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# THE WAR OF THE WORLDS: A FEW COMMENTS ON LAW, CULTURE, AND RIGHTS

*Lawrence M. Friedman*<sup>†</sup>

*Bridges and Barricades*, Professor L. Amede Obiora's article,<sup>1</sup> raises and discusses a number of very basic questions. At one level, the essay deals with a clash of culture systems; Western and non-Western. The precise question on which the essay turns is the (much-disputed) custom or practice of female circumcision among African peoples, both in and out of Africa. But on a more fundamental level, the essay deals with the conflict between two realms that the labels "Western" and "non-Western" do not fit quite so well.

One is the realm of "fundamental human rights." The argument here is that there are certain basic standards of justice and humanity; these are rights that are common property, and should belong to every soul on earth. Such rights do not vary from place to place; they are truly universal.<sup>2</sup> Obiora quotes from Article 5 of the Universal Declaration of Human Rights (the very name is significant): no one "shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment."<sup>3</sup> In the United States, people would tend to associate fundamental standards with the

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1. L. Amede Obiora, *Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision*, 47 CASE W. RES. L. REV. 275 (1997).

2. Whether they are also timeless is another question; probably most people never seriously consider this question. Most people, if they thought about it, might agree with Rainer Bauböck that these rights are "historically but not culturally relative" and are highly relevant for all present societies. RAINER BAUBÖCK, *TRANSNATIONAL CITIZENSHIP: MEMBERSHIP AND RIGHTS IN INTERNATIONAL MIGRATION* 239 (1994) (discussing human rights as universalized citizenship).

3. Obiora, *supra* note 1, at 277.

provisions of the Bill of Rights, and the body of case law that has been built up on this foundation.

The idea of "universal human rights" stands in opposition to something else called "culture." "Culture" is more personal, local, and time-bound. Arguably, one of the "fundamental human rights" is precisely the right to practice and enjoy one's own culture; or perhaps the culture of one's choice. But cultures themselves are never "universal;" indeed, the very essence of a culture is that it is special, local, particular, that it belongs to a certain people or community and to nobody else.

The question raised is, what to do when these two realms come in conflict, when there is a collision between a "human right" and a cultural practice? How can we decide between these two? I believe that most contemporary people would say that fundamental human rights have to trump the local, the particular, the cultural; if a cultural practice violates fundamental human rights, then it has to go. But so put, the conflict is not really a dispute on the level of theory; it is a question of where to draw the line between these two domains.

How, asks Obiora, can we "ensure that our presumptions and assertions of universality are not veiled projections onto others of our moral categories?"<sup>4</sup> How indeed. Nobody is likely to question the idea that torture is a violation of some basic standard; nobody is going to step forward in defense of torture. But we have to be careful not to label some practice as "torture" that is imbedded in a distinct culture, and that is not so defined (as torture) by the members of that community. This is, in essence, what Obiora warns us against.

There are, of course, dangers on the other side as well. I think we have to be very careful about using "culture" as a defense or excuse. Authoritarian regimes are quick to cry "culture" when their tyranny is criticized. We are told, for example, that it is not part of Saudi culture, based as it is on Islam, to let women drive cars, although nobody, as far as I can see, ever formally consulted Saudi women on that question. Perhaps Saudi women might agree; perhaps not. All sorts of authoritarian governments have explained to an impatient world that their particular people are not "ready" for democracy, or that democracy or due process are exotic imports

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4. *Id.* at 277-78.

that do not suit their culture. We have to be quite skeptical about any such arguments. Still, having said this, we cannot in the end brush off the "culture" argument so cavalierly.

The term "culture," it hardly needs to be said, is vague and difficult. I use the term here not in any technical sense, but simply as another word for customs; that is, practices that are local and transitory. "Culture" varies from place to place; indeed, in this sense, culture is what divides human beings from each other. Every human being has to eat and sleep, but not everybody has to eat sushi or rest her head on a pillow. Unlike fundamental human rights, which are the birthright (in theory) of every human being, cultures are variable and varying. "Culture" can and does have a range of meanings. It can refer to aspects of life that most people would consider rather superficial: what color of clothes people wear at funerals or what kind of holidays they celebrate. But "culture" can also refer to crucial, essential aspects of group life, marrow-deep beliefs and institutions, such that any alteration in this "culture" can seriously injure or damage the group in its very groupness. Language and religion are often "culture" in this sense. Of course, how to map out boundaries between these two poles of "culture" is not, in any case, an easy question.

