Law and Social Change in Mediterranean Europe and Latin America

A HANDBOOK OF LEGAL AND SOCIAL INDICATORS FOR COMPARATIVE STUDY

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STANFORD STUDIES IN LAW AND DEVELOPMENT (SLADE)

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INTRODUCTION

SLADE (for Studies in Law and Development) began as an enterprise on law and development. It soon grew to include first efforts toward (1) the quantitative description of legal systems, (2) the quantitative study of legal cultures, and (3) what we call "quantitative comparative law." This volume contains an introduction to the theory and design of the inquiry and presents the data on social and legal indicators that were a principal product of the field research.

SLADE began in 1971[1] and for five years, through the summer of 1976, was supported by a grant to the Stanford Law School from the Agency for International Development of the United States Department of State (Grant No. AID/csd-3151). The following language from the grant application indicates our general objectives:

> Though it is widely recognized that strong legal institutions are essential to sound national growth, little is yet known about the actual functions of law and legal institutions in the development process. There is clear need for a new body of theory and method — a "social science" of law and development — to provide the intellectual framework for effective study, research and decision-making . . .
>
> The developing world is heterogeneous in its legal forms and institutions. Useful study and research in law and development require close familiarity with the legal institutions and "cultures" of specific countries. Latin America and Mediterranean Europe together form a coherent, relatively homogeneous culture area, and the work under this Grant will center on selected less developed countries within it. The knowledge gained through this effort will contribute to the understanding of law in its relation to economic and social change in the developed as well as the developing world.

These objectives were refined in a series of three multi-disciplinary seminars which were held at Stanford in the fall and winter of 1971-1972.[2] The seminars were followed in the spring and summer of 1972 by an intensive period of research design

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1. In 1970 Professor Merryman received a grant from the Ford Foundation to review the law and development literature and assess the field. This provided an opportunity for reading and discussions that eventually formed the background of this study.

2. The following colleagues from Stanford and elsewhere joined us in these seminars: Gabriel A. Almond (Political Science), John Barton (Law), Jane Fishbourne Collier (Anthropology), Thomas Ehrlich (Law), Max Gluckman (Anthropology, Manchester), Alex Inkeles (Sociology and Education), John J. Johnson (History), Kenneth L. Karst (Law, UCLA), Roy Lave (Industrial Engineering), Joseph E. Leininger (Law), John W. Lewis (Political Science), Philip Lewis (Law, Oxford), Victor Li (Law), Gerald M. Meier (Business), John W. Meyer (Sociology), Robert A. Packenham (Political Science), Robert Rabin (Law), Clark W. Reynolds (Food Research), David L. Rosenhan (Psychology and Law), Wilbur Schramm (Communications), Eugene J. Webb (Psychology and Business), John D. Wirth (History). During the same period a two-day working conference was held at Stanford with Professors Kenneth L. Karst of UCLA, Stewart Macaulay of Wisconsin, Henry J. Steiner of Harvard, and David M. Trubek, then of Yale.

   An advisory committee composed of Stanford Professors Gabriel A. Almond (Political Science), John Barton (Law), Alex Inkeles (Sociology), John J. Johnson (History) and Victor Li (Law) was established in early 1972. Its members have provided us with valuable advice and criticism throughout the life of the project.

   Associate Dean Joseph E. Leininger of the Stanford Law School has expertly and expeditiously administered the financial, logistic and related aspects of the enterprise from its inception.

at Stanford by a group composed of Professors Merryman and Friedman and the SLADE National Scholars.[3] In the autumn of 1972 the National Scholars returned to their nations for a period of field research.[4] Professor Clark joined us in 1973. In 1975-1976 the National Scholars returned to Stanford to work up their field research results and begin preparation of national monographs.[5]

"Law and development" began to emerge as a potential new field of scholarship in the 1960s.[6] It received support from the Ford Foundation, from the Agency for International Development (AID), and from the International Legal Center (ILC), established in 1966 by the Ford Foundation to support work in law and development.[7]

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3. These were Professor Edmundo Fuenzalida Faivovich of Chile, Dean Carlos José Gutiérrez (assisted by Professor Ricardo Harbottle) of Costa Rica, Professors Sabino Cassese and Stefano Rodotà of Italy, Dr. Miguel Wionczek and Licenciada Maria Luisa Leal Duk of Mexico, Professor Lorenzo Zolezzi Ibarcena of Peru, and Professor José Juan Toharia of Spain. In 1973 Dr. Wionczek and Licenciada Leal withdrew from SLADE and Professor Fernando Rojas Hurtado of Colombia joined us.

