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LAW REVISION IN THE STATE OF WASHINGTON

The Present Picture and a Proposal*

HARRY M. CROSS†

I

WIDESPREAD skepticism about the adequacy of existing law to achieve justice poses one of the most serious problems to the legal profession. The practicing lawyer knows that in most instances existing law is reasonably efficient in achieving sound, just results, but to the uninitiated the instance in which the efficiency is small or the result unjust appears to be the usual circumstance rather than the unusual. Even the informed layman is likely to be more concerned with the inadequacies of present law than with its adequacies, and admitting the extent of skepticism to be unwarranted, still asks, "Why don't the lawyers do something about these inadequacies?"¹

Correction of many inadequacies can best be accomplished by legislation,² and although the criticism of "the law" frequently should be directed to the legislature, the Washington legislature cannot fairly be severely censured. A principal barrier to effective action by the legislature alone is the constitutional provision³ for biennial sessions limited to sixty days, and the fact remains that lawyers individually and collectively through their bar associations bear the brunt of the criticism. For this reason, even if for no other, all branches of the legal profession should strive to improve the law. The burden of such improvement

* This article conforms closely to the remarks of the writer to the Seattle Bar Association at its luncheon, February 20, 1952. The formulation of the ideas expressed is the writer's, but the general theme has been frequently discussed by him with colleagues on the faculty, with friends in the practicing bar, and with laymen.

It is the belief of the writer that extensive annotation of experience in other states with law revision agencies will serve no useful purpose here. Those who have explored the problem presented by this article know, for instance, that the New York Law Revision Commission has been functioning since 1934 and that through its efforts great strides forward have been made in correcting and bringing up to date the law of that state. It is the purpose of this article, rather, to call to the attention of the bar of the state that by means of a law revision agency much that needs to be done can be done.

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¹ In the minds of uninformed laymen more than skepticism frequently exists. The writer has observed in a Real Estate Law course conducted for laymen that many members of the class initially doubt the integrity of lawyers and are suspicious of law. Most of them by the end of that course have changed their attitudes but are likely to raise the questions posed in the text, and sometimes still feel strongly that the law is more legal than just.

² Frequently, application of the principle of stare decisis can mean that correction can be achieved *only* by legislation.

³ Wash. Const. Art. II, § 12.

neither the legislature nor the bar can really avoid. Certain steps aimed at proposing legislation to cure deficiencies in existing law have been taken, but the full potential of supplementary help to the legislature has not even been approached. What is needed is a comprehensive program of law revision.

In the minds of many in this state, "law revision" will connote "code revision" but code or law revision with this local connotation is not the subject of this article. The need for a more adequate code of existing statutory law had long been recognized when the efforts of the legislature to meet that need resulted in the adoption of the Revised Code of Washington as *prima facie* law,⁴ and the creation of a Statute Law Committee,⁵ with a Code Reviser to correct the Code as thus adopted so that it will accurately reflect the laws enacted by the legislature. The term, law revision, as used here, refers to legislation for substantive change by addition to and modification of existing statutes, and by enactment of entirely new statutes in areas heretofore covered only by non-statutory law.

Much law revision occurs constantly through efforts of special interest groups,⁶ but such change will rarely reach parts of the law important to most persons directly or indirectly, particularly those parts where individual amounts involved are relatively small or where frequently recurring application to persons of a particular group is unlikely. In these latter situations an organized attack to correct existing law is improbable under present circumstances, unless the area involved is one within the operating scope of the few existing agencies not motivated by special interests.

The oldest of the existing agencies is the Judicial Council created in 1925.⁷ The procedural law has been its principal concern.⁸ Much of the desirable change in procedure in its various aspects since 1925 has been the result of the work of the Judicial Council, but its members would be the first to report that all which can properly be done in this area has not been undertaken. Two primary causes can be suggested. First, the members are each principally engaged in other work, and second, the funds appropriated for its work have been very small with a result

⁴ Wash. Laws Extra Sess. 1950, c. 16; RCW 1.04.010.

