

## LAW AS AN INSTRUMENT OF SOCIAL CHANGE<sup>(1)</sup>

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From earliest recorded times law has played an important role in the social, political and economic development of the peoples of the world. This role has varied at different times and in different areas and at times even with regard to specific issues. It can be a conservative one where the law attempts to remain static and only reluctantly adjusts to emerging new needs of the society, it can be one where the law keeps abreast of these needs and, finally, law can assume a role of leadership in social and economic change. This discussion will deal primarily with the last-mentioned phenomenon which has become so important in our own times in developed as well as developing countries.

The question arises first of all how law can assume such a leadership role. It can be done either through statutory enactments or through court decisions. These two methods are, of course, not mutually exclusive. Indeed, it happens quite frequently that important changes are first introduced through court decisions and are later confirmed or modified by statutes. Where such changes are initiated by legislation they are, by necessity, enforced and interpreted by court decisions. Attempts to initiate or promote social change through legal means is, of course, not always successful. The reform legislation or the innovative court decisions may be rejected by the population or a significant part of it. This may result either in an abandonment of the attempt at change or, particularly where the change has been accepted by part of the population, in an effort to make the change acceptable to the rest of the people through various means. In the following the general statements made here will be illustrated through

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1) This article is based upon a paper read in the Egyptian Society for Political Economy, Statistics and Legislation on June 7, 1976.

examples taken from the United States, civil law countries of Europe and countries of the Middle East.

A prominent recent example where social change in the United States was promoted by decisions of the Supreme Court can be found in the field of race relations. The basic decision was **Brown v. Board of Education**.<sup>(2)</sup> The issue in this case, and similar ones, was whether a state of the United States by maintaining separate schools for white and black children thereby denied the black children "equal protection under the law" as guaranteed by the Fourteenth Amendment to the United States Constitution. The decision in **Brown** reversed an earlier decision by the Supreme Court. In 1896 the Supreme Court had decided a case where a man of mixed white and black blood, in the State of Louisiana, had been denied the right to sit in a railroad coach reserved for whites.<sup>(3)</sup> When he refused to move to a railroad coach on the same train reserved for Negroes he was arrested and jailed on the basis of a Louisiana statute requiring separate accommodations for white and black passengers on railroads. The Supreme Court held at that time that the provision of separate but equal facilities did not violate the Fourteenth Amendment, providing the facilities were actually equal.

The rule established by this case was applied, particularly in the southern states of the United States, to other aspects of life including the schools. In **Brown v. Board of Education** the Supreme Court specifically denied that the provision of separate but equal facilities constituted compliance with the requirements of the Fourteenth Amendment. It concluded "that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of equal protection of the laws guaranteed by the Fourteenth Amendment."

It should be stressed that the Supreme Court decision in **Brown v. Board of Education** did not start the movement to eliminate discriminatory measures based on race or colour. Pressu-

2) 347 U.S. 483 (1954).

3) **Plessy v. Ferguson**, 163 U.S. 547 (1896)

res had been building before this decision, indeed *Brown* might not have brought suit and questioned the separate but equal doctrine had there not been such pressures. However, the decision in that case gave an important impetus to the movement for racial equality. Cases in other fields held governmental discrimination as being likewise in violation of the Fourteenth Amendment and in 1964 the U.S. Congress enacted a comprehensive Civil Rights Act.

The U.S. Supreme Court decision in the *Brown* case illustrates also another problem which arises where decisions are used as a means to promote social change. All legal systems require stability and certainty, since excessive fluidity and changeability would create chaos. In common law countries one means of achieving such stability and certainty is the doctrine of *stare decisis* which means that precedents are binding. However, as a famous American jurist, Roscoe Pound, has expressed it : "Law must be stable, yet it cannot stand still."<sup>4</sup> Precedent, therefore, cannot be adhered to absolutely, but some room has to be provided for changes necessitated by changing demands of society. In the interest of certainty in private relationships the U.S. Supreme Court is less ready, however, to set aside a precedent which has become a well-established rule in property relationships or commercial law than to overrule a case in the area of constitutional law.<sup>5</sup> It is in this area that the U.S. Supreme Court has seen it as particularly important to keep the law in accord with changes in the social order. Thus Chief Justice Marshall declared in *McCulloch v. Maryland* : "It is a constitution we are expounding... intended to endure for ages to come and, consequently, to be adapted to the various crises in human affairs."<sup>6</sup> And more than a hundred years later Chief Justice Stone stated : "The doctrine of *stare decisis* however appropriate or even necessary at times, has only a limited application in the field of constitutional

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4) Roscoe Pound, *Interpretations of Legal History*, Cambridge, Mass., 1923, p. 1.

