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Stability and Change in Procedure

Hon. Charles E. Clark*

The invitation to participate in a symposium on *Stability and Change Through Law*, with stress upon procedure and its capacity to respond to the social and economic needs of the times, is one I have found difficult to decline. The historic and centuries-old lag in procedural advance, the great resurgence of the last quarter century, the extensive present achievements, and the vital needs for the future now apparent make this, in my judgment, the most fascinating and challenging branch of the law. And this is true, whether one looks to the law school curriculum or to the framing of judicial decisions or to the problems of active practice or to the public service which is or should be a professional obligation. Within the limits properly available to me, I cannot do more than suggest the vivid history of the struggle for better law administration and its present trends and problems. In responding to the invitation, I shall speak separately of civil and of criminal procedure. The developments in each field are in part at least in response to similar stimuli; but the differences are suffi-

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Bibliographical Note. No detailed documentation of the topics covered in this article has been attempted, since the literature is so voluminous as to make this impossible. Moreover, the discussion concerns matters of general public notice in the law. As further setting forth the writer's views and pointing the way to other authorities, citation may be made to his text, *CODE PLEADING* 1-71 (2d ed. 1947), and to his articles, including *Practice and Procedure*, 328 *ANNALS* 61-69 (1960); *Two Decades of the Federal Civil Rules*, 58 *COLUM. L. REV.* 435-51 (1958); *The Role of the Supreme Court in Federal Rule-Making*, 46 *J. AM. JUD. SOC'Y* 250-58 (1963); *Federal Procedural Reform and States' Rights: To a More Perfect Union*, 40 *TEXAS L. REV.* 211-29 (1961); *Making Courts Efficient*, 8 *U.C.L.A.L. REV.* 489-96 (1961).

Of value on particular topics here stressed are Clark & Clark, *Court Integration in Connecticut: A Case Study of Steps in Judicial Reform*, 59 *YALE L.J.* 1395 (1950); Clark & Rogers, *The New Judiciary Act of Puerto Rico: A Definitive Court Reorganization*, 61 *YALE L.J.* 1147 (1952); Kamisar, *What Is An "Involuntary" Confession?*, 17 *RUTGERS L. REV.* 728 (1963); Krantz, *Pretrial Discovery in Criminal Cases: A Necessity for Fair and Impartial Justice*, 42 *NEB. L. REV.* 127 (1962), reprinted in 1 *MODERN PRACTICE COMMENTATOR* 206 (1963); Lumbard, *The Administration of Criminal Justice: Some Problems and Their Resolution*, 49 *A.B.A.J.* 840 (1963); Sunderland, *The English Struggle for Procedural Reform*, 39 *HARV. L. REV.* 725 (1926); Walsh, *Fair Trials and the Federal Rules of Criminal Procedure*, 49 *A.B.A.J.* 853 (1963); Wright, *Procedural Reform in the States*, 24 *F.R.D.* 85, reprinted in 1 *BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE* §§ 9 to 9.53 (Wright ed. 1960); Kamisar, Book Review, 76 *HARV. L. REV.* 1502 (1963); Rogge, Book Review, 76 *HARV. L. REV.* 1516 (1963).

ently substantial and, indeed, obvious as to make identical treatment inconvenient.

The slow pulse of reform in civil procedure affords one of the most interesting chapters of legal history. We need to recall that one of the early great steps in the growth of the law, the development of new writs and hence of new forms of action in the king's court, came as a revenue-producing step of greedy kings, whose clerks in chancery issued the new writs for fees and thus supplanted the ineffective local courts. The growth of equity was occasioned by the abhorrence of churchmen—officers of the king—of the harshness of decisions at law. With Jeremy Bentham's revulsion against Blackstone's smug lectures in 1765 came the century-long English struggle for procedural reform, which counted more on lay assistance, such as the powerful novels of Charles Dickens, than aid from the generally resistant profession. At any rate, in England the Judicature Act of 1873 achieved an integrated court structure which became, and still is, a model for other systems, though complaints of heavy expense and inadequacy are beginning to arise. In this country the great and lonesome reformer of the nineteenth century was David Dudley Field, whose 1848 New York Code of Civil Procedure, with its merger of law and equity, spread to two-thirds of the states as code pleading, the standard method of procedure until the 1930's. During all this period the lag between improvements in law administration and the vital growth of substantive law was clear. Hepburn, in his classic work, well points up the "inveterate nature of the incongruity between procedure and substantive law—(1) The former petrifies while the latter is in its budding growth."¹ And then he continues most significantly: "(2) The conservatism of the lawyer preserves the incongruity."²

