

*In late spring of 1976 T.T.B. Koh, Singapore's ambassador to the United Nations, cancelled his scheduled appearance at the World Congress on Equality and Freedom that Professor Dorsey was organizing for late July of that year. Ambassador Koh was to make an important speech presenting the views of scholars and statesmen of South and Southeast Asia. The time was short and the persons qualified to make such a speech limited. Fortunately, Professor Dorsey was able to solve the problem. He telephoned Professor Weeramantry, a former member of the Supreme Court of Sri Lanka. Dr. Weeramantry agreed to participate despite the short notice. His speech was a highlight of the 1976 World Congress.*

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## **THE QUEST FOR CONGRUENCE BETWEEN CULTURE AND LEGAL SYSTEMS IN RECENTLY LIBERATED SOCIETIES**

**C.G. WEERAMANTRY\***

Can universal validity attach to a set of cultural values or are cultural values that a given society accepts valid in themselves, irrespective of universality? This is not a merely academic or jurisprudential discussion; it is a question of great practical importance in the context of states which have recently attained independence. Upon the attainment of independence they often need to take to a considered decision whether, and to what extent, they would wish to preserve their traditional values and cultural systems. The opportunity to make that decision has in the last

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half century been presented to over a hundred nations released from the bondage of colonialism and called upon to choose their own cultural values. Perhaps never before in history has the opportunity presented itself to so many nations to make a conscious decision on this matter.

The decision they make is often translated into legal terms, whether constitutional or otherwise. In any event it becomes part of the ongoing national discussion on questions of cultural values. Either way the opportunity arises to make decisions of lasting value, which will probably influence the cultural history of those countries for the indefinite future. The need to take that decision has necessitated in every country concerned, something beyond a mere academic study of the philosophical and cultural overtones to this question. For the lawyer and the student of human rights great opportunities exist here for an effective contribution.

As Gray Dorsey observed in his inaugural address at the Ninth World Congress on Contemporary Conceptions of Law, 1979:

Peoples that have recently regained political independence have a special opportunity with respect to organizing and maintaining societies and legal systems. It would be a tragedy if they should choose a philosophy of society and law because of a claim of universal validity, or in order to avoid being called backward or underdeveloped.<sup>1</sup>

Indeed, many problems of post-colonialism might have been even partially avoided if due attention had been paid to this problem. Many of the traumas we witness today in newly liberated countries, with processes of adjustment and compromise between the new legal order and the traditional value systems, are attributable to this. Indeed in many countries, the discarding of a first constitution and the series of adjustments embodied in new constitutions or constitutional amendments, stem from this factor.

However, those who drafted these new constitutions were not to blame. A long tradition of acceptance of metropolitan legal structures and value systems had preceded the drafting, for history had stood still for colonized people who could not develop their institutions during the centuries of their subjection. In the words of Albert Memmi: "The most serious blow suffered by the colonized is being removed from history."<sup>2</sup>

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1. 1 ARCHIV SUPPLEMENT 3, 20.

2. MEMMI, THE COLONIZER AND THE COLONIZED 91 (1965).

## I. COLONIAL ASSUMPTIONS AND ATTITUDES

For long years, especially during the period of colonialism, lawyers took the view, inspired by comfortable 19th century assumptions of the superiority of European culture, that the legal institutions of Asia and Africa needed to be reshaped to the forms evolved in the West. This was the comfortable assumption underlying colonial administrations in all parts of the world. It is true certain concessions were made by, for example, the British and Dutch colonial administrations, recognizing the importance to the people under their rule of their traditional culture. However, the bulk of the legal systems, procedures and structures introduced tended to impose Western patterns upon non-Western peoples. Thus, in India, for example, the criminal procedure code, the penal code, the evidence act, the contract act, judicial structures and legal professional organization were all modelled on those of England. Allowances were made for pockets of administration of Hindu and Muslim law, but overall the administration of justice followed a Western pattern. In so doing, much of value in traditional systems such as informal dispute resolution and group rights tended to be ignored. Panchayats in India, Gansabhawas in Sri Lanka, and tribal dispute resolution systems in Africa were bypassed despite their history of two millennia or more. They fell outside the formal area of the legal structure and were hence not within the purview of lawyers. Lawyers tended to lose sight of the expense, inaccessibility and delay associated with these systems and the ability of the traditional systems to overcome those problems.

