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## Ascertainment of Customs and Personal Laws in Medieval Italy from the Lombard Kingdom to the Communes

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## Abstract

The medieval systems of law in Italy and Europe have been proposed as a sort of virtual laboratory to deal with the issue of ensuring that the principle of equality in the rule of law be compatible with the recognition of indigenous peoples' customs.

The legal framework of the medieval communes sought to strike a balance between the general interest in having legal certainty and uniformity with the citizens' interest in ruling their family life and economic assets according to their cultural and social values.

Up until the 14<sup>th</sup> century, in Lombardy an individual's legal status, family and inheritance continued to be ruled according to the customs of the individual's *natio*, be they Lombard or Roman.

The ascertainment of customs is an arduous task, as oral customs are fluid and vary from place to place and from family to family. For this reason, in the Middle Ages ascertainment was always entrusted to judges and legal experts (*sapientes*).

Until a few decades ago, recognising and enforcing customs was mostly unthinkable due to legal positivism and the principle of equality. Now, however, the limits of the principle of legal equality are well known: »Legal positivism was not able to abolish *status*« (G. Alpa).

The recognition of »legal Indigenous status« provides continuity between the past (the Middle Ages) and present (Indigenous Peoples Basic Law). Just as in the past, when living according to a given *natio*'s laws and customs did not mean self-government, so today the enforcement of an indigenous peoples' basic law should not undermine the sovereignty of the State.



**Claudia Storti**

## Ascertainment of Customs and Personal Laws in Medieval Italy from the Lombard Kingdom to the Communes

- 1 Recognising customs without granting self-government from past to present

One of the goals of this *Focus* is to consider how to pave the way for effective application of indigenous customs in courts. In fact, in endeavouring to respect human rights, the Republic of China is actively dealing with the very complex problem of recognising the cultural and customary legal traditions of indigenous peoples in compliance with the *International Covenant on Civil and Political Rights*.<sup>1</sup>

According to articles 1, 23 and 30 of the *Indigenous Peoples Basic Law* of 5 February 2005, the legal customs of indigenous and /or tribal peoples are to be recognised and respected in »judicial and administration remedial procedures, mediation, arbitration and the like«, with respect to traditional and customary rules related to the social, economic and political institutions in their territories, as well as within the Traditional Territories and Reserved Land.<sup>2</sup>

The Republic of China is not willing to allow indigenous peoples any form of self-government.<sup>3</sup> However, this approach represents a reversal of the trend that swept across Europe from the beginning of the 19<sup>th</sup> century, which led to both the central-

isation and the codification of a unique State law in the name of equality, an equality that was actually fictitious, as it was not supported by an effective, *de facto* equality, with severe outcomes for the working class as well as for the indigenous peoples subject to European colonial powers throughout the world.<sup>4</sup>

The medieval Italian and European systems of the law have been very correctly proposed as a sort of virtual laboratory in which one can observe the exact opposite of the 19<sup>th</sup> century European model. In Middle Ages, citizenship and subjection to a kingdom did not prevent individuals from claiming to rule their legal affairs according to the customs or laws of their *natio*. Such circumstances were the outcome of a long series of historical events that began in the early Middle Ages.

Historical research shows just how controversial the meaning of the term *natio* is. What historians know is that the original ethnic characteristics and identity of barbarian peoples (*gentes*) that invaded the Roman Empire progressively faded or at least underwent continuous change due to the assimilation process among barbarian peoples (*gentes*) and Romans. Thorough studies have been carried out on the »ethnogenesis of the barbarian within the Empire«,<sup>5</sup> as well as the subsequent establish-

- 1 United Nations, International covenant on civil and political rights, art. 40.  
2 Indigenous Peoples Basic Law (2005): Art. 1 »This Law is hereby promulgated for the expressed purposes of recognizing, protecting, and promoting the fundamental rights of Indigenous People, enhance and secure shared prosperity of the Indigenous communities, so as to ensure Indigenous Peoples' continued survival based on sustainable socio-economic development and in the spirit of inter-people cooperation«. Art. 23 »The Government shall recognize and respect Indigenous Peoples' rights to choose their *way of life, customs,*