In the 19th century, generally speaking, the West, through its missionaries and explorers, treated the cultures of non-Western people with little or no respect. The West was imperialist; it was powerful and expansive. Its armies and navies came roaring out of Europe to invade and conquer "lesser" people. It had the strength to impose its will on what is now called the Third World. In fact, the main obstacles were other European powers. France and England, for example, battled over spheres of influence in Africa. Nobody consulted the Africans. Africans were savages. So were other indigenous people such as Pacific Islanders and Latin American Indians. In the course of European expansion, the cultures of most of these peoples were trampled underfoot. This was often quite deliberate policy.

The process began, perhaps, as early as the 16th century. In Mexico, the Spanish destroyed the temples of the Aztecs and built churches on top of the ruins; they tried to do the same thing with the Aztec mentality. The march of European conquest continued, later, in Africa and in the Pacific. At the end of the 19th century, the United States, which had been ruthlessly suppressing its native populations, joined in the overseas game; it grabbed Puerto Rico

and the Philippines, and annexed the Hawaiian Islands. Missionaries were often in the vanguard of the European empires. The padres built their missions up the coast of California and worked hard to convert the Indians. Missionaries swarmed over Africa. Missionaries transformed Hawaiian society. In every case, they brought European religion, and European prejudices, to places that were far away (from their standpoint) and thoroughly uncivilized. They were more subtle than the soldiers, certainly less willing to kill; but perhaps more thorough.

It is not popular today to defend the missionaries, at least not in academic circles. But it might be worthwhile to try to understand them in their time and place. People in the 19th century, in general, were not cultural relativists. They believed in progress from lower to higher, and European civilization was definitely higher than anything in Africa or Latin America or Oceania. Consequently, they drew the line we have mentioned in a very different way than we do today. I refer to the line between "culture" and something more universal, something that trumped or superseded it. The missionaries did not care whether the natives ate yams or not. But to the missionaries, religion (true religion), and certain aspects of social structure (individual ownership of property, the family farm system as opposed to communal land tenure,<sup>5</sup> and so on), were not "Western" or parochial, but were "civilized," in short, pan-human. Their ideas of religion (and, to a lesser extent, economic behavior) occupied, in other words, the same ideological space that "fundamental human rights" do today.

Today, democracy and human rights are on one side of the line, and religion (most definitely) has moved to the other. Interference with native religion is today certainly not accepted. Religion is considered a matter of identity and culture, or at worst, a matter of personal taste, or the individual quest for spirituality. This assuredly falls within the realm of choice.<sup>6</sup> And "culture," which

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5. Getting rid of tribal systems of land tenure was a prime goal of national policy toward the native peoples in the United States; it was expressed as policy in the infamous Dawes Act of 1887, c.119, § 6, 24 Stat. 390 (1887) (codified as amended at 25 U.S.C. § 349 (1994)). See DONALD L. PARMAN, *INDIANS AND THE AMERICAN WEST IN THE TWENTIETH CENTURY* 1-10 (1994). In part, the policy might have been nothing more than a device to steal more land, but it did reflect a deeply-held belief that *civilized* people operated on the family-farm system.

6. See LAWRENCE M. FRIEDMAN, *THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE* 164-69 (1990).

the 19th century Western expansionists respected poorly if at all, has also tended to move to the untouchable side of the line.

