**Embedded and Polylegal Systems**

Most of the legal systems we have been looking at are or were enforced by governments, but not all. Gypsy law, Amish law and, for most of the past two thousand years, Jewish law, are embedded legal systems, systems that enforce their own rules on their own people despite being under the legal system of a government with much greater access to force.[[1]](#footnote-2) Other examples would be the legal systems of the church of Latter Day Saints (Mormons) and the Nation of Islam (black Muslims) in present day America, the Sicilian Mafia, and the prison gangs described in Chapter XXX.

An embedded legal system faces the same problems as other legal systems, but additional ones as well. It must find ways of enforcing its rules on its population despite the fact that the chief ways in which legal rules are usually enforced, by force or the threat of force, may violate the rules of the overgovernment. If it wishes to permit activities that the overgovernment’s rules forbid, it must somehow prevent the latter set of rules from being enforced against its population. If individuals are free to shift out of the population controlled by the embedded system, it must find some way of making it difficult or undesirable to do so.

The diaspora Jewish communities found the simplest solution to these problems: Persuade the overgovernment to delegate to the communal authorities legal sovereignty over their population. As described in Chapter XXX, gentile rulers, Christian and Muslim, found it convenient to subcontract the job of ruling, and taxing, their Jewish subjects to the Jewish communal authorities. Those authorities were permitted to enforce their rules as legal rules are conventionally enforced, by the use or threat of force. In some cases, the force was even provided by the overgovernment. And since Jews were under their own courts and laws, they were not subject to the same legal rules as other subjects.

The Romani found a different set of solutions. The Vlach Rom enforced their rules by the threat of ostracism, a punishment that, unlike fines, imprisonment, or execution, did not violate the laws of the states they lived in. They also, judging by the historical evidence of the letters they carried in the 15th century, supposedly, and perhaps actually, from the Holy Roman Emperor, at some times and places claimed to have had legal authority delegated to them. It seems likely that, where those methods were inadequate, they made use of covert force.

The Romanichal and the Kaale relied on that final approach—using illegal force while evading the observation and legal authority of the over government. Both the private violence of the Romanichal and the duels and violent feuds of the Kaale were illegal, although the Kaale reduced the problem by conducting their feuds mostly by legal avoidance instead of illegal violence. In both cases, the risk of government interference was held down by the reluctance of Romani to complain to the authorities about the activities of other Romani.[[2]](#footnote-3)

The prison gangs described in Chapter XXX provide a striking example of an embedded system enforcing its rules by illegal force. Not only are they doing things, such as assault and murder, that are illegal, they are doing them inside a prison, where one might expect enforcement of government law to be particularly effective. The earlier convict code was enforced by the threat of ostracism in a context where ostracism produced an increased vulnerability to violence.

Ostracism is one example of a punishment that an embedded legal systems can impose without violating the rules of the legal system it is embedded in. Another is excommunication, refusing to allow participation in religious rituals. Both are effective because of special characteristics of the subpopulation.

The survival of the embedded system may depend on maintaining those special characteristics. Both the Romani and the Amish have a history of trying to keep control over the education of their children. Prior to the early 20th century this did not present a major problem for the Amish, since most of them lived in rural areas, sent their children to one-room schoolhouses where a sizable fraction of the class was likely to be Amish, and took them out of school after eighth grade. It became a problem in about the 1920’s due to increases in the age of compulsory schooling. Amish parents responded by refusing to send their children to high school, in some cases going to jail as a result. The resulting litigation eventually reached the Supreme Court, which ruled in *Wisconson v. Yoder* that the Amish could educate their children beyond eighth grade at home by teaching them the skills of running a house and a farm–as they were already doing.

A second problem arose some decades later as the increasing consolidation of school districts replaced small rural schools serving local families with much larger schools to which most students had to be bussed from a distance. Again the Amish refused to go along. They created their own system of one or two room local private schools staffed mostly by uncertified teachers and eventually persuaded state authorities to accept it. In both cases, it seems clear that the main concern of the Amish parents was that high school education, or elementary education in a large school where the teachers and most of the students were not Amish, would weaken their children’s connection to Amish culture.

