Custom and Tradition: An Ambiguous Relationship

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ABSTRACT
The study examines the meaning of custom and tradition in a legal sense as well as their relationship based primarily on recent and contemporary English-language scholarship. The works of Merryman, Berman, and Glenn, to only name a few from the field of comparative legal history, define the concepts in different ways identifying different meanings. The author demonstrates the lack of consensus in defining these notions and identifies the conceptual elements common to them both, such as their reference to manifesting or perpetuating (legal) information. The role of common and coherent identities of the social environment in which custom and tradition in the legal sense spread is also highlighted. The author demonstrates that the specific difference between the two notions is the passage of time, a requirement for the formation of tradition but not to that of a custom. The role of legal culture and the possibility of transplanting legal traditions are also briefly examined, as are the perspectives of adjacent legal fields on these respective notions.
KEYWORDS
custom, tradition, conceptualization, definition, comparative legal history.

Cutumă și tradiție: O relație ambiguă

REZUMAT
Studiul examinează semnificația obiceiului și a cutumei în sens juridic, precum și relația dintre acestea, bazându-se în principal pe studii recente și contemporane în limba engleză. Lucrările lui Merryman, Berman și Glenn, pentru a numi doar câteva din domeniul istoriei juridice comparate, definesc conceptele în moduri diferite, identificând sensuri diferite. Autorul demonstrează lipsa de consens în definirea acestor noțiuni și identifică elementele conceptuale comune ambelor, cum ar fi referirea la manifestarea sau perpetuarea informației (juridice). De asemenea, este evidențiat rolul identităților comune și coerente ale mediului social în care se răspândesc obiceiul și cutuma în sens juridic. Autorul demonstrează că specificul diferență între cele două noțiuni este trecerea timpului, o cerință pentru formarea cutumei, dar nu și pentru cea a unui obicei. Rolul culturii juridice și posibilitatea transplantării tradițiilor juridice sunt, de asemenea, analizate pe scurt, precum și perspectivele domeniilor juridice adiacente asupra acestor noțiuni.
CUVINTE CHEIE
obicei, cutumă, conceptualizare, definiție, istoria comparată a dreptului.

I. INTRODUCTION

Custom and *tradition* in a legal sense are not the same. Their relationship is debated and controversial in both legal and interdisciplinary scholarship. Through a selection of English-language sources and relying heavily on H. Patrick Glenn's scholarship, I attempt to show that *tradition* is normative information, which is transmitted over time horizontally and vertically and that people willingly adhere to, while *custom* is factual information, which members of a given group of society create and maintain and which, if supported by state authority, becomes binding law. The constantly changing spheres of both tradition and custom cause them to overlap and make their differentiation more difficult. Yet, custom is more closely related to the society within which it is observed while tradition truly gains significance when examined with regard to its timeline, primarily its pastness and the process of transmission. Based on the respective differences, both custom and tradition could be aligned with legal culture to help establish their role in legal sociology and jurisprudence.

II. WORDS AND MEANINGS

It is common to claim that singular expressions take on additional or different meanings when put in a legal context. But is that really so? How important are words for jurists? Are legal texts really different from any other writing? Is it necessary to be educated in the law in order to understand the legal meaning of a term?

These questions are important as I set out to examine the legal meaning of two words: *tradition* and *custom*. Every single person has an understanding of these two words in their everyday lives. People observe family traditions such as getting together for a birthday or an anniversary and they have customs that often make their lives easier such as having coffee in the morning. Though we may very well attribute something more profound, more ceremonial to tradition and something rather habitual or monotonously repetitive to custom, there are basically no consequences of not adhering to such family traditions or not sharing said customs.

The easiest way of proving that these terms, despite their similarities, are not interchangeable, not even in everyday use is to locate their differences in a thesaurus or dictionary of the English language. Though *Oxford's Thesaurus of English* lists *tradition* as a synonym for *custom* and vice versa,[1] *Websters's Collegiate Thesaurus* does not do that. *Custom* is, among others, the same as habit, consuetude, practice and usage, and, at the same time, it is related to law. *Tradition* equals heritage, yet it is claimed to be at least related to *custom*.[2] A relationship or a connection

1 (2009): *Oxford Thesaurus of English, Third Ed.*, Oxford University Press, Oxford, p. 190, 898 [referred to in the following as *Oxford Thesaurus* (2009)].

2 A. Merriam-Webster (1976): *Websters's Collegiate Thesaurus. First Ed.*, G. & C. Merriam Company, Publishers, Springfield (Massachusetts, U.S.A.), p. 192, p. 842.

between the two terms does not prove their interchangeability, it rather refers to their occasional overlap. *The Oxford Dictionary of English* claims that *custom* is "a traditional and widely accepted way of behaving or doing something that is specific to a particular society, place, or time" while *tradition* as a mass noun is "the transmission of customs or beliefs" and as a count noun, quite simply, "a long-established custom or belief."[3] *The Oxford Encyclopedic English Dictionary* does not connect *custom* to *tradition*, but it defines *tradition* as "a custom, opinion or belief (...)."[4]

This is where the starting questions become relevant as to what happens if we place both of these terms in a legal context. Are their differences better highlighted, is their connection less clear if we use *legal tradition* when speaking about *tradition* and *custom in the legal sense* when we mention *custom*? *The Oxford Dictionary of English* only lists a separate legal meaning for *custom*, i.e. "established usage having the force of law or right" while it has no legal meaning for *tradition*.[5] *The Encyclopedic English Dictionary* has legal explanations for both terms: *custom* – in a legal sense – is "established usage having the force of law" while *tradition* is "the formal delivery of property (...)."[6] The legal meaning of the two terms, as explained in a regular dictionary, highlights the difference, if by nothing else, the fact that one term has a legal meaning and the other may or may not have one – and when it does, it seems very particular to a legal institution.