5) See Edgar Bodenheimer, *Jurisprudence, the Philosophy and Method the Law*, Cambridge, Massachusetts, 1962, third printing 1970, p. 372 and pp. 218-220. See also Edward H. Levi, *An Introduction to Legal Reasoning*, Chicago, 1949, pp. 58-61.

6) 17 U.S. (4 Wheat.) 316 at 415 (1819).

law.”<sup>(7)</sup> This attitude is similar to that taken by lawyers in countries with a system of major codes with regard to the interpretation of these codes. In both instances there is a disinclination to amend the statutory instrument. The preferred means of meeting new social and economic requirements in these cases is through court decisions.

However, in both common law and civil law countries statutes are likewise used to adjust to social changes. At times comprehensive statutes follow a series of important court decisions, as in the case of the American civil rights legislation. In other instances socially important legislation is enacted in an area where the courts had not acted or could not act decisively. This was the case with the American prohibition of alcoholic beverages. A movement to limit or prohibit the consumption of alcoholic beverages had been gaining ground in various states of the United States for a long time and in 1919 a constitutional amendment was ratified by the states which outlawed manufacture, sale, or importation of intoxicating liquors for the United States and its territories (18th Amendment). On the basis of this amendment the National Prohibition Act (Volstead Act, 41 Stat. 305) was enacted in October 1919. Before the enactment of national prohibition the Supreme Court had not made any decisions fundamentally affecting this question and after the passage of the 18th Amendment and of the Volstead Act, the Supreme Court upheld their constitutionality.

Nation-wide prohibition proved difficult to enforce and actually gave rise to widespread bootlegging activities largely in the hands of organized crime. As a result the initial popular support of prohibition waned quickly and after fourteen years, in 1933, the 18th Amendment was repealed by the 21st Amendment. The prohibition of alcoholic beverages in the United States thus is an example of a socially highly significant legal development brought about by a constitutional amendment and implementing legislation in an area where the courts had not acted in a decisive fashion. At the time the American prohibition legislation provides an example of a social experiment introduced by legislation which for various reasons did not work satisfactorily. Here the govern-

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7) *St. Joseph Stockyard Co. v. United States*, 298 U.S. 38, at 94.

ment decided not to pursue the experiment further, but to have the prohibition repealed, a move which was popular because of the widespread abuses to which prohibition had given rise.

The techniques of adjusting law to the needs of the times in continental European countries are by necessity somewhat different from those in the United States. Here too, however, court decisions are utilized. One feature, of course, which distinguishes civil law countries from common law countries is the existence of comprehensive codes which provide the basic stability and certainty to the legal system. Theoretically at least, court decisions play a subordinate role. In practice court decisions have become increasingly important in many countries using a system of comprehensive codes, particularly as the codes have been aging. Because of the fundamental importance of the codes, however, the courts have usually attempted to fit their decisions within the framework of the codes, especially in France where the Court of Cassation would regard a decision in a civil case not based on the Civil Code as lacking a legal basis (*base légale*).

A good example of the adjustment of the law to new situations without change in the provisions of the Civil Code is provided by the treatment of motor vehicle accidents in France. When the French Civil Code was enacted in 1803, automobiles were unknown and the problems which their operation would cause could not be foreseen. However, the French courts have used one sentence in the first paragraph of Article 1384 of the Civil Code to derive comprehensive rules applicable to automobile accidents. That Article provides that a person is responsible for damage caused by "things in his custody" (*'choses que l'on a sous sa garde'*). One of the points which has been controversial was the meaning of custody and custodian in the above provision. The French Court of Cassation held for a number of years that the owner of an automobile remained responsible for the damage caused by the vehicle even if it was stolen. This holding was opposed by many of the Courts of Appeal in the late 1920's and early 1930's. The issue was brought to a head in a case which arose in 1929. In December of that year the son of a Nancy physician, Dr. Franck, parked his father's car on a street in that city at night. The car was stolen and the thief, driving the stolen car, killed a pedestrian, a M. Connot. The thief was never found. The family of the deceased sued Dr. Franck for damages. The

trial court and the Court of Appeal of Nancy dismissed the suit.<sup>(8)</sup> On appeal the Court of Cassation reversed, holding that notwithstanding the theft the custody of the owner had not ceased and remanding the case to the Court of Appeal of Besançon.<sup>(9)</sup> The Besançon Court, however, again found against the plaintiff.<sup>(10)</sup> On second appeal to the Court of Cassation the Court, decided en banc (*chambres réunies*) that Dr. Franck had been deprived of control over the vehicle by the theft and could therefore not be held responsible for damages<sup>(11)</sup>

