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# The Publicity "Defect" of Customary Law

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## Abstract

This paper examines the extent to which dispute resolvers in customary law systems provide widely understandable justifications for their decisions. The paper first examines the liberal-democratic reasons for the importance of publicity, understood to be wide accessibility of legal justification, by reviewing the uses of publicity in Habermas' and Rawls' accounts of the rule of law. Taking examples from Sierra Leone, the paper then argues that customary law systems would benefit from making the reasons for local dispute resolution practices, such as "begging" from elders, witchcraft, and openness of hearings, more widely accessible. The paper concludes that although legal pluralism is usually taken to be an analytical concept, it may have a normative thrust as well, and that publicity standards would also apply to formal courts in developing countries, which are also typically "defective" along this dimension.


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# The Publicity "Defect" of Customary Law

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From the standpoint of theories of the liberal democratic state, contemporary customary law systems in developing countries can be considered defective along several dimensions. The first "defect" involves the substance of the laws. Although the norms and rules across customary law systems vary enormously, the following characteristics are not uncommon. Usually, customary laws do not allow women to inherit assets, to manage jointly held property, or to seek divorce. Customary laws permit parents to predetermine the occupations and life destinies of their children. Customary laws not only tolerate inequalities in status and power but often understand them to be essential for social order, and grant unique prerogatives to elder males and other locally powerful individuals. Kin and co-ethnics of the dispute resolvers receive preferential access to and treatment under the law. Weak individual, or collective, land titles dampen investment incentives. Assault, rape, and murder are sometimes conceived as property crimes. To redress a crime or even an insult, collective punishment on the family or village of the perpetrator can be appropriate. Ostracism from the social community is acceptable under some conditions. Processes of adjudication and punishment employ thin standards of procedural fairness. Overall, customary laws do not valorize the classic liberal rights – personal dignity, bodily integrity and privacy, free choice of a life plan – nor many of the key liberal-democratic political rights, such as the right to political membership and equality under the law.

The second "defect" concerns the enforcement power available in customary law systems. Unlike state law, customary law systems generally do not possess the coercive authority needed to enforce contracts, incarcerate criminals, or confront the executive. Indeed, it is for this reason that many have argued that customary law is not really law at all (Hart 1961, p. 229). Weber distinguished convention, which uses widespread disapproval expressed toward deviating behavior to create social conformity, from law, which entails a "staff engaged in enforcement." (Weber 1978, 34) More recently, Tamanaha (2008) has argued that the motivating idea behind the anthropological understanding of legal pluralism – that all "semi-autonomous social fields" are bodies of law – is fundamentally incompatible

with the positive law conceptions of law as exemplified in the work of Weber and Hart. The enforcement of law by a juridical-bureaucratic staff, moreover, requires a rational-bureaucratic process – a "rule of recognition" in Hart's terminology – on the basis of which "a suggested rule is taken as a conclusive affirmative indication that it is the rule of the group to be supported by the social pressure it exerts." (Hart 1961, p. 94) Arguably, these sorts of secondary rules are not available in customary law systems, or at least not in a systematic manner.

This paper will not directly address these two "defects," which have received substantial attention in the literature. Rather, the focus is on a third problem. From the perspective of liberal democratic accounts of law, the purpose of adjudication is not only to resolve disputes but to state publicly and to elaborate broadly acceptable reasons for the concrete application of the general laws as exemplified in the proposed resolution of the current dispute. Dispute resolvers need to justify their decisions. Public and explicit justification serves not only to persuade the parties to the case to accept the proposed resolution but to alert other members of society that coercive power is being exercised according to principles that they can accept, and that it is safe for them to make life plans on the expectation that those same or similar principles will inform adjudication should disputes involving them arise.

