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AN UNCERTAIN STEP—THE LAW REFORM
COMMISSION OF CANADA AND THE
LEGISLATIVE PROCESS

by

Nicholas J. Spillane

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and Research in partial fulfilment of the
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Department of Political Science,
University of Ottawa,
Ottawa, Canada.

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TABLE OF CONTENTS

	<u>Page</u>
PREFACE	iv
INTRODUCTION	v
<u>Chapter</u>	
I THE COMMISSION'S INCEPTION.	1
A. The Enabling Legislation/Structure of the Commission.	1
B. Initial Pressure for a National Law Reform Commission.	3
C. The Parliamentary Debate	8
II THE COMMISSION AND THE CONCEPT OF LAW REFORM.	19
A. Law Reform Generally.	19
B. The Institutionalization of Law Reform	22
C. The LRC's Approach Toward Law Reform	25
III THE COMMISSION AND THE POLITICAL ENVIRONMENT.	35
A. Internal Organization of the Commission	35
B. The LRC and the Federal Distribution of Powers.	39
C. The LRC and Other Law Reform Agencies	41
D. The LRC and the Federal Department of Justice.	44
IV THE COMMISSION'S DIALOGUE WITH THE PUBLIC	61,

TABLE OF CONTENTS (Cont'd)

<u>Chapter</u>		<u>Page</u>
V	THE COMMISSION'S FUTURE	74
	A. Three Theoretical Models	74
	B. Success or Failure?	77
	C. The Political Factor	82
	D. Proposals	90
	BIBLIOGRAPHY	94

PREFACE

I should like to express my gratitude to those whose assistance has proved invaluable in the completion of this project.

The members and staff of the Law Reform Commission of Canada were most helpful in answering questions and in giving up time for interviews. A special note of thanks must go to Mr. M.H.F. Webber, who first showed me around.

My thanks must also go to the several officials of the Department of Justice who gave up some of their valuable time to be interviewed.

I am deeply obliged as well to the faculty and staff of the Department of Political Science at the University of Ottawa, who put up with me for two years. I am particularly indebted to Prof. Duncan Cameron, who suggested the topic in the first place.

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INTRODUCTION

The Law Reform Commission of Canada was, at the time of its inception, the product of a generally-perceived need for reform in the legal system. That there was in fact such a wide consensus is evident from the legislative debates and the reactions of the media at the time. In the absence of evidence to the contrary, there is no reason to imagine that there has since been a reversal of this attitude. Nor is it unreasonable to suggest that the Commission's establishment was also the product of a desire, politically-motivated though it may have been, on the part of the government to popularize the law—to give the electorate at least the impression that government was doing something directly for it. This "populist" outlook has certainly been reflected in the Commission's approach to law reform.

Perhaps as a result of these two factors, the Commission was endowed with three noteworthy characteristics. In the first place, its function was to work toward the reform of the law; a function which, subject to certain limitations, allowed the Commission to examine any topic it might choose. Secondly, in the absence of any opposition to the Commission's establishment, the government was able to provide it with the broadest possible mandate in pursuing its objective. Finally, in establishing the Law Reform Commission, the government purported to create an independent body, free of the usual restraints surrounding other agencies.

These three elements, arising out of the Commission's establishment, form the focal points of this thesis. Its main thrust is that the Commission has, as a result of the interaction between these three factors, developed into a unique organization, distinct from the vast majority of governmental agencies. It plays a distinctive role in the political process. It is neither legislative, judicial nor executive. Nor could it properly be classified as an organ of bureaucracy. It is in fact a unique interest or pressure group, created by government. As such, the problems which it faces, and the position in which it finds itself, are also unique. The Commission possesses many of the attributes of the classic conception of an interest group. At the same time, it does not fit neatly into that framework. For example, it lacks the "muscle" which is usually considered vital to an interest group. It is this problem—where to place the Commission into the political spectrum—which is the major concern of this thesis.

The Law Reform Commission presents an ideal opportunity for a study such as this, in that it has not to date been the subject of any kind of general investigation. Any work which has looked at the Commission has tended to concentrate on the legal issues raised by the Commission's work. There has been no attempt whatever to consider the implications of the Commission's existence and experience within a political, or more global, frame of reference. Whether or not such a factor implies a certain significance for this work, it is certain that this project is thereby rendered somewhat more difficult. The thesis faces the difficult task of breaking new ground, in one

sense, while suggesting some, and pointing to other, potential areas for studying the Commission.

What, then, are the major questions, and how were they handled in the research stage? Chapter I describes the Commission's inception and structure, as well as the considerations surrounding its organization. These are crucial to a complete understanding of the Commission's work. Of most relevance at this stage of research were the relevant pieces of legislation and the debates in Parliament at the time.

Chapter II introduces the notion of law reform and the Commission's approach to it and seeks thereby to situate the LRC in a theoretical context. As well, by setting out the Commission's approach to law reform, Chapter II serves in part as a basis for the discussion in Chapter V of the question of the standards to be used in evaluating the Commission's work. Chapter II is based on periodical articles and texts of speeches by members of the Commission and documents produced by the Commission.

The interplay between the Commission's mandate and its political superiors as discussed in Chapter III forms a major theme of the thesis, for the relationship has to a great extent decreed the scope of the Commission's activity, and very possibly its subsequent success or failure. The chapter examines the Commission's internal organization, the context of its operation within the Canadian federal situation, its relationship with other law reform agencies and with the Federal Department of Justice. Chapter III is based on both primary and secondary sources; however, it relies most heavily on interviews.¹

Chapter IV considers the Commission's dialogue with the public which represents its effort to involve the layman in the process

¹The interviews relied upon were conducted between March 1977 and June 1978 with four members of the Law Reform Commission of Canada, three officials in the Department of Justice and two Members of Parliament.

of law reform.¹ The effectiveness of the public dialogue is also relevant to the issue of the standards to be used in evaluating the Commission's work.

Chapter V examines the Commission within a theoretical framework. An effort is made to analyze the usefulness of a theoretical framework in explaining the role of the Commission within the Canadian political system.. Finally a few proposals are made with respect to some of the Commission's problems, and future areas of study are suggested.. In a sense, then, Chapter V attempts to "bring together" the diverse but related conclusions of the other four.

The departure point for the writing of this thesis was the notion that the law affects all of us all of the time. Whether one is merely waiting for a traffic light to turn green or is actually standing in court as a result of having jumped the light, it is impossible to escape the law. Similarly, it is not disputed that the law, or its manifestations, plays a political role, the precise nature of which depends upon the circumstances. The very existence of the Law Reform Commission is evidence of the first proposition. This thesis attempts to demonstrate the nature of the Commission's political role, its effects and ramifications.

¹Here, the reliance is largely placed upon newspaper clippings and analyses by the Commission itself of its questionnaire surveys.

CHAPTER I

THE COMMISSION'S INCEPTION

A. The Enabling Legislation/Structure of the Commission

The Law Reform Commission Act (LRCA), R.S.C. 1970 (1st Supp.), c. 23, as amended by 23-24 Eliz. II, c. 40, describes the membership, organization, and terms of reference of the Law Reform Commission of Canada (LRC).

Under s. 3, the Commission is composed of a chairman, a vice-chairman, and three other members. Their respective terms are not to exceed seven years (s. 4(1)), but each is eligible for reappointment (s. 4(2)). The chairman, vice-chairman, and at least one other member, must be legal professionals (s. 4(3)), and each holds office during good behaviour (s. 4(4)). At least two members of the LRC must be from Québec (s. 4(3)(a) and (b)). All members of the Commission serve on a full-time basis (s. 4(5)).

The chairman is the chief executive officer who supervises the Commission's work and presides over its meetings (s. 6(1)). The vice-chairman holds all usual replacement powers (s. 6(2)). The Commission's secretary and staff are appointed under the Public Service Employment Act (s. 7(1)). Under s. 7(2), the Commission is empowered to engage experts in various fields to assist in research projects, and may fix their salaries, subject to the approval of the Minister of Justice. Meetings of the Commission must be held at least six times each year

(s. 9(2)). Again subject to ministerial approval, the Commission may make by-laws respecting its meetings, the establishment of committees, and travelling expenses, etc. (s. 10).

The remainder of the Act outlines the Commission's objects, powers and duties. Under s. 11, the Commission is "to study and keep under review" the laws of Canada, "with a view to making recommendations for their improvement, modernization and reform." As such, it is to remove anachronisms and anomalies from the laws, eliminate obsolete laws, develop new approaches and concepts of law, while attempting to reflect the bijural nature of the country's legal structure. In order to fulfil these objectives, the LRC may receive proposals at large (s. 12(1)(a)), and may initiate studies and research (s. 12(1)(b)). The Commission must submit research programmes to the Minister of Justice (s. 12(1)(c), and embark upon the appropriate studies. Whenever feasible, it must be prepared to provide information to other government departments (s. 12(1)(e)). At the same time, the LRC must be prepared to include in its programme any priority studies assigned to it by the Minister (s. 12(2)). The Commission may undertake joint projects with other law reform agencies (s. 13), and may avail itself, whenever necessary, of the resources of other departments (s. 14). The LRC may, in the course of formulating its recommendations, conduct discussions, surveys, and hearings, either public or private (s. 15). Once a particular study is completed, the Commission must submit a report to the Minister (s. 16). In addition, an annual report must be submitted (s. 17). The research programmes, reports and annual reports must be tabled in

Parliament by the Minister (s. 18).

B. Initial Pressure for a National Law Reform Commission

In presenting the Inaugural Lecture in the George M. Druck Lecture Series at the University of Windsor in 1970, the Hon. John N. Turner, then federal Minister of Justice, presented a "manifesto" for law reform. "First, we must redress the imbalance in the relationship between the individual and the state. The bigness and remoteness of government must not be allowed further to obscure or dwarf individual rights."¹ He went on to point out the need for a contemporary criminal law, and for an "equality of access and equality of treatment before the law for rich and poor, young and old."² Calling attention to such vital areas of concern as pollution, Mr. Turner concluded his remarks by stressing the importance of the developing Research and Planning Section of the Department of Justice; an organization which would hopefully be in the forefront of this embryonic process of law reform.

Turner's speech represented in many ways the apex of a sense of inadequacy on the part of all persons who were involved in any way at all with the Canadian legal system. This sense of inadequacy has been referred to, footnoted, and discussed time and time again. Most commentaries make allusion to the increasing complexity of life in modern-day industrial society as a basic reason for the alienation of the law from the individual citizen. There is in such an argument, though, a

¹J.N. Turner, "Law for the '70's: a Manifesto for Law Reform," (1971) 17 McGill L.J. 3.

²Ibid., p. 5.

feeling of inevitability which frustrates any hope of solution. But Turner's address, while not painting a very pretty picture, suggested that instead of being an inevitable cause of this alienation, the complexity of life was merely a natural symptom arising out of the real problem. In Turner's mind the chief culprit was clearly the "bigness and remoteness of government." In efforts to promote their own longevity, successive governments have tended to entrench themselves in cumbersome apparati. The much illustrated process of bureaucratization in government has therefore had a distinct impression upon society in terms of alienating the products or processes of that government from its citizens.

Merely in terms of language, bureaucracy has created heavy-handed jargon which can usually be understood only by those who are already well-versed in its intricacies. What chance has the average citizen of comprehending or even of grasping the scope of the innumerable rules and regulations which emanate yearly from centres of government?

As if the problems posed by 'civil servantesse' were not already enough, it is possible to discern within the Canadian political system an additional complication. The institution of federalism has multiplied the number of governments which hold sway over the country's citizens. The obvious complications which this causes with reference to the above-mentioned process are evident. Others, however, include the eternal wrangling between the two levels of government over the meaning and equity of the country's 'constitution,' the British North America Act. Such debate, while possibly healthy, does not necessarily inspire confidence in the dictates of the governments. To a great degree, much

of the mistrust must be due to the oft-admitted antiquity of the B.N.A. Act itself. Although it is a disputed issue among political scientists, it is generally conceded that in many ways the Act is outmoded in terms of what Canadian federalism has become and where it is going. That it is in dire need of revision there can be little doubt.

If the characteristics of bureaucratized government and of an obsolete constitution have had their effect in alienating the citizen from the laws which control him, the cumulative effect of these two factors has been felt in yet another direction. The combined effect has been to imbue government with a kind of creeping paralysis. Entrenched on all sides by the process of bureaucratization, government has been able to accomplish less and less in real terms. The increasing impotence of the House of Commons in the face of an omnipresent civil service is a case in point. In turn, Parliament has lost the ability to solve the problem: to reform the law, in other words. Recently, therefore, it has tended to turn to such instruments as Royal Commissions and Task Forces, which attempt to reach an outside focus.

All of these problems concerning the law and the possibilities for its reform were evident at the time of Turner's speech at the University of Windsor. In fact, they had been extant for a considerable period of time before that. As early as 1966, a private member's bill, C-72, was introduced in the House of Commons by R. A. Bell.¹ Its purpose was to establish a Canadian law reform commission. The bill was introduced, given first reading, and ordered for second reading at the

¹House of Commons Debates, Canada, Jan. 24, 1966.

next sitting of the house, subject to examination as to its regularity, and was never heard from again, undoubtedly a victim of the agenda and the traditional fate which awaits the vast majority of private members' bills.

Undaunted, the same Mr. Bell went through the same procedure for 72's twin, Bill C-85, a year later.¹ The failure of his second effort seems to have prompted Mr. Bell to rise in question period and ask about the representations being received by the government concerning the establishment of a law reform commission and the considerations being given to them.² Rising in response, the Hon. Pierre Elliott Trudeau, then Minister of Justice, observed that representations had been received from the Canadian Bar Association based upon its resolution of 1966. In addition, the Faculty of Law of the University of Saskatchewan had made a representation urging the establishment of a national research institute akin to the envisaged law reform commission. Trudeau concluded by noting that the entire issue was under study by the Justice Department, but that no formal recommendation was as yet available.

The problem surfaced for its annual dredge over the coals on January 24, 1968. Speaking on the injustices of the Expropriation Act, Donald R. Tolmie, the member for Welland, recommended "the establishment of a permanent law reform committee to appraise our statutes continually, including such ones as the federal Expropriation Act which was first enacted in 1886."³ Later that same year, Bill C-64, proposed by

¹ Ibid., May 11, 1967.

² Ibid., July 7, 1967.

³ Ibid., Jan. 24, 1968, p. 5932.

Stan Schumacher, member for Palliser, met the same fate as its former counterparts, C-72 and C-85.¹

The perennial but persistent agitation for some kind of law reform agency evidently had some effect upon the rusty wheels of government. In November of 1968, John Turner, who had succeeded Pierre Trudeau in the Justice portfolio, promised a national law reform commission within two years.² Commenting upon revised departmental estimates, he announced his intention to embark upon extensive statutory revision. A new research branch in the department would be charged with this task. Such reform and revision would, however, take place within a framework of liaison and cooperation between the research section and the new law reform body. This latter would be charged particularly with revising the entire area of federal statutes and criminal law: an awesome responsibility.

