JOURNAL OF THE INDIAN LAW INSTITUTE

VOLUME 33 APRIL-JUNE NUMBER 2

CONFLICTING CONCEPTIONS OF LEGAL CULTURES AND CONFLICT OF LEGAL CULTURES

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I Towards a jurisprudence of contradictory worlds

ANTICIPATING THE denouement Prince Hamlet observes at one stage: "The air is promise-crammed." So it is today with legal theory and jurisprudence. There is growing concern about the obsolete, irritating, isolationist and insular ways of doing jurisprudence.

To be sure, old habits die hard. The colonial, imperial ways of doing jurisprudence are still very much with us, even when they manifest themselves unbeknown to jurisprudents. Thus, for example, the claim that there ought to be a universal or universalisable theory of judicial process, no matter how overwhelmingly based on a single variant of Western law tradition it may be, continues to evoke not too innocent jurisprudential excitement.[1] Such an acultural endeavour is being pressed as a serious contribution to legal thought even in the late twentieth century.[2]

Likewise, most theories of justice wear a universal mask. The conscientious ones remain aware both of civilisational and cultural diversities in approaches to justice as a property or attribute of societal arrangements. But the awareness is not productive of engagement with the non-Western people or worlds. Thus, even a profound thinker of our times who ordains a lexical priority for liberty is able to say without a frown on his face towards the end of his *magnum opus* that it may, after all, not extend to societies where basic wants are not satisfied.[3]

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1. R. Dworkin, *Taking Rights Seriously* (1977); *id., A Matter of Principle* (1985); see generally, M. Cohen (ed.), *Ronald Dworkin and Contemporary Jurisprudence* (1983); also see, *contra,* U. Baxi, "On How Not to Judge the Judges: Towards an Evaluation of Judicial Role", 26 *J.I.L.I.* 211 (1983); S. Fish, "Wrong Again", 62 *Texas L. Rev.* 299 (1983); S. Fish, "Working on the Chain Gangs : Interpretation in the Law in Literary Criticism" in W.J.R. Mitchell (ed.), *Politics of Interpretation* (1983).

2. The very word 'judge' brings to our mind certain historical and cultural contexts. There cannot be institutions called 'courts' without there being "categories which are common to politics...and without agreement to submit to court's jurisdiction", M. Foucault, in C. Howard (ed.), *Power/Knowledge* 27 (1980); U. Baxi, *Courage, Craft and Contention: The Indian Supreme Court in the Eighties* 4-9 (1985) ; M. Shapiro, *Courts : A Comparative and Political Analysis* (1981).

3. J. Rawls, *A Theory of Justice* 543 (1972).

One more example of this tendency is to be found amongst those who uneasily speak of attributes of 'modern' law or modernisation of the law, identified with reference to a whole cluster of attributes. Uneasily, because one wishes to save the 'ideal type' of the modern law from degenerating into a stereotype. No matter how hedged, modernisation of law theories rest on the premise that "the 'modern' legal experience in most of the world began only a short time after the European."[4] Indeed, the assumption is "more modern the law, that is, the more it conforms to European models the better it must work for social and economic development."[5] *Amen*!

So uneven is the impact of a radically transformed world on the received ways of doing legal theory and jurisprudence that eminent First World thinkers tend to continually forfeit the opportunity to look in the "global mirror." Indeed, they even tend to forget what the gifted Chilean author Ariel Dorfman poignantly reminds all of us:

> The Third World of humanity is just a filthy, undesirable, oversized, underdeveloped brother to the fourth, fifth, sixth, and *infinite contradictory* worlds which teem within the frontiers of the "advanced" nations.[6]

Where then is the promise? It lies, we believe, in the meandering and menacing (menacing to a hegemonial jurisprudential world view) concern to recover the "infinite contradictory worlds" in the doing of jurisprudence. Increasingly, there is a promise of sharing of comprehension concerning the multiplicity and plurality of law.

A new comparative jurisprudence is struggling to be born—a jurisprudence of, as it were, the First Causes—one that would seek to understand the creationist role of legal ideology and power in the historic production and reproduction of this "filthy, undersizable, oversized, under-developed" humanity everywhere.

Thus it is that the new jurisprudential discourse talks, frankly, about the *imposition* of law as an aspect of violent colonial seizures, not of the reception of law.[7] It begins to distinguish carefully, and yet imaginatively, between authentic customary law and the one fabricated for purposes of extension of colonial power and regimes.[8] It interrogates the role of legal

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4. M. Galanter, "The Modernization of a Law" in L.M. Friedman and S. Macaulay (ed.), *Law and Behavioural Sciences* 1046 at 1048-9 (2nd ed.).

5. *Law and Behavioural Sciences, id.* at 1060 (editorial note).

6. A. Dorfman, *The Empire's Clothes : What the Lone Ranger, Babar and Other Innocent Heroes do to our Minds* 8 (1983).

7. See, S.B. Burman and B.E. Harell-Bond (ed.), *The Imposition of Law* (1979); G. Eorsi, *Comparative (Civil) Law* 562-9 (1979).

