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Ana Laura Nettel

Universidad Autónoma Metropolitana

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Arguing for Principles in Different Legal Cultures

ANA LAURA NETTEL

*Department of Law
Universidad Autónoma Metropolitana
Amsterdam 180-403 Col. Hipódromo Condesa, D.F.
Mexico
analaura.nettel@gmail.com*

ABSTRACT: In all legal systems lawyers and judges appeal to general principles. These principles supposed to be taken from the very grounds of Justice. Accordingly they are presented as setting forth such an argument that it should defeat the opponent's. In this paper I will be interested in the principle of legal certainty and in how it is understood in Anglo-Saxon and a Continental legal cultures.

KEYWORDS: legal cultures, legal principles, legal reasoning, topoi.

1. INTRODUCTION

Is there a legal culture?

Law is amongst the different symbolic dimensions that an anthropologist interprets in order to characterize a culture (Gertz 1973). Law is an important part of a Nation's culture while it constitutes a system of meaning necessary to interpret the social world. Being an important part of a Culture, Law appeals to identity, in that sense is idiosyncratic or particular, hence a defining part of a culture.

Are there different legal cultures?

In spite of the fact that Western legal systems share a general discourse about the Rule of Law, which would seem to call for one paramount "legal culture" at least in modern legal systems, I contend for the differentiation of legal cultures for there are different interpretations of Law's institutions; i.e. different senses. In order to try to show it, I will be interested in analyzing how in each legal culture general legal principles (in particular the principle of certainty) give birth to different institutional outcomes (in particular I will refer to criminal procedural systems) depending on the core values of the cultural system. This calls for a differentiation of legal cultures even amongst Western countries. I will be interested in the case of Common Law and Civil Law legal systems. The general aim of this paper is to show that the adoption of institutional changes from one legal culture to another may hence be disruptive and is a delicate matter for the function of a society.

Law like every other institution stems from a principle or series of principles that inform the institution, which is the means by which those principles come to life. All

legal systems, as every social institution, ground their legitimacy on the ends they are purported to accomplish, in a sort of promise they convey by their image (Nettel 2005). In spite of the frequent difference between the promises and their performance (a topic which I will not develop here), the social ends and values and the general principles of Law by which those ends and values are conveyed, constitute the core arguments of legal reasoning.

By a principle I understand a normative formulation entrenched in the *doxa* conveying values and purposes and therefore, constituting a strong argument. Legal principles have the role of *topoi* in a way I will try to elucidate.

There are many senses in which the term “legal culture” is used; in this paper I will use it as the pattern of legally oriented social behaviour and attitudes (Nelken 2004) resulting from a store of meanings.

2. THE TOPOI AS CULTURAL ARGUMENTATIVE ITEMS

The conception of topics by Aristotle came to the scene of jurisprudence in the fifties thanks to Theodor Viehweg. In his seminal book *Topik und Jurisprudenz* he recalls that in his early work *Topics*, Aristotle was trying to apply the science of logic to the art of arguing or *disputatio*, a field traditionally developed by the sophists’ rhetoric, which is why he situates *Topics* in the dialectic domain. Viehweg underlines that in *Topics*, Aristotle’s intention is to separate the apodictic field of philosophical truth from the field of dialectics, i.e. e. the object of dialogue or dispute. So dialectical conclusions are those that have as their premises *endoxa*.

