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Legal Culture and Expectations of Justice

Der Begriff der »legal culture« (Meinungen, Einstellungen und Wertvorstellungen über Recht innerhalb einer bestimmten Bevölkerung) nimmt eine zentrale Stellung in der Rechtssoziologie ein. Die »legal culture« gilt als das Medium, durch welches die Einflüsse des sozialen Wandels das Rechtssystem durchdringen. Die »legal culture« hat sich im letzten Jahrhundert grundsätzlich gewandelt, so wie sich im allgemeinen auch die Lebensbedingungen gewandelt haben. Am Anfang des 19. Jahrhunderts war die Bevölkerung zum Beispiel physischen und wirtschaftlichen Katastrophen hilflos ausgeliefert. Parallel dazu erwartete man auch nicht viel von seiten des Rechtssystems. Die erstaunlichen Erfolge der Naturwissenschaften und der Technologie haben diese Ungewißheiten und Hilflosigkeiten des Lebens weitgehend reduziert; dadurch wurden soziale Prozesse in Gang gesetzt, die am Ende eine ganz neue »legal culture« produzierten, in der die Bevölkerung jetzt sehr hohe Erwartungen an die Gerechtigkeit von Recht und Staat im allgemeinen hegt. Die zeitgenössische Situation des Rechtssystems ist in der »legal culture« sehr tief verwurzelt; und Reformvorschläge müssen dies in Betracht ziehen, sonst werden sie unwirksam.

The subject of this essay is legal culture and its transformations. I should begin, then, by defining what I mean by legal culture. Very simply, legal culture means the ideas, opinions, values, and attitudes about law, that people carry about with them in their heads. It is possible to talk about the legal culture of Germans in general, or of Berliners, or of elderly people in Berlin, or of Gastarbeiter, or of any class, group, or community whatever.

Legal culture is, or ought to be, a central concept in the sociology of law. It helps to supply the missing middle term in the basic syllogism of that field. Social scientists who study law start from the premise, so obvious as to be banal, that outside forces - political, economic, intellectual, social - have a decisive impact on the legal system. To understand the legal system, then, scholars must understand what is going on in the world outside. One has to draw some connection, at least, between the Industrial Revolution, or the invention of the computer, or the germ theory of medicine, and the working legal system. The connections are plausible: but exactly what is the mechanism? How do we move from the invention of penicillin, or the development

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of modern banking, to specific rules of law, or specific kinds of legal behavior?

Here is where the concept of legal culture enters in. The basic metaphor of the sociology of law treats the legal system as a kind of processing machine. It takes in raw material from outside, grinds it up into legally usable bits, and cranks out a product at the other end. The product is legal behavior: laws, decisions, acts of administrative agencies. (The metaphor of the machine is far from perfect: it makes us think of a rigid object, bolted down in place; the law machine is in fact much more changeable and plastic).

Why do people in society make the choices they make? How do they decide what to do about the law-machine? Their feelings about the machine can be crucial: what they know about it, what they expect it to do for them or to them, and so on - their attitudes and expectations with regard to the legal system. So we can reformulate the basic proposition of the social study of law in this way: social change leads to legal change, but by means of the legal culture. Social change leads to changes in the way people think about law, what they expect from it, how they react to it. Their behavior, in turn, is the immediate source of legal change; their attitudes determine how they relate to the system, the use they make of it, the way they program it, the material they feed it, and so on.

When I say »people«, or »society«, I am, of course, not thinking of the population as a whole. I make no naive assumption about some kind of mystical, general legal culture, residing in »the people« or »society« as such. There is no assumption about a general legal consciousness, still less of an inborn »sense of justice«. »People« or »society« are simply short-hand expressions, so that every time one talks about legal culture it is not necessary to repeat, over and over, that society is stratified; that people and groups differ in wealth, power, talent, and behavior; that what the legal system produces depends on what is put into it in the first place. It responds, in short, to pressure, to the hand on the switch. Some people *can* exert more pressure than others, some *do* exert more than others. Some people matter a lot, some only a little. This is, alas, true of every society. It is, of course, a different group or a different constellation of interests in every period and in every society. What beggars think about the legal system, and how they behave toward it, no doubt matters far less in most modern countries than what lawyers, big businessmen, doctors, or politicians think and do. This goes without saying.

