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THE POLITICAL AND SOCIAL FACTOR IN LEGAL INTERPRETATION

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THE POLITICAL AND SOCIAL FACTOR IN LEGAL INTERPRETATION*:

AN INTRODUCTION

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WE MAY think of the task of the legal order as one of maintaining the inner order of a politically organized society. The term "law" is not uncommonly used to include the task and the agencies by which we endeavor to achieve it. Thus it is used (as by sociologists and by the historical jurists) for all social control, and, by those who limit the term to a highly specialized social control through politically organized society, for (1) the legal order, the regime of adjusting relations and ordering conduct by systematic employment of the force of a state (the type of social control which has become paramount since the sixteenth century); (2) the body of authoritative or received grounds of or guides to determination by which judges and administrative officials are expected to and on the whole do carry on their task of adjusting relations and ordering conduct through deciding disputes; and (3) the judicial and administrative processes. Interpretation, as the term is commonly used, refers to finding grounds of decision in law in the second sense and applying them in law in the third sense.

It is not easy for the Anglo-American lawyer, much as our law has been affected by doctrine and system of the modern Roman law, to appreciate to the full the prolific literature as to interpretation which has grown up since the rise of the theory of free finding of law and in particular since the epoch-making work of Gény. The most that I can do by way of introduction to the interesting monograph of Sr. Silveira

* ALIPIO SILVEIRA, O FATOR POLITICO-SOCIAL NA INTERPRETACAO DAS LEIS. (With an English Condensation.) São Paulo, Brazil. 1946.

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His principal works are: GOOD FAITH IN CIVIL LAW (1941); LEGAL INTERPRETATION ACCORDING TO POLITICAL RÉGIMES (1941); NATURE AND FUNCTIONS OF ETHICAL EQUITY IN POSITIVE LAW (1943); CLOVIS BEVILAQUA AND MODERN JURISTIC THOUGHT (1943); THE DECISION BY EQUITY AND THE CODE OF CIVIL PROCEDURE (1943); EQUITY AND LABOR LAWS (1944); METHOD OF INTERPRETATION AND SOURCES IN THE WORKS OF PROFESSOR CLOVIS BEVILAQUA (1945); THE EXTRAORDINARY RESSORT BY VIOLATION OF FEDERAL STATUTES (1945); GOOD FAITH IN PUTATIVE MARRIAGE (1945); THE INTERPRETATION OF CIVIL PROCEDURE LAWS (1945); LEGAL HERMENEUTICS AND THE NEW LAW OF INTRODUCTION TO THE BRAZILIAN CIVIL CODE (1946).

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is to point out how his problem and his exposition of it appeal to the different mode of juristic thought in which English and North American lawyers have been brought up. Interpretation has a narrower meaning to the Anglo-American lawyer than it has to a lawyer brought up in the atmosphere of the modern Roman law. We may say that decision of a case according to law involves (1) finding a ground of decision in the body of authoritative grounds of or guides to decision (law in the second sense); (2) if the ground of decision found is an authoritative text, ascertainment of its meaning or giving it a meaning; (3) applying to the facts of the case the ground of decision as found and given meaning. This traditional analysis of the judicial process into finding the facts and then finding, interpreting, and applying the appropriate legal precept, grew out of academic exposition and application of the *Corpus Iuris*. The tribunal was to find the appropriate text of the Digest, find the meaning of the text, and apply it to the case in hand. We know today that it is an over-simplification of the actual process. But it will serve to bring out a significant difference in technique between the modern Roman law and codes based upon it or drawn in its spirit and Anglo-American law. In Anglo-American law the grounds of decision are to be found in statutes or in reported judicial decisions. If the text of a statute prescribes an applicable precept, it is to be interpreted and applied. But "interpreted" here means a finding out of the meaning of a postulated lawmaker analogous to the sovereign lawmaker of the Eastern Roman empire, having a will the content of which is discoverable and to be discovered. It need not be said that this postulate is by no means in accord with reality. But it is workable in the common-law system because of the nature of Anglo-American legislation, the form of our law and the technique of finding applicable precepts therein. In that system a statute provides rules only. That is, it provides for definite detailed legal consequences which are to attach to definite detailed sets of facts. The statute is not like an article of a code, which may be used as a starting point for judicial reasoning. Except as a statute provides a rule, recourse is had to the body of judicial decision, either to find one covering the case exactly or to find a starting point of reasoning—a principle. We do not call this process of finding the law in the reported decisions interpretation. It is true the process of finding an applicable precept by analogical development of the text of a code and that of analogical development of a precept from the body of reported decisions is at bottom the same. But as we do not use statutory texts in this way and our codifying statutes are in the main declaratory of the common law and are eked