A similar issue was raised by the interaction of the Amish with the Selective Service system during and after WWII. The Amish, who are pacifists, claimed, and for the most part got, conscientious objector status. This resulted in many young Amish men being assigned to hospital work in cities far from their homes. When they were released, a sizable fraction were no longer willing to swear to accept their congregation’s *Ordnung* and be baptized. That problem was solved by negotiation between the Amish Steering Committee and the Selective Service system, resulting in a system in which Amish and Mennonite conscientious objectors were assigned to do their war work on farms leased for the purpose from Amish owners and supervised by Amish and Mennonites.

Romani have also been reluctant to put their children into the ordinary school system. A school run by *gaje* (non-Romani) will not follow Romani rules of purity, with the result that children attending it will be polluted, *marimé.* Children who spend a sizable part of their time taught by and interacting with outsiders may fail to be acculturated into their parents’ culture.[[3]](#footnote-4) Girls may have their reputations damaged by freely associating with boys past the age at which such association is acceptable in Romani culture.

The problem was not insoluble:

“Demands from school authorities that parents send their children to school, … usually are solved by an exodus of the family for as long as is necessary.

It is surprising how well this technique works. A diligent truant officer has no authority or concern for a family once they have left town, and when they return he will generally have to begin all over again applying pressure to the family before threatening prosecution. Once the threat is made, the family takes off again.” (Sutherland 1975 p. 50).

Although the number of Romani in North America is about twice as large as the number of Amish,[[4]](#footnote-5) they have been less successful in setting up their own schools. A Romani school in Richmond, California, initially unfunded and supported by volunteers, later funded with state money, lasted for seven years. Several other projects, all depending on state funding of one sort or another, survived for shorter periods of time.[[5]](#footnote-6) More recently, however, California Romani have taken advantage of the state’s loose control over home schooling, sending children to a public school to age 12 then homeschooling them, in part to keep the girls’ reputations from being tainted by contact with boys after puberty. That solves the problem posed by the system of compulsory schooling but at risk of infecting children with the surrounding culture, making it more likely that they will “become American.”

The easier it is for members to move out of the subpopulation, the less effective ostracism is as a sanction. But the harder it is for members to defect, the greater the internal problems caused by members dissatisfied with the rules of the embedded system but unwilling to leave. That problem is nicely illustrated by Amish experience. One of the lines along which Amish congregations divide is the division between strong and weak shunning. Under the rule of strict shunning, *streng meidung*, the shunning of a member only ends when he has been accepted back into his congregation of baptism, normally as a result of having confessed his error, mended his ways, and been forgiven. Under the weaker rule, the acceptance of a shunned member into any Amish or Mennonite congregation is likely to result in the ban on associating with him eventually being lifted. That is a large difference for someone considering doing things that might get him banned, since the people required to shun him are likely to include most of his relatives and his spouse.

By Meyers’ and Nolt’s acount, the “Swiss” [[6]](#footnote-7) congregations, descendants of the 19th century wave of immigration, usually include strict shunning in their *Ordnung*, as do the Schwartzentruber Amish, the lowest (most conservative) of the Old Order affiliations. Both groups have below average rates of defection, with ninety percent or more of their children choosing to remain in the congregation. But the Swiss also have the reputation of more internal dissension and more frequent schisms than the High German Amish, the descendants of the earlier 18th century immigration, many (but not all) of whose congregations practice weak shunning. And while only a small fraction of Schwartzentruber children defect from their congregation, those who do defect tend to defect very far, ending up, unlike defectors from more moderate affiliations, outside of the entire spectrum of Amish and Mennonite groups.

The Fate of the American Romani

The easier it is for individuals to function in the surrounding culture, the weaker the threat of ostracism hence the less the authority of the embedded legal system. Modern America is an unusually tolerant society. That is an advantage from the standpoint of the individual Rom but a threat to the Romani legal system and culture.

