

BOOK REVIEW

Masaji Chiba, *Legal Pluralism: Toward a General Theory Through Japanese Culture*.

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The introductory chapter of Masaji Chiba's latest book begins disarmingly: "This is the fifth book I know of with the main title of *Legal Pluralism*." His justification for adding to this literature is that he aims to present "a relatively underrated perspective of the topic, [namely,] the construction of an analytical general theory of legal pluralism from a non-Western point of view".

This is the unifying objective of the following chapters. Each has already been published separately, all but one (Chiba 1968) in the previous ten years. Since they have not been revised, arguments are sometimes repeated, and occasionally Chiba has to explain that one chapter revises ideas presented in another.

He sees his contribution to the general theory of legal pluralism as concerning three pressing problems: the construction of a systematic general theory of legal pluralism using "analytical tool concepts" developed for the purpose; the development of a truly scientific account of legal culture in relation to legal pluralism; and the investigation and analysis of non-Western situations of legal pluralism by newly developed scientific methods free of Western cultural bias. A fourth problem is the elucidation of legal pluralism in relation to Western society. He professes himself not qualified to investigate this empirically, while wondering at the relative absence of investigation by Western scholars.

The first, preparatory Part of the book, "Beyond Western Jurisprudence", seeks to demonstrate the limitations of current studies of legal pluralism. A chapter on "doubts on the utility of 'traditional' vs. 'modern'" argues that the dichotomy is derived from ethnocentric Western thought, and consists of excessively vague categories. Chiba argues in particular that it is inapplicable in Japanese legal culture, where it is impossible to attach definite characteristics to either notion. The dichotomy had, I believe, already been rejected on the same grounds by

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many students of law and society in the third world. Nevertheless, given its continued appearance in debate, especially that over the relationship between transplanted Western law and indigenous law, Chiba's critique is useful.

The other chapter in this Part criticises the "particularity of Western jurisprudence" and argues for the goal of understanding "cultural universality". Chiba sees Western jurisprudence as inseparable from, and confined by Western law, its purpose being to "justify, protect and improve" that law. It seeks to provide a basis for the ideal of the rule of law by analysing law as a self-consistent normative structure, consisting of systematically inclusive rules. The ideal is threatened by the constant challenge of change in social reality. This requires change and flexibility in law, entailing inconsistency. In the face of this challenge the ideal is maintained by adherence to broad underlying concepts such as justice and natural law, and, in the last resort, by legal fictions. These defensive strategies are used to support the claim that the law has an inherent capacity to meet demands for change and flexibility. The challenges are also absorbed by the maintenance of strict distinctions between law and fact and between law, ethics and religion, distinctions which restrict to a manageable compass the fields which law must explain or regulate according to the ideal of the rule of law. These various features of Western law are mostly not present in non-Western law. Chiba concludes that Western jurisprudence cannot adequately comprehend non-Western law, and that contributions from non-Western scholars are essential for a universal jurisprudence.

Chiba's charge of ethnocentrism in Western jurisprudence cannot be denied. However, today there is an extensive debate among Western jurists on the contingent nature of the rule of law ideal and its concomitants. This has arisen from an awareness of the differences between various Western legal and philosophical traditions, from a not inconsiderable experience of non-Western law, and from a recognition of the possible contradictions inherent in the ideology of the rule of law. Perhaps it is unduly pessimistic to conclude that jurists can understand the legal traditions only of their own types of societies. It is possible that Chiba underestimates the capacity of Western jurists, particularly legal anthropologists, to loosen the bonds of their own cultural conditioning and contribute to a universal jurisprudence. This is not to deny that usually indigenous scholars are likely to make the greatest contributions to the understanding of any particular legal culture.

The second Part is devoted to "Legal Pluralism in Japanese Legal Culture". It reports and discusses some of Chiba's own empirical investigations (being developed in part from the findings set out more fully in Chiba 1986: 301-377). These are likely to be of immediate interest to the inquiring outsider. He suggests, for example, an explanation for the fact that the "hard-work spirit"

among Japanese workers is not accompanied by demands for the rigorous observance of their rights under labour contracts, such as might have been expected if the hard-work spirit had approximated to the Weberian protestant work ethic. Again, he examines how the official constitutional separation of religion and state is both supplemented and undermined by unofficial legal postulates requiring various forms of religious observance. But he is primarily concerned to show how empirically-observed aspects of legal pluralism can be fitted into the conceptual scheme which he is constructing.

