LEGAL PLURALISM IN THE GLOBALISED WORLD: INDIGENOUS LEGAL SYSTEMS AND COEXISTENCE WITH STATE AND INTERNATIONAL LAW

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ABSTRACT

The paper discusses the study of legal pluralism which refers to the existing interaction and coexistence of diverse legal systems within the boundaries of a single state. This article will discuss the nature of indigenous customary law existing alongside state and international law in the globalised world. It will discuss the theoretical bases of legal pluralism that have developed from legal anthropology and sociology and will draw a contrast between the legal thought of the Western and the indigenous worlds. It will describe the implications of legal pluralism that exist between the indigenous people and the state after the globalisation that took place on the global stage due to human rights law and the development of the relationship between the indigenous people and the state under the impact of globalisation.

Keywords: Legal Pluralism; Indigenous Law; Customary Law; Globalisation; State Sovereignty; International Law; Human Rights; Self-Determination; Traditional Justice Systems; Comparative Legal Systems.

Introduction

Legal pluralism is the occurrence of more than one system of law within the same social space. Malinowski proved that law exists outside the state in societies governed by customary law. Then in the 1970s, the question of the existence of law in customary societies was revived by Malinowski's follower, the American anthropologist Sally Falk Moore. Even more influential was the publication of the paper titled "On Legal Pluralism," in which the author, professor of law of the Erasmus School of Law in Rotterdam, coined the expression 'legal pluralism', referring to the disregard of the colonial state towards the indigenous law of colonial societies. Nowadays, globalization has resulted in increased contacts between different legal systems. One of the major effects of globalization has been the rise in the contacts between indigenous laws and state law. The indigenous communities of the world exercise customary rights (over land, culture, and autonomy), which are either overlapping or in conflict with state law. The aim of the essay is to discuss the background theories of legal pluralism, describe the system of indigenous customary law in operation, provide some regional examples of the above two topics, and examine the interfacing of indigenous law with state law. [1]

Theoretical Framework of Legal Pluralism

Legal pluralism has historical antecedents in colonial and anthropological research. There was recognition of a new system of law imposed or created in a colony superimposing itself over a customarily or traditionally recognized law that already existed in indigenous societies [2]. However, it is argued that indigenous law was a colonial myth and a continuity of a static traditional system was actually created. Current understanding of legal pluralism is descriptive and prescriptive. Descriptive scholars observe different systems of law for what they actually are and function as (religious law and state or local law), and prescriptive scholars argue that recognizing different systems of law opposes state centralism. For instance, legal scholar Fernanda Pirie suggests that: Legal pluralism is often used to describe a recognition of different legal systems that coexist in a particular territorial space. Legal pluralism does not advocate a particular ideology that favours one system of law over another but can indicate a lack of faith in a particular ideology that posits only state law is legitimate. Another scholar argues that a

[1] https://www.studocu.com/ec/document/universidad-central-del-ecuador/trabajo-grupal-operativa/beyond-pluralism-a-descriptive-approach-to-non-state-law/148410705#:~:text=ABSTRACT%20The%20concept%20of%20legal,The

[2]https://colonialcorpus.hypotheses.org/files/2018/02/3.Merry_Legal_Pluralism.pdf#:~:text=Yet%2C%20a%20rich%20body%20of,1981b

recognition of indigenous law is essential in challenging state law and suggests that legal pluralism can state a survival of indigenous law and opposes legal centralism. Legal pluralism theory distinguishes two types of legal pluralism: "state-sponsored legal diversity" versus "deep" or "ungoverned" legal pluralism with overlapping norms.

Sally Falk Moore's "semi-autonomous social fields" emphasize that there are rules in a local community, enforced at the local level.

Also, Boaventura de Sousa Santos' "legal cosmopolitanism" argues there is a multiplicity of "legal imaginaries" resulting from global interrelations. [3]

In short, legal pluralism theory allows one to assess indigenous-state relations in terms of state law ignoring indigenous norms, incorporating them, or interacting with them on an equal basis.

Indigenous Law and Customary Legal Systems

It is based on the culture, religion, and social values of the people. It is not passed down through official state law, but through oral transfer by elders or in rituals.[4] In one study conducted in Canada, indigenous law is described to "continue to exist apart from Western legal systems" and have been passed down through generations. It includes political organization, resource management, marriage laws, conflict resolution, to name a few. More importantly, indigenous law seems to maintain community cohesion and restorative justice as priorities; many indigenous legal systems are based on restitution and reconciliation rather than punishment. According to a UN Special Rapporteur, "most indigenous legal systems do not share [the] preoccupation with punishment" of Western law; they only try to "restore balance" to society.[5]

The origins of indigenous law are varied. According to John Borrows, an indigenous law scholar in Canada, there are five sources of indigenous law: the sacred (creation stories and treaties), natural (connections between people and nature), deliberative (legislation from community councils), positivistic (written laws through treaties and statutes), and customary (traditional indigenous law). For instance, indigenous law may base its principles on creation stories and genealogies as authoritative sources or community-created rules in the form of

[3] Supra 3
[4] https://implementingtrc.pressbooks.tru.ca/chapter/natural-law/#:~:text=Canada%20is%20a%20multi,and%20legislatures%2C%20that%20governs%20Aboriginal
[5] https://www.icj.org/wp-content/uploads/2019/11/Universal-Trad-Custom-Justice-Compil-updated-Publications-2019-ENG.pdf#:~:text=59,that%20indigenous%20judicial%20systems%20are

decisions from community councils. As pointed out by Borrows, in indigenous cultures, the rules of indigenous law are often bound up in their spiritual values and their relationship to nature. According to another study cited in the report, indigenous cultures had their own "unique systems. to govern all spheres of politics, economy, and social relations," ranging from dispute resolution systems to resources allocation in their customary laws.

Case Studies by Region

- **North America**: "Indigenous legal traditions are in parallel to US and Canadian laws." For example, in the US, these communities "are recognized as 'unique aggregations possessing attributes of sovereignty over both their members and their territory'. US federal law considers them "domestic sovereigns;" they have their own courts and police power in "reservations, subject to Congress' control in some respects." (The US Supreme Court in United States v. Mazurie called these societies "a good deal more" than private associations ". Tribal courts use "codes of law" or "books of Navajo law" or something else in civil cases involving tribe members. By contrast, in the province of Canada, Section 35 of the 1982 Constitution protects "existing aboriginal and treaty rights." While it applies to property and hunting and "trapping rights" especially, "cases asserting aboriginal 'rights' based on oral traditions of indigenous peoples" are increasingly accepted by courts. For example, aboriginal or First Nations, Inuit, and Métis peoples retain some decision-making power in "councils of elder" or in "restorative justice circles" alongside the laws of Canada. "Indeed, in North America, there has been a long institutionalization of 'legal pluralism'; that is, the state in Canada, unlike most others, recognizes jurisdiction of these tribes in most 'areas'; and US and Canadian laws 'incorporate treaty rights and legal systems'[6]. •

- **South America**: "Plurinational" constitutions that recognize indigenous laws are common in Latin American countries. Thus, in Bolivia, the 2009 constitution (the first "Plurinational State" constitution) states that "all public authorities must submit to the decisions issued in the rural native indigenous jurisdiction" and that "the State must promote and strengthen indigenous Justice". There was a "special jurisdiction law," known as "Jurisdictional Demarcation Law," which was created in order to organize indigenous jurisdiction in relation to common jurisdiction in courts. Nonetheless, there are observations

[6] https://www.fedbar.org/wp-content/uploads/2017/04/Breaking-Faith-pdf-1.pdf#:~:text=are%20sovereign%20in%20character,regulating%20membership%2C%20as%20do%20private

that the jurisdictional demarcation law has strict requirements that limit jurisdiction "when there is a concordance of the personal, material, and territorial criteria," constraining the scope of jurisdictional action of indigenous courts. Thus, a scholar asserts that "The text of the Bolivian constitutional reform has shown a certain incongruence in recognizing indigenous justice according to which it becomes "equal," when in fact "state law reserves a superior control" over indigenous justice. Ecuador's 2008 constitution has the same provision that gives recognition to indigenous justice and autonomy, which in practice has restricted their application. Meanwhile, in Colombia's 1991 Constitution, there was a multiethnic/multicultural provision that guaranteed indigenous peoples their right "to exercise jurisdiction in their territories ". Then in May 2025, a decree was issued in Colombia that granted indigenous peoples the autonomy "to constitute autonomous territorial entities that would have their proper jurisdiction system that cannot be opposited in projects in their territories ". The 1988 constitution in Brazil was also revolutionary in the sense that it states that it "recognizes indigenous peoples' original rights over the lands that they have traditionally occupied in their territories" that also "have respect for their organizations, customs, languages, beliefs, and traditions ". In fact, this right was defined in accordance "with the use that the peoples make of their lands according to their uses, customs, and traditions ". Thus, in Brazil, there was a requirement that there would be demarcation in their territories in order for there to be "community ownership in accordance with indigenous law ". Thus, constitutions in South America accepted pluralism in theory that often was difficult in practice.[7]

• **Africa**: In postcolonial Africa, there are diverse forms of pluralism. In South Africa, custom has been given a constitutional status in 1996 with a specific provision guiding courts on how to relate with custom law: "Apply customary law when that law is applicable, subject to the Constitution and any legislation specifically dealing with it." Still, in this country, efforts have been made through various acts like "Recognition of Customary Marriages Act 1998" to fully merge custom law into national legislation, thus ensuring that human rights, particularly gender equality, are guaranteed. In Kenya, through its 2010 Constitution, courts have been mandated to "promote" customary justice systems because they are "trustworthy and accessible." [8]Yet they "forbids" customary justice systems from violating rights guaranteed in the constitution—a paradox in practice. To address this problem, indigenous court leaders have initiated

[7]https://politicalsciencereviewer.com/index.php/psr/article/download/838/1027/3802#:~:text=jurisdiction,%E2%80%9D

[8]https://en.wikipedia.org/wiki/Customary_law_in_South_Africa#:~:text=Section%20211%20of%20the%20Constitution,nb%202

"Alternative Justice Systems Policy" in a bid to make custom justice compatible with human rights norms. In other countries in this continent, "customary courts" (or "tribal" and "ethnic" courts) coexist and complement national law in areas like marriage and property. In some of these countries, like Nigeria and Ghana, "customary law" coexist with national legislation, particularly with regard to "personal status and local disputes," until they are "invalidated by statute." In Africa, in general, there is deep-rooted pluralism wherein state law, religious law, and indigenous law coexist, depending on level of government acceptance and approval. In 2016, "The African Union approved a Draft Indigenous Peoples' Declaration that affirms rights of minorities and indigenous peoples—the culmination of a continent-wide movement." [9]

• **Asia**: There is also a form of legal pluralism within Asian countries, although to a lesser extent within a more official framework. In India, a secular country from a constitutional perspective, a high level of legal pluralism exists concerning Personal Law (Hindu Law, Muslim Law, Tribal Law, and so on). More specifically, the Panchayats (Extension to Scheduled Areas) Act of 1996 (PESA) allows the self rule of tribes in ten states. The PESA clearly aims to promote self-rule while retaining the "customary laws, culture, and traditional mode of life of the tribes," applying any law within these areas "in consonance with the tribal customs... and traditional modes of utilization". The law gives village assemblies (Gram Sabhas) power to govern forests, land alienation, and local dispute resolution within these communities based on customary law principles. In a similar vein, Fifth and Sixth Schedule areas within India provide for the existence of tribunals with a restricted legislative power within the framework of their own customs and laws. The Indigenous Peoples' Rights Act (IPRA)[10], recognizes ancestral domains and recognizes the customary law systems applying to land rights among indigenous peoples within it. The law obliges the state to "recognize the applicability of customary laws governing property rights" concerning land rights to ancestral domains. The law further clarifies customary laws to be "the principles and laws considered, accepted, and being observed by the said" communities. An interesting case is Malaysia's Orang Asli laws and Nepal's constitutional safeguards providing for Janajati self rule, while another example is the law concerning indigenous communities (masyarakat hukum adat) from 2001, enacted within Indonesia. In Asia today, customary forests, land ownership by tribes, and customary law for local dispute resolution coexist with the mainstream national laws

[9] Supra 6
[10] a law enacted by the Government in 1997 (Republic Act No. 8371)

systems.

Oceania: Legal pluralism is widespread in the Pacific basin, where it is found as a legacy of colonization. Thus, in Australia, after High Court cases (Mabo, 1992) on native title, reinforced by the Native Title Act (1993), there is now a system where indigenous native title – now recognized by Australian statute – coexists with Crown land laws. However, changes (notably in 1998) have circumscribed native rights, leading to international concern, with the UN Human Rights Committee, for example, pointing out[11] that the constraints on native title impinge on indigenous cultural rights. Indigenous customary law in Australia is also preserved in rituals, social obligations, and indigenous conflict resolution, but is never judicially ruled on by national courts. New Zealand now increasingly recognizes Maori indigenous customs (tikanga Maori) in court rulings, with reference to the Waitangi Tribunal, a government-funded commission, now interpreting tikanga in their judgments, reflecting Maori notions of land (whenua) ownership. National Supreme Court cases now construe tikanga as 'a source of laws in New Zealand,' with reference to their 'bicultural' legal system. Throughout other South Seas Island states (Samoa, Vanuatu, PNG, etc.), 'village' councils, Chefs' Courts, handle cases according to indigenous laws, with national appeal to government itself, overseeing these local decisions.

Here, it is clear how indigenous law, whether involved with land, rituals, or indigenous people's courts, exists alongside 'mainstream' national laws, a classic manifestation of legal pluralism on a large scale.

Engagement with State and International Law Systems

The ways in which indigenous and state legal frameworks interact with one another are complex. In some countries, customary law is incorporated into the national legal system; in other countries, there is a division between indigenous and state law. In recent years, there has been a call for states to recognize and engage with indigenous justice. For instance, in 2019, a declaration issued from the International Council of Jurists discusses indigenous justice and states that states must consult indigenous peoples with regard to legislation impacting indigenous peoples and criticize states for seeking to make indigenous justice be 'viewed as second class'. In a similar vein, various bodies of the United Nations state that states must not

[11] (under Article 27 ICCPR)

use human rights arguments insofar as they attempt to 'abolish indigenous justice mechanisms'. A report from a rapporteur with a UN agency explained that indigenous customs and courts, in being 'in flux', 'respond to the needs of indigenous peoples' and must 'complement national law'. A second report states that "human rights standards should not be invoked…as a justification to deny the right of indigenous peoples to promote and maintain their systems of justice and self-governance," and instead states must 'ensure that indigenous justice becomes compatible with internationally accepted standards'.

At a national level, there are different methods. Some nations (Bolivia, Colombia, and Canada) have an indigenous judicial system and coordination with national courts. Others (Australia) only allow indigenous rights regarding property rights (native title), and there are no indigenous courts. In some African states, indigenous law has been recognized in the constitution and has to be "subject to the constitution". In this manner, a contradiction with constitutionally guaranteed rights (women's rights, for example) could render indigenous laws null and void in indigenous courts. State and indigenous laws and customs can be used for factual evidence in some nations (for example, in South Africa, family and inheritance conflicts involve indigenous law as factual testimony). In some instances, indigenous councils will resort to a national human rights commission.

The global community has increasingly recognized the significance of pluralism in human rights and laws. The most prominent frameworks which recognize indigenous law autonomy include the Indigenous and Tribal Peoples Convention (No. 169) established by the ILO in 1989 and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) adopted in 2007. Under UNDRIP, indigenous peoples' rights include being tried in accordance with their own laws (Article 34), and they should be treated by States in accordance with their own laws (Articles 34 and 40) by respecting their institutions. The United Nations' minority rights laws and cultures (such as ICCPR's Article 27) constitute guidelines and mechanics arguing in favor of indigenous customs being indigenous culture identity. The ICCPR provides its citizens the right to their own culture and language regardless of whether they are from an ethnic minority or religious minority or linguistic minority. This provision offers protection to indigenous customs. Conversely, universal rights (equality and procedural justice) form constitutional constraints; those customs that are violative of universal rights (such as corporal punishment and gender discrimination in laws) come under the purview of national constitutional law.

Henceforth, an ideological conflict between indigenous peoples' rights to collective rights under global human rights laws and rights granted to every individual under global laws emerges. [12]

Challenges and Opportunities in a Globalised Context

Globalization is both a threat and an opportunity for indigenous legal pluralism.On one side of this debate are the threats to indigenous lands and laws presented by global market and development pressures. Global transnational corporations are taking advantage of mineral resources, timber resources, and oil resources found on indigenous lands; for example, deforestation of the Amazon to Canadian tar sands mines. Global warming is also an environmental hazard for indigenous peoples' livelihoods; for example, indigenous peoples urging for the inclusion of their ecological knowledge into global policies.[13]

Some of these indigenous peoples have harnessed international climate law for their struggles; for example, urging that schemes to reduce deforestation ("REDD+" projects) "must guarantee.and ensure protection for the rights of Indigenous peoples to their lands, their territories, and ecosystems".

They believe that their approaches to natural resource management can deliver more sustainable outcomes than current development approaches. On the other side are the opportunities for indigenous legal pluralism. Globalization creates an opportunity for indigenous legal pluralism through international human rights regimes Additionally, there is a heightened state of connectivity and transnational activism that comes with globalization. There are new forums for indigenous expression in the UN Permanent Forum on Indigenous Issues, in the World Intellectual Property Organization (traditional knowledge debates), as well as through indigenous global networks (such as climate caucuses at COP meetings). There is greater use of communications technology to record laws, share methods, and organize claims (such as demarcating indigenous lands). There is also a heightened sense of international human rights norms[14] which indigenous peoples can use to claim a right to legal pluralism in a

[12] https://humanrights.gov.au/resource-hub/by-resource-type/books/native-title-report-2002-recognition-native-title#:~:text=

