DIRITTI COMPARATI
Comparare i diritti fondamentali in Europa

NORMS - WE NEVER CLOSE: REFLECTIONS ON LAWS & ORDERS*

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(*) This brief note is drawn from a presentation delivered at Roma Tre on 19 May 2015, and, far more distantly from '"Things being various": normativity, legality, state legality' for M Adams and D Heirbaut (eds), *The method and culture of comparative law: essays in honour of Mark Van Hoecke* (2014).

In a series of papers and presentations over the last few years, I've insisted, as a comparative lawyer and legal historian, that the study of *law* must be comparative across both space and time. Such a perspective makes clear that *law* and *legality* are *folk concepts* rather than universals, distinguished both from (i) *norms* and *normativity* generally and (ii) specifically *state laws* and *state legality*. Or so I'll suggest briefly here.

Normativityis an obvious and common aspect of human communities. Standards of right conduct or claims, of oughtness or appropriateness, are ubiquitous. We are normative animals. But even if there exists some normative baseline for the species (as natural lawyers suggest) or common institutional patterns for groups (as numerous others maintain), communities nevertheless express normativity and specific norms in radically diverse ways.

Such plasticity needn't result in relativism. But in the vast majority of cases, norms believed to be universal have been mere projections of a community's values beyond itself, a reification of its internal standards. This might even be true for '*justice*' itself. In fact, an apparently common core between different traditions may suggest correspondence and commensurability, but it also remains distinct, a bloodless conceptualisation draining the originals of the elements that gave them local significance. Meanings, like their descriptions, are thick.

Whatever their substance, norms are more or less formal. They may be elaborate and precise rules, perhaps redacted in writing. This may fix standards to a degree, but interpretation can still significantly alter meaning. Still more often across human history, norms have been instantiated in less precise, but no less important, aretaic models of behaviour and virtue. In any event, the violation of norms may involve sanctions of shame and ostracism, penal incarceration, or all manners of punishment or violence. If common institutional developments are at least possible, communal conventions and their ideational or ideological contexts can vary significantly.

Like any other word, '*law*' may be attached to different concepts over time and space.But the identifiable, conventional *focal* or *central meaning* of the word and its cognates across the West is that of an *institutional normative order* attended to or overseen by individuals trained in its specific conceptual vagaries and vocabulary. And this is true not only for those actively engaged in formulating the meaning of practices in some official or even jurisprudential sense, but, far more importantly, for the wider public engaged in those practices and their discourses.

In this way, Western *law* was typically distinguished from other norms, not least from more general customs. Of course, given the long history of *law* and the manner in which secondary meanings can arise over time, the concept for which it stands is admittedly polyvalent. But the inevitable conceptual movement of language doesn't mean that there aren't conventionally appropriate uses of language. Language is itself a normative system; the word *'law'* can be meaningfully misapplied.

Again, meanings can change over time. '*Norm*' in the sense of a standard of social aptness developed, for example, out of the idea of a craftman's tool used to create *right angles*; indeed, there's an interesting story here about *right* as a physical and normative direction. And most Western languages employ two different words for law, roughly equivalent to the Latin *ius* and *lex*. The former in particular derives its significance from more general normativity—a thing that is *right*—as distinct from the latter's relationship to a more formally-recognised authority. Over time, however, this wider sense of *rightness* becomes secondary to that characteristic of a *legal* order.

But if *law* is a culturally-specific instance of normativity, it needn't have any link to the *state*. Western *legality* is distinct from, and emerged long before, the derivative concept of *state legality*. Indeed, the state is built on ideas and institutions of law that preceded it and would, over time, become its prisoner. For the Western past and much of the global present, the metric of state law is simply inappropriate. Jural philosophies built on state legality merely express relatively recent and insular experiences rather than universal, perennial principles.

The same is true for the *common national laws* that, as a result of legal nationalism and positivism since the revolution in France, are mistakenly projected as the core meaning of a *legal system*. Before the rise of the Western state, poly-juralism was commonplace. The laws' many bodies competed both with rival legal regimes and other forms of normativity. There was no agreed hierarchy of norms or an exclusive, overarching or coordinating legal *system*. And both laws and legal orders were recognisably *hybrids*, products of cultural and political intercourse with other communities.

When Europeans adventured abroad, they discovered a wide variety of normative forms more-or-less like their conventional understanding of *laws* and *legal orders*. Indeed, along with the Reformation, these colonial engagements were of considerable importance to the shift in Western thought from *legality* to *state legality*. A rationalisation of laws, rooted in new administrative and imperial challenges, made for ever-more-common

laws to be applied to varied colonial contexts.

And in different ways, at different times, what we now call the Global North imposed their ideas and institutions on those they encountered. Frequently this was the result of explicit violence; often, it was the fruit of colonial hegemony and indifference. Indigenous, perhaps no less hybrid, norms and orders weren't always displaced. But like their communities and individual identities, the normativities of native and newcomer were each altered in the process. New hybrids were generated in-between the old standards. And that process continues.

In sum, merely as a matter of intellectual consistency, we should neither ascribe *'law'* promiscuously to just any normative order nor limit its meaning to the late modern sense of *state legal systems*. Both approaches fail to appreciate the encultured, settled meaning and conceptual significance of the term '*law*'. This is not to say, however, that we can't alter those connotations. *Words, like other norms, never close.*

Note: Donlan and D Heirbaut (eds), *The laws' many bodies: studies in legal hybridity and jurisdictional complexity, c1600-1900* is in press.