

## Different Conceptions of Law and Social Order

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 Capítulo 1: Los Distintos Conceptos de Derecho. UK, Brill, s/a.

**Law does not mean the same to everyone and its practical value therefore varies...**

**Different conceptions of law and social order** can be reduced to 3 types:

1. In some societies the function of the law is extolled; in others, the accent is on conciliation and on peace
2. Some see the law as an ideal system of rules and an example to be followed; others, as a system for resolving conflicts
3. Some seek in the law a system of rules; others regard it merely as a method of regulating various problems which arise in social relations

|  |                              |   |                           |
|--|------------------------------|---|---------------------------|
| An ideal of the rule of law  |                              | An ideal of social peace and harmony                        |                           |
| Law as a means of resolving conflicts  |                              | Law as a system of rules showing its subjects how to behave |                           |
| Law consists of substantive rules informing people of their rights and obligations | Law as a matter of procedure |   |                           |
| Romano-Germanic Countries  | Common Law Countries         | Islamic, Hindu and Jewish conceptions                       | Far East and Black Africa |

| An ideal of the rule of law   | An ideal of social peace and harmony   |
|---|--|
| Law has an essential part to play in society; it is natural, desirable, and just that disputes be resolved, criminals judged, and the administration controlled by courts... a man is a good citizen, on of the "just" if he lives according to the law   | This whole attitude (...) is not only strange, but absurd and shocking ...   |
| <b>West:</b> " <i>ubi societas ibi jus</i> " A well organized society must be based on the law... if a dispute arises, the normal way to settle it is to have recourse to the courts... if a crime is committed, it is for the courts to pronounce the sanction for that crime according to the law...the civic duty of each individual is to take part in the struggle to ensure the supremacy of the law... the most perfect society is the one where the law reigns most completely...   | <b>Far East and Black Africa:</b> reject the idea of law as a principle. Disputes and crimes are looked on as sickness disturbing the proper functioning of the social "body". These accidents should be treated as such; they do not call for authoritarian solutions; conflicts, when they occur, must not be resolved, but "dissolved" by conciliation procedures. In all circumstances, the essential is to restore harmony, for harmony among men, linked to the harmony of the cosmos, is something which must be ensured if it is desired that the world live in peace according to the natural order |
| <b>Moslem law:</b> there reigns among the Moslems the sentiment that it (the law) is bound up with the religion of Islam, and to question its principles or doubt its wisdom is apostasy  |  |
| <b>Hindu law:</b> Dharma is the manifestation of all that is just   |  |
| <b>Moslem</b> fikh and <b>Hindu</b> dharma are models of justice, not open to discussion, according to which it is hoped that all members of the community will behave at all times   |  |
| <b>Socialist law:</b> (Flexibility) in the Marxist-Leninist countries it is considered that the supreme organ of government is not and must not be bound by the law; it is the supremacy of socialist legality which is to be established, rather than the rule of law  |  |
| Even in those civilizations where it (the law) has an important place the law is not always looked at in the same way...Some see the law as a system of rules showing its subjects how to behave, others as a means of resolving conflicts. In other words, for some the law is the way of organizing a truly just society, whilst others who look at it only from the point of view of the remedies which it provides, see it as a means of constraint intended to impose certain behavior |  |

| Law as a means of resolving conflicts   | Law as a system of rules showing its subjects how to behave   |  |  |
|---|---|--|--|
| <p>The law is a means of constraint intended to impose certain behavior... rules which are applied by force in a particular country under the control of courts of justice... rules which are in fact enforced...</p>   | <p>The law is the way of organizing a truly just society. A body of rules, of principles, showing men how to behave if they desire to act in accordance with justice. The law which particular societies consider as being just...</p>  |  |  |
| <p><b>Modern western</b> thought tends nowadays on the contrary to concentrate principally, if not exclusively on "positive" law, the rules of which are laid down by the legislature, observed in practice, and applied by the courts</p>  | <p>(This) attitude is found in societies where the law is if a religious nature, or closely linked with morality: <b>Islamic, Hindu</b> and <b>Jewish</b> conception. The law tells the just man how to behave in his relations with his peers. It sets up standards of behavior in conformity with morality and social utility, and thus imposes obligations on individuals rather than according them rights... In Islam, as in India, the ideal system by which justice requires men to regulate their behavior is kept separate from the empiric rules laid down by rulers and applied by courts, which vary from place to place... Only the former represents justice and only the former is really law.</p> |  |  |
| <p><b>Romano-Germanic countries:</b> In the 19 century there was a revolution... The most rational order of things was that governed by legislation, an essentially national phenomenon</p>   |   |  |  |
| <p>In the <b>Common Law</b> countries it has been declared that the law is based on "reason" and that it is not to be identified with those in power... The traditional attitude is gradually being modified and brought closer to the Continental attitude by the increasing importance of legislation in modern times and by the development of English legal science</p> |   |  |  |
| <p>In the <b>US</b>, as in the <b>Romano-Germanic</b> countries, the judges at least, now see the law as the expression of a policy aimed at establishing a better social order in the interests of justice</p>   |   |  |  |
| <p><b>Marxists-Leninist countries:</b> the law is nothing other than the expression of the will of the rulers</p>   |   |  |  |
| <p>If we accept (this) view, taking a positivist attitude, there is another difference to be remarked... 2 opposing views can prevail...</p>  |   |  |  |

| <p><b>Law consists of substantive rules informing people of their rights and obligations</b></p>   | <p><b>Law as a matter of procedure</b></p>   |  |  |
|--|--|--|--|
| <p>(There is another attitude) which seeks to show the judge, from the beginning, how he is to decide on the substance of the case. Justice and social order are not content with rules of procedure, and the certainty of legal relations requires it to be sufficiently clearly known, in advance, what solution will be given in the event of conflict. What is important is foreseeability of solutions... Procedure is after all only the servant of the law...</p> | <p>The law (is) essentially as a matter of procedure enabling a decision to be reached. Only at the end of the procedure will it be known what the decision is to be and at the beginning one is not principally concerned with this question. All that the lawyer can do, on the general level, is to perfect a method: rules concerning the choice of judge, the behavior of the litigants, the admissibility and taking of evidence, so that the decision shall be taken in conditions which ensure, so far as possible that it will be just. To say in advance what the decision will be is neither possible nor desirable; a truly just decision can only be made in function of a whole collection of elements, which essentially vary from case to case, and which are not sufficiently clear until the procedure has taken place</p> |  |  |