

THE FUTURE OF TRADITION: CUSTOMARY LAW, COMMON LAW, AND LEGAL PLURALISM by Leon Sheleef. London, England and Portland Oregon: Frank Cass 2000. 485 pp. ISBN 0-7146-4953-8 (cloth)

This is certainly a book I wish could persuade the sitting Justices of the US Supreme Court to read. I recommend it also to anyone who is interested in the futures of jurisprudence in the US and throughout the world.

The US Supreme Court, in *RICE VS. CAYETANO*, (No. 98-818, decided February 23, 2000), held that the electoral provisions for the Office of Hawaiian Affairs (OHA), as provided for in the Constitution of the State of Hawaii, were invalid under the 15<sup>th</sup> Amendment to the US Constitution. The State of Hawaii had claimed that the indigenous people of Hawaii have a relationship to the State of Hawaii and the US Congress analogous to that between the US and certain American Indian Tribes. The Federal District Court and the US Court of Appeals for the Ninth Circuit had found for the State, the latter affirming that the State "may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be." (As cited in the Syllabus accompanying the decision, p. 2)

According to the rules governing OHA, only native Hawaiians were allowed to vote for the trustees of OHA. The suit against the State had been brought by one Harold F. Rice who, though born and raised in Hawaii in a family which first moved to Hawaii in the mid 1800s, did not have any native Hawaiian ancestors, and thus was not eligible to vote for the OHA trustees according to State rules.

After a review of Hawaiian history (which can be questioned because of its reliance on certain older Western writers while ignoring native Hawaiian and other newer sources), Justice Kennedy, writing for the Court (Chief Justice Rehnquist, Justices O'Connor, Scalia, and Thomas joining, with Justice Breyer writing a concurring opinion in which Justice Souter joined) declared that the OHA election rules violated the provision of the 15<sup>th</sup> Amendment which prohibits the US or any State from denying the right to vote on account of race.

In dissent, Justice Stevens with Justice Ginsburg concurring argued that the OHA provisions are based on "ancestry" and not "race" and thus do not violate the 15<sup>th</sup> Amendment. Justice Ginsburg further stated, quoting her concurring dissent in full:

I dissent essentially for the reasons stated by Justice Stevens in Part II of his dissenting opinion. ante, at 3&endash;12 (relying on established federal authority over Native Americans). Congress' prerogative to enter into special trust relationships with indigenous peoples, *MORTON V. MANCARI*, 417 U.S. 535 (1974), as Justice Stevens cogently explains, is not confined to tribal Indians. In particular, it encompasses native Hawaiians, whom Congress has in numerous statutes reasonably treated as qualifying for the special status long recognized for other once-sovereign indigenous peoples. See ante, at 7, and n. 9 (Stevens, J., dissenting). That federal trust responsibility, both the Court and Justice Stevens recognize, has been delegated by Congress to the State of Hawaii. Both the Office of Hawaiian Affairs and the voting scheme here at issue are "tied rationally to the fulfillment" of that obligation. See *MANCARI*, 417 U.S., at 555. No more is needed to demonstrate the validity of the Office and the voting provision under the Fourteenth and [Fifteenth Amendments](#).

I wonder how many subscribers to this list, and readers of this review, are aware of the Rice decision. More, I wonder how many are aware that there is a strong though diverse "sovereignty" movement in Hawaii which is fueled in part not only because the original overthrow of the Hawaiian monarchy, in 1898, was illegal (and initially declared so by US President Cleveland, with a formal Apology offered by President Clinton in 1993), but also because the 1959 vote which resulted in Hawaii becoming a State of the Union arguably violated international law. Only two options were given Hawaii's voters in 1959--either to attain full statehood or to remain a territory of the US. Yet Hawaii, like many other Pacific Islands, was at that time on the United Nations list of Trust Territories for which full sovereignty was a possibility. The option to vote for independence should have been given to Hawaii's voters in 1959, but it was not.

Now, I mention all of this (and leave out a lot more) merely to show that the issues which Leon Sheleff discusses so very cogently and fairly in *THE FUTURE OF TRADITION* are very much alive in the US, and, indeed, in almost every other country of the world. The crux of the matter is how it might be possible for indigenous people to live by their own laws and customs, if they wish, especially considering that many states throughout

the world are in the process of weakening and, in some instances, dividing, and perhaps ultimately transforming into nonspatial (or non-exclusively-spatial) forms of governance.

