THE LAW REFORM COMMISSION OF CANADA

Some Impressions of a Former Member

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I am honoured to have been invited to give the first lecture in this newly established series of Viscount Bennett Memorial Lectures. It is, I know, hoped that, at least in the future, lectures will be delivered that will contribute to our understanding of law and of its role in modern society.

Viscount Bennett was not only a distinguished statesman and lawyer. He not only played a major role as Prime Minister in the national life of Canada and as a Commonwealth statesman. He was a New Brunswicker. His continuing attachment to the Province is signified in his title, Viscount Bennett of Calgary and Hopewell. It is appropriate that this series of lectures, which will be an annual feature in the life of the Faculty of Law of The University of New Brunswick, should bear his name.

I am also pleased by your invitation because of my long personal association with the Law Faculty, as student, teacher and dean. We came through a difficult testing time together. The School is now firmly established. The future is filled with promise.

I have decided to devote this first lecture in the series to the Law Reform Commission of Canada. I have chosen the topic because I believe that the Commission, too, is now well established and filled with promise.

The theoretical case for institutionalized law reform has by now been made. Skepticism will be answered, if it is to be answered at all, not by further argument but by performance. I do not think that I can add anything very useful to what others have said so well about the need for law reform commissions for the purpose of complementing the work of legislatures and the judiciary in improving the law. At any rate, there is, by now, a considerable body of experience with law reform in the Canadian provinces, in England and Scotland, and within other Commonwealth countries, as well as in the United States and in other countries. There are lessons to be

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learned from this experience, lessons which may be more helpful than discussions in the abstract.

My purpose in talking about law reform is to tell you of some of the impressions I gathered about its scope and methods as a member of the Law Reform Commission of Canada during the Commission's first three years. The national Commission is at least somewhat distinctive. It is the first commission of which I am aware to be established at the federal level within a federal system. It is also, in my view, somewhat different from other commissions in the attitudes it has already developed on the purposes and methods of law reform. I will speak of my impressions rather than of my conclusions because, when I left the Commission, its initial program was only at what I would call mid-course. Much still remained to be done to test original conceptions and methods. Nonetheless it may be worthwhile to attempt to pull together some of my reactions, however tentative they may be.

Despite all that has been written and despite the experience that has so far been accumulated, there remains, I believe, a broad division of opinion over the purposes of law reform. Some see in law reform a way of correcting technical defects in the law, both statutory and common, a method of culling out the obsolete and the anomalous, of making the law as it is written in statute books and as it appears in judicial precedents internally more logical. This approach tends to assume that the postulates underlying present rules and structures are valid. An advantage of this attitude toward reform is that the reformer may avoid controversy and involvement in politics in the broadest sense. This approach conceives of the law reformer as technician, as skilled repairman.

Others see in law reform a broader purpose, the examination of the law in the light of policy, of social objectives, of philosophy. Not only are the rules in the books open to reform, but the jural postulates are themselves fair game. Dissatisfaction with law is running too deep today to be removed by a pruning job. There are, however, dangers in this approach. One danger, as seen by the technician-reformers, is the possibility of compromising a program by engaging in public debate going beyond what they would call "law properly so called". Another danger is that one may risk the accusation of encroachment upon the territory of Parliament or a legislature, the area of policy development through law. It does seem to me that this particular danger is not serious if one keeps in mind that the role of a law reform commission is purely advisory.

The federal Law Reform Commission, while not neglecting technical revision as one of the purposes, from the outset opted for the broader policy-oriented approach. Fortunately our founding statute contained words apt to justify this decision: we were directed

to develop "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".[1] I was in accord with this approach and, if I were still with the Commission, I would still be in accord with it. There was agreement within the Commission on the general proposition that national law reform should be a broadly based activity, an activity that should extend well beyond tidying up the law and should not shy away from basic questions of policy. Under the umbrella of this broad agreement there was ample room for divergence over methods. And, of course, I am not suggesting that, as experience was gained, views on purposes did not shift from time to time. The members of the Commission were, after all, very distinct personalities.

