The Path of Law Reform

Introduction

An incisive observer of the law and its institutions once remarked that "the English barrister tends to regard the common law as an inheritance to be preserved and technically perfected without being in any way altered".[1] The same thing has been said of the Continental civilian lawyers. When the focus shifts to Canada, where both systems operate, it is easy to see that all of us in the business of law are far more comfortable with formally perfecting received rules and procedures than we are with moulding the law to the needs of the social ends that law serves.

Law is said to be legitimate when it is made and has not been annulled or repealed in the constitutionally-prescribed way. This, however, tells us nothing about whether the law, no matter if it originates from the courts or legislatures, is wise, fair or consistent with our professed ideals. These latter attributes of law are not functions of the "legal" legitimacy of law so much as they are measures of its legitimacy in society. And law, as John Dewey pointed out, "is through and through a *social* phenomenon; social in origin, in purpose or end, and in application".[2]

One of the great unsolved problems facing the legal profession of the 20th century (and we include here the bench and government lawyers as well as the bar) has been the doctrine which demands that we concede legitimacy to almost every rule or doctrine that emanates from the Sovereign and is printed at state expense. Further, as the number of persons clothed with state power increases, our ability to test the official behaviour of those who act "under colour of law" seems to be decreasing. Holmes said in the 19th century that law was a guide to official action. In the 20th century it may be more accurate to say in some cases that official action is a guide to law, and in others, that law is often and unfortunately invoked as a means of regularizing or making technically "legal" whatever happens to be done by the state's bureaucracy, courts or, to quote Mr Justice O'Halloran of the British Columbia Court of Appeal, by "the dominant party then in control of the machinery of the State".[3]

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[1] Shklar, *Legalism* (1964), 14.
[2] Dewey, *My Philosophy of Law* (1941), 76.
[3] *Rex* v. *Hess (No.2)* [1949] 4 D.L.R. 199, 206.

The *Canadian Bill of Rights*[4] was an attempt to ensure that the ideals of our law find expression in the actions of those clothed with legal power. It was not a very successful attempt, as we know, but the jury is still out on its ultimate fate. The problems it addresses itself to, however, are very real, and in a sense define the task, not just of law reformers, but of everyone in the legal profession across Canada: the control of arbitrary official behaviour; equal treatment; fairness; prevention of irrational discrimination; and ensuring results that *are* "just" rather than results that are *defined* as "just" for no other reason than the fact that they are "legal". Law cannot elevate itself into justice simply by tugging on its own bootstraps.

To achieve these goals we require more than skilled lawyers and a wise bench; it is fair to say that we have both. We also require a continuing and systematic review of what the law does and why it does it, with the results we actually achieve being repeatedly tested against what we know we ought to be achieving. We need to always ask ourselves, and never fear to ask ourselves, whether we are living up to the ideals and logical implications of the democratic premise. To assist in this task, Canada, along with most other jurisdictions that share our heritage of parliamentary democracy, has created a Law Reform Commission.[5]

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[4] S.C. 1960, c.44 as am. by S.C. 1970-71-72, c.38, s.29.

[5] The Law Reform Commission of Canada owes its formal existence to the *Law Reform Commission Act*, R.S.C. 1970, c.23 (1st Supp.), as am. by S.C. 1974-75, c.40. Since the Commission established its first research programme in 1972 it has published twelve study papers relating to the reform of the laws of evidence, criminal procedure, substantive principles of criminal law, family law and the law relating to computers and banking. In addition, the Commission has published seventeen working papers since 1974 dealing with pre-trial discovery procedures and diversion, specific issues in the substantive criminal law, criminal procedure, sentencing and alternative criminal sanctions, family law, Commissions of Inquiry, and the family court. The Commission has presented seven Reports to Parliament: 1. *Law of Evidence Project;* 2. Guidelines on *Dispositions and Sentencing in the Criminal Process;* 3. *Our Criminal Law;* 4. *Expropriation;* 5. *Mental Disorder in the Criminal Process;* 6. *Family Law;* and 7. *Sunday Observance.* The Commission's present programme includes an examination of a number of seminal issues in the relationship of law to society: procedural fairness in the administrative process, the law relating to sexual offences, contempt of court, and the protection of life (which itself includes such topics as euthanasia, the definition of death, and consent to medical treatment).

