ГОСУДАРСТВО И ПРАВО В СОВРЕМЕННОМ МИРЕ: ПРОБЛЕМЫ ТЕОРИИ И ИСТОРИИ

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Some Reflexions about Legal Pluralism

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This article will be focused on two aspects of legal pluralism: legal history and legal anthropology which, in France, are strongly associated. Legal pluralism has always been concerned by the problem of relations between customs and Folk Law one side, that means living and fluent law; other side, State law of centered power, more abstract and rigid.

The first part will be more historical. We shall study the statute of customs in three centralized States: China, Russia and France. About China, it will be necessary to precise the place in customs in the Chinese legal thought and administration system of Chinese Empire, which is very different of the western Empires. After, we shall study the fate of customs in national minorities of South China, starting from 1949 to nowadays. About Russia and France, we shall give some data about same problems, in history and nowadays, with the particularity of Russian federalism.

The second part will be more theoretical. We shall try to explain what are the diverse theories of legal pluralism, which is the main current in legal anthropology today. All consider that State Law is not the unic law in any society. But the recognition of this fact by State and jurists is very variable, in the past and today. Moreover, the degree of plurality of law is not the same according the period. And it depends of the characteristics of the legal culture of each society. Common law systems more welcome legal pluralism.

We shall give a peculiar attention to the theories of Dutch author Van Den Steenhoven, who analysed legal pluralism in the context of colonialism, and also to the Japanese author Masaji Chiba, a legal anthropologist of Asian countries, who has written a lot of academic papers about legal pluralism in these countries.

Keywords: legal anthropology, legal pluralism, customs, state law, legal culture, common law system, Van Den Steenhoven, Masaji Chiba.

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Introduction

To study a problem, a French lawyer will first outline its theory, then come to concrete examples. The *common law* jurist, on the contrary, will start from concrete cases to develop a theory. Regarding this brief presentation on legal pluralism, although being French, I shall adopt the second approach.

In the first part, historical, I shall take examples of legal plurality in China, Russia and France. In a second part I shall study a number of theories of legal pluralism by placing them in their contexts.

Part I: Historical Approach of folk law in China, Russia and France

A) Folk Law in China

By Folk law, it is necessary to understand which the old French law called the *ius gentium*, that is to say the laws which human groups have given themselves, regardless of their recognition by the State.

a) Marriage customs: State Law and Folk Law

1) Place of customs¹

What was the place of customs in ancient China? The role of the law was not fundamental. One preferred to prevent conflicts and settle them by conciliation. Disputes had to be resolved above all on the basis of *ch'ing* (feeling of humanity), then *li* (respect for others), then according to *lii* (reason), and finally *fa* (law, or the law). The most profound difference between the traditional Chinese system and the Western systems is the absence of subjective rights.

The *fa* mainly regulates public law and criminal law, but in private relations, everything is done to reach a conciliation, according to the moral of Confucius.

China is mainly a country of customs (*su*, *xisu*, *fengshu*), like many other countries in the world. They governed whole parts of private law: family, property and trade law. The State was not interested in customs, which varied according to places and populations. However,

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¹ See: Antonio Gambaro, Rodolfo Sacco, Louis Vogel, *Le droit de l'Occident et d'ailleurs*, Paris, LGDJ, 2011, 387sq.

the judge had to find out about customs and take them into account when deciding, this activity gave rise to the publication of collections of cases law. The clan and the family themselves ensured justice by conforming to very variable customary rules.

The customs also governed the relations between the craftsmen and the tradesmen, grouped in corporations, which had their own jurisdictions. The State recognized family and corporate jurisdictions.

The Chinese Empire, by losing interest in a large part of the customs, acted in a manner comparable to the Pharaonic, Mesopotamia, Persia, Alexander, and India Empires.

The Roman Empire had a different attitude in codifying civil laws at its late period. Justinian's work provided the Eastern Empire, and therefore the Russian Empire, with a model of civil legislation. Later, Roman law was transmitted in Europe, but medieval jurists largely reinterpreted it, to adapt it to the situation of their time, very different from that of the Roman Empire.

But most of the time, the law applied in practice is customs. The ancient Romans lived for a long time under customary law, the *mores*, before resorting to codification very later. In France, before 1789, people lived according to customs, very different depending on the region. Until the beginning of the 20th century local languages were very common in this country.

Many times in history, and in many countries, customs have been written, and have been the subject of official writing. In this case, the customs were gradually transformed into State law. The men who wrote customs were influenced by the central government. And once the drafting was completed, the modification of customs became a monopoly of the central power.

2) Family customs in ancient China²

Since more than 2000 years, China is studying itself. Under the *Han*, when Empire has been unified, the *fangshi* were first ethnologists. They collected data to give the Emperor the means to well administrate different populations. This tradition continued with the *Song*.

In modern times, one can quote Yang Kun (1901—1988). He was a student of Mauss and Granet, French scholars, and founded in 1934 *The Society of Chinese*

Ethnology. Another author is Yang Chengzhi (1902—1991). He did fieldwork among the *Yi* of Sichuan.

Chinese ethnologists were first interested by the *minzu*, which had to access to the modernity. In 1980 the *Academy of social sciences* reappeared. In our century, the offices of culture (*whenhuaaju*) and of religion (*Zongjia Ju*) collect data about *Han*.

When one does fieldwork, one discovers that local customs differ often from official norms, specially in family organisation.

At the base of society is the family, united by the worship of common ancestors. The father has full power over his children and grandchildren; it is he who determines the choice of the spouse and he has authority over his wife and concubines. Kinship creates groups on two levels: the clan and the family. At the head of the clan, the *Zushang*. The clan generally comprises five generations. The wives of the son belong to his family, the girls married to foreigners leave their families. The engagement could take place even when the future spouses were very young. The husband could repudiate his main wife in seven cases and repudiate his concubine without any limit. However, the wife could not repudiate her husband. Only men benefited from inheritance tax. The will did not exist.

3) Family customs in modern China and folk law³

From the seizure of power by the Communist Party, one can distinguish two types of legal pluralism.

