
Thomas A. Shaw, Jr.
PROCEDURAL REFORM AND THE RULE-MAKING POWER IN NEW YORK

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AFTER thirty-five years of the Civil Practice Act, which practically from its inception has been denounced,¹ and amended, patched and tinkered with continuously, New York may at last be on the threshold of a complete overhaul of its civil procedure.

The Temporary Commission on the Courts, created by the New York Legislature in 1953 to study, among other things, "... Revision and simplification of the practice statutes and the enlargement and location of the rule making power. ...,"² has recently appointed a committee of eminent lawyers headed by Dean John F. X. Finn of Fordham Law School to undertake the task of drafting a completely new body of provisions governing civil procedure.³

THE NEED FOR PROCEDURAL REFORM

Judged from an historical viewpoint, such a complete revision is eminently due. The unsuccessful efforts to obtain such a revision stretching back over more than one hundred years of New York judicial history certainly prove, to paraphrase Chief Justice Vanderbilt, that procedural reform is no sport for the short-winded. New York has not had a successful over-all review and reorganization of its civil procedure provisions since David Dudley Field introduced the concept of statutory code pleading and practice into this State in 1848. Unfortunately, while Field's code was adopted by some thirty American jurisdictions and profoundly influenced the English practice provisions adopted in the Supreme Court

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Neither the Chairman nor any member of the Advisory Committee nor any member of the Temporary Commission on the Courts was in any way connected with the preparation of this article.

2. N.Y. Laws c. 591 (1953). The Commission has been extended from year to year since 1953.
3. 134 N.Y.L.J. No. 11, p. 4, cols. 1, 2. In addition to Dean Finn, the Committee consists of Professor Samuel M. Hesson, of Albany Law School; Professor John W. MacDonald of Cornell Law School; former U.S. District Judge Harold M. Kennedy of New York City; former New York State Bar Association President, Jackson A. Dykman of Brooklyn; and the State Solicitor General, James O. Moore, Jr. of Buffalo. Columbia Law School has made its research and drafting services available to the Committee, and Associate Professor Jack B. Weinstein of Columbia Law School is the Reporter for the Committee, heading a professional staff of research assistants.
of Judicature Act of 1875, it was never adopted completely in New York. Instead, only the first and basic portion of the code, which Field himself later called the "Field Fragment," consisting of 473 sections was adopted by the New York Legislature in 1848 and 1849—the balance was rejected. Instead, many of the old "Revised Statutes" of 1827 and 1828, which were more often than not attempts to codify the absurdities and complexities of common law pleading, were continued in force and became part of the Code of Procedure.

During the next generation, the Legislature, with no discernible thought for the whole picture, passed flurries of amendments and additions to the Code at almost every session until it grew into "... a conglomeration of petty provisions purporting to reach into every nook and cranny of practice and leading to an intolerable rigidity." The result of years of protest by leaders of the bar, including Field himself, was the perpetration of the Throop Revision. The underlying principle of this revision, which came to be known as the Code of Civil Procedure, was apparently to gather all of the existing practice provisions, governing practice in the utmost detail, into one volume. It consisted, when completed by the Legislature in 1880, of 3,356 sections.

Another generation of protest led to a legislative directive in 1913 to the Board of Statutory Consolidation, headed by Judge Adolph J. Rodenbeck, to undertake a complete overhaul of civil procedure. The Legislature further directed that the new revision was to consist of a short practice act containing only "fundamental and jurisdictional matters of procedure" supplemented by simplified and modernized rules of court regulating the important details of practice. In 1915 the Rodenbeck Board...

4. Clark, Field Centenary Essays 55 (1949). Recently fourteen Brooklyn Supreme Court justices in supporting the view that New York's judicial system is "second to none throughout the civilized world" stated that the New York Civil Practice Act and to great extent the Rules of Civil Procedure "have been adopted in whole or in part by twenty-eight states and two territories." (N.Y. Times, October 25, 1955). The writer must take exception. No jurisdiction has adopted the Civil Practice Act "in whole," indeed the act has been so frequently amended that it has not been sufficiently fixed to be a practical model. If individual provisions of the act have been emulated elsewhere, the volume of such emulation would hardly support the statement. The justices were probably referring to the old Field Code of 1848, which as noted above, was adopted in thirty American jurisdictions although there was no substantial adoption in New York.


6. See N.Y. Assembly Doc. 16 (1850).


8. N.Y. Laws c. 178 (1880).


10. Ibid.
reported back to the Legislature with a proposed Civil Practice Act of 71
sections and a proposed set of 401 rules, which were to be adopted and there-
after amendable by the Justices of the Appellate Division of the Supreme
Court. 11 This Rodenbeck draft received widespread support from leading
members of the bar and bar associations and was subsequently to be
widely emulated in other jurisdictions. 12 Upon receiving these proposals,
the Legislature appointed a Joint Legislative Committee to consider them.
In 1919, this Committee rejected Rodenbeck’s complete revision, 13 and
instead adopted its own revision which consisted principally of dividing
the old Code of Civil Procedure into a broad and detailed Civil Practice
Act, and separate acts for the Surrogates’ Courts, the Court of Claims,
Justices’ Courts and the City Court of the City of New York.