   The choice of nations to include in the study was governed by two principal considerations: our desire to represent some of the social, economic and cultural variety of Latin America and Mediterranean Europe and the availability of qualified lawyers-social scientists who were interested in empirical research and could be persuaded to join us.

4. During the field research several working conferences were held in order to discuss and resolve problems arising in the field, to make needed adjustments in the research design, and to maintain comparability of research results.

5. As of this writing the following publications by SLADE national scholars have appeared:
   S. CASSESE, QUESTIONE AMMINISTRATIVA E QUESTIONE MERIDIONALE: DIMENSIONI E RECLUTAMENTO DELLA BUROCRAZIA DALL'UNITÀ AD OGGI (Milano 1977); Fuenzalida & Lagreze, *La Investigación Empírica en Derecho*, in DERECHO Y SOCIEDAD (G. Figueroa ed., Santiago 1978); E. FUENZALIDA and collaborators, FLUCTUACIONES DE LA DEMANDA POR JUSTICIA EN FUNCIÓN DEL CAMBIO SOCIAL (Santiago 1973-74);Gutiérrez, *Los Jueces de Costa Rica,* 22 REVISTA DE CIENCIAS JURÍDICAS 71 (1973); *id., Cantidad y Cualidad de la Función Notarial en Costa Rica,* 27 REVISTA DE CIENCIAS JURÍDICAS 19 (1975); *id., El Desarrollo de un Sistema Jurídico,* 5 REVISTA JUDICIAL 61(1977); F. ROJAS, CRIMINALIDAD Y CONSTITUYENTE (Bogotá 1977); Toharia, *Derecho y Desarollo: El Caso de España,* 17 DOCUMENTACIÓN JURÍDICA 42 (1978); L. ZOLEZZI, DERECHO Y DESAROLLO: PERSPECTIVAS DE ANÁLISIS (Lima 1978).

6. This brief history and the more extended critique of the law and development movement in Chapter I are adapted from an article by Professor Merryman, *Comparative Law and Social Change: On the Origins, Rise, Decline and Revival of the Law and Development Movement,* 25 AM. J. COMP. L. 457 (1977).

7. The first major venture into the field by the Ford Foundation was in 1952, with a grant to establish the Harvard International Tax Program: ". . . to conduct, in association with the Fiscal division of the United Nations, a cooperative project of research and training relating to tax laws and administration in underdeveloped areas and to the comparative study of tax laws and administration." 1952 ANNUAL REPORT of the Ford Foundation 27-28. This program is still in existence and has received substantial additional grants from Ford and others. In January of the same year Carl B. Spaeth, then Dean of the Stanford Law School, went to the Foundation for a year and a half to plan its international division and program. The next major event was the series of International Legal Studies grants to a number of U.S. law schools announced in 1955 ANNUAL REPORT 57-59. International Legal Studies was a major category of Foundation activity thorugh 1958. See 1956 ANNUAL REPORT 180; 1957 *id.* 87; 1958 *id.* 136. In 1959 International Legal Studies was listed in the Foundation's ANNUAL REPORT under "Concluded Programs" (pp. 156-57). Then, in 1966, a $3,000,000 grant was made to establish the International Legal Center. 1966 ANNUAL REPORT 23. In addition to these major enterprises the Foundation has supported a wide variety of activities related to law and development throughout the Third World. *See generally* grants listed in the Foundation's ANNUAL REPORTS from 1952 forward.

