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Doin' the Transsystemic: Legal Systems and Legal Traditions

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Abstract

Transsystemic legal teaching is a challenge to the western bias against conceiving of law as anything other than that which is positively enacted by the state. A more convincing explanation for the normativity of law is provided by refocusing inquiry on legal traditions. By examining the traditions that form the foundations of particular legal systems, it is possible to gain a fuller understanding of the interrelationship of the laws of the world and to move beyond the theoretical constraints of traditional legal positivism.

Keywords

Legal system, legal tradition, comparative law, "transsystemic" legal education

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Introduction

The Faculty of Law of McGill University has recently embarked on a programme of legal education in which students study simultaneously, in the same classroom, civil and common law subjects. It is commonly, though unofficially, referred to as "transsystemic" legal education.³ The word says a great deal

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³ For the programme, see notably Nicholas Kasirer, "Bijuralism in Law's Empire and in Law's Cosmos" (2002) 52 J. Legal Educ. 29; Yves-Marie Morissette, "McGill's Integrated Civil and Common Law Programme" (2002) 52 J. Legal Educ. 12; Daniel Jutras, "Énoncer l'indicible : Le droit entre langues et traditions" [2000] R.I.D.C. 781, especially at 791ff.; Daniel Jutras, "Two Arguments for Cross-cultural Legal Education" in Heinz-Dieter Assmann, Gert Brüggemeier & Rolf Sethe, eds., *Different Legal Cultures—Convergence of Legal Reasoning: Grundlagen und Schwerpunkte des Privatrechts in europäischer Perspektive*, vol. 3 (Baden-Baden: Nomos Verlagsgesellschaft, 2001) 75; Adelle Blackett, "Globalization and Its Ambiguities: Implications

about how the concept of system has impressed itself on legal education in the last two centuries, but what can it possibly mean? If law is found exclusively within legal systems, how can it be found, and taught (as the prefix “trans” indicates) “across”, “through”, “beyond”, and even “on the farther side of” those same systems?⁴ The question raises fundamental issues about the conceptualization of law and about how one should think, and teach, the laws of the world and their relations to one another. It also raises a fundamental challenge to the idea of law conceived in terms of legal systems, probably the most pervasive concept of western legal thought for the last two centuries, now used more or less indiscriminately to describe laws of all provenances and types.

The notion of system comes from the Greek *sustema*, as assemblage or ensemble, but came into the mainstream of western intellectual life with the development of taxonomic biology in the eighteenth century, using systems as units of analysis.⁵ It received great impetus in the twentieth century with the development of informational systems theory,⁶ but in law had already come into accepted use by the eighteenth century,⁷ such that the French codifiers of 1804 felt it necessary to vigorously disclaim (“Un système! Nous n’en avons point ...”) any systemic intentions.⁸ It has obviously been closely linked to the development of exclusivist state authority (hence the disingenuous French disclaimer) and is thus a product of its times. With what is today described, however, as the decline of the state,⁹ the notion of a legal system may also suffer a corresponding decline.

for Law School Curricular Reform” (1998) 37 Colum. J. Transnat’l L. 57; Julie Bédard, “Transsystemic Teaching of Law at McGill: ‘Radical Changes, Old and New Hats’” (2001) 27 Queen’s L.J. 237; Pierre Larouche, “L’intégration, les systèmes juridiques et la formation juridique” (2001) 46 McGill L.J. 1011.

⁴ The definitions are those of *The Oxford Reference Dictionary* (Oxford: Clarendon Press, 1986).

⁵ See Carl von Linné (Linnaeus), *Systema naturae* (London: Trustees of the British Museum, 1956) (1st ed. 1735). For scientific antecedents dating from the seventeenth century, see René Sève, “Introduction” in *Le système juridique* (1986) 31 Archives de philosophie du droit 1 at 3.

⁶ See Thomas D. Barton, “*The Structure of Legal Systems*” (1992) 37 Am. J. Juris. 291 at 291-92, n. 4 (with references to Bertalanffy, Laszlo).

⁷ See Sève, “*Introduction*”, supra note 3 at 3-4.

⁸ See René Sève, “*Système et code*” in *Le système juridique*, supra note 3, 77 at 82, citing Cambacérés.

⁹ See Martin van Crefeld, *The Rise and Decline of the State* (Cambridge: Cambridge University Press, 1999); Philip Bobbitt, *The Shield of Achilles: War, Peace, and the Course of History* (New York: Alfred A. Knopf, 2002), especially at 237 and 241 (on the declining role of the state in matters of internal security and welfare), and at 337 (on the state “not withering away” but undergoing “historical change”). The designation “state”, applied to abstract political units, came into use in the first half of the seventeenth century.

Recent critiques of legal philosophers suggest that, beyond the traditional challenges offered by other ways of thinking about law, the decline of the idea of a legal system is already under way. In spite of the sophisticated character of systemic legal thought, and the genuine analytical progress which it has brought about, it has been described as not “fécond” or adequate for the legal enterprise.¹⁰ Its research programme has been described as “stagnant”;¹¹ its central concern with the concept of law has been said to be one that “really does not matter all that much”;¹² the debate on the nature of legal positivism, and hence of legal systems, has been said to involve “an increasingly narrow and arcane debate, with less and less at stake.”¹³ In France it has been observed that the practitioners of legal positivism “do not see beyond the end of their norm”¹⁴ and that there is increasing reluctance to think of law as system, as opposed to a means of dispute resolution or juxtaposition of solutions.¹⁵ A German author has found that “existing frameworks are partially outmoded because the premises of the state systems ... have been eroded.”¹⁶ The McGill Programme would thus be paralleled by major developments in the shape of institutional structures in the world and in philosophical thinking. Legal education would necessarily have to track, and even foreshadow, these developments.

The idea of transsystemic legal education is therefore a very contemporary and justifiable one. It may even be seen as innovative, given the historical western bias against teaching anything other than a one, true law (historically, either the *ius commune* or the law of the state).¹⁷ Yet what is to be taught, and how?

¹⁰ Christophe Grzegorzczak, “Évaluation critique du paradigme systémique dans la science du droit” in *Le système juridique*, supra note 3, 281 at 301.

¹¹ David Dyzenhaus, “Positivism’s Stagnant Research Programme” (2000) 20 *Oxford J. Legal Stud.* 703.

¹² Liam Murphy, “The Political Question of the Concept of Law” in Jules Coleman, ed., *Hart’s Postscript: Essays on the Postscript to the ‘Concept of Law’* (Oxford: Oxford University Press, 2001) 371 at 409 [Coleman, *Hart’s Postscript*].

¹³ Brian Z. Tamanaha, “Socio-legal Positivism and a General Jurisprudence” (2001) 21 *Oxford J. Legal Stud.* 1 at 32.

¹⁴ Gérard Timsit, *Thèmes et systèmes du droit* (Paris: Presses Universitaires de France, 1986) at 1 (“juristes qui ne voient pas plus loin que le bout de leur norme”), referring also to a phenomenon of “glaciation brutale” and an “image immobile de systèmes de droit fermés sur eux-mêmes” (ibid. at 2).

¹⁵ Bruno Oppetit, *Droit et modernité* (Paris: Presses Universitaires de France, 1998) at 113, n. 1.

¹⁶ W. Krawietz, “Paradigms, Positions and Prospects of Rationality—The Changing Foundation of Law in Institutional and Systems Theory” in Anders Bratholm et al., *Samfunn Rett Rettferdighet: Festskrift til Torstein Eckhoffs 70-Årsdag* (Oslo: Tano A/S, 1986) 452 at 453.

¹⁷ See H.P. Glenn, “Legal Education and Legal Hegemony” in *Swiss Institute of Comparative Law, Imperialism and Chauvinism in the Law* (Zurich: Schulthess, 2004) 11.

Unlike popular music and dance, which are both innovative and ephemeral (Doin' the Do, Doin' the Lawnmower, Doin' the New Low-Down), there are limits to innovation in professional instruction, and the law that is taught should in principle be founded on law that is lived and practised outside the university. Doin' the transsystemic therefore cannot involve inventing the law to be taught, nor concentrating exclusively on law known as international. It should rather involve the teaching of law which is more deeply rooted or profound than the law of legal systems, that which underlies and pervades all of them. This, it will be suggested here, involves reinvigoration of the idea of legal tradition as the necessary foundation of legal systems and as the necessary means of teaching across, through, and beyond them. Reinvigoration of the idea of legal tradition provides benefits, however, beyond those of legal education. It also allows a larger and more convincing explanation of the normativity of law and of the relations between the laws of the world.

1. The Normativity of Legal Systems and Legal Traditions

Hart famously stated that “the heart of a legal system” is to be found in “the combination of primary rules of obligation with the secondary rules of recognition, change and adjudication.”¹⁸ Secondary rules would be rules about rules,¹⁹ and they would provide a means of securing certainty, ordered change, and efficiency in law.²⁰ These propositions have been enormously influential, while provoking great controversy. They have been influential in providing analytical means of thinking about the structure of state law. They have been controversial largely because of the implication that state law can be identified through the formal operation of secondary rules, with no regard to its content. A bad or evil law is therefore possible, though it may be recognizably a bad or evil law. In the Anglo-American world, Hart has been challenged most vigorously by Ronald Dworkin, defending the existence of legal principles that provide moral justification for law,²¹ but there has been deeply rooted criticism elsewhere of law formally defined.²² This debate has been widely diffused and

¹⁸ H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Clarendon Press, 1994) at 98.

¹⁹ *Ibid.* at 94

²⁰ *Ibid.* at 94-97

²¹ Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977).

²² See Uwe Wesel, *Geschichte des Rechts: Von den Frühformen bis zum Vertrag von Maastricht* (Munich: C.H. Beck, 2001) at 47 (law for Roman jurists an art whose content was justice and morality, rather than a formal science; law, defined abstractly, separated from justice only in

represents in a sense the tip of the iceberg, the most visible and presentist dimension of the idea of a legal system. A compromise position is evident, and Hart himself in the postscript to the second edition of his *Concept of Law* acknowledged that “conformity with moral principles or substantive values” could be incorporated into secondary rules as a criterion of legal validity (“soft positivism”).²³ Legal systems could therefore exist that are based on substantive content (though this is of course contested) and the notion of a legal system can be therefore seen as sufficiently elastic to encompass the Hart-Dworkin debate or the debate between “hard” and “soft” positivists.²⁴ In what follows, an effort will be made to engage with the rest of the iceberg—the fundamental, underlying notions and normative deficiencies of the idea of a legal system. The project is not, however, one of destruction but rather of limitation or contextualization. How can one think of, and teach, an idea of legal system that is declining in significance? The process implies that legal systems continue to exist, in some measure, but that they cannot be thought of as they previously were. What replaces, if anything, the loss in explanatory power of the ideas of the state and its legal system? This requires examining a number of features of legal systems, as opposed to the larger idea of legal tradition.

A. Systems, Traditions, and “Descriptive Sociology”

the eighteenth century, followed by a process of legalization (*Verrechtlichung*) of society, as a means of domination). For a “re-presentation” of classical natural law theory, inconsistent with the use of non-evaluative identifying criteria for law, see John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980).

²³ Hart, *supra* note 16 at 251; see generally *ibid.* at 250 ff. (“soft positivism”).

²⁴ As to which see Jules Coleman, “Incorporationism, Conventionality, and the Practical Difference Thesis” in Coleman, *Hart’s Postscript*, *supra* note 10, 99 at 100, 101 [Coleman, “Incorporationism”]; Andrei Marmor, “Exclusive Legal Positivism” in Jules Coleman & Scott Shapiro, eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002) 104; Kenneth Einar Himma, “Inclusive Legal Positivism” in Coleman & Shapiro, *ibid.* at 125. The existence of legal systems has been accepted by both Dworkin and Finnis as compatible with their normative conceptions of law, though there are important differences between the two. Dworkin appears most committed to systemic concerns in stating that “[e]ach lawyer has joined the practice of law with that furniture in place and with a shared understanding that these institutions together form our legal system” (Ronald Dworkin, *Law’s Empire* (Cambridge, Mass.: Harvard University Press, 1986) at 91). Finnis accepts that “the central case of law and legal system is the law and legal system of a complete community,” yet concludes that “we must not take the pretensions of the modern state at face value” since “there are relationships between men which transcend the boundaries of all *poleis*, realms or states” (Finnis, *supra* note 20 at 148, 149). A place thus opens for tradition, though the concept of tradition defended in this paper is broader and more abstract than the particular tradition that is the object of “re-presentation” by Finnis.