However, one very significant advance was made in the form of the
delegation of the power to promulgate an enlarged set of supplementary
Rules of Civil Practice to a convention of judges. With minor modifi-
cation, these proposals were enacted by the Legislature in 1920. 14 In 1921,
the convention of judges adopted a set of 301 supplementary Rules of
Civil Practice which included a number of advanced devices, such as sum-
mary judgment. These Rules were thereafter amendable by the Justices
of the Appellate Division. 15 In addition, many local court rules were
adopted or continued, supplementing both the Acts and the Rules.

In 1934, one of the most constructive steps in the direction of genuine
reform of procedure in almost a century was taken with the creation of
the Judicial Council. 16 During the ensuing twenty years, the Council
brought skilled technical knowledge to the process of piecemeal amend-
ment and did much to improve civil practice in this State. 17

But the fact is that the Judicial Council from its start was confronted
with an overwhelming complex of archaic and disorganized statutes and
general and local court rules; the results of 100 years of constant petty
amendment, addition and relocation, frequently accomplished with little
regard for the whole. Twenty years of such piecemeal amendment, how-

11. Report of Board of Statutory Consolidation on the Simplification of Civil Practice
in New York vol. 1 (1915).
12. Judge Charles E. Clark, one of the principal authors of the Federal Rules of Civil
Procedure has said of the Rodenbeck draft: “This was an exceedingly able effort, whose only
substantial fault was that it was ahead of its time. It contained to a surprising extent the
provisions now widespread in operation through their adoption in the Federal Rules and
elsewhere.” Clark op. cit. supra note 4, at 62.
14. N.Y. Laws c. 926 (1920), effective October 1, 1921.
17. According to the 21st Annual Report of the Judicial Council (1955) at 17, the Council
has been responsible for changes in no less than 688 of the 1710 sections of the Civil Practice
Act and 89 of the 259 Rules of Civil Practice.
ever sound, has not and probably could not succeed in simplifying, modernizing and streamlining such a body of provisions, and doubtless two more decades of such amendment would not accomplish the task.

On the contrary, such halfway measures have had the effect of perpetuating the faults of New York's civil procedure. New York has not remained in the forefront of recognized procedural leadership, perhaps for the very reason that its procedure was brought sufficiently up to date by the enactment of the modern Rules of Civil Practice in 1921, and after 1934, by the able repair and patch work of the Judicial Council. Therefore it did not require the dazzling procedural revolutions which have brought recognition to the work of the federal and New Jersey procedural reforms. Unlike those two jurisdictions, it has not had the necessary "chaos yet within it to give birth to the dancing star."

But if New York procedure has not been a remarkable example of archaic imbecilities, it has nevertheless continued for generations as a sort of mediocre patch work of the good and bad, the old and the new. Even a superficial examination reveals a number of indisputable faults in the provisions presently governing New York civil procedure, and obvious need for extensive improvements. Such faults and needs are:

- a) drastic reduction in the volume of statutes and rules;
- b) more uniform procedures and procedural forms from court to court and within each of the various courts from district to district;
- c) removal from the procedural acts and relocation in the consolidated laws of hundreds of substantive provisions having no bearing on procedure;
- d) repeal of archaic and totally dormant provisions;
- e) consolidation of provisions covering one subject which are now needlessly numerous and hopelessly scattered;
- f) elimination of ancient and arbitrary language distinctions;

18. There are more than seventy-five separate "acts" governing civil practice in the various New York courts, and most of the courts at each echelon have their own county-wide or district-wide rules. These statutes and rules have, to the writer's knowledge, never been collected so that even an estimate of their number is difficult. However it must be well over 10,000.

19. For example, practice in the Surrogate's Courts from county to county.


22. For example, service of process by publication is presently governed by N.Y. Civ. Prac. Act §§ 144-147 (1920), 232 (1946), 232-A (1946), 232-B (1946), 233 (1946), 234 (1920), 1518 (1920), 1551 (1942) and 1574 (1920), by Rules of Civ. Prac. Rules 45 (1933) and 50 (1945), 51 (1935), 52 (1937) and by some local court rules such as Rule XI of the Appellate Division, First Department (1921).

23. For example, process in an "action" is called "summons"; and in a "proceeding" is
g) elimination of obvious errors due to careless amendment;

h) elimination of ambiguities;

i) elimination of inconsistencies and redundancies.

These examples apply equally to provisions governing practice in the inferior courts.

This type of obvious disrepair is merely symptomatic of the need for an over-all revision and simplification of civil procedure from service of process to supplementary proceedings. It is little wonder that the Temporary Commission on the Courts found, after public and private hearings and consultations with judges, bar association representatives and procedural experts, that there is "... a near unanimity of informed opinion that the provisions governing New York civil practice are in a state such that an entirely new and over-all approach is presently needed." It was on the basis of this finding that the Commission appointed the present Advisory Committee.

