Indian Philosophical Quarterly Vol. X, No. 3, April (1983)

LAW IN A MULTICULTURAL WORLD

In the present essay it is proposed to deal with the role of national and international law as it pertains to (1) The Islamic Middle East, (2) Africa, (3) India and (4) China. A fifth and concluding section is added. The material is taken from Bozeman,[1] with emphasis upon learning whether international law as conceived by western nations may or may not apply in those parts of the world under discussion. For all its well-integrated approach toward the concept of law as it relates to the world scene, Bozeman's treatment remains strictly an empirical and historical one, utilizing pragmatic themes in dramatizing the rather limited role of law as it moves forward to its goal of promoting the general welfare of mankind under rapidly changing world conditions.

In some Eastern lands the general vagueness of thought and exaggeration in expression, together with a tendency to often deliberately disregard seemingly important facts, make for difficulty and sometimes for impossibility in any attempt to achieve a meeting of minds preliminary to success in formulating the precise agreements that are required of negotiating countries. Contrast this situation with the tradition of law in the West which boasts its proliferation of abstractions, and in so doing we find the East left with only such facts and concepts as have proven useful in support of some specific and approved social or political order. Further, the lack of agreement on the precise meaning to be conveyed by such ordinary Western terms as 'peace', 'law', or 'order' gives rise to blocks in communication and a perennial misunderstanding between different societies, much to the detriment of any common policy that might otherwies be implemented.

I

Legislators and jurists in the Near East give evidence of an unrestrained eclecticism, including the adoption of opinions that have been drawn from the past, but with little regard to any systematization of context. Although the Modernists of Near Eastern countries may readily accept ideas from the West, they

nevertheless hold that law, in the last analysis, must be ruled by religion.[2] Not only law, but constitutions and governments, if they are to survive in Islamic societies are endorsed and sustained by religious or quasi-religious forces. Islamic society consists in an interrelationship of religion and government; there is no constitutional government that is absolutely divorced from Koranic law. Islamic law conforms to the rules of religion, with which it has a far greater concern than any that may be shown toward individuals in everyday commercial affairs; law has never been formulated with practical human needs in mind simply because the legal rules of Islam stem eventually from divine commands which are largely concerned with religious rites.

Government is often given over to the principle of absolute personal rule, with the major sources of power not residing in clear-cut govern nental departments such as the legislative and executive branches, but under a bureaucracy of religious and military officialdom. Militancy and all the ruthlessness that this term implies has long ago come to be not only the accepted but also the expected method of rule among sovereignties. Control is exercised by means of autonomous religious units affirming loyalty to the dynastic state rather than through separate branches of government. Governmental rule that operates through a centralized despotism precludes the administration of state affairs under constitutional law and by-passes the concept of citizenship as this has been understood under western jurisprudence.

It has not been uncommon for government in Islamic states, not always a source of benevolence to its citizenry, to be fraught by violence among ambitious contenders for its leadership. Whereas the West seeks to blend government with law, Islam sets government in opposition to law.[3] Indeed the Islamic world is ultimately guided by Divine law alleged to give voice to a supreme law of peace, although such claim to benignity apparently has not discouraged a belligerent posture consistently maintained in the presence of nonbelievers. In Eastern and Near Eastern lands where a certain ambiguity in the intention of the law seems nevertheless to contribute to what law there is, even as it tends to erode any attempt to establish a constitutional state on Western lines, there is not the talent in the Latin tradition for a precision of legal expression nor for a statement of general principles in

order to accurately represent particular occurrences. The West itself labours under the presupposition of a multinational reality adequately supported by means of a formal legal structure. There has been in evidence several overhasty attempts to impose constitutional and educational systems upon emerging national states where traditional religious beliefs have a much wider scope and a more ready opportunity for expression than a system that is not deeply rooted in the native culture and altogether foreign to the conscience of the individuals concerned.

II

Encountering in Africa forms of culture superior to its own, it has been claimed that Islam penetrated the Sudan of Africa from the northeast as a more or less primitive religion, and that indigenous law customary to the native population still survives even in Muslim-influenced areas with the possible exception of Nigeria. Neither the Arab settlements nor Indian and Persian immigration to the East African coast, nor the slave trade carried on by European countries have succeeded in basically changing the life and customs of Africa, for it has proven to be the case that foreign elements have been everywhere almost completely absorbed.[4]