Democracy, "lex"' and "jus"

Our courts have accepted parliamentary supremacy since at least 1688. It must be remembered, however, that Parliament did little that was inconsistent with the common law until the last century. It was quite easy for the courts to concede theoretical supremacy to Parliament while continuing to keep the common law contemporary through a change here, a new approach there, and a general policy of unassuming judicial activism.

When Parliament was democratized in the great reforms of the early 19th century the assumption of the legal philosophers, led by John Austin,[6] was that all significant policy questions could be successfully dealt with by the legislature. This was the legal profession's contribution to the democratic ideal: the removal of legislative power from a narrow judicial elite.

When, however, the bench retreated from imposing its non-representative social, moral and political views as law (something that must be counted as a great advance in democratic political theory), the judges, and consequently the lawyers, also laid down their centuries-old burden of systematically modifying, adapting and nudging forward the great mass of rules, doctrines, standards, precepts, ideals and guides to determination that collectively make up "law". Although we have been slow to perceive it and slower to respond to it, the very chemistry of the legal process has changed. Since the mid-1800's the formidable energies of the bench and bar have concentrated on the perfection of law received from the past as a consistent system of rules, on the theory that Parliament would carry the ball of change. Lawyers and judges became almost wholly occupied, and in too many instances, preoccupied with *lex* not *jus*. Parliament, on the other hand, has often appeared not to grasp the implications of this shift in legal doctrine, as if we still had judges with the mandate of Lord Mansfield to straighten things out when serious difficulties arose.

If the experience of the 20th century has shown anything, it is that parliamentary institutions have not been able to duplicate the great work of the legal profession in keeping the ordinary law responding to the dynamics of hundreds of thousands of individual cases. The assumptions of the 19th century legal philosophers have not always coincided with the priorities of, and massive demands placed upon, a contemporary Parliament.

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[6] See Austin, *The Province of Jurisprudence Determined* (1861).

As the judicial system withdrew from the business of creative adjustment of relations in a rapidly changing society, it became less and less responsive to the need for the development of new approaches to new social phenomena which is an integral part of a civilized system of government. Parliament neither can, nor has been able to, identify and take a vote on every minor aspect of law and procedure that is rendered obsolete by the substantial changes created by education, communications, population shifts, science and all the other modern phenomena that have assaulted the practices and verities of the past. On any particular point, use of the machinery of Parliament to continuously readjust minor rough spots in law would be like using a cannon to kill a fly. In the long run, however, minor rough spots eventually develop into serious legal problems involving large blocks of interrelated doctrinal structures.

The consequences have been threefold. First, Parliament has had to turn increasingly to the administrative process and the bureaucrat to make the vast number of individual value judgments and decisions required by life in the 20th century. The administrative system is growing and the legal system is shrinking, and with it is diminishing the traditional role and relevancy of the legal profession.

Secondly, policy being consigned to Parliament, the justification for movement and growth in what remains of the legal system must be found in the past, in precedent and established doctrine. As John Dewey pointed out, this "merely puts an artificial premium on ideas developed under bygone conditions"[7] — a situation that tends to seriously confine the scope of the contribution the legal profession is able to make to the perplexing demands of government under law in the 20th century.

Thirdly, we all know that the law *has* grown in the last century. But, because of the formal consignment of policy to Parliament, the changes that have occurred have been concealed under the doctrine that judges only "find" law, not make it. We agree with John Austin's view that this is "a childish fiction".[8] Further, it is a dangerous fiction. The democratic ideal claims that judges do not legislate even though experience has shown that Parliament cannot close the gap between what is and what ought to be. Social evolution, however, proceeds according to its own dynamics, with little regard for whether or not the law is able to keep up. Consequently,

[7] Dewey, *Human Nature and Conduct* (1922), 239.
[8] Austin, *Lectures on Jurisprudence* 3d ed. (1869), Cambell (ed.), 655.

lawyers and judges are being presented daily with increasingly novel problems for which they *must* find answers, without being allowed to openly recognize that the production of appropriate solutions, "just" solutions if you will, often requires them to trespass into Parliament's domain.