Sutherland’s first book, based on research done between 1968 and 1970, described a Vlach Rom culture in which elders had almost complete control over children and grandchildren, marriages were arranged with almost no input from the parties, barriers between Romani and *Gaje* were strictly maintained, the *kris* drew large numbers of Romani as observers and jurors and produced a verdict that was almost invariably obeyed. It was a society in which the rules of *romania*, the system of law and tabu, were enforced and obeyed, since a sentence of marimé for their violation resulted in ostracism, social death for people whose human contacts were almost entirely with fellow Romani. It was a system whose members successfully evaded the rules of the society it was embedded in, manipulated that society’s authorities for their own purposes, made their living off of its members, supported its own members through a tightly knit system of kinship and mutual obligations.

Her second book, written more than forty years later, paints a very different picture. For most Vlach Rom the kinship system, the *Vitsa*, is largely gone. The funeral of a prominent figure no longer brings *Vitsa* members from all over the country. Elder authority is sharply reduced, youths frequently choosing their own marriage partners, sometimes in defiance of parental authority.[[7]](#footnote-8) Gypsy Evangelical churches provide new sources of authority, the minister and Jesus, undercutting the authority of elders and big men. The sentence of marimé is still imposed but “people are choosing whether to obey or not, so the blackballed person will have plenty of relatives and friends who ignore the marimé decision.”[[8]](#footnote-9) Conflicts that would once have gone to a *kris* often go instead to the court system. “The *kris* is no longer representative of several groups and therefore its authority to enforce its rulings is weakened. If it is mainly two families from two vitsi; *vitsa* members side with their family member, and there is not a larger contingency of Roma to exert authority over the *vitsa*.”[[9]](#footnote-10) Marriage, holidays, funerals increasingly follow the pattern of the surrounding society. The younger generation is fluent in English, less fluent in *Romanes*. “Women who have converted [to Gypsy Evangelical churches] no longer have fortune-telling as a way to contribute to their families’ income [because the churches teach that it is sinful] and thus have lost their economic power. They are expected to stay home and raise children in nuclear families, obey their husbands, and behave modestly.”[[10]](#footnote-11)

Sutherland ends her description of the changes:

“I see a strong and lasting sense of identity as Roma despite rapidly changing cultural practices. … I do not know what further changes may occur, but, Roma identity will survive. It has always survived.”[[11]](#footnote-12)

But the picture she paints is of an embedded society gradually collapsing into assimilation.[[12]](#footnote-13)

Government as Threat

A further problem for an embedded legal system is the pressure on its institutions created by the need to interact with the overgovernment. Here again, the Amish provide an example. Issues such as the treatment of Amish conscientious objectors, schooling requirements, the Amish reluctance to participate in the Social Security system and requirements for marking Amish buggies as slow moving vehicles all require negotiation between a state or federal government and someone who can speak for the Amish inhabitants of the state or the nation—a requirement hard to satisfy, since the Amish recognize no authority above the individual congregation.

To solve that problem, organizations such as the National Amish Steering Committee and Amish state schooling committees were formed. The steering committee successfully negotiated with the Selective Service system, both to assure Amish draftees of conscientious objector status and to funnel them into agricultural war service that would keep them connected to the Amish culture. It was later instrumental in negotiating solutions to other conflicts between the Amish and the government.

The creation of such supra-congregational structures carried with it a threat to the decentralized nature of Amish institutions. The steering committee had no formal authority over the congregations, but the willingness of governments to treat it as the voice of the Amish gave it powers that might have been converted into *de facto* authority.

One of the things the committee did was to produce a set of recommendations for the running of Amish schools, designed to prevent them from being run in ways that would threaten the understandings that made possible the Amish system of private schools staffed by uncertified teachers. If the committee had felt sufficiently strongly about the importance of having those recommendations followed,[[13]](#footnote-14) congregations that ignored the recommendations could have been threatened with a refusal by the committee to assist their draftees in claiming conscientious objector status. By that tactic or others–the Committee also played a role in securing exemption from Social Security taxes for Amish employees–the Committee could have borrowed power from the federal government and tried to use it to control the congregations.

It did not, so far as we know, ever happen, perhaps because the ideological commitment of the members of the Committee, themselves Amish, was too strong to permit it.[[14]](#footnote-15) But the fact that it could have happened suggests one problem facing an embedded legal system based, as the legal system of the Amish is, on decentralized institutions.[[15]](#footnote-16)

Romani kinship structures such as the Vlach Rom *natsiya* (“nation” or “tribe”) can contain hundreds of thousands of individuals, but the highest level political structure is the *Kumpania*.[[16]](#footnote-17) The original sense seems to be something like “encampment.” In the modern American context a *kumpania* is a group of families in a given location, such as a single town, sometimes containing unrelated families of multiple *natsiya*. A *kumpania* often contains a *Rom Baro*, a “big man,” a dominant figure. His power may be based in part on kinship with many of the families in the *kumpania* but also on his perceived ties with and influence over the *gaje*. A connection with the local chief of police or welfare officer, symbolized by his presence next to the *Rom Baro* at a feast, is an important political asset. Sutherland mentions one case where a family, encountering a temporary delay in qualifying for welfare benefits, mistakenly intepreted it as evidence that the local *Rom Baro* did not approve.[[17]](#footnote-18) The willingness of local authorities to believe criminal accusations by one Rom against another can be a potent weapon in feud.

In the U.S., such dealings with *gaje* authorities support central power at the local level but not, as yet, at the national. The reason may be the difficulty of combining a national organization purporting to speak for all the Rom with the low profile tactics used to evade government authority. Outside of the U.S., however, such attempts sometimes occur.[[18]](#footnote-19)

**Polylegal Systems**

So far I have been considering legal systems unambiguously under the authority of an overgovernment. Somewhat different issues are raised by polylegal systems, societies where different people are under different legal regimes, none of which has superior status to the others. An example would be Sunni Islam, with four different and, at some times and places, coequal schools of law existing in the same city. Other examples existed in the Middle Ages. During the reconquista in Spain, it was not uncommon for a Muslim village to pass under Christian rule but be allowed to remain under Muslim law. During the period when German traders were expanding their activities into Slavic areas along the Baltic coast, local rulers sometimes permitted the Germans under their rule to be under German law. Under the millet system of the Ottoman Empire, different ethnic communities, not only Jews but also various Christian groups, were given self-governing powers, subject to whatever requirements the Empire imposed upon them.[[19]](#footnote-20)

Wales during the centuries before its union with England provides an interesting case. From Anglo-Saxon times on, the Welsh princes had viewed the English king as the overking to whom they owed fealty but not homage. Initially, Normans holding land in Wales by right of conquest claimed a similar quasi-regal status, owing allegiance to the king of England but free to apply a mix of Welsh and English law and custom to the lands they ruled. Over time Welsh territory, whether held by Welsh princes or Norman lords, gradually came under the legal authority of the English crown, a process completed by the Act of Union under Henry VIII.

Until then, in some cases and for some but not all legal purposes, English were under English law, Welsh under Welsh law.[[20]](#footnote-21) A single lordship might include both Welsheries, areas where Welsh law applied to matters such as inheritance, and Englisheries where English law applied.[[21]](#footnote-22) When Llywelyn ap Iorwerth, ruler of the northern kingdom swore fealty and liege homage to king John, the king “allowed either English or Welsh law to be utilized to resolve disputes in Llewelyn’s land, according to whether they were held of Welsh or English lords.” Late in the period, Welshmen were sometimes rewarded for service to the crown by being given denizen status, becoming honorary Englishmen. Under Henry VII, denizen status was sometimes given to whole areas or lordships.[[22]](#footnote-23)

A polylegal system raises no special problems as long as the disputes it applies to are intra rather than intercommunal, and in most such systems most disputes probably were. The problem arises when a polylegal system must deal with cross cases, disputes between (say) a Maliki plaintiff and a Shafi’i defendant. Does such a case go to a Maliki court, a Shafi’i court, or some third court? *[I don’t yet have a clear answer to this question]*