In January of 1969, in second reading of Bill S-3, an act to amend the Canada Evidence Act, Turner reiterated his interest in the creation of a national law reform commission and noted that the Department of Justice was actively moving toward implementation of such a programme. Stressing the need for an "objective, independent body constantly reviewing federal law, particularly the Criminal Code," he pointed to the law of evidence as an area in dire need of revision. To facilitate the setting-up of the Canadian commission, the Department of Justice was

¹Ibid., Sept. 20, 1968.

²Ibid., Nov. 20, 1968.

studying various foreign law reform agencies, such as the New York State Commission, the American Law Institute and the British Law Reform Commission. As well, Turner noted a particularly 'Canadian' task which the LRC would have to assume. In areas of overlapping federal-provincial jurisdiction (such as evidence), it would be the responsibility of the new LRC to ensure the compatible integration into federal statutes of the concepts of the Quebec Civil Code, as well as those of the common law.¹

Comments by MP's at this time reflected the two major concerns which would recur after the introduction of the LRC bill. Mr. David MacDonald (Egmont) expressed the hope that membership in the commission would not be confined to those who customarily dealt with or administered the law, and that it would include "persons representing a cross-section of opinion in our society."² Mr. Andrew Brewin (Greenwood) hoped that the LRC would not merely "tinker" with wording.³

C. The Parliamentary Debate

On October 13, 1969, the Speech from the Throne, opening the new session of Parliament, promised "a bill to create a national law reform commission, whose task will be the improvement and modernization of the law and its administration at the federal level."⁴

A few months later, Bill C-186 was introduced and given first reading, and a week later (moved into the main stage of debate, second reading

¹Ibid., Jan. 20, 1969, p. 4505.

²Ibid., Feb. 13, 1969, p. 5474.

³Ibid., p. 5480.

⁴Ibid., p. 3.

and referral to committee.¹ According to Turner, the general idea was to establish "a relatively small commission made up of personnel reflecting the priorities of law reform as they arise from time to time."² In addition, there would be room for persons outside the legal profession to become involved in the commission's work. Turner assured the House that the LRC would enjoy "a substantial degree of independence," but went on to observe, somewhat paradoxically, that "it is essential to the credibility of the commission that its programmes be directed toward reforms, the need for which is felt by the government and reflected in Parliament."³ As intimated earlier, a major task of the commission was to reflect its national character. It would work toward a reconciliation of the two systems of law in Canada. The bilingual state would be complemented by the bijural state. In order to achieve this objective, the LRC would cooperate with and perhaps execute joint projects with provincial law reform bodies (for example, in the areas of civil remedies enforcing the right to privacy, and criminal and civil evidence). To the federal government's way of thinking, then, the process of law reform would be coordinated, and would correspond to the needs and functioning of present-day federalism. Necessarily, therefore, the commission would consist of "a body of experts able to suggest reforms in the law on a continuing rather than on an episodic basis."⁴

¹Ibid., Feb. 16, 1970 and Feb. 23 respectively.

²Ibid., Feb. 23, 1970, p. 3960.

³Ibid., p. 3961.

⁴Ibid., p. 3962.

Turner hinted at another motive for establishing the LRC. He suggested there was a basic difficulty involved in assigning the work of this kind of law reform to the Department of Justice. Because the issues to be tackled by the LRC were so complicated in their federal aspects, they required the consideration of a permanent body to bring forward consistent pieces of legislation. The ideal procedure in terms of law reform was therefore a combination of daily, short-term policy development by the Department, and a more general but long-term overview by the LRC. Thus, for Turner, the priorities facing the Commission were 1) the rewriting of the criminal law, 2) a reworking of the Canada Evidence Act, 3) a review of the powers of public administrative boards, tribunals, etc., and 4) an assessment of the remedies available to the citizen in the face of administrative and judicial review.

Members' speeches during second reading reveal four distinct themes. In the first place, some members ascribed the reasons behind the establishment of the LRC to a "gap" in the parliamentary process. That is, for a variety of reasons, Parliament was perceived as being unable to fulfil the role of law reform. Mr. D. Gordon Blair (Grenville-Carleton) pointed out that law reform was a rarely-seen process in Parliament:

There are simply too many big and time-consuming issues which engage our attention for departments to continually, year after year, bring forward to this House small projects for the amendment of defects in the various statutes for which they are responsible.¹

¹Ibid., p. 3970.

In a similar vein, M. Pierre de Bané (Matane) voiced the problems of the backbencher:

Finally, to my mind, one of the reasons that make the passing of the bill necessary is, paradoxically, the lack of technical means provided for members of the House who are interested in the reform and updating of the laws. If members had had the means of doing this work, if they had them today, the commission would not have to be set up. I do not want to minimize the usefulness of the commission, but I think members could have achieved this task, had they been given the proper tools.¹

The second major concern voiced by members touched on the role of Parliament, and more particularly the House of Commons, vis-à-vis the LRC. In reading the comments, it is difficult to avoid the impression that at least some members felt that the Commission would deprive them of work which was rightfully theirs, or that they felt despite the deficiencies of Parliament, it was nevertheless doing its utmost in terms of law reform.

... the government is not necessarily bound by these recommendations [of the LRC]. However, as in the case of the third report of the committee on statutory instruments, if the government does not like the recommendations, it should come out and say so. The government should indicate the view it takes and what parts of a report it does accept. It should then place the matter before the House for debate and let the House decide on the issue. That is what this House is for, and that is what we were elected to do—consider, discuss, debate and then decide the issues. So it should be with this LRC.²

Mr. John Gilbert (NDP-Broadview) stressed that the Commission should not "become a stalling device for immediate and necessary legislation."³

¹Ibid., M. P. de Bané (Matane), p. 3974.

²Ibid., Mr. G.W. Baldwin (Peace River), p. 3972.

³Ibid., Mr. J. Gilbert (Broadview), p. 3965.

Also, "the legislative supremacy of Parliament should never be undermined by the reports of commissions."¹ It is not quite clear what he meant by this last statement, for the LRC bill never purported to impinge upon the legislative process in terms of implementation, and could certainly never deprive Parliament of its ultimate right to approve legislation or not. It seems that he was merely echoing the concern expressed by Baldwin: to the effect that Parliament's remaining role in policy formulation not be whittled away any further. Some members felt that the best method of ensuring a degree of control over the LRC would be to set up some kind of liaison between the Commission and the House's Standing Committee on Justice and Legal Affairs (SCJLA), or a shared-control arrangement between the committee and the Minister of Justice.²

A third point which arose during second reading concerned the way in which the LRC would fulfil its mandate. Numerous members commented upon the need for public discussion and dialogue as an integral part of a human/individual-oriented law reform programme.³ One member referred to the Commission as "a legislative ombudsman whose work would be of great assistance to us all."⁴ The 'populist' role that members felt the LRC should play was summed up by Mr. G.W. Baldwin (Peace River):

¹Ibid., p. 3968.

²Ibid., Baldwin & Bigg, pp. 3972 and 3990.

³Ibid., Mr. Fairweather (3964), M. Gauthier (3969), Mr. Blair (3970).

⁴Ibid., Mr. Blair, (p. 3971.

... membership of the commission should include people who have some personal understanding of what these laws mean to those who are likely to be directly affected by them. In any event the commission should make sure that they or their representatives get into the streets and talk to the people. I think it was Jeremy Bentham who said laws should be enacted so that they brought the greatest good to the greatest number.¹

Finally, the MP's alluded to the areas of the law with which the LRC should concern itself. These included the clarification of the philosophy underlying the criminal law, the standardization of quasi-criminal statutes (traffic and liquor laws), the investigation of parliamentary procedure and the legislative process, and the recommendation of constitutional changes required to accomplish the preceding.²

The committee hearings on Bill C-186 were mostly concerned with the clarification of certain technical aspects of the legislation; the definition of barristers or advocates of not less than ten years' standing at the bar of any of the provinces, the number of LRC members to be selected from Quebec, and the bijural nature of the Commission's objectives. More important was an elaboration by Turner of the respective and related roles of the LRC and of the Department of Justice. He emphasized that the research section of the Department would be concerned "primarily with short term policy reaction on questions that have become crucial in the day, the reconciliations between contemporary mores and the statute."³ In other words, the Department would be involved in the

¹Ibid.

²Ibid., Mr. Gilbert, M. de Bané (3974, Mr. Brewin, Mr. Bigg (3990).

³SCJLA, Minutes of Proceedings & Evidence, no. 22, April 21, 1970, p. 22:19.

"tinkering" aspect of law reform; the removal of verbal anachronisms from the statutes. On the other hand, Turner noted that the LRC would "do more of a global review of various segments of the law. It will be medium and long term."¹ The Commission's reports would become the property of Parliament and therefore of the SCJLA and of the Department of Justice. These bodies would "have to decide what position to take on propositions and proposals for reform presented to it by this national law reform commission."² At the same time, it was not the government's policy "to see the Law Reform Commission caught up in everyday policy considerations and having its work unduly interrupted."³

It is clear from the preceding that Turner was out to assure the committee that the LRC was in no way envisaged as a replacement for the usual legislative process, or even as an auxiliary organ in the policy-making process. The hint of apprehension voiced during second reading was also raised in committee by the Justice Minister. "It is conceivable that Parliament might resent having an outside body present as a fait accompli a piece of draft legislation for its scrutiny unless, of course, the Department of Justice or a Minister were to take responsibility for it."⁴ Thus, it is apparent that, at least at that time, Turner conceived of the LRC as a body which would prepare reports on various aspects of the law and which could be consulted by government. A

¹Ibid.

²Ibid.

³Ibid.

⁴Ibid., p. 22:23.

specific Department, though, would take the responsibility for any draft legislation. As well, Parliament was to retain ultimate control over the LRC through the Minister of Justice.

With few comments, all of which reiterated those made during second reading, Bill C-186 was given third reading in the House on May 12, 1970. The parliamentary secretary to the Minister of Justice summarized four goals toward which the legislation aimed.

Firstly, to give the government an objective machinery to review federal laws; Secondly, to create an institution to which the public may direct the serious grievances it sometimes has with respect to some federal laws; Thirdly, to give the cabinet the means to assess proposals which are submitted to it in order to amend existing laws or to pass new ones. Fourthly, to set up a body that will carry out a critical study of the federal laws, in the light of both common law and civil law.¹

There is a fashionable tendency, nowadays, to dismiss the deliberations of the Senate as being out-of-date, irrelevant, etc., often merely because of the character of that body. Yet, it is from the comments of various Senators during the Senate debate over Bill C-186 that may be drawn the most perceptive insights into some of the major difficulties which were to face the LRC in later years.

There was considerable concern as to the role of the LRC vis-à-vis the policy-making process. Senator Hayden wondered how "to harmonize what appeared to be the function of the commission with the right of the government to formulate policy."² For him, the ministerial approval of proposals was a necessary check on the Commission's

¹House Debates, May 12, 1970, p. 6859.

²Senate Debates, May 26, 1970, p. 1102.

powers. The Commission should not "enter the field of making pronouncements on policy . . . policy should emanate from government, and that is where responsibility lies for whatever policy may be decided upon."¹

While acknowledging that the LRC had "a definite place because of its permanency and because of its non-political aspect," Hayden stressed that it was not "a substitute for a royal commission procedure, nor [was] it a substitute for committees of the Houses of Parliament."² Senator Carter echoed these sentiments:

I can see that the only way to prevent the commission getting mixed up in matters of policy is to have the subject matter referred to the minister and to the Government for approval. On the other hand, to the extent that it does this, the commission is limited in its independence to pursue its own programs in its own way. Whichever method is adopted, I personally feel that the law commission would be wise to steer clear of policy issues and to avoid involvement in controversial issues as much as possible.³

But Senator Flynn, the leader of the Opposition in the Senate, was wary of government control over the Commission:

I suggest that, giving the minister the responsibility of approving every decision of the commission on the hiring of personnel is really a control that goes beyond what is necessary. It should be sufficient to allot to the commission a certain budget with which it could perform such responsibilities.⁴

In a similar vein, it had been suggested by some that the Commission's mandate should include the review of orders-in-council. That

¹Ibid.

²Ibid., pp. 1104-1105.

³Ibid., p. 1115.

⁴Ibid., p. 1183.

this was not a popular view was illustrated by Senator Martin's statements, which clearly represented the "traditional" view of a law reform agency.

I do not think it would be the function of the LRC to examine the role of governmental institutions. That is what it would be doing. Nor do I think that the LRC should be saddled with the policeman's job, which I think belongs to the legislative body, of examining the decisions of the cabinet.¹

The crucial feature of the LRC as a federal body was given recognition in the Senate. Senator Haig pointed out the need for federal/provincial consultation on law reform:

... when this bill becomes law, there must be full cooperation and liaison between provincial law reform commissions and the federal law commission, because a provincial law reform commission deals with provincial matters and the federal commission will deal with federal matters, but there may be an overlapping which will create a necessity for full consultation between the two commissions.²

Senator Langlois elaborated on the same theme: he hoped that the LRC would "adopt as a priority objective the task of eliminating in several cases the existing conflict between some federal and provincial statutes in the areas of jurisdiction shared by the federal and provincial legislative powers."³ Observing that the LRC would be the first federal law reform agency of its kind, he went on to suggest that it would be "absolutely urgent to eliminate these conflicts of jurisdiction which cause useless and expensive vexations to many Canadian citizens and which

¹Ibid., June 9, 1970, p. 1191.

²Ibid., May 21, 1970, p. 1085.

³Ibid., June 3, 1970, p. 1150.

are not of a nature to make people appreciate our federal system."¹

A very limited concern was expressed for the creation of the LRC in terms of economics. Senator Aseltine suggested at one point "that it would be a serious mistake for Parliament to pass and implement such a measure while we are desperately trying to carry on and win the battle against inflation."² Moreover, Senator Aseltine was of the opinion that "we have the best laws of any country in the world," and that, while perhaps not perfect, they were "generally satisfactory."³ His argument that there was a popular sentiment against such spending was laid aside by Justice Minister Turner during the hearings of the Standing Senate Committee on Legal and Constitutional Affairs. He suggested that there was "no other place in the total budget of Canada where the people get more bang for their buck than they do out of law reform."⁴ Bill C-186 passed Senate and received the Royal Assent on June 26, 1970.

¹Ibid., p. 1151.

²Ibid., June 2, 1970, p. 1136.

³Ibid.

⁴Standing Senate Committee on Legal and Constitutional Affairs, Complete Proceedings on Bill C-186, no. 5, June 16, 1970, p. 5:9.

CHAPTER II

THE COMMISSION AND THE CONCEPT OF LAW REFORM

A. Law Reform Generally

The concept of law has been variously defined since the early philosophers first tackled the question. The debate has often centered around the development of a functional definition of law (natural law, organic law, etc.). We are not here directly concerned with such an issue. A very general working definition of law will suffice. Law may be conceived as "those habits and customs which govern the relations of human beings with one another or with the group."¹ Such a definition suggests two aspects of law with which an agency such as the LRC may be concerned. Most obviously, it may deal with the written law; statutes of Parliament, regulations, etc. But there is a second aspect of law which is often overlooked. It may be called the "spirit of the law" and deals with the often non-formalized and unwritten manner in which the written law is applied in the courts. With regard to the latter, a law reform body may attempt in diverse ways to influence the practice of the law. Such an approach is likely to have a considerable "grass-roots" impact, for it necessarily bears on how the citizen is treated in a court of law.