The first is that which exists between the legislative law of the People's Republic and practical behavior. The second is that which results from the dichotomy between cities and countryside. We must add an intermediate category: the situation of migrants. These are observations that can be made in most countries of the world.

§ 1. State Law and real Life

From 1949, State law took legislative measures to suppress archaic and reprehensible customs: inhuman criminal sanctions, bandaging of the feet, oppression of young people by the family, etc. In 1950 a law prohibited forced marriage of women and authorized them to request a divorce. In practice, however, women were responsible for the well-being of their husbands and children. The traditional model remained. In 1953, women received the right to vote. But no woman has ever served on the supreme leadership of the Communist Party. In the National People's Assembly, women represent less than 25% of the 3000 elected representatives.

In 1980 a law on marriage was promulgated. It confirms consensualism. Divorce can be done by mutual consent or at the unilateral request of the spouses. But in practice, the deceived wife is held responsible for the infidelity of her husband: she failed to preserve the harmony of the household. In 1985 the law recognized equality between male and female heirs.

² See: Chen Zhongshi, *Bailayuan*, Renmin Wenxue, Beijing, 1993; Brigitte Baptandier, *La Chine d'un point de vue anthropologique*, *Études chinoises*, 2010, 219—233; Tania Angeloff, *Le féminisme en République Populaire chinoise: entre ruptures et continuité*, *Revue Tiers-monde*, 2012/1, numéro 209, p. 89—106; Leslie Chang, *La fabrique des femmes-du village à l'usine: deux jeunes Chinoises racontent*, Belfond, Paris, 2009; Shuaijiun Mallet-Jiang, Mao Zedong et l'évolution des droits de la femme en Chine, *E-Crini*, *La revue électronique du centre de recherche sur les identités nationales et l'interculturalité*, Université de Nantes; Catherine Capdeville, *Mariage et amour en Chine-Les échanges et les sentiments dans les mariages dans un village du d'aujourd'hui*, *Quatrième congrès du réseau Asie et Pacifique*, Paris, septembre 2011.

³ See: Alain Wang, *Les Chinois*, Paris, Tallandier, 2018; Xinran, *The good women of China*, 2002.

Article 48 of the 1982 Constitution stipulates that women have the same rights as men in all areas; in 1986, equality was enshrined in the Civil Code. A law was enacted in 1992 to protect the rights and interests of women. It was revised in 2002 and guarantees equal rights over the land holdings of husband and wife. However, an opinion from the Supreme Court confirmed in 2014 that the property of a couple must belong to the one who signed the related documents. The title of ownership of the house or apartment, the statutes of a company or the contracts of land exploitation rarely bear the signature of the wife. In 2011, 60% of the title deeds and 65% of the agricultural contracts mentioned bear a unique name: that of the husband. A recent inheritance law prohibited a girl from being disinherited for the benefit of her brother, which was a persistent practice.

During the 1990s, layoffs became massive in state-owned and collective enterprises that went bankrupt, restructured or privatized. The women were asked to return home.

A city girl earns on average 30% less than her male counterpart. The 2005 law on gender equality in employment has not changed anything. Half of the companies that make up the Shanghai Stock Index have no women on their executive committees. A third of women say they are harassed at work. The rise in the precariousness of women promotes the development of prostitution. In 2014, the Ministry of Public Security estimated the number of prostitutes from three to 6 million.

§ 2. Marriage in urban areas

Conciliation is always preferred. The Conciliation Councils, which were inactive during the Cultural Revolution, were reinstated. They handle ten times more cases than the courts. Civil procedure also emphasizes the importance of conciliation.

In large cities, arranged marriages have become rare. But the mothers persist in playing the role of intermediaries. Public parks discreetly host “*bursaries for singles*” where matchmakers take care of one hundred *Yuan* to write an ad.

Nine out of ten men want to marry young women under the age of 27 because of the “*biological clock*”. Beyond this age, single women are called *shengnu*, women “*which nobody wants*”. A Chinese proverb says: “*They are 36 virtues, but all disappear if you have no child*”. One thinks that women who have no children bring misfortune to nurselings.

Today, the middle class is returning to ceremonial weddings, which maybe can be compared to *potlatch*. Families show their social status and the extent of their relationships. Spending on organizing weddings in major cities averages € 20,000. Families host a banquet, with sometimes hundreds of guests. The husband must furnish the furniture and household appliances. The car will be provided by the wife or her family. Three out of five unions do not result in the signing of any marriage contract.

In the urban middle class, young people wish leave old customs. In the absence of financial security from either party, they choose “*naked marriage*” (*luohu*) without the consent of their families. Patience in conjugal relationships is no longer the rule: you quickly divorce in case of disagreement. In 9 out of 10 separations, the decision belongs to the woman, as in Europe. But in rural areas, shame hangs over divorced women who can no longer return to live with their families in their native village.

Some couples do not live together: the husband simply comes to spend certain nights of the week with his wife. The trend is for common-law unions in urban centers where individual private space is the rule in the middle class.

However, single mothers are very frowned upon. Although celibacy is perceived as a mark of immaturity or social maladjustment, the number of single people is increasing. By 2030, 30 million Chinese people will experience forced celibacy due to four decades of restrictive family planning which has altered the natural *ratio* between the number of men and women. This phenomenon could be accentuated with the change in the mentality of women graduates living in cities, who choose to remain alone and favor professional success.

The one-child policy has tended to reverse the traditional family hierarchy: attention is now focused on this child, the large siblings have disappeared. Married or not, young people leave their families to escape their parents' grip. The majority of 60-year-olds live alone. In the countryside, they are even more numerous. At the end of 2017, there were around 12,500 private retirement homes.

The appearance of retirement homes all around the world is the sign of profound change in relations between elders and young people.

Which *a contrario* revealed by two laws in China. In 1996 a law instituted the economic responsibility of young adults towards their parents; in 2013 another law established the obligation for children to regularly visit their parents.

§ 3. Marriage in rural areas

In the countryside, where half the Chinese population resides, the reality is different.

