A Century of Legal Reform

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There has recently been published in the United States a book on legal reform, important and interesting, which for some reason has had little or no notice in Canada.[1] For the profession in the English law provinces it should be both stimulating and provocative. For the thoughtful lawyer of any jurisdiction it illustrates the halting processes of the growth of law, the obstacles to reform, the advantages and the difficulty of codification of the common law, international law, and the law of evidence and procedure — to mention but a few of the subjects reviewed.

In 1948, a century after the State of New York adopted the Field Code of Civil Procedure, the New York University School of Law held a David Dudley Field Centenary conference and celebration in honour of the man who by common consent has long

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[1] David Dudley Field: Centenary Essays: Celebrating One Hundred Years of Legal Reform. Edited by Alison Reppy, Professor of Law, New York University, with an introduction by Russell D. Niles, Dean of the School of Law, New York University. Published by New York University School of Law, Washington Square East, New York. 1949. Pp. xxiii, 400. ($6.00)

Contents: David Dudley Field: An Appraisal, by Roscoe Pound; The Field Codification Concept, by Alison Reppy; Code Pleading and Practice Today, by Charles E. Clark; The Federal Rules of Civil Procedure, by William D. Mitchell; Modern Procedural Devices, by Edson R. Sunderland; Procedural Reform in England, by Lord Chorley; Civil Procedure Reform in Civil Law Countries, by Robert W. Millar; The Problem of Trial, by Sidney P. Simpson; Codification of Evidence, by Edmund M. Morgan; Codification of Probate Law, by Thomas E. Atkinson; Administrative Law and Codification of Statutes, by Carl McFarland; The Human Element in Judicial and in Administrative Procedure, by Bernard L. Shientag; Criminal Justice and Rule Making, by Alexander Holtzoff; Restatement and Codification, by Herbert F. Goodrich; The Jurisprudence of Codification, by Hessel E. Yntema; The United Nations and the Development and Codification of International Law, by Yuen-Li-Liang; International Control of Atomic Energy, by Adrian S. Fisher; International Organization for Peace and Law, by Clyde Eagleton; Our Anglo-American Common Law Heritage, by Lord Chorley; The Nuremburg Trial: An Example of Procedural Machinery for Development of International Substantive Law, by Mr. Justice Robert H. Jackson.

been known as "the father of American legal reform". This book records the addresses presented by leading legal scholars during the three-day programme and the speeches of Lord Chorley and Mr. Justice Jackson at the Centenary dinner. We all know that law and the rule of law are being weighed in a critical balance in our time, that disorder and frustration of law challenge the law's validity and efficacy to contain and discipline the wants and passions of men in an age of change and questioning and even of rebellion against old ways and controls; and with Dean Niles we can assent that "The readers of this volume should have their faith renewed and their determination strengthened so that they may aid in the great work which lawyers must do if law is to prevail in the difficult days ahead".

The addresses revolve largely around the life work of David Dudley Field (1805-1894) of the New York bar, and his devoted struggle for reform through codification of all the law, both substantive and procedural, and around the whole question of the value and the possibility of a general codification of the common law as the next advance to be made.

Field was a great lawyer, retained in many of the leading cases of his prime, a profound student of the history and philosophy of law, and deeply convinced that the law needed reform in substance and in statement. He saw in a general codification the means to that end, and during sixty years battled to convince his confreres and the state legislature — without success in his lifetime, except for his Code of Procedure, adopted in 1848. It was a momentary failure, in the light of decades or centuries of time, for his views have more acceptance in our day than in his own.

That he did not more greatly succeed was due to several reasons. The one inclusive reason was that the law was still in a formative state; so little was settled that a codification would have involved the legislative making of new law to fill the gaps; the profession in England and America was so wedded to the historical approach to jurisprudence as the only proper source of law that it could not and would not accept any other. That was the prevailing view even during the last quarter of the last century.