Traditional obligations are deeply ingrained in native societies, and under African law the individual, as understood in Occidental terms, has not always achieved status as a legal entity, nor does the term 'corporation' often carry the same technical meaning as in Western law. The tribe is the entity; truths are felt to be inherent rather than vocalized, so that no intruding European system has greatly altered the dependence of much of Africa upon its religious heritage and its accompanying regard for ancestral customs. No one should long remain under the misapprehension that Western law patterns may easily be imposed upon native cultures lacking a concept of law in the abstract. It would be an error to assume that the enactment of constitution for all native socities can be supposed to have the same effect as in the countries of Europe or America already familiar with the tradition of legal enactments. In newly independent African states the forms of stabilized law are not always held sacrosanct by ruling personalities or by the military, either of

which may well be inimical to a structured law system. Instead, there may be a basic and deep belief in that kind of law which is embedded in proverbs and various other forms of ancestral wisdom. The situation that results may then be truly said to present a challenge to the European-type development of law. It should indeed be appreciated on the part of observers from outside countries that the governments of emerging states consider it unwise not to utilize for their people the kind of law that is found deeply entrenched within the traditions of many previous generations.

Typical of African tribal society is the adherence to an all-encompassing law which merges religion and government together, a kind of law that fails to delineate clearly in the individual's thinking the fact that individual rights are of first concern. Justice is almost wholly a matter of placing main emphasis on restitution in the face of the affronts and catastrophes that accord with human existence, very little thought given over to the motivational behaviour of the parties concerned. In certain African societies less concern is given to the outcome of a trial than to the ritual of the proceedings, attesting to the organizational skill of the African rather than to any very considerable progress he has made toward the goal of a complete system of justice. African law and law enforcement practically identify with the broad spectrum of society itself and the African judge to a dispute aims ultimately at conciliation rather than any very strict determination of guilt. A judge plays the role of an arbitrator so that normal relationships may readily be resumed; compensation required of the offending party may take the form of nothing more demanding than a ritualized apology.[5]

Many African states south of the Sahara therefore are not as yet what may be termed ' law states ', and the obstacle is largely one of ' ethnic pluralism ' or, as it might also be termed ' particularism', a condition which obviously is the means of fostering numerous cells of differing political interests. It is well understandable that the temporary introduction of the constitutional and lawfully conceived state, which developed as a venture on the part of colonizing European powers, has not only been indifferently received, but has proven alien to the

African societies upon which such type of government came to be inflicted.

A certain cultural language which obtains in law and literature, a language not necessarily that of the West, but one which serves as a suitable medium for the rediscovery of native values, has meant that traditional beliefs and a newly released African spirit is quick to march in step with a recently won political freedom. It is coming to be realized that problems which have emerged must be viewed against the background of Africa's own cultural heritage upon which the political and social viewpoint of her people is ultimately based, rather than upon those influences superimposed by outside cultures. Newly independent non-Western societies, rather than adopt a new conceptual system, are quickly regaining their own native voices, while international leaders from the West are slow to appreciate the fact that most political systems are nurtured, not by unfamiliar political theories, but by cultural forces inherent in the native civilization itself. Occidental designs to foster schemes of political organization are not readily adaptable to small, ethnically unified and mainly orally based communities. No published text, for example, can long hold its relevancy where citizenship is associated more closely with kinship than with territorial boundaries, or where tribal cohesion and family loyalty rank higher than a constitutional tradition which may at best be only tenuous.

Administration in government in the independent African states is oftentimes restricted to the interests of the individual ruler, or alternatively it may depend upon a coercive one-party system which has failed to muster the support necessary for a European-style legal state. This kind of situation has made for instability in foreign affairs, where negotiations thus may turn upon the policies of vested rights or of personalities rather than upon the will of the nation state as a whole, and where persuasion is based upon the dictates of a leader in power rather than upon any legal philosophy shared by all citizens. But a rather floating and unstable nationalism within the areas concerned has not prevented a pan-African movement from wielding considerable power and exhibiting its rather solid front on the international scene where African jurisprudence has developed its own definitions for key legal terms : the notion of 'rights', for example, is said to be

interpreted to imply the rights only of groups of individuals rather than the rights of individual persons.[6]

III

Precise and coherent political thought, it is contended, is an unattainable standard for India. Law in India for kings, as well as for men has been enshrined within tradition and in sacred texts, as for example the *arthaśāstra*, and determined by means of a rigid caste system. Rather than assume an ideal of liberty and individual rights, every man accepts as part of life an inherent inequality, and he lives in accordance with his caste and in conformity to his appointed *dharma* or duty. The object of any punishment that may be meted out for an infringement upon the *dharma* of another is to ensure for the individual concerned somehow a favourable place not only here on earth temporally, but within the cosmic scheme of things eternally.

For centuries past the Indian kings ruled by the religiously sanctioned law of success, the Indian counterpart to the divinely appointed rights enjoyed by European monarchs. What was right internationally was determined by the strength that came to be exercised through espionage and war, a state of affairs considered not only normal but one to be respected and admired. Intrigue and interstate violence rather than peaceful government under law in the past constituted the accepted norm, and from the third to the eighth centuries the temple and the palace in South east Asia rather than constitutional government have symbolized to the populace an ordered world, insofar as order was attainable, much as did the mosque of Islam.