⁵ Wash. Laws 1951, c. 157, RCW 1.08.001 *et seq.* [RRS § 152].

⁶ There probably are situations in which, while something is being done, the bar might well be concerned about *what* is being done.

⁷ Wash. Laws Extra Sess. 1925, c. 45; RCW 2.52.010 *et seq.* [RRS § 10959-1 *et seq.*].

⁸ See the biennial reports of the Judicial Council.

that many extensive projects could not be undertaken.⁹ The surprising thing about the Judicial Council is not that it has not accomplished everything desirable in its area but that it has accomplished as much as it has.

The brevity of the legislative session, in part at least, led in 1947 to the establishment of the Legislative Council,¹⁰ which is almost an interim legislature. It is probably beyond serious argument that the work between legislative sessions of the committees of the Legislative Council, including studies prepared for and at the request of the committees, does and can continue to facilitate the work of the legislature. According to newspaper reports of its activities its tasks presently are, and probably in the future will be, in the areas of major legislative concern under the existing situation, and while law revision does demand some attention, *e.g.*, the welfare laws, legislative problems such as highway fund allocations and the adequacy of administrative procedures loom large in the total undertaking.

The Statute Law Committee established by the 1951 legislature¹¹ is the third agency concerned with correction of existing law, but as indicated above its primary task seems to be perfection of the Revised Code rather than substantive change of the law. It may be that at some time in the future the broader tasks of law revision could replace the present task of code revision, but for the immediate future the public announcements of the committee¹² indicate that code revision, in the sense of the local connotation, will demand the attention of the Code Reviser, except so far as he is called upon to put proposed legislation in acceptable form, to edit and codify the session laws, and perform such duties.

The Judicial Council, the Legislative Council, and the Statute Law Committee are all the existing agencies which are neither special interest private groups nor public agencies concerned primarily with a narrow area of the law. It is patent that the areas needing particular attention are more extensive than the areas presently receiving attention.

⁹ 1947-49 biennium, \$3500. Wash. Laws 1947, c. 287, p. 1336.

1949-51 biennium, \$3500. Wash. Laws 1949, c. 242, p. 951.

1951-53 biennium, \$4000. Wash. Laws Extra Sess. 1951, c. 10, p. 38.

In 1951 the Council asked for \$15,000 for a study of the inferior courts. Twelfth Report of the Judicial Council, January, 1951, p. 8, Appendix B, p. 13.

¹⁰ Wash. Laws 1947, c. 36; RCW 44.24 [REM. SUPP. 1947 § 8207].

The funds for the Legislative Council are the balances of appropriations for conduct of the legislature which remain unexpended at the close of the session.

¹¹ \$40,000 were appropriated for the work of the Statute Law Committee by Wash. Laws 1951, c. 157, § 20.

¹² 5 Wash. State Bar News 31, 34 (Aug. 1951); *id.* 47 (Dec. 1951); 6 *id.* 13 (Apr. 1952).

II

Two types of revision of existing statutory law in Washington can furnish worthwhile projects: first, changes of the law with reference to a whole area *e.g.*, the Insurance Code,¹³ or as it is sometimes called, title-by-title study and revision of the existing Revised Code;¹⁴ and second, correction of smaller areas of the statutes where, either by oversight or inadvertence, unworkable or unwise provisions¹⁵ have been enacted or statutes have become obsolete.¹⁶ Similarly, the approach to revision of the non-statutory law can proceed along a course either broad, covering whole "titles" not now extensively treated, or narrow, dealing with particular, smaller problems,¹⁷ or both such courses. In some situations although there are certain statutes, the bulk of the present law is non-statutory, and revision would be a mixture of the two. An additional valuable service to the state would lie in the study and identification of alternative ways to meet particular problems even though, or sometimes because, the final determination might be that the Washington position was the most desirable. Some such positions now established by non-statutory law might well be embodied in statutes merely declaratory, rather than amendatory, of existing law.