Surveys show that two thirds of women between the ages of 18 and 25 are looking for a *dashu* (“*great-uncle*”), ten years older, who can ensure a stable union. The men remain attached to the virginity of the future wife. Parents still use the intermediary and the astrologer.

Peasants in remote countryside sometimes resort to marriage by purchase. The young girls are kidnapped or come from North Korea, Vietnam, Burma from Laos in search of better living conditions.

But cross-border marriages are under the control of criminal gangs.

Among peasants, the preference for boys remains very strong, because it is essential for carrying out work in

the fields. The ancestral practice of girls' infanticide is emerging again. Among national minorities, the limit of three children has never been respected.

In rural areas, girls receive little family support. From high school, they are excluded more quickly from school curricula. In the poorest rural areas, they are sacrificed in favor of their older brothers, when the family cannot afford to send two children to school at the same time.

However, the creation of businesses in towns and villages during the 1980s changed the way of life of many peasant women who discovered a new way of life and acquired a form of financial independence thanks to the fixed daily wage.

In practice, in the countryside, girls do not inherit because they will benefit from their husband's inheritance in his family. The boy's family therefore bears most of the costs of the marriage. It is not, however, a purchase marriage, as a dowry from the girl's family is always possible. On the other hand, once married, it is always the wife who keeps the finances of the family.

There are two types of marriage. The first marriage is by presentation (*jieshao*). A third present the potential spouse. This third party can be a relative, a friend, or a professional matchmaker who will receive remuneration. The second marriage is said to be free (*ziyou*) and would correspond to the love marriage.

But the fate of young migrant women is uncertain. Many become domestic workers, housekeepers, or babysit children and the elderly in families of the new bourgeoisie. These are domestic jobs, which disappeared under Mao Dze Dong. 15 million women have been placed by companies which negotiate informal agreements without respecting the regulations of the Ministry of Labor on the protection of service people. One third of migrant women have received vocational training; the others, often in an illegal situation, have no employment contract and have very difficult living conditions.

§ 4. Marriage in national minorities of South China⁴

In the years after the Communist Party took power, a number of measures were taken in favor of minorities. Autonomy status was granted to them during the 1950s. Autonomy status was granted if the population of one ethnic group exceeded 30% of the total population. In the 1990s efforts were made to develop minority regions, in particular to enable peasants to reach a level of food self-sufficiency. In southern China, minorities inhabit the provinces of Yunnan, Guizhou and Guangxi. Peasants still use traditional medicine from village healers. In most villages, rituals are practiced to expel demons from the body of the sick, consisting of offerings and incantations with magical powers. In these regions, the application of family planning rules has not always been strict. Families of four to six children are not uncommon.

The persistence of matrimonial customs differs greatly according to ethnic groups.

Among the *Yi Talu* people in *Yongsheng* district, the ancient matrimonial custom of group marriage has continued. Some women do not marry all their lives, living with their lover of the moment and with the children they have conceived with them. Young girls are very free and before adulthood, they have to go and live in a common house, called "*stable*", where they have free sex. Birth is a dirty act. The husband must not see his wife in childbirth. The latter does not go out for a month after birth so as not to offend the god of the door; she must not make a fire so as not to offend the god of the home. The child receives gifts from the maternal uncle.

Among the *Bai*, of *Dali*, in Yunnan, the matrimonial system is monogamic. The marriage is arranged by the parents, with the help of a matchmaker. On the day of the wedding, the bride leaves her parents in tears to go to her husband's palanquin. When she arrives, her husband's brother or friend carries her on their backs to the bedroom.

Clan structures persist, with a very rigid separation between generations. In the same generation, the older brother's child takes precedence over the children of other siblings, regardless of age and gender. The clan leader must resolve conflicts.

Among the *Hani*, young people today still have complete freedom to court. They have a special house to meet. Marriages must receive parental consent, but betrothed people can also choose freely. After marriage, the boy can continue to seduce young girls, but the married woman must remain chaste.

The *Mosuo* are a branch of the *Naxi*, and have 30 000 individuals. It is one of the few societies close to the matriarchy still in existence. The *Mosuo* still practice a kind of cohabitation called adolescent or *azhu*, depending on the location. Young people meet during field work, festivals or religious activities. If a boy takes an object belonging to a girl and the girl responds with a smile, it is that she agrees to enter into relationships. If she claims the stolen object, it is a refusal. The members of an *azhu* relationship do not live in a household, do not have a common purse, neither has the right of possession over the other. Everyone is free to have other *azhu* relationships. This type of relationship can be established with several *azhu*, most women generally have successively six *azhu*, including two lasting and four temporary. To end the relationship, the girl closes the door and does not respond when the boy knocks on the door. The *Mosuos* argue that the notions of possession and jealousy do not exist in this type of relationship. The authorities have encouraged monogamous marriage since 1949, with more or less success.

Among the *Buyi*, arranged marriages persist, despite the official ban. These marriages can lead to suicide cases.

The *Zhuang* are the most numerous national minority: around 16 million people. They are monogamous.

⁴ See: Françoise Grenot-Wang, *Chine du Sud-la mosaïque des minorités*, Paris, les Indes savantes, 2017.

Marriages were either arranged or by consent. Today, in some villages, the young man still has to bring in a matchmaker to apply for marriage. She makes four visits to the girl's family. At the fourth visit, if an agreement from the girl's parents has been obtained, she brings gifts. A date is then set for the engagement and the boy brings gifts.

These various examples therefore show that in certain national minorities in southern China, despite the various laws which have succeeded each other for more than half a century, matrimonial customs still exist.

B) Russia: Recognition of minorities and aboriginal peoples⁵

The Soviet Union and present-day Russia are federal States, contrary to China and France. *A priori*, the federalism allows a easier representation of the minorities and indigenous peoples.

The Russian Empire, known as Tsarist Russia, described by Lenin as a “*jail of peoples*”, was an unitary State, while granting certain institutional autonomy to certain regions. But the rise of nationalist and revolutionary movements forced to seek solutions to soften the absolutist political regime and the too rigid territorial organization. Like the British Empire, territories were called differently: kingdoms (*tsarstvo*) of Poland and Finland, large regions (*kraj* or *oblast*) or governorates (*gubernija*) with such different statutes. They were therefore the beginnings of a certain federalism. The drafts of the Constitutions circulating from the 18th century took into account the ideas of the Age of Enlightenment and the experiences of the federal States of the time, primarily the Swiss Confederation and the United States.