What is interesting in Viehweg’s view is that *topoi* are seen within the frame of problem solving in the field of jurisprudence, i.e. as worth for legal argumentation. In further essays written in the seventies, Viehweg clearly locates *topoi* within pragmatics, leaning on Morris’s famous classification between syntax, semantics and pragmatics (Morris 1994). Pragmatics being for him the fact that signs are to be analyzed in relation to their users, an interest for argumentation seen as a communicative situation follows (Viehweg 1991, pp. 167-168). In another paper, Viehweg further develops the consequences of a pragmatic point of view: in so far as argumentation must be understood as a communicative process, i.e. a dialogue between at least two persons, arguments cannot be considered anymore as context-independent (Viehweg 1991, pp. 176-184). He then opposes a semantic perspective, what he calls “non situational” to a pragmatic perspective, which is situational. According to him, within a referential semantic perspective as Morris,’ which he rejects, legal concepts are considered as if they were extra-linguistic objects that the legal language would merely reflect (Viehweg 1991, p. 179). On the contrary, topics, which in this case comprise legal concepts, seen from a situational and pragmatic point of view are heuristic items he calls “research formulae” i.e., proposed directional guides that can be accepted or refused in the construction of an argumentation, whose aim is to find a solution to a problem posed in a dialogue (Viehweg pp. 180-181). Interestingly, Viehweg anticipated the development of the pragma-dialectic’s view, in so far as he saw argumentation as a dialogue, which needs to be understood from a linguistically pragmatic standpoint.

If everybody accords importance to Viehweg’s work, it has also received strong criticisms. First of all the usefulness of his work has been contested for his too vague

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conception of what a topos is (See Alexy 1987, p. 40; García Amado 1987; Atienza 1993, pp. 57-63). García Amado criticizes Viehweg's conception showing, by listing them, the heterogeneity of meanings that topos have in his view: commonplaces, arguments, empirical statements, concepts, means of persuasion, generally accepted criteria, guidelines for invention, etc. (García Amado 1988, p. 135).

What seems a weakness for his critics can also be seen as the main interest of Viehweg's conception of topos. Such a large conception of topos, conceives them as constituting a deposit of elements where one can go to fetch arguments relevant to our position. This is precisely what gives account of how the reservoir of topos has a variety of uses, depending on the different contexts where they are to be used. If a concern for precision and coherence reduces the idea of topos to one of those elements, the richness and flexibility of meaning the concept of topos would be lost. In this same direction, let me appeal to Anscombe and Ducrot's works on their account of the role of topos in argumentation.

According to Anscombe, topos are general principles on which reasoning leans and which are always part of the community consensus. A topos is product of a particular ideology and could as well be replaced by a different topos engendered by another ideology. A topos and its contrary frequently coexist in so far as our civilisations are not more monolithic than our ideologies. To the question concerning where do topos come from, the answer is with no ambiguity: from the ideological reservoir that every language possesses at a given time. This reservoir is composed of proverbs, slogans, generally accepted ideas, and so on (Anscombe 1995, p.39). As a result of their linguistic approach, Anscombe and Ducrot have come to grasp the relationship between topos and meaning; indeed their view of topos as "the source where an utterance takes its meaning," clearly shows the pragmatic stance of the business of argumentation. For them

using words is to call for topos. Hence the hypothesis that the meaning of words is not basically the assignment of a referent, but the availability of a range of topos (Anscombe 1994, p. 51).

Leaning on Anscombe and Ducrot, Amossy promotes a general conception of topos including also a diversity of elements: clichés, commonplaces, etc. (Amossy 2004, pp. 99-126).

Another objection that could be addressed to this conception of the role of topos, is that by integrating values to the deposit of topos "everything goes" for there is no hierarchy between different values conveyed by topos to which one can appeal while choosing a topos as an argument. My contention is that topos convey values, so as values can also get into conflict; the main interest of topos, being entrenched formulations accepted by the community, is that principles and values conveyed by topos are not about truth or falsity but about accent, weight, balance or priority. Topos being accepted by definition can be used as strong arguments. When a problem is put forward one can envisage different solutions and choose different topos, depending on the accent, weight, balance or priority given to values, therefore this is what calls for choosing one or another topos amongst the plurality contained in the reservoir. This is not a cynic way of seeing things precisely because each culture having established those priorities cannot accept an "everything goes" position to justify an action. Furthermore, in so far as *doxa* is knowledge shared by a community in a given time and space, topos depend on collective representations including of course values.

