



JPs Review of Conferences, Seminars and Events

SEMINAR “SOCIAL PLURALISM, LEGAL TRADITIONS AND GOVERNANCE OF DIFFERENCES -COMPARING EXPERIENCES”, TRIESTE, 4 DECEMBER 2013

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Several scholars of different scientific fields have discussed the issue of legal pluralism in contemporary world at the seminar “Social Pluralism, Legal Traditions and Governance of Differences - Comparing experiences” held at the Political Science Department, University of Trieste.

The papers focused both on the Latin-American experience – where some Countries amended their Constitution in order to promote indigenous values and principles - and on the European scenario. As a matter of fact, European countries, through immigration, have been experiencing a growing number of cases in which individuals claim to have a series of family and personal matters regulated by the law of their Country of origin. This is in many case traditional religious law or State law deeply influenced by traditional religious law.

Although deeply different, the two regional cases highlight the same phenomenon: the growing importance of legal pluralism for contemporary societies. Legal pluralism has been traditionally studied with reference to situations of acknowledgment of “customary law” in colonial and post-colonial settings. This led to conceive legal pluralism as an almost exotic phenomenon, which did not put into

discussion the idea of legal centralism. This is, according to John Griffith, the idea that the law (mainly produced by political organs) is and should be the law of the State, exclusive of all other laws and administered by a single set of State institutions. The underpinning issue of the Trieste seminar relies on the increasing relevance of legal pluralism as a general phenomenon that challenges the very idea of one and uniform law for all, even in legal orders and cultures deeply embedded in legal centralism as, at least formerly, in Latin America and, at least formally, in Europe.

Francesco Lazzari (University of Trieste) opened the programme. He focused on the experiences of some Latin American Countries like Bolivia and Ecuador, pointing out how in the last years the political struggles of the indigenous communities have deeply questioned the legitimacy of many economic and legal notions developed in the North American and European orders. Francesco Lazzari's contribution relied on Boaventura De Sousa Santos' works and on the idea of developing a new legal epistemology for the South. This implies conferring value to a new type of knowledge based on the practices of social groups that have suffered systematically the oppression and the discrimination patterns caused by capitalism and colonialism. Since neoliberal globalisation is the product of a relation of power between classes or, rather, between the Northern against the Southern part of the world, there is a need to develop counter-hegemonic political, cultural and economic tools. Indigenous culture may offer alternative instruments to be applied in the Latin American context.

The two following papers by Silvia Bagni (University of Bologna) and Serena Baldin (University of Trieste) focused on the constitutional reforms occurred, respectively, in Ecuador (2008) and Bolivia (2009).

Both Authors highlighted the increasing relevance of legal pluralism in the two Countries. To this extent they both stressed the insertion in the two Constitutions of the *BuenVivir* notion. This is the Spanish translation of the *Suma-Kawsay* notion, a fundamental principle in many indigenous cosmologies. It expresses the idea that the relations among human beings and nature should develop in a framework characterized by solidarity, communal economy and common legality. *Buenvivir* is a funding constitutional principle that both the legislative and the judiciary powers have to take into account in the exercise of their respective function.

The *Buenvivir* notion implies a strong commitment for the environmental protection, the recognition of indigenous collective rights and the multi-national nature of the state. This means that indigenous peoples are recognised as nations rather than as minority groups. The exercise of the judicial function according to their indigenous customary law is thus recognised.

The attention toward indigenous culture also led to introduce in the Constitution of both Countries forms of participatory democracy, alternative to the representative one, which are especially developed in the indigenous communities. Such forms of participatory democracy include *referenda*, people's initiative, duty of holding public hearings, public consultations on issues related to the environment.

However, both papers emphasised a substantial lack of effectiveness of these provisions. For example, the Ecuadorian Constitution provides for an *actio popularis* empowering any individual to claim action in defence of the rights of the Mother Earth. However, the statutory law needed to enforce this constitutional provision is still lacking. The same applies with regard to the judicial functions of the indigenous communities. Art. 171 of the Ecuadorian Constitution allows indigenous communities to give justice based on customary indigenous law, provided that the Constitution and the fundamental constitutional rights are respected. However the statutory law which should ensure coordination between the two legal systems has not yet been approved. In the case of Bolivia, a similar provision has been inserted in the Constitution (art. 304) and the enforcement statutory law has been approved in 2010.