In the camp of the Bolsheviks, the rulers of Soviet Russia, the battle of ideas was rather fierce.

Lenin, in his writings on the national problem, defends and develops the idea of the self-determination of nations up to the right of secession and the creation of their own States, without using the notion of sovereignty to which he was allergic. For rather tactical but also doctrinal reasons, Lenin revises the postulates of classical Marxism and introduces the concept of self-determination of the people, in a way a substitute for the sovereignty of the people. Having lived in Switzerland for a long time, he advocated the Swiss model of the organization of a multinational state.

On the other hand, Stalin who passed for “*a great specialist in national problems*” was openly in favor of the strong central State, but accepted a certain margin of cultural and linguistic autonomy of the nations populating the country. But, as a compromise with Lenin, he accepted the federative form of the State.

Soviet power opted for Lenin's plan: on December 30, 1922, the creation of the Soviet Union was declared, the Union Treaty of which provided for the sovereignty of the republics forming part of the Union. The first Soviet constitution of 1924 like those of 1936 and 1977 take up this option.

Until 1991, the year of the collapse of the USSR, the signs of sovereignty of 15 Soviet republics were carefully respected: each republic had its constitution, its hymn, its official national language on par with Russian, its parliament and government etc. The reality was more complex given the obvious centralizing tendencies, especially during forced industrialization and the war.

But this picture of territorial and political organization was more complicated: apart from 15 sovereign Soviet republics there were as many “autonomous republics” within the Soviet republics, but also autonomous regions and districts and regions (*oblast*). So most nations and ethnicities had “their” territory, with different statuses depending on the number of inhabitants.

This mosaic somehow preserved national or ethnic authenticity, despite the russification, evident in practice.

The era of liberalization called *perestroika* (reconstruction) opened the sovereignty hit-parade when, one after another, the republics — already having all the outward signs of sovereignty — proclaimed their true sovereignty and total independence.

Russia proclaimed sovereignty on June 12, 1991, while other republics made the same proclamation. The new Constitution was adopted after lengthy discussion on December 12, 1993.

Another feature of the constitutional legal language in Russia must be underlined: in legislative texts, including the 1993 Constitution, two concepts are distinguished: “*national minority*” and “*indigenous people*”. National minorities are representatives of peoples whose “*territory of attachment*” is outside Russia. For example, hundreds of thousands of Ukrainians, Georgians, Moldovans, etc., established in Russia and having Russian citizenship. They have all the rights of ordinary citizens, but in addition can establish their schools, clubs, associations.

As for the “*small indigenous peoples*” (art. 69), are qualified as such the ethnic groups of Siberia and the Far East whose traditional way of life and economic activity are the object of special protection. A series of federal and regional laws has been adopted for this purpose. Some of these peoples have “their” territory — autonomous districts or territorial units where their language and customs are valued. Finally, according to Article 68 § 3 of the Constitution “*The Russian Federation guarantees to all its peoples the right to the preservation of the national language and the creation of conditions for its learning and promotion*”. This peculiarity of the multinational State explains such a mosaic of the territorial structure of the Federation.

This explains that russian legal anthropology has been innovative in several areas.

⁵ See: Anatoli Kovler, L'anthropologie juridique russe, *Droit et Cultures*, 50/2009-2, pp. 1—15. Translation in chinese language by Pr. Weichen forthcoming; *Le fédéralisme russe à la croisée des chemins*, publication in french forthcoming.

First, the field investigation: several Russian researchers have done it before Malinowski. Maxime Kovalevski undertook field research on social relations and property relations among the Ossetians, a Caucasian population, in the 1880s. Nikolai Mikloukho Maklay (1846—1888) studied coastal populations in New Guinea and, before Lévi-Strauss, wanted to prove that traditional societies are not “primitive” societies, in the evolutionary sense of the term.

Moreover, when one briefly examines history, one realizes that from the time of the Tsarist period, for autocrats as they were, the governments stimulated the study of the customary law of the populations that the Empire absorbed. Many questionnaires were written in such a way that indigenous customs were better known. From this point of view, the Russian experience resembles North American, in that indigenous peoples were located on the very territory of the dominant state. While in Europe, anthropology has developed from ultra-marine colonies.

During the Soviet period, interest in legal anthropology did not decline. Anthropologist jurists were getting closer to their fellow ethnologists. The most brilliant personality of this period was Vladimir Bogoraz (1865—1936). Scientific periodicals, including the famous *Sovetskaja Etnografia*, had thousands of readers. Today, legal anthropology is taught in twenty universities.

The Russian administration, first of all Soviet, succeeded in stimulating the formation of indigenous elites who collaborated with it. Between 1920 and 1924, out of 264 Soviet leaders, 119 were not Russian. Lenin had understood that a balance had to be maintained between what he called on the one hand Great-Russian chauvinism, and on the other hand, the nationalism of the republics. Moreover, contrary to certain predictions, the Soviet Union has not disappeared because of the centrifugal force of the nationalities. As we know, it imploded. But it is true that the peripheral republics hastened to take advantage of this implosion. Today, Vladimir Putin names them: “*The near abroad*”.

C) France: Negation of national minorities

Like China, France is an unitarian State. But contrary to China, France does not recognize on its soil the existence of national minorities. When France ratifies international instruments concerning them (or aboriginal peoples), it exercises its right of reservation on the passages of the texts concerning these human groups. The Constitutional Council has issued a decision in which it expressly states that in France no collective rights can be recognized for any group. There is only one single French people. The history of French colonial law is one of the foundations of positive law in this field. I cannot trace in a few lines the legal history of European colonization, particularly the French one. Let us say that in Black Africa, almost all the colonial States have guaranteed the respect of customs and customs peculiar to colonized peoples. Great Britain preferred indirect administration,

France the direct one. But various procedures were used which all had the effect of shifting the frontier between indigenous and modern rights for the benefit of the latter, whether these native rights were considered to be contrary to civilization, or inconvenient for colonial domination. Interested persons may have the right to adopt modern law for the performance of a particular legal act, or more generally to renounce personal status. But the return to personal status was forbidden until a recent time. Modern law replaces traditional law in certain subjects because of the principle of colonial public order.