In pursuit of democracy we have created a system whereby the courts do not, in theory, legislate, yet where they sometimes must in fact, without official acknowledgment, make substantial changes in the social fabric through law. As a matter of political and legal philosophy we recognize that law-making by non-elected judges is undesirable. A democracy, it is said, follows a theory that judges only apply law, while the people make law through their elected representatives. As a matter of actual practice, we may be drifting dangerously close to the worst of both worlds. The lawyer's art at this stage of the 20th century is not only to know the law but also to know the code for concealing social and economic change in the interstices of jargon, precedent and legal fiction. The results are often unsatisfactory, some judges adhering strictly to what has been decided and others venturing into new territory, all doing their best to follow the ideal of fidelity to law.

We recognize on one hand that laws do not interpret or apply themselves and we also know that these tasks involve an appraisal of the temper and mores of the times. On the other hand, because "policy" is for Parliament, we suppress all mention of, and reasoned argument relating to, the policy motivations behind certain decisions. Whatever they are, and we can be sure they exist, they *must* remain hidden, unacknowledged, and unarticulated.

There is then, a doctrinal inability to recognize and debate judicial legislation on its merits, and therefore an inability to develop a rational doctrine of judicial change in law that ensures consistency with the views of a nation committed to democracy. The *Canadian Bill of Rights* could have given us a vehicle for this, but it has not so far been effective. This, together with the lack of adequate response mechanisms available to Parliament and the impact of the demands of our post-industrial society, has resulted in a concealed revival of a practice that John Austin thought he had consigned to the mediaeval scrap heap. Judge-made law is growing today, but its growth is not controlled by the public scrutiny of all exercises of state power (and judicial law-making is such an exercise) that democratic theory anticipated. Such scrutiny is no less healthy for the legal than for the political system. Without it, every judge is isolated from the experience and collective social wisdom of the bar and the rest of the bench. We therefore expect,

in matters where the judge must legislate and there is nothing else to guide him, that he will rely on his individual sense of justice. In most cases, this reliance has certainly not been misplaced. But in the long run, and law reformers must never lose sight of long-term considerations, this "might result in a benevolent despotism, if the judges were benevolent men".[9]

Constitutional Dimensions of Law Reform

Those who enacted the *Canadian Bill of Rights* and those who later created the Law Reform Commission of Canada were aware of these problems. The very existence of all law reform agencies in this country is a reflection of the fact that the existing mechanisms for legal response were falling unacceptably far behind social need. Canadian society requires a principle of growth in law that can help democratic practice coincide with democratic theory. The Commission's mandate, as we have interpreted it, embraces law in its widest sense. It follows that the larger problems we have discussed cannot properly be, in our view, divided into neat categories of "legal", "social" and "economic", with law reformers concentrating only on the "legal" and leaving the rest to someone else. Though we have tried, there is no valid way we can twist the definition of law so as to make social and economic considerations immaterial to justice.

It would be facile for us to claim or for anyone to assume that the law reform movement in Canada is going to straighten everything out. It is nothing more and nothing less than one form of commitment by Parliament to the search for solutions, as well as representing a new institutional development in a governmental structure that was created by evolution and which must continue to evolve. There can be no doubt that law reform can suggest some useful solutions. It may be, however, that in the long run its major contribution will lie less in what it answers than in what it questions.

One major aspect of our work involves recommending the removal of anachronisms and anomalies in law. This is mainly law as *lex* and deals with rules which no longer serve any purpose or which conflict with other rules. The Canadian Bar Association and other lawyers' organizations have spoken out on the need for this

[9] Cardozo, "The Nature of the Judicial Process" in *Selected Writings of Benjamin Nathan Cardozo* (1947) Hall (ed.) 107, 163.

sort of change for years, and it has certainly been needed. Although the courts have continued to move the law along in many areas, the definitive division of function reached in the 19th century between Parliament and the judiciary means that the legislators, not the judges, are responsible to the people for the ongoing modernization of all Canadian law. We, therefore, are undertaking the development of a programme which will be aimed at examining and revising the hundreds of outdated minor and annoying rules (whether in federal statutes or in the common law that lies within federal legislative jurisdiction) and plan to present such proposals for change to Parliament as part of an ongoing process. Taken individually, each change will be unextraordinary and perhaps mundane. Collectively, however, such changes would represent the practical and systematic, as opposed to the theoretical and sporadic, assumption by Parliament of responsibility for continuing the great task of construction of our legal system that has all too often and all too unfortunately fallen between two stools over the past century.