The second part of the meeting has focused on legal pluralism in the European context. As noted above, because of immigration, in many European Countries immigrants claim, under international private law, to have family and personal matters regulated by the law of their Country of origin.

In so far as this law corresponds to - or is largely influenced by - traditional Islamic law, European legal systems face the problem of reviewing its compatibility with domestic fundamental rights standards. International private law appears to be an ambivalent instrument: it can serve the purpose of either favouring the application of foreign law or, on the contrary, of keeping legal pluralism out. This may be done through the use of connecting factors which favour the application, as substantive law,

of the law of the judge or by applying a public policy exception (*ordre public*) which prevents the application or the enforcement of foreign law or judicial decisions.

Within this latter framework, Davide Strazzari (University of Trento) focused on the Belgian system, where, in an increasing number of cases, traditional Islamic law instruments are not given legal effect because of their assumed incompatibility with fundamental rights, especially when non discrimination against women is considered. This is a breakaway from the previous well settled line of cases where, at least in some circumstances, Islamic family law concepts, such as polygamy and repudiation, have been given effect by Belgian courts.

Protecting fundamental rights, especially non discrimination on the ground of sex, is the reason advanced to justify such a change in legal interpretation and case law. However this motivation presents some inconsistencies. As a matter of fact, the application of foreign law or the enforcement of judicial decisions based on foreign law substantially influenced by traditional Islamic law is denied in so far as one of the parties involved has acquired Belgian nationality or is permanently resident in Belgium. This is inconsistent with the view that fundamental rights as such are indeed fundamental and universal: if non discrimination on the ground of sex is at stake, then there cannot be a different result according to the fact the person involved had acquired or not nationality or long term resident status in the reception country (in the present instance, Belgium). Moreover, the failure to give effect to decisions on polygamy or repudiation, with no regards for the concrete circumstances of the cases, may clash with other fundamental rights, such as the right to family reunification. Relevance is to be given to the case of a migrant who is prevented from exerting the right to family reunification with his second wife due to the failure of recognition of an act of repudiation even in case this has been voluntarily accepted by the previous wife.

These inconsistencies suggest that the main purpose of such change in case law is the protection of the Belgian national legal order from the incursion of foreign law whenever this latter is clearly influenced by Islamic law tradition rather than the protection of fundamental rights as such.

This course of interpretation and application of Belgian rules of international private law led to question the shared and conflicting identity of the immigrants who keep strong relations with the Country of origin culture, being at the same time involved

in the culture and way of life of the Countries of destination. The tension caused by this conflict of identities has been the subject of the contribution by Ornella Urpis (University of Trieste). By relying on research data related to the condition of recently migrated women in Italy, the author highlights how these women started to behave according to strict Islamic rules only after settling in Italy. This means that cultural identity also is a process of self-construction which develops when the individual loses his/her original cultural ties and needs to build up new ones.

Comparing the emerging of phenomena of legal pluralism in two very different situations, such as Latin-America and Europe, is not an easy task. The seminar seems to suggest the idea that a very different rationale is at stake in the two regional scenarios. While in Latin America legal pluralism is a way to build up a new sense of Nation, giving relevance to autochthonous communities which have been substantially neglected in the previous process of nation building, the European case faces the problem of accommodating cultural rights of new minority groups, not originally present there. Non-discrimination and equality, freedom of religion and cultural pluralism are certainly part of the western liberal tradition and they provide legal grounds for accommodating some cultural expectations of these new minority groups. However, a certain degree of cultural and linguistic harmonisation needs to be guaranteed, bearing in mind that this is the only way to favour social mobility and thus the improvement of life conditions of immigrants in the new reception societies. Striking a proper balance between accommodating diversities and keeping a cultural, linguistic, legal common ground is the challenge the European countries need to face.