Law Commission
Reforming the law

The Third Leslie Scarman Lecture

Judicial Stimulation of Legislative Change: A View from the United States

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The Law Commission of England and Wales and Lord Scarman, its first chairman, have made exemplary progress in advancing the law's fidelity to the society law exists to serve, and I am honored to address this audience of Commission supporters. One measure of the success of the Commission: Since its creation in 1965, if I have it right, over two-thirds of the Commission's law reform recommendations have become the law of the land. And Lord Scarman's influence extends far beyond the U. K.'s borders; even in U. S. courts, his speeches have been cited at every level. Jurists everywhere have applauded a development he strived mightily to achieve: the incorporation of the European Convention on Human Rights into U. K. domestic law.

I.

A brief word about law reform work in the United States. Several of our States have official law reform commissions. New York, for example, established a law revision commission in 1934; inspired by the vision of Benjamin Nathan Cardozo (New York's Chief Judge prior to his 1932 appointment to the U.S. Supreme Court), the commission has a broad mandate to identify inadequacies in the law and to propose changes, both large and small. And a nongovernmental commission, launched in 1892, promotes the uniformity of state laws. The Uniform Law Commission has produced well over 200

model laws; its signature work, done in partnership with the American Law Institute, is the Uniform Commercial Code, now in force in every State of the United States.

At the national level, however, there is no U. S. counterpart to the Law Commission of England and Wales. Closest in mission is the American Law Institute (ALI), founded in 1923 “to promote the clarification and simplification of the law and its better adaptation to social needs.” The ALI currently undertakes projects of three kinds: Restatements portraying the common law and its statutory variations; model legislation; and principles to guide the development of emerging law. Unlike the Government-created and -financed Law Commission, the ALI is privately organized and funded, has a large membership (currently, some 4000 lawyers, judges, and law professors), and is in no way linked to the U. S. Executive or Congress. But most essentially, the Commission and the ALI share a common purpose — to keep “the law as a whole under review and [to make] recommendations for its systematic reform.”

I will mention just one allied endeavor—criminal law reform. The Commission’s effort yielded the Powers of Criminal Courts (Sentencing) Act of 2000, consolidating sentencing laws from over a dozen statutes. And a current project concerns simplification of the criminal law. An ALI work-in-progress, launched in 1999, is revisiting the Institute’s Model Penal Code. First published in 1962, the Code was designed to encourage reform and uniformity in state criminal law. In particular, the ALI is reconsidering sentencing provisions in light of changes in sentencing philosophy and practice over a near half-century span. A notable recent development: A Model Penal Code prescription (§210.6) created the framework operative in the United States today for imposition of the death penalty. After study, report, and discussion at last summer’s annual meeting, the Institute, in October 2009, withdrew the prescription, acknowledging “intractable institutional and structural obstacles” to what the ALI once thought possible — evenhanded administration of capital punishment. The ALI is endeavoring to communicate its position wherever the Model Penal Code is published and to the public generally.

Concerning references to Lord Scarman in U. S. courts, his words have aided U. S. judges in interpreting the Warsaw Convention and in determining where a child “habitual[ly] reside[s]” within the intendment of the Hague Convention on Civil Aspects of International Child Abduction. And his part in defusing inter-court conflict in the Laker Airways case has been noted. Respectful consideration has been given to his view, eventually embraced by the Privy Council and the European Court of Human Rights, that inordinate delay in the administration of death sentences qualifies as cruel and unusual punishment. Justices Stevens and Breyer have urged the U. S. Supreme

Court to give the issue full airing. The late Circuit Judge Richard Arnold's response, however, is representative of the opinion prevailing in the United States: "[D]elay in capital cases is too long," Judge Arnold said, with time served between sentence and execution running on average ten and a half years. But the delay is in large part a function of the opportunities defendants have, through successive petitions in state and federal courts, "to explore . . . argument[s] that might save [their] li[ves]." Absent those multiple, time-consuming review avenues, the penalty could be administered without long delay, but at a greater risk of error.

II.

