

Mauro Grondona

The Italian Academy at Columbia University

Alexander Pekelis: The Law, the State, and the Individual

-Abstract

- *A Biographical Sketch*

Alexander Haim Pekelis was born in Odessa in 1902.

In 1920 he escaped the Russian Revolution, moving first to Germany (Leipzig), then, in 1921, to Austria (Vienna), and finally, in 1924, to Italy (Florence and Rome, 1924-1938).

His graduate thesis (1928) was published two years later under the title *Il diritto come volontà costante* ("The Law as a Constant Will").

In the early 1930s he was appointed as *Libero Docente* (professorship, non-tenured) of Philosophy of Law at the University of Rome, where he taught until 1938.

In 1938, because of the Fascist Racial Laws, he fled Italy, and in 1941, after three years spent in Paris as an attorney, he came to the United States as a refugee.

In 1941, his first year in New York City, he was appointed professor of Sociology at the New School for Social Research, and graduated in law from Columbia School of Law.

In 1945 he was appointed Chief Consultant to the Commission on Law and Social Action of the America Jewish Congress.

On December 28, 1946, he died in an airplane accident near Shannon Airport, in Ireland.

- *Works of Pekelis*

Pekelis is the author of one book and several essays:

- *Il diritto come volontà costante* ["The Law as a Constant Will"], Padua: Cedam, 1930;
- *Saggio sui rapporti tra diritto e morale* ["Essay on Morality and the Law"], Padua: Cedam, 1932;
- *Azione* ["Legal Action"], in *Nuovo Digesto Italiano*, Turin: UTET, 1937;
- *Law and Social Action – Select Essays of Alexander H. Pekelis*, edited by Milton R. Konvitz, Ithaca: Cornell Univ. Press, 1950.

- *Works on Pekelis*

Apart from a number of reviews of his *Il diritto* and his posthumous *Law and Social Action*, five critical analyses of Pekelis' idea of law and legal action exist:

- Alessandro Levi, *Il diritto (obbiettivo) come volontà costante (dello Stato)*, in *Temi Emiliana*, 1931, 41ff.;
- Benedetto Croce, *Conversazioni Critiche – Serie Quinta*, Bari: Laterza, 1939, at 283-286;

- Giovanni Tarello, *Quattro buoni giuristi per una cattiva azione*, in *Materiali per una storia della cultura giuridica*, Vol. VII, 1977, 147ff.;
- Angelo Dondi, *Una pagina di Pekelis rivisitata*, in *Materiali per una storia della cultura giuridica*, Vol. XII, 1982, 131ff.;
- Edward Hicks, *Theoreticians: Questions Left Open*, in Carol Weisbrod (ed.), *Cultural Differences and the State*, Princeton and Oxford: Princeton Univ. Press, 2002, 101ff.

See also:

i) Carla Pekelis [A. Pekelis' wife], *La mia versione dei fatti*, Palermo: Sellerio Editore, 1996 [Engl. Trans. *My Version of the Facts*, Evanston (IL): Marlboro Press and Northwestern University Press, 2005];

ii) M. Giuliani, *Da Odessa a Firenze: Alexander Pekelis (1902-1946), ebreo russo emigrato in Italia*, in *Amicizia Ebraico-Cristiana*, Nuova Serie, XXXIV, 3-4 Luglio-Dicembre 1999, 113ff.

M. Mastrogregori, *Il Caso Pekelis – Croce, Russo, Calamandrei e la protezione degli studiosi ebrei nell'autunno 1938*, in *Storiografia*, Vol. 6, 2002, 127ff.

- *Pekelis and the Law: The Italian Years (1930-1937) - The Action of the State*
- *Introductory*

The main topics on which Pekelis most contributed during his Italian scholarly years (1930-1938) could be summarized as follows:

- The role of the State as the main source of the law (positive law);
 - The relations (if any) between law and morality;
 - The meaning (both as strictly legal as well as socio-political) of the legal and formal act starting the civil process -- and in this sense a legal action [“azione processuale”].
- *Pekelis and the Anti-Formalist Italian Movement*

In Italy in the 1920s-1940s, a number of young scholars (notably: Max Ascoli, 1898-1978; Alexander Pekelis, 1902-1946; Tullio Ascarelli, 1903-1959; Gino Gorla, 1906-1992; and Bruno Leoni, 1913-1967), strongly influenced by Benedetto Croce and his anti-positivistic doctrine, stressed the idea of the creative (but not unbounded) nature of the interpretation of the law.