The present Committee has of course, a most difficult task in drawing up the initial draft, though certainly no more difficult than that which faced the three-man Field Commission when it was appointed in 1847.

called a "citation", a "writ", an "order" or a "precept" depending upon the kind of proceeding involved.

24. See, e.g., N.Y. Civ. Prac. Act § 640 (1946) which contains a reference to the "next section"—the reference was clearly to § 641 until § 640-A was pasted in and became the "next section."

25. For example, sections which use the phrase, "except as otherwise provided by law" without indicating whether such exceptions exist or, if so, where, such as, N.Y. Civ. Prac. Act §§ 342 (1941), 344-A (1943).

26. See, e.g., N.Y. Civ. Prac. Act § 242 (1920) which provides that a party "shall" raise in his pleading the defense of statute of limitations; N.Y. Civ. Prac. Act § 30 (1921) which provides that this defense "can" be raised by answer or motion; and Rules of Civ. Prac. 107 (1944) which provides that it "may" be raised by motion.

27. For instance, at least five City Court Acts still provide that portions of procedure shall be governed by provisions of the Code of Civil Procedure which has not existed for thirty-five years; City Ct. Act of Auburn §§ 138, 140 (1920); City Ct. Act of Amsterdam §§ 131, 134, 135 (1911); City Ct. Act of Geneva §§ 112, 113 (1897); City Ct. Act of Lackawanna §§ 193, 194 (1909) and City Ct. Act of Rensselaer §§ 308, 317, 322 (1915).


29. Id. at 21.

30. "In preparing the Code of Procedure, Field had nothing to build on. He could not codify common law and equity pleading and practice as it stood in New York in 1847.... What was demanded was not a simple Legislative promulgation of common-law and equity pleading and practice as they were. The demand was for a complete Legislative overhauling to bring forth a modern unified procedure in which law and equity were administered in one court, according to one procedure, and if need be in one proceeding, with no forms of actions, and with elimination of a great mass of technicality.... Field had of necessity to strike out new lines, and with little to guide him but his legal learning and the instinct of a practical lawyer, worked out a system of procedure which endured for a century and left its mark on procedure today." Pound, Field Centenary Essays 12 (1949).
But no matter how excellent the proposed revision may be when completed, there will still remain the equally difficult task of the body or bodies responsible for enacting it, in resolving the inevitable differences of opinion concerning individual provisions.

Here there become relevant the questions which the Legislature has posed to the Temporary Commission on the Courts — should the power of the judicial branch to enact procedural provisions be enlarged so that that branch rather than the Legislature shall be primarily responsible for the adoption of a broad revision? And where in the judicial branch should such power be located?

**The Enlargement of the Judicial Rule-Making Power**

There is a natural and honest reluctance on the part of legislators to take the responsibility for enacting sweeping revisions and changes in judicial procedures. Many legislators are totally uninformed and uninterested in this large, difficult and technical field, and all of them are necessarily involved in legislative matters of much greater general and political importance. No doubt at least in part, as a result of this reluctance, the United States Congress and the Legislatures of twenty-eight states have vested substantially complete responsibility for judicial procedures in the judicial branch of their respective jurisdictions, most of them during the last twenty years.\(^3\)

Experience in these jurisdictions has taught that major procedural reform can best be achieved in this era of complicated litigation by such a delegation of responsibility for it to the judicial branch.\(^3\) Indeed many feel that it can only be achieved in this manner. The American Bar Association's minimum standards of judicial administration lays down the vesting in the judiciary of the power and responsibility for procedural rules as the key to procedural reform.\(^3\) Judge Harold R. Medina, one of the most outstanding experts on New York Civil Procedure before his ascendency to the federal bench, states that to his knowledge "... no jurisdiction has achieved major procedural reform except by proceeding in this

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31. Prior to 1934, the year in which the United States Congress vested the power in the United States Supreme Court (28 U.S.C.A. 2072 (1949)), nine states had vested the power in their respective judicial branches: Colorado, Delaware, Maryland, Michigan, New Jersey, Texas, Virginia, Washington and Wisconsin. Since that year, nineteen more have done so: Arizona, Connecticut, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Minnesota, Missouri, Nevada, New Mexico, North Dakota, Pennsylvania, Rhode Island, South Dakota, Utah, West Virginia and Wyoming.

32. Of the jurisdictions listed in note 31 supra, only three have failed to achieve a major procedural reform subsequent to the vesting of the power in the Judiciary—Idaho, Rhode Island and Connecticut. The latter vested the power only in 1953. Work on a major revision is presently in progress.

manner [vesting the rule-making power in the judiciary, thereafter aided by a drafting committee of procedure experts] and more than one-half of our American jurisdictions have proceeded in this manner. New York should do likewise."

These views tend to be corroborated by the fact previously noted, that while New York has produced two drafts of procedural provisions which have been widely adopted elsewhere, the Field Code (1848) and the Rodenbeck draft of 1915, both were substantially rejected by the New York Legislature, which instead clung to most of the then existing procedural provisions.

