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The Judicial Council Movement

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THE JUDICIAL COUNCIL MOVEMENT

OUT of the chaos of ill conceived reform legislation, piecemeal attempts at judicial improvement, and general failure to achieve concrete results in remedying the defects in our legal procedure, there has evolved a nation wide movement for the formation of Judicial Councils to aid in solving our procedural problems. Knowledge of this movement is important to Washington lawyers because the Washington State Bar Association at its convention in August recommended the creation of a Judicial Council for Washington, and a special committee of the bar will be appointed to secure the passage of a Judicial Council act at the next session of the Legislature.

The genesis of the judicial council idea is the English Rule Committee, originally created by the Judicature Act of 1875,[1] and subsequently modified until, in 1909, by the Rule Committee Act,[2] a committee was organized to consist of two barristers appointed by the General Council of the Bar, two solicitors (one of them appointed by the Incorporated Law Society and the other by the Lord Chancellor), and seven judges in addition to the Lord Chancellor, three of them designated by the act and four appointed by the Lord Chancellor.

As was said by Professor Edson R. Sunderland of the University of Michigan, "By the creation of the Rule Committee, responsibility, previously scattered, was localized through the addition of active members of the practicing bar, a broader outlook was obtained, and better contacts were established with the commercial communities and with the public generally. These measures obviously promote efficiency and have been adopted in other parts of the British Empire."[3]

In 1919 the Massachusetts legislature created a commission to investigate the judicature of the commonwealth.[4] And in 1921, the Massachusetts Judicature Commission, after having held numerous public hearings, and having made an intensive study of the judicature of the commonwealth "with a view to ascertaining whether any and what changes in the organization, rules, and methods of procedure and practice of the several courts would insure a more prompt, economical and just discharge of judicial business," reported its con-

[1] Sec. 17.
Judicature Act, 1894, Sec. 4.
[3] 22 MICH. LAW REV., p. 293.
[4] General Acts of 1919, Chapter 223.

clusions to the legislature and among other things recommended legislation to provide for a judicial council.[5]

In advocating the passage of such an act, the commissioners stated

> "It is not a good business arrangement for the commonwealth to leave the study of the judicial system and the formulation of suggestions for its development almost entirely to the casual interest and initiative of individuals. The interest of the people for whose benefit the courts exist calls for some central clearing house of information and ideas which will focus attention upon the existing system and encourage suggestions for its improvement. Some central official body is needed for the continuous study of questions relating to the court." (*id.* p. 26, 27)

In conformity with this recommendation, in 1924, the Massachusetts Judicial Council was established.[6] The Massachusetts Council is composed of the Chief Justice of the Supreme Judicial Court, the Chief Justice of the Superior Court, the Judge of the Land Court, one judge of the Probate Court, one justice of the District Court and not more than four members of the bar; all to be appointed by the governor with the advice and consent of the Executive Council. The Chief Justice of the Supreme Court and of the Superior Court, and the Judge of the Land Court may designate some other judge or former judge of their respective courts. It is provided in the Massachusetts Act that the Judicial Council shall report annually to the governor "upon the work of the various branches of the judicial system," and that the council may, from time to time "submit for the consideration of the justices of the various courts such suggestions in regard to rules of practice and procedure as it may deem advisable." It is provided also, as is true of all judicial council acts, that the members of the council shall not receive any compensation for their services, but Section 34C provides for an appropriation for the purpose of "such expenses for clerical and other services, travel and incidentals, as the governor and executive council shall approve."

The report of the Massachusetts Judicature Commission and the resulting creation of the Judicial Council in Massachusetts may be said to be the culmination of a series of investigations and reports of various commissions in the state of Massachusetts starting with the

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[5] Second and Final Report of the Judicature Commission, p. 28.