Meanwhile, other forces were and have been at work. Law making is seen as both necessary and salutary. In England, the law of partnership, of sale, of land, of procedure, to mention a few, has been codified. Some thirty American States have adopted Field's Code of Procedure, sixteen his Penal Code and Code of Criminal Procedure. His Draft Civil Code was largely followed in the Anglo-Indian Code. The commercial law of the United States

has been in part codified. There and in England and in the common-law provinces of Canada, industrial accidents, employer and employee relations, the protection of the health of employees, the duties of public utilities, a wide range of administrative agencies, are the subject of express laws. The law-making functions of common-law courts are thus diminishing. There still remains a vast field of civil or common law, the field of the private relations of the *civis* or citizen with others — status, family, marriage, successions, torts, contract, and so on. Is this part of the law to be codified? The principles to be relied on must largely be found in the accumulated jurisprudence, or, to fill the gaps, be newly declared, or be drawn from other systems. Can there be a sufficiently general assent to the principles authoritatively clarified by the jurisprudence; or to the principles to be enacted into law to fill the gaps? If a code is enacted, will it serve both now and in the surely changing future? Faced with such doubts and questions, many hesitate to proceed to codification.

It strikes an observer trained and practising under the codified civil law of Quebec as a little strange to hear Dean Pound say that the Anglo-American common law is as yet in many ways in a formative state and hence unripe for codification — it is "still growing and is far from sufficiently systematized and settled to lend itself to codification". By contrast, he says, very truly, that the law of France was ripe for codification in the Napoleonic Code, because it had been discussed and systematized by Pothier and earlier jurisconsults; and the mass lay more or less ready for arrangement in the divisions, chapters and articles of the Code. That of course is very much a generalization, for the old law was frequently departed from and new rules made. On the other hand, Dean Pound says, "No one has attempted, or at least no one has succeeded in making a complete doctrinal institutional treatise to the satisfaction of the profession since Kent". It is possible that the mountains of jurisprudence now existing make such a treatise utterly impossible. What then?

The Restatement of the American Law Institute seems at first glance to be the American substitute, in the absence of adequate treatises, for foundation material for a codification. Judge Goodrich discusses this possibility in his address, Restatement and Codification, and Professor Yntema in his address, The Jurisprudence of Codification.

Judge Goodrich makes the issue very clear. Even the project of the Restatement of the common law was assailed as a covert attempt to end with a codification, it was merely codification under

another name; even restating the law would tend to harden the stated rules. Repeated denials of any intention to assist codification, repeated affirmations that the only intention was to try to improve and clarify the law by restatement, were doubtingly received. But the work went on. Where conflicting lines of decisions were met, a choice was made—had to be made, for the law could not be clarified by stating it in two ways:

> That the undertaking has been a success is no longer a matter of debate. The work has found acceptance. It is used by lawyers in briefs and memoranda. It has found favour with the courts—if use is a test. And what other test can one offer for the acceptance of a work which was intended for the use of the profession in its day to day work? . . . The Restatement has likewise found its place as a useful tool in legal education. Law teachers have used it in classrooms as a supplement to the presentation of law problems through their case books. . . .

Dean Pound very properly emphasizes that while a code is authoritative because the legislature has enacted it as the law, the Restatement must rest on its persuasiveness and has no other authority—though, seeing the care and the expert judgment which moulded it, there must and does exist in its favour a strong presumption of its rightness. But a judge is not bound to follow or apply its suggested rules. It has therefore not constricted and prevented the future growth of the common law in the established way by judgments of the courts in concrete cases and from case to case. But it does tend to bring about more uniformity and less conflict in the jurisprudence.

Now that is one view—the view that, as Holmes so influentially phrased it, the life of the law is not logic but experience; that logic (for example, the logic which is the connective reasoning that inspires a codal system) is less important than experience, which in a sense finds a solution for deciding on the facts of cases as they arise, restrained only by *stare decisis;* and that a code restricts that freedom which ensures the flexibility and the growth of the common law. The system works—if so, why change it? That is Judge Goodrich's conclusion:

> Common law judges and common law lawyers are practical men. If common law rules are adequate and work, they leave them alone. If they do not keep up, resort is had to legislation to supply the defects. The change from one to the other does not involve a discussion of grave philosophical considerations. It is made because it is thought necessary. It is continued so long as it produces desirable results. This has been the method of the Anglo-American law. In following the same course the [American Law] Institute has been true to its common law ancestry.

A civilian stands puzzled by that indifference to the substantial certainty of a codified system of law, enjoyed by very practical

judges and lawyers and, in spite of an uninformed prejudice to the contrary among common law lawyers, capable of growth to meet new conditions and problems by interpretation and, if need be, also by legislation.

