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IMPLEMENTATION

IMPLEMENTATION AND AMENDMENT OF THE 1972 CONSTITUTION

Diana S. Dowling*

I. INTRODUCTION

Implementation of the 1972 Montana Constitution has been going on since preparation for the first day of the 1973 Legislature and will continue for legislatures to come. However, the greatest proportion of implementing legislation was presented and passed in 1973. In fact, some sixty bills drafted by legislative council staff immediately following passage of the new constitution reflected most of the mandatory legislation. Although the enabling act of the new constitution provided that the convention could prepare a schedule of proposed legislation for submission to the 1973 Legislature, it did not do so. Rather, the task fell to the legislative council staff. These initial bills were the result of the staff's informal study of areas in which the new constitution conflicted with prior statutory law; therefore the vast majority of these initial bills were largely "housekeeping" in nature.

One must remember that a state constitution provides for the fundamental system of law that is the basis for government. A state constitution defines relationships between and limitations on the branches of government. The 1889 Constitution was written for a former generation, a generation that distrusted legislatures and courts and believed that the law should be fairly rigid, fixed, and based more on history and custom than on the changing needs of Montanans. The 1972 Constitution was written by and for a newer generation, one more interested in social justice, but still somewhat

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shackled by old customs and habits. Over the years, old doctrines and beliefs gradually eroded until finally the convention delegates discovered a whole new landscape which had to be charted. In this vein, the 1972 Constitutional Convention delegates recognized that a constitution must allow the statutory law to be fluid and changeable to meet the ever growing needs of society. Because the 1972 Constitution is much less restrictive and inhibiting than the 1889 Constitution, the 1973 Legislature and those subsequent have been freer to fill the perceived gaps in the law. The legislative process, like the judicial process, is directed by philosophy (logical progression), history (evolution), custom (tradition), and sociology (justice, mores). Thus, there are vogues and fashions in legislation just as there are in literature, art, and dress.¹

What seemed to meet the needs of Montanans in 1972 very well might not meet the needs or expectations of 1993. But if the Montana Constitution dictates rules "not for the passing hour, but principles for an expanding future,"² statutory implementation will continue in an optimistic atmosphere of openness, and constitutional amendment will be unnecessary.

The 1972 Constitution reflects the majority opinion of 100 delegates, each of whom had differing personal philosophies. The legislation considered by the ten legislatures since 1972 reflects the differing philosophies of hundreds of legislators. In more modern terminology we might refer to their philosophy as their internal "programming." Since ratification of the constitution, medical researchers and neurophysiologists have progressed dramatically in understanding the mysteries of the brain's complex electro-chemical workings. It is a simple, but powerful, fact that the brain believes what it is told the most. Dr. Shad Helmstetter tells us:

We believe what we are programmed to believe. Our conditioning, from the day we were born, has created, reinforced, and nearly permanently cemented most of what we believe about ourselves and what we believe about most of what goes on around us. Whether the programming was right or wrong, true or false, the result of it is what we believe. *Programming* creates beliefs. *Belief* does not require something to be true. It only requires us to believe that it's true. Most of what reality is to each of us is based on what we have come to believe—whether it's true or not! Beliefs

1. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 64-66 (1974) [hereinafter CARDOZO]; see generally, Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) [hereinafter Holmes], reprinted in O.W. HOLMES, COLLECTED LEGAL PAPERS (1920). I used these two classic documents as background for my reflections upon the legislative implementation of the 1972 Constitution.

2. CARDOZO, *supra* note 1, at 83.

create *attitudes*, the perspectives from which we view life. Whatever attitude we have about anything will affect how we feel about it, which in turn determines how we'll act about it. Every action we take is first filtered through our *feelings*. Feelings determine actions and actions create results.³

Proposed constitutional amendments and proposed legislation reflect the "programming" of the proponents. This programming changes from generation to generation and therefore is slow and imperceptible to the subconscious that is being reprogrammed. Programming changes are not brought about by one debate on the floor of a constitutional convention or a legislative assembly. Nor are programming changes brought about by a short bombardment of lobbying or public opinion. Changes in basic beliefs, attitudes, and feelings take time. It is interesting to speculate on the programming behind some of the implementing legislation as well as the constitutional amendments since 1972.