[13] https://manoa.hawaii.edu/aplpj/wp-content/uploads/sites/120/2011/11/APLPJ_12.1_johnstone.pdf#:~:text=Declaration%20of%20the%20Rights%20of,protecting%20our%20rights%20to%20land

[14] (such as UNDRIP, ILO 169, regional affirmations)

global arena. To add to this, states have also utilized globalization for national gain in such a way that sees them invoke global commitments in the environment to negotiate indigenous rights through international trade agreements (such as court battles for indigenous rights in salmon fishing or in forestry). Nevertheless, globalization leads to a homogenization of laws. Free trade agreements or supranational laws can disregard traditional laws and may therefore cause a diminish in customary law. Assimilation of culture by means of media and urbanization further contributes to an absence of transmission of indigenous law from one generation to the next. It is a continuing challenge to strike a good balance in conforming to international human rights and environmental laws and in recognizing the autonomy of indigenous people. There is hope, though, in that legal pluralism may serve as an asset in sustainable and culturally rich development. By incorporating indigenous laws of communitarian land tenure and principles of restorative justice into a wider system of laws, better and more long-term solutions to globally challenged issues may be found. It is in this direction that international law now moves by, for example, encouraging the FPIC principle in projects involving indigenous lands [15]

Human Rights & Indigenous Law

The role of human rights frameworks in legal pluralism is complex. In one sense, universal documents establish the importance of indigenous culture and group rights. The UN Declaration on the Rights of Indigenous Peoples clearly states indigenous peoples' rights to preserve and develop their own institutions, including judicial systems (Articles 11-19, 34-40). Under ICCPR, Article 27 states the rights of persons belonging to ethnic minorities in relation to their own culture and language , giving a possible rationale for indigenous customs and judicial standards. States have accepted these standards in practice; for instance, in Colombia, indigenous territorial autonomy was enhanced through ILO Convention 169, which had been ratified in 1991 and later through the UN Declaration on the Rights of Indigenous Peoples.

Conversely, the balancing act between human rights and customary practices becomes apparent in the clash between the promotion of individual and liberal rights and customary practices as a whole. For example, a customary practice (such as land inheritance or community-imposed sentences) can be criticized within the framework of gender equality or the principle of due process. Countries have devised a way to somehow blend both by making customary laws subject to constitutional review. In Kenya, courts have already upheld the need for customary

[15] (UNDRIP Art. 32, ILO169 Art. 6).

courts to follow constitutional provisions with regard to torture and the right to a fair hearing. In South Africa, the Constitutional Court has nullified certain customary laws (such as the principal's divorce) as unconstitutional and thereby amended customary laws. However, it also creates theoretical questions: should indigenous law be stuck at a 'golden age' or be able to develop? Many legal scholars think that a dialogical relationship between human rights law and indigenous law may work smoothly. For instance, the UNDRIP regime is collective, while it urges indigenous peoples to achieve a developmental agenda (Art. 32). In reality, indigenous courts and assemblies may reinterpret their law depending upon human rights, and sometimes these courts include the protection of women and children within it, or resort to a broader indigenous principle (for example, respect or harmony) to support equality. The truth is that the idea of obligation and dignity within human rights may be embodied in these indigenous views concerning law.

The key to success is mutual respect between indigenous peoples, the national law system, and international law, which claim to promote the idea that "no one should be left behind within a law pluralism context." The indigenous peoples' side argues that "indigenous peoples' legal pluralism is a human right," while "the law systems must respect that idea [of legal pluralism]" because it ensures that "no one is left behind within a law pluralism context."

Conclusion

The coexistence of laws is not, in this globalized era, a neat identification of coexistence but a dynamic contestation over issues of authority, identity, and justice. Various legal systems all over the world, ranging from Native American tribal codes to Maori tikanga, from Amazonian customs to African chieftaincy courts, reflect the richness of human approaches toward conceptions of law. Entering alongside state law in ongoing processes continues to present both tensions (jurisdictional conflicts, value clashes) and synergies. Globalization through trade, communication, and international law reshapes these relationships: a threat to indigenous autonomy through resource exploitation or legal assimilation; empowerment for indigenous peoples through human rights instruments and transnational advocacy.

Basically, a pluralist legal order challenges the monopoly of the state: it compels recognition that a single legal system may not address all social realities. As one scholar observes, legal pluralism highlights the "alternatives to the legal framing of disputes" and the need for the state law to make space for other normative orders [OBJ]. Ensuring that indigenous laws and

state/international laws coexist peacefully and respectfully is both a practical necessity and a moral imperative. Protecting the integrity of indigenous legal orders enriches global justice with perspectives emphasizing community, sustainability, and human relations-values perhaps indispensable in dealing with the global challenges of our day.

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