Likewise, in jurisprudential thinking the customary systems of these countries did not constitute law. They were, rather, interesting anthropological phenomena that needed to be studied to expand academic knowledge rather than because of their practical utility.

We shall in this article examine some of the forces which at various times have been at work in reducing the disparity between legal systems and the cultural backgrounds in which they operate. These forces need to be put to work more actively in our time to help reduce these disparities, which are a significant source of tension both within societies and in their relations with the external world.

For the purpose of this discussion, I shall adopt the meaning of the term "culture" that looks upon it as representing "a social deposit comprising the material, intellectual and spiritual constituents of a way of

life.”<sup>3</sup>

## II. FACTORS INDUCING RECOGNITION OF INDIGENOUS CULTURES

### A. *Jurisprudential Considerations*

With the appearance of Malinowski's *Crime and Custom in Savage Society* in 1926, a dramatic change occurred in the universal acceptance of these assumptions. It is true this work did not change existing patterns of thought overnight, but it certainly demonstrated that there was another point of view that needed to be considered. Primitive law was still a matter of “anthropology”, but it had important overtones for law. Malinowski's observations of the precision with which traditional customary systems worked demonstrated that, without formalized structures or recorded law, it was still possible for a smoothly functioning system to exist, in which the rights and duties of people were precisely laid down. Not merely did these observations indicate the practical importance of customary law. They also indicated that there were in customary law the elements of uniformity, certainty, and enforceability associated with “mature” legal systems. This necessitated a rethinking of some of the prior assumptions of Western jurisprudence in regard to the nature of law properly so called.

Still the belief died hard that primitive law was not law at all but custom, and that law was a phenomenon restricted to sophisticated societies and the domain of the lawyer.

Malinowski's researches prompted the further development of the lines of thought he had opened, and *The Cheyenne Way* by Llewellyn Hoebel, published in 1941, opened new vistas of knowledge to be gained from customary societies which could benefit the legal systems of the West.

Inherent in this discussion is the question of the value of cultural systems, for cultural systems underpinned the customary legal systems of these communities. If the legal system was to have validity, the cultural system must have validity itself, and cultural systems which had withstood the passage of centuries and had established themselves as being suitable for the communities in question could not be lightly ignored. A new search began for the principles involved in these cultural systems, many of which were fast disappearing, and a desire arose to retain those

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3. Kleinig, *Cultural Relationism and Human Rights* in *TEACHING HUMAN RIGHTS* 111 at 113 (Tay & Kamenka eds. 1981).

that had survived and resuscitate those which, though recently extinct, were still traceable.

That search has not ended. Today, more than ever before, jurisprudence and the allied discipline of sociology need to continue the process of analysis, reconciling legal systems with their traditional background. Gray Dorsey's reflections are a major contribution in this field. His concept of jurisculture, which synthesizes philosophy and empirical observations, provides an important key to the methodology involved. In his words, "neither sets of meanings derived without reference to observed events, nor sets derived solely from observation, are considered to be a sufficient basis for understanding and anticipating human events."<sup>4</sup>

### *B. Attitudes of Lawyers and Planners*

Lawyers and planners in these societies became aware of the vast literature on cultural relativism and the complex philosophical and ethical problems involved. The illusion of certainty in Western legal systems was shattered, and the whole question was thrown open as to which particular legal concepts and procedures were suitable for a given society.

A new pride was generated in these customary systems and of course the realization came that, because these customary systems tended to differ among themselves, they must have an inherent validity within themselves rather than derive their validity from conformity to universally accepted norms. It followed that, theoretically, if an isolated community, for example a community on a Pacific island, had over the centuries developed a lifestyle of its own. The fact that some of the customs, principles and procedures of that community might have differed from those of other communities did not per se render it invalid. It derived its validity intrinsically within itself. That it had been followed and had proved effective for centuries or generations was one of the authenticating and validating factors that demanded recognition. The cry for universality of principles tended, therefore, to be muted. The desire to import unthinkingly the cultural patterns and legal structures of the West was tempered.

Yet, this answer was insufficient, for there are no longer any islands in human affairs. While respecting the particular we need also to have regard for the universal. We need a synthesis along the lines of Dorsey's statement, previously quoted. With their special training in national

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4. *Foreword to G. DORSEY, BEYOND THE UNITED NATIONS: CHANGING DISCOURSE IN INTERNATIONAL POLITICS AND LAW (1986).*

legal systems as well as in universal values, lawyers are specially able to provide this.

