

BOOK REVIEW

Leon Sheleff, *The Future of Tradition: Customary Law, Common Law and Legal Pluralism*. London and Portland, Oregon: Frank Cass. 2000. viii + 512 pp. ISBN 0-7146-4953-8.

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This is a long and wideranging book based upon an extensive study of literature. Its central theme is concerned with the particular genus of customary law which Leon Sheleff calls tribal law, and within that genus the species of indigenous law, especially in the common-law countries of the USA, Canada, Australia and New Zealand where the indigenous peoples and their laws have been almost overwhelmed by large numbers of European immigrants. Early in Part I, "Background", Sheleff summarises his objective thus:

I wish to adopt an overall sociological perspective to examine the utilization of modern law to determine the nature of the rights of 'tribal' people to follow their way of life according to those beliefs and practices that form the essence of their culture as an entity, and thereby forge the character of their members. But the work will focus not so much on the nature of the tribe *per se* as on the manner in which modern states respond to the challenge posed inevitably by the existence of such groups within the purview of their governmental authority. (p. 10)

Customary law is, he argues, truly law, and the legal positivists who asserted otherwise were wrong. It is, furthermore, a law which is effective, and which can change. A large part of the common law itself is historically the common custom of the English people.

In limiting the book to an exploration of tribal law, he advances a strong case for the revival of the term 'tribe'. Rid of its negative associations, he argues, this is a neutral term referring to 'pre-state societies', which have almost disappeared in Europe but continue as 'infra-state groupings' in new states (Chap. 1, the extended defence of the "vague but valid" term 'tribalism' being continued in Chap. 3). In contrast, the notion of ethnicity, propounded by some as an alternative, is excessively vague. It is generally used not of members of groups in their homelands, but only when their members have emigrated, and "basically

BOOK REVIEW
Gordon R. Woodman

replaces lost national or citizenship affiliation". It "certainly has no clear-cut line, neither of total definition as against other forms of groups, or of any clear-cut demarcation as between the different groups that are considered ethnic" (pp. 35-36). The tribe is usually a relatively small proportion of a nation-state, but often has a far greater social cohesion and sense of identity than the state.

The book contains references both to standard, classical texts and to many valuable but little-known writings, and recounts a wealth of detail from that literature. Whenever there is informative literature on tribal law in other countries than those which he principally discusses, Sheleff makes full use of it. Many pages are given to discussions of customary laws in Zimbabwe, South Africa, Fiji, Ocean Island (now in Kiribati), Papua New Guinea, Kenya, Nigeria, and the Philippines, while several dozen more countries are the subjects of brief but knowledgeable references. Sheleff's own personal experience - he was born and initially educated in South Africa, earned a PhD in the USA, and has for long been a citizen of Israel - has no doubt heightened his sensitivity to the issues raised by the contrasts between different customary laws as well as contributing to his knowledge of many varieties. A driving enthusiasm for the subject pervades the book.

More scene-setting is the object of Part II, "The Framework". In a chapter with the neat title "The Invention of Discovery" Sheleff introduces the process of colonisation by 'discovery and settlement' of the major states of his discussion, outlining some aspects of the emergence and development of their legal policies towards their indigenous tribes. He then discusses state recognition of tribal law, and the common exclusionary condition which denied recognition to 'repugnant' customary laws. This chapter contains, as always, much interesting information, although there is not a thorough analysis of the processes of recognition, nor of the use of the repugnancy clause in any specified state.

He then introduces some of the developments in international law and state constitutional laws which confer group rights on tribes and parts of tribes. The information is abundant, but the analysis stops short of that in some works of the 1990s such as Kymlicka (1995). Chapter 9, "Belonging and Identity", discusses the case for maintaining tribal communities. It uses as illustration the S.M. Otienu case in Kenya (recorded in Ojwang and Mugambi 1989), and discusses also the history in the first half of the 20th century of the Australian official abduction of Aboriginal children from their families to 'free' them from their tribal culture. (The latter is now notably depicted in the film *The Rabbit Proof Fence*). This is followed by a discussion of moves to raise the status of tribal peoples through legal activities (litigation and legislative proposals), sometimes in international fora, and often conducted by a number of tribal groups in concert.

This Part ends with a discussion of the operation of tribal ‘courts’, sometimes within and recognised by the state judicial system, sometimes parallel to or in competition with it. The bulk of the discussion concerns Indian courts in the USA. The references to tribal courts in Africa and Papua New Guinea are not complete: that to native courts in Nigeria is solely through one, rather old publication (Richardson 1965), and that to village courts in PNG gives no indication of the large volume of research which has been done on these courts.