8. See, *e.g.*, P. Fitzpatrick, "Custom, Law and Resistance", D. Williams, "The Recognition of 'Native Custom' in Tanganyika and New Zealand—Legal Pluralism or Monocultural Imposition?" in P. Sack and E. Minchin (ed.), *Legal Pluralism : Proceedings of Canberra Law Workshop* VII at 63, 139 (1986).

professions as generating that kind of legal pluralism which arises from "the inclusion of precapitalist social formations within the framework of the modern state."[9] The new discourse bristles with questions concerning the role of law and lawyers in the colonial mode of production.[10] Above all, it affirms the lawness of people's or non-state law, thus capturing a domain of multi-legalism in social orders.[11]

At the same time, it also seeks to decipher the nature of state power, in part, through an understanding of the dialectic between consent and coercion.[12] Put in another way, it explores the ideology of power and power of ideology.

Undoubtedly, these are scattered and small emergences. But they raise a new hope for jurisprudence, and the fellowship of juristic learning. Possibly, they herald the birth of a new sensibility enabling the thinking humanity to suffer and the suffering humanity to think.[13] For long, such a sensibility was needed in the human science of jurisprudence, where we have, at long last now, a whole new structure of feeling equipping us to take people's sufferings seriously.[14]

II Genesis amnesia and discovery of legal pluralism

The period of classical colonialism,[15] despite all its complexity and contradiction, still being unravelled, did make the world simpler and safer for the inauguration of a tradition of comparative study of legal cultures. By that period, the 'Western' legal tradition had accomplished its emergence

9. R. Luckham, "The Political Economy of Professions..." in C.J. Dias *et. al.* (ed.), *Lawyers in the Third World : Comparative and Developmental Perspectives* 287 at 296 (1981), also see, Y. Ghai, R. Luckham, F. Snyder, *The Political Economy of Law : A Third World Reader* 671–726 (1987).

10. See, Luckham, *ibid.* ; see also essays in the volume by Lynch, Ghai, Odenyo and Green, *id.* at 26, 144, 177 and 275 respectively.

11. See, *e.g.*, M. Chiba (ed.), *Asian Indigenous Law* (1986); U. Baxi, *The Crisis of the Indian Legal System* 348–58 (1982).

12. See, *e.g.*, C. Summer, *Reading Ideologies: An Investigation into the Marxist Theory of Ideology* 266–77 (1979); A. Hunt, "Dichotomy and Contradiction in the Sociology of Law" in P. Beirne and R. Quinney (ed.), *Marxism and Law* 74–98 (1982); D. Hay, "Property, Authority and the Criminal Law" in D. Hay, *et. al.*, (ed.), *Albion's Fatal Tree* 17–63 (1975); U. Baxi, *Marx. Law and Justice : Indian Perspectives* (*forthcoming*; 1991).

13. "The existence of a suffering humanity which thinks and of thinking human beings, who are oppressed, must inevitably become unpalatable and indigestable to the world of Phillistines.... The longer the time that events allow to thinking humanity for taking stock of its position and to suffering mankind to mobilize its forces, the more perfect on entering the world will be the product that the present time bears in its womb." K. Marx, "Letters from *Deutsch-Franzosische Jarbucher*" in K. Marx and F. Engels, 3 *Collected Works* 141 (1975).

14. *E.g.*, U. Baxi, "Taking Suffering Seriously: Social Action Litigation Before the Supreme Court of India" in R. Dhavan, *et. al.* (ed.), *Judges and Judicial Power* 289–315 (1985).

15. N.A. Simoniya, *Destiny of Capitalism in the Orient* 7-24 (1985).

from folk law, canon law into royal, state law.[16] The contact with new cultures and civilisations was, however, accompanied then by some sort of genesis amnesia.

If we telescope the early phase of colonial seizure and consolidation, we begin to perceive the nature of this amnesia. For example, the proud boast of the British was that they found India bereft of law; the gift of 'law' to India was one of their proudest achievements.[17] What was meant broadly by law was, of course, secular, state law with formal adjudication of disputes through legal professionals backed by a distinctive structure of sociological coercion. Colonies everywhere lacked such a 'law'; its imposition was regarded a civilisational contribution of the colonisers.

It would then have been outrageously seditious for a contemporary subject to have suggested that all that they were encountering in the colonies was a splendid re-enactment of the pre-history of the so-called Western legal tradition. From the sixth to the tenth century, folk law of the people of Europe was "merged with religion and morality; and yet it was law, a legal order, a legal dimension of social life."[18]

> As in many non-Western cultures, the basic law of the peoples of Europe from the sixth to tenth centuries was not a body of rules imposed from on high but was rather an integral part of the common consciousness, the "common conscience", of the community. The people themselves, in their public assemblies, legislated and judged; and when Kings asserted their authority over the law it was chiefly to guide the custom and legal consciousness of the people, not to remake it....Beyond the question of right and wrong was the question of reconciliation of the warring factions.... Rights and duties were not bound to the letter of the legal texts but instead were a reflection of community values which sprung..."out of the creative wells of the sub-conscious"...the customary law of this early period of European history was often "vague, confused and impractical, technically clumsy" but...it was also "creative, sublime and suited to human needs."[19]

Moreover, the Western law tradition in its prehistory and laterday evolution was suffused with religion. Western legal systems "have their sources in religious rituals, liturgies and doctrines of the eleventh and twelfth centuries reflecting new attitudes towards death, sin, punishment,

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16. H.J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983).