Every civilization has its jural postulates. It is difficult to embed a totally alien system within a set of jural postulates that will not accommodate them. The alien system tends to be rejected. Legal systems pruned to the needs of Western industrial society when grafted upon traditional value systems which did not accord with them, found themselves unable to take root. They withered or became distorted. Sometimes they died. Westminster-style constitutions in particular took a beating.

A grave danger exists, however, in the unrestrained jettisoning of all that has come from the colonizer. There is a strong tendency to do this, backed by waves of nationalist sentiment. Lawyers can help greatly in preserving the moderation that blends the best elements of both systems.

### *C. Attitudes of Administrators*

The new awareness of the importance of traditional systems had significant repercussions upon the thinking of the more discerning colonial administrators as well. The earlier complacent view that all peoples should be steered towards the adoption of Western ways began to be replaced by a realization that the traditions of the indigenous populations had to be respected. Most realized that Macaulay's brash assertion in the 19th century, that all the literature of India and Arabia was not the equal of half a shelf of good western literature, was not typical of the age. Even before Macaulay, administrators greatly appreciated not only the value of these traditional systems, but also the fact that these traditional systems should be preserved. Research into Hindu law by such officials triggered the discipline of comparative law, and colonial administrators such as Colebrooke and Cameron had made studies in depth of indigenous legal systems. Foreign civil servants wrote treatises on Hindu, Islamic, and customary law. Colonial administrators began to face the fact that unless the native population was completely disregarded, a practical branch of legal administration had to develop that regarded the law of those societies as part of the colonial law.<sup>5</sup> In fact in some jurisdictions a situation evolved where, to use the words of one researcher, "the white man's machinery of law enforcement was set up to enforce the black

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5. See SACK, *LAND BETWEEN TWO LAWS: EARLY EUROPEAN LAND ACQUISITIONS IN NEW GUINEA* 5 (1973).

man's substantive law."<sup>6</sup>

The process of achieving congruence between legal systems and traditions is one that is impossible to achieve without the help of administrators for it is they who in fact work the legal system at the level of the average citizen. They must have an enlightened attitude, conscious of the damage that can follow to the entire fabric of society if they abandon the principles of harmony and reconciliation between the two elements under discussion. Education for administrators is perhaps a necessary step in this direction. Administration involves, especially at the higher levels, considerations of policy. Jurists and lawyers imbued with some understanding of jurisprudence could usefully address the higher administrators of a country or deliver some lectures at its administrative school on this factor which is so important to contentment and harmony in every country.

#### *D. Internal Political Forces*

As with the colonial administrators, so it was with the political movements within those countries. While some of the earlier generation of political leaders might have sought to steer their people toward the ultimate goal of adopting the law ways and folk ways of the West, it now became evident to all political leaders that they needed to conserve their indigenous inheritance. This became a matter of political pride as well as of political advantage. The dormant forces of nationalism, latent thus far, began to stir, and political figures awakened to the importance of this fact. At the same time this produced tension in their ranks, for those who were in authority were largely the propertied classes who had enjoyed a good run under colonial rule and had identified largely with the colonial administrators. Their political interests dictated that they should swim along with the nationalist streams flowing strongly in their countries. Nationalism dictated that traditional customs, traditional institutions, and traditional ways of thought demanded increasing recognition. Some of the privileged and the elite in those societies then decided to adopt the popular demand as their own. Others continued in spirit with their former alliance with the colonial administration and with the introduction of the folk ways of the West. As these countries progressed further towards independence, a greater resurgence and a greater acces-

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6. *Id.*

sion of strength accrued to those who wished to depend upon their ancient customs.

Deep within many of these societies, there still ran a desire to imitate the ways of the West. This was not only because they associated economic prosperity with Western lifestyles, but also because many benefits could be gained from the existing order by accepting Western modes of thought and lifestyle.

The resulting dichotomy has prevented many societies, after they have gained independence, from fully accepting the fact that the cultural values of their own societies deserve prime importance or indeed a high level of importance. Many believed that the path to efficiency and prosperity lay through discarding these values and lifestyles. Consequently, although most of these societies have theoretically accepted the primacy of their own values, a tacit acceptance of Western value systems still exists beneath the surface.

