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LAW AS TRADITION*

ABSTRACT. This essay argues that to understand much that is most central to and characteristic of the nature and behaviour of law, one needs to supplement the 'time-free' conceptual staples of modern jurisprudence with an understanding of the nature and behaviour of traditions in social life. The article is concerned with three elements of such an understanding. First, it suggests that traditionality is to be found in almost all legal systems, not as a peripheral but as a central feature of them. Second, it questions the post-Enlightenment antinomy between tradition and change. Third, it argues that in at least two important senses of 'tradition', the traditionality of law is inescapable.

Legal philosophers disagree about many things, few more than the nature of law. Notwithstanding these differences, there are significant family resemblances among contemporary approaches to this question. I am struck by three. First, it is common for law to be conceived as a species of some other more pervasive social phenomenon: commands, norms, rules, rules-and-principles, rules, principles and policies, and so on. Though this runs

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the risk of explaining the obscure in terms of the more obscure, there are compensating benefits. Important among these is the opportunity of bringing to light central aspects of the complex set of phenomena known compendiously as 'law', which are encompassed by the concept(s) one favours but not by those of which one is critical. Thus Hart on rules versus habits, and on power-conferring laws versus command theories of law. Thus too, Dworkin on the importance of principles rather than rules alone, in hard cases. The aim is not merely to replace one word with another, but to draw attention to important legal phenomena not adequately grasped, or even likely to be much considered, in terms other than those one proposes.

Secondly, legal philosophy typically makes such progress as it does, without making discoveries. When Hart sought to show the significance of rules, or Dworkin of principles, for an understanding of law, they relied (and stressed that they relied) on extremely familiar elements of contemporary legal systems. Their aim, and I believe their achievement, was not to unearth hitherto unknown truths about law, but to focus attention on what was already familiar; frequently so familiar as to escape notice altogether. This is no small contribution, for as Wittgenstein observed, 'The aspects of things that are most important for us are hidden because of their simplicity and familiarity. (One is unable to notice something – because it is always before one's eyes)'.[1]

I have no quarrel with these characteristic moves in legal philosophy; on the contrary, I endorse and wish to continue them. One thinks differently, and more, about the character of law when one considers the ways in which it is like, and unlike, rules and principles – let alone habits, commands, obligations, rights, goals, policies.

However there is a third characteristic of modern legal philosophy which I would not wish to emulate. At least since Hobbes, theories of the nature of law have, as it were, lived in an ever-

[1] Ludwig Wittgenstein, *Philosophical Investigations*, 3rd edition (Oxford: Blackwells, 1967), para. 129, p. 50.

present world of sovereigns, commands, sanctions, more recently norms, rules, principles, policies and (for critically inclined theorists) interests, domination and power.[2] Similarly, modern social theories, full though they are of references to roles, interests, power, authority, structures, systems and 'socially constructed' realities, have few concepts which address the *traditionality* of law and life. Yet in law as in life traditionality is so pervasive that it is truly 'always before one's eyes' in fact, if not in theory. Others have drawn attention to the unsung importance of traditions in life,[3] and elsewhere I have also.[4] I will content myself here with law.

Law is a profoundly traditional social practice, and it must be. This is not merely to say that particular legal systems embody traditions, which of course no one would deny. To understand much that is most central to and characteristic of the nature and behaviour of law, the 'time-free' staples of modern jurisprudence are not enough. One needs to understand the nature and behaviour of traditions in social life. That is a large project. Here I will only discuss three elements of such an understanding. First, I suggest that traditionality is to be found in almost all legal systems, and not as a peripheral, but as a central feature of them. Second, I question the pervasive post-Enlightenment antinomy between tradition and change: whatever else is responsible for change in law, law's traditionality makes it inevitable. Third, I argue that in at least two important senses of 'tradition', and for at least two

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[2] For an interesting criticism of, and partial exception to, this general trend, see A. W. B. Simpson, 'The Common Law and Legal Theory' in Simpson (ed.), *Oxford Essays in Jurisprudence*, Second Series, (Oxford: Clarendon Press, 1973), pp. 77–99. See also Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA., Harvard University Press, 1983).

[3] See especially Edward Shils, *Tradition* (Chicago: Chicago University Press, 1981); Jerzy Szacki, *Tradycja* (Warsaw: Panstwowe Wydawnictwo Naukowe, 1971).

[4] 'Tipologia della Tradizione', *Intersezioni. Rivista di storia delle idee* 5 (1985): 221–49.

reasons, tradition is inescapable in law, whether or not that is a good thing. Frequently, however, it is a good thing.

1. LAW AS TRADITION

I have argued elsewhere,[5] and only have room to assert here, that every tradition has three characteristics or elements. First is pastness: the contents of every tradition have or are believed by its participants to have, originated some considerable time in the past. Second is authoritative presence: though derived from a real or believed-to-be real past, a traditional practice, doctrine or belief has not, as it were, stayed there. Its traditionality consists in its *present* authority and significance for the lives, thoughts or activities of participants in the tradition. Third, a tradition is not merely the past made present. It must have been, or be thought to have been, passed down over intervening generations, deliberately or otherwise; not merely unearthed from a past discontinuous with the present. A necessary consequence of this third element is that traditions are social. Habits, even customs, can be born, live and die solely in the behaviour of one individual. Traditions, as a simple matter of definition, cannot. Like every tradition, law shares these elements. More than many traditions, law is organized to preserve, maintain and draw systematically and constantly upon them.