Sheleff has written the most extensive discussion of this matter I know of. He demonstrates impressive knowledge of both the national and tribal laws not only of the US but also of Canada, Australia, New Zealand, and throughout Africa and the Pacific Islands. Sheleff seeks to explore two questions: "firstly, to what extent the all-encompassing State is able to concede the validity of the varied local customs and to share its rule-making and rule-enforcing powers with local communities; second to what extent the history of Europe is designed to serve as the role-model for other parts of the world in the present day? That is, whether the loose association of peoples, such as the tribe, are doomed to surrender their own unique qualities and to be absorbed within large State frameworks, or whether they may retain their inner vitality and corporate existence, and as such, to continue to shape some of the rules by which their members will conduct their lives; whether their customs that will doubtless subsist in one way or another, as part of some living law, will be sustained also by some conscious recognition as being of a defined and differentiated group, or whether they will be shorn of such support." (6)

The vehicle which Sheleff believes makes the incorporation of tribal law into modern law possible is the common law. What is now the common law, he reminds us, is simply the current, ongoing, endpoint of what was once the customary law of certain tribes living in some of the larger islands off the coast of Europe. Over the years, that law has grown, encountered other laws and customs, seen the rise of equity (to correct some of the abuses and omissions of the common law), and then spread, as the British Empire spread, to North America, parts of Africa, and Oceania where it still exists in ongoing living forms.

In those areas where indigenous peoples still live (even in an urban diaspora) and desire to govern themselves by their own customs, why cannot the common law of the surrounding state simply accept or perhaps, where appropriate and mutually desirable, incorporate tribal law into the overall legal framework of the polity? This is possible, Sheleff says, because "the common law countries...continue to work within a legal culture that is still basically oriented to the flexible development of the law in which judges help make the law, and do so in terms of their understanding of an evolving society" (p. 82)

Sheleff recounts the way in which Western societies came to dominate the lands and laws of tribal societies. He shows that this was often done legally--that is according to the laws of the Western societies--and rationally--according to the rules of reason of the conquerors--but never in a way which was fully understood or accepted by the members of the tribal societies who had different laws and different rules of reason--no less lawful and rational than those of the West, but nonetheless quite different.

Perhaps Westerners at the time believed they were doing the right thing--perhaps even the humane thing--perhaps even the divine thing by imposing their law on the tribes they encountered. Or perhaps they simply didn't care because they had the power to do what they wanted. Perhaps in some instances the laws and reason of the West were superior to those of the tribes they conquered--though Sheleff makes compelling arguments why this is not very likely. But now times have changed. Indigenous people, worldwide, are uniting to assert their rights. Many international organizations, NGOs, and other agencies exist to support and further their cause. Within Western societies, people who have taken the time to reconsider what happened in the past are coming to realize it was neither just, necessary, nor irremediable. As various technological, economic, and cultural global forces begin to weaken the notion of the all-powerful sovereign nation-state and its international system, and to enable the creation of a new system of global governance that is both more local and diverse as well as more global and holistic, the possibilities of revitalized tribal law within a kind of global common law seems both feasible and desirable.

The core of Sheleff's book is the section titled "Issues." In seven chapters, he describes the key concerns of tribal people vis-a-vis the claims and legal decisions of nation-states: the possibility of fundamental "tribal rights" rather than just individual civil rights; the central role of tribal lands (and of who uses it and how it is used rather than who technically "owns" it); the right to perform sacred rites and to access and preserve sacred sites; concern about shame rather than the determination of guilt; the centrality of restoring group harmony over establishing individual harm or rights; and the importance of tribal family and kinship systems, especially concerning women and children. He also considers the possibility and limits of the "cultural defense" in a state's formal legal systems. He discusses the possibilities of double jeopardy if dual systems exist, and the role of conventional "conflict of laws" assumptions in

resolving such issues.

Sheleff is no romantic. Although he makes a very strong case overall for incorporating tribal law into common law, he very carefully argues the pros and cons, and does not shrink from considering the cases that are most difficult for most Westerners to accept: female circumcision; witchcraft; the ritual use of drugs; the necessity of suicide in situations of overpowering shame; the value of polygamy as a deterrent to spouse abuse in the nuclear family.

One of the rules which some Western courts have adopted to determine the acceptability of tribal legal processes and decisions is whether or not they are "repugnant to universal standards of justice". Sheleff mentions, but does not develop as fully as he might, that many legal methods completely acceptable to most Westerners seem utterly repugnant to many tribal persons, most notably the use of prisons (and long prison sentences) and especially the death penalty. Many tribes eschew the death penalty, and view the West's comparatively freer use of it with horror. Similarly, since the point of tribal justice is to restore the harmony of the group, not abstractly to punish the law-breaker, it is far better to bring offenders back into the fold of the community as quickly as possible rather than to lock them up with other criminals for extended periods of time. This can only lead to greater injustice, misery and crime.