In order to better understand and interpret legal terms, it is worth consulting a legal dictionary. Oxford's *A Dictionary of Law* simply does not list *tradition* as a term. It has an entry though for *custom*. Accordingly, *custom* is:

> [a] practice that has been followed in a particular locality in such circumstances that it is to be accepted as part of the laws of that locality. In order to be recognized as customary law it must be reasonable in nature and it must have been followed continuously, and as if it were a right, since the beginning of legal memory. Legal memory began in 1189, but proof that a practice has been followed within living memory raises a presumption that it began before that date (...).[7]

This definition is quite detailed and exact, even if by that it connects *custom* perhaps too closely to the law, and particularly, English law. To take another example, this time from the American sources, *Black's Law Dictionary* has entries for both *custom* and *tradition*. The latter is explained, on the one hand, as the delivery at the completion of a contract referring back to Blackstone's Commentaries,

3 Angus Stevenson (ed.) (2010): *Oxford Dictionary of English, Third Ed.*, Oxford University Press, Oxford, p. 430, 1884–1885.
4 Joyce M. Hawkins, Robert Allen (eds.) (1991): *The Oxford Encyclopaedic English Dictionary*, Clarendon Press, Oxford, p. 356, 1530.
5 Supra note 3.
6 Supra note 4.
7 Elizabeth A. Martin (ed.) (2003): *A Dictionary of Law, Fifth Ed.*, Oxford University Press, Oxford–New York, p. 132.

which derived the term from the Latin *traditio*. On the other hand, *tradition* is also claimed to mean "[p]ast customs and usages which influence or govern present acts or practices."[8] Interestingly, *Black's* has a separate entry for *custom* and for *custom and usage*. The former is fairly brief stating that *custom* is a "[t]erm [which] generally implies habitual practice or course of action that characteristically is repeated in like circumstances."[9] The entry *custom and usage* is long and diverse establishing it as something that people repeatedly do and that – due to such repetition and the passing of time as well as the adherence to it by common consent –, becomes the law. The dictionary provides classification as it claims that *customs* can be "general, local or particular," thereby distinguishing *usage* that is not "the law or general rule which arises from such repetition."[10] There is yet another entry named *usage*, explaining it as a "reasonable and lawful public custom in a locality (...)" and as a "[p]ractice in fact."[11]

What can be derived from all of these definitions? *Tradition* and *custom* may have similar meanings in both the everyday and the legal sense, but they do have differences that allow for or maybe even require a differentiation of the two terms. It is fair to ask why that may serve any purpose. The easier answer is that, as it is already clear from the explanations of the terms, *custom* seems to be a much more clearly established legal expression than *tradition*.

Furthermore, it is important to look at the possible relationship between either of these terms and *culture*. Staying with the previously used dictionaries, only the *Oxford Thesaurus* mentions both *customs* and *traditions* in its *culture* entry.[12] The other two English dictionaries do mention *custom* in their *culture* entry, but they do not have the term *culture* in either their *tradition* or *custom* entries.[13] In the legal sense, however, though not expressly addressed by any dictionary, there are connections between *tradition* and *culture* as well as *custom* and *culture*. Various articles link either *tradition* and *culture*[14]

8 Bryan Garner (ed.) (1993): *Black's Law Dictionary, Sixth Ed., 7th Reprint*, West Publishing Co., Saint Paul (Minnesota, U.S.A.), p. 1495 [referred to in the following, according to academic practice as: *Black's* (1993)].

9 *Black's* (1993): p. 385.

10 *Black's* (1993): p. 385.

11 *Black's* (1993): p. 1541.

12 *Oxford Thesaurus* (2009) p. 188.

13 Hawkins–Allen (1991): p. 352; Stevenson (2010): p. 425.

14 The volume Mark Van Hoecke (ed.) (2004): *Epistemology and Methodology of Comparative Law*, Hart Publishing, Oxford – Portland (Oregon, U.S.A.) contains the plenary papers of a 2002 conference, where the first two contributions are Alan Watson: *Legal Culture v. Legal Tradition* (p. 1-6.) and H. Patrick Glenn: *Legal Cultures and Legal Traditions* (p. 7-20.). Watson boldly begins with: "Legal culture is legal tradition, and legal tradition is legal culture." p. 6. Glenn conducts a different analysis claiming that legal culture is the broadest of the epistemological tools and uses legal tradition as a contrasting concept (p. 7-8.). Another example is E.J. Dickson-Gilmore (1992): Finding the ways of the ancestors: Cultural change and the invention of tradition in the development of separate legal systems, 34 *Canadian Journal of Criminology* 479(1992) looking at the First Nations traditional legal structure and their options within the Canadian legal culture.

or *custom* and *culture*.[15] Only a few address *custom* and *tradition*,[16] and none connect all three. To identify these connecting links would go beyond the scope of this writing, yet it is a sufficient indication that the clear outline and definition of the terms *tradition* and *custom*, as well as their relationship to one another serves a purpose towards the explanation and understanding of *legal culture*.

Having established that both *custom* and *tradition* have general everyday as well as legal meaning, I would like to add a few more subtle limitations to the scope of the issue discussed here. Due to the sensitivity of these two terms, I am primarily using English-language sources, which means that the findings are conclusive with regard to these and the specific terms *custom* and *tradition*. As soon as we translate these terms, we already compromise their content. There are various options in numerous languages that may express exactly the same content as *tradition* and *custom,* but they may also be perceived differently by members of the community whose native tongues said languages are.[17] This is why, here, I am only discussing the English terms.

Even within the English language, however, there are certain differences, which is why I find it important to express that whenever I discuss *custom* here, I mean local, national, or domestic custom and not custom in the international sense. *Custom* in international law is an acknowledged source of law.[18] *Custom* in a domestic or local sense is much more difficult to explain and much less evident as to its content. At the same time, I acknowledge that there are established differences in the

15 E.g. Lawrence M. Friedman (1969): Legal Culture and Social Development, *Law and Society Review* No. 1/1969, p. 29-44. or similarly, Lawrence M. Friedman (1990): Some Thoughts on Comparative Legal Culture, in David S. Clark (ed.): *Comparative and Private International Law – Essays in Honor of John Henry Merryman on his Seventieth Birthday*, Duncker & Humblot, Berlin, p. 49-57.

16 Most of the articles that explicitly set out to discuss custom and tradition focus on a specific topic and therefore do not define or address the notion of custom or tradition. See e.g. Honorable Robert J. Torres Jr. (2013): Jon'd at the Hip: Custom and Tradition in Island Decision Making, *University of Hawai'i Law Review* 921(2013), p. 921-935, or Bruce Rigsby (2006): Custom and Tradition: Innovation and Invention, 6 *Macquarie Law Journal* 113(2006), p. 113-138. Again, others use both terms without differentiating, such as Anita Jowitt (2005): Reconstructing Custom – The Politics of Homophobia in Vanuatu, 30 *Alternative Law Journal* 10(2005), p. 10-14.

17 The potential dangers interpretation holds have been widely discussed in the literature of legal history, which is why it is a common requirement for comparative scholars to be fluent in numerous languages and consult the sources in their original languages. Similarly important, as Professor David Ibbetson referred to it, "what linguists would call 'false friends': things that look alike but which may in fact be different." David Ibbetson (2013): The Challenges of Comparative Legal History, *Comparative Legal History* No. 1/2013, p. 10. Professor Glenn also raised the argument of untranslatability, namely that the difference in languages hindered the flow of information and thereby limited tradition. H. Patrick Glenn (2004): *Legal Traditions of the World – Sustainable Diversity in Law, Second Ed.*, Oxford University Press, Oxford, p. 47.

