LEGAL SYSTEMS AND SOCIAL SYSTEMS

Edited by Adam Podgorecki, Christopher J. Whelan and Dinesh Khosla

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To my parents who inspired me
to look beyond cultures - DK

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INTRODUCTION

Law and legal norms can be studied on a number of different levels. The meaning, structure and context of legal norms is pre-eminently the domain studied by the lawyer. Occasionally, the semantic approach which the lawyer commonly adopts is supplemented by use of an historical or a procedural framework (such as that found in Kiralfy's The English Legal System (1978)) which enables non-lawyers to learn about the legal system. Comparative lawyers may go a step further. They may select a single norm which is similar in various legal systems, for example the norm granting a divorce in the event of 'continuous and deep disruption of marriage', and compare its functioning in different social settings. Even more ambitiously, comparativists may try to find out how a given social problem common to various social systems (such as job absenteeism) is tackled by different legal 'solutions' and with what consequences. Normally, however, such inquiries are limited to shedding light on a single, domestic system. Although one can find examples of bold attempts to analyse the evolution of very different legal systems, such as David and Brierley's Major Legal Systems in the World Today (1978), their value on what might be termed an 'intersocietal' level is rarely conclusive since they lack systematic criteria with which various social and legal systems can be compared.

This volume represents more than a call and an attempt to find such criteria, it also seeks to encourage the study of social and legal systems in an holistic manner. To achieve these aims, it has been necessary to analyse some existing and established links between various social and legal systems.

There are several important theoretical reasons for studying these matters. A current idea,

prevalent amongst a range of scholars, is that social systems determine the content of the corresponding legal system. In this approach, the relationship between the 'base' and the 'superstructure' is stressed, with the grounds of all social relationships located within the base and the legal system located within its superstructure. Other scholars have emphasized the existence and the influence of 'intuitive law' ('living law', 'law in life'). This, it is argued, decisively shapes not only the basic features of the social structure and social stratification of the given social system, but also designs the interrelations in the crucial production processes in which people are engaged. Thus, the question arises as to whether productive forces are indeed shaped by technical factors, or are they designed more by intuitive law? Even more importantly, when law is superimposed on an existing society, it may well be the intuitive law of the 'donor' country which, having shaped the official law, indirectly influences the social structure of the recipient society.

There are a number of practical reasons also. It has become increasingly common for societies to try to adapt their institutions and traditions. Third World societies try, or were compelled due to reasons of political domination, to adopt aspects of Western legal culture; Western and, indeed, Eastern societies are in the process of building larger structures (such as the European Economic Community and other 'common markets') or various types of meta-legal (or quasi-meta-legal) systems (such as the European Parliament). These processes not only break the traditional boundaries of social and legal systems, they also enlarge substantially existing legal domains. In order to understand these processes and possibly to regulate them in a rational way, a comprehensive cognitive scheme which places these processes into appropriate categories seems essential. The shortcomings of jurisprudence and the notoriously biased approach of political science leaves the 'sociologists of law' with the task of tackling this new area, aware, hopefully, that although the problems connected with the relationship between social and legal systems require more elucidation, these cannot be posed and solved at the same time.

An interaction with reality, with all its complexities and varieties, may be fruitful not only in practical endeavours such as trying to achieve certain spelled-out objectives like an enrichment of

legislation, but also in a theoretical enterprise where the task is to spell out the differences between the social and legal systems. So one may utilize certain 'packages' of theoretical categories, tools and concepts while trying to understand a specific social system in relation to its legal system. But, in order to finalize and shape one's theoretical proposition, one must allow the at times unnerving, critical inflow of certain puzzling questions and curiosities. It simply is not enough in this endeavour to say that in a certain study one is culture-specific or structure-specific.

The value of such an approach can be highlighted by reference to societies in transition, namely those placed under the convenient category of Third World, or developing, countries. Many of these countries, especially those with colonial histories have had a peculiar historicity or relationship between their social systems and legal systems. The Western legal system came to many of them as a forced 'gift' of their colonial masters, whether or not it was coterminous with the values, aspirations and needs of the people. Thus, from their very inception, these legal systems grew with alternative and exogenous characters, starting originally only as administrative necessities. This monstrosity of social disparateness eventually grew to marathon proportions and persisted even after the erstwhile colonies became autonomous and independent. How can we understand the existential linkage between the social system and the legal system in such circumstances?

In the present world it would obviously be difficult to find social and legal systems of a solitary or an isolated character. Due to historical, economic and political reasons practically all social systems are tightly interconnected. But the basis of these connections was not always imposed as an involuntary 'gift'. Sometimes the reception of law is voluntary: Khosla makes this point describing the situation in India: a new law, cherished and expected by many, was enacted, but its effects became null if not counter-productive. He says:

> [T]he law's legitimacy became dependent upon what is actually achieved. To the Untouchables, the legitimacy of the law to cause change and effect liberation became suspect. As they realized the strength of the socio-structural and economic chains, their initial

> response of radiant optimism died and gave away to painful diffidence, pessimism and dejection. Similarly, since the Untouchables did not use the law, the non-Untouchable's initial concern and apprehension of it changed to cynicism, ridicule and indifference.