Hart stated that the lawyer will regard his Concept of Law as an “essay in analytical jurisprudence” but that it “may also be regarded as an essay in descriptive sociology.”²⁵ The theory of legal systems would thus not be normative or evaluative but would rather be analytical and descriptive. This distinction is fundamental to the theory, since if law is to be identified by its formal characteristics (derived from adherence to secondary rules), it is important to avoid not only moral or normative definitions of legal content, but also moral or normative definitions of a legal system. There could be slippage from one to the other. A legal system would simply exist as an analytical or described phenomenon. The presumption of the existence of such systems is explicitly stated by Hart later in his book, when he states that the purpose of the book is not to provide a definition of law, but “to advance legal theory by providing an improved analysis of the distinctive structure of a municipal legal system ...”²⁶

There are at least three problems with this position. The first has been the object of comment and is to the effect that Hart inevitably slips from pure description to normative argument in his presentation. In stating that a legal system eliminates “defects” of uncertainty, stasis and inefficiency in “primitive communities”,²⁷ Hart would be necessarily arguing for a superior type of law produced by a legal system.²⁸ In arguing that users of the rules of a legal system adopt an “internal point of view” according to which the rules are guides to the conduct of social life,²⁹ Hart would be adopting a normative view both of persons and of law, as fulfilling a function of guidance through the providing of reasons.³⁰

²⁵ Hart, *supra* note 16 at v. On this statement, see William Twining, *Globalisation and Legal Theory* (London: Butterworths, 2000) at 36 (“This statement has provoked hoots of derision from the sociologically inclined, but little analysis”).

²⁶ Hart, *supra* note 16 at 17.

²⁷ *Ibid.* at 91-94.

²⁸ See Jeremy Waldron, “Normative (or Ethical) Positivism” in Coleman, Hart’s Postscript, *supra* note 10, 410 at 430. Given Hart’s view that his concept of law eliminates specific “defects” of pre-legal societies, and is therefore superior in nature, it does not appear possible to treat Hart’s use of the word “primitive” as simply “quaint” and suggesting “no particular interpretation of human flourishing,” as proposed in Leighton Moore, “Description and Analysis in *The Concept of Law: A Response to Stephen Perry*” (2002) 8 *Legal Theory* 91 at 111.

²⁹ Hart, *supra* note 16 at 90.

³⁰ See Stephen R. Perry, “Holmes versus Hart: The Bad Man in Legal Theory” in Steven J. Burton, ed., *The Path of the Law and Its Influence: The Legacy of Oliver Wendell Holmes, Jr.* (Cambridge: Cambridge University Press, 2000) 158 at 169; Stephen R. Perry, “Hart’s Methodological Positivism” (1998) 4 *Legal Theory* 427, especially at 438-39. Perry finds

These claims of the actually normative character of Hart's work are disputed by some, who claim, in defence of Hart, that the conceptual or descriptive must precede the normative, and that something must be capable of existence before it can be normatively defended.³¹ It would be possible to be descriptive or analytical. Here the second problem with Hart's position arises, which is that even if one accepts that Hart's argument is as analytical and descriptive as it is possible to be, the assertion of an allegedly true description is itself a normative proposition. There has been debate amongst positivists (Austin, Kelsen, Hart, most notably) as to the nature of positive law and a legal system. These are competing descriptions, and we have no way of ascertaining that any one of them is truly descriptive—that is, corresponding with a given, true nature of a legal system. Neil MacCormick has said that “[l]egal systems are not solid and sensible entities. They are thought-objects, products of particular discourses rather than presuppositions of them.”³² There are thus chosen claims of description, each one of which may exhibit, as MacCormick states, “a certain persuasiveness as a descriptive account.”³³ The legal system would thus be an “essentially contested concept,” understandable only in terms of its different historical understandings.³⁴ In France, Michel Villey has written that “le juriste défend une cause. Décrire pour lui c'est choisir.”³⁵

normativity in what he describes as Hart's “conceptual analysis” though a “descriptive-explanatory method”, which can also be found in Hart, would be merely “evaluative”. Yet both entail critical judgment in choosing amongst constructed models of law.

³¹ See Coleman, “Incorporationism”, *supra* note 22 at 110, 111; and see Jules L. Coleman, *Markets, Morals and the Law* (Cambridge: Cambridge University Press, 1988) at 11 (“the separability thesis can stand on its own”).

³² Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999) at 113.

³³ MacCormick, *ibid.* at 78. See also Sean Coyle, “Hart, Raz and the Concept of a Legal System” (2002) 21 *Law & Phil.* 275 at 282 (“an uncontroversial theoretical characterization of a (domestic) legal system is precisely what we do not have: Raz's momentary orders, Hart's union of primary and secondary rules and MacCormick's institutional facts are all attempts to bring a single theoretical framework to bear upon the intuitive conception we have of law ...”); Gérard Timsit, “Système” in Denis Alland and Stéphane Rials, eds., *Dictionnaire de la culture juridique* (Paris: Presses Universitaires de France, 2003) at 1462 (frequency of use of the concept would be equalled only by the disparity of meanings attributed to it).

³⁴ For the “essentially contested concept”, see Jeremy Waldron, “Is the Rule of Law an Essentially Contested Concept (in Florida?)” (2002) 21 *Law & Phil.* 137, notably at 148ff. with references; William E. Connolly, *The Terms of Political Discourse*, 2d ed. (Princeton: Princeton University Press, 1983), especially at 22-23 (essentially contested concepts are typically “appraisive”; designation acts both to describe and to ascribe a value; to describe is always to characterize a situation from the vantage point of certain interests, purposes, or standards).

³⁵ Michel Villey, *Leçons d'histoire de la philosophie du droit*, rev. ed. (Paris: Dalloz, 1962) at 292. I am grateful to Jean-François Gaudreault-DesBiens for this reference, in his “Identitarisation du droit et perspectivisme épistémologique: Quelques jalons pour une saisie juridique complexe de l'identitaire” (2000) 13 *Can. J. L. & Jur.* 33 at n. 1. See also A.W.B. Simpson, “The Common Law and Legal Theory” in A.W.B. Simpson, ed., *Oxford Essays in Jurisprudence*, 2d series

The final problem with Hart's effort to avoid the normative in describing legal systems has received less attention from legal philosophers. It concerns the internal characteristics of a legal system, not in terms of any moral content of its rules, but in terms of that which a system necessarily entails in terms of coherence, consistency, and completeness. Hart does not appear to discuss this, yet as a problem it has received enormous attention from those responsible in some way for the functioning of legal systems. There has been perhaps more attention in civil law jurisdictions than in common law ones, but it has been stated that "the deductive character of a formal system constitutes its primary constitutive characteristic."³⁶ Others emphasize consistency and a lack of internal contradictions.³⁷ Laws would therefore be non-systematic because of their refusal to adhere to formal criteria of internal logic,³⁸ which is not one of Hart's conditions. The line between non-system and system would be always unclear since there are infinite degrees of "systematic treatment".³⁹ Lawyers would thus exhibit a disposition "to regard inconsistency and insufficient coherence as defects of [the] system."⁴⁰ The idea of a legal system would therefore be inherently normative, in terms of what a system has to be.

(Oxford: Clarendon Press, 1973) 77 at 80 ("[t]hrough purporting to be an observation, [legal positivism] is best viewed as a dogma"); and for a contemporary philosophical view that "evaluation and description are interwoven and interdependent," see Hilary Putnam, *The Collapse of the Fact/Value Dichotomy* (Cambridge, Mass.: Harvard University Press, 2002) at 3 and 63 ("the terms one uses even in *description* in history and sociology and the other social sciences are invariably ethically coloured ...").

³⁶ Michel van de Kerchove & François Ost, *Le système juridique entre ordre et désordre* (Paris: Presses Universitaires de France, 1988) at 67 ("le caractère *déductif* d'un système formel constitue son premier trait constitutif"). The common law is increasingly sympathetic to this view. See Peter Birks, "Introduction" in Peter Birks, ed., *English Private Law*, vol. 1 (Oxford: Oxford University Press, 2000) xxxv at li ("the taxonomic debate among scholars has not been sufficiently vigorous. ... [I]f it turns its back on that debate, the common law will dissolve into incoherence").

³⁷ Ricardo Caracciolo, *La noción de sistema en la teoría del derecho*, 2d ed. (Mexico: Fontamara, 1999) at 9.

³⁸ See, for the non-systemic character of Roman law, Jean Gaudemet, "Tentatives de systématisation du droit à Rome" in *Le système juridique*, *supra* note 3, 11 at 28; A. Cock Arango, "El Derecho Romano se formó a base de realidades objetivas no por teorías o sistemas" in *Studi in onore di Vincenzo Arangio-Ruiz* (Naples: Jovene, 1953) at 31.

³⁹ T. Viehweg, *Topics and Law*, trans. by W. Cole Durham, Jr. (Frankfurt: Peter Lang, 1993) at 54; and see, for the "systematizing thrust" of the shift in language from the storytelling ("If a man steals a sheep ...") to the categorical ("Whoever steals a sheep ..."), David Daube, *Ancient Jewish Law: Three Inaugural Lectures* (Leiden: E.J. Brill, 1981) at 72-73.

⁴⁰ Aleksander Peczenik, "Unity of the Legal System" in Wermer Krawietz, Neil MacCormick & Georg Henrik von Wright, eds., *Prescriptive Formality and Normative Rationality in Modern Legal Systems: Festschrift for Robert S. Summers* (Berlin: Duncker & Humblot, 1994) 71 at 75; and see van de Kerchove & Ost, *supra* note 34 at 28 for the idea that systematization necessarily implies elimination of certain faults of the system, such as redundancy or an excess of casuistry.

This may perhaps not be morality, but it does imply evaluation of the content of the system.

There is therefore vigorous debate on the first claim of Hart that he is engaged in analysis or descriptive sociology. In the result, however, the reasons for the existence of a legal system are not a primary concern or product of the debate. The claim to description or analysis has shifted attention, even though the claim is an inherently normative one. This has important consequences for the ongoing influence of the idea of a legal system in the world, which becomes evident in considering, or attempting to describe, a legal tradition.

There is a tradition in the western world of being untraditional.⁴¹ This is sometimes referred to as modernism and sometimes as postmodernism, but its origins would lie well back in time, probably to the Greek mathematicians who thought in terms of numerical discontinuity. They accepted the existence of integers and fractions clearly distinct from one another, but refused to contemplate real numbers, expressed in decimals, or irrational numbers, such as the square root of 2. Real or irrational numbers would extend infinitely and destroy the sharp edges necessary for calculation.⁴² We owe the notion of incommensurability to this type of thinking.

Geometric proportions that could not be expressed in terms of whole numbers, such as those of the diameter and side of a regular pentagon, would be incommensurable, lacking a common (crude) means of measure.⁴³ The autonomous number is the predecessor of the autonomous individual; incommensurability is the rejection of interdependence. The independent, modern individual is thus free of the attachments—to others, to the environment, to the past—that would characterize other, contextual, “traditional” societies. Yet the concept of the independent, modern individual is not invented afresh by each one of its millions of contemporary instantiations. There is reliance, implicit or explicit, on the teaching that has gone before, and particularly that which teaches the concepts of modernity and postmodernity. This teaching is today unavoidable in the western world. Most people simply

⁴¹ See Harold Rosenberg, *The Tradition of the New* (New York: Horizon Press, 1959).

⁴² See William R. Everdell, *The First Moderns: Profiles in the Origins of Twentieth-Century Thought* (Chicago: University of Chicago Press, 1997) notably at 33-35, 351ff.

⁴³ See Ruth Chang, “Introduction” in Ruth Chang, ed., *Incommensurability, Incomparability, and Practical Reason* (Cambridge, Mass.: Harvard University Press, 1997) at 1; Victor J. Katz, *A History of Mathematics: An Introduction*, 2d ed. (Reading, Mass.: Addison-Wesley, 1998) at 50, 51.

absorb it and act upon it. It teaches that they needn't ask where it came from. Traditional western thinking would thus be locked in an antagonistic relationship with the concept of tradition. It rejects it, but cannot escape it. So there is a tradition of modernity, characterized by its ongoing denial of its own historical roots.⁴⁴ There are reasons moreover for this denial by western thought of its own past. For Edward Shils, the societies of the ancien régime were "repugnant to rationalists" and the best means of their destruction, as traditional societies, was through destruction of the idea of tradition itself.⁴⁵ Other traditions, less conflicted with themselves, would be more reconciled to their own traditional character. Yet if tradition is to be urged as a means of supplanting the idea of a legal system in some measure, or providing support for it, this requires consideration of the nature of tradition, what it is.