18 According to Article 38 (1) b of the Statute of the International Court of Justice, international custom is a source of international law. https://www.icj-cij.org/en/statute [accessed: November 30, 2020]. Oxford's *A Dictionary of Law* also states that "Custom is one of the four sources of international law." It goes on to explain how both established state practice and *opinio juris* are necessary to prove that something is indeed customary international law. Martin (2003): p. 132.

English-language legal literature relating to the differences between *custom in a legal sense* and *customary law*, however, the terms will be used quasi interchangeably here, as it is within the abstract sphere that the attempt to outline the term is being undertaken.[19] Regarding *tradition*, the difference in terminology may arise from tradition in singular and plural form or between *tradition* and *legal tradition*. For the present purposes, I will use all of these terms as one referring to *tradition in the legal sense*. In fact, I rely heavily and discuss in detail the scholarship of the late Professor H. Patrick Glenn, who with his book, *Legal Traditions of the World* revolutionized the scholarship and started a major professional debate on *legal tradition*.[20]

Therefore, following the introduction to the terms, I identify and try to consolidate the relationship between tradition and custom based on legal history. The methodological approach is historically rooted and wishes to remain in the abstract sphere. I examine in detail the scholarship of H. Patrick Glenn on both legal tradition and custom followed by other scholars on the development and role of custom. Finally, I take a brief look at potential links to the basic concept of legal culture before concluding the paper with a summary of the shared and different characteristics of the two examined terms.

III. THE CONCEPT OF LEGAL TRADITION

Relying on the previously quoted dictionaries, in particular *Black's Law Dictionary*, *tradition in a legal sense* has two meanings: delivery and past customs and usages that have an impact on present acts or practices.[21] The term, per se derives from the Latin *traditio*, meaning to hand over, to transfer. *Traditio*, as a legal term in Roman law had a number of meanings, among them the transfer of ownership, which indicated actual physical transfer as well as symbolic ones.[22] Henry Sumner Maine in his *Ancient Law* called tradition "the most obvious index of a change of proprietorship."[23] Why does the term *tradition* then today also have the meaning of "some past customs and usages" that impact the present? Thinking back to the everyday meaning of the term, this makes perfect sense: we consider something that we used to do for a longer period of time as the determining factor in why we still continue to do it. Yet, if *customs and usages*, according to

19 Harold Berman's example is a good summary of the established difference, namely "Custom, for example, in the sense of habitual patterns of behavior, is distinguished from customary law, in the sense of customary norms of behavior that are considered to be legally binding." Harold Berman (1983): *Law and Revolution – The Formation of the Western Legal Tradition*, Harvard University Press, Cambridge (Massachusetts, U.S.A.), p. 8.

20 Glenn (2004). The book was first published in 2000 and the most recent, the Fifth Edition in 2014.

21 Supra note 8.

22 George Mousourakis (2015): *Roman Law and the Origins of the Civil Law Tradition*, Springer International Publishing, Cham (Switzerland), p. 118.

23 Henry Sumner Maine (1986): *Ancient Law – Its Connection With the Early History of Society, and Its Relation to Modern Ideas*, Foreword by Lawrence Rosen, University of Arizona Press, Tucson (Arizona, U.S.A.), p. 269.

Black's, mean a repeated action that due to the passing of time and repetition as well as adherence to it becomes the law, our everyday practices should become the law. Just how much time has to pass, who has to adhere to it and how many times does this tradition need to repeat itself in order to become law? Alternatively, is there such a big difference between the everyday and the legal sense of the term *tradition*? Both questions are worth exploring. I start with the latter while the prior will be addressed through the legal tradition term introduced and explained by Professor Glenn.

The difference between the everyday meaning and the legal term of *tradition* can be established. Family traditions such as gathering on birthdays or anniversaries should not amount to law. Yet there are legal traditions, the content of which – at least in part – does become law. A comprehensive and clear explanation of this term took considerable time. The literature first approached it from the perspective of the concept of legal tradition.

In 1998, Mathias Reimann and Alain Levasseur published an article in the American Journal of Comparative Law on *Comparative Law and Legal History in the United States* where they addressed the concept of legal tradition in the United States as an idea "conceived by Roscoe Pound in the 1930s" and owing its "current popularity among American comparatists to the writings of John H. Merryman and Harold Berman."[24] The authors went on to explain that the idea of *legal tradition* assumed particular importance in the civil law family,[25] where it appeared to have "three major but not identical"[26] forms. These were John Merryman's "civil law tradition," Harold Berman's "Western legal tradition," and the so-called "European legal culture" propagated by Franz Wieacker. The first two deserve closer examination as they relate expressly to legal tradition and not to legal culture.[27]

John Merryman's *The Civil Law Tradition – An Introduction to the Legal Systems of Western Europe and Latin America* is not completely without precedent. To name just one: René David's work, *Major Legal Systems in the World Today* was published in its

24 Mathias Reimann, Alain Levasseur (1998): Comparative Law and Legal History in the United States, 46 *American Journal of Comparative Law* Supplement No. 1 for 1998, p. 4. Footnotes omitted.

25 Reimann and Levasseur being comparatists adhere to the terminology set out by the basic textbook of contemporary comparative law, René David, John E.C. Brierley (1978): *Major Legal Systems in the World Today – An Introduction to the Comparative Study of Law*, Stevens & Son, London. The original French text has been translated and amended by and with John E.C. Brierley, Second Ed., Simon & Schuster Inc., New York. David in his ground-breaking work used the term "legal family" to collect legal systems that were in one way or another similar. He did state that this was merely a "didactic device" to help the analysis. Accordingly, he identified the Romano-Germanic family, the Common law family and the family of Socialist law and listed a few examples as "other conceptions of law and social order." p. 20-21.

26 Reimann–Levasseur (1998): p. 5.

27 Though Wieacker used the terms legal culture and legal tradition as practically synonyms, Reimann and Levasseur themselves took note of the unclear relationship between the concepts of legal tradition and legal culture. They quote Merryman, who defined legal tradition as a link between the legal system and culture, as well as others, for example Friedman, who place legal tradition more in a historic context and see legal culture as a social approach to the law. See Reimann–Levasseur (1998): p. 6. For further scholarship by Friedman, see also supra note 15.

