

THE INTERMEDIATE VARIABLE OF LEGAL CONCEPTS¹

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The Conflict of Legal Conceptions From Different Cultures

It is obvious that legal concepts or conceptions expressed in official discourse differ from ordinary legal notions or conceptions in daily usage in a society, whether Western or non- Western. There is a contrast, however, between the tendency of Western people to take those differences for granted, and the frequent feeling of non-Western people that they are an infringement upon their human identity, and the occasional resort to violence against the law by non-Western people to maintain that identity.

Recent studies in legal pluralism or legal culture have reported many conflicts of this kind. These contemporary studies have been concerned not only to confirm or document such cases, but also to examine whether any device can be used to manage such conflicts. I wish here to suggest a step toward finding such a device by reformulating the cultural system of legal concepts. Some representative examples will first be reviewed briefly to underline the vital importance of this issue.

One is the concept of so-called 'witchcraft' among a tribe in Zimbabwe (Howman 1994). When a native midwife was charged with violating the Witchcraft Suppression Act, the Magistrate in charge, who was also native, was confronted with the difficult task of "striving to fit the sharp-edged, narrow and relevant instrument of a legal mind to the intangible, vast and impenetrable maze of African life" (Howman 1994: 639). The problem was how to apply the officially prescribed

¹ This article is an extended development of the basic idea of Chiba 1995. The part of that paper discussing human rights in particular is to be published in a book elsewhere.

INTERMEDIATE VARIABLE OF LEGAL CONCEPTS

Masaji Chiba

definition of witchcraft, namely “the use of non-natural means in causing any disease in any other person”, to her allegation that another woman was a ‘witch’. Investigating the native word *muroyi*, which had been equated with the English ‘witchcraft’, he found that it had twelve different meanings in the native usage, both natural and unnatural. He concluded that the effect of one of those definitions was that “until a definite series of rites have been observed which concentrate or inject this non-natural influence into the word *muroyi*, it remains a mere word,” as distinct from some others which were characterized as official or unofficial crimes (Howman 1994: 651). Adopting this definition, he declared her not guilty and discharged her.

Similar differences in the conceptions of legal terms are well known in the area of property, one of the most fundamental concepts in modern legal systems. Historical evidence relating to the Latin American Indians, North American Indians, Canadian Inuits, and Australian Aborigines demonstrate that the modern concept of ‘ownership’ or ‘fee simple’, the absolute, inheritable title in property empowering its holders to exclude every encroachment onto the object, was not known among non-Western peoples (cf. Kludze 1993: 144), and that, when imposed upon them, it eventually worked to deprive them of the lands they had peacefully appropriated. A great variety of conceptions of property different from modern ownership have recently been revealed by a Japanese legal scholar, who collected anthropological data from around the world, as having operated among or been employed by various non-Western peoples (Kato 1995).

The concept of ‘contract,’ which, together with that of ownership, forms one of the two fundamental components of modern legal systems, has also been found to differ from non-Western conceptions. A recent report from Trinidad revealed a typical example (Haraksingh 1994). Nearly half of the population of that country derives from the offspring of Indian laborers who came to work in sugar plantations in the period 1845-1917. The legal ground for their agreement to undertake the long voyage and hard labor was a formal contract of ‘indenture’ settled in a document allegedly on the basis of the individual will and decision of both parties, the validity of which was never doubted by the recruiters who acted as the planters’ agents. The other party to the contract, the laborers, could never grasp the legal meaning of the document they signed, since the kinds of contract they had been accustomed to were valid if made orally, the parties being “bound together by a course of dealings of the kind on which village and caste networks were sustained” (Haraksingh 1994: 63). The laborers were destined legally to be at the mercy of planters backed by an official legal system of Western origin.

