

Uldaho Law

Digital Commons @ Uldaho Law

Articles

Faculty Works

2011

Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique

David Pimentel

University of Idaho College of Law, dpimentel@uidaho.edu

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/faculty_scholarship



Part of the [Transnational Law Commons](#)

Recommended Citation

14 Yale Hum. Rts. & Dev. L.J. 59 (2011)

This Article is brought to you for free and open access by the Faculty Works at Digital Commons @ Uldaho Law. It has been accepted for inclusion in Articles by an authorized administrator of Digital Commons @ Uldaho Law. For more information, please contact annablaine@uidaho.edu.

Article

Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique

David Pimentel†

INTRODUCTION

Legal pluralism – defined as a situation in which “more than one legal system operate(s) in a single political unit”¹ – is a practical reality in a large number of countries in the world, most notably in the post-colonial states of Africa. These newly-independent states are grappling with how to preserve the cultural heritage reflected in their customary law and institutions,² even as they attempt to function as modern constitutional regimes.³ Many of their constitutions preserve a role for customary law or recognize the inevitability of legal pluralism in the state. But few have found a functional and effective way of implementing legal pluralism or,

† Fulbright Scholar (2010-11), University of Sarajevo, Associate Professor, Florida Coastal School of Law, and former Head of Rule of Law for Southern Sudan, United Nations Mission in Sudan. Thanks to Helene Maria Kyed and the Danish Institute for International Studies, and Deborah Isser and the United States Institute of Peace for support and inspiration. Thanks to Melody Whittaker, Cara Walker, and Lance Davies for research assistance.

1. BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION 89 (2nd ed. 2002).

2. “Newly” refers to the last fifty years or so. The decolonization of Africa began with Libya in 1951, and only a handful of countries achieved independence before 1960. David Birmingham et al., *ENCYCLOPEDIA BRITANNICA, Freedom from Empire: An Assessment of Post-Colonial Africa: Year in Review 2010*, *BRITANNICA BOOK OF THE YEAR* (2011), available at <http://www.britannica.com/EBchecked/topic/1707631/Freedom-from-Empire-An-Assessment-of-Postcolonial-Africa-Year-In-Review-2010/296577/Table-of-African-independence-dates>.

3. Manfred O. Hinz, *Traditional Governance and African Customary Law: Comparative Observations from a Namibian Perspective*, in *HUMAN RIGHTS & THE RULE OF LAW IN NAMIBIA* 59, 61-62 (N. Horn & A. Bösl eds., 2007), available at http://www.unam.na/centres/hrdc/3_traditional_governance_and_African_customary_law.pdf (“There is no African country that is free of African traditions or free of at least some elements that belong to western modernity. It is therefore that African governments have . . . to make decisions about the legal and political position of both tradition and modernity in their social and legal system.”).

more specifically, defining the relationships between the pluralistic institutions.

This Article attempts to define the challenges and opportunities associated with linking statutory and customary adjudication. In order to assess the various approaches to the problem, it is necessary to evaluate the appropriate goals and purposes of legal pluralism, distinguishing the motivations of many who have exploited pluralistic systems for their own self-interest. It is also necessary to recognize and preserve the virtues inherent in customary systems, which have been historically undervalued as "primitive," and remain under attack by those who see them as a threat to the protection of human rights.

Striking these balances to implement legal pluralism in Mozambique presents serious, but by no means unique, challenges. Mozambique's current situation serves as a case in point for application of the principles developed in this Article.

The best approach for Mozambique and other similarly situated states will be to maximize the role and independence of customary law and the institutions that apply it. Balances will have to be struck to ensure that human rights are not unduly compromised as a result. Such balancing will require a procedure by which customary court decisions can be reviewed for consistency with constitutional protections. This review can be accomplished without giving statutory courts jurisdiction to interpret and apply customary law. This will allow the customary law, and its application, to remain solely the province of traditional authorities, where it can continue to function as a vital and highly adaptive foundation for rural society.

The Article proceeds in five Parts. First, it introduces the concept of legal pluralism and discusses its inevitability. Second, it explores the various uses of legal pluralism, the opportunities it presents, and the both positive and negative agendas it serves. Third, it identifies three different conceptual approaches to legal pluralism, critiquing each and suggesting a productive reconciliation of them, aimed at realizing the benefits and minimizing the negative aspects of legal pluralism. This third section includes a specific procedural approach to reconciling the conflict between respecting indigenous culture and promoting human rights. Fourth, it explores the often-overlooked issue of jurisdiction, fundamental to the structure of a legal pluralism regime. It surveys options and approaches, and analyzes the implications of each for legal pluralism. Finally, it proposes an application of these principles to the country of Mozambique primarily as a case in point. Like many post-colonial states, Mozambique formally recognizes customary law; and like almost all of them, it has a constitution with a Bill of Rights. In addition, it retains the remnants of the Portuguese legal regime and its post-colonial experiment with socialism, further enriching the pluralism at play. This makes it an ideal example to illustrate the application of these principles. But this discussion is meaningful not only for Mozambique. The theory and proposal should be applicable, *mutatis mutandis*, throughout post-colonial Africa, and should be

worthy of consideration wherever indigenous justice is practiced.

I. LEGAL PLURALISM: A CONTEMPORARY REALITY

In any society, and any state, the legal system will reflect a *mélange* of doctrines, institutions, and practices reflective of that country's history, culture, and politics. In many countries, these eclectic influences have been harmonized into a unitary system of justice.

The common law, after all, could be characterized as a type of customary law, uncodified, and evolving as it was applied. Over time, the common law has gravitated toward a statutory tradition, with the overwhelming majority of legal standards and rules coming from codes rather than cases.⁴ The customary, common law tradition is still meaningful, mostly providing the backdrop for the application of codes, filling the gaps in the law, and providing a basis for judicial interpretation of statutes.⁵ But most common law states now apply statutory law, born of and influenced by the customary roots of the common law, and fully harmonized with it.⁶

But where the harmonization has not occurred – as in many post-colonial states – the tensions created in the intersection of inconsistent, even competing, systems are acute. In most African states, the key tensions arise between a statutory system, a creation of legislation, and the more organic customary or traditional systems, each with unique laws and institutions to enforce them. For purposes of this Article, the term “customary law” is used to describe these systems. It is defined as unwritten law, retained by oral tradition and by acceptance and observance by the community or society to which it applies.⁷

4. See Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT'L L. 817, 821 (2005) (“[C]odification of criminal prohibitions is the modern norm in domestic systems, even in common law countries – in the United States, for example, there are no common law crimes, and in the United Kingdom there are few.”). See also JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION* 27 (3d ed. 2007).

5. See, e.g., Suzanne Mounts, *Malice Aforethought in California: A History of Legislative Abdication and Judicial Vacillation*, 33 U.S.F. L. REV. 313, 315 (1999) (“On their own, the homicide statutes made little sense; they could only be understood with reference to the pre-existing common law they reflected.”).

6. See James E. Archibald, *Pledges of Voluntary Contributions to the United Nations by Member States: Establishing and Enforcing Legal Obligations*, 36 GEO. WASH. INT'L L. REV. 317, 332 (2004) (“Codes in common law countries are developed on a more ad hoc basis and often include provisions that reflect decisions in prior court cases.”) (citing JAMES G. APPLE & ROBERT P. DEYLING, *FED. JUDICIAL CTR. A PRIMER ON THE CIVIL-LAW SYSTEM* 36 (1995), [http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/\\$file/CivilLaw.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf)).

7. See Ike Ehiribe, *The Validity of Customary Law Arbitration in Nigeria*, 18 COMP. L. Y.B. OF INT'L BUS. 131, 132 (Dennis Campbell & Susan Cotter eds., 1996) (describing customary law as “an amalgam of customs or habitual practices accepted by members of a particular community as having the force of law as a result of long established usage.”). The fact that customary law is unwritten is important. While there have been attempts to codify it, the law ceases to be customary when it is written down; at that point, the source of law is no longer the custom of the community, but the text of the code. I have argued elsewhere that it is impossible to record customary law without doing violence to it, undermining its unique and powerful positive attributes, most notably its adaptability. David Pimentel, *Rule of Law Reform Without*

There is nothing inherently *wrong* with legal pluralism,⁸ and certainly nothing new about it. The concept is ancient, having been an issue wherever competing societies have overlapped, including undoubtedly the earliest instances of conquest and occupation.⁹ It has always proved easier to govern a conquered people according to their own laws.¹⁰

In Mozambique, the historical and political milieu is particularly rich. The legal system is influenced not only by traditional or customary law and Portuguese colonialism, but also by the post-independence socialist regime and, after the latter's collapse, its abrupt replacement with a new capitalist democracy.¹¹ Various legal institutions have survived this history, including hybrid institutions such as the community courts,¹² created by statute but not otherwise funded or governed by state organs. To the extent these divergent doctrines, institutions, and practices persist today and co-exist unhomogenized and unharmonized, Mozambique already functions as a legally pluralistic society.

Formal recognition of legal pluralism, moreover, legitimizes traditional systems, validating the cultural values that underlie them. Indeed, Mozambique has chosen to embrace legal pluralism in its new Constitution of Mozambique, adopted in 2004. Article 4, entitled "Legal Pluralism," and also Article 212(3) specifically contemplate linking statutory courts and non-state dispute resolution fora:

Article 4

Legal Pluralism

The State 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. . . . ;

Article 212

Jurisdictional Function

...

(3) The law may establish institutional and procedural mechanisms for links between courts and other forums whose purpose is the

Cultural Imperialism? Reinforcing Customary Justice Through Collateral Review in Southern Sudan, 2 HAGUE J. ON RULE L. 1, 21 (2010) ("Attempts at codification and even ascertainment, therefore, may end up threatening customary law far more than they strengthen it.") [hereinafter Pimentel, *Rule of Law Reform Without Cultural Imperialism*].

8. However, it has been argued that "[t]here is nothing inherently good, progressive, or emancipatory about 'legal pluralism'" either. BOAVENTURA DE SOUSA SANTOS, *supra* note 1, at 89. Discussion at Part III, *infra*, illustrates some positive aspects of the legally pluralistic regime, particularly in the context of post-colonial African states.

9. See, e.g., *infra* note 33 (discussion of Biblical accounts of the Roman occupation of Israel).

10. See discussion *infra* Part III.

11. Boaventura de Sousa Santos, *The Heterogeneous State and Legal Pluralism in Mozambique*, 40 LAW AND SOC'Y REV. 39, 47-48 (2006).

12. See discussion of community courts *infra* Part VI.A.

settlement of interests and the resolution of disputes.¹³

These provisions are not particularly remarkable, as similar provisions exist in a number of other African Constitutions.¹⁴ Moreover, the specifics and the mechanics of how “different normative and dispute resolution systems” can co-exist and function in a modern state is nowhere articulated in Mozambique, other than to allow the “law” to establish them.¹⁵

Given these constitutional provisions, the question is not *whether* Mozambique, and so many of its neighbors, should operate under a system of legal pluralism – indeed, pluralism is deemed inevitable, even desirable. The remaining question, as yet unanswered, is *how* that regime should be structured and implemented and, specifically, what linkages should and must be established between the customary and statutory systems. To answer that question, it is necessary to understand why legal pluralism is important and what societal values it represents.

II. THE WHY OF LEGAL PLURALISM

A. Legal Pluralism and the Rule of Law

A sound, stable, and predictable legal system might be characterized as one that reflects the rule of law. Often mentioned with reference to its value in fostering economic development, discussed separately below,¹⁶ rule of law also incorporates much broader, less tangible values: peace, security, equity, justice, and the protection of basic human rights. A key perspective, for purposes of this discussion, focuses on the role of legal pluralism in the establishment of the rule of law in the post-colonial society.¹⁷ Notoriously difficult to define, “rule of law” has been

13. CONST. OF THE REP. OF MOZAM. arts. 4, 212(3) (2004).

14. See, e.g., Johanna E. Bond, *Constitutional Exclusion and Gender in Commonwealth Africa*, 31 FORDHAM INT'L L. J. 289, 292-93 (2008) (discussing constitutional provisions that specifically recognize customary law: “Despite the marked trend toward increased constitutional protection for women’s rights, a number of countries in the region have retained clauses that exclude personal and customary law . . . from constitutional non-discrimination protection.”). See also Vanessa Jiménez & Tim Murithi, CENTRE FOR CONFLICT RESOL., SOUTH SUDAN WITHIN A NEW SUDAN 26 (2006), http://www.ccr.org.za/images/stories/pdfs/Vol_13-SudanFinal_211106.pdf (“The [Interim Constitution for Southern Sudan] also guarantees a role for traditional authorities and recognises customary laws regarding community land tenure. Articles 174 and 175 guarantee respect for the ‘institution, status and role of traditional authority,’ and call upon Southern courts to apply customary law.”).

15. CONST. OF THE REP. OF MOZAM. art. 212(3) (2004).

16. See *infra* notes 52-55 and accompanying text.

17. One might note the overlap between the economic development discussion and the rule of law discussion, observing that the rule of law is precisely what is required to support economic development. They are treated separately here because rule of law is a far broader concept, encompassing access to justice for the rural poor, as well as a range of human rights concerns, such as child protection and gender equity. Although the foundation for economic development could have been characterized as a sub-topic under rule of law in general, it gets separate treatment here because of its vital importance. This author has been drawn into too many rule of law discussions, particularly when serving as the Head of Rule of Law for Southern Sudan for the UN Mission in Sudan, have focused solely on human rights and due

characterized as:

[A] state of affairs . . . in which most people, most of the time, choose to resolve disputes in a manner consistent with procedurally fair, neutral, and universally applicable rules, and in a manner that respects fundamental human rights norms [T]his requires . . . a widely shared cultural and political commitment to the values underlying [its] institutions and codes.¹⁸

Consistent with this, the rule of law demands regularity and predictability, as well as the resort to official dispute resolution regimes to manage conflict, rather than vigilantism or private retaliation.

Access to justice is a major rule of law deficiency in many post-colonial African states. Large populations in these countries have no means of getting to urban centers where statutory courts are situated.¹⁹ Even if they can get to the city, few can afford the representation or legal advice that may be necessary to navigate the formal justice system.²⁰ Unless they can get their dispute resolved locally, in their own village or community, their claim is likely to go unheard.

