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## STATUTE REVISION FOR NORTH DAKOTA

JOHN H. CONWAY\*

### I.

#### *The Basic Issue*

NO discussion of statute revision can be satisfactory unless one point is grasped clearly from the start: statute revision has been and must be carried on whether you have a revisor of statutes or not. No state is today operating with the set of statutes it had when it joined the Union. Most states have revised their statutes several times. The question is not whether to have revision but rather what is the best kind of statute revision, and, specifically, what is the best kind of statute revision for North Dakota? The solution, unfortunately, is much like the weather — no one is completely happy with what he has, or even with what is promised, but everyone will admit that some kinds of revision, like some kinds of weather are better than others.

I would also like to make clear that I have not come to sell you on any particular system. Whatever solution you adopt — whether to continue your present system, or to make some modification in it — must be a solution tailored to your needs. I only hope to analyze the revision situation with you and point out what other people have learned about publishing and revising statutes during the last 40 years. From the array of their solutions, some helpful suggestions may come.

Your ultimate choice is limited quite largely by the service that the buyers of the statute book are willing to pay for, or that the legislature is willing to provide in the interest of making statute law widely available. In short, you can find out almost exactly what you will get for your money; the question is, how much do you want to spend?

### II.

#### *Compilation and Publication*

Publishing the laws passed at one session of the legislature has never presented any serious problem. They are simply arranged in the order of passage and printed in one volume. As the years go by, however, the collection of session laws becomes very difficult to use, especially since the session laws must be related to the most recent volume of statutes.

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At this point comes the need for the first device in the statute publication process. Some state agency should be given authority to assign new acts to their proper place in the statutes by statute section number. If this is done, a compilation of statutes can be published at any time by the simple mechanical procedure of inserting the laws passed by any number of sessions of the legislature into the last volume of the statutes and republishing the whole. The best agency to designate statute numbers for session laws is the agency that drafts bills for the legislature, unless, as in some states, the numbering is not done until after the bills are enacted.

After the session laws are tied to the statute numbering system, the next question is how often to compile and republish the statutes. This is largely a financial question. A state with many lawyers, like Illinois, works the session laws into the statutes after every session and republishes the set of statutes every two years. Most states republish at much greater intervals, and accompany the compilation with some amount of revision.

### III.

#### *Revision*

So far, we have been talking only about compiled statutes. Compiled statutes do not grow at quite the same rate as session laws because each legislature passes some private, special or local acts which are not published in the statutes, and repeals at least a few existing statutes. But most session laws do not go into the statutes. Conflicts appear, and duplications, as one legislature passes laws unaware of what a previous legislature has done. Obsolescence starts to operate; the horse is superseded by the automobile, and many sections become useless or inapplicable to new circumstances. Annotations to the statutes grow at an amazing rate as decisions are handed down and opinions given. As legislatures make efforts to correct by legislation court decisions which are not entirely satisfactory, early decisions are no longer helpful; other decisions are overruled by the courts. The fact that the legislature touches some chapters and not other related chapters makes for uneven development; actual errors arise in some cases where statutes are incorporated by reference into other statutes and the incorporated statutes are then amended. Improvements in administration, as of the criminal law, may require changes in substantive law. In short, for a variety of reasons, all stemming from the basic fact that human affairs are in a constant state of change, a compilation of statutes becomes unsatisfactory sooner

or later, depending only upon the rate of change. Every state that has used the compiled statutes system has had to revise the compilation at intervals, and to weed out the obsolete and surplus.

Revision takes two basic forms; the best known and most widely used is revision of the entire body of the statutes at long intervals—bulk revision. More recently bulk revision has been superseded in many states by continuous topical revision.

Bulk revision is ordinarily done by a commission since revision of the entire body of state's law in a reasonable time (usually between two sessions of the legislature) requires the work of more than one man. The difficulties in bulk revision are largely those relating to personnel. It is hard to obtain for temporary periods the services of people competent to revise large blocks of the statutes. There is also waste motion in setting up and training the necessary clerical force. The most satisfactory method of handling a bulk revision requires the establishment of a large number of committees of experts, legal and non-legal, to whom drafts of appropriate blocks of statutes may be referred. But even if the groundwork is carefully done, there normally results a feeling of helplessness on the part of any legislature which is presented with a bill several thousand pages long which purports to revise the entire body of statute law, and often to integrate into it a comparatively large body of case law.