The Commission's initial emphasis on policy was, I suppose, to some extent a consequence of the predilections of the members of the Commission. It was altogether natural that people newly appointed to what seemed to be a challenging and creative job should be attracted to its more exciting possibilities. The four full-time commissioners, drawn from active careers on the Bench and in the universities, were to devote their energies to the task of reform for up to five years. We could, of course, have elected to play it safe by concentrating during the first few years on the technical and the noncontroversial. We decided, however, to gamble for higher stakes[2].

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1 The objects of the Commission are stated in section 11 of the *Law Reform Commission Act*, R.S.C. 1970 (1st Supp.), c. 23:

> 11. The objects of the Commission are to study and keep under review on a continuing and systematic basis the statutes and other laws comprising the laws of Canada with a view to making recommendations for their improvement, modernization and reform, including, without limiting the generality of the foregoing,
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> (a) the removal of anachronisms and anomalies in the law;
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> (b) the reflection in and by the law of the distinctive concepts and institutions of the common law and civil law legal systems in Canada, and the reconciliation of differences and discrepancies in the expression and application of the law arising out of differences in those concepts and institutions;
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> (c) the elimination of obsolete laws; and
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> (d) 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.

2 Originally, the membership of the Commission consisted of a chairman and a vice-chairman, who were to serve full-time, two other full-time commissioners and two part-time commissioners. The Act was amended in 1975 (23-24 Elizabeth II, c. 40) so as to provide that all the members should be full-time, and that there should be five members, including the chairman and the vice-chairman. Sections 3 and 4 of the Act, as amended, provide:

It is also true that particular reforms, even those technical in nature, must have a context from which to take meaning. It is not possible to judge what is out-of-date, what is inappropriate, without having a system of values against which to measure particular proposals. It soon became apparent to us that, for whatever reason, legal literature in Canada on most of the questions we would have to consider was either sparse or non-existent. One simply had to think through one's own "philosophy of law", whether one viewed the purposes of reform in a broad or narrow sense.

It is, of course, artificial to draw a sharp distinction between policy and technicalities. They flow together. A good example of this was our experience with the law of expropriation. At the beginning it seemed that it might be well to have at least one project, rather precise in nature, that could be reported on quickly. There had been a general revision of Canadian expropriation law resulting in a new *Expropriation Act* not long before the Commission itself was established. Certain aspects of Canadian expropriation law had not, however, been covered by the statute, and the Minister's statement in the House indicated that work remained to be done. This, we thought, presented an opportunity to produce something promptly. One has only to read the Commission's Working Paper on Ex-

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3. A commission is hereby established to be known as the Law Reform Commission of Canada, consisting of a chairman, a vice-chairman and three other members, to be appointed by the Governor in Council on the recommendation of the Minister.

4. (1) The chairman, the vice-chairman and each other member of the Commission shall be appointed for a term not exceeding seven years.

(2) Subject to subsection (3), a member of the Commission is eligible to be reappointed in the same or another capacity.

(3) The chairman, the vice-chairman and at least one other member of the Commission shall be appointed from among persons in receipt of a salary or annuity under the *Judges Act* or barristers or advocates of not less than ten years standing at the bar of any of the provinces, and

(a) the chairman or the vice-chairman, and

(b) at least one of the other members qualified under this subsection

shall be appointed from among the judges of the Superior Court of Quebec or members of the bar of that Province.

(4) Each member of the Commission holds office during good behaviour but may be removed at any time,

(a) in the case of a person in receipt of a salary under the *Judges Act*, by the Governor General on address of the Senate and House of Commons, and

(b) in any other case, by the Governor General in Council for cause.

(5) The chairman, the vice-chairman and each other member of the Commission shall devote the whole of his time to the performance of his duties under this Act.

propriation[3], released after some two years of effort, to realize how mistaken we were in believing that the subject could be dealt with absent a well-thought-through philosophy on the role of expropriation in modern society. At the very outset of the paper there is a carefully articulated statement of the basic policies that ought to be served by a good expropriation act.

While technique and policy cannot be isolated one from the other, it remains true that it is possible to place more emphasis on one than the other. The emphasis that one chooses to give can be very important in determining the approach of a law reform commission to its job.

THE PROGRAM

The first step to be taken when embarking on law reform is to select the subjects to be studied. It is important that a law reform commission should be given the right to choose its own subjects. One of the reasons for appointing a commission is, after all, to obtain expert opinion on and to identify the areas of law most needing reform. The Law Reform Commission of Canada does have the authority to define its program[4]. It is true that the program must be submitted to

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3 Working Paper 9, *Expropriation* (1975).

