The standing and ad hoc committees to which I have referred have not been superseded; they continue to thrive and their services, too valuable to be dispensed with, have been utilized in a variety of law reform projects since 1965.

Subject to the Lord Chancellor's approval, the Commission is then to examine the subjects contained in its programme to make recommendations and, where appropriate, to prepare draft bills.[6] From its inception the Law Commission has been greatly assisted by a team of expert Parliamentary Counsel whose job it is to translate the Commission's recommendations into legislative form.

This, in outline, is the machinery which Parliament has constructed. How has it operated over the past three and a half years since its creation? Soon after the Commissioners were appointed in June 1965 their First Programme of Law Reform[7] received the approval of the Lord Chancellor. One consideration which, apart from the resources available to the Commission at that time, guided the choice of items for the First Programme was the desirability of examining studies already completed by other law reform agencies with a view to considering whether their recommendations, if not yet implemented, could be endorsed or supported.

The scope of the seventeen items contained in the First Programme varies considerably. Two topics are scheduled for codification: the law of landlord and tenant and the law of contract. These are major exercises which will inevitably take some years to complete since it is intended to reform as well as codify the existing law.[8] The codification of contract law is being carried out jointly with the Scottish Law Commission with a view to the ultimate production of an Anglo-Scottish Code. This involves reconciling certain basic differences between English and Scots law (which, of course, derive from quite distinct traditions) but the task is worthwhile since commercial law is one field where standardization of legal rules is particularly desirable, especially within a nation as small as our own.

---

5 S.3(1)(b).
6 S.3(1)(c).
7 Law Commission Publication No. 1.
8 Such codes as already form part of English law (for example, the Bills of Exchange Act 1882 and the Sale of Goods Act 1893) represent, for the most part, statements of the case law and statute law as it existed at the time of codification, no attempt being made to alter the law.

In the work on the Code the two Commissioners have also been mindful, in the light of Britain's application to join the Common Market, of the importance of achieving harmonization with continental systems.

These two codification exercises are now well under way but their completion cannot be expected for some time. The First Programme also contained a number of items of more limited scope, some of which have been disposed of. An example is Item XIII: a consideration of the problems raised by the decision of the House of Lords in D.P.P. v. Smith,[9] that is the question of "imputed criminal intent". The Commission recommended that where an accused's intent or foresight is relevant to his liability under the criminal law, the test of such intent or foresight should be "subjective".[10] This recommendation was implemented by s.8 of the Criminal Justice Act 1967.

The combination of law reform items of varying ambit makes it possible to proceed with research on some subjects while consultations with outside bodies and individuals are being carried out on others.

In November 1967 a Second Programme[11] was submitted to, and approved by the Lord Chancellor. It contained just three items: the codification of the criminal law, the codification of family law and the interpretation of wills. We may consider the first of these items as an illustration of the detailed organization and execution of a specific law reform study.

Item XVIII of the Second Programme of Law Reform recommends that there should be a comprehensive examination of the criminal law with a view to its codification. This, of course, will be a complex and lengthy operation and it is not, therefore, possible to map out all stages of the exercise; but, as a start, three topics are to be examined. The first and most fundamental is a consideration of the general principles of the criminal law by the Commission itself assisted by a Working Party whose members include judges, lawyers from all branches of the profession and representatives from the Home Office. Two of the Law Commissioners act as joint chairmen of the Working Party and a third Commissioner is also a member.

A working paper[12] has been published by the Commission setting out the topics which are to be discussed by the Working Party and what form the framework of what will ultimately be Part I (The General Part) of the Criminal Code will take. As work progresses on this agenda the provisional conclusions reached by the Commission and the Working Party will be published in the form of a succession

---

9 [1961] A.C. 290.
10 "Imputed Criminal Intent (*Director of Public Prosecutions v. Smith*)" (Law Commission Publication No. 10).
11 Law Commission Publication No. 14.
12 Published Working Paper No. 17.

of working papers consisting of sets of propositions accompanied by explanatory comments. Comment, criticism and suggestions will be invited on these working papers which will be widely circulated both within and without the legal profession. The Commission is also in close touch with specialists in other disciplines whose expertise and experience can contribute to the formulation of the basic principles of the criminal law. Relevant criminological and sociological data, as well as advice on the commissioning and feasibility of research projects, are available through a specially constituted Advisory Panel of Social Scientists.

Simultaneously with this study of the "General Part" of the criminal law, the examination of certain specific groups of offences has been initiated.[13] This work is being shared between the Commission and the Home Secretary's Criminal Law Revision Committee, which is to undertake a review of offences against the person (including homicide) and sexual offences. The third aspect of the criminal law so far planned for examination is "extra territorial jurisdiction in criminal offences", for which the Commission itself is responsible.