(i) *Pastness*

Every tradition is composed of elements drawn from the real or an imagined past. This is central to what it means for something to be a tradition. It is not central, or even necessary, to what it means for something to be an act, rule or principle. One can act, lay down a rule, enunciate a principle, and say imme-

[5] For a more extended discussion, see 'Tipologia della Tradizione'. Note, however, that I have modified my view on the second element of tradition. I had thought that it was enough that the past be present. I now believe that the past must be authoritatively present.

diately that that is what one is doing and has done. One cannot openly make a tradition all at once. Though of course one may *originate* a tradition, whether one has done so can only be decided after some time, and not on the basis of the originating act alone or even primarily. And while rules can openly be made retrospective (though they are hard acts to follow) traditions cannot.

In every established legal system, the legal past is central to the legal present. Like all complex traditions, law records and preserves a composite of (frequently inconsistent) beliefs, opinions, values, decisions, myths, rituals, deposited over generations. The stuff of legal doctrine – statutes, judgments, interpretations, rules, principles, conventions, customs – has been so deposited, in and by legal institutions where doctrine has been proclaimed, applied, recorded and passed down by officials specifically entrusted with these functions. Even if legal systems did not institutionalize the recording, preservation and transmission of so much of the legal past, residues of this past would still mould what can be done, indeed thought, in the present. This is evident in less institutionalized traditions such as those of art, literature and morals, as it is in the vast cultural inheritance embodied in the 'social facts'[6] which set much of the agenda of everyday living.

In law, however, past-maintenance *is* institutionalized: certain kinds of writings are recorded, some among them are defined as 'authoritative', others as persuasive; the decisions, opinions and judgments of certain kinds of readers, writers and officials are similarly distinguished. If not sacralized, they are at least ranked in orders of authoritative status, in ways familiar to initiates, though sometimes mystifying to rationalist outsiders. Successive participants in legal traditions are required to justify their arguments in terms of acceptable interpretations of these authoritative materials.

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[6] See Emile Durkheim, *The Rules of Sociological Method* (New York: The Free Press, 1966), pp. 1–2; *The Elementary Forms of the Religious Life* (New York: The Free Press, 1965), p. 29.

Such practices give the past-in-the-present power over those who think and act in the present. Of course this power is not absolute. For one thing, even in constantly vetted traditions such as law, the past speaks with many voices. This is inevitable precisely because of the traditionality of law. For in every complex written tradition, any particular 'present' is a slice through a continuously changing diachronic quarry of deposits made by generations of people with different, often inconsistent and competing values, beliefs, and views of the world. This assorted stock forms the constantly changing present of the tradition, to which each generation of participants contributes in turn. Unless social and legal values, doctrines and beliefs are static, and few are ever completely static, tensions and inconsistencies between those embedded in legal doctrine at any time are bound to occur. This allows, indeed makes necessary, choice in particular legal applications. (This should be borne in mind by those, 'critical' lawyers and others, who take incoherence in doctrine as evidence of deep crisis. For it remains an important question in social and legal theory, insufficiently considered: when does incoherence within a tradition, which always occurs, amount to crisis, which only occurs sometimes?)

So, the past is not univocal in complex traditions. Even if it were, what is to be made of it is, in a very full sense of the word, a matter of interpretation. Many interpretations are available. Only some are authoritative, but as most lawyers and all students of hermeneutics are aware, there is always room to move. Such important legal concepts as the 'intention of the legislature' or the *ratio* of a case, for example, make decisive reference to past phenomena which may have been otherwise interpreted, may have been otherwise, or may simply not have been. Moreover, as we shall see, the very fact that texts and their interpreters are embedded in a broader complex tradition, ensures that meanings attributed to texts will change.

The interpretation of traditional texts is a complex subject which has engrossed hermeneutic theorists for centuries. It is not a

specifically legal problem, though lawyers do it for particular practical purposes and within distinctive traditions. What lawyers recognise as ambiguities and gaps in the law are found, of course, in many other texts; so is the fact that texts written in certain periods have different significance to readers in different periods. What in literary hermeneutics is known as an 'aesthetic of reception',[7] which insists on the importance of the *audience* as an ingredient in the meaning of texts, has its parallels in, for example, the continuing debates over how the American Supreme Court should interpret the Constitution.[8] There, as elsewhere,

> It might be the intention of the recipient to adhere 'strictly' to the stipulation of what he has received but 'strictness' itself opens questions which are not already answered and which must be answered. If it is a moral or a legal code, or a philosophical system, the very attempt by a powerful mind to understand it better will entail the discernment of hitherto unseen problems which will require new formulations; these will entail varying degrees of modification. Attempts to make them applicable to particular cases will also enforce modification. Such modifications of the received occur even when the tradition is regarded as sacrosanct and the innovator might in good conscience insist that he is adhering to the traditions as received.[9]

However, if the hold of the past over the present in traditions such as law should not be exaggerated, it would be deep folly to dismiss it. Law is frequently conceived of as an instrument wielded for good or ill by lawmakers, lawyers and others to pursue their autonomous, freely chosen purposes, or at least purposes determined independently of the legal instruments they use. This instrumental view of law is indeed encouraged by conceptions of law-as-commands, rules, and so on, which are given, made, obeyed,

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[7] See Hans Robert Jauss, *Toward an Aesthetic of Reception* (Minneapolis: University of Minnesota Press, 1982), especially chapter 1, 'Literary History as a Challenge to Literary Theory'.