It seems to make sense that *topoi* being accepted by the community should not give rise to opposition; this point of view is coherent from a standpoint of a systematic approach. Nevertheless from a topic approach, and this is what makes it interesting, the aim is not algorithmic but heuristic. *Topoi* are sources of invention, which was already Cicero's idea of topics as Viehweg so interestingly recalls us. The reservoir of *topoi* contains all kinds of views that people generally accept, but that does not form a system and do not follow any hierarchy. The weight they may have is linked to the situation i.e. is context dependant.

Now, for the purpose of this paper Viehweg's account of Curtius is also interesting for he insists on the fact that the unity of the culture of the Middle Ages is due to the *topoi* (Viehweg 1986, p. 60). In other words, topics strongly help to fashion a culture; this is central for our understanding of the role of *topoi* on the shaping of legal cultures. Notwithstanding it is important to underline that legal culture as cultures *tout court* are not monolithic, in this sense a given legal culture might be part of Western legal culture and at the same time belong to a specific Anglo-Saxon or civil law legal culture. To share the Western set of *topoi* does not mean that there may not be important differentiations that can give account of a recognizable pattern of legal social behaviour and attitudes, resulting from a store of meanings that are necessary to interpret the socio-legal world in a certain way; this calls to distinguish legal cultures within of the Western world. This is what I would like to show by analyzing some differences between an adversarial and an inquisitorial legal system.

3. ANGLO-SAXON/CIVIL LAW PROCEDURAL SYSTEMS

In Western legal systems, general legal principles are supposed to come from the grounds of Justice; hence they stem from a starting perspective which amounts to tacit value judgements they are meant to reflect and which are the very purpose of Law.

The struggle to limit Royal Power gave birth, as everybody knows, to Modern States. The basic idea of "The Rule of Law," "d'état de Droit," "Rechtsstaat" is that one should be governed by laws and not by men.

The seminal principle that informs the institution of Law is the need to avoid arbitrary action of governmental power i.e. the principle of legal certainty. Legal certainty is then an end pursued by every legal system, i.e. the rock bed of the very concept of Law. It means that coercion should be applied on the basis of existing rules, and in accordance with an established procedure, hence legal certainty is linked with the aim of predictability of the consequences of our actions.

From the refusal of arbitrariness follows by the same token that nobody should be deprived of hers or his rights without a due process, i.e. the guaranty that no one will be sanctioned without a due process. What is at stake in Law Courts is the accurate resolution of a conflict between two parties that have opposite positions. It is the role of a third party, having heard both sides, to resolve the dispute according to rules set in advance, aimed to guarantee an adequate resolution of the dispute. Traditionally laymen believe that an adequate resolution of a dispute according to a system where the Rule of Law prevails would be "the one" that derives from the Law of the country; much of the deference to the authority of Law follows from this view. Is there only one right answer to legal disputes? This has been one of the most debated questions in jurisprudence during

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the last decades (see Hart 1994, Dworkin 1977 and 1978). I will not tackle directly this issue; nevertheless there is a germ of answer in what follows.

Does this mean that legal certainty is the one common concept to all Western legal cultures? Yes, in that all legal cultures are purported to provide legal certainty; but no, as I will be contending in what follows, because different legal cultures fashion their institutions in different ways giving rise to different solutions to the same problem.¹ As I have already said one of the main purposes of this paper is to contend that the interpretation and weight given to principles, in each legal culture inform the institutions of the particular legal system and by the same token influence the outcomes of legal reasoning. This is manifest in the different interpretations of the principle of certainty in Anglo-American legal system or in a Continental one, in spite of the fact that both are considered modern legal systems where the idea of “due process” is central for the realisation of the ideals of the Rule of Law.

Notwithstanding the fact that the general aim is to avoid arbitrariness i.e. e. the principle of certainty, each different procedural system claims to be the best way to reach the right solution for legal disputes. The principle of certainty will be served differently, depending on the weight given to the values guiding each procedural system.