17. L. Rudolph and S. Rudolph, *The Modernity of Tradition: Political Development in India* 253 (1969).

18. Berman, *supra* note 16 at 80.

19. *Id.* at 77.

forgiveness, salvation, as well as new assumptions concerning the relationship of the divine to the human and of faith to reason."[20] Despite the sea-change in the Western world now, "drying up" the "theological sources", the legal "institutions, concepts and values that have derived from them still survive, often unchanged."[21] Even though that commonplace of thought since 1122 which regarded the law as a "way of fulfilling the mission of Western Christendom to begin to achieve the kingdom of God on earth,"[22] may not hold so vividly in the late capitalist societies of Europe and North America, the notion still resonates with equal theological intensity in secular guises.

Secular law, under the regulation of canon law, emerged as a body primarily of royal and feudal law. The theological conviction that the "universe was subject to law" (so close to non-Western cultures) was the basis of the emergence of both rule *by* law and the rule *of* law.[23] Political pluralism of secular authorities, as well as division between the religious and temporal, sustained emergence of this notion.[24] Popular participation in the administration of justice assisted both the "establishment of a system of royal law and in the maintenance of its supremacy over the arbitrary exercise of power by king himself."[25]

Undoubtedly, even in the absence of genesis amnesia on the eve of colonisation, we would locate distinct aspects of the Western legal tradition not compatible with the traditions of the subjugated peoples. In many a non-Western society there was no counterpart to the first emergence of of the 'state' as the "church in the form of state."[26] Nor perhaps what has been described as the "dialectical tensions...in theology, science and law, corresponding to the dialectical tension between the ecclesiastical and secular authorities" marking the prehistory of the Western legal tradition been found,[27] if at all, in the same mix in the non-Western traditions. Finally, if the "experience of a dialectical interaction between revolution and evolution, taking place over centuries" is a "unique feature of Western history",[28] we may find in non-Western societies different forms of social *habitus*.

Despite these significant distinctions, the commonalities in legal experience are many and striking. If we had a corpus of knowledge for the "non-Western traditions" as rigorous as that concerning the prehistory of the Western legal tradition, we would be in a more fortunate position to

20. *Id.* at 165.
21. *Ibid.*
22. *Ibid.*
23. *Id.* at 521.
24. *Id.* at 536.
25. *Id.* at 538.
26. *Id.* at 533.
27. *Ibid.*
28. *Ibid.*

substantiate the commonalities more comprehensively. But even in the present state of knowledge the live traditions of law, symbiotically co-existing with the modern state law in many a Third World society, do indicate these commonalities.[29]

Undoubtedly, a decisive break occurred in the Western legal tradition with the rise of capitalism and its Siamese twin colonialism. This break did not *contribute* to but rather in itself *constituted* genesis amnesia. The growth of productive forces and revolutionary transformations *of* both relations of production and relations *in* production[30] entailed a necessary negation of folk law, a creeping secularisation of modes of production and reproduction of state and class power, and a historically sustained incomprehension of the legal tradition of non-Western people.

The forms of this incomprehension in the early phases of colonialism have yet to excite theoretical labours of comparative jurisprudents and legal historians.[31] But we do find, at least in the nineteenth century, in the efflorescence of the so-called historical "school" of jurisprudence some attempt to overcome it. The corpus here is rich and varied. But this much is clear: the attempt at historical comprehension of the law did not (and perhaps could) result in any erasure of the genesis amnesia. Nor did it result (and some would rightly say could not) in changing the colonial face of power. This is clear if we ask the question: did the discourse of Savigny, Maine and Weber have any benign impact on the progress of imposition of colonial law in the colonial societies? Insofar as jurisprudential thought can be attributed a radiation of political impact,indeed, this question is capable of invoking some uncharitable negative responses.

For example, Savigny's seminal insights on the people's law, and celebration of custom, remained confined within the origins of discourse on the codification of the German law.[32] The great work of Henry Maine, in the ultimate result, only provided a key to the unlocking of doors of the "hitherto progressive societies."[33] Max Weber's triumphant work, with a rich harvest of insights on the modes of evolution of law and state, in the net result, only contributed to the awareness that rationalisation of the law,

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29. See, *e.g.*, M. Chiba and U. Baxi, *supra* note 11; also, A.N. Allot and G.R. Woodman (ed.), *People's Law and State Law : The Bellagio Papers* (1985); U. Baxi, *Towards a Sociology of the Indian Law* (1986).