Special teaching and research programs were created at major law schools and a variety of individual law and development projects was undertaken by law professors, supported by the Ford Foundation, AID, or the ILC (itself funded primarily by Ford). Conferences were held. Articles were written. There was a good deal of travel both ways between the U.S. and the Third World, particularly Latin America and Africa.[8]

Undoubtedly some "law and development" enterprises could as easily have been financed under more familiar headings. However, there was money available to finance "law and development," so they became law and development projects. Since the field was new and undefined, relatively little bending and stretching was required; rather than change the project in any very serious way one needed merely to expand the definition of law and development to include it. Agencies with funds committed to the support of law and development welcomed such proposals (for a foundation or agency with ear-marked funds to grant, good proposals are hard to find) and did not agonize unduly about field definition.[9] That, after all, was the business of

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The Agency for International Development undertook some law and development projects under Title IX of the Foreign Assistance Act of 1966, 22 U.S.C. sec. 2218 (1970), which authorizes research and technical assistance in building democratic institutions. Butler, *Title IX of the Foreign Assistance Act: Foreign Aid and Political Development*, 3 *Law & Soc'y Rev.* 115 (1968). Another source of law and development work was the University of Wisconsin Land Tenure Center, established and originally funded by AID.

Early in the 1960s the Asia Foundation established a law and development program. However, the Asia Foundation's work seems not to have engaged the interest of the law and development establishment and to have been curiously out of contact with the mainstream, producing no substantial body of scholarship. For descriptions of Asia Foundation law and development activities *see* THE ASIA FOUNDATION, PRESIDENT'S ANNUAL REVIEW, under variant headings: *e.g.*, "Law and Development" (1968); "Legal and Administrative Systems" (1970); "Law and National Development" (1972); "Legal and Administrative Systems for National Development (1974); "Law, Public Administration and National Development" (1975). In money terms the Asia Foundation appears to have been a major contributor to law and development activity, with grants totalling nearly $600,000 in 1974, nearly $500,000 in 1975, and substantial, if lesser, amounts in prior years.

For a time, the American Bar Association was involved in an agrarian law reform (in developing nations) project. *See* Greenwood, *Seminar on Agrarian Reform and Economic Development*, AMERICAN BAR FOUNDATION RESEARCH MEMORANDUM SERIES No. 30 (1962). The Foundation's interest at that time reflected concerns expressed in such articles as: Parker, *Our Great Responsibility: We Must Lead the World to Freedom and Justice*, 44 A.B.A.J. 17 (1958); Malone, *Promoting the Rule of Law: The Role of the American Lawyer*, 45 A.B.A.J. 243 (1959); Wilken, *A Glorious Opportunity for American Lawyers*, 47 A.B.A.J. 142 (1961). Within a year or so, however, the Foundation terminated its interest in this project and turned to domestic concerns.

8. There is as yet no published history of the grants made, field projects carried out, studies undertaken, courses taught, and results achieved under the law and development banner. A substantial effort in that direction is J. Gardner, The Legal Profession and the Third World: A Critical History of the Law and Development Movement, with Particular Reference to Latin America (unpublished, n.d.). Mr. Gardner is a Program Officer with the Ford Foundation.

9. The following statement of the purposes of the $3,000,000 grant to establish the International Legal Center is more specific than most:

> Working with the U.S., foreign, and international agencies, foundations, universities, and practicing lawyers and jurists, the center will stimulate and support systematic study of the role of law in international relations and the development of modern nations. The center will also be concerned with recruitment and training to expand the ranks of lawyers, social scientists and others qualified to work on problems of law and development; and with projects to help developing countries establish legal institutions essential to the functioning of modern, free societies. FORD FOUNDATION, 1966 ANNUAL REPORT 23.

Still, "the role of law in . . . the development of modern nations" and ". . . legal institutions essential to the functioning of modern, free societies" are relatively flexible notions not sharply bounded by accepted theory.

scholars, and there was always the possibility that a proposal might justify itself in other terms even if a meticulous critic could argue that it was off the law and development target. The alternatives were to settle for proposals of lower quality or less interest falling comfortably within prevailing conceptions of the field or to cut back one's activity in law and development. Given the prevailing conceptual looseness it seemed better to the funding agencies to accept labels and not look too closely at the contents.