This is certainly true in Mozambique.²¹ A 2006 Open Society Initiative report on the rule of law in Mozambique observed:

On balance, despite its reform efforts, the state is unable to guarantee access to justice for its citizens, particularly those living in remote areas. The reality for most Mozambicans is that the judicial courts are inaccessible, blocked by a range of obstacles including financial constraints and their physical location. As a result, many citizens continue to rely on alternative mechanisms of dispute resolution, including community courts and traditional or other local leaders.²²

The reliance on such traditional systems is evidence of the public confidence those systems enjoy.²³ Public confidence, a staple of the rule of

process issues, without giving sufficient or meaningful attention to the economic development interests so vital to alleviating human suffering or improving the human condition in the developing world.

18. JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 78 (2006).

19. OPEN SOC'Y INITIATIVE FOR S. AFR., MOZAMBIQUE: JUSTICE SECTOR AND THE RULE OF LAW 121 (2006), available at [http://www.afrimap.org/english/images/report/Mozambique%20Justice%20report%20\(Eng\).pdf](http://www.afrimap.org/english/images/report/Mozambique%20Justice%20report%20(Eng).pdf); Pimentel, *Rule of Law Reform Without Cultural Imperialism*, *supra* note 7, at 14-15 (making similar observations about Southern Sudan).

20. *Id.*

21. It is true in Southern Sudan as well. Pimentel, *Rule of Law Reform Without Cultural Imperialism*, *supra* note 7, at 14-15.

22. OPEN SOC'Y INITIATIVE FOR S. AFR., *supra* note 19.

23. V. BOEGE ET AL., BERGHOF RES. CENTER FOR CONSTRUCTIVE CONFLICT MGMT., ON HYBRID POLITICAL ORDERS AND EMERGING STATES: STATE FORMATION IN THE CONTEXT OF "FRAGILITY" 9-10 (2008), <http://berghof-handbook.net/documents/publications/>

law, is elusive, and more easily lost than acquired. To the extent that traditional fora enjoy that confidence, those institutions must be retained and strengthened as a part of the larger rule of law strategy.²⁴

Finally, traditional dispute resolution is very inexpensive, particularly when contrasted with the resources required to establish and maintain statutory courts. This applies to community courts in Mozambique as well, which have a hybrid character,²⁵ having been established by statute but abandoned by the Ministry of Justice. They are “an important mechanism, providing access to justice for many citizens,”²⁶ and presently function on minimal budgets, none of it coming from official state coffers.²⁷ Given resource constraints in a relatively impoverished nation, the state cannot afford to replace them with state institutions.

The importance of legal pluralism to the rule of law in such countries is, therefore, readily apparent, given the vital role traditional fora play in resolving disputes in these remote and rural communities. Legal pluralism that retains and respects traditional and customary courts is essential to establishing and maintaining the rule of law in such areas.²⁸ Whatever

boege_etal_lead.pdf. The authors explain:

People do not perceive themselves as citizens or nationals (at least not in the first place). They define themselves instead as members of particular sub- or trans-national social entities (kin group, tribe, village). This is particularly true where state agencies are not present on the ground and the state does not deliver any services with regard to education, health infrastructure or security. Rather, it is the community that provides the nexus of order, security and basic social services. People have confidence in their community and its leaders, but they have no trust in the government and state performance. The “state” is perceived as an alien external force, far away not only physically (in the capital city), but also psychologically. Individuals are loyal to “their” group (whatever that may be), not the state. *As members of traditional communities, people are tied into a network of social relations and a web of mutual obligations, and these obligations are much more powerful than obligations as a “citizen.”*

(emphasis added).

24. See Pimentel, *Rule of Law Reform Without Cultural Imperialism*, *supra* note 7, at 15.

25. See description of community courts *infra* Part VI.A.

26. ‘OPEN SOC’Y INITIATIVE OF S. AFR., *supra* note 19, at 38.

27. *Id.* at 4. Noting:

These courts . . . are the most widespread officially recognised judicial fora in Mozambique, with more than 1,500 reportedly in existence. Although the 1992 Community Courts Law (*Lei dos Tribunais Comunitários*) provided the legal framework for community courts, with jurisdiction to deal with minor civil and criminal disputes, they have no formal links with the judicial courts, and, in practice, have received no financial or material help from the government or judicial courts.

28. See Pimentel, *Rule of Law Reform Without Cultural Imperialism*, *supra* note 7, at 28. Observing:

In Southern Sudan, these principles combined to suggest that the customary courts must be retained with any reforms built on such retention. Customary law mechanisms have deep cultural and historical roots and are effective in maintaining a sense of order, stability, and continuity in tribal society. Public confidence in them is high, higher than it would be in any newly-imposed statutory court. And given the enormous population to be served and the dearth of judges qualified to adjudicate in statutory courts, Southern Sudan lacks the resources to

linkages are ultimately established to implement legal pluralism should be designed with the rule of law in mind.

B. Legal Pluralism and Respect for Indigenous Culture

One of the most compelling reasons to embrace and pursue legal pluralism in the post-colonial state is to preserve and respect the cultural tradition of indigenous peoples. Historically, the traditional culture of the colonized state has been devalued while foreign models of governance and justice have been imposed.²⁹ This happens even today in the context of "rule of law reform" efforts, funded by Western nations and the World Bank. Rosa Brooks characterized it as "The New Imperialism," noting 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."³⁰

Nonetheless, since the demise of colonialism, and probably in reaction to it, sensibilities are far more respectful of indigenous culture and the institutions that reflect it. Hence, many constitutions in post-colonial Africa explicitly recognize the legitimacy of customary law, and some go so far as to exempt applications of customary law from their constitutions' anti-discrimination provisions.³¹ There is a grave risk, however, that as developing nations are attempting to bring their legal systems into conformity with prevailing international standards, traditional cultural values will be a casualty of that effort.³² The communities that still govern themselves by such principles – often the poorest and most remote in an

replace the customary courts with any alternative system.

29. Even in the United States, the treatment of tribal court jurisdiction in indigenous Native American communities has followed this pattern. A key example is the prosecution of Crow Dog in federal courts after the tribal courts had already resolved the matter under Sioux tribal law. When the U.S. Supreme Court overturned Crow Dog's conviction, Congress reacted by passing legislation to restrict tribal court jurisdiction, and ensure that all "major crimes" would henceforth be handled in federal court, and not in the tribal communities. David Pimentel, *Can Indigenous Justice Survive?: Legal Pluralism and the Rule of Law*, 32 HARV. INT'L REV. 32 (2010) [hereinafter Pimentel, *Can Indigenous Justice Survive?: Legal Pluralism and the Rule of Law*]. Within the last 35 years, the U.S. Supreme Court has issued new decisions, further restricting the authority of tribal courts. See, e.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (tribal courts have no criminal jurisdiction over non-Indians); *Duro v. Reina*, 495 U.S. 676 (1990) (tribal courts have no jurisdiction over Indians of another tribe); see also *infra* note 113.

30. Rosa Brooks, *The New Imperialism: Violence, Norms, and the "Rule Of Law,"* 101 MICH. L. REV. 2275 (2003) (detailing rule of law reform failures in Kosovo, Rwanda, and elsewhere, based on ignorance of local cultural norms, and overestimating the role of "law" in the rule of law).

31. Bond, *supra* note 14, at 290.

32. Pimentel, *Rule of Law Reform Without Cultural Imperialism*, *supra* note 7, at 4. Noting: [A]ny attempt to export concepts of institutional justice from Western powers – particularly those countries that dominate the UN power structure – can be characterized as a type of cultural imperialism, a particularly sensitive issue in post-colonial societies. The checkered history of Western powers' attempts to 'civilize the savages' around the world and across the centuries should make us all uncomfortable with any exercise of cultural imperialism.

economically aspiring state – may be victimized in the process as their way of life is jeopardized.

Accordingly, legal pluralism can be an effective means of preserving and respecting cherished cultural values and the societies that live by them. The linkages established to implement the pluralistic system should be crafted to serve and support these objectives.

C. Legal Pluralism and Politics

For many centuries, legal pluralism has been fostered and exploited for political advantage. It is an old dynamic, dating back at least as far as the Roman Empire, which occupied much of Northern Africa; indeed, it is clearly depicted in Biblical accounts of the Roman occupation of Israel.³³ Kyed states it succinctly: “State recognition of non-state legal orders is . . . not a technical, neutral process, but an inherently political one. The state legitimises the authority of non-state justice providers, but also assumes the authority to define what counts as legitimate non-state justice institutions and rules.”³⁴

Colonial regimes allowed local law and traditional legal institutions to persist under their rule, as a means of “managing” local society.³⁵ Describing British policy in Kenya, one commentator observed:

The recognition of African Customary Law was paramount to the colonial enterprise. With limited resources and incongruent policy objectives, it was highly unlikely that the governance of the colony could be achieved without the help of the indigenous communities. Moreover, implementation of the principles of indirect rule necessitated the maintenance of traditional rules and regulation so

33. While the Bible is not primarily a historical or political text, it presents an example, as compelling as it is ancient, of the legal pluralism at play in the Roman occupation. The account of the judgment and condemnation of Jesus involved accusation before a Jewish body – the Sanhedrin – and the transfer of jurisdiction to the Roman authority, Pontius Pilate, who had exclusive power to approve the infliction of capital punishment:

Pilate then went out unto them, and said, “What accusation bring ye against this man?” They [the Jews] answered and said unto him, “If he were not a malefactor, we would not have delivered him up unto thee.” Then said Pilate unto them, “Take ye him, and judge him according to your law.” The Jews therefore said unto him, “It is not lawful for us to put any man to death.”

John 18:29-31 (King James). The Roman preference to have locals judged according to local law is evident here, as is the Roman reservation of ultimate authority, that of execution, exclusively in themselves. Jesus was ultimately executed under Roman authority, by crucifixion, a Roman means of execution; had the Jews carried out the penalty under Mosaic law, it would have been done by stoning. JAMES E. TALMAGE, *JESUS THE CHRIST* 632 (1949).

34. Helene Maria Kyed, *On the Politics of Legal Pluralism: The Case of Post-War Mozambique*, 59 J. LEGAL PLURALISM 87, 90 (2004).

35. De Sousa Santos, *supra* note 11, at 62-63 (In Mozambique, “traditional authorities have been politicized or politically manipulated. This was also the case during the colonial period The colonial use of traditional law and structures of power was thus an integral part of the process of colonial domination obsessed with the reproduction of the super-exploitation of African labor.”).

as to eliminate active dissent to the British occupation.³⁶

The *régulos* system in Mozambique, for example, was an attempt by the Portuguese to use traditional authority (*autoridade gentílica*) "to control and tax the population."³⁷ Co-opting local leaders was by far the easiest way to assert colonial control.

In turn, local leaders were highly motivated to cooperate with the colonizers, whose support would help consolidate the local leaders' own power base.³⁸ Thus the politics of the indigenous authorities played a large role in the legal pluralism regime; the local leaders were exploiting pluralism as much as the colonists were.

Even today, political parties have built alliances with non-state authorities, pitching themselves as champions of traditional society and cultural values. Again, in Mozambique we see this dynamic played out fully. After independence, the new FRELIMO government attempted to marginalize traditional leaders (by ignoring their authority) and replace traditional law.³⁹ The opposition party, RENAMO, took up the cause, promising rural communities the "recuperation of an insulted identity," and protection of their "traditional social and cultural norms."⁴⁰

While legal pluralism has been embraced by political operators to serve their own interests, these motivations do not necessarily reflect the best interest of post-colonial society.⁴¹ This observation functions mostly as a caution, rather than a guiding principle. Linkages should be established with an eye toward minimizing the potential for political manipulation and exploitation of the legal pluralism regime.⁴² Although political influence plays an important influence in state governance, judiciaries cannot play their proper role in society if they are perceived as a tool for politics.

36. Laurence Juma, *Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalization of Customary Adjudication Processes*, 14 ST. THOMAS L. REV. 459, 478 (2002).

37. Ian Convery, *Lifescapes & Governance: The Régulo System in Central Mozambique*, 109 REV. OF AFR. POL. ECON. 449, 451 (2006) ("[A]ll *régulos* had to enforce 'native policy' designed to control peasant societies and extract surplus from them for the benefit of state or colonial companies.").

38. Bond, *supra* note 14, at 299 ("Indigenous male leaders . . . had an interest in establishing a source of authority, particularly in light of colonial oppression. The colonizers, in turn, had an interest in pleasing indigenous male leaders whose labor and cooperation was needed for effective colonial administration and economic development." (citation omitted)).

39. Convery, *supra* note 37, at 452.

40. *Id.*

41. See *infra* notes 64-65, discussing Local Government Act in Southern Sudan. There, the people are objecting to how the implementation of legal pluralism has resulted in political manipulation of the customary regime.

42. Of course, any country's legal and governmental institutions are a product of its politics, and one cannot expect customary law and statutory structures to be linked in a political vacuum. On the other hand, politicization of judicial institutions is particularly troublesome, as it is fundamentally at odds with the independence and impartiality we demand of judicial officers and judicial institutions.

D. Legal Pluralism and Human Rights

Another major theme in the legal pluralism universe is human rights. Human rights advocates complain that legal pluralism inherently compromises human rights, particularly those of women.⁴³ Their concern is that it often perpetuates and strengthens traditional patriarchal regimes that systematically undervalue women's rights and interests.⁴⁴

This is a compelling issue, one that demands attention in any discussion of legal pluralism. Where traditional and customary law, by their very precepts, undervalue the rights and dignity of women, children, ethnic minorities, religious minorities, or even political minorities, it is important that the legal pluralism regime account and control for that effect.

The conflict over human rights in this context is complex, pitting the collective right of a community to draw on its own cultural values, and to apply its own customary law, against the rights of the individual within that group who may suffer under the traditional regime. If justice is to be done in a pluralistic legal system, there should be *some* limits to the respect for and deference to indigenous culture.⁴⁵ Anthropologists blanch at this suggestion, as passing a moral judgment about what should be changed in a local culture violates core values of anthropological ethics.⁴⁶

Yet customary law has proven to be a battleground for human rights activists. These activists see customary law as an obstacle to recognition of the rights of those who have been historically disenfranchised. Most often, these arguments arise over women's rights to land, to inheritance, and to equal treatment. But the application of customary law can also do tremendous violence to others who lack power or authority under the traditional regime. In Sudan, for example, the rights and dignity of children and families have been compromised by the customary practice of awarding, as compensation in legal disputes, one of the defendant's daughters to the plaintiff/victim.⁴⁷ Similarly, it is common that a tribal

43. Bond, *supra* note 14, at 289 ("Multiculturalism has long been considered inimical to gender equality.").

44. *Id.*

45. Pimentel, *Rule of Law Reform Without Cultural Imperialism*, *supra* note 7, at 7-8. Arguing:

One may not excuse wholesale human rights violations, extreme examples of which might include slavery and human sacrifice, even if these practices were defining elements of an indigenous society's local culture. If ethnic or religious minorities, or women, or children, or political prisoners are being victimized by injustice in a society, it is neither respectful nor defensible to look the other way in the name of cultural sensitivity. Tolerance of cultural differences need not, and must not, require the acceptance of practices that violate the most fundamental principles of human rights and dignity.