[8] See for example, 'Symposium: Constitutional Adjudication and Democratic Theory' *New York University Law Review* 56 (1981), 259–582.

[9] Edward Shils, *Tradition*, p. 45.

applied, broken or ignored. Thinking of the character of traditions in general, of what it means to participate in them, and of legal traditions in particular, suggests that such instrumentalist conceptions are and must be, at the very least, seriously inadequate. Legal traditions provide substance, models, exemplars and a *language* in which to speak within and about law. Participation in such a tradition involves sharing a way of speaking about the world which, like language though more precisely and restrictively than natural language, shapes, forms and in part envelops the thought of those who speak it and think through it. For better or worse (almost certainly for better *and* worse) it is difficult for insiders to step outside it or for outsiders to enter and participate in it untutored. It moulds the thinking of insiders even where, perhaps especially where, they least realise, and evades the grasp of outsiders determined to pin it down. Of course where legal traditions are weak, or where the traditions of law are overwhelmed by the imperatives of power, particularly dictatorial power, 'law' – if it should be so called – may simply be a malleable instrument of power-wielders; another truncheon or water cannon. To this extent imperativist and instrumental conceptions are vindicated. It is odd that these conceptions should cope best with systems where law is least important and worst where it does its most distinctive work.

Moreover, apart from the ways in which the past is present in law as in every tradition, law and its practice involve highly organized and complex systems of past-reference, the consequences of which should not be minimized. Lawyers dwell on the words of past statutes and on glosses on them by past 'authorities' (a concept of central importance to many institutionalized traditions, as well as law). In court, and in the lengthy preparations for and attempts to avoid appearances there, lawyers seek to marshall a past more favourable to their clients' interests than to those of their opponents. All of this takes place in a context, often real, often hypothetical, where genealogical support for every argument is required and closely examined. That many legal genealogies seem contrived would not surprise students of lineage systems in

'traditional' societies. That they might fail to persuade the audience for which they are intended – or at least the canny realists in it – in no way diminishes the significance of the attempt. Moreover, judging, that activity so favoured with jurisprudential attention and writings, is an archetypally traditional and tradition-referring practice. For however innovative judges are, their modes of justifying decisions, and therefore the sorts of arguments which must be addressed to them, in fact or hypothetically, differ systematically from those of other decision-makers such as, say, engineers or entrepreneurs, or workers in less self-consciously authority-filled traditions, such as novelists, artists or scientists, who themselves are in no way free from the traditions of their calling. Judging is a specific and characteristic mode of making and justifying practical decisions: a judicial decision is one which is justified publicly by reference to authorized institutional tradition. In those hard cases that lawyers and legal theorists so enjoy to contemplate, the need publicly to justify one's decision in terms of interpretations of the legal past which seem plausible to experts, remains important long after simple rule-application has ceased to be possible. Doing this involves neither application of a clear unequivocal rule, as in the perhaps mythical easy cases, nor invention *ex nihilo*, but inescapably (though not only) interpretation of authorized institutional tradition.

(ii) Authoritative Presence

Law is not highly traditional merely because it has a past; so, after all, does everything over an instant old. However, the past of law, as of every tradition, is not simply part of its history; it is an authoritative significant part of its present. Without such authoritative presence, the past is not part of a living tradition or at least not a living part of such a tradition. Much of the past enters into no tradition. It simply disappears without trace, or leaves traces which survive without present consequence for anyone. Conversely, not everything from the past which has consequences in the present, such as an economically wise (or unwise) governmental decision, enters a tradition linking the

past and the present.[10] To the extent, however, that the real or imagined past plays a present normative or authoritative role in one's values or beliefs, this second element of traditionality is satisfied.

The authoritative presence of the past in traditions is frequently unnoticed by participants. Indeed, the past is often most powerfully and pervasively present when it is not known to be past or present. It is simply 'obvious' or 'natural', an unremarked piece of the furniture of the world. This is true of many moral, religious and political beliefs, ideologies, legal traditions, scientific procedures, and the vast cultural inheritances they embody. On the other hand, the pastness of elements of one's present can be recognised and appropriated in a specifically traditional way, when what is known or thought to be the past of one's race, vocation, institution etc., is considered to be of continuing significance.

In law the past has profound present significance in both these senses. Simple reflection on what is involved in knowing the law of a single jurisdiction suggests the importance of the unnoticed present-past in law. For as everyone knows but jurists sometimes forget, 'to know a legal system is not just to have learned its rules but to understand how the rules are put together, how the system is structured, how the rules are interpreted'.[11] Such understanding is important not merely, or even especially, for the historian or theorist of law who seeks to account for these things. It is in fact an unsung precondition of practical lawyering; the 'tacit' knowledge[12] which underlies competence within any legal or indeed any social practice. Mastery of such underlying knowl-

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[10] I am grateful to Philip Selznick for bringing home this (now obvious) truth to me.