But during the nineteenth century Great Britain imposed a secular and impartial legal structure in order to transform the traditional legal system of India; the purpose was to try to erase some of the uncertainties of Hiudu law, to protect the fundamental liberties of the individual, to release much of Southern and South east Asia from the grip of military power and to prepare the way for the establishment of parliamentary government in the subcontinent, all of which may be considered not only commendable, but a considerable feat in its own right, designed as it was to eventually fashion a better integrated society. But even so, in the lands of South east Asia, conflict

above law is yet a way of life, and the fact remains that government still hinges upon tradition and that personalities must be taken into account where any satisfactory reorganization of government in the countries concerned may be under consideration.[7]

IV

From the time of the early Ch'in Dynasty, China, fortified by Heaven's Mandate and supported by force of arms, considered herself to occupy a privileged position at the centre of the world. Because of changing boundaries, internal discords and much uncertainty as to the extent of central authority, it is doubtful if the term ' nation state ' as understood by Western political science can be made applicable to the China of history or even to the China of Communism. China is and has been a multi-state rather than a state. Unity among the various geographical and political divisions of China has been a doctrine rather than an actuality, and administration of government has been not so much through the avenue of constitutional law as by means of social ritual and an effective bureaucracy which have traditionally carried the burden of the slight amount of law that exists. Thus *li* for the Chinese means the entire body of social rules and moral principles together with accompanying penalties, and ' law ' is reserved for the preservation of social harmony with no undue emphasis upon the rights of the individual.[8] Where litigation occurs the concern is for the hurt occasioned to the status of the injured party, a concern which seems to be held in separation from the establishment of motivation, intent or guilt, all of which for the most part remain uninvestigated.

It should be realized that there is no analytical jurisprudence in the Orient; there is the notion of order, but not of the technicalities of positive law as understood in the West. Law is not distinct from morality and there is very little at all that may be said to resemble present-day international law. It must be understood that China's tradition and way of life are not amenable to the codification of law and that written law is a process that is scarcely applicable to the traditional practices in this part of the world.[9] In the Eastern countries international proceedings are

guided, not so much through technically enunciated statutes, as through unwritten traditions which antedate Western law by many centuries. As a matter of fact it has been remarked that even in the China of today the term 'law' is not frequently heard in intellectual circles.[10] It is not always appreciated that in the field of international affairs China has in the past negotiated almost to the exclusion of recognized law, disregarding that kind of formal international procedure upon which Western nations, as partners of equal status, have come to depend.

Chinese theoreticians have undeniably relied upon the concept of warfare to assist in bringing international negotiations to a successful conclusion, and modern Chinese strategy is said to be patterned after the recommendations of one Sun Tzu (c. 320 B.C.) as set forth in his *The Art of War*. It seems that Sun was first and foremost a militarist for whom politics meant the strategy of warfare while diplomacy coincided with the art of deceit, and from whom Chairman Mao often quoted with approval.[11] It may then fairly be observed that for centuries past in the Orient the use of force has been looked upon as a normal procedure to rectify the lack of achievement by good works alone; indeed the intervals of peace have been viewed as a considerable misfortune if by this means the progress of the nation came to be interrupted.

V

For not only centuries, but for millennia, Eastern tradition has made paramount the importance of the group rather than the individual as the centre of concern in matters of political control as well as social custom. This approach has obviously been an impediment to the introduction of any system of law featuring individual rights, including the ordinary right of contract. From the oversimplified viewpoint held by the Western world, world political unity would be practically unachievable, and in entertaining such a possibility the West fails to comprehend, much less allow for, the diversity of world cultures. Moreover, the political self-confidence recently arrived at by newly independent nations militates against the introduction of westernized forms of jurisprudence as major controlling factors,[12] so that for the present it is safe to say that there can be no one world in actuality, no world political union, but only one common

set of problems to be faced in a multicultural world. It is therefore little wonder that world unity is as yet an unrealized hope.