While the concept of law and its definition does not present any significant difficulty for the purposes of this discussion, there is a point

¹J. Béetz, "Reflections on continuity and change in law reform," (1972) 22 U. of Toronto L.J. 129, p. 130.

at which a definitional problem presents itself. The conceptualization of "reform" is of central importance in understanding and assessing the role of any law reform agency such as the LRC. For, depending upon one's eventual formulation of the concept, one may be committed to either one kind of reform or another and entirely different results may flow from each. This has certainly been the experience of the LRC, as will be seen in this and subsequent chapters.

There are two major trends in law reform today. The first has been termed "tinkering," and involves a purely verbal alteration of statute law, regulations and other written enactments. Although often used in a pejorative sense to disparage ineffectual attempts at law reform, the term is meant here simply to connote a particular approach to law reform. "Tinkering" is, as will be seen shortly, a legacy of the first-established law reform agencies. The second may be called the "fundamental" approach, and strives toward the development of profound philosophical foundations for any eventual verbal reform which will follow. It is necessary, and important, to note that a "fundamental" approach may or may not imply the ultimate use of legislation. As intimated in the earlier description of the two "types" of law with which a law reform agency may be concerned, a "fundamental" approach may merely represent an attempt through publicity or interest group action to influence the exercise of the law. The two modes of reform may roughly be compared, respectively, to merely repainting a house, and rebuilding it.

Given the existence of these two essentially different approaches to law reform, it is worth mentioning the perhaps obvious, yet significant, fact that one's definition of law reform may shape one's subsequent approach to it, in terms of methodology. Clearly, if one defines law reform as entailing verbal changes in the law, one will probably be committed, methodologically, to "tinkering." That the approach taken with respect to law reform is dependent upon, and shaped by, one's definition of the term, merely serves to illustrate the futility of attempting to develop an exhaustive or precise definition of law reform. For a definition is necessarily subject to interpretation. Two examples illustrate this. On the one hand, "reform does not necessarily mean change. It even implies some degree of conservation, since to reform presupposes the preservation of that which is being reformed, the modernization and restoration of old systems with a view to saving them by adapting them to new circumstances."¹ Similarly, law reform itself has been defined as "the process of identifying and clarifying standards of performance for the legal order and of finding and implementing ways of optimizing achievement of those standards."² Clearly, either definition could be interpreted as implying either the "tinkering" or "fundamental" approach. The former definition, however, serves to hint at some of the difficulties faced in law reform. There is an apparent contradiction, or at least an inconsistency, between conservation and preservation on the one hand,

¹Ibid., pp. 138-9.

²J.N. Lyon, "Law reform needs reform," (1974) 12 Osgoode Hall L.J. 421, p. 425.

and modernization and adaptation on the other. The obvious implication is that the crucial aspect to law reform involves answering the questions: to what extent should there be conservation? to what extent change? by what means? Hence, the approach taken may itself be the definition of reform. A selection of criteria for producing a mixture of conservation and modernization may, for example, lead to the conclusion that verbal change will suffice. One's definition of law reform has suddenly become "tinkering." Such a relationship in which approach conditions definition is primarily issue-oriented. ~~Where definition conditions approach, however, one is likely to be speaking of law reform in a much more general way.~~ There is therefore a dual effect by which definition, if attempted first, may shape the approach, and the approach may itself modify the definition. It is this relationship which is particularly noticeable in contributing toward the LRC's uniqueness in terms of approach toward law reform. Before examining this aspect of the Commission's work, though, we shall first consider the state of law reform prior to the LRC's inception.

B. The Institutionalization of Law Reform

The introduction of law reform agencies generally is a relatively recent step. The English Law Revision Committee and the New York Law Revision Commission, both established in 1934, were the first such bodies to be exclusively dedicated to the task of law reform. It is reasonable to surmise that the reasons for creating these and subsequent agencies were similar: namely, an inability on the part of existing law

reform mechanisms to fulfil that role. Until the law reform "boom," it was left to the legislature and the courts to reform when necessary, at least in Canada. For a variety of reasons, the legislature's role was somewhat limited. Subject to constant political pressures, it could not select a logical programme for law reform, according to existing priorities in a strictly legal context. Its role was therefore perfunctory and intermittent. On the other hand, the courts have always had a certain self-declared law-making power. Landmark cases such as Donoghue v. Stevenson,¹ which established the broad principles of manufacturer's liability, and Hedley Byrne v. Heller,² which established liability for negligent misstatement intended to be relied upon, are obvious examples of the courts' authority to modify and, hence, to reform the law. But there have also been limitations on the power of the courts in this regard. The applicability of a case to a particular factual situation, the general reluctance of appeal courts to overrule, the dependency on the vagaries of individual judges, and the principle of precedent all contribute toward this limitation and produce an unevenness in the courts' approach to law reform.³ It is reasonable to conclude that it was hoped that specific law reform bodies would fill a "gap" in the overall legislative picture.

¹[1932] A.C. 562.

²[1964] A.C. 465.

³R. Gosse, "The role of law reform in the quest for justice," (1969) 19 University of New Brunswick L.J. 29, pp. 33-4; W. Friedmann, "Stare decisis at common law and under the Civil Code of Québec," (1953) 31 C.B.R. 723, passim.

It is not too great an overstatement to call the consequent proliferation of law reform agencies an explosion. In England, four bodies are concerned with law reform: the Lord Chancellor's Law Reform Committee, the Lord Chancellor's Private International Law Committee, the Home Secretary's Criminal Law Revision Committee, and, most important, the Law Commission, set up in 1965. This last group has been responsible for much work on contract law, landlord and tenant law, and family law. In New Zealand, a Law Revision Committee was established in 1937, and was replaced by the Law Revision Commission in 1965. In Australia, the Law Reform Commission of New South Wales was created in 1966, and the Law Reform Committee (Western Australia) in 1968. In the U.S., the American Law Institute, a non-governmental agency, has been of central importance in producing the Restatements and the Uniform Commercial Code. A Conference of Commissioners on Uniform State Laws does much the same work as the Uniformity Conference in Canada. Law reform agencies have been established in many states, including California, Michigan, Louisiana, New Jersey, North Carolina and Oregon. Prior to the LRC's creation, law reform agencies had been established by each of Canada's provinces.¹

The foreign agencies appear to have encountered much the same variety of problems as has the LRC. For example, English critics point to the detrimental effect of four, uncoordinated law reform bodies, and the tendency for the government not to refer issues to the agencies

¹Gosse, op. cit., presents a good summary of foreign agencies.

until a state of chaos has been reached.¹ Where appropriate, reference will be made later on to the experience of the foreign agencies.

C. The LRC's Approach Toward Law Reform

In general, the foreign agencies have adopted the "tinkering" approach. It is in this regard that the LRC has differed from its counterparts elsewhere. There is little doubt that, at the time of the Commission's inception, public expectations were of "small quick changes to a variety of laws," and suggestions on an ad hoc basis to the government departments concerned.² This was also the prevalent opinion among the members of the legal profession. The actual approach which has developed constitutes a considerable deviation from those attitudes. It accentuates the "review" aspect of the concept of reform, and is based upon a broad philosophical approach which has been developed in a subtle manner, based often upon the backgrounds of the various commissioners. As intimated above, the LRC has been the first law reform agency which has developed such a conceptual approach. It has since been accepted and recognized by other agencies throughout the world, such that it is now essentially a difference in style.

The approach has been to take a global view of any particular issue; to look at the legal system from the inside to the outside, in much the same way as the Glassco Commission operated. From an

¹L. Scarman, "Inside the English Law Commission," (1971) 57 ABAJ 867.

²Report of the Proceedings of the 3^d Official Meeting of the Commission, Ottawa, Oct. 12 & 13, 1971, pp. 3-4.

inside perspective, it found individuals performing their jobs adequately, whereas from the external point of view, the system retained its bureaucratic foul-ups. Thus, the external approach became operative. The LRC's approach toward law reform reflects the feeling that legal strategies are not always the entire solution. For example, the project on diversion and sentencing recognized that there were simply too many people in jail and that many of them should not be there. Thus, a revoking of the entire concept was required. While it is difficult to assess the overall public response to the LRC's novel approach, it is fair to presume, on the basis of press articles and letters received by the Commission (see Chapter IV), a widespread acceptance of its proposal "to examine some of the most deep-rooted barriers to the improvement of our legal system."¹

However, the LRC recognized the need for selectivity in its development of a research programme. It could not "encompass in [its] first program a review of all the laws of Canada."² At the same time, it was recognized that the development of a long-term research programme would impose limitations on the scope of the Commission's work. As the First Research Program conceded, "this selection of topics, and the priorities assigned to them, will necessarily limit to some extent our freedom to study other areas over the next several years."³ The feeling was, based upon the already-initiated public consultation, that the

¹Toronto Globe & Mail, Jan. 26, 1973.

²First Research Program of the Law Reform CC, op. cit., p. 6.

³Ibid.

Commission "should focus initially on areas of law that affect the daily lives of Canadians in order to ensure that these laws operate as justly and as effectively as possible."¹ The objective was to simplify these areas of the law as much as possible, in terms of clarity and understanding. The choice of the field of criminal law for the LRC's major effort reflected the Commission's overall perceptions of its role. The criminal law constituted an ideal forum in which the LRC would be able to develop its novel "philosophical" approach. As a frequently misunderstood and misconceived area of law, the criminal law was ripe for the Commission's public-education oriented approach. As one observer has noted, technical charges in the criminal law were not sufficient, and "the main effort has been directed towards generating improvement at the level of the social operation of the law by an educational process designed to change the attitudes and practices of officials in the legal system, lawyers and members of the public."² This educational aspect of law reform was to be reflected by the distribution of readable working papers. The importance of accessibility to the public was underlined by the notion "that public education and administrative reform are also possible means of bringing about effective changes for the better and that the act of discussing the issues may well have achieved improvements."³ Also, as the most "visible" area of federal law, the criminal

¹Ibid., p. 7.

²J. Barnes, "Criminal law reform: Canadian style," (1976) *Crim. L.R.* 299, p. 299,

³Ibid., p. 302.

law would certainly produce much-needed publicity for the new Commission. In turn, the publicity would facilitate the LRC's efforts to develop a comprehensive public dialogue on law reform.

The First Research Program outlined the various projects with which the LRC was to be concerned during the first few years of its existence. The examination of criminal law was in fact several "sub-projects." One would study the aims and purposes of the criminal law on a continuing basis in the hope of producing the "underlying principles on which a modern Criminal Code should be based."¹ As such, it would be concerned with issues such as the types of conduct subject to criminal law, the objectives of sanctions, alternative techniques for regulating conduct other than through the criminal law, and would "play an important part in the resolution of specific problems to be studied by the commission."² A second sub-project would investigate the attainment of equality before the law within the context of particular groups in society such as native peoples and the poor. Others would deal with the general principles of the criminal law, prohibited and regulated conduct, criminal procedure, and sentencing and dispositions. The other major project areas would consider the law of evidence, family law, administrative law and expropriation. A final area would involve the ongoing modernization of statutes (traditional "tinkering"), and would consist of "the correction of statutory defects revealed by experience and by judicial decision."³ It should be noted that the degree to which the LRC has been able to involve itself in this latter category of law reform has always

¹First Research Program, op. cit., p. 12.

²Ibid.

³Ibid., p. 19.

been somewhat limited. In 1974, the federal government established the Statute Revision Commission.¹ Its function has been to oversee the biennial revision of federal statute law. In so doing, it is specifically empowered to remove anomalies, redundancies, etc. However, the Statute Revision Commission does not possess the authority to recommend substantive changes, and it would appear that the LRC's "tinkering" role refers to this.

As intimated above, public consultation was intended from the outset to play a central role in the development of the LRC's approach toward law reform and in the Commission's implementation of that approach.² That the LRC's work was inextricably linked to the notion of embarking upon a dialogue with the public in general and to the necessity of dealing with the "written and electronic press" was illustrated by the hiring of a P.R. firm to assist in the preparation of material for release.³ The intention was to distribute working papers to bar associations, law schools, political parties, etc. in an effort to receive as much feedback as possible (see Chapter IV).

The new approach was also intended to draw upon practical experience, and consequently made use of empirical investigations such as the East York project, which attempted to assess the impact of the implementation of certain criminal law recommendations in a real working environment.

Such an all-embracing approach reflected the view of the law held by members of the Commission. Just as the effect of the law touched every aspect of society, so did the approach used to reform the law have

¹S.C. 1974-75-76, c. 20.

²Report of the Proceedings of the 6th Official Meeting of the Commission, Ottawa, Jan. 4, 5 & 6, 1972.

³Ibid.

to do the same, for "if traditional methodology is followed it is almost certain that little will be effectively done in practical terms. That is, there might be a change of law on the books, but very little significant change, if any, in its application in the streets or in the courts."¹

Just as the LRC's approach toward law reform has conditioned its definition of reform, so has the Commission's ideology, or view of law as a conceptual arrangement, shaped its approach. It is consequently difficult to separate the parallel elements of approach and ideology. It may be done notionally or theoretically, rather than practically, and is in that sense a useful exercise, for it reveals the basis upon which the Commission's approach is founded. It has been suggested that, with respect to the evidence project,

... the LRC takes a classical liberal stance, safeguarding fundamental values, minimizing official interference, regulating discussion and so eschews the arguments of the radicals who would dismantle the whole adversary system and the conservative law and order viewpoint with its preoccupation with convicting a maximum number of accused.²

That this assessment may be applicable to the Commission's general attitude is implied in the First Research Program, which observed that "the law depends upon a broad consensus to achieve an effective ordering of social relations in a democratic society. In pursuing our objectives we envisage the process of law reform as involving a reciprocal educative function."³ Indeed, such a liberal democratic perspective of the law and its role in society was held by Mr. Justice E. Patrick Hartt,

¹E. P. Hartt, "The limitations of legislative reform," (1974) 6 Mar. L.J. 1, p. 2.

²G. Parker, "National Law Reform Commission," (1974) 17 C.L.Q. 31, p. 33.

³First Research Program, op. cit., p. 6.

the first chairman of the LRC, whose thinking was doubtless instrumental in moulding the Commission's approach to law reform. According to him, it was necessary to

... start with the basic assumption that the citizen is entitled to have his laws presented to him in a reasonable, understandable form and that he, acting as part of a community, is entitled to evaluate and reject those laws that fail to serve the needs of the society of which he is a part.¹

By implying a greater responsibility on the part of citizens, Justice Hartt was necessarily rejecting the traditional idea of law reform, insofar as it was "based on the thesis that law embodies the mainstream thinking of society."² As far as law reform was concerned, he perceived the LRC's role as central in filling a "gap" in the institutional process of law-making.

If knowledge of the society's interest is a prerequisite for the rational state's ability to govern, then I am questioning the capacity of the typical nation-state to deliver government in the technological age. In this sense, I believe it is the responsibility of bodies such as the LRC to explore new ways of helping the state to deliver government.³

This concept of law was fitted in to the LRC's interpretation of the major issues facing it, as alluded to by Turner when he spoke of "the imbalance in the relationship between the individual and the state" and "the bigness and remoteness of government." The First Research Program outlined the broad nature of the problem.

