

## BOOK REVIEW

*Legal Pluralism. Proceedings of the Canberra Law Workshop VII.* Edited by Peter Sack and Elizabeth Minchin. Law Department, Research School of Social Sciences, Australian National University, 1986.

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The Preface by Peter Sack announces that this volume does not seek "a systematic coverage of this topic," but rather "consists of the papers (now in some cases substantially revised) presented as [sic] a three-day workshop on this subject" in 1984. Despite the term 'Proceedings' in the title, there is no record of discussion of the papers. Did the workshop indeed consist solely of the presentation of the papers? He continues:

We have made no attempt to relate the papers to each other or to draw general conclusions. For, while the Workshop, in our view, advanced the debate significantly, it also demonstrated vividly that there has emerged so far no consensus with regard to an assessment of the position, much less with regard to desirable courses of action.

The lack of definition of the volume's subject is perhaps greater than those words acknowledge. There is no specification of what might have been the subject of "the debate" which was significantly advanced, of where might be "the position" which was not assessed, nor of whose "action" might take desirable courses.

What seems clear is that we are invited to consider each of the fifteen papers on its own merits. In my opinion three contribute significantly to an understanding of certain issues arising from the study of legal pluralism, and most of the others provide useful information about instances of legal pluralism.

The first in the former category is Sack's "Legal pluralism: introductory comments." Its title indicates that it is not intended to present

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a single thesis, but it is full of stimulating, provocative suggestions. It might have made even more impact if the writer had been more aware of the ideas of others. He refers to none of the modern literature on legal pluralism other than Abel (1973) and Roberts (1979). Beyond this, the only appropriate reaction is to comment on a selection of the points he advances.

He starts by setting an objective which readers of this Journal must undoubtedly approve: "Legal pluralism' is not a technical term with a precise, conventional meaning, but it deserves to become such a term." He distinguishes legal pluralism from "the acceptance [i.e. nothing more than the acknowledgement of the existence] of a plurality of law," and asserts that it "involves an ideological commitment" against "monism, dualism and any other form of dogmatism". Plurality of law "is concerned with [i.e. is?] the coexistence of different forms of law," not of different legal systems of the same form.

"Plurality of law is therefore also not identical with the distinction between official and unofficial law, or between state law and people's law, or between law and custom ... and it is a plurality not a duality." This is quite true, but perhaps Sack overestimates the prevalence of the views he attacks. The Commission on Folk Law and Legal Pluralism is standing evidence of an awareness on the part of its numerous members that plurality of laws exists in a very large variety of historical situations. And as far as I am aware none of those who have drawn the distinctions he mentions have supposed that unofficial law, people's law or custom were single phenomena. On the other hand, it would seem intellectually constructive for some scholars to spend some of their time considering the peculiar character of official, state and 'non-customary' law; this would be difficult if these distinctions were exiled.

Formally, Sack agrees, it would be possible to identify the concept of law with a single form of law. But then there would be a danger that instances of plurality of laws would be re-defined as cases of competition between law and non-law, with the former carrying the ideological armour of legitimacy and exclusivity, and being regarded as the sole effective technique for the protection of values such as human dignity or freedom.

These contentions form the basis of his further remarks about the universality of plurality of law, the views of Montesquieu and Savigny, the development of legal positivism, and the relationship of private international law to the notion of plurality of law.

Much of this is interesting, although fairly obvious, but one feels a sense of disappointment as one looks for the fulfillment of Sack's original promise. His initial propositions mean that he can progress towards giving legal pluralism "a precise, conventional meaning" only by elucidating the notions of "coexistence", "different forms of law", and "law". Clarification of the first seems not to be noticed as a possibility, of the second is mentioned but "cannot be pursued in this paper", and of the last is repeatedly rejected as a mistaken objective impossible of attainment. On this last, Sack's determination to avoid cultural bias seems to undermine the entire enterprise. He criticises Abel for assuming that disputes can be compared transculturally, that dispute processes in all societies are institutionalised, that 'rules' must play a key role in them, and that dispute management must always lead to a decision. He criticises Roberts for assuming that 'order' is a simple, unambiguous concept, and that in small-scale societies law, or various functional equivalents of positive law are shaped by concerns with order and control. It seems to me that Sack attributes to both writers contentions which are not entailed by or implied in their work. But, that difficulty apart, he offers no ordering of knowledge which might replace their proposals. Indeed, he claims that it is not possible "to identify law as a single generic field of study," and that "law as such is unknowable".