Part III, “The Issues”, considers principally three areas of activity. First it examines tribal claims to land, and in particular to sites which are sacred to the claimants. The latter are examined in conjunction with other claims to maintain tribal religious practices. Second, this part discusses certain issues arising in criminal legal systems: the culture defence in state law; the distinctions between repressive and restitutive laws and their manifestations in different state and tribal laws; and the distinction between guilt and shame as forces motivating the observance of law. Third, it considers issues related to the family, primarily the accommodation of tribal marriage law in state legal systems. In one respect there is a surprising omission here. Sheleff considers the situation where a person who has contracted a potentially polygamous customary marriage then contracts a civil (state law) marriage to someone other than their customary spouse. He notes that in some state laws the effect of the contracting of the subsequent marriage is that the former is dissolved. He does not note the case, which is far more frequent in Africa, where the contracting of the second marriage is in state law both invalid and criminal. Further, he does not consider the common phenomenon of marriages which are seen as valid in the popularly observed customary law, but are invalid in state law. These include many instances of the case just mentioned, and also the case where the marriages follow the reverse order, as well as the many cases where there may be only one, customary marriage, but where the validity of that marriage is contested in social practice (instances of the last being observed and analysed in Comaroff and Roberts 1981). Related to family matters, if not logically part of them, is the issue discussed in the last part of this chapter, harmful customary practices, especially female circumcision.

Part IV examines “Special Topics”. The first of these is the processes used to prove the content of customary law in state courts where judges lack specialised knowledge of that law. This discussion in my view overlooks some of the more important implications of the experience of this process (discussed e.g. in Woodman 1969, Renteln and Dundes 1994, and various writings by Australian anthropologists such as Maddock 1998). It is out of date and not well-informed as to the process in Ghana (pp. 382-85). Furthermore, it may leave the reader dissatisfied by asking questions without suggesting any view as to the answers, on

BOOK REVIEW
Gordon R. Woodman

such matters as the admissibility and desirability of evidence from anthropologists about the customary laws of the societies which they have investigated. Under the head "Academic Questions" the book discusses a number of further questions, which seem to be more than academic in the narrow sense, on the ethics of anthropological practice. A chapter on "Accounting for the past" consists of a sound, basic study of ways in which injustices inflicted on indigenous communities, mainly in Canada, Australia and the USA, might be mitigated. This includes a critique of the British decision in *Tito v. Wadell* [1977] 2 W.L.R. 496, in which the Banabans of Ocean Island were denied redress for the seizure of their island and their mass deportation to Fiji by the British government. There is no discussion here of the South African case, which might have been especially instructive. The conclusion, that the common law tradition could develop doctrines to enable redress to be given, has strength, but it might have been more persuasive if supported by references to some of the more perceptive studies of common law methods of judicial decisionmaking and law creation (e.g. Llewellyn 1960; Dworkin 1977), rather than a few references to the development of the Equity jurisdiction prior to the nineteenth century.

Finally in this part a chapter "Beyond the Law" examines the political claims of aboriginal groups. It gives much attention to Fiji and the coup there of 1987 when Fijians of indigenous descent, constituting slightly less than one-half of the population, struggled with Fijians of Indian descent, almost equally numerous, for political and legal control. (The book was completed before the further coups and unrest of early 2000.) This chapter illuminates the possible conflict between the claims of tribal law and of democracy. It concludes that there is a need for 'original thinking' that will allow newer concepts to be formulated and newer frameworks to be conceived. From these, it is argued, will emerge fuller expression of indigenous values, needs and interests, both in the political areas (involving shared sovereignty or special representation) and in judicial fora (involving legal pluralism and parallel jurisdictions).

In the last Part Sheleff answers some of the objections to the recognition of tribal laws. He contends that customary law can develop and change to eliminate features which unduly favour privileged sections of tribal societies and to take account especially of feminist claims. He draws an analogy with the common law development of the trust for a comparable purpose. He notes the emergence of organised opposition to the revival of tribal rights in some countries such as Australia. He criticises sociological discussion of community for ignoring the tribe, and concludes: "If tribes exist in nation-states as part of a social pluralism, then recognition must be accorded to their customs as part of a legal pluralism" (484).

This book provides a fine introduction to the legal aspect of the case for “the need to reassess the manner in which western power and western law has ridden roughshod over the rights and dignity, the culture and customs, of indigenous people in all parts of the world”, but especially in North America, Australia and New Zealand (p. 465). It provides references to, and frequently summaries of a remarkable volume of literature, which must supplement the knowledge of every reader, including those who have engaged in long study of the subject.

Whether it contributes substantially to the analysis of the subject is more open to question. There are many observations on particular events and arguments which enhance understanding and stimulate thought. But it is doubtful whether there are many new concepts, hypotheses or analyses at a deep level. Perhaps the main reason for this lack lies in Sheleff’s identification of his field of study. By limiting himself to tribal customary law (as he defines it), and the legal pluralism which may arise from the recognition by the modern state of such law, he largely excludes discussion of the recognition of other forms of customary law, which might have illuminated many issues in legal pluralism. They are not entirely excluded, because the work is relatively discursive. There is, for example, reference throughout the book to the partial recognition of African customary laws by states of which the overwhelming bulk of the population generally observe such laws. But these are not systematically examined. This criticism may be illustrated by several aspects of the work.

