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Legal Pluralism and the Rule of Law: Can Indigenous Justice Survive?

By David Pimentel

Introduction

While working for the federal courts of the United States in 1993, I was asked to staff a “Task Force on Tribal Courts” charged with addressing jurisdictional gaps and tensions between the federal courts and the tribal courts in Indian Country in the western United States. My introduction to the topic came at a conference in Santa Fe with the tribal justice community, where a representative of the new Clinton Administration, with a New York accent and a bow tie, briefly addressed what the Justice and Interior Departments would and would not do on these issues, which cut close to the theme of tribal sovereignty. Immediately after he completed his remarks, an elderly Pueblo prosecutor, in braids and beads, stood up, looked around the room, and said, “I hope you have not ALL lost your soul like this man!”

It was a sobering moment for me. I slipped out at the break, and swapped my own neckwear for black and silver bolo (string) tie being sold by an artisan on the streets of Santa Fe, and promised myself that rather than speak at this conference, I would listen and learn. Later that day, a young Native American law student shared her award-winning paper with the conference participants, in which she discussed the story and significance of the Supreme Court case *Ex Parte Crow Dog*. At this point, the moment ceased to be merely sobering, and became transformative.

She described the ethic of tribal justice at play in the Brule Sioux tribe of the 1880s. Crow Dog had been accused of the murder of Spotted Tail, and his guilt was conceded. Because the crime took place in Indian Country in the Dakota territory, the tribal authorities had exclusive jurisdiction over the case, which was resolved under the auspices of tribal leaders. The perpetrator’s family and his victim’s family sat in a circle, together with tribal authorities; the case was discussed and resolved with Crow Dog’s family providing Spotted Tail’s family with cash, some horses and a blanket. The purpose of the proceeding, the student author explained, was that of healing. The Brule Sioux community had been wounded by this horrible act of violence, and that community had to come together to heal. The wrongdoer had to be integrated back into society, and the crime had to be acknowledged so the healing could begin.

White settlers in the surrounding area were aghast with this outcome. From their perspective, these “savages” had just countenanced a gross injustice: the murderer himself remained a free man. Federal authorities quickly intervened, arresting Crow Dog, jailing him, and then trying him for murder. The process was swift and sure, bringing a sentence of death. Before Crow Dog could be hanged, however, the appeals process had to be completed, and in time, the case ended up before the United States Supreme Court. In a unanimous decision the Court ruled that the federal courts had no jurisdiction over this crime, that the tribal authorities had exclusive jurisdiction. Crow Dog was set free.

“What would have happened to the Sioux community, had Crow Dog been executed?” the young commentator asked. “It would have wounded them a second time, as Crow Dog’s death would be another blow to the Sioux community, another act of violence that would deprive the community of yet another of its members, harming the community all over again.”

The case presents a classic clash of cultural values in the fundamental concepts of criminal law. Justice for the Brule Sioux was all about healing and peacemaking. Justice for the Anglo community surrounding Indian Country was all about punishment and retribution. The respective justice systems were dedicated to entirely different objectives. No question the Brule Sioux failed to carry out effective retribution. And the American federal courts similarly failed to promote reconciliation and healing.

Legal Pluralism

“Legal pluralism” describes the situation in which different legal systems co-exist in the same geographic area, and it is not unique to the Dakota Territory of the 1880s. We continue to see clashes between state power and indigenous justice throughout the world, much of it exacerbated by the spread of Western law. The challenge comes not with expressing the need for mutual respect, but in finding ways for the divergent legal systems to function simultaneously in the same world, in the same state, and even in the same community. Jurisdictional tensions are inevitable.

So how *should* Western law interact with traditional, customary, or other non-Western legal traditions? Historically, the indigenous law has usually been subordinate. Even in the case of Crow Dog, where the Supreme Court decreed that indigenous law controlled the case, Congress responded by passing the “Major Crimes Act” asserting exclusive federal jurisdiction over serious crimes committed in Indian Country. There would never be another *Crow Dog*. Tribal courts were relegated to adjudicating only petty crime, because—based on the Crow Dog experience—they could not be “trusted” to handle the serious crimes.