Sack cannot help, in a discussion of legal pluralism, giving some indications of his concept of law. He tells us that "the purpose of all forms of law ... is, first and foremost, ideological," that "the main responsibility of law, including legal theory, is not analytical clarity or consistency but the performance of practical social tasks," and that "social organisation is the central task of law" (which is not easy to reconcile with his statement that law has "different and changing tasks"). These do not take us very far, although they do incidentally give a hint of the persistent tendency to personify institutions: the "model of positive law" has a "potential suicidal inflexibility," although "legal pluralism wants, if possible to use rather than destroy" this; however, "it may well be that positive law will refuse ... to modify its '*la loi c'est moi*' attitude...."

In a discussion which repeatedly uses the notion of law, more than this is needed. Apart from the repeated references to "different forms of law," we are told that "general legal theory ... must investigate what [law] can be," and must see law "as a range of possibilities"; that "law, and the plurality of law, has always existed and will continue to exist, because it is a necessary part of human life"; and that there are "basic facts of legal life". Without an

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indication of what he means by law (and of course this is not to demand a positivist, conceptual analysis, nor any essentialist 'definition') such statements are, quite simply, without meaning. This is unfortunate, because Sack might have advanced the theory of legal pluralism significantly instead of leaving us with just a few stimulating observations.

Upendra Baxi in the first phrase of his "Discipline, repression and legal pluralism" announces himself to be "an ardent exponent of people's law". In the next paragraph he provides a succinct summary of "the broad notion of 'legal pluralism'" which would probably be widely acceptable and by its example effectively refutes Sack's case against definition. The bulk of his paper is devoted to expressing the qualifications he places on his approval of people's law, repeatedly driving home the possibility of bad folk law, too often ignored by some students. As he says: "The possibility that legal pluralism in any society may be as repressive as, if, indeed, not more repressive than, legal centralism needs to be seriously pursued in legal pluralism studies."

Much of Baxi's paper, drawing on Foucault, is an exploration of the ways in which non-state legal systems may be instituted for repressive purposes or may assume such purposes through their own development, and how theories concerning legal pluralism may incorporate this recognition. This must be read in full, but one particular comment draws attention to a problem which is rightly receiving increasing attention, and which must be seriously addressed by students of legal pluralism: "Pluralist social reality is, it appears, overwhelmingly oppressive of women."

Peter Fitzpatrick, in "Custom, law and resistance," takes as his starting point the opposed views of custom in the third world as, respectively, essentially continuations from the pre-colonial past and purely colonial constructs. He devotes more attention to the latter view, but he argues that it has been exaggerated to the point where continuities which clearly do exist are ignored. According to this a social form is constituted through its external relations of support and opposition with other social forms. The involvement of different social forms with each other tends towards their convergence and hence dissolution: "their conservation as integral depends upon a separation between them and an element of mutual rejection." Fitzpatrick develops this idea, like Baxi drawing on Foucault, but also on a wealth of other literature, to contend that even in extreme relations of dominance, such as in a slave society, there is central to society a reciprocity whereby the dominant power does not totally

form the dominated element, but in contrast is itself significantly formed by the opposition of that element. As Fitzpatrick accepts, there remains a good deal of work to be done in exploring the implications of this in particular instances of legal pluralism - or indeed in human society generally, since this is social theory on a large scale.

As I have suggested above, many of the other essays are interesting as more narrowly focused sources of information and analysis. The following selection of brief notices is personal and arbitrary, but may give an impression of the range. Masaji Chiba draws together some of his work on the difficult task of developing a comparative study of law which will give adequate attention to the social norms and practices constituting or related to Japanese law. Bart Rwezaura gives an account, full of implications for other legal systems, of the course of resistance among the Kuria people of Tanzania to state laws attempting to restrict bridewealth payments. Mere Pulea describes a wealth of customary legal provisions relating to the management of the natural environment in the Pacific islands, while inducing the reader to question the possibility of these operating to beneficial effect in present or soon-to-be-experienced conditions. Yash Ghai explores the contradictions between custom and the market, and between state and community, in the policies considered in the formulation of the Vanuatu Constitution. He hints at a significant link between policies favouring popular participation and pluralism, but eventually expresses doubt as to the long-term prospects of a vigorous body of custom, cushioning people from the effects of the encroaching capitalist market. Bernard Narakobi's paper is perhaps the best available exposition of the policies which he unsuccessfully promoted in his short period as a member of the Papua New Guinea Bench, with a view to bending the Western, codified criminal law to respect custom. James Crawford reports on the issues which were to be more fully discussed in the monumental Report of the Australian Law Reform Commission on the Recognition of Aboriginal Customary Law (1986).

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References

ABEL, R.L.

1973 "A comparative theory of dispute institutions in society." *Law & Society Review* 8: 217-342

ROBERTS, S.

1979 *Order and Dispute: An Introduction to Legal Anthropology*. Harmondsworth: Penguin Books.