In that connotation, Professor Yntema's address is most timely and cogent. He sees codification as a natural evolution in method and statement, an evolution adjusting the application of law to the changed needs of the accelerating tempo of society in our time, and in fact during the last century:

> During the last hundred years and more, codification, or the effort to simplify, synthesize, and systematize the laws of the world by positive legislation, has been the cardinal vehicle of law reforms and unification of the national laws.

The "cardinal vehicle"— in the long overdue effort to simplify, to render more certain, "and in general to provide order in the inevitable chaos of increasingly complex legal systems"— this "great cultural movement" in which "the participation of the United States and other common law jurisdictions . . . has been significant but in some degree sporadic". Clearly, the evolutionary urge to codification exists and is pervasive. In common law countries it halts — in England because of hesitation before an organic and sweeping change, in the United States for the same reason and because of the existence of forty-eight states and a federal authority as well — a condition only less serious in Canada because of the existence of nine common law provinces and a federal authority. But for the numerous and excellent digests and other working tools, the ever-increasing tide of decisions would be beyond hope of reference and "the operation of the tradition of *stare decisis* on a national scale would be quite impossible". Professor Yntema quotes the remark of John Bassett Moore that:

> This system is supported by the Bar, with mingled feelings of gratitude and despair; for the Bar is conscious of the fact that, while it is in a sense served by the system, it is also enslaved and debauched by it. The very multiplicity of cases, and the consequent impossibility of dealing with them scientifically, reduces practitioners to a reliance upon particular decisions rather than upon general principles; and this in turn accentuates the tendency, long ago abnormally developed, to pay undue respect to mere cases as authority.

Professor Yntema welcomes the Restatement as the first sustained and comprehensive effort toward the codification of the unwritten or common law. In effect, it is another digest, a statement of the law as it is, a focus of scientific study, a useful advance, a preliminary analysis and synthesis — but unless formally enacted to be the law, not a relief from the continuous tide of mere case

law. Yet before formal codification would be prudent, there must be a cautious weighing of the needs and problems of today, and of tomorrow, and a comparative survey of the law of other countries in order that a selection of what has been proved best may be incorporated in the eventual code. Again, therefore, the law is not ripe for codification.

On those terms, will it ever be ripe? If ripe as conceived of and codified today, will the resulting code be free from defects in the tomorrow? Surely not so long as change and evolution bring new problems, and thinkers delve into the essential and eternal rightness of law in general and laws in particular. Somewhere a stand must be taken; somewhere, some authority must declare: This for today, and until changed, is the law. Professor Goodhart, speaking of English law, says that "in most of its branches, [it] is no longer in the formative period but has become a mature and fully developed system".[2] Would it be proper to ask whether law is not always in a formative state, but that, for the sake of greater certainty, there must be rest periods for "trial and error" by application and observation of clear statements of enforceable law? And would it be going too far to suggest that the Restatement discloses that in most of its branches the common law in the United States, while bound to evolve, has reached a point of such general recognition of its rightness as to merit codification — assuming that, as Professor Yntema said, codification is the "cardinal vehicle of law reform" in our time?

A Quebec lawyer, at home in his Code, should perhaps bow himself out at this point. He is not bursting with missionary zeal, but a little wonders why codification, with advantages which seem obvious to him, has been so long resisted in common law jurisdictions. Perhaps the conflicting views on codification are coming to a focus in an almost universal admission that law reform is needed. The book under review is an example. But there are others.

Professor G. R. Schmitt, of the University of Saskatchewan, concedes in cautious words the value of some "piecemeal" codification "to keep our law certain and ascertainable", but concludes that "most responsible authorities" do not approve a general codification. And he adds:

> These authorities say that it is inadvisable to codify those branches of the law which are still in a state of development: the law of torts is often used as an example. But where the judges have worked out the rules then codification serves to clean up the field and simplifies the work of judges and lawyers.[3]

[2] A. L. Goodhart, Precedent in English and Continental Law (1934), 50 L.Q.R. 40.