Jurisdictional dualism was ambiguous. Traditional courts could only apply traditional law, whereas State courts could pronounce themselves in modern law, but also in traditional law, when one of the parties was of modern status and the other of traditional status, or when two parties of traditional status chose to exercise their option of jurisdiction in favor of the State court. On the other hand, any judge, whether traditional or State, could make modern law prevail over traditional law if it was contrary to the colonial public order or did not offer a solution considered reasonable and sufficient. France, like Russia, also made extensive inquiries into indigenous customs, culminating in the drafting of customaries. But the spirit was different. At the end of the twentieth century, the socialist Jules Ferry had affirmed that it was a duty for the higher races (*sic*) to colonize the lower races in order to bring them progress. And the colonization was mainly advocated by the left parties, conservative parties wishing to recover the provinces of Alsace and the Moselle over Germany.

In 1905, Governor Roume ordered judges to gather information that would form the basis of a customary general. But the instructions he gives were very clear: “*Our firm intention to respect customs cannot create the obligation to remove them from the action of progress, to prevent their regulation or improvement. With the help of the native courts themselves, it will be possible gradually to bring about a rational classification, a generalization of usages compatible with the social condition of the inhabitants, and to render these usages more and more in conformity not with our legal doctrines, metropolitan areas that may be opposed, but to the fundamental principles of natural law, the primary source of all legislation*”. In 1931, another governor, Delavignette, criticized the Roume doctrine in very lucid terms: “*What is an African custom where sentences are Europeanized? [...] When we say that we judge according to custom, we mean that we begin by judging the custom itself according to the code*”.

In fact, the texts which have been written have hardly ever been used. The questionnaires were very ethnocentric, and the investigators were not trained in ethnological methods.

With the end of colonization in the sixties, the colonial law ends, but begins that of the overseas,

that is to say, territories that have chosen to remain french, named territorial communities overseas. A special visa is necessary for foreigners who want to go there. These territories have various statutes, ranging from departmentalization to autonomy. Some, such as New Caledonia, enjoy the personal status provided by Article 75 of the Constitution. Polynesia and New Caledonia can make *laws of the country*, applicable only in their territories, subject to the control of constitutionality. But in all cases it is very distant territories compared to the metropolis.

French spirit is more uniformity rather than diversity and multi-ethnism.

There were some facts of plurality of norms.

What about the theories?

Part II: Theories of Legal Pluralism⁶

A) Law and Custom in legal anthropology

Legal pluralism could be broadly defined as the existence, within a given society, of several systems of law. We will return later to this definition, which was criticized for being too imprecise. It implies that different legal mechanisms apply to identical situations. For example, during the colonial period, the distinction between the private law of the native is that of the colonizer. In 1941, in *Cheyenne Way*, Llewellyn and Hoebel had already insisted that the procedure for the settlement of a conflict will not be the same depending on the subgroup in which it takes place. When the parties belong to the same group, compromise procedures will be favored. When they belong to distinct groups, it will rather be revenge.

The distinction between law and custom, also known as *Folk law*, is at the center of the debate.

Talking about legal pluralism therefore implies returning to the problem of the definition of custom in legal anthropology, as well as the distinction between standards and processes, a classic debate in this discipline. We will then come to the presentations of some theories of legal pluralism.

The legal anthropologist has a broader view of custom than that of the lawyer. For the lawyer, when it is oral, it has practically no value. It only begins to acquire legitimacy when it is written, but does a written custom really remain a custom? On the other hand, many traditional societies have not known writing. Does that mean they lived without law? Of course not. Likewise, traditional societies are often considered to be simpler than modern societies, described as complex. But isn't that an illusion due to what we can call the "*wall of writing*"? These societies have not left written texts, no great monuments like the Empires, and their works of art are often difficult to interpret. But that's not enough reason to say that they worked in a rudimentary way.

The custom often consists of gestures, ways of saying and doing.

For example, in one of his last books, *Anthropology facing the problems of the modern world*⁷, Claude Lévi-Strauss comments on Japanese society (maybe valid, this is to be verified by chinese scholars), to chinese society.

The japanese carpenter uses the saw and planer upside down from western artisans. It saws and planes towards himself, not by pushing outwards. The japanese cooker who fry, unlike the european cooker, will not say that she immerses the ingredients in the fry, but that she lifts or raises the fry. A japanese who is absent for a short time (to buy the newspaper, or to put a letter in the post), to signify this short absence to those around him, will not say that he is leaving, but that he will soon return. For a Japanese, the trip is often described as a painful experience, marked by the desire to return to Japan as soon as possible.

The anthropologist links all of these isolated facts. He will notice that it is always a question of bringing towards oneself, or of bringing oneself inward. It is an attitude different from that which consists in initially posing the subject as an autonomous and already constituted entity. The Japanese "me" is not an original datum, but a result towards which we tend, without any certainty of reaching it. Descartes' famous phrase "*I think, therefore I am*" is strictly untranslatable into Japanese.

We also know that in asian languages, the pronominal form "I" is much less frequent than in western languages.

Similarly, in his book *The Amazon and the Cook-Anthropology of the Sexual Division of Labor*, the french anthropologist Alain Testart examines certain gestures in order to better understand the division of labor between men and women in most corporations.

He notes, for example, that hard materials, like metal, wood, stone, are almost always worked by men. On the other hand, soft or flexible materials, such as for weaving and pottery, are mainly used by women. Among the 185 traditional societies studied by Murdoch, 37 had a small iron and steel industry, which was the exclusive domain of men.

To study the law, the french jurist compares legal texts, often codified. The comparatist juxtaposes legal texts, without taking much account of their cultural and historical context. And the western comparatists make very little room for non-western laws. The law anthropologist is subject to other requirements, the first of which is the identification of legal categories.