In discussing this case Capitant stated that the Court of Cassation in its decision of March 1936 had been influenced by two main considerations<sup>(12)</sup> One was the objective theory of allocating risk, under which the owner having the benefit of the automobile should also be responsible for any damage caused by the vehicle. The other was based on grounds of social equity. The owner of an automobile was usually insured, the argument went, and damages were less burdensome to him. One might add that they would also have been easier to collect by the victim or his heirs than would have been the case with the thief. The reversal of the 1936 decision was based in part upon a lessening of the influence of the objective theory and recognition that the thief too had the benefit of the use of the car he had stolen. A role also was played, however, by a shift in the social outlook. By the late 1930's and the 1940's the general attitude toward ownership of an automobile had changed. In the early part of this century an automobile had been largely a luxury, but by the late 1930's it had become largely accepted as a vehicle essential for the rapid movement of goods and persons. It was no longer a symbol of affluence. Therefore the image of the rich car owner easily able to pay damages to the poor victim of an accident no longer applied. It is noteworthy in this regard that some time later, on December 31, 1952, a law was enacted (amended by decree no.

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8) Nancy, 10 July 1931, D.P. 1936. 1.83.

9) Civ. c. 3 March 1936, D.P. 1936.1.81, note Capitant; S. 1937.1.109.

10) 25 February 1937, D.H. 1937, 182; S. 1937.2.97, note P. Durand.

11) D.C. 1942.25, note G. Ripert; S. 1941.1.217, note Henri Mazeaud; Gaz. Pal. 1941.11 467, rapport cons. Legarde.

12) Henri Capitant, *Les grands arrêts de la jurisprudence civile*, 5th edition by Alex Well and François Terré, pp. 394-395.

59-112 of 7 January 1959) which established a public fund to compensate victims of automobile accidents or their heirs in cases where the person responsible was unknown or indigent. It should also be noted that this is an instance where the courts of appeal persistently differed with the Court of Cassation and ultimately induced the highest court to change its line of decisions.

A French example of legal changes through statutory enactments to meet new needs is provided by law no. 65-570 of 13 July 1965 which adjusted the marital property regime to the requirements of modern society. In the field of civil procedure the reforms of recent years also have brought about changes which were dictated by present-day concepts and needs. For example, these reforms greatly enhance the powers of the judge in the trial court, particularly with regard to the procurement of evidence, bringing the trial again closer to the inquisitory procedure. This development has important consequences since now the judge can order a party upon motion of the other party or on his own motion to produce documents even when these documents are detrimental to his case. This is a departure from the old rule that nobody should be forced to produce evidence against himself. In practice the new provision affords more protection to divorced wives since husbands who are delinquent in their alimony payments can now be forced to disclose their earnings. The increased role of the judge in French civil procedure has been explained as a manifestation of the changing role of the state. The state now is deeply involved in social and economic as well as political affairs. Greater involvement of the state and its organs in judicial affairs even where they are concerned with private interests of the parties is thus a logical and acceptable consequence.<sup>13)</sup>

German law also offers a number of instances where law promoted social changes either through court decisions or through statutory enactments. During the catastrophic inflation which followed World War I in Germany, creditors were threatened with the loss of their claim if the debtor was allowed to repay in practically worthless currency. In order to avoid the serious effects on the economy of such a development which would have wiped out

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13) Emmanuel Blanc, *Procédure civile 1972, Commentaire du décret du 9 Septembre 1971*, Paris 1972, pp. 9-10. See also Emmanuel Blanc, *La preuve judiciaire. Commentaire du décret du 17 Décembre 1973*, Paris 1974.

many debts and deprived the creditors of repayment, the courts intervened on the basis of Article 242 of German Civil Code, one of the so-called general clauses. This article provided that debtors must discharge their obligations "in good faith." Accordingly, the **Reichsgericht**, Germany's highest court, held that debts expressed in the old currency had to be repaid in the new currency at a rate adjusted to the circumstances of the individual case, taking into account also the general impoverishment of the population following the inflation. It should be noted that a statute enacted in 1925 regulated the revalorisation (**Aufwertung**) of certain debts, but the courts applied the principle of revalorisation earlier and more broadly.<sup>(14)</sup> Thus the German courts through a new interpretation of a provision of the German Civil Code had a strong influence on the economic consequences of a disastrous inflation.