30. See, *e.g.*, G. Eorsi, *supra* note 7 at 46-52, 62-99. For the distinction between relation *of* and relations *in* production, see, M. Buroway, *The Politics of Production* (1985); see also, U. Baxi, *supra* note 12.

31. By the same token, an examination of the impact of legal traditions of the colonised societies on the colonial law is an area demanding urgent, wide ranging studies, unless it is to be assumed that the traffic in jural ideas was only one way, an assumption which is itself palpably colonial.

32. See, for the exposition of this discourse, J. Stone, *Social Dimensions of Law and Justice* 94-101 (1966).

33. See, Stone, *id.* at 133-41 and the materials there cited.

with all its antinomies,[34] was the *summum bonnum* of human jural achievement; and that model did support, one way or the other, the onward march of the Western legal tradition through the subjugated world. Josef Kohler's notion of civilisation and human potential as a mastery of human nature and unfoldment of human powers carried, ultimately, a similar message.[35]

These cryptic summations in no way intend to do injustice to their scientific achievements which have provided the necessary impetus to the recovery of continuing understanding of the pre-contact and post-contact evolutionary dynamic of non-Western legal traditions.[36] But they also reinforce a truth which must not be lost (even if made trite by the sociology of knowledge) that the inauguration and development of comparative jurisprudence, all said and done, was "an internal affair of the West European world" which has "left its mark upon comparative science in the West."[37] And as an "internal affair" it could hardly transcend the *episteme* (to distort Foucault's notion somewhat) of capitalism/colonialism and the genesis amnesia that it entailed. The discovery of "legal pluralism" occurred in the zodiac of capitalism/colonialism and was controlled and confined by it.

III Conflicting conceptions of legal culture

Neither in the discovery nor in the rediscovery of legal pluralism nor in the analysis of legal change and complexity do we find a fully-fledged discourse on culture. And yet central to comprehension remain some operative notions of 'culture' and 'legal culture'. To unravel whole theories of culture nestling within these discourses is an intimidating enterprise. But one must begin somewhere. And the beginning can only offer some preliminary suggestions on ways in which such a task could, perhaps, be approached.

The most striking aspect of these discourses is, of course the oscillation between two complex meanings of culture. *First*, culture becomes a "noun of 'inner' process, specialised to its presumed agencies in intellectual life"; *second*, it becomes a "noun of general process specialised to its presumed configurations in the 'whole way of life.' "[38]

Perhaps, it is this distinction between the two complex senses of culture which is operative in the commonplace of contemporary sociological jurisprudence which distinguishes between the culture *of* law and the law *as*

34. M. Rheinstein (ed.), *Max Weber on Law in Economy and Society* (19_4); see, R. Bendix, *Max Weber: An Intellectual Portrait* 298-457 (1962).

35. See, J. Stone, *Human Law and Human Justice* 184-92 (1965).

36. For example, the lamented Max Gluckman movingly declared that his *Ideas in Barotse Jurisprudence* (1965) might well have been entitled "Footnotes to Sir Henry Maine's *Ancient Law*" (at p. xii).

37. G. Eorsi, *supra* note 7 at 38.

38. R. Williams, *Marxism and Literature* 17 (1977).

culture. The 'inner' processes which the notion of culture of law directs us to grasp are the processes of producing meanings which produces practices and of practices which produce meanings[39] within the presumed agencies of 'legal' life. The 'general processes' which the notion of law as culture directs us to is the law as social configuration providing 'whole ways of life'.

These two senses then direct us to different realms of analysis. The conception of the law *as* culture, typically lends itself to an epochal analysis of culture.[40] In this mode of analysis, a "cultural process is seized as a cultural system, with determinate dominant process."[41] The "epochal" definition of culture "can exert its pressures as a static type against which all real cultural processes are measured, either at the best to show 'stages' or 'variations' of the type," or, at the worst to "select supporting and exclude 'marginal' or 'incidental' or 'secondary' evidence."[42] The epochal mode of analysis entailing both the processes of typification and homology[43] was made known most comprehensively to social sciences by Karl Marx through his modes of production analysis and by Max Weber to jurisprudence through the ideal types of charismatic, traditional and legal-rational domination. The more responsible amidst the spawning ideal type formulations since Weber, are to be found in the typologies of Simpson and Stone[44] and more recently in the works of Roberto Unger (who elaborates the typification of customary, bureaucratic/regulatory and relatively autonomous legal order)[45] Niklas Luhmann with his ideal types of archaic law, the law of pre-modern high cultures and the postivisation of law[46] and Masaji Chiba in his articulation of a three-level structure of the law.[47]

In contrast, legal culture viewed as a culture *of* law is particularistic. It focusses on the lived relationship between societal values, beliefs and attitudes articulated through the law and law-related social behaviour. The distance we travel is truly vast: from Max Weber's sociology of law to Farnz Kafka's *The Trial*, from theories of surplus exploitation through overproduction of meanings to Albert Camus' *The Outsider*, or from the weight of historical jurisprudence to Milan Kundera's *Unbearable Lightness of Being*. From the overpoweringly abstract to the myriad real; from the determining forces to the determined; from abstraction of history without subjects to individuals who through praxis make the world, its limits and