Consequently, in many of these countries independence was achieved, but it was achieved under Western styles of politics, administration and culture. In a very short time a violent reaction erupted. Political and social revolutions ensued. The indigenous leaders who had gained power were dethroned largely because they were seen as a continuation of the old order. The pendulum swung to the opposite extreme. The traditional values and attitudes were advanced irrespective of their validity in a changed world.

We also face another problem here.

A marked disparity often arises in many societies between the pronouncements of some leaders and their actual desires. The topic we are considering, therefore, has to be approached from a dual standpoint. One needs to be guided not merely by the pronouncements of leaders and politicians but also by their actual acts, and very often one contradicts the other. The result is that the theoretical elevation of traditional lifestyles often conflicts with an inarticulate desire to adopt contrary institutions and practices. If, therefore, we are examining the quest for congruence between culture and legal systems in recently liberated societies, we cannot lose sight of the fact that there are pulls in different directions. The commitment to the traditional will be overly expressed and this is an invariable phenomenon. But we also need to examine the extent to which the legal system truly commits itself to that principle of acceptance.



### *E. Land Tenure*

Another reason why customary law began to gain practical significance even in colonial times was because traditional land ownership was tied up with principles of customary law. Ownership of land was one of the most precious of all rights and could not be lightly disturbed. In order to have peace and good government, recognizing and researching traditional methods of land holding was essential. Consequently, the economic and political planners found it impossible to proceed with their work without affording due recognition to these rights and traditional systems.

Indeed one of the best examples of the conflicting value systems comes from the sphere of land ownership and alienation. "Progress" may dictate that valuable land in the center of a city or near the site of a factory should be acquired. An attractive price may offer much inducement, viewed from the standpoint of *laissez faire* and Western values. Tradition would dictate however that land was not a commodity to be freely alienated like movables or consumer goods but belonged to a group, tribe, or family and must be preserved for posterity. These value systems clash, and the legal system, Western though it be in structure, must yield to the pressure of the traditionalist demand. Commercial efficiency and individual freedoms take second place to cultural values and collective duties. To neglect the latter values is to court not only cultural impoverishment but political disaster.

Yet these factors were not always sufficiently recognized. The Western oriented and trained legal profession did not in the early postwar years see the confrontation as clearly as we do.

The current land tenure system is a significant obstacle to the quest for congruence in many countries because traditional lifestyles have been closely tied to the tenure and ownership of land. Colonial administrations disrupted in many instances the traditional tenure of land, annexing tribal, communal, or individual lands into vast land holdings for the purposes of farms, estates, or plantations. As a result, when the colonial rulers left, traditional lifestyles had been disrupted, and many clamoured for their restoration. Yet the annexations of land that had taken place in colonial times rendered restoration impossible. Consequently, politicians in newly liberated countries often faced a very real obstacle in restoring to the thousands of little villages and settlements in their countries the ancient lifestyle that was no longer possible.

One of the demands that resulted was a call for the fragmentation of the vast land holdings that had been consolidated during colonial rule. This produced great tensions between the affluent, who had succeeded to those estates, and the peasantry. The resulting upheavals and their political consequences were in many cases quite dramatic. Indeed, many a political leader united with these dispossessed small holders. These leaders turned towards the left, hoping that the acceptance of left wing philosophies would lead to disbanding of the vast holdings.

An example that readily comes to mind, apart from the situation of large acquired land holdings in Asia and Africa, is the aboriginal land problem in Australia. With the aboriginal people, land and culture are integrated into each other. The loss of their land means loss of tribal culture, hence the enormous emotional political demand for restoration of aboriginal land.

Examples exist of massive legislative attempts at righting the imbalance created by large acquisitions of land. One such attempt occurred in India with the Uttar Pradesh Zamindari Abolition and Land Reform Act of 1950. Under this Act, no less than 21 million persons holding land interests in 41 million acres were involved in a land reform program on a scale not hitherto attempted in a peaceful manner. In Sri Lanka the Paddy Lands Act as well as various provisions fixing a maximum holding of agricultural land sought to break up the large land holdings that had accumulated during colonial times. These examples were not based purely on the need to restore indigenous culture, but also had very strong political overtones. The political overtones resulted from the enormous importance that the bulk of the people attached to cultural patterns based upon traditional methods of land holding. Indeed, land law is one of the most important areas for concerned research on the problem of congruence.

