Legal Traditions and the Separation Thesis

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Introduction

Following the London bus and tube bombings in the summer of 2005, Prime Minister Blair of the U.K. announced a commission on social relations and was reported as speaking of people ‘isolated in their own communities.’ He would further have stated ‘There’s a separateness there that might be unhealthy.’ Also in the U.K., the Chair of the Commission for Racial Equality would recently have said ‘Multiculturalism suggests separateness [but]... we are now in a different world.’1 In both instances the contemplated alternative to separation was integration, which the Oxford Reference Dictionary defines as a process of ‘combin[ing] (parts) into a whole.’2

The public discourse on social relations, and I believe this holds true for many if not most western states, would thus consist of a dichotomy between separation and isolation on the one hand and a form of social absorption or integration on the other. I am not aware of any generally accepted language which suggests a via media between the two, though I believe we are in desperate need of such language. It may be emerging in lawyer’s language of ‘reasonable accommodation’ but this has not yet entered into general use. I have myself written of ‘sustainable diversity’ though this has no verb form

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2 Thus the ‘Uber-Integration’ of the Third Reich was characterized as much by hyper-integration as by radical exclusion or separation, as to which P. Saladin, Wozu noch Staten?, at 203 (Stämpfli/C.H. Beck/Mainz, Bern/Munich/Vienna, 1995). Integration is on occasion contrasted with assimilation and it is true that there are differences between them. Assimilation would require uniformity or the elimination of cultural differences; integration would allow their continuing existence, though as private phenomena. Assimilation is obviously impossible and has never been a goal of western states; integration consists in imposing the model of western states and enlightenment (western) rationality on all populations. Integration thus involves the imposition of the most important and essential features of western tradition and involves no mutual recognition or accommodation.
and is not a simple noun so has few prospects. It also, for many, suggests too much diversity. The Mexican novelist Carlos Fuentes has asked, however, in a lecture I once heard, how we can ‘overcome separation’ and perhaps this is a more acceptable way of framing the objective. It also suggests the real problem, which I am here calling ‘the separation thesis,’ the idea that true separation, of concepts, things, people or peoples, is possible and even necessary. I think it is important, however, that Fuentes did not go on and formulate the binary alternative of integration, and this omission on his part suggests the possibility that if separation can be overcome, short of integration, some form of balance in diversity, and mutual understanding, can be sustained. I say this because I think integration is simply not a viable alternative, in spite of its prominence in public discourse. The world has arguably never known integrated societies, and is very unlikely to know them in the immediate future. The objective of integration would moreover be a very recent one. People of European origin did not speak of the need for (their own) integration into host societies as they colonized the world, though some forms of accommodation eventually emerged. How then can separation, and the separation thesis, be overcome, short of the impossible goal of integration?

Some form of mutual understanding between peoples would be required, but here I think a first distinction must be made. Some have maintained that mutual understanding is impossible because of differences in language and difficulties of inter-personal communication. This is a serious argument and much time and talent has been expended on it. I personally do not believe the difficulties are as great as many would make them out to be, but the important point is that if the difficulties in a given situation are only those of language and inter-personal communication then separation has in large measure already been overcome. There is contact, good will, and charity in the efforts of translation and comprehension. The real problem of separation would flow from larger obstacles, those which operate as forms of blockage of any efforts of dialogue and communication. How can such obstacles exist in a wired world of instant communication? They exist as intellectual constructions or intellectual barriers which teach, not that physical communication is impossible, but that, as between human groups, there is nothing that can be said. This may appear to be an impossible position to take, and I believe it is, but it is the actual result of many intellectual constructions. There are many of these in western thought, perhaps more than in other traditions, and I will concentrate on them in what follows, but noth-

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3 Enlarging the notion of separation discussed by Füsser, infra n. 44.
ing in principle excludes the possibility of their existence in other traditions. As Italo Calvino is reported to have written (I have it only second hand, and in French), ‘Pour ne pas communiquer, il faut être deux.’

In what follows, I want to attempt to do three things: first, illustrate the extent of the separation thesis in western intellectual and legal history; second, indicate in some measure, and it is good news, how some instances of separation are presently being overcome; and third, since I have been assigned the topic of ‘Legal Traditions and Diversity in Law’, suggest that the concept of legal tradition is one which lends itself to mutual understanding and the overcoming of separation, without implying integration.