The word "tradition" comes to us from the Latin "traditio", meaning transfer or transmission or conveyance. The concept has been influenced by the word, and some have maintained that tradition is the process of communication of knowledge, doctrine, or technique.⁴⁶ Others have said that tradition is an indefinite series of repetitions of an action,⁴⁷ though this would appear to conflate tradition with reaction to it. In law, however, it has been said that tradition, and law itself, is "something which has come down to us from the past."⁴⁸ This would capture the idea of tradition as information and would allow us to make some analytically useful distinctions in understanding the functioning of tradition.

If tradition is seen as information, it must be the object of transmission or traditio if it is to continue to function as an operative or living tradition. Tradition would be thus distinct from the process of its own transmission and maintenance. It would be then for us to decide what to do in particular situations, faced with the teaching of tradition and its availability to us, through transmission. In the absence of transmission, or in the absence of our acting in conformity with it, it could not be said that a tradition was a living tradition. It

⁴⁴ See Sang-Ki Kim, "Confucian Capitalism: Recycling Traditions" (1992-93) 94 *Telos* 18 at 19.

⁴⁵ Edward Shils, *Tradition* (Chicago: University of Chicago Press, 1981) at 6.

⁴⁶ See Romila Thapar, "Tradition" in Romila Thapar, *Cultural Transaction and Early India: Tradition and Patronage* (Delhi: Oxford University Press, 1994) 7 at 8.

⁴⁷ See J.G.A. Pocock, "Time, Institutions and Action: An Essay on Traditions and the Understanding" in Preston King & B. C. Parekh, eds., *Politics and Experience: Essays Presented to Professor Michael Oakeshott* (London: Cambridge University Press, 1968) 209 at 212.

⁴⁸ A.W.B. Simpson, *Invitation to Law* (Oxford: Basil Blackwell, 1988) at 23.

would be dead information, either because it was buried or locked up or forgotten, as with tablets covered over with sand or as with languages dead and forgotten, or because it no longer attracted adherence. Many traditions have thus died, though some may be in states of suspended animation, as where their information is still available and may one day begin again to attract adherence. This would be the process of returning to the sources, or origins. It is vital to dispossessed aboriginal peoples, among others.⁴⁹

How can a living tradition be analyzed or described? There must first be information derived from what we know as the past. Tradition itself entails no specific requirement as to how old the information must be in order to be recognized as traditional. This will depend on the tradition, and some traditions have been successful in preserving information of very great age. Information that is very recent may also be important in the functioning of a tradition, either because it confirms or explicates older, more general information, or because it may even be the information that will generate, over time, a new tradition. In the latter case, only time will allow us to distinguish between a genuine tradition and simple movements, fads or fashions. Tradition is thus necessarily diachronic in character. It is very different from the idea of a “momentary” legal system, the law that would be in force at a given time.⁵⁰ Understanding tradition would be like looking at a film; understanding a momentary legal system would be like looking at a single frame of a film.

How does the transmission or traditio of information occur? Most of the information generated by the world has disappeared forever, victim to the irresistible forces of entropy. In Robert Altman’s film *Cookie’s Fortune* (1999), there is a plaque in a very famous village that reads, sarcastically, “On this site, in 1897, nothing happened.” Of course, something did happen on that site in 1897, but it was not captured. We cannot ourselves remember what we did last Tuesday. Students take notes of only parts of lectures. Some of the information lost is noise that no one will miss. Other lost information is valuable and its loss is much regretted. Some information is in between, as with the lives of ordinary people, which social historians must then painfully attempt to reconstruct. So

⁴⁹ For a systemic view, however, of the effect of discontinuity (extinguishment of title), see *Yorta Yorta Aboriginal Community v. Victoria* (2002), 194 A.L.R. 538, [2002] HCA 58.

⁵⁰ See Joseph Raz, *The Concept of a Legal System*, 2d ed. (Oxford: Clarendon Press, 1980) at 34 [Raz, *System*]; Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) at 81 [Raz, *Authority*].

the first element of traditio is necessarily found in the capture of information. It is capture that allows us to retain and control information, and this may eventually allow others to access it. We capture information through language that is stored by memory, by writing on objects or in books, by codes stored through magnetic means on physical supports. Much can be said of each of these different means of capture.⁵¹ They are all subject to much refinement—whose words shall be memorized, what are the techniques of memory, what shall be written down and by whom, how and by what means do we ensure access to codified language? Traditions differ in their responses to these questions, yet as traditions they must necessarily commit to particular means of capture. Otherwise their information is lost and they will die.

Given captured information, available to us from the past, we must still have means of accessing and using it. This may require special education and, in the case of magnetically stored information, special equipment. We may need machines to read for us. Accessing information is however distinct from its use, and there may be special qualifications or special techniques for use, as where legal professionals, and only legal professionals, are permitted to engage in debate as to the true meaning of texts, before a decision maker. These are very much characteristics of a living tradition, with the result that present decisions made, in reliance on the information of the tradition, become themselves subject to it. Capture then again takes place, of present adherence to the tradition. The mass of information of the tradition is then enhanced in terms both of its size and of its legitimacy. A living tradition thus functions by way of a continual reflexive process, through looping or feedback.

It is evident that the information of a tradition must contain both substantive or primary information, that which the tradition is meant to provide, and also information concerning the survival of the tradition. This latter information deals with the primary information to be captured, its means of capture, and the means of accessing and using it. It could be qualified as secondary information, though this somehow undermines its importance. So it becomes evident that tradition, as a concept, is as analytically complex as Hart's

⁵¹ See H. Patrick Glenn, *Legal Traditions of the World*, 2d ed. (Oxford: Oxford University Press, 2004) at 7-11 [Glenn, *Legal Traditions*]; and for law resting on "mountains of inherited tradition, preserved, referred and deferred to by highly developed institutions and practices of tradition-maintenance," see Martin Krygier, "Law as Tradition" (1986) 5 *Law & Phil.* 237 at 256.

structure of primary and secondary rules and is even larger and more encompassing. Hart saw the law of “primitive” communities as static in the absence of secondary rules. Secondary rules, moreover, could only designate written primary rules.⁵² Yet we now see that such different traditions necessarily have “secondary” mechanisms, though they may be different in character in refusing, for example, written forms of capture. Traditions that have endured over time are thus necessarily complex in their structures, though the structures may not be institutionalized in form. To what extent is the preceding discussion an analytical and descriptive statement of the notion of tradition? There are certainly analytical and descriptive elements of it, as there are analytical and descriptive elements of the notion of a legal system.⁵³ Yet, as in Hart’s description, there are evaluative or normative elements in the description. The diachronic nature of tradition would allow better understanding than the synchronic nature of momentary legal systems. A living tradition would be better, or more useful, than a dead tradition. The concept of tradition would be broader, more inclusive, and more conciliatory than the concept of legal systems. Tradition conceived as information would be more persuasive than tradition conceived as traditio or repetition. More generally, as we will see, tradition is a highly normative concept.⁵⁴ So tradition can be analytically and descriptively presented, but it is, more recognizably than the notion of a legal system, an argument. There is no need to speak of tradition in purely descriptive terms. It contains arguments, and can be seen as argument, extended over time.⁵⁵ Tradition thus provides an argument for legal systems (as well as for other types of law), and teaching this allows us to not simply describe legal systems, but to better understand their historic and present status. Since Hart claimed to be descriptive, however, it followed that there had to be a statement of the conditions of existence of a legal system.

B. The Existence of a Legal System

⁵² For the restrictive character of Hart’s rules, see text accompanying notes 119-21.

⁵³ See *supra* text accompanying notes 23-38.

⁵⁴ See discussion under heading I.C, below.

⁵⁵ This is, of course, the idea of tradition defended by Alasdair C. MacIntyre in *Whose Justice? Which Rationality?* (Notre Dame: University of Notre Dame Press, 1988), notably at 8.

Following a line of thought derived most immediately from Bentham, Austin, and Kelsen,⁵⁶ Hart looked to the social fact of obedience on the part of the population as the essential test of existence of a system. He stated this generally to the effect that obedience on the part of the “bulk of the population” is “all the evidence we need ...”⁵⁷ Yet, refining the test to correspond to his notion of primary and secondary rules, he went on to state that such evidence is not all that is needed to describe the relationships to law involved in the existence of a legal system. Adequate description also involved a statement of the relevant relationship of the officials of the system to the secondary rules that concern them as officials.⁵⁸ Hence he eventually concluded that there are two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are valid according to the system’s ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.⁵⁹ We will return to the question of why such rules are or should be followed, and whether such questions are important. The basic idea, for the moment, would be the “general habit of obedience” that underlies a legal system.⁶⁰

As there are problems with the notion of description in general, however, there are also problems with this description of the conditions of existence of a legal system. The first is that which we have already encountered, to the effect that all efforts of description of a legal system are inherently normative. Positivists thus allow us to say that a system is immoral but not that it is not obeyed, since it would then not be a legal system. This would be contrary to the spirit of positivism, for which the existence of law is one thing and its function is another.⁶¹ The more truly positivist position would abandon the condition of efficacy, and this would allow us to conclude that legal systems can exist which are ineffective, corrupt, and even rapacious.⁶² This too, however, is a normative

⁵⁶ See, for the evolution, Raz, *System*, *supra* note 48 at 6-7, 93.

⁵⁷ Hart, *supra* note 16 at 114.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.* at 116.

⁶⁰ *Ibid.* at 24, citing Austin.

⁶¹ See Tamanaha, *supra* note 11 at 11-12.

⁶² See Tamanaha, *ibid.* at 12-13, 19-20.

position, standing most sharply in contrast to non-written or religious laws, the necessary content of which is incompatible with corruption or rapacious conduct. Many will prefer the implicit normativity of Hart to the implicit normativity of such unstructured, conventionalist positivism. Neither, however, can be taken as simple description, and neither provides reasons for their implicit normativity.

The second problem is one to which Hart refers, though only to dismiss it summarily. He states that the question of how many people must obey, and how often and for how long, “are not definite matters; they need not worry us more than the question as to the number of hairs a man may have and still be bald.”⁶³ The existence of a rule would therefore be compatible with “the existence of a minority who not only break the rule but refuse to look upon it as a standard either for themselves or others.”⁶⁴ Hart cannot have been ignorant that his statement of the self-evident character of baldness is formulated in terms reminiscent of the sorites paradox of Greek philosophy. If you remove a grain of sand at a time from a heap of sand, at what point do you no longer have a heap? The point of the discussion relates not to baldness, or sand, but to the justification of binary logic and the Aristotelian rule of the excluded middle. Must we choose between baldness and non-baldness, a heap or a non-heap, or are there gradations of each, with a middle point between them, such that the inherent notions or sets are imprecise? Contemporary fuzzy or multivalent logic argues for fuzzy sets and the arbitrariness of the boundaries of fixed entities or concepts.⁶⁵ It is a very serious debate, but Hart clearly felt sufficiently sure of his binary logic, and the visibility of a “general habit of obedience”, to dismiss problems of degree as inconsequential. He later spoke of the pathology of legal systems, as in cases of revolution or enemy occupation or banditry, but the uncertainty of such situations were of short duration and therefore were not incompatible with the existence of a legal system.⁶⁶ Today, however, the existence of legal systems in the world is in many cases very questionable, precisely because of doubt as to levels of obedience. What level of corruption in a judiciary is incompatible with the

⁶³ Hart, *supra* note 16 at 56.

⁶⁴ *Ibid.*

⁶⁵ See Bart Kosko, *Fuzzy Thinking: The New Science of Fuzzy Logic* (New York: Hyperion, 1993);

⁶⁶ Hart, *supra* note 16 at 118.

existence of an efficacious legal system? It is today said that corruption of the judiciary in the Commonwealth, where there is a strong tradition of an independent judiciary, is increasing.⁶⁷ Neither Hart, nor any other positivist legal theorist, has provided the means of knowing, in terms of efficacy, whether a given legal system exists or not. Joseph Raz has given most consideration to the question, and has concluded that “no method of computation can make much sense.”⁶⁸ We are left with no reasons for knowing why a legal system should exist, and no effective means of knowing when a legal system exists. This in itself will have consequences for the phenomenon of obedience.