Such differences in legal conceptions may provoke mortal conflicts between opposite meanings when concerned with human life. A few decades ago, a young girl in a

village in North India was reported to have died of cholera just before her marriage and after the performance of the traditional ceremonies. Astonishingly, she had in fact been murdered by her father with the full knowledge and approval of all his family, lineage, caste and village. Even the police would not arrest him to mete out criminal punishment. The reason was clear. The girl had been found by her fiancé to be pregnant by “illicit adultery” violating “both clan and village exogamy and caste endogamy”. The father, a leading Brahman, had no choice but to give her “merciful” death for her “rebirth in future lives”. So the opposing concepts of human life and murder were in conflict here. (Freed 1994)

This case may have resulted from the overwhelming influence of established Hinduism. However, a similar case provoked by a secular legal conception has been reported from Papua New Guinea. When five men were accused of having murdered an alleged sorceress in a village soon after the independence of the country in 1975, a native judge sentenced four of the accused to pay compensation and acquitted the fifth, a son of the murdered woman. In doing this he acted in accordance with the indigenous law in place of the official criminal law. His reason was that the accused had acted in fulfilment of their duty to the village to put an end to a vicious course of sorcery, that they had performed the required procedures immediately after the deed in faithful compliance with their own law, and that such indigenous law was officially sanctioned by the Constitution as the ‘underlying law’. The judges of the Supreme Court reversed the decision on appeal and imposed criminal punishment upon the four as prescribed by the official law (Narakobi 1986, 1993).

It is true that most reports of conflicts between legal conceptions come from non-Western societies, and specifically relate to the cultural definitions of lawful acts under the indigenous laws of native socio-legal entities such as tribes, castes and villages. However, similar conflicts take place even in Western society where different cultures coexist. The United States may be the most prone to such conflicts for her social structure is a melting pot of races of different cultures, and her legal structure respects individual freedom to the utmost under the rule of law principle. American judges are often challenged by cases that involve culturally different legal conceptions. For instance, is it just for them to punish a Japanese wife in accordance with American official law for the murder of her children, when she has attempted to commit suicide with them, an act which is punished less severely in Japan according to their tradition? Or, is a Hmong youth to be punished for the kidnap and rape of his Americanized lover, when he has forcibly performed the procedure of ‘marriage by capture’ in accordance with the practice of his homeland? (Renteln 1992. These questions will be answered later.)

Management of the Conflicts

We are thus presented with the serious problem of how to deal with such conflicts. There are many “jurists opposed to the use of the concept of folk law” (Woodman 1993a: 263). That attitude has recently been criticized, however, as indicating a tendency to ethnocentrism or imperialism by the established Western concept towards non-Western conceptions. The contemporary trend is not to disregard the conceptions of one of the conflicting parties, but rather to admit the cultural value of both on their merits.

A few sensitive scholars have warned Western students and practitioners to be prudent and careful in dealing with conflicts of this kind. In 1927 Cornelius van Vollenhoven, who was sympathetic toward the practices of native people, praised two officials of the British colonial government of India for their defence of the people against many others who had “promoted simple, uniform laws after good European models” (van Vollenhoven 1994: 259). They were Mountstuart Elphinstone, who was convinced that one should be “careful to avoid forcing [one’s] own views upon existing conditions”, and Henry S. Maine, who “fought against the ‘insularity’ of the English attitude towards jurisprudence” (van Vollenhoven 1994: 252, 260).

The most systematic study in history of conflicting conceptions must surely been the British efforts to restate African indigenous law. Antony N. Allott, who is regarded as having been the most “influential and prolific” scholar in the study of African law (Renteln & Dundes 1994: 285), was well aware of the pitfalls in the way of the task of restatement, and enumerated brief but useful practical warnings. He did not forget to advise against wrong interpretation “distorted by the introduction of English legal concepts”, and concluded that “one must regret the frequent attempts to force customary legal systems into alien frameworks” (Allott 1994: 291, 293). His warnings were fully justified with respect to the restatement then in progress.

