

Chapter 01

INTRODUCTION TO LAW, DEMOCRACY, AND LEGAL SYSTEMS

China and Africa are at the threshold of mutually beneficial cooperative development. China and Africa have emerged from a chequered socio-political trajectory sculpted in years of revolutionary struggles against colonialism, imperialism, and military dictatorship respectively. Thus, they are seeking to evolve systems of law and democracy which suit their local conditions. The central theme of this chapter is the nature and interaction of law, legal systems, government, and the concept of the rule of law in the world relative to how they have evolved in China and Africa. Some universal notions of law, government, democracy, and legal systems are also the main focus of this chapter.

Although this book is focused on explaining aspects of Chinese and African laws, the main tilt will be on China because of the uniqueness of its law and its profound capacity to keep evolving despite its over 5,000 years-old

history and how the dynamism and robustness of the contemporary law have shepherded the astounding transformation of China. Again, while this chapter focuses on notions of law, mainly from Western optics, what is quite mystifying to most scholars of Chinese law is how despite its codification under the imperial era, which qualifies it as a distinguishable legal family, its contemporary practice has many cross-cultural influences, as can be seen in specifically in Chapter three and others. But first, a look at the philosophical perspectives on the law.

Definition of Law

There are various definitions of law by many writers. Understanding the intersection between law and government will explain the nature of the rule of law in China and African countries. Basically, “Law” is a system of rules which a particular country or community recognizes as regulating the actions of its members and which it may enforce by the imposition of penalties.

Some sets of related definitions of law are varied but point to the same central theme of it being a regulating instrument of the state. George William Keeton defines law as “a rule of conduct, administered by those organs of a political society which it has ordained for that purpose and imposed in the first instance at the will of

the dominating political authority or by those to whom it has committed the task of making such rules.”

For John Erskine, “law is the command of the sovereign containing a command rule of life for its subjects and obliging them to obedience.” Deen Roscoe Pound defines law as “the body of principles recognized or enforced by public and regular tribunals in the administration of justice.” John Gray opines that the “law of the state or any organized body of men is composed of the rules which the courts - that is the judicial organs of that body lay-down for the determination of legal rights and duties.” Woodrow Wilson sees law “as that portion of the established thought and habit which has gained distinct and formal recognition in the shape of uniform rules backed by authority and power of the government.”¹

Different schools of law have presented the subject matter in varied interpretations. For the “analytical school”, also termed “positivists”², which comprises John Austin, Jeremy Bentham, and Thomas Hobbes, the law is a “command given by a superior or sovereign to an inferior and enforced by material sanction.”³ However, as

¹ Mahajan, V.D. (2013) *Political Theory: Principle of Political Science*. Ahmadabad: S. Chand & Company PVT Ltd p.372

² Shubi (Aug. 23, 2018) *Analytical School of Jurisprudence*. Legal Bites and Beyond. Retrieved on June 23, 2021, from <https://www.legalbites.in/analytical-school-jurisprudence/#comment-20967> pp.1

³ *Ibid.*, Mahajan, p.373

primitive societies dwelt on customs and could not have developed “command”, critics dismiss the existence of such a law or sovereign.

The “historical school” exponents such as Von Savigny, Friedrich Karl and Sir Henry Maine saw the law as “evolutionary”, the result of varying, progressive, slow and lengthy social processes rather than of the arbitrary will of a law-giver. For them, the law must be studied in relation to historical interactions, customs, and events. They reject the universal validity or applicability of law, the natural school of law, and the realist school of law, which emphasizes God and churches as the major sources of the law.⁴ But some critics such as Charles Allen suggest that legal studies should not be found in customs because they are not the common consciousness of people.