4 Section 12 of the *Law Reform Commission Act* provides:

> 12. (1) In carrying out its objects, the Commission
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> (a) may receive and consider any proposals for the reform of the law that may be made or referred to it by any body or person;
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> (b) may initiate and carry out, or direct the initiation and carrying out of such studies and research of a legal nature as it deems necessary for the proper discharge of its functions, including studies and research relating to the laws and legal systems and institutions of other jurisdictions in Canada or elsewhere;
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> (c) shall prepare and submit to the Minister from time to time detailed programs for the study of particular laws or branches of the law with a view to making recommendations for their improvement, modernization and reform, and shall include in any such programs prepared by it an estimate of the resources that will be required to carry out any such studies and the time that will be required for their completion;
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> (d) shall, in accordance with any programs for studies described in paragraph (c) that are approved by the Minister, undertake or direct the undertaking of studies of particular laws or branches of the law and make recommendations for their improvement, modernization and reform; and
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> (e) shall, with the concurrence of the Minister and to the extent that the Commission is able to do so without, in its opinion, impairing its ability to carry out any studies that have been or are to be undertaken by it pursuant to paragraph (d), provide information, research material and study results and make recommendations to departments, branches and agencies of the Government of Canada concerned with the improvement, modernization or reform of any laws or branches of the law.

the Minister of Justice for his approval. He must, however, table the Program in Parliament as it is submitted to him. He must indicate any item not approved by him, and presumably he would be expected to give his reasons for rejecting it.[5]

Apart from the details of organization, the hiring of research staff, and related matters, the Commission did give priority to preparing our program of studies. Quite frankly, certain important questions had already been decided. It was clear, from statements made by the then Minister of Justice, the Honourable John Turner, in the House of Commons and elsewhere, that the expectation was that our most important undertakings were to be in the areas of criminal law and evidence. We were in no way dissatisfied with this understanding. The very selection of the members left no real alternative. Mr. Justice Hartt and Mr. Justice Lamer were known for their work in criminal law and Professor Martin Friedland was a distinguished criminal law teacher and scholar. Of the full-time members appointed, I was the only one who was not a criminal law expert; most of my teaching had been done in common law subjects, in equity, and in jurisprudence. By default, I became the "expert" on every topic other than criminal law and evidence discussed in the Commission. I had to keep reminding my colleagues that I really knew no more than they did about the details of subjects like family law.

There is no question that the selection of the Commission members determined, at least in major part, the areas of law which

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(2) The Commission shall include in any program for studies prepared by it pursuant to paragraph (1) (c) any study requested by the Minister to which, in his opinion, it is desirable in the public interest that special priority should be given by the Commission, and the Commission shall, in determining its priorities for studies in relation to any such program, be governed by any request so made to it.

5 Section 18 of the *Law Reform Commission Act* provides:

18. The Minister shall, within fifteen days after

(a) the approval by him of each program for studies prepared by the Commission pursuant to section 12,

(b) the receipt by him of each report of the Commission submitted to him under section 16 on the results of any study undertaken or directed by the Commission pursuant to any program for studies described in paragraph (a), or

(c) the receipt by him of the annual report of the Commission submitted to him under section 17,

or, if Parliament is not then sitting, within any of the first fifteen days next thereafter that Parliament is sitting, cause to be laid before Parliament a copy of such program or report, together with, in the case of a program, a statement indicating any item or items proposed by the Commission and not approved, and in the case of a report, such comments, if any, as the Minister sees fit.

could be studied during the first five years or so. To the extent, however, that major items in a program remain unfinished as the terms of members of the Commission expire, the program itself may in turn influence the selection of successors.

It seemed important to all of us, despite what would be an initial emphasis on criminal law, that the Commission should not come to be regarded simply as a kind of royal commission on the subject. That is one reason why, before we submitted our program in final form, we went to the public with a draft program seeking criticisms and suggestions. As a result of the response we received, we revised the draft so as to include a major project on family law. We also included a project on administrative law and undertook to explore other areas with a view to preparing a possible supplementary program.

