CLISEL-HORIZON2020

Report of the International Conference

The Cultural Defense

In honour of the work of

Alison Dundes Renteln

Cagliari, Friday 8 July 2016, 9:15–16:30

Venue: Aula Arcari, Department of Law, Viale S. Ignazio 86

Fabio Botta, Director of the Department of Law, University of Cagliari welcomed the participants remarking that he was honoured to be opening one of the first public events of the CLISEL Project at the University of Cagliari. He acknowledged the role of the “visiting scientist” programme funded by the Sardinia region, which allowed the University to host Professor Renteln at the Department of Law for three weeks of research and teaching. Drawing on his background as a Roman law jurist, Professor Botta stressed how the topic of multiculturalism is not new to the European juridical culture: the Roman Empire was a multicultural state, and the diachronic comparison with the Roman model could be useful to thinking on an ongoing European common tradition for solving multicultural conflicts and dealing with a diverse society.

Ilenia Ruggiu, Professor of Constitutional Law at the Department of Law of the University of Cagliari, and CLISEL Coordinator, stressed the important impact of Alison Dundes Renteln’s book The Cultural Defense published by Oxford University Press in 2004. This book has had a crucial influence on studies on multiculturalism, opening a new field of research, and will continue to be important in future. Migration caused by climate change will increase the multicultural nature of European society: at the moment there are 6 million environmental refugees per year and a total of 40.8 million environmental refugees in the world. These numbers are destined to grow, reaching an estimated 250 million in 2050. Moving from this global reality to focus on the situation of Sardinia, Professor Ruggiu stressed how this global phenomenon has a local dimension. It is transforming the anthropological landscape of an island so far very homogeneous in terms of its population. She explained how the debate would be invaluable in preparing for the workshop on Multiculturalism, migrations and local communities in the era of climate change, which will be held in March 2017 for the Sardinian City Councils. In fact, an analysis of how the City Councils face the challenges posed by migration caused by climate change is pivotal in the multicultural transformation of society. In this regard, Professor Renteln’s book presents case-law on conflict between migrants and American citizens. This book has the great merit of creating a system for dealing with otherwise diverse material. Her index of multicultural conflicts grouped under the headings of “homicide, children, drugs, animals, marriage, attire, the dead” covers all the typologies of multicultural conflicts that may arise between migrants and
host cultures. Many of the types of conflict that have arisen in the USA since 1930 are now occurring in Europe, in Italy and in Sardinia. The public is aware, for example, of the debates about wearing the burka, the burkini, the veil, the issues of male circumcision and genital mutilation, and the problem posed by the desire of some minorities to carry religious symbols that are perceived as weapons in the West (e.g. the kirpan, the Sikh’s ritual knife). Professor Renteln’s theory clearly stresses that “culture matters for justice”, the right to culture being a human right recognized by Article 27 of the International Covenant on Civil and Political Rights of 1966. This position clashes with the present public perception that cultural diversity poses a threat to security and social coexistence. The aim of this conference was to explore these intersections and see how the work of Professor Renteln can help to develop one of the main aims of the CLISEL project, which is to explore the multicultural transformation of local communities caused by migration and the impact of such transformations on security. In fact, Professor Renteln’s book provides practical legal instruments, such as a cultural test and a theory on the right to culture and on the use of the cultural defence in courts that can provide a very useful framework for Italian judges and, more broadly, for Italian and European policy-makers who deal with multicultural conflicts.