There is also the “sociological school” of law led by Auguste Comte, Eugen Ehrlich, Emile Durkheim, Rudolf von Jhering,⁵ Leon Duguit, H. Krabbe, and Harold Laski. They argue that law is a product of society and it is, therefore, a social phenomenon which evolves from a

⁴ Kumar, I. (June 18, 2019) *Historical School of Law*. Diva Rai in All. Retrieved on June 23, 2021, from <https://blog.ipleaders.in/historicalschoo>

⁵ Nalbandian, E. (2010) Introductory Concepts on Sociological Jurisprudence: Jhering, Durkheim, Ehrlich. *Mizan Law Review*. Vol 4. No 2. pp.6

sense of right and social solidarity.⁶ A major criticism of this theory is that it did not take cognizance of the role of formal law influences and reforms practices in society.⁷

The “Marxian school” which derives from the Marxism-Leninism ideology argues that the will of the dominant class is elevated into a statute. As distinct from the capitalist state where law helps to safeguard capitalist interests, in a socialist state, the law is a tool in the hands of the workers.⁸ This school has been criticized for being economically deterministic because it failed to take into account that other factors shape history.

The “philosophical school” or “natural law” school was developed by scholars like Hugo Grotius, John Locke, Jacque Rousseau, St. Augustine, and Thomas Aquinas. This school considers the law as a product of abstract, moral, or ethical principles. St. Augustine and Aquinas proffer this by differentiating natural law as used by God to govern all rational beings from the civil and eternal law of God.⁹

⁶ Bhola, S. (June 11, 2019) *Sociological School of Jurisprudence*. Retrieved on June 23, 2021, from <https://blog.ipleaders.in/sociologicalschool>

⁷ Menski, W. (2006) *Comparative Law in A Global Context. The Legal Systems of Asia and Africa*. 2nd Edition. Cambridge: Cambridge University Press., p.96

⁸ Ibid., Mahajan, p. 1

⁹ Alozie, P. (ed) (2000) *Logic, Philosophy & Introduction to Computer Science*. Calabar: Elcrof Publishing Company. p.198

This school has been faulted for its inability to determine what exactly are the laws and how they apply to human circumstances.

Proponents of the “comparative school” of law advocate the examination and comparison of the legal systems of the past and present to arrive at certain conclusions.¹⁰ Critics believe the ideas of this school have excessive doctrinairism and tendencies to superficiality and triviality.

In sum, the law is a basic characterization of human governing principles; it is the notion of achieving justice in interpersonal relations. In other words, the essential notion of freedom, welfare, and happiness for the greater majority of a society is the focus of the institutions of law and government. Indeed, the discursive presentation above shows that over time, societies had devised means of dispute resolution, and attainment of justice, which is a pathway to a well-ordered society. Maintaining order is one of the basic functions of government.

Law as a discipline is classified into substantive and adjectival or procedural law. While the former defines the rights and liabilities of a person, the latter consists of the rules of procedure that regulate how these may be given effect that is implemented and enforced before the court.¹¹

¹⁰ Ibid., Mahajan, p.374

¹¹ Abubakar, A. (2017) *Islamic Law Practice and Procedure in Nigerian Courts*. Lagos: Malthouse Press Ltd, p.2

Theories of Law and Government

The role of law in politics and government is necessary because they form part of the institutions and driving mechanisms for the maintenance of political order. Indeed, the legal approach to political theory treats the state primarily as an organization for the creation and enforcement of the law. That is, it describes the constitution and activities of the state in terms of their legal or juristic nature. Thus, the idea of a well-ordered society using the instrument of law informed the preoccupation of early thinkers as society evolved from the ancient to medieval and modern.