French original as well as its amended English version a few years earlier.[28] While David identified three *legal families*, Merryman identified three *legal traditions*.[29] David depicted the *Romano-Germanic*, the *Common law* and the *Socialist laws* as families sharing similar characteristics, while for Merryman it was the *civil law*, the *common law* and the *socialist law* that constituted the three legal traditions. In an attempt to synthetize the two authors' categorization, it would be necessary to identify the Romano-Germanic legal family as the civil law tradition, unless there was a clear difference between the terms *legal family* and legal tradition. The authors did not provide a differentiation, yet one can still be drawn.[30]

The usefulness of differentiating *legal family* from *legal tradition* has been recognized by various scholars but while others have claimed to locate the difference between these two in relation to their connection with legal culture, namely that legal family expresses more the connection to the socio-legal reality within a given legal culture, whereas legal tradition would rather relate to its historic development, I find the difference lies in the formalistic or methodological approach as well.[31] David's term was a tool without any meaning of its own. David himself claimed that legal family had nothing to do with biological family; it was merely a didactic device to create groups or categories into which the various legal systems could be ordered for their better understanding.[32] Merryman acknowledged David's aim in establishing his own clear taxonomy. He distinguished legal tradition from legal system defining the latter, for his purposes in his book, as "an operating set of legal institutions, procedure and rules" which, as such, was connected to sovereign states and organizations of states, and concluded that "[n]ational legal systems are frequently classified into groups or families."[33] Yet, legal systems that for various reasons were grouped together may still have very different legal institutions, processes or rules. Categories such as *family* indicate that the legal systems therein have something in common and Merryman claimed that common characteristic to be the legal tradition itself. In that sense, while David's *family* was a catchall phrase used as a didactic device to locate legal systems where the practitioners of one could function among those of the

28 John Henry Merryman (1985): *The Civil Law Tradition – An Introduction to the Legal Systems of Western Europe and Latin America, Second Ed.*, Stanford University Press, Stanford (California, U.S.A.). The first edition was published in 1969. René David's original work, *Les grand systemes de droit contemporains (Droit comparé)*, was first published in 1964 by Dalloz in Paris. The first English-language edition with John E.C. Brierley followed in 1966.

29 Both authors acknowledge that these three are the major ones they respectively selected while there are other conceptions of laws and social order as well as legal traditions.

30 Since the publication of the above mentioned two books, several others have been published which use these terms, most prominently Konrad Zweigert, Hein Kötz (1987): *An Introduction to Comparative Law, Second Ed.*, Oxford University Press, New York uses the term "legal family".

31 This is not to say that any other differentiation is in any way less valid than the one I aim to establish. See: Rafał Manko (2013): Survival of the Socialist Legal Tradition? A Polish Perspective, *Comparative Law Review* No. 2/2013, p. 4.

32 David, Brierley (1978): p. 21. See also Seán Patrick Donlan (2010): Comparative Law and Hybrid Legal Traditions – An Introduction, in: Eleanor Cashin-Ritaine, Sean Donlan, Martin Sychold (eds.): *Comparative Law and Hybrid Legal Traditions*, Schulthess, Zürich–Basel–Geneva, p. 9.

33 Merryman (1985): p. 1.

other, Merryman named the group based on their shared characteristic not *family* but *tradition* adding a particular meaning to this term instead of using it as a device. Namely, according to Merryman, *legal tradition*

> is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught.[34]

Accordingly, from a formalistic or methodological point of view, it could be said that David's *legal family* was a bucket with various content filling it, and Merryman's *legal tradition* was the hook upon which said various content hung.[35]

How does Merryman's legal tradition relate to others'? David S. Clark outlined it as follows:

> (...) Merryman has used the concept of a legal system. Since a tradition includes more than one legal system, a major point of controversy has been to identify those systems that are more important or more typical in illustrating the general features of a tradition. Finally, there is the even grander notion of a Western legal tradition, which if it has increasing validity implies a convergence of the civil law and the common law.[36]

Merryman's work had a very broad horizontal focus within the civil law tradition, but only within that. It included legal systems that developed from Roman law or its reception geographically reaching way beyond the borders of Europe all the way to Latin-America and East Asia. The analysis was thorough exploring the historic development all the way to codification and the origins as well as justification of law as science.[37]

According to Clark, Merryman used the term legal system within the larger frame of legal tradition. However, Western legal tradition was an even broader notion and that is what concerned Harold Berman. Similarly to Merryman, Berman used the term legal system, which he defined as "something narrower and more specific than law in general, or what may be called a 'legal order.'"[38] Berman's book, *Law and Revolution* was indeed revolutionary because it claimed that in the Western European territories, namely in the part of continental Europe which was linked to the Roman Catholic Church as well as in England and the Scandinavian territories certain legal institutions had developed and had been transferred through centuries from

34 Merryman (1985): p. 2.
35 Nevertheless, not even Merryman's definition of the legal tradition is as precise as it could be since the focus of his work was the civil law tradition and therefore, he did not spend too much time on outlining the term. Glenn devoted significant work to identifying legal tradition in the first two chapters of his book. See: Glenn (2004): p. 1-58.
36 David S. Clark (1990): The Idea of the Civil Law Tradition, in: Clark (1990): p. 12.
37 René David: Book Review, *RabelsZ* 34(1970), p. 360-362. As quoted in Clark (1990): p. 11.
38 Berman (1983): p. 49.

generation to generation. His explanation of Western legal tradition commenced, however with the statement that this transfer of legal institutions had begun in the eleventh and twelfth centuries as a result of a revolution. The book therefore, is a very detailed legal history of the named territories, focusing on transfer and revolutionary changes occurring from time-to-time.

The question concerning the task at hand, however, is whether said Western legal tradition is a broader notion than that of legal tradition used by Merryman. There is no conclusive answer to this question based on Berman's work, even if the inconclusiveness presupposes the negative. Berman defined each term in his expression and still failed to provide a concrete explanation on what *Western legal tradition* was. In a later article, Berman claimed that the legal institutions in the Western European sphere originated from the Papal Revolution of 1075 and survived, at least, four major total revolutions before encountering their most serious crisis to date in the twentieth century.[39] In an attempt to try and clarify the potential interaction between *Western legal tradition* and a so-called *World legal tradition*, Berman dropped valuable information on his understanding of Western legal tradition today: "what is uniquely Western, however, is the conscious historical evolution of law over generation and centuries, the historicity of law, its conscious balancing of continuity and change, its concept of an ongoing autonomous legal tradition that can even survive great revolutions and be renewed by them." Later he added:

> Western concept of a legal tradition rests on the integration of the three main schools of legal philosophy – positivism, natural law theory, and historical jurisprudence – which trace law respectively to political will, to moral reason and conscience, and to historical experience.[40]

Though detailed and correct, Berman's scholarship, deeply rooted in legal history helps us no further in the quest of clarifying the respective terms and their definitions.

