LEGAL TRADITIONS AND SYSTEMS

AN INTERNATIONAL HANDBOOK

EDITED BY

Alan N. Katz

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GREENWOOD PRESS
NEW YORK · WESTPORT, CONNECTICUT · LONDON

Library of Congress Cataloging-in-Publication Data

Main entry under title:

Legal traditions and systems.

Bibliography: p.
Includes index.
1. Comparative law. I. Katz, Alan N.
K583.L44 1986 340'.2 85–27158
ISBN 0–313–23830–8 (lib. bdg. : alk. paper)

Library of Congress Catalog Card Number: 85–27158
ISBN: 0–313–23830–8

First published in 1986

Greenwood Press, Inc.
88 Post Road West, Westport, Connecticut 06881

Printed in the United States of America

The paper used in this book complies with the Permanent Paper Standard issued by the National Information Standards Organization (Z39.48–1984).

10 9 8 7 6 5 4 3 2 1

To the memory of my parents,
Nathan David Katz and Beatrice Beverly Katz

TABLES

ACKNOWLEDGMENTS

As editor of this volume, I take full responsibility for any errors or omissions contained herein. A venture of this sort obviously depends upon the good wishes and offices of a large number of people. I am most indebted to the fourteen other contributors to this volume. They all labored under both time and style restrictions with patience and good humor. This book could not have been completed without the assistance of a number of people at Greenwood Press. My thanks go to Marilyn Brownstein for aiding in the initial formulation of this volume, Marie Smith for innumerable helpful suggestions, and to Cynthia Harris and Michelle Scott whose patience and good humor played no small part in seeing this project to its completion. There are also many people at Fairfield University who have added much to this endeavor: Dorothy Sokol Macchio, now a resident of the fair state of North Carolina but during the initial stages of this project, a graduate assistant at the university, who did much of the preliminary, vital, bibliographical research for this project; the staff of the university's Nyselius Library, especially Susan Dunn and Nancy Haag, who have been so gracious and helpful in obtaining research materials for this project; Edward Dew, my colleague in the politics department, who made a number of helpful suggestions; Lee Mihalik, who, among her many other duties, typed the vast bulk of this volume. This book owes much to her generosity and skill; and the Fairfield University Faculty Research Committee, which provided me with a summer research grant to complete the work on this project. Finally, I would like to thank my wife, Lucy, and our children, Laura and Douglas, for their patience, understanding, and support.

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CONTENTS

INTRODUCTION

Alan N. Katz

It is a curious phenomenon that a number of societies have attempted to minimize the role played by members of the legal profession, giving support to Bernard Schwartz's assertion that "the attempt to administer justice without lawyers is a characteristic of both utopias and revolutions."[1] Thomas More, for example, barred them from his *Utopia*.[2] Similarly, in the years after the landing of the *Mayflower*, lawyers were assigned almost no role in America's early political system.[3] More recently, one of the characteristics of the People's Republic of China has been the miniscule role allotted to lawyers in solving that nation's problems.

Despite the attempt to minimize the role played by lawyers in colonial America, members of that profession played a significant role in the politics of the new Republic, for twenty-seven of the fifty-six signers of the Declaration of Independence, seventeen of the first twenty-six United States Senators, and twenty-five of the initial members of the House of Representatives were lawyers.[4] A scanning of the literature regarding contemporary China (especially since the period of the "four modernizations") indicates a similar growth in the importance of both codified law and western-trained lawyers.[5] Thus, despite the hopes of both utopians and revolutionaries, lawyers have ultimately been asked to aid ordinary citizens in dealing with the problems posed by increasingly complex societies.[6] As such, lawyers have become powerful figures in many of the nations of the world.

While many acknowledge a dominant role for the legal profession in modern society, there is much less consensus regarding the role(s) that the law and legal system can play. One reason for this is the difficulty encountered in defining a clear link between the law, the legal system and its personnel, and the general culture found in modern society. This volume is based on the premise that there is a linkage between these concepts and that it is probably best seen in J. H. Merryman and D. S. Clark's definition of "legal tradition":

A legal tradition, as the term implies, is not a set of rules of law about contracts, corporations and crimes, although such rules will almost always be in some sense a reflection of the tradition. Rather, *it is a set of deeply rooted, historically conditioned attitudes about the nature of the law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way the law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which it is a particular expression. It puts the legal system into cultural perspective.* (my emphasis)[7]

Therefore, in order to study the legal system of most of the nations of the world, this volume will, during the next eighteen chapters, focus upon four of the major ingredients found in the above definition.

