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THE ROLE OF COURTS AND JUDICIAL COUNCILS IN PROCEDURAL REFORM

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The movement for the reform of court procedure which has been going forward in this country for the past fifteen years has had two main objectives. One is the creation of judicial councils to act as advisors to the legislature and also to the courts on matters of procedural reform. The other is to persuade courts themselves to play a far larger role than they have in the past, by exercising more fully their ancient rule-making powers. Gradually it is being realized that the two are complementary. If a court is to use rule-making as a means of reform, it needs a judicial council to advise it. Similarly a judicial council is greatly hampered in its work if it has always to appeal to the legislature rather than to the courts to carry out its suggestions. Hence, the problem of the mechanics of procedural reform has come to revolve around the role of courts equipped with judicial councils. The questions which it is proposed to discuss here are, what should be the extent of rule-making powers and who should exercise these powers and sit on judicial councils.

It may be well to review briefly the history of the judicial rule-making power and of judicial councils. The earliest English rules of court extant are the Chancery Orders of 1388.¹ By the beginning of the seventeenth century we find all four of the King's courts enacting rules,² a practice which has continued to this day. Before the nineteenth century the courts seldom used their rule-making powers as a means of reform. An examination of

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1. I SANDERS, *ORDERS OF THE HIGH COURT OF CHANCERY* (1845) 1-7a. See also JENKS, *A SHORT HISTORY OF ENGLISH LAW* (1924) 191.

2. See I TIDD, *PRACTICE* (9th ed. 1828) xxxviii-xlvi. Reference is made to rules of the King's Bench from 1604, Common Pleas from 1457, and Exchequer from 1502. Of the rules made before the American Revolution 169 were by the King's Bench, 83 by the Common Pleas, and 30 by the Exchequer. Tidd does not list Chancery rules.

the rules listed in Tidd's Practice shows that the courts applied to rule-making their ancient conception that courts found rather than made law. Again and again when changes were needed, Parliament superseded the rules by statutes instead of the courts revising their rules.³ Only occasional instances appear, such as the extension of the jurisdiction of the courts by the *ad etiam* rules, in which new practices were brought about by rule of court. Generally the rules merely enacted what was the customary practice of the time. Such are the numerous provisions specifying the duties of attorneys, clerks and other court officers.

The courts did not claim the power to supersede acts of Parliament, but merely to fill in crevices between statutes. But from 1833 on, the English acts reforming judicial procedure have given the courts authority to enact rules superseding statutes.⁴ Parliament has maintained its supreme authority, however, by requiring all new rules to be laid before it and to be subject to its veto.

American courts have made rules almost from the moment of their creation. One of the earliest acts of the Supreme Court of the United States was to adopt by rule the practice of the King's Bench and of Chancery.⁵ Nevertheless, in America as in England, rule-making has not been an important judicial function. Rules have usually been made at long intervals and then covering only minor points left unprovided for by statute.⁶ Furthermore, even when authorized by statute to make rules, courts have been extremely reluctant to act; witness the failure of the Supreme Court of the United States to make rules covering actions at law during the many years it had that power, and its revision of equity rules only three times in 120 years, and then only after the reforms were long overdue and strenuously advocated by the bar.⁷

3. 1 TIDD, PRACTICE (9th ed. 1828) xxii-xxvii lists 274 statutes and parts of statutes dealing with practice as enacted between 1603 and 1775.

4. See Civil Procedure Act, 1833, 3 & 4 Wm. IV, c. 42, § 1; Common Law Procedure Act, 1852, 15 & 16 Vict., c. 76, §§ 223-5; English Judicature Act, 1873, 36 & 37 Vict., c. 66, §§ 74-5; Appellate Jurisdiction Act, 1876, 39 & 40 Vict., c. 59, § 17; The Indictments Act, 1915, 5 & 6 Geo. V, c. 90, § 2; Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo. V, c. 49, §§ 99, 210.

5. August 8, 1791. See 1 Cranch xvii.

6. The following articles deal with the small accomplishment of American supreme courts which have been granted rule-making powers: Whittier, *Controlling Court Procedure by Rules Rather Than by Statutes* (1926) 20 AM. POL. SCI. REV. 836; REPORT OF COMMITTEE OF AMERICAN BAR ASSOCIATION DELEGATES ON JUDICIAL COUNCILS AND RULE-MAKING POWER (1929).

Professor Sunderland states: "In those American states where the rule-making power has been conferred upon the courts, there has been little vigorous use of it as a means for improving practice. Where it has been employed, recourse to it has been sporadic and infrequent, and the initiative has almost invariably come from committees of the bar." Sunderland, *Progress Toward a Better Administration of Justice* (1933) 17 J. AM. JUD. SOC. 49, 51.