IV. LEGAL TRADITION AND CUSTOM

H. Patrick Glenn's scholarship to this day provides the most comprehensive approach to legal traditions and also, to some extent, to custom. The second edition of Glenn's *The Legal Traditions of the World* provided the basis for a conference the results of which were published in a collective review of the book.[41] This review did

39 Harold Berman (1999–2000): The Western Legal Tradition in a Millennial Perspective: Past and Future, 60 *Louisiana Law Review* 739(1999–2000), p. 742, 750-751.

40 Berman (1999–2000): p. 762.

41 Nicholas H. D. Foster (ed.) (2006): A Fresh Start for Comparative legal Studies? A Collective Review of Patrick Glenn's Legal Traditions of the World, 2nd Edition, 1 *Journal of Comparative Law* 100(2006), p. 100-176.

not praise Glenn at all, however, it welcomed the discussion that had begun upon the publication of the book. The reviewers were to some extent understanding that Glenn's work had been the product of a generalist while at the conference and subsequently in the review, the individual chapters were assessed by specialists of the respective fields. The discussion continued as Glenn replied – upon invitation – to the review,[42] which was again followed by a rejoinder.[43]

Glenn entitled his book *Legal Traditions of the World* and spent the first two chapters out of ten – as well as various other articles – explaining what exactly he meant with legal tradition. First, he acknowledged that there was a theory of tradition corresponding with other theories, such as rationality or identity and then moved on to introduce individual legal traditions. Though detailed and logical, Glenn in the end did not provide one single definition on *legal tradition* but rather saw it as a notion claiming somewhat different meaning when placed in certain situations where it had to correspond with and relate to others. A good example is the following excerpt from his book, from the chapter dealing with chthonic legal tradition:

> Tradition is just doing things over and over again. The same can be said of custom, and both therefore lack rational justification and are cast out of the rational tradition. The rational tradition does this, however, by divorcing custom from its justification, from the reasons and information which lead to its ongoing performance. (...) So we should think of custom as the outcome of a particular tradition, the result of a process of massaging pre-existing information and deciding how to act.[44]

Glenn published the article *The Capture, Reconstruction and Marginalization of "Custom"* in 1997,[45] where he explained the whole history of custom, without providing a singular definition for it. First, he talked about the early period of custom, which dated until the "capture," and by capture he meant codification, starting in the 16th century. Glenn used a variety of terms for custom. He relied on the term *informal law* as a synonym of custom, to set it in contrast with *formal law*. The dualism of informal and formal law had been expressed in the 9th century sources through the terms *consuetudo* and *lex*, while the documents of the 12th century and Gratian's work in particular had operated with *unwritten* and *written* law. Following this logic, we could interpret that custom equaled informal law, which equaled consuetudo, which again equaled unwritten law. Glenn claimed that present definitions of custom variably contained two elements, albeit factual elements, namely first, "the existence of a long and settled practice, i.e., of repetitive human behaviour" and second, "a "sense" or "belief" by adherents to the custom that it is of an obligatory

42 H. Patrick Glenn (2007): Legal Traditions and Legal Traditions, 2 *Journal of Comparative Law* 69(2007), p. 69-87.
43 Andrew Halpin (2007): A Rejoinder to Glenn, 2 *Journal of Comparative Law* 88(2007), p. 88-93.
44 Glenn (2004): p. 74.
45 H. Patrick Glenn (1997): The Capture, Reconstruction and Marginalization of "Custom", 45 *American Journal of Comparative Law* 613(1997).

character."[46] Glenn in this article followed the informal law from its existence in practice to its capture in some form – on an object, through oral transmission or in writing – all the way to its reconstruction, namely the process where new generations tried to recover the content of the earlier practices to clarify it and use it vis-á-vis formal or codified law. The need for defining custom only arose during this reconstruction process, which ultimately led to the explanation that custom was the present manifestation of something we think we know, of something we think we have to do and finally of something that is articulated by someone with authority. This vague outline would be acceptable but for Glenn's determination that "[i]nformal law in the past was information,"[47] which creates confusion when read in the light of his scholarship on tradition, which he also defined as *information*.[48] In addition to the terminology and its potentially miscellaneous content, Glenn also described the same line of events relating to tradition, its capture and transmission, even if he did not connect it to concrete historic events but rather expressed a constant change, an ever expanding pool of information characterizing major legal traditions. It is the broad basis and societal reliance that ensures adherence to these legal traditions. This logic would indicate no difference between custom and tradition, if both were information that was captured over time. There is, however, a difference in the emphasis or focus of custom and tradition with the prior relating more to the society within which it is observed, while the latter needs the connection between the past and the present.

For Glenn tradition was primarily non-binding normative information[49] that had a certain pastness and which people willingly adhered to. Every element deserves some examination. Tradition is information and as such, for Glenn's purposes, it was normative. This would mean that at any given time, if we stopped the clock and examined the information underlying any group of people or any society, we would find its tradition. Yet, this type of information cannot possibly be or stay static over time. Glenn acknowledged that the information needed to be captured somehow in order to be preserved and transmitted to the next generation. It could be captured through objects, through verbal transmission or in writing.[50] The transfer of the information happened both vertically and horizontally in time. Vertically, meaning from generation to generation as this information passed from father to son or from inhabitants of a certain area to the newcomers there. Horizontally, meaning the potential collision between groups of coexisting human beings who abode by different traditions and whose meeting at any given time and place impacted the other, transmitting, exchanging or reevaluating information. The vertical transfer was less affected by the globalizing world while the horizontal one was very much influenced by the fast-paced contemporary communication we all share in the 21st century. However, it

46 Glenn (1997): p. 616-617.
47 Glenn (1997): p. 617.
48 Glenn (2004): p. 12-13.
49 H. Patrick Glenn (2008): Globalization and National Legal Traditions, in: Jürgen Schwarze (ed.): *Globalisierung und Entstaatlichung des Rechts*, Mohr Siebeck, Tübingen, p. 64.
50 Glenn (2004): p. 7-12.

is the vertical transmission which necessarily brought with it an expansion of the information as every generation added to the content or – through the horizontal transmission – altered it, thereby strengthening the tradition. Major traditions survived more easily due to their more stable basis.

