Code Revision in the Legal Process

By RICHARD O. WHITE*

Probably the most eye-compelling portion of any law library is the section housing its collection of State codes. Upon these shelves stand row upon row of bright-hued, slickly-clad volumes like the color guards of many regiments assembled for tattoo. The collector's interior decorator is as oft consulted on his arrangement as his law librarian, and political candidates have been known to travel for miles to have their campaign photos taken in the midst of an especially attractive collection.

Beauty, however, is only skin deep, and given the necessity to use these books for their real purpose, the book binder's delight may quickly become the researcher's nightmare. The importance of statutory research as a primary inquiry in the search for answers to legal problems need not be emphasized. Inept indexing, inadequate cross referencing, poorly-conceived organization of material, and indifferent typography frequently lurk behind these beautiful covers. The researcher deserves better, and as the result of an awakening awareness on the part of State legislatures in the mid-twentieth century, he is now beginning to enjoy the benefits of an improved product.

Code-making is essentially a process of classifying laws according to subject matter. Any code is better than no code. Imagine the difficulty of researching a legal problem through the myriad volumes of session laws of any jurisdiction. Session laws are typically compiled in the chronological order of the enactment of the several measures enacted at that particular session, without regard for affinity of subject matter, and wholly lacking in continuity from session to session.

The earlier codes of modern times consist, in the main, of compilations of laws that were compiled and edited by private law publishers to fill the demand for a ready reference into the statutory law of a given jurisdiction. These codes are arranged by subject matter, according to a hierarchy of major titles and subordinate parts. Considering the legislative products upon which they are based, they represent a very creditable work indeed. But, like Grandma's cake, a code can only be as good as the ingredients that go into it; and, until very recently, the session law ingredients that made up the codes were, in many cases, seriously flawed.

State legislatures are traditionally part-time bodies. Their effectiveness has been badly impaired by strict constitutional limits as to the frequency and duration of meetings. Beset by pressures of time and controversy, and hampered by a lack of professional assistance, legislatures have quite understandably yielded to expediency in the law making process. Of the various short cuts employed, perhaps the most typical was the wholesale use of the general repealer. Having proclaimed sweeping changes in the law of the land, the legislature traditionally sought to reconcile the new provisions with existing laws by proclaiming that "All acts and parts of acts in conflict herewith are hereby repealed." The ultimate result of this practice and other concomitant shortcuts was the creation of a pyramiding mass of conflicting laws, which either compelled the code compilers to exercise their own judgment as to which laws should be dropped or should be continued in the code, upon the penalty of either deleting provisions that might still be relevant or carrying a multiplicity of sections on the same subject matter that would surely derogate from the utility value of the code as a simple and rapid device for ascertaining the statutory law.

In the mid-twentieth century the State legislatures have discovered that, with the increasing complexity of society and government, they must adopt reformed procedures if they are to survive. Because of their part-time nature, they have been hard put to compete with the Federal Government in remaining responsive to the needs of the people and have even been relegated to a position of secondary importance as compared with the full-time efforts of the executive branch of State governments. The legislatures have almost unanimously determined that, if they are to function properly as an equal and coordinate branch of government, some semblance of continuity must be established; and to this end they have created legislative service agencies to provide necessary staff services.

The organizational form of legislative service agencies differs widely among the States. Furthermore, agencies having like names do not always perform like services. Virtually all of

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these agencies are staffed by professional and clerical people operating under the general supervision of members of the legislature, who are appointed to these tasks as members of various legislative interim committees. Such interim operations provide the continuity that was heretofore lacking and provide the means for examining, in depth, the major proposals to be brought before the legislature and for the advance preparation of such proposals in draft form. The services performed by these committees may be grouped into four major categories:

(1) Administrative services,
(2) Fiscal services,
(3) Research services, and
(4) Legal services.

It is the legal service interim agency that has had the primary impact on the contemporary development of code making.

Every State that has contented itself with merely compiling its statutes must sooner or later face up to a statutory revision. It may be advisable at this point to attempt to define some terms:

Compilation is a mere bringing together of pre-existing statutes, with no change in wording, under an arrangement designed to facilitate use.

Revision, on the other hand, is a change in the pre-existing law. It must be accomplished by enactment or reenactment of a finished product by the legislature. Viewed from the standpoint of the treatment of its subject matter, revision is of two general types: formal revision of statutes, with which we are here concerned, and substantive revision of law.