But the justifications for dispute resolution decisions in customary law systems may not, generally speaking, be sufficiently public to stabilize expectations and promote rationally motivated cooperation among members of the society. When dispute resolvers in customary law systems – local chiefs, religious leaders, village elders, respected community members and the like – make decisions, the basis for their decisions do not typically reference the many other decisions that have been made in related cases; utilize terms, concepts, and reasons that would be persuasive for community outsiders as well as insiders; or gain wide publicity and access. The problem is exacerbated by the fact that

customary law systems are almost always partial systems, typically covering only certain legal domains, and operating alongside a variety of state-based and other legal systems. Thus, the justifications that they can offer must contend with rival explanations (whether real or hypothetical), and the range of the applicability of justification under customary law systems – where "range" is understood as their potential extension into the future as well as to other potentially similar disputes in the present – are necessarily questioned. In other words, the precedential value of customary law justification is in doubt from the beginning.

This essay addresses this third "defect" of customary law systems. The following section expands on the importance of publicity from the liberal democratic point of view by drawing on the work of two prominent liberal theorists – Habermas and Rawls. The account of their work in that section is necessarily abbreviated, selective, and partial, but hopefully it uses their arguments in a way that at least illustrates what is at stake in the publicity "defect." The succeeding section draws out, from the account of liberal theory described in the previous section, a few normative implications for the processes of justification under customary law. That section attempts to assess, in a preliminary way, the extent to which the publicity "defect" really is a defect. The concluding section raises some issues not only for customary law but also for formal, state-based law in developing societies.

**The Liberal Democratic Case for Publicity**

On the face of it, it may seem odd to use the work of Habermas and Rawls, both committed liberals, to benchmark the processes of justification under customary law, which are usually not liberal in their core assumptions regarding the value of individuality, the sources of political authority, and equality. It may seem like an ethnocentric limitation, perhaps reminiscent of the way that Christian missionaries judged indigenous religious practices outside Europe by the light of their Biblical interpretations.

But this approach may not be totally unfounded. Liberalism arose as an approach to overcome a cycle of fierce and deadly religious wars. Although in retrospect it seems difficult to relate to the animus that existed between Catholics and the 16th and 17th century "heretics," at the time the differences between them constituted an instance of extreme normative pluralism that was understood to be as irreconcilable as liberalism and "non-western" views are believed to be today. The origins of liberalism lay in a simple cease fire, or mere tolerance among various Christian faiths – a modus vivendi. One could say that that in many developing societies the state-based, more or less nominally liberal, legal system exists in a somewhat similar state of truce with customary law systems – there is tolerance, but not necessarily a lot of mutual understanding. More recently, and as described by theorists such as Habermas and Rawls, liberal theory, and perhaps also political practice in some societies, has moved beyond mere tolerance to something closer to a consensus on the procedures and styles of discourse necessary for accommodating extreme normative pluralism. Importantly, this near-consensus (to the extent it exists) is primarily about the procedures of government and the conditions that make the procedures legitimate, rather than about philosophical or metaphysical values. As Olivier Roy (2006) describes it in another context:

> The perception of the opposition between the West and Islam in terms of a debate on 'values' (are they Western or universal?) is biased because Western values are seen in the West as being consensual, which is nonsense. Dialogue between pro-lifers and pro-choicers, patriots and human-rightists, statists and free-marketeers, Christian rightists (form Saint Louis to the Vatican) and liberation theologians, conservatives and liberals, and so on, shows that in the West there is a debate on values, which could cross-cut the same debate in Muslim countries. . . The dominant and final consensus in the West is about institutions, not values.

Roy's way of putting it may overstate the case because it may be impossible to establish a consensus on institutions and procedures without at least some minimal agreement on values. The agendas of Habermas and Rawls, however, are to show that only a relatively thin agreement on moral beliefs is necessary to establish a political consensus on the kind of government that can accommodate

values pluralism. One need not hold a romanticized conception of individuality, privilege the individual over community, or ascribe an identical schedule of rights to all individuals to support a liberal democracy in this sense. As Rawls puts it, this understanding of freedom is "political, not ethical." (Rawls 1993, 77) For both Habermas and Rawls, however, it seems that one of the political values that are important in this kind of government is publicity. If this version of liberal democratic arrangements is applicable to the kind of values pluralism that exists in developing countries with customary law systems, and if it is desirable for countries like Sierra Leone and Timor-Leste to move from mere tolerance of various normative systems to an endorsement of the possibility of diversity, then publicity might be important for dispute resolvers in those systems.