Whereas Occidental intellectual development has relied upon abstractions and generalizations which have characterized the thinking of the West since the advent of early Greek philosophy, scholars persist in attempts to impose a universal conceptual order into areas and upon societies where such is inapplicable. And such is unsuitable because those factors that are of significance to the growth of the still developing areas of the globe are largely ignored. Nor can it be hoped that Eastern or Middle Eastern countries should be organized and governed along lines entirely compatible with Western patterns and ideals. The Western world should disabuse itself of the notion that for every society of the world, law is that which is distilled from experience that is immediately factual, in the strictly empirical sense of the term 'factual'. This voices Bozeman's considered conclusion drawn from a variety of source material, the listing of which runs to some twenty pages.[13]

The West is apparently burdened under the concept of a new Humanism which would allow the elimination of all uncertainty from the future course of events, while at the same time preempting to its own liking certain selected happenings as well as principles in disrespect of the facts of experience. It seems to be a requirement that the course of nature should henceforth wait upon man's own personal intuition. We often hear it said that the ultimate aim is to achieve world unity or at least the coherence of world cultures by the imposition, for example, of a Western-style educational system together with a Westernized system of constitutional law upon various other societies of the world. Native leaders who are advocates of this approach are misled by Western rhetoric along with an over-idealization of what they have been led to believe is possible of achievement upon the world scene; they are misinformed as to the adaptability of native cultures to a conceptual system that is alien to their own. Prior to any hope for the attainment of a universal pattern for local or international law which might apply to all societies indiscriminately, a thorough and proper research into the cultural map of the world and its people is indicated. Indeed, on many fronts of the world today

the efficacy of law in general is questioned, especially where the concepts of contract and property have been made central to those situations where individuals interrelate in societal living. Where rebellion against the precepts of law is incipient, such may often be traced to the precipitous intent of one part of the world to project its own methods in jurisprudence upon those parts of the world where development has been very different and over a longer period of time.

Since the law that has evolved in the Western world is a code derived from and applicable to experience and observed happenings, it holds just so long as it is not inconsistent with the stated facts, or at least it tolerates a minimum of inconsistency. The development of law has gone hand in hand with a deep respect for private agreement and marked confidence in the individual as a party to contract and promise. Law in the West has kept closely in touch with life; while maintaining its autonomy it has acted as a normative reference point serving to moderate the tyranny of fashion and the waywardness of passion. Law lends priority, singling out whatever is suggestive of order and regularity, and law has both recognized and protected individualism. The penchant in the U. S. A., for example, for individual freedom and individual rights and also the efforts of its people toward surmounting cultural legacies, has largely been responsible for the development of a political system which has been proposed as a model for governments in the world at large.

In recent years in international affairs where, regardless of law, conflict is now more often the rule than the exception, the alleged ambience of international law might better be restricted in scope from that of a world force which attempts to unify, to that of a reserve intelligence service, as it were, ready to act in an advisory capacity and to exercise its role only upon invitation and in certain specific cases. It should never be expected that international law should be fitted for, or applicable to, or remedial in, every localized problem situation in every world locality, especially among those societies having a diverse cultural heritage.[14] It is simply erroneous to expect that Western-style legal procedures can be made to apply in blanket fashion to local populations possessing a heritage of varying cultural traditions.

In later centuries the political, economic and intellectual ascendancy of the Western world has served to convince it of the correctness of its own system of law for the entire world. But in its eagerness for a United World one part of that world has exhibited a profound lack of sensitivity for the moral and religious practices of other and varied cultures, and in fact would deny to other races many of the freedoms that the West itself has seen fit to reserve for its own benefit.

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NOTES

1. Bozeman, Adda B., *The Future of Law in a Multicultural World*, Princeton University Press, Princeton, N. J., U. S. A., 1971.
2. Schacht, Joseph, *An Introduction to Islamic Law*, Oxford, 1964, pp. 106 f., as referred to by Bozeman, p. 55n.
3. Bozeman, pp. 75, 78.
4. In support of this view, cf. the following, as referred to by Bozeman: (pp. 85n, 195 f.) Anderson, J. N. D., 'The Future of Islamic Law in British Commonwealth Territories in Africa', in H. W. Baade and R. O. Everett eds., *African Law : New Law for New Nations*, New York, 1963; Westerman D., *The African Today and Tomorrow*, London, 1949. Also cf. various works by J. S. Trimingham: *Islam in Ethiopia*, London and New York, 1952; *Islam in West Africa*, Oxford, 1959; *Islam in East Africa*, London 1962; *A History of Islam in West Africa*, London, 1963; *The Influence of Islam upon Africa*, New York, 1968.
5. Re. African law, cf Bozeman, pp. 106-7; also Gluckman, M., ed., *Ideas and Procedures in African Customary Law*, London, 1969, as referred to by Bozeman, pp. 110-1.
6. Cf. Bozeman, pp. 117, 120.
7. Cf., e. g., Bozeman, pp. 132, 134.
8. Bozeman, pp. 144-5.
9. This has been made clear in Escarra, J., *Le Droit Chinois*, Peking and Paris, 1936, a work of which Bozeman makes ready reference; cf. pp. 143, 145, 146, 148.
10. Cf. Bozeman, p. 156n.
11. Bozeman, pp. 153, 159, 160.
12. Bozeman, pp. 162, 163.
13. Bozeman, pp. 61, 65, 195-217.
14. Cf. Bozeman, p. 186.