#### *F. International Dialogue*

The lines of thought outlined above were reinforced by the post-colonial international dialogue that took place in the United Nations and other forums after World War II. Newly liberated countries with long traditions powerfully asserted in international debate the value of traditional cultures and of the value of cultural rights. Western thinking, which hitherto had been geared to the concept of civil and political rights, was forced to accept that another group of rights — economic, social, and cultural — was of equal validity and importance. However,

in the 18 years between the Universal Declaration of 1948 and the twin Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights of 1966, this debate occupied a considerable part of the conceptual thinking of the international community. Over these years the West was forced to accept the authority of the new group of rights. These two Covenants, particularly the Covenant on Economic, Social and Cultural Rights, provide powerful conceptual weapons in the quest for congruence.

As a result of this increased international recognition of the importance of traditional rights and customs and of conserving them, the movements within these countries to preserve their value systems gained greater momentum.

Consequently, some of the countries which steered their way towards eventual self-government in the 1960s attached great importance to preservation of cultural systems, and this became a matter of political significance. For example, the newly resurgent countries of the Pacific realized the importance of conserving their traditional lifestyles. A classic recognition of the importance of cultural values and traditional systems is contained in the Constitution of Papua New Guinea which expressly elevates customary law to a level superior to that of other forms of law.

Today, internationalism is a potent reconciler. While countries would like to retain as large a part as possible of the traditional, the fact that we are one world community makes this difficult when those traditions are inconsistent with prevailing international concepts and attitudes. Self-immolation as a tribute to a deceased politician, the caste system, ritual sacrifice and child prostitution are some examples that come to mind.

#### *G. Modern Communications Technology*

Modern technology is shrinking the world to an extent that could not have been foreseen even two decades ago. Intercommunication between nations and people has reached such a level today that ideas, customs and values are more difficult to confine than they were when the barriers surrounding a nation state were less porous. Consequently, each cultural system tends continuously to fertilize and be fertilized by its neighbors.

This cross-fertilization is a two-way process, for while it makes minority cultures better known, it can also result in their dilution — not by imposed authority, but by voluntary acceptance. The nature of this voluntariness may need some examination because the more powerful nations tend to have more resources with which to impregnate the culture

of the weak.<sup>7</sup> We consequently face another dilemma here, for although the process of adoption appears to be voluntary, in fact it may be induced; and the process of inducement may not be a conscious and deliberate process, but may be a natural result of the superior communications penetration available to one group. For example, American culture has the ability to penetrate via satellite and sophisticated communication methods into cultures that cannot similarly penetrate the American system. This imbalance results in American culture dominating the culture of many of the latter societies.

There is another factor which could acquire greater importance in the very near future. That factor is the anticipated ability of persons throughout the world to be able to communicate with each other individually at minimal expense and with great technical efficiency. Once this is achieved it will provide a means by which individuals, cultural groups, and social organizations can establish links with each other and thereby develop a better appreciation of other value systems and cultural attitudes than is possible today.

#### *H. Human Rights*

Developments in the field of international human rights may well provide an important segment of the answer to the question we are examining. This field encompasses a growing body of knowledge and experience that aims at reconciling the rights of the individual with the rights of groups, legal values with cultural values, and economic values with traditional values. The power of the strong is curbed to prevent exploitation of the weak without interfering with the basic rights of all, strong and weak alike, which are universally recognized. One of the ways in which the traditional cultures we are looking at can best be preserved is through concerted attempts to reinforce the body of internationally accepted norms recognizing these rights, rather than an attempt within each country to assert those rights purely on the strength of forces within that country itself. Quite often, forces within a country are unable to resist the pressure of more powerful influences from outside. Hence, it is important to work towards a recognition of a universal set of norms that makes accommodations which are universally recognized for the rights of small groups and for their cultural values.

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7. On the various factors at work internationally which can denigrate human rights autonomy, sometimes without being perceived, see C.G. WEERAMANTRY, *National and International Systems as Denigrators of Human Rights*, TEACHING HUMAN RIGHTS 45 (A.E-S Tay ed.).

In articulating universal norms of human rights, it is useful to remember that the norms contained in the Universal Declaration of Human Rights are not a set of exclusively Western norms that are meant to be foisted upon all countries, North and South alike. Many of these norms are already embedded in the traditional systems of most of these countries. They may not have been formally articulated as they are in the Universal Declaration of Human Rights or other documents, but the principles and concepts were there. Strong traditions of equal and impartial justice existed in Africa, impregnated with human rights values.