For New York today, the issue is not whether the concept of judge-made procedural rules should now be adopted. It always has accepted this concept, and since 1921, the concept has been broadly applied in the Rules of Civil Practice. Nor is the issue, as apparently many have assumed, whether the Judiciary shall now be given the power in this field for the sole purpose of permitting the adoption of the Federal Rules of Civil Procedure. The fact is that most of the Federal Rules, including some of the most controversial Rules providing for broad summary judgment, abolition of bills of particulars, limited motion practice and pre-trial conferences, and even to a large extent broad depositions and discovery, could be adopted today as Rules of Civil Practice by the Justices of the Appellate Division without conflicting with the Civil Practice Act.

The issue is simply whether New York's present system of having procedure laid down roughly one-half by the Legislature and one-half by the Justices of the Appellate Division, supplemented by "local" court rules, should be continued.

If it could be said that the Legislature lays down only the basic procedural concepts in the Civil Practice Act, leaving to the Appellate Division the function of providing the details in the Rules of Civil Practice, divided responsibility would at least have a rational basis.

But the present division of responsibility is entirely arbitrary and haphazard, with the Legislature laying down many petty provisions governing details, while the Appellate Division lays down all of the Rules governing broad and vital areas of procedure. Certainly, no one could rationally insist that this present division is based on any sound or constitutionally sacred precept. There could be no reasonable justification for insisting that, in any new revision and modernization of New York procedure, the areas now covered higgledy-piggledy by the Civil Practice Act must continue to be governed by the Legislature and the Rules of Civil Practice relegated only to their present scope. One of the great benefits that the

new revision could bestow would be a rational assignment of this responsibility.

Reflection on this point however, suggests that even an approximately equal division of the responsibility can only be made on an arbitrary and highly artificial basis. The fact is that the provisions governing civil procedure are much too complicated and interdependent to provide any sound division of responsibility and demands that either the Legislature or the Judiciary have a substantially complete responsibility. Any other kind of division can only continue to result in doubt as to powers and responsibilities which tends to defeat over-all review by either branch of government, while providing each with an escape from the responsibility for inaction. Thus, it follows that either the Civil Practice Act or the Rules of Civil Practice must be greatly enlarged at the expense of the other.

There seems little doubt that the choice should be in favor of substantially enlarging the scope of the Rules of Civil Practice, thus placing the primary responsibility for New York Civil Procedure squarely in the judicial branch. To do so would not by any means eliminate the Legislature's power in the field since it would be free, even as it is now, to override rules by legislative enactment. Furthermore, if there are indeed areas of procedure which vitally affect social policy, as some writers claim (the only one that is ever cited is the injunction in labor disputes), then these might be left to legislative enactment.

The general arguments in favor of such broadened judicial rule-making have been stated by many commentators and need not be rehearsed at length again here. They are well summarized in a recent statement by Judge Fuld of the New York Court of Appeals:

"Regulation of Court procedure belongs in the Courts rather than with the Legislature. The latter body has neither time nor experience to give proper attention to the matter. Legislation is based, as often as not, upon occasional hardship observed by a legislator without evaluating the effect of rule generally. Legislative rules are rigid and difficult of amendment. The judges, on the other hand, are engaged in the administration of justice as an everyday business and they know by actual experience what must be done. Rules promulgated by Court will rarely be applied in such a way as to result in injustice, whereas Courts may excuse a hard result stemming from legislative rule on the ground that the Legislature has so written the law."

It seems likely that the New York Legislature would not oppose but indeed would favor such a substantial enlargement of the scope of the Rules of Civil Practice. Since 1921, when the Rules of Civil Practice were

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first promulgated, the Legislature has itself, on a number of occasions, enlarged the area of the Rules by repealing statutes and in their place simply providing that the subject matter should be governed by the Rules.\footnote{37}

Furthermore, the Legislature has avoided taking the primary responsibility for the procedural rules of its own quasi-judicial creatures, such as the Workmen's Compensation Board,\footnote{38} the State Labor Relations Board,\footnote{39} and the Rent Commission,\footnote{40} but rather has given them substantially complete power to make their own rules of procedure. It would be extremely difficult to rationalize the vesting of such power in a legislative creature composed of legislative appointees while refusing to vest it in judges representing a separate and equal branch of government.

The New York Legislature rarely sits more than three months per year and then usually only two or three days per week. It has an enormous volume of important legislative business to consider each year. Its desire to be relieved of this burden is clear from its direction to the Temporary Commission on the Courts to study the "enlargement," rather than the reduction, of the judicial rule-making power.

LOCATION OF THE RULE-MAKING POWER

If the scope of the Rules of Civil Practice is to be expanded so as substantially to cover the entire field of civil procedure, and indeed even if it is to be left at its present half-way mark, the present vesting of the power to promulgate these rules in a majority of the twenty-six Justices of the Appellate Division, should be critically examined.

