

FOREWORD

LEGAL TRADITIONS. A CRITICAL APPRAISAL

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Our goal was to bring together scholars from a number of different legal fields who are working with a methodology which might be defined as critical in a way that- we hope- will become much clearer at a later stage in the Conference.

1. We started from a widespread opinion that over the last years, there has been an increasing emphasis on legal traditions which replaced- in the mainstream comparative law- the previous approach that emphasized legal families and legal national systems. Tradition- it has been suggested- may well be a more interesting concept to work in a global world.

The sources of this approach may be traced back to various critiques of the comparative enterprise, focussing on the idea that there is something more we have to consider, something other than the usual apparatus of substantive solutions to legal problems and their justificatory arguments routinely used in the mainstream comparative analysis. Even though the critiques may disagree about what exactly the constitutive elements of this something should be.

The notion of tradition plays a crucial role when we compare and contrast systems. It marks a boundary in a much stronger way than mere difference. The call for tradition (or culture) means that there is something very basic in a particular difference, something more important at stake and something that implies a possible tension between systems.

As such, the notion of tradition is the basis for a set of different arguments (in the European integration debate- for instance- tradition is often used to justify to go slowly or quickly in the reform or harmonization projects).

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Even a progressive document as the Manifesto for Social Justice cannot refrain from referring to the need of “continuing respect for traditions”.

Traditions develop and play their role at a level usually different from the national, at an intermediate regional level. That’s why our focus therefore will be on regional areas such as Europe, Arab Middle East and Latin America.

Regions in which we get interested not as regional specialists, but as students of the general relationship between “center” and “periphery”, or better of the appropriation or reinvention- in the “periphery”-of the law from the “center” of the world.

In the future it will be extremely interesting to broaden the scope and extend this type of analysis to other regions that occupy similar positions- other areas that share the complex historical experience of colonial rule, independence and unequal interaction with Western powers (Africa, Central and Eastern Asia).

We have the idea, to be tested at this meeting, that particularly scholars working on issues of European integration will benefit by increasing their knowledge about what is happening in these regional areas.

Tradition has a normative or prescriptive force. The definition of its content is always in progress, but tradition always requires something to be done by the analyst: to weigh or to balance something. Tradition is used to emphasize common interests, beliefs, values, traditional allegiance of those who share a culture, but it is invariably called on and used against something.

2. We noticed that traditions are understood in two quite different modes. We might define them as organic and semiotic. But what do we mean exactly by those definitions ?

To stick to the title of our Conference in the former the emphasis is more on tradition, in the latter the accent is more on construction.

In the former, tradition means an entity that constitutes and is dialectically constituted by a whole national culture or spirit. Each entity is unique, a specific product of cultural features and of a national spirit and history. In this perspective a legal tradition is produced generally by an elite that is linked to another entity that may be a dominant foreign (or local) legal culture or a local non-legal culture.

In the metaphor of organicism, a tradition grows, develops and decays. The idea of an organic connection has been at work in European legal

thought for ages. Its strategic character is patent, sometimes openly credited. It is the case of Western legal tradition, understood as unique evolving from Roman times through the Middle Ages to its actual predominance.

Notice also that this achievement was wisely accomplished by working selectively in different ideologically and methodologically grounded subfields: by a systematic privileging of private law over public law and of the law of the obligations over the law of the family, and by recombining the different elements as a unity.

These distinctions- for some formally collapsed, or severely challenged by others or defined as less culturally entrenched in some systems- survive as archetypes everywhere in the mind of contemporary jurists and are still capable of producing various discursive consequences.

That's why we organized the panels around those dichotomic poles.

Notice also the side-effect of such construction: the exoticization of many legal cultures different from the Western one and the construction of colonial/post-colonial narrative voices.

But it is also possible to see tradition in a different view. In a semiotic perspective, national traditions exist only as accumulated speech, a complex system of distinct and multiple elements (as a common conceptual vocabulary, a set of potential rule solutions, typical arguments pro and con, organizational schemes, modes of reasoning) as a list of elements that help us make the context more intelligible than it was before.

As with ordinary language, there are an infinite number of "grammatically" correct norms, legal arguments and conceptual ordering ready to be used. These are channelled by the pre-existing mass of rules and the conceptual order, as well as more complex elements such as Sacco's cryptotypes or Bourdieu's habitus.

The way they combine in any given experience is dependent on the balance among forces operating within the legal field.

It is possible to see tradition through the genealogical method. It's not a search for origins but for the pre-existing (dispersed or disseminated, according the poststructural jargon) elements that actors combine at moments of change to produce a new version of the "whole". Tradition is a work of representation. It is explained not by the idea of incremental change but by the idea of sedimentation, a series of layered patterns in which the new lies on remaining dispersed elements of the old.

We are not interested in new forms of classification or taxonomic exercises (as in the mainstream) but we are interested in identifying cultural and legal elements that can be included and are actually included in each tradition, the way in which tradition works, it adapts and maintains its distinctiveness, it reworks their foundational myths, how it makes strategic use of law in relationship with other cultures.

As with culture, any totalizing understanding of tradition fails to take into account the role of individual actors in generating meanings and in particular fails to account for conflicting understandings and views within every tradition. It treats traditions as hermetically sealed units rather than pluralistic, intersecting hybrid entities.

Many of these cultural practices are not necessarily local and not necessarily closed.

We have the idea that in the transnational order

1. National diversity is only a different solution within a common conceptual structure and with a common language. The specific regimes are extremely different in details but fit into a relatively small number of patterns, reproduced in country after country.
2. The reception process is always complex. The importing system appraise the model and always transforms it- sometime in a radical way- by a creative and original re-shaping of the transplanted element in the receiving context.
3. In this regard it is important to distinguish between context of production and context of reception. What is transferred from one place to another it can become associated with a different or more limited political project.

This is the case of the more socially-oriented continental schools of thought which were appropriated by Islamic lawyers to present the Egyptian code as modern and traditional at the same time against the individualism of classical Western tradition.

We have also the idea that in the transnational order:

1. Systems are in complex relations of interaction and/or integration (up to the end of the 19th century Italian private law system was relatively open to French and German systems and integrated first

with France and then with the Germany. After the Second World war while remaining relatively integrated and open to them, it became relatively open to the U.S. system). Also, regional systems can be in relation of relative openness or closedness vis-à-vis other similar systems of comparable scale. For instance, by the appeal to a European legal tradition local jurists seem sometimes to aim to constitute an entity under their influence that can countervail the influence of US dominated global contemporary legal consciousness. As in the case of citizenship where a thick conception grounded on a welfare is pitted against a thin conception grounded on individualism or in the case of contract law where a conception grounded on altruist good faith is pitted against a more individualistic American conception of contract.

2. In Latin American, on the contrary, the European-ness with which that tradition is routinely associated may be used to strengthen and support the liberal project of national governance by insulating the legal system from the input and interests of broader local cultures.
3. To reconstruct a national or regional identity is to redistribute wealth and power. It is not only a merely ideological manifesto. For importers reception means replacing old rules with new ones. It may be a strategy with distributional consequences. As usual, the choice of a rule will also produce losers and winners. For instance it determines who gets to shape both form and substance of local legal discourse. Some will face steep costs of transition; others will enjoy first-movers advantages and will export both their own categories of legal discourse and their own set of justificatory principles. Different opinions may be better understood in terms of ideological disputes over the acceptable limits of redistributive projects.

An investigation of legal tradition may better be understood as a self-reflection and critical interrogation of the various and conflicting political projects underlying comparative law.