The existence of a tradition can also be seen in certain circumstances as a positive phenomenon. Since tradition is information, the disappearance of the information of a tradition would necessarily mean that the tradition no longer exists. This might be demonstrated by showing, for example, in the case of a written tradition, that all of the books of the tradition had been burned, or been eaten by moths. Yet tradition need not be thought of as a positive phenomenon, nor as either existing or not existing.

Tradition exists as other than a positive phenomenon since information need not be identified with its physical means of support. It may not even have such a support, as in the case of oral tradition. Or it can survive after destruction of physical means of support, if the memory of its adherents is up to the task. The ideas of a tradition thus have a life of their own and will lead the same wraith-like existence as do all ideas.⁶⁹

⁶⁷ See Nihal Jayawickrama, “Combatting Corruption in the Judiciary: Need for New Strategies” *The Commonwealth Lawyer* 10:2 (2001) 23, citing the Centre for the Independence of Judges and Lawyers, associated with the International Commission of Jurists in Geneva, that out of 48 countries covered in its annual report for 1999, judicial corruption was pervasive in 30. See also the Transparency International Corruption Perceptions Index 2004 (available online: Transparency International <www.transparency.de>), indicating that on a scale of 1-10, only 39 countries of 145 listed obtained a score of 5 or higher.

⁶⁸ Raz, *System*, *supra* note 48 at 203 (asking how to calculate the effect of multiple violations of speeding laws, or the number of opportunities to obey the law). See also Raz, *Authority*, *supra* note 48 at 42 (“[e]fficacy is the least controversial of these conditions. Oddly enough it is also the least studied and least understood. Perhaps there is not much which legal philosophy can contribute in this respect”); and see Coyle, *supra* note 31 at 282, for rejection of thinking of laws “more or less” as legal systems in the absence of an uncontroversial theoretical characterization of a legal system.

⁶⁹ It is true that some physical scientists would see “memes”, or units of information, as comparable to genes in terms of their capacity of survival. Memes would also be physical in character, since they can exist only on physical means of support or in brains. In brains they would be self-replicating structures in the nervous system. See Richard Dawkins, *The Selfish Gene* (Oxford: Oxford University Press, 1976) at 206-207. This view raises large questions as to the nature of the human mind. We are, moreover, far removed from the “social facts” that would control the existence of a legal system. Other scientific explanations allow for ongoing

This is how there can be traditions in states of suspended animation. No one might presently adhere to them, but present inefficacy cannot be taken as death, or inexistence. If the information is available, adherence remains possible and some languages, for example, have been the objects of major efforts of revivification. A tradition may therefore exist, even if we have presently lost all of its particular manifestations. This is an advantage of the accommodating nature of the concept of tradition. It is also a reason for speaking of tradition in terms of information and not in terms of knowledge.

Moreover, the nature of traditions means that we are not faced with a binary choice between their existence or non-existence. A particular tradition may fail and die, but the result is not an absence of tradition. Another tradition will take its place. Anthony Kronman has written that it is “[r]emembrance and fame, the work of conservation, the linkage of the generations” that define “a uniquely human world in which neither gods or animals appear.”⁷⁰ Being human means living in a world of communicable and communicated non-genetic information, living within a tradition or traditions. Whether a particular tradition is a living one, moreover, is a matter of degree. There are traditions that are losing their grip, others that are in ascendancy. So their existence is more a matter of influence than of verifiable or categorical data. This means that the great divergencies in efficacy of the laws of the world do not have to be somehow crammed into the categories of existing or non-existing legal systems. There can be healthy and unhealthy legal systems, ones that satisfy more or less the citizen’s expectation of impartial justice. Very refined gradations are here possible, as degrees of perception of corruption can be measured on a scale from 1 to 10.⁷¹ It is appropriate to speak of the “high degree of effectiveness of oral legal traditions.”⁷² Positivism thus would rely exclusively on the notion of a legal system but would be unable to tell us why legal systems exist or when they exist.⁷³ Tradition would tell us why they exist and would provide some measure of understanding of the extent of their

existence of beliefs and memories as “collections of information ... residing in patterns of activity and structure in the brain” and there being the object of computational-like activity: Steven Pinker, *The Blank Slate: The Modern Denial of Human Nature* (London: Penguin Books, 2002) at 32.

⁷⁰ Anthony T. Kronman, “Precedent and Tradition” (1990) 99 Yale L.J. 1029 at 1065.

⁷¹ See *supra* note 65.

⁷² Walter O. Weyrauch & Maureen Anne Bell, “Autonomous Lawmaking: The Call of the ‘Gypsies’” in Walter O. Weyrauch, ed., *Gypsy Law: Romani Legal Traditions and Culture* (Berkeley: University of California Press, 2001) at 62 [emphasis added].

existence. This would flow from the normativity of tradition, and this too can and should be taught in contemporary legal education.

C. An Obligation to Obey the Law?

In the common law tradition there has been much talk, since the early nineteenth century, of “binding law”.⁷⁴ The expression is closely linked to the nineteenth-century emergence of *stare decisis*. Most frequently, first-instance judges have been said to be “bound” by decisions of the (new) courts of appeal. The expression was therefore extremely useful in articulating relations between the units of the newly hierarchical common law court system. It also appeared to fit nicely with the Austinian command theory, higher courts issuing commands in the form of formal orders and lower courts being obliged (somehow) to follow the commands. The expression remains profoundly rooted in common law language and is a good example of how simple ideas prevail over complex ones. The idea of “binding law” has therefore been successful over some time. It is, however, incompatible with the idea of positive law and a legal system, as these concepts are explained by legal theory, and may now be reaching the end of its career.⁷⁵

How can a legal system create “binding law”? There are two dimensions to the problem, which correspond to Hart’s primary and secondary rules. How can primary rules be considered binding, for the population at large? How can

⁷³ See text accompanying note 66. On the tendency of legal philosophers to “cling dogmatically to classificatory ideas,” rejecting analysis of legal systems as matters of degree, see Klaus Füsser, “Farewell to ‘Legal Positivism’: The Separation Thesis Unravelling” in Robert P. George, *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Clarendon Press, 1996) 119 at 124, and at 155, n. 17 (Dworkin opposing Fuller’s non-classificatory proposals); and see, for rejection of “more or less” reasoning about legal systems not on the basis of classificatory ideas but on their absence, or at least the absence of a non-controversial characterization of a legal system, Coyle, *supra* note 31 at 282. This view, however, would ignore the possibility of conceiving of Hart’s view of a system as itself a tradition, capable of being more or less fulfilled in given cases, as to which see text accompanying note 147. Compare *Finnis*, *supra* note 20 at 280 (“It is a philosophical mistake to declare, in discourse of the latter kinds, that a social order or set of concepts must either be law or not be law, be legal or not legal”).

⁷⁴ For the emergence of the expression, see Jim Evans, “Change in the Doctrine of Precedent during the Nineteenth Century” in Laurence Goldstein, ed., *Precedent in Law* (Oxford: Clarendon Press, 1987) 35 at 68.

⁷⁵ See Leslie Green, *The Authority of the State* (Oxford: Clarendon, 1988) at 247 (idea of a general obligation to obey law eventually to lose “any explanatory or ideological value it may once have had”). Religion too was initially conceived as “binding”. This is the etymological origin of the word, derived from the Latin *ligare*, to bind. In many instances today, however, the word no longer fulfills its mission.

secondary rules be considered binding, for the legal officials charged with their application?

Hart is very clear that primary rules are directed to citizens at large and not simply to legal officials. He states that citizens are “expected without the aid of intervention of officials to understand the rules and to see that the rules apply to them and to conform to them.”⁷⁶ Rules may even be “conceived and spoken of as imposing obligations,”⁷⁷ and Hart recognizes that it is possible that private citizens adopt an “internal” point of view of acceptance of the rules.⁷⁸ It eventually becomes clear, however, that this “internal” point of view on the part of the citizenry is not fundamental to the existence of a legal system. What is essential is the “social fact” of obedience and Hart acknowledges that citizens may “obey [the law] for a variety of different reasons,” including the consequences of disobedience.⁷⁹ The test would be empirical and not normative. People may obey for many reasons; what is essential is their obedience; there is nothing in the law or in the existence of a legal system that in itself would oblige. Facts do not give rise to obligations.

The absence of a general obligation to obey the law in legal systems has become much clearer in subsequent positivist legal writing. Joseph Raz is very clear that there may be “prudential reasons” for obedience to the law but that these “do not provide an adequate foundation for an obligation to obey the law,” and this even in a “good” legal system.⁸⁰ Raz also allows that “respect” for the law may be a reason for obeying it and that this may be expressed as an obligation. Respect would be a source of obligation.⁸¹ Yet here again the test is empirical. Respect may or may not exist; we may speak of obligation only if it does exist. Otherwise there is no obligation to obey. Others acknowledge an

⁷⁶ Hart, *supra* note 16 at 38-39.

⁷⁷ *Ibid.* at 86.

⁷⁸ *Ibid.* at 90 (an “external” point of view cannot reproduce the way in which rules function as rules in the lives of those normally in the majority. “These are the officials, lawyers, or private persons who use them ...”).

⁷⁹ *Ibid.* at 112, 114; and see Caracciolo, *supra* note 35 at 72 (identifying fear or inertia as grounds of obedience). Kelsen too speaks of an obligation to obey the law, but “a legal obligation is nothing else but the positive legal norm which commands the behavior of an individual by attaching a sanction to the opposite behavior ... [T]he concept of legal obligation is determined. It is fundamentally connected with that of the sanction”; the necessary “effectiveness” of the system is thus dependent on obedience, as with Hart: Hans Kelsen, *Pure Theory of Law*, trans. by Max Knight (Berkeley: University of California Press, 1967) at 116.

⁸⁰ Raz, *Authority*, *supra* note 48 at 242, 244-45; and see Matthew H. Kramer, *In Defense of Legal Positivism: Law Without Trimmings* (Oxford: Oxford University Press, 1999) at 256, 266.

⁸¹ Raz, *Authority*, *supra* note 48 at 250, 259-60.

obligation to obey specific laws, because of their moral content, while still denying a general obligation to obey the law.⁸² Nor would consensual or utilitarian considerations be adequate to found a general obligation of obedience, since these criteria yield to empirical circumstances and consequences.⁸³

Is the situation different for officials and judges charged with application of the law? Their perspective is different from that of the citizen, according to Hart, since it is a condition of the existence of a legal system that its secondary rules are “effectively accepted as common public standards of official behaviour by its officials.”⁸⁴ Officials, unlike citizens, must adopt an “internal” point of view with respect to the rules of the system, since otherwise the system, inevitably lacking efficacy, cannot exist. Again, however, Hart does not provide a reason for such assumptions of obligation. There is thus an “explanation of the internal point of view, without adoption of it.”⁸⁵ There is a system if there is obligation and there is obligation if there is a system. The system therefore does not impose obligation on its judges, though they must assume obligation. The essential liberty of the judicial function is confirmed by positivist acknowledgment that the power of distinguishing is inconsistent with a notion of systemic judicial obligation.⁸⁶ Legal systems therefore, perhaps surprisingly, do not provide any binding obligation to obey the law. This raises large questions as to whether this position is compatible with law as it is generally understood.

Traditions exist in the measure that the information they contain can be said to exist. It must be somehow accessible. What is the nature of this information? David Novak has said that “[t]hinking within the context of a tradition is always an essentially normative pursuit, whether it advocates ‘do this’ practically or ‘say this’ theoretically.”⁸⁷ Why is a tradition “essentially normative”? It has to

⁸² See M.B.E. Smith, “Is There a Prima Facie Obligation to Obey the Law?” (1973) 82 Yale L.J. 950 at 950; Kenneth Einar Himma, “Law’s Claim of Legitimate Authority” in Coleman, *Hart’s Postscript*, *supra* note 10, 271 at 288-289; Green, *supra* note 73.

⁸³ See Smith, *supra* note 80 at 955, 972; Richard A. Wasserstrom, “The Obligation to Obey the Law” in Robert S. Summers, ed., *Essays in Legal Philosophy* (Oxford: Basil Blackwell, 1968) 274 at 291, 296.

⁸⁴ Hart, *supra* note 16 at 116.