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39. P. Bourdieu, *Outline of a Theory of Practice* 118 (1977; R. Nice trs.).
40. R. Williams, *supra* note 38 at 121.
41. *Id.* at 121-2.
42. *Id.* at 121.
43. *Id.* at 101-7.
44. J.B. Simpson and J. Stone, *Law and Society*, Vol. I-III (1949).
45. R.M. Unger, *Law in Modern Society* 48-58 (1976).
46. N. Luhman, *A Sociological Theory of Law* 103-58 (E. King-Utz aad M. Albrow trs.) (1985).
47. M. Chiba, *supra* note 11 at 5-6, 301-58.

its future. In this area, literary works, more than sociology of law *genre*. illuminate our understanding of the culture *of* law as legal culture.

But, of course, there are more staid and prosaic pursuits, too: legal culture as culture *of* the law is perceived as culture of the extant and ongoing legal institutions and agencies. Thus we hear of, (*i*) the culture of deviance, and of law enforcement; (*ii*) custodians and those detained (prison culture); (*iii*) judges and their roles (activist, restraintivists, eclectics or just, in complete plain words, time-servers); (*iv*) legal professionals and of legal education; (*v*) legislatures and regulatory agencies;[48] and (*vi*) (in the sector of the people's law or the non-state law) the culture of dispute-handling and conflict-resolution.[49]

Further, pursuit of the culture of law may even be, to use that shocking word, "cross-cultural." Shocking, because it is often confidently asserted that the word cross-cultural is appropriately invoked in the context where "Western industrial cultures are compared with pre-literate tribal ones";[50] the scandal of this Eurocentric view, urged by otherwise intelligent people, is aggravated by the self-serving truism that "hardly any cultures have remained unaffected by Western ideas and technologies."[51] Cross-cultural studies, despite so many decades of decolonisation, find it scientifically decent to proceed on these axioms! In no sense, cross-cultural comparison, except in the obsolete and even obscene imperialist sense, is a one-way intellectual traffic. It is solacing that jurisprudents have not, by and large, and for a change, followed such an impoverishing path and have illuminated the possibility of a cross-cultural analysis in which the word 'cross-cultural' signals scope for mutual learning—even to a point where one hears of the "peaceful uses of anthropology"[52] and the "creation of an African type moot in the suburbs of San Francisco."[53]

Comparative studies of legal cultures, besides providing antidotes to arrogance, help us remove the continual impoverishment of our sensibility; they even provide us with a hope that jurisprudence will some day begin to belong to humanities as much as it now does to social sciences. The astonishing jural creativity of ordinary people throughout the world must inspire a sense of awe and wonder. The infinite variety of the people's law should serve some day to liberate us from the preferred poverty of state

48. See, for example, the readings in Friedman and Macaulay, *supra* note 4 at 577-828.

49. See, *e.g.*, L. Nader (ed.), *Law in Culture and Society*, *possim* (1969); R. Abel, "A Comparative Theory of Dispute Institutions in Society", 8 *Law and Soc. Rev.* 217 (1974); see also, *infra* notes 54-60.

50. N. Frijda and G. Jahoda, "On the Scope and Methods of Cross-Cultural Research", 1 *Int'l Jl. of Psychology* 110 (1966).

51. *Ibid.*

52. N.J. Lowy, "Modernizing the American Legal System: An Example of the Peaceful Uses of Anthropology", 32 *Human Organization* 205 (1973).

53. R. Danzig and N.J. Lowy, "Everyday Disputes and Mediation in the United States: A Reply to Professor Felsteiner", 9 *Law and Soc. Rev.* 675 (1975).

law. Do not we learn immensely more than what we learn from the state law concerning the province and function of law, for example, from the Cheyenne[54] or the Cherokee[55] from great cosmologies of the aborigines of Gove Island whose notion of the Dreamtime encompasses all legal forms and processes[56] or from Barotse[57] and Tiv?[58] From the Eskimo's "situational pluralism?[59] And from the Kabyales of Algeria concerning the ways of achieving practical coherence in the ritual practice as well as "acts of jurisprudence"?[60] And from the Tolai of New Britain?[61] Truly, the jurisprudence of humanity began millennia ago; to ignore this in the teaching and doing of the law and jurisprudence, and this is what we learn above all, is to squander the common heritage of mankind.

It is in this sense, a *civilised* cross-cultural sense, that one may say that comparability is not excluded in the study of legal cultures as the culture *of* law. To this domain belong, for example, Henry Maine's stages of legal growth,[62] and more significantly, Durkheim's conception of the restitutive sanctions being more preeminently associated with societies with organic solidarity and repressive sanctions being similarly associated with societies displaying mechanical solidarity,[63] even when the location of Durkheim at this juncture rather than at the phase of law *as* culture may remain subject to contention. Perhaps, the distinguishing inarticulate features of these comparative discourses concerning the culture *of* law is that they are non-epochal in the sense ascribed earlier.