The Separation Thesis

It appears to me that the greatest contribution which has been made to the separation thesis is that of Aristotelian logic, with its rules of the excluded middle and non-contradiction. These are generally accepted in western jurisdictions as representing the essential elements of logic, or how one must behave in an ideal-speech situation. Thus one cannot affirm, at the same time, A and not-A, since this would be contradictory. Between A and not-A there is no middle ground; it is excluded by the oppositional character of A and not-A. One must therefore affirm A or not-A, so as properly to avoid the excluded middle and violation of the rule of non-contradiction. The Aristotelian rules, however, presume what I wish here to question, that is, the possibility of separation. If it is not possible to separate A and not-A, because they are inextricably linked or interdependent, then there is a middle ground between them, and it is possible to affirm them simultaneously, as the outer boundaries of a continuum. The Aristotelian rules do not provide any justification for the underlying presumption of separation. If separation can be overcome, then Aristotelian logic need not prevail.

Greek thought also yielded a parallel idea which is that of incommensurability, though it was confined by the Greeks to mathematics, representing the impossibility of a common form of measure, notably where the proportional lengths of the diameter and side of a regular pentagon could not be expressed in terms of integers or whole numbers, then thought to be the only possible form of numbers.5 This today seems to be a very crude idea, but it has been widely taken over in discussion of scientific ‘paradigms’, in moral

5 See R. Chang (ed.), Incommensurability, Incomparability and Practical Reason, at 1,255 (Harvard University Press, Cambridge, MA, 1997); and for amplification V. J. Katz, A History of Mathematics: An Introduction, at 50,5 (Addison-Wesley, Reading, MA, 2nd ed., 1998). Once the irrationals were discovered, they were refused recognition as numbers, being incapable of expression in integer form.
philosophy and in discussing the comparability and comprehension of different laws (by communists, some historians and even some comparative lawyers). Like Aristotelian logic, the notion of incommensurability presumes much which is not justified, notably separation and distinctiveness so radical that claims of mutual incomprehensibility (as opposed to simple incompatibility) can be made.

To turn to the other great source of western tradition, the Christian religion, its major characteristic would not be the existence of a single God, since this is found elsewhere, even in the form of the same God, but in the affirmation of a separation between the world of God and the world of humanity. There is in Christianity that which is of Caesar, which is not of God, while that which is of God is ‘not of this world.’ This is why, for much of the rest of the world, the so-called secular jurisdictions appear so fundamentally Christian in character. ‘Secularity’ flows from a separation taken as given within the forms of western thought which have prevailed in recent centuries, even taken to the level of constitutional principle in jurisdictions which speak of the separation between Church and State. This fundamental separation, within Christianity, is perhaps the explanation for the clear separation between Christianity and the other monotheistic religions, subject however to the same God. Thus it has recently been stated that we ‘do not include Islam in our civilization club because we are heirs to a Christian construction of history that is deliberatively exclusive.’

All of these forms of separation, and resulting mutual exclusion or even incomprehensibility, are of long standing and are profoundly anchored in all levels of western civilization. They are major conceptual barriers to communication, and even to attempts to communicate. They have contributed to more contemporary forms of separation, which are more directly related to law.

Greek logic and the Christian religion have contributed greatly to the western idea of the legal system. The separate, terrestrial city being subject to

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6 Matt. 22:21; and John 18:36 (‘My kingdom is not of this world’).
human direction, it can be separated from other terrestrial cities. The result we know today as the state, or national legal system. The most important features of a legal system are its boundaries, since it is within these boundaries that the elements of the system are in interaction. Without boundaries, there could be no ongoing interaction, only entropy. This is why the tracing of national boundaries was fundamental to the contemporary state and the concept of national sovereignty.9 Within the state, law is said to be rationally constructed, and by this is meant construction according to Aristotelian logic, such that state law would represent a non-contradictory field of legal meaning. It thus excludes all other law and is separate not only from all other law but also, in leading versions of positivist theory, from morality.10 The legal system, moreover, would exist as simple, positive fact, its separate existence not being normatively justified, such that legal systems, conceived as positive systems, can have nothing normative to say about whether state law should yield, in some circumstances, to non-state law.11 State law, as fact, is normatively dumb, autistic, incapable of dialogue or exchange with other forms of normativity. Its separation from them would be insurmountable.