It is useful to begin with the significance of publicity in Habermas' account. The beginning point for Habermas is the modern situation, which is characterized by its normative pluralism – the fact that people disagree about ultimate values. There is, moreover, no authoritative external standpoint, such as divinity, a conception nature, or transcendental reason, on which people can draw to resolve deep disagreements: the world is, in Weber's terms, "disenchanted." And economic and social processes, especially the division of labor and technical specialization, which multiply the various roles, tasks, and interest positions in societies, have made societal coordination more important while at the same time demanding a stance of self-interested calculation that jeopardizes society-wide projects. As a result of all this, the shared background assumptions that facilitate meaningful social communication have faded, and forms of social, political, and legal power need to be justified more explicitly.

In Habermas' account, any justification of political and legal power is problematic because of the tension between power ("facticity") and legitimacy ("normativity") that pervades all social practices and institutions. The roots of this tension are linguistic: when communicating and convincing, human speakers use reasons that are necessarily addressed to an idealized community of competent listeners,

but their present audience can only grasp those reasons in a "good enough" and provisional way that is sufficient (or not) to motivate the joint effort necessary to tackle the problem at hand. The actions taken, then, never seem to live up to the norms used to justify them. Traditional societies, Habermas believes, merged the social power of chieftains, obligatory behavioral norms, and mythical sources in a manner that established enough of a background consensus to overcome this basic tension. Those societies could draw on that background consensus to build institutions of conflict resolution and political authority. No such background consensus exists in modern societies, which instead must rely on law.

It is worth emphasizing that for Habermas the other alternative basis for the legitimacy of law and political authority, bargaining based on the cold calculations of *homo economicus*, is obviously insufficient. There are strategic accounts of democracy that can explain *the idea* of political compromise – for instance, ruling elites might entrench liberal democratic rights and liberties because they know that one day they could lose an election and fall under the power of a vengeful rival party. But that does not explain why elites and their constituents should support a *particular* set of rules for sharing power, with its attendant implications for the distribution of political and economic resources in their society. Bargaining that results in legitimacy requires not only compromise but fair compromise, and the establishment of the latter requires communicative, not strategic, interaction. Legitimacy requires the perspective of a participant, not the perspective of an observer, which is what one becomes when calculating.

Without access to the shared background available in traditional societies, and given the limited legitimacy that can arise from bargaining, modern political communities, then, must establish their normative appeal using their own resources, as it were. Positive state-based law, which is the characteristic mode of establishing social coordination and collective action in modern societies,

requires a foundation that has validity for modern participants. How Habermas develops his principle of validity is difficult to summarize in a short space. The end product, however, is the discourse principle: "Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses." (Habermas 1996, p. 117) This principle applies to all of the various modes of action norms, including moral principles, the criteria of fairness in bargaining, and positive state-based law. When applied to law, this means that "it must remain possible for everyone to obey legal norms on the basis of insight," (Habermas 1996, p. 121) although the law must not compel its addressees to conform to law on that basis, and must leave open the option of external compliance on the basis of utility calculation. To state it another way, only those statutes are legitimate that, in principle, all participants could assent to in a communicatively open process of legislation that has been legally constituted. Habermas believes that this discourse principle establishes a sufficient and "post-metaphysical" foundation for the basic civil, political, and social rights.