It requires no great leap of imagination to guess that legal culture must have fundamentally altered in the last century or so in the Western countries. After all, fundamental changes have taken place in society itself. But the exact form of the changes, and the reasons for the changes in legal culture, are not always obvious.

Recently, the German press has reported on problems of the Bundesverfassungsgericht, the German constitutional court. The number of constitutional complaints is rising rapidly. The judges see no solution to the problem of overload, except to limit their own jurisdiction.

Why are there more and more complaints before the constitutional court? The situation in the constitutional court reflects, objectively speaking, something afoot in German legal culture. More people are conscious of legal »rights«; more are willing to take steps to translate their attitudes into legal behavior. The underlying phenomenon is not a change in law as such, though of course it leads to legal change. The reality underneath is in the realm of legal culture. What is this feeling that is at work here? And where did it come from?

I will try to answer that question, though largely in terms of American society; the general themes apply, I believe, to other nations of the West as well. To begin with, let us picture life in, say, 1820, somewhere in the United States - perhaps on a small farm in Massachusetts. One striking aspect of reality would be one's sheer helplessness in the face of disaster. There were no cures or even treatments for most of the dreaded sicknesses that periodically swept through the population. Even in this healthy and prosperous country, women died by thousands in childbirth. Parents had to make their peace, somehow, with the death of small children. Grown men, too, died quickly and suddenly of infections and other diseases. People lived out their lives in the shadow of unexpected death.

There was uncertainty, too, in the realm of the economy. Here too people lived in the shadow of catastrophe - even in the richest of countries. Most people lived and worked on farms. They were typically in debt, and they depended on good crops and fair weather for their living. But weather and crops sometimes failed; banks collapsed; debtors did not pay; creditors turned desperate; economic calamity was always around the corner. Factories began to dot the countryside in the 19th century. Their workers had no job security. There were no pensions, public or private. Life insurance was almost unknown, and fire insurance was common only among businessmen. There was only a rudimentary system of welfare. Of course, there was charity; there were churches; there were friends and relatives. And there were fat years as well as lean years - perhaps more fat than lean, overall. Still, in the early years of the industrial transformation, farmers and workers had to reckon with grave economic uncertainty, along with the other uncertainties and dangers inherent in the human condition. Human beings had to reckon with the *chance* of sudden disaster. The facts of life were reflected, necessarily, in legal culture as well. In life, there was no general expectation of justice or fairness; no general expectation that somebody, or some agency, would step forward and help out. The same was true of law.

My thesis is simply this: since the 19th century there has been a major revolution in legal culture, as well as in the legal order. The world has been transformed - to begin with, by new technology. To take one example, a real science of medicine has developed - a science which can actually cure diseases. Plague, infant mortality, death in childbirth - these are simply no longer important problems in the modern Western countries. Technology laid the basis, too, for economic transformation. Science and technology held out the hope, or the promise, that humanity could control powers and forces that had been beyond it before. This was first and foremost true of the physical world; later came promises about the social and economic world. Some were false promises; but they nonetheless inspired considerable belief. Thus a certain kind of life-uncertainty, the sense of exposure to sudden calamity, began slowly to ebb.

Slowly, too, expectations were transformed. What was impossible became possible; what was blind fate became the object of human contrivance; and the culture of expectations moved from hopes and demands for bodily security, to more complex hopes and demands that were displaced onto law or the state: hopes and demands for collective control. At the end of the process, in modem times, people have come to expect a higher level of justice - social justice, life justice.

Of course, life is still unfair, in all sorts of ways; there are still massive uncertainties - disease, accidents, economic reverse. The 19th century, for all its sins, did not have hydrogen bombs and acid rain. It had no way to kill off the whole human race. Uncertainty is still very much with us, and so is the sense and reality of cosmic injustice. But in the little orbits in which most people in Western countries live and work, there can be no doubt that technology, and its social consequences, have had an enormous impact on day-to-day life. People still suffer catastrophe. What is notably different about modern legal culture is what these victims afterwards expect. They expect to get something in return. They expect help. They expect amelioration. They expect compensation, in short. And more and more, broad segments of the population get it.