One of the most important problems in legal anthropology is that of the universality of legal categories.

A debate on this subject took place between two great anthropologists, P. J. Bohannan and Max Gluckman. For Bohannan, the use of western legal categories and concepts used in the analysis of traditional legal systems

⁶ See: Norbert Rouland, *Legal Anthropology*, Stanford University Press, Stanford, California, 1994. Translated in chinese by Pr. Liu Yun Fei, Guiyang University (Publication in China forthcoming).

⁷ See: Claude Lévi Strauss, *L'anthropologie face aux problèmes du monde moderne*, Paris, Le Seuil, 2011, pp. 36—39.

should be prohibited. On the contrary, we must privilege those of the native culture. For Max Gluckman, a thinker influenced by marxism, such an attitude risks leading to making the comparative approach impossible. In studying the *Barotse* of Rhodesia, Gluckman had highlighted analogies between the *Barotse* kingdom and the English Middle Ages, and had considered it possible to apply to *Barotse* land law concepts belonging to the history of english law. Continuing his reflection, he thought he had found in the notion of “*reasonable man*” a universal legal concept. Any society, to judge the behavior of an individual, refers to behavior — type, that which a reasonable man would have followed in the same circumstances.

The answer must be nuanced. There are many universal categories of thought: legal / prohibited, beautiful / ugly, just / unjust and universal legal concepts: marriage, divorce, parentage, etc. On the other hand, certain legal categories that western thinkers inherited from Roman law are often untransposable as they are: real / personal, private / public rights, patrimonial / extra patrimonial, movable / immovable, etc.

As far as I'm concerned, I would tend to be on Bohannan's side for the methodology. It seems impossible to study a system different from that of the observer without taking into account the categories of the observed society. It is therefore essential to collect indigenous legal terms and formulations. It is only once these have been identified that we can then decide whether or not they have equivalents in our own legal system. Glucksmann's concept of a reasonable man, which could also be translated as a good man, is interesting. It allows cross-comparisons between companies. Each society can have its own idea of what human rights are, and it is not excluded that on certain points (prohibition of wrongful murder, slavery, torture, infanticide, etc.) the ideals of various societies come together and form what one might call a hard core.

According to their cultural legal affiliations, the authors will insist either on the standards, possibly codified; or on the processes, which they will discover above all thanks to the analysis of the methods of conflict resolution.

Normative analysis corresponds to countries with a civil law tradition, such as France. The law essentially consists of a certain number of explicit written standards, contained in texts most often gathered in codes. *Common Law* lawyers favor judgment and judicial precedents over codified standards. Authors like Bohannan consider that the conflict is not pathological, but that it is an inevitable and positive adaptive process.

For a legal anthropologist, normative analysis has many flaws. It results in rejecting many societies, centralized or not, outside the law. And the identification of the law to abstract and explicit corpus of rules narrows the field of law to western societies. However, apart from the western, few societies, like China under the *Ch'in*

dynasty (221-206 BC), or the Aztecs, have a normative conception of the law. Let's take a concrete example.

If you ask for a *Comanche* Indian:

“*What rule does one apply in the event of the abduction of a woman abducted from her husband by a member of the tribe?*”

It is likely that the Indian will answer:

“*I do not know ... but I remember that there are many moons, when my mother's sister was taken from her husband by So-and-so, we act as follows ...*”.

In China, as we have seen, for most of its history, the chinese people have considered that moral precepts and conciliation should be preferred to law. At most, the laws were only to serve as a model and were not mandatory. Furthermore, even in modern western societies, citizens often ignore the law, or occasionally learn about it through the media. Or in the event of a traffic violation, a divorce, a dispute relating to the ownership or rental of his apartment.

We can therefore see by these few remarks that normative analysis can only account for part of the legal phenomena, and only in certain societies.

B) Main theories of legal pluralism

Like any theory, that of legal pluralism must be contextualized.

Legal pluralism is a doctrine that developed during the 20th century, and can largely be interpreted as a reaction to legal evolutionism, which dominated the 19th century.

Unilinear evolutionism considers human societies as a coherent and unitary whole, subject to laws of global and general transformation, which make all societies go through identical forms in their content and their succession. Traditional societies were called *primitive* and modern western societies are *civilized*. There followed a number of dichotomies. Primitive societies knew only private vengeance, custom, status, large family. On the side of civilized societies: the state punishment (substituted to private revenge), the law, the contract, the nuclear family.

From the end of the 19th century, criticism rose. The authors insist on the diversity of human societies, on the fact that one can also find concepts attributed to civilized societies in traditional societies, and that there are no universal laws applying to all societies. In the 20th century, certain neo-evolutionary authors brought new theses of evolutionism. Not all societies go through the same stages, but overall, there is indeed a transition from the simple to the complex, the general sense of evolution being placed under the sign of the increase in legal standards, without the societies with “Minimal law” should be considered qualitatively inferior to the others.

The various theories of legal pluralism are oriented differently, insofar as they insist on the coexistence in any society of several legal systems which can be centered around very different values. All societies, traditional and modern, are plural, but the former recognize it, while the latter tend to deny it in the sense of the exclusivity

of State law. Indeed, traditional law teaching consists of presenting it as the attribute of a society taken as a whole. This presentation is based on an assumption: a society has a single legal system, which governs the behavior of all its members, and on two corollaries: the sub-groups of a society (association, group based on residence and kinship) do not have legal autonomy. Societies that do not have a centralized political organization, strictly speaking, have no law.

Mauss and Malinowski state that within a society there may be several interacting legal systems, but they do not develop this idea.

Vollenhoven was the first to do it, as we shall see.

Then, in the middle of the previous century, the analyzes will multiply and will mainly concern multi-ethnic societies where the phenomena of pluralism are more easily perceptible: Radcliffe-Brown (1940) for South Africa; Bolke (1953) for Indonesia; Little (1955) for Sierra Leone; Van Lier (1950) for segmented societies in the West Indies; Nash (1958) for Guatemala and Mexico.