In this sense, the mission of the Law Reform Commission of Canada, and indeed of all such commissions, will be to make a contribution towards assuring that the democratic institutions as originally envisaged are able to function effectively under the awesome impact of 20th century realities. This programme will be concerned almost exclusively with what is sometimes fashionably disparaged as mere "black-letter" or "lawyers' law". It cannot be doubted, however, that the past inability of our system to respond effectively to the host of minor problems repeatedly experienced by the legal profession in the task of ensuring that every Canadian gets justice, constitutes one major, if not overwhelming, problem. We regard this part of our work as one of our most significant responsibilities.

A second important aspect of our mandate which, among all law reform agencies and commissions in the world, we believe is unique to the Law Reform Commission of Canada, is:

> the development of new approaches to and new concepts of the law in keeping with and responsive to the changing needs of modern Canadian society and of individual members of that society.[10]

Parliament has given us a broad definition of law, one which reflects the role of law in Canadian *society* rather than the role of law in Canadian *courts*.

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[10] *Law Reform Commission Act*, R.S.C. 1970, c.23 (1st Supp.), as am. by S.C. 1974-75, c.40, s.11(d).

Unfortunately, the education, training and experience of modern lawyers is almost exclusively oriented to the judicial aspect of the legal system. Lawyers fall into the pattern of interpreting experience through the norms established for them by courts in deciding cases. To say a fact exists means that it can be proved to exist after passing through the screen of the rules of evidence, and therefore has some consequence to the outcome of a legal encounter. To say something is relevant means relevant in terms of whether it affects the course of legal events, and not socially or economically relevant. Things that do not legally exist or are not legally relevant are someone else's responsibility. In the classic approach of the last century of jurisprudence we say these things are matters of "policy", or belong to the realm of "politics" which cannot be allowed to interfere with the determination of individual rights and responsibilities, which is the business of law.

The fidelity with which lawyers and judges have maintained this distinction has led to court decisions that are beyond doubt absolutely independent of notions of political expediency and which have not subjected individuals' rights to the whims and vagaries of various popular movements and trends. This is not only laudable but essential to a civilized system of justice.

Court work, however, is only a small part of what lawyers do. As we said at the outset, and indeed as the Chief Justice of Canada has said, law is a social discipline[11] and as such has a great contribution to make to the growth and structuring of every aspect of Canadian society. That contribution is artificially confined when lawyers see their role *outside* the courtroom as circumscribed by the limits that exist for very good reasons within it. As one political scientist from Harvard University wrote:

> The habits of mind appropriate, within narrow limits, to the procedures of law courts ... have been expanded to provide legal theory and ideology with an entire system of values. This procedure has served its own ends very well: it aims at preserving law from irrelevant considerations, but it has ended by fencing legal thinking off from all contact with the rest of historical thought and experience.[12]

That the reform of the law is of a broader nature than its practice has been acknowledged in the mandate given to us by Parliament. We are required, then, to see law not just as logic, precedent and analogy, but also, in Cardozo's words, as "philosophy, history,

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[11] Laskin, *A Judge and his Constituencies* (1976) 7 Man.L.J. 1, 11, 14.

[12] Shklar, *supra,* note 1, 2-3.

custom and social justice" in a system in which "the final cause of law is the welfare of society".[13]

Without a deliberate, conscious and systematic questioning of the grounds of doctrines we take for granted, a person trained in the classical legal method of "imitation of our fathers" will, in Holmes' words,

> hesitate to affirm universal validity for his social ideals, or for the principles which he thinks should be embodied in legislation.
> ... He may be ready to admit that he knows nothing about an absolute best in the cosmos, and even that he knows next to nothing about a permanent best for men.[14]

Holmes, however, felt that this professional self-restraint, this excessive reliance on legal authority to the exclusion of experience, became, at some point, inbred. He therefore called for lawyers to examine the received law with:

> An enlightened skepticism ... a deliberate reconsideration of the worth of those rules. When you get the dragon out of his cave onto the plain and in the daylight, you can count his teeth and claws and see just what is his strength. But to get him out is only the first step. The next is either to kill him or to tame him and make him a useful animal. For the rational study of law the black letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.[15]