To a certain extent, the point is obvious; it is the very definition of the modern welfare state. But where did the welfare state come from? And how do we explain what might be called the private welfare state - the incredible expansion of legal liability *outside* the boundaries of taxsupported programs? Why has private law moved in the same direction as public law? The two streams of law do not necessarily run parallel. In socialist countries, no such development has taken place; rather, there is a kind of stagnation in private liability; social legislation has essentially replaced it. This is not the case in the West.

My argument, briefly put, is this: the welfare state is an effect as well as a

cause of modern legal culture. The reduction of uncertainty, as it gradually took place, led to a spiral of demands on the state; the legal system responded, and in this way more expectations were evoked. To repeat: in the beginning of the period, there was no general expectation of justice, neither from life nor from law; at the end, in present times, precisely this kind of general expectation has taken hold of the population. It colors all our attitudes, and stamps the whole legal system with its influence.

The law of personal injury - of accidents - can serve as an apt illustration. Before the machine age, the law of personal injury was rather insignificant. Personal injuries were relatively rare as grounds for lawsuits. The industrial age was, for the first time, an age of powerful, dangerous instruments; and the railroad engine was the most dangerous and destructive of all.

In the first half of the 19th century, legal doctrine on the subject of personal injury developed very rapidly. This branch of law became extremely complicated, full of bewildering technical details. The main point of it can be quickly stated, however. A web of doctrines grew up in the United States that were tilted rather sharply toward the side of the railroads (and industry in general). Victims and their families, who tried to recover compensation for injury or death, faced high and tricky legal barriers. It was hard for a passenger to collect money from a railroad company; even harder for an injured workman. Oddly enough, if the victim died, his family's chances of recovery were smaller yet.

In brief, workers or passengers hurt in accidents often collected no money at all. Few got as far as the courtroom. If their case went to a jury, there was a good chance the jury would return a favorable verdict. But even winners did not collect much money. Most American lawyers firmly believe that juries are, and have always been, exceedingly generous with other people's money. In fact, this does not seem to be true.

Why was the law, in theory and practice, so callous? There is an obvious *economic* explanation. In the United States, the policy of encouraging enterprise was genuinely popular. If encouraging railroads required freeing the companies from the burden of lawsuits, then so be it. On a number of accounts, it is not surprising that the law in a capitalist state should show little sympathy for victims of accidents.

But the general economic argument leaves some questions unanswered. One might expect, for example, less harshness and cruelty in American law than in English or continental law. America was, after all, a more egalitarian society. And the behavior of juries is something of a puzzle. The men who sat on juries were not rich capitalists. They were drawn, by and large, from the lower middle class; they were carpenters, farmers, smallholders. Why were *they* so callous at times? Why did they harden their hearts against widows and orphans?

At least part of the answer lies in the legal culture. There was no general expectation of justice. Men, women, and children got sick and died; they suffered accidents; calamities were a normal concomitant of life. And there was never (or hardly ever) a *deus ex machina.* In other words, only the *exceptional* case got, or even deserved, some kind of compensation. There was, I suggest, an unconscious attitude, which conditions of life itself helped create; and when this attitude joined forces with general attitudes toward economic growth, the result was a powerful culture of non-liability - a folk-theory of justice, a folk-conception of justice, that was restrictive and limited. It was a society where only the few collected compensation; the many were left where blind fate and the Gods had put them.

Over the years, the old structure of accident law has been changed, root and branch. Very little is left of the tough body of law that flourished a century ago. Key changes took place *outside* the law - economic changes, social changes (including the growth of insurance), technological changes. Nineteenth-century cases were harsh and unyielding, because that was the texture of life itself. The courts, and everybody else, including members of juries, lived in a world of calamity. They fully expected someone to suffer when an accident happened. Either the loss would fall on the workman and his family, or on the company. Either way, the result was calamity. Better to spare the company - better, that is, for society as a whole.

Expectations today, rightly or wrongly, have a wholly different flavor. Victims believe in, and expect, compensation. Somehow society must take responsibility; in any event risks have been foreseen and the consequences spread, through private or social insurance. Reduction of uncertainty in one area of life leads people to expect less uncertainty in other areas; this leads, in the end, to a culture of *high* expectations; which in turn transforms the body and soul of the law. A subtle form of mutual influence turned the law of personal injury upside-down. Insurance, and the new rules of tort law, made recovery much more likely. As a result, people came to *expect* compensation; they felt they had a right to some form of money payment. The source of the compensation became almost irrelevant; it might come from an insurance company, or from the tortfeasor, or from the government. It hardly mattered. The crucial point was, that somebody would pay.