Without attempting to be exhaustive or to identify where they lie among the above types, the following include some areas or problems which have occurred or been suggested to the writer as appropriate for study by a law revision agency.¹⁸

Community property law: Liability of community property for separate obligations of the spouses, both ante-nuptial and post-nuptial; nature of the community interest in purchase contracts when payments begin before marriage and are completed after marriage, compare real estate contracts and life insurance contracts; enforceability against Washington community property of obligations incurred in a non-community property state prior to change of domicile to Washington.¹⁹

¹³ Wash. Laws 1947, c. 79; being most of RCW Title 48.

¹⁴ See *e.g.* 1949 Report of the California Code Commission.

¹⁵ In 1945 the legislature deleted from the homestead statute the provision insulating the property from the reach of the homesteader's creditor after it passed to the hands of the purchaser from the homesteader. Cf. Wash. Laws 1945, c. 196 § 2; RCW 6.12.090 [RRS § 532].

¹⁶ The exemption statutes furnish the prime example: RCW 6.16.020 [RRS § 563].

¹⁷ Included here would be antiquated common law rules of judicial origin.

¹⁸ If these examples are mostly in the property field, it does not imply a lack elsewhere; it is, merely, that the writer's principal field is property law.

¹⁹ *La Selle v. Woolery*, 11 Wash. 337, 39 Pac. 663 (1895), *rev'd on rehearing*, 14 Wash. 70, 44 Pac. 115 (1896); *Meng v. Security State Bank*, 16 Wn. 2d 215, 133 P. 2d 293 (1943). No effort is made to annotate all the problems or to annotate any fully.

Survival of claims against tort feasers.

Chattel mortgage and conditional sale contracts statutes, including the variation in filing and enforcement provisions.

Real estate mortgage foreclosure: Would a rapid, inexpensive procedure permit a practice of making loans in amounts nearer the market value of the land, thus helping the solvent debtor?

Real property law: The whole area of future interests is essentially untouched by statute and only brushed by court decision. Should the legislature enact some form of a rule against perpetuities? Should we have statutory rules limiting accumulations or restricting the duration of private trusts? Should the rule in Shelley's Case²⁰ and the rule against a remainder to the grantor's heirs be abolished?²¹ To what extent can powers of appointment be released in Washington? Are contingent remainders in Washington indestructible? To what extent are possibilities of reverter and rights of re-entry transferable? Does the fee tail estate exist in Washington, the fee simple conditional, or neither?²²

Landlord-tenant law: Should there, in some situations, be statutory responsibility on the landlord for the condition of the leased premises? Should there be an automatic termination of a periodic tenancy in the absence of specification in the lease?

Real estate brokers: Should a broker be permitted to recover in tort when his principal by fraudulent conduct has defeated the collection of a commission earned, even if the broker had no written commission contract?²³ Should the law provide for a maximum duration of an exclusive agency regardless of notice of termination by the owner?

Probate law: It has been suggested that there is need for a complete revision of the statutes on administration of decedent's estates.

Justice courts: The Judicial Council recommended in its 1951 report that there be undertaken a study of the inferior court system with the purpose of preparing appropriate measures for legislative consideration to improve the administration of justice in the inferior courts.²⁴

²⁰ Comment, Cross, *The Rule in Shelley's Case in Washington*, 15 Wash. L. Rev. 99 (1940).

²¹ McKenna v. Seattle-First National Bank, 35 Wn. 2d 662, 214 P. 2d 664, 16 A.L.R. 2d 679 (1950), 26 Wash. L. Rev. 139 (1951).

²² The writer is informed that in Walla Walla County, for example, there are extant deeds and wills which could create fee tail estates, if the English statute *De Donis Conditionalibus* (1285) is part of the common law of Washington under RCW 4.04.010.