It is precisely at this stage that a major conflict surfaces between the epochal analysis of the law as culture and comparative studies of legal cultures as cultures of law. The conflict centres on the nature of legal pluralism, entailing the coexistence of non-state (or people's) legal system with the state legal systems. The first phase of it is seen in the enormous controversy over the definitional question: can there be law outside the auspices

54. K. Llewellyn and E.A. Hoebal, *The Cheyene Way*: *Conflict and Case Law in Primitive Jurisprudence* (1941); E.A. Hoebal, *The Law of Primitive Man* (1954).

55. Note the fascinating notion of "structural poses" of legal and social orders, introducing collective rhythms and temporality in F. Gearing, "The Structural Poses of the 18th century Cherokee Villages", 60 *Am. Anthropologist* 1148 (1959).

56. See, U. Baxi, *The Lost Dreamtime, Forever Lost*: *A Critique of Millirrupum* (1970 mimeo).

57. See, Gluckman, *supra* note 36.

58. P. Bohannan, *Justice and Judgment Among the Tiv* (1957).

59. N.H.H. Graburn, "Eskimo Law in the Light of Self and Group Interest", 4 *Law and Soc. Rev.* 45 at 58 (1969).

60. P. Bourdieu, *supra* note 39.

61. A.L. Epstein, *Matupit*: *Land, Politics and Change among the Tolai of New Britain* (1969).

62. See, *supra* note 33.

63. See, R.B. Schwartz and J.C. Miller, "Legal Evolution and Societal Complexity", 70 *American Jl. of Sociology* 159 (1964); U. Baxi, "Durkheim and Legal Evolution: Some Problems of Disproof", 8 *Law and Soc. Rev., supra* note 49 at 654; R.B. Schwartz, "Legal Evolution and Societal Complexity: A Reply to Professor Baxi", *id.* at 653.

of the state? The definitional question was designed to do away with a co-equal status for the category of 'people's' or non-state law and to confine pluralism within the realm of state-law processes. The second phase arises out of the appreciation of the interminability of definitional discourse. It is here that the epochal analysis, both of the liberal and marxist genre, makes some singular contribution.

It is, indeed, unfair (and at points misleading) to collapse rich bodies of theories into single paragraphs of a few sentences. But both liberal and marxian variants of epochal analysis will, despite this, be here presented starkly, vivifying their overall *gestalt*.

Broadly, then, the liberal variant would suggest that the forms of non-state law are relics of the past destined to disappear in the Great March to Progress, whether conceived in terms of the movement towards autonomous legal order (Unger), positivisation of law (Luhman) or legal-rational domination (Weber). In an encounter with the 'modern' law these forms of law-as-culture are marginalised and will altogether vanish.

The marxian and marxist variants of the epochal tradition analysis does, after designating the folk law formations as distinctive to precapitalist modes, direct our attention to the reality of exhaustion of these formations in the wake of emergency of bourgeois or socialist law. The existence of folk law will, of course, be conceded. But only as a 'remnant,' an archaic survival which must vanish in course of time. Some marxist thinkers pour scorn on scientific adventurism urging revival (in the sense of theoretical praxis) of folk law. And they would tend to see resistance on the ground by 'traditional' legal cultures as foredoomed to failure but in the process capable of creating a 'mystification' of the nature of the operative class factors, forces and interests.

The available responses to epochal analysis seem simply to consist in the reiteration of the social reality of multilegalism in every society and a general acknowledgement that while the law can express class domination and struggle, and is basically affected by economic structures, it also constitutes a relatively autonomous cultural process. Such a view, while exceedingly tolerant of sharp divergence, does not resort to any underlying cultural theory at all.

It is here that one recalls sensitive marxian analysis of culture for they have help to offer. Raymond Williams offers us three valuable distinctions in cultural analysis, *viz.*, the categories of, (*i*) "residual" cultures; (*ii*) "emergent" cultures; and (*iii*) "dominant" cultures.[64] Of course, it is from the standpoint of dominant cultures that one speaks of the other categories. Even so, the other two categories interpenetrate the dominant culture as the latter does the residual and the emergent. Residual culture has "[B]y definition... been effectively formed in the past, but it is still active

64. *Supra* note 38 at 121.

in the cultural process, not only and often not at all as an element of the past, but as an effective element of the present. Thus, certain experiences, meanings and values which cannot be expressed or substantially verified in terms of the dominant culture, are nevertheless lived and practised on the basis of the residue—cultural as well as social—of some previous cultural and social formation."[65]

The residual in this sense is the active having oppositional or alternative relationship with the dominant culture.[66] At the same time, the residual may also be absorbed in the dominant. It is this interaction with the dominant culture, in any conjuncture, which imparts precision to the notion of the 'residual.' "It is", says Williams, "in the incorporation of the actively residual—by reinterpretation, dilution, projection, discriminating inclusion and exclusion—that the work of the selective tradition is especially evident."[67] And the "struggle against selective traditions is understandably a major part of all contemporary activity."[68]