In modern civilised life, the nature and methods of justice express the moral character that a state possesses. Indeed, in determining a nation's rank in judicial civilisation, "no test is more decisive than the degree in which justice, as defined by law, is realised in its judicial administration, both as between one private citizen and another and as between private citizens and members of the government."¹² Scholars such as St Augustine, Thomas Hobbes, John Locke, Charles de Secondat, the Baron de Montesquieu, Jean Jacques Rousseau, Jeremy Bentham, Friedrich Hegel, have a profound influence on the development of law and government in the world.¹³

¹² Kapur, A.C. (2014) *Principles of Political Science*. 21st Edition. New Delhi: S. Chand and Company PVT Ltd., p.577

¹³ *Ibid.*, Mahajan, p.21

St. Augustine lived in North Africa between 354 and 430 AD. His notion of justice was two forms that centres on God. The first is eternal law, which is God's reason commanding, and natural law, which is man applying the eternal law. He likened the basis of justice to love which he believes its enforcement is the purpose for the establishment of the state.

The political views of Thomas Hobbes helped institutionalize the notion of the social contract in a democracy by people submitting their distinct sovereignties to a higher sovereign. The premise for his postulation in his book 'Leviathan' was that competition for the acquisition of values or private property was very likely to brew serious conflict between peoples. Such conflicts could result in what he termed a life of continual fear. "And danger of violent death; and the life of man, solitary, poor, nasty, brutish and short."¹⁴

John Locke (1632-1704) in his "Second Treatise on Government", expounded a liberal theory of the social contract by arguing that individuals give up some of their rights to create the state which will protect private property. For him, individuals retain all the rights they

¹⁴ Duiker, W.J. & Spielvogel, J.J. (2004) *World History*. Belmont: Wadsworth Group/Thompson Learning. P. 68 -70.

possess under the state of nature other than the right to punish the offender.

Jean Jacques Rousseau (1712-1778) in his *Discourse on the Origins of Inequality of Mankind*, presents the notion of the social contract as people's desire to adopt laws and governors to preserve their private property. As a corollary to this, in his 1762 work 'The Social Contract', Rousseau explores the inhibitions the law and governors can have on the people and propounded the theory of the general will, which may be put as public interest. The logic behind it is to ensure that where the individual puts their will or self-interest above the general will, they should be compelled to abide by the general will. This way the interest of the community is preserved above the excesses of the governors.¹⁵

Charles de Secondat, the Baron de Montesquieu, who lived between 1689 and 1755, developed the idea of the separation of powers by having multiple branches of government and checks and balances to curtail the excesses of the governors abusing the law. The typical divisions of governmental power are the legislative, executive and judicial branches. Montesquieu further classifies government into three: republics, monarchies, and despotism.¹⁶

¹⁵ Ibid. p. 69

¹⁶ Ibid. p.70

Jeremy Bentham (1748-1832) explored a utilitarian theory of government. His view was that the object of legislation must be the “greatest happiness of the greatest number.” He also posited that punishment of the law, which involves pain, may be used to exclude greater evil among the people.¹⁷

While ideas about the law and systems of government have universal applicability, it can be suggested that for China and Africa, there is a need to relate these to utilitarian conditions inherent in their societies. In the case of China, this condition is necessary for understanding the evolution of the law and the democratic state. Thus, the important influence of Confucianism (Kung Fu tzu), which thrived during 551 BCE, on Chinese law cannot be ignored. Confucianism is an ancient belief that focuses on the importance of personal ethics and morality. In other words, it believes that if each individual worked hard to fulfill his or her assigned destiny by following the Dao (path), the affairs of society as a whole would surely prosper as well.¹⁸

Other scholars in Confucius’s School such as Mencius (370-290 B.C.E) projected the humanistic side of Confucius’s ideas, arguing that humans were by nature good, hence could be thought of their civic

¹⁷ “Law” Encyclopedia Britannica. Retrieved from www.britannica.com

¹⁸ Ibid. Duiker, W.J. & Spielvogel, J.J. p.68-70

responsibilities by example. This contrasts with the views of the Legalists that humans were by nature evil and would follow the right path only if coerced by harsh laws and stiff penalties. They argued for a system of impersonal laws as a government of “superior men”¹⁹ could not solve society’s problems.