The stresses arising from conflict between collective and individual values are leading to modifications in the traditional rôle of the individual in relation to others within society and in relation to society itself; they are

¹Canadian Welfare, July, 1973.

²Hartt, op. cit., p. 2.

³Ibid., p. 3.

leading also to challenges to established ways of balancing the protection of individual integrity with the security of the state and other institutions. This has caused many to question the efficacy and in some instances the legitimacy of the present legal system.¹

Such a perspective necessarily signified a "fundamentalist" approach to law reform and indicated the need for a "reassessment of fundamental assumptions" concerning criminal, family and administrative law, etc.

At issue was a reformulation of the age-old problem of individual freedom vs. collective security; "rencontrer à la fois ce besoin de l'homme de se sentir en sécurité derrière un treillis de lois tout en lui donnant l'impression qu'il doit se sentir libre, émancipé intégralement."² Four years later, chairman Antonio Lamer rephrased the same collective v. individual dichotomy in words similar to Turner's. In noting the Commission's commitment to freedoms, he stressed that "big government, big business and big labor are not masters, but they are powerful and we've got to be doubly vigilant to protect the little guy."³ An example of the multitude of questions that such a point of view raised was given by the Commission.

Should euthanasia be a crime in all circumstances?
 ... Should the state ever control the expression of ideas?... Should an offence committed under the influence of alcohol or drugs be excused?... Is an Eskimo to be judged by the same criteria as other Canadians?... When should a peace officer be entitled to enter a person's home to search for and seize incriminating objects?... Should a citizen have the right to refuse to answer questions asked by the

¹First Research Program, op. cit., p. 7.

²Québec, Le Soleil, April 24, 1972.

³Saint John, N.B., Telegraph-Journal, Feb. 2, 1976.

police? . . . Should a citizen's duty to testify result in an economic loss to him? . . . does the threat of punishment deter the commission of a crime and does a jail term make a person better able or more fit to live in society? . . . Does it cost too much to obtain a divorce?¹

Again, the media appear to have been quick to praise the merits of the LRC's "populist" view of law reform. One paper observed that "the LRC is Canada's chance to bring humanity - credence to its system of justice."² The Globe and Mail noted that,

Traditionally, the law and its enforcement machinery has been principally directed toward interests related to economic, proprietary and purported moral values as espoused by the dominant groups in the particular society. We now have the possibly unique opportunity to assist in adapting the social force of the law to the minimum needs of a new society, i.e., to the protection of values concerned with individual dignity and acceptable quality of life standards for all,³

Certainly, the major criminal law project was a perfect reflection of the basic problems, and of the need to discover new concepts. It pointed out the inefficacy of mere housecleaning and necessitated a re-thinking in terms of societal values.⁴

In a sense, the LRC's view of the law and consequent approach to law reform have created some of the problems which are examined in Chapter III. They have also set up two standards by which it is possible to evaluate the Commission: to what degree has it been successful in

¹First Research Program, op. cit., p. 9.

²Dundas, Ontario, Star, Feb. 9, 1972.

³Dec. 8, 1972.

⁴Hartt, op. cit., passim.

reforming the law as an initiation of legislation by Parliament (Chap. III);
to what extent has it been able to influence the application of the written
law—i.e., what happens to people in courts of law?

CHAPTER III

THE COMMISSION AND THE POLITICAL ENVIRONMENT

A. Internal Organization of the Commission

The First Research Program of the Law Reform Commission of Canada (1972) projected the breakdown of the Commission's annual operating budget. More than any other indicators, these figures suggest the degree of importance attached to each particular research project. Of the entire 1972-1973 operating budget of \$1,200,000, for example, 30% was assigned to the library and the salaries of the support staff, etc., while 70% of the budget went to the various projects in the form of researcher's salaries, etc. Of this 70%, 40% was for the criminal law projects, 10% each for the projects on family law, evidence, expropriation, administrative law, ongoing modernization of statutes, and studies to explore areas of future reform and research priorities.¹ A tentative timetable for the completion of each of these undertakings was also presented. The factors surrounding the LRC's failure to satisfy this timetable will be examined later in this chapter.

The crystallization of these two important elements of the LRC's planning necessitated, as the Commission moved into the actual work of law reform, the development of an internal decision-making structure which would move each project from initiation through to completion. The structure which has emerged appears to be well-suited to the

¹First Research Program of the Law Reform Commission of Canada, March, 1972, Information Canada, Ottawa, 1972.

character and requirements of the Commission. For on the one hand, the LRC is not so small as to be able to dispense with any regularized course of conduct, but on the other, it is not so large as to require a highly formalized procedure. The resulting blend is a generally recognized system which is still flexible enough to be capable of modification upon an informal basis when the need arises.

During the development stage, prior to the issuing of the First Research Program, the Commission hired a management consulting firm to assist in determining the appropriate internal structures.¹ The ultimate result has been that the commissioners are directly involved in the various projects through the project directors. Each commissioner is assigned the responsibility of supervising one or more research projects, and takes a hand in the editing of working papers and reports. The close relationship with the project director and the group enables each commissioner to report to the LRC on a regular basis. The relevant commissioner thus becomes responsible for the accuracy of information relayed concerning his project(s).² The usual procedure followed in terms of actually moving a project toward completion is generally easy to discern.³ First, a study paper is prepared for comment. It embodies the findings of a particular project and receives a limited distribution.

¹Report of the Proceedings of the 7th Official Meeting of the Commission, Ottawa, March 1, 9 & 15, 1972.

²M. L. Friedland, "The work of the Law Reform Commission of Canada," 6 Gazette 58 (March 1972), and Report of the Proceedings of the 3d Official Meeting, Oct. 12 & 13, 1971.

³Friedland, op. cit.

There follows a Commission working paper which is also circulated for comment, but on a wider basis than the study paper. The working paper is the result of reactions to the study paper received by the LRC, and includes tentative recommendations. The final report to Parliament is completed in the light of reaction to the working paper, and may include draft legislation (i. e., the proposed Evidence Code in the recent Report on Evidence, 1976). At any of these stages, it is possible for the LRC to hold hearings on the subject in question (s. 15, LRCA). The move toward implementation, during which the Standing Committee on Justice and Legal Affairs might also hold hearings, is largely out of the hands of the Commission and necessarily subject to the vagaries of the normal legislative process.¹

But, as intimated above, such an apparently rigid process is also flexible. In certain cases, a study paper may not be required. In others, the working paper may be omitted. Nor is the usual study paper—working paper—report progression necessarily a reflection of the internal decision-making progress. It is here that flexibility in the sense of the requirements of a particular situation is most evident. The issuing of any study or working paper may be the result of several internal "background" papers, which serve to present varying viewpoints. It is therefore possible for the individual researcher to have a strong influence, especially in terms of the conceptual approach. But he or she must "sell" that point of view to the commissioner in charge of the project. In turn, he must "sell" it to the other members of the Commission.²

¹The factors dealing with implementation are dealt with in section D of this chapter.

²Interview. Confidential interviews were conducted with members of the LRC (4), personnel in the Department of Justice (3) and Members of Parliament (2). Much of this chapter is based upon these interviews which were conducted between March 1977 and June 1978.

However, it is at this stage that the commissioners do have a considerable influence over the content of the end product. For example, the project on evidence went through numerous drafts before being finally accepted. That this is so, suggests that there is a second level of decision-making among the five members of the LRC appointed under s.3 of the LRCA. While it is impossible to describe the process which goes on at this stage as any kind of set "system," certain characteristics do stand out. The objective is not strictly to reach a consensus over any given issue. Rather, there is an attempt to accommodate opposing views and concerns within the framework of specific findings. This is more a reflection of the nature of the law itself, than an unwillingness to be precise in terms of recommendations.¹ It is at this stage particularly that the value of the "inputs" (public opinion and dialogue) is felt. They may reveal facets of an issue which have been overlooked or not fully appreciated in their ramifications. Occasionally, as in the case of the First Research Program, an entirely new course of conduct may be indicated.

The internal decision-making process in general is therefore an accurate reflection of the nature of the law itself. There is no "right" or "wrong" laws; merely laws which are comparatively better or worse than others. Their improvement requires an airing of the difficulties faced and, as much as possible, an accommodation of different perspectives. The recognition on the part of the LRC of this feature of the

¹I.e., law reform is not a "right or wrong" enterprise. See Chapter II.

law has contributed toward an expansion in the scope of the external aspects of the Commission's decision-making process. Study and working papers are distributed to Bar associations, Judges' Committees, Law Schools, other law reform agencies, the media as well as other interested parties such as unions, voluntary agencies and high schools. The effect of this public dialogue on the LRC's work will be discussed later.

B. The LRC and the Federal Distribution of Legislative Powers

As a creation of the federal government, the LRC is strictly speaking limited to examining subjects falling under the federal power as enumerated in s. 91 of the British North America Act, 1867. But the federal power also extends to areas of concurrent jurisdiction such as agriculture and immigration (s. 95). There is also a third "grey" area where the federal and provincial powers overlap, but neither's legislation is ultra vires unless there is 1) a collision in terms of outright conflict or repugnancy where the federal legislation will prevail, 2) merely supplemental provincial legislation, which is usually allowed to stand, or 3) duplicative provincial legislation, where again the federal legislation will usually be paramount.¹

By including s. 13 in the LRCA, thereby enabling joint projects with provincial law reform agencies, the federal government recognized that the LRC would be able to enter this "grey" area. The LRC has in fact done so, the Family Law and Evidence projects being examples. Here, there is a clear need for cooperation and consultation between the two levels of law reform activity. As noted earlier, the federal/provincial

¹W.R. Lederman, "The concurrent operation of federal and provincial law in Canada," (1963) 9 McGill Law Journal 185.

aspect of the LRC's work was recognized during the parliamentary debate over the LRCA. Writing in 1972, then-commissioner Friedland noted that there were already law reform agencies in all the provinces and that joint study would be of vital importance in order to avoid duplication. He felt that the LRC had "an important role to play in helping to coordinate the work of the various provincial law reform bodies and in helping to achieve a measure of uniformity in certain areas of the law."¹

It is fairly clear, however, that this federal aspect of the LRC's role has acted as something of an inhibiting factor. While the Commission will not ignore the federal aspects of certain reforms, it has been suggested that this factor does inhibit precision in the sense of formulating complete recommendations.² If a particular project's recommendations are to be presented in the form of proposed legislation, for example, the LRC cannot fully present them, if a substantial portion falls under provincial jurisdiction. Such an attempt would be perceived by the provinces as blatant intervention into their sphere of competence. Politically, such a move could only harm the LRC. Also, because of the same kind of problems as are faced by federal/provincial conferences, the LRC has not taken a lead in coordinating the activities of provincial law reform agencies. However, the LRC has at least reaped from that "failure" the benefit of not becoming too closely identified with the federal government in the pejorative sense (the "feds"). Yet these kinds of difficulties were perceived as having had an unfortunate effect upon

¹Friedland, op. cit., p. 67.

²Interview.

the scope of the Family Law project.¹ But once these difficulties are surmounted, the federal/provincial structures often play an important role in terms of putting recommendations into effect. For example, the implementation of unified family court systems at the provincial level is assisted to a considerable extent by the federal government, mostly through funding. If an LRC report, or part of one, is to be implemented, the Department of Justice plays a key role in the necessary federal/provincial consultation which must take place. This is often accomplished through the annual Uniformity Conference, a gathering of provincial legal officials, which will often consider LRC recommendations in terms of uniform implementation in the provinces. At the present time, the federal Department of Justice is involved in a 3-year study with the provinces on evidence and one on mental disorder.

These important aspects of the LRC's work, its relationship to provincial and other law reform agencies and to the federal Department of Justice, must now be considered more closely, for they reveal much about the LRC's political character and effectiveness.

C. The LRC and Other Law Reform Agencies

The relative tardiness of the legislation creating the LRC (i.e., as compared with New Zealand - 1937, N.Y. State - 1934, California - 1953, Ontario - 1964, and England - 1965) perhaps made it inevitable that it should have been modelled after some of its foreign predecessors.

By 1974, the government was beginning to draw fire from critics in Parliament and elsewhere for its failure to implement any of the

¹Calgary Herald, Feb. 11. 1977.

LRC's recommendations in the form of legislation. In attempting to defend his department's inactivity, then Justice Minister Lang suggested at one point that the real difficulty lay in securing the cooperation of the various provincial law reform agencies.¹ The fact was that there were very real problems as far as joint federal/provincial law reform was concerned. Nor were these difficulties necessarily the result of any rivalry or jealousy. In the first place, the timetables of the different agencies often varied. Understandably, a particular provincial law reform body whose program had been established for the long-term years before the creation of the LRC would not feel particularly inclined toward revising its schedule in order to fit in with the LRC. Also, the timetables of the various provincial agencies could differ, thus complicating efforts at cooperation. Secondly, the programmes of the LRC and its provincial counterparts were frequently based upon contrasting sets of financially-imposed priorities. Where the LRC was devoting the greater part of its financial resources to criminal law studies, provincial bodies were appropriating more to family law, etc. Such problems were also a result of the division of legislative areas between the two levels of government; criminal law, for example, being a federal matter. Finally, problems of liaison were encountered in terms of the mere mechanism of meeting and resolving issues in a mutually satisfactory manner. Nevertheless, a continuing effort has been maintained on the part of the LRC to meet with its provincial opposites. There is some exchange of per-

¹House of Commons Debates, Dec. 12, 1974.