[11] Alan Watson, *The Making of the Civil Law* (Cambridge, MA.: Harvard University Press, 1981), p. 14.

[12] See Michael Polanyi, *Personal Knowledge* (Chicago: University of Chicago Press, 1962); *The Tacit Dimension* (London: Routledge and Kegan Paul, 1967).

edge depends on tradition, both oral and written. As inexperienced lawyers learn quickly, knowledge of the rules is no substitute for this tacit knowledge. As experienced lawyers often demonstrate, such knowledge can frequently serve as a substitute for knowing the rules. What Bernard Rudden observes of judges is true of almost all legal professionals:

> ...not only is the individual judge conditioned by his background, but ... the decades, or even centuries, of a traditional training, of particular methods of recruitment, even of the physical characteristics of the place where the job is done, create a corpus of professional habits and assumptions which affects judicial method and, through it, the legal order, and does so all the more strongly for being so rarely made articulate.[13]

Like the expert cook or scientist discussed by Michael Oakeshott, a reflective lawyer:

> would observe that, in pursuing his particular project, his actions were being determined not solely by his premeditated end, but by what may be called the traditions of the activity to which his project belonged. It is because he knows how to tackle problems of this sort that he is able to tackle this particular problem.[14]

This should not be surprising, for to know and understand a system of law is in many ways similar to knowing and understanding a language. Indeed, as I have suggested, law contains a language of some density and complexity, and it is not only lawyers who speak it. We all do, and even the least legally expert of us arrange and transact some of the most and least significant of our everyday affairs in terms of our understanding of it. Moreover, like law:

> a language is not a fixed stock of possible utterances, but a fund of considerations drawn upon and used in inventing utterances; a fund which may

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[13] 'Courts and Codes in England, France and Soviet Russia' *Tulane Law Review* 48 (1974): 1010–28 at 1014.

[14] 'Rational Conduct', in *Rationalism in Politics* (London: Routledge and Kegan Paul, 1962), p. 99.

be used only in virtue of having been learned, which is learned only in being used, and which is continuously reconstituted in use.[15]

Like language-speakers, lawyers and all who use law inhabit and manipulate traditions whose general intellectual structures, underlying conventions, canons of authority, and standards, change glacially and in ways that individuals rarely have power to affect radically. They may innovate within these traditional idioms, and of course in law, unlike ordinary language, it is possible to decree or legislate important elements of novelty, including rules, less often principles, and even new lawmaking or interpreting institutions, such as new tribunals. But at the level of underlying assumptions and presuppositions, change within legal systems is a more complicated, supra-individual and usually supra-generational affair. At this level, revolutions are rare in law, and more rarely still are they total. This of course is true of many traditions outside the law, none of which is best understood in terms of the 'time-free' concepts prevalent in modern legal and social theory.

The traditionality of law is reflected not merely in the pastness of its present, the extent to which current law is the presently visible residue of generations of deposits. It is equally reflected in the presence of the past, the extent to which only the presently authoritative past is treated as significant and only to the extent of this present authority. The lawyer preparing a brief, the judge justifying a decision, the layman trying to understand and predict the effects of law on his activities, are not engaged in disinterested forays into legal history, though they may be deeply concerned with the legal past. On the contrary, this past is treated as though it were a vast storehouse to be searched for solutions to present problems. One characteristic complaint by legal historians is revealing in this regard. In seeking to explain 'Why the History of English Law is not Written', Maitland suggested that one reason was the lawyer's peculiar attitude to the legal past:

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[15] Michael Oakeshott, *On Human Conduct* (Oxford: Clarendon Press, 1975), p. 120.

what is really required of the practising lawyer is not, save in the rarest cases, a knowledge of medieval law as it was in the middle ages, but rather a knowledge of medieval law as interpreted by modern courts to suit modern facts.[16]

Applied to legal history itself, this attitude to the legal past has frequently led to history-as-genealogy or, as the American historian Daniel Boorstin has written, the considerations of legal history as 'an alchemy for distilling legal principles':

So obviously has it seemed necessary to adopt the categories of the modern 'developed' legal system that much of legal history has become a sort of legal embryology – the search for the rudimentary forms of the 'full-grown' legal system. The present becomes the culmination of all the past, and the present forms of institutions seem to be their inevitable forms. The imagination is thus closed to the infinite possibilities of history.[17]

A similar complaint has recently been made by Douglas Hay. When it comes to thinking about the past, one characteristic of 'thinking like a lawyer', Hay argues, is what historians call 'presentism'; 'the fallacy of working from present concerns to past origins, is anathema to historians, but necessarily half the lawyer's method'.[18] What appears to historians as bad history is simply typical of the behaviour of participants within a tradition. Whig interpretations may be unsuccessful history, but they are often very successful law.

When participants in a recorded tradition consult its records, they are rarely concerned to reconstruct the past *wie es eigentlich gewesen ist*. All developed legal systems, for example, produce rules of statutory interpretation which prescribe and circumscribe the resources on which a lawyer may draw to interpret statutory provisions. A point little remarked upon by lawyers is that these are not rules for which an historian seeking to analyze the origins

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[16] *The Collected Papers of Frederic William Maitland*, ed. H. A. L. Fisher (Cambridge: Cambridge University Press), vol. 1, p. 491.

