Legal Cultures, Legal Traditions and Comparative Law

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Most papers in this volume are directly relevant for comparative law. They discuss problems of identifying, defining and comparing legal cultures or traditions in the context of intercultural communication. These are also important theoretical issues that are being discussed among comparative lawyers. The aim of this paper is to offer partly a summary of some points in those papers and of the discussion related to them as it took place during the Conference on June 9th and 10th, 2006.

Let's start with a clarification as to the meaning of the concept of 'legal culture' as used in this paper. Patrick Glenn has some problems with this concept of 'legal culture' and prefers 'legal tradition'. Here, we will not discuss this point but use the words 'legal culture' in its general, be it rather vague, sense, which includes Glenn's concept of 'legal tradition'.

Defining legal traditions or cultures by demarcating them from one another, has, in the Western binary thinking, led to a sometimes rather strict separation, which, in its turn, has led to the 'separation thesis' that denies the possibility of intercultural communication, let alone integration. The separation approach to (legal) cultures is, according to Glenn, largely a typical Western construction of reality, not something which would be 'naturally' or sociologically given. This approach leads to ontological claims as to typical characteristics of those cultures and as to unbridgeable differences when comparing them.

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According to Roland Pierik, the separation thesis is not ontological, but epistemological. It follows from the way the human brain works. We need categories and even stereotypes to order reality and to cope with an otherwise fundamentally disturbing chaotic environment. Moreover, tradition goes on to influence our thinking even a long time after changes. He gives the example of slavery in the USA, where, almost one and a half century after its abolishment, it still leads to racist opinions and attitudes.

Along similar lines, Rik Pinxten argues that our thinking about cultures is partly determined by two illusions. The first one being the illusion of our observations: 'we get what we see', whereas reality may quite differ from our first impression. He gives the example of the sunrise and sunset that create the illusion that the sun is turning around the earth, whereas we meanwhile know that it is the other way around. The second illusion is the idea that cultures would be stable, that they would not change. For instance, a person from Turkish origin, who was born in Belgium, has always lived there and has the Belgian nationality will, by many, still be considered to be a 'Turk', even if (s)he belongs to the third or fourth generation of the immigrant family. These two illusions inevitably lead to separation and exclusion, both in a monocultural approach as in a multicultural one. In the first case, one will ask these people from foreign origin to fully adapt to the society in which they live or to return to what is considered to be their 'home country', even if they never have been there and don't even speak the local language. But also in a 'multicultural' approach this way of thinking leads to separation and exclusion. The proponents of multiculturalism will ask for respect for what they claim to be a 'Turkish' culture within a European society, by this assuming that they cannot integrate into a 'Western' culture and isolating them in an enclave of a presumably 'authentic' and incommensurable Turkish culture.

Some have argued that this way of binary thinking, underlying the separation thesis, would be inevitable in legal practice, where one has to think in terms of 'guilty or not guilty', 'proven or not proven', 'valid or invalid', etc. To this, Glenn replies that it is only true if one reasons in terms of winners and losers in a trial. In this context, it may be interesting to note that nowadays there is an increasing interest for all kinds of alternative dispute resolution, where mediation and reconciliation are not following that binary way of thinking. Actually, Glenn argues, there has been a problem with this binary legal thinking in Western legal education and scholarship over the last millennium. As a typical example he mentions the branch of law known as 'Conflict of Laws', where any overlap between two legal systems is excluded. However, today one sees an increasing acceptance of 'subsystems' of law or 'unofficial' law by State legal systems, such as the acceptance of Inuit law by Canadian courts, or of aboriginal law by Australian courts, or even a parallel

development of Sharia law in the UK, ignored but implicitly accepted by the State legal system. On the other hand, when one tries to integrate this Sharia law into the official State law of a Western society, it does not work, as is shown by the way Ontario has tried to include Sharia into the 'arbitration' trial as offered by their procedural law.

