

BOOK REVIEW

Werner Menski, *Comparative law in a Global Context: The Legal Systems of Asia and Africa*, 2nd ed. Cambridge: Cambridge University Press. 2006. xx pp. + 674 pp.

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In this lengthy book Professor Menski develops a general theory of law through comparative legal study. This second edition is of particular interest because it contains, among other additions, a substantial development of his first edition analysis of legal pluralism as a basis for understanding and comparing some greatly varying legal systems in the world. His theory calls upon a far greater knowledge of legal systems outside modern Europe than most comparative law studies, and as a result his conclusions are more compatible with those systems. The three chapters of Part I provide the 'Comparative Framework' and present the elements of his general theory. Part II consists of four chapters on 'Regional Comparisons', one each on Hindu Law, Islamic law, African laws and Chinese Law. The final chapter elaborates further the general theory.

The work starts from a concern that "the current state of jurisprudence and comparative law leaves much to be desired", suffering in particular from Eurocentrism, legal centralism, and legal evolutionism (25). These weaknesses are perpetuated by systems of legal education which fail to give due attention to most of the world's legal systems. Legal pluralism, it is argued, is universal, and has been recognised, although not always under this name, in much of Western legal theory from the earliest ages to the present. It is indefensible, in comparative legal studies ranging outside the Western world of modern times, to limit the notion of 'law' to the positive laws of states. The work of Masaji Chiba (1986, 1989, 2002), to whom the book is dedicated, is seen as presenting the most advanced and helpful study of legal pluralism worldwide.

Menski argues that it is necessary to move beyond legal positivism to incorporate also in a theory of law both natural law theories and socio-legal approaches. A truly 'plurality-conscious' study of comparative law needs to be based upon the

recognition that every manifestation of law contains elements of state law (as analysed by legal positivism), of religion, ethics or morality (as analysed by natural law theories), and of society (as analysed in socio-legal approaches). Sometimes one of the three is dominant in a legal system, but there are many legally plural scenarios in which none is dominant. “Perfect ‘justice’” is the result of an equilibrium between the three, but such an equilibrium is inherently unstable and requires continuous renegotiation, because no legal condition is static (186-87). Aspects of this pattern are illustrated by a series of triangular diagrams (185-89).

The chapters on Asian and African legal systems are based upon analyses of large volumes of literature. For each of the four it is contended that, throughout its history, the three sources of state, religion and society, and the three theoretical approaches resulting from them, have demonstrably been present, each in varying forms and in varying degrees. Throughout it is argued that a plurality-conscious avoidance of Eurocentrism is necessary if we are to understand and compare these legal systems with each other and with those of the West.

I am not competent to assess the arguments on Hindu, Islamic and Chinese law. In the first two Menski is a recognised scholar (Pearl and Menski 1998; Menski 2003), and on the last he has clearly read widely. A brief review of Chapter 6, ‘African laws: the search for law’ may indicate the main features of Menski’s approach to each law, although it would be wrong to imply a uniformity in his general conclusions, and even less in the multitude of detailed observations, on each law.

In examining African law Menski points to the early Western fallacy that there were no African culture or laws (hence the ironic subtitle of the chapter), and argue that it has not yet been overcome. Still today there is a widespread reluctance to recognise African traditional laws as law, and a concomitant tendency to underestimate their contemporary importance on the legal scene. In relation to this he debates the suggestion by Obilade and me that there is not and is not likely to be a distinctively African legal theory but that African laws, especially customary laws, may provide valuable instances contributing to global legal theories (Woodman and Obilade 1995). He seems to be both sympathetic towards and critical of African legal philosophers who have claimed that there were distinctively African forms of law, suggesting that the terms of their arguments show that they have been enchained in positivist thought which has looked only to state law for information and inspiration about law in Africa. He

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agrees that more attention to customary laws in Africa would be valuable, especially if it were directed against the positivist view that customary law is not truly law except when it has received state recognition. He seems to agree that the prominence of customary law in Africa does not of itself enable a distinctively African legal theory to be constructed, arguing that his analysis of South Asian societies and laws and Islamic legal systems in the previous chapters has shown that customary laws are significant sources of law there also. In respect of our suggestion that it is necessary to establish the claim that customary law is law, he comments: "What is there to prove?" He argues that, "[w]hen Western scholarship asserts that something is a fact, it becomes a fact, it may even become a theory", whereas "[w]hen African or Asian authors do the same, it tends to be disregarded and treated as unscientific" (400). We might reply that, if legal theorists have accepted particular theoretical propositions as correct when they were asserted by Western authors without supporting argument, the answer is not to take the African or Asian authors' assertions also as self-proven, but to require proof of all, African or Western.