7. The action of the Supreme Court is described by Professor Sunderland as follows: "It was given power in 1792 to make rules of equity practice for the federal courts (1 U. S. Statutes at Large, p. 276), but it drifted along for thirty years before taking up the task (Rules of Equity Practice, 7 Wheat. XVII). It then rested for twenty years before making

The exact status of rules of court as compared with statutes is still to be solved in many states. The 1934 Act of Congress, authorizing the United States Supreme Court to make rules unifying the procedure at law and in equity, follows the English precedent and requires that the rules be laid before Congress for approval.⁸ Other American statutes enlarging the rule-making power of courts are in the form of grants of authority to courts to make rules, often to supersede statutes by rules.⁹ They make no provision for submitting the rules to the legislature or for what shall happen if the supreme court and the legislature disagree.¹⁰

One might expect that any power which the legislature had granted it could take away and hence that statutes would control rules. The question is complicated by our division of powers into executive, legislative and judicial. Clearly the legislature has no constitutional authority to pass a procedural statute that would place a serious handicap on the administration of justice, and a supreme court is within its rights when it holds such a statute unconstitutional.¹¹ Dean Wigmore argues that the regulation of court procedure is inherently a judicial function and hence all statutes on the subject are unconstitutional.¹² Most reformers, however, less willing than Dean Wigmore to overthrow history and accepted doctrine, think merely that courts should expand their rule-making to cover all phases of court procedure, hoping that legislators will realize this is a subject which the courts can regulate better than they and keep hands off.

The personnel of the rule-making bodies in England has until recently consisted of all the judges composing the court for which the rules were made, except that the judges of the King's Bench made rules binding on the

any further substantial changes. (See Univ. of Mo. Bull., Ser. 13, p. 20). Thereafter no considerable reforms in the rules occurred for seventy years, when in 1913 the current set of equity rules was prepared and published by the supreme court, in response to the almost universal complaint that the practice had become utterly intolerable." Sunderland, *supra* note 6, at 52.

8. 48 STAT. 1064 (1934), 28 U. S. C. A. § 723c (1934).

9. In the following instances the power to supersede statutes by rules has been granted: 1 COLO. ANN. STAT. (Courtright's Mills, 1930) § 1526a; 34 Del. LAWS 1925, c. 226; 2 FLA. COMP. LAWS ANN. (Skillman, Supp. 1934) § 4682 (1); 2 N. J. COMP. STAT. (Supp. 1924) p. 2820, § 163-308; VA. CODE ANN. (Michie, 1930) § 5960a; 2 WASH. REV. STAT. (Remington, 1932) tit. 1, § 13-1; WIS. STAT. (1929) § 251.18. To a limited extent the power exists also in Connecticut [2 CONN. GEN. STAT. (1930) § 5360], Maryland (LAWS 1927, c. 684), and Michigan [MICH. CONST. art. I, § 77; 3 MICH. COMP. LAWS (1929) § 13604].

10. An exception is the Wisconsin statute which after granting complete rule-making power over judicial procedure to the supreme court, provides: "Nothing in this section shall abridge the right of the legislature to enact, modify or repeal statutes or rules relating to pleading, practice or procedure." WIS. STAT. (1929) § 251.18. See also *Re Constitutionality of Statute*, 204 Wis. 501, 236 N. W. 717 (1931).

11. For a discussion of the cases see Shanfield, *The Scope of Judicial Independence of the Legislature in Matters of Procedure and Control of the Bar* (1934) 19 ST. LOUIS L. REV. 163.

12. Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally* (1928) 23 ILL. L. REV. 276. Philip Kates goes nearly as far as Dean Wigmore when he maintains that: "The adoption and changing of Codes of Procedure is really, under most of our State Constitutions, the duty of the courts, not of the Legislature." Kates, *A New Deal for Justice: Oklahoma Supreme Court Boldly Exercises Power* (1934) 20 A. B. A. J. 148, 150.

inferior courts. The English Judicature Acts provided for two bodies to take part in law reform: a Rules Committee¹³ and an annual meeting of all judges were to consider the operation of the Judicature Act and of the rules of court including "inquiring and examining into any defects which may appear to exist in the system of procedure or the administration of the law." They were to report annually to a secretary of state as to alterations in the administration of justice which require an Act of Parliament.

This method of stimulating judicial interest in procedural reform did not prove a success. In 1913 the Royal Commission on Delay in the King's Bench Division reported but three meetings of the judges in 37 years.¹⁵ The Lord Chancellor testified that in seven years he had summoned one meeting, and said, "I can conceive no more futile proceeding."¹⁶ Subsequent chancellors have appeared to agree, since hardly any meetings have been held.¹⁷

The body that has made English rule-making famous is the Rules Committee. At first this committee consisted entirely of judges, but in 1894 three practitioners were added in the hope that their presence would give the committee a more liberal outlook on reform.¹⁸ At present the Rules Committee consists of twelve persons: the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the President of the Probate, Divorce and Admiralty Division of the High Court, four other judges of the Supreme Court of Judicature to be appointed by the Lord Chancellor, ". . . two practising barristers, being members of the General Council of the Bar, and two practising solicitors of whom one shall be a member of the Council of the Law Society and the other a member of the Law Society and also of a provincial Law Society."¹⁹ All of the practitioners are appointed by the Lord Chancellor.

