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Volume 30 | Issue 3 Article 3

April 1924

An Advance in Legal Reform

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Recommended Citation

Benjanin N. Cardozo, *An Advance in Legal Reform*, 30 W. Va. L. Rev. (1924).
Available at: https://researchrepository.wvu.edu/wvlr/vol30/iss3/3

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AN ADVANCE IN LEGAL REFORM.

The State of West Virginia has deemed the revision and codification of its laws of sufficient importance to justify the creation of a commission which is now engaged in this work. It is believed that the work of this commission will be of inestimable value in placing in the hands of its citizens a readily accessible code of laws. This is well for the present. But may not the work of this commission be partially if not wholly defeated and lost, unless the work of the Revision and Codification Commission be extended in the future? It is therefore suggested that there should be a permanent commission created whose duty would be to investigate defects in the law and its administration. To this commission complaints could at all times be made and it could serve as a legislative drafting bureau in scientifically preparing tenative drafts for all proposed legislation. To bring before the bar of the state a concrete example of what another jurisdiction is doing in this direction the following report of the Committee on Plan and Scope of the Commission to Investigate Defects in the Law and its Administration, of the State of New York, prepared by Judge Benjamin N. Cardozo, is submitted.*

To the Commission created to investigate defects in the law and its administration:

The Committee on Plan and Scope respectfully reports as follows:

By chapter 575 of the laws of 1923, a commission was created "to examine the statutes and judicial decisions of the State of New York; to investigate any defects in the present law and in its administration; and to recommend such changes as are necessary, to modify or eliminate antiquated and inequitable rules of law and methods of administration, to remove anachronisms in the law, and generally to bring the law of this state, civil and criminal into harmony with modern conditions."

By section 7 of the act, the Commission was directed to "make a report of its proceedings together with its recommendations to the legislature on or before the 15th day of March, 1924."

The act became a law on May 22, 1923. The members of the

* Of New York City.

Commission were appointed on November 28, 1923, and a chairman was named on December 6. Five days thereafter, on December 11, 1923, the Commission held its first meeting, and after discussion by the members, a Committee on Plan and Scope was designated by the Chairman with instructions to lay before the Commission a program of its work.

The interval of time between the date of the first meeting and the date when the report to the legislature is due, is substantially three months. Self-evidently we shall be unable within any such period to discharge the whole or any considerable part of a mandate so comprehensive and ambitious. We shall suffer from the same disability though the date for the submission of the report be extended many months. The adequate execution of the project sketched in this statute will be the work not of months, but of years. Those who are to devote themselves to it will find their energies engrossed to an extent that is likely to be incompatible with the discharge of other duties. The survey is not to be restricted to this field or that one, to substantive law or to procedure, to civil law or to criminal, to common law or to statute. The entire *corpus juris* is to be re-examined and reformed.

Your committee on Plan and Scope appreciating the magnitude of such a task and the indefinite period of time essential to its adequate discharge, is persuaded that the program to be laid out at the beginning may best be bounded by the limits of possible achievement within the brief time remaining before the recommendations to the legislature will be due. Especially is that true if the Commission is prepared to recommend the creation of agencies of government that may tend in some degree to make superfluous its own existence for the future, or to render the extension of its investigations a needless duplication of labor and expense. The legislature, with these preliminary recommendations before it, with knowledge of the things which in our judgment may wisely be done at once, will be in a position to advise us whether we are expected to do more.

We find a widespread agreement that there should be established a permanent agency, continuously functioning, to consider the changes essential to the proper administration of justice, and to report its recommendations yearly. One of the anomalies of our legal institutions is that no such agency exists. The courts and the legislature work aloof and in isolation, with no responsible intermediaries through which the needs of the one may be communicated to the other. Hardships are not corrected by the lawmakers

because it is not the business of any one to give notice that they exist or to frame measures of correction. Let responisbility be centered somewhere, and at once the difference appears. The Attorney-General discovers that in the administration of the tax law or of the Workmen's Compensation Law or in some other field within his province, changes are essential if justice is to be done. At once he is before the legislature with a bill for the correction of the evil. The legislature has confidence in the sincerity of his motives, and in a great majority of cases approves the bill which he submits. The difficulty is that there is no one to discharge a like duty, to fulfill a like function, in the great mass of controversies arising between man and man. Anachronisms persist not because they are desired, but because they lie buried from the view of those who have the power and the will to end them when they ought to be brought to light. Reforms are not made because the impulse to make them is sporadic, working by fits and starts, and at times because the motives of the sponsors are unworthy or at least suspect. A disinterested agency should exist to survey the body of our law patiently and calmly and deliberately, attempting no sudden transformation, not cutting at the roots the growths of centuries, the products of a people's life in its gradual evolution, but pruning and transplanting here and there with careful and loving hands. The work of such a body may not be spectacular. It may not show itself at once in ways that will arrest attention. It must be content, as all true progress must be content, with change that is slow and gradual, here a little and there a little. In the end we shall have to judge by the aggregate of achievement whether the task was worthy the doing. Possible misapprehension as to the scope and function of such a commission must be corrected at the outset. It is not to busy itself with schemes of legislation unrelated to the existing body of our law. It is not to take sides as between one view and another where the point at issue is the wisdom of some untried experiment involving fundamental change of the existing legal structure. To give its work so great an extension would be to bring within its province every form of legislation, possible or actual. The proper bounds of its activity, though incapable perhaps of precise definition, are described with substantial accuracy in a report of a committee of lawyers setting forth the function and the purposes of the American Law Institute, then about to be organized. "It is the province of the people and of legislative bodies, through constitutions and statutes, to express the political, economic and