Today, some decades after Allott’s warnings, the prevalence of conflicting conceptions appears to have been more widely and deeply revealed through the use of the concept of legal pluralism. At the same time, some leading scholars in this area remain critical of the lack of development in the scientific treatment of these conflicting conceptions. For instance, Robert L. Kidder has criticized the general tendency to go no further than simply regarding non-Western legal culture as a ‘black-box’ (1993) and Gordon R. Woodman has warned of the “non-state, unbounded, unsystematic” nature of African law (1993b).

This theoretical maze is sometimes noticed as practically important to modern legal systems and contemporary world peace as exemplified by the field of human rights.

Human rights are declared in the Constitution of every nation and in the Universal Declaration of Human Rights, and their universality has never been doubted. It is also recognized that the implementation of human rights as declared in these documents is so difficult as to appear impossible to achieve in the near future on account of the irreconcilable conflict between the established concept of human rights and the opposing conceptions based mainly on non-Western culture. The conflict may be symbolized in practice by the debate on the Tienanmen Square incident in Beijing on June 3-4, 1989, between the American Government manifestly supported by other Western governments, and the Chinese Government latently backed by the other non-Western.

Human reason and intellect have begun to work overtly through the activities of the United Nations to resolve similar conflicts concerning indigenous peoples. These are expected to be managed through the adoption of appropriate policies by sovereign states, avoiding political confrontation of the type likely to develop between the governments of states. UN bodies have suggested two requirements to be accepted by sovereign states: namely, "to ensure respect for equal enjoyment of human rights" and "to accept and to respect the diversity inherent in any plural society". But they have also had to profess the conclusion that the "pursuit of each of these tasks ... is practically difficult. *No universal recipe exists* to guide States on this difficult road" (UN 1992: 20, emphasis added). Despite their best efforts to promote their proposal, there has yet to be progress beyond the stage of "no universal recipe".

This issue will be never resolved in the absence of appropriate political and economic policies. At the same time, such policies will never be formulated without accurate conceptualization of conflicting notions of human rights. From a theoretical viewpoint, Raimundo Panikkar was the first scholar, as far as I know, to advance a proposal to admit a different idea of human rights and another scheme for conceptualizing them (Panikkar 1992, originally 1982). His arguments were based on the premise that the term 'human rights' should be used not to refer to any specific notion but as a 'symbol' which could connote various notions. To illustrate his argument he showed that Indian culture had long cherished its own notion of human nature and human rights just as Western culture had exhibited the prevailing concept of human rights (Panikkar 1992: 404). This was an attempt to correct the misuse of a Western term. He suggested further the formation of a "*cross-cultural intermediary space*" for mutual dialogue between conflicting notions (Panikkar 1992: 413; emphasis added). This was in effect a step towards the required recipe.

This step was advanced further by two scholars nearly a decade later. One was Peter Sack, who rejected in principle the advocacy of either the Western or the non-Western perspective and demanded "a *third criterion* which can deal with the

INTERMEDIATE VARIABLE OF LEGAL CONCEPTS

Masaji Chiba

plurality of the world” to remedy the lack of neutral perspective (Sack 1993: 412, emphasis added). The other was Alison D. Renteln, who suggested that “an *intermediate standard*” might offer a cross-cultural solution (Renteln 1994a: 28; emphasis added). These suggestions clearly lead to the conclusion that another standard of human rights should be formulated as a third criterion in a cross-cultural space.

Renteln proposed specifically as part of her general scheme for tackling the issue that a “cultural defense as a partial excuse” be recognized to assist the reasonable management of cultural conflicts in the law of the United States (Renteln 1994a: 69; 1994b: 505). This she substituted for her earlier assertion that there was “no need for a cultural defense because mechanisms already exist which can take culture into account” (Renteln 1992: 487-489, 497). Her new idea may have been devised as an intermediate standard for those cases.

