

LEGAL PLURALISM AND FOLKLORE

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INTRODUCTION

In the leading international environmental law case, *Hungary v. Slovakia*,¹ Judge Weeramantry of the International Court of Justice made an extensive use of Buddhist philosophy, traditional wisdom of Sri Lankan people, love to nature of native Americans, the classical literature of such writers as Virgil in Ancient Rome, Wordsworth in England, Thoreau in the US, Rousseau in France, Tolstoy and Chekhov in Russia, Goethe in Germany - all these embodiments of the world's wisdom - to solve one of the most complicated legal issues concerning the balance between protection of the environment and the need for the economic development. In applying such an interdisciplinary approach, Judge Weeramantry believed that the sources of law are found not only in conventions, treaties, legislative and judicial acts and so forth, but also in the manifold wisdom of human civilizations.

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¹ The text of the judgement can be found at: http://www.icj-cij.org/icjwww/docket/ihc/ihcjudgement/ihc_ijudgment_970925_frame.htm

The opinion of Judge Weeramantry in this case can be seen as an excellent application of the idea of legal pluralism. It shows that legal pluralism is not an idle talk of idle academics. Rather it is the programme to reform our legal reasoning. So, what is then legal pluralism? Speaking from the point of view of a legal theorist, legal pluralism is seen as one of the alternatives to the predominant school of jurisprudence called "legal positivism" which focuses on the study of rules enacted or otherwise approved by the state. Legal positivism is often criticized for inability to grasp the complexity of law when considered in particular social, cultural and religious contexts. Other alternatives to legal positivism are sociological jurisprudence, historical school of law, psychological theories of law, natural law and legal anthropology.

Legal pluralism, however, does not stand as a separate school of jurisprudence. It can merge with any of the alternatives listed above depending on the focus of the researcher. The pluralism of social interactions within legal relationships, psychological experiences of law, and cultural diversity of legal practices - all these aspects can bind legal pluralism to any of the alternatives to legal positivism. For example, the interest in traditional water resource management practices would bring legal pluralism within the ambit of sociological jurisprudence or, if there is a strong historical interest in such practices, then the historical school of law can easily incorporate the legal pluralism ideas. In fact, with the appearance of this movement, the traditional borders between different theories of jurisprudence become less apparent. What is difficult to conceive, however, is the existence of legal pluralism within legal positivism. The reason for that is that legal pluralism is

based on the acknowledgement of the plurality of the sources of law understood not in formal sense as in the positivistic picture of law, but in its material sense according to which the state law is only one of the sources of law.

Legal pluralism will be considered in this article within the rich tradition of legal anthropology, because this tradition has paid the most attention to folk materials. It will be, however, argued that legal anthropology was not able to appreciate the value of folk materials completely due to its cultural and moral relativism. Having briefly outlined the general theoretical position of legal pluralism, and the importance of folk materials for legal anthropologists, the main argument of this article will be presented. It will focus on the place of folk wisdom which it deserves within the contemporary system of law in the era of globalization.

LEGAL PLURALISM AND FOLKLORE

Legal pluralism is the central thesis of legal anthropology simply because legal anthropology is the way of studying laws through observing the variety of cultures with their unique legal norms and practices. The distinct approach of legal anthropology is a respect for the non-Western legal cultures. Often it implies the belief that Western law is not better than any other law, and that other legal systems have their own cultural value worthy of protection and preservation. In fact, other legal systems were used by legal anthropologists to criticize Western legal rules, institutions, and particularly, legal practices.²

² See for example: Turnbull C., "The Individual, Community and Society:

Using the idea of legal pluralism as a basis for comparison of legal cultures and criticism of the Western law is one of the best contributions of legal anthropology. However, the majority of legal anthropologists would be very cautious to suggest any transplantation of non-Western moral values into domestic legal systems. The goal of legal anthropologists is not to discover non-Western moral values in order to reform Western law. The main goal is either idealistic: to protect non-Western moral and legal systems from the colonialism of Western law, or purely pragmatic: to help non-Western countries who adopted Western law to handle difficulties with its efficient enforcement.

A work of M.B. Hooker on legal pluralism, for example, falls within this second pragmatic trend.³ His book is not only a good example of the way how legal pluralism can affect anthropological or cultural studies of law it also shows that legal pluralism is not a purely academic pursuit. Rather it is a reform movement which has and will have implications for national legal policies in the developing world. Hooker did not deal directly with folk materials. His main interest lied in customs. In this respect his work may be classified as belonging to the historical school of jurisprudence rather than anthropology. Hooker saw his primary task as to critically examine the reception of Western law by non-Western countries. Observing legal practices in many countries which adopted Western law, Hooker concluded that the

Rights and Responsibilities from an Anthropological Perspective," P. Sack. (Ed) *Law and Anthropology*. (Aldershot: Dartmouth, 1992) pp. 201-258.