Sheleff points out that the Western taboo on euthanasia, and our easy acceptance of a lengthy period of increasing suffering by our elderly, is viewed as the utmost in repugnant cruel behavior by those tribal members who revere their elderly and understand that death with dignity is fully a right which must be accorded them. Sheleff might well have also mentioned America's obsession with guns as another weird custom beyond the comprehension of most humans.

He also argues several times that rulings by American courts which refuse to permit Indian tribes to control alcohol, while forbidding them from using far less harmful and customarily-required drugs, are perverse. Indeed the lengthy discussions throughout the book detailing the fate of tribal laws and customs not only in the US courts but also in the formal courts of Australia, Botswana, Canada, Fiji, Ghana, Kenya, New Caledonia, New Zealand, Nigeria, Nyasland (Malawi), Papua New Guinea, Solomon Islands, South Africa, Vanuatu, and Zimbabwe are overwhelmingly depressing, with only occasional glimmers of light, such as the MABO case

in Australia, the growing respect for the Treaty of Waitangi in New Zealand, and especially the situation in South Africa since apartheid. However, recent developments in Australia show how fragile such apparent victories can be.

That the basic legal principles concerning the treaties between the US and the various Indian tribes were established by Chief Justice Marshall in the very earliest days of the American judiciary does not inspire confidence for enlightened current jurisprudence. Neither does the fact that virtually every Western judge is largely ignorant of either legal anthropology or tribal law, however learned in the law of their nation-state and imbued by its ideology they might be, and thus are willing to rely on interpretations of tribal law by early settlers or more recent anthropologists rather than by the tribal practitioners themselves.

Sheleff is especially respectful of the feminist critique of much tribal law that is often justly seen as patriarchal special-pleading. He also admits that some neo-tribalism is simply "made-up tradition" and acknowledges that distinguishing the made-up from the authentic is no easy job. This is in part because, as Sheleff shows over and over, customary law is highly flexible and adaptive to the times. It is a huge mistake to believe that tribal law is static and fixed. To the contrary, tribal law is not stuck in precedence or empty tradition. It is quite willing and able to adapt to changing times in order, when necessary, to achieve a better understanding of justice according to the new possibilities of the present. Thus he is confident that tribal law can and will, if permitted, adapt to those aspects of modern society to which it should adapt.

He also admits that there are tensions between the desire of contemporary scientists and society to learn about the ways and customs of the past, and the desire of descendants to preserve the bones and burial objects of their dead ancestors as they were originally buried, and not to have them removed, examined, and placed on display in museums. We are probably all aware of the ongoing controversy over who has rights to the remains of the Kennewick Man in Washington State who, some feel, is not an ancestor of the tribes who currently claim him. And here in Hawaii, the Bishop Museum is embroiled with several different groups of Hawaiians over the Museum's recent release of certain funeral items to one group of claimants rather than another--or rather than to none.

No, Sheleff does not try to make tribal law appear to be easy, much less

perfect. But he does argue very convincingly how much better we would all be if we were to find a way to draw upon the richness of customary law rather than to try to continue to force everything into the single vision of the Westernized state.

This is something we have explored here in Hawaii in several ways. Hawaii may seem unique and exotic to most people. That is the feeling which the Hawaii Visitor's Bureau spends millions of dollars each year to instill. Tourism is dependent on many people believing it. Hawaii IS unique and exotic in many ways, but it is also typical of many places in North America now and especially in the future as immigration and differences in fertility continue to change the face of America, and as the indigenous people of North America strive to find a better place in the new sun of the 21<sup>st</sup> Century. Hawaii is experiencing developments now which everyone in North America will experience in analogous ways in the near future.

Several years ago, with a grant from the State Justice Institute (SJI), the Hawaii Research Center for Futures Studies (HRCFS) conducted an extensive study of "Culturally Appropriate Dispute Resolution Techniques." Here in Hawaii, traditional techniques exist which are still widely used within the indigenous Hawaii community, and among the more recently arrived Samoan communities. These two communities are still using what Sheleff would call tribal law. There are also many other ethnic groups in Hawaii whose members still prefer to use "their ways" to the "state's ways" when settling disputes.