This scheme is presented more fully in the third Part, "Analytical Theory of Legal Pluralism at Work". Chiba proposes a view of a three-level structure of law, which he illustrates with aspects of Japanese law, but also claims to be accurate of law in any society. The first level is that of "official law", which includes both state law and religious, family, local and ethnic laws in so far as they are authorised by state law. Second, "unofficial law" consists of practices which are authorised by the general consensus of a certain circle of people and have a distinctive influence on the effectiveness of official law. Third, "legal postulates", as Chiba initially explains the concept, are constituted by the values and ideals which found, justify and orient unofficial law and thereby determine the relationship between unofficial and official law. Within this framework he elucidates the concept and functions of the most fundamental legal postulate of a people, which he calls their "identity postulate". This postulate functions *inter alia* to enable a people to adapt to or modify transplanted laws, and so to preserve the people's indigenous identity. However, investigations of the identity postulates of various Asian peoples (Chiba 1986) has led him to the important conclusion that it is not related only or primarily to unofficial law. His revised conception is that it underlies the whole of any people's "legal culture, or legal pluralism", or the "working whole structure of law of a people".

The analysis of a three-level structure is to be developed into a global theory by investigating the concept of the "functional complement". Chiba's development of this concept starts from a discussion of motivating attitudes towards law. Official and unofficial law both influence behaviour, but may be in competition. When this occurs, then, according to Western jurisprudence, the individual makes an autonomous decision to observe one and repudiate the other. Chiba sees the Western attitude to individual legal rights as "definite" (strict, not allowing of discretion in their observance). Non-Western attitudes are different. The African attitude is characterized by "elasticity", and the Japanese by "indefiniteness". For non-Western peoples additional motivating attitudes arise from personal preferences, particular relationships of the individual, and social appraisal of the individual's choice. These provide functional complements to official and unofficial law. More specifically in Africa functional complements

are constituted by status roles, and in Japan by specified roles for particular social relations between parties.

Chiba argues that the whole law of a people can be viewed in terms of three dichotomies. Official law is to be contrasted with unofficial law, legal rule with legal postulate, and indigenous law with transplanted law. Applying this scheme Chiba suggests: "The law of a Western country is, from the perspective of orthodox jurisprudence, confined to the official law whose legal rules and legal postulates developed from its own indigenous law." Thus Western jurists limit their conceptions to the field of official law, ignoring unofficial law; and although they concern themselves with both legal rules and legal postulates (or principles), they do not have to contend with the complexities of a transplanted ('received') law co-existing with indigenous laws. Non-Western jurists need to study the issues arising in these other areas. An important instance is the modification of legal rules of official, transplanted law by functional complements provided by unofficial legal postulates of indigenous law.

The single paper of the fourth and last Part, "Another Legal Pluralism", explores further the notion of "legal culture", and considers the issue of an identity postulate of international law.

One merit of this book is its comparative perspective. Written primarily from the viewpoint of Japanese law, it draws comparisons with other systems, asking questions and presenting insights of general relevance which would not be suggested, or not suggested so forcefully by the study of other legal systems. Thus Chiba's emphasis on the importance of unofficial law, and the unofficial components of official law, in the "working whole structure of law of a people" may highlight the deficiencies of those Western studies which seek to exclude all unofficial law. While in Western societies the unofficial laws of earlier ages may have disappeared, new forms have sprung up to populate the unofficial legal world. The laws of particular professions, of immigrant ethnic groups, of commercial and industrial organisations, and of recreational and educational institutions are examples. (Chiba notes the comments to this effect of some Western jurists, referring to Ehrlich (1913) and Galanter (1981).) The distinction may seem to have little application in Western Europe, although it may well illuminate issues affecting indigenous peoples in North America and Australasia. (Cf. Morse and Woodman 1988.) It has in fact some relevance to the history of legal development in Western Europe. Civil Law is the descendant of a notable transplantation. The British India and Colonial Offices directed the transplantation of the common law to many territories, and for a long time administered the resulting pluralist legal systems, although contemporary legal theory largely ignored the experience (Woodman 1989).

