

# Rechtspolitisches Forum

## Legal Policy Forum

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H. Patrick Glenn

Law Reform and Legal Policy in Canada

Das Institut für Rechtspolitik an der Universität Trier hat die wissenschaftliche Forschung und Beratung auf Gebieten der Rechtspolitik sowie die systematische Erfassung wesentlicher rechtspolitischer Themen im In- und Ausland zur Aufgabe. Es wurde im Januar 2000 gegründet.

Das *Rechtspolitische Forum* veröffentlicht Ansätze und Ergebnisse national wie international orientierter rechtspolitischer Forschung und mag als Quelle für weitere Anregungen und Entwicklungen auf diesem Gebiet dienen. Die in den Beiträgen enthaltenen Darstellungen und Ansichten sind solche des Verfassers und entsprechen nicht notwendig Ansichten des Instituts für Rechtspolitik.

## LAW REFORM AND LEGAL POLICY IN CANADA

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It is a great pleasure to be in Trier and to be able to participate in the work of the recently-founded Trier *Institut für Rechtspolitik*. Its projected programme is very interesting and I am very grateful to Professors von Hoffmann and Robbers for the invitation to be with you this evening.

The Trier *Institut für Rechtspolitik* is a university-centred institute with a broad mandate in the formulation of legal policy and law reform. It will deal with issues in both public and private law and will serve a constituency both within and without the university. In Canada we have no directly equivalent institution and the Trier model is therefore of great interest. The Canadian experience with law reform institutions, as I will indicate, has been mixed, and it may well be the case that the Institute you have created represents the best means of collaboration between governments and *Rechtswissenschaft*.

Let me first say a few words on the context of legal reform in Canada, before turning to the various modes of law reform with which we have experimented over the last half-century.

### *I. The context of law reform in Canada.*

Legal institutions in Canada have been profoundly influenced by the English common-law model, even in my civil law jurisdiction of Quebec. To the extent a law reform movement has therefore existed in Canada, it has been largely shaped by common law history and similar movements elsewhere in the common law world. This may be seen as both favourable to a law reform movement and ultimately prejudicial to it.

The notion of law *re-form* has not been inherent in the common law tradition. For the first eight centuries of its existence the common law consisted of a curious combination of local, unwritten custom and procedural rules which integrated local custom into royal courts.<sup>1</sup> The common law judges did not make law (the notion of judicial law-making became current only in the 19th century with the development of the notion of *stare decisis*, a response to the 19th century continental codes) and the judicial role was essentially

one of supervision of access to local juries. The common law, whatever it was, was therefore not substantive, formal law. It was wraith-like. It was “secreted in the interstices of procedure”, in the famous phrase of Maine.<sup>2</sup> Custom and the slow accretion of precedent (a form of custom) being at the heart of it, it was not possible to act affirmatively, and positively, to reform it, in any decisive way. One could only add, incrementally, to its base of information.

This basic set of circumstances did not prevent efforts to legislate, though in private law the efforts were few indeed, and often dominated by considerations of royal revenue. Legislation was often seen, moreover, as articulation of that which was *already* law, so the notion of legislative change was not one which was entirely accepted. Still, the Statute of Quia Emptores in 1290 succeeded in commodifying land, abolishing the old process of sub-infeudation in which each transfer of land simply added a new layer of feudal obligations. The Statute of Wills of 1540 brought about testamentary succession to land. The Statute of Frauds of 1677, usually said to be borrowed from French legislation, established requirements of writing for certain contracts. Yet the limits of legislative activity are perhaps best illustrated by the Statute of Uses of 1535, which attempted to eliminate the predecessor to the trust. Why did some statutes succeed and others fail? It depended in large measure on the judges, and as their role as a source of law grew in importance, this became more and more clearly recognized in rules of statutory interpretation. Legislation was to be given its plain meaning and legislative intention could not be pursued beyond the words of the law. The words of the law, moreover, had to be given meaning, through the accretion of judicial interpretation. Entire volumes were therefore published, and continue to be published, of “words judicially considered”, that is to say of the meaning given by judges to legislation which, by itself, is taken to have no essential meaning until judicial consideration has occurred. This was the position which had been reached by mid-twentieth century in common law jurisdictions. Legislation was becoming widespread, but notions of judicial supremacy and *stare decisis* (which by then had developed) still prevented any broad programme of law reform.

