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M. T. Van Hecke

FOUR SUGGESTED IMPROVEMENTS IN THE NORTH CAROLINA LEGISLATIVE PROCESS*

M. T. VAN HECKE**

I suggest the consideration of four methods of improving the efficiency of the legislative process in North Carolina: (1) Elimination of "blind" amendments and repeals of former statutes; (2) Adoption of a system of constant topical revision instead of a complete revision of the entire statute book every decade; (3) Establishment of a new legislative drafting agency; and (4) Further restrictions upon the enactment of private, special and local legislation.

(1) *Amendments and repeals.* The current legislative practice in this state in amending legislation is illustrated by the following:[1] "That section four thousand one hundred and sixty-one (4161) of article five, chapter eighty-one of the Consolidated Statutes, be amended by adding after the word 'debt' in the fifth line and before the word 'until' the following: and payment of all taxes and debts that are a lien upon the property of the decedent, as may be allowed by order of the clerk of the Superior Court." Frequently, it is true, the title gives some indication of the subject matter involved, by a recitation such as:[2] "relating to co-operative non-profit life benefit associations." When the chief purpose of a new statute is to repeal an existing law, it is the practice to designate exactly the specific sections or the complete title of the act sought to be repealed. Thus:[3] "That section six thousand and nineteen (6019) of the Consolidated Statutes be and the same is hereby repealed." But when existing laws are sought to be repealed in connection with the enactment of a new provision, the repealing clause usually reads:[4] "That all laws and parts of laws in conflict with this Act are hereby repealed."

* This paper is based upon the following six manuscript reports, prepared in the spring of 1930 under the supervision of the present writer, in a seminar on the subject of Statute Law Making in the course on Administration of Justice: The Parliamentary Counsel in England, J. A. Williams; The Legislative Counsel in the United States Congress, John A. Mullican; Legislative Reference and Drafting Bureaus in the United States, W. L. Marshall, Jr.; The North Carolina Legislative Reference Library, J. Frazier Glenn, Jr.; Training for Legislative Service, Edward F. Taylor; The Need for Improvement in North Carolina Legislation, B. Thorn Lord.

** Professor of Law, University of North Carolina.

[1] Ch. 119, P. L. 1927.
[2] Ch. 252, P. L. 1927.
[3] Ch. 82, P. L. 1927.
[4] Ch. 83, P. L. 1927.

These "blind" amendatory and repealing acts are objectionable from three points of view. During the passage of the bill through the legislature, the representatives and senators are not given an adequate basis on the face of the bill for discerning the precise effect of the bill. The lawyer who has occasion to use the new amendment as reported in the session laws must place the text side by side with that of the earlier session laws or Consolidated Statutes to trace out the full purport of the change. And, in the case of the incidental repeal, the courts are furnished no guide as to the legislative intent with reference to the effect of the new laws upon others in the same field. The provision adds nothing to the necessary effect of the new legislation itself. The courts go at the task of interpretation on the assumption that the legislature acted with knowledge of all previous laws and would express any change if one were intended. The failure to repeal statutes specifically is thus a common cause for conflicting statutes, with consequent confusion in their administration by public officials, their observance by the public, and their construction by the courts. In a word, the use of the "blind" amendment and repeal clause passes on to others a responsibility for clear delineation of intention that should be borne by the legislature.

Many states have constitutional provisions[5] designed to obviate such practices in amendatory legislation as are common in North Carolina. This state has none. Nor is any here suggested. These constitutional provisions have frequently given rise to results almost as objectionable as the evil originally sought to be cured. For example, the common constitutional provision that "No law shall be revived or amended by reference to its title only, but the law revived, or the section amended, shall be inserted at length in the new act," has resulted frequently in a statute being held unconstitutional because it in effect modified the substance of some other law by implication. And it has become exceedingly difficult for the legislative draftsman to be able to tell just when the new act must include the provisions of some other law to which it more or less relates.