General Acts of 1924, Chap. 244, Sec. 34, A-C.
Sec. 34 A.

year 1798. Some of these reports were on special matters such as compensation for industrial accidents, et cetera, but during the period of time from 1798 to the first report of the Judicature Commission in 1920 there were at least thirteen previous commissions and committees reporting upon matters of a general nature affecting either the entire judicial system of Massachusetts or one of its major branches, such as criminal law or equity practice.[8] None of these commissions or committees was permanent; nor did its work, except in matters of detail, succeed in accomplishing the object for which it was created.

In Oregon, the legislative assembly of 1919, at the urgent request of members of the bar association, authorized the Chief Justice of the Supreme Court to appoint a commission on law reform, including judges, lawyers and a member representing other callings.

The chairman of this commission was Charles Henry Carey, one of the leading lawyers of the West. In a concurring supplemental report Judge Carey, with one other member of the commission, recommended a thorough revision of the judicial system on the one court plan, with an executive council.[9] The recommendation was evidently based on the English Rule Committee. This feature of the report was not acted upon until 1923, when the legislature passed an act "providing for the administration of the courts through a judicial council."[10]

The Oregon Judicial Council is composed of the Chief Justice of the Supreme Court who appoints an Associate Justice of the Supreme Court and three judges of the courts of record to serve as members of the council for the term of one year. The Chief Justice, who is chairman of the council, has the "power to invite the president of the State Bar Association, the president of the State Attorneys' Association, or other members of the bar, to attend the meetings of the council and advise it in the performance of its duty."[11]

The purpose of the Oregon Council is substantially the same as in Massachusetts, though the act also gives the council the power to administer oaths and to require the attendance of witnesses and the production of books and documents. Judges of all courts, including courts not of record, are required to report to the chairman of the council at such times and in such manner as he shall prescribe, respecting the condition of the judicial business,—(whether civil or criminal),—in their respective courts.[12] This provision, in practice, has

[8] Second Report of Massachusetts Judicature Commission, p. 166.
[9] Report of the Commission on Law Reform of the Oregon Legislature, p. 12.
[10] General Laws of Oregon, 1923, Chap. 149, p. 211.
[11] *Id.*, Sec. 1.
[12] *Id.*, Sec. 3.

not been broad enough and the Oregon Bar Association, on September 26, 1925, recommended the passage of an amendment compelling the secretary of state to furnish information which in turn would be compiled from the clerks' reports.

The weakness of the Oregon Act and the reason for its failure to operate until 1925 was, according to an article written by Judge Carey in the Oregon Journal, largely "owing to lack of an appropriation to cover expenses." This defect was remedied by an act of the legislature in 1925, providing for the traveling expenses of the judges attending the meetings and for clerical expense.

The establishment of the judicial council in Oregon, as in Massachusetts, was the culmination of a long series of unsuccessful attempts to get action in matters of judicial reform, there having been, in 1911, an Oregon Commission authorized by the legislature which made a report in December, 1913, on which no action was ever taken.

In 1922, after years of effort, Congress passed an act by way of amendment to the judicial code in which a federal judicial council was created, composed of the Chief Justice of the United States and the nine senior circuit judges of the nine circuits. The declared purpose of the federal judicial council is to "advise as to any means in respect to which the administration of justice in the courts of the United States may be improved and to submit such suggestions to the various courts as may seem in the interest of uniformity and expedition of business."[13]

This act was passed largely on account of the active aid it received from Chief Justice Taft, one of the foremost advocates of the Judicial Council idea.

On the 6th of April, 1923, the general assembly of the State of Ohio passed an act providing for a judicial council. By the terms of the Ohio Act the council is composed of the Chief Justice of the Supreme Court and two associate judges of the Supreme Court selected by the judges of the Supreme Court, the Chief Justice of the Court of Appeals of the state, one Common Pleas judge, to be selected by the Common Pleas judges of the state, one municipal judge to be selected by the municipal judges of the state, and three practicing attorneys at law, to be appointed by the governor.[14]

The council is required to report biennially to the general assembly upon "the work of the various branches of the judicial system with its

[13] U. S. Comp. Stat., 1923 Sup. Vol. I, Sections 980, 982, 985 1113A.
[14] Section 1.

recommendations for modification of existing conditions." The act includes the provision omittd from the Oregon Act requiring the "clerks of the various courts and other officers to make to the council such reports on such matters and in such form periodically from time to time as the council may prescribe." Otherwise the purpose and powers are the same as in Oregon except that the act contains allowance from the treasury for expenses "for clerical and other services, travel and incidentals, as the council and the governor shall approve."