The drafting of a program presents a difficult preliminary problem: in what detail should the projects be defined? There are two dangers. On the one hand, if a project is defined too specifically, it may unduly confine research later undertaken. On the other hand, lack of specific targets may tend to postpone initiating and completing the work to be done. The problem is not dissimilar to that which confronts a student beginning a dissertation for a doctorate or a master's degree. Some find it more convenient to wait until exploratory research is well advanced before preparing an outline. Others need an outline in order to have the stimulation of specific targets.

Both techniques were used in drafting our program. On the criminal law side, we started on the assumption that the long-term objective was to prepare a new and comprehensive criminal code, embracing general principles, specific issues, and procedure. With that in mind, we drafted an outline covering the entire area of criminal law under major headings formulated along more or less traditional lines. Within each major category, however, there was a general statement of purposes and problems followed by a listing of selected topics to be given priority treatment. I know that we were criticized for this approach. It was said, for example, that the program of research in criminal law resembled the outline of a course in a law school curriculum. There was, indeed, within the Commission itself a certain tension during the drafting of the program, some being of the opinion that the program bore the imprint of the conventional; that it did not, in its wording, adequately impart our underlying commitment to innovation in style, experimental technique, and outlook on the social purposes of criminal law in present day society. My own experience with the outline, however, was that it served quite well. It at least had the effect of giving us, from the beginning, a comprehensive framework. This had the consequence of reminding us from time to time of the need for

relating specific studies to an overriding general purpose. The outline was, I found, sufficiently flexible to leave room for experimentation. At any rate, nothing precluded program revision as time went on. This was mooted occasionally, but adaptation by means of changes in emphasis and in the grouping of particular subjects, all possible under the program, seemed to some of us to meet changing needs.

In administrative law we adopted precisely the opposite approach. Shortly after we commenced operations, we held a meeting which was attended by many of the leading administrative law teachers in the country. As a result of that meeting and of extensive inquiries, it became clear that we simply did not have enough pragmatic information about the ongoing operations of the federal administrative process to prepare an outline at all analogous to the one on criminal law. Over the first three years we moved slowly in this area. We concentrated on the preparation of detailed studies of particular administrative agencies. The object was to discover what were the practical problems in Canadian administrative law at the federal level.

PUBLIC INVOLVEMENT

From its very beginning, the Commission conceived of law reform as involving public participation in matters of legal change. There were at least two reasons for this. One was the belief that, ultimately, significant legal change must be grounded on pressures for change moving from the public. It is unlikely that such pressures would emerge from the legal profession alone, particularly in relation to the postulates underlying the legal order. Another reason for seeking public participation was that the Commission believed that a significant part of its role was, quite simply, to educate citizens and to be educated by citizens on the role of law in social change. As we said in our first annual report, we took the view that law reform involved "a reciprocal educative function". The Commission deliberately set out to stimulate discussion and debate on "the development of new approaches to and new concepts of law". Without the involvement of the lay public, it would really not have been possible to fulfil our statutory mandate.

The search for techniques to secure public involvement proved to be one of our most puzzling tasks. It led, at times, to a sense of frustration.

The basic structure we developed for consultation was quite simple and straightforward. In respect of each matter we undertook to study in our program, we set up a research project. Each project included one or more members of the Commission and members of the research staff assigned to the subject being studied. The first task of the project was to produce a study paper. This paper usually con-

tained a review of the existing state of law, an indication of its deficiencies, and tentative recommendations for change. The study paper would then be distributed to a wide range of interested individuals and groups, non-legal as well as legal. Criticisms and suggestions were solicited. The next stage was to prepare a Commission working paper based on the project study paper and on the reactions to it. The working paper was then to be given an equally wide circulation. The most important difference between a study paper and a working paper was that the working paper would contain the tentative views of the Commission itself. The final stage was envisaged as the report containing the definitive recommendations of the Commission, the report to the Minister of Justice.

In fact, at the time I left the Commission, we had not got beyond the circulation of working papers on the subjects we were studying. By that time, however, we had decided to forego the study-paper stage, except in relation to our Evidence Project where the pattern was already established and commitments made. It had become evident to us that the circulation of study papers involved going to the public once too often. Many seemed unwilling to respond to a paper to which the Commission itself was in no way committed.