To Holmes' "statistics and economics" we suggest adding psychology, sociology, psychiatry and all the other sciences and disciplines that have since come to maturity. Insofar as its content spans the whole range of human activity, law reform is an interdisciplinary undertaking no less than law itself. If we fail now to reach out to other social disciplines, justifying this failure by some theory that what they have to say is not "legal" and is therefore not relevant, we run the very serious risk of needlessly fostering the movement within government over the last century to turn to other agencies and structures outside the judicial system for a practical adjustment of significant human problems. This has happened before, when the common law system became so rigid and closed to new ideas that the Crown had to step in and provide justice, as opposed to law, through the prerogative courts and Equity. The monumental growth of bureaucracy in the 20th century is a duplication of the same phenomenon. Those who do not understand their history will be condemned to relive it.

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[13] Cardozo, *supra*, note 9, 133.
[14] Holmes, *The Path of the Law* (1896-97) 10 Harv.L.Rev. 457, 468.
[15] *Ibid.*, 469.

It would seem that nobody wants "big government" yet the bureaucrats for all the abuse that is heaped on them, are the most important means by which the modern system delivers to every man his due — a result that has been synonymous with "justice" during the entire history of Western civilization. Unless our traditional system of fixed laws, known rights, confrontation with accusers and all the rest of what we lawyers hold to be fundamental is to be eventually reduced to an insignificant role in our society, so that men look to government and its functionaries rather than to law as the source of rights, liberties, duties, and freedom itself, then we must open our courts, our law and more important, our minds, to the influences that shape public attitudes and expectations in contemporary society.

This is one way we interpret the mandate given to us by Parliament: to reach beyond those concepts and boundaries that determine what may properly be considered by an appellate court; to break through the iron gates of formalism; and, by the use of a multidisciplinary approach, to bring *into the formulation* of law the vast range of insights into the human condition that we, as lawyers, in a different context, so rigorously *exclude from its application.*

The Constituencies and Dynamics of Law Reform

Law is one of the few disciplines dealing with the public which makes little effort to discover if its consumers are satisfied. From the highest court to the newest law student, all recognize that law exists to serve the public interest, yet those who have solved the extraordinary complexities of future interests (and can understand the *Rule in Shelley's case*) have never managed to develop any mechanisms of comparable sophistication to find out what the public thinks about the law or how it could be improved. We would be pleased to announce that we have found the perfect formula, but perfection has a tantalizing way of remaining beyond human grasp. We can say, however, that we regard the public, along with the bench and bar, as our constituency and in many ways, our most important constituency.

It is easy to now acknowledge that when a disputed title in a quite ordinary 14th century land transaction was settled by a lawsuit in which the fictitious Richard Roe was accused of trepass *vi et armis,* and the equally fictitious John Doe was forcibly dispossessed, the public interest was not particularly well served. Perhaps it even occurred to a few members of the public to ask

their lawyers what all this rigamarole was about and what these Doe and Roe people had to do with it. If so, they were doubtless soothed by references to the occult majesty of the law.

That little corner of conveyancing was tidied up in a matter of three or four hundred years, but it is as close to moral certainty as we can get when we express the opinion that the ghostly descendants of John Doe and Richard Roe still keep the meter running in more than one law office. It is instructive, for example, to compare the response of some members of the bar to the public support of the Law Reform Commission's recent proposal that marriages no longer be ended by an accusatory, usually fictitious, certainly corrosive and always expensive lawsuit. It was very much as if a 14th century bar convention had been presented with a proposal for a *Short Form of Deeds Act.*

The point we are making is that the public interest does not always coincide with the interests of lawyers or of judges for that matter. No one is suggesting that we take a survey or hold a plebiscite every time a law is changed. But communication with the public, as well as with the bench and bar, is an integral part of law reform.

Communication is a two way street. It has been our experience that an informed public can appreciate what lawyers and judges do and can understand, in light of the pressures, uncertainties and demands placed on legal professionals, the deficiencies in the system. But they can also understand a great deal better than we may think, *and they tell us so,* the difference between difficulties required by justice and difficulties created by the tribal customs of the law. The Law Reform Commission of Canada does not exist to further the interests of organized lawyers or of judges' associations any more than it is an arm of the government of the day. Where it is our considered opinion that governments, lawyers or judges follow traditional legal patterns that neither further the cause of justice nor serve the public interest, we can and must propose reform.