For present purposes, it is important to emphasize that, for Habermas, putting the discourse principle into practice in the real world requires not only the system of rights, which protect classical private autonomy; popular sovereignty, which supports public autonomy and a collective capacity for mutual recognition; and the legal form, which stabilizes expectations in a complex society on the basis of principles such as consistency, precision, and non-retroactivity. It also requires "communicative power." The latter involves processes of "violence-free" mutual understanding, if we follow Habermas' reading of Arendt, and "undamaged intersubjectivity." (Habermas 1996, p. 151) These terms are hard to pin down, but they have to do with the absence of repression and inequality in the processes and procedures that authorize, undertake, and interpret collective action. The various identities, values, and interests in a society need to be given due consideration as the "general will" is developed. "Thus, along with the system of rights, one must also create the *language* in which a community can understand

itself as a voluntary association of free and equal consociates *under law* [emphasis in original]." (Habermas 1996, p. 111)

The development of this language takes place in all of the various institutions of modern societies. Principles such as the autonomy of the public sphere from social interests and party competition promote this kind of discourse and its publicity. These are elements of the "publicity requirements that keep institutionalized opinion- and will-formation open to the informal circulation of general political communication." (Habermas 1996, p. 183) The ultimate goal is a form of public opinion in which issues, contributions, information, and arguments are not attached to particular people (public opinion is "subjectless") and in which they move unblocked from civil society to the public sphere and back.

The focus here, however, is on the narrow legal culture. There, and in contrast to Dworkin's account, Habermas argues that judges are engaged in a fundamentally dialogic process. Legal "argumentation is characterized by the intention of winning the assent of a universal audience to a problematic proposition in a non-coercive but regulated contest for the better arguments based on the best information and reasons." (Habermas 1996, p. 228) To generate communicative power, judges should have the intention of speaking to a wide audience, and should do so when formulating the basis of their decisions. This process facilitates the process by which "the perspectives of participants and the perspectives of uninvolved members of the community (represented by an impartial judge) come to be transformed into one another." (Habermas 1996, p. 229) This is an argument for the rendering of broadly accessible arguments by judges. It is also an argument for the establishment of judicial procedures that support this kind of argumentation in court hearings:

> Procedural law does not regulate normative-legal discourse as such but secures, in the temporal, social, and substantive dimensions, the institutional framework that *clears the*

> *way* for processes of communication governed by the logic of application discourses. [emphasis in original] (Habermas 1996, p. 234)

Although more welcoming of public expressions of religious and non-liberal perspectives on ultimate values than Habermas appears to be, Rawls develops a broadly similar endorsement of publicity in the judicial sphere. Rawls' account starts with the idea that a society is to be understood as "a fair system of cooperation over time, from one generation to the next." (Rawls 1996, p. 16) In that kind of society, citizens would ask themselves: How should they, all free and equal citizens, establish the rules of fair cooperation in the society in which they are going to spend the rest of their lives together? Given that they are citizens sincerely committed to mutually advantageous rules, and that these fictional citizens have a developed sense of justice and capacity to formulate their life goals and rationally choose the best means to achieve them, Rawls believes that bargains struck among them would, under certain specified conditions, lead to the basic structure of a just society. To abstract from the advantages that accompany private information and unequal bargaining power, Rawls assumes that the citizens who meet to strike that bargain regarding the basic societal rules would know nothing about the age, gender, race, ethnic group, social position, and religious outlook of the citizens they represent. Rawls argues that this imaginary procedure would produce two basic principles of justice: each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others, and social and economic inequalities are to be arranged so that a) they are to be of the greatest benefit to the least-advantaged members of society (the difference principle), and b) offices and positions must be open to everyone under conditions of fair equality of opportunity.