46. George P. Castile, *An Unethical Ethic: Self-Determination and the Anthropological Conscience*, 34 HUM. ORG. 35 (1975) (arguing that anthropologists should never make ethical judgments based on ethnocentric or subjective morality).

47. Pimentel, *Rule of Law Reform Without Cultural Imperialism*, *supra* note 7, at 18. Observing:

community's customary law will favor members of that tribe, discriminating against or wholly disregarding the rights of those outside the tribal community.⁴⁸

Cultural sensitivity and respect for local custom cannot justify wholesale rights violations like this. Legal pluralism cannot be used as an excuse to disregard the rights and dignity of individuals victimized by the traditional regime.

Moreover, as Johanna Bond has eloquently explained, the customary law that has been used for the continued subjugation of women in African post-colonial society is not necessarily a pure reflection of traditional culture.⁴⁹ Customary law is irretrievably tainted by colonial rule, which reinforced gender distinctions consistent with the European values the colonizers brought with them. The influence of the colonial regime, therefore, interfered with women's ability to advocate for themselves *within* their traditional society.⁵⁰ Most cultures and legal systems in the world – with the possible exception of those most heavily steeped in religion – have gravitated, over the last 100 years, towards greater recognition of women's rights and interests.⁵¹ African customary law is likely to evolve that same direction if women are allowed to advocate for themselves within that

[D]ue to the long-standing cultural practice of “‘bride ‘wealth’” – a custom by which a young man wishing to marry must present the bride's family with a bride price – an unmarried girl has significant economic value in certain local communities. For many families in this incredibly impoverished region, their daughters are their only significant assets, as each carries the promise of future bride wealth and a means of social security for the family. When a tort claim such as wrongful death arises between two families, the tortfeasor may have nothing to compensate the plaintiff with other than his own daughter. Recognizing this, customary courts in Southern Sudan have historically resorted to this as a remedy: ordering one family to compensate the other by giving them one of their daughters. It is, of course, impossible to reconcile this legal and cultural practice with contemporary standards of human rights. Nonetheless, it is a practice deeply rooted in Southern Sudanese society.

(citations omitted).

48. See, e.g., Ana Natividad Martinez, *Intertribal Conflicts and Customary Law Regimes in North Africa: A Comparison of Haratin and Ait 'Atta Indigenous Legal Systems*, 5 TRIBAL L.J. 1 (2005), http://tlj.unm.edu/tribal-law-journal/articles/volume_5/intertribal_conflicts_and_customary_law_regimes_in_north_africa_a_comparison_of_haratin_and_ait_atta_indigenous_legal_systems/index.php (last visited Apr. 18, 2011) (In Morocco, “[t]he Ait 'Atta divided land and water among their lineages . . . , adhering to their organizational principle of excluding strangers or non-members from these benefits.”).

49. Bond, *supra* note 14, at 297-98.

50. See also Castile, *supra* note 46 (arguing that the preservation of variation in plural societies as a step toward increasing evolutionary potential through a model of incorporative change has the special virtue of placing moral decision-making as to the nature of change in the hands of those who are to undergo the change).

51. For example, over 185 nations in the world, representing a wide range of cultures, are now parties to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Convention on the Elimination of All Forms of Discrimination Against Women, Opened For Signature Mar. 1, 1980, 1249 U.N.T.S. 14. Those missing from the list include prominent Islamic states, such as Iran, Somalia, and Sudan. The United States is also one of the few states that has not ratified CEDAW, but even there, from suffrage to Title VII to Title IX, there have been enormous advances in the protection of the rights of women.

culture. Colonialism, however, impaired their ability to do so, and some versions of legal pluralism, which view traditional customary law as something static that must be preserved in present (or ancient) form, would have the effect of perpetuating these inequalities.⁵²

In fact, customary law is not fixed or static, and should not be treated that way by those attempting to implement a system of legal pluralism. The oral tradition typical of customary law is marked for its flexibility and adaptability; it can evolve to embrace a stronger recognition of the rights of women. This aspect of customary law was noted in an oft-cited Kenyan case over forty-five years ago:

A characteristic feature of native law is flexibility. In its contact with European civilization, foreign concepts may creep into the native customary law and influence it without necessarily depriving it of its essential character of custom. A customary law that once prevailed may now exist in a modified form owing to modern political, social and economic developments. The new or modified custom may be deemed to have acquired the force of law if it is shown that the members of the community recognize it as an obligatory rule which regulates the conduct of persons within that community.⁵³

Accordingly, it is important to remember that respect for customary law includes respect for its ability to evolve, and that human rights may be best protected if the legal pluralism regime allows customary law to do precisely that.⁵⁴

Legal pluralism, therefore, has the potential to either strengthen human rights protections or wholly undermine them, depending on how it is implemented. The human rights interest should accordingly be given particular attention and priority when framing and implementing linkages.

E. Legal Pluralism and Economic Development

Promoting economic development is another interest served in the implementation of legal pluralism. This is a strong theme, especially in the wake of the collapse of socialist ideology in the post-colonial state. The “Washington Consensus” of the mid-1980s, embraced by both the IMF and the World Bank, acknowledged that the best hope to improve the lot of developing nations came in diminishing state power over the national

52. See Bond, *supra* note 14, at 297-98.

53. Kabaka's Gov't v. Kitono, (1965) 1965 E.A.L.R. 278, 285 (Kenya) (a Kenyan case quoted in Juma, *supra* note 36, at 481).

54. See Raquel Yrigoyen Fajardo, *Legal Pluralism, Indigenous Law and the Special Jurisdiction in the Andean Countries*, 27 BEYOND LAW 32, 36-37 (2004) (“It is important to realize that indigenous peoples and cultures are not static, even though conceptions of them tend to be. Cultures and forms of social organization are constantly transforming and re-creating themselves.”), available at http://www.themastering.com/www_edit/upload/cades/courses/050301/Ryf-LegalPluralism-BeyondLaw27-5.pdf (last visited June 14, 2010).

economy, in favor of deregulation and privatization.⁵⁵ But the World Bank also recognized, by the mid-1990s, that this new development model "presupposed a state strong and efficient enough to ensure an effective regulation of the economy and the stability of the expectations of economic agents and social actors in general."⁵⁶

The demise of the socialist state resulted in a radical reordering of power, including "the reemergence of traditional authorities as a social and political actor."⁵⁷ The problem with the emerging pluralism is the unresolved question as to whether the legal order it has produced is sufficiently sound, stable, and predictable to invite investment and sustain development.

Consequently, the economic development needs of the nation need to be taken into account in establishing the role of customary dispute resolution fora, and in any system of linkages adopted. The ability to sustain life – jobs and livelihood – is a far more immediate need, at least in the Maslovian sense, than the less tangible promise of access to culturally-meaningful justice. Legal pluralism cannot be allowed to sacrifice the former for the latter.

III. THE HOW OF LEGAL PLURALISM

An unanswered question for Mozambique, and for many of the countries that have officially recognized their pluralistic status, is how the non-state and state institutions should be connected. There is no obvious answer to this question, as any system of linkages brings its own set of problems and difficulties.

The optimal structural approach undoubtedly depends on what one is trying to accomplish. Colonists used legal pluralism as a means of keeping the indigenous peoples in check. Modern political leaders, including elites within the indigenous society, may use it as a political tool to consolidate their own power and influence. Religious groups may rely upon it in an effort to perpetuate practices affecting women, even when such practices violate generally recognized human rights norms.

The recommended approach for Mozambique should be driven by higher principles and purposes, and by the desire to avoid the exploitation of legal pluralism for purposes of oppression, or political or personal gain. Accordingly, the linkages should be established in a way that (1) recognizes and respects traditional culture and custom, (2) limits the potential for such traditions to violate the fundamental human rights of women, ethnic or political minorities, or other persons or groups, and (3) fosters the establishment of the rule of law.⁵⁸

Obviously, some of these ideals are at cross-purposes. If the traditional

55. Boaventura de Sousa Santos, *supra* note 11, at 43.

56. *Id.*

57. *Id.* at 44 (explaining that this phenomenon occurred in Mozambique).

58. This third element should serve to support the economic development interests, discussed *supra*, as well.

values and customary law do not accord inheritance rights to women, then the respect of the tradition comes at the expense of the human rights of women. If the state courts have power to strike down this discriminatory provision of customary law, then the legal pluralism regime is *failing* to respect traditional culture and custom, at least to the extent that such tradition includes the marginalization of women.

So the appropriate mechanism for implementing legal pluralism involves some necessary balancing and trade-offs, to ensure that justice is done (both from a human rights and a rule of law perspective), while being as respectful as otherwise possible of traditional culture and institutions. While human rights are of the greatest importance, disrupting local culture unnecessarily will undermine peace and stability, including the rule of law, in the affected society. The welfare and dignity of the society and of the individuals in it demand a more nuanced approach.

Below, we will consider different conceptual approaches, grouped in three general categories: (1) the colonial approach, (2) the superior state approach, and (3) the equal dignity approach.

A. The Colonial Approach

Although colonialism has been thoroughly discredited today, colonialism's approach to legal pluralism reflected this concept of balancing. The British colonists, for example, took an approach to legal pluralism that assumed the validity of local customary law and the authority of traditional leaders to administer it. To avoid offensive outcomes under the traditional regime, however, they relied on "repugnancy clauses," which allowed a British Magistrate's court to overrule customary laws or the local authorities' judgments if they were "repugnant to justice and morality."⁵⁹

The repugnancy clauses are notorious today because they reflect an assumption of cultural superiority. What is repugnant to English sensibilities is largely a product of English culture, and if customary law is to be struck down on that basis, the sole rationale is the assumed superiority of English ethics and morality. Coming from the other direction, certainly some aspects of European culture were repugnant to indigenous society,⁶⁰ but the repugnancy clauses worked only in one

59. Juma, *supra* note 36, at 477-78 (Appeals from the native tribunals "lay to the Magistrate's court" which, in turn, could be "'guided' by customary law in cases where the parties were natives . . . only in so far as the same was not 'repugnant to justice and morality,' or inconsistent with any written law," (citation omitted)). See also LEILA CHIRAYATH ET AL., CUSTOMARY LAW AND POLICY REFORM: ENGAGING WITH THE PLURALITY OF JUSTICE SYSTEMS, 8-9 (2005), http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary_Law_and_Policy_Reform.pdf (last visited June 2, 2011) ("Most colonial regimes introduced colonial repugnancy clauses thereby recognizing customary law only to the extent that it conformed to European legal norms.").

60. H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 66 (3d ed. 2007) (The indigenous people of the North American Great Lakes region "were repelled by French practices, notably prohibition of divorce, corporal punishment of children, and prudish attitudes toward the human body." (citation omitted)).

direction.

Another aspect of colonial pluralism that appears offensive from today's perspective is the role colonizers played in empowering some traditional leaders and disempowering others. While the official policy of the British, for example, was to defer to the non-repugnant judgments of traditional leaders – e.g., tribal chiefs administering customary law – it was the colonial authority that decided who was recognized as such a leader.⁶¹ Traditional authorities who resisted colonial rule were ignored, or forced from positions of influence, as colonialism strengthened those traditional leaders who collaborated with the occupying force. Here is a prime example of how legal pluralism was exploited on all sides for political advantage: (1) colonial authorities benefitted by using formal recognition of local authorities as a means of securing local leaders' support and loyalty, and (2) the cooperating traditional leaders benefitted, by using the support they enjoyed from the colonial occupiers to consolidate their own power.⁶²

While some aspects of the colonial approach were positive – such as the presumption that customary law should apply (subject only to certain limits) – no one is advocating a return to colonialism. The conceptual foundations of the colonial approach, which might be characterized as condescending exploitation, are deeply offensive to modern sensibilities. At the same time, we should be careful to learn what we can from the experience of colonialism, both positive and negative, and we should be careful not to adopt or endorse a regime that reflects the flaws, or repeats the mistakes, noted above.

As an example, the newly-formed government of Southern Sudan appears to be, in one respect at least, replicating the colonial dynamic. It has recognized the legitimacy of customary law and customary courts under its interim constitution.⁶³ But the recently passed "Local Government Act" provides that chieftainships – presumably those empowered to administer customary law – will be established by popular elections, not according to traditional legitimacy.⁶⁴ It is not clear yet to

61. Manfred O. Hinz, *Customary Law in Southern Sudan: A Strategy to Strengthen Southern Sudanese Customary Law as a Source of Law in an Autonomous Legal System*, ¶ 294, at 104 (2010) ("[T]he colonial administration created agents, called chiefs, who, on the one side, were reliable in terms of colonial interests, but, on the other side, also needed to be respected by the communities as leaders.").

62. Bond, *supra* note 14 at 299; see passage quoted *supra* note 38.

63. "The ICSS [Interim Constitution of Southern Sudan] also *guarantees a role for traditional authorities and recognises customary laws* regarding community land tenure. Articles 174 and 175 guarantee respect for the 'institution, status and role of traditional authority,' and call upon Southern courts to apply customary law." (emphasis added) VANESSA JIMÉNEZ & TIM MURITHI, CENTRE FOR CONFLICT RESOLUTION, SOUTH SUDAN WITHIN A NEW SUDAN 26 (April 2006), available at http://www.ccr.org.za/images/stories/pdfs/Vol_13-SudanFinal_211106.pdf.

64. Local Government Act of 2009, § 117 (S. Sudan). Hinz observes that:

The Local Government Act obviously intends to ignore the chiefs system in place in the sense that the act will call for elections at the various levels of what the act calls chieftainships, elections, which might result in the re-election of incumbent office holders, but also in the out-voting at least of those who will lose as the new structure will only accommodate leaders elected in accordance with the envisaged one-dimensional pyramidal

what degree this will politicize the selection of chiefs, or to what degree the dominant party, the Sudan People's Liberation Movement (SPLM), will attempt to influence such local elections, but the community appears resistant to this re-definition and reallocation of traditional authority.⁶⁵ Thus, as in the colonial state, traditional authority is preserved in name, but it is reinvented to reflect the interests of the modern state. There is considerable risk that the party in power – which passed the Local Government Act – will be able to influence these local elections, thereby shoring up its political base. At the same time, chiefs and other customary law adjudicators may learn that they can strengthen their own standing and authority by offering their allegiance to, and securing the endorsement of, the party in power.