This pattern of work is of course peculiar to the particular project which we have been discussing since working techniques must be adaptable to the needs of any particular inquiry. Generally speaking, two stages can be identified before recommendations are finally made: research and consultation. It is at the research stage that experience and materials from other jurisdictions may be considered. The 1965 Act has in fact made it a specific duty of the Commission "to obtain such information as to the legal systems of other countries as appears to the Commissioners likely to facilitate the performance of any of their functions".[14]

Once research has been completed the results of the Commission's preliminary deliberations are distilled into the form of a working paper which sets out the existing law, indicates the defects which in the view of the Commissioners require correction, and makes tentative suggestions for reform. This is the general practice, and on the whole this method of consultation has been found preferable to issuing general invitations to submit memoranda of evidence. A working paper focuses the mind of the reader directly on the issues in question, saving time and work both for the reader and for the Commission as the eventual recipient of the reader's comments. It also allows those who are consulted an opportunity of seeing the direction in which the commission's thinking is moving at a stage when it is not too late for the Commission to be diverted from an unacceptable or unwise course. It is through consultation on specific

---

13 Malicious damage to property, forgery, perjury, bigamy and offences against the marriage law, offences against the person (including homicide) and sexual offences. See Second Programme of Law Reform (Law Commission Publication No. 14) page 6.

14 S.3(1)(f).

projects as well as periodic meetings with the three chief representative bodies[15] of the legal profession that the whole profession is given an opportunity of participating in the evolution of the law.

In a country with a legal tradition as ancient as ours one problem of which any law reform agency must be aware is the form of the law and its arrangement and accessibility. The law of England is to be found in some 3,000 Acts of Parliament dating from the thirteenth century, in many volumes of delegated legislation made under those Acts, and in over 300,000 reported cases. In many cases codification will be the ideal method of reducing the number of sources of the law while at the same time rendering it more readily comprehensible. Two other techniques which are concerned rather with the form and arrangement of the law than with its content are consolidation and statute law revision. The Act of 1965 requires the Commission to prepare from time to time at the request of the Lord Chancellor comprehensive programmes of consolidation and statute law revision and to undertake the preparation of draft bills pursuant to such programmes.[16]

By "consolidation" is meant the process of combining the legislative provisions on a single topic into one coherent enactment. This in itself will make the law more accessible and may in some cases usefully precede complete codification of that branch of the law including not only previous legislation but also judge-made law. "Statute Law Revision" is the process of eliminating obsolete and unnecessary enactments from the statute book — an operation which facilitates the later process of consolidation and, where appropriate, codification. Work on the First Programme on Consolidation and Statute Law Revision[17] is now well in hand. It includes the consolidation of such major areas of the law as the Income Tax, Rent[18] and Road Traffic Acts.

We are also keeping in close touch with other developments directed towards improving access to legal sources. Computerized techniques of information retrieval may represent one answer to this problem but the practitioner and layman are likely to gain more immediate benefit from the proposals of the Statute Law Committee to produce a new official edition of Public General Statutes in force. The present official edition consists of the Third Edition of Statutes Revised (32 volumes) containing those statutes passed between 1235 and 1948 and in force on 31st December 1948. The second part consists of the annual volumes of the Public General Acts from 1949

---

15 These are the General Council of the Bar, the Law Society (Solicitors) and the Society of Public Teachers of Law.
16 S.3(1)(d).
17 Law Commission Publication No. 2.
18 This item has now been completed with the enactment of the Rent Act 1968. See the Commission's Third Annual Report (Law Commission Publication No. 15), paragraph 73.

onwards. The Statutory Publications Office prepares annually a volume of Annotations to Acts which contain directions for amending the volumes of the official edition in accordance with the changes made by the year's legislation. By 1963 the state of this edition can only be described as deplorable. One volume (for the year 1952) is out of print and, therefore, unobtainable; almost one third of all the pages in the edition has now been cancelled and many of the remaining pages are disfigured by amendments and deletions — that is, of course, assuming that the owner of the volumes has had sufficient time and resources to make all the necessary annotations. The Statute Law Committee has, therefore, proposed that the new official edition be arranged by subject rather than chronologically, and in a convenient loose-leaf form.[19] The Law Commission has warmly welcomed these suggestions as complementary to their own efforts in the field of consolidation and statute law revision.

Items listed in the Commission's programme of law reform and statute law revision and consolidation do not represent the sum total of its work. The Commissioners are required by statute to receive and consider any proposals for the reform of the law, which may be made or referred to them.[20] Inevitably most law reform proposals emanate from the legal profession — either from the judges or from individuals and bodies representing the academic and practising branches of the profession. Only in a small minority of cases is no action taken on these proposals, although the pressure of work often necessitates the postponement of suggestions for later consideration. The remaining proposals are either incorporated into an existing programme item or referred to other departments, committees etc.