The missionaries, settlers, explorers, and conquerors at best felt they had something to give to the poor heathens; at worst, in the earlier phases, and in the settler communities (the United States, Australia, Argentina), they were willing to stamp out the people and their cultures with no more concern than when one swats a fly. Cultural traffic went only one way. A trickle of gew-gaws and artifacts were collected (or stolen) from the natives for museums, or as curiosities and souvenirs; but that was just about all. Even classic ethnography was one-sided. The non-Western cultures were passive objects of study.<sup>7</sup> Western "culture" and technology flowed from West to East, to Africa, Oceania, and other parts of the world. In the period before contact, this "culture" and "technology" was simply unavailable to the rest of the world. As Europe expanded, it exported its machines and its mind-set to the rest of the world. But the traffic, as we said, went only one way. What came back was gold, lumber, tin, rubber, minerals—and slaves.

Today, of course, all this has changed. There are reciprocities of interaction, between core and periphery, between the global and the local, between the powerful and the powerless; there is a real blurring of lines. Commodities now move in both directions. A "commodity" is something that can be bought and sold—they are literally or symbolically transferable, movable, portable. The movement from periphery to core started with a trickle of curios and souvenirs, "native handicrafts" and the like; but today, primarily because of low wages, the flow of commodities, even when the commodities are, by nature, "Western," is apt to come from the Third World. Sports shoes are manufactured in Indonesia. Coca-Cola is sold in Albania. It is hard to say that Coca-Cola is "Western" when everybody in the world now drinks it. Coca-Cola has gone global. It is part of a world culture, a single cultural language, so to speak, split into a variety of dialects.

Human beings, too, are increasingly "commodities" in the sense I have used the term. They are certainly portable, movable, and transferable. Today, millions of people are on the move; all of

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7. Classic ethnography did, however, treat indigenous cultures with respect, and even, at times, romanticized them: it took them to be coherent structures that made sense in their own terms, and did not dismiss them as "savage" or "primitive."

the Western countries (and especially the big cities) are becoming much more "cosmopolitan;" waves of refugees, asylum seekers, and immigrants are dashing against all the shores.<sup>8</sup> Immigration, I hardly need to remind the reader, is a major political issue in the United States; and elsewhere as well (very notably in Western Europe).

Movements of people are certainly nothing new in the world. But there are some elements of current immigration which are, in fact, rather different from aspects of past immigration. American immigration law, in the 19th century, was noteworthy mostly because of what it did *not* do: it made no attempt to restrict immigration. This country was (apparently) open to anybody. The first restrictions, late in the century, were directed against the Chinese.<sup>9</sup> Only in the 20th century, very notably in the harsh and biased statute of 1924,<sup>10</sup> was there any concerted attempt to keep out undesirables. The undesirables, aside from Asians, were peasants from Southern and Eastern Europe. Surprisingly, the 1924 law did nothing to control immigration from the Western hemisphere. In theory, all of Honduras could have taken up residence in Los Angeles.

What was it that kept out the masses of Latin America, or for that matter, the millions of Bengalis or Africans or Malays? What kept all these people from knocking on the doors of the United States, a rich and powerful country and a magnet for millions? The sheer cost of travel is one answer. Indeed, the invention of the steamship had a great impact on the late 19th century burst of immigration from Europe.<sup>11</sup> Travel became cheaper; but it was still far beyond the reach of the poorest of the poor, especially in Asia and Africa.

I think, however, that another factor was even more crucial than cost. Immigration is by and large an offshoot of modernization. Modern immigration demands a certain level of awareness, a certain degree of sophistication, a certain amount of exposure to the big, wide world. Truly traditional people do not move, if they

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8. There is, of course, a huge literature on the subject. *See, e.g.*, STEPHEN CASTLES, *MIGRANT WORKERS AND THE TRANSFORMATION OF WESTERN SOCIETIES* (1989).

9. *See* BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICAN THROUGH IMMIGRATION POLICY, 1850-1990* (1993).

10. Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924).