The volume of public response to the material circulated fell short of our expectations. Many of the responses were incisive and helpful, but there just did not seem to be enough of them.

By way of stimulating interest in the study and working papers, use was made of the mass media, press releases, radio and television interviews, and visits to Bar societies and many other groups. I have no doubt that all of these approaches must be continued. It is difficult to estimate what the impact of this sort of communication may have been or may yet be. One can never be sure what has been read by whom and what discussions may already be under way.

I have rather a strong personal view on the whole matter of communication with the public. I have long had the feeling that the best single method of reaching non-lawyers — and lawyers too — is the written word directed to interested readers in the form of clearly written short books or papers. It is a myth that people in modern society have stopped reading; that they respond only to electronic flashes on a screen. One has but to drop into any bookstore in Ottawa during the lunch hour to sense the significance of the written word. I suspect that more people, proportionately more people, are now reading good books than ever before. When I was at the Commission, I kept repeating, to the point of boredom, that we should be turning out books that could be picked up by people who, while waiting for their plane at the airport, stop at a news stand or drop into the bookshop to buy a copy of Reich's *The Greening of America* or Toffler's *Future Shock*. Now I would add Pirzig's *Zen and The*

Art of Motorcycle Maintenance. What I have in mind, as a vital audience for law reform materials, are those who make up Robertson Davies's "clerisy"[6]. Books about law, of the kind I have in mind, can be written. The Commission's Working Paper on *The Meaning of Guilt* is an example[7]. It is written in readily understandable language, yet it in no sense oversimplifies; it provokes attentive reading.

THE COMMISSION'S MEMBERSHIP

A point on which there is still some disagreement is whether a law reform commission should have non-lawyers as well as lawyers as members. If I had been asked the question four years ago, I would probably have answered no. My attitude then was that law reform involves making recommendations for changes in the law, and at the end of the day only lawyers are competent to put such recommendations in definitive form even if, in the process of deciding upon them, they consult, as they undoubtedly should, social and behavioural scientists and others. On this question I have changed my mind. This change is a result of working with Hans Mohr, a non-lawyer, as a colleague on the Law Reform Commission.

By now it has become merely tiresome to say that law is not a self-contained phenomenon. Everybody, or almost everybody, agrees. So far as law reform is concerned, the point to be argued is whether, this being so, it is enough for a commission of lawyers to consult experts from other disciplines or whether non-lawyers should be on the Commission itself. My experience has been such as to satisfy me that there is a vital difference between taking an opinion from a consultant and continuously being reminded by a colleague who is not a lawyer of the forces other than law that affect legal change. What is significant is that a colleague, as colleague, is bringing to bear the insights of another discipline; or, to put it in another way, issues are being placed in a broader frame of reference by a person who is not a lawyer but is to share responsibility for the decision to be taken. For this there can be no substitute.

It may, of course, be suggested that there is simply no end to the matter once one starts to appoint non-lawyers. If a sociologist, why not an economist; if an economist, why not a political scientist; and so on. This, to my mind, is to miss the point. What is vital is the impact, at the level of decision-making, of another perspective. Once that impact is made, the ambit within which decisions are taken is changed, and in my experience the value of the insights gained is beyond calculation.

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6 Robertson Davies, *Voices from the Attic* (McClelland & Stewart Ltd., Toronto, 1972), at page 6.

7 Working Paper 2, *Criminal Law — The Meaning of Guilt-Strict Liability* (1974).

I speak of social and behavioural scientists, but there is no reason to limit the range of possible appointments to these disciplines. As I have already suggested, law reform may well involve considering law from the point of view of philosophy or religion or the physical sciences as well as of the social sciences. In its Working Paper on *The Meaning of Guilt*, the Commission said that "guilt must always depend on personal responsibility". The contribution of a philsopher or a theologian to the discussions of a Commission taking so fundamental an approach to criminal law reform hardly needs demonstration. What is essential, once it is agreed that law reform goes beyond "law and logic", is the participation of a mind, not nurtured in law as a profession, at the level where final debate is held and decisions taken.