Formal revision deals only with the form and expression of pre-existing statutes and is carried on for the purpose of producing certainty and conciseness in expression and logic in arrangement of pre-existing statutes, so that they can be found readily and, when found, can be understood easily. The aims of this type of revision are the consolidation of overlapping statutory provisions; correction of inaccurate, wordy, or superfluous expressions; deletion of obsolete, superseded, or unconstitutional statute provisions; and the collection and enactment of the whole in a logical arrangement; all without change in effect or meaning.

There are two basic approaches to formal revision. One of these, *topical revision*, involves revision of those statutory provisions that, by reason of their close relationship, can be conveniently revised together as a topic or logical subdivision of the statute law. An insurance code would be an excellent example.

The second approach, which is called *bulk revision*, involves a revision of all the statutes in effect at a given time. Bulk revision is always difficult and expensive, depending in large measure upon how long the task has been neglected. Its main advantage over topical revision is that it permits a rather wholesale reorganization to be accomplished at one time.

Any State that may be planning to do a bulk revision should recognize that this is a time-consuming task and would be well advised to set a realistic target date, one which is far enough in advance to enable the work to be accomplished in a thorough and workmanlike manner. Provision should also be made for continuous review by leaders of the bench and bar as various portions of the work are completed and prior to the submission of the project to the legislature for enactment.

Assuming that, after such a vast expenditure of time and money, a State has produced an accurate and reasonably efficient official code, how may it be kept that way? How can the State best protect its investment? The body of statutory law of any State is a living thing, and as long as legislatures are to be responsive to the changing requirements of society it will ever be so. The obvious result is that a revised code does not stay revised unless there is within the State government an agency charged with this specific duty.

Having acquired a code, a State has but two alternatives: (1) to establish and maintain a legislative service agency charged with the responsibility of continuing revision or (2) to ignore such maintenance and assume the burden of periodic bulk revision. As mentioned above, the legislative service agency concept is of recent origin. In many States having 19th century constitutions, periodic bulk revision (usually every 10 years) is constitutionally mandated; yet even in these States the overwhelming advantages of continuous revision have been recognized and this approach has been adopted.

Unless the State is content to adopt a *laissez faire* policy with regard to the future of code revision, which policy would surely result in the need for a new bulk revision in a relatively few years, it will be necessary to establish a

permanent legislative service agency whose duties toward the code should be (1) to perform topical revision on a selective continuing basis when any subject matter classification may require it, while (2) concomitantly maintaining the revised status of all parts of the code by exercising, on a continuing basis, the supervision over the drafting and integrating of new materials therein.

The logic of combining, within a single legislative service agency, the functions of revision and legislative bill drafting is nowhere better expressed than as appears in *Mr. President . . . Mr. Speaker . . .* : report to the Council of State Governments (1963):

> The inextricable relationship between bill drafting and code revision should determine the selection of the agency responsible for continuous code revision. The code revision agency must know the rules and the form governing the drafting of bills, and the agency drafting bills must have the same knowledge. It follows that both functions can be more efficiently performed if conducted by the same agency. The same practical relationship exists between the agency that performs the bulk revision and the one that performs the continuous revision service. Either the bill drafting and continuous code revision agency should be the same as the one that drafted the code or it should employ some of the key personnel engaged in the code drafting project.

Not only do code revision and bill drafting require the same skills, they also complement each other as to the time when each of the services is required.

California is typical of the States having an agency that performs both functions. Writing for the *American Bar Association Journal* of January 1953, Mr. Ralph Kleps, then legislative counsel of California, observed as follows:

> The ultimate objective of any legislative body is the efficient enactment of needed laws. To accomplish this objective, a state legislature must be advised of the existing law on the subject, of the applicable constitutional limitations and of the legal effect of the language selected. All of this requires legal training. It is the function of a legislative counsel to furnish such advice to the legislator, and to apply the techniques of bill drafting to achieve his objectives.
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> To furnish adequate legal advice and bill drafting service, the legislative counsel must gather a staff of experienced lawyers. His staff must not only be well versed in general law and well trained in bill drafting; they also must be specialists in the fields of law with which the lawyer in private practice has little experience. This is demonstrated by the major trends of state legislation in 1950-51. Legislative activity during this period centered in the fields of governmental reorganization, civil defense, financial assistance to public schools, health and welfare services and water rights. It is apparent that, in these fields, the legislative counsel must develop his own specialists. To do this, he must have a permanent staff of attorneys.

One of the results of a permanent legal staff for the legislature is an increasing amount of between-sessions work. While the Code Commission work was the mainstay of the interim assignments of the office in California when it was first placed on a full-time basis, that work is now approximately one-fifth of the interim work. The balance of the work is legal research for individual legislators and for interim investigating committees of the legislature upon legal problems in which they are interested. The very fact that a permanent staff of full-time attorneys is available will encourage their use by legislators. Experience has demonstrated that the skilled legislator, who has served several terms in the legislature, will turn to the legislative counsel for assistance more frequently than the newcomer. Likewise, the well-financed and well-staffed interim committee will require more legal advice than the committee whose work is merely perfunctory.