B. The Superior State Approach

The colonial approach was built on the premise that the colonial power retained ultimate authority; local authorities could govern only to the extent that the colonial regime chose to allow.⁶⁶ Any serious conflict with the colonial power was certain to result in restriction of local authority.

Now that the colonial regimes have, for the most part, folded up their tents and gone home, the governments of newly-independent states are assuming the role of ultimate authority. Many of their constitutions recognize the validity of customary law and of customary courts – non-state institutions – but the superiority of the state institutions is assumed. The result is a superior state approach to legal pluralism, in which state institutions always trump the customary ones, often through the power of appellate review.⁶⁷

system of local cum traditional authority.

Hinz, *supra* note 61, ¶ 299, at 105.

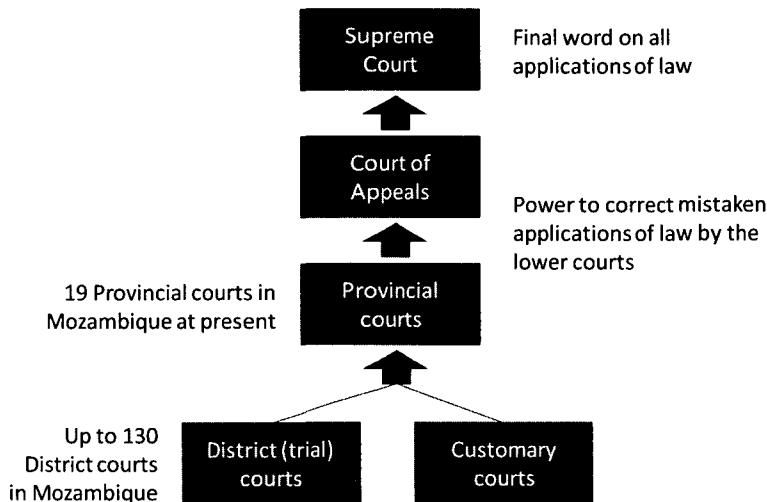
65. Hinz, *supra* note 61, ¶ 302, at 106 (“[At a community meeting] the majority . . . refused to accept such elections. The majority opted for the system in place, according to which chiefs . . . come from one family and the position of chiefs is in so far hereditary.”).

66. See, e.g., TOYIN FALOLA & MATTHEW M. HEATON, A HISTORY OF NIGERIA 7 (2008) (“[I]n all cases they [the British] took away the sovereignty that local rulers had enjoyed previously. If an ‘indirect ruler’ displeased the British, he would not be the local authority for long, regardless of the ‘traditional’ basis of his authority.”); see also Susan Elizabeth Ramirez, *Colonialism – Latin America – Bibliography*, JRANK SCIENCE ENCY. <http://science.jrank.org/pages/7571/Colonialism-Latin-America.html> (last visited February 2011) (“Colonialism is all about the exercise of power and its consequences. . . . The imposition of one state’s will over another is the essence of colonialism.”).

67. See generally Brynna Connolly, *Non-State Justice Systems and the State: Proposals for a Recognition Typology*, 38 CONN. L. REV. 239 (2005). Connolly breaks down a state’s approach to customary law into four categories: (1) abolition, (2) full incorporation (where the state law formally adopts customary law), (3) limited incorporation (where customary law is permitted to continue as a separate legal regime, subject to the state’s authority), and (4) no incorporation (where the legal regimes remain entirely separate). The first two categories of Connolly’s typology are not instances of legal pluralism, as a singular legal regime prevails under both systems, although the latter attempts to adopt customary law principles in the new system. Legal pluralism plays out primarily if not exclusively under the “limited incorporation” model. The *colonial approach* and the *superior state approach* are both examples of this. Connolly’s fourth category, “no incorporation,” is largely hypothetical, because it is practically

Superior State Approach

Figure 1



In extreme cases, the result may be virtually indistinguishable from the Colonial Approach, as the state retains ultimate authority.⁶⁸

A key difference, however, is that the colonial power was always an outsider. It was rarely interested in completely incorporating local society. Colonists were content to exploit local resources and imposed their own law and their own regime only to the extent necessary to do that. Once a former colony achieves independence, however, the new state is highly motivated to assert a unified national identity. Accordingly, the newly-independent state will naturally gravitate toward the superior state approach, asserting that the state can be a proper guardian of local culture in a way the colonial power never could. The practical application of the

impossible for the systems to remain entirely separate; they will inevitably come into contact and conflict with each other. Even in Native American communities of the United States, Connolly's example of "no incorporation," federal courts assert jurisdiction over major crimes. See Pimentel, *supra* note 29, at 1 (discussing how federal authorities intervened in *Ex Parte Crow Dog* when tribal justice was deemed inadequate). The equal dignity approach theoretically tracks Connolly's "no incorporation" model, but in practice requires some limited linkages. See *infra* Part III.F (explaining that the equal dignity approach, strictly applied, may leave certain human rights abuses unremedied and unremediable).

68. Sanele Sibanda argues that this is happening in South Africa currently. Sanele Sibanda, *When Is the Past Not the Past? Reflections on Customary Law Under South Africa's Constitutional Dispensation*, 17 NO. 3 HUM. RTS. BRIEF 31 (2010) ("[S]imilar to other post-independence states, South Africa has engaged in extensive judicial and legislative customary law reforms that replicate colonial relations and structures.").

Superior State Approach, therefore, may include attempts to codify customary law into state law and to assert the primacy of statutory courts over customary adjudication.

1. Written Law Versus Unwritten Law

The Superior State Approach will inevitably create pressure to reduce the customary law to writing. Formal codification has obvious appeal to Western interests – the World Bank, foreign rule of law reformers, etc. – whose own legal traditions are deeply rooted in the interpretation and application of written codes and decisions. There are other advantages to codification as well, including that it provides a means of addressing human rights issues. To the extent that certain principles of customary law are offensive to constitutional and human rights norms, those provisions can be formally excised from a written code. As long as the law remains unwritten, preserved and applied solely by oral tradition, the human rights problems are difficult to isolate and resolve.

Written law may be necessary as well if statutory courts are to exercise appellate jurisdiction over customary court decisions. If the appellate court is not privy to the customary law, it has no adequate basis for reconsidering the rulings of a traditional authority. Left to guess at the legal principles applied by a chief in a rural community and without a full understanding of customary law or the social milieu in which it operates, the statutory court is likely to get it wrong. Accordingly, codification may be a necessary precursor to meaningful appellate review.

Codification, however, brings other costs to the system and to the concept of legal pluralism, and should not be pursued without at least considering the compelling advantages of an oral legal tradition. First, oral law is flexible and highly adaptable;⁶⁹ this is one of its greatest strengths.⁷⁰ It responds to shifting priorities and exigencies in its society in ways that written law never can.⁷¹ Written law is frozen in time, reflecting the issues and concerns that were present at the time the law was adopted. Courts struggle continually with the problem of how to apply old law (including constitutional language), born of obsolete concerns, that no longer reflects

69. Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 STAN. L. REV. 509, 519 (“[O]ral traditions were far less likely to be rigid or ‘dead letter’ than later handwritten and typographic law would be. While oral culture had formalistic and exclusionary qualities, adaptability was its dominant feature. The fact that customs had to be recalled and repeated, rather than recorded and read, made them relatively malleable.” (citations omitted)).

70. Juma, *supra* note 36 at 481. See also Raja Devasish Roy, *Challenges for Juridical Pluralism and Customary Laws of Indigenous Peoples: The Case of the Chittagong Hill Tracts, Bangladesh*, 21 ARIZ. J. INT’L & COMP. L. 113, 143 (2004) (“Customary law based upon oral traditions has the advantage of flexibility, in that local communities may craft their unique multi-dimensional approaches in dealing with personal law disputes and provide remedies to fit the situation.”).

71. EWA WOJKOWSKA, U.N. DEV. PROGRAMME, *DOING JUSTICE: HOW INFORMAL JUSTICE SYSTEMS CAN CONTRIBUTE* 26 (2006) (“Codification is an oft debated subject. Customary law is often defined by its fluidity. This allows customary law to change with the community. The codification process would freeze the laws in place and may not allow them to develop and change over time.”).

the needs or priorities of contemporary society.⁷² Oral traditions, in contrast, evolve naturally and almost effortlessly to accommodate societal changes.

Second, oral traditions tend to be more fully understood and embraced by the community. Because the law is recorded only in memory, it must be fully internalized by those who will apply it, and it is therefore likely to be more wholly internalized by the community as a whole.⁷³ Public acceptance of and public confidence in legal rules and institutions are vital to the establishment of the rule of law.⁷⁴ Citizens will abide by such laws and heed such institutions when they know, understand, and collectively embrace them.⁷⁵

Moreover, codification delivers far less than it promises. First, when a statutory court attempts to apply customary law based on a codification or ascertainment, it suffers from the problem of recursive translations: from practice to writing, and from writing back to practice. In other words, it is unlikely that the nuances of the oral tradition can be fully captured in writing in the first place, including the role of equity in accounting for all surrounding circumstances. And when that writing is later interpreted and applied, especially by a statutory court unfamiliar with the particular culture and community from which the oral tradition emerged, something more is likely to be lost. Thus, even with the benefit of a written version of the customary law, the statutory court is likely to get it wrong.

A compelling example is the *S.M. Otieno* case in Kenya. In this case a statutory court was asked to determine whether state law or customary law of the Luo community applied to the decision as to where a deceased would be buried.⁷⁶ The deceased's widow – wanting to bury her husband in Nairobi – asserted rights in a statutory court, but the deceased's other relatives, representing the Luo clan, insisted that because the deceased was a Luo, he should be buried according to Luo custom, i.e., in the ancestral home. The court of appeals decision ultimately vindicated the customary law, and the case has been cited as an example of the continued vitality of customary law despite the intrusion of statutory regimes. As Juma points out, however, the case was a “missed opportunity”:

72. Adrian Vermeule & Eric Posner, *Outcomes, Outcomes*, THE NEW REPUBLIC, Aug. 12, 2009, <http://www.tnr.com/article/books/outcomes-outcomes> (last visited June 3, 2011) (noting the difficulty in reconciling application of the original language and intent of the U.S. Constitution with “the raw fact that large chunks of the original constitutional order are, from the standpoint of the present, normatively horrifying, economically obsolete, or politically unacceptable to supermajorities of the current citizenry.”).

73. Roy, *supra* note 70 at 143 (“As is the general trend with customary laws worldwide, practices and usages change as more and more people indulge in, get used to, and accept new ways of doing things. The creation of a walking path through a grassy field or woods is one of the best metaphors describing how customs originate or change.”).

74. See STROMSETH et al., *supra* note 18, at 75-76.

75. *Id.* at 76 (“Without a widely shared cultural commitment to the idea of the rule of law, courts are just buildings, judges are just bureaucrats, and constitutions are just pieces of paper.”).

76. The case is summarized nicely in Juma, *supra* note 36, at 484.

[T]he widow's case should have rested, not in denying customary law, but on asserting that those customs could allow for burial in places other than one's ancestral home [T]he clan lawyer failed to present current evidence on the current position of Luo Customary Law, thereby portraying Luo Customary Law as "timeless essences called from the pre-colonial past." . . . [T]he accuracy of Luo customs, as presented by the clan, was taken as absolute truth.⁷⁷

Had the Luo customary law been codified, the statutory court could have relied upon that code and might have avoided a misapplication of the controlling principle. On the other hand, reliance on a codification done in the past will similarly fail to capture "the current position of . . . Customary Law," and will tie its application to some timeless, but never timely, written characterization of it.⁷⁸

2. Ownership of Customary Law

With or without codification, there are serious problems with giving statutory courts appellate jurisdiction over customary courts. As already noted, there is a serious likelihood that the statutory court will get it wrong. But even if the statutory court gets the customary law right, the customary law institution is irreparably harmed by the assertion of statutory court authority over the legal question. Once a statutory court – in an exercise of appellate review – has ruled on what customary law means, the traditional authority, representing the community itself, loses ownership of its customary law.

The statutory court decision typically becomes a matter of public record and may be cited as precedent. In a common law jurisdiction such as Kenya or Uganda, the court's decision actually *becomes* law. At that point, the customary court and the community cease to be the owner and guardian of such law. Future statutory courts will look to the precedent, with little regard for what the original customary law may have been or how the customary law may have evolved since. The customary law is no longer customary, no longer a reflection of the community's norms and values, but a law defined and imposed by an external authority: the statutory court.

The problem is even worse if the customary law is codified, because then only the legislature can amend it. In that event, the community is entirely deprived of "its" law and subject to a statutory regime which, although originally inspired by its own oral tradition, is now imposed on

77. Juma, *supra* note 36, at 484-85 (citation omitted).

78. The real problem here came with the idea of expecting a statutory court to interpret and apply customary law at all. As argued *infra* in Part IV.D.2, the linkages should be established to ensure that statutory courts are never called upon to interpret or apply customary law.

the community by external authorities.⁷⁹

Recognizing the problems with codification for use in appellate review, some have advocated the less intrusive exercise of "ascertainment," that is, a recording of customary law that is merely descriptive and not authoritative.⁸⁰ But this is a minor concession to the problems inherent in codification; ascertainties will still embolden statutory courts to second-guess customary ones, and with no greater likelihood of faithfulness to the underlying principles and policies of customary law. Moreover, ascertainties will *not* amend themselves to reflect the ever-changing norms and customs, and may therefore be quickly rendered obsolete. Ironically, the ascertainment may impede the natural and salutary evolution of customary law toward greater recognition of women's rights and other human rights, because the older values and principles are ossified in written form.

3. Demeaning and Devaluing Customary Law Institutions

Quite aside from what happens to a case, and to the law, when it is appealed, the very structure of appeals formally and officially asserts state dominance over customary law and non-state institutions. This feature of the Superior State Approach inevitably undermines the dignity that many of these institutions deserve, simultaneously depriving them of their relevance in the communities they serve.

Accordingly, the typical implementation of a Superior State Approach, involving statutory appellate review of customary law decisions, and possibly the codification or ascertainment of customary law to facilitate such review, does incalculable damage to customary law and customary law institutions. So handicapped, customary law cannot maintain its vitality and relevance over time, and will simply be extinguished as the statutory regime assumes control of all law.