out by reference to the decided cases, the process of interpreting a statutory text and of deriving a principle from the authoritative decisions seem quite distinct. It is only where a judicial decision or a uniform course of judicial decision do no more than fix a rule for a definite detailed state of facts that the process would be comparable to our technique of finding a ground of decision in a statute.

Law in the second of the three senses above noted is made up of precepts, technique, and authoritative or received ideals. Interpretation, in the wider sense, is determined by this ideal element of a legal system. The received ideals are, as it were, pictures of the end of the legal order by which the finding, application, and development of legal precepts are guided or even determined. What may lead us to be skeptical as to this is the extreme view sometimes urged as to the effect to be given to the ideal element. Thus when Duguit argues that the ideal of social solidarity is to be given effect over any text of the law we are given pause. But he is there giving us a proposition of natural law. If his ideal were the authoritative, received ideal of the time and place, interpretation and application of the text would be found to be shaped by it, or even, as in totalitarian regimes, the text would be superseded by it.

In Anglo-American law, where starting points for reasoning are found by working out the presuppositions of decided cases, the narrow view of interpretation, as having to do only with the text of statutes laying down rules for definite states of fact but not affording a basis by analogy for deciding cases not within the four corners of their text, was well enough until in the United States this technique had to be applied to constitutional texts under conditions of change of received ideals in the transition from a pioneer, rural, agricultural to an urban, industrial society in the present century. Much the same problem is raised with respect to our eighteenth-century bills of rights, declared to be the supreme law of the land, as is raised by century-old codes in the domain of the modern Roman law. But our technique of finding grounds of decision in the reported cases where the legislative text leaves any gap, has delayed recognition of what we have to face. Moreover, we are not troubled by something which has embarrassed interpretation in Continental Europe. In Anglo-American law there was no place for a doctrine of a complete system of legislation in which every case was provided for, if not by express provision then by an authoritative basis for logical development of the required precept. With us legislation has not purported to be complete beyond furnishing definite detailed provisions for definite detailed situations of fact.

Beyond this, principles, authoritative starting points for judicial reasoning, have been found in the law reports—in the reported course of judicial decision.

At one time some attack was made on the traditional common-law technique of finding grounds of deciding new questions by reasoning from the reported cases. An extreme analytical view of the separation of powers was vouched for a proposition that the judges had no power of finding precepts for new cases by reasoning from the analogy of decided cases; that they must find an applicable rule already established by a statute or a rule established by some authoritative precedent, and apply it mechanically. Otherwise, it was urged, the case must await legislative action. The last gasp of this attack on our common-law technique was in a memorial addressed to the New York Constitutional Convention in 1912 by a small group of lawyers.

In the United States the separation of powers is a constitutional distribution of authority not a juristic dogma. It has its roots in the history of colonial British America, and was put in all our constitutions, federal and state, as a result of experience of the concentration of power in the home government before the American Revolution. Hence its application in our constitutional law has tended to be historical. The powers of the crown, of Parliament (before 1688), and of the courts as they were in England at the time of colonization, with a reservation that powers of doubtful classification were assignable to an appropriate department by legislation, has made the constitutional provisions reasonably workable in practice.

Influence of politics upon the body of authoritative grounds of or guides to decision in matters of adjusting relations and ordering conduct in the everyday life of men in society has hardly been what the political interpretation would lead us to expect. French law has a continuity from before the Revolution. The ordinances of the French kings of the old regime and the writings of Pothier gave the contents of the French Civil Code. The common law of England, as Coke had laid it down in the fore part of the seventeenth century determined the law of England after the Revolution of 1688 and maintained itself in the eighteenth and nineteenth centuries. The same common law of England, as it was before the American Revolution, continued after that Revolution and obtains today in all but one of our states. The influence of politics has been upon the ideal element of the law and so upon the background of interpretation and application.