Turning to the announced topic, judicial stimulation of legislative or political change, I will begin with a question routinely put to nominees for U. S. federal-court judgeships by members of the Senate Judiciary Committee: Does the nominee understand, and will she abide by the understanding, that policy and law making are the domain of the Legislature, while the job of a judge is simply to read and apply the law as written by legislators? That neat divide overlooks the tradition of common-law judging familiar to the many members of the U. S. Senate who hold law degrees. Nor does the description of the respective provinces of legislative and judicial authorities hold true today in civil-law systems, if, in reality, it ever did. Legislation is not uncommonly ambiguous or silent on issues presented in particular cases. And there may be higher laws — national constitutions and instruments of international governance — against which ordinary laws must be measured.

My remarks on the interdependence or interaction of courts and the political branches of government stay mainly on home turf. They concern the ongoing dialogue between the U. S. Supreme Court and Congress in making and shaping U. S. laws, a dialogue in which the Court speaks through its opinions. But I will essay first a few comparative sideglances, illustrations of judicial contributions to lawmaking drawn from European systems.

An important facet of the free movement of goods within the European Union is the mutual recognition principle, which requires that products lawfully produced and marketed in one Member State gain access to markets throughout the Union, even when the product does not meet content or quality standards set by the destination State. Article 30 of the EEC Treaty proscribed "measures having an effect equivalent to quantitative restrictions on imports." That spare provision, as interpreted by the Court of Justice of the Union, includes qualitative or content restrictions. It means that Cassis de Dijon can be purchased in Germany's wine shops although the French product's

alcohol content falls below the German standard. And, correspondingly, foie gras from Spain cannot be barred from French markets although the Spanish product does not meet exacting French standards. The current regulation of the European Parliament and Council, adopted in 2008, calls for mutual recognition clauses in national legislation and acknowledges the principle's origin: "The principle of mutual recognition," the regulation states, "derives from the caselaw of the Court of Justice of the European Communities."

To mention just one other area of EU law, the Court of Justice has played a significant part in implementing, clarifying, and informing Council Directives on the permissible scope of "positive discrimination" to ensure "full equality in practice between men and women in working life." In talks on this topic, I have referred to the EU Court's 1997 decision in Marschall v. Nordrhein-Westfalen as pathmarking, particularly for its sensitivity to sometimes unconscious bias. "[T]hat a male candidate and a female candidate are equally qualified," the Luxembourg Court observed, "does not mean that they have the same chances." Traditional habits of thought may lead to the selection of males in preference to females, the Court noted, because employers fear women will be distracted from their work by "household and family duties." Thus a tie-breaker preference for women may do no more than ensure actual adherence to the nondiscrimination norm. Questions referred since Marschall continued to invite the Court of Justice to reconcile the principle of equal treatment with the need "to promote equal opportunity for men and women . . . by removing existing inequalities which affect women's opportunities . . . ."

In countries that installed judicial review for constitutionality after World War II, Constitutional Courts live in constant dialogue with other institutions of government about constitutional values and priorities. The current shape of abortion regulation in Germany, for example, is a product of the interplay between Bundestag and the Federal Constitutional Court. For European countries, the Strasbourg Court is a vital voice in the conversations. And other major contributors to global constitutional dialogues include the Supreme Court of Canada and the Constitutional Court of South Africa.

The United Kingdom has become a closely watched participant in human rights enforcement particularly since the 1998 enactment of the Human Rights Act. Perhaps the most widely noted example: The Law Lords, late in 2004, responded to the complaints of suspected terrorists incarcerated in Belmarsh Prison indefinitely, without charges in anticipation of trial or access to counsel. The Lords of Appeal declared the authorizing legislation, the 2001 Anti-Terrorism, Crime and Security Act, incompatible

with the Human Rights Act. A New York Times article, reporting on the decision the day after it was announced, called the ruling “a strong example of the increasing interdependence of domestic and international law, at least outside the United States.”

Three months after the Lords’ judgment, Parliament responded by enacting the Prevention of Terrorism Act of 2005, which allows, in lieu of imprisonment, control orders involving stringent constraints on liberty. Last year, the Lords addressed procedures for issuing control orders, particularly, the right of suspected terrorists to fair notice of the essence of the case against them. “[T]he exigencies of national security,” Lord Phillips said, referring to Strasbourg Court decisions, “could justify non-disclosure of relevant material to a party to legal proceedings,” but “counterbalancing procedures [must] ensur[e] that the party was accorded a substantial measure of procedural justice.” The cases were remitted, am I not right, for determination whether, for each individual, that measure was met.

