**Embedded and Polylegal Systems**

Most of the legal systems we are familiar with 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-1) 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, the and the prison gangs described in Chapter XX[Prison].

An embedded legal system faces the same problems as other legal systems, but additional ones as well. It must find ways of enforcing rules on its population despite the fact that the 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 XX[Jewish], 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 provided by the overgovernment.

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, 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, in varied times and places, 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 overgovernment. 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-2) The Vlach Rom in America, in contrast, used the *gaji* legal system as a weapon, accusing their opponents of crimes, real or invented, charges that would be dropped if the feud was settled.

The prison gangs described in Chapter XX[Prison] 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 a punishment that an embedded legal system 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 effectiveness of the threat of ostracism depends on how easily the exiled Romani can function outside of his community. *Gaje*, non-Romani, do not know the marimé rules and so do not and cannot obey them. It follows that they are all polluted, unclean, carriers of a contagious spiritual disease and perhaps physical diseases as well, people with whom no Rom in his right mind would willingly choose to associate; when and if such association is unavoidable it must be taken with great care.[[3]](#footnote-3) The Romani view of *gaje*, reinforced by the *gaje* view of the Romani as uneducated and illiterate thieves and swindlers,[[4]](#footnote-4) eliminates the exit option and so empowers the *kris* to enforce Romani law by the threat of exclusion from the only tolerable human society. It is a particularly powerful threat in a culture where social interaction plays a very large role in individual life.

Part of the painfulness of being denied contact with one’s own people, whether to be in a jail, a hospital, or a job, as that of being alone. To be among a group of Rom is the natural everyday context within which a person lives, learns and expresses his personality; to be among a group of *gaje* is to be alone. Wherever he travels or lives, a Rom is rarely alone. More often he is surrounded by large numbers of relatives and friends.[[5]](#footnote-5)

For the Vlach Rom in the relatively tolerant environment of the U.S. that mechanism has proved inadequate, leading to the partial breakdown of the traditional institutions as described in Sutherland 2017.

The survival of the embedded system depends on maintaining its special characteristics. Both the Romani and the Amish have a history of trying to keep control over the education of their children, as described in earlier chapters. I have already described the problems that the Amish faced, and eventually solved, in dealing with increasing centralization of the school system and extensions of the length of schooling. 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 their religion and culture. Similar issues were raised by the interaction of the Amish with the Selective Service system during and after WWII, and again solved.

Romani have also been reluctant to put their children into the ordinary school system. A school run by *gaje* will not follow Romani rules of purity*.[[6]](#footnote-6)* Children who spend a sizable part of their time taught by and interacting with outsiders may fail to be acculturated into their parents’ culture.[[7]](#footnote-7) 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,[[8]](#footnote-8) 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.[[9]](#footnote-9) More recently, 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 part of the problem posed by compulsory schooling but not the risk of infecting children with the surrounding non-Romani culture.

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 conflict 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 account, the Swiss[[10]](#footnote-10) congregations, descendants of the nineteenth-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 eighteenth-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.[[11]](#footnote-11)

## 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 weaker 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 by parents and grandparents 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 taboo, were enforced and obeyed, since a sentence of *marimé* for their violation resulted in social death for people whose human contacts were almost entirely with fellow Romani. It was a system whose members supported each other through a tightly knit system of kinship and mutual obligations while successfully evading the rules of the society it was embedded in, manipulating that society’s authorities for their own purposes and making their living off of its members.

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.[[12]](#footnote-12) 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.”[[13]](#footnote-13) 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*.”[[14]](#footnote-14) 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.”[[15]](#footnote-15)

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.”[[16]](#footnote-16)

But the picture she paints is of an embedded society gradually collapsing into assimilation.[[17]](#footnote-17) In the words of a correspondent who had been a student in the school she briefly ran in Richmond, now a grandfather:

Wow, Anne those were the best times–when Roma would get along and care for each other. If someone was sick they came to the hospital till the guards would tell them to leave. When someone would die, the whole Roma that was in town would come to the family and would stay round the clock not to leave them (the deceased) alone. I’m so glad Anne that I was in that time. A lot has changed, and for the worse. They forgot where we came from–our ways, our life, what we stand for, when our people fought to not change our way of life. Our freedom.[[18]](#footnote-18)