The emphasis on morals over law connotes a non-absolute principle. But laws would make no sense if there are no moral principles underpinning them. Mahajan expands this view with the assertion that “In a democratic state like India if the legislature makes laws without taking into consideration ethical principles, the consequences would be disastrous. The people will not obey a law that is morally unsound, absurd, and cruel. They will refuse to pay taxes which are without adequate moral justification.”²⁰

In all, it needs to reiterate that law and law-making must serve the justice of society and must be equal for all.

This position is captured thus:

Distinctions can be made on a rational basis. Rationality of law depends upon the social requirement of a given society and is associated with the human values of a

¹⁹ Ibid. p.70

²⁰ Ibid., Mahajan, V.D. p.367

society. A law may be reasonable in one society and unreasonable in another. That depends upon the social requirements of the two societies.²¹

Universal Concept of Rule of Law

There are varied views of what constitutes the rule of law, but the universal conception revolves around adherence to the supremacy of law. Elizabeth Anderson is of the view that based on the submission by the United Nations and the U.S. federal judiciary, the rule of law can be understood as a system that delivers accountability, just laws, open government, and fair and impartial dispute resolution. Thus, the rule of law ensures accountability regardless of power or privilege, in or out of government. The idea, traceable to ancient scholars, resonates in most major legal traditions. “So, let’s be clear. Just because a policy or practice is pursued through law does not mean it upholds the rule of law. A nation governed by the rule of law should check corruption but not selectively, arbitrarily or without regard for due process.

The rule of law promises law and order but not at the expense of fundamental rights.”²²

²¹ Ibid. p.367

²² Anderson, E. (Jan 22, 2021) *To defend rule of law we must agree on its meaning* retrieved from Thehill.com 8 pp.

However, democracy as the best system of government can be applied by different societies in a unique context, which suits their reality. In other words, democracy in the USA cannot be applied similarly in a country like China or Egypt or Nigeria which have different historical and existential realities

What is important is the quality of the legislation, justice dispensation, and the delivery of services by accountable and responsive leadership to guarantee the happiness of the greater majority of the people. More aspects of the rule of law in China are dealt with in chapters three and five.

Classification of Legal Systems

A system or systems are entities that “interact with one another in varying degrees and varying ways.”²³ The exact ramification of the term ‘legal system’ may not be exhausted in this book as there are different interpretations of it. Generally, the legal system may be viewed as the law and its administration. It can be described as “an organized set of ideas or theories or a particular way of doing something; a group of things,

²³ Palmer, D & Perkin H.C. (2007) *International Relations. The Word Community in Transition*. (3rd Edition). Delhi: AITBS Publishers and Distributors.

pieces of equipment, etc that are connected or work together.”²⁴ Furthermore, the notion of “system” derives from interconnectedness, or having several interrelated, interdependent parts functioning together within space and time. Just as the criminal justice system would include security agencies, courts, prisons and all the institutions responsible for the processing of law offenders. Thus, a “legal system” can also be defined as the laws, personnel of the law, and administration of justice in a given state, country, or geographical entity.

In the Chinese conception, a legal system may be viewed as “a unity that consists of organically connected branches of legislation grouped by all the present legal norms of a country”²⁵ In this wise, the concept of ‘judicial system’ in China is broader in scope than courts and judges. In China, the ‘judicial system’ commonly includes the People’s Courts, the People’s Procuratorate, public security agencies under the Ministry of Public Security (the police) and the justice department (under the Ministry of Justice). Each has powers and functions

²⁴ “System”. A.S. Hornby (ed) Oxford Advanced Learner’s Dictionary of Current English, 4th Edition. Oxford University Press (1974)

²⁵ Lin, I (2014) *Interpreting China’s Legal System*. London: World Scientific Publishing Co. Pte. Ltd. p.114

defined by the Constitution and laws.²⁶ The implication is that the interaction of institutions such as the legislature, police, courts, and prisons in a given environment or country conduces to its legal system.