Encouraged by these advances, I have recently proposed that the intermediate variable of human rights be employed as a tool concept (Chiba 1995). In brief, the concept of human rights should not be limited only to that established by Western jurisprudence, but rather divided into *ideal concept* which is a further elaboration of the established concept designed to render it compatible with otherwise conflicting non-Western conceptions, and *intermediate concept* which may be reformulated on the basis of varying non-Western conceptions in the light of steady advances toward the achievement of the ideal. Thus reformulated, the various particular intermediate concepts of human rights form a group of variations, namely, the *intermediate variable* of the ideal concept. The established Western concept, and apparently conflicting non-Western conceptions belong together to this intermediate variable of the ideal, that is, a truly universal concept of human rights. Both the established concept and conflicting conceptions thus work to implement the ideal concept in cooperation, although the former may be assessed to be more or less advanced.

The Intermediate Variable of the Legal Term

It was when I dealt specifically with human rights that I developed the idea of the intermediate variable. My basic objective was, however, to advance some methodological device of general applicability to manage conflicts between modern legal concepts established in jurisprudence and the legal conceptions prevailing among non-Western peoples. This is, from a cultural point of view, an issue of vital importance not only to the non-Western laws I have long pursued, but also to the Western social norms which interact in practice with modern law. I felt compelled to make an attempt to formulate the device in concrete terms when I came across the

reprinted report on witchcraft from Zimbabwe introduced at the outset.

The witchcraft case provides a typical example of indigenous legal conceptions liable to be “force[d] ... into alien frameworks”. Similar remarkable situations must occur frequently whenever established legal concepts are applied one-sidedly to non-Western situations. Several of the reports introduced in the first section must have concerned one or another fundamental human right, but the device of the intermediate variable may be applied more widely to the concepts of other legal terms, and need not be limited to that of human rights alone.

For instance, the twelve indigenous notions of witchcraft found in daily usage among the people in Zimbabwe could be scientifically formulated into some intermediate concepts vis-à-vis the universal concept of witchcraft, collectively forming its intermediate variable. This intermediate variable may be elaborated further with others to form another intermediate variable in a suprasystem, which, when logically inferred, may ultimately attain the cross-culturally universal concept of witchcraft.

Similarly, intermediate concepts and variables may be reformulated vis-à-vis the established concepts of ownership, contract, murder, and many other legal terms. So treated, the culturally different notions among non-Western peoples may work, from a scientific point of view, in the form of the intermediate variable rather than remain a ‘black-box’ or retain a ‘non-state, unbounded, unsystematic’ nature. The *intermediate variable of the legal concept* thus forms a tool concept which is indispensable to the accurate observation and analysis of legal conceptions prevailing among non-Western peoples when these are culturally different from modern legal concepts.

The serious question may then be raised as to the significance of the intermediate variable of the legal concept to the established modern legal system, which is alleged to be armed with intolerably rigid concepts and relentlessly normative logic, as symbolized by the pure theory of law. That is, would the prevailing legal system allow such a group of apparently heterogeneous concepts to coexist with its own concepts in the name of the intermediate variable? I believe this question can be answered in the affirmative for two reasons, although I am well aware that the assistance of other interested scholars will be necessary to supplement the deficiencies of my proposal.

First, the modern legal system presumes the existence of innumerable sets of both universal and intermediate concepts of socio-cultural terms. Moreover, the modern legal system includes similar sets in its system. I have little specialized knowledge of Anglo-American law, and consequently I feel difficulty in offering examples. But I suggest that the legal concept of witchcraft presupposes some other definitions of

INTERMEDIATE VARIABLE OF LEGAL CONCEPTS

Masaji Chiba

related cultural terms; for instance, magic as the universal concept, and sorcery and witchcraft as intermediate concepts. Ownership forms an intermediate concept of the universal concept of property, together with possession and others. Contract is an intermediate concept of the universal concept of agreement, together with others. Murder is an intermediate concept of the universal concept of homicide, together with variations such as manslaughter. Those who are well acquainted with Anglo-American law will easily enumerate better examples. Thus, the intermediate variable must never be heterogeneous, but rather homogeneous, to the established legal system.