THE RELATIONSHIP OF THE COMMISSION TO GOVERNMENT AND PARLIAMENT

The Commission is vested with a large measure of independence. This is clearly desirable if the Commission is to perform the sort of policy and educative role I have indicated. The Commission must not be regarded as a department of the government or as performing the role that a government agency is often conceived of as playing in the development of legislation. For one thing, the Commission's mandate of openness might be regarded as inconsistent with the confidentiality that sometimes surrounds the drafting of legislation within established governmental structures.

The Commission's legal independence is reinforced in several ways. Its members are required to devote their full time to the task. During their period of appointment, they hold office during good behaviour. A member who is a judge can only be removed from office by the Governor General on address of the Senate and the House of Commons. Members who are not judges can only be removed by the Governor-in-Council for cause.

The independence of the Commission is further reinforced by two other statutory provisions. I have already spoken of the requirement that the Commission's program of studies must be tabled in Parliament by the Minister of Justice as it was submitted to him. A report of the Commission to the Minister on the results of its studies, together with its recommendations, must also be laid before Parliament by the Minister and this must be done within fifteen days of its receipt if Parliament is then sitting or within fifteen days after Parliament resumes sitting if it is in recess when the report is submitted. The Minister may submit comments on the report if he wishes to do so, but the report itself must be tabled as written. A consequence, in my view, is that the recommendations the Commission makes for the improvement, modernization and reform of the laws of Canada are essentially recommendations to Parliament. There is in this sense a direct line running from the Commission to Parliament.

This linkage, to my way of thinking, means that the Commission should not hesitate to make a recommendation merely because it suspects that the recommendation might meet resistance in the Department of Justice or in Cabinet. If the Commission is of the opinion that the recommendation, if implemented, would serve the common good, it should transmit it to Parliament even though prompt legislative action may appear unlikely.

I recall that, when I was with the Commission, we met with members of the party caucuses. The discussions were frank and open. We expressed our willingness, indeed our anxiety, to make available to members full information on what we were doing. We wished to stress the directness of our relationship with Parliament. We wished to emphasize that the Commission is not a department of the government.

I do regret that the Commission was not in a position to submit a final report containing recommendations while I was still a member. The tabling of a report in Parliament will be an event of major importance in the life of the Commission. I can only express the hopes I had, and still have, about the function of the report in fulfilling the role of the Commission.

When I first joined the Commission, I envisaged a draft bill as lying at the heart of a report. The text of the report, as I then saw it, would consist of background to the bill, identification of the defects of the existing law, and the ways in which the provisions of the bill would correct these defects.

I have changed my mind. With some exceptions, I should like to see the final reports written in much the same way as are the working papers. The reports should be written in clear and persuasive prose. They must be devoid of legalese. They must describe problems. They must propose remedies where remedies are possible. They must indicate alternatives. The remedies need not, however, always take the form of amendments to statutes or regulations, nor need they always take the form of new statutes or regulations. Often institutional changes, changes in the way things are done, are more important than changes in the written rules; if so, this should be said.

The reports should also be continuing exercises in providing information, information removed from the sort of passionate invective, folklore and fable that in sensitive situations make it so difficult to improve the law, particularly the criminal law. I am afraid that inclusion of draft legislation in a report might tend to concentrate discussion at this critical stage on analysis of precise words rather than open up discussion of real issues.

I do hope, too, that some mechanism will be available for getting the reports before House or Senate committees or before a joint committee so that there may be hearings. I do not know whether,

procedurally, this is possible. Parliament would provide the best possible forum for debate on certain of the important policy questions raised by the Commission's papers, especially in the areas of criminal law and family law.

Professor Gower, who served as a member of the English Law Commission, spoke in Toronto about two years ago on law reform[8]. He told of his experience and spoke of lessons learned. He appeared pleased that so many of the bills resulting from the recommendations of the English Commission slipped quietly through Parliament, sometimes in the form of private members' bills, without much debate. Actually it might be better if the opposite happens here. My wish is that by and large there will be vigorous parliamentary discussion of the Commission's proposals. I can conceive of no better way to raise the level of public awareness and understanding of significant legal questions.