Since we deal with unsolved problems, it is inevitable that our work will take us to the heart of controversy. Law has always managed to paper over its significant problems with legal fictions, conceptual arabesques, uneasy compromises and conspiracies of silence. It is not possible to lift the lid on such matters without aggravating old wounds and disturbing conceptual castles where justice is thought to reside, although it may be often as an unwilling guest. We would seldom annoy anybody if we concentrated

all our efforts on the *Statute of Limitations*, or were exclusively occupied with black-letter law, though, possibly, our very existence may annoy a few. Parliament, however, has required us not only to propose reform of the law, but also new concepts of the law, and we cannot do that without asking people to surrender a part of what is known, what is familiar and what is comfortable.

Over the doors of one of our great western Canadian law schools is the motto, *Fiat Justicia Ruat Coelum*, "Let Right be Done, Though the Heavens Should Fall". Some, however, would have us translate such safely theoretical invocations to righteous deeds as "Reform the Law but for Heaven's Sake don't *Change* Anything". If the heavens do fall, then we would doubtless be prepared to entertain suggestions that we had gone somewhat too far, too fast. In the absence of that unlikely eventuality, however, rather than bracing against disaster, we who are associated in the task of law reform will continue, with the good will and assistance of all those involved in the legal system, to devote our primary energies to making some contribution towards leaving the law a bit more understandable, a bit more fair, a bit more humane than we found it. We are prepared to debate the wisdom and necessity of every reform we propose and the validity of the particular process we have adopted in order to formulate our proposals. We are not, however, prepared to concede that the necessity for law reform, on a systematic and ongoing basis, is even open to question at this stage in the development of our legal system and its institutions.

It is gradually sinking into professional and public awareness that reform of the law involves not only debates and motions at the bar conventions and in the law schools but also the very real necessity for choice and change. Because these do not come easily, and as it has become apparent that the Commission is not just a way of giving professors something interesting to do or giving lawyers and judges a break from their jobs, our work has resulted not only in warm support and encouragement but also in some discomfort.

Debate means discussion of ideas, confrontation, challenge and response. The debate begins at the Commission and continues with the bench, the bar and the public. Our whole approach to our task, starting with the publication of study papers, building towards tentative proposals in working papers and arriving at recommendations in our reports, is predicated on the idea that law reform is not an isolated exercise or wise thoughts in a vacuum. Rather, it is a process of determining the policy preferences of the community in which all members of the community can and should participate.

This often requires months and years. Law reform is still too new to have built up a body of aphorisms and maxims but there is one that we think is ready for publication now: "Reform in haste, repent at leisure". Putting together a reform package that combines the legislative power of Parliament with the views of the bench, the bar, other disciplines and the public takes time; time for views to be conceived, time for propositions to be formulated, time for cautions to be expressed and time for alternatives to be proposed.

Reform on a Fundamental Level

Whatever may have been its shortcomings, judicial law-making was generally accomplished on a conceptual as well as a practical level. It was slow, but it kept legal theory abreast of legal practice. Legislative law-making, like the pace of social change over the past century or so, has been faster but has not been particularly concerned with the theoretical or conceptual part of our law. This is precisely that part of the law, however, that must provide the supporting structure for all change, no matter how evident the need for some pragmatic improvement in areas of detail.

As the experience with the *Canadian Bill of Rights* has shown, a change of any significance which leaves untouched the entrenched starting points for legal reasoning is handicapped from the outset because of its inconsistency with fundamental conceptions that, notwithstanding invocations of the supremacy of Parliament, are more authoritative than specific legislative content. Unless particular reforms can, where necessary, be coupled with more complex structural alterations, many changes in specific legal content or practice are predestined to characterization as subversive of a system that has a ruthless efficiency in dealing with threats to the integrity of its internal logical patterns. Isolated reform efforts may fail not because they are unwise — a conclusion that the legal system, at least officially, generally tries to avoid making — but rather because they are simply inconceivable. We all know how a case that raises disturbing problems on a fundamental level can be effectively finessed into some legal limbo by the device of saying it must be "confined to its own particular facts". The same fate can be just as authoritatively assigned to superficial legislative reform through legitimate manipulation of the canons of interpretation.