[17] 'Tradition and Method in Legal History', *Harvard Law Review* 54 (1941): 424–36 at 428–29.

[18] 'The Criminal Prosecution in England and its Historians' *Modern Law Review* 47 (1984): 1–29 at 18–19.

and purposes of a statute would have much use. Even if he could make sense of the notion of the 'intention of the legislature', for example, no historian seeking it (or them) on a particular matter would feel bound to limit himself to the sources or kinds of inference allowed to a judge by whatever rules of statutory interpretation prevail in a particular jurisdiction. Nor should he believe he had found the intentions he was looking for if he did so. An historian, *qua* historian, is an outsider to the internally authoritative traditions of law, even though he may need to be an empathic outsider. A lawyer is bound to invoke legal rules of interpretation, not because he is an inferior historian, but because, *qua* lawyer, he is not an historian at all. He is a participant in a legal tradition, for whom statutes are primarily important not as sources of clues to events in the otherwise hidden past, but as authoritative materials from which meanings must be extracted by authorized means, to enable responses to *present* problems to be fashioned; or at least to be publicly justified to other cognoscenti of the tradition.

(iii) *Transmission*

Traditions do not exist automatically wherever the past has authoritative presence. There is, as a matter of etymological necessity, a third element in every tradition: transmission, a handing-over. A 'primitive' African mask, an ancient Japanese painting, which serve as models for French painters, are not, simply because they involve the normative presence of the past, elements in any tradition linking the past with the present. Traditions depend on real or imagined *continuities* between past and present. These continuities may be formalized and institutionalized as they are in the institutions of law and religion, though they need not be. Whatever the mode of transmission used in a particular tradition will affect directly and profoundly what passes from generation to generation, what is added, what subtracted, and how the transmitted past enters and is received into the present. As we have seen, in drawing on their store of present-past, contemporary legal systems depend upon sophisticated and complex means of recording, preserving, editing and transmitting a legally authorized

past for present and future use. Such practices give this authorized past special importance for the present in institutionalized record-keeping traditions, with rules about and hierarchies of authority. They also give strategic importance to those entrusted with such tasks of transmission. Record-keeping allows more of the past to speak to the present and can help lend a sense of inter-generational continuity and coherence to traditions. Coherence of preoccupations over time, often quite self-conscious coherence, can be established. Also where records are kept, those who fashion and/or implement the criteria for selecting what to record have a means to edit the past and control the future.

In societies which have developed institutions of sacred and/or secular authority, castes of experts – kings, priests, judges, scholars – are frequently granted an official monopoly in the authorized interpretation of recorded texts. Where their authority is unappealable or ultimate, their interpretations of such texts become what their tradition is officially taken to mean. This gives, to these interpreters also, power over the past and the future. Such power, however, is rarely absolute, but must conform to canons of coherence and plausibility known to and accepted by participants in the tradition.

2. TRADITION AND CHANGE IN LAW

Central to the practices of law, then, are forms of tradition, transmitted components from a real or believed-to-be real past which are authoritatively present. This is not to deny the possibility, or the fact, of change in law. On the contrary, the familiar post-Enlightenment antinomies – tradition and change; tradition and progress; tradition and modernity – rest on a deep misunderstanding of the nature and behaviour of traditions. For whatever else leads to change in law, and there are, of course, many sources both internal and external, the very traditionality of law ensures that it *must* change. Although authoritative interpreters might police the present to see that it does not stray too far from their interpretation of the past, it is impossible for traditions to survive

unchanged. Many traditions allow for deliberate change by, for example, revelation or legislation, or recourse to extra-doctrinal considerations. The changes thus made are then incorporated into the tradition and come to be interpreted in the traditional ways. Thus even radical legislation enters a continuing tradition which probably affected the way in which it was drafted and certainly will affect the ways in which it is read and applied.

However, quite apart from deliberate changes and even in traditions which permit no such change,[19] it occurs, always and inevitably. In oral traditions, the only available evidence of the tradition is what is conveyed to any generation by the existing members of earlier generations, what they recall and what they choose to transmit. What is forgotten is lost, what is currently inconvenient can be forgotten, in the process described by the anthropologist J. A. Barnes as 'structural amnesia'.[20] And just as inconvenient pasts can sink without trace, so more convenient ones can rise without independent evidence.

In written traditions, all who can read can examine evidence from and of the past. The past becomes more available for controversy, and notwithstanding the existence of written (after print, fixed) texts, the past-in-the-present remains unstable. Written traditions are continually subject to modification. Their transmission necessarily involves interpretation of writings. This ensures change. As lawyers know, natural languages are full of ineradicable open texture, ambiguity and vagueness. Legal texts, as Julius Stone has shown, are productively full of 'categories of illusory reference'.[21] Interpretation of such texts, even by contemporaries, is bound to yield different readings.

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[19] Cf. A. R. Blackshield ed., *Legal Change: Essays in Honour of Julius Stone* (Sydney: Butterworths, 1983), especially chapters by Cohn and Perelman.

[20] 'The Collection of Genealogies', *Rhodes-Livingston Journal: Human Problems in British Central Africa* 5 (1947): 52.