⁸⁵ van de Kerchove & Ost, *supra* note 34 at 29.

⁸⁶ See Hart, *supra* note 16 at 135 (on “creative or legislative activity” of courts by “narrowing” a rule or “widening” it); Raz, *Authority*, *supra* note 48 at 186 (“given the general power to distinguish, ... precedents are never binding for the courts are always free to change them”).

⁸⁷ David Novak, *Natural Law in Judaism* (Cambridge: Cambridge University Press, 1998) at 192.

do with the nature of a tradition. There have to be reasons for the capture of information. It may be the case that the information is seen as revelatory, as in the case of religious traditions and religious law. It may be the case, however, that the information is simply seen as useful, or interesting, or perhaps beautiful. Capture is an indication of the value of the information captured. This is so whether the information is explicitly normative, as in the case of legislative acts or judicial decisions, or not explicitly normative, as where objects of curiosity or beauty are retained. Even here, however, there is normativity, since the object will teach that which underlies its interest, or demonstrate that which is aesthetically good. Of course it is true that much junk is retained or captured, whether in terms of pure information or in terms of material objects. So it is not simply the initial capture or retention that provides the normativity of tradition, though this is of fundamental importance. It is also the duration of the capture that provides much of the normativity or authoritativeness of the tradition. Junk does not last. That which does last demonstrates its value with each passing day. Its initial value is enhanced through the growth in its recognition, through time. Duration and longevity can become the most obvious means of proof of normative value.

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 no guaranteed sanctions that will punish our failure to do so. So the world of tradition is an inherently normative world. There are no brute facts, social or otherwise.

There may, however, be a notion of fact within tradition if there is a particular tradition that tells us to think in terms of fact. We know this is the case in western tradition since the construction of the notion of fact, from the legal “factum”, in the seventeenth century.⁸⁸ Within this tradition it is thus

⁸⁸ See Barbara Shapiro, “The Concept ‘Fact’: Legal Origins and Cultural Diffusion” (1994) 26 *Albion* 1, reprinted in David Sugarman, ed., *Law in History: Histories of Law and Society*, vol. 2 (New York: New York University Press, 1996) 245; Barbara J. Shapiro, *A Culture of Fact: England,*

appropriate to speak of simple or social facts, such as a habit of obedience on the part of a population, or “custom” that may ground a constitutional normative order.⁸⁹ Even duration of tradition in time may be regarded as a fact, in spite of its inherent normativity, and economists display loyalty to western tradition in discussion of so-called path dependency. A factual or non-normative tradition, one that speaks in terms of legal systems for example, would thus not be one that would create, by its own terms, obligation. Yet we have already seen that this factual or descriptive tradition is challenged in terms of its underlying normativity.⁹⁰ And we now understand that it will inevitably be challenged, since it can exist only as the product of a tradition that argues, tells us, that we should think in terms of facts. Those who argue that Hart is really normative are recognizing that Hart speaks for a long, normative tradition that favours the idea of facts. Hart then favours a particular version of facts. He is choosing by virtue of a long tradition that tells him so to choose. The debate on this question is of course a primary characteristic of all traditions. They inspire debate because of their inherently normative character, whether they are thought of as legal or not.

There are many other arguments, in addition to those that favour the idea of fact, which support the idea of legal systems. They constitute the normative tradition of legal systems. In and around the positivist debate there are many references to the predecessors of Hart, notably Hume and Bentham, who are recognized as having argued normatively in favour of legal systems.⁹¹ There were of course predecessors of Hume and Bentham, those who opened the way for the notion of human law and the exercise of God’s dominion on earth

1550-1720 (Ithaca: Cornell University Press, 2000) at 3, 9, 11, 60, 107, 110 (notion of fact in medieval common law procedure drawn from Romano-canonical tradition and then adopted by other disciplines, though “fact” in law only an issue placed before jury, either fictional or real, and came to be an “established truth” only under the influence, notably, of Bacon and Hobbes); R. Dekkers, “Le fait et le droit dans la procédure classique romaine” in *Travaux du Centre national de recherches de logique, Le fait et le droit: Études de logique juridique* (Brussels: Émile Bruylant, 1961) 15, on Roman action *in factum*; MacIntyre, *supra* note 53 at 357.

⁸⁹ See MacCormick, *supra* note 30 at 25.

⁹⁰ See discussion in Part I.A, above.

⁹¹ See e.g. Waldron, *supra* note 26 at 413; Dyzenhaus, *supra* note 9 at 708; Benjamin Z. Zipursky, “The Model of Social Facts” in Coleman, *Hart’s Postscript*, *supra* note 10, 219 at 255; Gerald J. Postema, “Roots of Our Notion of Precedent” in Goldstein, *supra* note 72, 9 at 13-14; and see Edward Shils, *The Virtue of Civility: Selected Essays on Liberalism, Tradition, and Civil Society*, ed. by Steven Grosby (Indianapolis: Liberty Fund, 1997) at 110 (“The free society must rest, once it comes into existence, on tradition”).

through human agency.⁹² Hart was able to operate within this tradition, assuming the existence of a concept of social fact, only once it had obtained sufficient persuasive authority. This same persuasive authority led to the adoption of state forms of government throughout Europe, and the Westphalian system of international law. No one was obliged by hierarchical authority to adopt these forms of governance: they had simply reached a stage of sufficient coherence and appropriateness that they could prevail as accepted tradition.⁹³ So work then began on refining and developing the idea of a legal system, said to rest on underlying fact.

There is more, however, to legal systems than underlying fact. There is also their content. And while the theory of legal systems has sought the identification of law by formal means, those who look to law for guidance must look inevitably beyond the formal identifiers. They are interested in content as a guide to action. There has been a debate between positivists and those who defend a necessary moral dimension of law. Yet much law is not of obvious moral content or significance. It may nevertheless be highly normative, if only because it has been law, and accepted as law, for a long time. In the common law, the law of trespass to land may be one of the best examples, but there are many others. There are traditions of substantive law, many of which have existed since a time prior to positivism. Of course this may be seen also as a reason for rejecting them, but there must be powerful reasons for this to happen. Tradition thus creates a normativity for law even when it is expressed positively, and denies its own normativity. The legal system would not create obligation, but obligation would be inherent in the (traditional) law adopted by the system. Where the law is of a moral dimension, tradition would add to its normativity. There would thus be an obligation to obey many of Hart's primary rules because they would be the law even were there no legal system as such. Positivism has sought clearer and more neutral means of identification of law, which is a very praiseworthy objective. Law cannot be allowed to disappear in a

⁹² See Marie-France Renoux-Zagamé, *Origines théologiques du concept moderne de la propriété* (Geneva: Droz, 1987); John Finnis, "The Truth in Legal Positivism" in George, *supra* note 71 at 195: "positivity" first articulated circa 1130 among "theological humanists of Paris and Chartres."

⁹³ For the tradition of the state and its legal system, for example, see Alan Harding, *Medieval Law and the Foundations of the State* (Oxford: Oxford University Press, 2002); and for national constitutional law as "a part of a greater body of constitutional tradition that crosses national borders," see Jaakko Husa, "Guarding the Constitutionality of Laws in the Nordic Countries: A Comparative Perspective" (2000) 48 Am. J. Comp. L. 345 at 345.

welter of competing normative claims and a horrifically rising tide of litigation. Yet there is some evidence that legal systems are not entirely effective against such developments, since they bind no one. Tradition is much more rigorous, however, in identifying law. It rejects that which cannot be shown to be deeply rooted. This is why apparently radical movements do their historical homework, to show they are not simply creations of the moment.

Tradition is not inherently conservative, as Edmund Burke made it out to be. It can be profoundly destabilizing, as the French revolutionaries understood in revolving, or returning, to the tradition of Greek rationality as a means of overturning the ancien regime.⁹⁴

Tradition may thus add the force of obligation to particular primary rules of conduct. It is therefore more binding than is the legal system for the ordinary citizen. Tradition also, moreover, obliges the officials and judges of the legal system, even though they are not bound by the system itself. This is because there is a tradition of judging, to which judges must necessarily bind themselves, if they are to judge. It has been argued that, by undertaking and engaging in judicial practice, there are “legal obligations defined by the rules of the game.”⁹⁵ This, however, appears to miss the mark, since the judge assumes no obligation to apply the rules of the system, as a legal obligation, but only to “render justice within the framework of the law.”⁹⁶ One assumes an ethical obligation to seek justice, which may take place within or without the cadre of the system. This has been the case in western law since the time of the Roman iudex, who was not to “make the litigation his own” (litem suam facit) through imposition of personal views on parties seeking a judicial ruling in law. It is in the nature of the judicial ethic to judge according to law. There may, depending on the jurisdiction, even be ethical sanctions for infringement of this judicial ethic, applied by other judges. They act in virtue of centuries of teaching of what it is to judge. A momentary legal system adds nothing to this and can add nothing to this. It may even be said that rules of judicial independence, of the legal system, confirm this, since the judge is

⁹⁴ See H.P. Glenn, “Law, Revolution and Rights” in Werner Maihofer & Gerhard Sprenger, eds., *Revolution and Human Rights* (Stuttgart: F. Steiner, 1990) 9; and for recognition of the potentially destabilizing effect of tradition, see Glenn, *Legal Traditions*, *supra* note 49 at 23-24.

⁹⁵ Andrei Marmor, “Legal Conventionalism” in Coleman, *Hart’s Postscript*, *supra* note 10, 193 at 215.

⁹⁶ *Judicial Code of Ethics*, R.R.Q. 1981, c. T-16, r. 4.1, s. 1, as to which see H. Patrick Glenn, “La responsabilité des juges” (1983) 28 McGill L.J. 228 at 247-48, 251.

fundamentally unaccountable, except in terms of this ethical obligation, which in many cases is unwritten. The functioning of the legal system, in terms of the activities of its officers, thus rests on tradition.

The difficulties of contemporary legal systems are giving rise to increased reliance on the concept of legal tradition, and this reliance is illustrative of its nature. In Switzerland and Germany, a major article has recently been published on tradition and contemporary law, in which it is stated that national legal systems are by their nature inadequate and therefore in need of complementing through legal tradition.⁹⁷ National legislation is traditional law, but legislation does not exhaust the sources of legal tradition, and such sources therefore can and must be resorted to.⁹⁸ Sources of legal tradition beyond official state law include legal doctrine, general principles of law, custom, legislative preparatory work, and foreign law or comparative law.⁹⁹ We see here that the legal system, as a particular tradition, is given authority to identify sources of law, but that where the legal system is demonstrably inadequate, legal tradition in a broader sense is itself entirely capable of identifying further sources of law. Much will depend here on particular traditions, and there will be those that insist on an autonomous concept of law, which may be more or less broadly defined, as well as those, religious or customary in nature, that see less need to do so. Legal tradition in its broad sense thus allows a judicious expansion of the sources of normativity, in a way compatible with, or at least complementary to, particular traditions. A similar form of reliance on legal tradition is becoming evident in the common law world. Professor Baker has recently demonstrated that the common law functioned throughout its history with “two bodies” of law, both formal and informal, and that the latter, sustained by the Inns of Court, consisted of “a tradition as to what was received learning and what was dubious.”¹⁰⁰ Professor Postema has recently stated a “philosophy of the common law”, which is “in important respects incompatible with both orthodox natural law thought and with orthodox legal positivism.”¹⁰¹ In his view the common law would consist above all of a

⁹⁷ See Eugen Bucher, “Rechtsüberlieferung und heutiges Recht” [2000] Z. Eu. P. 394.

⁹⁸ See *ibid.* at 455-56.

⁹⁹ See *ibid.* at 468-87.

¹⁰⁰ J.H. Baker, *The Law's Two Bodies: Some Evidential Problems in English Legal History* (Oxford: University Press Oxford, 2001) at 74.

¹⁰¹ Gerald J. Postema, “Philosophy of the Common Law” in Coleman & Shapiro, *supra* note 22, 588 at 599.

“practised framework of practical reasoning” that would draw fully on the “unwritten common law ... deposited in the experience and memory of practitioners ...”¹⁰² The experience and memory of common law practitioners exists now of course in multi-jurisdictional form, and Commonwealth citation practices may be seen as perhaps the best example of the functioning of legal tradition over and beyond national legal systems. The authority here is persuasive, but it is unquestionably authority and not simple fact.

There are therefore reasons today for the decline of legal systems. They are rooted in a particular way of understanding the world that refuses to recognize the reasons for their existence; their actual existence is increasingly challenged; where they would exist, they deny their own normativity. The notion of tradition does not suffer from these problems, and is itself the justification for legal systems and other forms of law. It also supplements and completes systemic law, which cannot be understood and taught without understanding the contribution of tradition. This brings us to the relations of the laws of the world, and the consequences of conceptualizing law in terms of systems or traditions.

II. The Relations between the Laws of the World Maestro Why focusing on the interpretative rulings of the ECJ (again)?

Hart, in the first edition of the *The Concept of Law*, saw himself as clearly engaged in a theoretical work of very broad dimensions. He stated that “in almost every part of the world which is thought of as a separate ‘country’ there are legal systems which are broadly similar in structure in spite of important differences.”¹⁰³ He acknowledged that “besides the clear standard cases constituted by the legal systems of modern states, which no one in his senses doubts are legal systems,” there were “doubtful cases” of “[p]rimitive law and international law.”¹⁰⁴ The notion of legal system therefore appeared at least potentially adequate to explain these different forms of law. In his postscript to the second edition, Hart appeared to go still further, in stating that the book

¹⁰² *Ibid.* at 596, 594.

¹⁰³ Hart, *supra* note 16 at 3.

¹⁰⁴ *Ibid.*

was “both general and descriptive. It is general in the sense that it is not tied to any particular legal system or legal culture, but seeks to give an explanatory and clarifying account of law as a complex social and political institution with a rule-governed (and in that sense ‘normative’) aspect.”¹⁰⁵ There is still ambiguity in this statement, since it could be taken to mean that he is dealing only with this institutional type of law, wherever found. Yet the title of the book, with its hugely important definite article, suggests a larger ambition. There would be law, so defined, and non-law. This raises important questions as to how general Hart’s thesis is.

A. General and Particular Jurisprudence

Hart worked within a common law tradition but clearly saw his theory applicable to legal systems throughout the world, whether of common or civil law origin. Civilians, however, see Hart’s concept of law as profoundly marked by common law experience. This is because his book would represent a shift in perspective, away from the process of creation of norms (the “original legislator”) to the process of their application.¹⁰⁶ In speaking of secondary rules composed of rules of recognition, change, and adjudication, Hart in all cases would have assumed an existing body of law and directed our attention to the detailed process of working with it. This is of course important to the civil law world, but ignores the primary preoccupation of that world with getting the law right in the first place. This would not be the usual complaint about the “hypertrophied” role of judges in some Anglo-American views of law, notably those of so-called “realists”, but rather a complaint that Hart has not accurately captured the primary objective or characteristic of many western legal systems.¹⁰⁷ Hart can of course be defended, since his rule of recognition contemplated legislative activity,¹⁰⁸ yet it is true that the perspective is that of the user of the system and not that of its legislative source. Hart intended to correct the views of Austin, whose command theory was much influenced by German civilian thought, and Kelsen, since their legislatively-driven views would represent only a partial explanation of a legal system. His own explanation, however, would be equally partial, and therefore particular.

¹⁰⁵ *Ibid.* at 239. For the notion of “general” jurisprudence prior to Hart, notably in the writings of Bentham and Austin, see Twining, *supra* note 23 at 20-21.

¹⁰⁶ See e.g. Caracciolo, *supra* note 35 at 65.

¹⁰⁷ See *ibid.* at 65-66.

¹⁰⁸ Hart, *supra* note 16 at 94-95.

The larger question, of course, is as to the compatibility of “the” concept of law, as developed by Hart, with many other types of law in the world, beyond the civil law. There are many reasons for thinking that Hart’s concept of law is not sufficiently general to accommodate them. Many of these reasons serve to distinguish, or particularize, western concepts of law (whether of civil or common law origin) from non-western concepts of law.

Hart’s preoccupation is with the users and officials (or judges) of the system. This is a perspective of the common law but, in its concentration on judges, it is also a perspective of western law generally. The civil law places less emphasis on judges but does consider them to be very important. Why do non-western ways of thinking about law give less importance to the judge and to rules of adjudication? The main reason would be found in christianity and in the importance of the notion of the “Judgment of God” for the office of the judge. In contrast to other legal traditions, the history of the function of judging in the civil and common laws would be the history of a transfer from God to officials.¹⁰⁹ Bribes to judges, the principle of “reciprocity” of treatment, would have been eliminated only once the model of the perfect justice of a monotheistic God had been accepted.¹¹⁰ This is found in jewish law, yet christianity would have been unique in attempting to capture the transcendent character of God’s justice and in attempting to implement it on earth in the judicial process and in the contemporary state.¹¹¹ The device for so doing was initially the ordeal as indicative of God’s will. Today in German the word for judgment remains “Urteil”, from the original germanic “ordal”.¹¹² The ordeal

¹⁰⁹ See Robert Jacob, “Le jugement de Dieu et la formation de la fonction de juger dans l’histoire européenne” (1995) 39 Archives de philosophie du droit 87 at 90.

¹¹⁰ See John T. Noonan, Jr., “God Does Not Take Bribes” in John T. Noonan Jr. & Kenneth I. Winston, *The Responsible Judge: Readings in Judicial Ethics* (London: Praeger, 1993) 3, citing at 6 Isaiah 1:11-13 (“No more shall you trample my courts. The offer of your gifts is useless”).

¹¹¹ See Jacob, *supra* note 107 at 89 (“le jugement de Dieu est une formation culturelle originale qui singularise la chrétienté occidentale et constitue un épisode majeur de la constitution d’une culture juridique européenne”) and 95 (“[l]’histoire judiciaire de l’Europe occidentale paraît donc ... entièrement originale. ... Elle seule a élaboré la liturgie du miracle judiciaire qui permettait de faire de la présence de Dieu dans le procès le ressort essentiel de sa décision”).

¹¹² See Jacob, *ibid.* at 96. The linguistic continuity is evidence of the process of transfer that so particularizes the European developments. The ordeal existed in other laws, but nowhere outside of the civil and common laws was there continuity of the idea of religious legitimation, from earlier forms of the ordeal to the eventual institution of the judge in state law. The jury was an instrument of continuity, and it has been said that the jury was first seen as a new form of ordeal: Robert Bartlett, *Trial by Fire and Water: The Medieval Judicial Ordeal* (Oxford: Clarendon Press, 1986) at 139, with references. For the still earlier transformation of the animistic and probably Frankish ordeal to an instrument of christianity, see Bernard S. Jackson, “Evolution and Foreign Influence in Ancient Law” (1968) 16 Am. J. Comp. L. 372 at 380;

gave way, in the civil and common laws, to the oath of judicial office and, in the common law, to the sworn jury, but all are evidence of a function or mission profoundly impressed by a particular religious belief. A legal system characterized by rules of recognition, change, and adjudication and not by other, more transcendent perspectives, would be possible, or likely, only within such a historical context.

Other particular features of Hart's legal system relate to the role and nature of the secondary rules that are at its heart. To the extent such secondary rules would allow us to identify law with no regard to its content, Hart's legal system would create law unique in the world. The perspective would be particularly that of the common law of England, in its limited or historical sense. The normative world of England was already abundant on the arrival of the Normans and their common law could become common only on condition of respect for, and alliance with, all the other sources of pre-existing normativity. The common law arguably has been separate from morality throughout most of its existence, and separate as well from equity, canon law, maritime law, and custom. It was separated notably by the writ system, and only on its abolition did it become necessary to formally articulate and justify a separation thesis. Other legal traditions are characterized not so much by rules of recognition but by the manner in which a particular source is taken to have necessary substantive, or moral, content. There is no separation of law and morals in talmudic, islamic, or hindu law, the other great textual traditions, since religiously inspired law cannot be neutral with respect to content.¹¹³ Nor is such separation possible in the non-formal legal tradition that is confucianism,¹¹⁴ or in the world of *lex non scripta*, infused with notions of respect for a cosmos that constitutes its own form of normativity.¹¹⁵ The existence of secondary rules that are exclusive determinants of what is law would be therefore a very particular

Bartlett, *ibid.* at 21 (on "[p]icking up a burning brand in the name of Jesus" as a powerful argument in favour of the new faith). In talmudic law there was no adjudication effected directly by God, as with the ordeal, and if there were some early suggestions of judicial decisions being divinely inspired, these would have given way to the idea of judicial decisions based on texts of law, and as such not meriting reporting. See Bernard S. Jackson, "Judaism as a Religious Legal System" in Andrew Huxley, ed., *Religion, Law and Tradition: Comparative Studies in Religious Law* (London: RoutledgeCurzon, 2002) 34.

¹¹³ See Glenn, *Legal Traditions*, *supra* note 49 at 101-103 (talmudic law), 186 (islamic law) and 281-83 (hindu law).

¹¹⁴ See *ibid.* at 319 (on normativity drawn from inherent harmony pre-existing in society).

¹¹⁵ See *ibid.* at 69 (law "inextricably interwoven" with beliefs of chthonic peoples).

phenomenon. The nature of such rules would also be suggestive of their particularity. This is particularly so for secondary rules of change. Hart states that such rules of change are necessary to overcome the “static quality of the regime of primary rules.”¹¹⁶ A rule of change is one that would empower an individual or group to introduce new primary rules and to eliminate old rules. Is such a rule of change part of a general or particular concept of law? Chthonic peoples arguably have neither a concept of change (as opposed to a concept of diversity or flexibility) nor a rule of change.¹¹⁷ Such a rule, and such an empowerment, would be contrary to the fundamental legal and moral duty of chthonic law to change nothing in the life of the world. In the laws of Jewish, Islamic and Hindu religions there is no legislator, and no state. Nor are judges empowered to make changes in the law.¹¹⁸ The idea of change in such circumstances goes underground, to be found only through minute examination of decisions made, and then only constructed from a presumed hypothesis of what otherwise might have been. There are no secondary rules of change, no rules of empowerment to alter law divinely inspired, given such concepts of law.

The nature of Hart’s rules of recognition would appear to be very generally formulated. He states that the existence of a rule of recognition may take “any of a huge variety of forms, simple or complex”¹¹⁹ and that the rule of recognition “exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law ...”¹²⁰ This practice could therefore be one that acknowledges secular or religious rules as law and the notion of a rule of recognition is therefore not restrictively articulated in formal terms. Yet elsewhere Hart makes it clear that his notion of a rule of recognition is incompatible with “primitive” law or the “pre-legal”. He states that the step from the “pre-legal” may take place in distinguishable stages, of which the first would be the writing of hitherto unwritten rules.¹²¹ The crucial step would be the acknowledgement “of reference to the writing or inscription

¹¹⁶ Hart, *supra* note 16 at 95.

¹¹⁷ See Glenn, *Legal Traditions*, *supra* note 49 at 74-77.

¹¹⁸ See *ibid.* at 110-11 (for an obligation or mitzvah limiting the concept of change in talmudic law), 198-203 (for the subtlety of the notion of change in Islamic law, closing of the “door of endeavour”) and 287-89 (for the largely meaningless character of change in Hindu law).

¹¹⁹ Hart, *supra* note 16 at 94.

¹²⁰ *Ibid.* at 110.

¹²¹ *Ibid.* at 94-95.

as authoritative ...”¹²² Thus, while the rule of recognition may exist only as a practice, there can be no primary rules of a system that would be in unwritten form. Their absence would mean the absence of a formally discernible object of the rule of recognition, a reversion to the pre-legal. Hart’s “primitive law” may originally have been a “doubtful” case,¹²³ but the full statement of the conditions of a legal system take it outside of the, or his, concept of law.

In the result, Hart’s “general jurisprudence” is fully compatible only with the common law tradition, and compatible only in a partial manner with that of the civil law. It has thus been stated recently that The Concept of Law would have been better entitled as The Concept of State Law or Elements of State Law,¹²⁴ just as Alan Watson’s The Evolution of Law¹²⁵ has been re-entitled, in its expanded edition, The Evolution of Western Private Law.¹²⁶ A theory of a legal system could thus be general in that it claims to be true of all state legal systems,¹²⁷ but of no more.

In the world today, only a few decades after Hart wrote, we increasingly see state legal systems challenged by non-state law. The notion of “failed” or “dysfunctional” states has emerged, with the result that state structures, now seen as a product of colonialism, are no longer universally applicable on the surface of the earth.¹²⁸ The expression “post-legal” has been used.¹²⁹ Where states continue a precarious existence, they may be seen as “poisoned gifts”,

¹²² *Ibid.* at 95.