Similarly, Chiba's concept of functional complements may be illuminating in the study of Western laws. Although legal rights in these laws may be "definite" for the purpose of judicial decision-making, some are far from definite in their social observance. Chiba suggests tentatively in a footnote that Western jurists might investigate the possibility of a Western functional complement in terms of "the freedom of each party to resort to or waive his or her rights". Thus the definiteness of Western law may be greatly qualified by postulates which deter people from having recourse to the state institutions which operate in a "definite" manner. Indeed this possibility was noted and given a preliminary analysis by Ehrlich (1913; and see Macaulay 1963). However, at present the tendency in Western jurisprudence is to regard the non-enforcement of private rights as not a matter for the jurist. It has been the object of some sociological investigation. It is necessarily a matter of concern for some legal practitioners. If it were to be shown that people's decisions as to whether to enforce their legal rights were reached according to general norms (or postulates), jurists might be led to change their view.

However, Chiba's work must be appraised primarily in relation to its principal object. Will it prove possible to construct a realistic analytical general theory of legal pluralism within Chiba's framework? There seem to be several possible difficulties.

His scheme gives high prominence to the state. The major category of official law is defined as state law together with such other laws as are authorised by state law. But if it is accepted, as it is by Chiba, that law can exist independently of the state, there seems little justification for this emphasis. The definition, by delimiting the category according to the criterion of state authorisation, does not require or prompt an examination of the social acceptance of law. Furthermore, even the category of unofficial law seems to be identified primarily by a tendency to have an effect on official law. Thus Chiba's primary distinction between official and unofficial law is effectively dependent on the claims and concerns of the state. It might be suggested that there are other distinctions which would be more likely to prompt fruitful investigation. Examples are categorisations of laws according to: sources of claimed or effective legitimacy; the types of social fields in which they exist; the modes of creation of specific sorts of norms (such as legislative acts, or the emergence of customary practices); and their principal modes of conflict-management.

A related difficulty in Chiba's scheme is the implied assumption that the notion of a "people" is unproblematic. In the scheme a "people" is the social field within which a body of law operates. Chiba seems to assume that every identity postulate relates exclusively to the totality of one people, with one official law,

sharply demarcated from its neighbours. The same assumptions have often been made by Western jurists (the classic instance being Savigny 1814; see the criticisms in Stone 1966: 102-108). It is immediately apparent that in some contexts, such as virtually the whole of Africa, where states' and ethnic groups' boundaries rarely coincide, these assumptions give difficulty. Similar questions arise in relation to non-state laws in Western countries. The boundaries of the field of effectiveness of a particular law may bear little systematic relationship to the fields of jurisdiction exercised or claimed by other laws, including state laws.

Chiba's other dichotomies may also need qualification. The distinction between the legal rule and the legal postulate could be a matter of degree. The only differences may be that postulates are expressed less specifically and applied less strictly than rules. Again, the distinction between indigenous and transplanted law becomes blurred when each is modified as a result of their coexistence.

The notion of functional complements needs mention not to suggest a difficulty but to emphasise its usefulness. Western jurisprudence seems signally unable to construct a legal analysis of the phenomenon, for example, that legal rights in Africa are not rigidly enforced. The tendency is either to regret it as a pathological departure from the rule of law, or to conclude that it entails an absence of law. Empirical research has provided some understanding of the social reality (e.g. Gulliver 1963; Nader and Todd 1978; Comaroff and Roberts 1981; Moore 1986). Chiba provides concepts for a more strictly jurisprudential analysis.