The primary element of tradition is therefore, the so-called pastness. Glenn adopted the term from T.S. Eliot as adequate for expressing an unknown period of time in the past. There was no answer to the question how much time had to pass, during which period tradition needed to be observed, maintained or transferred to be recognized as such. Therefore, Glenn said that it was difficult to determine the establishment of tradition or easy to refute the term instant tradition as it was not known how much time needed to pass for the creation of a tradition until its acknowledgement or acceptance. The time of origin of the so-called major legal traditions was pointed out by the previously mentioned authors. Merryman identified the beginning of the three legal traditions he named. Accordingly, the civil law tradition originated from "450 B.C., the supposed date of publication of the XII Tables in Rome," the common law tradition began in 1066 A.D. upon the success of the Norman conquest in England and the socialist law tradition was dated at the time of the October Revolution in 1917.[51] Harold Berman placed his beginning to the time of the Papal Revolution in the 11th and 12th centuries.[52] The existence and maybe even the time of beginning for long standing major traditions – normative information if we follow Glenn – was not in question, yet how do we create a new tradition?

Said matter of pastness in terms of tradition is interesting for two reasons. First, it leads to the existence of invented or instant traditions, and second, the effect of the past on the future is a cornerstone of the precedent legal system, primarily the common law system. Glenn, being a legal scholar did not categorically state that an invented or instant tradition cannot exist, rather he traced the pastness element of tradition back to its procedure, to the fact that in order to transfer information time has to pass, which means that a new tradition, if established, also needs some time to evolve. The book Glenn also referred to when discussing this question is probably the most holistic book on tradition written by historians. In *The Invention of Tradition*, Eric Hobsbawm claimed that invented tradition does not necessarily mean a completely new phenomenon, but rather "a set of practices, normally governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms of behavior by repetition, which automatically implies continuity with the past."[53]

Yet, how much influence should the past have upon the present? The past for its own sake should not determine the future and nevertheless, the strict system of judicial precedents predominant in the common law countries presupposes that courts and judges are bound by their previous legal decisions.

51 For more on the socialist legal tradition see e.g. Manko (2013), Merryman (1985): p. 2-4.
52 Berman (1983): p. 28.
53 Eric Hobsbawm (1984): Introduction – Inventing Traditions, in: Eric Hobsbawm, Terence Ranger (eds.): *The Invention of Tradition*, Cambridge University Press, Cambridge, p. 1.

> [F]or most of the time that human beings have lived together in organized communities, every aspect of their communal lives – social, religious, political, and economic as well as legal – has to a large degree been organized on the assumption that the past has an inherent authority of just this kind (...). The name we give this once-pervasive attitude is traditionalism, and the legal practice that we call the rule of precedent – the willingness of lawyers and judges to be guided by the past – is merely one expression of this more general outlook.[54]

The past, therefore, should not have an automatic and inherent authority upon our present and the content of the tradition can indeed change over time. Glenn himself also addressed the issue of the past's binding nature when he detailed the normativity of tradition thereby addressing differences between the notion of tradition and that of a legal system.

> Traditions thus are normative and create obligations. The obligations may or may not be said to be "binding", but there are at least obligations, which is not the case for legal systems. The obligations of a tradition may be said to be binding when they are morally imperative or at least justifiable. It is more generally the case, however, that the obligations of a tradition may be seen as simply persuasive, since the authority of tradition is simply persuasive. They are obligations to which we bind ourselves. We are not forced to do so, and there are not guaranteed sanctions that will punish our failure to do so.[55]

Accordingly, the last characteristic of tradition listed by Glenn was the manifestation of willingly adhering to the content. Glenn here expanded his initial explanation or rather returned to its original implications. He had concluded that tradition was information because that was the only way to define what really was transmitted from one generation to the other over time. Subsequently, Glenn claimed that tradition also meant the process of transmitting this information. This would mean that both the transfer and the content being transferred were expressed by the term *tradition*. In addition to that, while the content which was being transferred meant information, *custom*, as informal law, also meant information.

On the basis of the previous considerations, what could be the relationship between these two terms, *tradition* and *custom* in Glenn's scholarship? Glenn did not answer the question explicitly. Sometimes, in terms of certain traditions he even claimed them to be similar, which was proven by his conclusion of defining both, in some form, as information. However, Glenn did claim that certain traditions dealt with facts, for example the Western tradition, and custom could be defined as such

54 Anthony T. Kronman (1989–1990): Precedent and Tradition, 99 *Yale Law Journal* 1029(1989–1990), p. 1044.

55 H. Patrick Glenn (2005): Doin' the Transsystemic: Legal Systems and Legal Traditions, 50 *McGill Law Journal* 863(2005), p. 881-882.

a fact as it "may ground a constitutional normative order."[56] Another good example of an existing relationship between custom and tradition that again proves them to be terms with separate meaning can be found in Glenn's *A Concept of Legal Tradition* where he wrote:

> [b]y limiting the definition of custom to observable forms of conduct, Western theoretical discussion has (almost) succeeded in eliminating it as a source of law. Custom becomes law only when accepted as such by an authority of the state, and cannot be law prior to that because in itself it is purely factual in character. The notion that tradition is simply repetitive behaviour is thus very widespread in contemporary understanding. Yet, a definition of tradition reduced entirely to present behaviour denies something fundamental in the notion of tradition – that it is unequivocally linked to what we call the past.[57]

This means that even though both custom and tradition are often characterized as repetitive human behavior, or are defined as normative information for tradition and factual information for custom by Glenn, custom needs to be acknowledged by some kind of authority in order to gain real force in a given society and tradition needs to have the element of pastness in order to be considered as tradition.

In the collective review published about Glenn's *Legal Traditions of the World, Second Edition*, the reviewers, primarily William Twining[58] and Andrew Halpin[59] very accurately pointed out that first, Glenn, by focusing on tradition as solely normative information limited the scope of his research and second, that his individually logical analyses when read together did not necessarily add up. Nevertheless, Glenn achieved with his book and subsequent scholarship a major academic debate regarding legal traditions, an issue interesting and important not only to legal scholars.

Historians do not have any problems differentiating between custom and tradition. In *The Invention of Tradition*, Hobsbawm wrote:

> [t]he object and characteristic of 'traditions', including invented ones, is invariance. The past, real or invented, to which they refer imposes fixed (normally formalized) practices, such as repetition. 'Custom' in traditional societies has the double function of motor and flywheel. (...) [Custom] give[s] any desired change (or resistance to innovation) the sanction of precedent, social continuity and natural law as expressed in history. (...) 'Custom' is what judges do; 'tradition' (in this instance invented tradition) is the wig, robe and other formal paraphernalia and ritualized practices surrounding their substantial action. The decline of 'custom' inevitably changes the 'tradition' with which it is habitually intertwined.[60]

56 Glenn (2005): p. 882. Footnote omitted.
57 H. Patrick Glenn (2008–2009): A Concept of Legal Tradition, 34 *Queen's Law Journal* 427(2008–2009), p. 430.
58 William Twining (2006): Glenn on Tradition: An Overview, in: Foster (2006): p. 107-115.
59 Andrew Halpin (2006): Glenn's Legal Traditions of the World: Some Broader Philosophical Issues, in: Foster (2006): p. 116-122.
60 Hobsbawm, Ranger (1984): p. 2-3.