The history of legal pluralism—which has been a reality for millennia, undoubtedly dating back to the first examples of invasion and occupation—has usually been marked by a profound lack of respect for indigenous justice. In British colonial regimes, indigenous law was allowed to function only as long as it did not run afoul of now-notorious “repugnancy clauses,” which assumed the superiority of British legal and cultural norms and invalidated any indigenous law repugnant to those values. These themes show up in the New Testament, which confirms that Roman authority was asserted as superior to Jewish law in Israel—Jesus could be judged by the Sanhedrin, but the Jewish authorities had no authority to administer capital punishment. The Roman occupiers reserved to themselves exclusive authority to do that, so Jesus was executed by crucifixion, a Roman penalty, rather than by stoning, which would have been called for under indigenous law.

We like to think that since colonial times, we have moved into a state of greater enlightenment and sensitivity with respect to indigenous peoples and values. We even romanticize indigenous customs and values, as depicted so broadly in the recent hit movie *Avatar*. But can chthonic cultures maintain their separateness and their customary justice in an increasingly globalized world?

Today, most African states are enjoying relatively recent independence—only a handful of them were independent before 1960—and wish to reassert their traditional culture, so long repressed or at least demeaned by colonial regimes. This involves resuscitation and reinvigoration of customary law and the institutions that apply it. At the same time, however, these states are eager to participate in the larger world community, enjoying dignity and recognition as members of the United Nations. For the latter, they must buy into Western legal concepts that generally fall under the heading of “rule of law.”

Accordingly, many of these states have adopted constitutions that give formal recognition to customary and traditional law and institutions, but at the same time establish Western-style three-branch governments, including independent judiciaries empowered to enforce a formal bill of rights. The former reflects a reaction to and rejection of colonial influence, but the latter depicts the embrace of Western-dominated priorities associated with the global community: (1) protection of human rights, depicted in the various international conventions that UN-member states are expected to join, and (2) establishment and maintenance of the rule of law, generally deemed the price of admission to the world economy.

Indeed, economic considerations also strongly dictate in favor of buying into Western norms. In order to enjoy the economic advantages that come from cooperation with the World Bank, the IMF, and in order to attract foreign investment, these countries have been under pressure to adopt market economies, and with it the legal structures that support and facilitate them. It is generally assumed that the rule of law is a necessary precursor to investment in developing economies. After all, who will do business in a society that cannot enforce property rights and contractual obligations?

By formally embracing legal pluralism, many of these post-colonial states hope to have it both ways—or perhaps get the best of both worlds—reconciling the compelling but inconsistent objectives to reclaim and validate indigenous culture and, at the same time, to be a player (or at least a participant) in the global political scene and the international economic community. Mozambique, for example, adopted a new Constitution in 2004 which, in Article 4, “recognises the different normative and dispute resolution systems that co-exist in Mozambican society, insofar as they are not contrary to the fundamental principles and values of the Constitution.” Six years later, Mozambique is still struggling to figure out how to implement this legal pluralism, or what kind of procedural mechanisms might appropriately link their traditional justice systems with the statutory courts. Other post-colonial states face similar challenges as they attempt to implement similarly vague constitutional pronouncements.

The primary difficulty lies in the fact that some aspects of customary law are simply incompatible with basic principles of Western law, principles that may be enshrined in the constitution. And Mozambique—like South Africa, South Sudan, and others—recognize customary law only to the extent it is consistent with those constitutional principles. Thus the Constitution itself sets up the conflict—customary law is officially recognized, except when it’s not, and inevitably, statutory courts have to make that call, overruling customary law when it is found to conflict with constitutional protections.

External pressures on pluralism—the “rule of law” priority

Of course, the international aid community is active in promoting the rule of law and human rights in many of these countries as well. Donors attempt to work “with” local governments to improve the delivery of justice, but such improvements are defined by the donor, usually reflecting Western expectations for how a legal system should operate and what interests it should protect. These intervenors will tolerate local variation, but only as long as the core rule of law principles are not compromised.

This approach, by international aid agencies and other rule of law reformers, bears a striking resemblance to colonialism, however. The colonists needed a legal system that would protect their interest in economic exploitation of the colony, after all. The World Bank’s commitment to establishing a Western version of the rule of law in these same regions, as a means of promoting economic development there, is not so far removed. Similarly, the colonists’ desire to implement basic norms of civilized society, reflected in their “repugnancy clauses,” may be difficult to distinguish from our present-day insistence on conformity with international human rights norms. Legal pluralism can be maintained, but only on certain conditions which—whether they come from international aid donors, or the country’s own constitution—reflect largely Western principles of rule of law and human rights.