In the second half of the twentieth century a number of shifts in law-making authority occurred. Legislation, under popular pressure, became more ambitious and, more significantly, its style of drafting changed. From the precise, defensive, style of drafting of the common law tradition, there was movement to more purposive statements, simpler language, and inclusion of preambles declarative of legislative intent.<sup>3</sup> The judiciary, collaborating

in some measure with these legislative developments, drew back some of the more radical features of the doctrine of *stare decisis*, notably the principle that a supreme court or court of appeal was bound by its own decisions, and also developed more purposive forms of legislative interpretation.<sup>4</sup> Finally, to take advantage of these new opportunities, ministries of justice created formal, governmental institutions of law reform whose purpose was to plan and prepare more ambitious and effective legislative measures. It is in this sense that the common law tradition can be seen as favourable to the law reform movement, in institutionalized form. From the perspective of legislative activity, there was so much to be done, so much need, that the normal legislative process had to be complemented, reinforced, by formal, new agencies which would provide the necessary impetus. The new law reform agencies, it should be noted, were generally governmental agencies, subject to ministerial responsibility and governmental budgets.

The common law judiciary, while collaborating in some measure with these developments, has itself been subject to new developments, notably the growth in enactment of Bills or Charters of fundamental rights. This process has now occurred, following the U.S. model, in various modes in Canada, New Zealand and the United Kingdom. So at a time of increasing judicial deference to legislation, the judiciary also became the repository of constitutional review of legislation. The judiciary became the source of radical re-form of the law, through over-turning of both recent legislative attempts at law reform and also long-standing law judged no longer responsive to modern needs. This re-invigoration of the common law tradition has cast a long shadow over the institutionalized law reform movement. It had its own problems of context, and now had to face a major new source of legal innovation.

As a civil law jurisdiction in a country dominated by common law thinking Quebec, however, has maintained in some measure a distinctive profile. The Quebec judiciary is essentially a common law judiciary, with the same conditions of appointment and tenure as elsewhere in the country, and Quebec procedure is now largely faithful to a North American, adversarial model. The Quebec codes, however, have been the object of constant attention. The Civil Code of 1866 was the object of a major effort of re-codification which came into force in 1994; the Code of Civil Procedure, also of the nineteenth century, is now undergoing its third major revision. Legislation, particularly in codified form, thus occupies a more commanding position than in the common law provinces; its amendment and re-form is seen more as a normal legislative process. Quebec has thus known an Office of Revision of the Civil Code, and a commission for the revision of the

Code of Civil Procedure, but has as yet not followed the common law model of governmental law reform commissions. It is now quite possible, given the history of these commissions, that it will never do so. What does the history of the law reform movement tell us about reforming the law?

## *II. The law reform movement in Canada.*

Given the historical context of the law reform movement, in common law jurisdictions, it is not surprising that there have been major differences of opinion as to the best means of its implementation. There have therefore been institutional differences from jurisdiction to jurisdiction; more importantly, there have also been major differences of philosophy in terms of the programme of work of the various law reform commissions. These may be described, with no pretensions to scientific accuracy, as giving rise to three distinct concepts of law reform: i) the pre-modern; ii) the modern; and iii) the post-modern.

### *i. The pre-modern concept of law reform*

Pre-modern attitudes to law reform are those which continue, reflected in law reform programmes, long-standing attitudes of the common law. This has been referred to, by an Australian author, as “historical pessimism à la Savigny”,<sup>5</sup> and the New South Wales Law Commission once actually recommended repeal of that state’s Defamation Act in favour of reversion to the common law.<sup>6</sup> Elsewhere legislation was conceived as fulfilling a more positive function, but nevertheless a very limited one. A former Director of the Alberta Law Reform Institute has stated that Canadian provincial law reform commissions “reflected the virtues and deficiencies of common lawyers”, in that they “tended to take pragmatic approaches to law”, and “have tended to be dubious about the wisdom of wide-ranging schemes for reform, however attractive to the intellect...”<sup>7</sup>. This limited concept of the role of law reform agencies was closely linked to their initial status, since many of the early commissions were composed of part-time commissioners and were accorded very limited budgets.<sup>8</sup> Ontario’s commission became full-time only in 1964, though this model became widespread in the immediately ensuing years.