From a legal perspective, this differentiation is debatable at certain points but the distinction and the nevertheless persistent interaction between tradition and custom is very clear.[61]

Bruce Rigsby, an Australian anthropologist in his article *Custom and Tradition: Innovation and Invention* treats the terms like, yet when he defines them, he does not relate to any legal element. Addressing the difference between *custom* and *law*, he states:

> customs are simply patterns for actions or behaviour that members of a social group share. (...) Law, then, is backed by legitimate force and administered by an authorized agent acting in a manner consistent with precedent. (...) So, then, all laws are customs, but not all customs are laws.[62]

Rigsby relates to a semantic analysis when addressing *custom* and *tradition* pointing out the dual meaning of the term just like Glenn did, namely that tradition means both the process of transmitting from generation to generation as well as the product of the process. He concludes that "[a]s a first approximation, we can say that traditions (as products of the process of tradition) seem simply to be old customs. They are customs which have been handed down across the generations from the past."[63] In essence Rigsby concludes a similar relationship between custom and tradition as he did with law and custom, namely that all tradition is custom but only old customs are tradition. This, as acknowledged by Rigsby himself, ignores certain elements such as the normativity of tradition.[64] Ultimately Rigsby arrives to the conclusion that tradition is not the process of transmission, but rather the innovation or interpretation happening through it, namely the interpretative process of applying whatever derived from the past to the present.[65]

61 Similarly interesting and relating to the topic though not addressing specifically the differences between tradition and custom are e.g. Mark Slaber Phillips, Gordon J. Schochet (2004): *Questions of Tradition*, University of Toronto Press, Toronto. This volume, an interdisciplinary effort at addressing various aspects and questions of tradition entails a chapter by the legal historian, David Lieberman: Law / Custom / Tradition: Perspectives from the Common Law, p. 233-257. Lieberman is very precise and does entertain the notion of custom and particularly custom in a legal sense as well as tradition, thereby concentrating on the process of transmission from generation to generation. Even so, he does very strongly link both terms to the English common law discussed within the chapter and he does not specifically highlight any kind of potential relationship or per se difference between custom and tradition. An even more recent work addressing the Western legal tradition and tradition as a legal notion is David B. Goldman (2008): *Globalization and the Western Legal Tradition: Recurring Patterns of Law and Authority*, Cambridge University Press, Cambridge.

62 Rigsby (2006): p. 117-118.

63 Rigsby (2006): p. 118.

64 Rigsby (2006): p. 122.

65 Rigsby (2006): p. 138.

V. CUSTOM

Based on Glenn, custom is factual information, which only becomes law when an authority of a state accepts it as such.[66] This would imply that there are customs that are law and others that are not. Yet, how could customs that are not law still exist in today's societies, where – at least in Western societies – the positive law of the individual states largely dominate?

Glenn was not the only scholar who understood custom as the earliest form of rules governing or organizing the life of a community. Understanding custom as unwritten law, as consuetude, as informal law appeared in numerous scholars' work, making it the manifestation of early legal practice. The logic that customs, or the factual information that it contained needed to be captured in order to preserve it, is also widely accepted.

> Legal development passes through the early stage of unwritten custom, followed by the writing down of customs as rules. The earliest known written codes of law, for example the Code of Hammurabi (Mesopotamia, *circa* the eighteenth century BC), give all the appearances of more or less systematic collections of customary norms. Yet, as has often been remarked, with this writing down customary law lost its character as custom. It could be interpreted as rules.[67]

This would logically mean that once custom was captured, and its content included into the laws through codification, it no longer existed as custom. To rebut this, Glenn claimed that the reconstruction of custom was necessary to counterbalance the positive lawmaking of the modern states. This dual nature of custom, meaning that it possibly continued to exist or was reconstructed following the prevalence of the positivist movements was supported by a number of legal scholars of the 18th – 20th centuries. Friedrich Karl von Savigny, perhaps the most outspoken representative of the German historic school, fought against codification with the very arguments that the rules developed by society, i.e. customs, would be denied their evolutionary nature through codification and could no longer correspond with the needs and occasional changes of the society.[68] Eugen Ehrlich, the Austrian-born legal sociologist, who is considered the father of modern legal sociology claimed that since all human beings were embedded in their associations, their compliance with the rules of those groups or communities was self-explanatory and did not need the force of state or formal law or the potential sanctions of these authorities to coerce them into adhering to those.[69] Ehrlich's dichotomy of what he called *living law* and

66 Supra note 57.
67 Roger Cotterrell (1992): *The Sociology of Law – An Introduction, 2nd Edition*. Butterworths, London–Dublin–Edinurgh, p. 22.
68 Friedrich Karl von Savigny (1975): *Of the Vocation of Our Age For Legislation and Jurisprudence* (1831) [translated by Abraham Hayward], Arno Press, New York.
69 Eugen Ehrlich (1975): *Fundamental Principles of the Sociology of Law* (1936) [translated by W. L. Moll], Arno Press, New York.

official or *formal* law corresponds with the continued existence of customs parallel to codified state law, which could also be derived from Glenn's scholarship.

Despite the popular understanding that custom is the earliest form of rules in a society, Henry Sumner Maine, the British legal historian and comparatist, who is also considered a forefather of modern legal sociology, claimed in his *Ancient Law* that in the earliest societies or associations judgments preceded custom. Based on Homer, the judgments handed down by the kings derived from the gods and were expressed by the decision-makers who were, therefore, not legislators but judges. Maine explained that custom was expressed either by the term *Themis*, which is also the word for judgment or by *Dike*, "the meaning of which visibly fluctuates between a 'judgment' and a 'custom' or 'usage'."[70] Maine also emphasized that the term *Nomos*, that is Law, did not appear in the works of Homer. The brief history of jurisprudence, which Maine presented in the first chapter of his book implied that though the judgments may have preceded customs in time, they were limited in their scope as those were in one way or another exact focused commands which served the sole purpose of adjudication in a concrete case. Following the epoch of the heroic kings, the aristocracy took charge, which led to a form of judicial oligarchy. This period Maine called the "epoch of Customary Law," when, due to the lack of writing and only very primitive art, just the privileged few had access to the customs, which were in fact unwritten laws, but they were laws. As such, they governed life as well as legal disputes. Maine explained how unwritten law disappeared as soon as judicial decisions were recorded because following that all law was either case-based or code-based, but in either way written law.[71] This meant that the earliest form of custom could be considered law as it was maintained and enforced in the society or community.

