

Legal Traditions of the World: Sustainable Diversity in Law

By H. Patrick Glenn

Review by Myint Zan

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This book is an ambitious and successful attempt to have a bird's-eye and panoramic view of various legal traditions mainly from a comparative and historical standpoint. The sub-title of the book Sustainable Diversity in Law is instructive in that it conveys the thesis of co-existence among diverse though complimentary –and complimenting- legal traditions of the world.

The author H. Patrick Glenn is the Peter M. Laing Professor of Law at McGill University, Montreal, Canada. In the Preface Glenn writes that his book “can be read in a number of ways”. For those who are interested in “tradition and its relation to society” Glenn recommends that they need “read only the first two chapters and the last chapter”. Glenn suggests that “if you are interested only in specific legal traditions [read] only the Chapters relating to them”. The author of this superb book perhaps a tad “mischievously” also suggests that “[y]ou can also read it from beginning to end, which might present some advantages, since that’s the way it was written” (page xxiii).

This reviewer did read the entire book but I did not “strictly” read it sequentially from “beginning to end”. I read the book first published in the millennium year of 2000, post “September 11 (2001)”. I started off with the Chapter on “An Islamic Legal Tradition: The Law of a Later Revelation”. Some of the headings in the Chapter includes “THE SHARI’A: SOURCES”, “QADI JUSTICE AND MUFTI LEARNING”, “ISLAMIC TEXT AND ISLAMIC REASON: THE ROLE OF IJHAD”, “THE INDIVIDUAL IN THE SHARI’A”, “OF SCHOOLS AND SCHISM” “CONTRAPUTNAL EXCHANGE, WITH ISLAM”, “THE ISLAMIC DIASPORA” and finally, perhaps inevitably “JIHAD”. In a footnote, Glenn approvingly paraphrases a Muslim scholar’s contention that it is “impossible to understand anti-western feeling in muslim world without understanding anti-islamic tradition in west” (page 201, footnote 235).

The reviewer has only given “snippets” of the sub-titles in a particular Chapter to give a glimpse not only of the eclectic nature of Glenn’s perceptive analyses of a major and perhaps most important -undoubtedly in terms of the need for the West and non-Muslim world to appreciate- legal tradition but also the range and depth of Glenn’s scholarship. I did read the Chapter “A Hindu Legal Tradition: The Law as King, but Which Law?” after I read the Chapter on the Islamic Legal Tradition and before I started from the “beginning”: the introductory Chapter on “A Theory of Tradition? The Changing Presence of the Past”. This introductory Chapter is followed by the “interlocutory” Chapter (the designation of this Chapter as “interlocutory” is that of the reviewer) of “Between Traditions: Identity, Persuasion and Survival”. The concluding Chapter is on “Reconciling Legal Traditions: Sustainable Diversity in Law”. Sandwiched between the two introductory Chapters and the conclusory Chapter (so to speak) are the Chapters on (apart from the Islamic and Hindu legal traditions already mentioned) “A Chthonic Legal Tradition: to Recycle

the World”, “A Talmudic Legal Tradition: the Perfect Author”, “A Civil Law Tradition: the Centrality of the Person”, “A Common Law Tradition: the Ethic of Adjudication” and “An Asian Legal Tradition: MAKE IT NEW (with Marx?)”. Each Chapter contains gems of information regarding the origins, historical developments, the peculiar characteristics and the linkages with as well as the interactions and tensions within and among the major legal traditions. Each Chapter is an enjoyable and educative read. This reviewer particularly learns from and enjoys reading about the “Chthonic Legal Tradition” – the oldest legal tradition going back at least 10, 000 years - and the “Civil Law Tradition”. As a person who has studied and taught law in Universities in countries that have at least in part a “common law heritage” Glenn’s analysis of the “A Common Law Tradition: the Ethic of Adjudication” gives an interesting and detached perspective of what arguably is the “youngest” legal tradition (roughly not much “older” than a thousand years). One could add though that in some if not most of the countries of the South Pacific – like other countries and territories which were British colonies- it has been the predominant influence.