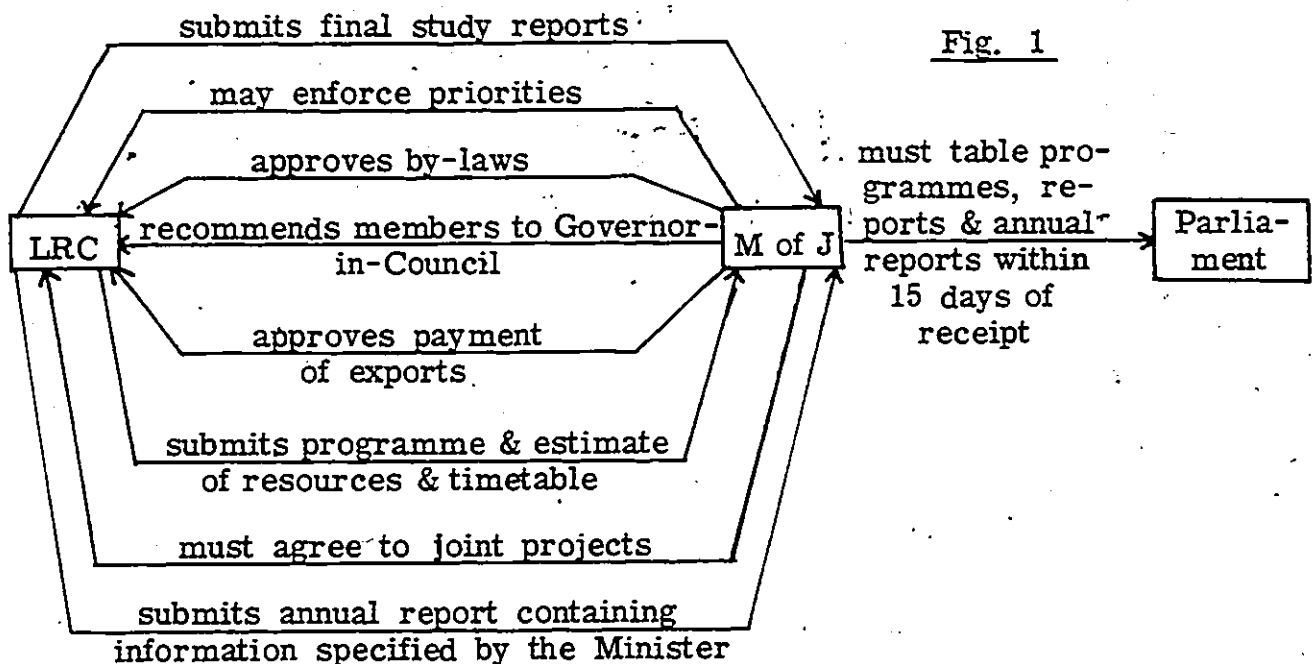
sonnel to observe meetings and the entry of the LRC into the field of family law and evidence has of necessity led to closer cooperation. It is possible to speculate that much of the difficulty lay in the generally accepted notion that areas of provincial jurisdiction are easier to change because they are more suited to the "verbal" form of law reform. These areas constitute what is often termed "lawyers' law." They are the most technical, in terms of the usage of language. Because there is widespread agreement as to the meaning of such terms, the implications of change are more apparent than in the field of criminal law, for example, where it is necessary to deal more with unwieldy principles and societal notions. Thus, it is easier to effect change in the former area. On the other hand, it is argued that federal jurisdiction is much more limited in terms of "lawyers' law," often to specific sections of the Criminal Code and certain aspects of family law. Hence, there may be a tendency on the part of a federal body such as the LRC to involve itself as much as possible in these strictly provincial areas which are "easier" to reform, and hence more attractive. Any cooperation between federal and provincial law reform agencies which seeks to establish a common timetable, etc., necessarily takes on a certain competitive character as each level strives to satisfy its own aspirations. As noted earlier, the potential for a mere duplication of the usual federal/provincial infighting is enormous.

Fortunately for all parties concerned, including the public, the annual Uniformity Conference has been playing an increasingly important role in easing any actual tensions and in defusing potential ones. Its

capacity to do so is derived from its non-partisan character. As a consulting body which brings together the two heads of government, while concentrating on inter-provincial issues, it is perhaps able to face compromises where a political group would not be able to. Since the creation of the LRC, the Uniformity Conference has urged cooperation between the provincial agencies and the federal Commission. In 1972, it established a continual exchange of study and working papers, etc. Since 1973, the LRC has played a considerable role as observer. In that year, its working-papers were discussed at the conference. The next year, LRC representatives led seminar discussions on various working papers. In 1977, a joint federal/provincial project on evidence was announced, a direct result of the previous year's presentation to the conference of the LRC's report on evidence.

D. The LRC and the Federal Department of Justice

Figure 1 outlines the relationships between the LRC, the Minister of Justice and Parliament, based upon the relevant sections of the Law Reform



Commission Act.

In 1970, Justice Minister Turner had promised "a substantial degree of independence" for the LRC.¹ But, as noted earlier, several MP's and Senators suggested that the wording of the Law Reform Commission Act would enable the Minister of Justice to exert a preponderance of control over the Commission. In 1972, the LRC voiced the need for guidelines to establish a division of responsibilities between the Department of Justice and the Commission. Its genuine concern over the LRC's independence was demonstrated in its response to an apparently trivial proposal suggesting that the Department assume responsibility for the Commission's library. "It was the consensus that to make the Commission library a sub-library of the Department of Justice [would] be frittering away the independence of the Commission."² Indeed, the notion that the LRC would be independent was seriously contradicted by Mr. Turner himself, who noted that the LRC would be concerned with reforms, "the need for which is felt by the government and reflected in Parliament."³ Moreover, it would be the role of Parliament, the appropriate committees, and the Department of Justice to first take a position on any of the LRC's recommendations. It is difficult to escape the conclusion that such functions would fall essentially to the Department, for it is its responsibility to screen and first assess proposed legislation. Before Parliament

¹Ibid., Feb. 23, 1970, p. 3961.

²Report of the Proceedings of the 11th Official Meeting of the Commission, Ottawa, Sept. 20-21, 1972, p. 6.

³House of Commons Debates, Feb. 23, 1970, p. 3961.

would be able to take a stand on the Commission's recommendations, therefore, the Department would already have had an opportunity either to modify or to block them completely, obviously at the discretion of the Minister and ultimately, of Cabinet.

These concerns are supported by the relationships sketched out in Fig. 1, and have prompted some observers to call the situation one of "relative independence."¹ The relationships between the Commission and the Minister are ones of control. In every instance, the LRC must either submit a report, or the Minister must approve some course of action. Nowhere is it stated that the Minister of Justice has a responsibility toward the Commission in terms of implementing recommendations. Similarly, while it may be argued that the tabling of LRC reports in Parliament by the Minister constitutes a direct form of responsibility, there is nowhere in that relationship (Minister/Parliament) any kind of commitment as to final implementation. Although s. 18 of the LRCA does provide for a statement by the Minister at the time a report is tabled, including such comments as he "sees fit," this can hardly be called a responsibility to indicate the cause of action likely to be taken by the government on a particular report. Clearly, there exists considerable potential for LRC recommendations to simply disappear into the machinery of the Justice Department, with no assurance that they will ever reappear. We may hypothesize that this will be the case where Department or government priorities do not fit in with the work being

¹Friedland, op. cit., p. 67.

done by the LRC. If, for example, the government is heavily involved in criminal law matters, it will not be interested in acting upon a recent LRC recommendation in the area of family law. On the other side of the coin, we may hypothesize that there is adequate room for government priorities to become the LRC's priorities. Section 12(2) of the LRCA is precisely the means by which this may be accomplished. It requires the LRC to include in its programme any study of a "special priority" requested by the Minister. To sum up, then, while the government's priorities may become the LRC's, the reverse does not necessarily hold true.

The nature of the relationship between the LRC and its political masters is reflected in the fate of the LRC's final reports which have appeared to date. The failure of the government to take any concrete action on any recommendations has certainly engendered some frustration on the part of the LRC. Yet there is still a feeling that something is being done. In the area of family law, the federal government is currently negotiating with the provinces over the implementation of some recommendations. The recommendations concerning the Criminal Code, mostly of a conceptual and philosophical nature, are being adapted to a great extent in the courts. However, nothing whatsoever has been done with the reports on Sunday Observance and Expropriation. This is undoubtedly a reflection of ministerial, and hence government, priorities. The Sunday Observance project in particular is an excellent example of the Justice/LRC relationship. It was referred to the LRC by the government, and was patently a political move, for the issue was relevant at

the time. The placing of the report in limbo also demonstrated that the issue had become politically "dead."

In 1974, during the debate over Bill C-43 (amendment to LRCA), several MP's began to express concern over the failure to implement any recommendations. One suggested that then-chairman E. Patrick Hartt was becoming discouraged with the progress of the LRC's work.¹ In 1971, Justice Hartt had not anticipated "waiting a long period of time before making a report."² Even the timetable outlined in the First Research Program had been optimistic. It predicted that reports on native offenders, poverty and the criminal law, evidence and family law would appear within two years; that is, in 1974-1975. However, final reports did not begin to appear until early 1976. Mr. Andrew Brewin attacked the Minister of Justice during question period:

... what has transpired as a result of this commission? I ask the Minister to tell the House what legislation had resulted from this?, what single recommendation has been made part of the law of this country, by reason of the LRC? I suggest that there is something very wrong when four years after the commission was created the net results, in terms of actual legislation, are completely absent so far as I can see.

I am not complaining about the commission itself, but where in the House have we seen any evidence of improvement, modernization and reform of the law? Where are the new approaches and the new concepts?³

Although it is possible to dismiss such a query in the light of the implications of the "fundamentalist" approach taken by the LRC, and

¹House of Commons Debates, Dec. 12, 1974.

²Vancouver Sun, Dec. 17, 1971.

³House of Commons Debates, Dec. 12, 1974.

therefore the relative unimportance of verbal changes, it was nonetheless a fact that virtually nothing of substance had transpired as a result of the Commission's work. Justice Minister Lang correctly replied that no final reports had as yet been received. In all fairness, the LRC could not be accused of anything but over-eagerness and an imperfect understanding of what it was getting into. The subsequent failure of the Commission to meet its initial timetable undoubtedly reflects the fact that it took longer than expected to develop a satisfactory approach. Almost every study project was by its nature long-term. This was not fully appreciated in 1974. While Mr. Lang's reply was correct, the Department of Justice (or the Minister) did not remain blameless for long. Shortly before several final reports were expected in late 1975, the new Justice Minister, Mr. Basford, told Parliament to expect changes accordingly, and that the Department was "gearing up" in anticipation.¹

The appearance of final reports and their fate offers an excellent illustration of the working relationship between the Commission and the Department of Justice. From the outset, several general criticisms were made of the reports by the press and, more particularly, the legal profession itself. Some said that their quality was not so great, while others maintained that the reports were only academic. Still others suggested that they were very P.R.-oriented and did not elaborate sufficiently upon the areas of law covered. But any initial antipathy now appears to have vanished.

¹Ibid., Nov. 19, 1975.

The very fact that the LRC's reports go directly to the Department of Justice, and are examined by officials there, created an initial, understandable and inevitable friction between the two. On the one hand, the Department of Justice was generally felt to be conservative and certainly constrained in its scope of activity by direct ministerial control. On the other hand, the LRC was a new agency, related to, but allegedly independent from, the Department. It was perhaps natural that each would strive to assert its territorial imperative, and, when these overlapped, that there would be a certain amount of conflict and tension. But to a great degree, what potential conflict existed at that time has been minimized by the slow development of a working relationship. Because final reports only began to appear in 1976, prior to that time nothing had really been arranged in terms of liaison between the LRC and the Department of Justice. The sudden influx of reports (7) came as something of a surprise, therefore, and the relationship gradually evolved in an informal, almost ad hoc, manner as people saw what needed to be done. Until that time, the Policy/Planning section of the Department had had little to do with the LRC. But a number of new positions were created to cope with the inflow of new work.

Because of the essentially informal nature of the relationship, it is difficult to draw any consistent path that a Commission report will follow through the Department. A report's progress is decreed by the nature of its subject matter. For that reason, it has been difficult also for Department officials to establish any sort of regularized procedure. A report covering an issue that is politically relevant, for example, is

likely to pass through the Department much faster, and very possibly reach the stage of proposed legislation, than a report which is politically obsolete. In other words, whether a report moves into the legislative arena is a matter of ministerial priorities. This pattern is demonstrated by the failure of the report on Sunday Observance to reach the legislation stage, in spite of having been referred to the LRC by the government. The fact was that between the time of referral to the Commission and the time of the report's submission, the subject had become relatively unimportant in political terms. In much the same way, because of government priorities, some reports may be shelved for an indefinite period of time. This obviously caused some frustration among the Justice Department officials who would have dealt with the report. An example of this is the LRC's report on Family Law, which was only recently taken off the shelf, presumably because the issue had gained the political limelight once again.

However, it is possible to discern certain general tendencies with regard to the department's treatment of LRC reports. In much the same way that a particular commissioner at the LRC will be responsible for a particular research project, one member of the Policy/Planning unit of the Justice Department is usually assigned to take care of a report. At this stage, the department's task is the analysis of the Commission's report. While there is obviously room for duplication of work in such a re-examination, it is generally felt that a fairly efficient division of labour has been effected between the LRC and the Department of Justice. It has been suggested that, on the one hand,

the LRC's role is one of innovation, while on the other, the department's task is one of implementation. Although such an apportionment of roles is by no means exclusive, it is useful as a rough guideline. Within such a context the LRC's function is to provide the broad philosophical underpinnings of an area of law. For example, the report Our Criminal Law attempts to outline some of the basic notions that should serve as the basis for a revised Criminal Code. The Department of Justice's role is to temper the Commission's idealism. It must translate the LRC's recommendations into reality by considering the potential effect of implemented recommendations on other legal infrastructures. It would, for example, attempt to assess the impact of a revised Criminal Code, based upon LRC recommendations, on other statutes, the economic implications such as shared-cost arrangements with the provinces, and resources (i.e., police, social agencies, court timetables, etc.). The department's job of adding reality to LRC material is occasionally rendered difficult when the Commission fails to provide the philosophical basis for a particular subject. It then becomes arduous for the department to visualize the recommendations within the framework of an entire scheme. There is a concern within the Department of Justice that the Commission's reports have lacked specificity in certain cases.

At the same time, it is clear that the Department of Justice faces the same kinds of problems as does the Commission. The department's output, because it is more closely tied to ministerial control, is totally subordinated to government priorities, whereas the LRC's immediate output is to a great extent self-determined. More significantly, if a

'hot' political issue arises, and the government considers it necessary to take immediate legislative action, the ongoing work of both the LRC and the department on that subject may be ignored by the government. For example, the recently introduced amendments to the Criminal Code dealing with rape and sexual offences were the direct result of a Prime Ministerial directive. This sudden action, in which the measures were incorporated into the Bill in a space of five hours, was the result of the representations of women's pressure groups whose suggestions were accepted on the spot.¹ It is possible to react to this by applauding it as "democracy in action." But there is an equally valid argument which contends that the acceptance of suggestions should not preclude careful thought before implementation. It is clear that little thought can possibly have been given to these measures before their incorporation into the Bill, and that much LRC and department work was ignored in the rush. One does not immediately rush a new aircraft design into production, without first testing and evaluating its future performance, even if the design is an undoubted theoretical success.

The Department of Justice encounters problems also at the level of federal/provincial relations. As noted earlier, the department plays a central role at the implementation stage. At this point, the process of consultation is implicitly difficult. First, the department is much more closely associated with the "feds." Secondly, if the department merely presents "suggested" reforms to the provinces, it is accused of being unprepared. If on the other hand, the department presents a com-

¹Interview.

plete package, it is often accused of having already reached a decision without having consulted the provinces. In short, the difficulties are those of normal federal/provincial relations. But generally, the department is developing new techniques of consultation which are working well. While much is accomplished on an informal basis, the department does resort to some of the formal mechanisms of federal/provincial relations. As does the LRC, the department has found the Uniformity Conference to be of use in rendering more effective the necessary federal/provincial discussions.

The foregoing discussion points to two inescapable conclusions. In the first place, the LRC is an important part of the process of legal reform because it fills a 'gap' or a 'void' in which, prior to the establishment of the commission, little could be done in the way of law reform. As former commissioner Friedland pointed out: "When law reform is tackled directly by the government without a law reform commission, the process of consultation is usually more selective. There is no machinery for widespread consultation."¹ While he was speaking particularly about the degree to which the government could engage in a dialogue on law reform with segments of the population, the same statement could be modified to apply to the areas of law which are taken into consideration for possible reform. Because a government is by its very nature attuned to political issues, it is unable, or unlikely, to touch on questions which may very well be deserving of reform, because they are either politically irrelevant or dangerous.