In Wisconsin, by act of the legislature, the Board of Circuit Judges was created similar in purpose to existing judicial councils. This board has published printed reports of its proceedings from the time of its formation and the Wisconsin judges and lawyers generally praise the board's accomplishments.

The most recent Judicial Council act passed is that in the state of North Carolina where the 1925 session of the legislature created a "Judicial Conference" with the same purpose as outlined in the above mentioned acts. The complexion of this conference or council differs somewhat from the other acts in that it is composed of the "judges of the Supreme and Superior Courts, the attorney general, and one practicing attorney at law from each judicial district, to be appointed by the governor." The conference is to meet twice a year and may hold public meetings and, in practical working, may be reduced to "not less than two of the justices of the Supreme Court, six judges of the Superior Court and six of the attorneys at law who are members of the conference." Appropriation is made for actual expenses incurred for clerical help and incidentals.

The 1925 session of the California legislature passed a resolution proposing to the people of the state of California that the constitution of the state be amended to include a provision for a judicial council. The original amendment, Senate Constitutional Amendment No. 15, proposed to give to the Judicial Council the rule making power, that is, that the Judicial Council might "adopt or amend rules of practice and procedure for the several courts, provided, that such rules shall not affect substantive rights and shall be subject to amendment or repeal by the legislature." It is probable that the inclusion of this provision is responsible for submitting the judicial council to the people as there would seem to be no legal question as to the constitutionality of an advisory judicial council. However, when the resolution came up on the floor, the legislature struck out the provision giving the council rule making power, leaving for submission to the people an advisory judicial council. This act will be voted upon a year from

this fall by the people of California and is the most complete in its provisions of any act thus far proposed (except possibly the Missouri article), including as it does reference to the assignment of judges and certain provisions for terms of office.

In 1922-23, the Missouri Constitutional Convention prepared for submission to the people a judiciary article providing for a judicial council with rule-making powers. The article also contained a provision for court reorganization, in that Section 27 provided "The Judicial Council, when the business of the court requires, may call to the aid of the Supreme Court, or any of the courts of appeal, one or more judges of the circuit courts for such time as may be necessary Such judges, while so acting, shall possess all the powers of judges of the court in which they are called to sit."

This article was submitted to the people of Missouri on the 26th day of February, 1924, together with twenty-one amendments to the Missouri Constitution. All but six were rejected by the voters and among those defeated was the above-mentioned judiciary article.

Herbert S. Hadley, chancellor of Washington University, St. Louis, Missouri, in a letter to the writer, says that the opposition to the judiciary article "was chiefly due to the provision for the inclusion of two circuit judges as members of the judicial council, and for calling circuit judges to aid the Supreme Court and courts of appeals in disposing of their business."

Judge R. E. Culver of St. Joseph, Missouri, a member of the committee on judiciary article of the constitutional convention ascribes the defeat of the article to the same causes which defeated all of the important articles approved by the constitutional convention and states that the unpopularity of the constitutional convention, on account of the expense, created an unfavorable impression throughout the state, so that "the voters had a disposition to say no to any proposal."[15]

It will be noticed also that the Missouri article gave the rule-making power to the judicial council and the inclusion of this section undoubtedly had a great deal to do with the opposition which might not have been met in the case of a purely advisory council. It is significant that in the defeat of this measure in Missouri, when a full tabulation of votes cast in St. Louis, Kansas City St. Joseph, Carthage, and other cities had been made, the judiciary article had a substantial lead, but the vote which straggled in from the rural precincts, where the proposition was not thoroughly known or its importance understood, defeated the measure. Chancellor Hadley also says that the total vote

[15] JOURNAL OF THE AMERICAN JUDICATURE SOCIETY, Vol. 7, No. 6, p. 184.

was small, being about 350,000, as compared with 1,300,000 in the presidential election in 1920.