Emergent culture has its source almost always in emergent classes; but such cultural emergence is subordinate, slow and incomplete.[69] The incorporation of the emergent "looks like recognition, acknowledgement, and thus a form of acceptance," a complex process which causes "regular confusion between locally residual (as form of resistance to incorporation) and the generally emergent."[70]

These insights from the domain of marxist literary theory should also assist us through its enabling distinctions of cultural analysis of the law. It suggests that the dismissive attitude of non-state or people's law formations on the one hand and the celebrative attitude affirming its multifarious existence and potent future on the other must be both avoided. Not all legal cultural survivals are archaic; nor do they all hold potential as emergent or dominant cultures. They are best regarded as active residual cultures of past social and cultural formations acting as an "effective element of the present." Their residuality should not make us think of their irrelevance or obsolescence. On the contrary, residual legal cultures are those which cannot be articulated in the diction of the dominant legal cultures but they are *lived* as "experience, meaning and values."

We also learn that what is crucial, after this reconceptualisation, is the process of preservation of the nature of residual cultures in their oppo-

65. *Id.* at 122.
66. *Id.* at 122-3.
67. *Id.* at 123.
68. *Id.* at 117. The author now understands better his own notions as to "hegemonial" and "antagonistic" relations between state legal systems and non-state legal systems elaborated in a paper presented to the Research Committee on Sociology of Law of the International Sociology Association (Japan 1975) and elaborated in his *Crisis of the Indian Legal System*, *supra* note 11 at 328-47.
69. *Id.* at 124.
70. *Id.* at 124-5.

sitional and alternative forms and struggle against their incorporation through the construction of "selective tradition." It is this dynamic that studies of legal pluralism ought to self-consciously address.

Equally important is the interaction between the actively residual legal culture and the emergent legal culture. How the subaltern classes generate new emergent cultures, how these in turn relate to the actively residual cultures and how the dominant culture responds to these conjunctures now become intensely relevant concerns for the study of legal cultures. If the process of construction and reconstruction of "selective traditions" is the response of the dominant culture to actively residual ones, so is co-optation by way of recognition and acceptance of its response to the emergent cultures. And the *determinate dominance* of the dominant legal culture, we should recall again, is not complete. As Williams states:

> *[N]o mode of production and therefore no dominant social order and therefore no dominant culture ever in reality includes or exhausts all human practice, human energy and human intention.*[71]

And, indeed, determination by the dominant "is never only a setting of limits; it is also the exertion of pressures."[72] Hence, both the crucial features of determinate domination allow for active presence and power, despite historic limits, for the actively residual and emergent legal cultures. Such an understanding removes, among other things, the picturesque, but poignantly uninformed, metaphoric analysis of people's law as being under the shadow of state law.[73]

The enabling distinctions also now empower us to approach the conflict of legal cultures. For example, we are now in a better position to grasp the key to the famous Weberian puzzle concerning inadequate rationalisation of English law which made it, in his eyes, a deviant case of capitalist development.[74] Certainly, the common law waywardness was far from the ideal legal calculus that Weber thought existed in ample measure in the continental legal cultures. We should now be able to suggest that the active residual culture of the common law which initially stood in opposition and as an alternative relation to the transformations of relations *of* and *in* production was gradually adapted by the construction of "selective tradition" by the judges and jurists.

Similarly, the famous hypothesis of cultural lag, formulated by Ogburn, now acquires a deeper cultural meaning than controversial sociological

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71. *Id.* at 125 (Emphasis added.).

72. *Id.* at 87.

73. See, *e.g.* M. Galanter, "Justice in Many Rooms" in M. Cappelletti (ed.), *Access to Justice and Welfare State* 147 at 149 (1981).

74. See, D.M. Trubek, "Max Weber on Law and Rise of Capitalism", *Wisc. L. Rev.* 720 at 746-53 (1972).

analyses would disclose.[75] Ogburn's characterisation of the English common law as merely "adaptive culture" which reacted slowly to changes in the productive forces and in relations *of* and *in* production was really an aspect of how dominant culture managed to hold back alternative emergent culture arising from values, beliefs, meanings and experiences of the emergent working classes and subalterns.

To take yet another example (and again in a summary fashion) the 'rejection of right' and the cultural under-valuation of courts in Korea and Japan, for example, may be understood as a part of the dialectics of the actively residual, emergent and dominant cultures.