Second, the science of modern law is required in practice to theorize indigenous legal conceptions which co-exist plurally with transplanted modern concepts, if this science is to treat non-Western law. Gordon R. Woodman believes this to be possible when he maintains that “other [legal] norms could be precisely specified in terms of strict duties” among African peoples (Woodman 1992: 147). My earlier suggestion of ‘functional complements’ (Chiba 1989: 148-9), which was in effect an attempt to devise a conceptual scheme adequate to non-Western law, was accepted as “useful”, though perhaps needing “some amendment”, by Woodman (1992: 146). The intermediate variable proposed here is devised from a viewpoint which is similar to but different from that of the functional complement.

The idea of functional complements was devised over twenty years ago to compare the African and Japanese conceptions of individual rights with that of the West. Initially the African conception was characterised as elastic and the Japanese as indefinite, with the result that neither appeared able to work as an effective legal standard, rigidly specifying the behavioral pattern the law required to be observed. It was argued, however, that in reality they were complemented by specific indigenous legal conceptions which enabled the people concerned to identify their legal standards as rigidly as Westerners did. The African and Japanese functional complements found were respectively the “social status of the parties” and “the particular relationships between the parties”. It was suggested that functional complements were to be found not only among Africans and Japanese, but also among other peoples including Westerners.

That argument concerning functional complements may be reformulated by use of the intermediate concept or variable. That is, African and Japanese conceptions of individual rights may each be seen as composed of both an intermediate variable of their own and the alleged universal concept of transplanted law. Such a function of the intermediate variable as the functional complement must hold true with respect to peoples other than Africans and Japanese and to rights other than individual rights.

The intermediate variable truly seems to play a most positive role in respect of the legal concepts of official law. It plays however also a negative role in respect of the latter. Viewed structurally, intermediate variables, cherished in the indigenous law of a people, tend to be unofficially maintained irrespective of what the official law may provide, while some features of the indigenous law are often officialized, subject to varying degrees of modification. Viewed functionally however, it is possible for indigenous law to bring unintended or even opposing influences to bear upon the official law. When the people concerned prefer their indigenous patterns of behavior to those enjoined in official legal concepts, the negative result may be to lay the official concepts aside and to invite evasive, unlawful, or even resistant behavioral patterns. A detailed investigation would disclose even more complicated relations between intermediate variables and functional complements. It may however be safely asserted that the intermediate variable has a wider coverage in its application than the functional complement on account of the possibility that it may have a negative function. In sum, I would like to conclude that the intermediate variable of the legal concept is a useful tool concept, and is more inclusive than the functional complement.

Concluding Comments on the Intermediate Variable

The conclusion is subject to some comments on possible problems and some warnings about the proper use of the intermediate variable.

First, in the contemporary circumstances of law and legal science, the intermediate variable may initially be formulated vis-à-vis legal concepts of the modern law which has been established in Western countries and transplanted to non-Western countries. This will cast scientific illumination upon the allegedly strange non-Western legal notions or conceptions from the viewpoint of the modern legal system and authentic jurisprudence. Then, in order to construct a truly scientific theory of law, the intermediate variable should be reformulated vis-à-vis the truly universal legal concept. The status of modern legal concepts will in consequence change from being regarded as if they were universal concepts to being one of the intermediate variables vis-à-vis a truly universal 'third criterion', though they may be assessed as more or less advanced than the non-Western.

Second, I am well aware that such a procedure might be viewed by some radical critics as still bearing some ethnocentric inclination. For instance, one such critic has pointed out that the "cultural relativism" advocated by most anthropologists is still inclined to ethnocentrism in so far as their arguments tend to "focus on enculturation" rather than "true relativism" on the basis of "cross-cultural

INTERMEDIATE VARIABLE OF LEGAL CONCEPTS

Masaji Chiba

universals” (Renteln 1990: 86-87). Another has rejected “superfluous translations [of non-Western terms into Western languages]” for the reason that “readers would easily miss the point” (Sack 1993: 409; see also Arnaud 1993: XXIX). And in fact, my theory concerning the concept of functional complements was criticized for giving “undue preeminence to the state” (Woodman 1992: 147).