The separation of state law from all other forms of law is reinforced by western forms of legal education, in which only one form of law, state law, is taught. The radical nationalism of legal education in western jurisdictions is not, however, a recent invention, since teaching of a ius unum is a pedagogical tradition extending throughout the history of western universities and law schools. For centuries the teaching of the ius commune even ignored the laws of the land, and it has been concluded recently that under Church and Imperial influence no other laws could be taught for fear of ‘contamination’.12 Today U.S. lawyers are accused of intellectual hegemony, but how are they to act otherwise? They know no law other than their own, and in this they continue the European tradition.13

Law is now examined frequently as a cultural phenomenon, but the notion of culture does not in itself lead us away from the separation thesis. As a construction of anthropologists in the nineteenth and twentieth centuries, the

9 H. Krüger, Allgemeine Staatslehre, at 22 (concept of Herrschaft only possible if spatially delimited), (Kohlhammer, Stuttgart/Berlin, 1966).
The notion of culture remarkably resembled that of a legal system, as consisting of a ‘totality’, a ‘total way of life’, and even a ‘total system’. It thus served principally as a means of differentiation, or separation, of peoples. Apartheid South Africa was said to be a multicultural society, and in one of the opening quotations of this paper the Chair of the U.K. Commission for Racial Equality stated that ‘Multiculturalism suggests separateness (...).’ In its suggestion of unbridgeable differences between human groups it is now said to contribute to a ‘new racism’ which ‘essentializes culture rather than genetic endowment, or in other words makes culture do the work of race.’ This was perhaps inevitable, given the initial process of anthropological reification. Moreover, culture as simple fact is as dumb as a legal system. Cultures do not engage in dialogue or understanding; they simply are, as markers of identity presumed to be internally consistent. In cases of overlap or contact, the expression ‘culture wars’ is now frequent, in precisely the same manner that one speaks of a ‘clash of civilizations’, these being posited by Huntington as distinct ‘entities’. To the reified concepts of ‘culture’ and ‘civilization’ must be added that of the ‘nation’ in its sociological and non-political sense. European elites would thus have chosen to repress Islamic influence on European development ‘in order to artificially generate a homogeneous European Self’, and within Europe peoples would be seen as ‘distinct, stable and objectively identifiable social and cultural units (... supposed to be formed either in some impossibly remote moment of prehistory, or (... at some moment during the Middle Ages (...) then ended for all time.’

Finally, the most egregious instance of separation of peoples has been that founded on the notion of race. To the extent the history of this concept is known, it would have originated in Spanish repression of Jews in the 15th and 16th centuries, when children of Jewish converts to Catholicism contin-

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15 T. W. Bennett, Customary Law in South Africa, at 21 (‘this thinking presupposed the existence of separate cultures’), culture still seen as means by which group can ‘distinguish itself from other groups’ (Juta, Cape Town, 2004).
16 Supra, n. 1.
ued to be treated as Jewish, and persecuted as such, on the basis that this particular form of collective identity (religious in character) was transmissible genetically. We continue to see religious discrimination designated as racial, but the idea of race became perhaps even more effective once it became applied to discernible physical characteristics the result of genetic transmission. It then became the object of scientific and anthropological reinforcement as 19th and 20th century science engaged in a process of taxonomy of human characteristics and ‘races’, and anthropology furnished detailed information on the activities of ‘primitive races’. Law reflected these developments.

This all appears as a depressing, though I think incontrovertible, story, which has institutionalized human difference and created great potential for antagonism while greatly reducing the possibilities of mutual understanding. There are, however, more cheering recent developments, which may go some measure towards overcoming separation.

**Overcoming Separation?**

The separation thesis, in its different manifestations, has been put forward in western societies by the elites of those societies, whether in the form of ancient philosophers, religious leaders, physical or social scientists, or those practising the law. It has therefore enjoyed great prestige, and the underlying ideas are profoundly rooted in popular belief. Traditions have developed, which cannot be simply repealed, and overcoming them can only come about through long, patient and public work, probably of centuries of duration. There are signs, however, that the process is now under way.

Of all of the above forms of separation, that of race is probably now the most discredited. There are still occasional bursts of scientific activity indicating genetic propensities of human groups (now often flowing from therapeutic forms of investigation) but it is now recognized that nothing permits the extension of such findings to the broader concept of race. The project of


human taxonomy has broken down, notably with the most recent genetic discoveries showing the extent of human similarities and the impossibility of categorizing remaining differences according to racial types. It is now said that ‘race’ is a social construction, that is, devoid of any scientific or objective reality. This does not mean, however, that it has been eliminated as a means of separation of peoples. This is partly because it continues to be employed for remedial purposes (affirmative action, where it exists) but more importantly because four or five centuries of teaching and use have profoundly impressed public (and journalistic) consciousness. The absence of any scientific foundation for the concept of race was articulated as early as the end of the 19th century, yet after a century there are few signs of disappearance of the idea from popular understanding or discourse. It does, however, no longer have official or learned approval.