He then examines the nature of traditional African laws. He shows, with extensive quotations and citations, that students of law in Africa have found that superhuman, religious forces have always been important elements of the law. African societies treat morality and law as fully complementary, although this again Western jurisprudence fails to recognise. The "integrated African model" in which law, religion and morality overlap "indicates that none of the three competitors in the triangular relationship of state, society and religion/ethics could be set up as supreme, as all three spheres had to work hand in hand" (419). The argument for the "three spheres" here may not be entirely convincing. The presentation of evidence, full and detailed on society and religion and ethics, is largely silent on the state. This is understandable as many of these communities are commonly said to have been stateless.

In his examination of African customary laws Menski acknowledges that there is a great deal of variation, and that they are not easily accessible to the student. However, in all African societies, even acephalous societies, he finds that there is a marked dimension of social stratification. This is an important feature of dispute settlement processes. In the subsection on these he relies much on Allott (1968) and Ayittey (1991), but does not mention at this point many other important findings such as those of Abel (1969a, 1969b, 1970), Bohannan (1957), Gluckman (1967), Gulliver (1963, 1979) or Moore (1986). One can hardly criticise a writer who considers such a large amount of literature as does Menski for failing to

consider more in this particular context (and most of these writings are referred to elsewhere in his book), but the omissions perhaps cast some doubt on the feasibility of such an ambitious project as this.

The imposition of colonial rule, Menski argues, did not immediately change the well-established pre-existing legal systems. It should be seen, “within the triangular interactive model of jurisprudence cultivated and tested in the present study” (445), as adding a new layer of official law. Here the work studies primarily the impact which the imposed law had on the customary laws. Thereafter the discussion of the post-colonial period largely pursues the themes of the preceding sections, again supported by pertinent literature. Prevalent academic discussion still, it is said, is imbued with positivist attitudes, overlooks unofficial laws and African legal postulates, devalues African traditions, and sees customary law as created, or at least shaped by the state. Despite this criticism, most of the following analysis assumes that, in the study of the laws of Africa, the subdivisions should be primarily states. It would have been difficult to avoid this, given that the legal literature overwhelmingly and the sociological literature mainly (although not the anthropological literature), focuses on social fields delimited by state boundaries. Nevertheless it must be noted that this approach privileges the statist, positivist view by adopting the state’s perspective. It would be worthwhile to analyse not only the impact of one or a number of colonial states or national governments on the populations within their internationally recognised boundaries, but also the impact on a particular ethnic group of the colonial and modern government or governments which may have affected them. Then one might move beyond such impact studies to consider fully the reactions, adaptations and resistance of African societies to those forces (cf. Woodman et al. 2004).

The chapter on African law concludes with a section on ‘The Future’. The emphasis on traditional (customary) laws leads naturally to the view that “a global North-dominated agenda of legal uniformisation” cannot be feasible for Africa. Legal development requires plurality-consciousness, but this also entails that “placative advocacy of a return to ‘custom’ and ‘tradition’ is too simple as a remedy” (485). That type of debate “distracts from the real socio-legal issues at the heart of modern Africa’s woes”, especially the manner in which African rulers and elites are manipulating state laws to their own sectional advantage (487). Some suggestive comparisons are drawn with Pakistan and India. Throughout this chapter David and Brierley (1978) is cited to illustrate the Eurocentric, state-centred positivism of much commentary on African law, and when they recommend “further modernising, formalising reforms, such as extended legal

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education, publication of legislative texts, judicial decisions and legal writing” (David and Brierley 1978: 529), Menski comments that this “does not tackle the roots of the dilemma”, since it is “in total disregard of African cultural traditions and skills of orality” (490-91).

The Conclusion to the book builds on the four chapters on non-Western laws to develop further the theoretical view presented in Part I and frequently referred to in those four chapters. This further elaboration is illustrated by one further triangular diagram (612). I have had some difficulty in understanding the exact terms of this theory.

Those four chapters, it is said, have presented examples of legal systems of which the sources are, in various combinations, positivist state prescription, religious or non-religious ethical belief-systems, and social practice and demands – or state, religion/ethics/morality and society. These are seen as sources, at least in the sense that their content is in fact derived from these, of many of the laws in effect in each region at different periods of history. But Menski appears to insist that they must have been and be elements of the laws of every society. No reason is given for this absolutist claim, and it is surely undermined by those cases in pre-colonial Africa where positivist prescriptions of states cannot be found. There is, moreover, some ambiguity in the notion of ‘sources’ of a legal system: does this perhaps refer to something more than influences on the content of the laws, such as the bases of claims to authority for law? If it is this, it would still appear incorrect to state that all three sources exist in every society.