## Government as Threat

Another potential 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, 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.[[19]](#footnote-19) 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 schools, designed to prevent them from being run in ways that would threaten the understandings with state authorities that made possible Amish schools staffed by uncertified teachers. If the committee had felt sufficiently strongly about the importance of having those recommendations followed,[[20]](#footnote-20) 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.[[21]](#footnote-21) 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.[[22]](#footnote-22)

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*,[[23]](#footnote-23) often contains a *Rom Baro*, a “Big Man,” a dominant figure. His power is likely to be based both on kinship with many of the families in the *kumpania* and on 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 interpreted it as evidence that the local *Rom Baro* did not approve.[[24]](#footnote-24) 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. Elsewhere, however, such attempts sometimes occur.[[25]](#footnote-25)

## 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 for a considerable while 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.[[26]](#footnote-26)

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.[[27]](#footnote-27) 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 Acts 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.[[28]](#footnote-28) A single lordship might include both Welsheries, areas where Welsh law applied to matters such as inheritance, and Englisheries where English law applied.[[29]](#footnote-29) When Llewellyn 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 Llewellyn’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.[[30]](#footnote-30)

A polylegal system raises no special problems as long as the disputes it applies to are intracommunal, 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.

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.[[31]](#footnote-31) Each pair of legal systems might have an agreement specifying the court to which disputes between them would go,[[32]](#footnote-32) although that still raises problems for a dispute with multiple parties adhering to more than two systems. In the Islamic case, disputes between a Muslim and a Christian or Jew could be taken to a Muslim court.

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 plaintiff and defendant are from different states–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 it is 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.

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-1)
2. Historical accounts make it sound as though, early on, some tried to enlist outsiders in their internecine feuds. *Gypsy Law* pp. 142-145. [↑](#footnote-ref-2)
3. Sutherland 1975 pp. 259-260. “When they must be in non-Roma places, Roma generally avoid touching as many impure surfaces as possible, but, of course, prolonged occupation of a non-Roma place such as a hospital or jail means certain impurity. In this case the person tries to lessen the risk by using disposable paper cups, plates, and towels–that is, things not used by non-Roma.” Sutherland 2017 p. 72. [↑](#footnote-ref-3)
4. For the modern version see Sutherland 2017, p. 51. For evidence that the view is not entirely unjustified, pp. 86-94. [↑](#footnote-ref-4)
5. Sutherland 1975 p. 99. [↑](#footnote-ref-5)
6. The rules do not apply to children before the age of puberty, so this would be a problem mostly for older children. [↑](#footnote-ref-6)
7. For details see Hancock 134-5. For the gradual breakdown of Vlach Rom institutions see Sutherland 2017. [↑](#footnote-ref-7)
8. 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 imitate 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-8)
9. Hancock, Chapter 9. [↑](#footnote-ref-9)
10. 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-10)
11. “Although very few in number, defecting young Amish in the “lowest” ranks tend to make abrupt changes like joining the army.” Hostetler 1980 p. 290. The context is a discussion of groups varying from low to high in a single community in Pennsylvania. [↑](#footnote-ref-11)
12. “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-12)
13. Sutherland 2017 p. 99. [↑](#footnote-ref-13)
14. Sutherland 2017, p. 45, quoting a communication from Ian Hancock. [↑](#footnote-ref-14)
15. Sutherland 2017, p. 104. [↑](#footnote-ref-15)
16. Sutherland 2017 p. 105. [↑](#footnote-ref-16)
17. 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 maintenance of Romani culture. http://daviddfriedman.blogspot.com/2009/12/toleration-vs-diversity.html [↑](#footnote-ref-17)
18. Sutherland 2017, p. 8. [↑](#footnote-ref-18)
19. For a detailed account of supra-congregational structures in the Lancaster settlement, the oldest of the large settlements, see Kraybill 1989 pp. 86-90. [↑](#footnote-ref-19)
20. “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-20)
21. “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-21)
22. 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-22)
23. 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-23)
24. Sutherland 1975, p12. Pp.110-113 [↑](#footnote-ref-24)
25. “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-25)
26. 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-26)
27. That meant was that, while the princes were in allegiance to the king, their land was not held from him hence not under English law. [↑](#footnote-ref-27)
28. “… 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-28)
29. “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-29)
30. Watkin 2007, pp. 118-119, 121-2. [↑](#footnote-ref-30)
31. This seems to have been the rule in some Muslim polities. 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-31)
32. The approach used in the hypothetical legal system described in Friedman (1972). [↑](#footnote-ref-32)