Omar Aly Kamel Hassan, Mayor of the City Councils of Modolo, located on the north-west coast of Sardinia, who is a member of the Consiglio delle Autonomie Locali, a CLISEL partner, reported that particular attention is being paid by Sardinian City Councils to the phenomenon of migration and its social and political consequences. The Mayor mentioned how the recent disembarkments of asylum seekers on Sardinian coasts have put the refugee crisis at the top of the political agenda. The involvement of City Councils in policy-making, and the scientific idea of the CLISEL project of developing a pilot model based on the case of Sardinia, is crucial to the current debate on migration. The Mayor recalled that following the recent local elections, 101 Sardinian City Councils had renewed their political organs, and the summer, with the associated increase in numbers of disembarkments, presents serious challenges for City Councils. The Mayor stressed how the main security-related issues that City Councils face are connected with multicultural and social conflict. In this regard he emphasized that the social services provided to migrants need to be provided on equal terms with other Sardinian citizens who should not be left behind in this regard. Finding a balance between the social needs of the migrants and those of the Sardinians, when resources are scarce due to the ongoing economic crisis, is an important step. The Mayor noted that the Sardinian City Councils had expressed interest in being involved in the CLISEL initiatives and were closely following and in constant dialogue regarding the development of the project.

Prakash Shah Queen Mary University of London considered the subject “On culture”. After recognizing the debt that European scholars of multiculturalism owe to the work of Alison Dundes Renteln, Dr Shah analysed the main discourses developed in anthropology and other social sciences around the concept of culture, stressing not only the criticism that surrounded it, but also its ongoing vitality.

Paola Parolari, University of Brescia, discussed the topic “Multicultural conflicts in civil litigation”. She observed that although the cultural defence has been widely discussed with reference to criminal cases, its implications for civil litigation are still widely underestimated. Nonetheless, many civil law issues are strongly interdependent with the protection of human rights. In this light, one of the most remarkable and distinctive features of Alison Renteln’s seminal work on the cultural defence is precisely its attention to the relevance of multicultural conflicts in civil litigation. Therefore, the speaker moved on from Renteln’s work to exemplify when culture can become an issue in civil litigation. The analysis aimed not only to show why, in principle, cultural differences should be taken
into account, but also to sketch out some possible criteria for drawing the line between when the cultural defence is admissible and when it is not. Provided that due attention is paid to the plurality of the different conceptions of human rights that may distinguish different cultures, the protection of these rights can go hand in hand with – and grant the strongest rationale for – the recognition of cultural differences in multicultural contexts.

Alejandra Castillo Ara, Max Planck Institute, Freiburg spoke about “Cultural defence: de lege lata and the lege ferenda in criminal law”. She presented the cultural defence as a new legal construct which requires a two-level analysis. First, from the perspective of de lege lata, one has to look at how the existing legislation deals with multiculturalism in court. In other words, how do the actors in the legal system: district attorneys, defendants, judges, and even scholars, incorporate and interpret the cultural defence in existing law (usually under the mistake of fact and insanity defences). Only then can the second level of analysis be undertaken – namely, the lege ferenda. How do we justify and establish a legal proposal for the cultural defence in the law which should be recognized in the legal system?

Giuseppe Lorini, University of Cagliari, considered “Vengeance as culturally motivated crime”. Applying his background in the philosophy of law, Professor Lorini stressed how the topic of cultural defence is one of the many chapters of the legal pluralism and introduced the concept of folk law, analysed in Folk Law, the seminal work of Alan Dundes and Alison Dundes Renteln. Professor Lorini emphasized that, at the core of multicultural conflicts involving immigrants, stands a normative conflict: the same fact, a “killing”, can be classified as a crime in the official law, and as a duty in the “folk law”. Professor Lorini illustrated this point with a case study of a vendetta in the Sardinia region: the zone of Barbagia, including around 40 City Councils, has been studied by Antonio Pigliaru as an example of a Code of Folk Law, which disciplined the “vendetta”.

Daniel Krošlák considered “Honour killing in Germany”. Honour killings are increasingly becoming a problem (not only) in German society. Honour killing is usually considered as the homicide of a member of a family by other members, due to the perpetrators’ belief that the victim has brought shame or dishonour upon the family, or has violated the principles of a community or a religion. In Germany, the perpetrators and victims of honour killings are mostly Turkish citizens (which does not necessarily mean that they were Turks, because in many cases the perpetrators and victims of honour killings were of Kurdish origin). Dr Krošlák introduced some very well-known cases and explained the meaning of honour as it is understood in these families and communities (especially the case of Hatun Sürücki from 2005). He then discussed whether cultural and religious differences have served as a factor in criminal defence in German courts.

