

A Perspective for Law Revisors

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• THIS PAPER offers a few comments on the problems of law revision in a somewhat wider context. The term "revision" is used here in a broad sense. As distinguished from codification, revision is creative and demands much more of the lawyer and researcher.

Of course, the first task is taking inventory and this means codification in a sense. It may be a long and difficult process. If one is dealing only with State materials, it may be tedious but not impossible. As one descends to the local level, however, difficulties mount. At one time the author was concerned with the collection and subsequent revision of the public health ordinances of a large city. It was discovered that the city had a box devoted to public health. Whenever an ordinance dealing with the subject was passed, it was put in the box and this was the only record maintained. To the extent that local authority is involved in highways, comparable situations have undoubtedly arisen.

Codification may be important because it forces a consideration of history and reveals the various ways in which law makers deal with social, economic, and political problems. In the compiling of highway legislation, a pattern develops similar to one observed in other fields. It has been seen in such widely diverse areas as public health, oil and gas regulation, and the creation of corporations. Usually the beginning of legislative treatment of a problem involves a series of minute, highly detailed provisions directed toward a narrowly defined situation. Various stages are gone through until the end result is apt to be a broad, general statute usually vesting considerable discretionary power in an administrator or a board. The basic policies involved are determined by the statute and the detailed rules are provided by administrative regulations. To the extent that any problem demands continuing supervision and regulation, this approach is much more effective than that involving detailed statutory enactments.

Another similarity that may be noted from the three previous discussions is that in almost every field there are areas of obsolescence. This is a difficult problem to handle, and, of course, it is not unique to highway law. For example, in the area of public health the codes of many of the States recite at great length all sorts of communicable diseases for which there must be a quarantine. Yet many of these diseases no longer exist or require quarantines because of various wonder drugs that have been developed. In its way this is the sort of situation that afflicts the highway codes.

Undoubtedly the compilation of highway laws in any jurisdiction will reveal numerous instances of conflicting and obsolete legislation. For example, in Nebraska, before the passage of the 1955 act, it was said that there was a "disorganized mass of archaic law." This is true largely because no problem stands still. Legislation adequate in the days of the Model T is unlikely to be effective in an era that has placed America on wheels and imbued every citizen with the desire to be somewhere else in the shortest possible time. Undoubtedly, the techniques of highway construction have changed greatly, just like those in the building of sanitary facilities. The recognition and elimination of conflict and obsolescence is, then, one of the great benefits of statutory revision. No modern regulatory program can be carried on under archaic laws. Law must reflect the best and most advanced technological information available and it must be flexible enough to continue to reflect this information as conditions change. In the highway field this has been fully realized in at least three studies. Nebraska has been mentioned. Thorough analysis of the highway laws of New Mexico has revealed deficiencies in existing statutes. In Wyoming, a modern highway code has been prepared which seems an admirable document.

Perhaps it is assuming too much, but an examination of these studies seems to reveal the type of cooperative effort among lawyers and representatives of other professions that is essential. Statutory revision is not something to be done in a slapdash manner. It requires detailed and thorough consideration of substantive problems and policies as well as mere drafting technique, although the latter is extremely important. It requires mutual respect and understanding among all participants, lawyers and non-lawyers alike.

There has been much emphasis on the necessity of communication. This is seen in the descriptions of the various conferences held in the Wyoming and West Virginia studies. These are clearly essential not only from the political standpoint but also from the standpoint of doing an intelligent job of law revision. No law should operate in a vacuum, but this kind of law particularly cannot operate in a vacuum if it is to be successful. This means not only conferences with the citizens and politicians but also a continuous and intimate cooperation among the technical people that are involved. This sometimes is difficult because of the way that lawyers and engineers approach their work. Engineers must have precision and accuracy in constructing tangible works. The lawyer also strives for a type of precision and accuracy, but must do it in dealing with human beings with all of their variations. Different approaches are characteristic of every field in which technical subject matters that also require a framework of law are handled.

Some years ago, in a lecture at the University of West Virginia Law School which was subsequently printed ["Lawyers and the Legislative Process." 54 W. Va. L. Rev. 287, 295 (1952)] the author stated the matter in this way:

If.....a problem arises which demands technical knowledge and governmental action for its solution, it seems obvious that the skills of the lawyer must be brought to bear on it. He must, however, be a special kind of lawyer. I should say, first, that he must be trained in the technical aspects of legislation in the sense that he must know something of the rules of drafting and must understand the particular constitutional problems of his jurisdiction. But this is only the beginning. Above all else he must be sympathetic with the purposes of the program in which he is called upon to participate. He must have at least a modicum of respect for the wisdom and judgment of the other professional men with whom he works. He must have patience enough to convince them that constitutional requirements, particularly those of definiteness and certainty, really mean something and that it is important to express ideas with clarity and precision. He must be critical enough to help the experts think through their own problems but tactful enough to avoid discouraging them.

Taking inventory, eliminating obsolescence, preserving flexibility and understanding technical problems, then, are all parts of the revisor's task. There is, in addition, an element that is becoming more apparent but which in the past has been sadly neglected. This is the environment of legislation. In part this relates to problems of highway use and construction as they are affected by increasing population and urbanization. Louis R. Morony has discussed these matters in connection with limited-access highways and the acquisition of right-of-way for future use and has pointed out a number of other problems of this general nature. This type of consideration can surely be extended even further.

A highway is more than a ribbon of concrete or asphalt. It is more than a transportation facility. It is a social institution that intimately involves many aspects of life. As one who has ventured timidly into the field of city planning, the author is aware of the influence of highways on the development of urban areas. Many problems

are raised, some of which involve value judgments and the expression of preferences. In the City of Washington, for example, there is currently a running controversy between groups that have been locally identified as the bird watchers and the road builders. The former fear the destruction of the parks and forested areas by throughways, and the latter are concerned with the ever-mounting needs for transportation from and to the suburbs. Similar problems may emerge in the apparent determination of the highway officials of the State of Michigan to cover the tip of the Southern Peninsula with concrete. Last summer the author was appalled by the slaughter of wild life which seems to be occurring along the new superhighways of that State. Along other roads one may note the complete destruction of vegetation caused by chemical sprays. And so it goes. Further evidence that the society is so interconnected is that when one talks about highways—and these things are very important to the society and to the economy—one must think of them not only as means of transportation but also with their other implications for the community.

But the picture is not all dark. For one thing, the program of this meeting shows in itself a realization of the point of this paper. A session dealing with community values as affected by transportation has been scheduled at this very time. The highway and its neighbors will be discussed this afternoon. Roadside development is a topic for later consideration. It would seem that the Highway Research Board is a leader in its realization of the interrelationship of these problems.

It is also a pleasure to report that a session of the 1962 meeting of the American Society of Planning Officials was devoted to highway planning cooperation. Lest the strictures of Michigan highways be taken too seriously, it may be added that the Director of the Planning Division of the highway department of that State stressed the policy of cooperation with local communities in the designing of road systems.

One not entirely disinterested suggestion in conclusion: Statutory revision as well as completely original drafting can be accomplished very effectively in a university setting. There are many advantages in having work of this sort done by a university through its law school. That in a university there are not only the resources of the law school but also other skills that can be tapped, and that there is a relatively detached atmosphere in which to do this sort of work are great advantages. It is hoped that, as the process of statutory revision continues, there will be greater utilization of the facilities of the many law schools that stand ready to serve.