Aristotelian logic is also challenged today but is also profoundly rooted in popular consciousness. Here the separation thesis and the rule of the excluded middle even take the form of popular maxims, of national hue, as in ‘You can’t have your cake and eat it too’ (in England), ‘You can’t have both the butter and the price of the butter’ (in France), and ‘You can’t have the bottle full and the wife drunk’ (in a Mediterranean country which shall be nameless). So here centuries would be necessary to displace binary logic, if it could ever be displaced at all. The alternative is now known most frequently as ‘fuzzy’ logic though the expression ‘multivalent’ logic is less apparently pejorative and perhaps even more accurate. Multivalent logic challenges that which Aristotelian logic simply presumes, the possibility of separate sets or classes. This appears counterintuitive, until one takes into account the fuzziness (or vagueness) of the real world and its categories. Fuzzy logic is thus a logic of fuzziness rather than an imprecise logic, and deals with what would be the inherently vague or imprecise nature of boundaries. It tells us we should think always in terms of a continuum of values as opposed to ones which are binary opposites. This is entirely consistent with the new continuum of human genetics and the elimination of either/or racial categories. In law its most obvious example is the range of national solutions more, or less, compatible with the European Convention on Human Rights, taken as not dictating a single, uniform solution but rather as allowing a range or continuum of solutions and a corresponding margin of appreciation of them.

23 S. Molnar, Human Variation: Races, Types and Ethnic Groups, at 19 (Prentice Hall, Englewood Cliffs, NJ, 2nd edn 1983), and for Darwin even earlier, supra n. 22.
The notion of incommensurability would appear in contrast to be increasingly in vogue, and it is becoming one of the most frequently heard words in academic discourse. This is unfortunate, since most examples of its use relate to simple incompatibility rather than anything more fundamental or incomparable. The initial concept of incommensurability, however, that of mathematics, is no longer with us, since the absence of common means of measure in the Greek geometric examples simply disappeared with the admission (which was strongly resisted) of what are now known as real numbers, expressible in decimals, and irrational numbers. The arbitrary separation of whole numbers or integers from one another (which meant that there was no common form of measure for many geometric forms) yielded to what is now seen as a truer continuum of decimal possibilities between the whole numbers (continuous as opposed to discrete quantity). As in genetics and logic, greater and more detailed information dissolves the boundaries and allows work to be done in the newly-discovered middle. Rik Pinxten has thus written that ‘few dichotomies can be sustained upon closer examination’ and this proposition appears supported by the mathematical history of incommensurability. Many values are today said to be incommensurable, notably with money, but one need not be an economist to appreciate that people will choose certain values over money (or the reverse) precisely because they do engage in forms of comparison or commensuration. Where two ideas or concepts are said to be radically incommensurable, as with, say, Beethoven’s Ninth Symphony and the city of Chicago, or French toast and the number 9, we commensurate with a wide range of standards (and in some cases their absence). Even a conclusion of incommensurability would have to be based on some measure of commensuration for the conclusion to be reached. As a concept, however, incommensurability is not declining in use as it should be, given its decline in mathematics. The idea was rebooted by the work of Thomas Kuhn on scientific paradigms, but Kuhn himself withdrew significantly from his own initial formulations. It was not that Galileo’s ideas were incomprehensible to his peers; they just didn’t like them. Real decline of the idea of incommensurability may require more widespread understanding of the unintended and unfortunate consequences flowing from ideas of radical separation and incomprehensibility.

25 See references supra n. 5. In mathematics incommensurability would retain a narrower, technical sense of being unable to be written as a fraction, which is the case for irrational numbers, the best know example of which is the square root of 2.
Religious teaching is often anchored in sacred texts, but even where this is the case there is ongoing debate on the meaning of the texts. The separation of the world of Caesar from that of God is now being questioned within Christianity in a very serious and sustained manner, which appears to be attracting considerable theological support, given the doctrine of panentheism. This would not, as I understand it, remove the fundamental Christian legitimacy of the terrestrial city, but would place God more visibly within it. God would no longer be external to the world but would permeate it, without being exhausted by it.28 This is a doctrine with enormous consequences, both for human treatment of the environment (to say nothing of other humans) and for relations with other religions, with their religious laws, which hold the world to be sacred and not ‘fact’.29 Panentheism represents, if not an overcoming of separation, at least a major form of contact. Outside of theological teaching, the process of ‘secularization’ has been recently described as ‘too simple’ or ‘undercomplex’.30

The necessity of contact and exchange appears also to be driving a re-assessment of the historical, 19th and 20th century concept of culture. This is reflected in the title of this conference, which speaks of ‘intercultural law’ (and not, for example, of multicultural law), though the concept of intercultural law would be for the moment a ‘possibility’ and nothing more. What would prevent the possibility of intercultural law from becoming a reality? The first obstacle would be the concept of culture itself, and what might be described as the cultural inertia involved in bringing about a change in its understanding. The idea of culture as a kind of monolithic marker of separately understood peoples has been a hallmark of the social sciences, and hence of popular understanding, for a very long time, and this inertia will be difficult to overcome. There is a larger conceptual problem, however, of how the ‘intercultural’ can be squared with any ongoing concept of culture. What is culture to be if it no longer has the characteristics it has been taken for so long as having? Roland Pierik argues, rightly I think, against the reification, compartmentalization and essentializing of culture, though warns at the same time against


29 For Islamic teaching, for example, S.H. Nasr, ‘Islam, the Contemporary Islamic World, and the Environmental Crisis’, in: R. Foltz, F. Denny & A. Baharuddin (eds.), Islam and Ecology: A Bestowed Trust at 85, notably at 96 (‘(...) creation is sacred but not divine, for divinity belongs to God alone (...)’). Nature is not there only for our use. It is there to reflect the creative Power of God.’ (Harvard Univ. Press, Cambridge, MA, 2003).

denying it is a ‘real phenomenon’ in society, by turning it into a ‘narrative discourse’, a ‘process’, or an ‘identity’.\textsuperscript{31} It is, however, a notoriously vague concept, identifiable mainly by its holistic or total character. If it is denied this character, must it not dissolve into its constituent elements, whatever they may be?\textsuperscript{32} Yet if explanations of particular social phenomena in terms of ‘culture’ consist of explaining something in terms of everything,\textsuperscript{33} how can there still be cultural explanations if there is no more everything, if, like the famous centre of Oakland, ‘there is no there there’?\textsuperscript{34} On the other hand, if a distinct notion of culture is preserved, will it in itself be an obstacle to effective interchange? The experience of the ‘inter-national’ does not bode well, since it speaks to the regulation of holistic units or states, rather than exchange between them. John Rawls’ recent effort to articulate a ‘Law of Peoples’, as opposed to an international law of states, is still founded on a notion of mutually distinct and culturally coherent peoples, between whom little exchange is likely to take place and who must therefore be spoken for by official representatives.\textsuperscript{35}

The efforts of contemporary social scientists to conceptualize culture as a means of communication are heartening, but there are further difficulties with the concept of culture. One is its unquestionably western character. It grew out of German resistance, in the name of Kultur, to French universalism in the 18th and 19th centuries,\textsuperscript{36} but then became a major instrument of western anthropology, in the study of different peoples. It is a product of western social science, often treated as itself a universal.\textsuperscript{37} Yet the people who are studied often have no concept of culture, and see it as incompati-

\textsuperscript{33} See B. Williams, Truth and Truthfulness, at 29, for whom an explanation of changes in cultural practices being found in other values or beliefs of the people who live in the culture ‘does not offer much of an explanation... we need an explanation of why that itself should have happened.’ (Princeton University Press, Princeton, 2002).
\textsuperscript{34} Gertrude Stein, on her hometown.
\textsuperscript{37} See M. Strathern, ‘The nice thing about culture is that everyone has it’, in: M. Strathern (ed.), Shifting Contexts: Transformations in Anthropological, 153, notably at 156 (‘And one effect of this ubiquitous descriptive is to think that it in turn comprises a world historical phenomenon. It is as though those who talk about “cultures” were witnessing cultures talking about themselves!’), (Routledge, London/New York, 1995).
ble with their own understandings of themselves. Tariq Ramadan has stated, very recently, that 'Islam is not a culture', and the idea of a Jewish culture has been described as essentially anti-Semitic in character. We must work with some intellectual concepts, but there are limits to which a concept which inspires animosity can contribute to mutual understanding. The notion of the intercultural may thus be freighted with too much historical and intellectual baggage, though the emerging consensus of the social sciences may yet bring about a radical new understanding.

Recent challenges to the sociological concept of the nation are also instructive. If peoples defined by various combinations of language, geography, religion and ways of life are in reality highly contingent and are best seen as snapshots, at a given time, of the play of different human circumstances, then there would be no French, Dutch or English nation, simply people who are born into a particular, contingent set of circumstances. As such there would be no collective identity which could act as an obstacle to interchange and mutual understanding. Yet those who presently challenge the notion of the 'nation' feel compelled to draw what they perceive as the logical conclusion from their own deconstruction of the reified identity. Absent reification, there would be only 'myth' and 'imagined communities', while claims that 'we have always been a people' would actually be claims to become a people, whatever that might mean. This debate would be more fundamental than the challenge to culture, since here even the peoples possessing the cultures disappear, along with that sense of belonging or solidarity which some maintain is essential to human existence.

Finally, there is the question of the role of the national legal system as an instrument of separation. There are many challenges today to the exclusivity of state law, and the challenges come both from within the state, in the form of claims for application of non-state law by various minority groups, and from without the state, in the form of claims for application of various forms of transnational law. In many instances these claims are being acceded to, notably where it is found that state law is not of public order,

40 For the contingency of language, and emergence of French as a written language not in France but in England (under Norman control), M.T. Clanchy, From Memory to Written Record: England 1066-1307, at 18 (French then only one of many unwritten vernaculars in France), (Blackwell, Oxford, 2nd ed. 1993).
41 Geary, Myth of Nations, supra n. 20, at 37, 155.
such that different forms of normativity are at the disposition of the parties. Islamic financial law is being resorted to in an accelerating manner within western states, and is even being utilized by western governments in their financing efforts. In the U.K. the Muslim Law (Shariah) Council plays an active adjudicative role in resolving family law disputes, though not formally recognized by civil authority, and in Ontario for more than a decade arbitration of family law disputes has been possible according to various religious laws, notably Jewish and Islamic. There is increasing recognition of the law of aboriginal or chthonic peoples.

Is it possible therefore to conclude that the state and its legal system are flexible instruments facilitating mutual understanding? In addition to the challenges to the exclusivity of state law, however, we now also witness vigorous re-affirmations of it. This is entirely consistent with positivist legal theory, and it has been concluded notably that legal philosophers (or at least some of them) ‘cling dogmatically to classificatory ideas’, rejecting analysis of legal systems as matters of degree. The state would be a dicotomischer Fixbegriff, capable of registering only binary relations. There is either a state, and its (uniform) legal system, or there is not, though Joseph Raz has concluded that ‘no method of computation can make much sense’ in determining the efficacy, and hence existence, of a legal system. We see the deeply-rooted nature of Aristotelian logic and western propensities to reification in public reactions to recognition of alternative sources of law. In Ontario, Islamic authorities recently announced their intention to formalize Islamic arbitration proceedings by creating an official institution and training programme for its officials, stating that shari’a would thereby be introduced into Ontario. This was met by an immediate reaction objecting to the sharia’s treatment of divorce and polygamy, as well as treatment of women in general. Following this binary debate, for or against the sharia, the Ontario government is now introducing legislation to prohibit all religious forms of arbitration, though it will be years before the constitutionality of the legislation is determined. While a government commission attempted to provide a middle ground the debate was entirely polarized, and largely

43 For an Islamic bond or sukuk issued by the German Land of Sachsen-Anhalt, Frankfurter Allgemeine Zeitung, 6 Nov. 2003 at 31; and for a large U.S. firm with a ‘Middle East-Islamic Finance Investment’ practice, <www.kslaw.com>.


45 C. Möllers, Staat als Argument, at 432 (state thus not, in spite of title, an argument), (C.H. Beck, Munich, 2000).

ignored existing law which precludes resort to the sharia notably in cases of marriage and divorce, and is open to its application in many instances involving a foreign element or where party choice prevails. The middle ground already exists, but was almost entirely overlooked in the binary formulation of the public debate. Echoes of this strong, binary tradition were heard recently in Bavaria, where Edmund Stoiber in a ringing speech in March of this year declared ‘Hier gilt das Grundgesetz, nicht die Shari’a’.48 It would probably be news to most people that there was a possibility of replacement of the Grundgesetz by the Sharia in Bavaria, but we now know that, if the proposal is raised, Edmund Stoiber is against it. It is too easy, however, to dismiss these developments in Ontario and Bavaria as simply the reactions of local, populist politicians. The same attitudes have been found to exist at the highest level of government in the United States (though this will come as no surprise to many).49 They reflect much larger attitudes and traditions, of separation, which are deeply rooted as well in the population. The notion of a national legal system remains a formidable barrier to mutual recognition.50

These developments towards an overcoming of separation suggest that separation is (western) tradition-specific and as such capable of eventual change. It would notably not be a necessary feature of human cognition, flowing inevitably from human use of categories as a means of conceptualisation, as suggested in some measure by Roland Pierik in his contribution to this symposium.51 Fuzzy logic assumes the continuing existence of sets, but insists on their overlapping character. Legal traditions other than western ones (and even western ones in great measure) use multivalent and not


49 See notably Bulliet, Islamo-Christian Civilization, supra n. 8, at 115: ‘The problem is integrating this mass of information about Islam with the perspectives of those charged with determining government policies. The policy community, and the scholars on its fringes, continue to shun alternative visions of modernity that might embrace a Muslim rather than a western perspective. At worst, they posit Islamic politics as a malignant and inveterate foe, debating the best strategies for holding the Muslims at bay [i.e. maintaining a policy of separation] while simultaneously whining “Why do they hate us?” At best, they acknowledge a need to be sensitive to local cultural norms, and even to moderate Islam, without figuring out how such sensitivity can be manifested in practice.’

50 On the principle of mutual recognition (as a prerequisite to mutual understanding), J. Tulley, Strange Multiplicity, at 116 (Cambridge Univ. Press, Cambridge, 1995). If separation is officially taught, however, does it not follow that the population will object strenuously to its violation? For U.S. internet postings menacing U.S. Supreme Court justices for citing of foreign legal material in judgments, C. Lane, ‘Ginsburg Faults GOP Critics, Cites a Threat from “Fringe”, in: Washington Post, March 17, 2006, at A 03.

binary logic and thus do not separate concepts or propositions over an excluded middle. They rather bring together through insistence on an included middle, but the use of concepts or categories is in no way excluded by this process. Categorisation, separation and reification are distinct processes, but it is the latter two which are the major obstacles to mutual understanding and peaceful relations between groups. Let me now try to suggest how the idea of legal tradition may contribute to such objectives of mutual understanding and peaceful relations.

**Legal Traditions and Diversity in Law**

First, however, a word on the modernity of tradition. It has recently been described as ‘undertheorized’ and this certainly results from the ongoing hostility of enlightenment-derived, rationalist opposition to various traditions supportive of the ancien régime. Edward Shils concluded that it was thought necessary not only for these particular traditions to be eliminated, but also the concept of tradition itself. Yet this has proven to be an impossible task. Anthony Kronman even sees tradition as the hallmark of humanity, distinguishing it from both gods and animals. So western social theory is now re-adjusting itself to recognition of its own, and other, pasts, largely through the notion of memory, though memory is but the subjective or operative side of tradition and both are now receiving renewed attention. Modernity is just another tradition, characterized by its denial of its own past.

The modernity of tradition is most evident in its contemporary and most frequent formulation as normative information, that which is handed down to us from what we describe as the past. Tradition would thus be neither habit nor custom (both presentist in understanding) nor the process of transmission of information (traditio) which has given its name to the concept.

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Since tradition is information, contemporary information theory is immediately relevant, though the lawyer concerned with legal tradition is more concerned with content, sources and formulation, than with volume and regulation of flow. Tradition is a wide, though potentially technical, concept. Conceived as the preserved record of the past (in whatever form of retrieval, from individual memory to magnetic recording), tradition creates (relative-ly) little animosity since it is the invention or construction of no particular group. It is as neutral as organizing concepts can be, across the world. Revelation is a particular, and sacred, form of tradition. Yet in its particularized forms, since it exists only in particularized forms, it may be highly technical, as where lawyers or other professionals develop highly structured means of recall, use and capture of information. An ongoing, living tradition thus is characterized by a looping, reflexive process of feedback, which can be highly specialized or very informal.57

Tradition appears immediately relevant to the relations between groups of people and their mutual understanding, principally because it exists as a flow of information and in no other, reified form. And since information flow is difficult in the extreme to regulate, it will flow across whatever formal borders which may be created by particular systems. Indeed, the systems themselves are best seen as particular instantiations of tradition and their closure impossible, since they are essentially dependent on information external to themselves.58 The separation thesis thus collapses in the face of tradition, and while particular systems may be more or less successful in their efforts of separation, there is no separation so complete or total as to preclude awareness of ‘a world out there’ and at least some of its content. Moreover, if something is known to be ‘out there’, as information it is already ‘in here’,59 and traditions therefore exist only in what may be called inter-traditional form. They all contain information more or less peripheral to their own main teaching, derived from other traditions. Those adhering to any tradition thus are ensured access to information of other traditions and it is in principle not possible to speak of ‘deux systèmes d’exclusion mutuelle fondés sur l’ignorance.’60

57 For contrasts between the operation of tradition generally and the operation of the particular tradition which is that of a legal system, H. P. Glenn, “Doin’ the Transsystemic: Legal Systems and Legal Traditions’, in: (2005) 50 McGill L. J. 863.
58 Glenn, supra n. 57, at 893 (‘a legal system is a tradition and can only be understood, like a film, as part of a larger story. It is a “positivist tradition” that has given rise to the concept of a legal system.’)
Yet if tradition is so ubiquitous and free flowing, why are there so many obstacles today to mutual understanding? Why is there a separation thesis? The separation thesis flows from particular traditions which have sought to disguise their origins in tradition in order for them to assume apparently autonomous or free standing status. Legal systems would thus simply ‘exist’, founded on a fact of obedience or some presumption of basic normativity. Cultures or nations would exist as unities or entities, their boundaries directing attention exclusively to internal workings and homogeneity. If these boundaries are accepted, binary logic requires choice, and national laws of citizenship long insisted on the exclusivity of any state-defined form of citizenship. Yet all of these forms of identity which would claim exclusivity are eventually founded on information, in the form of tradition. Even race, long held to be founded on physical and genetic reality, is now recognized as a social construct, that is, founded on information and belief, now rapidly declining. The rules of citizenship may change, as their information base in state legislation changes; peoples may lose their identity through various forms of acculturation (i.e, acceptance of other forms of normativity); states and national legal systems may merge or disappear, depending on the maintenance, or replacement, of their founding instruments. The essentially traditional or information-based nature of all forms of collective human identity should mean, however, if recognized, that no separation can be seen as definitive or even effective and all must be seen as open in some measure, and in a fundamental and not simply regulated manner. This is in no way destructive, however, of necessary human identity. It is recognition, however, in modern language, that all communities are essentially, and only, epistemic communities.

Reified identities should thus be seen for what they are, contingent and momentary crystallizations of ongoing information flow, upon which they remain dependent. Legal traditions in particular represent such transnational flows of normative information, and national states and legal systems exist as particular instantiations of these traditions at a particular time and place. They exist within ongoing common laws (European versions have been English, French, German, Spanish, and Dutch in origin, but there are non-European laws which have the same characteristics) and these common laws continue to provide nurture and support, even if unacknowledged, and remain available in case of need.61 No state has been free of dependence on such ongoing common laws, as forms of legal tradition. Where the tradition thrives, the state thrives; where the tradition is weak, largely unknown, or unsuccessful in displac-

ing other normative traditions, the state may fail, as is now happening. Failed or failing states cannot be explained or understood by positivist legal theory; they can only be understood in terms of the non-binary, relative strength of an underlying legal tradition.

Since legal traditions exist as ongoing flows of very large amounts of information, they must accommodate more and different forms of information than do legal systems. Legal traditions are inclusive and not exclusive and therefore by their nature must accommodate diversity. A legal tradition thus constitutes a contradictory, as opposed to a non-contradictory, field of legal meaning. To accomplish this, and to maintain some level of coherence as traditions and avoid schism, the great legal traditions have abandoned Aristotelian logic (if they ever adopted it) in order to find a middle (non-excluded) ground. Within the tradition of francophone civil law (French common law) there is Quebec law and French law, which often differ, yet I think no-one will deny a transnational tradition of francophone civil law, extending far beyond France and Quebec. The English-derived common law also accommodates the different laws of the Commonwealth, and even that of the (republican!) United States. Legal traditions are thus built on multivalent logic. It is not necessary to choose between A (within the tradition) and not A (which would then be without the tradition). The tradition can encompass A and not A. There is no embedded separation thesis. Both A and not-A are entitled to (mutual) recognition, and both are entitled to maintain their ground. Multi-valent logic is more often explicitly recognized in legal traditions beyond the western ones, but western legal traditions, like M. Jourdain writing his prose, have been multivalent without acknowledgment of it, at least in the legal theory of recent centuries.

In western discourse the need for mutual understanding and co-existence is often expressed in terms of tolerance, but tolerance is an ambiguous concept. \(^62\) It teaches acceptance, but does nothing about underlying animosity. We tolerate that which is external and alien to us, for justifications which may be utilitarian or right-based. Christians, it is often said, do not wish to be tolerated, but accepted. In the logic of traditions, however, it is not a question of ongoing, covered-over animosity, but of acceptance of the different, within the cadre of the multivalent tradition. The underlying idea is that of interdependence. All of the common laws of the world have ongoing, pacific relations with the other common laws of the world, in recognition of the necessity of all of them.

\(^62\) Glenn, Legal Traditions, supra n. 56, at 353 (‘Beyond tolerance’, arguing for alternative notion of interdependence).
Conclusion

Richard Rorty has written recently that

‘Despite growing recognition that the essentialist habits of thought which pay off in the natural sciences do not assist moral and political reflection, we Western philosophers still show a distressing tendency to essentialism when we offer intercultural comparisons.’

If this statement is true, it is a result of the powerful force of the separation thesis, and the many traditions which contribute to it in jurisdictions usually designated as western. The separation thesis, however, is simply a tradition and may be resisted as such, in the name of tradition itself. This should contribute to a freer flow of information, and less separation. Mutual understanding could thus be improved. To the extent that separation is no longer taught as the normal and desirable state of affairs, there should be less violent resistance to human contact and exchange.