Around 1970 a reaction set in. Questions arose within the Ford Foundation both about its own law and development programs and about further funding for the International Legal Center.[10] The Center, at Ford's suggestion, convened a group of committees to help it rethink fundamental questions about field definition and about its program in law and development.[11] Eventually Ford's funding of the ILC came to a close.[12] The Agency for International Development's law and development activity began to contract at about the same time and was soon reduced almost completely to meeting prior commitments.[13] Scholars formerly active in the field began drifting off, turning to other interests.[14] Our project was born during this period of reappraisal.

Our announced purpose has been to study "law and development in Latin America and Mediterranean Europe." In Chapters I and II we describe the thinking that

10. The Foundation undertook a broad-ranging internal review of its law and development activities in the Spring of 1971 and invited a number of interested scholars to participate in that review. Although it was too early then to predict Ford's withdrawal from the field, the belief that its own and the International Legal Center's law and development programs had been unsuccessful was by that date rather widely held within the Foundation. The law and development community was then in what David Trubek and Marc Galanter call "The period of competing articulations" in *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States,* 1974 WIS. L. REV. 1062, 1093. In retrospect it seems clear that this absence of consensus among the scholars, when combined with a discouraging evaluation of the record by the responsible people within the Foundation, weakened law and development as a competitor for future support and made Ford's withdrawal more probable.

11. There were three such committees: on legal education, legal research, and legal services. Their reports were published as: ILC COMMITTEE ON LEGAL EDUCATION IN THE DEVELOPING COUNTRIES, LEGAL EDUCATION IN A CHANGING WORLD (1975); ILC RESEARCH ADVISORY COMMITTEE ON LAW AND DEVELOPMENT, LAW AND DEVELOPMENT: THE FUTURE OF LAW AND DEVELOPMENT RESEARCH (1974); COMMITTEE ON LEGAL SERVICES TO THE POOR IN THE DEVELOPING COUNTRIES, LEGAL AID AND WORLD POVERTY: A SURVEY OF ASIA, AFRICA, AND LATIN AMERICA (1974).

12. 6 FORD FOUNDATION LETTER, no. 6 at 5 (November 1, 1975) refers to $5.45 million in grants to the Center, "including a recent and terminal $650,000."

13. Comparatively successful AID law and development programs, like that in Costa Rica in the late 1960s (see Skidmore, *Technical Assistance in Building Legal Infrastructure: Description of an Experimental AID Project in Central America,* 3 J. OF DEVELOPING AREAS 549 (1969), have terminated, and there seems to be little interest in reviving them. No major AID grants have been made to U.S. law schools or scholars for law and development activities since the SLADE grant to Stanford in 1971. Inquiries about the possibility of AID funding for law and development projects are regularly discouraged with the explanation that the Agency has no funds specifically intended for such programs and that there are higher priorities (population, public health, etc.) for allocation of non-earmarked Agency funds.

14. Trubek and Galanter, *supra,* note 10, is the valedictory article. The authors had been responsible for or associated with much of the best work that went on under the law and development banner. They concluded that the future of law and development was uncertain at best. *See id* at 1101-1102.

translated this objective into a concrete research design. Chapter III contains a description and instructions for use of the data. The tables themselves are presented in Chapters IV to IX.

We are painfully aware that the data presented in this volume fall short of the ideal. Despite the industry and ingenuity of the National Scholars, on whom the main burden of data collection fell, some of the kinds of information that we sought either did not exist in any form, could not be generated, or were inaccessible to investigators. Indeed, to anyone with experience in data collection, the wonder is that so much that is interesting and potentially useful was found or generated through the National Scholars' efforts.

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CHAPTER I: BACKGROUND

A. The Intellectual Origins of the Law and Development Movement

In the 1960s several strands of intellectual history united to encourage people in universities, foundations and government to think of law and development as a promising field for technical assistance and scholarship. These components were the idea of progress, the movement for law reform, the emergence of an interest in "law and society" and its various strands (sociology of law, anthropology of law, law and economics, law and psychology, law and politics), the notion of social engineering through law, and the post-World War II United States commitment to foreign assistance.