Burman and Fuchs come to a similar conclusion in their study on the introduction of the civil law in South Africa. They say,

> In practice, the introduction of the civil law has not therefore improved the position of urban African women in relation to the control and ownership of property in South Africa, nor their ability to control their own lives. On the contrary, in many crucial aspects it has deteriorated.

Voluntary acceptance of the law may be influenced by the lack of knowledge of its undesired by-products. Taking this possibility into consideration, Kludze formulates the following warning:

> It is, however, not yet possible to assess the social effects of such legislative attempts to cure defects under either the common law or the customary law ... If such legislation were to be extended generally to land disputes, in which families and stools or skins [administrative entities] could be losing vast tracts of land, the social upheaval could be phenomenal.

This statement could be regarded as a demand for an adequate knowledge of this social reality which is supposed to be affected by the proposed law.

There are also some (theoretically and practically) interesting situations when 'gifts' from outside are disguised as indigenous revolutionary institutions generated by the demands of the politically conscientious masses. Thus, for example, rapid changes in the judicial system in Cuba were characterized, in the beginning, by the tendency to eradicate the old system and then, by the establishment of a Soviet-type judicial-legal system. Subsequently, Soviet Union-type popular courts, procuracy, reorganized institutions of attorneys, 'parasite law', to name just a few, were introduced as indigenous institutions demanded by the Cuban population. These changes were consistent

with the statement of Castro in 1971 (quoted by Salas): 'We now have two truths: the first is that capitalist legality must be destroyed and the second is that we must establish socialist legality'. Salas concludes his penetrating study of the Cuban situation with a statement (which is in some ways a succinct and accelerated replica of the Polish 'revolution' triggered in 1945) that '... a judicial system cannot be counted on to rapidly, if ever, transform the political culture of the citizenry which it serves'. The political culture of a given social system is closely connected with its general culture as well as with the culture of the legal profession. Several studies in this volume discuss this latter topic.

While studies collected together in this volume shed light on some essential connections between social systems and legal systems, according to Tomasic, it is too risky to search for too sharp a distinction between the two sets of systems since they belong to the same realm. An Australian study indicated that approximately 60% of the general population regarded lawyers as self-interested (while 20% said that it is a good policy to 'avoid solicitors if possible' and 20% expressed the opinion that 'law is too complex'). A similar study of lawyers by Tomasic reveals a far-reaching coincidence: 61% of the studied lawyers express a synthetic professional attitude classified as a 'cynical realism' (whereas attitudes of 'Laissez Faire' and 'Gemeinshaft' are articulated by 22% and 16% respectively). These findings show that the social functioning of lawyers is quite visible as well as socially 'transparent'. The general public is apparently able to ascertain lawyers' social activities adequately and consistently with lawyers' own assessments of their professional activities. A study in Japan by Ishimura on the general public (lay people) and lawyers (judges) supports a previous Polish study which discovered that there is a close relationship between the strong condemnation held by the general public and the severity of condemnation held by the Polish judges. The Japanese research indicated that judicial leniency coincided with the general leniency of the Japanese people. Ishimura concludes that 'the similarity of the behaviour and attitudes of the judges and the people in both countries might suggest that judicial rigorism or leniency might be the reflection of the similarity of attitudes of the lay people in each country'.

One may assume that the above reflections point to more general societal interdependencies. Lawyers as agents of the establishment are regarded by the population, especially in times of accelerated social change, as exponents of social conflicts (dormant or overt); nevertheless as part of the same 'societal body' they share the same social values - for example, attitudes toward general social rewards and punishments. But even though they are essential elements of the existing establishment, they are not necessarily the proper and suitable vehicles of social change and progress. In India, 'lawyers ... are ill prepared to play any such grandiose role as using law for facilitating the achievement of equalitarian and egalitarian goals'. One may interpret this last statement by Gandhi in a more general way: lawyers, as agents of the existing establishment who (with the exception of 'a small sector of the profession viz. the intellectual lawyers, who possess the requisite social sensibility') have vested interests in supporting the existing order, are quite resistant to any type of social innovation or new macro-social change. Thus, from the point of view of the emerging social order, they represent a conflicting force; but from the point of view of the status quo they may be regarded as consensus-prone. In other words, in homogeneous societies, a congruence exists between the values of the population and the agents of the justice system. In heterogeneous societies this congruency does not exist: lawyers play the role of exponents of the values of the ruling élite.