Instead, could not a rule be adopted by both houses, or better still, a statute, which would state a more desirable procedure? The following is suggested:

[5] NOTES ON BILL DRAFTING IN ILLINOIS, Legislative Reference Bureau, Springfield (1920), pp. 75-82; NOTE, *The Form of Amendatory Statutes* (1930) 43 HARV. L. REV. 482.

"No law shall be expressly re-enacted or amended by reference to its title or chapter or section numbers alone, but the law re-enacted or the sections amended shall be inserted at length in the new act so as to present the full text of the old law as re-enacted or amended."

But that would not tell the whole story. To indicate omissions and new provisions on the face of the bill or in the session laws, mechanical printing devices are needed. Several different methods[6] are in use in other states. Some seem to require first a "blind" amendment, reading in terms of striking out, inserting in lieu, or adding particular words, followed by the full text as amended. Others have the omissions indicated by asterisks or by lines drawn through the words to be deleted, with new matter set up in italics or enclosed by brackets. New York resorts to the use of footnotes. The clearest and most economical plan seems to be that in use in Wisconsin, pursuant to a statute, which, modified to meet our conditions, would read as follows:

"All bills introduced into either house of the General Assembly proposing an amendment to any existing statute shall have matter to be stricken out printed with a line drawn through the same and new matter printed in italics. All such bills enacted into law shall be printed in the session laws in such manner as to indicate omissions by asterisks and new matter in italics."

Perhaps the following would help to eliminate the "blind" repeal clause:

"No bill introduced into either house shall contain any section or clause purporting to repeal other laws or parts of laws unless they shall be specifically identified by their title and chapter or section numbers."

(2) *Topical revision of the statutes.* Statutory revision comes in North Carolina approximately every ten years, the last of these wholesale restatements of all the statutes in force having been accomplished with the publication of the Consolidated Statutes in 1919. Two thousand and nine (2009) public laws enacted by the last five General Assemblies, together with the now more or less emasculated Consolidated Statutes, today await the attention of the revisor. And another legislative session will add several hundred more within the next few months. If the previous practice is again repeated, a revision commission will be set up, composed of members of the General Assembly, under whose supervision one or more men, tempora-

[6] These are ably discussed, with full citations to the statutes, in NOTE, *Drafting Amendatory Statutes* (1930) 43 HARV. L. REV. 1143.

rily withdrawn from the practice or the teaching[7] of law, will attack the entire statute book together with its intricate superstructure of judicial interpretation. The revisors, within two or three years, will be expected to correct mistakes, to supply omissions, to omit laws and parts of laws held unconstitutional or which have become obsolete, to eliminate repetitive and redundant expressions, to reconcile inconsistencies, to consolidate, simplify and condense, to revise, compile and codify, to harmonize and systematize the entire body of the laws now in force, and to append to the finished text, annotations indicating the judicial construction of what had gone before. All of which then goes to the legislature for re-enactment. Obviously, the task is too great. However able and industrious the revisors may be, they can only scratch the surface.

Instead, I suggest consideration of the plan of a constant process of revision, during the intervals between legislative sessions, by a professional drafting staff, such as that carried on in Wisconsin by the official known as the Revisor,[8] in Pennsylvania by the Legislative Reference Bureau,[9] and in England and some of her dominions by the Parliamentary Counsel.[10] Only a small number of topics are chosen each biennium, from among those which most need the treatment. This gives a trained, full-time staff of revisors an opportunity to do an accurate and thorough-going job. The results are first published in the session laws, later in the general compilations. This work could be done in North Carolina by the Legislative Drafting Service, should the suggestions which follow find favor.

3. *A Legislative Drafting Service.* The Legislative Reference Library was established in 1915 in answer to demands which did not include one for a legislative drafting service. Neither the reports of J. Bryan Grimes, Secretary of State, who advocated the creation of the Library, nor the act of 1915[11] providing for the Library as a unit of the Historical Commission, contemplated the possibility of bill-drafting by the Library.

Nevertheless, considerable bill-drafting has actually been done in the Library. Perhaps three-fourths of the members of the House

[7] The Revision Commissioner for the Consolidated Statutes of 1919 was the late Dean L. P. McGehee, and the annotations were prepared by Professor A. C. McIntosh, both of the faculty of the University of North Carolina Law School.