Having said that legal certainty is one of the aims of any legal system, I will focus now on how certainty is to be achieved in both main legal procedural systems.

4. LOOKING FOR CERTAINTY THROUGH LEGAL TRIAL

a) Adversary legal procedural system

At the outset it might be useful to recall that no actual legal procedural system is purely inquisitorial or purely adversarial. Nevertheless Anglo-American systems are considered mainly adversarial and continental ones are purported to be of an inquisitorial kind.

The adversarial system contends that legal certainty may better be served by giving the parties the prevailing role; by contrast the role of the third party (judge or jury) is mainly passive up to the point that many consider that the seminal feature of the adversary process is the judge’s (or jurors’) passivity. They are hence considered arbiters or referees whose aim is to decide who is the winner of a combat this is why some authors characterize the judicial process as an eristic dialogue where victory on the opponent is the main goal (Walton 1998, pp. 178-197).

The parties decide what evidence to present, what witnesses and exhibits to introduce and how to perform the examination. Consequently the length but also the direction of the trial will depend on what the parties consider relevant for their case. In effect, the fact that the parties lead the trial has also qualitative consequences, for the required passivity of the judge (or jury) can have the effect that parties can withhold evidence possibly relevant but that they consider unuseful to their case. In a book of

¹ In the same sense, see Eser 2008, p. 207:

In theory, I always had expected that various criminal procedures, even in case of considerable differences, in the end will all come down to the same essential result: finding the accused guilty or not guilty. During my experience at the ICTY, however, I had to realise more and more that the final result of a criminal proceeding may well be different depending on the basic procedural model pursued.

Ethics in an Adversary System, Monroe H. Freedman sustains that lawyers are constraint to withhold evidence relevant but not pertinent for their client's case the reasons given are:

What seems to be less readily understood is [...] the obligation of the lawyer's to their client and, in a larger sense, to a system of administering justice which is itself essential to maintaining human dignity [...] The explanation to that answer takes us to the very nature of our system of criminal justice and, indeed to the fundamentals of our system of government. [...] Under our adversary system, the interests of the state are not absolute, or even paramount. The dignity of the individual is respected to the point that even when the citizen is known by the state to have committed a heinous offense, the individual is nevertheless accorded such rights as counsel, trial by jury, due process, and the privilege against self-incrimination. [...]

Actually, however, a trial is far more than a search for truth, and the constitutional rights that are provided by our system of justice may well outweigh the truth-seeking value [...] (Freedman 1975, p. 2)

An adversary system is concerned with the value of the search for truth, the government officials work in the sense of eliciting truthful evidence but when the criminal defence attorney obstructs those efforts he is, in Chief Justice Warren's opinion "merely exercising [...] good professional judgment [...] In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution. (quoted by Freedman 1975, p. 3)

In other words in a criminal trial like the American adversary trial, the principle of certainty, concerning the defendant's position, is served by giving priority to his individual rights: the right to self-defence, the privilege against self incrimination, the principle of innocence (the burden is on the prosecution to prove guilt beyond a reasonable doubt) and the right to remain silent; these individual rights overwhelm the search for truth.

b) Inquisitorial legal procedural system

By contrast, in an inquisitorial system the role of the judge is not passive in so far as he is able, in different degrees depending on the specific legal system, to intervene in demanding more evidence when he or she considers it necessary to come to conclusions. While the outcome of the proceeding in an adversary procedure depends on the ability and discretion of the parties, in an inquisitorial, system the judge is the one who guides the trial. Impartiality is served not by his passiveness but by the equal procedural rights enjoyed by both parties. The accusatory nature of the adversarial system is also present in the inquisitorial one for the accusatory nature depends on the presence of an independent prosecutor i.e. where there is a separation of the prosecutor and the defendant's case. Hence, the participation of the judge can be impartial, in spite of his more active role in the search of truth. In an inquisitorial system the principle of certainty is served not only by respecting the defendants rights to self-defence, the privilege against self incrimination, the principle of innocence and the right to remain silent, but also by the faculty of the Trier of facts looking for the elements necessary to arrive to a conclusion as close as possible to material truth. Truth finding is considered of great interest for the realisation of the principle of certainty so much for the benefit of the defendant as for that of the victim and of public interest.