Paradoxically enough, models which have been prepared to analyze different types of social systems in conjunction with various types of legal system, as well as corresponding with their many 'ideal types' of legality, can be used not only in the study of these systems but also could be helpful to proceed with a multidimensional inquiry within a single society. As Olgiati puts it,

> According to this perspective, in highly heterogeneous and complex social systems, it is possible to hypothesize a form of 'condensation' of these models [of legitimacy] so that any type of legitimacy does not overcome any other, but their intertwinement gives rise to a peculiar intra-systematic model. And the Italian social system is a case in point. The four models under examination appear, in fact, all to be recognizable at present.

Since the comparison of social systems (taken as distinctive entities) with legal systems (taken as separate wholes) is not an easy task, it may be helpful to try to solve this problem in a piecemeal manner: to study from different perspectives some selected segments of social systems and their corresponding legal institutions. To discover whether and to what extent this type of approach could be useful, various sectors of social and legal systems have been taken into consideration: attitudes towards the law (Ishimura), law as an instrument of social change (Gandhi), lawyers in society (Tomasic), the law of equality (Khosla), the judicial system (Salas), family law (Burman and Fuchs), land law (Kludze), tenants' law (Nelken) and the law of sales (Renfrow). Although some may say that the above theoretical propositions, even if they are supported by some systematically collected empirical data, give only a synthetic picture of an arbitrary value, being selectively taken from various social and legal systems, it is nevertheless the case that the problem of studying social systems and legal systems is ripe for systematic research. Accordingly, in what is a new area of investigation, it is necessary to start from the existing, empirically verified data and from models which seem to be theoretically feasible. It is always better to start from an elaborated guess than from an entirely unsupported hunch.

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CONTENTS

Chapter One

SOCIAL SYSTEMS AND LEGAL SYSTEMS - CRITERIA FOR CLASSIFICATION

Adam Podgorecki

THE PROBLEM

Since 1900, a concept of families of law has been introduced to jurisprudence and comparative law. In 1905 Esmain divided existing legal systems into the following families of law: Romanistic, Germanic, Anglo-Saxon, Slavic and Islamic. The most comprehensive classification was presented by Zweigert and Kötz in 1977. They grouped law families into: Romanistic, Germanic, Nordic, Common Law Family, Socialist, Far Eastern Systems, Islamic Systems and Hindu law. The main criterion which they employed was that of eclecticism. This criterion of 'style' consisted of five elements: historical background, predominant model of thought, particularly distinctive institutions, types of legal sources and ideology. A more simple and clear classification was made by David and Brierley (1978). It is built on the twofold criterion of ideology and legal technique. It divided law families into: Romanistic-German, Common Law, Socialistic, Islamic, Hindu and Jewish, Far East and Black African.

It is easy to observe that these classifications (chosen as the most characteristic) differ in that they differently place various legal families, simplify or multiply their numbers and take into consideration exclusively the existing official law. As a result they are inconclusive. Ziegert comes to similar conclusions:

> as far as the future of comparative law is concerned, it now has to incorporate - at long last - those steps of scientific development which it lacked at the beginning of the century: the adaptation of reliable empirical methodology for legal purposes. The prospects

> of being able to do this successfully today are better than ever before, because social sciences have developed considerably in the meantime, and because sociology of law could operate as a conveyer for the needed scientific technology. There is, however, a chance also that comparative law will defy those prospects - as it has done before, now irretrievably (Ziegert, 1981, p. 72).

Therefore, an entirely different approach seems to be appropriate.

Legal phenomena have important consequences for the individual. If somebody buys a house, borrows a book, adopts a child, gets a divorce etc., then legal phenomena operate through the individual psyche. This is because the person involved obtains a subjectively perceived right to use the house, retain undisturbed the book for a certain period of time, raise the child as his own or to establish the claims of his former spouse. Although all of these phenomena shape the attitudes of the given individual - attributing to him a certain claim or labelling him with a certain duty - they do not simply exist in a social vacuum. They also influence the attitudes of legal partners or adversaries creating thereby the group environment within which legal activities take place. In this way various clusters of legal attitudes belong to different kinds of legal subcultures. But these 'legally structured' groups are still not appropriate targets for a comprehensive analysis. A wide variety of legal norms, particularly criminal regulations, are supported by formal sanctions established by the state; thus, they contribute to consistent legal sub-systems which, when taken together, appear to be a normative unit. It seems to be methodologically proper, therefore, when the given society has to be taken as a whole, to take this unifying legal system as a proper element of the analysis.

There are several possible ways to analyse the relationships between legal systems and corresponding social systems. Both of these systems may be treated as independent variables: usually social systems are regarded as those which generate legal ones, but legal systems may also be regarded as independent variables - they may design, shape and influence the social systems with which they are linked (see Annex A).

Legal systems corresponding to various social systems, in my judgment, may be categorized into: