Introduction

The Possibility of Intercultural Law

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In the past decades debates have developed around multiculturalism and legal pluralism.[1] The rise of international terrorism and growing tensions between different cultural orientations within many nation states have given these debates a sharp edge. On the one hand politicians and other public opinion-makers have called for a rehabilitation of presumably indigenous norms and values, demanding of residents with roots in other traditions to take over the national canon. On the other hand, proponents of multiculturalism and legal pluralism call for the acceptance of difference, declaring that bridging such difference is in fact impossible because we are all caught up in our own parochial perspectives. Though it may be easy to argue that both positions start from the same (mis)conception of 'culture' as homogenous and 'cultures' as mutually exclusive, it seems more difficult to advance a third position.[2] Attempts to avoid the pitfalls of both mono- and multiculturalism often focus on what is called the intercultural, arguing that communication between different cultural orientations within a society is preconditional for a viable democracy.

To explore the legal implications of cultural diversity, the Association of Legal Philosophy organised a conference in June 2006 on 'The Possibility of Intercultural Law'. Intercultural law was provisionally defined as a type of law that manages to cohere a diversity of legally relevant social practices,

1 Cf. Charles Taylor e.a., Multiculturalism: Examining the Politics of Recognition (Princeton University Press, Princeton, 1994); Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights (Oxford University Press, Oxford, 1995); André J. Hoekema, Rechtspluralisme en Interlegaliteit, (Vossiuspers, University of Amsterdam, Amsterdam, 2004); J. Griffiths, 'Legal Pluralism', in: International Encyclopaedia of the Social and Behavioral Sciences, 2001, at 8650-8654; Franz von Benda Beckmann, 'Who's afraid of legal pluralism?', in: Journal of Legal Pluralism (47) 2002, at 37-83. Cp. Samuel Huntington, The Clash of Civilisations and the Remaking of World Order (Touch Stone, New York, 1996).
2 Cf. Wim M.J. Binsbergen, Culturen bestaan niet. Het onderzoek van interculturaliteit als een openbreken van vanzelfsprekendheden (Rotterdam, 1999); Jaap van Brakel, Interculturele communicatie en multiculturalisme (Universitaire Pers Leuven/Van Gorcum, Leuven/Assen, 1998).

thereby regulating diversity without enforcing rigid unity, while at the same time avoiding a normative chaos leading to legal uncertainty. For legal philosophy the question seems to be whether this is indeed *possible*: Is such an intercultural law a recent invention or could it be that before and beyond the national state intercultural law has been a common practice? Which are the epistemological presumptions of such a conception of law? Do we have to discard the central tenet of some postmodern comparativists that proclaim the incommensurability of cultures?[3] Do we have to relativise Western conceptions of positive law? To what degree is coordination of diversity sustainable? (How) could religiously inspired law like the Shari'a be accommodated in a constitutional democracy?

To confront such questions speakers were invited from a range of different disciplinary backgrounds. One of the pitfalls of the public debate on cultural difference in contemporary societies is a regrettable tendency to discuss what is at stake in terms of sweeping statements and provocative one-liners, not very apt to generate any kind of understanding of the relevant issues. To address the legal and philosophical implications of increasing cultural diversity a patient exploration is needed of intercultural communication, moving beyond what Pinxten calls 'the phenomenological illusion' of mutually exclusive identities. To avoid populist reduction the complex relationships between legal norms, cultural backgrounds and the national state should be taken into account. This implies that both the epistemological and the institutional level should be faced, acknowledging that different epistemological positions will engender different perspectives on the priority of either individual action or institutional design. Interestingly most authors in this issue seem to have chosen an epistemology based on face-to-face interactions between individual actors, advocating the priority of practice. This results in a tension between the epistemological and the institutional level. For lawyers this raises important questions, since one of the functions of the law is to stabilize the legitimate expectations of people that may never meet in person, demanding legal certainty between actors that do not share what Van Brakel calls an *Umwelt*.

To provoke cross-disciplinary perspectives the first two sessions, on Friday, consisted of a keynote paper that was replied by two reviewers from other disciplines. The first session, on 'Legal Traditions and Diversity in Law', started from the perspective of comparative law. Patrick Glenn was invited to clarify how an adequate understanding of non-western legal traditions may attri-

3   Cf. Pierre Legrand, 'The Same and the Different', in: Pierre Legrand & Roderick Munday (eds.), Comparative Legal Studies: Traditions and Transformations at 240-312 (Cambridge University Press, Cambridge, 2003).

bute to an understanding of law beyond the monopolistic jurisdiction of the national state. As repliers Hendrik Pinxten was invited to confront Glenn's approach with the findings of cultural anthropology and Roland Pierik to assess Glenn's position from the tenets of political theory. The second session, 'The Possibility of Intercultural Communication', was initiated by Jaap van Brakel with an epistemology of the intercultural. Van Brakel was invited because of his previous work on intercultural communication and the constitution of (political) community.[4] As a replier Marc Loth was invited to assess the findings of Van Brakel with regard to the legal need for shared meaning and Wim Staat was invited to confront the radical epistemological undercurrent of Van Brakel's notion of first contacts from the perspective of media studies. The above mentioned tendency to debate in terms of sweeping statements may be related to the fact that this debate is influenced by the logic of the mass media, calling for a reflection from the perspective of media studies. Since media studies are part of 'cultural studies', applying cultural theory to modern mass media, salient insights were expected concerning the symbolic or semiotic meaning of intercultural communication.

Because the present public debate is captured to a large extent by the opposition of Islamic and secular law, the third session, on Saturday, was dedicated to some of the many intricate questions relating to 'Religion, Law and the State'. To generate a serious exchange between Islamic and western traditions an Islamic scholar, Tariq Ramadan,[5] was invited to present a perspective from within the Islam, followed by a presentation from the perspective of cultural sociology by Anton Zijderveld. When Tariq Ramadan cancelled his participation at a rather late moment, Abdullah An Na'im stepped in to introduce the historical development of the Sharia and its sources, also discussing its relationship to secular jurisdiction.[6] As professor An Na'im was not able to contribute a written text at such a late moment, the discussant of this session, Maurits Berger, a lawyer and Arabist specialised in Islamic law and political Islam, has added an introduction to the Sharia that is to a large extent congruent with An Na'im's explanations. Mark van Hoecke was invited to write a personal impression of the conference itself, see his 'Legal Cultures, Legal Traditions and Comparative Law' in this issue. Below we will provide a brief overview of the contributions, including references to some of the other texts in this issue (the interview with Patrick Glenn and the afterthoughts of the guest editors).

4   Van Brakel, 1998, supra n. 2, Jaap van Brakel, 'We', in: Ethical Perspectives, 6, 1999 (3-4), at 266-276.
5   Presently teaching at St Antony's College, University of Oxford, see Tariq Ramadan, Western Muslims and the Future of Islam (Oxford University Press, Oxford, 2004).
6   Professor of law at Emory Law School in the US – at the time professor of Islam and Human Rights at Utrecht University, see Abdullahi Ahmed An-Na'im, 'Globalization and Jurisprudence: An Islamic Perspective', in: Emory Law Review (54) 2005, at 25-52.

1   Legal Traditions and Diversity in Law

In his 'Legal Traditions and the Separation Theses' Patrick Glenn provides
arguments against both complete separation between different groups of
people and against complete absorption of one group by the other, thus
introducing the main conference theme: beyond multi- and monocultural-
ism. Glenn's main point here is the lack of necessity and the lack of justifica-
tion for the western tendency to claim that groups, concepts and legal tradi-
tions are best defined by mutually exclusive categorisation, following the
Aristotelian logic of the excluded middle.
The first replier, Hendrik Pinxten, agrees with the tenor of Glenn's main the-
sis and proceeds to discuss educational practices in which such separation is
actually overcome. This way Pinxten grants priority to the practice of inter-
cultural communication, rather than continuing the debate on whether it is
theoretically possible.
The second replier, Roland Pierik, agrees with Glenn's thesis in as far as it
entails an ontological claim of things or groups actually being separate enti-
ties. However, he claims that separation is equivalent with categorisation,
which he defines in epistemological terms (it is a way of knowing, not of
being). As human beings need to categorise their world to be able to act ade-
quately, such categorisation is a cognitive universal inherent in all human
beings. He thus claims to refute both the argument that separation is typical
for western traditions and the idea that we could do without it. However,
Glenn's arguments for multivalence could raise doubt about equating sepa-
ration with categorisation, a point further discussed by Mireille Hildebrandt
in her editorial afterthoughts. In the interview Glenn clarifies his separation
thesis, focusing on the separation of groups of people as mutually exclusive
and the binary logic of legal verdicts in western jurisdictions.

2   The Possibility of Intercultural Law

Jaap van Brakel's contribution bears the intriguing title 'De-essentialising
Across the Board. No Need to Speak the Same Language'. Criticism and
deconstruction of essentialist positions have been with us for long, but to
propose that we actually do not need to speak the same language in order to
achieve mutual understanding is somewhat provocative. According to Van
Brakel the shared local context (*Umwelt*) of speakers will create a conver-
gence in the subjective interpretations of the utterances, implying that
cross-cultural comparison can only constitute family resemblances, because
any attempt to attribute local *species* to a translocal *genus* must fail. To gen-
erate understanding a new local context is needed that allows mutual
attunement between those that speak different languages, thus performa-

tively achieving what counts as mutual understanding, without however necessitating complete understanding or exact translation. Van Brakel argues his position in a discussion of first contacts between European maritime explorers and American Indians, taking the example of Captain Cook's expedition to what is now called Vancouver Island.

Marc Loth agrees on the primacy of practice argued by Van Brakel, but he denies that this implies that we don't need to speak the same language. His first objection is that in close encounters we may do without a shared natural language, but not without sharing the non-verbal preconditions for shared understanding. He suggests that restricting the meaning of the term language to natural language turns the provocative subtitle into a trivial statement. His second objection is that even if in a specific local context we can do without a shared language, we do in fact need a shared language to cope with cross-cultural communication in the context of complex societies that need to regulate translocal interactions not entailing face-to-face relationships. This would generate a specific need for legal regulation to provide legal certainty beyond the local context, challenging the primacy of local practice in the case of a need for translocal (legal) language. Loth thereby raises important points of reference to link the discussion of mutual understanding with the possibility of intercultural law.

Wim Staat takes Van Brakel's position seriously by moving away from the hard case of intercultural communication to the 'easy' case of intracultural communication, which seems to presume a shared language. In agreeing with Van Brakel that the argument for 'no need to speak the same language' is equally valid for *intra*cultural communication, Staat discusses the Hollywood screwball comedies and the women's weepies of the thirties and fourties of the last century. Focusing on communication within typically American marriages, he provides a lateral perspective to demonstrate the radical nature of Van Brakel's point in case. Referring to Stanley Cavell he suggests that precisely the reiterative contestation of our sense of self by an intimate other is preconditional for our sense of self and the possibility of community.

3   Religion, Law and the State

In 'The Legal and Moral Dimensions of Solidarity' Anton Zijderveld professes solidarity to be a precondition for intercultural law, understanding it as a typically human virtue, consisting of a sense of interdependence and mutual responsibility. In his main argument Zijderveld links effective communication to Mead's symbolic interactionism which seems to share Van Brakel's and Loth's primacy of practice in the constitution of mutual understanding. He discusses Mead's proposition that the capacity to 'take the role of the other' – inherent in the use of the pronouns 'I' and 'you' – is constitutive of

our sense of self and our capability for meaningful interaction. Integrating the reiterative change of perspective into a 'generalised role of the other' we learn to internalise society's expectations by thus transcending our egocentrical perspective. Zijderveld explains how religion may be a prime example of this transcendence of the self, if regarded from an interactionist rather than an institutional perspective. Coming to the point of the relationship between solidarity and intercultural law, Zijderveld propagates a dialogue between different religious laws and secular constitutional law. Any introduction of religious law into the national positive law should depend on acts of the democratic legislature and be subject to international human rights law, while quite apart from such legislative enactments Zijderveld argues peaceful co-existence of Islamic and other pillars within which each citizen is free to practice his own religion, with due respect to the practices of his fellow citizens.

In his 'Sharia: A Flexible Notion' Maurits Berger explains the historical emergence of the sources of Islamic law, consisting of divine revelation to the prophet Mohammed (the Quran) and the commentaries of the prophet on the Quran (the Sunna). As these sources did not provide conclusive answers to all the relevant legal issues, legal scholars had to infer relevant rules from them, generating what Berger calls an Islamic legal science. As these scholars restricted themselves to the question of how people should live according to the law of God, they did not concern themselves with the decrees enacted by the rulers, thus creating a kind of autonomous law that could act as a buffer between subjects and rulers. With the advance of the modern state in the Islamic domain, the factual monopoly of the legal scholars eroded and due to the rise of new class of intellectuals a new type of interpretation evolved, unconstrained by the traditional rules of interpretation. This has led to the tradition becoming a real 'bran tub' of information, open to both fundamentalist and liberal interpretations. In the case of fundamentalism 'Islam' is thus turned into an ideology, an instrument to advance the causes of those that claim to adhere to it, without necessarily having any interest in understanding the complexities of the tradition. Berger indicates that many Western opinion leaders make a similar use of the term 'Islam', using it as a slogan without having any serious knowledge of the Islamic jurisprudence.

The contributions to this issue do not generate a broad consensus about the possibility or the nature of intercultural law. Also, as An-Na'im stressed in his interventions during the conference and Drosterij indicates in his editorial afterthoughts, the political implications find little explicit discussion. However, many of the authors demonstrate that intercultural law or communication is not a recent invention but part of most (legal) traditions, also with-

in contemporary Western societies. Interestingly most authors seem to favour a priority of practice, even if the epistemological arguments and the institutional preconditions for a primacy of practice seem to differ (cf. Huppes in her editorial afterthoughts). In counterpoint to the practice-oriented approach, several authors explain that priority for practice cannot do without serious theoretical reconstruction, a point clearly demonstrated in the content of this issue (even where priority of practice is advocated, this is mostly done by discussing the theoretical underpinnings of such priority).