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THE INTERACTIONS OF LEGAL AND SOCIAL CHANGE

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ABSTRACT

The controversy between those who believe that law should essentially follow, not lead, and that it should do so slowly, in response to clearly formulated social sentiment- and those who believe that the law should be a determined agent in the creation of new norms, is one of the recurrent themes of the history of legal thought. It is tellingly illustrated by the conflicting approaches of Sevigne and Bentham. For Sevigne, a bitter opponent of the renationalizing and lawmaking tendencies spurred by the French Revolution, law was 'found', not made. Savigny particularly deprecated the trend towards the codification of law, inaugurated by the Napoleonic codes, and spreading rapidly over the civilized world.

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By contrast, Bentham, a fervent believer in the efficacy of rationally constructed reforming laws, devoted a great part of his life to the drafting of codes for a large number of countries, from Czarist Russia to the newly emergent republics of Latin America. While most of these efforts were not immediately successful, notably in his own country, whether in the field of civil law, criminal law, evidence or poverty law, his philosophy became increasingly influential as the nineteenth century progressed. It was Bentham's philosophy, and that of his disciples, which turned the British Parliament- and similar institutions in other countries - into active legislative instruments, effecting social reforms, partly in response to, and partly in stimulation of, felt social needs.(Diecy,1914)

In most other fields- of which electoral reform, social welfare legislation in he broadest sense, tax law and the reform of the machinery of justice are examples- the Bentham philosophy triumphed in the practice of states, as the urbanization and industrialization of nineteenth century Western society proceeded, and long before the political and social catacylsms of the twentieth century posed a series of new challenges with which this book is essentially concerned.

Savigny's theory is today a matter of history, too much out of tune with the basic condition of modern society to be a matter of serious discussion. But the far more subtle and realistic theory proposed a century later by the Austrian jurist Eugen Enrlich.(Ehrlich1936)

The similarity of Ehrlich's to Savigny's approach lies in his emphasis on the 'living law of people', based on social behaviour rather than the compulsive norm of the state. Norms observed by the people, whether in matters of religious habits, family life, or commercial relations are law, even if they are never recognized or formulated by the norm of the state. For Ehrlich, the main sphere of the compulsive state norm is in the fields specifically connected with the purposes of the state, i.e. military organization, taxation and police administration.

Today the legislature is everywhere heavily at work, flanked by a multiplicity of administrative agencies on the one side and a variety of judicial institutions on the other side. It actively moulds and regulates the scope of business enterprise as well as the property relations of families and even breeding habits. Hire purchase legislation strongly affects purchasing habits, while zoning and town planning legislation strongly affects purchasing habits, while zoning and town planning legislation has a decisive influence on the

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pattern of land ownership and other property rights. A highly urbanized and mechanized society, in which great numbers of peoples live close together and are ever more dependent upon each other's actins and the supply of necessities outside their own sphere of control, has led to an increasingly active and creative role of the conscious law making instrumentalities of the state.(Friedman,1936)

The state is indeed the organized power of the community, equipped with a steadily increasing armory of instruments of action, and, as such, it is opposed to the unorganized groundswell of public opinion. The power of those who control the machinery of the state has been multiplied manifold, absolutely and relatively by the development of the modern legislative and administrative machinery as well as t he growing concentration of physical and technical power, and the means of communication. But it is still the people, groups and individuals, who control the machinery. They are, themselves, to a greater or lesser extent, the representatives of the social forces which, in turn, they seek to mould and control through the instrumentalities of the state.(Latham,1952)

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But whether we are concerned with the abolition of secret police powers, the creation of legal remedies against administrative action, the enactment of an anti-trust law, or the introduction of new divorce grounds, there is always some interrelation between the state machinery which produces these changes, and the social opinion of the community in which they are intended to operate. The kind of interrelation that obtains in any given situation is essentially determined by two factors: (a) the type of political system that controls legal action; (b) the type of social interest which is the object of the legal regulation in question.

As such a government has, among its many other powers complete power over all forms of education and the media of communication, it may, in due course, be able to mould and condition the minds of the people which it controls to such an extent that they will meekly, or even enthusiastically, accept whatever laws the masters impose up on them.

In a democracy, the interplay between social opinion and the law moulding activities of the state is a more obvious and articulate one. Public opinion on vital social issues constantly expresses itself not only through the elected representatives in the legislative assemblies, but through public discussion in press, radio, public lectures, pressure groups and, on a more sophisticated level, through scientific and professional associations, universities and a multitude of other channels (Cordojo,1921)

Because of this constant interaction between the articulation of public opinion and the legislative process, the tension between the legal and the social norm can seldom be too great. It is not possible in a democratic system to impose a law on an utterly hostile community.

On the other hand, a determined and courageous individual or small minority group may initiate and pursue a legal change, in the face of government or parliamentary lethargy, and an indifferent public opinion. Such legislation as now exists in many countries for the preservation of forests or wild life, or the conservation of other vital resources, has been the belated result of the determined efforts of small groups of men who saw beyond the immediate interests. A much needed liberalization of the English divorce law effected in 1937 was the result of the almost single-handed efforts of an individual Member of Parliament, A.P. Herbert. When President Franklin Roosevelt carried through the legal revolution in American labour relations, symbolized by the National Labour Relations Act, he enjoyed the unusual combination of a brilliant political mind and a large Congressional majority-although the opposition of a majority of the Supreme Court judges retarded the process for a while(Hart,1963)

In recent years, the Indian Constitution of 1949 has abolished both the polygamous marriage and the caste system, in the face of age old social and religious custom. How far this legal revolution will be successful, is still a matter of some uncertainly. That it has even been attempted is, in itself, a sign of the greatly increased power of modern state action as against old social custom. But not even the prestige of a Nehru, or the predominance of the Congress Party in organized

political life in India, could have attempted such lar- reaching reforms, unless the impact of Western ideas had effected a far- reaching change in educated public opinion.

Similar problems arise in the transformation of long- standing and, until recently, unalterable personal status laws in the Muslim world. The sacrosanctity of the Sharia- the canon law of Islam- derived partly from its predominantly theological origin and partly from the static character of overwhelmingly rural nomadic and autocratically governed societies. But while the hold of Islamic religion remains as strong as ever, the majority of Islamic States are in a process of rapid economic and social change, leading to increasing commercialization and industrialization. The first and major legal impact has been in the held of civil and commercial law, where a majority of Islamic States have introduced codes based on the leading western (particularly French) systems or a blend of Sharia and western principles. Egypt, Iraq, Jordan, Lebanon, Pakistan and the Sudan have at least begun to introduce reforms which give some rights to the wife. Here, as in India, legislative action could not have been attempted unless social changes, such as urbanization, and intellectual influences (from western ideas absorbed by the younger educated generation) had prepared the soil.

We have seen that in a democratic system of state organization there is great variety of interactions between social evolution and legal change. There may be the slowly growing pressure of changed patterns and norms of social life, creating an increasing gap between the facts of life and the law, to which the latter must eventually respond. There may be the sudden imperious demand of a national emergency, for are distribution of natural resources or a new standard of social justice. There may be a farsighted initiative of a small group of individuals, slowly moulding official opinion until the time is ripe for action.

The law responds in various ways, too. The speed and manner of its response is usually proportionate to the degree of social pressure. It is also influenced by the constitutional structure. But circumstances and personalities may hasten or retard the response. In the sphere of political law or where a new status is created, legislative action is required. In other fields, there is a give and take between legislative and judicial remedial action, in part determined by the subject matter but in part by the changing and diverse attitudes of legislators and judges.

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