II. LIBERTIES

The abundance of legislation and litigation concerning the right to know, right to privacy, "full legal redress", and veterans' preference indicates fundamental change taking place in some basic programming. This process, with all its silent yet inevitable power, was described years ago in an article concerning the changing law of foreign corporations.⁴

When an adherent of a systematic faith is brought continuously in touch with influences and exposed to desires inconsistent with that faith, a process of unconscious cerebration may take place by which a growing store of hostile mental inclinations may accumulate, strongly motivating action and decision, but seldom emerging clearly into consciousness. In the meantime the formulas of the old faith are retained and repeated by force of habit, until one day the realization comes that conduct and sympathies and fundamental desires have become so inconsistent with the logical framework that it must be discarded. Then begins the task of building up and rationalizing a new faith.⁵

For instance, civil rights legislation passed in Montana in the 1970s was a natural result of the reprogramming occurring nationally since the 1960s. In 1974 Montana's Commission on Human Rights

3. S. HELMSTETTER, *WHAT TO SAY WHEN YOU TALK TO YOUR SELF*, 63-71 (1986).

4. HENDERSON, *Foreign Corporations in American Constitutional Law*, 33 *POL. SCI. Q.* 569 (Dec. 1918).

5. *Id.*

was established by an Act preventing discrimination in employment, public accommodations, education, and real property transactions. The laws protecting human rights have not remained static, but rather have been amended at each session of the legislature since 1973. As the law has developed over the years, a greater and greater majority of Montanans embrace a "new faith" concerning individual liberties.

III. REVENUE AND FINANCE

The 1972 Constitution returned to the legislature the inherent authority over taxation and finance by removing the onerous restrictions present in the 1889 Constitution. The issue of taxation continues to arise. For example, property tax classifications have been the subject of legislation each session since 1972. Furthermore, each election year initiatives circulate concerning some aspect of governmental finance, such as the sales tax—an issue which probably will remain with us until the end of time.

As Holmes told us in *The Common Law*, "The life of the law has not been logic; it has been experience." The Montana tax laws follow in this tradition because they are based on long-time Montana experience and custom. Although Montanans are known for their independent thinking, perhaps historical research of tax laws could change the custom, or programming, of Montana legislators. As Cardozo said,

Nowadays we may see the office of historical research as that of explaining, and therefore lightening, the pressure that the past must exercise upon the present, and the present upon the future. Today we study the day before yesterday, in order that yesterday may not paralyze today, and today may not paralyze tomorrow.⁶

Historical research may also provide insight into the basic programming of many Montanans who believe that if a tax measure is truly for the common good, it should be voted on by all of the people, not just the legislature.

IV. ENVIRONMENT

In 1972 delegates to the Constitutional Convention were aware of the existing body of statutory law and the antiquated legal theories and laws that had evolved through tradition. One example of the historical evolution of a law can be found in real property. No legislator devised the system of feudal tenures. History built the

6. CARDOZO, *supra* note 1, at 54.

system and the law followed. Similarly, history pervades contract law as evidenced by the seal, a former custom which has passed with time.⁷

In contrast, environmental law has little, if any, history or custom in Montana. Legislators had heard of "primogeniture" and "consideration" in contracts and of the "law merchant," but laws pertaining to the "ecosystem" were not part of their programming. In spite of this, the convention delegates drafted a document which requires the legislature to provide for enforcement of our constitutional right to a clean and healthful environment and the right to freedom from depletion and degradation of our natural resources. Instead of creating a self-executing right in the constitution or creating a public trust or giving citizens explicit standing to sue, the convention delegates imposed a duty on the succeeding legislatures to provide for enforcement and remedies.