The first goal of this volume is to analyze the historical development of the legal systems of the nations studied. This will first involve discovering the sources of the law in each.[8] In addition, an assessment will be made of how the legal pattern in a particular nation (or group of nations) fits into the common law, civil law, ''mixed,'' Scandinavian, and socialist families as well as a number of variations found in some of the Third World nations today (which have been influenced by their colonial legacies as well as their own customary and/or religious law).[9]

Our second goal is to describe one aspect of Merryman and Clark's definition—the organization of legal systems—in the nations to be studied. This volume will attempt to assess the connection between the organization of a nation's legal system, its historical development, family of law, as well as form (''federal'' versus ''unitary'') of government.

A third goal of this volume is to evaluate another component of the legal tradition, the personnel of the law, in each of the nations to be studied. Once again, this is thought to be linked to the historical development of a nation and its legal system. Dias and Paul, for example, have contended that lawyers have played a very significant role in the historical development of first world (Western) nations during the past few centuries—lawyers have articulated the major ideas related to political and social change, developed political structures to accommodate such change, and later transformed the law to the changing political, social, and economic needs of society. They conclude that ''the idealized model of an independent legal profession—as a learned group, as trustees of an autonomous legal system—has been derived from this historical experience.''[10] On the other hand, they contend that lawyers in the Third World states, because of their very different historical experiences, have played a far different role: ''they tend to play brokerage roles—helping to produce an orderly transfer of power, from colonial officials to new national leaders, over political institutions which had been developed by essentially authoritarian and devolutionary political processes.''[11]

In addition to the general historical development of the legal profession and its present role(s), this volume will focus on three other issues related to the

personnel of the law. The first two of these are the recruitment and training of those entering the profession. Nonet and Carlin contend that these two issues are related:

> By controlling access to the profession and the future training of lawyers, legal education has an important bearing on the character of the profession and the orientations of the law. Whether the law becomes the property of a privileged class or of the whole polity depends to some extent upon criteria of access to the profession.[12]

The final issue tied to the personnel of the law relates to mobility within the legal profession, especially as it affects judicial selection and promotion. Schmidhauser indicates the importance of this:

> Judicial selection has been considered the first great problem that arises in any judicial system. Solutions to this problem and to the closely related subject of judicial tenure have varied in accordance with the prevailing theoretical conceptions of the nature of justice and political considerations reflecting the distribution of power in the society.[13]

The final goal of this volume is to assess the public's perception of the legal system and its personnel and the role played by the courts in the legal systems studied. In many ways the task of evaluating the public's perceptions of the legal system will be a difficult one because, outside of the first world nations, there is little empirical data on attitudes toward the legal system and its personnel.

Fortunately, other indicators exist for measuring these attitudes. The first among these is the status afforded members of the legal profession. For example, the high prestige of members of the legal profession in England is but one indication of the generally positive view that the average Englishman has toward his/her legal system. A second indicator is the likelihood that the decisions of the legal system are viewed as authoritative by the populace in a particular nation. For example, one measure of the esteem afforded the American Supreme Court is the compliance with its decisions (both by members of the political system and the population at large) despite the fact that the Court has little power to force such compliance. A third measure of the public's views of the legal system is its willingness to utilize the system to solve problems. This is, of course, tied to the historical development of the legal system and its personnel. Japan, for example, has had a tradition of both distrust of legal practitioners and a desire to solve societal problems harmoniously rather than through the adversarial processes afforded by the legal system. Citizens in Japan today are, therefore, quite likely to try to solve their problems through conciliation and mediation rather than through their modern (and highly efficient) legal system. It has already been noted that Americans made great use of lawyers as far back as their colonial period. This pattern has continued and accelerated to the point that Americans today are often described as among the most litigious people in the world. While

this description is often used pejoratively, it does indicate a great willingness of Americans to utilize their legal system. A final measure of the public's views of the legal system are the role(s) that it is allowed to play within the larger political system. Hitchner notes five judicial functions common to most societies: (1) establishment of the facts; (2) finding and interpretation of the law; (3) enforcement of authority and remedies; (4) administrative responsibilities; and (5) judicial lawmaking.[14] The extent to which legal systems are allowed to perform these functions will provide us with another measure of status afforded the system and its members.

A second issue related to the roles of the courts involves the concept of judicial independence. This concept often has two meanings: (1) structural independence—the independence of the courts and their personnel from interference by political leaders in the selection, assignment, and promotion of members of the judiciary as well as the remuneration of members of the legal system; and (2) decisional independence—interference (or threats of interference) with decisions of the courts that may run counter to the interests of the government. This volume will, therefore, attempt to evaluate the strength of judicial independence in the nations studied by carefully assessing the personnel policies regarding members of the legal profession as well as discovering any examples of interference in the decisions of the courts.