There was in the Anglo-American legal system no public law as the modern Roman law understood that term. In Blackstone's Commen-

taries (1765) the law as to public officers was put as a branch of private law—that part of the law of persons which had to do with persons invested with governmental authority subject to the law of the land as all persons were in their several activities. We are having to revise our ideas in face of the change from a pioneer, rural, agricultural society to an urban, industrial society. But that change has gone on at varying rates in different parts of the United States and is by no means complete for the whole country. Its effect upon interpretation is chiefly as to interpretation and application of constitutional texts and as to them raises much of the sort of questions to which Sr. Silveira addresses himself. With us, there was at first an idea of the end of law as securing the reasonable expectations (rights) of individuals as "natural rights." Later, there was an idea of the end of law as making possible a maximum of free individual self-assertion. This was the idea of the metaphysical jurists of Continental Europe in the last century. Other ideas not so clearly worked out have been urged of late. One which has been most clearly put and vigorously urged is that the end of law is simply to maintain the social order by securing the political or the economic order of the time and place. Does not Sr. Silveira's question get down to one of the influence of the received ideal of the end of the legal order upon the judicial and administrative processes in the way in which they apply law in the sense of the body of received or established grounds of or guides to decision?

Rise of administrative tribunals as an incident of development of the idea of the state as an institution for service rather than merely an agency of maintaining the general security is requiring us to rethink many points on which our Anglo-American juristic ideas had become settled. This is especially notable as to our fundamental doctrine of supremacy of law.

Nothing need be said nowadays of the idea of a slot machine administration of justice; put the facts in the slot, pull a lever, and pull out the pre-appointed decision. There was a vain endeavor in the nineteenth century in all systems to make the judicial process conform to this theory. A not unnatural reaction has been calling for a turning of the judicial process entirely at large; for substituting the personal, subjective standard of the individual judge guided at most by a general notion of the public good. But the mechanical theory had the public good in view. Its proponents believed that the public good consisted in maintaining individual liberties. Exactly in what the public good is to be taken to exist as men think today is not easy to say. Often it seems as if the self-styled realists assume it to be absolute power of officials for

its own sake instead of absolute freedom of individual action for its own sake. At any rate, in recent political absolutism the ideal is not officials governing according to law, which has been the ideal of Anglo-American law, but officials governing through law. It conceives of law as the instrument of official action, not as the guide of official action.

Under totalitarian regimes, while the judge is by no means independent in the Anglo-American sense, yet in another sense he is in appearance wholly free. He is to act according to discretion, not by applying binding precepts. It is significant that this has been much urged in lands which are by no means totalitarian in their politics. This phenomenon is nothing new. In legal history there has been a pretty constant movement back and forth between rule and discretion; between a quest of certainty and uniformity, with an eye to the social interest in the general security, and a quest of individualization with an eye to the social interest in the individual life. The difficulty of keeping the two in balance has been perennial. Here Radbruch's idea of irreducible antinomies is significant. Neither can be carried out to complete logical development. When this is done with respect to one it negates the other. But it does not follow that we must make a final choice of one or the other and carry it out to its fullest extent. This has been tried more than once and has never succeeded. No matter how hard men have tried they have never been able to exclude either wholly from the administration of justice. It may be that, as Radbruch argues, we cannot unify the two. But we can and must keep them in a balance which will give each a real place. To speak after the fashion of the moment, the public good is not wholly identified with either. It includes both and is to be achieved in terms of both kept in a balance which allows as much to each as is compatible with the other.

It should be added that in the totalitarian state the discretion allowed the judge was subjected to official interpretations and special directions which reflected the discretion of the head of the state. A sort of official natural law was sought to be set up; "an unwritten law which evolves from the soul of the people." As Sr. Silveira suggests, it is comparable to Savigny's *Volksueberzeugung* with the ethical element left out. But the organ through which this soul of the people was expressed was the political organization—those who wielded the authority of the politically organized society. In these regimes there was a caricature of law rather than law.