With the coming of the Federal Rules of Civil Procedure—effective in 1938—there was a significant and revolutionary change; the lawyers, including the law teachers, took over the struggle for improved law administration. So great is the impetus and drive which the movement has developed that it does not seem likely the profession will again be as somnolent and reactionary as it was in the past. The federal rules themselves were the product of many years of campaigning by bar association leaders for the grant by statute of rule-making power to the Supreme Court for all the federal district or trial courts. When Congress acted in 1934 and when the following year the Court proceeded to assume responsibility for the making of procedural rules and appointed an Advisory Committee to recommend a draft, the new era was initiated. The Committee, working

1. HEPBURN, *THE HISTORICAL DEVELOPMENT OF CODE PLEADING* 31 (1897).

2. *Id.* at 37.

swiftly to carry out its mandate, produced a draft of eighty-six rules, notable for their simplicity and succinctness; and these, after adoption by the Court in 1937 (to be effective the following September), have had an unusual success in their complete acceptance by the bench and bar and in the pride with which they are viewed by all lawyers. While clarifying amendments have been proposed and adopted by continuing Advisory Committees sponsored by the Court, there has been no basic change in the original structure. On the contrary, it has proven the model or the example for all recent reform. The system through which the rules were formed has been adopted in a majority of the states; nearly half have adopted the federal rules *in toto*. Half the remaining states have made major revisions of their procedure, largely following the federal system; and most of the rest have made changes stimulated by the federal reform. Thus that reform has revolutionized all American civil procedure and has caused a major change in law school curricula, advancing a lowly so-called "vocational" subject to a major and challenging position in legal scholarship and pedagogy.

The phenomenal success of the rules has seemed at times almost to provide a glut of activity and material for court reform. The modern literature on law administration is overwhelming, and much of it is more on the level of propaganda than of precise scholarship. Thus the great rash of bar association medals and other public awards seems often to stress the publicity value of participation in reform, rather than the serious scholarly research necessary to produce good rules. But this is probably only a natural and perhaps a healthy growth accompanying what has become a popular movement. In fact there have been notable scholarly works on the new procedural systems; and the reporters of the several federal advisory committees now at work under the expanded machinery developed under recent statutes, as well as their counterparts in state reform, are doing work of sound intellectual worth as well as of practical utility. There are several research organizations which are sponsoring studies in depth and which are seemingly more successful in obtaining foundation and other charitable grants, which have not been readily available in the past for this hitherto underregarded field. Finally, the stimulus for study and reform of the entire court organization has been direct and productive.

This stimulus has in effect brought about another and correlative movement, that for "court reorganization." The usual program calls for a great simplification of the court structure, with an integrated court of separate divisions, rather than the former independent units—all under the administrative direction of the chief justice or highest

judicial officer of the state and assisted in its business, financial, and housekeeping functions by an administrative office for the courts. It appears that a majority of the states are now engaging in careful study of their court structures. Major reforms have been widely instituted: in Puerto Rico as early as 1952, and in a number of states as to certain courts, such as Connecticut, New Jersey, Maine, Illinois, and Iowa. Often this has involved the substitution of a statewide and state-supported system in place of various hybrid "minor" courts, including police and town courts and the ancient and largely discredited system of justice-of-the-peace courts. This is a major advance in both the quality and the utility of the courts closest to the ordinary citizen whose contacts with the law—motor vehicle violations and the like—may be slight in overall impact, but are of the utmost importance to the individual involved.