#### IV.

##### *Topical Revision*

All these difficulties taken together lay behind the establishment of continuous topical revision systems. Topical revision requires as its essential the creation of a position of a revisor, full time if possible. The revisor is able, between any two sessions, to revise, with the help of experts in the field, a considerable body of law. It is true that the presentation of long topical revision bills to a legislature creates some opposition just as in the case of bulk revisions; a revision of the corporation law, or criminal law, for example, is long enough to cause conscientious legislators a good deal of concern. But it is possible for those interested to read the bills revising selected topics; it is impossible for anyone to read understandingly in the available time a bulk revision bill.

It is well to consider the actual problem involved in topical revision so that the pressure of the work may be grasped, and so that legislators may understand the need for attention to revision bills in each session. If the work load is not understood, the em-

ployment of a full-time reviser may seem like a luxury, and the successive legislatures may feel that there is an unnecessary tinkering with the laws.

The Wisconsin system of continuous revision has been in existence since 1909; at the present time all the statutes which were in effect then have been revised except the substantive criminal law and the law of property. It should be possible to complete the first full revision on a topical basis in the next few legislative sessions. This schedule indicates that a fifty-year cycle is about the best that can be hoped for with the services of a full-time reviser. A faster cycle would require the employment of more people, and might cause resistance on the part of the legislature as the volumes of revision bills introduced each session are increased. The amount of revision that can be handled per session in any state is something that each state must determine for itself; if there is an optimum cycle for all states, it can be determined, if at all, only after much more experience than the states have now. As successive legislatures in a state become more and more familiar with the revision process, the amount of revision each one is willing to consider may increase slightly.

Divide the number of chapters in your statute volumes by 25 (biennial sessions in 50 years) and see what you think of the quotient as a possible number of chapters to be considered by any session. Look at a block from each of the five main parts: 1) state and local government; 2) persons, property, tort and contract; 3) civil procedure; 4) crimes; 5) criminal procedure. If the average is too much for some parts, is it too few for others? Would it be a practical average? Or is a 100-year cycle better? A 25-year cycle? These are questions which must be answered locally.

We have proceeded thus far without explaining very clearly the nature of the revision process under the topical revision system. There are only two distinct kinds of revision: 1) Revision which does not change the law; 2) Revision which does change the law. The first generally occurs where one of the two duplicating provisions is repealed, or where a restatement is made to eliminate verbosity. Various attempts have been made to break down revision which does work a change into degrees; such attempts are sometimes helpful for discussions; generally speaking, however, the distinctions overlap, are confusing, and create doubt as to the true function of the revisor. If you remember that it is very difficult to restate the law without making a change; that very little is

accomplished by more restatement of statutes, and that the statutes are kept up to date and down in bulk only by revision which does make changes, you will understand why I consider the "change-no change" classification the only meaningful one. Once we arrive at this clear division, the next step follows logically: the revisor should always explain the exact nature of the change involved in any bill he submits.

## V.

### *The Revisor's Job*

The reader may be shocked at the thought that the revisor can suggest changes in any law on the books. What one man knows enough law to attempt such a feat? The answer is simple: no one. Neither, as I have stated, would I recommend the establishment of a large office which might possibly contain enough experts to attempt encyclopedic revision. The fact is that in every state there is a large number of individual groups and agencies interested in revision; people, moreover, who are well acquainted with the law, and willing and competent to undertake revision. The solution of the problems of revising at a rate fast enough to make topical revision possible, keeping down the size of the revisor's office, and securing competent revision lies in the effective use of a large number of people. Law schools, bar associations, other professional associations, trade groups, state agencies, especially legislative and judicial councils, are groups which immediately come to mind.

If you consider such outside assistance possible (and, I can assure you, it has been forthcoming in many states) the nature of the revisor's job under a continuous topical system becomes a little clearer. First, he is responsible for the arrangement of the statutes—the basic classification. In most states today this classification is in need of expansion to make more room for contract and tort law, which was largely non-statutory at the time most initial statutes were adopted but which is being more and more subject to legislation. Arrangement also involves responsibility for the division into sections, paragraphs, and for a numbering plan. Second, he is responsible for the style of the statutes; this means he must prepare, or collaborate with the drafting agency in preparing a drafting manual. Third, he must keep aware of the parts of the statutes which are most in need of revision, and seek, often long in advance of the start of operations, to interest individuals and agencies in assisting in such a revision; he must work with

such revision groups to assign the numbering plan, to assist with the drafting, and to prepare the bill for introduction into the legislature. This, as I have indicated, is the backbone of the job. Fourth, he must revise those chapters in which no one else has any interest, or in which everyone is interested. Fifth, he must prepare bills to correct the smaller errors which creep into any large publication and bills which reconcile conflicts created in one session of the legislature by acts which amend the same provision in two different ways. Sixth, he must prepare annotations for the statutes; last (and not least in amount of time) he must keep a master set of the statute up to date after each session of the legislature (unless a plan of integrating and republishing after each session is adopted); he must prepare the supplements after each session; he must revise the index after each session; he must keep various tables of statutes up to date, and he must prepare copy and proofread all material to be published. (Most revisors also have related functions, but to the extent that these take time from the revision process, must be compensated for by assistants to the revisor or the revision schedule cannot be maintained.)