The Idea of Progress. First was the idea of progress: the notion that society is somehow moving toward a better state of affairs or, in the alternative, that we can improve the social condition if we only think clearly and manage things properly. We are so habituated to one or the other form of this attitude that we seldom question it. It is worth recalling, however, that the progressive credo is a belief — a faith ultimately not subject to empirical verification.[1] In earlier times it appears to have been far less widely held. Bury places its origins in the 17th century, with Jean Bodin and Francis Bacon.[2] By the time of Voltaire and the Age of Reason it had become embedded in Western thought. Indeed, the Age of Reason is itself a peculiarly progress-permeated notion. Reason was not a modern invention, but in the medieval world its principal function was to demonstrate the truth of revealed knowledge, to justify the state of man and society. What was new about the Age of Reason was the faith in reason as an agent of progress.

During the 19th century an evolutionary view of progress became dominant, in part as a reaction to the unfulfilled optimism of the French Revolution, fueled by the thought of Hegel, Marx and Darwin. Carl Becker has summarized the difference: "Whereas the eighteenth century held that man can by taking thought add a cubit to his stature, the nineteenth century held that a cubit was to be added to his stature whether he took thought or not."[3] In the current century, at least in the United States, there has been a strong return to the 18th century view: "can-doism," "progress is

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1. The point is made by A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 18 (1970).

2. "Our history . . . definitely begins with the work of two men who belong to this age, Bodin, who is hardly known except to special students of political science, and Bacon, who is known to all the world. Both had a more general grasp of the significance of their own time than any of their contemporaries, and though neither of them discovered a theory of Progress, they both made contributions to thought which directly contributed to its subsequent appearance." J. BURY, THE IDEA OF PROGRESS: AN INQUIRY INTO ITS ORIGIN AND GROWTH 36 (1920). For a more recent review of the topic *see* Chambers, *The Belief in Progress in Twentieth-Century America,* 19 J. OF THE HISTORY OF IDEAS 197 (1958). Bury's view that the idea of progress is a modern development is questioned in Wagar, *Modern Views of the Origins of the Idea of Progress,* 28 J. OF THE HISTORY OF IDEAS 55 (1967).

3. Becker, *Progress,* 12 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 495 (1934). Becker also discusses the idea of progress in his THE HEAVENLY CITY OF THE EIGHTEENTH CENTURY PHILOSOPHERS (1932). *See also* K. BAKER, CONDORCET: FROM NATURAL PHILOSOPHY TO SOCIAL MATHEMATICS (1976).

our most important product,'' planning, social engineering, and all that. It is this kind of confidence in progress that underlay the law and development movement: a curious mixture of belief in the inevitability of social betterment and in our special ability, as products of American legal education, to hasten and direct the process.[4]

Law Reform.[5] ''Tinkering,'' ''following'' and 'leading'' sum up three kinds of law reform. Tinkering accepts the existing system, seeks to keep it operating, and makes occasional adjustments to improve efficiency — for example, by providing more judges when the judicial backlog seems unmanageable. ''Following'' refers to

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4. The notion of a changing society also raises the possibility of decline, rather than progress, but the prevailing intellectual styles, over the past two centuries or so, have been dominated by optimism. Still, the notion that things are getting steadily and inexorably worse, whether because of forces beyond human control (see discussion of entropy in next paragraph) or because of the villain of the moment — politicians, big corporations, the imperialist powers, industrialization, etc., — persists. For example, the recent statement by the Club of Rome on ''The Limits of Growth'' appeared to advance the hypothesis that what was popularly taken for progress was in fact leading us to catastrophe. D. MEADOWS *et al.*, THE LIMITS OF GROWTH: A REPORT FOR THE CLUB OF ROME'S PROJECT ON THE PREDICAMENT OF MANKIND (1972). Most such criticisms, however, are pessimistic only in a relative way; they do not so much question the idea of progress as they do the validity of certain assumptions about the proper way to achieve progress or the operation of programs that purport to be progressive. They imply that a change of assumptions — different stategy and tactics — would put us back on the progressive path. There are, however, more truly pessimistic philosophies. OSWALD SPENGLER, in THE DECLINE OF THE WEST (1926-28) is an obvious example; the work of Schopenhauer is another. Then there are the millenial sects that preach Armageddon and eventual damnation for most of us, with salvation only for the select few. *See, e.g.* W. WHALEN, ARMAGEDDON AROUND THE CORNER: A REPORT ON JEHOVAH'S WITNESSES (1962). Outside Western thought attitudes we would characterize as fatalism and resignation are more widely held, as are faiths whose principal note is that change, whether progressive or other, is illusion and that things really stay the same: the ''ever-changing many'' are really the ''never-changing one.'' *See e.g.*, D. SUZUKI, OUTLINE OF MAHAYANA BUDDHISM 72-73 (1963). Common to a number of these world-views is an attitude that excludes any note of optimism about temporal social progress.