Every year the Rules Committee has made new rules or amended old ones.²⁰ At first its changes related to minor matters only, but recently it has made far-reaching reforms.²¹ It would seem, however, that the change

13. Appellate Jurisdiction Act, 1876, 39 & 40 Vict., c. 59, § 17; Supreme Court of Judicature Act, 1881, 44 & 45 Vict., c. 68, § 19; and Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo. V, c. 49, § 99 (4).
the judges of the Supreme Court of Judicature.¹⁴ At this annual meeting of

14. Judicature Act, 1873, 36 & 37 Vict., c. 66, §§ 74-5; Judicature Act, 1875, 38 & 39 Vict., c. 77, § 17; and Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo. V, c. 49, § 210.

15. ROYAL COMMISSION ON DELAY IN THE KING'S BENCH DIVISION (1913) 42.

16. *Id.*, testimony of Viscount Haldane, ¶ 4658, p. 191.

17. See MULLINS, IN QUEST OF JUSTICE (1931) 195; (1927) 64 L. J. 287.

18. Supreme Court of Judicature (Procedure) Act, 1894, 57 & 58 Vict., c. 16, § 4. It was not essential that all three be practitioners for the statute describes them as "the President of the Incorporated Law Society for the time being, and . . . two persons (one of whom shall be a practicing barrister) . . ."

19. Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo. V, c. 49, § 99 (4).

20. See the volumes of THE ANNUAL PRACTICE.

21. See Sunderland, *The English Struggle for Procedural Reform* (1926) 39 HARV. L. REV. 725; Rosenbaum, *Studies in English Civil Procedure—The Rule-making Authority*

is due more to the acquiescence of judges in the public demand for law reform than to broadening the membership of the committee.

A noteworthy feature of the Rules Committee is the diversity of experience of its members. In 1936 all four of the judges appointed by the Lord Chancellor were engaged in trial work, two on the King's Bench and two in the Chancery Division.²² The differences in title of the named judges indicate the variety of their professional point of view, while the practitioners must represent not only both branches of the profession, but territorially must include the rest of England as well as London.

There is no American organ of procedural reform corresponding to the English Rules Committee. From the earliest times rule-making has been the function of all the judges of every court, except that a court which has had powers of superintendence over inferior courts has also the right to pass rules binding on such courts.

The advocates of the recent movement to increase the rule-making powers of the courts and to persuade judges to exercise their powers for procedural reform have assumed that the rule-making authority in each state should be the judges of its supreme court. Thus the statutory grants of rule-making power have all been to supreme courts,²³ and nowhere have trial judges or practitioners been included.

It is in our judicial councils that we have sought to secure the diversity of experience which is represented on the English Rules Committee. However, we have given many different answers to the question of the personnel of judicial councils. The first American judicial council, created in Ohio in 1923, was composed of six judges representing the various courts and three practicing attorneys. The idea of a council consisting of both judges and lawyers has been followed in most of the twenty-nine states creating councils.²⁴ Only California and Kentucky have councils composed entirely

(1914) 63 U. OF PA. L. REV. 151, 273, 380, 505. Sunderland, *The Regulation of Procedure by Rules Originating in the Judicial Council* (1935) 10 IND. L. J. 202, 204, and Greenbaum, *English Justice Through English Eyes* (1932) 18 A. B. A. J. 449, point out that the reforms which have been made in English procedure still fall short of meeting the complaints of the business men.

Examples of recent far-reaching reforms are abolishing of the grand jury and making trial by petit jury discretionary with the judge in most civil cases. Administration of Justice (Miscellaneous Provisions) Act, 1933, 23 & 24 Geo. V, c. 36, §§ 1, 6.

22. See (1936) 80 SOL. J. 350.

23. See *supra* note 9.

24. Judicial councils have been created in the following states: Arizona, 1936, (1936) 20 J. AM. JUD. SOC. 46 (by state bar); California, 1925, CAL. CONST. art. VI, § 1 (a) (amend. 1926); Connecticut, 1927, 2 CONN. GEN. STAT. (1930) c. 284, § 5362; Idaho, 1929, (1931) 1 IDAHO LAW J. 113 (by state bar); Illinois, 1929, ILL. REV. STAT. (Cahill, 1933) c. 131, ¶ 16-20 (now lapsed); Indiana, 1935, IND. STAT. ANN. (Baldwin, Supp. 1935) § 1306; Kansas, 1927, KAN. REV. STAT. (Supp. 1931) c. 20, § 2201; Kentucky, 1928, KY. STAT. (Carroll, 1930) § 1126a; Maine, Me. LAWS 1935, c. 52; Maryland, 1924, 1 MD. ANN. CODE (Bagley, 1924) art. 26, § 74; Massachusetts, 1924, 2 MASS. GEN. LAWS (1932) c. 221, § 342; Michigan, 1929, 3 MICH. COMP. LAWS (1929) § 13524; Missouri, 1934, (1935) 6 MO. BAR J. 3 (by supreme court); New Jersey, 1930, N. J. COMP. STAT. (Supp. 1931) p. 877, §**103; New Mexico, 1934, (1935) 18 J. AM. JUD. SOC. 152 (by supreme court); New

of judges,²⁵ while the temporary Judicial Advisory Council of Illinois was the only one in which members of the legislature predominated.²⁶ Five states require that two members of the council be laymen,²⁷ and in nine other states it is possible but not probable that there will be laymen on the council, since membership is given to certain members of the legislature, usually to the chairmen of the judicial committees of the senate and assembly.²⁸ The acts creating judicial councils in eight states have the unusual provision that one or more members shall be teachers in law schools within the state.²⁹