[8] WIS. GEN. STATS. (1927) §43.08.

[9] PA. STATS., CUM. SUPP. (1928) §13850a-7.

[10] ILBERT, THE MECHANICS OF LAWMAKING (1914), pp. 29-43.

[11] N. C. CODE (Michie, 1927) §§6147-6149.

and Senate have sought this service. At the 1919 session of the General Assembly, the Library prepared four hundred and twenty-four bills. Since then, it has drafted about six hundred and fifty for each succeeding session. Most of the bills drafted, however, are public-local and private bills; and a majority of the legislators requesting drafting aid are from the rural sections of the state.

In other words, few of the public laws of state-wide significance are written in the Legislative Reference Library. The reason assigned is that such bills are usually drafted by experts in the field affected or by some governmental department, long before the legislative session gets under way. Hardly any drafting is done between legislative sessions. That time is utilized in keeping the Library abreast of the constantly growing amount of reference material available to such institutions, and in issuing the Library's own useful publications. During session-time, the staff consists of the librarian and his permanent assistant, of a young lawyer employed for the session, and of three temporary stenographers. Between sessions, the staff is cut down to the two first named. The Library has, since its creation, cost the state approximately $6,000.00 a year.

This paper does not purport to deal with the excellent library and reference service maintained by the Legislative Reference Library. In performing its originally assigned task, the Library has as full a load as it can reasonably be expected to carry. Rather, this paper is concerned only with the suggestion that there should be established independently of the Library and as a direct adjunct of the General Assembly a permanent, year-round, full-time professional drafting staff of trained and experienced men. Between legislative sessions, these bill-drafters would assist governmental departments, agencies, and commissions in the preparation of the administration's next legislative program; it would assist the aforementioned "experts" in the field affected by proposed state-wide, public measures in the shaping of their ideas into workable statutes (witness the easily avoidable defects encountered in the first year's administration of the Workmen's Compensation Act of 1929);[12] and it would carry on the work of topical revision of the statutes suggested in the preceding section of this paper. During the legislative sessions, the legislative drafting service would draft the public bills and resolutions and

[12] See Smith, *Nine Months of Workmen's Compensation in North Carolina*, 8 N. C. L. Rev. 418 (1930); North Carolina Industrial Comm. v. O'Berry, 197 N. C. 595, 150 S. E. 44 (1929).

amendments thereto, and the substitute measures worked out by the various committees of the Senate and House. And it would render opinions and memoranda on questions of legislative power, constitutionality, and statutory construction.

The suggestion is based upon the very notable achievements in England of the Office of the Parliamentary Counsel,[13] established in 1869 and since copied by the more important dominions of the Empire; in the United States Congress of the Office of the Legislative Counsel,[14] created in 1918, after six years of argument by legislative leaders and two years of actual demonstration by Columbia University's Legislative Drafting Research Fund; and in a number of American states of legislative reference and drafting bureaus,[15] particularly those of California, Connecticut, Illinois, Massachusetts, Nebraska, New York, Pennsylvania and Wisconsin.

Save only where indiscreet activities or incompetence have destroyed confidence, the typical attitude of able legislators toward professional draftsmen is illustrated by an incident in the public career of the late Claude Kitchin, United States Representative from North Carolina. He was majority leader in 1916 when some of his colleagues advised him to make use of the services offered by Columbia University's Legislative Drafting Research Fund in connection with revenue measures then pending before the Ways and Means Committee. The substance of Mr. Kitchin's reply was that he did not need advice as to the legal phases of legislation. But the chairman of the sub-committee on the estate tax, Mr. Cordell Hull, of Tennessee, felt differently. He did avail himself of the service with such results that Mr. Kitchin was not only converted, but became an active advocate of the creation by Congress of what is now the Office of the Legislative Counsel.[16]

For, "despite the common impression of the layman, the aid rendered by the members of the Office of the Legislative Counsel is not primarily that of a professor of English. . . . The essentials and the time consuming elements are analyses of the problems and of the existing law and the administrative and technical details—in order that the general substantive policies may be built upon a sound under-