Separation leads to reification and finally to conflict. So we need to find a third way to overcome the false dichotomy of monoculturalism versus multiculturalism, as determined by our binary way of thinking.

For intercultural contacts language is often seen as an important obstacle for adequate communication. Here, language is understood in a broad sense, incorporating tradition, dominant ideology in the language community and a whole background foreigners largely lack, as well. Some deny, almost a priori, the possibility of intercultural communication because of an inevitably insufficient knowledge of each other's language with all possible nuances. To them, communication requires a same language, spoken in one and the same community. Even communication between Americans and Brits would be problematic in this perspective. The assumption is that once there is not a 100% understanding, there is no communication at all. A typical example of binary thinking, again. Van Brakel's paper is clearly an answer to this essentialist approach, as the second part of its title reveals: 'No need to speak the same language.' Van Brakel understands language in the sense of 'English', 'French', 'Dutch', etc. From Marc Loth's comments, but also from the examples Van Brakel himself is giving, it appears that communication requires at least some common 'language', in a broad sense. When captain Cook meets Indians in 1778, they happen to share some common feeling for music,[1] even if they play instruments the other one never heard and also the tunes are of a different category. They may, however, communicate to some, very basic but still important, extent, without *speaking* the same language at all. Worded in this way, Loth argues, Van Brakel's thesis is not very exciting. This would be the case if no form of language would be needed at all. However, such a thesis would be difficult to defend. *Some* shared language and *some* shared frame of reference is necessary to reach any kind of, even very minimal, communication.

Wim Staat offers a 'film studies alternative' to the essentialist approach to language. Protagonists in the comedies of remarriage and the melodramas of the unknown woman don't speak the same language, he concludes; their community works, or not, because they cope successfully (comedies) or not (melodramas) with potentially de-essentialising crises. Actually, Staat emphasises that we never fully speak the 'same language', even not in our

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1   In this issue at 273.

own culture, even not within a marriage of two persons belonging to one and the same community. Sharing a same language, thus, is a matter of degree, not an all or nothing binary conclusion.

The problems raised until now are basic issues for any kind of intercultural communication and for comparative law.

Abdullah An-Na'im discusses the relation between (Islamic) law and religion in one and the same society. Instead of a communication problem between two communities that do not share the same language and/or culture, here we are faced with the relationship between a religious community and a legal community within one and the same society, between a religious normative system and a legal normative system.

In the Islamic world there has traditionally been a holistic idea of normative system in society, based on the two holy writings, the Koran and the Soenna, both for moral and legal matters. However, the legal system was decentralised and not linked to public authorities. It was developed through the interpretation of mullahs, who worked fully independently, as moral authorities.

With colonialism a centralised state has been created with a delimitated territory and State legislation. All this has been kept after decolonialisation, without really fitting with Islamic tradition. Instead of the moral authority of Islamic legal principles, State law may only offer the authority of political and military power. Moreover, within the Islamic tradition there are four main schools of interpretation of the religious sources, which are partly based on oral tradition. For those two reasons, a 'Muslim State' is, according to An-Na'im, not compatible with Islam, as it limits the law to the interpretation of one single school, as chosen by the ruling leaders on power, and to some specific territory, to one State among the 44 States with an Islamic majority.

Moreover, there is no space for non-Muslims within the territory of a Muslim State. For those reasons, the State should be a 'neutral supervisor of the public sphere', he argues. (Legal) rules dependent on belief should not be imposed on non-believers. Only (religious) rules that may be valid independently of religious belief and that are supported by public reason may be converted into State law. The possibility for change should be kept open with State law. This is not the case with Islamic law.

When applied to Muslim communities in Europe, all this means that there should not be created 'Islamic ghettos' with their own law. Religious rules may act in the private sphere within the context of the whole Islamic world. As to the public sphere, local State law will be valid for all citizens of that State, including the Muslims, who should be encouraged to participate actively in that public sphere.