It seems obvious that the Appellate Division is not by any means an ideal repository for this power. The twenty-six Justices live and work in widely separated areas of a large state. They seldom, if ever, assemble in one place. They are divided into four completely separate courts and have no unified organization and no responsible single head. The First and Second Departments, which embrace only the New York City metropolitan area have between them fourteen of the Justices, while the Third and Fourth Departments covering the entire upstate area have only twelve Justices between them, so that theoretically at least the metropolitan viewpoint on procedural problems could always prevail. Perhaps most important of all, these Justices are heavily engaged in appeals on specific points of law and do not have any staff of their own to review the body of procedural provisions as a whole, initiate desirable reforms and do the necessary

\footnote{37} See, e.g., N.Y. Civ. Prac. Act §§ 140 (1940) and 247 (1936).
\footnote{38} N.Y. Workmen's Compensation Law § 117 (1946).
\footnote{40} N.Y. Unconsol. Laws § 8588 (1951).
preliminary research and drafting. The result is that proposed amendments to the Rules must be circulated amongst the four departments and separately considered by each without expert technical assistance. Presiding Justice Foster, of the Appellate Division, Third Department, has recently described this system as:

"... a very cumbersome one. The Appellate Divisions adopt [proposed amendments] separately and you have to circulate them around... I do not think all four Departments have given the thorough study that they should receive. In fact, I know they don't."41

New York has, however, in the Judicial Conference newly created by the 1955 Legislature,42 what would seem to be an ideal body in which to vest the power over and responsibility for procedural rules. The Conference, which supersedes the Judicial Council43 and already has been assigned the Council's former function of studying and recommending improvements in judicial procedure,44 consists of the Chief Justice of the Court of Appeals as chairman, the Presiding Justices of each of the four departments of the Appellate Division and one Supreme Court trial justice from each of the four departments, elected by the Supreme Court trial justices of the respective departments.45 Thus it is small in number and therefore functional, geographically representative, and it is representative of the trial courts where most procedural provisions are actually applied, yet has the benefit of the more detached and experienced views, as well as the prestige, of the chiefs of the top appellate courts of the state.

Of prime importance is the fact that the Conference will have its own staff, headed by the State Administrator for the Courts.40 This staff will have among its tasks that of collecting and evaluating data on the work of the courts, which will be of immense assistance in evolving procedural rules to best suit changing needs. The staff, like the staff of the former Judicial Council, will undoubtedly include experts on procedure and drafting who could assist the Conference in carrying out the rule-making power.

Also of prime importance is the fact that the Conference has a built-in pipeline to the trial bench and the practicing bar in the form of departmental committees and conferences.47 The departmental committees, headed by the respective Presiding Justices and composed of representatives from the trial bench and bar of each judicial district within the

43. The Council was abolished, N.Y. Sess. Laws c. 869 (1955), § 2, and the Conference given all its powers in addition to other powers, N.Y. Judiciary Law § 233 (12) (1955).
department will annually convene a departmental conference of interested judges, attorneys, legislators and others to consider criticisms and suggestions concerning the conduct of the courts and judicial business, including procedures. Based on this annual conference, and its own studies, each departmental committee will be required to submit an annual report to the State Judicial Conference

"... on the effectiveness of the procedures and practices of the courts within its department and its recommendations and those of the departmental conference within the department with respect to general improvements in the conduct of the business of the courts therein."48

The Judicial Conference must meet at least twice a year49 so that there will be a periodic forum before which judges and lawyers most concerned with procedure may have their views considered.

New York's good fortune in having created such an excellent repository for the rule-making power50 just at the very time that it is undertaking a major procedural revision is compounded by the fact that possibly unlike any other jurisdiction in the country, there can be little if any doubt that in New York the rule-making power can be vested in just such a body as the Conference without constitutional amendment.

The Federal Government and all but three of the twenty-eight states which now have substantially complete judicial rule making, have vested the power in their highest appellate courts.51 This was not necessarily done out of choice but in many cases out of probable constitutional necessity. The problem has not been whether a legislative grant of the power to the judicial branch is an unconstitutional delegation of an exclusively legislative power, since the power has uniformly been held to be historically inherent in the courts, and therefore not exclusively legislative.52 But while it is generally considered in American jurisdictions that courts have an inherent power in the absence of conflicting legislation to regulate their own proceedings, the power of one court or group of judges to make rules for all the courts (i.e. "supervisory rule-making power") even under a legislative grant has raised some doubts.