VI. LINK TO LEGAL CULTURE

Maine's analysis, just like Savigny's relied on the presumption that in early societies it was easy to have customs that all members of the community followed and accepted as these societies were fairly simple and their demands or needs could be identified and met. At this stage, it cannot be denied that the needs of any given society depends on the culture, or more precisely on the legal culture of that society. Yet what is culture or legal culture and how is it defined? Cotterrell claims that in modern sociological writing culture "refers to the complex of beliefs, attitudes, cognitive ideas, values and modes of reasoning and perception that are typical of a particular society or social group."[72]

Lawrence Friedman, the American legal sociologist defined legal culture as "ideas, attitudes, values, and opinions about law held by people in a society."[73] Probably the most important element of this definition should be the law as that is what

70 Maine (1986): p. 5.
71 Maine (1986): p. 8-13.
72 Cotterrell (1992): p. 23.
73 Friedman (1969): p. 34.

differentiates it from other culture. Friedman did elaborate when he expressed that "legal culture refers to those ideas and attitudes which are specifically legal in content."[74] Yet culture necessarily has a strong relationship to the society, so what is the connection between the society, legal culture, and law? Based on Friedman, legal culture is a potential link between social innovation and legal change,[75] it is a channel through which the changing needs of the society are communicated in order to evade the inability to evolve that Savigny claimed the rules of the society would suffer once codified.[76]

Friedman understood the difficulty of synthetizing legal culture with society and its population which is why he distinguished between external and internal legal culture. "The external legal culture is the legal culture of the general population; the internal legal culture is the legal culture of those members of society who perform specialized legal tasks."[77] This means that external legal culture is that of the people, the members of a society and whatever they consider law, whereas internal legal culture is that of its practitioners, lawyers, judges, legal scholars and so on. Based on this differentiation, we could align custom with external legal culture as custom includes factual information that the members of a given society consider for their own purposes to be true and guiding, as well as binding if supported by state authority. The question then, is whether tradition could be aligned with internal legal culture? Is tradition something more easily understood and explained by jurists, is the normative information with a certain pastness the concern of lawyers and legal professionals? While custom fits relatively well within the external legal culture as the product of a given society with the active participation of its population, tradition is too constrained if forced within the term of internal legal culture primarily because that would ignore its element of the people's willingness to abide by it.[78] Nevertheless, it is true that "[v]ariations in legal culture may thus explain much about differences in the ways in which seemingly similar legal provisions or institutions may function in different societies."[79]

VII. CONCLUDING REMARKS

Clearly, up to date, there is no general consensus about the meaning of the terms *tradition* and *custom* in a legal sense, nor about their potential relationship. Some deem them to mean the same, others though acknowledge their differences, do not highlight or list them, while again others suggest that a clear differentiation is

74 Lawrence M. Friedman (1989): Law, Lawyers, and Popular Culture, 98 *Yale Law Journal* 1989, p. 1579–1606. Reprinted in: Richard K. Sherwin (ed.) (2006): *Popular Culture and Law*, The International Library of Essays in Law and Society Series, Ashgate, p. 3-30, 3.
75 Friedman (2006): p. 7.
76 Supra note 68.
77 Lawrence M. Friedman (1975): *The Legal System*, Russell Sage Foundation, New York, p. 223.
78 Supra note 14. Some authors, e.g. Alan Watson claimed that legal culture was legal tradition and vice versa, whereas Glenn identified legal culture as the broadest concept.
79 Cotterrell (1992): p. 23.

superfluous as it limits contemporary scholars in adjusting the use of the terms to their respective purposes.

There are various characteristics that tradition and custom share. Both have a content which is best described as information or data. This content is captured in some form, whether on an object, through verbal transmission or in writing, so as to allow members of future generations to learn, interpret and use said information or data. Both tradition and custom gain their meaning within a certain social environment, even though both can be observed by single individuals, they are more likely adhered to by certain groups who do share some general characteristic or identity.

Questions remain as to how each of the terms relate to time, whether they have binding force in the legal sense, and how their respective interactions may influence each other. Glenn's differentiation seemed fairly plausible as he inadvertently drew a line between the two claiming that the element of the past was a *differentia specifica* of tradition, which represents normative information, while custom, being factual information does not necessarily have the same relationship to the past. At the same time, it is custom that clearly rises to the level of law when so declared by the authority, and with that, it gains a type of binding force that tradition does not have. All in all, while both custom and tradition can and – with the passing of time and the change in society – do change, it may be concluded that tradition is the broader concept of the two.

In fact, tradition is a notion that is broader than any other term, such as legal family or legal system. As such, it would completely encompass custom if they related to the same social and geographical sphere at the same time. Yet, traditions coexist today and they evolve through collisions, which is why their hegemony is not exclusive. Some customs represent law-like rules and regulations as incorporated in certain legal systems over time, while again other customs remain non-binding and only willingly observed by members of certain societies. Probably the most pertinent difference between custom and tradition is their emphasis, as custom has a closer link to society while tradition concentrates more on the past. When coexistent in the same sphere, their circles overlap and custom might even be completely included in tradition, yet various customs may exist within a tradition and multiple traditions may observe the very same customs.

Put it another way, custom can be defined as a set of factual information within a given society, which likely developed over time, but the pastness is less important than its present manifestation in a community. It is maintained and preserved through the society, its actors and as such, it is a part of the external legal culture of that society. Customs are very much connected to their cultural area, it cannot be uprooted and replanted elsewhere, so its geographical limits are of importance.

Tradition is normative information, which has a certain, though undefined, pastness to it. Its content derives from the past through transmission, an element of the tradition itself. This is also why tradition is less connected to the area as to the people who transport and safeguard it. A tradition could, therefore, be uprooted and replanted elsewhere as it is the normative information that needs to arrive, through transmission, from one society to another. Tradition can only as much be a part of

the internal legal culture of a society as it has or rather may have elements that, if transmitted from elsewhere, need specialized legal knowledge and assistance to prevail. Legal traditions, theoretically, could be transplanted with the help and interaction of the legal community. Such a development would fall within the internal legal culture of a community. Yet, tradition also needs the approval and acceptance of the population, it needs the voluntary adherence of the population to it, so completely eliminating and abstracting legal tradition from the legal life of the general population cannot succeed.