   There may be a conflict between the idea of progress and the concept of entropy. Even in the narrow context of its origins in thermodynamics the concept of entropy is basically pessimistic, since it posits an inexorable and irreversible decrease in the availability, as distinguished from the quantity, of the energy in any isolated system. When expanded to other fields, for example, to art, information theory, economics, biology, astronomy, and cosmology, it begins to take on the stature of a great and perhaps universally applicable principle. As applied to social dynamics it suggests that each of the various transformations viewed as progress contributes to entropy, and thus to the eventual running down of the system. *See* S. ANGRIST & L. HELPER, ORDER AND CHAOS: LAWS OF ENERGY AND ENTROPY (1967); R. ARNHEIM, ENTROPY AND ART (1971); H. BLUM, TIME'S ARROW AND EVOLUTION (3rd ed. 1968); N. GEOGESCU-ROEGEN, THE ENTROPY LAW AND THE ECONOMIC PROCESS (1971); E. MONTROLL & W. BADGER, INTRODUCTION TO QUANTITATIVE ASPECTS OF SOCIAL PHENOMENA 152-61 (1974); Bork, *Randomness and the Twentieth Century*, 27 ANTIOCH REV. 40 (1967); Whitrow, *Entropy*, in THE ENCYCLOPEDIA OF PHILOSOPHY (1967); Wiener, *Progress and Entropy*, in THE HUMAN USE OF HUMAN BEINGS 41 (1967). For an interesting recent challenge to belief in the irreversibility of entropy *see* Ayzer, *The Arrow of Time*, 233 (6) SCIENTIFIC AMERICAN 56 (December 1975).

5. There is an excellent brief history of law reform in England in the first chapter of J. FARRAR, LAW REFORM AND THE LAW COMMISSION (1974). Francis Bacon figures prominently (with Coke and Matthew Hale) in D. VEALL, THE POPULAR MOVEMENT FOR LAW REFORM 1640-1660 (1970). According to Veall, the movement for law reform in that period, stimulated by Bacon's ideas, failed. It was not until the work of Jeremy Bentham in the early nineteenth century that it was revived but, under Bentham, it was revived with a vengeance: ''The legislative reform movement, as an era in the history of Anglo-American law, is considered to have begun with the publication of Bentham's first book in 1776.'' Pound, *David Dudley Field: An Appraisal*, in DAVID DUDLEY FIELD CENTENARY ESSAYS 3 (1949). For a critical discussion of law reform, with specific relevance to law and development, *see* Friedman, *Law Reform in Historical Perspective*, 13 ST. LOUIS U.L. REV. 351 (1969).

the sort of law reform intended to adjust the legal system to social change — to the rise of a credit economy, for example. "Leading" law reform, on the contrary, uses law to change society. Most people, when they think of law reform, refer to some mixture of all three kinds. This is true of some law and development thinking, but the strongest emphasis has been on *leading* law reform.[6] Law, properly employed, is seen as an instrument of development, not merely a response to it.

Such a view of law reform obviously derives support from the idea of progress; one must envision the possibility of achieving a better society in order to propose specific measures for attaining it. In the law and development context, "development" is a euphemism for progress,[7] and the work of law and development is to lead the way to progress through law reform.