In a broad, more taxonomical sense, the legal system is the “juristic philosophy and techniques shared by several nations with broadly similar legal systems”²⁷. This can be related to the major legal system or parent legal families such as common law which refers to English law, civil law which relates to France and Germany, and socialist law where China falls in. But Konrad Zweigert, views the Chinese law system as a “mixed law system”.

This incorporates civil law, common law, continental laws of Europe and socialist law with Chinese characteristics. While some scholars submit that three major systems are driving the world legal system: The Continental law system of Europe, the Anglo-American law system, and socialist law system,²⁸ others submit more definitely that civil law, common law and the socialist law are the traditional legal systems.²⁹

²⁶ Wang, Y. Biddulph S. and Godwin A. (2017) *A Brief Introduction to the Chinese Judicial System and Court Hierarchy*. Melbourne: Asian Law Centre Series p.5

²⁷ De Cruz, P. (1999) *Comparative Law in a Changing World* (2nd Edition). London: Cavendish Publishing Ltd p. 205

²⁸Ibid. Lin, p.4

For Africa, it is difficult to situate the legal system in a particular system. The different colonial background of African states means that the legal systems differ. The English common law, French civil law and mixed law jurisdictions abound in Africa and these are the categorization of countries for this work. An important way to delineate the different legal families includes (a) the system's historical background and development; (b) its predominant and characteristic mode of thought; (c) its particularly distinctive institutions; (d) its sources of law and the way it handles these; and (e) its ideology.³⁰

By their historical and evolutionary trajectory, law families could be classified according to the traditional notions of codification and systemization of concepts into categories. For instance, China's revolutionary history from the ancient to the modern or Africa's colonial history has a great influence on its law, and this could be regarded as an acceptable criterion for classifying their systems. Also, the civil law systems' Roman origins and the strong influence of the French Civil Code and German Civil Code have a major imprint on the Continental Europe family of law.

³⁰ Ibid, De Cruz, p.36

Arriving at classification by mode of thought entails a slant towards applying the law in the court. It is in the legal procedural mind. A good example of this is the English common law vs French-German Code. A basic explanation of this is that where civil law proceeds from general principles to general principles, common law proceeds from case to case. Where cases have formed the primary source of the common law, statutes and codified law have been the civil law counterparts. And while common lawyers think in terms of the existing enacted rules, codified or statutory, which may be applied to a given situation.³¹

For the distinctive legal institution for classification, the use of trust, agency, tort principles, consideration, and estoppel would be associated with the common law jurisdictions. The Germanic family, for instance, has institutions such as the abstract real contract, *clausulae generalis*, the concept of legal action, the notion of unjust enrichment, the doctrine of the collapse of the foundations of a transaction, and liability based on *culpa in contrahendo*.³² It needs to be noted though that contract, ownership and private property similar to the capitalist system, has emerged in socialist systems.

³¹ Ibid., p.38

³² Ibid. p.39

Sources of law are also important criteria for the classification of legal families, although the debate has been about the distinguishing feature of cases or statutes; methods of interpretation, and court structures and procedures between common law and civil law. For instance, sources of law in China being constitutional law, laws, administrative rules, local laws, regulations, treaties, and so on can provide a guide to the classification.³³ Explanation of the sources of law in China is necessary to the understanding of the legal system and practice.

Finally, the ideology of a legal system is the main criterion for classification. It can be described as a set of ideas that an economic or political system is based on, or “a set of beliefs, especially, one held by a particular group that influences the way people behave.”³⁴ An example is the classification of the legal systems of countries like China, Mongolia, Vietnam, North Korea, and Russia under the influences of the Marxist-Leninist thought. This ideology as it relates to Chinese law will be discussed in detail in chapter three of this book.

³³ Ibid. Lin, p.3

³⁴ “Ideology” Ibid. Oxford Dictionary.