This approach would be appropriate, perhaps, if legal pluralism were envisioned as a temporary status to govern a state in transition. But where the intent is to maintain and support a pluralistic regime over the long term, the Superior State Approach is problematic. Customary law and customary institutions need a stronger structural foundation if they are to avoid obsolescence.

79. The *S.M. Otieno* case is an example of this. See *supra* note 76-78 and accompanying text.

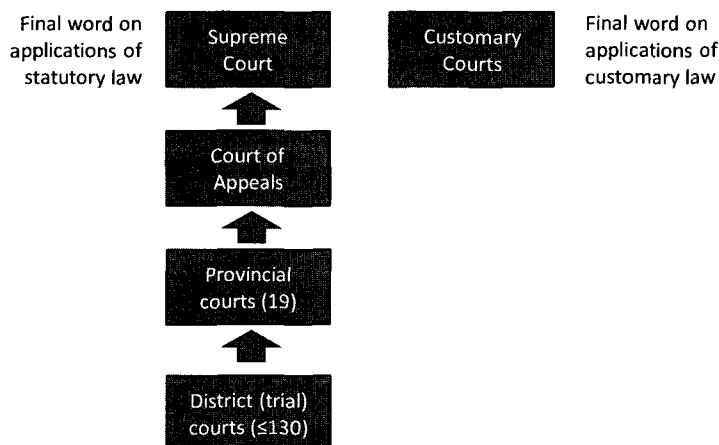
80. Manfred O. Hinz, *The Ascertainment of Customary Law: What Is It and What Is It For?* Conference Packet: Customary Justice & Legal Pluralism in Post-Conflict Societies 133, available at <http://www.usip.org/files/centers/.../Final%20Conference%20PacketINPROL.doc> (last visited Apr. 12, 2010). The United States Institute of Peace has embarked upon projects to ascertain customary law on the assumption that this is a better approach to the problems of implementing legal pluralism. See, e.g., U.S. Institute for Peace, Customary Law and Criminal Justice in South Sudan, <http://www.usip.org/programs/projects/customary-law-and-criminal-justice-south-sudan> (last visited June 2, 2010).

C. The Equal Dignity Approach

To avoid the stigmatizing effect of the Superior State Approach – and the violence that codification and appellate review do to customary law and legal pluralism itself – the non-state, traditional authority requires recognition separate from, and independent of, the state courts. Empowering and dignifying customary law institutions in a robust incarnation of legal pluralism requires that customary law, and the institutions that apply it, enjoy a separate and equal dignity, or something close to it, with the statutory courts.

Equal Dignity Approach

Figure 2



There are significant advantages to keeping the statutory and customary systems separate. If customary courts remain the sole guardians of customary law, the full benefit of the oral tradition can be retained. The law will retain its flexibility and responsiveness to community needs. Accordingly, customary law will continue to be a vital force in the community as a reflection of its culture, and public confidence will be preserved.

The primary difficulty with the Equal Dignity Approach is that complete independence of customary courts will open the door to human rights violations in those institutions. Traditional law and traditional values, in many cultures, violate modern and otherwise widely-accepted principles of gender equality and child protection. Application of such customary laws will run afoul of guarantees included in the constitution as well as the international human rights conventions and treaties the state has adopted. As a matter of constitutional integrity, as well as treaty

compliance, there has to be a way to ensure that customary courts comply with basic principles of human rights. Unfortunately, any effort to do that will necessarily compromise, to some degree, the concept of "equal dignity."

Beside the human rights issue, the other problems with the Equal Dignity Approach are not so much conceptual as practical. The simultaneous co-existence of parallel but wholly independent systems creates an opportunity for forum shopping, and introduces a range of jurisdictional, "choice of law," and "conflict of law" issues that are difficult to address.⁸¹ A preliminary discussion of such issues is set forth below in Section V.

D. Reconciling the Approaches

Given both the advantages and disadvantages of each of these approaches, it becomes apparent that the most productive approach may involve a compromise between them. The result will be a system that favors customary law, creating a presumption that customary law applies wherever it can – "maximizing" customary law – and that limits review of customary court decisions to the narrowly-tailored questions of human rights and due process dictated by the constitution. It is impossible to set forth all the mechanics here, or to resolve all the details of implementation, but some larger principles can be articulated. These principles can serve as useful guides in the establishment of linkages for an effective pluralism regime.

1. "Maximizing" Customary Law

The natural tendency for statutory law to subsume and diminish customary systems militates in favor of enhancing the role for customary law and customary systems as much as possible. If the pluralism regime contemplates a continuing and meaningful role for customary law, the structure of the system must tip the scales heavily toward customary law to resist the natural forces toward obsolescence that the Superior State Approach would impose. This first principle may be referred to as "maximization" of customary law.⁸²

There are compelling reasons for the "maximization" approach beyond

81. Choice of law is a problem under *any* system of legal pluralism. See Bond, *supra* note 14, at 301 ("The plural legal system established under colonial rule created difficult choice of law questions.").

82. This "rule of maximization" was articulated by the Colombian Constitutional Court in a 1997 decision on the rights of indigenous people and their claims to autonomy within the Colombian state. Manuel José Cepeda-Espinosa, *Judicial Activism in a Violent Context: The Origin, Role and Impact of the Colombian Constitutional Court*, 3 WASH. U. GLOBAL STUD. L. REV. 529, 623-24 (2004), citing Decision T-523 of 1997, Carlos Gaviria Díaz, J. (unanimous), Francisco Gembuel Pechene contra Gobernador del Cabildo Indígena de Jambaló y Otros (*Pechene v. Governor of Cabildo Indígena de Jambaló et al.*). Clearly the Colombian court recognizes the need to strike a balance that favors empowering indigenous systems.

the obvious one of demonstrating cultural sensitivity. In many post-colonial states where legal pluralism is the norm, the traditional fora are the most accessible, productive, and effective in meeting the dispute-resolution needs of the population.⁸³ If existing systems work, one should adhere to the “do no harm” principle and hesitate to tamper with them.⁸⁴ Legal institutions function within a delicate interplay of cultural values and human expectations. Unnecessary meddling is likely to upset this balance and harm, rather than strengthen, the rule of law.

2. Collateral Review in Lieu of Appeals

As already noted, the Superior State Approach does tremendous violence to the customary law, depriving the community of its ownership and control of such law, while depriving the law itself of its flexibility and responsiveness to community needs. Even a system of appeals from customary courts to statutory courts is likely to “do harm” in this way.⁸⁵ But without appeals, how can the human rights violations so often associated with customary justice be dealt with?

One approach is simply to trust the customary courts to do the right thing, focusing on educating and training the customary court adjudicators. After all, one of the strengths of the oral tradition is its flexibility and adaptability. As soon as it is apparent that gender discrimination cannot be tolerated in society, the customary law can certainly adapt itself to accommodate the shift. But merely trusting and training is likely to fall short of providing the protections needed. How many generations will it take before customary courts become effective guardians of those rights?

Some minimally intrusive method for correcting human rights violations is needed. Donovan and Assefa articulated the requirements succinctly in their analysis of the issue as it relates to Ethiopia: “What is needed in Ethiopia is a coherent, multi-faceted plan of state action designed to support and preserve the existing customary law systems while modifying them to eliminate the worst human rights abuses.”⁸⁶ Of course,

83. Minneh Kane et al., *Reassessing Customary Law Systems as a Vehicle for Providing Equitable Access to the Poor* (World Bank “New Frontiers of Policy” Conference Paper, 2005) available at <http://siteresources.worldbank.org/INTRANETSOCIALDEVELOPMENT/Resources/Kane.rev.pdf>. Stating:

Customary Law systems . . . provide communities with a sense of ownership, in contrast to formal legal systems that are perceived as alien to a considerable number of people in Africa. Customary law tribunals are inexpensive, accessible, and speedy. Their proceedings are easily understood by users of the system. They are useful when the formal state institutions are unable to reach the people, or where such institutions have broken down or are affected by civil strife and conflict.

See also *supra* text accompanying notes 19-22.

84. This is the concept of *primum non nocere* (“First, do no harm”) a core principle of medical ethics derived from the Hippocratic Oath.

85. *Id.*

86. Dolores A. Donovan & Getachew Assefa, *Homicide in Ethiopia: Human Rights, Federalism, and Legal Pluralism*, 51 AM. J. COMP. L. 505, 549 (2003).

there is a conflict inherent in the attempt to “support and preserve” customary law, while simultaneously “modifying” it.

The compromise lies in the concept of collateral review, rather than appellate review. The specifics of collateral review procedure I have recently summarized as follows:

Statutory courts can be vested with power to review and overturn customary court decisions not on their merits, but rather on the ground that the procedure, outcome, or remedy afforded by the customary court somehow violated minimum standards of human rights or judicial process guaranteed in the . . . Constitution. The procedure leaves the customary court to determine what its law is and how it should be applied, with the statutory court reviewing those decisions only against these external standards.

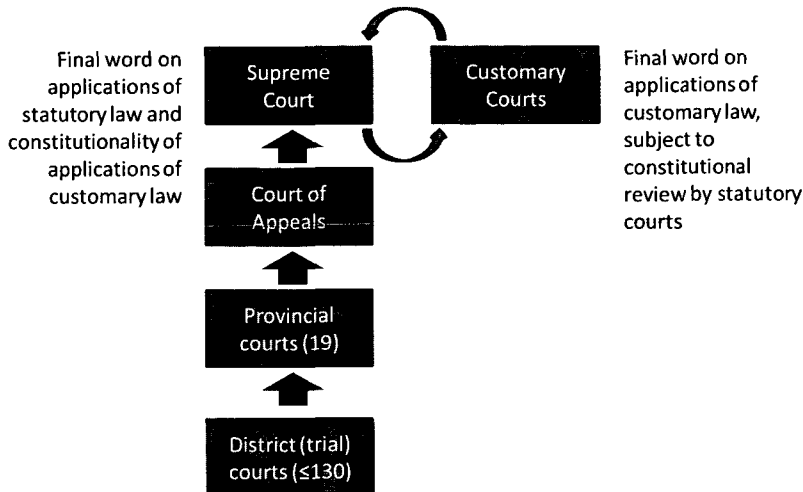
United States federalism suggests an analogy. Federal courts will not attempt to interpret state law but will defer to a state supreme court on such questions, overturning a state court determination (on, for example, a writ of habeas corpus) only if the state court proceedings or decision violate rights under the federal laws or Constitution. As the United States Supreme Court stated in *Estelle v. McGuire*: “[I]t is not the province of a federal habeas court to reexamine state court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.”

Similarly, statutory courts . . . can be empowered to review customary court determinations, deferring entirely to the customary court on issues of local law, but safeguarding the minimum standards of justice and human rights. That is, the statutory courts can be empowered to overturn a customary court decision only to the extent it violates principles reflected in a national constitution or in international human rights instruments that the country has signed or ratified.⁸⁷

87. Pimentel, *Rule of Law Reform Without Cultural Imperialism*, *supra* note 7, at 23-24 (citing *Estelle v. McGuire*, 502 US 62, 68 (1991)).

Collateral Review Approach

Figure 3



When the occasional case is overturned and remanded to the customary law forum for reconsideration, the customary court has an opportunity to internalize and adapt to the holding. Adaptation is easier because customary law “is not written but is retained in the mind and memory of a contemporary person, who attempts to apply it in the present-day world, ideally bringing contemporary sensibilities and local wisdom to the task.”⁸⁸ It is unnecessary to reconcile evolving legal standards with precedent or statute, as no such constraints are present in a customary law regime. Customary law’s “characteristic flexibility”⁸⁹ was recognized in a Nigerian case over 100 years ago:

“One of the most striking features of West African custom is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its character.” It should be noted that eighty-two years later the oft-quoted dictum was again quoted with approval by the Supreme Court [of Nigeria].⁹⁰

The upshot is that one of customary law’s defining characteristics and strengths is its adaptability, and because it is adaptable, it should be able,

88. Pimentel, *supra* note 7, at 19 n.76.

89. Ehiribe, *supra* note 7, at 132.

90. *Id.* (quoting Lewis v. Bankole, [1909] 1 NLR 100-101 (Nigeria); *Agu v. Ikewibe*, [1992] 3 NWLR 385, 409 (Nigeria)).

relatively easily, to incorporate the newly articulated standards.⁹¹ This is likely to be the least intrusive and most effective means of bringing customary law into line with constitutional norms on human rights.

Following the "rule of maximization," the presumptions are against interfering with customary law, with any such intervention narrowly tailored. The approach of the Colombian Constitutional Court to the issue is illustrative. In deciding whether to overturn a sentence of public flogging, handed down by a traditional court,

[t]he [Constitutional] Court held that (i) whenever conflicts between indigenous jurisdictions and other national interests arise, the constitutional judge should apply the "Rule of maximization" of indigenous autonomy; and (ii) the Rule requires acceptable limitations of autonomy, which are the least restrictive available alternatives. Indigenous peoples are thus limited in their use of their autonomous jurisdictional powers by a standard of "minimum inter-cultural consensus," which includes the right to life, the prohibition of torture and slavery, and the application of cultural procedural requirements.⁹²

In Mozambique, there are constitutional protections for human rights that should be enforceable at every level in the country.⁹³ Respect for indigenous systems cannot displace the constitutionally mandated respect for human rights. In addition to the specific constitutional provisions, Mozambique is signatory to a number of international human rights instruments, including the Universal Declaration of Human Rights and the

91. Kane et al., *supra* note 83 ("Customary Law systems . . . are flexible; they evolve as communities evolve. . . ."). Bond observes that customary law was transformed by colonial influence, including the general disenfranchisement of women. Bond, *supra* note 14, at 299 ("[T]he colonial authorities allocated control over personal law to indigenous communities. Personal law, however, was never truly free of British influence. It was this interaction between traditional elites and colonial authorities that led to the distortion of custom and customary law during the colonial period." (citation omitted)). If the customary law will adapt negatively in response to colonial authority, it should certainly be capable of adapting to conform more fully with international human rights norms.