At the risk of being selective and narrow I will henceforth concentrate on the Chapter “An Asian Legal Tradition: MAKE IT NEW (with Marx?)”. After reading the Chapter (I have not re-read it in its entirety) I am not fully sure whether there is a need or attempts have been made to MAKE IT NEW (the use of the capital letters are that of the author) “(with Marx?)” (the parentheses and the interrogatory form is also that of the author). This query can be made in the context of the current Chinese legal system and its de-emphasis, so to speak, of parts of Marxist legal theory. One realizes that (aspects of) the current Chinese legal system is different from the East Asian legal tradition of which the Chapter mainly deals with. Still, in a rough way one could say that the current Chinese legal system partly arose out of or “reflects” the values of the Chinese legal tradition. It is also realised that the “downplaying” of Marxist legal theory in China (the main originator and “purveyor” of the East Asian legal tradition) is restricted to its economic (development) aspects only. Still, when Marxism as an economic, political and therefore legal doctrine (as per the Marxist or socialist theory of law being the “super structure”) is on the wane in Asia one can query as to whether there has been or should be an attempt to MAKE IT NEW (caps in original) in relation to “An Asian Legal Tradition” (emphasis added).

Glenn devotes most of this Chapter (up to 25 out of 36 pages) to what could be described as pre, post and neo-Confucian or Chinese Legal Tradition. All the major legal traditions that Glenn discusses can be discerned or are reflected in the customs, norms and practices and in the social, societal, familial and legal relations of the diverse peoples of “Asia”. In this regard one also wonders whether one could speak of “An Asian Legal Tradition” as a geographical or “conceptual construct”. Hence the query could be raised as to whether the title of this particular Chapter should have been “An East Asian Legal Tradition” and also perhaps shorn of the phrase “mak(ing) it new with” (without or other than) Marx.

Glenn rightly states that “Buddhism is profoundly egalitarian as a philosophy and its egalitarianism extends to all forms of existence” (page 291). He also makes a point about the “general lack of success of Buddhism at the level of the political, legal and economic” with the wry comment “how could it be otherwise?” (page 292, footnote 62) to which I would merely add “fair enough”. I would “demur” however from his statement that the (Buddhist) “Middle Way” is “not one of moderation but one of the bringing together with the opposites”. (page 292, foot note reference omitted). This may perhaps be true of the “Ying and Yang” concept of Taoism and for that matter of “Li and Fa” (pages 282 to 290) of (what I would classify) as the Confucian or Chinese legal tradition but it is not the case with the Theravada Buddhist doctrine of the “Middle Way”. The “Middle Way” of Buddhism essentially espouses the need for avoidance by the Bhikkhus (monks or seekers of enlightenment) of the “extremes” of indulgence in sensual pleasures and “ascetic practices” of “self-mortification”.

Most of the Chapter deals with East Asian, Confucian or “Chinese” legal traditions and its off-shoots. In this regard Glenn writes that

From a confucian perspective, religion tends to develop along one of two undesirable paths – either as a

complex, written law (talmudic, islamic, hindu traditions) or as a preoccupation with an immortal soul, to the detriment of daily life and present human relations, (christianity, buddhism, taoism, shintoism). (page 290).

The “preoccupation” with an “immortal soul” may be – and indeed is- a cardinal feature of Christianity and perhaps of Taoism and Shintoism (the subject and subject matter of which I am ignorant of). However canonical (“original”) Buddhism’s cardinal and -for both outsiders and “insiders” as well- elusive doctrine is that of ANATTA or “non-self” or “no-soul”. In the rejection of a permanent entity of the “self” or the “soul” Buddhism is unique among the world’s major religions. The Buddhist concept of ANATTA or “non-self” constitutes a radical departure from that of Hinduism’s ATMAN or soul. Glenn repeats this misconception about one of Buddhism’s fundamental doctrines again when he makes reference to “buddhist notions of the recycling soul” (page 299). Glenn wrongly describes this “buddhist” notion of the “recycling soul” as an example of Buddhism “maintaining this link with hinduism” (page 299). In fact canonical Buddhism’s (in contrast to “popular” Buddhism’s) ANATTA concept makes a clean break from that of the Hindu’s “recycling soul”.^[i]