¹Friedland, op. cit., p. 61.

The second conclusion, which arises out of the first, is that a body such as the LRC necessarily plays a political role. The degree to which it does so is determined by its "proximity" to sources of control at the governmental level. Thus, the question of the LRC's "independence" becomes crucial to its mode of operation. One observer has succinctly stated the question as follows:

... whether a government should be in the position to decide on priorities for studies by the agency or to veto studies in controversial areas which the government might find politically embarrassing. The first question points up the danger of an agency being used by the government as a means of relieving it from the discomfort of current political issues which ought to be resolved directly in the legislature.¹

The political aspects and implications of the LRC's work are revealed in various ways. Under s. 4(3)(a) and (b) of the LRCA, at least two members of the commission must be from the province of Québec. The LRC itself was quick to recognize "that the Commission needed to establish its presence in the Province of Québec in order to be 'visible' in that province and to ensure the maximum participation of its citizens in the work of the Commission."² There has also been speculation that the political uses to which the Commission might be put, which were recognized in Parliament, have been realized from time to time. In a sense, the LRC can be perceived as acting as a testing ground for recommendations which might be politically hazardous if put forward by the government. Although to this extent the Commission may be the

¹R. F. Gosse, "Canadian law reform agencies," 1 Canadian B.J. 1 (1970), p. 2.

²Report of the Proceedings of the 1st Official Meeting of the Commission, Ottawa, July 27, 1971, p. 2.

tool of its political masters, those involved observe that the Commission has been otherwise unaffected as the creation of a partisan government. However, it is difficult to imagine such other ways in which it might be affected. Certainly, the "testing ground" theory has received the most widespread attention.

To be able to receive a report that has already yielded to public opinion before it is even released must be a very comforting cushion for any insecure or aimless government. It is also an abdication of its responsibility and a visible weakness of the law reform body in whatever guise it appears.¹

The referral of the question of Sunday observance legislation to the LRC was obviously such an effort at evading treacherous political ground. But it is also clear that the political role may be played in both directions. It has been suggested that the LRC refused to embark upon the study of abortion and capital punishment because of the political character of those subjects.² In turn, this suggests that a government's power to impose a research project upon the Commission (LRCA) is not absolute and that the LRC retains a certain "political" capability of its own.

On the other hand, it is possible that a politically-active LRC would be a good thing. By throwing off all pretence, the Commission would effectively become a particular kind of pressure or interest group. It would be able to intervene, for example, in an effort to prevent the Standing Committee on Justice and Legal Affairs from putting its own ideas into Bills without bothering to consult the LRC.³

¹Toronto Globe & Mail, Jan. 18, 1973.

²Interview.

³This notion is taken up in the final chapter.

Given the near-total subordination of the LRC's work to the political element, at least in theory, what may be done to alleviate the situation?¹ Here, three central issues must be dealt with. In the first place, should there be some measure of responsibility on the part of the Minister of Justice toward the Commission in terms of the implementation of recommendations? Secondly, should the Minister have a responsibility toward Cabinet? Finally, should the Minister have an obligation with regard to Parliament in general, or the House Committee on Justice and Legal Affairs in particular, for example?

The scheme envisaged by the LRCA was to render the Commission responsible to Parliament, through the Minister of Justice, by the tabling of reports and programmes.. There is no doubt that the LRC, as a consumer of public funds, should be held accountable for its operations to the elected representatives. But should there be a correlative accountability on the part of the Minister to explain either action taken on Commission recommendations, or the lack of it? It is obvious that at the present time, there is no assurance whatever that LRC reports will ever emerge from the Department of Justice, or ever be considered by the department itself. The relationships noted above in Figure 1 are all relationships of control and dependency, all of which work to effectively restrain the activity of the LRC, or the effect of its findings.

The answer to the question of whether there should be any form of ministerial responsibility turns on the nature of the LRC's role. On

¹That this subordination has effectively hampered the LRC in the pursuit of its objectives is made abundantly clear in Chapter V.

the one hand, it must be considered merely as an advisory agency, somewhat unique in its quasi-independence from the daily workings of the Department of Justice, but nevertheless under ministerial supervision. Such is the case in instances where the Commission carries out projects selected on its own under s. 12(1)(b) of the Act. Here, there is clearly room for ministerial discretion as to the fate of recommendations and reports. But this is not to say that such a discretion should be exercised without explanation. Just as the LRC is accountable for its use of public funds, so should the Minister be accountable to Parliament, and thereby to the public, for vetoing the progress of any report, etc. Section 18 of the Act should be amended in such a way as to force the Minister into making a complete statement if parts of programmes are not approved or reports are "shelved" by the department.

To counter any poorly-explained use of ministerial discretion, the LRC should be able to make use of the political aspects of its role. It has already been noted that to an extent, the LRC may be regarded as a particular type of pressure group. To some degree, it undoubtedly already fulfils the functions of an interest group. It has already been suggested that the business of law reform is a matter for interest groups.¹ In its meetings with representatives of provincial law reform agencies and Department of Justice officials, it attempts to "push" its own views. There is no reason why the LRC should not expand this role and lobby at the government level, in much the same way as do the Canadian Medical Association or the Canadian Labour Congress, etc. Also, the

¹Interview. This theme is picked up in Chapter V.

Commission has made use of its "public dialogue" to modify and develop its research programmes (see Chapter IV). Why should it not be able to use the results of these consultations to back up demands for action at the government level?

On the other hand, the LRC may be conceived as a part of the legislative process. In exercising its right to refer studies to the Commission under s. 12(2) of the Act, the Minister is necessarily indicating to the Commission, as well as Parliament, that a particular area of the law is in need of reform, and that the Commission is to determine the best way to accomplish it. It seems reasonable here to expect a considerably higher degree of responsibility on the part of the Minister to the LRC. In this way, the need for a greater responsibility toward Parliament would also be satisfied. A report or recommendation would still be reviewed by the Department of Justice, but only to be "tempered" with reality. It would then become the responsibility of some suitable body, such as the Standing Committee on Justice and Legal Affairs, to be implemented in the appropriate form.

When assessing the Canadian political system in institutional terms, one seems inevitably to come full circle and return to the most significant problem. As elsewhere, the central difficulty here is the phenomenon of increasingly-powerful cabinet government. The obstacles encountered by the LRC are very similar to those faced by parliamentary backbenchers. Both are limited in the degree to which they are able to participate in the policy-making process. Their access to it, and influence over it, is tenuous.

The only question which distinguishes between the two, i.e., how much of a right does the LRC have to be a part of the legislative process. It is, after all, an extension of the government bureaucracy, and in no way a representative body. Once it is conceded that the Commission does play a part in the process, it is only fair to concede it the right of having its recommendations at least considered by elected bodies, rather than by another branch of the bureaucracy. The issue of the LRC's role in the legislative process is discussed further in Chapter V.

CHAPTER IV

THE COMMISSION'S DIALOGUE WITH THE PUBLIC

Reaction to the work of the LRC has been mixed, to say the least. On the one hand, a substantial segment of the press and general public has been disappointed over the absence of implemented legislation arising as a result of the Commission's recommendations. It is evident that some of the blame for continuing problems in the field of law reform was initially placed at the doorstep of Parliament. As the most visible source of law-making, and hence verbal law reform, it was perhaps inevitable that Parliament should receive the brunt of the attack. Mr. David Orlikow (Winnipeg North) hastened to defend Parliament.

The public assumes that because the commissions have recommended these things, we have in fact done them, and that since we have done these things and since crime continues to increase, these recommendations have not worked and will not work. The public is misinformed; the public misunderstands. We have never done most of the things which have been recommended by these committees and commissions which governments have approved.¹

Whether this was actually a criticism of the LRC or merely an implied attack upon the government (i. e., cabinet) is unclear. What is clear is that Orlikow was pointing out that recommendations had never reached the stage where they could be considered by Parliament and that Parliament as a legislative institution was not about to be saddled with any of the blame. It is more than likely, as suggested by the description in Chapter III of the relationship between the LRC and the Minister of

¹House of Commons Debates, March 31, 1976, p. 12333.

Justice (and consequently Cabinet), that the failure to take action may be placed on the peculiar institution of Cabinet government.

The press's response, on the other hand, dealt directly with what it perceived as criteria for evaluating the LRC's effectiveness. The majority of criticisms levelled at the Commission were based on a misunderstanding of its research program and more specifically, its approach to law reform. In commenting upon the First Research Program, a frequently-levelled criticism was that the ultimate objectives of law reform were already known and that results, presumably in the form of legislation, were what mattered. More significantly, the Commission's "relevance remains a long way from being established."¹ In a similar vein, the Montreal Star observed that the LRC's "work will only have value if its proposals for change are actively taken up by the government. . . ."² It later criticized the Commission as being too academic-oriented; so much so that it was ignoring reality.³ One of the most scathing comments, at least in its implications, appeared in the Edmonton Journal:

The Commission is 30 months old, and it is fighting against obscurity. When the report (The Worst Form of Tyranny) was tabled in Parliament this month, it generated little interest or publicity around the country, a sign that perhaps law reform isn't the issue it was when former justice minister John Turner created the permanent commission.⁴

¹Toronto Globe & Mail, Jan. 20, 1973.

²July 26, 1976.

³Dec. 16, 1976.

⁴Nov. 5, 1973.

But the LRC received its share of kudos from the press as well. Writing about the growth of self-critical attitudes on the part of the legal establishment, one newspaper complimented the Commission as "one of the most effective instruments in this gradual process."¹ Thanks to the efforts of the LRC, lawyers were beginning to shed their attitude of isolationism and to recognize that legal institutions were not necessarily perfect, in their eyes as well as those of the public.

That most realized that the true culprit was the government (Cabinet) was illustrated by the increased effort on the part of backbench MP's to introduce private members' bills based upon the Commission's recommendations. One of the LRC's model bills (on evidence) was introduced in order "to test the government's sincerity about their commitment to reforms in the law as proposed by the LRC."² A similar enterprise was mounted with respect to the LRC's recommendations concerning no-fault divorce, which had been endorsed by the press. Both of these private members' bills either died on the order paper or failed to receive approval for first reading. The obvious implication is that the government simply did not consider these recommendations important enough to take up the time of Parliament. That such is the fate suffered by the vast majority of private members' bills does not detract from this conclusion. For whenever a private members' bill is thought to be of sufficient value, it will be taken up by the government. Once again, the overpowering influence of Cabinet, if not prime ministerial, govern-

¹Trenton, Ontario, Trentonian, Oct. 15, 1973.

²Saint-John, N.B., Telegraph-Journal, Feb. 2, 1976.

ment is the determining factor.

On February 11, 1977, the Calgary Herald noted that Parliament had yet to pass a statute leaving the LRC's imprint. But it did suggest that the Commission's reports were beginning to take on some degree of political importance, in terms of being recognized by the government. It noted that it was "no secret the Liberal government slapped the Commission in the face last year with some of the harsh sentencing measures contained in its 'peace and security' package." Those measures were precisely contrary to recommendations made by the LRC. But such a rebuff had to at least take notice of the LRC's recommendations, if only in a negative sense. The same article noted that Justice Minister Basford was preparing to move on the Commission's recommendations for major reforms in family law, and cited the LRC as the catalyst which would produce "mutations of attitude" in the system of justice. However, as noted elsewhere, there has been no conclusive action on that or any other Commission report. As late as 1975, one newspaper observed that "the Commission faces a major task of public education before it can hope to win widespread acceptance of its suggestions."¹ This was more than three years after the LRC had announced its intention to embark upon a dialogue with the public. The suggestion here is that the Commission, while enunciating the policy of "public dialogue" as the essence of its fundamentalist approach to law reform (i. e., what happens to the citizen in a court of law as opposed to merely verbal changes), in actual fact failed to pursue it with the required per-

¹ Pembroke, Ont., Observer, Oct. 16, 1975.

severance.

If the mode of law reform adopted by the LRC had been that of "tinkering," then one would probably be justified in assessing the Commission's effectiveness in terms of the number of recommendations implemented by Parliament. Such is clearly not the case, at least in general. It has been pointed out that the LRC's approach to law reform involved a blend of "tinkering" and fundamental change. Chapter III stressed that the Commission has had little, if any, success with the former. At the same time, an accent has been placed on fundamental law reform. The LRC's "fundamental" approach is based on a "reciprocal educative function" (see Chapter II). In other words, the legal profession and the public at large must become engaged in a process of mutual consultation with the Commission. Once communication has been established, the LRC would naturally attempt to influence the other two into accepting recommendations based upon that communication. As such, the effectiveness of the Commission's work with regard to fundamental law reform must be measured as against that of its dialogue with the public (which includes the legal profession). Three questions must be kept in mind throughout such a discussion: a) has the public dialogue been successful or has it failed? b) if it has been successful, has a reform of popular attitudes taken place? c) if it has failed, was it because such an enterprise was inappropriate in the first place or must the failure be attributed to other factors?

The LRC's public dialogue has served, or attempted to serve, a dual purpose. On the one hand, it has represented the LRC's approach

to law reform. On the other hand, it has been one of the major methodological tools employed in the "fundamental" approach. A former member of the Commission articulated the function of the public dialogue as follows:

We are not attempting to engage in this dialogue with the public as a PR gesture, but rather because the Commission feels that public participation is an integral part of effective law reform. As the chairman stated in a speech several months ago:

'Law touches the lives of everyone; it is therefore the business of everyone. The functioning of a legal system depends upon a cooperative effort with the very process of making law. The public must therefore be actively engaged in a dialogue with the Commission concerning the revision of the law and the formulation of new laws. Whether we will be disillusioned and revert back to the traditional approach of seeking mainly the advice of interested groups, remains to be seen. I hope not.'¹

Still others saw the public dialogue as arising out of a need to keep the legal profession 'honest,' in the sense of preventing a complete technocratization of law reform, and out of an inability on the part of lawyers to take a global view of the varied aspects of law reform.² The Ottawa Journal alluded to the major obstacle facing such a programme. "The Commission's most difficult task may be to persuade the public to get interested in law reform, for it must fight not only apathy but what we suspect is a general public uneasiness about criminal law in particular."³

In general, the public dialogue appears to have been reasonably effective, while a little frustrating because of the rather small response.⁴

¹Friedland, op. cit., p. 60.

²Interview.

³May 4, 1972.

⁴Friedland, op. cit., p. 60.

The scope of consultation has depended on the character of the subject under scrutiny. Obviously, a highly technical research project, dealing with "lawyers' law," would not involve the public to the same extent as would a broader topic. For the very reason that "lawyers' law" requires a more specialized understanding, the Commission has tended to steer away from it and toward the more general conceptual areas where it is possible and definitely desirable for the layman to have an input. Again, the broad nature of most of the areas of law under the LRC's purview, combined with the Commission's 'fundamental' approach, usually permits a wide scope of consultation. The project on obscenity, for example, illustrated the need to pursue the public dialogue. Such an issue clearly transcended the legal profession, simply because it involved the development of broad concepts rather than a measure of expertise at dealing with technical material. The LRC held meetings and communicated with such groups as the Church Council, the Canadian Medical Association, forensic psychiatrists, various human rights groups, High Schools, and the general public. The response was therefore both organized and informal. As noted earlier, public consultation assisted the LRC in its drafting of the First Research Program, and in its choice of the criminal law as the first major project.¹ The same result may be seen in other areas of the Commission's work. A response of 200 out of 6700 questionnaires sent out in 1972 prompted the LRC to "shift its priorities to give more emphasis to family law as a result."² However,

¹First Research Program, op. cit., p. 65.