I suggest that this analysis could be developed in terms increasingly related to empirical observation, while continuing to contribute to the refinement of universal theory. For this purpose perhaps some amendment of Chiba's statement of the African aspect would be helpful. His view of the problem as being the "elastic" treatment of legal rights seems a somewhat Western characterisation. Moreover, it may amount to little more than an assertion that legal rules are not totally and unconditionally observed. This suggests the further question as to whether the rules usually cited on any particular issue in African legal systems constitute in truth the whole of the law on that topic. Contract laws provide an example. In Western state legal systems the rules which are said to define contractual rights may be the whole of the law applicable to the performance of a contract (although there is room for doubt, as suggested above). African systems of law may contain many more legal norms to govern the performance of contracts. Legal rules and postulates related to the status of the respective parties may, as Chiba suggests, affect the enforceability of rights. Without superseding the general rule according to which a party has a right to the performance of a contractual obligation, other legal norms may, according to the relative status of the parties, require the holder of the right to postpone,

modify or waive it, or a mediator or judge to exert influence on the parties to reach a compromise. I am inclined to think that these other norms could be precisely specified in terms of strict duties. This is not to deny that they may constitute such an immensely complex body that it may be practically impossible to express them comprehensively and as a coherent, consistent set. But I do suggest that it may be possible to describe the laws more fully than an account which merely gives a limited number of rules, and states that their application is "elastic". The latter may result from an unfounded assumption that the whole law on a subject such as the enforcement of contracts falls within the pattern of Western laws on the subject. Or am I, in claiming that it may be possible to find a comprehensive body of non-elastic rules, the one who manifests that ethnocentric particularity with which Chiba has charged Western jurisprudence?

Perhaps none of us is yet able to escape entirely from ethnocentric particularity. I am tempted to try to turn the tables on Chiba. Is it possible that aspects of his theory which I have questioned, and which I have suggested do not sufficiently depart from Western jurisprudence, lie in just those areas where the Japanese legal world is similar to the Western? I have suggested that, like many Western jurists, he gives undue preeminence to the state, and insufficient consideration to the problem of defining the social fields in which laws operate. In these matters his theory may not fully accord with African legal experience. Could this be because he is most familiar with a law which applies to a clearly defined people with a distinctive culture, united for many centuries in one state?

These reflections are all evidence of the quality and importance of Chiba's book. This is an important contribution to the theory and empirical investigation of legal pluralism. I have not found it easy to read. It presents arguments which, because of their originality, and their objective of advancing theory on a universal front, are difficult for the Western jurist to grasp. I incline to conclude that Chiba's theoretical structure may eventually need considerable revision. Nevertheless, it should stimulate progress in this field, and will repay any student of comparative law or legal pluralism who gives it the study it merits.

REFERENCES

- CHIBA, Masaji
1968 'Relations between the school district system and the feudalistic village community in nineteenth century Japan.' *Law & Society Review* 2: 229-240.
1986 (ed.) *Asian Indigenous Law*. London: Kegan Paul International.

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- COMAROFF, John, and Simon ROBERTS
1981 *Rules and Processes* Chicago: University of Chicago Press.
- EHRlich, Eugèn
1913 *Grundlegung der Soziologie des Rechts*. Berlin: Duncker & Humbolt.
- GALANTER, Marc
1981 'Justice in many rooms: courts, private ordering, and indigenous law.'
Journal of Legal Pluralism 19: 1-47.
- GULLIVER, Philip H.
1963 *Social Control in an African Society: A Study of the Arusha: Agricultural Masai of Northern Tanganyika*. London: Routledge & Kegan Paul.
- MACAULAY, Stewart
1963 'Non-contractual relations in business: a preliminary study.' *American Sociological Review* 28: 55-67.
- MOORE, Sally F.
1986 *Social Facts and Fabrications: 'Customary' Law on Kilimanjaro, 1880-1980*. Cambridge: Cambridge University Press.
- MORSE, Bradford W. and Gordon R. Woodman (eds.)
1988 *Indigenous Law and the State*. Dordrecht: Foris Publications.
- NADER, Laura, and Henry F. TODD (eds.)
1978 *The Disputing Process: Law in Ten Societies*. New York: Columbia University Press.
- SAVIGNY, Friedrich K. von
1814 *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft*. Heidelberg.
- STONE, Julius
1966 *Social Dimensions of Law and Justice*. London: Stevens.
- WOODMAN, Gordon R.
1989 'The peculiar policy of recognition of indigenous laws in British colonial Africa. A preliminary discussion.' *22 Verfassung und Recht in Übersee* 22: 273-284.