Optimism of this kind is not limited to law and development. It is a necessary premise of much of the work of legislatures, executives, administrative agencies and courts. The amount of leading law reform activity in the West in the past two centuries is enormous. The Constitution of the United States can be seen as a law reform, one that had extraordinary influence, establishing a style of constitution-making later emulated in Latin America and in other parts of the world.[8] The post-revolutionary

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6. The notion that law can lead society in progressive directions is firmly held by some people but has been questioned by others. The argument goes back at least to the Thibaut-Von Savigny debate about German codification in the early 19th century. Thibaut saw codification along rationalist French lines as a way of achieving a number of important social objectives in the Germany of the time. Savigny, while not opposed to eventual codification, thought that the function of codification should be to find, distill, and crystallize into statutory form the historical German law. There is an authoritative summary in F. WIEACKER, PRIVATRECHTSGESCHICHTE DER NEUZEIT 234-38 (1952). Savigny's position was first fully stated in his famous tract: VOM BERUF UNSERER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT (1814), published in translation as OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (1975). *See generally,* on Savigny's thought and influence, J. STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 94-118 (1966).

7. That "development" is a progressive notion appears obvious, and we define development as "progressive social change," taking "social" in its broadest sense. There is a rival conception, to which one might apply the term "legal development," that is arguably inconsistent with this social emphasis. It treats legal systems, independently of their social contexts, as more or less developed, falling at different points along a scale of legal development. However, even this approach is more convincing if one relates the legal system to society, as do Galanter, *The Modernization of Law,* in MODERNIZATION 15 (M. Weiner ed. 1966); Schwartz & Miller, *Legal Evolution and Societal Complexity,* 70 AM. J. OF SOC. 159 (1964); Udy, Jr., *Comment,* 70 *id.* 625 (1964); *Reply,* 70 *id.* 627 (1964).

8. The United States Constitution and others like it have significance far transcending their importance as documents in the history of law reform. They are also political and social documents, and in some cases their significance as legal instruments may be relatively slight. However, in the case of the United States Constitution, it would be difficult to question its significance as an example of fundamental law reform, particularly in the field of public law. C. FRIEDRICH, THE IMPACT OF AMERICAN CONSTITUTIONALISM ABROAD (1967) is the best treatment of this topic. For other discussions *see* I. DUCHACEK, RIGHTS AND LIBERTIES IN THE WORLD TODAY: CONSTITUTIONAL PROMISE AND REALITY (1973); C. MCILWAIN, CONSTITUTIONALISM ANCIENT AND MODERN (1947); E. MCWHINNEY, FEDERAL CONSTITUTION-MAKING FOR A MULTINATIONAL WORLD (1966).

legislation in France, culminating in the great French codes;[9] the law reform movement in England in the early nineteenth century; the institutionalization of law reform by establishment of law revision commissions in New York, California, and other states and the Law Commission in England; all these are examples of significant law reform activity. There has been a staggering increase in the total volume of reformist legislation and in the reform activity of courts and administrative agencies. We live in a time of continuous, extensive, some might say hyperactive, law reform. Law and development is merely a special application of this familiar and pervasive notion. It is based on the same assumptions, requires the same leap of faith, and is subject to the same doubts and reservations.[10]

Law and Society. The place of law and development in intellectual history is further

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9. The relation of codification to law reform is complex. Much codification has been undertaken with the intention merely to clarify and simplify the law rather than to reform society. This was true, for example, of the bulk of the great work of consolidation, clarification and simplification that took place under Justinian and produced the *Corpus Juris Civilis*. Justinian did not seek primarily to relate law to progress; indeed he regarded much of the law of his own time and the centuries immediately preceding it as overelaborate, conflicting, confusing, buried under commentaries, and inaccessible. He sought to find, restore and restate in compact form the law of an earlier and purer time — the classical age of Roman law — and to excise the inferior later law. *See* J. MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 8-9 (1969); B. NICHOLAS, AN INTRODUCTION TO ROMAN LAW 38-45 (1962). Napoleon wanted his civil code to be a kind of popular law book that could be consulted by the citizen who wished to know his rights. J. MERRYMAN, *id*. 29-30.