Nevertheless, it must be pointed out that Croce was a strong opponent of the so called “Scuola del diritto libero” -- having its “noble ancestor” in the German *Freirechtsschule*.

Critiques addressed by Croce towards legal formalism (here intended in an extremely broad sense) have their core in the critique of the law as a philosophical realm; in contrast, Croce argues the law could be studied only from an empirical and pragmatic point of view.

This is a good statement, because it avoids certain excesses focused on totally-free judicial legal reasoning, but contradicts as well the assumption of legal system as a logical system.

It is a matter of fact that legal reasoning faces to logical rules (the rules governing the use of legal arguments), but it is undeniable that the use of juridical logic obeys to political more than logic claims.

In a more general sense, the approach to the law shared by these academics was:

- Anti-formalistic, in the sense that the law was not the reign of the pure logic, because it is strictly interconnected with economics, and thus the meaning of the legal rule (the norm) is related to its interpretation by the judge. The interpretation being not merely a declaration of the meaning of the law (which *per se* does not exist), but a creative act giving a certain meaning to legal rules (as an *ex post* outcome), the role played by interpreters -- both scholars and judges -- is the very core of the law enforcement, as a direct consequence of the interpretation;
- Anti-conceptualistic, in the sense that the law has to be intended as a body of rules regulating the economic and social needs of the society. Along this path, indeed, the jurist does not have a dogmatic role as theorist of the legal system, because he assumes the more complex role of social engineer who puts in order an open society, in the sense of a dynamic society.

From the specific anti-formalistic but Crocian point of view, Pekelis criticizes the “Scuola del diritto libero”: starting from the observation that law are often imperfect, it appeals to the freedom of judging. But -- writes Pekelis -- the relinquishment of every order, depending on the lack of a perfect order, is a weakness which will be soon regretted: anyone who does not want to be subjected to the will of the law, is going to be the victim of a lot of abuses.

However, Pekelis, who is an anti-positivistic jurist (this is a point which will require a more thorough analysis because of the complexity of the Pekelis’ place within the Italian legal literature, but here I assume this qualification without discussing it), admits that the judge-made-law is an atypical source of law: the specific task of jurisdiction is the clearing of the abstractness of the law.

- *Pekelis and the Law: State vs. Individual?*

In this tentative paper, my localized task is to focus: i) on the Pekelis’ conception of law, and ii) on the logical outcomes he derives from this conception as to the relations between the State and the individual, from the point of view of the formation of the state legal order.

- *On the Concept of Law*

From a chronologically point of view, it is necessary to start with Pekelis’ main Italian publication: *Il diritto come volontà costante*.

It is unnecessary to quote here many passages from the book, especially because of the Pekelis’ style, which often makes recourse to the difficult neo-idealistic terminology.

Pekelis’ approach to the law along the 1930s could be summarized by these following points, which I’ll try to make more clear and at times problematic.

The main distinction -- assumed as the very basis of the *Il diritto* -- is between thinking and willing: both of them are activities of the spirit and their difference is intrinsically evident: in

other words, thinking and willing are two fundamental attitudes of the spirit considered in its unity.

If at the very basis of the concept of Science is the knowledge of the laws governing the world, at the very basis of the concept of Law there is the will, the intention of certain laws (in the sense of rules, norms) prescribing certain conducts or/and avoiding others.

The will of laying down the law is the will of having an order, and in this sense the law is an appearance of a certain order.

- *The Law of the State and the Law of Individual*

At this point, a clarification is necessary on two different matters: i) what is the particular element that differs the individual will from the state will as to the concept of the law, and ii) what is the relation between the different sources of the law.

Focusing on the concept of legal rule, Pekelis does not seem to differentiate between the individual will and the will of the State: in both cases, in fact, the core of the law -- if it is a legal rule -- is the will expressed in causal relations.

Focusing on the sources of the law, Pekelis criticizes the idea of the State as the only source of law: the law (in the sense of a set of legal rules) does it exist also out of the State, and also without the State; in this sense, Pekelis appreciates the so called doctrine of the plurality of legal orders.

In spite of this, the State is the social subject from which the strongest legal will derives, in the sense of juridical will: the State is merely the most powerful of the social organizations.