Rosa Brooks characterized the global push to establish the rule of law as “The New Imperialism,” in her 2003 article bearing that title in the *Michigan Law Review*. She noted that “[i]t should go without saying that the project of intervening in ‘other’ cultures in order to change and ‘improve’ them is a fundamentally arrogant and imperialist project, with many pitfalls.” Indeed, this is a caution anyone in global rule of law initiatives should be sensitive to.

Reconciling Rule of Law with Indigenous Justice

But rule of law need not always be at odds with customary law. In some cases, preservation of traditional and indigenous justice systems may be the *best* means of establishing and preserving the rule of law. In my recent article in the *The Hague Journal on Rule of Law*, entitled “Rule of Law Reform without Cultural Imperialism?,” I argue that because the customary courts of Southern Sudan command tremendous public confidence and operate on minimal resources, they must be part of the larger rule of law solution for Southern Sudan. Indeed, any attempt to replace them with formal statutory courts would only worsen the rule of law situation there, as those new courts would almost certainly be under-resourced, inaccessible, and lacking in public confidence, particularly in remote and rural communities. Similarly, in a forthcoming work, I argue that Mozambique needs a legal pluralism regime that dignifies and strengthens customary justice, resisting the natural tendency for the Western-style statutory institutions to assert dominance.

The Human Rights Problem

The nettlesome problem here, however, is that of human rights. Traditional systems of justice in indigenous societies apply traditional values. The example of Crow Dog demonstrated that indigenous values—in terms of the purpose of criminal law proceedings—may simply be different from the prevailing view in Western culture: the tribe’s restorative justice priority being fundamentally at odds with American emphasis on retributive justice. In today’s world, we may be more willing to

acknowledge that the Brule Sioux community is entitled to enforce criminal law against its own in a way that reflects the values of tribal society. At the same time, however, traditional values often include discriminatory ones, showing little respect for principles of, *inter alia*, gender equality, child protection, and religious protection.

Accordingly, there are limits to the principle of respect for indigenous law. In countries where legal pluralism prevails, either *de jure* or *de facto*, statutory systems can play an important role in enforcing constitutional human rights standards and other rule of law principles that preserve the potential for economic development.

Defining that role in a way that does not unduly demean and devalue customary legal institutions poses daunting challenges. Unfortunately, some of the current attempts to address that challenge are fundamentally misguided, and threaten to do more harm than good. And following a familiar theme, the flaws in these approaches are rooted in Western society's own cultural biases about law.

Misguided Western Thinking / Flawed approaches

The first mistake is to think of customary law as static, something to be preserved from the pre-colonial past. But customary law is inseparable from the mechanisms for preserving and applying it, and those are anything but static. Many indigenous systems apply a law reflected in an oral tradition, which is inherently flexible, evolving naturally and almost effortlessly to reflect the changing needs and circumstances of the community. Westerners often fail to appreciate this feature of customary law and its inherent advantages and opportunities; we fail to see it because we think of law in Western terms, where statutes and constitutions are written and unchanging, except by relatively cumbersome legislative intervention.

This leads to the second mistake, which is to attempt to give customary law that fixed status that Westerners uncritically embrace. A popular initiative in the aid and development community is to reduce the oral traditions to writing. This push is no doubt borne of Western biases suggesting that law *should* be written, as well as by the shared sense that Western reformers know how to change written law. Once written, it is argued, the most offensive aspects of the indigenous law—those that violate human rights principles in particular—can be surgically excised from it. But reducing customary law to writing—whether or not it is subsequently amended—does serious violence to customary law, depriving it of its greatest strengths: its flexibility, vitality, and responsiveness to community needs and external forces. Worse, production of the written code, or “ascertainment” of customary law, will deprive community members of the ownership and control of their own law.