Constitutional conversations initiated outside the United States can—and, I anticipate, increasingly will—elicit attention inside the States. A case in point. In December 2005, the Law Lords resolved another headline case involving the Belmarsh detainees. It was the unanimous view of the seven-member panel that evidence obtained by torture was inadmissible in British courts to establish criminal liability or eligibility for deportation “irrespective of where, by whom or on whose authority the torture was inflicted.” Lord Bingham’s lead opinion surveyed U.N. instruments as well as judicial decisions from other nations, sources that supported his ringing declaration: “[T]he English common law has regarded torture and its fruits with abhorrence for over 500 years, and that abhorrence is now shared by over 140 countries which have acceded to the Torture Convention.”

Some of the Lords’ speeches cast a critical eye across the sea. Lord Hoffman ventured that “many people in the United States, heirs to the common law tradition, have felt their country dishonoured by its use of torture outside the jurisdiction.” It may not be entirely coincidental that, shortly thereafter, the U. S. Congress banned cruel, inhuman, and degrading treatment of detainees in U. S. custody. The legislation, however, stopped short of explicitly banning evidence elicited by torture from consideration by military tribunals then engaged in determining whether a detainee ranked as an enemy combatant.

The U. S. Supreme Court, between 2004 and 2008, decided four cases involving persons captured in Afghanistan and incarcerated as suspected Al Qaeda or Taliban members or supporters. Each time the Court ruled cautiously, mindful of the large

power and responsibility of Congress and the President to safeguard the Nation's security. But each time the Court exerted what my colleague, Stephen Breyer, called "a constitutional tug on the string," and each time, the challengers prevailed. We will hear a fifth case next month, involving Uighurs still held at Guantanamo Bay. I expect that the Lords' speeches will be noted in briefs filed in this latest case.

III.

Of the interchange between the U. S. federal courts and Congress, my former Court of Appeals colleague, Abner Mikva, said: "Judicial review and congressional overruling are, in the normal course of events, constructive measures to correct the inevitable goofs both branches commit." Congress indeed does attend to Supreme Court decisions. An empirical study published in 1991 found that, since 1975, Congress has held hearings on close to half of the Court's decisions interpreting statutes, and each Congress has overridden about a dozen decisions construing legislation. One stunning example. In the late 1980s, continuing through 1991, a sharply divided Court narrowly read civil rights legislation to limit the claims and relief a plaintiff could pursue. Congress disagreed with the Court's restrictive readings and, in a 1991 omnibus Act, overrode twelve of the Court's decisions.

Lower federal court statutory interpretation decisions, on the other hand, do not attract regular congressional attention. To remove ambiguities, fill gaps, and resolve conflicts sooner rather than later, Circuit Judge Henry Friendly, in 1963, proposed that Congress continuously undertake law revision in-house. He recommended a "second look at laws" committee that would monitor federal court decisions construing statutes. Judge Friendly envisioned a mixed committee composed of four legislators and four to six presidential appointees drawn from the ranks of legal scholars, retired judges, and lawyers "who have attained the age when such public service is more attractive than continued professional success."

Judge Friendly's idea did not take hold, but a more modest and recent proposal advanced by Circuit Judge Robert Katzmann, remains live. Courts of Appeals — there are now thirteen — would simply identify opinions that reveal statutory deficiencies and send them to designated members of Congress for the legislators' information and whatever action they might wish to take. Legislative counsel in the House and Senate report that the opinions dispatched this way call attention to drafting deficiencies capable of repetition and are useful in teaching staff attorneys the art of careful writing.

So much for law clarification, low key. I would like to devote the remainder of my remarks to opinion production U. S. style, the Supreme Court's means of communicating with the political branches and with society at large.

The common-law style of judging is our heritage and I have trepidations about suggesting that our workways may be of interest, and perhaps of some utility, here. I surely would not suggest going down "the American road" on the appointment of judges, a system Lord Phillips said he would totally oppose, and for good reason. Nor will I speak of the substance of our Court's decisions. But our effort to speak in not too many voices has merit, I believe, so I beg your indulgence as I describe how we respond to the competing tugs of collegiality and individuality ever present in our work—and how that response may affect law reform.

IV.