IV The juridical world outlook : juristische weltanschaauung

In understanding law *as* culture, and the culture *of* the law, we ought not to overlook the possibility that the dominant culture may, indeed, be global and seek to encompass the world in hegemonic spheres of influence. Engels identified for us in 1887 the key conception of juridical world outlook: the law now replaces the "theological outlook"—the "place of dogma and of divine law" is now occupied by the "law of man, the place of the church by the state."[76] Juridical world outlook celebrates a creationist role of the law. Economic relationships mediated by law, assume a *universality*; the *forms* of law help convert particular interest of the ruling classes into general societal interests. Thus, in early capitalist production competition assumes the "basic *form* of contract between free commodity producers" and is the "great equalizer, equality before... becomes the fond rallying cry of the bourgeoisie."[77] The *forms* of law mediate not just domination but also struggle against it: any class struggle is essentially a political struggle, a "struggle for state power and for legal demands"— a fact which has "helped in *consolidating* world juridical outlook."[78] Juridical world outlook celebrates two major demands: maximum freedom of the individual within the community and subjection of state power to the principles and procedures of law. These two notions—rights to freedom and the rule of law—together form the gestalt of the politico-juridical conception of the *Rechstsstaat*.[79]

A full history of the bourgeois juridical world outlook shaping the cultural composition of the law (in most parts of the world) has yet to be written.

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75. L.M. Friedman and J. Ladinsky, "Social Change and Law of Industrial Accidents", 67 *Colum. L. Rev.* 50 (1967); E. Curria, "Sociology of Law: The Unasked Questions", 81 *Yale L.J.* 134 (1971).

76. See, V.A. Tumanov, *Contemporary Bourgeois Legal Thought: A Marxist Evaluation of the Basic Concepts* 40 (1974).

77. *Ibid.*

78. *Ibid.*

79. Tumanov, *supra* note 76 at 46 ; *see also*, U. Baxi, *supra* note 12, for a more elaborate presentation.

We have already noted some critical components of that history so far. But such a history of the global impact of hegemonic juridical outlooks can only be complete if it takes account of its Other—the socialist world juridical outlook[80]—celebrating:

(*i*) the social ownership of the means of production;

(*ii*) the principle of satisfaction of basic human needs;

(*iii*) the marginalisation of *personal property* satisfying the principles of "participation in social production " and "performance-determined inequality of socialist distribution";[81]

(*iv*) the principle of planning;

(*v*) the principle of the "proper exercise of rights, the prohibition of the improper exercise of rights";[82]

(*vi*) the principle of socialist co-existence and cooperation;[83] and

(*vii*) the struggle to attain a "really complete equality" concommitant with the "distant process of the withering away of law."[84]

The struggle for appropriation of the world by these two fundamentally antagonistic, contradictory juridical world outlooks must, of course, inform any attempt at exploration of the actively residual, emergent and dominant legal cultures within a given society. So must the current *detente* between the two juridical world outlooks, signified by *glasnost* and *perestroika,* which themselves were preceded, both sides, by a gradual process of convergence.[85]

It is enough at this stage to indicate, even if synoptically, how one may approach through these enabling distinctions the present revival of Islamic law in some societies. The mix of religion and rising nationalism (often miscalled 'fundamentalism') here stands opposed to world hegemonic legal cultures valorising liberal secularism (as state policy) and socialist legality as a regime sponsored militant marginalisation of religion in both state and civil society. At the same time, this 'mix' is opposed to the seismic shifts in the contemporary global culture (ideologies) of the law. The *detente* or convergence jurisprudence delegitimates 'fundamentalism' by its renewed emphasis on *rechstsstaat* and the emergent cultures of new human rights (especially the feminisation of human rights models). The contemporary discourse on 'revivalism' and 'fundamentalism' overlooks through the processes of *genesis amnesia* the formative era of the Western legal tradition. In this, it institutes its own notions of *hegemonic temperality.*[86] On the jurisprudence of the infinitely contradictory worlds, clearly,

80. See, G. Eorsi, *supra note* 7 at 71-99.

81. *Id.* at 7.

82. *Id.* at 77-81.

83. *Id.* at 82-4.

84. *Id.* at 71.

85. *Id.* at 396-412; *see also,* U. Baxi, *supra* note 12.

86. See, U. Baxi, "Marginal Notes on Hegemonic Elements in Human Rights Discourse" being a paper presented to the colloquiuum on the Rights of Subordinated Peoples at the University of La Trobe, November 1988 (mimeo.)

far more sensitive analysis of the cultural composition of the law is needed than is now available to us.

V Towards a conclusion

One must end somewhere, even if an end suggests only the possibilities of a new beginning. The central theme of this paper is the need to develop a more articulate notion of legal cultures both as cultures *of* law and law *as* culture. In this endeavour, jurisprudents have a lot to learn not just from social sciences but also from the humanities. More so, because conveniently arts, literature and law have been lumped in the superstructural realms as "culture." It has been shown with remarkable lucidity, that the concept of 'superstructure' represents not "a reduction but an evasion"[87] in that it ignores that the arts, literature and the law, as well as politics, constitute the "necessary material production within which an apparently self-sufficient mode of production can alone be carried on."[88]

Indeed, it is nothing but ethnocentrism which prepares ground for the "unconscious acceptance of *a restricted definition of economic interest*, which in its explicit form, is the historic product of capitalism."[89] It is time that even jurisprudents learn from (Bourdieu's) Kabyle the secret of "symbolic capital," perhaps another name for culture, and thus disturb their *doxa* by an assertion of heretical powers.

87. R. Williams, *supra* note 38 at 93.
88. *Ibid.*
89. *Supra* note 39 at 177.