BOOK REVIEW

Prakash Shah, *Legal Pluralism in Conflict: Coping with Cultural Diversity in Law*. London, Sydney, Portland Oregon: Glass House Press. 2005.

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The main thesis of this book states that the legal pluralism of Britain has been intensified, and the conflict it engenders has been increased, by the immigration from outside Europe which has taken place since World War II; and that in these circumstances the state law fails woefully to treat ethnic minorities fairly, omitting to understand and recognize their laws. This thesis is developed primarily with regard to the post-war history of immigration and nationality law, Dr Shah's main fields of expertise. But he also has much of interest to say concerning the teaching about ethnic minorities in law schools (or the absence of such teaching), the treatment of issues arising from cultural diversity in homicide cases, and many other issues pertinent to the main thesis. These fields have been neglected by legal writers, and this work must be welcomed.

Arguing for his first premise, that legal pluralism arising from cultural diversity is today a major feature of the legal scene in Britain, the author adopts the analyses of legal pluralism presented by Masaji Chiba (Chapter 1, referring to Chiba 1989, 1998). Chiba proposed inter alia that "the fundamental structure of the working whole of law" in human society should be seen as having a three-level structure, consisting of official law, unofficial law, and legal postulate (Chiba 1989: 138-40). The first, official law is usually state law. Secondly, unofficial law is "authorized in practice by the general consensus of a certain circle of people, whether of a country or within or beyond it" (Chiba 1989: 139). The notion includes the normative orders of the communities with which Shah is concerned, being the "self conscious and more or less well organised communities entertaining and living by their own different systems of beliefs and practices" (p. 1, quoting Parekh 2000). Clearly, if these orders are recognized as a category of law, there is

a marked degree of legal pluralism in Britain today. Thirdly, "the legal postulate of a country is the foundation of its official and unofficial law which it also justifies and orients" (Chiba 1989: 140). This is later referred to by Chiba as the "identity postulate" of "the working whole structure of law of a people" (Chiba 1989: Chaps. 11, 12).

Shah's book may be seen as making the case for a particular type of identity postulate of British law, He states:

> This study takes inspiration from Chiba's argument that it is essential to observe conflicts within legal pluralism, the better thereby to highlight and to manage them 'wisely', and to address this from the subjective perspective of the recipient of legal pluralism (p. 9).

The case for an identity postulate which will manage conflicts wisely is advanced through detailed studies of the ways in which current state law responds to situations in which human activity has been influenced by the norms of ethnic minority laws. Of a succession of such cases Shah argues that British legal thinking is strongly ethnocentric, showing little understanding of and no interest in cultures other than that of the white majority, indigenous population. The dominant view adheres to legal centralism, the belief that "law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions" (Griffiths 1986: 3).

Shah makes a powerful case, although in places he seems unduly dismissive of those with whom he disagrees. For example he regards it as "incredible" that the Court of Appeal upheld a decision despite his own published comment on it, "three senior judges apparently unable to see the, by this stage, ridiculous position the legal proceedings had reached" (p. 134). However, generally he presents a convincing critique of the recent development of immigration and nationality law. Especially telling, in the view of this reviewer, are his accounts of the persistent findings that the laws observed in resident ethnic minority communities can be recognised only as 'foreign' laws (pp. 34-35). The consequence has been that the only ground for applying laws claimed to be the personal laws of members of these groups in state courts has been the recognition of these laws as foreign systems of law applicable according to the rules of private international law (p. 101).

One may wonder whether British state law has always rejected the recognition of

other laws so inflexibly as Shah suggests. While there has historically always been a centralising, homogenising tendency in the common law, there has also been a long tradition of abstaining from intervening when minorities apply their own laws within their own communities. The large body of case-law on the recognition and enforcement of local customs suggests that these were seen as a significant element in the common law for centuries until industrialisation and urbanisation eroded their social effectiveness. The history of Jewish law in England shows a similar approach. After their readmission to England around 1660, the Jewish community established their own places of worship, celebrated their own religious forms of marriage, and generally regulated relations within their community. It has been said that they had their own "miniature republics, with councils and law courts of their own" (Kiernan 1978: 26). Only in the 19th century were Jewish marriages brought within the general English law regulating the incidents of marriage and the processes of its termination. Again, the Huguenots, protestants who in the 16th and 17th centuries took refuge in England from religious persecution in France, generally created their own church and work environment, and the elaborate organization of their churches effectively regulated the lives of members of this community (Gwynn 1985; also Kiernan 1978: 38-39). Huguenots were eventually, in the 18th century, assimilated into the majority English community. Jews, with individual exceptions, were only partially assimilated. Cases such as these need to be studied further.

That part of British legal history concerned with the acquisition of colonies and government of colonized peoples displays readiness on the part of the state to recognize personal laws. The notion of personal law was the basis for the diffusion of English law through British settlers who "brought their law with them". But was equally the basis for the principle that the existing laws of colonized peoples continued to apply to them after British sovereignty had been established, and were to be observed and enforced by British colonial courts. (The law is conveniently summarized by Roberts-Wray 1966: 539-44.) Shah draws a neat analogy between the transplantation of the common law through settlement by groups of British and the transplantation of the laws of ethnic minorities through their immigration to Britain (pp. 4, 60). The fact that the diffusion of the common law was aided and accompanied by a firm recognition of the principle of personal law raises questions about the legal foundation for the current reluctance to recognize personal laws within Britain.

Shah recognizes that much more work needs to be done in this field, and explains that the book "emerges out of a perceived urgency to provide students with

accessible material and to continue the debate among the wider communities of ethnic minorities, scholars, policy makers, legal professionals and others...” (p. 26). It may be suggested that there is an urgency to add to the debate some other information and arguments.