³ Hooker M.B., *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws*. (Oxford: Clarendon Press, 1975)

fact of poor legal administration in those countries is explained by the vitality of indigenous systems of obligation, and that "legal pluralism may be a good legal policy."⁴ Hooker suggested that indigenous law, after being modified to a certain degree to meet modern needs, is better suited to unique cultural values.⁵ It is in this aspect that his work presents a framework within which the importance of folk materials as the embodiment of unique cultural values can be clearly seen.

From the examination of law customs, particularly those which conflict with the adopted Western legal rules and institutions, an anthropologist can proceed to the study of folklore as a source of identification of indigenous values of law which conflict with the Western legal values. There are, however, two weaknesses which a legal pluralism theorist must overcome in relation to folk wisdom. The first is that folk wisdom has a tendency to be restricted by legal anthropologists only to the area of indigenous law, without much chance of influencing interpretation and application of modern Western like law. Secondly, the idea of legal pluralism can take the form of moral relativism, since every legal culture has and is based on distinct moral beliefs and practices. The idea of moral relativism, for example, that there are no universal moral values is alien to folk wisdom. This moral relativism is the strongest obstacle for legal anthropologists to overcome in order to acknowledge the whole value of folk tradition for the contemporary system of law.

⁴ Ibid, p. VII.

⁵ Ibid, p. VIII.

LEGAL ANTHROPOLOGY AND THE IDEA OF PLURALISM

Since legal anthropology tends to examine law in its cultural context, pluralism within legal anthropology is inevitably understood as related to the cultural diversity. Legal anthropology tries to see law in its relationship to other cultural phenomena: mythology, folklore, religion, family relationships, etiquette, and the whole system of interpersonal relationships. In linking those cultural phenomena to law, there is, however, one particularity which makes the whole approach of legal anthropology distinct from other alternatives to the legal positivism. A legal anthropologist would concentrate on a small, often primitive society where he can empirically observe cultural relationships. The American school of anthropology founded by Franz Boas⁶ is especially known for its emphasis on field work and first-hand observance. The interest for primitive cultures is one of major characteristics of legal and general social anthropology. This emphasis on a small scale research within one primitive society contains the danger of failing to see the universal and absolute values found in folk materials. Pluralism in legal anthropology is localised. It is not about the plurality within one system, rather it is the plurality of autonomous systems which can co-exist within one territory. Pluralism is always identified with a particular group of people who preserved their autonomous cultural structures. This is exactly where the weakness of

⁶ Franz Boas also had interest in folktales (See: Boas F. *Folk-tales of Salishan and Sahaptin tribes*. (Lancaster: American folk-lore society, 1917) His perhaps the most well-known book is *The Mind of the Primitive Man*. (New York: Free P. London: Collier-Macmillan, 1965)

theories based on the cultural relativism lies. Cultural relativism cannot go from the pluralism of autonomous cultural systems to the pluralism within one globalized system of cultures, in the meaning that this system presupposes the *single* order of values and norms rather than an agglomerate of unrelated cultural values.

Thus, it is important to emphasize that legal pluralism can be seen by legal anthropologists in two ways. First, it can be seen as the existence of multiple legal regimes which are hostile to each other and trying to exclude each other, or at least ignore each other. Second, multiple legal regimes can be seen as the parts of organic unity in which each element of the complex system of legal values, norms, and relationships performs its own function. Legal pluralism in this latter vision can be compared with the ecosystems in which the biological diversity is a necessary condition of their survival. The problem with legal anthropology is that being concerned with the primitive cultures endangered by the social and economic development, the anthropologists tend to conceive legal pluralism in its antagonistic form. Primitive societies with their values and norms are seen as victims of the development and aggression of the modern law.⁷

It is true that not all legal anthropologists share this pessimistic vision of the relationship between primitive and modern laws. The founders of the school of legal anthropology, for example, saw evolution as a positive development: from simple and barbarian forms to more developed and civilized forms. One of the most prominent

⁷ Klein R., "Cultural Relativism, Economic Development and International Human Rights in the Asian Context," 9 *Touro Int'l L. Rev.* 1. 2001.

anthropologists who were very interested in folklore and law was James Frazer. In his three volume work *Folklore in the Old Testament*⁸ Frazer examined legal institutions and rules contained in the Old Testament with the task of eliciting primitive customs of the past which all nations of the world shared alike. This work has avoided the parochialism of later schools of anthropology. Particular folk sources were given their universal significance. Frazer accomplished a superb substantial comparative research in folklore and law customs. However, he was unable to see in folklore something more than the mere sources of finding out the relics of savagery and barbarism.