In France, it was essentially Gurvitch (*The law experience and the philosophy of law*, 1935) who introduced legal pluralism. He uses the history of law to show that there have always been several legal systems coexisting within the same state.

The degree of pluralism in a society can vary from time to time. Social groups can lose their uniqueness by reducing inequalities, which are all the more sustainable because they are progressive. When the egalitarian process is violent and revolutionary, pluralism will reborn, as shown by the formation of bureaucracies in socialist States. The reduction of pluralism can be imposed by a central body: a supreme court favoring the unity of jurisprudence, or, more generally, the political will of the State to jointly affirm its unity and that of society, this has been a characteristic of the french State: absolute monarchy, Napoleonic Empire, republican State. But also the decolonized States of Africa, where customs have long been deemed obsolete in favor of state law.

Among the different theories of legal pluralism, the dutch school of customary law, *Adat Law School*, should be favored.

Its founder is G. Van Vollenhoven (born in 1874). He is a precursor of legal pluralism, which he developed from a colonial situation, that of Indonesia which was Dutch until the end of the Second World War. In 1900 he used the concept of “*indigenous communities*”, capable of producing their rights themselves, within the framework of villages, families and clans. These indigenous laws had for him the same dignity as the law of the dutch colonizer, a very daring position at the time.

In 1937, he anticipated the controversy between Gluckmann and Bohannan by 20 years, insisting that the anthropologist of law should use the legal categories of indigenous thoughts and languages. Besides, he was also a committed anthropologist. He intervened several times with the colonial administration, and sought to defend

the Indonesian populations. He affirmed the rights of the native people on their lands. He opposed the unification of the law in Indonesia, rightly believing that it would have been done at the expense of traditional law.

From 1900 to 1940, Holland was the most productive country in legal anthropology. The Dutch school has done a lot internationally for the development of legal anthropology. In 1978, it was responsible for the creation of the *Commission on folk law and legal pluralism*. After colonization, Indonesian anthropologists, such as Professor Mohamed Koesnoe, took over.

The purpose of the Commission is to study the relationship between Folk Law and State law with an emphasis on the former. It has held several congresses on different themes. For example: in 1981, *State institutions and their use of folk law*; in 1983, *The legal condition and real status of ethnic and cultural minorities*; in 1986, *Folk Law and indigenous rights: a comparative perspective*; in 2018, *Citizenship, legal pluralism and governance in the age of globalization*.

Among the various theories of legal pluralism, we can also expose that of Léopold Pospisil.

For him, any society is made up of a set of sub-groups which are organized in a hierarchical manner, each sub-group having its own legal system. Pospisil introduces the concept of *legal level*. A legal level is formed by the sum of the legal systems of subgroups of the same type. For example, the levels corresponding to nuclear families, lineages, village communities, nations, Empires, etc. There is therefore only a hierarchical difference between State law and that of an association of criminals. Each individual generally belongs to several sub-groups and uses their multiple memberships according to their interests. For example, a member of the *Mafia* can recycle the economic product of his criminal activities into legal investments: stock market transactions, building construction, etc.

It is also necessary to briefly outline the theory of Masaji Chiba, a japanese jurist specializing in the study of non-western rights.

He points out that the classic distinction between an official law (State Law) and an unofficial law (people's law) is far too schematic. Official law is not necessarily reduced to State law.

For Chiba, official law includes State law, but also other laws: religious law, association law, the law of ethnic minorities, etc. which are first sanctioned by the authorities specific to the groups they govern, but whose coordination is ensured by the State which can also impose sanctions on them. Next comes unofficial law, or a legal system which is not officially sanctioned by a legitimate authority, but which is in practice applied by a social group within which there is a consensus on the subject of this law. This consensus can be expressed in formal rules, or can only consist in certain behaviors. But all non-official practices based on consensus do not necessarily constitute unofficial law: they must therefore exercise a modification of official law.

Chiba also clarified the role of legal postulates, that is, representations. These are value systems linked to an official law which serve as its foundations, such as natural law, equity, divine prescriptions, the principles of exogamy or seniority, the various declarations of human rights, etc.

These three levels (official law, unofficial law, legal postulates) are ordered according to a hierarchy which can vary according to the societies, and according to whether one is in East or West. The West favors official law, insofar as it has always valued law as a regulating principle of social relations. Eastern societies, on the contrary, have never favored the law, as the example of ancient China shows.

On the other hand, Chiba draws a distinction concerning the origin of the law. These may be law received from a foreign country; or indigenous law, stemming from the original culture of the population. Western jurists tend to favor the law received.

However, it may have happened that official law changed as a result of the inclusion of indigenous law in its own sphere. In India, official law is a mixture of indigenous Hindu law and English received law. In modern China, Western business law has become very important. In the case of New Caledonia, France recently allowed the creation of a Kanak customary civil law.

In addition, the passage of time changes the distinction between laws received and aboriginal law. As a result of the circumstances, the law received is gradually becoming aboriginal law. For example Islamic law in Egypt and Iran; Chinese law in Japan, Hindu law in Thailand.

In Japan, since the beginning of the *Meiji* era, in 1868, Japanese law has been modeled on received Western law: first European; then, after the Second World War, a Common Law imported from the United States. Currently, Japanese law is very plural and complex. Written law exists, but in practice one deviates from it quite often. We can take the example of the contract. For a Westerner, the contract sets more or less precise conditions of application of an agreement between the parties. For a Japanese, it only gives general inspirations, largely modifiable, according to the circumstances.

The comparative study of business practices is studied in western countries within the framework of Intercultural Management.

What about relations with the pluralism of marxist authors?

Having lived in the 19th century, they were very much influenced by evolutionism. For Marx and Engels, the law can exist without the State, but it is linked to the presence of a public authority. However, not all non-State societies have public authority. They precisely locate its appearance by placing it within the framework of Morgan's evolutionary scheme. That is to say, in the first degree of the second stage (*Barbary*. Morgan postulated the existence of three stages: *Savagery*, *Barbary*,

Civilization), and that only in certain societies, like the *Iroquois*. So, if the law is a general phenomenon, it is not universal. During the first stage of its evolution, which lasted for hundreds of thousands of years, humanity has lived without law, and will experience classless societies in the future, where law, replaced by morality, will eventually disappear.