[21] *Legal System and Lawyers' Reasonings,* (Sydney: Maitland, 1964), chapter 7; *Precedent and Law. Dynamics of Common Law Growth* (Sydney: Butterworths, 1985), *passim*.

Apart from ambiguities already present in texts,

> ...over time words change their meaning and values shift ... expectations as to form evolve. All of this is bound to have an effect on the reading of the text ... There is a sense in which *The Merchant of Venice* is for us unreadable, so different is the meaning of 'Jew' to Shakespeare and to us. And think how recently one's own use of the word 'gay' has been made problematic.[22]

Moreover, it is not just a question of the vagaries of texts. Texts do not stand on their own in a tradition. If they are taken to be part of it, they must be interpreted in ways that are consistent and coherent with it and thus the meaning of any traditional text will be affected by the nature of, and changes within, the tradition itself. Such changes will occur continuously over time as, independent of any particular text, new elements are added to the tradition and must be taken into account by subsequent participants. Gadamer makes the point well:

> Every age has to understand a transmitted text in its own way, for the text is part of the whole of the tradition in which the age takes an objective interest and in which it seeks to understand itself. The real meaning of a text, as it speaks to the interpreter, does not depend on the contingencies of the author and whom he originally wrote for. It certainly is not identical with them, for it is always partly determined also by the historical situation of the interpreter and hence by the totality of the objective course of history ... . Not occasionally only, but always, the meaning of a text goes beyond its author. That is why understanding is not merely a reproductive, but always a productive attitude as well.[23]

Thus the interpreter is confronted by far more than a text to interpret; he must interpret it in terms of the tradition to which both he and it belong.

This is as true of the interpretation of statutes, where a canonical form of words might seem to limit room for subsequent

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[22] James Boyd White, 'Law as Language: Reading Law and Reading Literature', *Texas Law Review* 60 (1982): 415–45 at 427.

[23] Hans-Georg Gadamer, *Truth and Method*, 2nd edition (London: Sheed and Ward, 1979), pp. 263–64.

manoeuvre, as it is of case law. Indeed, given the impossibility of univocal interpretation of most complex texts, there is a sense in which legislation forces interpreters to rely more rather than less heavily on tradition than does the common law. For a relevant statute, still more a code, forces itself on an interpreter. Its words cannot be sloughed aside as *dicta* or dissent; they *have* to be interpreted. Since their meanings often will be plural, and since later lawyers nevertheless have to give meaning to them, they are bound to repair to interpretations which have become settled and accepted and/or to canons of statutory interpretation which, as we have seen, are highly traditional.

Finally, the interpreter is not a passive recipient of meanings. He is active in seeking to understand *them* in terms of what *he* knows, values, understands, and seeks to do with them. New questions render prior understandings problematic and yield new answers. Change, then, is never independent of the traditions in which it occurs. It is also without end.

3. CONCLUSIONS: THE INESCAPABILITY OF LEGAL TRADITION

The umbrella-concept tradition shelters many different types of phenomena with different characteristics. Any complex tradition, such as law, itself is likely to be made up of different sorts of traditions: traditions of claims about the world; 'second-order' traditions about such 'first-order' traditions and how one should respond to them;[24] real traditions which wreak their effects unnoticed; historically spurious traditions in which people believe and to which they are deeply attached. Adequate analysis of traditions needs to be able to encompass this complexity without denying or blurring it, as so much discussion of tradition does, in

[24] For the distinction between first-order and second-order traditions, see Karl R. Popper, 'Toward a Rational Theory of Tradition', *Conjectures and Refutations*, 3rd edn., revised (London: Routledge and Kegan Paul, 1969), pp. 126–27, and see Krygier, 'Tipologia della Tradizione', 234–35.

vague undiscriminating praise or blame. Yet the many different types of tradition do have some common features – the authoritative presence of transmitted past – and use of the concept of tradition allows one to speak of this. When one does, however, one must do more than speak of tradition-in-general. If one wishes to understand law or any other complex tradition, it is important first to appreciate their traditionality and then to make distinctions.[25]

One useful distinction between what, following Rawls and Dworkin, might be called three different conceptions of tradition, has been made by the Polish historian of social thought, Jerzy Szacki. Szacki distinguishes between three major foci of attention of writers on tradition, which are rarely distinguished; three different 'ways of approaching the problem of links between present and past.'[26] The first focuses on the *process* or activity of communication between generations, of transmission of elements of culture from one generation to another. It is what is referred to when we speak of things being passed on *by* tradition, and is much concerned with the means of such transmission. The second, which Szacki calls the *objective* conception of tradition, is concerned with traditions as historical deposits, as actual inheritances from the past; 'the dead hand of the past', 'the wisdom of ages'. The third, *subjective*, conception of tradition has to do with the evaluative commitment of a given generation to, or in opposition to, the past, 'that specific kind of value, whose defence (or criticism) involves on calling on its descent from the past'.[27] Weber's conception of traditional authority clearly has to do with tradition in this third sense.

For those speaking from within a tradition, the objective conception of tradition has priority over the others. Subjective traditions are parasitic upon the assertion of objective ones – participants in a tradition are always committed to allege, if often

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[25] For one attempt to do this, see Krygier 'Tipologia della Tradizione', pp. 233–47.