From this brief survey of rule-making in the United States and of the personnel of the courts and judicial councils exercising this power, a number of questions emerge:

York, 1934, N. Y. CONS. LAWS (Cahill, Cum. Supp. 1931-1935) c. 31, § 40; North Carolina, 1931, N. C. CODE (Michie, 1935) § 1461 (a); North Dakota, N. D. LAWS 1927, c. 124; Ohio, 1923, OHIO CODE ANN. (Throckmorton's Baldwin, 1934) § 1697-1; Oklahoma, 1934, (1934) 4 OKLA. BAR J. 193 (by supreme court); Oregon, 1923, 2 ORE. CODE ANN. (1930) tit. 28, § 501 (repealed, Ore. LAWS 1931, c. 26); Rhode Island, R. I. LAWS 1927, c. 1038; South Dakota, 1933, (1933) 2 S. D. BAR J. no. 1, 59, no. 2, 43 (by state bar); Texas, 1929, TEX. STAT. (Supp. 1931) art. 2328a; Utah, 1931, (1932) 1 UTAH BAR BUL. no. 4, 54 (by state bar); Virginia, 1928, VA. CODE (Michie, 1930) § 6571; Washington, 1925, 11 WASH. REV. STAT. (Remington, 1931) tit. 75, § 10959-1; West Virginia, W. Va. LAWS, 2d Sp. Sess. 1933, c. 71; and Wisconsin, 1929, WIS. STAT. (1929) § 251.18.

Closely related to judicial councils are the federal Conference of Senior Circuit Judges, 42 STAT. 838 (1922), 28 U. S. C. A. § 218; and the Pennsylvania Judicial Conference, 292 Pa. xxv (1928), 297 Pa. xxvii (1929), and 300 Pa. xxv (1930).

25. CAL. STAT. 1925, c. 48; KY. STAT. (Carroll, 1930) § 1126a. The Oregon council, created by Ore. LAWS 1923, c. 149, and repealed by Ore. LAWS 1931, c. 26, was composed solely of judges.

26. The council was created in 1929 for two years and consisted of fifteen members, ten lawyers, members of the General Assembly, and five other persons who were either lawyers or judges. The council was continued for two more years in 1931 and again in 1933. ILL. REV. STAT. (Cahill, 1933) c. 131, ¶ 16-20. Work which might have been undertaken by this council was done by committees of two bar associations. See ILL. CIV. PRAC. ACT ANN. (1933) IV-V; Sunderland, *The Function and Organization of a Judicial Council* (1934) 9 IND. L. J. 479, 490-497.

27. Maine, three laymen, Me. LAWS 1935, c. 52; Michigan, two laymen, 3 MICH. COMP. LAWS (1929) § 13524; New York, two laymen, N. Y. CONS. LAWS (Cahill, Cum. Supp. 1931-1935) c. 31, § 40; North Carolina, two laymen, N. C. CODE (Michie, 1935) § 1461(a); and Texas, three laymen of whom one must be a journalist, TEX. STAT. (Supp. 1931) art. 2328a.

28. Chairmen of the judicial committees of the senate and assembly in Indiana, IND. STAT. ANN. (Baldwin, Supp. 1935) § 1306; Kansas, KAN. REV. STAT. (Supp. 1931) c. 20, § 2201; Missouri, (1935) 6 MO. BAR J. 3 (council created in 1934 by state bar); New Jersey, N. J. COMP. STAT. (Supp. 1931) p. 877, § **103; New York, N. Y. CONS. LAWS (Cahill, Cum. Supp. 1931-1935) c. 31, § 40; North Carolina, N. C. CODE (Michie, 1935) § 1461 (a); Texas, TEX. STAT. (Supp. 1931) art. 2328a; Washington, 11 WASH. REV. STAT. (Remington, 1931) tit. 75, § 10959-1; Wisconsin, WIS. STAT. (1929) § 251.18.

29. Indiana, IND. STAT. ANN. (Baldwin, Supp. 1935) § 1306; Michigan, 3 MICH. COMP. LAWS (1929) § 13524; North Carolina, N. C. CODE (Michie, 1935) § 1461 (a) (three law teachers); North Dakota, N. D. LAWS 1927, c. 124; South Dakota, (1933) 2 S. D. BAR J. No. 1, 61 (judicial council created by state bar); Texas, TEX. STAT. (Supp. 1931) art. 2328a; Utah, (1932) 1 UTAH BAR BUL. no. 4, 54 (judicial council created by state bar). In Missouri the supreme court created a judicial council by rule and appointed to it a law teacher, (1935) 6 MO. BAR J. 4.

The attorney general is a member of the council in North Carolina, North Dakota, South Dakota and Texas, and a prosecuting attorney in Connecticut and Washington.