In discussing the attitude of various states towards judicial council legislation, the proposal in the state of New York to establish a "Law Revision Commission" should be examined. Governor Smith in his annual message to the legislature of January 3, 1923, recommended a statute providing for an honorary commission to investigate defects in the law and its administration, and the New York legislature of 1923 acted upon this recommendation and created a commission to report to the legislature of 1924.[16]

The members of this commission, John Godfrey Saxe, chairman, Chief Judge Frank H. Hiscock, Judge Benjamin Cardozo of the Court of Appeals, various other justices of the appellate division of the Supreme Court, and of the Court of General Sessions, together with some legislators and many prominent lawyers, adopted a report of a special committee on plan and scope, recommending the creation of a "Law Revision Commission" for the purpose of examining not only the defects in procedural but also in substantive law The draft of the proposed legislation provided for the appropriation of $50,000 for personal service and maintenance of the commission and was, of course, much more far-reaching in its powers and duties proposed for the commission than that of any judicial council thus far suggested.

The committee on amendment of the law of the New York City Bar Association approved these recommendations and recommended their enactment to the last New York legislature which, however, did not take favorable action, though the chairman of the commission, John Godfrey Saxe, states that the bill is still "pending" before the legislature. Back of this proposal are to be found many lawyers of national reputation such as Henry W Taft, Harvey D. Hinman, Milton E. Gibbs, Charles B. Hill, and the general findings of the commission were admirably stated by Judge Cardozo.

Many state bar associations have acted favorably upon a judicial council proposal, among them North Dakota, Illinois, Missouri, Pennsylvania, Colorado and, most recently, Washington.

The report of the Pennsylvania Bar Association, adopted June, 1925, recommends the establishment of a judicial council consisting of eleven members, to be appointed by the Chief Justice of the Supreme Court of Pennsylvania as follows: One of the justices of the Supreme Court of Pennsylvania, one of the justices of the Superior Court of Pennsylvania, two common pleas judges, one Orphans Court judge, the presi-

[16] Chapter 575 of the Laws of 1923.

dent of the District Attorneys' Association, and four other members of the bar.

The other provisions are similar in nature to the acts above set out and follow closely the model statute recommended by the American Judicature Society [17]

On the 4th of August of this year, the Washington State Bar Association went on record in favor of the passage of a judicial council act for this state. The report of the special committee appointed to investigate the question recommended that an advisory judicial council be created, small enough to be workable and large enough to be representative of the lawyers and judges of the state. A few days before the action of the state bar, after a thorough investigation of proposals for the reform of the judiciary, the convention of Superior Court judges of the state of Washington also approved the judicial council idea and appointed a committee to work with the state bar in urging the passage of such legislation at the next session of the legislature.

No exact form for the Washington Judicial Council has been recommended by the judges or the bar, the reports stating that the composition of the council should be left to the joint committees of the bench and bar working in cooperation with the legislature. The general opinion among Washington lawyers seems to be that the council should consist of two Supreme Court Judges, three Superior Court Judges, the chairman of the House and Senate Judiciary Committee and three members of the bar. It is also suggested that of the members of the bar one shall be a prosecuting attorney and also that the President of the State Bar Association be designated in the act. To secure members most representative of their associates it is proposed that each body represented select its own member, though some acts provide for appointment either by the Governor or the Chief Justice of the Supreme Court. The term should probably be longer than one year, and, if the chairman of the judiciary committees are included, two years. Ample provision for clerical and traveling expenses is necessary for the success of the council the expense involved is obviously nominal considering the importance of the council's work and the fact that there is no other appropriation for judicial administration as such.