As a logical consequence of his arguments, Pekelis criticizes the idea of the sociality of the law as one of its intrinsic features.

The sociality of the law is just a pragmatic element, not being it at the core of the definition and notion of the law. On the contrary, from an aprioristic point of view, the law is a category of the spirit in its volitive attitude, that is the logical category of causality.

There is sociological order -- or a natural order, such as the order existing in the world --, and a legal order -- or an artificial order -- that exists in the will.

From this perspective, the definition of law proposed by Pekelis covers only two elements: will and causality. If the element of sociality is added to these two elements, the very essence (displayed by means of an aprioristic and logical approach) of the definition of law will perish: "In defining the law as a will, we want to state the spirituality, individuality, and personality of its origin."

The famous phrase: *Ubi Societas, Ibi Ius*, has to be converted into a more appropriate: *Sine Persona, Nullum Ius*.

Pekelis devotes special attention to this point: indeed, he admits that a social group normally is or could be a source of rules, if and when that social group will be carrying out certain rules binding upon each member; but this system of rules, that is an order, is not, accordingly to Pekelis, a legal order; this order is not a legal system, and these rules are not laws in the usual sense of the word.

Why? Because what is lacking is the existence of a will: the laws of nature are the laws of a natural order not-determined by man, while juridical laws are the laws of the "ought-to-be", a

category of the will, indeed determined by men.

- *The Morality of Law*

If and only if man's will acts in a higher, "spiritual", form, that is the form of causality, and so the form of the law, can a legal order rise up: *Ubi Voluntatis Ordo, Ibi Ius*.

The law is a spiritual activity *per causas*, bound to causal nexes.

The causal form of the law is the universality and abstractness of the law: if A, then B.

To understand what is law, from a structural point of view, and what just law is, from a moral point of view, it is necessary to have recourse to a strictly formal criterion : the will to act in an identical way in all identical cases is the form of the law, and this (form of the) law is in itself a just law, deriving from a just will.

The employment of the same rule for all analogous cases is the most extraordinary guarantee of the equity of the rule.

In this sense, the word "justice" is simply the choice of a criterion of judgment, and not the content of this criterion.

Starting from the Latin saying: *Iustitia est Constans et Perpetua Voluntas Ius Suum Cuique Tribuendi*, Pekelis points out that the core of this sentence is not in the phrase *Ius Suum Cuique Tribuendi*, but in the phrase *Iustitia est Constans et Perpetua Voluntas*: indeed, it is extremely difficult to know what is due to anyone; nevertheless, the quoted saying makes an identification between justice and the choice of a criterion; the worst inequality operates when recurring indifferently to double standards.

Within this system of causal relations, a legal rule, that is the law in the proper sense, is an ethical act: "Per cattiva che appaia una disposizione, se é veramente legge, ha pur sempre un valore etico [...]."

The distinction between thinking and willing, and thus between "to be" and "ought to be", is reflected in the distinction between the law of nature and juridical laws.

In order to surpass this dualism, Pekelis argues it is necessary to stress the idea of a will of action: this will of action is a bridge between the "to be" and the "ought to be", and in this sense it is a completely ethical will.

The concept of the morality of law -- a morality that is a consequence of the acting of the will -- is thoroughly investigated by Pekelis in his essay published in 1932 (and defined by himself as the first self-critical revision of his book). Just law is the law as a consequence of a certain will, because the regularity and constancy of the acting will is, at its very essence, a legal will and a just will.

Within this relation between the law and the morality, there is a central point: the law as morality is unitary, while the law as legislation is a multifarious.

Pekelis suggests that morality, *per se*, is nothing other and nothing more than concrete legal will; in any different case, it will be an abstract and impracticable ideal.

So, the more legal the will, the more moral it is. From this point of view -- both legal and moral --, morality and law are perfectly coincident.

Legal will, moral will, and good will fare the same reality in its becoming. When a will is expressed by someone in the world, this will is action, freedom, and pure morality via-à-vis the

person expressing his or her will; and it is intended as coercion, necessity, and law by the external world, to which this action is addressed.

Every individual action -- that is both legal and moral -- is at the same time coercion with other individuals.

In the beginning stages of the development of the State, referring to the notion of sovereignty, there is no any superior to whom the other members of the society are subject or dependent, but there are people who obeying their own moral imperative are willing and acting.