The final issue related to the role of the courts involves the most controversial aspect of judicial lawmaking, judicial review, that "process whereby a judicial body determines the constitutionality of an activity undertaken by a country's legislature and chief executive."[15] Judicial review was probably first discussed by Plato and is now performed in approximately sixty of the nations of the world.[16] This role is probably most aggressively performed by the American Supreme Court, which often plays an "active" role, "balancing" the power of the president and Congress. Edward Corwin has, in fact, described judicial review as "America's way of hedging its bet."[17] While Theodore Becker has maintained that there is often a very close correlation between the existence of judicial review and judicial independence, it is possible to have an independent judiciary and flourishing democracy without the existence of judicial review.[18] England provides us with the best example of this for the English judiciary plays a less active role in the political process. This is primarily because the length and pattern of historical development in England has created a political system where the extent of trust is such that the British Parliament is not checked and can do everything "except transform a man into a woman and a woman into a man."[19] This volume will then finally attempt to discover whether judicial review exists in the nations to be studied and whether such a function is performed by "regular general-jurisdiction" courts (as in the United States, India, Australia and Japan) or in courts specially designated to perform this function (as in Italy, Germany, and Austria).[20]

L. M. Hager has written that "law and legal institutions are themselves empty bottles. Their worth to society depends upon the quality of the wine poured into

them.''[21] The hope is that this volume, in assessing the historical development and organization of the legal system, the personnel of the law, and the public perceptions and the role of the courts might not only well describe the bottles that house the law and legal institutions in the nations to be studied, but the quality of the wine poured into them as well.

NOTES

1. B. McGinty, ''Lawyers in Early America,'' *Early American Life*, February 1982, p. 52.
2. Ibid.
3. Ibid.
4. Ibid.
5. See, for example, F. Butterfield, *China: Alive in the Bitter Sea* (New York: Bantam Books, 1982).
6. McGinty, ''Lawyers in Early America,'' p. 56, comments on this:

> Despite the efforts of most of the colonies to suppress lawyers, the people demonstrated an irrepressible appetite for their services. A man who spends every day on the farm, guiding a plow through rock-choked fields, has little time for legal study. A merchant who stands from dawn to dusk behind the counter of a busy store is unlikely to find the time (or the inclination) to peruse Cooke's *Commentaries on Littleton*. A man charged with a serious crime—particularly one for which death is the penalty—will not willingly entrust his fate to a judge who, as often as not, is untrained in the law and has no lawyers to guide him toward a reasonably predictable decision.

7. J. H. Merryman and D. S. Clark, *Comparative Law: Western European and Latin American Legal Systems* (Indianapolis: Bobbs Merrill Co., 1978), p. 3.
8. D. G. Hitchner and C. Levine, *Comparative Government and Politics: An Introductory Essay in Political Science* (New York: Harper & Row, 1968), p. 157, note four major sources of the law: moral and ethical principles, custom, judicial rulings, and legislation.
9. ''Mixed'' refers to those systems that utilize elements of both the common law and civil law. Among those mixed systems are British Guiana, Cameroon, Sri Lanka, the Philippines, Quebec, Rhodesia, and Scotland. See E. S. Easterly III, ''Global Patterns of Legal Systems: Notes Toward a New Geojurisprudence,'' *The Geographical Review* 67 (April 1977), p. 216.
10. C. J. Dias and J.C.N. Paul, ''Observations on Lawyers in Development and Underdevelopment,'' in C. J. Dias et al., eds., *Lawyers in the Third World: Comparative and Developmental Perspectives* (Uppsala: Scandinavian Institute of African Studies, 1981, p. 339.
11. Ibid., p. 343.
12. P. Nonet and J. E. Carlin, ''The Legal Profession,'' in *International Encyclopedia of the Social Sciences* 9 (1968), p. 68.
13. J. R. Schmidhauser, ''Judicial Recruitment,'' in *International Encyclopedia of the Social Sciences* 8 (1968), pp. 322–323.
14. Hitchner and Levine, *Comparative Government and Politics*, p. 73–176.
15. J. Tannenhaus, ''Judicial Review,'' in *International Encyclopedia of the Social Sciences* 8, (1968), p. 303.

16. See T. L. Becker, *Comparative Judicial Politics: The Political Functioning of the Courts* (Chicago: Rand McNally, 1970), pp. 205–6, for a discussion of the role of judicial review in ancient Greece.