The representatives in the original position cannot appeal to metaphysical views ("comprehensive doctrines") to ground the bargain that leads to the principles of justice. What is most interesting for the present paper is that irreducible pluralism means that real flesh-and-blood members of a liberal pluralist society ("you and I," says Rawls) also cannot appeal to metaphysical views when

justifying their chosen principles of justice, whether those turn out to be identical to Rawls' principles or some other conception of liberal political justice that also accommodates values pluralism. In implementing and interpreting the principles they have agreed on, real citizens must use public justifications and public arguments that all citizens could agree to, whatever their private metaphysical commitments. That notion leads to a certain understanding of the criteria for reasonable public arguments ("public reason") and to the dispositions and opinions needed in real-life citizens. Without such dispositions and the commitment to public reason that those dispositions support, the just liberal society would not be stable. This means that says that real citizens (we) should be, in Rawls' terms, "reasonable" – that is, be willing to propose fair terms of cooperation, and abide by them, as long as others are willing to do so; and to refuse to impugn the reasonableness of people we disagree with when the disagreements are rooted in normal sources of argumentative uncertainty, such as different kinds of evidence, conceptual ambiguities, varying life experiences and normative considerations, and different priorities among the shared liberal values. Through reasonable behavior, the full justification of the just liberal society comes to be publicly known and supported. Rawls notes that:

> Once [the publicity] condition is imposed, a political conception assumes a wide role as part of public culture. Not only are its first principles embodied in political and social institutions and in public traditions of their interpretation, but the derivation of citizens' rights, liberties, and opportunities also contains a conception of citizens as free and equal. In this way citizens are made aware of and educated to this conception. They are presented with a way of regarding themselves that otherwise they would most likely never be able to entertain. To realize the full publicity condition is to realize a social world within which the ideal of citizenship can be learned and may elicit an effective desire to be that kind of person. (Rawls 1996, p. 71)

Judicial activities are among the most crucial sites for the "derivation of citizens' rights, liberties, and opportunities." Indeed, for Rawls a supreme court is the branch of government that serves as the exemplar of public reason. He believes that the court gives "public reason vividness and vitality in the public forum" and that the court's role "is part of the publicity of

reason and is an aspect of the wide, or educative, role of public reason." (Rawls 1996, p. 236-7)

Although Rawls is particularly interested in apex courts in constitutional regimes with judicial review, his account of the educative power of judicial reasoning is relevant for other kinds of dispute resolver as well:

> Citizens and legislators may properly vote their more comprehensive views when constitutional essentials and basic justice are not at stake; they need not justify by public reason why they vote as they do or make their grounds consistent and fit them into a coherent constitutional view over the whole range of their decisions. The role of justices is to do precisely that and in doing they have no other reason and no other values than the political. (Rawls 1996, p. 238)

**The Need for Justification in Customary Law**

States such as Sierra Leone draw on sources of legitimacy apart from their liberal democratic practices. This may be because liberal democratic values are not widely shared, or it may be that disenchantment, pluralism, and role diversification have not (yet) eroded the shared "lifeworld" of their inhabitants. Still, states in many developing societies are now broadly liberal democratic in form, and one can ask whether it makes sense to apply publicity standards to social, political, and legal practices there, both for the purpose of strengthening the normative basis of the formal liberal democratic state and for managing the values pluralism of those societies.

If, say, a section chief, a customary official in Sierra Leone, endorses a community's decision to ostracize a woman accused of witchcraft, should he (usually he's a male) be encouraged to do so publicly, with reference to related court rulings, with words and reasons that he believes can persuade non-residents? Although those kinds of public statements – public derivations of individual and community rights and responsibilities – by village section chiefs and other dispute resolvers are not the norm in Sierra Leone, one can imagine interventions to encourage them: judicial training, NGO advocacy that teaches people to ask dispute resolvers to give them justifications for their decisions, changes in the

formal rules governing customary courts, inducements for dispute resolvers to meet together and publicly hash out tough cases. These interventions might or might not produce better legal justifications, but the question here is: would this be desirable even if it were clearly feasible, or would it be a mistaken application of a "best practice" that serves a purpose in the global North but would not work, or even be counterproductive, in poor and/or non-liberal societies?