The broad compass of many of the programme items permits action to be taken not only on proposals from outside the Commission but also allows the Commissioners, on their own initiative, to make recommendations concerning matters of importance or urgency which are brought to light from time to time. The Family Provision Act of 1966 incorporates certain proposals designed to remedy the unsatisfactory state of affairs revealed by three cases decided in 1965 and 1966.[21] These proposals were formulated by the Commission in the context of its general review of family law.[22]

One further function of the Commission, as laid down by statute, remains to be discussed — the provision of advice and information to government departments or other authorities concerned with the reform or amendment of any branch of the law.[23] This is another

---

19 See the Commission's Third Annual Report (Law Commission Publication No. 15), paragraphs 84-87.
20 1965 Act, s. 3(1)(e).
21 See the Commission's First Annual Report (Law Commission Publication No. 4) at paragraph 82.
22 Item X of the First Programme (now Item XIX, Second Programme).
23 1965 Act, s.3(1)(e).

aspect of the co-ordinating responsibility of the Commission. If we are adequately to discharge our duty to keep under review all the law with a view to its systematic development and reform, then it is vital that we are given the opportunity of ensuring that the legislation which is promoted by the various government departments remains in step with the development of the general law. It should be noted, however, that while departments are increasingly seeking the advice of the Law Commission there is no duty on their part to do so — the Commission can only act in response to a request. One such request was that received by the Commission in December 1967 from the Ministry of Labour (now the Department of Employment and Productivity) for advice on the review of the form and scope of the Factories Act 1961 and allied legislation. While this branch of the law is specialized in the sense that its application is limited to a particular, though of course important section of the community, a review of this kind involves questions of principle touching fundamental aspects of law reform and the general law — such questions as the form and structure of statutes and subordinate legislation, the place of strict liability and the appropriate criminal sanctions in social legislation of this kind.[24]

Of perhaps more general interest to Canadian readers, in the light of the enactment of the Canadian Divorce Act of 1968, was the reference to the Commission, under s.3(1)(c) of the 1965 Act, of the Report of a Group appointed by the Archbishop of Canterbury entitled: "Putting Asunder: A Divorce Law for Contemporary Society". This also serves as an illustration of how the Commission proceeds in a controversial field like that of divorce. The Archbishop's Group recommended, inter alia, the abolition of all existing grounds for divorce and the substitution of the breakdown of the marriage as the sole ground. The examination of the grounds for divorce fell conveniently with Item X of the Commission's First Programme.

In their report[25] to the Lord Chancellor on this reference the Commission recognized that it was for Parliament to settle such controversial social issues as the advisability of extending the present grounds for divorce. They pointed out that they regarded their function in such cases as the limited one of assisting the legislature and the general public in considering these questions by indicating the implications of various possible courses of action. Thus while the jurisdiction of the Commissioners is in no way confined to what is sometimes described as "lawyer's law", they, as a body of lawyers, are aware that their expertise is as such and that where important social issues are involved the ultimate policy judgments must lie with the community at large as represented by Parliament.

---

24 See Third Annual Report (Law Commission Publication No. 15) at paragraph 69(ii).

25 "Grounds of Divorce: The Field of Choice" (Law Commission Publication No. 6).

But of course there is really no sensible distinction between "lawyer's law" and social legislation — merely a gradation in the extent to which the social judgments which have inevitably to be made excite public controversy. Even the Report on the Reform of the Grounds of Divorce,[26] in which the Commission made no recommendations but set out the possible form which reform might take, started from two premises which, though hardly contentious were undoubtedly social judgments. They are set out in paragraph 15 of the Report:

> "Accordingly, as it seems to us, a good divorce law should seek to achieve the following objectives;
>
> (i) To buttress, rather than to undermine, the stability of marriage; and
>
> (ii) When, regrettably, a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation."

I believe that provided the Law Commission remains aware of its limitations as a specialist body it can make a valuable contribution to the resolution of social problems, not only by the deployment of legal skills but also, through the processes of consultation and research, as a medium for the collection and assimilation of information gleaned from other fields such as the social and economic sciences.

The Law Commission has now been in existence for over three years. It is not of course for one of its members to pass judgment on its achievements even if any assessment were possible after so short a life span. The legislative fruits of many current projects which are being worked on intensively cannot hope to be reaped for some time yet. At this stage in the Commission's history I prefer to look forward rather than back. Two particular problems pose challenges to the cause of law reform, each of which in different ways stem from one rather obvious fact — this is that Parliament by enacting the Law Commissions Act has recognized that henceforth the development of the law is primarily the function of the legislature rather than the courts.