[26] *Tradycja*, p. 97.

[27] *Tradycja*, p. 155.

falsely, that objective traditions lie behind their attachments – and without objective traditions there would be nothing for mechanisms of transmission to transmit.

For those wishing to analyze traditions, however, it is not clear that one should choose any one conception over the others; though it is useful to distinguish them. A priori, traditions in the second and third senses need have little to do with each other; objective traditions to which no one attends, subjective attachment to nonexistent pasts. In practice, the interrelationships between inheritance and subjective traditionality are complicated, often inextricable, frequently controversial among scholars, and in need of investigation in particular cases. Most complex traditions, such as the Judaeo-Christian tradition or the common law tradition, combine characteristic objective and subjective forms of traditionality, and ways of passing them on, in distinctive ways. What at any present of such a tradition is 'objective' is an amalgam of layers of past as it has been witnessed, recorded, interpreted, imagined, and assimilated. What is 'subjective' tradition may have little to do with the historical past of which it speaks, but it is rarely uninfluenced by the consciously and unconsciously transmitted past. Traditions are rarely either simply given *or* socially constructed, if only because what is given in one generation includes what had earlier been socially constructed, and social constructions are profoundly affected by whatever happens to be given when they occur. Important traditions are a combination of inheritance and (often creative) reception and transmission.

Law, in any event, rests upon mountains of inherited tradition, preserved, referred and deferred to by highly developed institutions and practices of tradition-maintenance; that is to say, it is highly traditional in at least the first two of Szacki's senses. This would remain true even if such traditionality were unaccompanied by any subjective traditionality on the part of contemporaries, as Max Weber believed was increasingly the case in the modern world. I do not believe that Weber was wholly right, particularly about law, as consideration of the central role of 'authority' in legal systems would reveal. However I will not pursue that here.

Traditionality in these first two senses is indispensable in social life generally and in law specifically. Its contributions are both cognitive and normative. The major cognitive contribution of transmitted inherited tradition is, as it were, to have done our thinking for us and to have done it ahead of time. Even when we do consciously reflect, the point Popper makes about tradition in science can be generalized: 'If we start afresh, then, when we die, we shall be about as far as Adam and Eve were when they died (or, if you prefer, as far as Neanderthal man)'.[28] Much of the time though, we do not have time, skill, imagination enough to solve each of our problems afresh. Traditions, particularly recorded traditions, provide us with storehouses of possibly relevant analogies to our present problems, ways of thinking about such problems, and successful and unsuccessful attempts to solve them. It makes sense to try to imitate the successful attempts and avoid those which with hindsight appear unsuccessful. Whether or not it makes sense, it is easier. David Armstrong makes the point well:

> Conscious thought, choice and decision are difficult matters. They occupy no very extensive part of a human being's life.... Whitehead said that *thought* was the cavalry charge of the intellect. His point was that cavalry charges, though vitally important, could form no very extensive part of battles. Conscious deliberation followed by decision might be said to be the cavalry charge of the will. Now suppose that one is free to adopt a wide variety of courses of action, but no particular course is obviously superior. It will be an important volitional economy simply to do what one remembers that some conspecifics did.[29]

The relevance of this to law is obvious. Law deals with myriad practical problems which individuals who use it have not, indeed could not, alone foresee or forestall. Durkheim noted this when he

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[28] Popper, 'Toward a Rational Theory of Tradition', p. 129.

[29] D. M. Armstrong, 'The Nature of Tradition', *The Nature of Mind and other Essays*, (Brisbane: University of Queensland Press, 1981), pp. 89–103 at 98.

insisted on the importance in every legal contract of the vast store of noncontracted elements which the law implies:

> ... contract law is that which determines the juridical consequences of our acts that we have not determined. ... A resume of numerous, varied experiences, what we cannot forsee individually is there provided for, what we cannot regulate is there regulated, and this regulation imposes itself upon us, although it may not be our handiwork, but that of society and tradition.[30]

Durkheim's observation applies generally, beyond contracts and in the everyday law-affected lives of everyone.

A related point can be made specifically about the activities of legal professionals. Charles Fried has argued that neither moral philosophy nor economics, which it is so fashionable to use to assess law, can provide solutions which are sufficiently *determinate* to solve the practical problems which face lawyers and judges and on which judges *must* pronounce. Fried asks:

> So what is it that lawyers and judges know that philosophers and economists do not? The answer is simple: the law. There really is a distinct and special subject matter for our profession. And there is a distinct method.... It is the method of analogy and precedent.... The discipline of analogy fills in the gaps left by more general theory, gaps which must be filled because choices must be made and actions taken.[31]

It is the traditionality of law in the two senses mentioned above which makes this 'distinct method' possible.

The presence of recorded past is also important to several normative functions that law performs, and in any large society must perform. In particular, many laws, and the very existence of bodies of authoritative legal propositions, solve what game-theorists call coordination problems between people. There are many social situations where our decisions are strategically interdependent, that is, where 'the best choice for each depends upon

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[30] *The Division of Labor in Society*, (New York: The Free Press, 1964) p. 214.