[13] ILBERT, THE MECHANICS OF LAWMAKING (1914).
[14] Lee, *The Office of the Legislative Counsel*, 29 COL. L. REV. 379 (1929).
[15] Consult *Report of Special Committee on Legislative Drafting*, REPORTS OF AMERICAN BAR ASSOCIATION (1913), pp. 622-670; Leek, *Legislative Reference Bureaus in Recent Years*, 20 AM. POL. SCI. REV. 823 (1926).
[16] See, note 14, *supra*, at pp. 385-389.

structure that will make practicable the accurate execution of the policies."[17] Obviously, the accomplishment of that task makes for smoothness and despatch and the elimination of wasteful confusion all along the line. The policy to be determined by the legislature is more clearly defined. The public can more accurately understand the implications of the new law. Its administration is simplified. And litigation is largely avoided. The savings in terms of money, while indirect, are enormous.

The English Parliamentary Counsel is paid the equivalent of $12,500 a year and is honored with knighthood. His chief assistant earns $10,000 a year and the appropriation for the entire office is $38,500 annually. But the Counsel serves only those members of the Parliament who are in the cabinet or ministry. The head of the Office of the Legislative Counsel in the U. S. Congress originally received $6,500 a year; today his salary is $10,000. His assistants may earn as much as $7,500 a year. The annual appropriations for the whole office (one branch in each house) have increased from $25,000 in 1919 to $75,000 in 1928, 1929 and 1930, but, allowing for unexpended balances, the net cost for the last three years has averaged $57,000. In the better state drafting agencies, the salaries of the chief draftsmen run between $5,000 and $7,500; their assistants earn from $2,500 upwards.

It is suggested that the staff of the proposed Legislative Drafting Service for North Carolina be made up of a secretary or chief draftsman at $5,000 a year, three assistant draftsmen at figures of between $2,500 and $4,000, and three stenographers and clerks at $1,500. The annual cost, including office equipment and printing, would not exceed $25,000. The job is not worth doing unless it can be done with the highest possible degree of professional skill and thoroughness. Legislative drafting and the preparation of opinions on matters of constitutional law, administrative law, taxation, and statutory construction, has become an intricate and specialized form of legal science. A considerable literature[18] on the technique of legislative

[17] *Ibid.*, at p. 390.

[18] See, for example, ILBERT, LEGISLATIVE METHODS AND FORMS (1911); ILBERT, THE MECHANICS OF LAWMAKING (1914); WILLARD, A LEGISLATIVE HANDBOOK (1890); JONES, STATUTE LAWMAKING IN THE UNITED STATES (1911); FREUND, STANDARDS OF AMERICAN LEGISLATION (1917); Report of the Special Committee on Legislative Drafting, *A Manual of Legislative Drafting*, REPORTS OF THE AMERICAN BAR ASSOCIATION (1921), pp. 68, 410-460; Freund, *The Use of Indefinite Terms in Statutes*, 30 YALE L. J. 437 (1921); Mason, *Legislative Drafting*, 14 CALIF. L. REV. 298, 379 (1926); NOTES ON LEGISLATIVE DRAFTING IN ILLINOIS, Illinois Legislative Reference Bureau (1920).

draftsmanship is now available. The work requires the type of mind that can do constructive legal engineering. The salaries suggested are the minimum amounts that can possibly attract the personnel desired.

A proposed bill for the establishment of the new service follows:

"Section 1. There is created a Legislative Drafting Service, to be governed by a joint legislative commission composed of the Governor and of the chairmen of the Committees on the Judiciary and on Finance, respectively, of the Senate and of the House of Representatives. The Governor shall be chairman of the commission and shall serve during the term for which he shall have been eletced; the chairman of the Committees on the Judiciary and on Finance of the Senate and of the House of Representatives shall serve as members of the commission until their successors as such chairmen shall have been appointed at the next meeting of the General Assembly.