It is, of course, too early to give final judgment on the work of the Massachusetts, Ohio and Oregon councils. The Massachusetts council, according to a letter received from its secretary, F W Grinnell of the Boston Bar, is proceeding on a conservative basis. Mr. Grinnell says:

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[17] JOURNAL OF THE AMERICAN JUDICATURE SOCIETY, Vol. 6, No. 4, p. 102.

> "The important thing to remember, particularly at the beginning of such an experiment, is that improvements come about gradually. If too much haste is attempted or too many radical ideas of reorganization, etc., are suggested all at once, the council itself and everybody else would get indigestion and nothing would happen at all."

In Massachusetts, the council has begun the study of some of the equity rules, particularly those relating to masters and auditors about which there has been considerable criticism in that state. They are also considering a general revision of their equity rules. The Massachusetts Council has made many suggestions to judges in regard to experiments and practice where no legislation or rule was needed, and some of these suggestions of detail have been followed with apparently satisfactory results. It has dealt with the revision of the system of appeals in civil cases, which has received favorable consideration from the legislature. It has also secured the passage of an act allowing the Chief Justice of the Superior Court to call in district judges to sit with juries in certain classes of cases in the Superior Court which, Mr. Grinnell says, did much to break the congestion of criminal appeals. The council is considering, and will probably recommend, a declaratory judgment act as well as special proposals to assist the courts in their preliminary work of defining the issues and reducing the case in advance to the real points of dispute for trial. As is well known, this was the theoretical purpose of common law pleading, but in most of our American cities the reaction against extreme technicality has resulted in such looseness as to give nobody any idea of what is to be tried. The object of the most modern practice and the aim of the judicial council is to secure methods of determining as soon as possible what the real point of controversy is and then to deal with it quickly and thoroughly.

In Ohio the council has not made any specific recommendations upon any particular reform, but has been considering, among other things, the rule making power of the courts, limiting the work of grand juries, legislation designed to discourage preliminary motions and demurrers and for unification of the courts, as well as other proposals which are peculiar to Ohio practice.

In the state of Oregon, on September 26th, the Oregon Bar Association approved the proposal of the judicial council to submit to the people, by constitutional amendment, the question of giving to the Supreme Court of the state the power to make rules of practice and procedure, many of which are now made by the legislature. The judicial council in Oregon has also collected and catalogued much information with regard to the kind and character of actions being

brought in their courts, and is attempting at the present time to work out changes which will relieve the congestion in the Supreme Court where some cases have been held without decision for two or three years.

The functions or duties of the judicial council may be summarized as follows:

1. From time to time to recommend such changes in the law as it deems necessary, to modify or eliminate antiquated and inequitable methods of law and methods of administration, and to bring the law of the state, civil and criminal, into harmony with modern conditions.

2. To receive and consider suggestions from judges, justices, public officials, lawyers, and the public generally as to defects and anachronisms in our procedural law and its administration.

3. To examine the common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in our civil and criminal procedure and recommending needed reforms.

4. To make a continuous study of the organization, rules, and methods of procedure and practice of the judicial system of the common law, the work accomplished and the results produced by that system.

5. To secure statistical information concerning the operation of the courts, keeping an up-to-date record of how the various laws, rules and methods are succeeding, making the same available to the public in convenient form, to survey the condition of business in the several courts with a view to simplifying and improving the administration of justice.

6. To submit such suggestions to the several courts as may seem in the interest of uniformity and the expedition of business.

7 To report to the governor and the legislature at the commencement of each session such recommendations as may be deemed proper.

Some of the advantages of a judicial council may be enumerated as follows.