The U. S. Supreme Court, in its early years, adhered to the inherited pattern: Each Justice spoke for himself whenever more than a memorandum judgment issued. The great Chief Justice John Marshall, whose tenure ran from 1801 until 1835, had a different idea about how the Court should operate. He believed the Court would gain greater respect and better comprehension of its decisions if it spoke with one voice. At first he was hugely successful in achieving consensus among his colleagues. When the Court met in the Capital City in those days, all members resided and dined together in the same boarding house. After dinner, so the legend goes, the Chief would serve Madeira from his own supply, talk about the argued cases, then volunteer to write all the opinions himself.

Thomas Jefferson, President at the time, objected to the innovation, as he did to many of the judgments made by his distant cousin, John Marshall. "An opinion is huddled up in conclave," Jefferson wrote, "perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his own mind, by the turn of his own reasoning." Marshall's resistance to seriatim opinions prevailed in large part. Opinions that speak for the Court remain standard. Since Marshall's early years at the helm, however, Chief Justices have written only their fair share of Court opinions. But unlike courts in the civil law mode, each member of the Court has the prerogative to write separately. The question is when to do so.

No doubt the U. S. Supreme Court can speak with greater force and provide clearer guidance when it is not fractured. Consider the extra weight carried by the Court's

unanimous 1954 opinion in Brown v. Board of Education. All nine Justices signed one opinion making it clear that the Constitution does not tolerate legally enforced segregation in the Nation's school systems.

Even for dissenters, I believe, one opinion speaks more impressively than four. In the rush to judgment in Bush v. Gore, for example, there was no time to compose a single dissent, so the press and public had to fathom four to discern our views. Contrast the single opinion Justice Stevens composed expressing a united minority view in a case decided last month, Citizens United v. Federal Election Commission. (The Court's judgment in that case nullified a key constraint on spending by corporations to elect or defeat candidates for public office.)

Circuit Judge Irving L. Goldberg described federal judges in the U. S. as "fire[fighters]," a description particularly fitting when judges are invited to resolve matters of political import. Judges do not ignite the conflagrations that produce litigation but, if their authority is properly invoked, Judge Goldberg said, they "must respond to all calls." U. S. judges, in their turn, regularly call in alarms to the legislature for the law revision needed to curb or cohesively resolve litigation. The most stirring pleas for congressional or community attention, however, are often voiced in dissenting opinions.

Chief Justice Charles Evans Hughes, in a book about the U. S. Supreme Court published in 1936, famously said: "A dissent in a court of last resort is an appeal . . . to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed." That description fits, particularly, decisions interpreting the Constitution which, in the U. S. system, cannot be overturned save by constitutional amendment or the Court's recognition that a prior opinion was a grave mistake. We have no "notwithstanding clause," as Canada does in its Charter of Rights and Freedoms, permitting legislative override of court decisions resolving constitutional questions.

One contemporary example of the genre of dissent Hughes described. In 2007, the Court invalidated student assignment plans adopted by boards of education in Seattle, Washington, and Jefferson County, Kentucky. The plans were designed to counter resegregation in the local elementary and secondary schools. The question was whether local communities had leeway to use race-conscious criteria to promote the kind of racially integrated education Brown v. Board anticipated. The Court held, 5-4, that the Constitution prohibited the school boards' efforts to prevent resegregation.

Justice Breyer's comprehensive dissent concluded: "[T]he very school districts that once spurned integration now strive for it. . . . [T]hey have asked us not to take from their hands the instruments they have used to rid their schools of racial segregation . . . . The last half-century has witnessed great strides towards racial equality, but we have not yet realized the promise of Brown. To invalidate the plans under review is to threaten [Brown's promise] . . . . This is a decision . . . the Court and the Nation will come to regret."

Typically, when Court decisions are announced from the bench, only the opinion of the Court is summarized. Separate opinions, concurring or dissenting, are noted but not described. A dissent presented orally therefore garners instant attention. It vividly conveys that, in the dissenters' view, the Court's opinion is not just wrong, but grievously misguided. Ordinarily, only a few dissents will be presented orally each term. Justice Breyer's dissent in the school assignment plan cases was one such instance; Justice Stevens' dissent last month in the campaign finance case was another. While those dissents "appeal[ed] to the intelligence of a future day," bench announcements of dissents in certain statutory cases — civil rights cases prime among them — aim to engage the public and propel prompt legislative change.