Human rights is therefore a field with great potential for the reconciliations we seek. It can combat the tendency still strongly present in the legal education of lawyers and in the general attitudes of citizens to think that the set patterns of formal justice introduced by colonialists can be changed without detriment to the fabric of justice. It is a powerful catalyst and a strong promoter of the movement for change as contrasted with legal and cultural dependence on the institutions of the colonizer. As Rajni Kothari observes, "the power of the status quo has always been largely derived from its capacity to control subjective perceptions, beliefs and myths, and to induce in those who oppose it a feeling that the situation is hopeless. . ."<sup>8</sup> Human rights doctrine provides a means of altering those subjective perceptions by showing the existence of an objective set of world standards to which even the most well entrenched structures and concepts must yield.

### *I. The Interdisciplinary Approach*

Perhaps one answer may be that one must tend to invoke the benefits of modern sociological and economic knowledge from which, traditionally, the lawyer has kept his distance. It may be that legal education may have to be restructured to enable future lawyers to have more of these perspectives in view than were traditionally made available in the stereotypical law school education. It may be that a less structured and formalized legal profession divorced from the formalism associated with Western legal structures will be better able to provide an answer. All of these are avenues for inquiry.

Emphasis must be placed on the need for a closer dedication to interdisciplinary knowledge than has characterized legal learning in the past.

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8. Rajni Kothari, *Orientations to Transition* in FALK, KIM AND MENDOLOVITZ, TOWARD A JUST WORLD ORDER 583 (1984).

The disciplines of legal history, legal philosophy, comparative law, international law, human rights, law and technology — all of these must, in one way or another, be pursued.

#### *J. The Role of the United Nations System*

No doubt a role also exists for the United Nations. We cannot lose sight of the fact that Article 1 of the Charter states that one of the purposes of the United Nations is to achieve international co-operation in solving international problems of an economic, social and *cultural* character. Co-operation can only be achieved by properly respecting the cultures of the different constituent members of the United Nations community. Inter-cultural understanding is thus a vital international and national need. Indeed, UNESCO and other bodies have worked a great deal towards the achievement of such a perspective, but much more needs to be done. The law-makers of any particular country cannot without such a realization achieve the desired recognition of their own cultural inheritance.

#### *K. Control of International Commerce*

International commerce pays scant regard to the culture and lifestyles of the countries it trades in. A textbook example was when Pacific traders instituted "smoking schools" in Pacific islands in order to generate a demand for tobacco.<sup>9</sup>

In one of the most traditional areas of Papua New Guinea a plane was once hired to "bombard" the ground with packets of fast foods in very attractive packaging. The purpose was to entice the young people of that country into the fast food habit. In that traditional area known as Mount Hagen, the population had survived for many centuries without such fast foods. What was being set in motion, without due regard to either morality or the cultural background of the people, was a dangerous trend towards an alteration of traditional lifestyles. Because the forces of commercialism do not hesitate to tamper with lifestyles and ancient cultures, these cultures need protective clothing, so to speak, against alien, commercially-based intrusions.

In this discussion we need to note also the various ways in which a formal legal system can be used as a vehicle for the introduction of com-

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9. S. FIRTH, *German Firms in the Western Pacific Islands 1857-1914*, 8 JOURNAL OF PACIFIC HISTORY 13 (1973).

mercially promoted schemes aimed at creating fresh markets and wealth for a select few. The difficulty is compounded by the fact that in nearly every developing country an elite class exists who, while being leaders of their own countries, also have an interest in the external world whether through trading or political contacts.

In this sense such leadership often has one foot in each camp, and it may well be that the guidance which leadership gives does not suit the people's needs so well as it suits the needs of the leaders. The legal system can thus be used as a source of entrenchment of privilege. This means that legal professions have to be more alert and universities more perceptive in their research.

### *1. Education*

Another area for attention is no doubt the education system. In many a colonial country, educational systems were patterned on the needs of the colonial rulers. Quite often the colonial rulership needed a large reservoir of semi-skilled inferior bureaucrats to draw upon for their administrative machine. It became the function of the educational system to turn out people who could satisfy this need. Higher education tended to be neglected. Universities and agricultural training institutions were few.

In the course of turning out the necessary assistance to the colonial administrations, a certain orientation was naturally given to the education imparted under the colonial education systems. This emphasized the culture of the foreign country that was the metropolitan power and tended to devalue the importance of local culture. The indigenous language was often not taught in these schools, and in some colonial countries, students in such schools were penalized for the "offence" of speaking their own language. Similarly, students were discouraged from studying their indigenous culture.