And the mentality spread. In the 19th century, it was almost unheard of for a patient to sue a doctor. There was no *theoretical* reason why a doctor should not pay for his mistakes; but there were practically speaking no cases. All this has dramatically changed: in the United States at least, lawsuits against doctors, nurses, hospitals are an everyday affair - and, for that matter, lawsuits against lawyers, accountants, even teachers and preachers.

So far, I have been mostly talking about the right to collect money in what European legal scholars like to call »private law«. The term is avoided in the

common law countries; and, in any event, what continental scholars label private and public law are in fact hopelessly intertwined in every country. A person who is hurt in an accident may, to be sure, have the right to sue somebody; but in the welfare state, the victim or his family will almost certainly have additional rights, which the government provides or guarantees. The government or insurance will take care of medical costs; or some other form of compensation will become available. Obviously, there are tremendous differences from country to country, but the basic commitments are surprisingly similar.

The welfare state is essentially a product of the last hundred years. The state in the nineteenth century was small, and it was cheap. Hobbes described the state as a *Leviathan;* but the 19th century state, to us at least, looks more like a minnow than a whale. What kept the state from getting larger, from doing more and more, as its potential wealth and power grew? One obvious factor was ideology: the cult of *laissezfaire.* For the rich and the powerful, this theory had obvious advantages. It glorified the free market, and it kept the government from meddling in the affairs of commerce and trade.

But the United States is an interesting case here too. From the early 19th century on, in most Northern states, all adult men had the right to vote; most families owned at least a small piece of land, and the lines between classes were never as sharply drawn as they were in the old country. There was no king, no nobility, no established church. And, at first, there were not many genuine capitalists of the late 19th century sort. Landless factory labor was not a significant political force until the last half of the nineteenth century. In the first half of the century, power was greatly decentralized; and a good deal of this power was in the hands of small farmers and minor merchants.

What controlled the level of demands on government? Why did farmers and workers not ask for riiore from the state? I would suggest that legal culture played a part: not ideology; not ideas about what the state should and should not do, but about what it *could* do - about its ability to control events and circumstances.

The argument is this: people had a high expectation of uncertainty, and a low expectation of justice in private affairs, and from life in general. They transferred their expectations to government as well. They believed, of course, in the just society; and they put pressure on the government, to provide this just society. But people defined a just society differently in 1800, or 1850, from the way they define it today. The voting public expected from the state a certain amount of physical protection; people wanted the state to deliver the mail; they expected it to help finance roads, canals, and railroads; they expected an honest system of courts; and not much else. They did not

think other things were *possible*. And they got what they asked for, more or less.

But the 19th century was in the middle of a revolutionary process. Science and technology were tearing down the old world and putting up a new one. There was a tremendous increase in power to control the forces of nature. Scientific knowledge, technical knowledge, is power; but it is power of a particular kind: it is collective power. Science and technology mean that society - through the state - can do more, can exert more control, than without this knowledge. Nobody asked the government in 1800 to do much about disease. There was nothing much it *could* do. But the germ theory, and the rise of modern medicine, changed the situation drastically. When nobody knew how to cure measles or polio; when penicillin and insulin had not yet been discovered, when there were no liver transplants and dialysis machines, there was of course no demand on the state to pay for drugs, medicine, doctors, vaccinations, operations, at least for people who could not pay for these themselves.

Technology does not create social demand in itself; it lays the foundation. The process may go roughly like this: science (let us say) discovers a way to cure or control some disease. The victims now, for the first time, have hope, but also for the first time there are conditions that give rise to a social demand. Destiny is no longer controlled by blind fate, or by the Gods. Destiny is in a doctor's hands, or in a bottle of medicine. If the patient dies, it is not the Gods who sentenced him to death, but rather a concrete form of earthly injustice: some institutional failure. And *who* can guarantee that the bottle of medicine, which is now defined as the precondition of justice, will be actually delivered? Society is more and more complex; people are dependent on strangers, the unseen hands that mass-produce food and clothing; the unknown people who drive busses and trains, or who build bridges and elevators; the distant companies who make medicine and sell it. Private arrangements and markets cannot guarantee safety and efficiency; they cannot guarantee delivery of the products of modern technology, in proper form. Only through the generalized third-party, the state - or in other words, the law - is there leverage or power, to make the machinery move. At least, this is the popular conception.