²Toronto, Globe & Mail, Feb. 26, 1972.

the response continued to be low. A second questionnaire (about 7000 sent out) resulted in only 400 replies and the press began to suggest that the public dialogue was a futile exercise.¹ To answer that question, it is necessary to ask whether the response to these questionnaires has been adequate. The returns for each of these two questionnaires are 2.1% and 5% respectively, and tend to suggest that the organized public dialogue has not been a success.

However, reference was made earlier to an informal dialogue with the public. This has consisted of unsolicited reactions to the First Research Program and various working papers. The results of five "sets" of these comments received by the LRC are set out in Figures 2-6 respectively.² Three points deserve to be made concerning these results. In the first place, the overall number of letters received from the "public" in each case is surprisingly large and falls below the greatest number only twice. Moreover, with reference to all the categories, "the majority of these letters were written on behalf of associations and agencies and, therefore, . . . cannot exactly represent the total number of opinions expressed."³ Finally, it is interesting to observe that the field of family law is generally considered a part of what is called "lawyers' law." As such, the number of responses in the "public" category becomes even more significant.

¹Toronto, Star, March 23, 1972.

²LRC, Evaluation of Comments Received in the Area of Family Law, 1976, prepared by Carole Kennedy.

³Ibid., p. 1.

Fig. 2

**Number of Suggestions and Responses received re
First Research Program, 1972**

<u>Topic</u>	<u>Public</u>	<u>Lawyers</u>	<u>Social Agencies</u>	<u>Judges</u>	<u>Academics</u>	<u>Government Departments</u>	<u>MP's</u>	<u>Psychiatrists</u>	<u>Total</u>
Divorce	64	8	8	7	4	2	1	-	94
Unified Family Courts	15	12	9	12	3	2	2	1	56
Maintenance	25	5	6	3	1	-	-	-	40
Family Property	7	1	3	-	2	-	1	-	14
Total	111	26	26	22	10	4	4	1	204

Fig. 3

**Number of Reactions received to Working Paper #1
(Family Court)**

<u>Group</u>	<u>For</u>	<u>Against</u>	<u>Total</u>
General Public	35	-	35
Associations	22	1	23
Lawyers	9	1	10
Judges	8	-	8
Academics	5	-	5
Church Groups	3	-	3
Psychiatrists	3	-	3
Gov't dept's & LRC	3	-	3
Women's groups	2	-	2
MP's	1	-	1
Total	91	2	93

Fig. 4

**Number of Reactions received to Working Paper #8
(Family Property)**

<u>Group</u>	<u>For Approach 1</u>	<u>For 2</u>	<u>For 3</u>	<u>?</u>	<u>Against All</u>	<u>Total</u>
Editorials	-	16	3	4	1	24
General Public	2	5	4	3	5	19
Academics	-	1	10	1	2	14
Lawyers	1	1	1	-	2	5
Associations	1	-	2	-	1	5
Psychiatrists	-	1	-	-	-	1
Total	4	24	20	8	11	68

Fig. 5.

Number of Reactions received to Working Paper #12
(Maintenance on Divorce)

<u>Group</u>	<u>For</u>	<u>Against</u>	<u>Total</u>
Editorials	15	2	17
General Public	12	3	15
Lawyers	1	2	3
Academics	3	-	3
Women's groups	6	-	6
Associations	2	-	2
Total	39	7	46

Fig. 6.

Number of Reactions received to Working Paper #13
(Divorce)

<u>Group</u>	<u>For</u>	<u>Against</u>	<u>Total</u>
Editorials	15	2	17
General Public	15	4	19
Academics	4	1	5
Lawyers	1	1	2
Judges	1	1	1
Psychiatrists	-	1	1
Associations	-	-	2
Total	37	10	47

The necessary conclusion is that the public dialogue has encountered partial success. The question now is to what degree? First of all, the public dialogue has been concerned with both the "fundamental" and "tinkering" approaches used by the LRC. As far as the latter is concerned, the public dialogue has encountered the greatest success with regard to the First Research Program to which allusion has already been made, and the implementation of unified family court systems, where the letters received by the LRC must have played some role. It is difficult to estimate the effect of letters received relating to other areas of "lawyers' law," as there have been no implemented recommendations. It is equally difficult to ascertain the extent to which the public dialogue has played a part in effecting fundamental law reform. Because such reform involves the transformation of attitudes and practices, the best that can be said is that the dialogue has had a certain influence upon the Commission in its development of recommendations. Whether the communication of those recommendations has had any return effect, is difficult to assess.

The LRC came in for criticism on the basis that the public dialogue concept was itself inappropriate to the law reform process. It was argued that law reform was intrinsically an interest group affair,¹ or that it was not the Commission's proper function to engage in such a venture.²

For a reform body to equate reform with what is generally acceptable to the uninformed public and equally uninformed

¹Interview.

²Toronto, Globe & Mail, Jan. 16, 1973.

newspaper editors is to deny the basis for its own existence.

The government receiving the report is in a totally different position. If strong in ideals and leadership they can accept a recommendation and decide that, in leading, they may become unpopular. If weak, they can decide that they would rather be re-elected than contribute to the development of society.

What is utterly useless is for a law reform body to feed its government only recommendations that have already received the imprimatur of the electorate.¹

In spite of the LRC's defence that "the imprimatur of the electorate may help to speed beneficial legislative enactments,"² other critics concentrated on the simple lack of response, similar to that encountered by the Ontario Law Reform Commission, and argued that the members of the LRC would "be required to orient their thinking to the fact that they aren't going to get anything like the amount of feedback from John Q. Public on the issues which they think are important and on which they would hope to get comment."³ These critics argued that the very scope of the LRC's undertaking mitigated against public involvement.⁴

Such criticisms are rather facile, and may be dealt with briefly. The crucial point which covers them all is that if the LRC is determined to pursue fundamental law reform at all, then some kind of public dialogue is vital. In that sense it is entirely appropriate to the process of law reform. Also, whether or not law reform is an interest group matter, it still involves communication and therefore a public dialogue.

¹Ibid.

²Ibid., Jan. 18, 1973.

³Ibid., June 22, 1972.

⁴Calgary, Herald, Dec. 3, 1973.

Nor is the fact that it has not to date met with great success any excuse for forgetting about it.

Inasmuch as fundamental law reform is the task of the LRC, the public dialogue remains a necessary tool in the pursuit of basic re-orientations of popular and professional attitudes toward the law. What may be done to improve such a process is discussed in Chapter V, where the important political elements are included.

CHAPTER V

THE COMMISSION'S FUTURE

A. Three Theoretical Models

It remains to determine, in the light of the foregoing chapters, the degree to which the LRC has met with either success or failure. To what interplay of factors, culled from the preceding chapters, may this success and/or failure be ascribed. To some extent, this will require a re-ordering of some of the more obvious and yet tentative conclusions reached earlier. But an attempt will be made here to offer these conclusions in a more highly integrated fashion, within the framework of a more theoretical discussion of the LRC than has hitherto been contemplated.

A recent article by B.A. Grosman on the Law Reform Commission of Saskatchewan has outlined three possible models of law reform agencies, based upon an examination of several agencies already in existence.¹ The first of these is the "Royal Commission" model. According to Grosman, an agency of this type is "utilized as a device for diffusing matters that the government of the day feels are particularly contentious."² It is therefore largely a safety valve which permits the government to safely procrastinate on delicate issues, while still giving the appearance of having taken concrete action. Such an agency would work almost ex-

¹B.A. Grosman, "Law reform: a Saskatchewan viewpoint," (1975) 2 Dal. L.J. 455.

²Ibid., p. 456.

clusively on projects referred to it by the government or by its various departments. The agency's relationship with the government would be almost symbiotic, according to Grosman. Its task would be to examine some aspect of government or of the law as efficiently as possible and to make recommendations based upon its findings. The government, on the other hand, will be only too willing to let the matter lie fallow for as long as possible, and thereby avoid having to deal with it.

Grosman calls the second model the "lawyers' law" model. A law reform agency of this genre is usually concerned with the "tinkering" approach to law reform. Accordingly, it tends to promote conservation by effecting minor changes in the law (i.e., not of a conceptual nature) and attempts to avoid high visibility. Grosman observes that most of the agencies in this category, at least in Canada, are provincial bodies whose functions are difficult to distinguish from those of the research sections of the various provincial justice departments.

Finally, the "fundamental change" model represents those agencies which seek to infuse the legal system with entirely new concepts. By virtue of their approach toward law reform, these bodies tend to be the most visible in terms of publicity. A comparison of the LRC to each of these models will not only enable further theoretical refinement, but should permit a more precise placing of the LRC within its political environment.

It is apparent that the LRC does not fit precisely into any one of these categories. While this certainly points out the difficulties of creating models which are neither too general, nor too specific, it is

not of great assistance in analyzing the progress of the Commission. The LRC's experience has encompassed elements of all these models. The referral to it of the Sunday Observance project and the potential for such intervention in the Commission's programme on the part of the Minister of Justice as set out in s. 12(2) of the Law Reform Commission Act places it within the ambit of the "Royal Commission" model. However, while Grosman fails to elaborate, there is in that model the implication that such an agency's work is almost exclusively of the referred type. Such is definitely not the case with the LRC. Similarly, the LRC does not conform to the "lawyers' law" model. Again, while some of its work is necessarily concerned with verbal changes in the law, it is not primarily concerned with "tinkering" in the pejorative sense. This is largely the product of the Commission's choice of research projects, which has centered around the conceptual areas of federal jurisdiction such as the criminal law.

Must we therefore conclude that the LRC fits the mould of the "fundamental change" model? The idea of fundamental or conceptual law reform has certainly been in the forefront of the Commission's work. The LRC has also made overt use of the media and deliberately sought a high profile. Such a pigeon-holing of the LRC is fine, as far as it goes. Unfortunately, Grosman's models do not go any further and thus leave much to be explained. Most importantly, the political element is virtually ignored. Referring to the "fundamental change" model, Grosman merely hints at inherent dangers which may arise if the government feels the law reform agency's recommendations are politically

unattractive. But such dangers must surely exist also for agencies conforming more to the other two models. For any of them, politically unattractive recommendations are likely to die stillborn, all other things being equal. It is therefore logical to presume that there are other, and more significant, variables which tend to explain the success and/or failure of the LRC. We will therefore proceed to summarize the successes and failures, and the reasons for them, of the LRC as an essentially "fundamental change"-type law reform body. Such an exercise will hopefully indicate changes which will render the models more accurate and remedies for the problems encountered by the LRC.

B. Success or Failure?

Whether the LRC has encountered success or failure is a question which can only be answered adequately after an examination of the Commission's objectives in terms of law reform. It is in describing these objectives that great care must be taken. For, we are concerned not with the perceived objectives of the LRC, but with the Commission's self-defined objectives. There is a vast difference between the objectives assigned to the Commission by "outsiders," such as the media, the public and even individuals at the government level, and the LRC's objectives as defined by the enabling legislation and the Commission itself.

The LRC's "real" objectives are outlined in s. 11 of the Law Reform Commission Act. They range along the entire spectrum of law reform: from traditional "tinkering" to fundamental reform. That this is so is of no great use in attempting to assess the Commission's per-

formance. But it is reasonable to suggest that the Commission itself has interpreted its official mandate in such a way that it has consistently geared its work to the notion of fundamental reform. The First Research Program, the annual reports, the attitudes of members of the Commission (particularly the legal philosophy of the first chairman, Mr. Justice E. Patrick Hartt) are all evidence of this tendency. Moreover, the tenor of the various final project reports have reflected such an attitude. As a result, it is apparent that the LRC conforms most precisely to Grosman's "fundamental change" model. The orientation toward the development of new ideas and concepts, and a self-confessed desire for a high profile on the part of the Commission confirm such a conclusion.

The logical consequence of such a conclusion is that the LRC must be evaluated, in terms of its objectives and output, as an example of a "fundamental change"-type law reform agency. Grosman observes that the "fundamental change" model is likely to have "a high potential for criticism, based on a lack of understanding of goals and upon professional resistance to potential change which threatens established learning and procedures."¹ Clearly, a body dedicated to "fundamental change," such as the LRC, must be evaluated by a different set of standards than would an agency which conformed to the "lawyers' law" model. The objective of a "lawyers' law" agency undoubtedly would be to effect as many verbal changes in the law as possible. It can be argued that such an agency might effectively be evaluated on the basis

¹Ibid., p. 460.

of the number of changes which are brought about.¹ It should be noted that such a standard for evaluation may still not be completely satisfactory for, if the "lawyers' law" agency is dependent upon a legislature to implement its recommendations, the ultimate control may not be in the agency's hands. It would thus become extremely difficult to evaluate the agency's performance at all. However, assuming that the same kind of reasoning applies it follows that a law reform agency of the fundamental-change type can be evaluated only according to its objectives. That is, it ought to be evaluated on the basis of the number of fundamental reforms which are effected. It is at this point that Grosman's models begin to break down. For while the LRC is generally a fundamental change agency, the reforms with which it is concerned may be expressed in two ways. In the first place, many can undoubtedly be effected through legislation and are in this sense closer to what is termed "lawyers' law." Yet others are geared towards reforming the practice of the law, a process which is more analogous to the normative conception of fundamental law reform. It is therefore clear that the LRC's work may be evaluated according to two standards: how many recommendations have been implemented a) through legislation and b) through Commission influence over the practice of the law? It is crucial to note that such standards are by no means hard and fast. For if, as it has in fact turned out, the fate of LRC recommendations is not under the Commission's control, then the LRC cannot reasonably

¹The political variable, which is common to all three models, renders this basis for analysis ineffective, as will be noted later. However, this point is sufficiently valid to make the point here.

be measured against them. It is, however, necessary to account for any apparent failures, for these may point to the more significant variables which go to explaining the LRC's environment.

Earlier on, we noted that it was possible for the LRC to concern itself with two "kinds" of fundamental law reform.¹ While both necessarily involve a conceptual approach, it is nevertheless possible to differentiate between them. In the first place, the Commission has attempted to deal with the notions which underlie existing laws. In the fields of criminal law and family law, for example, it has recommended new working concepts which could be introduced in written form into these areas of the law. In a sense, these would operate as the "spirit" of the law: as basic operating guidelines. The second aspect of the LRC's attempt at fundamental law reform has been geared toward the practice of the law itself. The recommendations on diversion and sentencing are examples of this. Essentially, then, the difference is that the former is more easily expressed in writing within the body of the law, while the latter involves an attempt to influence the practice of the law and the attitudes of its practitioners as well as the public.

Insofar as the first is concerned, it is probably fair to say that the Commission has met with mixed success. Certainly, in the field of criminal law, none of its recommendations has moved into the implementation stage. On the other hand, the joint federal/provincial effort to implement unified family court systems is undoubtedly the result of Commission recommendations to this effect.

¹See Chapter II.