11. *See* STEPHEN STEINBERG, *THE ETHNIC MYTH: RACE, ETHNICITY, AND CLASS IN AMERICA* 34 (1989).

can possibly help it. They stay put. They may even be totally *unaware* of other ways of life. Modern communication, for example movies, radio, television, has brought images of the world into homes or villages almost everywhere; for countless millions of people, it has opened their eyes to distant possibilities; it has shown them images and patterns other than the old familiar ones. It has thus planted the seeds of rootlessness. It has evoked, in other words, the urge to seek a fortune, or at least a living, and to see the world. Poverty, hunger, and war help to push immigrants; but the pull of the developed world depends on the images and devices of modern communication. Once a "colony" is established in New York or London, to be sure, letters home and rumors of jobs complete the process.

This mobility is one of the underlying causes of culture clash. After all, we can ask why female circumcision is an issue now in France. It certainly was not on the agenda of French politics in the 19th century, or even in the 1930s or 1940s. France had other things to worry about. Hence we face a kind of paradox. It is the (partial) breakdown of traditional society that makes the new mobility possible. But aspects of traditional societies decay at different rates. The "culture clash" that we find in France, or elsewhere, is a result of this kind of differential decay (or, more neutrally, differential evolution or change). Africans now live in France; but they are not "traditional" people in the same sense that their ancestors were; they are modern people in many or most regards. This is the point made earlier. One might argue, then, that the clash between the Africans and the French, is not a clash between the modern and the tradition, but a clash between different dialects of modernity.

That would not be so far off the mark. Africans living in France watch TV, drive cars or ride busses, buy food at the supermarket, and go to the movies. They may be different from the majority of the other people living in France, in various ways. But they are probably far *more* different, and profoundly so, from their own village ancestors of, say, some centuries ago. For that matter, most of the French are profoundly different from *their* ancestors, even those of not so long ago.<sup>12</sup> And they retain, from their past,

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12. See EUGEN WEBER, *PEASANTS INTO FRENCHMEN: THE MODERNIZATION OF RURAL FRANCE, 1870-1914* (1976). What is particularly striking in this important book is the description of exactly how isolated and traditional life was in rural France as recently as



vestiges of traditional France. But they do not really *think* of these as “primitive” because they are familiar and accepted. When some Muslim girls tried to wear head-coverings to school, it threw some of the French into a panic. Wearing a crucifix, of course, would go totally unnoticed and accepted.

The receiving societies have changed substantially since the 19th century. They now embrace (more or less) forms of cultural pluralism, though often very reluctantly. This was certainly not the case in the past. The Americans, for example, rushing to conquer the continent, cared nothing at all about the cultures of the native tribes. For people of good will, assimilation was the solution to the “problem” of native Americans;<sup>13</sup> for people without good will, extinction would do just as well. Very few people thought native culture was worth preserving, or that it *could* be preserved, in competition with “advanced” societies. Cultural pluralism, as a value, is distinctly twentieth century. And, as we have argued, the irony of modern cultural pluralism is that it is, at core, not entirely pluralistic. All of the subgroups are, in their own way, modern. There are groups on the margins that stretch this point a bit—the Amish, to take an American example. But on the whole this generalization holds true.

Moreover, cultural pluralism has its political and social limits. There is, to begin with, resistance, sometimes serious resistance, from various segments of society. It is enough to mention the crusade against affirmative action, the fuss over legal and illegal immigration, and the “English Only” movement. Another limit, and one more worthy of respect, is the notion of fundamental human rights or fundamental human dignities. Of course, these ideas are themselves culture-bound, and, perhaps even more important, they are historically specific. Most of the notions that we think of as “Western” are not “Western” but modern. They are the products of a dramatic evolution, which began in the West, and which turned traditional society inside-out. Indeed, torture (now outlawed, on paper at least, as a violation of fundamental human rights) was once a standard practice in Western legal systems.

But most people are not aware of history, and never think about it. Nor, perhaps, would it make any difference to them. What

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a century ago.

13. Assimilation was also, of course, the solution to the “problem” of immigrants in general.

is important is the passionate sense of right in their guts—the sense of entitlement. One of these “fundamental” rights is the right to preserve a culture, as we mentioned before. But other “fundamental” rights can, and do, clash head-on with cultural claims. How such clashes are to be resolved is not easy to say. It is in this intersection, this zone of free fire, that Obiora’s article can be placed.