Section 2. The commission shall meet during the regular and special sessions of the General Assembly and at such times between sessions of the General Assembly as shall be designated by its chairman. The members of the Commission shall serve without compensation, but their necessary expenses incident to attendance upon meetings called between legislative sessions shall be paid out of the appropriations to the Legislative Drafting Service.

Section 3. The commission shall appoint a secretary and such draftsmen, clerks and other assistants as may be needed to carry out the provisions of this act, at such compensation and for such terms of service as shall be determined upon by the commission. The secretary and draftsmen shall, however, be persons skilled by training and experience in the work of legislative bill-drafting. They shall be appointed without reference to political affiliations.

Section 4. No officer or employee of the Legislative Drafting Service shall urge or oppose the enactment of any legislative measure. Nor shall any officer or employee reveal to any person outside of the Legislative Drafting Service the contents or nature of any matter entrusted to the Service, without the consent of the person who brought the matter before the Service.

Section 5. It shall be the duty of the Legislative Drafting Service, both during and between sessions of the General Assembly, to furnish to members and committees of the Senate and of the House of Representatives, and to governmental departments, agencies, institutions and commissions, upon request, legal assistance in connection with the drafting of public bills and resolutions and amendments thereto. Between sessions of the General Assembly, it shall, in addition, be the duty of the Legislative Drafting Service to prepare for adoption or rejection by the General Assembly at its next session, revisions of such topics, chapters, articles or sections of the statute law in force as shall be determined upon by the joint legislative commission in charge of the Legislative Drafting Service. No such revision shall introduce any new policy or any change in the substance of any law; but it shall be the duty of the Legislative Drafting Service so to prepare the revision as to correct mistakes,

to supply omissions, to omit laws and parts of laws held unconstitutional or which have become obsolete, to eliminate repetitive and redundant expressions, to reconcile inconsistencies, and generally to harmonize, simplify and condense the statute law in force. Each such revision shall be accompanied by a list of statutes and parts of statutes to be repealed upon the enactment of the revision bill, and by memoranda or notes indicating the plan and purpose of the revision together with its effect upon existing law. It may also be accompanied by such annotations as may be thought desirable.

Section 6. There is hereby appropriated to the Legislative Drafting Service, for the carrying out of the purposes of this Act, the sum of twenty-five thousand dollars ($25,000.00), annually, or so much thereof as may be necessary."

4. *Private, Special and Local Legislation.* In 1911, Chester Lloyd Jones, in his book, Statute Lawmaking in the United States[19] was able to state that North Carolina was the worst offender in the Union when it came to the enactment of private, special and local legislation. And the figures do, indeed, make an interesting picture. In 1911, the North Carolina General Assembly passed 215 public laws of state-wide application. Yet the public-local laws, enforceable only in particular cities or counties, totalled 773 and the purely private laws 472. In 1915, the General Assembly passed 287 public laws, 814 public-local laws and 395 private laws. It was at this session of the legislature that several amendments to the Constitution were proposed, designed to restrict, if not to eliminate, the practice of enacting private, special and local legislation in this state.

These amendments, all of which carried in the election of November, 1916, were three in number. One added the phrase "by general laws" to Art. 8, §4, so as to require the legislature thus to provide for the organization of cities, towns and villages and the regulation of their finances, instead of merely to provide, as the section formerly stood. The Supreme Court, however held[20] that this amendment added nothing to the original meaning of the section, that at most it imposed only a moral obligation on the legislature, and did not affect the validity of a statute authorizing municipalities in Wayne County to sell bonds at less than par. Thus, by a curious lack of definiteness in drafting, Art. 8, §4 has not been a hindrance to local legislation in relation to cities.

A second amendment was the revision of Art. 8, §1 of the Constitution, so as effectively to stop the creation, amendment, extension or

[19] At p. 39.
[20] Kornegay v. Goldsboro, 180 N. C. 441, 105 S. E. 187 (1920).

alteration of private corporate charters, except those for eleemosynary institutions, by other than general laws. This amendment was couched in precise terms which left no opportunity for construction, except for the holding that it did not apply to municipal corporations. As this section formerly stood, it expressly authorized the creation of municipal corporations by special act and the creation of others when in the judgment of the legislature their objects could not be attained under general laws.