It is impossible to assess with any accuracy the extent to which the LRC's voice has had an effect on popular attitudes toward the law. While the concept of diversion is gradually being experimented with, it is likely that the law is still a domain restricted to practitioners and a complete mystery, if not anathema, to the public at large. But without the hard data of a survey or some other appropriate form of research, it is not possible to be more precise. The high public profile which the LRC has assumed has surely had some impact on at least awareness of the law in general.

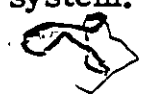
It is very evident that the Commission's approach to law reform, or its interpretation of its objectives, has been widely misunderstood. The media and even MP's who should know better have consistently assessed its performance exclusively in terms of the number of recommendations which have been implemented. Even if such a criterion were a valid one for assessing any law reform agency, it cannot be used for evaluating the LRC, whether that body be considered a "fundamental change" model or a "lawyers' law" model. Such a single variable analysis completely ignores the nature of the LRC's working environment. For, in the case of the LRC, it answers nothing. Whether it be regarded as an example of model #2 or model #3, we are still left with the glaring fact that there has been little or no action taken on any of the Commission's recommendations. This is deserving of explanation, not as a means of evaluating the LRC, but in order to elaborate upon the nature of its political surroundings.

C. The Political Factor

A law reform agency is not generally given any kind of legislative powers. Even if it is part of a government's Department of Justice, the fate of its recommendations and reports are still ultimately in the hands of the legislative, or more probably, the executive branch, depending upon the precise character of the political system. As we have seen, such is the case with the LRC.¹ Because the future of the Commission's recommendations, in terms of their ever being implemented by legislation at least, is totally dependent upon the locus of power in the Canadian government, it becomes nonsensical to use such a standard for evaluating the LRC's work. It follows that new criteria must be developed. This subject will be discussed shortly. It is first necessary further to examine the reasons for the failure to implement any LRC recommendations, for such an exercise is likely to shed further light on the political context in which the Commission operates and which conditions its actions to such an extent.

It was suggested in Chapter III that the LRC is overly dominated, for a number of reasons, by the political element. It is now desirable to go beyond this bald conclusion and seek the implications of these reasons. It is somewhat inadequate to explain the absence of action on any of the Commission's recommendations merely by noting the great degree of control exerted by the Minister of Justice. For the fact that such control exists means that the LRC's experience reflects some of the peculiar characteristics of the Canadian political system.

¹ See Chapter III.



A subtle yet significant factor which goes toward explaining the lack of action has been the role of the Parliamentary Opposition. While the lengthy dominance of Parliament by the Liberals has prompted some observers to lament the disappearance of an effective Opposition, there is little doubt that the Opposition is still able to perform one important task. Given an adequate manipulation of Question Period, press conferences, etc., it can still elevate obscured issues into the political limelight, and thereby at least embarrass the government. But the Conservatives have failed to raise the question of the LRC's activities to any level of importance. Consequently, in the absence of any such Opposition agitation, there has been no reason for the Government to concern itself with the LRC, unless it has felt so inclined.

A second factor does much to explain the ascendancy of the political element and also happens to shed light on the failure of the Opposition to raise the issue of the LRC. There is a sense in which Parliament may be perceived as a stage whereon a continuing election is taking place. Such a concept is by no means new, and has been noted by many political scientists. According to this theory, a Parliament is constantly faced with the threat of dissolution and election. Even a majority government's lifetime is, within certain common-sense parameters, subject to the whim of the Prime Minister. Hence, it must always seek to deal with politically relevant issues to its best advantage. Similarly, the Opposition is forced to react to those issues, and ignores them at its own peril. The position of a minority government is even more election-oriented, for the obvious reason that it must depend on another party or

group for support in the House. The result is that Parliament deals only with issues that are politically relevant at any particular moment. Others are relegated to the limbo of committees and government bureaucracy. Such has clearly been the case with the LRC's recommendations. They have not been perceived by either the government or the Opposition as having any electoral importance.

If no electoral significance has been attached to the LRC's recommendations by Parliament as a result of the above two factors, we are necessarily faced to conclude that they also lack importance in the eyes of the public. This of course presupposes that elections are in fact fought over issues which are the reflections of popular attitudes. There is no doubt a school of thought which contends that election issues are artificially created by the media, etc. While there is a measure of truth in this argument, it is possible to give the democratic process a little more credit. It is more likely that popular attitudes (public opinion) create a broad spectrum of issues, and that the media serve to heighten the importance of some of these, as does Parliament in its turn. There may consequently be a circular process by which issues are created, filtered, added to, etc. However, the fact is that the LRC's recommendations have probably never even been made part of the broad spectrum of issues. If they have, it has been at the far end of the spectrum.

The fourth factor to be considered entails a greater degree of speculation. Thomas Hockin has suggested that the Prime Minister is limited in the sphere of his political leadership by a number of factors.¹ Among these, the Prime Minister may be limited by "bureaucratic

¹T. A. Hockin, "The Prime Minister and political leadership: an introduction to some restraints and imperatives," in T. A. Hockin (ed.), Apex of Power, Scarborough: Prentice-Hall of Canada, 1971, pp. 2-22.

realities." According to Hockin, information may fail to reach the P.M., either because there is simply too much of it being pushed around the various departments, or the P.M. may receive a biased view of an issue which has percolated its way through various levels of bureaucracy. Placing the LRC within this framework would suggest that the P.M. and/or the top levels of government policy-making are either receiving nothing or distorted information. It would be difficult, however, to test such a theory.

Yet another factor sheds light on the motives surrounding the Justice Department's domination of the LRC. It has been observed that every government department acts as an interest group in advancing its own interests to the policy-makers.¹ With regard to its own projects, recommendations and draft legislation, each department exhibits two characteristics. In the first place, a department is aggressive. It seeks to promote its own interests at the higher levels of policy-making by attempting to ensure the acceptance of its recommendations, etc. The byproduct of such aggressiveness is that the department's position hopefully will be enhanced by greater budgetary appropriations and more responsibility. The department's second posture will be one of protectiveness. Accordingly, it will seek to defend its position from any and all challengers. Here, the "territorial" boundaries will be well-defined. It is within the context of these two characteristics that the relationship between the LRC and the Department of Justice may perhaps be better

¹The testimony of Rob't Bryce et al., "The Cabinet and the public service establishment," in Hockin (ed.), op. cit., pp. 116-127.

understood. The aggressiveness function may be perceived in the re-examination by the Department of the Commission's recommendations. Presumably, the more a LRC report is "revised," the better the Department's position. Similarly, the Department's scrutiny of LRC reports will seek to ensure that the Commission has not overstepped the bounds of its mandate.

A sixth factor which has worked toward limiting the extent of the action taken on the LRC's recommendations requires but a brief word here. The mechanisms of federalism have undoubtedly inhibited to a degree the Commission's ability to reform the law. It is also evident that any such problems are the result of two factors. First, the federal distribution of powers has provided for, or evolved in such a way that it is possible for, both the federal and provincial levels of government effectively to exercise jurisdiction concurrently over certain areas. This poses obvious difficulties when reform is attempted in those areas of the law. Secondly, the attractive nature of provincial areas of law, in terms of reform, has embroiled the LRC in the federal/provincial tango.

It was noted earlier that these six factors just cited are all characteristics of the Canadian political system. It is reasonable to conclude that, as it is affected by some or all of these, the LRC must necessarily be considered a part of the political process generally. It should also be stressed that it is these six elements which "set the scene," as it were, for the Commission's "inferior" status vis-à-vis other branches of government, such as the Department of Justice. For

example, if the Opposition were to raise questions in Parliament with respect to the handling of LRC recommendations, or were the media to play its role, then it is clear that it would be much more difficult for either Cabinet or the Department of Justice to shelve Commission reports. However, such is not the case, and the immediate consequence is that any attempt to evaluate the work of the LRC in terms of output (with the possible exception of fundamental reforms aimed at changing the practice of, or attitudes toward, the law), a bureaucratic efficiency, is rendered futile, if not nonsensical.

There is still another variable which may do much to explain the Commission's failure to see any of its recommendations accepted and implemented. The very philosophical basis of much of the Commission's work may well render its recommendations unpalatable in certain quarters. This is certainly the suggestion which may be drawn from a recent series of periodical articles written on the Commission's political orientation.¹ Whether the LRC's work is perceived as based upon either a value-consensus model of society or upon a more radical view, it is clear that the resulting product cannot be divorced from its ideological background.

However, there is a crucial question which remains to be answered. If, as a result of the above analysis, it is concluded that the

¹M. R. Goode, "Law Reform Commission of Canada—Political Ideology of Criminal Process Reform," in (1976) Canadian Bar Review 653; J. Barnes and Randal Marlin, "Radical Criminology and the Law Reform Commission of Canada—A Reply to Professor M. R. Goode," in (1977) 4 Dalhousie Law Journal 151; M. R. Goode, "The Law Reform Commission of Canada, Barnes and Marlin and the Value-Consensus Model: More about Ideology," in (1978) Dalhousie Law Journal 793.

LRC is a part of the political process, where exactly does it fit in?

The first observation which may be made is that the political process is an extremely broad term, which embraces the most diverse phenomena.

It is possible to limit this somewhat by referring back to the nature of the LRC's activity. The Commission's mandate concerns law reform, obviously. We have seen that this may include anything from broad, philosophical reform of practices and attitudes, to specific verbal changes. It is also fair to say that most of the LRC's proposals and recommendations envisage implementation by other branches of government. As a consequence, the Commission may well fall into the legislative process, in its broadest sense. The question now is precisely where does it fit into the legislative process?

It is easier to note where the Commission does not fit in. First, the LRC obviously may not be classified as a legislative institution of any kind. It is in no way an elected, representative body capable of legislating; of passing laws. Secondly, it would be wrong to classify it as a bureaucratic agency, for there are several distinguishing characteristics. For example, while Chapter III noted that the LRC is to some considerable degree under the control of the Department of Justice, it is nevertheless much more independent than most other agencies. In addition, where the role of most agencies is primarily to carry on research and ascertain facts, the LRC's primary role is to formulate proposals and recommendations.

Where does this leave us? We know what the LRC is not, but still have not focussed on what it is, and where it fits in. The

necessary implication, from the description in earlier chapters of the Commission's activities, etc., is that the LRC is a unique creation. It is an interest group in the best sense of the term. The unusual characteristic is that it is an interest group created by government. But, again, the earlier chapters point to the fact that the LRC performs the two major roles of an interest group: interest aggregation and articulation. Both these functions are reflected in the Commission's populist approach to law reform. In this sense, it has almost attempted to operate as a kind of ombudsman for the legal system. Moreover, it was entirely natural for the Commission to assume such a role, for the Law Reform Commission Act gave it a very broad mandate, which statute in turn reflected the concerns and expectations voiced by Members of Parliament during the bill's passage. With respect to interest aggregation, the Commission's attempts to engage in a dialogue with the public and its internal organization with regard to research and the development of reports were noted, and it was shown that the LRC's operation strives to collect a variety of points of view and to develop from them sets of recommendations. The Commission's activity then focusses upon the articulation of those recommendations which have become, in a very real sense, its interests. It is at this stage that the Commission makes an effort to put forward its views to the Department of Justice and to the public generally.

If the LRC is indeed a particular kind of interest group, then it is certainly faced with a number of severe problems as a result of which its freedom of activity and general effectiveness are restricted to

a lesser or greater degree. Therefore, there is little question that the LRC would be rendered more effective (as opposed to efficient) if its proposals and recommendations had a greater chance of at least being aired, if not necessarily implemented.

At a more theoretical level, this analysis of the LRC's experience demonstrates that it is certainly possible for bureaucratic creations to possess individual characteristics which set them apart from other members of the species. This uniqueness is reflected in the dynamics of the Commission's relationships with other organs of government, as well as the public.

D. PROPOSALS

An evaluation of the LRC's work has pointed clearly to the existence of a number of problems. The crucial question necessarily becomes whether any suggestions may be made which would at least alleviate these difficulties. Some of the observations which follow are based on a view of the LRC as a "fundamental change" law reform agency. At the same time, others also recognize that much of the Commission's usefulness may ultimately be felt in the form of implemented recommendations.

There should be a recognition on the part of the LRC and/or government that the Commission does operate within a political framework as an interest group. In the first place, the law itself embodies a political element. Judicial decisions are often as much reflections of the courts' application of public policy as they are interpretations

of the laws themselves. It is clear that the reform of the law entails at least the same degree of political consideration. It has also become reasonably clear as a result of the discussion of the LRC's relationship with the Department of Justice that law reform is, essentially, an interest group question in the sense that what laws are reformed (and in what way) is largely dependent upon the pressure which the various "lobbies" can bring to bear upon the significant levels of policy making. This is not to say that the public dialogue has been of no use and is a pointless exercise, for ultimately lobbying or interest group action involves a public dialogue. Unless the LRC works within this context, it is operating in a vacuum. In order to render its work as effective as possible, therefore, the Commission must step into the political arena and articulate its views as loudly as possible. It must play the role of an interest group, in every sense of the term, in an effort to influence the policy makers. Whether the LRC can do this within the constraints of its present budgetary allocations is a relevant issue. While it is nowadays an unpopular thing to advocate more government spending, there is little doubt that the LRC would be more effective in its political role with greater funds. This obviously depends upon the degree to which the government views law reform as a priority issue.

It has been noted that the expansion of the Privy Council Office under Prime Minister Trudeau has effectively given the P.M. and/or Cabinet an independent source of policy initiation from the

civil service.¹ This was entirely consistent with the view of the Trudeau style of policy-making as being essentially rationalist.² By virtue of its statutory responsibility directly to the Minister of Justice, it is possible to view the LRC as the introduction of a further step in the optimal policy-making system simply in the sense of providing an additional source of information. Such a step in all probability would cure any bureaucratic interference with Commission recommendations. It would, however, perpetuate the major problem which has been the growth of Cabinet or Prime Ministerial government.

It is clear that a major factor in the failures of the LRC has been the unwillingness or the inability of Parliament to become involved in the process of law reform. This is undoubtedly symptomatic of Parliament's general impotence. The Law Reform Commission Act should be amended in such a way as to impose an obligation upon Parliament, or more suitably upon the Standing Committee on Justice and Legal Affairs, to hold hearings on each LRC report. Such a procedure would at least ensure that the Commission's work would be aired publicly. The Opposition would be forced to respond in some way.

Similarly, a well-defined obligation on the part of the Minister of Justice should be included in the Act, forcing him to elaborate upon the government's intentions with regard to the LRC's recommendations.

¹F. Schindeler, "The Prime Minister and the Cabinet: history and development," in Hockin (ed.), op. cit., pp. 22-51.

²G. B. Doern, "The policy-making philosophy of Prime Minister Trudeau and his advisers," in Hockin (ed.), op. cit., pp. 127-135.

Finally, in those areas of the law which are subject to concurrent jurisdiction, a greater effort must be made to ensure a higher and more effective degree of federal/provincial cooperation.

In recognizing that the LRC is an interest group, it should perhaps also be recognized that the concomitant of its interest role is pressure. In other words, the Commission is also a pressure group, which at present lacks the means to exert any meaningful pressure. It must be provided with these means if it is to be able effectively to perform its role as an interest group.

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