In a foot note and paraphrasing and summarizing three different academic articles Glenn makes the claim that “[t]he notion of ‘buddhist law’ is most frequently encountered in Myanmar (Burma) where there has been a process of conversion of hindu dharmasastras and fusion with local, informal tradition”. (page 292, foot note 63). The reviewer submits that though this statement is not wrong it is not entirely correct. As early as 1951 a Burmese scholar has expressed the view that at least some if not aspects of what was then called “Burmese Buddhist law” is not entirely of Hindu “dharmastras” origin.^[ii] It has developed independently. Though not totally divorced from its Hindu “roots” they are mainly based on Burmese social mores and custom. While Hinduism’s influence can still be discerned it would be a tad simplistic to classify Burmese customary law (as it is now called)^[iii] (merely) as a process of a “conversion” of “hindu dharmasastras”. Lest this contention be classified as a zealous claim of nationalistic Burmese scholars it should be pointed out that at least one non-Burmese legal scholar makes the same claim or endorses the contention that Burmese customary law is more than an off-shoot or even “adaptation” of the Hindu Dharmasastras.^[iv]

A few observations regarding the style of the book can be made here. As can be seen from the direct quotes of the book the author “eschews” the use of capital letters for what has traditionally and generally (even nowadays) are written with capital letters. For example except when used in a chapter heading Glenn “spells” Buddhism, Christianity, Confucianism, Hinduism, Islam, Judaism, Shintosim, and Taoism as buddhism, christianity, confucianism, hinduism, islam, judaism, shintoism and taoism. The reviewer expresses no view on this “non-traditional” practice. This is probably the first time I have seen such usages in an academic book. Another peculiar feature of H. Patrick Glenn’s writing style is that he often and somewhat informally and colloquially addresses the reader directly as “you”. A brief extract from page 188 would suffice to illustrate this “direct” writing style:

If you look at the Koran, and accept a notion of binding taqlid (which would have much of the effect of western law, in terms of binding people to particular substantive provisions here seen as perpetual) then there is an islam [sic]. If you look at the dynamic of islamic [sic] law, including the different schools .. you will tend to a notion of islams [sic]. If you lump all semitic people together, or all religious people together islam [sic] won’t count for much; it’s just cause for (yet) another group of fundamentalists.

The author dedicates the book to “Jane” with the statement “who wouldn’t have written it quite the same way”. In the manner of Glenn’s occasionally informal, and perhaps even jocular “style” one could aptly comment here that few academics would have (“style-wise”) written the book the same way as Glenn did. I trust “you” understand what I mean.

I have said previously that H. Patrick Glenn's *Legal Traditions of the World* is a superb book. One feels that this description is not a "superlative" in the context of Glenn's excellent scholarship. In the "traditional" sense of the word Glenn's is a "classic" book about law which could be read with profit and indeed for pleasure. In the novel style of Glenn, I would say that if you are in any way interested in comparative law, legal history, jurisprudence and also the history and sociology of cultures, religions and societies you should indeed read the book or at least parts of it. Not only you would have nothing to lose you could gain a lot of knowledge about the legal traditions of the world.

[i] There are many academic books and scholarly writings which explained the concept of "non-self" (an "approximate" and perhaps unsatisfactory explanation of ANATTA) but here reference will only be made to a former Catholic nun's "popular" book on religion: see Karen Armstrong, *Buddha* (2001) 102-04.

[ii] E Maung, *The Expansion of Burmese Buddhist Law* (1951). The book is out of print now. It is stored in micro-fish form at Cornell University's library but it is apparently not available for interlibrary loan. See also parts of the Introduction in Maung Htin Aung, *Burmese Law Tales: The Legal Element in Burmese Folklore* (1962).

[iii] In the case of *Na Si Ti v Ah Phu Si* 1969 BLR [Burma Law Reports] CC [Chief Court],FB [Full Bench]155 the Chief Court of Burma, then the highest court of the land, in a ruling written in Burmese) ruled that hence forth the genre of law known hitherto as "Burmese Buddhist law" should be called "Burmese customary law" since the law though applicable only to Burmese who are Buddhists did not derive directly from the tenets of Buddhism but is based on (secular) Burmese customs albeit they may have been indirectly influenced by and infused with Buddhist moral and ethical values.

[iv] See for e.g. Andrew Huxley "The Importance of Dhammathats in Burmese Law and Culture" (1997) 1 (1) *Journal of Burma Studies* 1. A short summary of this article can be seen at <http://www.niu.edu/cseas/seap/jbsD.html> (accessed 5 February 2003).

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