At the very beginning, indeed, neither orders nor obedience, but only action.

- *The Morality of the State*

This action, free in itself, is the very source of every human association -- family, society, State. In this sense -- writes Pekelis -- every State is *per se* a democratic State: not because the State acts on the basis of the general will of its members -- to whom its action is directed --: this hypothesis is totally wrong being unreal; but because the action of the State is unanimously accepted by all members who, through their wills, give rise to this action.

If, referring to the State, this concept is intended as a type of power, it is quite incorrect to identify it with the nation, namely, the people living within its borders. It is better to recognize the truth of the consideration that there does exist an identification between the State and the Government, between the State and the Class taking power. Pekelis argues that there is a continuous modification of the members of the class in power, with a consequent change of the will of the State.

The moral character of the will of the State explains why the law of the State can be considered the morality of the State: legislation means the perfect correspondence between the will of the State and the will of the human beings acting as legislators.

With reference to the ethical nature of the State, it will be legally constituted only by means of its action expressed in a causal form, and the existence of a causal action as the source law, has *per se* an ethical value; therefore, the ethical State is intrinsically a legally constituted State (“Stato di diritto”).

Pekelis admits a moral conflict between the action of the State and the action of the individual: in this case, the individual will legitimately react against the State, opposing the latter with his will, his law, his action, inherently free and moral.

This consideration, according to Pekelis, explains: i) why the members of the group in power accept and support the doctrine of the Ethical State, and ii) why groups out of power look at the action of the State as the action of a group which acts against them. Groups out of power deny the ethicalness of the State; the action of the State is considered as a legitimate action, arising from a legitimate social organization, but not a moral action in the sense of an action pursuing an ethical goal.

At this point in his reasoning, Pekelis specifies that the State derives from the concurrence of a multiplicity of individual wills, in the sense that these wills are the essential components of the law of the State, and are the main source of the State.

Finally, it is the law which is the source of the State, and not the State the source of the law.

- *The Role of Legal Action*

In this framework focused on the concept of action, Pekelis in his *Azione* discusses the primacy of the procedural law (“diritto processuale”) over substantial law (“diritto sostanziale”), claiming that this primacy is the consequence of the constant phenomenon in the legal systems of the XX century, that is, the progressive substitution of the individual by the State.

The action of the State is the main center of legal and social action in modern times: the individual acts not directly but through the State.

In this sense, and from a critical point of view, it could be said that the conception of a State stressed by Pekelis gives us a notion of the State so strong and so overcharging that the individual is absorbed within it, with the probable consequence that the singular rights of the individual will be brought into the general action of the State.

- *Pekelis and the Law: The American Years (1941-1946) - The Jurisprudence of Welfare*

In his American scholarly work, Pekelis -- soundly with his idea on the centrality of the action of the State -- argues that by means of action of the State social goals must be pursued.

One of the most interesting essays is his *A Jurisprudence of Welfare*, which, at its very basis, argues the idea of the necessity of the continuance of the struggle against formalism, in the sense of legal dogmatism and conservatism.

- *The Heritage of American Legal-Realism*

According to Pekelis, in Europe, antiformalistic doctrines remained confined within Universities. The practical legal world (legislators, lawyers, and judges) refused them, being faithful to the principle of legal certainty and the function of judges to declare what is right and wrong -- according to the written law -- and not to create the law.

All these anti-formalistic doctrines, apart from their specific differences, have at least three main characteristics in common:

- an insistence on the gap between what the law appears to be in the books and what it is in reality;
- a feeling for the dissonance between the abstractness of general rules and the individuality of concrete cases;
- an awareness of the creative nature of the judicial function.

“If judges are unwilling to admit, even to themselves, the degree of their freedom to create law, this is because it is easier to exercise authority by predicating it upon a law placed beyond the control of those who declare it.”

Pekelis explains that sometimes judges are haunted by an unconscious “father complex”, a childlike longing for legal certainty, in a world of chaotic dangers. Hence they dissect statutory provisions, weigh divergent lines of precedents and select admissible items of evidence, destined to form the so-called facts of a controversy, knowing little, and telling less, of the

motives that actually prompted their choice, and of their bias and favor.

The truth of the matter is that in the main judges are lawmakers, not law-finders.