50. At its public hearings last year, concerning the creation of the Conference, the Temporary Commission on the Courts posed the question whether the Conference would be an appropriate repository for the rule-making power. The response was overwhelmingly in the affirmative, significantly including all of the Justices of the Appellate Division who spoke on the point.
51. The three exceptions are Connecticut, Rhode Island, and Delaware, which have vested the power in the entire body of the judges of their trial courts of general jurisdiction. The constitutionality of this delegation of power does not appear to have been passed upon in any of these jurisdictions.
52. See, e.g., U.S. Bank v. Halstead, 10 Wheat. 51, 60 (1825). See also Pound, Regulation of Judicial Procedure by Rules of Court, 10 Ill. L. Rev. 163 (1916).
The first ground upon which the delegation of such supervisory rule-making power to the courts of last resort has been justified is historical precedent. In most jurisdictions, from the beginning of the court system, the highest court has made rules for the lower courts and this function is said to have been derived, as an historically inherent power, from the "historical equivalent" of such courts, the Court of Kings Bench, which sitting en banc at Westminster, heard appeals and made rules of procedure for all the British courts.53

The second ground for upholding the delegation of the power has been found in the constitutions of most American jurisdictions, which expressly vest "superintending control" over inferior courts, or following the federal model, vest the "judicial power" in the highest appellate court, thus giving them an implied supervisory rule-making power.54

It has been assumed in these jurisdictions therefore, that the power to make rules binding on other courts is inherent only in the highest court and that lower courts or judicial councils representative of a cross-section of courts could not be vested with the power without constitutional amendment.55

New York's unique judicial history however leads to the opposite result. In this State, the Supreme Court was created in 1691 as the highest court of the State.56 The entire body of Supreme Court Justices sitting en banc at General Term, not only heard appeals, but following the precedent of the Court of Kings Bench, made procedural rules for all the courts of the State from the beginning. After the enactment of the Revised Statutes of 1827 and 1828, these rules were, however, subject to a growing body of legislative enactments.

Despite the creation of the Court of Appeals as the highest court in the State in the Constitution of 1846, this power was specifically continued in the Justices of the Supreme Court by provision of the Field Code of 1848,57 and no supervisory rule-making power whatever was vested in or exercised by the Court of Appeals either then or at any later date.

The entire body of Supreme Court Justices continued to exercise the power until 1870, when, the number of justices having grown unwieldy,
the power was restricted to the Justices of the General Term of the Supreme Court, plus the Chief Judges of the City Superior Courts and of the Courts of Common Pleas of New York and Brooklyn. The Appellate Division was created by the Constitution of 1894, and was thereupon vested with the rule-making power until 1920. This exercise of the rule-making power through the years appears to have been without constitutional challenge or doubt.

In 1920, the Legislature, in connection with the enactment of the Civil Practice Act, created a "Convention" of 13 justices "... to consider and adopt Rules of Civil Practice..." The make up of the judicial membership of the Convention bears a striking resemblance to the new Judicial Conference, for it consisted of four Appellate Division Justices chosen respectively by the Appellate Division Justices of the four departments, and nine Supreme Court trial justices chosen respectively by the Supreme Court trial justices of the (then) nine districts.

This Convention promulgated the Rules of Civil Practice in 1921 and its right to do so, in particular to promulgate Rule 113 providing for summary judgment on motion, was promptly challenged in two cases.

In *Hanna v. Mitchell*, the Appellate Division, First Department, per Justice Page, who had been Chairman of the Convention, placed its decision upholding the power of the Convention to adopt the Rules squarely on an historical basis, rather than citing the Constitution as its authority. The opinion reviewed the historically continuous role of the Supreme Court in rule-making since colonial times, including the exercise of the power between 1870 and 1896 by a convention of General Term Supreme Court Justices and the chief judges of other courts of record, and noted that the 1921 Convention resembled the entire body of Supreme Court Justices which initially had exercised the power since all of the Justices were "represented by their chosen delegates." The court concluded:

"We conclude that the power to make rules of practice is a judicial power inherent in, and expressly conferred upon the Supreme Court; that the act creating the convention to adopt rules of civil practice merely provided a method and means whereby the court could conveniently and expeditiously exercise its judicial duty, and was in no sense a delegation of legislative power by the Legislature."

In the second case, *General Investment Co. v. Interborough Rapid*

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58. N.Y. Laws c. 408, § 13 (1870).
60. N.Y. Laws c. 902 (1920).
61. The Convention also included as non-voting members, the Attorney General and representatives of the Legislature and the bar.
Transit Co., the Court of Appeals quoted this conclusion and expressly adopted it in disposing of the same point.

It is almost certain that, on the authority of these two decisions which have never been questioned by any court, the Judicial Conference would be held to be a perfectly proper method and means whereby the Supreme Court Justices, through their representatives, could "conveniently and expeditiously" exercise the rule-making power. The presence of the Chief Justice of the Court of Appeals on the Judicial Conference amongst the eight Supreme Court and Appellate Division Justices has a direct precedent in the presence of chief judges of various inferior courts of record who, together with the Justices of the Supreme Court General Term made up the rule-making Convention which existed from 1870 to 1894, without any expression of constitutional doubt either during that time or in the Hanna case which refers to it.

Thus, unlike other American jurisdictions, the constitutional doubt in New York exists, not with respect to vesting a body such as the Judicial Conference with the rule-making power, but rather with vesting the power in the Court of Appeals.