[31] Charles Fried, 'The Artificial Reason of the Law or: What Lawyers Know', *Texas Law Review* **60** (1982): 35–58 at 57.

what he expects the others to do, knowing that each of the others is trying to guess what *he* is likely to do'.[32] Coordination problems are a subset of problems of strategic interaction: those where parties have reason to cooperate, have mutually conditional preferences (I will drive on the left if you will; you will if I will; each needs to know that the other will and knows that his counterpart will, etc.) and at least two alternatives to choose from. Edna Ullmann-Margalit has shown that in such situations, *norms* will be generated which provide 'some *anchorage*; some preeminently conspicuous indication as to what action is likely to be taken by (most of) the others, or at least what action is likely to be expected by everyone to be taken by (most of) the others.'[33]

Social life is full of recurring coordination problems and no society can exist without solutions to many of them. In a 'society' with nothing but unsolved coordination problems, life would be not merely nasty, horrible, brutish and short, as it is in many societies, but also impossibly and endlessly confusing. No one would know what anyone else would do, in any situation where coordination was necessary for interdependent decisions. Whatever else it was, such a solipsistic aggregation would not be a society. A large, populous and complex society full of anonymous (inter-)actors is likely to have institutionalized solutions to many pervasive and important problems of coordination, particularly among strangers. Legal systems contain rules of the road, in both the literal and metaphorical sense, as one way of institutionalizing solutions to such problems and of stabilizing and focussing the relevant expectations.

Legal systems vary in the degree to which they contribute usefully, or even positively, to the solution of life's coordination problems. Much that goes on in any legal system is concerned with other problems. Some legal systems contribute little to solving, or even compound, problems of coordination. Kafka

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[32] Edna Ullmann-Margalit, *The Emergence of Norms* (Oxford: Clarendon Press, 1977), p. 78.

[33] *The Emergence of Norms*, p. 109.

insisted upon this and Stalin – some of whose instruments of random mass terror were in at least a formal sense legal – demonstrated it in ghastly fashion. So at its weakest my argument becomes that, *to the extent that* legal systems contribute to the solution of coordination problems, tradition in the two senses referred to is necessary. A normative implication is that, since rule without reference to the present legal past, for example rule by unpredictable *ad hoc* decree, fails to contribute to the solution of such problems, it is objectionable from this point of view, as it is from many others.

Even at its weakest, the argument amounts to more than might appear. Many legal systems contribute a great deal to the solution of coordination problems, by providing a matrix of commonly understood signals which masses of strangers can decode in familiar and similar ways. While systems differ significantly in their reliance on coordination-aiding traditionality, in no society will *all* law be up for grabs, or for decree, all the time. In matters of political indifference, even dictatorial rulers are likely to let law solve recurring problems of coordination. Even in contemporary Poland, after all, where decrees are rather thick, fast and confusing, everyone knows on which side of the road cars drive. Moreover, even legal systems poor at aiding coordination in extra-legal matters, by their very existence and activities create coordination problems which they themselves must resolve. For as Postema has argued, once a legal system exists, its own operations require it to generate mutually concordant expectations about the law, not only among citizens but between citizens and law-applying officials and among law-applying officials themselves;[34] 'co-ordination is fundamental to law and ... no legal *system* is conceivable without substantial coordination elements at its foundations'.[35]

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[34] I owe the specification of these three co-ordination situations to Gerald J. Postema, 'Co-ordination and Convention at the Foundations of Law', *Journal of Legal Studies* **11** (1982): 165–202, especially at 182ff.

[35] Postema, 'Co-ordination and Convention of the Foundations of Law', p. 194.

What is necessary, and what the transmitted present-past of legal authority, precedents, conventions, practices, rules, common understandings of the way the system works and doesn't work, go some way to provide, are relatively identifiable and reliable 'anchorages' for the mutually interdependent expectations which arise about and through the law.

To the extent that the traditionality of law in Szacki's first two senses aids in the solution of coordination problems, this is an argument for, or at least a presumption in favour of, subjective traditionality. However, as Marxists and others have emphasized, solving coordination problems is not all that legal or other institutions do. And, as Weber's gloom about bureaucracy showed, not everything that is indispensable is in every respect good or to be welcomed. As it happens, I believe that many traditions, like many bureaucracies,[36] are much maligned and in need of defenders. But many traditions, like many bureaucracies, are vile and pernicious; all the more so because they are so hard to shift. Apartheid, anti-semitism, racism of all sorts are, after all, highly traditional practices in all three of the senses I have mentioned. It is, moreover, no accident that beneficiaries of entrenched advantages of wealth, power and status are often also supported by strong normative traditions. Such traditions render acceptable even hallowed and apparently 'natural' to those who believe in them, what might be, frequently should be, seen to be unjust, exploitative, tyrannical, and highly contingent once unmasked. The hold of such traditions on social life has not been negligible in human history, nor have the advantages accruing to the groups benefiting from them.

Social theory should not find it insuperable to accommodate the different functions that traditions perform; though scores of 'consensus theorists' on one side and 'conflict theorists' on the other appear to have found it difficult. And social theory is no substitute for moral argument. While it is always important to con-

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[36] See Eugene Kamenka and Martin Krygier, eds., *Bureaucracy. The Career of a Concept* (London: Edward Arnold, 1979).

sider, it is never a sufficient argument for a practice that it has existed for 'time out of mind'. On the other hand, that is even less satisfactory as an argument against it.

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