In the United States, with reference to Legal Realism, doctrines of judicial freedom were (and still are) at any rate a fitting rationalization of the position in which judges and administrators found themselves by virtue of American constitutional and legislative technique.

In a sense, the United States has no written Constitution.

The great clauses of the Constitution, just like the more important provisions of fundamental statutes, contain no more than an appeal to the decency and wisdom of those with whom the responsibility for their enforcement rests. To say that compensation must be "just," the protection of the laws "equal," punishments neither "cruel" nor "unusual," bails or fines not "excessive," searches and seizures not "unreasonable," deprivation of life, liberty or property not "without due process," is but to give a foundation to the law-making, rather Constitution-making, activity of judges, left free to define what is cruel, reasonable, excessive, due, or for that matter, equal.

In their turn, Congress and state legislatures have long adopted the same technique.

The consequences of this consciousness are considerable, according to Pekelis.

First of all, when Legal Realists became judges or administrators they found less enthusiasm for the emphasis upon the discrepancy between books and reality.

Somehow, first-person realism -- "law is what we judges do in fact, not what we say" -- sounded far less appealing. It was hardly helpful to persist in defining law as the prediction of judicial behavior, since no judge could regulate his own behavior by trying to predict it.

If it is true that the mere presence of an observer influences the reality being observed, the nature of the judicial process had to change when judges began to philosophize about it or when philosophers, searching the reality of judicial law, became themselves the reality they were looking for.

The resulting transformation of the judicial process is not everywhere equally apparent or deep. But, on the whole, leading legal opinion knows that policy-making only begins with the adoption of a constitutional amendment or a statute.

Judges in their turn avow that they cannot be expected to be more certain about the course of their action or more infallible than other men, including legislators.

2. The Jurisprudence of Welfare

In terms of a new approach to the judiciary, the beginnings of it is what Pekelis called a "jurisprudence of welfare".

In other words, judges, who have long been asking themselves a series of questions about canons of construction, intentions of the legislators or lines of judicial authority, may be about to ask themselves the only question that really matters, according to Pekelis: "Which course of my action -- which rule of law -- is going to serve best the general welfare of the society I am sworn to serve?"

And judges may be inclined to ask this question openly and explicitly, and attempt to answer it intelligently, with the help of all available data that the social sciences can offer.

A responsible judicial approach based on the utilization of such data could build upon

foundations already laid by legal writers in many fields of public and private law.

Jurisprudence of welfare is thus fundamentally an educational problem.

The clear separation of law schools from schools of politics, economics and sociology has led -- writes Pekelis -- to a corresponding separation of the scientific activity of the two groups:

“Quite naturally, within each of them, a trend away from the slippery borders has developed. The combined effect of these trends has created a scientific no-man's land which has become covered by dense conceptual and semantic hedges. A common effort is needed to cut them back.”

Participation of the social sciences in the development of a welfare jurisprudence could bring, argues Pekelis, the normative elements in social science into the light of consciousness, and thus contribute to a healthy development of social theory.

In short, welfare jurisprudence may offer an opportunity to answer not only the question: “How do and how should legal institutions shape social reality?”, but also: “How important for the life of a society are social sciences?”

Welfare jurisprudence may thus become a testing ground of the incidence of legal institutions and of the relevance of social studies.

Obviously, some problem could arise from this perspective.

In the first place it could be said that the welfare question should be asked, and the available social data should be considered, not by judges but by legislators.

And this proposition, in turn, will be justified by various considerations from various points of view.

- If the government is a government of laws and not of men, we must be ruled by general and impersonal propositions formulated without regard to individual litigants, applying with the same rigor to all of them.
- If courts are left with the power to ask the welfare question they will be tempted to change their answers according to their personal beliefs, and this would gravely impair the stability of the legal system. There is a particular injustice and hardship in "judicial legislation" because unlike a new statute which is binding only for the future, the decision of the courts purports to be declaratory of the law, and thus applies retroactively.
- If the welfare of the people requires a change in the law it must be made by the people themselves, through their duly elected representatives, composing their legislative assemblies.

A second group of objections may center on the notion that the pursuer's full awareness of his goal does not necessarily promote the success of his pursuit.

It may be maintained, indeed, that most lawmakers have asked the welfare question, at least unconsciously, and that judges too must have done so, to the extent that they were lawgivers.