What tasks are appropriate for a law reform agency driven by pre-modern concepts of law reform? Some of those undertaken by the Alberta commission were: sharing of matrimonial assets on dissolution of marriage

(the common law not knowing matrimonial regimes until the late twentieth century); abolition of spousal immunity in tort; abolition of the common law rule that an action for wrongdoing dies with the victim; compensation for the victims of crime; the age of majority; the rights of expropriated land owners; criteria of civil liability of occupiers of land; rights of tenants against landlords; and reform of the rule against perpetuities, in the law of successions.<sup>9</sup> These are not unimportant or purely technical matters, but they would be seen either as issues on which a broad social consensus already existed, or which generated little or no public interest. The expression “lawyer’s law” has been used with respect to some such projects. They may be seen by the general public as largely technical in character. Given this limited type of mandate, it is probably accurate to say that Canadian law reform commissions were largely successful in fulfilling it. This inevitably led to more ambitious projects, and to a larger and more modern concept of law reform.

## ii. Modern law reform

The full-time law reform commissions of the 1970’s and 1980’s had to be more ambitious than their part-time predecessors. It was said that “if one plays ones cards skillfully there is no need for a law reform commission to fight shy of highly charged social issues and certainly no need for it to attempt to restrict itself to ‘lawyers’ law”.<sup>10</sup> The new commissions were not limited to topics proposed by the government of the day; they could embark of their own volition on large projects of societal organization.

Topics of law reform study thus became of larger import. The Ontario Law Reform Commission undertook major studies on court organization, class actions, Sunday observance and artificial human reproduction. The Manitoba Commission made an extensive study on the regulation of professions and occupations. They thus extended their work into “areas that would not have been forecast by the promoters of the provincial law reform commissions as things which the commissions would do...”.<sup>11</sup> The work which was done, however, was invariably of very high quality.

The commissions were certainly aware of the difficulties in extending their mandate. They developed, or attempted to develop, more sophisticated means of research and presentation. The “field of choice” type of report was one such innovation. Such a report did not simply make proposals for reform; it rather reviewed a number of various possible reforms, giving the arguments for and against each of them, while undertaking to draft legislation

once parliament had decided which direction to take.<sup>12</sup> Social research was also considered necessary. This was done usually through ad hoc contracting, though some commissions succeeded in securing funding for full-time social scientists.<sup>13</sup> Yet the cost and time consumed by social surveys remained a major problem.<sup>14</sup>

Much important legislation resulted from this more ambitious law reform work. There has clearly been a cost, however, in terms of the future of the law reform commissions themselves. At the present time, the only provincial commissions which are now fully functional are those of Nova Scotia and Alberta, and the Alberta Commissions has always been a university-based, as opposed to governmental, commission. The 1990's has seen a steady process of abolition (Ontario, British Columbia, Manitoba, the Federal Commission) or downsizing of the commissions.<sup>15</sup> This development has been given the most optimistic explanation in the following terms:

“... viewed objectively, the surprising thing is that any provincial government has ever tolerated an institution one of the principal functions of which is to engage in work that the government is not interested in; the independence of which is likely to lead it to give advice that the government finds unpalatable; and which is substantially outside the control of the government. That some governments continue to tolerate them and that others did so for many years is an indication of the strength of the underlying idea”.<sup>16</sup>

To these underlying problems must be added the general phenomenon of government budget-cutting in recent years, and the underlying political reality that pure research has no basic political constituency.

It is therefore possible to see the institutional law reform movement in Canada as having largely run its course, at least in pre-modern or modern mode. Reform of the law would thus be seen as reverting to a more continental model, in which the primary responsibility is seen as resting with the government, aided by specific commissions if considered necessary and by university doctrine. The Canadian history is not yet over, however, since we are now witnessing a third mode of law reform, which I tentatively entitle the post-modern.

### iii. Post-modern law reform

Technological and social change has been thought to accelerate in the 1990's, raising major questions about the appropriate legislative response. This circumstance, combined with the programme of a vigorous Federal Minister of Justice, brought about a reconsideration of the law reform programme



in the mid-1990's in Canada, and the creation in 1997 of a new law reform institution, the Law Commission of Canada.<sup>17</sup> The new Commission is leaner than those of its federal and provincial predecessors, with only one full-time member and a much smaller budget, but its programme is if anything more ambitious.<sup>18</sup> Its enabling legislation provides specific objectives, which include the development of "new concepts of law, and new approaches to law", the development of measures to make the legal system more efficient, economical and accessible, as well as stimulating "critical debate" about law through forging "productive networks with academic and other communities".<sup>19</sup> The new Commission is to receive specific governmental mandates (its first has been to examine physical and sexual abuse of children) and it is required to adopt a long-term Strategic Agenda and its own annual programme of study. With its first Strategic Agenda the Commission has chosen the notion of *relationships* as its focal point, with four more specific themes of personal relationships (domestic), social relationships (minorities, the poor), economic relationships (the effect of technology, new property) and governance relationships (democracy; the adversary process; corporate, union or university governance).