17. H. Abraham, *The Judicial Process: An Introductory Analysis of the Courts of the United States, England and France* (New York: Oxford University Press, 1975), p. 279.

18. Becker, *Comparative Judicial Politics*, pp. 211–14.

19. Abraham, *The Judicial Process*, p. 279.

20. Becker, *Comparative Judicial Politics*, p. 206.

21. L. M. Hager, "The Role of Lawyers in Developing Countries," *American Bar Association Journal* 58 (January 1972), p. 37.

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1

AFRICA

Harvey M. Feinberg

The evolution of the legal systems in Africa has been very different from developments in the European world. This is primarily because the intervention of colonialism in the late nineteenth century brought with it the sudden imposition of a foreign legal system on the people of each colony. The European colonial powers introduced their own legal systems based on the legal philosophy, laws, and court organizations of the home countries. These systems were imposed on the peoples of each colony in supplementing their own existing legal frameworks.

When the colonies became independent, mainly in the late 1950s and early 1960s, the legal framework established by the former colonial power was retained. However, government leaders also had to contend with the traditional rules and legal institutions of the multiple ethnic groups who lived within the boundaries of a particular new nation. Since that time, government leaders have attempted to blend the two systems, modern and traditional, or to subordinate the traditional systems to the national legal system, or to modify that system inherited from the colonial period in a manner more consonant with local conditions.

There are forty-six independent countries on the continent of Africa. However, the discussion in this chapter will be limited to those countries between the Sahara Desert and the Zambezi River. The Republic of South Africa and the previously white-dominated Zimbabwe have been excluded as well as the Portuguese speaking countries of Angola, Mozambique, and Guinea Bissau.

The foci of this chapter are the Anglophone and the Francophone countries south of the Sahara. The Anglophone countries, Gambia, Ghana, Kenya, Malawi, Nigeria, Sierra Leone, Tanzania, Uganda, and Zambia, use a legal system based upon the English common law tradition. The Francophone countries, Benin, Burkina Faso (formerly Upper Volta), Cameroon, Central African Republic, Chad, Congo (Brazzeville), Gabon, Guinea, Ivory Coast, Mali, Niger, Senegal, Togo (all former French colonies), and Zaire (a former Belgian colony),

inherited a system based on the civil law tradition dominant on the European continent. The reader should be cautioned, however, that with such a large number of countries involved, generalization is difficult, especially since scholarly resources are uneven in depth and quality.

THE DEVELOPMENT OF THE LEGAL SYSTEMS

Imperialism and colonialism arrived in Africa mainly during the last two decades of the nineteenth century. The main colonial powers were France and England. The French introduced a legal system based on codes, using the Napoleonic Codes as a foundation. This means that the law predominantly came from statutes organized within the various codes. However, a civil lawyer must take cognizance of the decisions developed around the articles of the code. While these, in theory, do not make law, court decisions, together with academic debate of the cases are still important for understanding many parts of the code. Nevertheless, precedent plays a lesser role in the decisions of judges, and less room existed for judicial interpretation than within the English common law tradition.

The legal situation in English colonies was more complex. The foundation in particular colonies was English common law and statutory law as of a particular date (for example, July 24, 1874, for Ghana and January 1, 1900, for Nigeria). Criminal and penal codes in English colonies had varying origins: English common law was the most important source; Indian colonial law was also important to the development of colonial law; codes from Australia and the West Indies were also introduced into some colonies.[1]

Customary law (except for the harsher elements, such as trial by ordeal, torture, and unusual punishments, those practices deemed to be "repugnant to civilized practice") continue to prevail as a parallel legal system in most of the colonies during the twentieth century. Customary law courts, whether existing prior to the colonial period or created by the colonial government, were most often the courts of first instance, particularly for cases concerning land, inheritance, marital matters, or disputes among members of the society. The colonial governments' courts handled most criminal matters (using European law as the guide) and heard appeals from the customary courts. In addition, a very substantial amount of legislation enacted by the colonial government affected rural Africans and might supersede the laws inherited from the metropole. In the field of land law in many English colonies, for example, local statutes "wholly or substantially restricted the general application of English legal notions."[2]

In ordinary criminal and civil cases, impartiality and the normal rule of law generally seem to have prevailed in the European colonial courts. Thus, where there were issues involving Africans in which the government had no stake, judges or administrators (such as district commissioners) sought to reach judgments based on the available evidence, to try, in the African manner, to "settle the dispute." Ghanaians, for example, regularly brought disputes over traditional leadership positions and land to the colonial courts, undoubtedly because of the