[3] Law Reform and the Bar (1950), 15 Saskatchewan Bar Review 36. And

Mr. Dennis Lloyd, of the Faculty of Laws, University College, London, bravely and pungently expresses his views of "the present unwieldy shape" of what Cromwell once described as the "tortuous ungodly jungle" of English law:

> And so the welter of confusion has grown and still grows with every passing day, and with it a kind of unctuous complacency that enabled a distinguished writer to observe recently that while the law is admittedly 'bulky and technical', that it is not 'too high a price to pay for the benefits of a legal system . . . which has enabled the lawyers to construct a body of scientific doctrine which is matched only by that constructed by the classical jurists of Rome'. [Holdsworth, Essays in Law and History, p. 163] Can one not hear the very bones of the great Bentham rattle with wrath at both elements of that proposition? We piously preserve the dead bones but the eternal and living spirit escapes us.[4]

Judge Jerome Frank is emphatic in condemning codification:

> Recurrently men say, 'Why tolerate the uncertainties in the rules which come from the vagaries of judges? Why not make the rules clear and certain by a simple device? Enact, once and for all, a code, a complete body of rules, prescribed by the legislature, to settle all future legal problems, thereby putting an end to lawyer's quibbles.' This method was once popular on the continent of Europe. Frederick the Great tried it. Napoleon did the same. So, too, did Germany at a later date.
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> This plan has never succeeded. No code can anticipate every possible set of facts. Moreover, when social conditions change and social attitudes alter, many portions of any code act as an intolerable straitjacket. Resort is necessarily had to judicial interpretations. These interpretations, or 'glosses' as they are sometimes called, take the place of the letter of the code. Judge-made glosses possess all the uncertainties of judge-made rules. Indeed, some persons have suggested that elaborate codes increase judicial legislation.[5]

What enormities of error are packed into those two paragraphs. Napoleon *tried it* — though his code marked the first great advance in the statement of a body of national law since the time of the classical Roman jurists, and has been the inspiration if not the model for codal systems in many parts of the civilized world — in the French colonies, in Quebec, Spain, Portugal, Belgium, Holland, Germany, Switzerland, Norway, Sweden, Denmark, to name but a few. The list suggests, in its racial and national diversity, the felt need for simplification in a very complex modern society, the functioning of which requires a *tempo* of greater certainty and speed, and hence economy of time, effort and expense. Codes do not pretend to provide a distinct rule for every possible set of facts — to suggest that they do is to misconceive the method and

see the excellent article, The Challenge of Jurisprudence, by Professor Jerome Hall, Indiana School of Law, in (1951), 27 A.B.A.J. 23, where at p. 26 he agrees that codification "joined to a looser grip of precedent, makes the practice of law less arduous".

[4] Codifying English Law, Current Legal Problems 1949, p. 155.

[5] Courts on Trial (1950) p. 290.

the purpose of codification, which seeks largely a statement of principles in the light of which, and by processes of interpretation inevitably touched by subtle changes in the thinking of the time, the facts of individual cases are resolved and justice done. A stated principle of law is inherently capable of development to meet changing conditions, so that on the whole the codified law grows by increase of its incidence. And that is not to pretend that any code or any system of law on earth is perfect. We must be pragmatic about that and, if necessary, use a stable lantern if the electric light is off. A codal system is not fairly condemned outright merely because of its defects.

When we come to the teaching of law there seems to be an advantage in a systematized code speaking at once in all its parts, not contradictorily but in a harmony or orchestration of principles, so that teaching and study proceed as nearly as may be in a scientific way. Mr. Lloyd, in the article already mentioned, and with special reference to torts, speaks of the difficulty of teaching that subject from a "welter of individual instances" in case-book selections. Judge Frank, in *Courts on Trial*, condemns the "Langdell spirit" as having "choked American legal education", but also condemns codification, and possibly he cannot have it both ways.

Take our Quebec Civil Code, for example, with its chapters on status, domicile, the family, marriage, property, contract, partnership, successions, wills, gifts, prescription, and so on — its orchestration and harmony of parts. You teach and study it, over a period of three or more years, rule by rule, chapter by chapter, principle by principle — its origin and history, its meaning, intent and philosophy, the jurisprudence and doctrine which it has occasioned and by which, whether rightly or wrongly, it is illumined and illustrated in action. That seems like a truer *education* (that *educatio*, leading forth, developing and cultivating mentally or morally); for it seems, and perhaps one is too partial, to encourage thinking in law, the ability to move easily and familiarly around in and among legal principles and therefrom to issue with reasoned conclusions of a principle — within of course the ambit of the overall system of the code in question. Thinking in law, the acceptance, denial, expansion, interpretation of the principles, leads to juristic writing, the doctrine of the codified law, an essential of its living growth.

But one must end this long comment, made with no thought of arguing the superiority of the civil or of the common law, for each is acceptable in its field; but rather that some day it may prove true of David Dudley Field that, as Montaigne says, "There are defeats more triumphant than victories".