92. Cepeda-Espinosa, *supra* note 82, at 624.

93. E.g. the Mozambican Constitution provides protections as follows:

Article 35: equal protection of law

Article 36: gender equality

Article 40: no "torture or . . . cruel or inhuman treatment"

Article 47: child protection

Article 48: freedom of expression and information

Article 51: freedom of assembly and demonstration

Article 52: freedom of association

Article 54: freedom of conscience, religion, and worship

Article 55: freedom of residence and movement

Article 59: right to due process, presumption of innocence, no double jeopardy

Article 61: no ex post facto law

Article 62: right to counsel

Article 65: right to a public trial; nonadmissibility of coerced confessions.

CONST. OF THE REP. OF MOZAM. (2004).

African Charter of Human and Peoples Rights, which are specifically referenced in the constitution itself.⁹⁴ Indeed, these international instruments could be characterized as a reflection of this “minimum inter-cultural consensus” mentioned by the Colombian Constitutional Court.⁹⁵ It should not be difficult, therefore, to determine what constitutes a sufficient basis for overturning the decision of a traditional forum.

One example of the testing of customary law against constitutional standards comes from the South African case of *Bhe v. Magistrate, Khayelitsha*,⁹⁶ which Bond discusses in some detail.⁹⁷ The question was whether the customary law of intestate succession – male primogeniture, in this community – violated 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, “[c]omparing the customary law rule of male primogeniture to the equality and dignity guarantees of the Constitution, the Court concluded that the customary law was a clear violation of the Bill of Rights.”⁹⁸

Applying such constitutional principles to customary law will certainly present a challenge, but the statutory court need not reconcile the two, only determine whether a particular application of customary law violates constitutional principles. On remand, it is up to the customary court to adapt customary law principles to accord with constitutional protections.

Unfortunately, this was *not* the ultimate outcome of the *Bhe* decision. The Constitutional Court did not merely strike down the application of male primogeniture and leave it for a customary forum to fashion a new constitutional judgment under customary law.⁹⁹ Rather, the Court went further and substituted the statutory provisions for intestate succession, enforcing a judgment under that law instead.¹⁰⁰ As Justice Ngcobo’s

94. CONST. OF THE REP. OF MOZAM. art 43 (2004).

(“The constitutional principles in respect of fundamental rights shall be interpreted and integrated in harmony with the Universal Declaration of Human Rights and with the African Charter of Human and Peoples Rights.”).

95. See *supra* text accompanying note 92.

96. *Bhe v. Magistrate, Khayelitsha* 2005 (1) BCLR 1 (CC) (S. Afr.).

97. Bond, *supra* note 14, at 327-29.

98. *Id.* at 328.

99. My recent essay in the Harvard International Review suggests that this was indeed the outcome of the *Bhe* litigation, that the task of reinterpreting or revising customary law was left to a customary forum. Pimentel, *Can Indigenous Justice Survive?: Legal Pluralism and the Rule of Law*, *supra* note 29. It was not. Indeed, in the South African regime, statutory courts (Magistrates’ Courts) have jurisdiction to apply customary law, so the case would not go back to a customary forum in any case. See Christa Rautenbach, *South African Common and Customary Law of Intestate Succession: A Question of Harmonisation, Integration or Abolition*, 12 ELECTRONIC J. COMP. L. 1, 3 (May 2008) (“section 54A(1) of the Magistrate’s Court Act [in 1988]. . . extended the application of customary law by any court where people from indigenous communities were involved.”), available at <http://www.ejcl.org/121/art121-20.pdf>. Thanks to Sanele Sibanda for educating me on these points. The fault for the earlier mischaracterization of this aspect of the *Bhe* decision is entirely my own.

100. *Bhe v. Magistrate, Khayelitsha* 2005 (1) BCLR 1 (CC) (S. Afr.).

dissent pointed out, however, the court did not need to go that far.¹⁰¹ It may have been possible to uphold a gender-neutral version of primogeniture, for example, that would have been more respectful of the customary law principles at play.¹⁰² South African scholar Sanele Sibanda, therefore, laments the *Bhe* case because it, and more particularly the legislative action in response to it,¹⁰³ serve to “ossify perceptions of the inferiority of customary law vis-à-vis the common law.”¹⁰⁴ He goes on to clarify, “[w]hat is objectionable is not the idea of reform but that this type of substitution is termed a reform of customary law.”¹⁰⁵ The more limited collateral review contemplated and promoted in this Article would avoid such unfortunate repercussions for customary law.

Perhaps a better analog than the *Bhe* case for this conception of collateral review is constitutional court review in civil law jurisdictions in Europe.¹⁰⁶ In Germany, Italy, and Spain, for example, if a statute’s constitutionality is called into question in a case, that case is suspended while the question of constitutionality is referred to and decided by the constitutional court.¹⁰⁷ The constitutional court does not decide the case, or dictate what law should apply if the challenged provision is found to be unconstitutional; rather, the constitutional court merely determines whether the statute is unconstitutional, and the case goes back to the lower court for resolution in light of this holding.¹⁰⁸ Similarly, under collateral review, a statutory court should not decide the outcome of the case or, as was done in *Bhe*, substitute another law for the offending customary provisions. Rather, the case should be sent back for reconsideration under customary law, in light of the finding of unconstitutionality.

IV. JURISDICTIONAL ISSUES AND CHOICES UNDER LEGAL PLURALISM

As already noted, any example of legal pluralism will inevitably raise difficult issues of jurisdiction and choice of law. The Mozambican constitution anticipates this, leaving the issues to be addressed through legislation:

101. *Id.* at 86 (“In my view, the rule of male primogeniture should be developed in order to bring it in line with the rights in the Bill of Rights.”)

102. *Id.*

103. The Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 (RCSA); Sibanda, *supra* note 68, at 33 (“After *Bhe* and the RCSA, the surviving wife and all the deceased’s children are entitled to inherit their share as determined by the Intestate Succession Act 81 of 1987. The RCSA, among other things, stipulates who may inherit after an intestate death by departing from the concept of dependents who may inherit in the traditional African family structure.”).

104. Sibanda, *supra* note 68.

105. *Id.*

106. Oral comments by Markus Böckenförde, Programme Officer, International IDEA, in Maputo, Mozambique (Apr. 28, 2010), when the author presented an earlier draft of this article at the international conference: “State and Non-State Public Safety and Justice Provision: The Dynamics of Legal Pluralism in Mozambique.”

107. JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION* 141 (3rd ed. 2007).

108. *Id.*

Article 212

Jurisdictional Function

* * *

(3) The law may establish institutional and procedural mechanisms for links between courts and other forums whose purpose is the settlement of interests and the resolution of disputes.¹⁰⁹

The question is still an open one, therefore, in Mozambique, and for most of the post-colonial world. When a particular legal claim arises, which system will have jurisdiction to hear it? Whose law will apply? And who will decide where it will ultimately be heard? There are several possible approaches to these questions, and it is helpful to review the full menu, considering the implications of each for legal pluralism.

A. Concurrent Jurisdiction

The first option is to give both customary and statutory courts concurrent jurisdiction: either system has authority to hear any case brought before it. That seems simple enough at first blush. But the recognition of concurrent jurisdiction only raises more questions. If either court *can* hear the case, how is it decided which court *will* hear the case?

Presumably, a plaintiff can choose to file in either forum, if both have jurisdiction. One option is to give the plaintiff that right – choice of forum, and hence choice of law – absolutely. But there may be reasons a defendant would object to that choice, reasons that may range from the tactical and strategic to more substantive concerns about whether the plaintiff's chosen court has the competence or impartiality to do justice in the case. Should the defendant have a right to seek removal of the case to the other court system which, after all, has jurisdiction over the case as well? And if so, on what basis?

Presumably, again, the defendant would have to bring his or her removal petition in the court chosen by the plaintiff. If the defendant were permitted to bring some kind of motion in the other court, it would create the intractable problem of having the case pending in both courts at the same time, along with the potential for both courts to assert jurisdiction and render inconsistent judgments.¹¹⁰

If concurrent jurisdiction exists for any or all cases in the plural system, the court where the case is filed first should have exclusive jurisdiction over the case. Any attempt to have the case transferred to another court or another legal system will have to be made with the court presently seized of the case. As explained below, however, there are compelling reasons to allow removal, and not permit the "first-to-file" rule to control where the

109. CONST. OF THE REP. OF MOZAM. art. 212(3) (2004).

110. Conversely, it is conceivable that both courts, aware that the case is pending elsewhere, might decline to hear the case, leaving the plaintiff without meaningful legal recourse in *either* forum.

case will ultimately be heard.

B. Subject-Matter-Based Jurisdiction

It is common to distinguish between types of cases, and allocate jurisdiction that way. In Kenya, for example, the Magistrates' Courts Act defines "claims under customary law" to include only certain subject matter:

- (a) land held under customary tenure;
- (b) marriage, divorce, maintenance or dowry;
- (c) seduction or pregnancy of an unmarried woman or girl;
- (d) enticement of or adultery with a married woman;
- (e) matters affecting status, and in particular the status of women, widows and children, including guardianship, custody, adoption and legitimacy;
- (f) intestate succession and administration of intestate estates, so far as not governed by any written law.¹¹¹

This statute gives statutory courts explicit jurisdiction over these claims under customary law. One might just as easily exempt this, or similar, subject matter from the statutory courts' jurisdiction, reserving exclusive jurisdiction for those claims in the customary forum.

There is some logic in this, particularly as customary law may have a lot more to say on some issues – such as family law and succession – than others. However, there are good reasons for customary courts to retain criminal jurisdiction: remote and rural communities need to maintain law and order. Access to justice remains a concern as well. When statutory courts are inaccessible for large portions of the population, restricting the subject matter jurisdiction of customary courts may have no other impact than to deny litigants a forum and a chance to have their claims heard.

In the United States, the federal courts have jurisdiction over "major crimes" committed in Indian country.¹¹² This decision was made by the legislature in 1885, based entirely on patronizing attitudes about the competence of tribal courts to do justice in serious cases.¹¹³ Nonetheless,

111. Magistrates' Courts Act (1967) Cap 10 Part I § 2 (Kenya), available at <http://www.kenyalaw.org/Downloads/GreyBook/5.%20The%20Magistrates%20Courts%20Act.pdf> (last visited June 3, 2010) (although the purpose of this definition does not appear to be one of allocating jurisdiction to customary courts).

112. Major Crimes Act, 18 U.S.C. § 1153 (2006) (Originally enacted as Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362 (1885)).

113. Rebecca A. Hart & M. Alexander Lowther, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CAL. L. REV. 185, 201-02 (2008). The authors explain:

Congress passed the MCA [Major Crimes Act] in response to the outcome of *Ex Parte Crow Dog*, in which the Court held that federal authorities could not prosecute a member of the Brule Sioux tribe who murdered another member of the same tribe on the Brule Sioux reservation because the crime was an intra-tribal issue that had already been adjudicated

the rules are clear, and everyone knows when the federal court has jurisdiction, and when jurisdiction is exclusively in the tribal court.¹¹⁴

C. Ethnic, Tribal, or Community-Based Jurisdiction

If the purpose of legal pluralism is to keep community-based legal systems working in the communities they serve, it may be appropriate to restrict the jurisdiction of those systems to the members of that community. Moreover, there may be manifest injustice in exposing someone outside of that community to a version of customary law that is foreign to him. Preserving the collective right of a tribe or community to apply its customary law in a customary way should not necessarily extend to imposing their law on outsiders.

Raquel Fajardo provides some perceptive insight on the underlying policies. She notes that there are two bases for the right to one's own law. The first, which she characterizes as "cultural," is based on the principle that "each human person or group has the right to be judged within the normative system pertaining to their culture."¹¹⁵ The second, which she characterizes as "political," concerns "a collective's power to control its institutions and determine what happens within its territory."¹¹⁶ She draws heavily on the 1989 Indigenous and Tribal Peoples Convention, which recognizes "the aspirations of the Indigenous Peoples to control their own institutions."¹¹⁷

according to Brule law. The Department of Justice (DoJ) viewed reservations as 'lawless,' and department officials enlisted the help of Congress to impose law on tribes. The DoJ sought a grant of federal jurisdiction over crimes in Indian Country, resulting in the MCA giving federal authorities the power to prosecute certain enumerated 'major crimes' committed in Indian Country.

(citations omitted). See also Gaylen L. Box, *Tribal Sovereignty & Criminal Jurisdiction in Indian Country*, 50 ADVOC. 13, 14 (2007) ("The paternalism of the United States was aimed at abolishing the pernicious practices of the Indians and demanding respect for law and order and civilized life . . .").

114. Some courts have held that tribal courts retain concurrent jurisdiction over major crimes, but they are able to punish them only as if they were misdemeanors. See, e.g., *Wetsit v. Stafne*, 44 F.3d 823, 825-26 (9th Cir. 1995) (upholding a tribal court conviction for manslaughter and noting concurrent jurisdiction under the Major Crimes Act); Warren Stapleton, *Indian Country, Federal Justice: Is the Exercise of Federal Jurisdiction Under the Major Crimes Act Constitutional?*, 29 ARIZ. ST. L.J. 337, 342 (1997) ("Today tribal police forces are capable of investigating and making arrest on cases involving major crimes. In fact, many tribal police forces already do so, but the offenders are only prosecuted for misdemeanors due to the punishment restrictions placed on tribal courts by the Indian Civil Rights Act."). The irony of this result is almost comical in light of the history of the Major Crimes Act. The statute was passed in reaction to the *Crow Dog* case in which the tribal court was widely perceived to have accorded inadequate punishment. If the effect of the current legislative regime in such circumstances is to ensure that major crimes prosecuted in tribal court are punished lightly, the statute is now at cross-purposes with its original intent.

115. Fajardo, *supra* note 54, at 41.

116. *Id.*

117. International Labour Organization, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, No. 169 (1989) available at <http://www.ilo.org/ilolex/english/convdisp1.htm>.

In the United States, for example, the U.S. Supreme Court has made clear that tribal courts have no jurisdiction over non-Indians.¹¹⁸ The doctrine was later extended, for a short time, to deny tribal courts criminal jurisdiction even over Indians, if they were of another tribe.¹¹⁹ The sympathies of the U.S. Supreme Court, therefore, are consistent with the cultural policy: that it is unfair to subject those outside the tribal society to the tribe's normative system. But because that policy deprives the tribal community of the power to prosecute crimes committed by non-Indians in Indian country, it undermines the "political" policy, the need for a tribal community to control what happens in its own territory.¹²⁰

A corresponding drawback to this approach is that it can severely restrict the jurisdiction of customary courts, limiting their role in the community and the easy access to justice they provide. For example, if such rules applied to family law issues,¹²¹ and members of two different tribes marry each other, neither tribal court would have jurisdiction to consider a divorce petition. The principle of "maximization" may well be lost in the application of such a restrictive rule.