More of Menski’s theory may be revealed in the terms in which he introduces and then periodically refers, in various phrases, to his “triangular interactive model of jurisprudence” (445). He writes in Chapter 3, “Comparative jurisprudence: images and reflections of law” of three “legal theories”: legal positivism, natural law (or 20th century “new natural law” theories), and socio-legal approaches. These theories of law appear to be far more than mere sources, and it is difficult to see how they can be used to form a triangular diagram on which particular known legal systems, or their elements, can be located.

Each of these theories uses a different methodology for the selection of criteria for the concept of law which it aims to elucidate. Natural law theories, old and new, claim to show the existence of laws derived from divine command, universal ethics, the dictates of practical reason, or the ‘idea of just law’ as a basic category of thought. The fundamental, universal principles of this law are discovered by

reason, intuition or revelation, and carry authority irrespective of the prescriptions of any human government. The theories of legal positivism, in contrast, see law as an emanation of human political authority. The criteria for valid laws are compliance with the formal law-making procedures of states, elaborated by established doctrinal methods. These two concepts of law exist in different universes. Either of them may or may not confer recognition in its own sphere on what it perceives to be the other. Each claims exclusive dominance in its own field. But the fields are intrinsically different and cannot be combined.

The third group of ‘theories’, the socio-legal approach [sic: one wonders whether an ‘approach’ can be a ‘theory’] is employed in another, third field. This is the field of empirical studies of social activity, where law is seen as an element in social existence. This approach can investigate which rules people in practice observe, or use to interpret social acts. It can also investigate which rules people believe they ought to observe. It can thus, given the appropriate methodology of research, discover the content of the law believed in by a natural lawyer or by a positivist, and it can investigate the extent to which the conduct of members of a society complies with either of these. But in these investigations of empirical fact it cannot concern itself with assessment or justification of those beliefs; it cannot debate the validity of the normative claims of legal positivism or natural law. The data provided by socio-legal approaches may be thought relevant and be used by positivist lawmakers or natural law philosophers, but whether they do so depends on reasoning within those fields. Socio-legal approaches do not themselves have ‘authority’ in the sense that they can provide reasons for action. There cannot be a realistic triangular diagram which shows positivism, natural law and socio-legal approaches somehow interacting to form a “globally valid, plurality-conscious analysis of law” (608).

At some points Menski appears to argue that, where there are different opinions on an issue, each widely held, it is necessary to accommodate them all in a general theory: “plurality-conscious legal theory ... has to remain at all times so plurality-conscious that no one prominent legal theory must be allowed to dominate. This is why we need a theoretical model which can incorporate and interlink all major approaches” (179). Does not this relativism reduce objectivity to absurdity? It is analogous to saying that seventeenth-century astronomers should have accommodated both Ptolemaic and Copernican visions of the universe in their theoretical models because each was widely accepted within some cultures; or that today anyone studies of the history of the world must interlink evolutionary and ‘intelligent design’ theories, allowing neither to dominate.

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Menski's book appears to me to advance predominantly the field of socio-legal approaches. He reports the prescriptions of legal positivists, and says much about the extent to which these prescriptions are observed in practice, but he almost never engages in doctrinal analysis. He reports the beliefs, controversies and forms of reasoning of religious and moral philosophers, but he never debates the true content of universal ethics. He provides a rich, comparative account of the laws of many societies as social phenomena, and this greatly advances our understanding. If his diagrams referred, and claimed to refer only to the state, religion/ethics/morality and society as the sources of the content of laws the value of his study would be clear. There are and have been many societies in which the observed, effective laws are as a matter of fact derived in part from prescriptions of the state, in part from the ethical beliefs held by some members, and in part from acceptance of customary practices. One could go further, taking the notion of a legal 'source' as that which is seen in a particular community as giving authority to norms. There are and have been many societies in which there was a general acceptance that authority was carried by the state, by the teachings of a religion, and by the popular acceptance of customary norms. It is worthwhile to compare societies in this respect, and perhaps to compare the different forms of legal pluralism which exist in consequence of a plurality of legal sources. But there is no ground to assert that every legal system must of necessity include all three elements. Neither is there any reason to conclude that 'perfect "justice"', whatever that means, is indicated by an 'equilibrium' between the three. There is so much of interest and value in this book that we should not be distracted by these unsustainable claims.

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