Against the background of these specific objections, Pekelis stressed the following points:

- The awareness of his lawmaking function and a conscious pursuit of welfare do not necessarily make a man, or a judge, a good or better lawgiver.
- Even if judges should be perfectly conscious of what they are doing, people, for their

own good, should not be told of the degree of judicial freedom, and, least of all, in judicial opinions.

Finally, objections and critics may challenge the usefulness of injecting the welfare concept into the judicial process:

- The agreement that laws, judge-made and other wises, should be good (or serve the general welfare) is as general as the disagreement on what serves the common good.
- The difficulty is not solved by reference to the social sciences, for there is no agreement among social scientists in general, or even among the scholars of a single branch of social science, on what welfare is, on what the means of furthering it are, and on whether or not it is proper or possible for the social sciences to give guidance for the solution of social problems.
- If some social scientists should prove willing to provide such guidance, the result might be intolerable paternalism, a tyrannical government by experts.

Pekelis remarks, on the contrary, on the relation between laws and welfare, that “whether or not a type of legislation which would eliminate the need for judicial lawmaking is desirable or possible, precious little of such legislation is to be found on the books today.”

The weight of traditional common law ideology, and the techniques of American political and legislative machinery, have joined forces to multiply the instance wherein legislators give judges no better guidance than adjectives such as "just," "reasonable," "fair," "convenient," "adequate" or "proper".

And the greater the strategic value of a given provision, the greater the likelihood that the legislative majority needed for its adoption will be gathered through the use of "neutral" words which do not prejudge the issue.

3. The Jurisprudence of Welfare and the Rule of Law

According to Pekelis, the ideal of a jurisprudence of welfare is in no way inconsistent with that of government by law.

The notion that government by law presupposes and requires a legislative lawmaking monopoly may have been justified in a given historical and political setting, but, considered in itself, it is totally unwarranted:

“Such a monopoly is neither sufficient nor necessary for the preservation of the ideal of government by law: on the one hand, statutes, and, indeed, constitutions, may and sometimes do contain ad personam provisions which fly in the face of that ideal; on the other, the ideal has often celebrated its highest expression in catholic rules of purely judicial origin.”

So, the real test is not by whom an order is given, nor whether it is given in a general and impersonal form, nor the occasion of particular litigation, but whether or not the order is predicated upon a maxim capable of acquiring that universality which characterizes law in its higher sense.

Welfare jurisprudence should never attempt to escape this fundamental requirement. It would misconstrue the essential relation between law and welfare if it neglected the truth that law is an

element in and indeed, the foundation of welfare itself.

The question "what is good for our society?" is crucial, and must be asked by all those -- be they legislators, judges or administrators -- who are in fact entrusted with lawmaking functions. And it must be answered with the help of all pertinent non-legal data, originating in the social sciences or elsewhere. The answer itself, however, must be a law-making one.

Jurisprudence of welfare

"must not be corrupted into a jurisprudence of expediency. The expediencies of specific situations must be valued from a general viewpoint and shaped into an intelligible pattern. A true jurist, mindful of the general welfare, instead of merely investigating what specific judicial action or administrative measure would best serve the public welfare in individual situations, will ask himself what canon of action can best serve that purpose, upon what maxim, capable of becoming a universal law, can the specific measure be predicated."

Concrete cases cannot be decided by general propositions, but neither can they be decided without them.

Even in the most narrow sense welfare is measured not only by the absolute amount of goods and services enjoyed by men, but by their relative distribution as well.

The quest for a conformity to rules, for a recognizable pattern of action, for an *ordo voluntatis*, is nothing less than a quest for

"harmony and beauty. It is a trait of mankind; even more, it is the mysterious prime force of our universe, which gives a rhythm to the crooning of savages and the games of children and a geometrical form to the crystallization of salt."

The problem of the relation between stability and change cuts right across the dogmas of the separation of powers, and has little, if any, relation to the problem of whether judges should have the power to make law.

Legislatures and courts may both make mistakes in the timing of changes, and both may be either behind their time or before it:

"Nor does the simple asking of the welfare question guarantee that a correct answer will be given. But no matter how fallible legislators or judges may be in administering the test, it seems obvious that only considerations of the wholesomeness of a given change, at a given time, in a given society, and not abstract logical theories on the limits of stare decisis, can furnish intelligent guidance. And the test would seem particularly appropriate in a country whose foremost tradition has been the tradition of change."