A less restrictive, and therefore preferable, variation on this is the assertion of jurisdiction based on *residency* rather than formal membership in the tribe or community. In that scenario, a married couple from different tribes might still have their divorce adjudicated by a customary court, the customary court that operates in the community where they resided during their marriage.

D. Territorial Jurisdiction

Another option is to establish the jurisdiction of the customary court according to the location where the claim arose. This would involve drawing boundary lines, which may be difficult politically in some areas. The fairness and practicality of such an approach may well depend on the

118. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

119. *Duro v. Reina*, 495 U.S. 676 (1990), *superseded by statute*, Criminal Jurisdiction Over Indians Act of 1991, Pub. L. No. 102-137, 105 Stat. 646 (1991). Although Congress acted promptly to restore tribal courts' criminal jurisdiction over Indians of other tribes (in the so-called *Duro-fix* legislation), that legislation does not affect civil jurisdiction or the lack of criminal jurisdiction over non-Indians.

120. Justice Marshall, in his brief dissenting opinion in *Oliphant* (joined by Chief Justice Burger and quoted *in toto* below), highlighted the importance of the political policy:

I agree with the court below that the "power to preserve order on the reservation . . . is a sine qua non of the sovereignty that the Suquamish originally possessed." *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (CA9 1976). In the absence of affirmative withdrawal by treaty or statute, I am of the view that Indian tribes enjoy, as a necessary aspect of their retained sovereignty, the right to try and punish all persons who commit offenses against tribal law within the reservation. Accordingly, I dissent.

Oliphant, 435 U.S. at 212 (J. Marshall, dissenting). See also *infra*, Part IV.D Territorial Jurisdiction, discussing problems of enforcement of petty crime by non-Indians, at notes 124-25.

121. Both *Oliphant* and *Duro* dealt with criminal jurisdiction. *Oliphant*, 435 U.S. at 193-94; *Duro*, 495 U.S. at 677.

degree to which the local community is defined by its territory.

The analog here is the national boundary. Although there are exceptions, typically a foreign national cannot escape prosecution, by virtue of her citizenship, in the host state for crimes she commits there.¹²²

The counter-example again comes from the Native American community in the United States. As already noted, the tribal courts of an Indian community have no jurisdiction to prosecute a non-Indian even for crimes committed on tribal lands.¹²³ Only a federal or state court can prosecute such an individual.¹²⁴ This legal doctrine is unfortunate, as it has given rise to difficulties of law enforcement in Indian country. Federal prosecutors have higher priorities than petty crimes committed by non-Indians in Indian country – often situated at great distances from the urban centers where the federal courts are located. Accordingly, non-Indians have been able to commit minor offenses (such as shoplifting) with impunity on Indian reservations.¹²⁵ Because the territorial lines are very clearly drawn – the concept of “Indian Country” is defined with great precision in American law¹²⁶ – it would be easy to determine and enforce jurisdiction along such lines. Depriving the tribal courts of jurisdiction over crimes committed in their own lands emphatically diminishes the authority and dignity of tribal law and tribal institutions to enforce that law.

The mistakes made in American federal-tribal relations should not be repeated in post-colonial societies. Customary courts should be empowered to enforce their own local law, even against outsiders, if the claim arises in the community in which that court sits. To prescribe otherwise would do serious damage not only to the principle of “maximization,” but also to law and order – indeed, the rule of law – in that community.

E. Consent-Based Jurisdiction

Another approach is to prescribe a default jurisdiction but to allow the parties to agree to have the case heard in another system. For example, the statutory court might be granted universal jurisdiction, but if both parties consent to jurisdiction of customary court, the case can be adjudicated there

122. The exception to this general principle is the concept of diplomatic immunity, based on the Vienna Convention on Diplomatic Relations of 1961. Vienna Convention on Diplomatic Relations, August 18, 1961, 500 UNTS 95, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf. The Vienna convention makes clear, however, that such immunity applies only to “diplomatic agents” and their families. *Id.* arts. 31, 37. It is also clear that the immunity belongs to the diplomat’s government, not to the diplomat herself, meaning the government retains the power to waive diplomatic immunity and allow its agent to be prosecuted where the crime occurred. *Id.* art. 32.

123. *Oliphant*, 435 U.S. 191.

124. *Tribal Justice Act: Hearing Before the S. Comm. on Indian Affairs*, 104th Cong. (1995) (statement of Hon. William C. Canby, Jr., J. 9th Cir.).

125. *Id.*; J. Clifford Wallace, *A New Era of Federal-Tribal Court Cooperation*, 79 JUDICATURE 150, 152-53 (1995).

126. 18 U.S.C. § 1151 (2006).

instead. Procedurally, the plaintiff could initiate the action in customary court, which will assert jurisdiction unless the defendant objects in a timely manner to such jurisdiction.¹²⁷ Failure to object would constitute consent,¹²⁸ and the customary court would be able to proceed with full jurisdiction.

A variant of this system is in place in Zimbabwe:

When Zimbabwe became independent, the customary courts established under the colonial administration were not abolished. Instead, the new government passed the Customary Law and Primary Courts Act to enhance their operation. The bill, as the name suggests, integrated the primary courts (the village and community courts) into the mainstream judicial structure. The courts were given the jurisdiction to 'hear, try and determine any civil case in which customary law was applicable,' provided that: the defendant was a resident within the court's jurisdiction; that the cause of action arose within the jurisdiction; and that the parties consented to the court's jurisdiction.¹²⁹

According to this description, a Zimbabwean customary court has no jurisdiction unless the parties consent to it. There are other threshold requirements that must be met – community-based jurisdiction, in terms of the residency of the litigants, and territorial jurisdiction, in terms of the place the cause of action arose – but consent is a necessary condition.

The problem with this approach – which requires consent of both parties for the customary court to assert jurisdiction – is that it too easily marginalizes the customary courts.¹³⁰ They become purely optional, akin to voluntary mediation programs, which are tacked onto existing legal systems as a form of alternative dispute resolution. Moreover, if the statutory court is more likely to favor the defendant's position, or if the defendant believes the plaintiff lacks the resources to pursue her or his case in statutory court, it is likely that defendants will withhold their consent and engage in a type of forum shopping. The ability of either party to block customary court jurisdiction, by withholding consent, therefore seriously damages the concept of maximization.

A better role for consent-based jurisdiction is to enhance another type of jurisdiction. For example, if the system confers jurisdiction based on

127. Another variation would require both parties to affirmatively consent to community court jurisdiction, before jurisdiction could be asserted. Such an "opt-in" procedure, however, would serve only to further marginalize the customary courts which, as explained *infra* in this section, are already marginalized by consent-based jurisdiction to an unfortunate degree. Rather, it is preferable to take approaches that maximize the role of customary law.

128. Presuming jurisdiction absent an objection is another procedural approach toward maximizing customary law and customary court jurisdiction.

129. Juma, *supra* note 36, at 507 (footnotes omitted) (citing Andrew Ladley, *Changing the Courts in Zimbabwe: The Customary Law and Primary Courts Act*, 26 J. AFR. L. 95, 100, 103 (1982)).

130. Of course, the Zimbabwean model is even more marginalizing to the customary courts, as consent alone is *not enough*. The statute also requires jurisdiction over the litigants as residents of the community, and over the claim as arising in the territorial jurisdiction of the customary forum. This rule violates the "maximization" principle three times over.

community membership that gave rise to the claim, the outsider would not normally be subject to the jurisdiction of the customary court, *unless* he or she consented to such jurisdiction. Similarly, under a territorial jurisdiction regime, the parties could consent to customary court jurisdiction over a claim that arose outside the territorial limits of the customary court's regular authority. Because consent in these situations would serve to broaden the jurisdiction already accorded to the customary courts, this use of consent-based jurisdiction would serve the principle of "maximizing" customary law.

F. Reconciling the Approach to Jurisdiction

The ideal method system for linking up these traditional fora with the state regime will vary from state to state and society to society, depending on the circumstances particular to the pluralism in place. A few key concepts should govern those choices if legal pluralism is to be functional and meaningful in a particular society.

1. Presumptive Jurisdiction in the Traditional Forum

As already noted, following the principle of "maximizing" customary law, the jurisdictional presumptions should tip in that direction, with customary courts as the presumptive forum for most disputes in rural African society. As a practical matter, this is already happening in most of post-colonial Africa; the structure of legal pluralism, of linkages, should be crafted carefully to avoid undermining what is *working* at present. Access to justice issues alone suggest that the rule of law is better served when most cases enjoy the timely, responsive, and cost-effective adjudication that customary courts provide, particularly outside of urban centers.¹³¹

Accordingly, the traditional forum should retain the full scope of jurisdiction that it exercises or historically has exercised. The newly formalized legal pluralism should in no way limit that jurisdiction. In many places, this will mean that the traditional forum will have jurisdiction over disputes between members of that community and disputes that arise in that community.

These jurisdictional lines may, of course, be difficult to draw if the community is not clearly constituted, or its territorial boundaries are not well defined. Nonetheless, the answers will be obvious for a large number of legal issues, such as divorce proceedings or other domestic disputes. The wife and husband will have immediate recourse to their village or tribal forum to settle the dispute.

If a statutory court has concurrent jurisdiction, the plaintiff has a choice of forum. But the principle of "maximization" suggests that a statutory court should decline to exercise jurisdiction when a traditional forum is available that could hear a claim and resolve it. Again, the presumption

131. OPEN SOC'Y INITIATIVE FOR S. AFR. *supra* note 19, at 121.

should be that the case goes to the traditional forum. Anyone seeking to file a claim in statutory court would have to cite a reason why the statutory court should exercise its jurisdiction to hear the claim, such as (1) the parties to the dispute are from two different communities, so there is no obvious community forum to hear the case, (2) the parties to the dispute are located in the urban center, where the statutory court provides adequate access to justice, and/or (3) a party to the dispute seeks to assert a right arising under statute that would not be recognized by the traditional forum.

2. Consent Jurisdiction in the Traditional Forum

A traditional forum is unlikely to claim jurisdiction over disputes arising elsewhere, or involving “outsiders” who are not a part of the community served by the traditional dispute resolution body. However, as already noted, consistent with the “maximization” principle and the compelling “access to justice” objective, the outsider should be permitted to waive that objection and consent to the jurisdiction of the traditional forum. Accordingly, even when the traditional forum would not otherwise enjoy a presumptive right to jurisdiction, the parties may well prefer to have their case heard there, rather than incur the expense, logistical difficulty, and delays associated with litigating in the statutory courts. Consent-based jurisdiction should be employed to allow that.

3. Forum Shopping

One of the key difficulties with pluralistic systems is that of forum shopping. If there are different systems applying different rules, each party is likely to seek resolution of the dispute in the forum whose rules favor his or her respective legal position.

Instructive here is an example from Israel, which has operated under a formally-recognized system of legal pluralism for over 50 years. Despite the sophistication and refinement of that system over the years, it is vulnerable to this forum shopping problem. The situation is explained by Susan Weiss, who runs the Center for Women’s Justice in Israel, in a recent story on National Public Radio:

“When you get divorced, you have to decide issues of custody, you have to decide issues of marital property, you have to decide issues of visitation rights – all sorts of . . . matters that are ancillary to the issue of divorce,” [Weiss] says.

In Israel, there are two courts that have jurisdiction over these matters, the rabbinical court and the civil or family court. When a spouse sues the other for divorce, the court that receives the suit first gets to decide on issues like custody and property. What has developed is a race that can sometimes come down to a matter of minutes.

"If you're a woman, you want to race to the family court, because you want the family court deciding how much child support your husband pays for the kids or if he owes you alimony," Weiss says. "And men usually run to the rabbinic courts because they have a tactical advantage in the rabbinic courts."¹³²

This type of forum shopping – this race to the courthouse – is problematic for two reasons. First, it appears to reward gamesmanship at the expense of justice. Second, it encourages litigation as opposed to cooperation in addressing disputes. A marriage that has encountered difficulties may well be salvageable; similarly an unexpected disruption of a contractual relationship might be resolved simply and easily through open negotiation. But if both parties in each of these situations has incentives to file immediately for divorce or for breach – lest the other party initiate the action first in a less-friendly forum – the "first to file" rule for venue will result in premature and unnecessary court filings, contributing to an overly litigious society.

The need to discourage this type of forum shopping is another reason to establish presumptive jurisdiction in the traditional forum. If the statutory court will defer to the traditional forum, and decline to exercise jurisdiction in cases where the traditional forum appears capable of resolving the dispute, there is no incentive to rush to initiate the action early in statutory court. The appropriateness of the forum, rather than timing, should control the venue question.¹³³

V. APPLICATION TO MOZAMBIQUE

Mozambique's specific situation poses challenges for the effort to regularize and systematize legal pluralism. As an initial matter, a simple dichotomy between statutory and customary courts does not exist there. Not only are there multiple fora for dispute resolution, but they do not fall neatly into clean and simple categories. Competing with the statutory courts are a variety of other institutions engaged in dispute resolution in Mozambican society.

This is not to suggest that Mozambique is unique. Indeed, the issues that arise with its attempt to establish legal pluralism are representative of the problems throughout the region – problems that have resulted from the culture and history of post-colonial Africa. The purpose of the discussion concerning Mozambique is to illustrate, with greater specificity, how the issues arise in the real world, and how proposed solutions can and cannot

132. Lourdes Garcia-Navarro, *Under Israel's Divorce Laws, Men Get the Final Word*, NAT'L PUB. RADIO (Apr. 7, 2010), available at <http://www.npr.org/templates/story/story.php?storyId=125673859>.

133. Of course, there are compelling advantages to a "first-to-file" rule, most notably the ease of application. The question of appropriateness, or "whether the traditional forum is capable of resolving the dispute," is a far more difficult standard to apply.

be implemented. A brief history of Mozambique since independence is necessary for context.

A Portuguese possession, for all practical purposes since as early as 1500, Mozambique saw an independence movement gain strength in the 1960s:

[I]n 1962 several anti-colonial political groups formed the Front for the Liberation of Mozambique (FRELIMO), which initiated an armed campaign against Portuguese colonial rule in September 1964. After 10 years of sporadic warfare and major political changes in Portugal, Mozambique became independent on June 25, 1975.

...