social policies of the nation, of its states, and of smaller communities. It is the province of lawyers to suggest, construct and criticize the instruments by which these policies are effectuated. The proposed organization should concern itself with such matters as the form in which public law should be expressed, the details of private law, procedure or the administration of law, and judicial organization. It should not promote or obstruct political social, or economic changes.'' We do not mean that these boundaries are to be treated as inflexible and final. Deviation within moderate limits must be to some extent a matter of judgment and discretion. Even as thus restricted, the work of the new commission will be sufficiently onerous and wide. Its capacity for service must be measured by the good sense which it shall show in avoiding the twin evils of an attempt to do too much and a willingness to do too little. The experiment, however fair its prospect, may fail like any other. If achievement is worthy of opportunity, authority and prestige will be augmented with the years. But whatever the outcome, one gain at least will be assured. The state will have done its part. It will not have turned a deaf ear to the unorganized multitude who, unable to speak for themselves, may look to it as *parens patria* for the correction of abuses. It will have created the agencies through which attention can be focused upon hardship and injustice. The wise years must judge whether it has builded well or ill.

Your committee, therefore, advises that the commission recommend to the legislature the formation of a permanent agency or commission for the amendment and correction of the law as it is administered in the courts. To the end that it may be conveniently distinguished from this commission, we may describe the new commission in this report as a ministry of justice, though we do not recommend this as the official title. The members of the ministry should be not more than five in number. We are strongly persuaded that at least two of the five should be members of the law faculties of some university of the state or some institute of learning of like standing and authority. Scattered amendments of the law are likely to prove a snare and an evil unless effected with scientific understanding of the law as a whole. Correction at one spot may produce abnormalities and inconsistencies at another unless the relation between the parts is remembered and perceived. The scholarship essential to so delicate a task can be found in the law schools more readily than elsewhere. On the other hand, the practicing lawyer, too busy often to arm himself

with the scientific equipment of the scholar, must contribute his knowledge of affairs, his experience of the practical workings of the law, his readiness of resource, his skill in administration, his sagacity and wisdom. Representation of both these elements of strength with their diverse points of view is likely to bring us in the end to the level of the best results. It would not be difficult to give illustrations of particular measures that such a body might advise with advantage to our law, and of particular inquiries that they might profitably pursue. Some have been indicated in the literature which the subject had already developed in law reviews and elsewhere. If we were to propose such measures now, they would seem fragmentary and trivial when compared with the comprehensive scope of the mandate laid upon us. A ministry, functioning continuously, will not be expected to remake the law overnight, but will be judged, as the years pass, by its accumulated achievements. We shall seem to minimize rather than emphasize its utility by the selection of a few instances out of the countless number which experience will develop with the progress of the years. We are to set the force in motion. We are to mark its power and its tendency. It will cut its own path. It will reach its own goal.

Having gone thus far, having recommended to the legislature the creation of this continuing body, functioning not occasionally nor for a season, but steadily, as a permanent channel of communication between the legislature and the courts and indeed between the legislature and the people, the question remains whether within the brief period available we shall attempt to do more until the legislature has considered this recommendation, and has determined whether there shall be in this state a ministry of justice.