I. Should the power to control court procedure be divided between legislatures and supreme courts?

II. Is our system of giving rule-making power solely to judges of supreme courts as satisfactory as having rules committees composed of appellate and trial judges together with practitioners?

III. Admitting that American courts have done little rule-making in the past, will the assistance of judicial councils enable them to keep legal procedure abreast of the times?

IV. What is the ideal personnel of a judicial council?

I

A quarter of a century ago no American would have asked whether the power to control court procedure should be divided between legislature and state supreme court, but rather, how much rule-making power should a legislature allow a supreme court? English and American legislatures have from early times passed an increasing number of statutes regulating different phases of court procedure, until now there are very complete codes of both civil and criminal procedure in many states. But since Dean Wigmore and others have urged courts to declare that constitutional provisions separating judicial from legislative powers give courts as complete control over judicial procedure as legislatures have over legislative procedure, it may be well to consider some of the implications of such a doctrine.

Some of the problems of procedural reform touch too closely the liberties of citizens to be decided in a democracy by any body not subject to the popular will. Many of the changes in procedure now being advocated involve the abandonment of procedural safeguards that have long been considered important bulwarks of individual liberty. Let us take, for example, the question whether information should be substituted for indictment by a grand jury. Many states have already made the change either by statute or constitutional amendment, and American public opinion at this moment seems strongly in favor of it. There are, however, some who would agree with Mr. Justice Avory when he addressed what may be the last grand jury ever to be held in England to the effect that they were to be sacrificed upon the altar of economy, and in his opinion the suggested saving of time and money to be accomplished by the change would not compensate for the loss of the time-honored safeguard of the liberty of the subject. Such an issue is not one to be determined finally by a body free from political control. A similar argument is applicable to many of the other major reforms currently advocated, such as curtailing the right to trial by jury, greatly reducing if not entirely eliminating the right to bail pending appeal, and the sentencing of convicted offenders by a disposition tribunal composed only partially of judges.

A second consideration is that public opinion is so sharply divided on some of the more important questions of procedural reform that for courts to settle them would bring down on their heads a storm of criticism. An illustration may be taken from a recent experience in Colorado. In 1913 the Colorado legislature enacted that: "The Supreme Court shall prescribe rules of practice and procedure in all courts of record and may change or rescind the same. Such rules shall supersede any statute in conflict therewith."³⁰ In 1929 the Colorado Supreme Court, apparently without consulting the bar (there being no judicial council in Colorado) or giving the question careful consideration, formulated a poorly worded, ambiguous rule authorizing trial judges to comment on the weight of the evidence.³¹ One trial judge who did not properly understand what was expected of him exercised his new duty in a questionable way. While the case was on appeal the legislature passed a statute providing "that no rule shall be made by the supreme court permitting or allowing trial judges of courts of record to comment on the evidence given on the trial".³² A majority of the supreme court upheld the rule and after referring to the separation of powers in the Colorado constitution said:

"A search of the Constitution warrants the statement that there is no provision therein expressly directing or permitting the legislative or executive departments to make rules with reference to trial procedure in the judicial department of the government. We are not called upon to determine what right and power the legislative department possesses, with reference to procedure in acquiring jurisdiction of the person or subject matter, but the question with which we are concerned is the right, irrespective of the statutes and the common law, but in conformity with constitutional provisions, to make rules with reference to procedural matters for the conduct of trials. This is inherent in the judicial department."³³

If the Colorado Supreme Court persists in its claim that the legislature has no authority "to make rules with reference to procedural matters for the conduct of trials", further controversy may ensue.³⁴ We have no reason to anticipate that the legislature and citizens will tamely acquiesce in attempts to deprive the legislature of its historic power to control by statute the major questions of judicial procedure. What is more likely to occur is that the Supreme Court of Colorado will in the future be unduly cautious. It may

30. Colo. Laws, 1913, c. 121, § 1, now embodied in COLO. CODE CIV. PROC. (1921) § 444.

31. The rule read: "The rules governing comments by district judges shall be those now in force in the United States district court." At its first meeting after the rule went into effect the State Bar Association asked the Rule Committee of the Supreme Court to consider the desirability of clarifying and amplying the rule. (1930) 33 COLO. B. A. REP. 16, 35.

32. Colo. Laws 1931, c. 132, § 1.

33. *Kolkman v. People*, 89 Colo. 8, 33, 300 Pac. 575, 584 (1931).

34. McCormick, *Comment on Kolkman v. People* (1933) 27 ILL. L. REV. 664 (1934).

become so fearful of public disapproval that it will hesitate to make the minor changes which are clearly within the scope of its authority. Thus one false step may impede reform for many years.

A third objection is that there are a number of problems, even minor ones, on which the interests of the bench differ from those of the bar and the public. On some of these judges will doubtless acquiesce in any recommendation of a judicial council or bar association. But on others the issue is not so clear, especially if there is to be no recourse to the legislature. An example of such an issue is whether the record and briefs on appeal should be printed or merely typewritten. That case might be designated pocket-books of clients v. eyesight of supreme court justices. Perhaps printers and lawyers have also sufficient interest to be joined as parties defendant. Surely the maxim that a man should not be a judge in his own case applies as truly in this instance as in questions of judicial salary increases and the length and frequency of terms of court.³⁵

If the three objections just considered are sound, it follows that the field must remain divided between state supreme courts and legislatures.³⁶ The danger inherent in such a division is that supreme courts will tend to abandon the field and that legislatures will occupy it only sporadically and piecemeal. Legislation will then consist mainly of a large number of regulations of the minutiae of procedure, as it has in New York for many years, each perhaps good enough in itself but not properly integrated into a system of judicial procedure.