The first problem that I want to discuss is the practical one of devising the most efficient means of translating the Commission's recommendations into enacted law. Part of the difficulty is the lack of Parliamentary time which, divided as it is between law-making and control of the executive, severely limits the opportunities for introducing law reform measures which are not regarded as important politically. The remedy lies in the reform of Parliamentary procedure and in particular in the greater use of committees. One step in this

---

[26] Ibid.

direction is the provision for the transfer of the Second Reading debate on non-controversial bills to an all-party Standing Committee of the House of Commons. This procedure is designed to expedite the passage of such bills by removing them from the floor of the House, but its utility is dependent both on the willingness of the House to treat a bill as non-controversial and on the attitude of the Opposition, whose consent is required before the procedure can be invoked.

But to find time in the crowded Parliamentary timetable is only to surmount the first hurdle. The problem is then to ensure that the measure can be safely steered through what Sir Mackenzie Chalmers called the "shoals and quicksands" of Parliament. Where a bill is short there may be little difficulty but in the case of major bills such as codifications there is always a risk that an elaborate and integrated measure, prepared after thorough and time-consuming research and consultation, will be vulnerable to the ignorant or the uninstructed amendment. To quote Chalmers again

> "When a bill is introduced which professes to alter the law, it comes at once into the category of opposed measures. Every member considers himself justified in expressing an opinion, and as far as he can in giving effect to his opinion on each and all of its provisions. The result is that the measure is so hacked and hewed at by ill-advised and hasty amendments that it emerges from Committee wholly disfigured."[27]

I do not of course suggest that Parliament ought to give unqualified acceptance to anything which the Law Commission puts before it. But Chalmers' strong words do indicate a danger from which Parliament must protect itself if the years of work which have gone into the preparation of, say, a draft code and report are not to be wasted. Greater use of committees to provide expert and detailed scrutiny is only part of the answer. Long and complex pieces of legislation must have skilled guidance through both chambers, but in fact there is no Minister in either House with a direct responsibility for law reform. The Law Officers in the Commons already carry heavy responsibilities and in the Lords the Lord Chancellor is overburdened by his multifarious duties.

Two models of liaison between the law reform agency and the legislature are instructive. In New York for example, four members of the legislature sit as ex-officio members of the Law Revision Commission. They have the duty of introducing bills drafted by the Commission and of guiding them through the legislature. Clearly this arrangement has much to recommend it but it suffers from the

---

27 (1886) 2 L.Q.R. 125, 133. And there is more than a grain of truth in the remark which Chalmers quotes, at the same page: "A Bill usually goes into Parliament in the state in which it ought to come out, and comes out in the state in which it ought to go in."

disadvantage that it might appear to compromise the non-political status of a specialist advisory body such as the Law Commission. Perhaps the ultimate solution lies in the second approach, through the creation of a department of justice, which, quite apart from its other advantages in rationalizing the present division of responsibilities for the operation of the legal system, would provide a minister who could handle law reform bills in the Commons and act as a link between the Commission and Parliament.

Finally, I want to look briefly at the other consequence which, I suggest, flows from the greater reliance on enacted law which we are to see in the future. The simple fact is that the courts and the profession will have to adjust to interpreting and applying law which derives increasingly from statute in the form, eventually, of comprehensive codes. This will inevitably mean a change in the judge's traditional role of creative law-making. The Law Commission has recognized the importance of the rules of statutory interpretation by including this topic in its First Programme (Item XVII). In a working paper[28] (produced jointly with the Scottish Law Commission) it has been suggested, first, that words must be read in their context; secondly, that the context must include all other enacted provisions of the statute; thirdly, that it should also include the reports of Royal Commissions and similar committees, and any other explanatory material that might be made available by Parliament. Finally it is suggested that if the statute has failed to express an intention which covers the particular circumstances of the case, the court should be ready to argue by analogy from other provisions in the statute, so as to give effect to its intended purpose.

Allied with this subject is the whole question of stare decisis. Does the need for certainty in the law demand that previous interpretations of the code should have binding force in subsequent cases? Or will this defeat the object of codification by leading to the accretion of quantities of case-law beneath which the words of the code soon become buried? Just how much room for manoeuvre ought individual judges to have?

I do not pretend that we have the answers to all these questions but I am sure that the legal profession will be able to meet whatever demands the Law Commission, through Parliament, makes on it in forging a living, socially relevant system of law in the true spirit of the English legal tradition.

—6th January 1969

---

28 Law Commission Published Working Paper No. 14 (Scottish Law Commission Memorandum No. 6).