Marx and Engels therefore do not fully identify the law to the State. On the other hand, they do not say that the law must necessarily consist of explicit and codified rules, but admit that custom, even if it obeys different rules, is no less the law. If it is true that Marx was mainly concerned with western societies, the fact remains that in his text on the *Forms which precede capitalist production* (18 57-18 58), he looked at the exotic socio-economic training, in particular by defining an *asian mode of production*.

But the various theories of legal pluralism have obviously drawn criticism. In general, it is obvious that like any theory, they are an interpretation of reality. And theorists are not abstract entities, they fit into a certain context. It is no less obvious that for anthropologists of law, their interest in the legitimization of their discipline is to support the idea that State law is not exclusive. Otherwise, they would be deprived of most of their fields of study.

More specifically, John Griffiths points out that there are two types of pluralism, of which only the second is authentic: that authorized by the State, that which escapes its control. Legal diversity should therefore not be confused with legal pluralism. State law may allow a certain degree of legal diversity, as in the case of federal States. Legal pluralism is outside the domain of the State. For Griffiths, the law is the self-regulation of a social group more or less autonomous from the State.

French jurists are mostly opposed to legal pluralism, since in the Carré de Malberg tradition they identify the right to the State. For the dean Jean Carbonnier, however very open to legal anthropology, State law is real law, the rest is just a kind of ghost.

Conclusion

On such important issues, it is very difficult to conclude. I therefore confine myself to a few remarks.

In the reality of life, the plurality of legal systems still exists. This is a relatively easy finding.

The problem becomes more complex in terms of recognizing this plurality.

The observer's own legal traditions greatly influence the recognition or misunderstanding of legal pluralism. In general, civilist thinkers oppose it. On the other hand, the anthropologist of law tends to favor the theories of legal pluralism. On the one hand, because of his broader idea of the law than conventional jurists. In this debate, the place of custom is central. On the other hand, legal pluralism is used by anthropologists to legitimize the existence of their discipline.

Finally, it seems that oriental thinkers, because of their conception of the world, more readily admit the concept of legal pluralism than Westerners.

References

- Alain Wang. *Les Chinois*, Paris, Tallandier, 2018.
- Anatoli Kovler. L'anthropologie juridique russe, *Droit et Cultures*, 50/2009-2, pp. 1—15. Translation in chinese language by Pr. Weichen forthcoming; *Le fédéralisme russe à la croisée des chemins*, publication in french forthcoming.
- Antonio Gambaro, Rodolfo Sacco, Louis Vogel. *Le droit de l'Occident et d'ailleurs*, Paris, LGDJ, 2011, 387sq.
- Brigitte Baptandier. La Chine d'un point de vue anthropologique, *Études chinoises*, 2010, 219—233.
- Catherine Capdeville. Mariage et amour en Chine-Les échanges et les sentiments dans les mariages dans un village du d'aujourd'hui, *Quatrième congrès du réseau Asie et Pacifique*, Paris, septembre 2011.
- Chen Zhongshi. *Bailayuan*, Renmin Wenxue, Beijing, 1993.
- Claude Levi Strauss. *L'anthropologie face aux problèmes du monde moderne*, Paris, Le Seuil, 2011, pp. 36—39.
- Françoise Grenot-Wang. *Chine du Sud-la mosaïque des minorités*, Paris, les Indes savantes, 2017.
- Leslie Chang. *La fabrique des femmes-du village à l'usine: deux jeunes Chinoises racontent*, Belfond, Paris, 2009.
- Norbert Rouland. *Legal Anthropology*, Stanford University Press, Stanford, California, 1994. Translated in chinese by Pr. Liu Yun Fei, Guiyang University (Publication in China forthcoming).
- Shuaijiun Mallet-Jiang. Mao Zedong et l'évolution des droits de la femme en Chine, *E-Crini, La revue électronique du centre de recherche sur les identités nationales et l'interculturalité*, Université de Nantes.
- Tania Angeloff. Le féminisme en République Populaire chinoise: entre ruptures et continuité, *Revue Tiers-monde*, 2012/1, numéro 209, pp. 89—106.
- Xinran. *The good women of China*, 2002.

Некоторые размышления о правовом плюрализме

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Статья посвящена двум аспектам правового плюрализма: юридической истории и юридической антропологии, которые во Франции тесно взаимосвязаны. Правовой плюрализм во главу угла ставит проблему соотношения, с одной стороны, обычаев и народного права, т. е. живого и свободного права, а с другой — государственного права централизованной власти, более абстрактного и жесткого.

В первой части статьи, исторической, исследуется положение об обычаях трех централизованных государств: Китая, России и Франции. Относительно Китая требует уточнения место обычаев в китайской правовой мысли и системе управления Китайской империей, которая сильно отличается от западных. Рассматриваются обычаи национальных меньшинств Южного Китая, начиная с 1949 г. и заканчивая нашими днями. Касательно России и Франции приведены некоторые данные об одних и тех же проблемах как в истории, так и в наши дни, учитывая особенности российского федерализма.

Во второй части статьи, более теоретической, сделана попытка объяснить, что представляют собой разнообразные теории правового плюрализма, которые сегодня являются основным течением в юридической антропологии. Превагирует мнение, что государственное право не является единым правом ни в одном обществе. Однако признание этого факта государством и юристами весьма изменчиво как в прошлом, так и в наши дни. Кроме того, степень множественности права различается в зависимости от периода, и это зависит от особенностей правовой культуры каждого общества. Системы общего права более лояльны к правовому плюрализму.

Особое внимание уделено теориям Ван Ден Стенховена, анализировавшего правовой плюрализм в контексте колониализма, а также Масадзи Тиба, юридического антрополога азиатских стран, написавшего много научных трудов о правовом плюрализме в этих странах.

Ключевые слова: правовая антропология, правовой плюрализм, обычаи, государственное право, правовая культура, система общего права, Ван Ден Стенховен, Масадзи Тиба.

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