Another way to think about this is to consider how law and development theorists, as well as practitioners, have reconciled themselves to the human rights "defect," mentioned above. When, say, a married man in rural Sierra Leone has sex with another man's wife, and the village chief requires the offender to pay a fine to the offended husband, outsiders for the most part view this as a tolerable outcome, even if the village chief later endorses more severe punishment for a married woman who has had sex with a married man. The reason that this may be tolerable, even though it diverges from an international standard of gender equality, is that it is difficult (though not impossible) to act as if someone's dignity has been violated if she herself does not make that claim. Outsiders view a case like this as a long-term challenge to increase the sense of agency and entitlement among women in Sierra Lone. In that way, human rights, even civil and political ones, are viewed under the lens of "progressive realization," which is usually applied only to social and economic rights. The goal becomes one of raising rights consciousness, rather than redressing all human rights violations immediately, and doing so in a manner that is cognizant of local practices and the alternative forms that dignity might take in different societies. In a similar manner, standards of publicity could be applied in a gradualist way, over time.

When undertaking such a project, it would be important to note that justification is distinct from both codification and documentation. Several analysts have argued that codifying customary laws might rigidify current power relations and weaken the flexibility and responsiveness of customary law systems, which for those living under them is one of their most attractive features. Codification might also,

perversely, make decisions and the justifications for them less, not more, public in circumstances where most people do not read and write well, and where legal justification were to take a written form or even reference written texts. De Soto (2008) notes that actors in the informal economy in places such as Peru frequently document land titles and other economic transactions. Demonstrating the fact of contractual entitlement is a different endeavor, however, from justifying the legal basis for one's claim. One would not say that the publicity standard has been fulfilled if a dispute resolver merely compares the documents of two parties to a land dispute, without explaining the source of the legal validity of the documents or the reasons one might be more salient than another.

Maru (2006) describes the case of "Kadiatu T.," a woman living in a neighborhood of east Freetown, Sierra Leone, whom a police officer beat and kicked into unconsciousness, and on whose behalf a paralegal filed a complaint and threatened a private prosecution and a civil suit. The accused police officer responded to the allegations by apologizing and asking a senior police official to "beg for him" to the victim, Kadiatu T. "Begging" in Sierra Leone is a specific action in which someone apologizes and asks for forgiveness, often via a respected intermediary. Kadiatu T. accepted the officer's apology, as well as his compensation payment, and the legal case was dropped. In this instance, a paralegal mediated the conflict, so there may have been a less obvious opportunity for legal publicity than had a dispute resolver issued an opinion. Still, it may have been possible to talk to the police officer, his colleagues, and his superior concerning the reasons that this restitution was considered acceptable. (The case study does not indicate whether or not this in fact happened; I am assuming, for the sake of argument, that it did not.) Specifically, there may be a set of behaviors and indications of sincerity that are constitutive of "begging" in contemporary Sierra Leonean practice. There may be a common understanding of a kind of proportionality between the offense and the form the begging and compensation should take. There may be certain acts for which, or certain settings in which, victims should not accept someone's "begging." There may be criteria of competence, such as a person's age,

before a victim is qualified to accept “begging.” Developing and elaborating such descriptions of the practice, or at least taking opportunities to talk about them, may fortify the normative consensus on which they are based. This in turn could motivate members of the society who are otherwise truculent to accede to mediations and adjudications, could stabilize expectations regarding the likely legal responses to behavioral deviations, and could articulate the standards of the local customary justice system to outsiders to the community.

The absence of a normative consensus on the criteria for “begging” comes out clearly in a case involving the distribution of rice (Manning 2009a). When the government gave bags of rice to the leaders of a poor rural community in southern Sierra Leone in 2004, a section chief held back, of the five bags allocated to his community, two for himself and a secret society swearing ceremony. When a young man named “Mohammed” learned of this, he and a few others loudly protested. Then the paramount chief and other leaders sent a delegation of elders to investigate, and they decided to ask the protesters to apologize and pay a small fine. At first, all but Mohammed apologized. After repeated humiliations and threats, Mohammed finally relented and reluctantly begged for forgiveness. Begging in Sierra Leone contains at least two normative elements: deference to respected authorities, and the recognition of a principle of righteousness. As this case indicates, sometimes these elements are in tension. The development of “case law,” or perhaps a body of oral casuistry, concerning begging could help clarify and strengthen the normative basis of the practice.