Clara Rigoni, Max Planck Institute, Freiburg spoke about “Accommodating cultural diversity in Europe: the role of alternative dispute resolution”. She observed how, in the past two decades, the issue of accommodation of cultural and religious diversity in judicial proceedings has received increasing attention from scholars. However, despite the huge changes experienced by society during this period, the discussion has remained mainly academic. The rise of nationalist movements and the demand for assimilation of foreigners in Europe have impeded the transformation of national judicial systems in a way that could facilitate the recognition of diversity. This is particularly evident in the criminal law sphere, where the monopoly of the state over punishment and social control and the normative function of the legislation often clash with the requests for accommodation coming from minority groups. Lacking a satisfactory response from the law enforcement agencies, cultural and religious minorities have started searching for alternatives outside the formal system. Alternative dispute resolution and so-called “parallel systems of justice” are becoming a way to accommodate
diversity and to bring religion and tradition into the resolution of disputes. Using the example of honour crimes and forced marriages, in which family issues and violence intertwine, the presenter discussed some examples of official and unofficial alternative programmes set up in several European countries.

**Ilenia Ruggiu**, University of Cagliari, discussed “Renteln’s cultural test”. In her book, *The Cultural Defense*, Professor Renteln presented one of the most brilliant intuitions to be seen in multicultural studies: the idea of a test for assessing the cultural claims of migrants. The test consists of the following four questions: 1) Is the litigant a member of the ethnic group? 2) Does the group have such a tradition? 3) Was the litigant influenced by the tradition when he or she acted? 4) Is the practice irreparably harmful?

Renteln’s book established a dialectic between anthropology and the law that is very balanced in the sense of allowing space both for the law and for anthropology. With respect to culture in the courts, Renteln says that cultural evidence should be allowed in all cases as a procedural matter. This means that the judge should always consult a cultural expert (e.g. an anthropologist). To Renteln, the opening up to cultural evidence does not mean that it should always be an excusatory or mitigating factor. Starting from Renteln’s intuition, Professor Ruggiu explored more existing tests based upon which it is possible to stress that the following elements are taken into account by judges when assessing a multicultural claim: e.g. harm, compulsory nature of the cultural practice, violation of women’s rights, and length of time the immigrant has resided in the host country. Professor Ruggiu suggested a test that further develops Renteln’s test and others proposed by the courts. The proposed test consists of the following questions: 1) Is it possible to use the category of culture? 2) How can the cultural practice be described in detail? 3) How is the cultural practice related to the broader cultural system? 4) Is the practice essential (to the cultural survival of the group), compulsory or optional? 5) Is the practice shared or contested within the group? 6) Is the group vulnerable within a society? Is it discriminated against? 7) How would a reasonable person in that group behave in the same circumstances? 8) Is the subject sincere? 9) Is there a “cultural equivalent”, i.e. a similar or comparable practice in the majority culture? 10) Is the practice harmful? 11) What is the impact of the practice on the culture and value system of the majority? 12) What good reasons does the minority present for continuing to follow the practice at issue?

**Alison Dundes Renteln**, University of Southern California, concluded the conference by answering the many questions posed to her by the participants. In particular, Professor Renteln wished to clarify that the aim of her book was not to open the door to every cultural claim, but to invite judges and policy-makers to become aware of the cultural component that a behaviour can have, and to remind them that culture is a human right to be protected. Professor Renteln explained that the point of view of the victim of a culturally motivated crime must be considered, and is considered through her test, which ascertains whether the cultural practice is harmful and causes damage. Although the differences between common law and civil law systems are many, Professor Renteln believes that multiculturalism is a comparative subject that allows space for interactions: in this sense she thinks that if European scholars, judges, and policy-makers wish to adopt a cultural test based on the model of the North American test, they can evaluate this model. Professor Renteln finished by thanking the European Union and the CLISEL project for making the conference possible. She also expressed her gratitude to the “visiting scientist programme” of the Sardinia Region and the University of Cagliari.