There is another reason for questioning whether draft legislation should form part of a report. As I mentioned earlier, the Law Reform Commission of Canada is a federal commission operating at the federal level. In many areas, particularly in criminal law and family law, but in commercial law as well, effective change may well involve cooperation with the provinces. The experience of the Commission in working with the provinces, particularly but not exclusively with provincial law reform commissions and agencies, has in my view been very good[9]. I am thinking especially of the meetings we had in relation to the law of evidence and family law. The importance of cooperative action in the administration of the criminal justice system is, of course, obvious. When I speak of cooperation, I do not refer merely to complementary legislative action. I have in mind as well administrative cooperation, joint educational undertakings in relation to legal change, and pilot projects to test in practice reform ideas as yet tentatively held.

I would just mention another reason why I grew skeptical about submitting draft legislation with Commission reports. I became in-

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8 L.C.B. Gower, *Reflections on Law Reform*, (1973) 23 University of Toronto Law Journal 257.

9 Section 13 of the *Law Reform Commission Act* provides:

> 13. The Commission may in its discretion and with the concurrence of the Minister undertake any particular study, having as its intended result either directly or indirectly the improvement, modernization and reform of any law of Canada, as a joint project of the Commission and any one or more other law reform commissions, agencies or bodies in Canada or elsewhere, and may enter into such contractual or other arrangements as it deems necessary for the carrying out of any such joint project, including arrangements for the provision of personnel or other resources of the Commission to any such commission, agency or body.

creasingly discontented with established ways of putting laws into written words. I became more and more interested in what I would term, in a vague way, "law and language". I expected, and this expectation was, I believe, shared by others in the Commission, that we might do some work on discovering better ways of expressing the legislative will to the citizen. Unfortunately, we just did not seem to find time[10].

There are, naturally, always exceptions. I would like to see a Commission report on evidence submitted in the form of a draft code. This would be innovative, at least in the common law world, and might serve as a valuable example of the role of codification in law reform.

VALUES

The *Law Reform Commission Act*, as I have already noted, requires the Commission to submit a report to the Minister of Justice for tabling in Parliament when it completes a study undertaken by it pursuant to its program of studies[11]. In its report, the Commission must set forth its recommendations. To recommend is to exercise a serious responsibility, serious because it involves the application of values. This duty to recommend thus raises the important question of sources of values: where should the Commission look for the principles or standards to be applied? The source quite obviously cannot simply be the law itself. The law, of course, may well be a source, particularly when a recommendation has to do with the internal consistency of rules or procedures. But the law is not a closed system. The law, in its development, must have regard to morals and ethics, to social utility, to economic efficiency, and to philosophy in its broadest sense.

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10 But now see M.L. Friedland, *Access to the Law*, a study conducted for the Law Reform Commission of Canada (Carswell/Methuen, Toronto, 1975), particularly at pages 66 to 70.

11 Sections 15 and 16 of the *Law Reform Commission Act* provide:

15. The Commission shall, to the extent that it deems it practicable to do so in the course of formulating its recommendations for the improvement, modernization and reform of any law or branch of the law, consult with the Minister, associations of members of the judiciary and of the bar, institutions and persons engaged in the teaching of or research into the law, and other interested bodies and persons including members of the public likely to be concerned with or affected by its recommendations, and, for the purposes of this section, the Commission may conduct such discussions, surveys and hearings, either in public or otherwise, as it deems necessary to effect such consultation.

16. Upon completion of any study undertaken or directed by the Commission pursuant to any program for studies prepared by it and approved by the Minister pursuant to section 12, the Commission shall prepare and submit to the Minister a report on the results of such study and shall set forth therein its recommendations in such form as the Commission deems most appropriate to facilitate the explanation and understanding of its recommendations.

To determine whether the law should be changed it is not enough, it seems to me, merely to ascertain what people, at any given time, may want, assuming that techniques are available to make such a determination. Neither would it be acceptable for the Commissioners to seek to impose their personal vision of what is right or what is good; somehow, something more must be involved. That something must in some way embrace reason as a central element and it must encompass some view on the basic principles essential to what I would call a free society, a society founded on the acceptance of man as a being with intellect and will, possessed of a sensitive emotional structure, a person with a unique claim to respect. I confess that I did not get much beyond this rather vague formulation while I was with the Commission, although I struggled with the problem. It was in fact a problem with which we were all concerned. This concern did, at one point, result in a statement which was included in our Second Annual Report. The statement had particular reference to a series of internal meetings we had held on the aims and purposes of the criminal law, but it had, as well, wider application to all the areas of law which we were in the course of studying. This is the passage:

> Above all, however, the meetings highlighted a basic problem about values. For the criminal law is *par excellence* that part of the law that enshrines and underlines certain social values — e.g. physical integrity, security of property, and honesty. The criminal law is a description of the society in which we live.
>
> But is it the right description? Does it describe the society we really have? And is this the society we really want? If it is not, whose values should the criminal law enshrine?
>
> The problem appears in the Commission's own terms of reference. Section 11 of the Act includes among the Commission's objectives "the development of new approaches to the law and new concepts of law to respond to the changing needs of modern Canadian society". But whose approaches are these to be?
>
> Should the Commission decide the approach and dictate the values the criminal law should enshrine? Yet what mandate has a small, unelected body, consisting mainly of lawyers, to impose its own values on the rest of society?
>
> Should it look then for the values held by society at large? Is its job really one of market research and opinion polls — telling the country what the country thinks about criminal law? Neither alternative seems right.
>
> The Commission is trying a third approach. First it is trying to discover, by looking at the criminal law itself, the values which that law enshrines. This involves looking at all aspects of the law: the way it is enforced, the people against whom it is enforced and the way they are treated. Only such an overall view will elucidate the values implicit in the law.
>
> Secondly, it is asking if these are the values Canadians would want to see in their law. Does the criminal process take as much account as we should wish of the victims of crime? Does it do enough to help victim, offender and society itself discover and understand the social problem of which the offence may be merely the symptom?

> Thirdly, the Commission is asking whether the values enshrined in the law are the values that *ought* to be there. Can they be supported by rational argument? Can they be shown to be necessary or desirable in any society — or at least in the sort of society Canadians want? Can we show for example, as Mill tried to show, that liberty must take precedence? Or can we show that the common good requires that liberty at times defer to other values?
>
> So the values the Commission seeks are not simply values of its own preference, nor are they simply the values currently held by the majority of Canadians. They are those values which, in the light of the general views current in Canadian society, could best be rationally supported and defended. The Commission aims not just to recommend these values but to support them with argument to show that these are the values most worthy of support.

THE FUTURE

I am tempted to make predictions and to offer recommendations. All I will do, however, is express a hope or two. After all, the future of the Commission will depend to a large degree on the aims and insights of its future members. What it does will be determined in most part by their conception of law and its purposes rather than by programs, budgets and institutional structures. I have little doubt, for example, that the first five years of the life of the Commission will be spoken of as the "Hartt Commission" because its character during that period was so much shaped by the humane and progressive ideas of the Chairman on the purposes of law, particularly of the criminal law.

I do hope that the work begun by the Commission on criminal law will be continued. Valuable insights have already come through. But the Commission is still some distance from completing the tasks it undertook in its Program. This is true, despite the valuable papers and reports already submitted.

I hope also that the work on administrative law will be pursued unabated. So much needs doing. It is of necessity slow work because careful, empirical studies are required as a prelude to recommending change in a sector that has come to affect so intimately and in such complex ways the lives of people.

Finally, I hope that the need to develop better ways of letting people know what the law is will not be lost sight of. In this respect, I continue to believe that law and language is a pressing and practical problem, and that there are real possibilities in research involving linguists, psychologists, writers, and others, as well as lawyers.

Possibly when the Commission started its work, expectations were too high. Possibly too many expected, and still expect, too much from the law as an instrument for developing a better, or, to use a now outmoded term, a "more relevant" society. My own belief is that the role of law, though important, is limited and it is desirable that it should be. I have long felt sympathy with what Saint Thomas Aquinas said about what law should forbid and what it should com-

mand: "Human law cannot forbid all and everything that is against virtue: it is enough that it forbids deeds against community life . . . ." And again: "Every act of every virtue is not commanded by human law, but only those that can be enjoined for the sake of the public good."[12]

The Commission has developed, I believe, a sense of proportion about what law and law reform can do. This may be the most important single lesson of its first five years.

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12 Saint Thomas Aquinas, *Philosophical Texts*, selected and translated with notes and an introduction by Thomas Gilby (Oxford University Press, 1951), at pages 361 and 362.