With independence, these patterns required correction, and the education systems were overhauled to recognize these imperative demands. Histories of the countries concerned needed to be re-written to erase the emphasis given during the colonial period to foreign culture and history at the expense of the local. All this required considerable effort and time.

In the context of the problem under consideration, the education apparatus can be used in reverse: as a powerful means for inducing extreme views, extolling the traditional to the total disregard of all other values. This must be resisted and moderation inculcated that aims at finding in any culture that which is best for the people. While the traditional values

have importance, so have some of the Western values. An eclectic mix must be aimed at. All countries that have been liberated have now had sufficient time to swing away from the understandable tendency to reject all that savoured of Western values. A universalist attitude to the education of the younger generation is most important. UNESCO in particular has much to contribute in this respect. Its handbook for the teaching of human rights in schools is a good example of what can be achieved.

Multicultural education must be imparted in the schools and it is perhaps true to say even today that in the most democratic of societies the school curriculum still fits into a monocultural pattern. Even among lawyers one finds all too often an understanding of only one culture. Educationalists have an important role to play in this regard. We must overcome the "us/them confrontation" which, as Ali Mazrui has written, ". . . is the most persistent theme in world order confrontations. The dichotomy can take a variety of forms - the native versus the foreigner, the friend versus the foe, the familiar versus the strange; the North versus the South, the developing versus the developed countries."<sup>10</sup> Indeed an education system that fails to combat this dichotomy is a failed education system.

### *M. The Group Concept*

In the quest for congruence between culture and legal systems, we cannot ignore the fact that during periods of colonial rule the individualist philosophy of the West was introduced through legal systems, educational curricula, and social customs into the traditional societies ruled by the metropolitan powers. Most of these traditional societies were based not upon an individualist philosophy, but upon the concept of membership of a group. The individual belonged within that group, looked to the group for protection, and gave to the group whatever assistance he could. Consequently, the idea of individual rights was one which could not find an entrenched position in those cultural systems.

As a result of foreign rule, this group tradition was undermined, and individuals were set adrift from their traditional moorings within the group to face society very much on their own resources. Many of these societies were not prepared for such a drastic change, and individuals

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10. A. MAZRUI, *The Moving from Monotheism to North-South Relations* in CULTURE, IDEOLOGY AND WORLD ORDER 24 (R.B.J. Walker ed. 1984).



thus released from the protections of the group found themselves floundering.

With the attainment of independence, a demand for a revival of group ways of ordering the affairs of citizens naturally occurs. Many desired to go back to the village units to the extended families and to the tribal groupings that provided the cement of those societies in the days before the impact of the West. This became difficult to attain because, as observed earlier, legal systems had been introduced that were based upon the concept of individual rights. It is true leaders like Mahatma Gandhi contended for some sort of recognition for the group within the legal system and the constitutional framework. Gandhi, for example, stressed the importance of Panchayats and of the group organization of society.

Yet even leaders of the stature of Gandhi found it difficult to have their concepts introduced into the newly emergent legal systems. Such leaders encountered resistance from a phalanx of Western-trained lawyers who instinctively thought of the rights of individuals rather than the rights of the group. Gandhi's attempt to have the Indian Constitution recognize such group rights, therefore, did not succeed.

Seeing that the concept of individual rights has gained so much importance in the world today, it will of course be impossible to revert to the traditional group based system of rights in those societies. However, it does not necessarily follow that the group based concept of rights ought to be rejected in its entirety. Neither does it follow that the concept has no future. Much conceptual work may need to be done to reconcile individual and group rights in the difficult days that lie ahead, when the resurgent demand for recognition of that which was traditional will force political leaders to give greater emphasis to the rights of the group.

#### *N. The Move Towards Informal Dispute Resolution*

Associated with the rights of the group are also certain mechanisms related to the administration of justice such as informal dispute resolution mechanisms that often existed within the group itself. It may be possible through deformalization of justice to reconstruct at least some of the atmosphere of justice that prevailed when the individual found his shelter and protection from within the group rather than from the more distant and powerful entity of the state.