There is a need to consider seriously the considerable volume of literature which debates the possibility that there are universal values against which all laws, including the unofficial laws of ethnic communities as well as state laws can be assessed. Most of us would recognize that it is not entirely coherent to assert a strong moral relativism while also criticizing the actions of a state and its judiciary on moral grounds. There is in Shah’s book no discussion of, nor even reference to the debates about group rights (e.g. Kymlicka 1995, 2001). The Foreward by Roger Cotterrell, suggesting that liberal individualism as a practical attitude has become “socially ignorant and ethically barren” (p. ix) points in this direction, but the possibility is not pursued. In consequence criticism, for example, of the practice of polygamy, permitted in the laws of origin of some minority communities, tends to be dismissed as ethnocentric and assimilationist. The vast literature on human rights, much of which is relevant to the issues discussed in this book, is dismissed as also ethnocentric, or is ignored at points where it might have been relevant (Chap. 5). The criticisms directed at Poulter (1998), to the effect that his judgements were affected by an adherence to legal centralism (e.g. pp. 35-36) are in general well taken, but more consideration might have been given to the possibility that there was strength in some of his evaluative arguments.

It is also unfortunate, since Shah devotes a chapter to the culture defence (Chap. 4, on homicide), that he does not take account of Renteln (2004), which presents a huge volume of information and argumentation on the subject. Although Renteln writes primarily about the USA, her book contains many examples from other countries. Moreover, the USA is the country in which the topic appears most frequently to have arisen, and there are many possibilities of fruitful comparison with Britain. Renteln also contains reports arising from applications to present in state courts evidence of the cultures of minority communities. Much of this could have been relevant to the chapter on expert opinions on South Asian laws in immigration cases (Chap. 7.

The discussion does not often move beyond critique of past and present events and policies to analyze the field more generally and present proposals for the future. If ethnic laws are to receive recognition in British state law, some pressing practical problems will arise. It will be necessary to formulate principles determining how a

'community' is to be identified, and also to define the scope of a 'law'. Many members of minority groups observe or use their laws for some purposes, but not for other parts of their lives. These somewhat indeterminate 'communities' have often changed and adapted their laws of origin to meet the circumstances of life in Britain. If a policy of recognition of these laws is accepted, it will be necessary not only to determine the content of the social norms which are observed in practice by members of minority communities, but also to find criteria to distinguish between those norms which are to be classed as legal, and those which are not. It will be necessary to decide to what extent there is to be normative recognition (in which the institutions of the recognizing law adopt norms from the recognized law), and to what extent institutional recognition (in which the recognizing law cedes jurisdiction to institutions of the recognized law). There is much colonial experience of both forms which may throw light on these issues. Normative recognition may be more acceptable, but it requires law-makers to confront the problem that institutions, such as courts, which recognize norms require reliable sources of information as to their content (and will almost certainly make errors in this respect); and that they often cannot as a practical matter enforce, through their mechanisms, the norms of a system with widely different concepts and practices from their own. Shah discusses well the difficulty which state judges experience in trying to ascertain and understand non-state laws. He does not mention the necessity to adapt practiced non-state laws to enable them to operate as lawyers' customary law in the state law system.

Finally, it must be questioned how far Shah succeeds in his aim of adopting a "subjective perspective". (A well-considered argument for this perspective is contained in Vanderlinden (1989, 1993).) Anthropologists specialize in this. Lawyers, including legal academics, are with a few exceptions quite unequipped for it. In consequence our efforts to improve the general legal situation seem always to result in recommendations for legal action by state law alone. Chiba's notion of a legal postulate is the legal postulate of a 'country', a state. So in developing the identity postulate Shah can seek only to establish a formal recognition of legal pluralism by state law. The result will be state law pluralism (in which state law incorporates areas of non-state laws), not a conscious or planned deep legal pluralism, or legal pluralism in the strong sense as it is termed by Griffiths (1986), in which state law recognizes that it coexists with other, independently valid laws and vice versa. That mutual recognition of deep legal pluralism entails some adjustment within each law. Shah's final sentence reads:

> It remains difficult to see the coexistence of these different orders [of the state and ethnic minorities] in harmony unless adjustments are made to *the official system* to make it more responsive to the socio-legal orders within its scope (p. 178, emphasis added).

A reasonably broad-minded legal centralist would not have put it very differently.

References

CHIBA, Masaji
1989 *Legal Pluralism: Toward a General Theory through Japanese Legal Culture*, Tokyo: Tokai University Press.
1998 'Other phases of legal pluralism in the contemporary world.' *Ratio Juris* 11: 228-245.
GRIFFITHS, John
1986 'What is legal pluralism?' *Journal of Legal Pluralism* 14: 1-55.
GWYNN, Robin D.
1985 *Huguenot Heritage: The history and contribution of the Huguenots in Britain*. London: Routledge & Kegan Paul.
KIERNAN, V.G.
1978 "Britons Old and New", pp. 23-59 in Colin Holmes (ed.), *Immigrants and Minorities in British Society*, London: George Allen & Unwin, 1978.
KYMLICKA, Will (ed.),
1995 *The Rights of Minority Cultures*. Oxford: Oxford University Press.
2001 *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship*. Oxford: Oxford University Press.
PAREKH, Bhikhu
2000 *Rethinking Multiculturalism: Cultural Diversity and Political Theory*. Basingstoke: Palgrave.
RENTELN, Alison Dundes
2004 *The Cultural Defense*. New York: Oxford University Press.
VANDERLINDEN, Jacques
1989 'Return to legal pluralism: twenty years later.' *Journal of Legal Pluralism* 28: 149-157.
1993 'Vers une nouvelle conception du pluralisme juridique.' *Revue de la recherche juridique - droit prospectif* XVIII: 573-583.