The Second World War was followed by significant changes in the social structure of Germany. One of these changes was in the relationship between husband and wife. The German Constitution of 1949 established in its Article 3, paragraph 2, that men and women have the same rights. According to Article 117, paragraph 1, statutory provisions not in agreement with Article 3, paragraph 2, were allowed to remain in effect only until 31 March 1953. It was expected that by that date the parliament of the German Federal Republic would have enacted new legislation adjusting the Civil Code to the constitutional requirement of equality of men and women. This, however, was not the case. In fact, legislation establishing equality between men and women was not enacted until 1957.<sup>(15)</sup> Thus there was a gap of slightly over four years which the courts filled on the basis of the constitutional provision. In their decisions the courts took into account the very significant social changes which had occurred in Germany.

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14) Palandt, *Bürgerliches Gesetzbuch, Becksche Kurzkommentare*, vol. 7, 29th revised edition, Munich 1970, pp. 186-187. See also E.J. Cohn, *Manual of German Law*, vol. 1, 2d revised edition, London, 1968, p. 99. Wolfgang Friedlander deals with the general phenomenon of the frustration of contracts through economic upheavals in *Law in a Changing Society*, Berkeley 1959, pp. 112-115.

15) Law of 18 June 1957 (BGB1, 1957 I p. 609, so-called *Gleichberechtigungsgesetz*).

This is apparent from an opinion of the Federal Court, the highest court of the Federal Republic of Germany, in a case pending before the Federal Constitutional Court.<sup>16)</sup> This opinion related to a case where the marriage of the parties had been dissolved by the court of first instance. The wife (defendant) appealed and moved that the husband (plaintiff) be ordered to pay an advance on the court costs. The court of appeal held that according to Article 1387 of the Civil Code (now abrogated) any obligation of the husband to pay an advance on court costs of the wife in cases where the wife is the adverse party arises only if the spouses live under a system of matrimonial property which gives the husband administration and use of the assets brought into marriage by his wife. The court of appeal held that this Article was incompatible with the constitutional provision on equality between men and women. In its opinion the Federal Court stated that "this practice may have been justifiable as long as the right of the husband to the use of assets brought into the marriage by his wife represented a tangible economic value, while in case of a separation of assets, which generally was agreed upon only if the wife had assets, the wife actually had means of her own. The economic development since the drafting of the Civil Code has, however, made the husband's right to the use of the wife's assets in most cases a purely theoretical one because the wife only rarely has assets which yield income. On the other hand, inflation and the consequences of the war and the period immediately following have turned assets into losses in most cases where separation of property had been agreed upon. Therefore the practice of making the duty to advance costs dependent upon the existing property arrangement has long lost its basic relevance."<sup>17)</sup>

The German courts went further than the statute in their endeavour to promote equality between men and women even after

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16) Under German law the Federal Constitutional Court may ask the highest courts of the Federation and the *Länder* how and on the basis of what considerations they have interpreted the constitution in the question under dispute, whether and how they have applied in questions before them the provision whose constitutionality is being challenged and what legal questions involving this provision are before the court in question. The above-mentioned advisory opinion of 6 September 1953, IVRG 11/53, BGHZ 1954, Appendix pp. 34 - 81 is in answer to such a query from the Federal Constitution Court.

17) *Ibid.*, pp. 37 - 38.

the enactment of the law on equality of the sexes. The Federal Constitutional Court thus held Article 1628 and 1629 of the Civil Code to be unconstitutional. These articles had been inserted in the Civil Code by the law on equality of the sexes. They provided that in cases where the parents could not agree on measures relating to the exercise of parental power over their children, the father would decide. Also, the minor child was to be represented by the father. In holding that these provisions were in conflict with the constitutional requirement for complete equality of the sexes, the Federal Constitutional Court again referred to the change in social conditions. It stressed that the position of the German woman in society and in the family had changed and that this change was reflected in the social conditions existing at the time the constitution was enacted. The Constitutional Court, therefore, ruled that the parents together had to make all decisions concerning the exercise of parental power. In case they could not agree the court should decide.<sup>(18)</sup>

The German courts have acted in other areas too to adjust the law to the requirements of the present time. One such area is that of privacy and protection of the personality, particularly against libel. The German Civil Code does not provide generally for monetary compensation for damages, and allows compensation for non-material damages, pain and suffering, only in cases of injuries to the body or health or of unjustified deprivation of liberty.<sup>(19)</sup> Even though there was at the time no general protection of privacy, the courts even before World War II felt that the provisions of the Civil Code were inadequate. This feeling increased after World War II and the courts gained a general basis for a new approach to this question in Article 1, paragraph 1, of the Constitution which declared that human dignity is inviolable and that it has to be respected and protected by all governmental powers. This provision and an analogous application of Article 847 of the Civil Code were used by the courts to establish broad protection of privacy and award monetary damages in cases of violation of this privacy.