The idea of pluralism in the evolutionary theory of law presupposes the movement from basic simple forms which are similar to each other to the variety of forms which are more complex and different from each other. Pluralism is the result of adaptation to different environments. In this aspect, folklore is seen in that theory a more primitive stage of cultural development. However, what Frazer could not foresee is the time when all cultures will integrate into each other, and the prospect that folk sources may represent the cultural unity of the globalized world rather than archaic expression of primitive beliefs. Anyway, the evolutionary approach in legal anthropology did not last, and the view of folklore as leftovers from the primitive cultures attracted a fierce criticism among the twentieth century anthropologists.

⁸ Frazer J. *Folklore in the Old Testament*. In 3 Vol. (London: MacMillan, 1919)

FOLKLORE AND FUNCTIONALIST CONCEPT OF LAW

Malinowski was, perhaps, the most famous representative of the second generation of legal anthropologists who rejected the evolutionist approach to studying non-Western cultures.⁹ Malinowski denied the positivistic concept of law in terms of central authority, codes, courts and constables. Instead he suggested a functionalist concept of law, as something **securing social reciprocities and interdependencies**, and indeed such law can be found in every human society. This broader vision of law inevitably widens scope of the sources where law can be found. Malinowski stressed the importance of tales and myth in the system of securing social reciprocities and interdependencies.¹⁰ He insisted that there is an intimate connection between folklore and social organization, and even between folklore and the practical activities of the society.

For many legal anthropologists, however, folktales did not occupy the central place in their research. Their main interest lay in observing the way in which social conflicts in non-Western cultures are resolved. Folktales came to their attention only if they related to dispute resolution. For example, William Bascom observed that Yoruba diviners had recourse to the tribal repertoire of traditional narratives in arriving at their analysis of individual problems. The beans which they threw on a board and which fell in a series of complex patterns were used to identify folktales, whose content was then applied to the particular

⁹ Malinowski B., *Crime and Custom in Savage Society*. (N.Y.: Harcourt, 1926)

¹⁰ Malinowski B., *Myth in Primitive Psychology*. (Westport, Conn: Negro Universities Press, 1971)

situation in hand.¹¹ Those conflict- resolution studies, however, did not pay sufficient attention to fundamental moral principles underlying folk narratives with the purpose of eliciting them in order to be used in modern legal systems. There was much interest in process, but little in substantive law.

This lack of interest to the substance of legal and moral obligations expressed in the folktales, and the preoccupation with the process does not necessarily mean the departure from the functionalist concept of law as the mechanism of securing social reciprocities. The majority of legal anthropologists seem to move to the behaviorist type of research. They are preoccupied with observing what participants to a legal process do rather than what they say they do,¹² without rejecting, however, another way to apply this concept: an interpretation of the world view of the people in a particular culture who enter into a reciprocal and interdependent relationship. This last approach finds its support in one of the leading authorities in anthropology, Hoebel, who wrote: "Not all peoples or persons can by any means articulate systematically what their world view is.... Usually it is up to the anthropologist or philosopher to analyze and formulate a people's world view from what is learned of their thinking, feelings and actions."¹³

There is much difficulty in analyzing moral beliefs of ordinary people when relating them to the function of law. One reason for this

may be that the use of the functionalist concept of law in the end depends on the moral vision of the society shared by the researcher. A researcher who shares the view that moral beliefs are a private matter and the main function of law is to let people to pursue their private goals, will end up with a very different work from the researcher who believes in the absolute morality and the law as the means of achieving the happiness of all.

It is possible to argue, however, that whatever are the moral beliefs of the researcher, **folktales and other forms of folklore are important if we want to understand the world view of the participants in legal relationships.** One of the advantages of anthropology is that law and world view of people cannot be considered separately, and therefore a legal anthropologist must reconstruct people's beliefs on what is right and wrong. The whole theoretical framework of legal anthropology with its interest in the function of law provides a significant contribution to studying folk moral principles in their relationship to the modern legal systems. First of all, legal anthropologists provided working concepts of law which cannot be reduced to officially authorized legal rules. Malinowski's concept of law as a mechanism of enforcement of social reciprocities and interdependencies is not alone. Another prominent legal anthropologist Max Gluckman conceived law as a set of rules accepted by all normal members of the society as defining right and reasonable ways in which persons ought to behave in relation to each other and to things.¹⁴ Those broader

¹¹ Bascom W., *Ifa Divination*. (Indiana University Press, 1991)

¹² Hoebel E.A. Weaver Th., *Anthropology and the Human Experience*. - 5th ed. (N.Y.: McGraw - Hill, 1979) P. 484.