²³ See *American, Inc. v. Bishop*, 29 Wn. 2d 95, 185 P. 2d 722 (1947); *Gertz v. Shaeffer*, 38 Wn. 2d 639, 231 P. 2d 273 (1951).

²⁴ Twelfth Report of the Judicial Council, *loc. cit. supra*, n. 9.

Recording statutes: Should there be provision for *ex parte* affidavits of claim of rights not created by written instruments? Consider adverse possession titles,²⁵ prescriptive easements, ways of necessity, and easements by implication—is the recording act to be applied to them with consequent destruction of the interest, should the act be amended to cover such interests specifically, or should the possibility of creation of interests in such fashion be abolished?

III

It is obvious from the illustrations above, and from many more the reader can bring to mind, that much of the need for law revision lies in areas beyond the scope of organized, special interest groups. This means that some agency should have the specific task of effectuating a program for improvement and revision of the law of the state. Many of the corrections needed relate to technical legal rules and certainly in such situations the bar should take steps to assure that corrections are made.

On the other hand, however, even though the burden of inadequacies may be put on the lawyers, and also the responsibility to see that devices to assure ultimate correction are adopted, it does not follow that the cost of such correction or devices should be borne by lawyers. Fulfilling the basic need will be a service to all persons affected by Washington law—the public generally, and it is on the public generally that the cost can fairly be put. The service to the lawyers is merely incidental in that some of the unwarranted criticism of the bar should be eliminated or minimized.

The agency to carry on such work could take any one of several forms, but these seem to be among the essential attributes: first, it must be non-partisan; second, it must not reflect or represent primarily the views of any single economic group; third, it must have available facilities for extensive research, both technical and non-technical; fourth, it must have available when needed the services of specialists in the various areas of law.

It is this writer's belief that there should be established in this state a law revision agency and that the headquarters of such an agency should be at the School of Law of the University of Washington.

All of the four attributes mentioned in the preceding paragraph are present in the school, and such a program as outlined in this article,

²⁵ See *Mugaas v. Smith*, 33 Wn. 2d 429, 206 P. 2d 332, 9 A.L.R. 2d 846 (1949).

great or small as desired, can be effectuated if the legislature will make adequate funds available.

The organization of such an agency which most appeals to the writer would include a supervisory board with members drawn from various branches of the profession, *i.e.*, practicing bar, judiciary, teachers, and government legal administrators. The supervisory board would determine which proposed projects should be undertaken and give final approval for the agency of the results. To be most valuable such an agency would not only pursue projects on its own initiative but also complement the work of the existing agencies by preparing preliminary studies for (and at the request of) the Judicial Council, the Legislative Council or other state agencies.²⁶ Depending upon funds available both broad and narrow projects could be simultaneously advanced.

More precisely, the objective of the agency would be to provide facilities and qualified personnel to make critical studies of various aspects of the existing law of the state, to prepare reports embodying the results of such research together with recommendations for enactment, revision or repeal of statutes, and to implement such recommendations by drafts of bills designed to carry out such recommendations.

IV

Assuming that it is desirable in the minds of the lawyers of the state that such a program be initiated, this writer proposes to each lawyer that he, individually or through his local association, urge the Board of Governors of the Washington State Bar Association to appoint a special committee to meet with appropriate members of the faculty of the School of Law to formulate specific proposals in bill form for presentation to the legislature, and that support be given in the legislature for the proposals.

Such concrete steps toward achieving the goal of more justice in the law can do much to minimize unreasonable skepticism of the law and unreasonable criticism of the bar.

[Since preparation of this article there has appeared strong support for the writer's belief in Dean Pound's article, *A Ministry of Justice: A New Role for the Law School*, (Aug. 1952) 38 A. B. A. Jour. 637, particularly p. 704, col. 3. See also the editorial comment, *id.* p. 668.]

²⁶ It is emphasized that such a Law Revision Agency would not be designed to supplant existing agencies. In New York, for example, the Law Revision Commission and the Judicial Council both exist and perform admirable services for that state.