As time goes on, old uncertainties and impossibilities tend to wither away. Infectious disease is more or less tamed. Social inventions guarantee an economic minimum. The articulate public - which grows larger and larger in Western countries - demands ever more public action. A cycle begins. The state grows in size, and takes on new tasks. Thus the public comes to expect still more from the state. At each stage, justice gets redefined, becomes a broader and more general concept. It is applied to areas of life where it never penetrated before. In the middle ages, when the Black Death

swept over Europe, people flocked to the churches to pray. They expected nothing from their princes, kings, and dukes; the princes, kings, and dukes had nothing to give them. The same was true in the face of earthquakes, floods, and fires. Today, all events and situations, even so-called »acts of God«, involve, as cause or consequence, arrangements of law, for better or for worse. Law cannot prevent an earthquake, of course; but it can lay down rules about the construction of schoolhouses and public buildings; it can require cities to draw up emergency plans. Government is also responsible for disaster relief, for medical care of victims, and so on. A public disaster calls forth a public response. The same is true of a private disaster in this modern age. An American obstetrician, disgusted with malpractice cases, put it this way: in the past, if a baby was born imperfect, it was »an act of God. Today, there are no more acts of God. They expect you should have been able to do something.« *(Intl Herald Tribune*, Feb. 13, 1985, p. 3).

In short, there is a new climate of opinion, a deep culture, that generates new legal principles out of social norms. In modern societies, and in their legal systems, there is, for example, an implicit social principle or norm that goes something like this: no calamity shall be so great, so overwhelming, that it utterly and irrevocably ruins a person's life. Of course such calamities do occur; but there must also be at least some kind of compensation or provision for the victims. There are exceptions to this social principle - for example, for people who are monstrously evil, mass-murderers, or the like. But even the criminal justice system shies away from ruining a person's life irrevocably; it is full of second chances. Leniency for first offenders is written into the criminal law. The criminal record of a juvenile delinquent is sealed and wiped out when he reaches 18. Indeed, the legal system as a whole is a system of second chances - the law of bankruptcy, for example.

I have used the phrase, »general expectation of justice.« It contains the difficult and complex term »justice«. Philosophers have argued over its meaning since antiquity. In all Western languages, »justice« has many meanings, and is drenched with ambiguities. Legal culture reflects these ambiguities. The popular mind mixes together a number of phenomena, subsuming them under the folk concept of justice. The phrase, »general expectation of justice« refers to »justice« in the popular sense - broad, ambiguous, complicated. A fair trial is justice; but justice is also getting a fair wage, or getting a pension check on time. It is also justice to be able to live in peace, to develop and carry on one's life, without economic or social disaster, without discrimination or oppression, and without calamity, without earthquakes, fire and flood, without plague, without criminal attack. The opposite of all of this is injustice - human, legal, cosmic, or bureaucratic injustice.

In modern legal culture, all forms of justice are jumbled together in

people's minds, and the lines between them become vague and indistinct. This is why the modern American - and, more and more, the modern German or Englishman, I believe - feels that all forms of injustice should give rise to legal claims, or legal intervention, in court or otherwise. The boundaries between what is appropriate to law, and what is not, blur to the point where they vanish altogether, at least in the popular mind.

This does not mean, of course, that there is no separate legal domain, a little world in which legal technicality is king. Obviously law and legalism exist; and in growing amounts. The job of translating and transforming the stuff of life - and popular notions of justice - into legal terms is a difficult one, as always. Nor does the general expectation of justice necessarily produce a »litigation explosion«, or a »flood of norms«, or the like. The point made here is not a point about *quantities* of law. That is a separate, and difficult, subject.

I have tried to sketch out, in the briefest possible form, an argument about changing legal culture. I tried to show the development of what I called the general expectation of justice. The story was told in a descriptive, not a normative way. Whether the changes go too far, or not far enough, I did not say. There is controversy about every aspect of modern justice. Justice in its various forms can be expensive. It is a luxury good. This has become fairly obvious with regard to some of the arrangements in the welfare state. Programs of social benefit cost money, and lots of it. There is debate about whether society, in the current economic age, can afford to pay the price.