One possible solution is for one system, perhaps the system of the ruler, to have jurisdiction over such cases, but there are others. The rule might, for instance, be that a case always went to the legal system of the defendant.[[23]](#footnote-24) Each pair of legal systems might have an agreement specifying the court to which disputes between them would go,[[24]](#footnote-25) although that still raises problems for a dispute with multiple parties adhering to more than two systems. In the Islamic case, disputes between a Mulim and a Christian or Jew could be taken to a Muslim court. But that did not solve the problem of disputes between Muslims adhering to different schools.

The same issue exists in current U.S. law, which is in its own way polylegal. Each U.S. state has its own law. Most disputes have an unambiguous location in a particular state, but not all; consider the case of a customer in California who purchases a product produced in Massachusetts from a seller in Texas. What court gets to decide the resulting product liability dispute? U.S. legal theory includes an elaborate set of rules for solving such conflict of law cases.

One of those rules is diversity jurisdiction. A civil case that would normally be under state law can be heard by a federal court instead if the plaintiff and defendant are from different states. Think of it as a modern version of the rule that sends cross cases to the ruler’s court. The answer is not simply that federal law controls—in some contexts federal law cannot override state law, making it the job of the federal court to resolve the case according to what it finds to be the relevant state law.

The same problem appears, *de facto* if not *de jure*, within the federal system, since the interpretation of federal law is mostly done by the appeals courts of the twelve federal circuits. There is thus a law of the circuit, and just as in the case of state law there may be ambiguity as to which circuit has jurisdiction over the case. Only when the Supreme Court agrees to hear a case is a rule produced that is binding on all circuits. Conflict between circuit opinions is one of the reasons for the Supreme Court to accept a case.

*[This chapter could use more information on how historical polylegal systems worked.]*

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Even within a lordship there might be different processes for Welsh and English inhabitants … . Ireland p. 17

“In substantive law, then, the old compensation model seems to have long survivied, even where, as in the northern lordship of Dyffryn clwyd, it seems to have existed procedurally alongside the English-based criminal prosecution procedure of the appeal of felony.” Ireland p. 17

“Dispute settlement techniques work for as long as they work, and in the social circumstances in which the conditions for their existence prevail. Law is an inatrument which is off great importance, particularly in the modern world, but its use will require that those who are supposed to employ it both know of its existence and choose to employ it above other instruments available to them. We need not assume that these conditions will automatically apply in the Wales of the middles ages, or indeed later.” P. 18

“in no generation has political outrage been unduly inhibited by close

attention to the facts;” Davies, about English attitudes to Welsh law in the 15th c.

http://reader.eblib.com.libproxy.scu.edu/%28S%280okpx2lasrl2ziainjzrhk0t%29%29/Reader.aspx?p=1987307&o=2897&u=JXN18Ol6ODmFHjEQCa2HhA%3d%3d&t=1460392873&h=7F655C03BB18AF0D61C44D248BE476CD63E9047B&s=43954902&ut=9689&pg=1&r=img&c=-1&pat=n&cms=-1&sd=2#