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18) Decision of the Federal Constitutional Court of 29 July 1959, BVGE 10 (1960) pp. 59-89.

19) Article 847. Article 249 provides that the person liable for damages must reestablish the conditions which would exist had the action which caused the liability not taken place.

Again the courts emphasized the need to take changing social conditions into account. In a decision confirming the award of monetary compensation to a television announcer who had been libeled in a magazine article, the Federal Court stated that legal concepts had changed since the Civil Code had been enacted in 1900 and that furthermore fundamental technological and social changes had taken place which provided opportunities for injuries to the right of privacy which the Civil Code could not have foreseen. The judge should not be bound by the decision made by the legislator in 1900 which limited non-material damages to such an extent that such damages could not be awarded even in case of a very serious invasion of privacy.<sup>(20)</sup>

The Federal Constitutional Court in a decision dealing with a basically analogous case of libel voiced similar sentiments.<sup>(21)</sup> It declared that "the task of the judge may make it necessary to bring to light through his insight into societal values (an insight which necessarily has personal elements), value concepts which are implicit in the constitutional legal order, but which are not or not sufficiently expressed in the text of the statutes....." The judge must fill the gap existing in the law "creatively," using the "yardstick of practical common sense and the well-established general concepts of justice in the community."<sup>(22)</sup>

The court further stated that the freedom of the judge to develop the law further grows with the aging of the codification. The provisions of the code have to be interpreted "in the context of the social conditions and the socio-political views with which it must interact." The content of a statutory provision "can and must change with these conditions and views when necessary. This is particularly true when conditions of life and views on the law have changed as fundamentally between enactment and application of the law as has been the case in this century."<sup>(23)</sup>

In a statement reminiscent of those made with regard to the

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20) Decision of the Federal Court of 5 March 1963, BGHZ 39 (1963), pp. 124-134, at pp. 131, 132.

21) Decision of the Federal Constitutional Court of 14 February 1973, BVGE 34 (1937), pp. 269-293.

22) *Ibid.*, p. 287.

23) *Ibid.* pp. 288-289.

relationship between decisions of the United States Supreme Court and changes in the United States Constitution, the Federal Constitutional Court declared further that "legislative reforms encounter particularly great obstacles and difficulties if they are directed toward the modification of a large codification which is as important within the framework of the total legal order as the codification of the private law in the Civil Code."<sup>(24)</sup>

The emphasis on the role of the courts in the adjustment of the law to social and economic changes in Germany is greater than any similar emphasis in France. This phenomenon can be explained not only by a somewhat different philosophical outlook, but also by the fact that Germany since the enactment of the Civil Code has undergone economic and political changes which profoundly affected German society and many concepts which existed at the time the Code was enacted largely antiquated. The provisions of the Code could thus be maintained without legislative changes in many instances only through judicial interpretation which took into account the changing social and economic conditions.<sup>(25)</sup>

In the Middle East, law also has been applied frequently to promote social change. A prominent example of a fundamental change in the legal system is post-World War I Turkey. After some initial hesitation the government of Kemal Ataturk decided in 1924 to abolish the application of *shari'a* law even in matters of personal status and to put Turkish law on a completely secularized and Europeanized basis. In the field of private law Turkey in 1926 enacted a civil code which followed the Swiss Civil Code and Code of Obligations with very few changes. In other fields of the law, codes closely based on other European codes were adopted soon thereafter.<sup>(26)</sup> The total elimination of Islamic law in Turkey was a deliberate step in the modernization of the country which President Ataturk intended to achieve, and

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24) *Ibid.* p. 289.

25) For a comparative treatment of the use and importance of judicial decisions in English, German and French law see John P. Dawson, *The Oracles of the Law*, Ann Arbor, 1968. See also S. Belaid, *Essai sur le pouvoir créateur et normatif du juge*, Paris 1974.,

26) See Herbert J. Liebesny, *The Law of the Near and Middle East, Readings, Cases, Materials*, Albany, 1975, pp. 79-81.

law has become in Turkey a conscious instrument in the promotion of cultural change.<sup>(27)</sup>

Given the difficulties arising from the abolition of long-established and deeply-rooted institutions and from the introduction of a new legal system based on a number of foreign codes taken from different nations, the Turkish legal system can be said to have worked generally well. However, some difficulties did arise, particularly, as was to be expected, in the fields of family law, inheritance law and land law. Especially in rural areas, the population did not easily become adjusted to the requirement of a civil marriage which the new Civil Code established and continued the old forms of marriage following Islamic law and established customs which called for the presence of an *imam*. Under the law such a so-called *imam nikah* was permissible, but only if it followed a civil ceremony. This requirement was ignored and many marriages in rural areas of Turkey were therefore not valid in the eyes of the State.