It is possible for judicial councils to act as effective brakes on excessive legislative activity while at the same time stimulating the exertions of

35. See Sunderland, *The Regulation of Procedure by Rules Originating in the Judicial Council* (1935) 10 IND. L. J. 202, 207-209, for an argument that, though courts cannot be expected to decide impartially when the interests of the bench, bar and public differ, judicial councils can, even though composed predominantly or entirely of judges and lawyers. "The chief safeguard of public interest, . . . would be in the fact that the council itself would desire and strive for political success under the constant stimulus of public discussion and criticism."

36. See Pound, *Regulation of Judicial Procedure by Rules of Court* (1915) 10 ILL. L. REV. 163, 175-176, for an argument by Dean Roscoe Pound in favor of the legislature committing the whole subject of procedure in its entirety to rules of court. He believes that any division of the subject between court and legislature is bound to be difficult of application.

Perkins, *Proposed Remedies in Court Procedure* (1913) 12 MICH. L. REV. 362, discusses the many changes in procedure that were then needed in Michigan. Though the supreme court has had sufficient rule-making power since 1857 to inaugurate many reforms, it has done little. Many statutes on court procedure have been passed by the legislature and upheld by the courts. Mr. Perkins thinks that the dual responsibility of supreme court and legislature for court procedure ought to be ended and the entire obligation placed upon the court.

The present situation in Michigan seems to be that the supreme court considers that the state constitution gives it exclusive control over court procedure, but does not believe that changes are desirable, thus effectively blocking needed reforms. If the legislature shared control over procedure with the court, it would be possible to appeal to the other when either refused to act.

For the view that all large and important changes in procedure must be made by the legislature, because if the courts make them, they will become embroiled in conflict, see Wylie, *Legislatures Must Scourge Ancient Fallacies* (1934) 18 J. AM. JUD. SOC. 114.

supreme courts. By submitting each year such reforms as it considers too important to be made by rule of court, the council can keep a stock of procedural bills always before the legislature, which thus need never feel that it is neglecting the field. Furthermore, the council can act as a legislative reference bureau on all bills submitted relating to procedure. For example, the Massachusetts Judicial Council has been reasonably successful in getting its ideas adopted by the legislature and very successful in blocking ill-considered changes. The legislature is becoming accustomed to delaying bills on court procedure until it can secure the advice of the council. If there were also in Massachusetts an integrated bar to throw its weight behind the recommendations of the judicial council, the danger of legislative interference with the details of judicial procedure would be very slight, and the legislature could confine its attention to matters involving questions of major interest.

Of course a judicial council supported by a strong bar would also serve as a stimulus to rule-making by the supreme court through enabling the court to learn the reasons for and against each proposed change and to estimate the strength of professional opinion. Another provision which might prove valuable in the same direction is to require that all new rules be laid before the legislature and become effective if the latter did not disapprove of them. The fact that the rule came automatically before the legislature might make the supreme court less hesitant in approving suggestions of the judicial council. It would reduce the responsibility of the court for the rule. Furthermore, it would lessen the objections of both judges and legislators to courts passing rules on subjects which might be considered appropriate for legislative action.

II

The second question we have asked ourselves is whether the American plan of giving rule-making power solely to supreme court judges gives promise of success. Should we, rather, try to change to the English plan of a rules committee composed of appellate and trial judges together with practitioners? We are assuming, of course, that if rule-making powers are granted to supreme court justices they will be advised by a judicial council, and we hope also by an integrated bar.

Our experience of the exercise of rule-making powers by supreme court justices has been short, but so far not encouraging. For example, the Massachusetts Judicial Council has had much more success in securing action from the legislature than from the supreme court and hence has again and again requested the legislature to act in matters which belong properly to the supreme court. But the Massachusetts Supreme Judicial Court has not been granted rule-making powers by the legislature, and there is no integrated bar in Massachusetts.

Theoretically, supreme court justices are not an ideal body to entrust with the duty of procedural reform. Many have reached an age in life when all change seems abhorrent. Many have never had much court practice and have been on the appellate bench for so long that they are only ex-officio experts on the procedure of the lower courts. A rule-making body consisting of trial judges and practicing attorneys as well as justices of the supreme court might prove superior to one consisting of supreme court justices alone. Perhaps the solution is to give judicial councils power to make rules as well as to recommend them.