The picture thus drawn may seem rosy indeed. In fact it is one in which the profession may take solid satisfaction. More has been done to improve the administration of justice in the past twenty-five years than in all our previous history. But it would be a mistake to believe the task ended. In truth, reform begets reform; the first steps show others which must be taken. It is well, therefore, to note the probable trends of the future. First, notwithstanding the fine accomplishment which the federal rules represent, there are still areas ripe for further study; indeed, study should be continuous, as is the program for the standing committees now operating in the federal system under recent legislation. Thus the appropriate committees are now studying intensively issues of joinder of parties, of the extent of use of pre-trial and discovery machinery, of the merger of the civil and the admiralty procedures, of formulating rules of evidence (not attempted by the original committee), and of procedure on appeal (only recently made the subject of rule-making). Second, there is still a considerable area for prospective action among the states. This is true of the movement for court reorganization and the integrated court, which, though vigorous, may be considered still in its infancy. And there is still open for consideration the impact of the federal rules on local procedure in a number of states and the question whether states which, like New York, have made only a partial adaptation of the federal system, have served their constituencies well. Third, and perhaps most pressing, is the problem caused by the failure of the courts to keep pace with the population explosion and the growth of modern business—a problem usually subsumed under the title "court congestion."

It does seem sadly to be true that the judicial establishment, one of the three historic departments of government, does not stand well enough with the legislature to command sufficient governmental funds

to keep abreast of current needs. This is true both federalwise and statewise. Of course the courts are not alone in this financial drought; schools, mental institutions, and numerous similar public institutions feel the pinch, while defense and preparations for war appear to sap our financial strength. The consequence appears not only in the lack of sufficient judges and of supporting judicial personnel, but also in the need to use old and outworn courtrooms and courthouses quite inadequate in both number and equipment for modern demands. This is a severe handicap, but one with which it seems the courts must learn to live. It is all the more serious because the well-known American propensity to make all problems legal, and to seek their settlement through court action, has brought vastly increased new business to the courts in handling such matters as the manifold issues arising out of claims of racial discrimination and of malapportionment of representation of the voters in various states. Moreover, the truly notable increase in the extent and impact of federal habeas corpus actions to review state criminal convictions is actually swamping some federal district courts. But even though the courts are compelled to accept this flood of new litigation, as well as the increased flow of the normal cases, the problem of congestion and delay is one directly facing the courts, which they must meet so far as they can.

This is a problem arising particularly in metropolitan areas and concerning notably the automobile accident claims, now the chief bulk of state civil litigation. In many places the jury calendar is not only months, but years, behind, so that justice delayed is truly justice denied. Even though the accident case is brought largely to achieve a negotiated settlement, no good way has been found to speed up the process, and judges and jurors must sit around to await the outcome of the bargaining—a highly wasteful, time-consuming, and boring procedure. Many years ago the writer was a member of a voluntary committee which recommended a plan of compensation for automobile accidents modeled upon the effective workmen's compensation acts; this was designed to secure a fairer and more certain method of compensating the victims of accidents, through the operation of an administrative agency. But this plan, while often debated since its announcement in 1932, has been adopted only in Saskatchewan in modified form. It seems possible that an even bolder approach is needed; and that is found in the proposal, vigorously made before professional groups by Chief Judge Desmond of New York, for the abolition of civil juries, as in England (in substantially all cases) and in countries subject to English law (where alone the jury has taken root). This proposal has already stirred wide comment, and it is clear that any limitation on jury trial will be strongly fought by our con-

servative profession. Yet another fifty years is likely to find the courts quite submerged if bold measures are not undertaken.

Thus it will be seen that there is plenty yet to be done in gearing the civil procedure adequately to keep pace with the litigation of the future; there is no chance that the field will remain static. When we turn to criminal procedure, recent developments are at least as dramatic, and possibly even more so. Most striking is the Supreme Court's expansion of the constitutional concept of due process of law to require close scrutiny in the federal courts not only of federal, but also of state, crime convictions. Only this past year the Court has emphasized the duty of federal judges to grant hearings, even though state violations of due process are rather imprecisely charged; and, unanimously overruling an earlier decision, it has required the states also to assign counsel at seemingly all stages of a criminal prosecution. The increased grist of federal cases which this year's decisions have already brought about is an earnest of what is to come by way of court burden in future years.