The most sweeping amendment, however, was that embraced within the new section to-day known as Art. 2, §29, which forbids the General Assembly to pass any local, private or special act or resolution relating to some thirteen subjects, such as the establishment of courts inferior to the Superior Court; the laying out, opening, altering, maintaining or discontinuing of highways, streets, or alleys; ferries or bridges; establishing or changing the lines of school districts, etc. Unfortunately, the net result of some thirteen years of judicial construction of this amendment has been that of a severe narrowing of its scope as a restriction upon the output of private, special and local legislation. For example, in the Kornegay case,[21] Judge Allen, speaking it is true of Art. 8, §1, says, "an act applicable to all the municipal corporations of Wayne County, including cities, towns, townships and school districts, is not special." And in *State v. Harris*,[22] the enactment of a statute authorizing recorder's courts in all counties of the state except 44, described by name and by judicial districts, is upheld and the effect of Art. 2, §29 evaded by the suggestion that such an act is neither special nor local. Many cases could be gone into. Whether or not the Court in each case was justified in its decision is not now the point. Rather, the fact is that the Supreme Court, expressing a sympathy with that brand of political philosophy which conceives of each locality as in need of distinct and peculiar treatment, aiming more at the worst phases of the evil involved than at the clear meaning of the Constitution, and reserving the power to consider each non-general law against its own unique circumstances before passing upon the applicability of the amendments, has weakened the effect of the restrictions upon the legislature.

What of the situation since 1917? These amendments went into effect on Jan. 10, 1917. Between January 3rd and January 10th of that year, that is to say during the space of one week immediately

[21] Note 20.
[22] 183 N. C. 633, 112 S. E. 425 (1922).

preceding the shutting down of the gates, 402 laws intended to be impossible of enactment after the 10th, were passed.[23] In 1929, the General Assembly passed 346 public laws, 506 public-local laws and 218 private laws. Compared with the figures for 1915, this shows a decrease of 38% in public-local legislation, of 10% in private laws, and an increase in public laws of 20%. Put another way, and measured in terms of the numbers of bills involved, in 1915 the legislature spent 75% of its time enacting private and public-local legislation; last year it spent 67% of its precious sixty days in this activity. When it is remembered that many of the so-called public acts are applicable only to parts of the state, it must be obvious that the amendments of 1916 have not helped much and that the legislature still is denied even a major portion of its time for the consideration of state-wide legislative programs.

But, say members of the legislature, these figures are misleading; these special and local acts do not take much time; they go through the legislature almost mechanically. That is, however, beside the point, which is this: with almost every member of the two houses primarily interested in getting through a number of bills relating only to his home community, the whole General Assembly is locally minded. Only a few of the outstanding leaders are state-conscious.

No state has wholly solved the problem.[24] Where constitutional limitations have been severe, local matters have been handled by general laws applicable only to cities or counties having a designated population or otherwise capable of a distinct classification. Sometimes general laws have been applicable only to communities adopting their provisions by a local referendum. Other states have resorted to constitutional grants of "home-rule," under which local communities solve their peculiarly local problems for themselves, and leave the legislature free for the measures which affect the state at large.

A statute could be drafted, worked out after an extensive study of every aspect of special, private and local legislation in North Carolina, that would serve as a rule of each house, to be administered by the speakers and committees, effectively reducing the worst forms of such legislation. The constitutional provisions could be redrafted in the light of their construction and of the results of the study men-

[23] See Reade v. Durham, 173 N. C. 668, 92 S. E. 712 (1917).

[24] See DODD, STATE GOVERNMENT (1922), pp. 64-68, 191-193; Anderson, *Special Legislation in Minnesota*, 7 MINN. L. REV. 133, 187 (1923).

tioned, and submitted to the people for re-enactment. Neither of these measures could be effective however, without an escape from provincialism. The state has largely escaped in the last decade; it is now the turn of the communities.