Supreme court justices have been the unquestioned repositories of rule-making power in this country for reasons partly historical, partly constitutional. Though all courts have had some rule-making power, supreme courts have had power to make rules for lower courts.³⁷ Our court system, with its emphasis on the importance of the appeal, tends to increase the prestige of appellate courts over trial courts and to secure for them better judges. It was therefore natural for lawyers looking for a body in which to confide additional rule-making powers to select the supreme court. Furthermore, in most, if not all, states it would probably have required a constitutional amendment to set up a judicial council representing the courts and the bar, with power to make rules binding on the courts. The advantages of not having to secure a constitutional amendment are so great that we shall doubtless continue our present system for some time.

III

The third problem is, will supreme courts with judicial councils to advise them succeed in keeping judicial procedure abreast of changing needs? Undoubtedly the most important reason why courts until recently have made so little use of their rule-making power is that neither the public nor the bar has demanded that they do so. Generations that believed a sharp division between executive, legislative and judicial functions was both desirable and practical naturally looked to the legislature for reform. In such an intellectual climate judges also thought reform was none of their affair. These ideas are not dead, and judges cannot be sure how far the bar and the public really wish them to go. It is therefore important for bar associations to urge the utility of statutes granting to courts full rule-making authority.

37. See Pound, *Regulation of Judicial Procedure by Rules of Court* (1915) 10 ILL. L. REV. 163, 170-175; Note (1935) 29 ILL. L. REV. 911, 914-915. Two very enlightening cases are *State ex rel. Foster-Wyman Lumber Co. v. Superior Court for King County*, 148 Wash. 1, 267 Pac. 770 (1928), and *In re Constitutionality of Statute*, 204 Wis. 501, 236 N. W. 717 (1931). Both hold that the grant by the legislature to the supreme court of authority to make rules for the lower courts is not unconstitutional either as a delegation of legislative power or as an attempt to vest in the supreme court a power which the constitution gives to the lower courts. The latter case also holds that it is not unconstitutional for the legislature both to retain itself the power to alter court procedure and to grant it to the supreme court.

Legislators long ago worked out a system of debates and public committee hearings for the purpose of ascertaining public opinion on measures before them. Before the advent of judicial councils, courts might conceivably have adopted an equally thorough procedure for rule-making. For example, they could have invited the bar and the public to offer suggestions for changing the law, appointed committees to consider suggestions and draft necessary rules, and listened to arguments on the advisability of suggested rules.³⁸ If judges had developed some such procedure, they would have become more competent than legislators to reform criminal procedure because of their greater familiarity with the problems involved. In the absence of a procedure calculated to focus the abilities of the bench and bar on rule-making, judges were doubtless wise to confine their efforts to simple problems on which reasonable attorneys could not differ. By so doing they saved themselves from much adverse criticism and perhaps from being reduced to the dependent position of the Continental judge in a period when democratic feeling ran high.

The judicial council has supplied courts with a technique for rule-making that is equal if not superior to the legislative process for statute-making. Because of its permanence the council can conduct investigations and secure information from other states with a thoroughness usually not possible for a legislative committee. Since nearly all its members are lawyers and the field of its endeavors is limited to court procedure, it easily develops great expertness. The publication of recommendations in its annual report gives the bar and public an opportunity to discuss them thoroughly before final adoption either as rules of court or as statutes. For nearly all judicial councils make recommendations both to the supreme court and to the legislature, and of these two functions the latter sometimes occupies the larger role in the activity of the council.

Public discussion and criticism are essential to the success of changes in law, whether by statute or by rule of court.³⁹ The democratic process succeeds only when the opponents of a measure are permitted to criticise it both before and after enactment. If epoch-making changes in court procedure were to be made by rule of court, they would inevitably become political issues, especially in the case of candidates for election to the bench. Such a result would be prejudicial to the best traditions of our courts.

38. An excellent procedure is that prescribed by the Wisconsin statute conferring rule-making power upon the supreme court and creating a judicial council to assist it. The act provides that when the supreme court proposes a rule, it shall publish it for four successive weeks in the official state paper and then hold a public hearing. Thereafter the court may adopt the rule, but it shall not become effective until sixty days after its adoption. WIS. STAT. (1931) § 251.18.

39. It would be desirable for judicial councils to copy the legislative practice of holding public hearings. Letters received from various councils state that at present they almost never do this.

It is not surprising therefore, that before supreme courts had judicial councils to take the blame for unwise or unpopular rules, they made rules only infrequently and avoided controversial topics.⁴⁰ Even today, if a supreme court should by rule make a very great change in procedure, such as adopting the English practice of requiring the losing party to pay for the winner's attorney, it would doubtless become involved in a storm of criticism. The fact that the judicial council and the bar association both urged the change, and that the court merely adopted their recommendation, would scarcely save the situation. The public would rightly feel that in a change so fundamental they, or at least their elected representatives, should be consulted. However, there are a vast number of minor questions, important for the smooth running of the courts, but too detailed and technical to excite general interest, upon which courts can follow the recommendations of judicial councils without danger of repercussion. Furthermore, the procedure of investigation by a judicial council and publication of its recommendations in an annual report gives the court, before being called upon to act, an opportunity to discover whether the contemplated change meets with the approval of the bar.