The reasons why civil marriage was not accepted by much of the rural population were many. The parties had to fulfil a number of formalities strange to them before being allowed to marry, such as a medical examination of both the prospective bride and groom. Many men did not want to have their future wives examined by male doctors. The marriage ceremony itself was quite often performed by a rather indifferent official in an unattractive office, quite different from the traditional ceremony to which the population had been used.<sup>(28)</sup> Another reason was that the new Civil Code did not allow divorce by repudiation (*talāq*). The divorce law of that Code not only was more involved, but also called for specific grounds. The public airing in court of family difficulties was regarded by many as unacceptable. There was apparently a wide-spread belief in rural areas

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27) See on this point Bülent Davran, "Die Rechtsstillung der Pflegekinder und die Rezeption des Schweizerischen Zivilgesetzbuches" *Annales de la Faculté de droit d'Istanbul*, 3rd year, no. 4 (1954), Istanbul, 1955, pp. 405-424, particularly p. 405.

28) H. Timur, "Civil Marriage in Turkey : Difficulties, Causes and Remedies", *International Social Science Bulletin*, vol. 9, no. 1 (1957), pp. 34-36.

that use of the old marriage forms preserved the right of *talaq*<sup>(29)</sup>.

Despite the difficulties which had arisen, the Turkish Government did not change the provisions of the Civil Code. However, since so many unions existed which were not marriages in the eyes of the law, measures had to be taken with regard to the offspring which was considered illegitimate. Otherwise complications would have arisen concerning inheritance and other matters touching upon parent-child relationships. Consequently the Turkish parliament periodically enacted legislation legitimizing children born from these unions. This was, however, special legislation, legitimizing children born during a specified period, not general legislation amending the Civil Code.

Over the years the problems created in this field by the enactment of the Swiss Civil Code have diminished and there has been a greatly increased acceptance of the civil marriage. In most parts of Turkey a large percentage of couples are now married in civil as well as religious ceremonies. This is probably due again to a variety of factors. Female doctors have been employed in many instances thus making medical examinations of the prospective brides more acceptable and the offices where the civil ceremonies are held have been made more attractive. At the same time there has been a better understanding of the practical advantages of civil marriages. World War II and the Korean war brought home to Turkish women the fact that receipt of government financial aid while their husbands were serving in the armed forces was dependent on the possession of a marriage certificate which could be obtained only through a civil ceremony. After the outbreak of these two wars, women applied in large numbers for these benefits. The claims of many of them were rejected, however, because they were not validly married. As a result the Turkish army temporarily released its men so that they could enter into a civil marriage in addition to the religious marriage they had concluded earlier.<sup>(30)</sup>

Other financial benefits accruing to wives and widows pro-

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29) H.V. Velidedeoglu, "The Reception of the Swiss Civil Code in Turkey", *International Social Science Bulletin*, vol. 9, no. 1 (1957), p. 64.

30) Hifzi Timur, *op. cit.* note 28, p. 36.

vided they had concluded a civil marriage, likewise made women generally more aware of the usefulness of a civil ceremony. Thus civil marriage now is widely accepted in Turkey and the result at which the Civil Code aimed appears to have been largely achieved. It is likely, however, that this acceptance is due primarily to the obvious practical advantages which flow from a civil marriage and that the religious ceremony, which persists in many instances alongside the civil ceremony, satisfies emotional needs for the traditional mode of marriage.

In the field of divorce, the Turkish legislature likewise refused to ease the provisions of the Civil Code. However, the courts, to some extent at least, have permitted divorce on grounds of mutual incompatibility, thereby avoiding the discussion of intimate family matters in court.<sup>(31)</sup> In the area of rights to real property difficulties arose, as in many other countries, with regard to land registration. Such registration is required both for the creation and transfer of rights in land. However, in villages particularly land was transferred without registration. This induced the legislature and the courts to develop new rules to remedy the situation.<sup>(32)</sup>

In the Arab countries the approach to law reform was less radical than in Turkey. Islamic law was not eliminated from the legal system. The aim rather was to codify rules of Islamic law in personal status matters and to achieve a synthesis between European law and Islamic law in other matters, such as obligations and real estate.<sup>(33)</sup> In drafting of statutes in the field of personal status law as well as in other areas of law the drafters used the eclectic method. This means in the case of Islamic law that they drew upon the writings of jurists of the various schools of Islamic jurisprudence in drafting the new statutes, rather than

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31) H.V. Veldedeoglu. *op. cit.* note 29, p. 64.