¹²³ *Supra* note 102.

¹²⁴ See Tamanaha, *supra* note 11 at 17.

¹²⁵ (Baltimore: Johns Hopkins University Press, 1985).

¹²⁶ (Baltimore: Johns Hopkins University Press, 2001).

¹²⁷ See Raz, *System*, *supra* note 48 at 1.

¹²⁸ See Ruth Gordon, “Saving Failed States: Sometimes a Neocolonialist Notion” (1997) 12 Am. U. J. Int’l L. & Pol’y 903; Nii Lante Wallace-Bruce, “Of Collapsed, Dysfunctional and Disoriented States: Challenges to International Law” (2000) 47 Nethl. Int’l L. Rev. 53; more generally, see Eric Hobsbawm, in conversation with Antonio Polito, trans. by Allan Cameron, *On the Edge of the New Century* (New York: New Press, 2000) at 12-15, 31, 34, 36, and 37: “It raises the question of interaction between the world where the state exists and where it does not.” For the majority of states in Africa south of the Sahara now being in initial, advanced, or complete collapse, see *Die Zeit* (18 May 2000) 3; and for the failure of state structures ever to have taken hold in the form of a national legal system in Indonesia, see Adijaya Yusuf, “Integrating the Country through Legal Reform: The Indonesian Experience” in Morigiwa Yasutomo, ed., *Law in a Changing World: Asian Alternatives* (Stuttgart: F. Steiner, 1998) 110 at 113 (“Although steps have been taken, law development has not yet been able to formulate a national legal system”).

¹²⁹ Keith Culver, “Leaving the Hart-Dworkin Debate” (2001) 51 U.T.L.J. 367 at 395 (“Some of the most exciting questions and sweeping empirical changes in life under law today are found in precisely these borderline cases ...”).

powerful and entirely undemocratic structures of internal domination.¹³⁰ They would be susceptible to manipulation by local legal elites and would themselves demonstrate a lack of “ethical and value content”.¹³¹ Their “mechanics” are said to be incapable of providing meaningful justice; western-style constitutions would produce no “social facts”, only “paper law” and “paper rights”.¹³² So the notion of a legal system appears less and less capable of generalization. It can of course continue to be thought of as an analytical model. Yet we increasingly see that its particular origins are a profound obstacle to its widespread application in the world. It simply cannot provide a general “explanatory and clarifying account of law.”¹³³

Hart’s teaching of his particular concept of law and legal system was, however, very influential, and his claim to generality has not been without effect. Two consequences of such claims of generality have become evident.

The first consequence is the widespread tendency to speak of law of all types and provenances as systems of law. Even comparative lawyers have succumbed to this facility of language.¹³⁴ This extension of the idea of legal system has not been entirely a question, however, of linguistic facility. Positivist theorists have defended it. The claim is made, first, that law exists only where a legal system would exist. This may be seen as an immediate implication of Hart’s speaking of “the” concept of law and relegating non-systemic concepts of law to the non-legal. Joseph Raz has thus stated that “every law necessarily belongs to a legal system (the English, or German, or Roman, or Canon law, or some other legal system)”¹³⁵ and that “a particular law is a law only if it is part

¹³⁰ Michael Hardt & Antonio Negri, *Empire* (Cambridge, Mass.: Harvard University Press, 2000) at 132-34.

¹³¹ James A. Gardner, *Legal Imperialism: American Lawyers and Foreign Aid in Latin America* (Madison: University of Wisconsin Press, 1980) at 11, 266.

¹³² Werner F. Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (London: Platinium, 2000) at 202.

¹³³ Hart, *supra* note 16 at 239. The notion of a legal system, or culture, is also seen as challenged by transnational legal phenomena. See e.g. Wolf Heydebrand, “From Globalisation of Law to Law under Globalisation” in David Nelken & Johannes Feest, *Adapting Legal Cultures* (Oxford: Hart, 2001) 117 at 131 (“it seems that it is no longer possible to talk about the virtues of national legal cultures as stable and viable entities ready to be compared in the conventional anthropological or sociological mode, but as rapidly changing and moving objects”); H. Patrick Glenn, “A Transnational Concept of Law” in Peter Cane & Mark Tushnet, eds., *Oxford Handbook of Legal Studies* (Oxford: Oxford University Press, 2003) 839.

¹³⁴ See e.g. René David & John E.C. Brierley, *Major Legal Systems of the World: An Introduction to the Comparative Study of Law*, 3d ed. (London: Stevens & Sons, 1985) at 19 (though throughout the work the concept of system is little used and reference is made more frequently to legal families).

¹³⁵ Raz, *System*, *supra* note 48 at 1.

of American law or French law or some other legal system.”¹³⁶ These statements could be interpreted as referring only to legislative enactments and therefore as being relatively innocuous. Such a benign interpretation, however, is difficult to square with the reference to Roman law and with more affirmative statements of positivist theorists. Thus Joseph Raz has stated further that “[l]egal systems are always legal systems of complex forms of social life, such as religions, states, regimes, tribes, etc.”¹³⁷ There would therefore be no conceptual problems in extending the concept of system to non-state forms of law.

Joseph Raz has moreover dealt with the methodology of such extension, in stating that there is nothing wrong in interpreting the institutions of other societies in terms of our typologies. This is an inevitable part of any intelligent attempt to understand other cultures. It does not imply that in interpreting alien institutions you disregard the intentions, beliefs, or value-schemes of their participants. It only means that at some stage you classify their activities, thus interpreted, in terms of a scheme for analysing social institutions of which the participants themselves may have been ignorant.¹³⁸

It is noteworthy that there is here no suggestion of later or more developed forms of mutual comprehension or accommodation. This may be because the notion of system is too inflexible to allow such comprehension of non-state forms of law in their own terms. The process described by Joseph Raz would thus be characterized by its unilateral and inflexible mode, as Edward I would have “straitjacketed” the categories and customs of native Wales within the formulae of English manorial practice.¹³⁹ Historians examining the relations of the French and the Algonquins in the early stages of North American colonization also speak of a process by which “new people were crammed into

¹³⁶ Raz, *Authority*, *supra* note 48 at 78.

¹³⁷ Raz, *System*, *supra* note 48 at 188; see also 207: “Whether or not two legal systems are compatible depends first of all on the social forms of organization of which they are part (e.g. the legal systems of a tribe, a state, a religion, etc.).”

¹³⁸ Raz, *Authority*, *supra* note 48 at 50.

¹³⁹ R.R. Davies, *Conquest, Coexistence, and Change: Wales 1063-1415* (Oxford: Oxford University Press, 1987) at 367; and see R.R. Davies, *The First English Empire: Power and Identities in the British Isles 1093-1343* (Oxford: Oxford University Press, 2000) at 111 for England, notably in its relations with Wales and Ireland, “unable to cope with societies which could not be readily integrated into its political and governmental configuration.”

existing categories in a mechanical way” (Algonquins as savages, French as manitous) before a more sophisticated “middle ground” could be reached.¹⁴⁰

A second consequence of the claim for the generality of legal systems is that the idea of system becomes much more fluid than in its original conception. If we must use the idea of system to describe various types of laws, then it is the idea of system that comes to be adapted. So formal positivism, as envisaged by Hart, yields in many cases to informal positivism, in which a legal system is conceived not as a formal relationship between primary and secondary rules, but as an open-ended process that may eventually come to look like life itself. This is the type of thought underlying notions of “autopoietic systems”¹⁴¹ or “networks of processes”.¹⁴² Here hierarchies become “flat”¹⁴³ and the notion of system is expressly acknowledged to be able to accommodate the most “strategic, innovative or rebellious choice-making”¹⁴⁴ or even catastrophe.¹⁴⁵ The notion of system thus approaches that of culture, criticized recently as failing “to identify any particular factors that could be seen to be making a difference ...”¹⁴⁶

We saw earlier, however, that Hart’s structures of a legal system can be situated within those of traditions. Enduring traditions necessarily have both primary rules and other rules (which Hart would designate as secondary) that identify law (though not necessarily “sources” of law) and provide for the ongoing vitality of the tradition (though not necessarily for “change”).¹⁴⁷ This

¹⁴⁰ Richard White, *The Middle Ground: Indians, Empires and Republics in the Great Lakes Region, 1650-1815* (Cambridge: Cambridge University Press, 1991) at 50-51; and for French colonial lawyers “eliminating different laws through constant reference to their own”, see Charles de Lespinay, “Droits de l’oralité africaine et traduction francophone, un compromis difficile” (2002) 44 *Droit et cultures* 49.

¹⁴¹ These would be entirely present constructions, “cognitively open” though identifiable as law through “operative closure”. See Niklas Luhmann, *Law as a Social System* (Oxford: Oxford University Press, 2004); Gunther Teubner, *Law as an Autopoietic System* (Oxford: Blackwell, 1993), notably at 72 (“no binding force”), 80 (closure not isolation), and 131 (“created anew from moment to moment”).

¹⁴² van de Kerchove and Ost, *supra* note 34 at 10.

¹⁴³ Barton, *supra* note 4 at 300 (“Each repeating pattern of human interaction becomes its own ‘sovereign’”).

¹⁴⁴ Sally Falk Moore, “History and the Redefinition of Custom on Kilimanjaro” in June Starr & Jane F. Collier, eds., *History and Power in the Study of Law: New Directions in Legal Anthropology* (Ithaca: Cornell University Press, 1989) 277 at 287-88.

¹⁴⁵ In mathematics, see Ivar Ikeland, *Mathematics and the Unexpected* (Chicago: University of Chicago Press, 1988) at 88-90, 106.

¹⁴⁶ Roger Cotterrell, “The Concept of Legal Culture” in David Nelken, ed., *Comparing Legal Cultures* (Aldershot: Dartmouth, 1997) 13 at 20; and more generally, see H. Patrick Glenn, “Legal Cultures and Legal Traditions” in Mark van Hoecke, ed., *Epistemology and Methodology of Comparative Law* (Oxford: Hart, 2004) 7.

¹⁴⁷ See text accompanying note 50.

suggests that the concept of a legal system is best seen as a particular exemplification of tradition. It has been said that traditionality is to be found in almost all legal systems¹⁴⁸ and this is certainly true, though the traditionality may be often lost sight of in the concentration on momentary systems. In a larger sense, however, it would be the case that a legal system is a tradition and can be only 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 system¹⁴⁹ and to the idea that a sharp distinction must be drawn between law and morality, ideas that are generally not subscribed to outside of the tradition. Legal systems would thus have a history, and even a particular history. One cannot say the same of tradition, which exists simply as the recorded, or remembered, story of humanity.¹⁵⁰ It is true that there are particular traditions, and traditions of thinking about tradition,¹⁵¹ yet the concept of tradition stands beyond any of its particular manifestations. So the concepts of tradition and system are not necessarily conflicting ones. A legal tradition may both support a legal system and its designation of formal law and, to the extent a legal system is defective, complement it.

The notion of tradition would also be compatible with all non-state forms of law that exist, along with legal systems, as particular traditions. The concept of tradition, in general, is sufficiently complex to account for their survival.¹⁵² The notion of tradition as information is also compatible with revelation; the information here is of a particular, sacred kind. And tradition explains the human efforts to articulate divine and other ways of life, and human efforts to follow them. Tradition is thus an inherently general concept. Unlike “flat” or

¹⁴⁸ See Krygier, *supra* note 49 at 239. Krygier goes on, however, to say that “[l]egal traditions provide substance, models, exemplars and a *language* in which to speak within and about law” (ibid. at 244).

¹⁴⁹ MacCormick, *supra* note 30 at 75. To deny this would be to repeat the “error” of positivism, since “[t]he claim that there is no overall or larger-scale sense to be made of the past is itself a larger-scale claim, and it has to be earned, like any of the others” (Bernard Williams, *Truth & Truthfulness: Essays in Genealogy* (Princeton: Princeton University Press, 2002) at 246). There would thus be both a general tradition of the concept of a legal system, and particular, national instantiations of it in the form of the traditions of individual, national legal systems. These would themselves be reflections of larger traditions of civil and common (public) law. For the constitutions of the common law world as taking their “character largely from the context of common law principle and doctrine which provides the context and the foundation against which a constitution is to be read and understood,” see Anthony Mason, “The Common Law in Final Courts of Appeal outside Britain” (2004) 78 *Austl. L.J.* 183 at 183.