In January 1991, the HRCFS team made a presentation on the project to the participants of a Judicial Foresight Congress which included Hawaii's Supreme Court justices, State judges, members of the State Bar, key Judiciary staff, legislators, academics, and members of community interest groups. Following a panel presentation and discussion of the SJI Project, Congress participants were asked to indicate their preferences concerning culturally-appropriate dispute resolution techniques and the Hawaii Judiciary. The participants were asked to choose which of several statements was the closest to their view.

The ballot choices, with the percentage of participants favoring each option, follow.

- 1) Culturally-appropriate dispute resolution techniques ought to be incorporated into the judiciary and ought to replace the

current adversarial system in most situations. [9%]

2) The Hawaii Judicial Foresight Commission or the Annual Judicial Conference, as appropriate, ought to prepare recommendations for having culturally-appropriate dispute resolution procedures be accepted by or incorporated into the formal judicial system. [62%]

3) Although I am sympathetic to letting people use their own culturally-appropriate modes of settling disputes, the formal legal system ought not be involved. [17%]

4) We ought to be focusing our energies on making sure that current laws are administered fairly to all groups regardless of cultural background rather than risking even more unequal treatment. [12%]

5) Culturally-appropriate dispute resolution techniques of the sort discussed today have no place whatsoever within the formal judiciary. There is no need for the Hawaii Judiciary to consider this matter any further. [0%]

Seventy-one percent of the participants favor culturally-appropriate dispute resolution techniques playing a larger role in the formal judicial system. Moreover, if we include those who feel that people should be able to use their own dispute resolution procedures, although outside the judiciary (Question 3), then 88% of the participants in the Judicial Foresight Congress are sympathetic to the use of culturally-appropriate techniques. It is remarkable that absolutely no one voting felt that these procedures have "no place whatsoever within the formal judiciary" (Question 5). These results are not scientifically valid. But they are illustrative of the views many people in Hawaii.

Nonetheless, incorporating, for example, the Hawaiian dispute resolution technique known as "ho'oponono" into the legal system of the State of Hawaii is not as easy as it might first seem. Ho'oponono is completely at odds with almost everything in the formal system. It does not seek to determine guilt. It seeks to restore harmony. It does not restrict discussion to the facts of the case. It allows almost anything to be discussed. It is in fact a process of talking to exhaustion, where anyone can say anything (well, not really; there are many very subtle rules all intended ultimately to quell and not to fuel the controversy). Ho'oponono takes a lot of



time and engages a lot of people. It is not something that can just be appended to the current system. I suspect the same is true of almost all tribal systems of justice.

And yet there are many attempts to reform the formal legal system in America and elsewhere. A lot of what "ADR" and "restorative justice" seek to do, for example, is what tribal law does already. Every "Multi-Door Court House" needs to have at least one door that leads to tribal concepts and ways. I suspect that anyone who has once walked through them, and into the formal court room as well, will want to try to tribal door again, if necessary.

If there is one weakness in Sheleff's presentation, it is a weakness which is characteristic of all legal, political and economic thought and systems, past and present. It is the failure to consider how present actions impact the lives of future generations. One of the increasing, but seldom-noticed, characteristics of life in modern and especially postmodern societies is that our most ordinary daily actions not only impact many other people worldwide, but also impact the quality of the lives of the unborn.

Finding ways to balance the needs of present generations with the needs of future generations is the next great challenge facing humanity. The issue almost certainly will be brought to our attention not through legislation, but through judicial action. And yet, on our obligations to future generations, in spite of "seven generations" myths to the contrary, tribal law is as silent as the body of the US Constitution (though some people find hope in the words of the Preamble which refer to "our Posterity". See Bruce Tonn, "Court of Generations" FUTURES, June 1991, pp. 482-498).

Sheleff concludes his book with these inspiring words: "[T]he only way in which [a] shared civilization...will really crystallize is when the dominant part of that civilization--commonly known as the West--is willing not just to re-examine its imaginings of...tribal people, but also its imagination of itself as civilized conqueror, benevolent guardian of nature, liberal law-giver, the tribal person's ultimate savior. The aim of social and legal pluralism is not a regression to the past, but a recognition of the role that the past--every past--plays in the here and now, including the myths--all the myths--of a truly-shared civilization." (p. 476)

**The past is important, but a truly worthy civilization will only come into existence, and survive, when we also ask what future**

**generations want from us, and when we then try to respond to their wants and needs, as well as to our own and our ancestors'.**

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