It is in the environmental area that we are seeing all of the forces—logic, and history, and custom, and utility, and the accepted standards of right conduct—independently and in combination, shaping the progress of the law. The dominating force during any given legislative session will depend largely upon the comparative importance or value of the social interests that are being promoted or impaired. How do legislators know when one interest outweighs another? From experience, study, and reflection⁸—their programming. What legislators *believe* is true affects their attitudes about the environment which in turn affects their feelings which control their actions.

Even before the new constitution, the legislature in 1971 enacted the Environmental Policy Act and created the Environmental Quality Council. Since 1973 legislators have passed many environmental Acts, including in part: the Water Use Act, the Major Facility Siting Act, the Clean Air Act, the Natural Streambed and Land Preservation Act, the Agricultural Chemical Ground Water Protection Act, the Solid Waste Management Act, the Open Cut Mining Act, the Montana Strip and Underground Mine Reclamation Act, and the Comprehensive Environmental Cleanup and Responsibility Act.

Montana environmental law has, indeed, had an historical growth, "for it is an expression of customary morality which develops silently and unconsciously from one age to another. . . . But the law is also a conscious or purposed growth . . . because the

7. Holmes, *supra* note 1, at 472.

8. CARDOZO, *supra* note 1, at 112-13.

legislator must find the standards and morals in the life of the community.”⁹ The legislators enact into law parts of our system of social philosophy because the “spirit of the age, as it is revealed to each [legislator], is too often only the spirit of the group in which the accidents of birth or education or occupation or fellowship have given [legislators] a place.”¹⁰

“Life casts the moulds of conduct, which will some day become fixed as law. Law preserves the moulds, which have taken form and shape from life.”¹¹

V. THE JUDICIARY

The Judiciary Article of the 1972 Constitution reflects the diverse “programming” of the convention delegates concerning the selection of judges. A minority of the delegates believed that a judge should not be chosen by means of election and the majority believed that election of judges was an inalienable, unchangeable, constitutional right! Never by a process of logical deduction (philosophy) could a person arrive at the “true” method of selection. This programming was input by history, custom, experience.

The delegates who proposed the appointment of judges succeeded in providing for the filling of judicial vacancies via a nominating process. The constitution provides that “The governor shall nominate a replacement from nominees selected in the manner provided by law”¹² By relying on this provision, some delegates and legislators assumed the nominating process would include a provision for the Judicial Nomination Commission to initiate the process of selecting candidates for judicial office. However, under the rules of the Commission and nearly twenty years of custom, the nominating process has become a “rank-the-applicant’s process” and only those lawyers who complete a lengthy application are considered. A more philosophic approach to the method of nomination might have lead to a different procedure. If one assumes that members of the Nomination Commission are in the best position to determine which lawyers would make the best judges, it logically follows that if a nomination were to flow directly from the collective and considered opinion of the commission based on the lawyer’s reputation among his or her peers, then it would carry more prestige and be more acceptable to the best lawyers. Currently, the application process differs little from any other

9. *Id.* at 104-05.

10. *Id.* at 174-75.

11. *Id.* at 64.

12. MONT. CONST. art VII, § 8.

state job, except that the Commission is often accused of discriminating among applicants because of politics.

The Judicial Article and its implementing legislation were greatly affected by the "preprogramming" of the delegates and legislators, including the provision for appointments being effective until senate confirmation. If such provision subverts election of judges, that is exactly what many legislators believed was the best for the common good.

VI. CONCLUSION

While there is no assurance that the rule of the majority will be the expression of perfect reason when embodied in the Montana Constitution or in the statutes, the eccentricities of legislators balance one another to effectuate a common good. As Justice Cardozo stated,

Out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements. . . . What is good in it endures. What is erroneous is pretty sure to perish. The good remains the foundation on which new structures will be built.¹³

13. CARDOZO, *supra* note 1, at 177-78.