We have seen that, in the development of a permanent, full-time staff, legal work must be assigned between sessions. There are a number of types of legal service, sorely needed in most states, that are available. Among these, the various kinds of statutory revision are the most essential. The legislative counsel should act as a reviser of statutes. The work of nonsubstantive revision is most adapted to his role, for it does not require him to advocate to the legislature changes in the policy of the state as expressed in its laws. He should compile the existing laws, revise them as a matter of form, and remedy technical errors—all of which can be done without jeopardizing his usefulness to the legislature. In addition, he can be given the task of editing and indexing the ses-

> sion laws after each session of the legislature. In the field of substantive revision of the law, his activities must be more limited, but work can be made available in the form of staff work for a law revision commission. He should not be placed in the position of advocating the changes of law proposed by such a commission, but his staff can be used to examine the existing law, to determine the areas in which it is in need of revision, and to draft the measures sponsored by such a commission. By assigning work of this character to the office of the legislative counsel, it will be possible to staff the office on a full-time basis.

Other sustaining functions that may logically and profitably be placed in the revision agency are the responsibility for publishing the session laws, assisting the other State agencies in the publication of the laws that they administer, and the filing and publication of departmental rules and regulations under the administrative procedure act.

Let us now examine how the advent of the code revision agency improves code-making. Whereas formerly, codification—or, more properly, compilation—was solely a post-legislative concern, it is now a pre-legislative and in-session concern, as well. In short, laws are now formulated with codification in mind. Ideally all legislative measures should be submitted to the revision agency for scrutiny prior to their introduction as bills, resolutions, or memorials. The revision agency must at that time examine each measure, wherever and by whomever prepared, and be satisfied that, in addition to conforming to local billdrafting conventions, it also meets at least the following criteria relative to the existing code:

1. Does it conform generally to the established form and style of the code?
2. Does the proposal impliedly repeal or otherwise affect any other sections that are not therein dealt with?
3. Does it raise constitutional problems?
4. If a matter of procedure, does it conflict with rules of court?
5. If it contains new material, is such material directed to be codified in the most logical place?
6. Do all internal references track; and, if reference is made to "this act," is it clear whether such reference relates to the original act or to the instant amendatory act?
7. Are adoptions by reference clearly made so as to obviate questions of whether the adopted statute runs with the reference?

Ideally, also, provision should be made for testing the measure against these standards after it has been amended by the legislature and prior to its enactment.

If the measure passes all these tests successfully, the likelihood is that, upon its adoption by the legislature, it will fit snugly into the State code.

The specialized knowledge of the reviser personnel is made evident in still other ways not directly connected with the law-making process. The reviser will create a code numbering system that is flexible and roomy enough to accommodate new material in its logical order for years to come. Ever mindful of the statutory citations that are locked up in the bound volumes of the court decisions, he will safeguard the permanency of code numbers, retaining memorials to repealed sections, and avoiding the redesignation of section numbers. He will draw upon his intimate knowledge of the body of statute law and his fresh recollection of laws recently adopted, to prepare cross reference notes and reviser's notes concerning such abnormalities as he may be aware of. And when, in spite of all precautions, duplicate amendments are passed by the legislature or other technical errors are committed, he will prepare correction bills to be submitted to the next session for legislative action.

With regard to publication practices, the typical reviser's office concerns itself with such factors as typography, form, style, timing and cost of supplementation, and, whether the actual printing is done by the State or by private enterprise, the agency will be continually striving for improvement in this regard.

The success of the permanent legal legislative service agency is attested by its overwhelming acceptance among the States. There is scarcely a State remaining that does not now avail itself of a majority of these services.

Much has been said of the information explosion and its impact upon the law researchers. Great strides have been taken since the early 1960's toward adapting computerized information retrieval to the field of legal research. The revision agencies throughout the country are presently incorporating this resource into their daily activities, employing its capabilities in the substantive and mechan-

ical aspects of bill drafting, code revision, and code publication. The computer holds great promise with regard to enhancing the quality of our codes, while keeping their cost down.

All of us tend to take our codes pretty much for granted, and it appears that many of the improvements that have been accomplished in recent years in the field of code making may have gone quite unnoticed. If the work of the revision agencies has saved some research time, avoided some law suits, and made the statute law generally more comprehensible, this is reward enough for our labors. We have striven to make our codes useful as well as attractive.

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