*clothing, modes of social and economic institutions, methods of resource utilization and types of land ownership and management, based on their Indigenous knowledge systems and practices* (IKSPs)«. Art. 30 »The Government shall give due respect to tribal languages, *Indigenous customs and practices*, cultural diversity, cultural integrity, and the integrity of the values, practices and institutions of Indigenous Peoples in the process of dealing with Indigenous affairs, making laws or implementing judicial and administration remedial procedures, notarization, mediation, arbitration and the like, for the purpose of protecting the lawful rights of Indige-

- nous Peoples. In the event that an Indigenous Person does not understand the Chinese language, an interpreter who speaks the tribal language shall be put in place. Indigenous Peoples' courts and /or tribunals may be established for the purpose of protecting Indigenous Peoples' rights and equitable access to Justice /the judicial system /the judiciary system«. (The italics are mine).  
3 Implementation of the International Covenant (2012) 2.  
4 NUZZO (2009); NUZZO (2012).  
5 GEARY (2003) 99–150; PHOL (1998), (2000) 17–69.

ment of the Kingdoms of Burgunds, Visigoths, Franks and Lombards in the territory of the Roman Empire between the 5<sup>th</sup> and 7<sup>th</sup> centuries.

In any case, the political nature of the kingdom's establishment did not eliminate the ethnic consciousness of the predominant people making up the kingdom, as was the case with the Lombards in Italy;<sup>6</sup> it was only a 'new' identity, so to speak.<sup>7</sup>

As described below, medieval Lombard records show how claiming the application of the laws of the *natio* (Lombard or Roman) was an attempt by individuals to apply a specific set of rules to their legal affairs.

From this point of view, it could be argued that, in medieval law, a twofold *status* (or legal personality) coexisted within each person: that of one's *natio* (e.g. Roman or Lombard), and that of a citizen or subject to the king. There was even a threefold *status* in some cases: a 'national' *status* (e.g. Roman or Lombard), the *status* of being a citizen and the *status* of being a subject to the king.

In early medieval Europe, multiple sets of rules on the status of subjects in the same legal system could apply simultaneously when custom was a source of law and the principle of equality was still unsettled, which was made easier by the fact that the modern concepts of State law did not yet exist. The status of the individual, without distinction between legal capacity and capacity to act, was determined by the bundle of customs or laws that ruled his or her life according to the people, *gens* or *natio* to which he or she belonged. Determining the law applicable to a specific case was a matter of the »internal« rules on conflict of laws, and these rules, which were developed by jurists and applied in courts, were often common to several jurisdictions.

While living according to the law of one's origin was consubstantial with one's status, I maintain that the recognition and enforcement of personal laws did not lessen the authority of State law, nor did it create forms of autonomy that might weaken the sovereignty of States.

On the contrary, by respecting pluralism in specific categories of cases that did not affect public order/policy, the State was able to enhance integration and consensus. Indeed, there seemed to be a belief that such integration would translate into obedience and respect for fundamental traditional legal values, such as those concerning personal legal capacity, marriage, family, property, ownership, contract and inheritance law. It simply depended, then as now, on the minorities' propensity to seek contact and interaction, or in contrast, to isolate themselves or advocate separatism.

Legal pluralism was the main characteristic of the legal order.

In the eyes of a European legal historian, when considering medieval legal categories, the only way to deal with such matters as the granting of fundamental rights to indigenous peoples without granting them self-governance is to appeal to the theory of statutes and the distinction between personal and real statutes. The former are rules applicable to individuals in accordance with their people and/or their familial traditions, while the latter are rules applicable to land.<sup>8</sup>

Though it may seem paradoxical, there is indeed a specific term in the above-mentioned »Basic Law« that suggests and allows for a closer connection to be established between Taiwanese law in the 21<sup>st</sup> century and European law in the Middle Ages, or at least provides the possibility of a common ground of reasoning. That term is »*status*«, in reference to both individuals and land.<sup>9</sup>

6 For bibliographical references, see also: PADOA-SCHIOPPA (2011) 71–72. During their occupation of Italy, the Lombards were helped by Saxons, Gepids, Bulgarians, Sarmatians, Pannonians, Swabians and Noricans. As a consequence of their military support, these people were then allowed, under the king's protection, to settle wherever they wanted within the conquered Italian territory, but at the time of Rothari's edict in 643 which was drawn up according to the style of his *gens* – *secundum ritum gentis*

*nostrae*, these peoples, with the exception of the Saxons, accepted the Lombard rules (JARNUT (2003), 416–427): »The *rex gentis Langobardorum* was, therefore, acclaimed by his *gens* as their ruler and leader, and in this position was of rank fully equal to that of the other *reges*, whether they ruled over the Herules, the Gepids, the Goths or the Franks. As *rex Langobardorum* he was the central focal point of his *gens* and the embodiment of his tribal consciousness«.

7 GEARY (2003) 71–78.

8 See bibliographical references about the theory of statutes in STORTI STORCHI (1989) 1–66.

9 Indigenous Peoples Basic Law art. 2: »The term »Indigenous Persons« means nationals who are registered either as Mountain Region Indigenous Peoples or as Plain Region Indigenous Peoples, and thereby obtain legal Indigenous *status*, being evidenced by the household registration records of aforesaid Indigenous Persons.« (The italics are mine.)

The term *status* shifts legal reasoning from the category of rights to that of the intrinsic nature of a person or thing. In this sense, as far as individuals are concerned, their customary way of acting is consubstantial with their personal status, in addition to indicating some specific legal elements of their capacity.

In light of these preliminary considerations, I will pursue two distinct lines of reasoning, as they refer to two different sets of categories or questions from a juridical point of view. The first line of reasoning concerns defining the validity of law, as well as the distinction between the laws of the nation (*gens – natio*) to which a person belongs by birth (family, tribe, people) and the laws that apply within the territory where the person resides. The other line of reasoning relates to the technical problem of identifying customary law and to the process of writing down customs. From this point of view, judges have played a fundamental role because the recognition of customary laws could increase the number of claims and result in the juridification of social and legal issues.<sup>10</sup> This phenomenon might have informed art. 30 of the Indigenous Peoples Basic Law, which states that the due respect of indigenous customs and practices requires »implementing judicial and administration remedial procedures, notarization, mediation, arbitration and the like« and subsequently setting up specialised chambers and sections in the justice system to handle cases involving an indigenous party.<sup>11</sup>

The judiciary might have a fundamental role in carrying out this task. Settling controversies based on customs and traditions requires that judges ascertain the content and proper understanding of indigenous peoples' customary rules as they emerge from particular cases. Needless to say, however expert and legally experienced judges may be, they might have great difficulty in recognising the religious and ethical values underlying ethnic customs.

Going back to the 6<sup>th</sup> century, a famous text held that the conscience and expertise of the judge were the *rectum tramite* to reconcile and bring together general law with personal law: »*omnis populus ibi commanentes, tam Franci, Romani, Burgundionis vel reliquas nationis sub tuo regimine et gubernatione degant et moderentur, et eos, recto tramite, secundum lege et consuetudine eorum regas*«. <sup>12</sup> In other words, all peoples residing in the State, Franks, Romans, Burgundians as well as every *natio* subjected to your government, live in peace. You have to rule them *by means of justice* – which I suspect was a way of saying by means of equity – while keeping the balance between the general law and their customs.

## 2 Pluralism in the medieval communes and kingdoms

*Quale lege vivis?* What is your law?<sup>13</sup>

In the early medieval period this was the first question that defendants had to answer when they were sued in courts.

Much legislation shows that respect for ethnic law is the basic, original feature of the German legal conception,<sup>14</sup> a conception that some early medieval kingdoms inherited. In actuality, the Romans also recognised the right of some peoples who were annexed by the empire (*foederati*<sup>15</sup>) to live according to their own law.

Obviously, ethnic and customary law concerned not only private relationships; public law and the body of principles underpinning the different forms of government were profoundly influenced as well.

Historians have thoroughly studied this way of recognising and enforcing personal law in the early Middle Ages. Still, studying the Lombard Kingdom can help to explain some features of subsequent judicial practice in the communal cities and kingdoms, first the Normans and later the King-

10 DECHERF (2001) 5.

11 See fn. 1 above.

12 Marculfi Formularum liber I, 8 Carta de ducatu, patriciato et comitatu, MGH, Legum s. V, 48.

13 See, for example: Chartularium, in: M.G.H. Leges IV, 600: *Qualiter charta ostendatur*: »Domne comes, propter hoc ostendit Petrus hanc cartam venditionis

[...] *Qua lege vivis? Longobarda. [...]* *Similiter est in Romana. In Salicha dic: oblige te, et »uarpi te« et »proheredes« et »insuper.«*; STORTI (2011) 418–428.

14 CORTESE (1995) 51–172; PADOA-SCHIOPPA (2009) 38–48.

15 D. 49,15,7.

doms of Sicily and France. Indeed, between the 12<sup>th</sup> and 15<sup>th</sup> centuries, jurists and judges continued to recognise personal law despite the strong increase in integration between individuals and families of Roman and Lombard law. As time passed, the differences between the two peoples, Lombard and Roman, faded and general customs became ever more widespread.<sup>16</sup>

As the preambles of the Lombard kings' laws demonstrate, the certainty of customary rules was an essential instrument to maintain and protect social order. This was even more important in the peripheral or remote, mountainous areas of the kingdom, where public officials and judges were few, or less skilled, less learned or less authoritative. In such areas, public outrage, rebellions and uprisings broke out more readily. As provided by Liutp. 42 and Ratc. 10, the king was sometimes inclined to justify protests, and not to punish them, on the grounds that officials and/or judges and courts were responsible for denials and/or miscarriages of justice, or for the infringement of customary rules. Indeed, orders or judgments issued by public officials that were deemed contrary to some customs or unsuitable for the common understanding and experience of local society were the increasingly frequent pretext of such revolts. It was not infrequent that the king's *curia* launched an inquiry in response to this kind of disorder, or on the specific request of officials, judges or dukes. The end of the inquiry might consist in recognising the proper content of a specific custom that was written down in a king's rule (*edictum*).<sup>17</sup>

Disputes and inquiries could also arise with regard to lands and estates. Distinguishing the king's demesne from freehold property and from the collective ownership of a community was not

always easy. On the contrary, the process of definitively establishing who had rights (the king, a private individual, a community) to work a piece of land and exploit its resources was a problem of public order, even leaving aside that the wealth of the State consisted in land and land revenue. The judges ascertained rights over the land by cross-examination.<sup>18</sup>

The Carolingian Empire did not do away with the laws of the conquered kingdoms. In particular, the *edicta* of the Lombard Kingdom were not abolished, but only modified in some cases. Between 783 and 802, the provisions of Charles the Great's *capitularia* stipulated that his officials (*missi et comites*) were to conduct inquiries to ascertain the laws of the peoples living in his new territories. Each individual was to be asked what the binding rules of his or her people were »*per singulos inquirant quale habeant legem ex natione*«. <sup>19</sup> Charles the Bold adopted the same policy with the peoples living in the Kingdom of the West Franks.<sup>20</sup>

I have examined the ancient Lombard and Carolingian Empires to point out how, despite extraordinary political, cultural, economic and social changes, the ancient system of legal thinking about national laws still exercised a very strong influence over learned lawyers, judges and indeed over the entire European legal system until the late Middle Ages.

However, there was a shift in the meaning of the expression »national law«. It originally indicated the law of a people, but as time passed, it came to mean personal law; that is, the law according to which a person lived because of his or her origins. As is evident in documents and judicial *formulae* (formal statements), individuals formally asserted their legal personality by declaring to live as Lom-

- 16 POHL-RESL (1998) 205–219; GEARY (2003) 120–127 and with regard to the famous Liutprand's edictum de scribis: PADOA-SCHIOPPA (2009) 49; CORTESE (1995) 230–236.
- 17 STORTI (2015) 461–462 with reference to Liutp. 42, a. 723, and Ratc. 10. PADOA-SCHIOPPA (1966) 158–161.
- 18 STORTI (2015) 462–472.
- 19 STORTI (2011) 425–426 with reference to Capitulare missorum, 792 (Capitulare regum Francorum, t. I, Kar. M. 25). See also: Carolus Magnus, 143 = Leges Lanogobardum, II, 56: *Qualiter diversarum legum homines*

*res suas diffinire debent. 1: Sicut consuetudo nostroest ut Longobardus aut Romanus (si e venerit quod causam inter se habeant) observamus ut Romani successiones iuxta illorum legem habeant; similiter et omnes scriptiones secundum legem suam faciant; et quando iurant, iuxta legem suam iurent; et quando componuntur iuxta legem ipsius cuius malum fecerint, componantur; et Longobardos illos convenit similiter componere; de ceteris vero causis communi lege vivamus; Leges longobardorum II, 56, 2 (= Pipinus 27): De diversis generationibus hominum; and Leges Lon-*

*gobardorum II, 57, 1 (= Loth. 38): Ut interrogetur populus romanus qua lege vult vivere.*

- 20 STORTI (2011) 428–429.

bards or as Romans based on the nation to which they belonged (in Latin: »*ex natione mea professus sum lege vivere ...*«).

Further testament to the continuity of this habit in the *Regnum* of the Lombards (or of Italy) in the 11<sup>th</sup> century can be found in collections of documentary *formulae*, in particular the *cartularium Regnum Italiae*, a French text readapted to Italian praxis,<sup>21</sup> as well as in the reports and case-material written down in the *Expositio ad librum papiensem*, and the *formulae* adopted in judicial proceedings before tribunals and courts.

Later, in the self-governing communes as well as in the communes under the control of a kingdom, personal or local customary rules, which were sometimes written down, and statutes could coexist together with the general law of the kingdom. Examples include Frederick II's *Liber Constitutum Regni Siciliae* of 1231, Philip the Fair's *Ordonnance* of 1312 as well as the French Midi, Southern Italy and the cities of Sicily.

The plurality of sources in medieval legal systems and the compulsory nature of customs were not at stake, nor was the city's and /or kingdom's unity.<sup>22</sup>

Although a commune's citizens were subject to its statute or local customs for the specific categories of cases ruled by general law (usually penal law, procedural rules and so on), some citizens continued to live according to the law of their ancestry or family for other kinds of cases, regardless of whether it was an independent *civitas sibi princeps*, a commune subjected to a republican or seigneurial State or to a principality.

Carolus de Tocco was a lawyer, jurist and professor at the Universities of Piacenza in Lombardy, near Pavia and Milan, and Benevento in Campania, near Naples.<sup>23</sup> As he wrote in the 13<sup>th</sup> century, different obligations could be binding for Romans and Lombards as far as contract and penal law were concerned. In contractual obligations, there was indeed a distinction between Romans and Lombards living in the same city or kingdom when it came to accountability. Roman contract law ac-

tually provided specific elements of *formality*, which were necessary for the *contract* to be valid. In contrast, no such formalities prevailed under Lombard contract law. Even an informal agreement (*pactus nudus*) resulted in obligation, became enforceable and produced legal effects.<sup>24</sup> Consequently, Romans were immune to legal action in cases of informal agreements, but a Lombard could be sued as a result of this kind of stipulation.

In the late medieval period, the legal enforceability of informal agreements, originally only a Lombard institution, became part of European civil law in general, thanks to the jurisprudence of canon law.<sup>25</sup>

### 3 Writing down customary rules

There were also measures to avoid abuse of judicial discretion and arbitrary judgments and sentences in the Lombard Kingdom and the city communes.

As a general rule, oral customary rules were enforceable in the legal system throughout the Middle Ages without formal recognition on the part of lawmakers. Lawmakers did not provide a unifying framework for oral customary rules. The territorial extent of the applicability of customs depended on the relative preponderance of the groups or even the families, which naturally varied both over time and in kingdoms, cities and rural regions. As a result, the impact of customary law on the legal system of each region, as well as the interaction between general or official law and customary law, strongly depended on the context and the historical period.

Generally speaking, ascertaining customary rules in the Middle Ages was a bottom-up process. Specialists, including lawyers and judges, induced a general rule from specific cases and from the evidence and statements provided by common people. Legal rules were then promulgated by kings, or later, in the communal cities, by commune assemblies.

21 Cartularium, in M.G.H., Leges, IV, 595–601, and on the examination of personal law and the formalities necessary for a given act to be legally valid in the eyes of a given law: 17 Qualiter carta ostendatur, p. 600. There was a striking difference among the for-

malities required for the enforcement of *ostensio chartae*, an institution that had recently been created as a result of contractual and judicial practice. CORTESE (1995) 163, nt. 95.

22 GROSSI (2007) 37–64.

23 CORTESE (2013).

24 CAROLUS DE TOCCO (1537), Gl. Sicut cui malum a Lombarda Lib. II, LVI (sec. XIII); STORTI (2011) 429–432.

25 PADOA-SCHIOPPA (2008) 111–112.

Writing down customary rules in official texts during the early medieval period was conceived as a safeguard for public order, even though, as Liutprand asserted, some customary rules had bound courts and been applied by judges for decades or even centuries without having been written down by his time. By no means did the king's approval and the recording of customs by public officials or chancery constitute a requirement or precondition for their enforceability: »*quia tantumodo causa ipsa in hoc modo semper et antecessorum nostrorum tempore et nostro per cawar-fida sic iudicatam est; nam in edicto scripta non fuit*«. <sup>26</sup>

In case of uncertainty about the rules applicable in a case, the judge or the court summoned the citizens or rural peoples, the laity and the ecclesiastics, to give evidence of their knowledge and perception concerning the content of controversial customary rules and their application.

In 726, for example, a dispute broke out in the king's court because some judges had used their discretion to resolve, arbitrarily (*per arbitrium*), a particular case that would have traditionally been ruled by oral custom. The judgement delivered was contrary to, or at least different from, those that had been previously issued according to the customary understanding and interpretation of that same custom. At this point, Liutprand ordered that the customary oral rule be transformed into a written law, which was then to be made known to all subjects (*omnibus manifesta*). He was sure that the only way to prevent future contrasting judgements would be to write the rule down, and thereby clarify and certify its terms and content.

Regardless of the reason a customary rule was to be recognised and written into a general law, the ascertainment of its content and spirit was to be done by *subtile inquisitionem*. Great difficulties could arise in »translating« Lombard institutions and procedures into Latin – and therefore Roman – words and legal conceptual frameworks.

As is reported in some trial minutes, the expression »*subtile inquisitionem*« indicated not only formal or informal inquiries made by judges and officials, but also a formal procedure in the king's court. In the Lombard Kingdom, as in the Mer-

ovingian dynasty, the Carolingian Empire, the Lombard *Italiae Regnum* and the Norman duchy of southern Italy, the members of the King's court were both legal experts, such as judges, lawyers, public officials, wise and learned laymen or religious men, who were all chosen as »analysts« of the society.

These judges and faithful experts convened from all over the kingdom and met in special committees. They then reported the main results of their discussions to the king, including any dissenting opinions, and debated with him until a unanimous solution was reached. The solution was issued in a general assembly, and at the end a report of the proceedings was composed. Thus, both society and legal culture contributed to making the law more and more certain.

Communal cities adopted similar procedures when they had to ascertain and record their customs. The *constitutum usus* of Pisa in Tuscany, issued in 1160, is one of the oldest and most complete texts of recorded customs in a communal statute. The proceedings held to compile the text are summarised in its introduction. Between 1155 and 1160, the commune assembly elected five committees of legal experts (*Sapientes*) to examine unwritten customs that were commonly applied in the city tribunals and courts, although these rules originated from relationships between the *Pisani* and foreigners or merchants from various countries around the world. The aim was to guarantee that the common, still unwritten rules and stipulations were uniformly applied to analogous cases no matter the level of culture, awareness of cases or knowledge and understanding of the rules the judges might have.

The committees' task was very hard. They had to discern and distinguish customary rules from Roman and Lombard law and produce an exact ascertainment of what those customary rules prescribed. As in the ancient Lombard Kingdom, at the conclusion of this formidable work, the city assembly approved the final text, ratified it and made it effectively applicable in contracts, deeds and, of course, in tribunals and courts. <sup>27</sup>

The Pisan experience in writing down customs eventually came to be seen as the archetype for the

26 STORTI (2015) 452, with reference to Liutp. 133 (MGH, Legum t. IV, 165).

27 VIGNOLI (2003) 129–130.



medieval legal system in the communes of that time.

Another procedure was established alongside the one mentioned above that was passed down until the modern era. Developed by the glossators, it was a judicial procedure stating that a custom could be considered ascertained and in force if it had been the *ratio decidendi* of two similar cases.

#### 4 Conclusions

Having taken a »provocative« look at the past, so to speak, it is now time for some concluding remarks on the present.

Until a few decades ago, there would have been no point in reviving the memory of Europe's historical experience. It has recently been recognised, however, that extraordinary errors were committed by »civilized« European countries during colonialism, not to mention the more recent injustices committed by dictatorships all over the world. These tragedies have led to a search for renewed dignity of those who have had their cultural and societal traditions trampled upon. As a consequence, it has become necessary to retribute in the name of protecting human rights, by recognizing differences and by taking the opportunity to create a new legal system that safeguards such differences.

After all, even »Western« countries continue to deal with the effects and complications of different legal statuses based on socio-economic class, religion, race or gender, despite formal declarations of egalitarianism and the notion that everyone is equal before the law. »Legal positivism was not able to abolish statuses. Nor was the ever-present yet unattainable model of natural law able to achieve better results. On the contrary, it was strongly contested.«<sup>28</sup> In Europe and the Western world in general, the use of status as a way to differentiate between persons before the law continues to have significant repercussions within and beyond the realm of law.<sup>29</sup>

Further, recent decades have witnessed deep thinking on State-centrism and the potential coex-

istence of State law with non-state legal orders, despite the fact that this might jeopardise those principles of equality that modern democracies have fought so hard to promote but have not yet fully achieved.<sup>30</sup> Clearly, the social, economic, political and cultural aspects of this age of globalisation are completely different than those that existed in the medieval and modern eras. Prominent scholars, such as Twining, have recently considered State legal pluralism as »not unimportant or uninteresting«.<sup>31</sup>

Thus, from a purely theoretical point of view, there may not be anything keeping a plurality of customs from being recognised within a sovereign State. This is especially true for the regulation of personal status, but also in terms of rules on the ownership and utilisation of land, as is the case with the Indigenous Peoples Basic Law.<sup>32</sup>

From a practical point of view, however, it may not be so easy to resurrect a compressed and debased form of customary law – or rather, a plurality of customary laws – and apply it to modern times. Moreover, the doctrine of desuetude, which was well known in the legal culture of the Middle Ages, may have resulted in the disappearance of many local or indigenous customs, for better or for worse. Whether it was brought on by force or happened on its own, a large part of indigenous heritage could be lost. As evidenced by the complex and unsuccessful work of anthropologists in Taiwan, it can be very difficult to ascertain the content and spirit of the customs of the sixteen indigenous peoples living in Taiwan. Notwithstanding the democratic constitution, Chiang Kai-shek's lasting authoritarian power undoubtedly led to social, cultural and economic changes, to the point that the memory and meaning of customs might have faded, if not been lost entirely.

It should also be said, perhaps superfluously, that customary sources are unstable and continuously evolving. They are passed on in the traditional language and through traditional acts, and they are based on particular religious beliefs, forms of society and social and economic relationships. Thus, with the passage of time, several customs might lose their roots. It might now be impossible

28 I only mention this as a highly authoritative source: ALPA (1993) 175–178.

29 ALPA (1993) 24–25, 38–41.

30 TWINING (2010) 500–502.

31 TWINING (2010) 490–493, 496.

32 See nt. 1 above, Indigenous Peoples Basic Law, art. 23.

to identify and ascertain them, as their foundation and reasons for being are lost. Nonetheless, if something is ascertainable, and not contrary to the general principles of a democratic State, it could be recovered.

Due to delays in the implementation of the human rights principles established by the UN, much has certainly been lost. Those same delays may also explain why it has been so hard to recover and ascertain customs, despite the fact that this work is founded on principles and conducted scientifically. Many customs may have been lost in the meantime or may have changed. Whatever the case may be, there may not be any reason for them to exist anymore in an economic and social

context that is completely different from when the customs were formed and observed.

Allowing the indigenous peoples to live according to their own customs means moving past the principle of equality among citizens and granting recognition of inequalities, but it does not mean challenging the national sovereignty of the Republic of China. Indeed, recognising indigenous customs in State-approved matters would fall exclusively within the realm of conflict of laws within the State. Therefore, the process of identifying when these customs can be applied to specific cases would be entrusted to the State's internal rules of private international law. ■

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