My fear of such criticisms in presumption and reality may have arisen from the fact that the intermediate variable was first devised in opposition to the established modern legal concepts of Western origin, in order to recognize the function of non-Western indigenous law. In other words, the approach could perhaps be nothing but a variation of the Western perspective in observing non-Western facts. In my former theory the standard to identify the functional complement was truly based on established Western concepts, for non-Western indigenous law was recognized as far as it functioned to complement the former. Still, I am not convinced of any bias to the theory of the intermediate variable, and I am convinced of its usefulness and necessity in the advancement of the contemporary scientific study of law.

Why do I say so? First, because methodologically the intermediate variable is to be formulated as a tool concept to provide an adequate scientific classification for existing legal conceptions with no biased preconceptions as to their substantial nature as law, although the term used in a particular case might sound as if it depended to some extent on the Western concept. This is, however, no more than a matter of terminology. As a proof, one might replace the terms used by obviously unbiased terms. For example, the established concepts of ownership, contract, and human rights could be expressed as A2, B2, and C2 respectively, and the intermediate variables of them could be A3, B3, and C3. This criticism would then lose its significance. In addition, the final goal in formulating the intermediate variables is not simply to find the characteristics of non-Western law, but also to establish a scientific system of legal concepts including both Western and non-Western conceptions among the intermediate variables in the system.

Second, because substantially it cannot be denied that the modern legal concepts and systems of Western origin have prevailed overwhelmingly throughout the world to an extent unrivalled by any other system. It must therefore be justified to use their concepts as a tentative standard for recognizing the different conceptions of non-Western indigenous law at a heuristic stage of the scientific procedure, supposing that other steps will follow to advance ultimately into a perfect system of legal concepts of truly universal applicability. Such a procedural step is also admitted by the above radical critics as far as they “use the Western perspective of law as a starting point” (Sack 1993: 409) or advocate true “cross-cultural relativism”

(Renteln 1990).

For these reasons, the intermediate variable is expected through its essential neutrality to contribute to expose the Western bias of established legal concepts. It will thereby promote a proper appreciation of non-Western indigenous law as it works in reality, and to take a firm step towards the ultimate establishment of a system of truly universal legal concepts. At the same time it must be recognised that, however neutral a symbol may be, none can be immune from the potential danger that it may be misused through bias in practice, whether overt or covert. Here it is necessary, as a third comment, to add a set of warnings against the positive and negative misuse of the intermediate variable.

First, as a specialist in African law has observed, “recent signs of ‘traditional’ norms and practices” are coming to be “the proud reminders of a pre-colonial past, symbols of cohesion in an uncertain contemporary world” (Roberts 1993: 143). Certainly, it is admitted that each non-Western people which has cherished its own cultural system of law may be qualified to maintain its unique systematical concepts by reformulating them into a system of intermediate variables and to demand that others respect these. At the same time, they must be most prudent to avoid the accompanying pitfalls. If they are too attached to their own culture to pay due respect to fellow cultures, or too conservative to adapt their outdated practices to changing circumstances (cf. Baxi 1986), their strategy will be self-destructive. Each people is destined to strive incessantly to avoid such pitfalls by eliminating the negative features of their indigenous culture and developing the positive features which are compatible with other peoples, by making the best use of the intermediate variable of the universal concept.

In contrast, Western peoples may not only be qualified to maintain their own concepts of the modern legal system, but also be proud of the progress they have made. At the same time, they must realize that even their advanced concepts still have some way to go before they reach the ideal, that is, become universal concepts, and that they must also strive to achieve the ideal by reformulating their intermediate variables in cooperation with non-Western peoples, respecting and assisting the latter to advance by themselves.

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INTERMEDIATE VARIABLE OF LEGAL CONCEPTS

Masaji Chiba

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