Embracing Flexibility in Customary Law

Instead, those concerned with creating a viable model of legal pluralism, respecting legitimate rule of law principles while preserving indigenous law, should embrace the inherent flexibility of customary law and the oral tradition that serves as its source. Customary law can and will evolve, not through amendment, the way Western law is changed, but through influence from both inside and

outside the community. This flexibility should be embraced, not extinguished. Advocates of legal pluralism should look for opportunities to address human rights concerns by the least intrusive means possible, providing *influence* and allowing the indigenous law system to adjust and adapt, in its own way, to prevailing international standards. Johanna Bond has argued, in her 2008 article “Constitutional Exclusion and Gender in Commonwealth Africa,” that a carefully prescribed judicial role in protecting women’s rights will help foster “a reform process that brings custom in line with the constitution.” I have, in earlier work, noted the success with providing education to tribal chiefs and other customary law adjudicators in Southern Sudan, and their responsiveness to international standards once they understand them. I have also argued that giving statutory courts a very narrowly-defined power to hold customary courts to constitutional standards will similarly help them adapt their law to give better respect for fundamental principles of human rights.

A Role for Limited Judicial Intervention in Customary Law

An compelling example of this latter dynamic—the testing of customary law against constitutional standards—comes from the South African case of *Bhe v. Magistrate, Khayelitsha*, 2004 (18) BHR 52 (CC) (S. Afr.), which Bond discusses in her article. The case arose as a challenge in the statutory court to an application of the customary law of intestate succession—male primogeniture, in this community—under the South African Constitution’s gender equality guarantees. The court examined the application of the customary law and noted that the oldest male heir no longer inherits, with the property, the responsibility to provide for the widow and other children, who are often left destitute as a result. Against this backdrop, the court weighed the customary law rule against the equality and dignity guarantees of the Bill of Rights and concluded that the customary law as applied in this case violated the Constitution. The inevitable message back to the customary law adjudicators was that they must adapt the concept of male primogeniture to comport with constitutional guarantees of gender equality. Importantly, however, the statutory court did not rewrite or reinterpret customary law in the *Bhe* decision; it only struck down the offensive result, and left the customary court to reinterpret its own law in a way that supports, rather than undermines, the constitutionally-protected rights.¹

Conclusion

This is a pattern for legal pluralism and the continued relevance of customary law in today’s world. If these non-Western legal systems are to maintain their relevance and vitality, if they are even to have a place in the new global community, they will need to resist the pressures to simply import or impose Western law and instead adapt to minimum international norms on their own terms. Accordingly, those agencies and individuals engaged in promoting the rule of law, economic development, or respect for human rights should resist the impulse to simply impose the Western laws

¹ **Author’s Correction:** I am sorry to report that this statement is incorrect, perhaps the product of wishful thinking. Under South African law, statutory courts (Magistrates’ Courts) have jurisdiction to apply customary law, so this case and others like it, regrettably in my view, do not go back to a customary forum for reinterpretation of customary law. I wish to thank Sanele Sibanda, Senior Lecturer at the University of Witwatersrand in Johannesburg, for educating me on the South African procedure -- alas, too late for me to make this correction before publication in the *Harvard International Review*. Fault for the error is entirely my own.

and legal institutions—as the U.S. Congress did to the Native American communities post-*Crow Dog*. Instead, reform-minded agencies and individuals should seek opportunities to engage and influence customary law and customary institutions, to encourage human rights recognition within such systems. Solutions can and must come from customary systems’ embracing human rights norms, not from initiatives to displace or ignore customary systems in favor of Western ones. With appropriate influence, including that of limited judicial enforcement of constitutional guarantees under the legal pluralism regime, customary courts and customary law can become guardians not only of traditional culture, but also of human rights and rule of law principles. And they will be all the more effective in this latter enterprise because the systems are home-grown, culturally appropriate, and embraced by the communities they serve.

The mistaken reaction to *Ex parte Crow Dog*, when fear and misunderstanding of cultural difference led to an imposition of federal jurisdiction over tribal communities, is a sobering case in point. Indigenous and other non-Western systems deserve more respect and deference than that, but the reform and development winds are blowing against them, particularly on what have become non-negotiable issues of human rights and rule of law. Customary law institutions will have to bend and adapt if they are to survive; but they are already equipped to do that, and Western reformers should acknowledge and appreciate that. Legal pluralism continues to offer great promise, both for the preservation of cultural values and institutions, and ultimately for the establishment of the rule of law, but only if the indigenous legal systems can be engaged in a spirit of mutual respect.