IV

Our last question is, what should be the personnel of judicial councils? In answering it, the assumption will be made that the function of a judicial council is to advise both the legislature and the supreme court as to desirable changes in judicial procedure.⁴¹

That the judicial council should not consist solely of supreme court justices seems clear, but certainly one of its members should be a representative of this court. One point of view needed by a judicial council is that of the judges of the supreme court. Furthermore, the presence of such a judge should increase the likelihood of the supreme court following the recommendations of the council.

The Massachusetts Judicial Council has had little success in persuading either the Supreme Judicial Court or the Superior Court to adopt its recommendations. This is thought to be due to the fact that no judge of either court has ever sat on the council. The act creating the council gives the chief justices of both courts the choice between nominating an active or a retired judge, and they have always chosen the latter. It seems reasonable to suppose that, if the judges of these courts had taken part in the delibera-

40. See Sunderland, *The Regulation of Procedure by Rules Originating in the Judicial Council* (1935) 10 IND. L. J. 202, 209-210, for a similar argument.

41. This is true everywhere except in Wisconsin, where the council acts solely as advisor to the supreme court. Hence its membership does not include any justice of that court, but consists of the attorney general, the revisor of statutes, the chairmen of the judiciary committees of the senate and assembly, a member of the board of circuit judges, a member of the board of county judges, the president of the state bar association and three members of that association. WIS. STAT. (1931) § 251.18.

tions of the council, they would have seen the wisdom of at least a large proportion of the council's recommendations and secured their adoption by their brethren.⁴²

A similar argument may be made for giving a seat on the council to a judge from each of the leading courts of the state, and perhaps also to the chairmen of the judiciary committees of the senate and assembly. Besides their usefulness in securing the passage of legislation, the two chairmen are apt to be lawyers with experience of value to the council.

It is assumed, of course, that a judicial council should consist of both judges and practitioners.⁴³ The active practitioners on the council might well be officers of the state bar association or appointees of the association. The insight into court procedure gained by practicing before courts is not the same as that secured by sitting on the bench, and both points of view are needed.

A council composed entirely of judges and active practitioners is theoretically qualified for its tasks, but still lacks some one to keep it supplied with projects. Except in Kentucky, members of judicial councils are not compensated for their services and usually have no funds, certainly not sufficient funds, to employ experts. Therefore, if the council is to function successfully someone, preferably a member of the council, must spend time for which he receives no remuneration in preparing work for the council. The difficulty of securing judges or practicing lawyers with both the ability and leisure necessary to perform this function is doubtless the reason why law school teachers are placed on several of the councils.⁴⁴

The remaining question concerns the inclusion of laymen. A judicial council composed of judges and lawyers will, of course, represent the interests of the bench and bar. When these differ from the interests of the remainder of the public, as they occasionally do, that body is in no position to act as an unprejudiced advisor. Yet it is probably not desirable to have

42. WARNER AND CABOT, *JUDGES AND LAW REFORM* (1936) 217-220.

43. See Sunderland, *The Function and Organization of a Judicial Council* (1934) 9 IND. L. J. 479, 490-497, in which Professor Sunderland suggests that judicial councils should not be official bodies, but committees of state bar associations, as they are in seven states. Sikes, *Judicial Affairs* (1935) 29 AM. POL. SCI. REV. 456, 471-472, expresses a contrary opinion. Though both types may well prove successful the official council should find it easier to obtain official records, the testimony of witnesses and funds for investigations.

44. Professor Sunderland writes: "In providing that a member of the faculty of the Law School of the State University shall be a member of the Judicial Council, Michigan has undertaken to avail itself of the facilities for legal research which the Law School offers. If judges are too busy with judicial duties to carry the burden of the rule-making power, the members of the Judicial Council will also be too busy with their professional work to be able to personally make the careful studies of procedural problems which ought to precede changes in the practice. The Judicial Council should be furnished with all the information necessary to enable it to determine what reforms to recommend, the extent to which they may properly be carried, and the specific methods which should be employed in making them effective. For the collection and analysis of such data, a research organization of some kind is indispensable." REPORT OF COMMITTEE OF AMERICAN BAR ASSOCIATION DELEGATES ON JUDICIAL COUNCILS AND THE RULE-MAKING POWER (1929) 60.

laymen on the council, certainly not many.⁴⁵ To include enough laymen for the council to have a chance of representing the interests of the public rather than of the bench and bar is to run the risk that the council will be a useful representative of neither. The judgments of such a council on technical questions of procedure would not command respect. Furthermore such a council would almost certainly be too large.

Throughout this discussion of the role of courts and judicial councils in procedural reform, emphasis has been laid upon the importance of the attitude of the public, bar and bench. These groups are now beginning to look to courts to take an active part in procedural reform. Whether this will prove possible in the long run will depend largely upon the accuracy with which the roles of courts and legislatures are differentiated and upon the adequacy of the rule-making technique. Without the assistance of judicial councils, supreme courts will fail. With their aid and that of the bar a large measure of success seems assured.

45. Of course, some method is needed for focusing lay as well as professional opinion on the reform of court procedure. The issue is whether this can best be done by giving laymen a large, if not a preponderate, representation on the judicial council or by making that body an organ of bench and bar and relying upon periodic public commissions, legislative committees and committees of chambers of commerce and other lay associations to present the lay point of view.