1. Through the judicial council there is provided, for the continuous, thorough, scientific study of defects in procedure and proposals to remedy those defects, a small, compact, yet representative body whose conclusions, by reason of the personnel of the council and the manner of investigation will carry weight with lawyers, the legislature and the people. It differs from a code commission in that it is a permanent body which can hold public hearings from time to time, and provides a medium for flexible action which could not be secured through a

code commission or any body which would make a special recommendation and then be discharged from further action. Furthermore, it is unlike a code commission in that no compensation is allowed to the members of the council, the only appropriation being for necessary traveling and clerical expenses of the members.

2. If the council is composed of a cross-cut of judges and lawyers, a breadth of view will be obtained which, unfortunately, has been lacking in many previous attempts at judicial reform. Through its operation the judges will become active in measures for improvement of our legal procedure and if the judicial council functions properly the public as well as the judges and the lawyers will cooperate in the solution of our procedural problems.

3. The official character of the judicial council should replace inactivity with action and initiative and, more than that, responsibility. Due also to its official character, leading members of the bar feel appointment on the judicial council desirable, and their appointment naturally gives weight to the council's findings.

4. The council tends to prevent ill advised, radical and undigested reforms and piecemeal, spasmodic or ill advised proposals which have too often been presented, and sometimes adopted, by the legislature. In the place of unscientific action, or no action at all, the judicial council proposes to act upon full information and to secure action from the legislature or from the judges on needed reforms of sound character.

The general testimony of the leaders of the bar and bench where the judicial council is in operation is that it is the first step in securing knowledge of and action on the defects in our procedure.

William Howard Taft says that the federal judicial council is designed "for expedition and efficiency."

Judge Charles Henry Carey of the Portland, Oregon, Bar, in speaking of the judicial council, says:

> "It will be seen at once that this is the most forward step that has been taken by Oregon in the direction of law reform since the adoption of the first code of civil procedure."

William A. Klatte, secretary of the Milwaukee Bar Association, says:

> "The creation of the Board of Circuit Judges was in itself one of the greatest reforms accomplished in the judiciary in this state. The board is in the nature of a judicial council."

Albert B. Ridgway, president of the Oregon Bar Association, says:

> "The two most important reforms on which the members of the Washington bar should concentrate are, first, the obtaining of a judicial council and the second important reform is to secure for your Supreme Court the right to prescribe rules of practice and procedure."

Benjamin Cardozo, Judge of the New York Court of Appeals, says:

> "We find a widespread agreement that there should be established a permanent agency, continuously functioning, to consider the changes essential to the proper administration of justice, and to report its recommendations yearly One of the anomalies of our legal institutions is that no such agency exists."

Roscoe Pound, Dean of Harvard Law School, and America's leading authority on jurisprudence and administrative law, in a recent letter to the writer, says

> "There can be no question of the desirability of a judicial council. Committees of bar associations can do something. Judiciary committees of the houses of the legislature can do something. But neither is at hand all the time, both have much else to do, each has to act at relatively crowded sessions, and neither is in touch with the everyday difficulties in all their phases as the judges are. Most of all it is important to have a body at hand continually whose function and duty it is to study the machinery of justice in operation and study how to make it as effective for its purpose as is possible. We need to organize intelligent effort. "

An examination of correspondence from practically every state in the Union, the reports of state bar associations, periodicals devoted to reform of procedure, and many other available sources of information indicates that wherever the judicial council proposal has been fairly presented to lawyers and judges it has received enthusiastic endorsement. The limits of this article do not permit the writer to explain specific proposals for judicial improvement which may apply in the state of Washington, and, after all, the passage of judicial council legislation does not depend on outlining the particular defects in procedure and suggesting adequate remedies. Sufficient justification for the enactment of such legislation may be found if the judicial council, after a scientific investigation of the subject, can show the public that there is nothing the matter with our judicial procedure.

However, there are very few who have made a study of our civil and criminal procedure who are not convinced that there is much room for improvement, and that the time has come for the lawyers and judges to get together and take an aggressive stand for a more expeditious and accurate determination of causes. It may be remarked, in conclusion, that the last progress of a substantial nature in judicial reform was achieved by the Field Code of 1840, and only after a determined fight.

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