   Although the urge to make the law clear and simple through codification is ordinarily expressed by non-lawyers, professional lawyers are not immune to it, as is shown by the discussions during creation of the American Law Institute and the Restatement of the Law. *See* REPORT OF THE COMMITTEE ON THE ESTABLISHMENT OF A PERMANENT ORGANIZATION FOR IMPROVEMENT OF THE LAW PROPOSING THE ESTABLISHMENT OF AN AMERICAN LAW INSTITUTE (1923); ACADEMY OF POLITICAL SCIENCE, 10 PROCEEDINGS no. 3 (July 1923); AMERICAN LAW INSTITUTE, 1 PROCEEDINGS 6-11 (1923). There was no intention to change the law in any way, either to catch up with a changing society or to lead it. The objective was to impose order. Out of the welter of confusing case law, as the result of careful study by thoughtful scholars, should emerge a body of principles of law that could be clearly and coherently stated. The reaction of the American legal realists to the Restatement was in large part a reaction against this kind of thinking. For a brief description of this episode *see* Merryman, *The Authority of Authority*, 6 STAN. L. REV. 613, 629-34 (1954).

   The French codification following the Revolution went far beyond mere tinkering with existing law. The structure of society had been radically changed; new ideas about man and the state demanded a new legality, and the codes were the medium for promulgation of the new body of law. J. MERRYMAN, *supra*, at 28-31. In Germany, after unification, there was a different emphasis. A new nation had been formed from previously separate and independent states, and unification of the law was a major concern. The *Bürgerliches Gesetzbuch* was not a revolutionary document in the same way as the French Civil Code. The BGB was a following, rather than a leading law reform. It was consciously so, as a consequence of the prevalence of Savigny's ideas. *See* J. MERRYMAN, *supra*, at 31-33. The Latin American codifications on achieving independence in the nineteenth century tended to be, like the French, revolutionary, leading law reforms.

10. We do not suggest that *all* law-making activity is reformist, in the leading sense. However, a very large proportion of it does proceed on the assumption that law can and should alter social behavior — i.e. that progress can be induced through law reform. The point is amplified below in discussing "social engineering through law."

defined by its relationship to law and society.[11] There was substantial interest in law and society early in the nineteenth century, and it is probably no accident that the field is little younger than, although roughly contemporaneous with, the law reform movement. Conscious law reform requires that certain assumptions be made, consciously or unconsciously, about the relations between law and society. The most common and basic assumption is that the legal system is a part or aspect of society; events that occur outside the legal system may have legal consequences, and events that occur within the legal system may have social consequences.[12]

These propositions seem so obvious to us now that it hardly seems worthwhile to restate them. They are, however, relatively modern propositions. What is even more modern is the attempt to study the relationships between law and society in a comprehensive and systematic way, whether for theoretical or scientific purposes, on the one hand, or in pursuit of practical objectives, on the other. The study of law in relation to society is hardly older than the late nineteenth century, and its principal development has come even later. One major focus of study in the field of law and society is on the relationship between law and social change. Development can be thought of as a type of social change — more particularly, as suggested above, *progressive* social change. From this point of view, law and development is merely a subtopic of law and society.

Social Engineering through Law. Sociological jurisprudence in the United States relates the legal system to the recognition and protection of social interests — to claims made by or on behalf of people, groups and institutions in society.[13] This kind of sociological jurisprudence fills a gap left by the decline of natural law; it provides a guide to the right content and right administration of the law. The legislator, the administrator and the judge are to be directed in the performance of their activities by the play of social interests in the problem at hand. A proposed statute that advances a minor social interest at the expense of a major one should not be enacted. A law should be administered, interpreted, and applied in such a way as to advance the social objectives it expresses or implies. This school of thought calls for the study of the law in action. If we are to make and apply law in such a way as to recognize and advance specified social interests we must know how to bring about desired social consequences through law. The study of the law in action provides the empirical foundation on which to base such legal action.

Accordingly, sociological jurisprudence envisions two kinds of activity: identification and evaluation of the social interests at play in the law and the elucidation of principles to advance such interests through legal means. The latter of these is often

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11. The relationship of law and development to the study of law and society has been observed by a number of writers. *See, e.g.* Friedman, *On Legal Development*, 24 RUTGERS L. REV. 11(1969); Friedman, *Legal Culture and Social Development*, 4 LAW & SOC'Y REV. 29 (1969); Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1 (1972); Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720.

12. For an introduction to the law and society field with a useful bibliography *see* L. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE (1975).

13. The leading figure is Roscoe Pound. *See*, e.g., Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489 (1912). For an introduction to sociological jurisprudence *see* J. STONE, THE PROVINCE AND FUNCTION OF LAW 391 *ff.* (1946).