The interpretation of the principle of certainty is only one example of how this principle is differently argued in both models. Nevertheless, it is important to stress that legal cultures are not fixed but evolve. This means that the sense and the weight given to

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a principle entrenched in a given legal culture might experience changes depending on the evolution of the society. It might be useful, as an illustration of this phenomenon, to recall the changes in the interpretation of the principle of liberty concerning freedom of contract in the United States Supreme Court resolutions.

Before the Civil War Constitutional protection of entrepreneurial activity from governmental interference was by the contract clause of the Constitution, but due to the fact that entrepreneurs were dependant on state subsidization there were not really free from governmental regulation. State/private economic partnerships and state regulation of economy were common. While the purchasing power of private individual increased by 1860 some entrepreneurs could function without the help of the state. By the end of the nineteenth century the new enterprises were already used to do business free from governmental regulation. Ideological trends were in the sense of unregulated private activity, the paramount value being "liberty," the clause was interpreted as protecting corporation's freedom of contract: each one could freely bargain to buy and sell one's labour force; as anti-regulationist theories inspired constitutional interpretation, a principle of constitutional law followed: no state could pass legislation that interfered with the right of an individual to contract freely. By the end of the nineteenth century industrial development brought disease, violence and poverty; egalitarian principles were affected. During a period the Supreme Court attached itself to freedom of contract, but in 1937, after difficult economic times and severe criticisms from academics, the Court sustained that since the Constitution did not speak of freedom of contract, liberty under the Constitution is subject to the restraints of due process and of regulation reasonable to its subject. At a time the topos of the ideal of liberty inspired an unrestricted freedom of contract but when the economic juncture changes ideological trends, this topos is substituted for the reasonableness of limits to freedom in accordance with the subject. The Court considered that liberty was a fiction because true equality of bargaining did not exist between employers and employees at the time of American industrial development. (White 1978, pp. 38-41). As we all know too well, during Reagan's administration, the topos of non restricted liberty came back for almost three decades. Today with the economic crisis we can expect that "reasonable" restrictions will be welcome again.

5. CONCLUSION

By way of conclusion I would like to draw attention to the risks of transplanting a whole legal institution from one nation to another one. As we have seen above, each institution is informed by the values entrenched in the legal culture, i.e. the nation's idiosyncrasy. Therefore each model of criminal procedure gives different meaning, weight and balance to the same principles and by the same token can give different outcomes. Transplanting a foreign model hence means imposing a different axiological orientation, i.e. disrupting the nations' idiosyncrasy. Entrenched values are indeed not fixed, nevertheless changes in a society's set of prevailing values is most of the time slowly achieved or as we have recalled by a specific jointure. The risk of implanting legal institutions is then to exercise violence to the people's idiosyncrasy by imposing institutions that do not correspond to their pattern of legal social behaviour and attitudes and therefore do not match with their interpretation of the socio-legal world.

If this is so in the case of a sovereign state like Italy which willingly decided to implant the adversarial procedural system (See Illuminati 2005), for as Illuminati's account shows, big difficulties followed as a result of this experience; furthermore in the cases of political pressure made by various American governments, toward Latin-American nations, where governments are constrained to impose the adversary model.

Not only the social price but also the economic one of the implementation of legal implants is unbearable. However the most dangerous consequence in every respect is the dysfunctionality of the administration of Justice in countries where insecurity is at stake. Nevertheless, as I have already mentioned, since there is no pure procedural legal system, what can be envisaged is the reinforcement of certain desirable features of the alien model, publicity would be a particular principle of American model useful to fight against corruption, a scourge in most Latin-American countries.

[Link to commentary](#)

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