Then there is witchcraft. Maru (2006) also recounts the case of “Macie B.,” a twenty-six year old woman from southern Sierra Leone all three of whose children died, and from whom a diviner elicited a confession to have agreed to sacrifice her children to a coven of witches she had seen in a dream. Macie B.’s family and community rejected her. A paralegal convinced her family to take her back, for a time, by appealing to their love for her. Then a court required her husband’s family to pay for prenatal care after

she became pregnant a fourth time. (That child also died.) Here, the substance of a public legal argument would have involved the tension between witchcraft, a belief in which is widespread in Sierra Leone and which may be a category for making sense of vulnerabilities and threats and mental illnesses, and familial love, which is not only a naturally occurring sentiment but is also the basis for many familial and extra-familial moral obligations. ("Ma," "Pa," and "brother," for instance, are frequently used terms to indicate affection and respect.) Dispute resolvers could promote a public discussion regarding the moral basis of obligations of societal support, and the ways in which witchcraft and familial bonds affect moral commitments. In response, some might well say that witchcraft is better left unmentioned and unspoken, that courts and customary dispute resolvers could involve themselves in dangerous matters were they to undertake such public discussions, and that this is precisely the sort of "best practice" from the West that would be counterproductive in an African setting. I am not sure. The secrecy surrounding witchcraft may already be exacerbating suspicions and threats and stoking discord. And it may be reasonable to hypothesize that the lack of publicity, on balance, most serves those with things to hide.

Publicity in the narrow sense of open court hearings (in customary and formal courts), rather than in the broader sense of explicit and public justification for the basis of legal decisions, can expose wrongdoing. Manning (2009b) describes a case in which "Mr. K" raised money for rebuilding homes destroyed during the civil war, but then absconded without finishing the promised construction. He was charged in magistrate court, but before the police had completed their investigation; and the court apparently disposed of the case without the presence of the police officer or community members, who were never repaid. Similarly, when some youths did not show up for the start of a road building project, a local councilor sued them, and a 70-year old male village chief refused to withdraw the case once it was filed even though many villagers thought his action was extreme, probably because he wanted to impose fines on the youths and keep a share of the receipts for himself, which may indeed be what happened Manning (2009a). Under a norm of publicity, a public account of the procedures for filing a

suit, and the basis on which it could be withdrawn, is something that the community members would have expected, perhaps before, and certainly after, these events occurred.

**Conclusions**

In the anthropological and law and development literatures, legal pluralism is, for the most part, understood as an analytical concept. This essay has argued that legal pluralism might also be understood to have a normative thrust, at least from the perspective of liberal democratic theory. Elaborating the legal and moral basis of decisions taken in customary law might help developing societies such as Sierra Leone not only manage divergent values and moral concepts, but create the conditions for the endurance of a society in which that diversity is seen as desirable and is understood to be an institutionally supported fact of social life. Of course, the lack of justification for legal decisions is a "defect" not only for customary law systems but for many formal state-based legal systems in developing countries. Formal courts often suffer from the absence of written records, insufficient public access to written records where they do exist, and poorly reasoned and even fiat-like legal decision making. Law and development practitioners have, in various places, lobbied for state courts to accord some degree of recognition and legitimation to customary law systems, which many people find more accessible and responsive than the formal system. That kind of recognition is, to an extent, a way in which customary law systems can gain public legitimation. But a deeper form of legal publicity would occur if judges in formal courts themselves presented better reasons for their decisions and did so more often, and if they themselves grappled with the content of customary law in a deeper and more systematic way. The normative thrust of legal pluralism pushes in both directions.

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