One of the main objectives of the Law Reform Commission is therefore to examine, always thoroughly, sometimes exhaustively, the common law canvas upon which any particular reform is to be painted, so as to provide Parliament not only with the particular formula for achieving a desirable goal but also with the blueprint for structural change in the common law foundation for any new legislative programme.

Such reform approaches include making available to Parliament a contemporary and legislatively-appropriate version of the significant factors that guided those who were engaged in the great task of building the common law from the bench. In addition to a thorough restatement of the structural or "legal" dimensions of any proposed course of action, there must be included an analysis of the social and economic implications of suggested reforms and our perception of the individual and public interests which the reform seeks to secure, modify or advance. As opposed to the idiosyncratic elements of traditional judicial law-making, in which the ultimate result was far too often the product of the narrow facts of a particular case as perceived by a single judge, we make every effort to support our recommendations with objective data gleaned from a broad interdisciplinary base.

Because law reform deals not only in rules but also in legal abstractions, a reform programme, once formulated, may sometimes appear to be objectionally radical, especially to those whose professional experience and perceptions of the need to maintain the integrity of established expectations incline them, especially in conceptual areas, towards defining the acceptable limits of change in terms of what is legitimate within the judicial process. Legal professionals are also often uneasy with legislative reforms on a doctrinal level not only because we have had so little experience with them but also because the past record of parliaments in such matters, such as it has been, has sometimes unfortunately failed to create confidence that alterations necessarily mean improvements. A law reform commission must always be sensitive to these apprehensions and where it finds that they are well-founded in terms of the public as well as the professional interest, must adjust its reform programmes accordingly. Notwithstanding any of this, however, one of a law reform commission's essential public responsibilities is to avoid confining itself to superficial, isolated, *ad hoc* and "safe" changes to a system that requires an institution for examining much of our basic approach to, and way of thinking about, law.

Tradition and transition

If the last century was one in which men of firm, if not necessarily well-founded, social conviction and moral certainty forged and clearly articulated the heritage of basic principles we use — and we think, with respect to most approaches to contemporary legal problem-solving, that this view is accurate — then the modern experience must be characterized, if we are to be candid, as one of caution often bordering on ambivalence, distrust of the truth of our discoveries about ourselves and a not-quite impalpable want of confidence in our abilities to duplicate the great work of our predecessors in law. We certainly have among us men and women no less able than they, but the mantle of those who did not hesitate to make decisive pronouncements on issues that we can see, in retrospect, were more complex than was apparent to nineteenth century eyes, does not rest comfortably on the shoulders of many legal professionals in our more pluralistic age.

Unfortunately the thrust of our philosophical heritage, with its emphasis on uncompromised authority, its need to justify the classic winner-take-all result, and its formal commitment to finding solutions in the form of the "true rule", often proves inadequate as a vehicle for the necessary confrontation of our ambiguities. Although it is only satisfactory as a short term technique for consolidating gains and assessing alternatives, the experience of the 20th century looks more and more like a long term reliance, both legislatively and judicially, on the device of seeking respite, if not refuge, in muddling through on a case-by-case basis.

The appreciation we have of the multifaceted nature of many significant issues that now arise for resolution through law seems to have had two results. First, there has been a retreat from the simplistic practice of laying down judicial fiats as if they were inevitable expressions of social or economic policy aimed at the permanent best of mankind, destined from all time to be unfolded by the legal system. This, if anything, is consistent with what we have learned in this century about the human condition. Secondly, however, we also seem to have generally underemphasized the need for the legal system to assert its authoritative voice in the framing of our contemporary goals. This is seriously inconsistent with the fundamental rights of the public to due process of law in a democratic society.

These results may be attributable, at least in part, to the fact that we have a system, legislative as well as judicial, that is still

conceptually geared to respond to the needs of a society in which social change was evolutionary rather than revolutionary. In addition, the jurisprudential approach in legal education no less than in our appellate courts still has not given us the intellectual illumination by which we can critically examine such things as traditional prohibitions concerning the folly of questioning authority or the wisdom of an inheritance that assures us it is better that a rule be settled than it be settled right.

Our hesitancy may be understandable and our prudence admirable, but our results are too often neither. We can no longer afford the misleading comfort of continuing to build for the 21st century using 19th century tools.

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