The new Commission is therefore meant to be inter-disciplinary and innovative in its work. Its President has been articulate in formulating a broad concept of law which is meant to guide the Commission in its deliberations and publications. He has stated that it is erroneous to believe that state legislation is the superior form of law; that "everyday practices", including non-linguistic ones, also constitute part of legal normativity; and that law reform is not the exclusive domain of law reform commissions but also that of judges, lawyers and all citizens, every day, simply by the performance of their daily activities.<sup>20</sup> The projected output of the Commission, is designed to reflect these broad objectives. In addition to recommendations to change legislation, the Commission also "imagines" using a variety of vehicles to "re-state" the law. These could include draft appellate judicial opinions, mock in-house legal memoranda, draft standard-form contracts and monographs, as well as documentary films, plays, magazines, comic books, video-games, art exhibits, commissioned pieces of music, and book tours.<sup>21</sup> Reaction to this programme has not been wanting. A former provincial commission Director has referred to it as "very nebulous", and "beyond the powers of a small institution".<sup>22</sup> The Commission continues its work.

## Conclusion

There are real risks in a programme of institutionalized, governmental law reform. The pre-modern mode may offer too little to justify the endeavour; the modern clearly makes governments uncomfortable; the post-modern may collapse both of its own weight and because of opposition to it. Paradoxically, this may be good news for a university-centered institute of law reform and legal policy, which is free to develop its programme and financing independently, in some measure at least, of governments. While such an institute has no direct channel to ensure enactment of its proposals, the Canadian experience demonstrates that the governmental model also provides no guarantees in this regard. I therefore re-iterate my earlier remark that the Trier *Institut für Rechtspolitik* represents a very interesting development, and we in Canada will watch its progress with interest.

Thank you again for your invitation, and for your kind attention.

- <sup>1</sup> See H. P. Glenn, “La civilisation de la common law“, *Rev. int. dr. comp.* 1993, 559.
- <sup>2</sup> H. S. Maine, *Dissertations on Early Law and Custom: lectures delivered at Oxford* (London: John Murray, 1883) at 389.
- <sup>3</sup> See W. Dale, *Legislative Drafting* (London: Butterworths, 1977).
- <sup>4</sup> See H. P. Glenn, “The Common Law in Canada” (1995) 74 *Can. Bar Rev.* 261 at 271.
- <sup>5</sup> G. Sawyer, “The Legal Theory of Law Reform” (1970) 20 *U. Toronto L.J.* 183 at 187.
- <sup>6</sup> *Ibid.*
- <sup>7</sup> W. H. Hurlburt, “The Origins and Nature of Law Reform Commissions in the Canadian Provinces: A Reply to ‘Recommending Law Reform’ by Professor R. A. Macdonald” (1997) 35 *Alberta L. Rev.* 880 at 886.
- <sup>8</sup> See generally W. H. Hurlburt, *Law Reform Commissions in the United Kingdom, Australia and Canada* (Edmonton: Juriliber, 1986).
- <sup>9</sup> Hurlburt, *supra*, note 7, at 894, 895.
- <sup>10</sup> L. C. B. Gower, “Reflections on Law Reform” (1973) 23 *U. Toronto L. J.* 256.
- <sup>11</sup> Hurlburt, *supra*, note 7, at 897.
- <sup>12</sup> Gower, *supra*, note 10, at 265.
- <sup>13</sup> Gower, *supra*, note 10, at 267
- <sup>14</sup> *Ibid.*
- <sup>15</sup> R. A. Macdonald, “Recommissioning Law Reform” (1997) 35 *Alberta L. Rev.* 831 at 838, 839.
- <sup>16</sup> Hurlburt, *supra*, note 7, at 899.

- <sup>17</sup> See R. A. Macdonald, “Law Reform and its Agencies” (2000) 79 Can. Bar Rev. 99; and on the background to the new commission, A. Macklin, “Law Reform Error: Retry or Abort” (1993) 16 Dalhousie L. J. 395. Annual Reports of the Commission may be found on line at <http://www.cdc.gc.ca>.
- <sup>18</sup> Macdonald, *supra*, note 17, at 101.
- <sup>19</sup> Macdonald, *supra*, note 17, at 102.
- <sup>20</sup> Macdonald, *supra*, note 15, at 831.
- <sup>21</sup> Macdonald, *supra*, note 17, at 114, 115.
- <sup>22</sup> Hurlburt, *supra*, note 7, at 900, 901.

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