If these instances of state ‘recognition’ of customary laws - instances which affect far more of the world’s population than state recognition of the customary laws of minority ‘tribes’ - had been examined more fully, an analysis of the form and problems of recognition might have been possible. There appears to be a distinction between two types of recognition: the recognition of institutions of customary law, allowing them some independence of operation, and effected by restricting the scope of operation of state institutions; and the recognition of norms of customary law by their observance in state institutions. This distinction might be typified as that between institutional recognition and normative recognition. An examination of these separately might have led to a more thorough consideration of the problems in each type of recognition. Sheleff discusses the problem of proof of the content of customary law for the purpose of normative recognition, but only in terms of possible errors of understanding on the part of state judges. He does not consider the extent to which it may be inevitable that a customary law is transformed by its enforcement through state institutions. Thus a state court may determine that it must enforce coercively norms which have previously been given weight, but have not always been decisive in the complex and subtle processes of administration of land by a council of elders. Again, as I have mentioned, he does not discuss the various ways in which customary marriage law and a state civil marriage law may be combined in

BOOK REVIEW
Gordon R. Woodman

a state legal system. Furthermore, in his discussion of the 'cultural defense' (Chap. 14) he makes no use of much of the work of Alison Dundes Renteln (citing Renteln 1994, but not Renteln 1987/88, 1990, 1993), apparently because it often concerns issues arising from customary laws which are not 'tribal'.

It is perhaps the concentration on indigenous tribes of North America, Australia and New Zealand which leads Sheleff to adopt the concept of a group subject to a customary law as a well-defined entity, largely insulated from the rest of the population of the state, and with few internal differentiations as far as concerns the acceptance of law. Excluding 'ethnic groups' from his discussion because of the vagueness of the distinctions between members and non-members of ethnic groups, and between members of different ethnic groups, he does not recognise that tribes may have equally blurred boundaries. He has difficulty with the members of a tribe who reside in urban areas, for the tribe in his view is essentially rural (p. 217) There is no discussion of the persons who are only partly 'tribal', because of mixed ancestry or choice of a 'mixed' way of life. As a result of this unrealistic (as I would suggest) view of the tribe, he has no occasion to discuss the many instances in the modern world where people simultaneously observe laws of different origins, sometimes without experiencing serious conflict, and sometimes 'shopping' between different laws to their own benefit.

This concentration of attention also seems to impede a clear view of the common law, of which Sheleff clearly has a good knowledge. He assumes readily that the common law developed from the common customs of the English people (p. 4 *et seq.*). But to adopt this notion of a homogeneous English people, steadily developing their law out of their unanimously experienced Volksgeist, is to take at face value the ideological claims emanating from the common lawyers of the past. English legal historians are united in seeing the common law as developed by a small professional cadre (Allen 1958: 121-123).

Simpson's seminal article arguing that the common law may be seen as a form of customary law, although quoted by Sheleff, does not support his vision (Simpson 1970). That paper sees the common law as the customary learning of the English bar. The implication is that it would be revealing to study the common law as the customary law developed by a small professional group as a guide to the manner in which they were to perform their professional functions, in the interests primarily of related interest groups who were their patrons, and imposed on a much wider community with a limited degree of success. This is the character of other systems of customary law (e.g. Chanock 1982, 1985), a fact noted by Sheleff in one of his later chapters, but the implication of which he does not examine. Had he considered the common law case more fully, he might have

taken a less simple or optimistic view, for example, of the development of the law of trusts as having for one of its underlying causes the modification of the common law exclusions of women from inheritance of property (pp. 469-470). He might also have been led to consider the ways in which principles of social conduct are taken into consideration by the judiciary as they develop the common law (Dworkin 1977). An appreciation of this practice may not only enhance our understanding of the nature of the common law, but would suggest that we might study in other customary laws, including tribal laws, the interactions between the interests of dominant groups and those of the numerically larger underprivileged whose acceptance of the law must be won, but for which a price may have to be paid.

Finally the concentration on indigenous tribal groups may result in some bias in the moral arguments presented. There is no doubt that the groups at the centre of Sheleff's discussion have been historically subject to a high level of injustice. It would be unreasonable to deny that redress is needed today. But if this case is pressed without attention to the wider implications, the result may be support for arguments which disregard possible injustice to other tribal and non-tribal groups. A portion of the arguments for policies favouring these groups - that which posits rights on the ground of first possession of a locality - can also be used to support discrimination against underprivileged immigrant and other ethnic groups who are resident in lands which are not their territories of origin such as Roma and Jews in Western countries. A realisation of this should lead us to consider which arguments are rationally based, and which are rather a reflection of an emotional revulsion towards misdeeds of the past.

These comments are not intended to suggest a general neglect of differing perspectives. It is a feature of Sheleff's style that many viewpoints are presented in the course of many parts of his discussion. It is the predominant emphasis which may be open to criticism, and this perhaps is a consequence of his definition of his field. Nevertheless every reader can benefit from the extent of his learning.

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BOOK REVIEW
Gordon R. Woodman

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WOODMAN, Gordon R.

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