There are other costs as well. It follows logically from the modern conception of justice, in Western countries, that there must always be a way to cut down authority to size. The professor can no longer be an absolute dictator, within his domain. Nor can the legislator, the bureaucrat, the prison warden, the Army colonel. The state provides more than welfare; citizens, more and more, have the right to protest against actions of government, through regular procedures. There is at least *some* sort of recourse, some means of protest and argument, with respect to any action taken by government which affects the subject's life, liberty, property, health, or even his pure sense of right. One result is the incredible growth of constitutional law. This is most striking, of course, in the United States; but, as we saw, something similar is happening in Germany as well. Most litigants lose; but a few of them win; each winner upsets some plan, law, order, or arrangement fostered or devised by the state. Perhaps some regulation is swept aside; or a new highway does not get built; or an airport plan goes back on the shelf; or the state is forced to take action on toxic waste; or raise or lower welfare benefits; or loosen or eliminate security measures. Government must, in our times, reckon with the chance of legal challenge, in any controversial

instance. This is a new situation; and it is costly, in terms of delay, in terms of obstruction. I think it is worth the price, overall. Not everyone agrees.

How does the general expectation ofjustice affect order and discipline in society? To put it another way, does the new legal culture contribute to social unrest? New expectations certainly encourage the use of law. People expect justice from courts, and from government; they do not, of course, always get justice, at least not as they define it. There are plenty of losers. But in some obscure way, most losers seem to accept their legal outcomes. With significant exceptions, there are few signs of overt revolt, in modern Western states.

What *does* seem clear is that people expect a kind of loser's justice. They expect not to be punished for trying. In most countries, past or present, a person foolish enough to protest against injustice, usually suffered a second catastrophe. This was most obviously true of political losers. Rebels and protesters who lost their cause also lost their lives. Nowadays, it is not fatal to lose an election; you keep your profession, your social status, your family; best of all, you keep your life. If you sue your landlord for failing to give heat, and lose, you expect to keep the apartment. In most times, and places, and systems, this could not be taken for granted. The price of asserting or claiming rights was high - sometimes prohibitive.

Loser's justice encourages, of course, a kind of claims-consciousness, a kind of feistiness, a kind of individualism. Most people, after all, are not heroes by nature. They like peace and security. The modern protestor - and here I mean not only people who riot in the streets, but also people who sue their bosses, or criticize their governments, or try to change institutions - are unconsciously responding to, and reflecting, modern legal culture, that is, the reduction of uncertainty, and the general expectation ofjustice. Their actions presuppose the welfare state, the social safety net; they presuppose general justice, and also loser's justice, the right to protest, to make a certain amount of trouble, to kick against the traces.

Of course there are things one may not do, and it is easy to go too far. Social disapproval can still inflict a kind of cold, hard punishment; the state can itself be vengeful and despotic, even in the best of countries. But in relative terms, and compared to the past, the protestor, the claimant, the rebel, all face far less danger. This may even be true at the level of social disapproval. Society is so big, so pluralistic, that nonconformists can find some niche, some subgroup, some normative home, more easily than in the past. The modern legal system, then, acts as a sort of base camp, which a mountain climber uses for refuge and safety, before and after the assault on some high and difficult peak. The general expectation of justice thus encourages a certain boldness in asserting claims, which affects at least a few people in society. Hence the (apparent) »litigiousness«, the claims-con-

sciousness, the »excessive« use of law, and of mild social protest, which observers claim to see in so many societies.

If my argument is basically right, then the causes of legal transformation lie deep; and the consequences are far-reaching. In many countries, there are complaints about a (perhaps mythical) litigation explosion. There is endless discussion about the sicknesses and problems which result from the »overuse« of law. The problems and pathologies are certainly real. But the critics fail to come to grips with the roots of modern law. They ignore legal culture, and the general expectation of justice. They see things that strike them as wrong; they suggest technical or »legal« solutions. But merely technical, or »legal«, or structural »solutions« are unlikely to have much impact. They do not address the underlying issue. They do not flow from a grasp of the underlying phenomenon. They ignore the deep structure of modem legal culture. Legal culture links the community with its working legal arrangements. It is a strong, flowing current. One can swim with it or against it, but to ignore it means failure in response or reform.