¹⁵⁰ For tradition as transmitted information, see text accompanying note 46.

¹⁵¹ As to which see Glenn, *Legal Traditions*, *supra* note 49 at 2, n. 4.

¹⁵² See *supra* text accompanying notes 50, 51.

“autopoietic” systems, moreover, which also purport to generality, it is not tied to an underlying western epistemology, that of the existence of present and observable social facts. Traditions teach and are normative (again unlike “flat” systems) and cannot be reduced to sociological phenomena. They are also flexible and tolerant of great human diversity. Chthonic life is not static, pace Hart,¹⁵³ and may exist in many forms, which may be altered. This raises the question of the nature of the relations between legal systems and legal traditions.

B. Relations of Conflict and Relations of Conciliation

How accommodating is a legal system to other legal systems and to other, non-systemic forms of law or normativity? The attention of positivist theorists has been directed almost exclusively inwards, toward the constitutive characteristics of a system. External relations appear to have been neglected, and there has also been neglect of notions of legal pluralism within states, transnational forms of law, and even various forms of federalism or confederalism. Neil MacCormick has thus referred to “an extraordinarily blinkered attitude” of legal philosophers toward questions of statehood, sovereignty, and the development of the European Union.¹⁵⁴ Yet it may not be a question of neglect or conscious disregard that explains the lack of positivist philosophical interest in these questions. It may rather be the case that system theory by its nature can have little or nothing to say about such questions. Hart acknowledged that “[t]he legal system of a modern state is characterized by a certain kind of supremacy within its territory and independence of other systems ...”¹⁵⁵ Kelsen spoke of the relations between “norm systems” as being either those of independence or subordination.¹⁵⁶ Joseph Raz has explained that “[a]ll legal systems ... are potentially incompatible at least to a certain extent. Since all legal systems claim to be supreme with respect to their subject-community, none can acknowledge any claims to supremacy over the same community that may be made by another legal system.”¹⁵⁷ This would not

¹⁵³ Hart, *supra* note 16 at 91-93; on the non-static character of chthonic life, see Calvin Martin, “Epilogue: Time and the American Indian” in Calvin Martin, ed., *The American Indian and the Problem of History* (Oxford: Oxford University Press, 1987) 192 at 196-97.

¹⁵⁴ MacCormick, *supra* note 30 at vii.

¹⁵⁵ Hart, *supra* note 16 at 24.

¹⁵⁶ Kelsen, *supra* note 77 at 330, 332.

¹⁵⁷ See Raz, *Authority*, *supra* note 48 at 119.

mean, however, that legal systems are somehow definitively closed. They may even be considered as open systems, to the extent that they themselves contain norms that give effect to norms that do not “belong” to them.¹⁵⁸ Contracts are thus enforced, as custom may be enforced, and there are rules of private international law for giving effect to foreign law in private international cases. How truly open, however, are legal systems to recognition and enforcement of non-state law, within states? To the extent that legal systems are supreme and independent of other systems or laws, there is an inherent presumption that a system should not be in the business of giving effect to laws other than its own. It would be, in principle, “undesirable and an unstable situation” for a community to practise two legal systems.¹⁵⁹ There are thus inherent difficulties with a federation and still greater difficulties in recognizing non-state law. In Mexico, in the Chiapas negotiations, it was stated by the government of Mexico that the Mexican legal system was incompatible with another legal system, and the Mexican government’s position was therefore doctrinally founded. There is, in principle, “nulle place pour un pluralisme des ordres juridiques.”¹⁶⁰ US judges would be somehow “required” to decide according to US law,¹⁶¹ though we have seen that the judicial function is inherently free of legal obligation.

There are of course very profound reasons for the recalcitrance of legal systems before other potential sources of internal law. If, in an internal case, a legal system is to “jump over its own shadow” and apply non-state law, there must be reasons for doing so. There must be good reason for going beyond simple contractual freedom, for example, and admitting that the non-written law of chthonic peoples, or the religious law of religious minorities, should be recognized and applied in some manner by state courts. What could these reasons be? They are reasons that suggest that the legal system should not be applicable in certain cases. They are reasons that go to the justification for

¹⁵⁸ *Ibid.*

¹⁵⁹ See Raz, *Authority*, *supra* note 48 at 118. See the recent reliance by a majority of the justices of the US Supreme Court on European jurisprudence in *Lawrence v. Texas*, 539 U.S. 558 (2003), 123 S. Ct. 2472; on the decision, see Donald E. Childress III, “Using Comparative Constitutional Law to Resolve Domestic Federal Questions” (2003) 53 *Duke L.J.* 193; and for its background, see James A.R. Nafziger, “International Law and Foreign Law Right Here in River City” (1998) 34 *Willamette L. Rev.* 4 at 19ff.

¹⁶⁰ van de Kerchove & Ost, *supra* note 34 at 37, interpreting Kelsen

¹⁶¹ See Joseph Raz, “Two Views of the Nature of the Theory of Law: A Partial Comparison” in Coleman, *Hart’s Postscript*, *supra* note 10, 1 at 34.

legal systems, for their content, and for their exclusivity. Yet we know already that the theory of legal systems purports only to describe them and not justify them.¹⁶² There can be no reasons for adherence or non-adherence to a legal system according to descriptive or analytical theory. Social facts do not give reasons for their own rejection, or even adoption. So a system may be open, if it is open as a matter of fact according to its own rules, but there are no reasons for it to take this position. The presumption therefore prevails, in many if not most situations, that it is not open. Systems theory thus contributes greatly to the teaching of only a single law, since systems theory by its nature provides no means of choosing between different laws, or even of appreciating their historical relations to one another.

How open are legal systems even in international cases? There have been jurisdictions with no private international law and which have therefore been characterized by radical territoriality of state law. Mexico, until the last decade, was an example, with its “import-substitution economy”.¹⁶³ Yet most states today have some notion of private international law. As a matter of “fact”, they can be said to be open systems since their own norms allow for some application of norms other than their own. Yet each system remains supreme since private international law would be profoundly national and subject to control of the sovereign of each state. Application of law other than that of each state would be highly exceptional, and so it is. Moreover, the criteria for application of foreign law are usually geographic ones, a process of localization of events within or without supreme systems, such that the discipline of conflicts of laws is ultimately consistent with the maintenance of systems.

More importantly, how are the relations between state systems perceived? The other appellation for private international law is that of “conflicts of laws”, and this entire legal science and terminology developed in importance with the growth of the state and the concept of legal systems. Why are differences in laws conceptualized as conflicts? Because the co-existence of sharply defined,

¹⁶² See discussion in Part I.A, above. The possibility of “soft” positivism would not imply an opening of systems to use of laws drawn from outside the system, only to a notion of “morality” that would clearly not extend to the total range of national laws.

¹⁶³ Héctor Fix-Fierro & Sergio López-Ayllón, “The Impact of Globalization on the Reform of the State and the Law in Latin America” (1997) 19 *Hous. J. Int’l L.* 785 at 791 (“To a closed economy corresponded a ‘closed’ legal system. Since economic exchange was limited, the room for interaction between the domestic and the international legal systems was also limited”).

mutually exclusive, sovereign entities will inevitably be perceived as a conflictual situation. This is even the case in biological sciences, the origin of systemic thinking, where systems richest in information are seen as inevitably dominant.¹⁶⁴ Systems conflict because of their claims to sovereignty and exclusivity. Samuel Huntington, in his best-selling *Clash of Civilizations*, essentially adopted nineteenth-century legal thinking in constructing civilizations as “entities”, which then would inevitably clash.¹⁶⁵ The notion of an open legal system is therefore a very relative and marginal one, since the main effect of the concept of a legal system at a global or regional level is the creation of disharmony and conflict.¹⁶⁶ The historical importance of the law of war is the most evident indication of this in public international law.

We are today experiencing, however, how systems thought is being surpassed or avoided, both within and between states, in an increasingly interdependent world. Here conflict avoidance becomes the objective and no longer conflict resolution. Conflict avoidance involves thinking differently about laws and their relations with one another.

Tradition conceived as information has no borders. Groups defined by adherence to tradition may create borders for themselves, but this will be the product of particular traditions only, such as that of legal systems. So tradition, as a general concept, can have no underlying idea of territorial supremacy. Tradition is a general idea, but allows itself to be particularized to everyone’s particular way of life. Tradition is therefore not a hegemonic idea, though cannot itself prevent the development of hegemonic traditions. The relations between traditions are thus in principle relations of influence and persuasion, as opposed to conflict and dominance. Traditions float, as with the “general principles” of the common and civil laws.¹⁶⁷ They are therefore in principle accommodating both of local exception, and of other large traditions, as has been the case for the common laws of European origin, which now exercise

¹⁶⁴ See Ramón Margalef, *Perspectives in Ecological Theory* (Chicago: University of Chicago Press, 1968) at 16-17.

¹⁶⁵ Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster, 1996) at 28, 41, 43: “We know who we are only when we know who we are not and often only when we know whom we are against” (*ibid.* at 21), and: “A civilization is a ‘totality’” (*ibid.* at 42).

¹⁶⁶ See H. Patrick Glenn, “Harmonization of Law, Foreign Law and Private International Law” (1993) 1 E.R.P.L. 47.

¹⁶⁷ John Bell, “Sources of Law”, in Birks, *supra* note 34 at 1213; Preliminary Provision, *Civil Code of Quebec* (Civil Code to govern “in harmony with ... the general principles of law”).

persuasive influence in the world far beyond their initial colonial expansion.¹⁶⁸ We see this also in laws that are not conceived in terms of systems, that expressly allow for application of different types of laws, in a general manner,¹⁶⁹ and that have no territorial limitations. How such accommodation is brought about will depend on each tradition. It will frequently be done substantively, for substantive reasons, as debate on the merits of particular positions goes on. It may be done quasi-substantively, as with the notion of “reasonable accommodation” of non-state norms within states.¹⁷⁰ It may be done formally and geographically, as with the tradition of legal systems and their private international law, but we are seeing how this means of thinking about law is itself being questioned. Its role is a matter of ongoing influence. Teaching the merits of different laws, in a dialogical process in the same classroom, must therefore be based on their traditional and normative character. The process is not one of description, but rather of engagement.

Conclusion

Western lawyers, if they are able to overcome their tradition of hostility toward the idea of tradition, are nevertheless likely to view tradition as an imprecise and non-binding concept. This view is a product of much of the information available within western legal systems, which would teach that systems are precise, stabilizing, and binding. Tradition would be none of these things. In one sense this is true, since tradition as a general concept is simply information. This is its main advantage, however, since it allows us to conceptualize all of the laws of the world and to better understand their nature and their methods, in a non-conflictual manner. In another sense, however, the traditional western position is very misleading, if not downright mistaken. Tradition exists not only as a general concept, but in many particular manifestations. Particular traditions may be very precise, very stabilizing, and some may even purport to be “binding”. The idea of a legal system provides an example of such a particular tradition. Yet on closer examination we find that legal systems do not create any obligation to obey the law. They do not bind. This is because they

¹⁶⁸ See H. Patrick Glenn, *On Common Laws* (Oxford: Oxford University Press, 2005).

¹⁶⁹ Thus the notion that the “law of the land is law” (*dina de-malkhuta dina*) in talmudic law, and the place for local legislation (*kanun* jurisdiction) in islamic law, and the accommodation of state law, however reluctantly, within chthonic tradition.

¹⁷⁰ See José Woehrling, “L’obligation de l’accommodement raisonnable et l’adaptation de la société à la diversité religieuse” (1998) 43 McGill L.J. 325.

exercise only persuasive authority, as do all traditions. We can therefore eventually come to see western legal systems as substantive arguments, which are in constant and closer dialogical relations with the other legal traditions of the world. There is much to be said, and much has been said, in favour of legal systems. If they decline in influence, however, it does not mean they will be followed by a normative void, or anarchy. They have existed as traditions and the general concept of tradition has supported them. Where they lose authority, this may be replaced by the idea of tradition itself, and by many of the particular substantive legal traditions that legal systems have adopted. Both the general concept of tradition, and particular traditions, will continue. Transsystemic teaching therefore does not take place in a normative void, in a no-place where there is not (even) the social “fact” of a legal system. It rather takes place where the normative action is, in the large debate on the nature of justice and its content, and on the manner of reconciliation of different concepts of justice in the world. Doin’ the transsystemic is the most justifiable form of legal education in the present state of the world.