¹³ Ibid, p. 523, 526.

¹⁴ Gluckman M., *The Judicial Process among the Barotse*. (Manchester University Press, 1955)

definitions of law allowed much more place for folktales to be taken seriously by lawyers.

According to the functional approach the societies are conceived as living organisms where law and folktales administer certain vital functions. The primary function of law is to enforce social rules. The function of folklore is to give a justification for compliance or non-compliance to those rules. **Consequently, folklore is the source for identification of the community beliefs on what is right and wrong, good and evil.** In fact, it is not only the source but it performs in the most efficient way the function of communicating those beliefs to the members of the society.

FOLKLORE IN THE ERA OF GLOBALIZATION

The idea that folktales are important for identification of moral beliefs of the participants to legal relationships can meet several objections. The *first* is that our world has changed so dramatically that the beliefs expressed in the folktales do not match the beliefs of the contemporary age. The *second* objection is that folktales are often the product of a unique culture which is localized. In contrast, we live in the world of globalization which is opposed to the parochialism of local cultures. The *third* objection can be directed generally against the functional approach of legal anthropologists like the one of Malinowski. It is true that folktales can be useful means of exploring law of the cultures where the formal sources of law like legislation, case-law and etc. are not developed. In the modern age, however, the functions of law to safeguard mutual reciprocities and interdependencies are performed by the official or state made law.

Therefore, the importance of folklore has diminished.

The first two objections cannot be met by abstract arguments. The only way to overcome them is to go to the folk materials themselves and to see what those materials can offer to our age of globalization. One of the main conclusions of the research conducted by the author of this article on Thai folktales is that they contain moral principles which transcend the limits of a particular locality or country.¹⁵ In the analysis of many folktales it has been shown that Thai folk wisdom being much influenced by Buddhist religion at the same time affirms many moral precepts shared by other religions, particularly Christianity. Moreover, those beliefs do not contradict many moral beliefs of those who deny any value of religion at all. We may not agree with all the ideas contained in folktales, but it is not the same as to say that those ideas have nothing to do with the contemporary age. The values of justice as well as care and love are important for the globalized law as for any other law. Moreover, in the age of democracy one can hardly neglect the most democratic form of art: folklore.

The third objection is, perhaps, the most difficult to meet unless one has to go beyond the limits of cultural and moral relativism. The tradition of natural law can reinforce the universal moral appeals of folk wisdom. At the same time, this wisdom can reinforce the theory of natural law against the claims that the ethical and legal formulations of the natural law theorists are nothing but the product of their own imagination. The comparative study of folklore can elicit the folk law whose statements are identical to natural law. The tradition of natural

¹⁵ Shytov A.N., *Thai Folktales and Law*. (Chiang Mai: Acts, 2004)

law needs folklore because it contains the great potential to unite the diverse cultures under one globalized system of law. In this respect, folklore can offer the forum where legal anthropology and natural law meet and unite with each other without denying their diversity.

CONCLUSION

If we look at folklore as the source of moral principles and moral beliefs of the participants to legal relationships, then the place of folklore in the whole body of the system of law will depend on the answer to the ultimate question of jurisprudence on the proper connection between law and morals. The whole tradition of legal pluralism stresses the organic unity of law and morals within human culture. Therefore, if one has to take that tradition seriously, moral principles and beliefs of the people must be incorporated into the consideration of legal phenomena.

Legal pluralism has to meet the challenge of globalization. We live in the world where many of our rights and duties are affected by the globalized law. In the plurality of legal and moral cultures there is a need to find core values shared by the whole humanity. Without this underlying moral unity the globalized system of law will remain a mere collection of numerous international bodies which produce piles of ambiguous documents whose interpretation is left to the arbitrariness of the few powerful nations, or rather to those who assume that they represent them. Folklore contains the wisdom of the nations in all their unity and plurality. Without this wisdom, which is able to hold all cultures together, law will become a mere instrument of violence and injustice.

The opinion of Judge Weeramantry, quoted in the introduction, seems still a lonely voice among the judiciary. Yet, there is a growing consensus among lawyers that law is a cultural phenomenon, and that law can be studied through the manifold manifestations of the world cultural heritage. Folklore is only one part of it. Nevertheless, it is an important part since it reflects the wisdom of common people from whom the authority of law receives its legitimization in the democratic era of the human history.