A fit example is the statement I read from the bench, dissenting from the Court's 2007 decision in Ledbetter v. Goodyear Tire & Rubber Co. The plaintiff, Lilly Ledbetter, worked as an area manager at a Goodyear tire plant in Alabama; in 1997 she was the only woman Goodyear employed in such a post. Her starting salary (in 1979) was in line with the salaries of men performing similar work. But over time, her pay slipped. By the end of 1997, there was a 15 to 40 percent disparity between Ledbetter's pay and the salaries of her fifteen male counterparts. A federal jury found it "more likely than not that [Goodyear] paid [Ledbetter] a[n] unequal salary because of her sex." The Supreme Court, again dividing 5-4, nullified the verdict, holding that Ledbetter filed her claim too late.

It was incumbent on Ledbetter, the Court said, to file charges of discrimination each time Goodyear failed to increase her salary commensurate with the salaries of her male peers. Any annual pay decision not contested promptly (within 180 days), the Court ruled, became grandfathered, beyond the province of Title VII (our principal law prohibiting employment discrimination) ever to repair.

The Court's ruling, I observed for the four dissenters, ignored real-world employment practices that Title VII was meant to control: "Sue early on," the majority counseled, when it is uncertain whether discrimination accounts for the pay disparity you are

beginning to experience, and when you may not know that men are receiving more for the same work. (Of course, you would likely lose such a premature, less-than-fully-baked challenge.) If you sue only when the pay disparity becomes steady and large enough to enable you to mount a winnable case, you will be cut off at the Court's threshold for suing too late. That situation, I urged, could not be what Congress intended when, in Title VII, it outlawed discrimination based on race, color, religion, sex, or national origin in our Nation's workplaces. "The ball is in Congress' court," my opinion and bench statement ended, "to correct [the Supreme] Court's parsimonious reading of Title VII."

Congress responded within days of the Court's decision. Bills were introduced in the House and Senate to amend Title VII to make it plain that each paycheck a woman in Ledbetter's situation received renewed the discrimination and restarted the time within which suit could be brought. Early in 2009, Congress passed the Lilly Ledbetter Fair Pay Act, and President Obama signed the corrective measure as one of his first actions after taking office.

One can prize the independence of the individual judge to speak in his or her own voice, and the transparency of the judicial process, yet appreciate the value of collegial judging. A Justice of the U.S. Supreme Court, contemplating publication of a separate writing, will routinely ask herself: Is this dissent or concurrence really necessary? Oliver Wendell Holmes, who graced the Court from 1902 until 1932, was called "The Great Dissenter," but he in fact dissented less often than most of his colleagues. Harlan Fiske Stone, who served on the Supreme Court from 1925 until 1946, once wrote to legal scholar Karl Llewellyn: "You know, if I should write in every case where I do not agree with some of the views expressed in the [Court's] opinions, you and all my other friends would stop reading [my separate opinions]."

Sometimes a dissent is written, then buried by its author. An entire volume is devoted to the unpublished separate opinions written by Louis Dembitz Brandeis during his 1916 to 1939 tenure on the Court. He would suppress his dissent if the majority made ameliorating alterations or, even when he gained no accommodations, if he thought the Court's opinion was of limited application and unlikely to cause real harm in future cases.

Constitutional law scholar Paul Freund, who clerked for Justice Brandeis in 1932, recalled his memory of the new Justice who came on board that year, Benjamin Nathan Cardozo. Freund "was surprised . . . how often Cardozo was in sole dissent in the vote at conference." Freund "was also struck by how preponderant [Cardozo's]

course was of suppressing a dissent so that an opinion would come down unanimous . . . ."

On when to acquiesce in the majority's view, and when to take an independent stand, U.S. Court of Appeals Judge Jerome Frank wrote in 1958 of the model Brandeis set:

"Brandeis was a great institutional man. He realized that . . . random dissents . . . weaken the institutional impact of the Court and handicap it in the doing of its fundamental job. Dissents and concurrences need to be saved for major matters if the Court is not to appear indecisive and quarrelsome . . . . To have discarded some of [his separate] opinions is a supreme example of [Brandeis'] sacrifice to [the] strength and consistency of the Court. And he had his reward: his shots [were] all the harder because he chose his ground."

In the years I am privileged to serve on the U.S. Supreme Court, I hope I will be granted similar wisdom in choosing my ground.