1. Some legal systems, such as Somali, are non-governmental but not embedded, since there is no government above them with the power to enforce its rules. [↑](#footnote-ref-2)
2. Although the historical accounts make it sound as though, early on, some tried to enlist outsiders in their internecine feuds. Gypsy law pp. 142-145. Sutherland describes Vlach Rom in America accusing other Vlach Rom of crimes as a move in feud. The objective does not usually seem to have been to get the accused actually convicted of anything, however. [↑](#footnote-ref-3)
3. For details see Hancock 134-5. For the gradual breakdown of Vlach Rom institutions see Sutherland 2017. [↑](#footnote-ref-4)
4. Hancock estimates a million overall, about two-thirds of them Vlach Rom, stricter in maintaining social distance from others than other Romani groups, hence less willing to risk pollution or acculturation by sending their children to non-Romani schools. Hancock pp. 128-129. The major Vlach Rom dialects are mutually intelligible, unlike some other dialects of Romani, so the Vlach Rom would seem to be the group most able to immitate the Amish solution to the problem. The Romanichals, the next largest group, speak a language that is not mutually intelligible with the Vlach dialects, English with many loan words from Romani. The smaller Romani groups are to a considerable extent geographically concentrated, however, which should make establishing schools easier. Hancock pp. 130-131. [↑](#footnote-ref-5)
5. Hancock, Chapter 9. [↑](#footnote-ref-6)
6. The Swiss Amish speak a German dialect related to Schweizerdeutsch while the High German Amish speak Pennsylvania Dutch, a German dialect that developed in Pennsylvania out of multiple immigrant dialects. [↑](#footnote-ref-7)
7. “Young people run off together when they want to get married and these issues of purity and morality are never brought to a *kris*.” Sutherland 2017 p. 103. [↑](#footnote-ref-8)
8. Sutherland 2017 p. 99. [↑](#footnote-ref-9)
9. Sutherland 2017, p. 45, quoting a communication from Ian Hancock. [↑](#footnote-ref-10)
10. Sutherland 2017, p. 104. [↑](#footnote-ref-11)
11. Sutherland 2017 p. 105. [↑](#footnote-ref-12)
12. Seven years before Sutherland’s second book was published I put up a blog post arguing that the tolerance of North American societies was a threat to the maintainence of Romani culture. http://daviddfriedman.blogspot.com/2009/12/toleration-vs-diversity.html [↑](#footnote-ref-13)
13. “It is the Committee's definite concern that one small group does not upset the general school system appreciated by many and approved by the United States Supreme Court.” (Old Order Amish Steering Committee 1980:42) [↑](#footnote-ref-14)
14. "Some people may think that the Committee is trying to run the churches but this should not be so. *The Committee is only the voice of the churches combined"* (Old Order Amish Steering Committee 1972:58; emphasis in original). [↑](#footnote-ref-15)
15. For an extended discussion of the history of the Steering Committee and the tension between its structure, hierarchical and bureaucratic, and the decentralized Amish culture, see Olshan 1990. [↑](#footnote-ref-16)
16. While there is no political structure above the *kumpania*, the *kris* can be and is used to resolve feuds that cross *kumpania* boundaries. [↑](#footnote-ref-17)
17. Sutherland 1975, p12. Pp.110-113 [↑](#footnote-ref-18)
18. “Earlier, during our fieldwork in the 1980s in Slovakia (among the Lovari and Bougešti), we witnessed attempts of such institutionalisation when the regional respected clan leaders tried to govern their communities by accepting the role of Roma representatives in front of the majority authorities… .” (Marushiakova and Popov 207, pp. 86-87.) [↑](#footnote-ref-19)
19. As this example suggests, the line between embedded and polylegal systems is a fuzzy one; diaspora Jewish communities with delegated legal authority could be classified either way. [↑](#footnote-ref-20)
20. “… the racial divide between the Welsh and the English remained significant with regard to what procedure was to be used in certain personal actions, with regard to whether property was to be inherited and with regard to whether lands were freely alienable, … .” Watkins 2007 p. 113. [↑](#footnote-ref-21)
21. “Areas under the jurisdiction of the Norman laws were often divided into Englishries, where the Norman customs obtained, and Welshries, where the population continued to live according to their native laws at least insofar as private law rights and duties, such as those relating to landholding, succession and family matters, were concerned.”Watkins 2007 p. 81. [↑](#footnote-ref-22)
22. Watkin 2007, pp. 118-119, 121-2 [↑](#footnote-ref-23)
23. In an analogous English context, the plaintiff decided what court a dispute went to. The income of the judges came from judging cases, giving them an incentive to be pro-plaintiff so as to attract suits. Klerman 2007. [↑](#footnote-ref-24)
24. The approach used in the hypothetical legal system described in Friedman (1972). [↑](#footnote-ref-25)