Most traditional justice systems were essentially informal. Colonial structures were formal and rigid. The administration of justice fell into disrepute as not being just because the formal system was expensive and

dilatory. Extreme reactions such as the "Mums and Dad experiment" in Burma, by which all formal courts were abolished and replaced with people's judges chosen from among ordinary citizens (on the basis that as "mums" and "dads" they had experience in resolving disputes) illustrate the extent of the disillusion that can exist with formal courts.<sup>11</sup> Indonesia's substitution of a banyan tree as the symbol of justice in place of the blindfolded lady with scales is another example.<sup>12</sup>

The informalization of justice procedures can rest upon various rationales. These have been well analyzed by N. Tiruchelvam in the context of the Sri Lankan Conciliation Boards Act which was a legislative measure passed to set up Conciliation procedure as a precondition to access to the formal courts. The parliamentary debates preceding the bill seem to have revealed three approaches - "the reformist", "the socialist legalist" and "the revivalist". The first, like the 19th century reformists in England, looked upon the reform as a purely judicial reform intended to improve the efficiency of the court system. The second was based on the Marxist concept of the court system as securing the interests of the dominant groups. The third viewed the Bill as an attempt to revive the traditional dispute resolving mechanisms of the past.<sup>13</sup>

The system attracted a great deal of international interest and was — unfortunately, in this writer's view — abandoned by the later Government on grounds of politicization of the system. These same considerations could arise in nearly every country and the Sri Lankan experience could be of great benefit to legislators contemplating such a move.

### *O. Crime and Correction*

An important practical way of seeking congruence with traditional culture comes from the area of crime and correction. In this area, Western based concepts of imprisonment are proving inadequate in many societies to provide the elements of correction and reintegration into society to which traditional cultures attached great importance.

The Western concept of a punitive system functioning apart from the community is yielding in many developing countries to the concept of

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11. See M.C.Tun, 77 FAR EASTERN ECONOMIC REVIEW 20 (1972); C.G.WEERAMANTRY, EQUALITY AND FREEDOM: SOME THIRD WORLD PERSPECTIVES 29 (1976).

12. D.S. Lev, *The Lady and the Banyan Tree* 14 AMERICAN JOURNAL OF COMPARATIVE LAW 282 (1965).

13. N. TIRUCHELVAM, THE IDEOLOGY OF POPULAR JUSTICE IN SRI LANKA: A SOCIO-LEGAL INQUIRY 95 (1984).

involvement of the criminal justice administration in the environment of communal forces. Alternatives to imprisonment, which avoid the counterproductive effects of penal confinement are being explored. Various strategies are also being employed to change the prison itself and to increase inmate contacts with the outside world.<sup>14</sup>

Each nation must mould and adapt the ideas and concepts of community based corrections to the traditions of its own society. The mere acceptance of the imprisonment notion of Western penal jurisprudence, isolated as that concept is from the community, is often of negative value.

Extramural penal employment, techniques of rehabilitation, reconciliation, and acceptance into the community, conciliation with the victim and the victim's family, suspended sentences, community service, public participation in criminal justice administration, reassurance for the elderly, citizen crime-prevention programs, citizen patrols, advisory services, community-police workshops, involvement of traditional local organizations and village communities — all these areas offer enormous opportunities for the incorporation of traditional values.<sup>15</sup>

The path to congruence between culture and legal systems in recently liberated societies is thus a complex one. Many forces are involved and many elements within society must be tapped to achieve the fullest result.

The task is important for social harmony. Indeed, even social cohesion may depend upon a proper and acceptable reconciliation. Neither the one element nor the other can be permitted to fall into disfavour to an extent which prevents it from discharging its obligations to society.

It is to be hoped that through such work as Gray Dorsey pioneered, pathways will be found to a solution. We need a culturally diverse world, not a cultural monolith. We need a world of respect for each other's culture and not one of dominance or subordination. These hopes will not be achieved unless we give thought to them now, for the tendencies towards new cultural imperialisms are always latent. But for work such as Dorsey's, they will undoubtedly emerge and with their emergence destroy the harmony that ought to exist between legal systems and the cultural backgrounds of the communities they serve.

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14. E.H. Johnson, *The Community in Community Corrections: Potentialities and Applications for Developing Societies* in UNAFEI RESOURCE MATERIAL SERIES 113 at 132 (1985).

15. See Report of the Workshop on Criminal Justice Administration in UNAFEI RESOURCE MATERIAL SERIES at 160. For a set of propositions concerning "national societal factors" and "local community" characteristics, see T.N. CLARK, *COMPARATIVE COMMUNITY POLITICS* 21-45 (1974).