32) *Ibid.*

33) A plan for a synthesis between the two systems was developed by Dr. 'Abd al-Razzaq al-Sanhuri in his *Le Califat, son évolution vers une Société des Nations Orientales*, Paris 1926. Dr. Sanhuri was deeply involved in the drafting of codifications which applied the principle of synthesis in several Arab countries.

use exclusively the rules of a specific school.<sup>(34)</sup> Where, as in the case of the new civil codes, the drafters also examined European codifications, a similar method was followed. The drafting was no longer based primarily upon one European code, but provisions from various codifications were utilized and fitted into the new code.<sup>(35)</sup> This eclectic method thus differed not only from the nineteenth century practice in the Ottoman Empire and Egypt when the primary European source of legislation was French, but also from the method employed by the Turkish Republic in the 1920's which was eclectic in that Turkey did not turn to a single European legal system as had been done in the nineteenth century but chose among several European systems. However, Turkey in the 1920's still essentially adopted or adapted one foreign code in a specific field, such as the Swiss Civil Code and Code of Obligations or the Neuchâtel Code of Civil Procedure. It did not go as far as countries, including Turkey, did later when they chose specific provisions from various foreign codes as models for rules of the code they were drafting.<sup>(36)</sup>

The new statutes enacted by Egypt and other Arab countries have taken into account and accentuated the changes which have been brought about in large measure by increased urbanization, industrialization and the influence of mass communications which are bringing disparate cultures closer together than ever before. The two methods employed by Egypt and other Arab countries in the reform of their legal system, eclecticism and synthesis of Islamic and non-Islamic rules, have, however, made the reforms more easily reconcilable with social and economic conditions.

In the field of personal status law, the new legislation generally has endeavored to make unilateral repudiation of the wife

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34) Cf. the Explanatory Memorandum to the Egyptian Draft Law Concerning Certain Questions Affecting Personal Status, Decree-Law no. 25 of 10 March 1929 and the Explanatory Memorandum to the Egyptian Law of Wills, no. 71 of 24 June 1946.

35) This method is well-illustrated in the materials to the Egyptian Civil Code, *al-Qanun al-Madani. Majmu'at al-amal al-tahdhiriyya*, 5 vols., Cairo, no date.

36) This practice is not used only in the Middle East. The Portuguese have used a very similar method in drafting their new civil code which was promulgated in 1967.

by the husband less easy and give the wife a wider opportunity to divorce her husband for specific reasons. Tunisian law is interesting in this regard. It has completely eliminated unilateral repudiation in its traditional form and decreed that all divorce action has to be brought in court.<sup>(37)</sup> Article 31 of the Tunisian Code of Personal Status permits divorce through court decree on the grounds specified in the Code; in case of mutual consent of the spouses; and upon unilateral demand of the husband or wife. In that case the court will assess damages to be paid to the other party against the party who has asked for the divorce. Cases decided by the Tunisian courts show that the courts have allowed a change in pleading during the suit, permitting the plaintiff in the divorce action to shift the legal basis of the pleading from Article 31, paragraph 1, which calls for specific grounds to Article 31, paragraph 3, which permits a unilateral request for divorce without specifying grounds, but with liability for an indemnity.

In effect Article 31, paragraph 3, gives the wife as well as the husband the right of a court supervised unilateral repudiation. There is, however, a legal presumption of an abuse of right making the plaintiff liable to pay damages to the other party.<sup>(38)</sup> The court must award damages, but it can apparently award purely nominal damages in cases where it feels that the demand for divorce, though based on Article 31, paragraph 3, was justified.<sup>(39)</sup> Although the award of damages to the other party may be minimal, the plaintiff shifting from Article 31, paragraph 1, to Article 31, paragraph 3, still risks having to pay a sizeable indemnity. The tendency to change the pleading may, however, be explained on social grounds. There is hesitation in Middle Eastern and North African society to reveal intimate details of

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37) Article 30 of the Tunisian Code of Personal Status of 13 August 1956. Divorce outside a court of law is without legal effect.

38) Cf. Decision of the Court of Appeal for Tunis of 25 June 1965, *Revue Tunisienne de droit*, 1966-67, pp. 205-206. M.T. Es-Senoussi, *Code du statut personnel annoté*, 2d edition, Tunis, 1958, p. 32 Arabic text, p. 23 French text, equates the indemnity (*gharama*) stipulated in Article 31, paragraph 3, with the *mut'a* due the divorced wife under certain circumstances. In the Tunisian legislation, however, the indemnity may be due to the wife or the husband.

