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Comment: [Law Reform Needs Reform]

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Comment: [Law Reform Needs Reform]

COMMENT

By J. W. MOHR*

It is a pleasure to comment on Professor Lyon's article because it touches in so many ways the very experience of attempting to do law reform. I should admit at the outset that I did have the privilege to read a previous draft and to observe Professor Lyon putting into practice what he preaches; and preach he does. I should also admit that the article has been read and discussed at our Commission, and some colleagues were kind enough to give me written comments so that I can rely at least to some extent on a collective experience. In fact, the Second Annual Report of the Law Reform Commission of Canada shows that the *strategy* of law reform has been very much in our minds for some time.

This introductory digression should already establish in its own way the importance of Professor Lyon's concern. Although there is, of course, a plethora of articles offering grand and not so grand ideas of what the law should be, do and accomplish, relatively little has been written on how this is to be done. Professor Lyon has tackled at least some of the naive assumptions that are involved in transforming ideas into reality. Everyone joining a law reform commission (or making suggestions) seems to know exactly what and in which direction the law ought to be reformed. The frustrating and maddening experience is to find out that all these individual certainties differ from person to person and are as often as not contradictory. One can only achieve early reconciliation between these contentions at a level at which the reconciliation is meaningless to everyone concerned. Such solutions, of course, merely reinforce the original problem.

Professor Lyon tends to ascribe this kind of process to the legal mind. Far be it from me to defend this legal mind, but in all fairness it has to be said that the legal mind is not just something which is in the heads of lawyers (although it finds a fertile soil there) but lies in the laws and legal institutions as well as in the public mind. Even Parliament (although it has to be admitted that lawyers are over-represented there) seems to keep a tally and measures its productivity by the number of laws it passes in a given session.

Law reform that wishes to reform itself has to do so on the basis of, and over against, the conceptual foundation which created it as an institutional activity. Professor Lyon points out the basic similarity between all law reform statutes which create commissions. This similarity is not just a matter of copying but of a shared historical model — the English law reform movements of the nineteenth century. It is becoming clear that this model, at least as we seem to understand it, is largely inappropriate today. Yet to be fair, this emerging clarification is a function of having tried, and indeed Professor Lyon could not have written his article in the same knowledgeable way if he had not participated in a commission.

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This experience may also explain his aversion to having the productivity of a commission measured by the reports it issues. Again, one could not agree more; but one must not forget that in the very writing of his article Professor Lyon relies on this form of communication — it *is* a report. Undoubtedly he would defend himself by saying that this is not his only activity, with which everybody who knows him would agree. Nevertheless, he must have thought it important to share his thoughts in written form (and so do I or I would not take the trouble to comment).

This raises a further point — Professor Lyon's aversion to legislation. One must again agree wholeheartedly that the premature rush to the draftsman is the *furor therapeuticus* of the legal mind in the same way as categorizing, naming and labelling is the magic solution for other minds. But again one must not overlook that he himself makes extensive reference to a piece of legislation — the Canadian Bill of Rights.

These are just examples to show that Professor Lyon's thrust and impatience have to be seen in context and in a dialectic relationship with deeply entrenched patterns of thought and behaviour. The bias and even one-sidedness that emerges from this struggle is understandable and — to my mind — is the best guide for setting priorities. What I find much harder to accept is his constant reference to limited resources as creating a need for setting priorities. He claims right at the beginning of his article that "substantial amounts of public money (are) being spent on law reform in Canada", and although it is of course laudable to have proper consideration for the public purse, the word *substantial* is relative. One can easily replace it by *insignificant*, if one takes the perspective that ours is a government by law (no industry would get away with spending so little on its major tools) and if we consider, in addition, the absence of almost any expenditures in this area for almost a century. As he acknowledges later on, there are some real limitations in any case as to how much money can be meaningfully spent in this area.

However, the question of resources raises another problem which becomes even more crucial as one attempts to follow Professor Lyon's prescriptions for law reform — the absence of both knowledge and knowledgeable personnel in the areas he pushes to the forefront. It has always been a puzzle to me, and still is, how a profession can exist and still make claims of being "learned" when it encompasses hardly a graduate program worth mentioning and hardly an institute devoting itself to those basic questions of theory and practice which could give bodies such as law reform commissions their basic tools.

I have no problem accepting Professor Lyon's demand, (and I hope that this is also the real public demand) that law reform commissions should change the law in practice. We have to be aware, however, that the methodologies that Professor Lyon proposes sound deceptively simple but are indeed the most difficult ones, since, as he recognizes, they depend on a change of mind. What is easy right now is the rush towards legislation in the accustomed pattern. Even new drafting would depend on a change of mind — the mind that understands what language is about. Changing a mind pre-

supposes a mind and the problem with many of the things that Professor Lyon objects to is that they are mindless.

It cannot be stressed enough in a forum such as this, a university law journal, that the heart of law reform, as Professor Lyon says, is "essentially an educational process, having as its prime objective the release and direction of human potential". If one looks at the structure and curriculum of a law school one finds very quickly that many of the needs and pressure points which arise in law reform have no place there. The rest of the university tends to be rather silent about law as a whole and it is obviously not a subject important enough for our high schools; how can it compete with the temperature curve for Upper Volta?

I am not speaking of the law of experts; this kind of law is truly overstated and has undue dominance. I am speaking of the law which I think Professor Lyon means when he speaks of values and principles. The development of policy; problems in the legal order (rather than the solution of sterile problems of legal doctrine); injustices felt by citizens (rather than lawyers' dissatisfaction with the law); questions of what are facts and whose facts they are; questions of priorities and implementation — these are all issues which cannot be left to the expert. As a result, they all require a public sufficiently educated and conscious to be able to see and to define their problems in these ways. And this public at the present time includes the profession; because most practitioners, law teachers as well as law students, would be uncomfortable and embarrassed if one told them with Professor Lyon's words that their venture has "as its prime objective the release and direction of human potential". They would tend to talk about training, and training tends to create a stance antifithetical to reform because it manipulates the mind but does not involve it. A mind, however, that has not been involved in its own formation is hard to change, because it cannot re-form itself on the basis of training; it can only do so on the basis of the kind of education that Professor Lyon proposes.