When independence was achieved in 1975, the leaders of FRELIMO's military campaign rapidly established a one-party state allied to the Soviet bloc and outlawed rival political activity. FRELIMO eliminated political pluralism, religious educational institutions, and the role of traditional authorities.¹³⁴

A rebel alliance called the Mozambican National Resistance (RENAMO) emerged, funded and supported by the neighboring governments of Rhodesia and apartheid South Africa.¹³⁵ A bloody civil war ensued, tearing the country apart, killing an estimated one million, and displacing many millions more.¹³⁶ Ultimately, in the mid-1980s the FRELIMO government conceded the failure of socialism and began peace talks with RENAMO.¹³⁷ In 1990, a new constitution was enacted which provided for a multi-party system, a market-based economy, and free elections.¹³⁸ The war ended with a peace agreement in 1992, and although the fighting has stopped, FRELIMO and RENAMO remain the primary forces in Mozambican politics.¹³⁹

134. U.S. Dep't of State, Bureau of African Affairs, Background Note: Mozambique, available at <http://www.state.gov/r/pa/ei/bgn/7035.htm> (last visited Oct. 1, 2010).

135. *Id.*

136. *Id.*, explaining:

Civil war, sabotage from neighboring states, and economic collapse characterized the first decade of Mozambican independence. Also marking this period were the mass exodus of Portuguese nationals, weak infrastructure, nationalization, and economic mismanagement. During most of the civil war, the government was unable to exercise effective control outside of urban areas, many of which were cut off from the capital.

137. *Id.* ("In the third FRELIMO party congress in 1983, President Samora Machel conceded the failure of socialism and the need for major political and economic reforms. He died, along with several advisers, in a suspicious 1986 plane crash. His successor, Joaquim Chissano, continued the reforms and began peace talks with RENAMO.").

138. *Id.*

139. *Id.*

A. The Community Courts (formerly known as Popular Courts)

The community courts are the successor to the “popular courts,” established in the “revolutionary” period (1975-1984) when socialist ideology prevailed in newly-independent Mozambique.¹⁴⁰ The predominant view during early independence was that traditional or community cultures, and whatever dispute resolution systems they employed, should be rejected in favor of revolutionary socialist institutions. The earlier institutions were deemed products of colonialism, incompatible with the new independent state.¹⁴¹ In time, the government concluded that traditional cultures could be selectively co-opted to serve the socialist cause; this resulted in the formation of “popular courts.”¹⁴²

After democratic culture took hold as a successor to socialism in Mozambique in the mid-1980s, the “community courts” became a successor to the popular courts. Created in 1992, these community courts retained not only elements of traditional culture, but aspects of socialist culture as well, if only because many of the popular court judges were retained as judges of the community courts.¹⁴³

Community courts are widespread throughout Mozambique – with 1,653 identified in a 2004 Ministry of Justice Report – although no one seems to know just how many of these are actively functioning.¹⁴⁴ The lack of personnel and lack of financial support have presumably led a number of them to close down, or at least to fall dormant.¹⁴⁵

B. The *Régulos* System and Other Local Leaders

The *régulos* system in Mozambique is sometimes characterized as the heir to traditional or customary law and procedure in the Mozambican communities. This is a somewhat misleading characterization. Rather, the *régulos* system was a direct product of Portuguese colonial rule, an attempt to “interact with the existing lineage structures by instituting a system of traditional authority,”¹⁴⁶ by applying traditional rules and values. “Put simply, in theory the *régulo* was the ‘traditional’ authority, in accordance with customary laws, in practice *régulos* administered formal law, and to all intents, the *régulos* should have been considered government officers.”¹⁴⁷

This perception of the *régulos* undoubtedly accounts for the post-

140. De Sousa Santos, *supra* note 11, at 47-50.

141. *Id.* at 48-49.

142. *Id.* This follows a pattern in socialist revolutionary culture, seen also in Nepal, where the Maoists established “people’s courts” in the local communities, simultaneously heralded for providing meaningful access to justice to the people, and condemned for failing to adhere to minimal standards of justice and due process. David Pimentel, *Constitutional Concepts for the Rule of Law: A Vision for the Post-Monarchy Judiciary in Nepal*, 9 WASH. U. GLOBAL STUD. L. REV. 283 (2010).

143. De Sousa Santos, *supra* note 11 at 49-50.

144. OPEN SOC’Y INITIATIVE FOR S. AFR., *supra* note 19, at 127.

145. *Id.*

146. Convery, *supra* note 37, at 451.

147. *Id.*

independence marginalization of the *régulos* system, as the ruling FRELIMO party sought to diminish all legacies of colonialism. But in some parts of the country these traditional leaders continued to command deference and respect in their communities.¹⁴⁸

The RENAMO opposition, of course, seized this as a political opportunity, championing traditional systems, reflecting traditional customs and norms that remained popular in rural areas. They attempted to characterize the FRELIMO government as "hostile to African society."¹⁴⁹

Accordingly, the *régulo* system continues to operate in various areas of Mozambique, particularly those central areas dominated by the RENAMO party.¹⁵⁰ However, the *régulo* system is not found in the urban and suburban areas where the FRELIMO government has established state administration.¹⁵¹

Obviously, the *régulos* who still function are no longer serving the colonial power, or even the newly-independent state which, under the FRELIMO government, has sought to ignore them.¹⁵² With the help of RENAMO, the *régulos* have been recast as traditional leaders of traditional African society, embodying the whole system of traditional customs and norms.

In addition to the *régulos*, there are other locally elected leaders, called *secretários*, who may play dispute resolution roles in the *bairro* (neighborhood or town) or in the *povoação* (village).¹⁵³ In some cases the *régulo* and the *secretário* may be the same person.¹⁵⁴

C. Community/Tribal Authorities

In addition to the *régulos* and *secretários*, there are dispute resolution authorities in the local communities or tribes. They often function through small consultative councils or larger community councils which assemble to hear and resolve disputes according to traditional principles of equity.¹⁵⁵ Concerns have been raised about how well these fora adhere to constitutional principles and human rights standards,¹⁵⁶ but there is little question that they play a large role in resolving disputes and maintaining

148. *Id.* at 452.

149. Convery, *supra* note 37, at 452 (citing Giovanni M. Carboni, *Emerging Pluralist Politics in Mozambique: The FRELIMO-RENAMO Party System* 4 (London School of Economics, Development Research Centre Working Paper, 2003), attributing this quote to RENAMO leader Dhalakama).

150. Convery, *supra* note 37, at 452.

151. *Id.*

152. *Id.* (citing José Negrão, *Land and Rural Development in Mozambique* (1995) (unpublished paper presented at the Workshop on Integrated Analysis and Management of Renewable Natural Resources in Mozambique, 7-11 June 1999, proceedings edited by P.V. Desauter & L. Santos)).

153. OPEN SOC'Y INITIATIVE FOR S. AFR., *supra* note 19, at 129-30.

154. *Id.*

155. *Id.* at 133.

156. *Id.*

order in local communities.¹⁵⁷

D. Dispute Resolution by Religious Authorities and Traditional Healers

Religious groups and traditional healers, including AMETRAMO (the Mozambican Association of Traditional Healers), can also play an important role in resolving conflicts in the community. These actors tend to draw upon moral principles and moral suasion to help wrongdoers take responsibility for their actions. One *curandeira* (traditional healer) in Maputo noted that when her efforts, and those of the association, fail, they “call upon [their] *xehe* [a Muslim scholar] to come and solve it through Islamic law.”¹⁵⁸

Resort to Muslim authorities occurs primarily in the central and northern areas where Islam is dominant.¹⁵⁹ Traditional healers are relied upon heavily in cases involving witchcraft allegations.¹⁶⁰

E. Sorting the Pluralistic Adjudicatory Authorities

Under our “maximization” principle, presumptive jurisdiction over all disputes should rest with local, traditional authorities. Many of these institutions and individuals are playing a vital role in resolving disputes in their respective communities, and they do it through the application of principles that reflect the culture, tradition, and heritage of those same communities. Any implementation of Articles 4 and 212 of the 2004 Constitution should be done with caution to avoid harming or undermining the very mechanisms now maintaining the rule of law in rural Mozambique.

The mechanisms established for pluralism should provide, to the extent possible, equal dignity to these non-state fora. The problem for Mozambique is determining *which* non-state fora are entitled to such presumption and deference.

157. Maria Paula Meneses, *Traditional Authorities in Mozambique: Between Legitimation and Legitimacy*, OFICINA DO CES. 231, 19 (2005) (“Amongst all the entities involved in community justice, the traditional authorities and their law have, for a long time, been the most significant.”), available at <http://hdl.handle.net/10316/11125>.

158. OPEN SOC’Y INITIATIVE FOR S. AFR., *supra* note 19, at 134.

159. De Sousa Santos, *supra* note 11, at 60 (“Because it does not recognize any strong distinction between the religious and the nonreligious, the Islamic faith tends to regulate social life as a whole.”).

160. *Id.* at 69 (“Even in the revolutionary period, the popular courts would often turn to the traditional healers in order to solve cases involving witchcraft accusations.”) (citing Maria Paula Meneses, et al., *As Autoridades Tradicionais no Contexto do Pluralismo Jurídico*, in CONFLITO E TRANSFORMAÇÃO SOCIAL: UMA PAISAGEM DAS JUSTIÇAS EM MOÇAMBIQUE (B. S. Santos & J. C. Trindade, eds., 2003)); Juma, *supra* note 36; Meneses, *supra* note 157, at 25 (“When the case involves witchcraft accusations, the presence of traditional healers becomes central.”).

1. The Perils of Formal Recognition of Non-State Authorities

If the state engages in an accreditation process, designating which of these local authorities are entitled to recognition and deference, the whole system will be quickly politicized and corrupted. The *régulos* system itself is precedent, where local authorities were recognized, but only to further the interests of the colonizing power. As noted above, the legislature in Southern Sudan is repeating the mistakes of colonialism on precisely this issue, by politicizing the recognition of tribal chiefs.¹⁶¹

This latter concern is even more acute in Mozambique, where the opposition party has long championed the power and authority of traditional leaders. If the central government is going to play *any* role in deciding or designating which traditional leaders will be formally recognized under Article 4, it is impossible to imagine that it could be carried out without the taint of political bias or corruption.

2. Staying True to the Spirit of Article 4: Recognizing Them All

Given the problems inherent in picking and choosing between traditional fora, the default should be to recognize them all. Any customary or community authority – community courts, *régulos*, traditional authorities, even religious authorities and traditional healers – may be accorded jurisdiction to resolve disputes among those in the relevant community. Given the *mélange* of systems present in Mozambique at present, it is likely that any attempt to distinguish these fora on a scale of legitimacy is destined to fail. That is precisely the type of intervention that will do more harm than good, damaging local institutions' effectiveness in maintaining the rule of law in their own communities.

3. The More General Risk of Articulating Detailed Linkages

The risks associated with establishing formal linkages do not stop with the state's recognition of traditional authorities. Virtually *any* well-defined linkage mechanism will serve to over-assert state authority and undermine the autonomy and efficacy of traditional fora.

The reason any attempt at close integration of state and non-state systems is likely to fail is that the systems are built on entirely different, and in some cases mutually exclusive, cultural assumptions. Even the underlying principle of justice may be conceived quite differently – particularly as community-based systems often reflect the values of restorative justice, while statutory systems are more likely to reflect retributive justice models, consistent with their civil law antecedents in the Portuguese legal system. The resulting misunderstandings could serve to damage both systems.

In order to “maximize” customary law, its “linkage” with statutory

161. See *supra* text accompanying notes 63-65.

courts should be minimized. The power of collateral review can be invoked as a check on human rights violations by traditional authorities. But otherwise, the operative principle should be one of “delinking.” If they are to retain their vitality and functionality, traditional dispute resolution fora *must* be left alone to apply and develop their own traditional law and to exercise traditional authority in their own communities, without oversight or meddling by state authorities. Statutory courts should intervene only to address compelling human rights violations, and even then only in the most narrowly tailored way.

It will be impossible to articulate a system of linkages that could seamlessly correlate and integrate the diverse and divergent legal structures now operating in Mozambique. Any attempt to do so is unlikely to result in a functional structure, responsive to the needs of the full spectrum of Mozambican society. Because most of these systems are working, and providing some culturally-appropriate approximation of justice in a way the statutory courts could never hope to do, they should be accorded as much autonomy and deference as possible, consistent with basic principles of human rights.

The awkward gaps and overlaps that will inevitably emerge as these plural systems attempt to function side-by-side can be sorted out on a case-by-case basis. Some of the most nettlesome issues, such as the jurisdiction of the traditional authorities, already are the subject of ad hoc and pragmatic solutions; indeed, these entities are functioning and having a real impact, even now. As new conflicts and issues emerge, they can be dealt with by the courts themselves, applying the more general guiding principles of “maximizing” indigenous law and striving for equal dignity for the traditional adjudication fora.

CONCLUSION

There are no easy answers for how to correlate and link pluralistic adjudication in post-colonial African states, and Mozambique presents a typically troublesome case. Although the precise mechanisms cannot be articulated with specificity, the core underlying principles can. Those principles should respect traditional systems and values, affording them dignity as independent systems. Making these principles or traditional systems subservient to state institutions, allowed to exist as long as they serve the state institutions on the state’s terms, would be nothing more than repackaging and relabeling tried-and-failed colonial approaches.

Instead, the pluralistic regime should operate on the principle of “maximizing” the role and impact of indigenous law, and giving equal dignity to the institutions that apply such law. This will require state courts to defer to community-based adjudication, even declining to exercise jurisdiction when the case can be appropriately resolved in the latter forum. It will grant concurrent jurisdiction wherever possible, supplementing it with consent jurisdiction for those who could not otherwise be subject to the authority of the traditional forum.

The most troubling aspects of traditional law, the oft-cited human rights violations, cannot be ignored. A mechanism can and must be developed for guarding against such violations, doing as little violence as possible to the autonomy and dignity of traditional fora. A system of collateral review – giving statutory courts limited jurisdiction to review a traditional forum's decision for compliance with constitutional human rights standards – can serve that function. Such a system is calculated to tamper with traditional dispute resolution systems as little as possible, and to respect the community forum as much as possible. Most importantly, it allows customary law to respond in its own way to the human rights requirements, not threatening customary law with restrictions, but strengthening customary law by fostering its legitimacy and relevance.

For better or for worse, Mozambique has embraced the concept of legal pluralism. Sensitive implementation will help ensure that it is better, and not worse. Operational solutions will require ongoing attention, but the benefits and values of pluralism can be maintained as long as the implementation does not stray from these core principles: maximization of indigenous law and equal dignity for the traditional fora.