39) In the above case the defendant husband was awarded one penny in damages.

family life in court and witnesses may be equally reluctant to testify to events which would cast an unfavorable light on members of a family of which they themselves may be members or which they are friendly. Using Article 31, paragraph 1, as basis for a divorce action thus may put the plaintiff in a position where he or she is unable or unwilling to substantiate the facts alleged through evidence. In such instances Article 31, paragraph 3, provides a means of obtaining a divorce without having to allege specific grounds. Other Arab countries have not adopted this Tunisian device, but some have stipulated that a marriage can only be dissolved by the courts for specified reasons.<sup>(40)</sup>

In the field of inheritance law new legislation in the Arab countries also stayed within the framework of Islamic law. Among the most important new rules enacted was the rule of obligatory bequests to grandchildren introduced first by the Egyptian law no. 71 of 24 June 1946. This law provided in Article 76 that in cases where the decedent has not made a bequest for the descendants of a predeceased child equal to the portion which such child would have taken had he survived, the descendants shall be entitled to a bequest equal to that portion up to one third of the estate. In the debate on this bill in the Egyptian Senate the rapporteur stated that "in the bill on wills the government has not confined itself to the use of rules of the Hanefite rite. Rather it has searched among other rites for sources of inspiration so as to draft a bill which is well-adapted to present-day circumstances and which is well in line with practical needs."<sup>(41)</sup>

The institution of obligatory bequests while staying wholly within the Islamic framework protects orphaned grandchildren who under the rules of the Islamic law of inheritance would otherwise be excluded from inheriting from their grandfather if a son of the grandfather survived. The solution found by the Egyptian legislator and followed in other Arab countries with some variation,<sup>(42)</sup> is better adapted to the needs of Islamic

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40) For details and discussion of divorce in other personal status laws cf. Norman Anderson, *Law Reform in the Muslim World*, London, 1976, pp. 114-133.

41) *Annals of the Egyptian Senate*. Session of 25 March 1946.

42) Cf. Anderson, *op. cit.* note 40, pp. 155-156 and Liebesny, *op. cit.* note 26, p. 186.

society than a complete abandonment of the **per capita** distribution of Islamic law and introduction of **per stirpes** distribution where these descendants take the portion which their progenitor would have inherited not limited to one third of the estate.<sup>(43)</sup>

Space does not permit the treatment of more examples of the adjustment of legal institutions in the Arab countries to present-day needs. Generally it can be said that the methods employed, synthesis as well as eclectic use of various sources have been successful. One question may be raised. In our discussion of the adjustment of law to changing conditions in society in the United States and in continental Europe, the role of the courts has been emphasized. What is the role of the courts in the other countries discussed ? In these countries, too, the courts have an obvious role in the interpretation and day-to-day application of the law. However, in a number of countries in Europe as well as other parts of the world, court decisions are not published as fully, and sometimes not as regularly, as in most common law countries or France and Germany. Unpublished decisions, of course, have much less impact on legal developments than published decisions, particularly those of the highest courts. On the other hand the rapid technological, social and economic developments of modern times make the role of the courts in the development of the law increasingly important. It is impractical to revise major statutory enactments, such as codes, frequently and needed adjustment to changing social requirements of the society therefore often have to be made by the courts.

This brief survey has shown that law, as contained in statutes or court decisions, is an important factor in the changing society of our day. The law at times spearheads such changes, at times brings about needed adjustments. In some cases, such as Turkey, law has been used as a conscious instrument to bring about social change in a traditional society. This can and often does lead to friction and tension within the society. It may then be a question whether the attempt to change society through legal enactments should be abandoned or further pursued despite re-

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43) Among Islamic states which follow the system of distribution **per stirpes** is Turkey which took over this system with the Swiss Civil Code and Pakistan which introduced **per stirpes** inheritance in the Muslim Family Laws Ordinance of 1961.

sistance. In Turkey the latter course was chosen and was successful, but in part at least because other factors promoted the acceptance of such institutions as civil marriage. In other cases, as in the Arab states, reform has tried to find a middle road, utilizing Islamic as well as Western rules and thereby staying closer to the legal traditions of society. As rapid social and economic changes continue, law in all countries will play a role, probably an increasing one, in promoting social change. This role is likely to be most successful if the law can build upon and be adjusted to the traditions and experiences of the society which it is helping to change.