Clearly, there would be no historical basis for upholding the exercise of the power by the Court of Appeals, for it would be totally unprecedented. Although the Court of Appeals has always made its own rules, it has never made procedural rules for any of the lower courts. Furthermore, there is nothing in the New York Constitution comparable to the United States Constitution or that of most states vesting the "judicial power" or "superintending control" in the highest court. On the contrary, article VI, section 7, of the New York Constitution limits the jurisdiction of the Court of Appeals with certain exceptions not relevant here, "to the review of questions of law." The Supreme Court, on the other hand, has "general Jurisdiction" and the Appellate Division has such jurisdiction "... as is now or may hereafter be prescribed by law.", as well as the specific power to supervise Supreme Court calendars and assignments "... or to make rules therefore."

Finally, the Court of Appeals itself has expressly confirmed that the

64. 235 N.Y. 135, 139 N.E. 216 (1923).
65. Id. at 143, 139 N.E. at 220.
67. U.S. Const. art. III, § 1 (1789); see note 54 supra.
68. The Court of Appeals itself has said, "The constitutional convention clearly entertained the opinion that the continued existence of the Court of Appeals was justified only by the necessity that some tribunal should exist with supreme power to authoritatively declare and settle the law uniformly throughout the state." Reed v. McCord, 160 N.Y. 330, 335, 54 N.E. 737, 738 (1899).
69. N.Y. Const. art. VI, § 1 (1953).
70. N.Y. Const. art. VI, § 2 (1953).
power to make rules of practice for the Supreme Court and inferior courts “... is a judicial power inherent in and expressly conferred upon the Supreme Court...” The use of the inherent power phraseology, meaning “an authority possessed without being derived from another” does not of course mean that power is exclusively in the Supreme Court—there was and is no doubt that the Legislature has constitutional predominance over the Supreme Court in the procedural field and that Rules of Civil Practice must yield to conflicting legislation provisions. The phrase would seem to mean at least that in the absence of legislation, delegating the power elsewhere, it would be exclusively in the Supreme Court. But it could be argued that the court meant that the continuous and unquestioned exercise of the power by the Supreme Court Justices or their representatives since the beginning of the State's judicial history precludes the Legislature from delegating the power elsewhere than to the Supreme Court Justices or their representatives.

It may be that the delegation of the power to the Court of Appeals could be upheld on the same basis that delegation of powers to administrative agencies has been found constitutional—i.e., the power is not “... inherently and exclusively legislative, ...” and the delegation is made subject to explicit standards for its exercise. Most of the enabling acts have not, however, contained any standards other than phrases like that contained in section 83, Judiciary Law “... not inconsistent with any statute. ...” which would hardly seem sufficient. Significantly, such a theory as the sole ground for upholding the delegation of the supervisory rule-making power does not appear to have been suggested by any court nor any commentator, who instead have relied on elaborate grounds of historical inherency and constitutional implication. One of the difficulties of this theory is that it would seem to carry within it the proposition that the Legislature could vest the power completely outside the judicial branch—in a legislative commission or agency for example. Yet there seems no other basis on

73. See note 35 supra.
74. In Hanna v. Mitchell, 202 App. Div. 504, 512, 196 N.Y. Supp. 43, 51 (1st Dep't 1922), the First Department said in discussing the provision in the Revised Statutes of 1828 for the Supreme Court's rule-making power, that the power “... would have been conferred on the Supreme Court without the express grant of such power contained in the act.”
76. It is to be noted in this connection that the New York Legislature's power to regulate judicial procedures is not plenary but consists only of such power as it “... has heretofore exercised.” N.Y. Const. art. VI, § 20 (1925). See Riglander v. Star Co., 98 App. Div. 101, 105, 90 N.Y. Supp. 772, 775 (1st Dep't 1904), aff'd, 181 N.Y. 531, 73 N.E. 1131 (1905) in which
which the New York Court of Appeals could be given the power.

Suffice it to say that it appears to this writer that while there is doubt as to the constitutionality of vesting the supervisory rule-making power in the Court of Appeals, there is substantially no doubt that the power could be vested in the Judicial Conference.

On the other hand, it would seem equally doubtful, from a constitutional viewpoint, whether the Judicial Conference could be given the power to make rules governing procedure in the Court of Appeals. The doubt arises on the same grounds as noted above—the power of the Supreme Court Justices or their representatives to make such rules is neither historically inherent nor is it preceded. Nor is there any provision in the New York Constitution which would suggest such a power. On the contrary, the power to make its own rules, is undoubtedly and historically inherent in the Court of Appeals. The result is that a delegation of this power to the Conference could be sustained in the Conference only on the same untried theory that would support a delegation of the supervisory power to the Court of Appeals—that it is a power which the Legislature can delegate to any agency of government which it wishes, subject to proper standards for its exercise. A solution resolving any doubt on the point might be to provide that rules adopted by the Judicial Conference for the Court of Appeals would be effective only if they are and remain consistent with rules adopted by the Court of Appeals for itself.

CONCLUSION

It is contemplated that the task of the Advisory Committee will require several years to complete, especially since the Committee intends to obtain the views and collaboration of the bench, bar and interested public and the Appellate Division said: “The courts are not the puppets of the Legislature. They are an independent branch of the government, as necessary and powerful in their sphere as either of the other great divisions. And while the Legislature has the power to alter and regulate the proceedings in law and equity, it can only exercise such power in that respect as it has heretofore exercised.”