Perhaps the most often recurring issues concern a conviction after a plea of guilty by an accused unrepresented by counsel and the admissibility in evidence at trial of a confession allegedly coerced. The first is complicated by the existence of statutes, such as in New York, providing harsh and increased penalties for defendants with multiple convictions. It has been common practice to employ a judgment entered in a distant state against a then youthful defendant on his plea of guilt—which he now claims to have been coerced—to increase punishment for a present offense to anywhere from twenty years to life imprisonment. Here it is obviously difficult to obtain the true facts of such a conviction long ago, with limited or inadequate records to illuminate the issues now important—whether the accused was adequately informed of his right to counsel and made a free and independent waiver of his right. Important too is decision as to what extent the recent rulings of the Supreme Court are retroactive. As to the coerced confession there are several subordinate questions, such as whether the confession was obtained by trick or force, whether there was delay in arraigning the accused so that detention was unlawful, whether the original arrest was lawful, and so on. Among other questions are the use of evidence procured by wiretapping; the use of discovery in criminal cases, including disclosure of the accused's own statements; disclosure of the grand jury minutes; the delivery of witnesses' statements to the accused; and the like. This by no means exhausts the problems which still remain unsettled as to their precise sweep and impact, even though the recent trend of Supreme Court decisions does seem to support the contentions of the accused.

As a matter of fact, in many of these problems there is a head-on collision between the views of the police and the prosecutors as to what is necessary to cope with modern-day crime and the equally strong views of the defenders of personal liberties. Thus the prosecution view is that arrest for the purpose of investigation is proper and, indeed, that time should be available after arrest for questioning of the accused before he is arraigned and assigned counsel. On the other hand, many think that a confession should never be available against an accused once he has repudiated it. Again, the extended and continuing debate over wiretapping illustrates the wide divergence in views. The broad scope of the charge of conspiracy and the dangers of mass prosecutions which may catch the comparatively innocent in the same net with the guilty have led to suggestions that a trial of more than six defendants not be permitted or that separate verdicts be always required as to each defendant. In short, the increased activity stimulated by the Supreme Court, far from settling the law, has aroused interest which has suggested other questions of the most vital importance to both the prosecution and the accused in the trial of criminal causes. The opinion may be ventured that in any event the attitude of concern, lest constitutional rights be violated, evinced by the Supreme Court has led to a considerable improvement in police methods about the country and to a healthy care for the protection of individual rights.

The problems to which I have adverted are those of criminal procedure, of the way in which a criminal prosecution is to be carried to completion. But of course they go beyond mere rules of action and closely affect the ultimate rights of the parties. Here, as so often in the law, questions which turn up as those of procedure affect profoundly the parties' substantive rights. It should be noted that in 1946 the Supreme Court, on report of an Advisory Committee, adopted the Federal Rules of Criminal Procedure to regulate the conduct of federal criminal proceedings. As yet these rules have had nothing like the wide impact of the civil rules and have not been adopted in state practice. Unlike the civil rules, there was no continuing committee; and the only changes since made were those promulgated by the Court itself without report of a committee. This now seems likely to change with the appointment of a new and vigorous advisory committee on criminal rules, which has already reported a draft of extensive amendments for the study and consideration of the bench and bar before final report to the Court. Several of these provisions have already stimulated healthy debate; these include rules requiring the pleading of an alibi, extending discovery, requiring the delivery to the defendant of reports made by probation officers, and so on.

Whatever may be the fate of individual rules, the criminal rule-making activities are stimulating interest and discussion of this most important feature of law administration. These activities, coupled with the debate on constitutional rights under Supreme Court aegis, guarantee that no important rights will be overlooked or lost at least from inattention.

In what has been said above I feel I have been guilty more of sins of omission than of commission. The field of law administration is now so vast and so important that fragmentary treatment seems necessary. I hope, however, that I have been able to convey something of the life, the fluidity, and the essential power of the law as a vital force in meeting the present-day needs of the individual, as well as of the society and civilization in which he finds himself. Perhaps the most satisfying feature of the emerging story is the awakening of the lawyer to social needs and the heretofore novel professional leadership which we find in all movements for the better administration of justice. True, there will remain individual lawyers who can look only to the past; but it is confidently believed that never again will the main force of professional opinion be backward-looking.