There are many reasons why the present time is inopportune for a comprehensive revision by official agencies of the entire body of our law, and why a ministry of justice, dealing with specific problems, one by one, can be more helpful than a commission charged with the duty of revising the whole system in all its length and breadth. The duplication of labor and expenses, since the ministry and the commission to some extent at least would cover the same fields, is one consideration, though not the most important. The vital consideration is that other voluntary agencies have already been established; that they have been established with adequate financial support, under the leadership of the most distinguished lawyers and jurists of the country; that their

work will be available for our guidance as quickly as work of equal quality could be done by us ourselves; that even if we were to undertake the task we could hardly hope to vie with the Institute in the resources of learning and talent that have been placed at its command; and that when the reports are ready and are submitted to the public, a permanent commission will be able to determine to what extent the work is worthy of approval and to what extent approval will necessitate a change of the existing law. Illustration will make plain the scope of the agencies of improvement that are even now at work. We may begin with the law of evidence. We are often told that this branch of the law should be reformed. If were to take up that subject, we should probably do what section 5 of the statute empowers us to do, and appoint an advisory committee to consider and report. Some years ago, the Commonwealth Fund of New York established a committee for legal research. That committee determined to investigate the changes necessary in the law of evidence. A subcommittee was thereupon appointed, with Prof. Morgan of Yale University as chairman, and with other distinguished professors and judges as his associates. That committee has made a most careful and scientific study of the subject, sending questionnaires to many lawyers and students from whom light might be expected. Its report will soon be ready. We shall waste our time and energy if we duplicate this study. A permanent commission will be able to tell us how much to approve and how much, if any, to reject. Even more comprehensive is the work that has been undertaken by the American Law Institute organized at Washington in February, 1923. It is not too much to say that the whole juristic talent of the nation, whether on the bench or at the bar or in the universities, has enlisted under the banner of the Institute in the cause of a restatement of the law. We are told that criminal law and procedure should be made simpler and surer. A committee appointed by the Institute has been considering this subject, and its report may be expected shortly. It will consider how much of the existing trouble is due to inefficient administration by the police and by other administrative agencies and how much to uncertainty or complexity in the criminal law itself both substantive and procedural. No doubt there will be need of special changes to meet conditions or evils special to our own state. None the less, the problem here will be the same as the problem elsewhere, at least in many of its aspects. We shall waste our time and money if we travel over the same ground, studying, for example, the meth-

ods pursued in sister states and foreign countries, when necessary data will be at our service through work already done. So it is in other fields. The restatement of the law of contracts, of torts, of agency, and of conflict of laws is already under way. The anachronism of the seal has often been the subject of animadversion. A statute regulating its use has been drafted by the Commissioners on Uniform State Laws. The permanent commission will know whether the adoption of such a statute, with or without changes, will be helpful to our law. Possibly some subjects may seem so important as to call for investigation and report by special committees, supplementing the ministry. Conceivably this is true of Criminal Law or Criminal Procedure. Conceivably the time is ripe for changes in the law of real property after the manner of changes made recently in England. We speak of these possibilities without suggestion of approval. They are worthy of study and discussion. What seems to us certain is that an attempt to cover the law as a whole or even a considerable section of the law, would commit us to an inquiry covering many years, and an inquiry already in the making with the brightest promise of success. We need a permanent commission to utilize the results of these inquiries when they shall be given to the world. We need it for the correction of hardship and injustice as they shall manifest themselves from time to time in the workings of our legal system. But a commission organized as this one, functioning, not as a permanent body, but within narrow limits of time and even money, cannot helpfully embark upon the gigantic task of scrutinising and revising the entire fabric of the law.

One other thing the Commission *can* do within the brief term of its existence. It can sound public sentiment and particularly the sentiment of the bar to discover the branches of the law in which the need of the change is greatest. It can do this either by meetings or by published invitation for the submission of suggestion, or in both these ways. We may not have time to pass upon the merits of the reforms thus put before us for our study, though it is possible that some will seem so pressing and useful as to justify immediate action. In any event, we shall have gathered together a body of information that will be helpful in guiding the legislature to a conclusion whether the work to be done can best be accomplished through the creation of a permanent commission, or through the creation of special commissions to deal with special subjects, or through the continuance of this Commission, reconstituted, it may be, so as to be capable of dealing more efficiently

with a task so varied and extended. If public hearings are held, minutes of the addresses can be preserved, and a copy submitted to the legislature as an exhibit to form part of our report. The more the lawmakers know of evils, real or fancied, the better they will be able to judge whether there is a field of profitable activity sufficient to justify the creation of a new agency of government.

In discharge, therefore, of our duty to report a program of plan and scope, we submit:

1. That on or before March 15, 1924, the commission recommend to the legislature the creation of a permanent commission whose general powers and functions shall be those described in this report.

2. That the recommendation be accompanied by the submission of an appropriate bill.

3. That the bar and the public generally be invited to express their views as to the reforms most important for the better administration of justice in the courts.

4. That the commission determine after considering the responses to its invitation whether any of the reforms suggested are of such a nature that they should be recommended to the legislature at once, and that in any event the responses be communicated to the legislature and laid before that body for its information and guidance.

5. That the development of a further program abide the action of the legislature upon the recommendations thus submitted, or a statement by the legislature of its instructions in the premises.