78. California appears to be the only state in which a majority of lower court judges, through the California Judicial Council, make rules for the highest court, but this is done pursuant to article VI, § 1(a) of the California Constitution.

79. This was the solution proposed by the Committee on Court Rules of the Association of the Bar of the City of New York whose report states that the Court of Appeals had indicated it was satisfactory. The Extension of the Rule-Making Power, at 694 (1934).
private organizations through public hearings and private conferences in the course of its work.

The final draft will thus be a distillation of thousands of hours of concentrated and highly expert thought and research not only by members of the Committee, but, it is hoped, by judges, lawyers and laymen throughout the State. Inevitably, however, there will be differences of opinion, some of them in vital areas. The resolution of these differences will, if the present haphazard outlines of the scope of responsibility of the Legislature and the Justices of the Appellate Division remain as they are presently drawn, be extremely difficult. This present irrational division of responsibility would almost inevitably lead to destruction of the unity and coordination of the whole revision for which the authors will have strived.

Furthermore, it is reasonable to predict that if any major portion of the revision must run the legislative gauntlet, with all its pressures for individual changes, not only from individual legislators, who are practicing attorneys, but from others with special axes to grind, and with the inevitable lack of both interest and background technical knowledge on the part of most legislators, this new revision will meet the same fate of substantial emasculation in favor of the status quo that was suffered at the hands of the Legislature by the Field draft of 1848 and the Rodenbeck draft of 1915.

The New York Legislature has already accepted the concept of delegation of the responsibility to adopt procedural rules. It has already given substantially complete responsibility for procedural rules to many of the various quasi-judicial boards and commissions which it has created. Further, the Legislature has already given to the judicial branch the responsibility to enact Rules of Civil Practice covering perhaps one-half of the civil procedural field.

The New York Legislature should now do what twenty-nine other American legislatures have done—entrust to the judicial branch substantially complete responsibility for adopting and nurturing New York civil procedure. It should do so now specifically so that the responsibility for adopting the projected over-all revision will be placed in the most experienced, knowledgeable and trustworthy hands available.

Within the judicial branch, the Judicial Conference seems the ideal repository for this responsibility. Unlike the two other most likely repositories, the Appellate Division and the Court of Appeals, (1) the Conference has a full time staff of experts capable of making the necessary detailed studies of alternative proposals; (2) it is representative of the trial as well as the appellate benches; and (3) it has a built-in pipeline to the whole of the trial bench and practicing bar.

The Conference has the additional advantage over the Justices of the
Appellate Division of being a small functional body which will meet regularly as part of its statutory duties. It has the additional advantage over the Court of Appeals in that there exists very strong judicial authority to the effect that the Conference could be vested with this responsibility without constitutional amendment, whereas, no such authority exists with respect to the Court of Appeals—on the contrary both the constitutional nature and the history of the Court of Appeals leads to doubt on the point.

Accordingly, it is proposed that section 83 of the Judiciary Law, and other relevant statutory provisions be amended (1) to remove the rule-making power from the majority of the Justices of the Appellate Division and vest it in the Judicial Conference, and (2) to provide that the Rules of Civil Practice shall be subject only to substantive, as opposed to procedural legislative enactments and specifically that existing statutes governing procedure shall thenceforth be considered to be Rules of Civil Practice.80

By so doing in the next legislative session of 1956, it would be made clear that the revision will be the responsibility of the Judicial Conference. The Advisory Committee could thereafter work closely with the Conference thus affording it the continuous benefit of the advice of the body which will ultimately adopt the revision.81 In the meantime, the Conference could make any amendments or new rules deemed immediately necessary.

Under this proposal, the Legislature would not have abdicated its constitutional power to override Rules of Civil Practice or indeed to revoke the rule-making power entirely.82 It would, however, have placed an undivided primary responsibility for revising and simplifying civil procedure upon a body from which the people of this State could require and expect a sound and simple civil procedure. And such procedural rules would go a long way toward mitigating the present triple threat to the true administration of justice in this State—excessive delays, excessive cost, and the decision of causes on procedural technicalities rather than the merits.

80. This has been the transition formula in most of the rule-making states. It can probably best be effected by a legislative adoption of a schedule of those statutory sections deemed procedural at the time that the rule-making statute is enacted. In New York, the schedule could be initially prepared by the Judicial Conference.

81. Although the Advisory Committee is now working under the aegis of the Temporary Commission on the Courts, that Commission may well complete its work and make its final report to the 1956 or 1957 Legislature, resulting in its termination.

82. See note 35 supra. There seems no good reason for adopting the federal provision that proposed rules must be submitted to the Legislature and become effective automatically at the end of the legislative session unless the Legislature otherwise enacts. The provision really adds nothing to the Legislature’s power, its only practical effect being to delay the effective date of the proposed rule. New York has never had such a requirement either with respect to the Rules of Civil Practice or other court rules.