## VI.

### *Questions to be Decided*

The basic decision is not, then, to have revision or not, but to choose the kind of revision—bulk revision at comparatively long intervals, or continuous topical revision; to choose whether to have complete revisions presented to the legislature in tremendous bulk, or to have bills revising a few chapters, and prepared by experts in the field, presented to each session of the legislature. If you decide on continuous revision, try to make it possible for the revisor to spend full time on revision; if he must perform other tasks to make the adoption of the plan financially possible these must not aggregate so large a total that he cannot spend an adequate amount of time on revision.

Having decided on topical revision, the remaining questions are not basically difficult; they are somewhat hard to resolve, however, because normally the bar is divided in its opinion on mechanical features. How often shall the revised statutes be published as an integrated unit? If not after each session, how shall supplementation be accomplished; by session law volume only? By supplements to each volume of the statutes as in Nebraska? By a combined supplement to all volumes as in Kansas? How shall annotations be related to the statutes? How shall the an-

notations be cumulated: with the statute supplements? Or in a separate volume?

It is obvious that no arbitrary rules can be made here. User's choice is highly important. A committee representing state and local officials, bar associations and other public associations is probably the best group to decide these and allied questions.

I have said nothing so far about the appointment of the revisor, the size of his staff, his salary, and his relation to other agencies in the state service. The delay in consideration has been deliberate; these administrative matters are peculiarly local. If you decide on the service, and decide further that you want someone to carry it on continuously, it is obviously possible to give the function to an existing agency, to create a new independent agency, or to merge old agencies and the new function into a new agency. Since I am skeptical about the value of suggestions about organization made by outsiders who do not understand the present organization of state services, I offer you no plan for the location of the revisor. Only two suggestions come to mind: one absolute and one conditional.

The absolute requirement is this: wherever the revision function is located, it must be so located that the bench and bar and the public have confidence that the person doing the revision job is free from political control.

The conditional suggestion is very minor. If you should decide to set up an independent agency to deal with revision and to appoint the revisor, I would suggest that you investigate the New York practice and consider calling it a *law* revision agency instead of just a *statute* revision agency. We spoke previously about the revisor's interest in case law as he prepares annotations to the statutes, and as he incorporates case law into statutes in the process of preparing revisions. Court rules, too, should be part of the publication system, and their relation to legislative rules of procedure a matter of continuing study. All these considerations indicate that while the primary emphasis will be on statutes, statutes are properly conceived today as including a continuous crystallization of case law.

## VII.

### *The Value of Continuous Revision*

All right! you say. We get a revisor, we spend our money, how are we better off? I hope that I have indicated the answer as we have proceeded. You are better off in that your statute system is

kept continuously up-to-date. A focal point for the expression of the large interest in revision is provided. The legislature is spared the embarrassment of passing bulk revisions which must of necessity be hastily done, and cannot possibly be read.

One highly desirable result, I must warn you, cannot be achieved. No revision agency in this country has been able to save an amount of space in revision which would equal the amount of legislative additions. In short, while revision slows the rate of increase, it cannot entirely eliminate the increase. In my state, for example, since the first edition of the statutes was published under the revisor system in 1911, the average biennial increase has been fifty-seven pages.

To me this not an indication that legislatures spend their time passing foolish laws. It is rather the expression of regulation in new fields, and, as we have mentioned previously, the inclusion of much case law in the statutes.

I do not feel, however, that continuous revision has yet done all it can to slow down the rate of increase. We don't have time to get into this tremendously interesting subject today. Suffice it to say that we must all do more thinking about a revised overall classification of our law which would permit some reduction by better arrangement, and, secondly, we must consider the introduction of more standard procedures for all agencies—non judicial as well as judicial—at all levels of government. A considerable part of any act is concerned with procedure; only as we can refer to standard procedures can this bulky spelling-out of procedures for each new local activity be reduced.

These are both, you will observe, suggestions which go far beyond the scope of so-called mechanical revision. They indicate, however, the type of activity which tie revision to better administration of law, and the fields in which a revisor can stimulate the work of many people to the benefit of law and the people served by the law.

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